Volume 4, Issue 1

Editorial Board

Editor-in-Chief

Myles Frederick McLellan
Osgoode Hall Law School
Toronto, Canada
Chair: Canadian Criminal Justice Assoc.: Policy Review Comm. Ottawa, Canada

Editorial Board

Ira Belkin
NYU School of Law, New York University, United States

Stephen Bindman
Faculty of Law, University of Ottawa, Canada

Gary Botting
Barrister, Vancouver, Canada

Kathryn M. Campbell
Department of Criminology, University of Ottawa, Canada

Kimberly Cook
Department of Sociology and Criminology, University of North Carolina Wilmington, United States

Rachel Dioso-Villa
Griffith Criminology Institute & School of Criminology & Criminal Justice, Griffith University, Australia

Keith Findley
Wisconsin Law School, University of Wisconsin-Madison, United States

Jonathan Freedman
Psychology Department, University of Toronto, Canada

Maryanne Garry
School of Psychology, New Zealand Institute for Security and Crime Science
The University of Waikato, New Zealand

Gwladys Gilliéron
Faculty of Law, University of Zurich, Switzerland

Adam Gorski
Faculty of Law and Administration, Jagiellonian University, Poland

Jon Gould
School of Criminology and Criminal Justice and Sandra Day O'Connor College of Law
Arizona State University, United States

Anat Horovitz
Faculty of Law, The Hebrew University of Jerusalem, Israel

Matthew Barry Johnson
John Jay College of Criminal Justice, City University of New York, United States

Luca Lupária
Department of Law, University of Rome III, Italy

Richard Leo
Law and Psychology, University of San Francisco, United States

Bruce MacFarlane
Barrister & Attorney, Winnipeg, Canada and Phoenix, United States

Carole McCartney
School of Law, Northumbria University, United Kingdom

Daniel Medwed
School of Law and School of Criminology and Criminal Justice Northeastern University, United States

Robert Norris
Department of Criminology, Law and Society, George Mason University, United States

Debra Parkes
Peter A. Allard School of Law, University of British Columbia, Canada

Hannah Quirk
The Dickson Poon School of Law, King's College London, United Kingdom

Arye Rattner
Sociology, Center for the Study of Crime, Law and Society, University of Haifa, Israel

Christopher Sherrin
Faculty of Law, Western University, Canada

Allison Redlich
Department of Criminology, Law and Society, George Mason University, United States

Oriola Sallavaci
School of Law, University of Essex, United Kingdom

Clive Walker
School of Law, University of Leeds, United Kingdom

Marvin Zalman
Criminal Justice Department, Wayne State University, United States

Student Editorial Board - The Lincoln Alexander School of Law at Toronto Metropolitan University, Toronto, ON, Canada:

Evan Alderman, Sarah Dawson, Jash Dhaliwal, Rebecca Field Jager, Julia McDonald, William Tobias Rylance, Ayena Zahid

Volume 4, Issue 1 **Cited as (2023) 4:1 Wrongful Conv L Rev**

Table of Contents

Articles

Innocence Mortality Tax: The Impact of Wrongful Conviction on Lifespan
Mary Catlin, Allison D. Redlich 1 - 15

Canada's False Guilty Pleas: Lessons from The Canadian Registry of
Wrongful Convictions
Kent Roach 16 - 47

Identifying How an Individual Becomes a Suspect:
A Needed Addition to the Innocence Literature
Noah Barr, Glinda Cooper 48 - 70

Sometimes the Snitch Recants: A Closer Look at the Use of
Jailhouse Informants in DNA Exoneration Cases
Wendy Pamela Heath, Joshua Robert Stein, Sneha Singh,
Da'Naia Lynnette Holden 71 - 94

Book Review

Barred: Why the Innocent Can't Get Out of Prison
(Daniel Medwed)
Valena Beety 95 - 97

Innocence Mortality Tax: The Impact of Wrongful Conviction on Lifespan

Mary Catlin
George Mason University
Fairfax, Virginia
U.S.A.

Allison D. Redlich
George Mason University
Fairfax, Virginia
U.S.A.

The wrongful conviction of innocent individuals is a growing problem for those unjustly convicted and the integrity of the American legal system, with exonerees often struggling post-exoneration. Yet, too little is known about the long-term impact of wrongful convictions on those unjustly convicted. Thus, we investigated the effect of wrongful conviction on mortality and lifespan—that is, we tested for the possibility of an "innocence mortality tax." We found that more exonerees have died than expected when compared to U.S. death rates, and that exonerees died 13.24 years earlier than would be expected given their age, gender, race/ethnicity, and incarceration length. Notably, those exonerees whose cases involved a false confession or mistaken eyewitness identification died significantly sooner than their counterparts whose cases did not involve such factors. Our results highlight the need for researchers, practitioners, and policymakers to continue to find ways to mitigate the harm done to innocent individuals unjustly convicted.

I. Introduction
 A. Life Expectancy
 B. Wrongful Convictions and Health
II. The Present Study
III. Method
 A. Standardized Mortality Ratio
 B. Life Expectancy
IV. Results
 A. Standardized Mortality Ratio
 B. Lifespan Expectancy
V. Discussion
 A. Theoretical and Applied Implications
 B. Limitations and Conclusions

I Introduction

The advent of DNA evidence into the criminal legal system in the 1980s introduced an improved mechanism to sort the guilty from the innocent. To date, DNA evidence has been used

to exonerate nearly 570 wrongly convicted individuals, but perhaps even more importantly it has helped to shine a light on the failings of the United States' criminal legal system. Since 1989, over 2,700 individuals have been exonerated *without* exculpatory DNA evidence, most often for serious crimes like murder and rape (National Registry of Exonerations [NRE], 2023). However, many scholars opine that the number exonerated to date grossly underestimates the true number of wrongly convicted, and that there are many innocent individuals languishing in prison that the system has not yet identified (see Zalman & Norris, 2021 for an overview of the "dark figure" of innocence). Indeed, as our understanding of wrongful convictions continues to grow, so too does the number of annual exonerations (see online: https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx).

The scholarship of wrongful convictions has advanced significantly in the past 30 years (see Norris et al., 2020). While there has been much written and researched on the contributing factors of wrongful conviction, such as false confessions (Kassin et al., 2010) and eyewitness misidentification (Wells et al., 2020), less scholarship has focused on what happens post-exoneration. As stated by Norris et al. (2020), "[r]esearchers have yet to examine many additional harms associated with justice system errors" (p. 39); that is, the aftermath of wrongful convictions. In the present research, we examine what may perhaps be the ultimate consequence: the effect of wrongful conviction on one's lifespan, which to our knowledge, is a question not yet addressed in the scholarship. More specifically, we ask whether being wrongly convicted influences life expectancy itself, or alternatively put, whether there is an innocence mortality tax associated with wrongful conviction. If so, what are possible factors that may explain such a relationship? To address these issues, we access and analyze data from the National Registry of Exonerations (NRE) and the Centers for Disease Control and Prevention (CDC). After briefly reviewing research on life expectancy, we then describe relations between wrongful convictions and health outcomes and the potentially unique impacts for those wrongly imprisoned.

A. Life Expectancy

With the exception of the recent pandemic, the United States life expectancy—a common measure of population health (Andrasfay & Goldman, 2021)—has experienced steady increases over the past 60 years (Woolf & Schoomaker, 2019). Researchers, however, have long known that not every group has the same life expectancy at birth (e.g., Antonovsky, 1967). For example, Black and Hispanic Americans are known to have shorter lifespans than White Americans, a pattern that has worsened with the pandemic (Woolf & Schoomaker, 2019).

Another group of individuals that has historically experienced reduced life expectancy is incarcerated individuals (see Massoglia & Pridemore, 2015 for an overview). As the overwhelming majority of known exonerees did spend time in prison (up to 47 years), disentangling the effects of incarceration from the possible effects of wrongful conviction on lifespan is an important consideration. The shortened lifespan of those incarcerated is likely due to the negative health sequelae associated with serving custodial sentences, such as chronic health concerns (Schnittker & John, 2007), infectious diseases (e.g., hepatitis; Massoglia, 2008b), lower self-reported health overall (Massoglia, 2008a), and increased body mass index (BMI; Houle, 2014). Several mechanisms have been proposed to explain the association between incarceration and poor health outcomes: incarceration increases exposure to diseases; incarceration itself is a

stressor, which can in turn increase inmates' vulnerability to mental and physical illness; and incarceration impedes life after release, making it difficult to recover from any illness obtained or exacerbated by incarceration (Massoglia & Pridemore, 2015). Regardless of how incarceration impacts health, the situation is made worse by the poor healthcare offered to inmates. In fact, it was not until 1976 that healthcare was even guaranteed to inmates by the Supreme Court of the United States (*Estelle vs. Gamble*, 1976). Even with this ruling, scholars have argued that healthcare offered to inmates is often insufficient (Nowotny, 2017) and in conflict with inmates' needs (Allen et al., 2010). Not surprisingly, these changes in health status impact life expectancy for incarcerated individuals.

Generally, research on incarceration and mortality has focused on (1) the increased risk of death for incarcerated individuals compared to non-incarcerated individuals (e.g., Patterson, 2013; Spaulding et al., 2011) and (2) the cause of death (e.g., Harzke et al., 2011; Mumola, 2007). For the most part, this research has focused on the short-term, particularly the threat to inmates' health immediately following release (e.g., Farrell & Marsden, 2008). However, studies with longer follow-up periods continue to find that people who experienced incarceration have higher mortality rates than residents of the same state (Rosen et al., 2008).

These increased mortality rates associated with incarceration are connected to a reduction in life expectancy. By studying data from a cohort of New York parolees, most of whom had served less than two years incarcerated, Patterson (2013) found that each year of incarceration reduced life expectancy by two years. However, this impact on life expectancy decreased over time and parolees could "recover" their lost years if they survived at least two-thirds of their incarceration period on parole. Looking at a more diverse sample of inmates, weighted towards long-term incarceration and with a longer follow-up observation period, Daza and colleagues (2020) determined that incarceration reduces life expectancy at age 45 by four to five years (see also, Kouyoumdjian et al., 2017). It is important to note that both Patterson (2013) and Daza et al. (2020) used estimates from the U.S. vital statistics (CDC) to offer an estimation of life expectancy reductions.

Overall, incarceration has been found to have serious consequences for inmates' health, mortality, and life expectancy. The question we ask here is whether the experience of wrongful conviction shortens lifespan, over and above the tax of incarceration itself? Specifically, as of May 2023, the NRE calculates a total of "more than 29,100 years lost" to incarceration (NRE, n.d.), but are there additional years of life lost when exonerees pass prematurely?

B. Wrongful Convictions and Health

Wrongful convictions have gained increasing attention from the public, legal actors, researchers, and policy makers (Norris, 2017). The research that has examined the aftermath of wrongful conviction has indicated that exonerees suffer materially (e.g., housing, jobs, compensation; Gutman & Sun, 2019; Kukucka et al., 2020; Zannella et al., 2020), psychologically (e.g., Grounds, 2004; Westervelt & Cook, 2012), and physically (Westervelt & Cook, 2012). Generally, those who have been wrongly convicted have been found to experience some of the same struggles as those 'rightly' convicted. However, there are also likely to be challenges unique to those wrongly convicted because of their factual innocence.

Some of the difficulties experienced by exonerees have been explained through the phenomenon known as stigma-by-association (e.g., Clow et al., 2012; Sigelman et al., 1991). Researchers have suggested that exonerees and factually guilty individuals are often perceived similarly because of the time exonerees spent incarcerated, which links innocents to factually guilty offenders (Clow & Leach, 2015). However, it is not just that exonerees suffer from similar stereotypes attached to factually guilty offenders, but that exonerees would be expected to suffer similar health consequences because of their shared incarceration experience.

Each potential mechanism that could explain why factually guilty individuals' health suffers because of incarceration applies equally—and perhaps even more so—to exonerees. First, there is no reason to expect that innocent individuals would be exposed to fewer diseases/stressors during incarceration than factually guilty individuals. In fact, exonerees have shared with interviewers that one of the reasons compensation is so important is they often need medical care to address the harms they have experienced in—or existing harms that were exacerbated by—prison (Westervelt & Cook, 2012). Self-reported data from the largest sample of exonerees to date support the claim that exonerees often suffer from physical ailments after their release (Kieckhaefer et al., 2023).

Second, Massoglia and Pridemore (2015) suggest that formerly incarcerated individuals experience mortality threats and shortened lifespans because their criminal history makes it difficult, if not impossible, to recover from the stress and harm of incarceration. Evidence indicates exonerees suffer stigma comparable to factually guilty individuals (Clow & Leach, 2015). For example, exonerees often struggle to find housing (Kukucka et al., 2021; Zannella et al., 2020), employment (Kukucka et al., 2019), or support for other reintegration services (Scherr et al., 2018a; Scherr et al., 2018b; Scherr et al., 2020a). Further, unlike factually guilty individuals, exonerees often do not have access to traditional reintegration services available to parolees. In fact, an audit study of mental health professionals suggests that exonerees were the most likely to be ignored when making inquiries in comparison to parolees and former first responders (Reyes-Fuentes et al., 2023).

Third, if the stress of incarceration is a mechanism through which individuals' mortality becomes at risk and life expectancy is decreased (Massoglia & Pridemore, 2015), then exonerees may be at greater risk than factually guilty individuals. Interviews with exonerees have suggested that the toll of maintaining, or hiding, their innocence while incarcerated could lead to exonerees experiencing greater carceral stress than their factually guilty counterparts (i.e., a "social and psychological burden") (Umamaheswar, 2022a, p. 8). This comparatively higher level of carceral stress relative to factually guilty individuals may be especially true for minority exonerees (Umamaheswar, 2022b). In fact, self-reported data from exonerees suggest that the majority (80%) experience at least one traumatic event while incarcerated and that roughly half of exonerees meet the clinical criteria for post-traumatic stress disorder ("PTSD") and/or depression (Kukucka et al., 2022). Comparatively, a review of the literature on PTSD in sentenced prison populations found rates of PTSD symptoms ranging from 4-21% (Goff et al., 2007). Thus, like factually guilty individuals, it seems likely that exonerees' mortality and lifespan could be impacted by their time wrongfully incarcerated and the stress of incarceration. Unlike factually guilty individuals, however, *how* exonerees end up wrongfully convicted could introduce factors unique to their experience that impacts their health.

To explore the potential impact of factors unique to wrongful conviction to impact mortality and lifespan, we include compensation and case characteristics in our analyses. One such case characteristic is false confession. A recent, novel framework has suggested that the consequences of a wrongful conviction are especially pernicious for false confessors. Specifically, the Cumulative Disadvantage Framework ("CDF") (Scherr et a., 2020b) demonstrates that false confessors experience a series of negative outcomes stemming from a false confession, even post-conviction and post-exoneration. For example, false confessors have been found to be perceived as more responsible for their wrongful conviction, as less likely to be innocent, and less deserving of financial and other compensation (Kukucka & Evelo, 2019; Scherr et al., 2020a) than those who did not falsely confess.

Another possible factor that may relate to a reduced mortality is whether exonerees received compensation for the wrongful conviction. To date, approximately 42% of exonerees have received compensation (Gutman & Sun, 2019), which facilitates financial stability. This in turn increases housing stability and access to health care, and ultimately may help to alleviate Massoglia and Pridemore's (2015) concern about the inability to recover from the stigma of incarceration. Furthermore, research has suggested that receiving significant compensation reduces the likelihood that exonerees will engage in criminal activity (Mandery et al., 2013), which reduces the chance of a violent death and further incarcerations (Lim et al., 2012).

II The Present Study

Because of their shared incarceration experience, there is reason to believe that exonerees may experience lower life expectancies and reduced lifespans like their factually guilty counterparts. What remains unclear, however, is whether the factors unique to the experiences of exonerees might increase the risk to their lifespan. Therefore, we examined (a) whether exonerees were dying at similar rates to that of the general population sharing certain demographic characteristics; (b) whether a sample of exonerated individuals who had passed either failed to achieve, met, or exceeded their established life expectancy; and (c) what factors might predict exonerees' lifespans. We hypothesized the existence of an "innocence mortality tax": a gap in lifespan and life expectancy for exonerees over and above the deleterious effect of incarceration.

We also investigated how efforts to obtain compensation and contributing factors to wrongful conviction influence exonerees' lifespans. The extant scholarship of wrongful conviction has identified six canonical contributors of wrongful conviction. These include false confession (typically when an innocent suspect is coerced into confessing to police; see Kassin et al., 2010), eyewitness misidentification (when a witness mistakenly identifies the wrong perpetrator; see Wells et al., 2020), official misconduct (when legal actors abuse their authority in such a way that their actions contribute to the wrongful conviction; see Drummond & Mills, 2020), perjury or false accusation (when an individual other than the exoneree offers false incriminating testimony under oath or offers false information that would be considered perjury if given under oath; see Hail-Jares et al., 2020), false or misleading forensic evidence (when an individual is convicted in part because of forensic evidence that resulted from error or fraud, was the product of unreliable or unproven methods, or was present with exaggerated confidence; see Cole et al., 2022), and inadequate legal defense (when, at trial, a defense lawyer offers "obviously and grossly inadequate

representation"; NRE, n.d.; e.g., Greenbaum, 2019). Given the abundant scholarship that false confessors are uniquely disadvantaged and suffer additional consequences relative to non-false-confessors (Scherr et al., 2020b), we expected an increased loss of life among false confessors. We do not make *a priori* hypotheses about the remaining five factors, though we examine relations with exoneree lifespan.

III Method

To answer our research questions, we needed to create two measures, the *standardized mortality ratio* and *life expectancy* (see below). The first step was to identify exonerees who have passed. We identified the exonerees who passed (n = 186) as of June 2022 by having two independent coders review detailed case information in the NRE. Specifically, each reviewer went through all 2,657 case summaries available as of June 2022 for any information regarding the exoneree's current status. If the case summary provided information about the exoneree's passing in addition to the year and cause of death, that information was recorded. If it was unclear if the exoneree was still living or other information regarding their passing was missing, the coders conducted internet searches, using phrases such as "[EXONEREE NAME] exoneree obituary", to supplement information. Coders went through the first two pages of each search. Disagreements were resolved via discussion, though the first author made all final decisions.

Once the sub-sample of passed exonerees were identified, we calculated the *standardized mortality ratio* using U.S. death rates. This ratio determined if exonerees' mortality risk was higher than that of the average population. Next was to calculate *life expectancy* (and *adjusted life expectancy*; see below), which represented the difference between exonerees' lifespan and estimates of exonerees' remaining years (given their age, gender, and race/ethnicity) at the point of their wrongful conviction.

A. Standardized Mortality Ratio

Using the U.S. vital statistics, published by the Centers for Disease Control and Prevention (CDC, 2019), we identified the death rate for several groups of individuals. These groups were identified based on their race, sex, and (categorical) age at death. Using these death rate estimates from the general population, we calculated how many exonerees in each corresponding group would be expected to pass in our sample. For example, if the U.S. death rate for Black men aged 30-35 years is 1,000/100,000 individuals, and our sample of exonerees included 100 Black men aged 30-35 years either at the time of their death or as of 2022 (i.e., the point of censorship), we would expect that 1 man in our sample would have passed. We then took the ratio of observed deaths relative to the expected deaths (i.e., the mortality ratio), standardized the calculated value, and applied a statistical test using a chi-square distribution. By calculating a *standardized mortality ratio* using the full sample of known exonerees, we can be assured that results stemming from the

sample of passed exonerees only were not capitalizing on a statistical anomaly. The sample of living exonerees served as a comparison group for death rates.

B. Life Expectancy

Obtained lifespan for passed exonerees was calculated by subtracting year of birth from year of death. Using the U.S. vital statistics, life expectancy was obtained using the exoneree's gender, race, age at conviction, and year of wrongful conviction (CDC, 2019). Specifically, using the CDC (2019) Life Expectancy tables, exonerees' estimated life remaining at the point of their wrongful conviction was determined and then added to their age at conviction for their total *life expectancy*. For example, a White woman who was 59 in 1989 could expect to live another 23.09 years according to the CDC (2019). Thus, at the time of her wrongful conviction in 1989, this woman could expect to live to 82.09 years old (i.e., the 59 years she had already obtained added to the 23.09 years remaining). Because the CDC (2019) estimates life remaining using ranges of years that are not continuous (e.g., 1989-1991 and 1999-2001, with no estimates for the years between 1991 and 1999), exonerees' year of conviction could fall in an unrepresented year. In those cases, the range closest to the year of conviction was used. If two ranges were equidistant from the exoneree's year of conviction, the more conservative range was used to estimate life remaining (i.e., in the previous example, the more conservative range would be 1989-1991). By using the older estimates, we decreased the estimation for years remaining, which artificially lowered exonerees' life expectancy, making it more difficult to demonstrate a difference when compared to obtained lifespan, and thus a more conservative estimate.

Estimated years remaining were not readily available for the Native American (n = 2) or Hispanic/Latinx exonerees in our sample (n = 16). To estimate life expectancy for Native American exonerees, information from the U.S. Department of Health and Human Services Office of Minority Health (n.d.) was used, indicating that Native Americans' life expectancy was most similar to estimates collapsed over all races and genders. Specifically, the average life expectancy for each possible combination of race and gender (e.g., average of all men, average of Black men, average of White individuals, etc.) was calculated using the CDC (2019) information and compared to the life expectancy estimate provided by the Office of Minority Health (n.d.). The CDC (2019) average that was closest in value to the Minority Health (n.d.) estimate was retained. Thus, for the two Native American exonerees, the life expectancy estimate was obtained from the average life expectancy, collapsed across race and gender, in the appropriate year. Next, the CDC (2019) provides life expectancy information for Hispanic/Latinx individuals starting from 2006, but none of the passed Hispanic/Latinx exonerees were convicted in 2006 or later. Rather, the most recent conviction for this subsample was in 1998 (NRE, 2022). The 11-year CDC (2019) observation period for Hispanic/Latinx individuals was compared to the same observation period for all other CDC (2019) categories using the same approach employed with the Native American sample. This comparison indicated that Hispanic/Latinx life expectancy estimates were most similar to the life expectancy of White individuals regardless of gender. Thus, estimates for the 16 Hispanic/Latinx exonerees were taken from White individuals collapsed across gender in the years corresponding to their wrongful conviction.

Once life expectancies were calculated, a new variable, *adjusted life expectancy*, was calculated to account for the deleterious impact of incarceration on life expectancy. Daza and

colleagues (2020) found that incarcerated individuals experienced a four- to five-year reduction in life expectancy. By adjusting exonerees' life expectancy by five years, as opposed to four, we created a lower adjusted estimate of life expectancy by subtracting a higher value. As a result, it was more difficult to find a difference between the lower life expectancy estimates and exonerees' lifespan. Thus, we used the more conservative estimates and adjusted the CDC estimates by five years for all exonerees. In a separate series of analyses, the incarceration adjustment was calculated using both Patterson's (2013) and Daza's et al. (2020) estimates of the impact of incarceration on life expectancy. Results did not change substantively, so we present analyses using the latter's estimates because the vast majority (95%) of our exoneree sample spent significantly more time incarcerated than the sample used in Patterson's (2013) study.

Both estimates for life expectancy (i.e., adjusting for incarceration or not) were then statistically compared to exonerees' obtained lifespan using paired *t*-tests. By using an ideal measure of life expectancy based on each exoneree's race, gender, and age at wrongful conviction, the adjusted and unadjusted estimates of life expectancy served as a matched comparison. Thus, we had two comparison groups: (a) the standardized mortality ratio used the full sample of living exonerees as a statistical comparison for the rate of death among exonerees; and (b) the CDC estimates served as a statistical, matched comparison for the loss of life among passed exonerees.

IV Results

We identified 186 exonerees who have passed as of June 2022. Passed exonerees (94% male) were 30.99 (SD = 11.09) years old when wrongfully convicted and spent an average of 13.49 years (SD = 9.36) incarcerated. The majority were racial and/or ethnic minorities (57%). Passed exonerees were 53.76 years old (SD = 13.23) at their death and lived an average 9.28 years (SD = 8.90) post-incarceration. Similar to the population of known exonerations in the NRE, leading contributors to the wrongful conviction for the past sample were perjury/false accusation (60%; compared to 63%) and/or official misconduct (62%; compared to 59%). Furthermore, 17% of cases included false confessions (compared to 12%) and 39% included eyewitness misidentification (compared to 27%).

A. Standardized Mortality Ratio

First, we examined the *standardized mortality ratio*, which compared the number of observed deaths in our sample to the number of deaths that would be expected based on population death rates. We found that among exonerees (i.e., those living and passed; n = 2,657), a standardized mortality ratio indicated that significantly more exonerees had passed than would be anticipated based on U.S. death rates, $\chi^2(1) = 738.18$, $p < .05$. The expected number of deaths in our full exoneree sample was 32 but we identified 186 exonerees who passed. Thus, our standardized mortality ratio was 5.81 (186 observed deaths: 32 expected deaths). With evidence that almost six times as many exonerees are dying than expected, we turn our focus to those exonerees who passed.

B. Lifespan Expectancy

Analyses indicated that passed exonerees died 18.24 years (SD = 13.61) earlier than would be expected given their age, race, and gender. Passed exonerees were expected to live to 72.00 years old (SD = 4.77), but only lived to 53.76 years old (SD = 13.23); $t(185) = 18.28$, $p < .001$, $d = 1.83$, 95% CI of d [1.56, 2.10]. Even after accounting for years incarcerated (i.e., the *adjusted life expectancy*), passed exonerees died 13.24 years (SD = 13.61) earlier than the expected 67.00 years (SD = 4.77), $t(185) = 13.27$, $p < .001$, $d = 1.33$, 95% CI of d [1.09, 1.57].

A multiple ordinary least squares regression was conducted to investigate whether the six factors commonly identified as leading to wrongful conviction and compensation predicted exoneree lifespan. The overall model was significant, $F(11,172) = 4.63$, $p < .001$, explaining about 23% of the variance in lifespan. Results (Table 1) indicated that White exonerees lived longer than their counterparts. However, those whose cases involved a false confession or mistaken eyewitness identification died 6.09 and 5.46 years earlier than their counterparts, respectively. There was also a small, counterintuitive effect of incarceration, such that for every additional year of incarceration, exonerees lived 0.48 years longer.

Table 1. Predicting exonerees' age at death controlling for time incarcerated, race, and gender.

	B	*SE*(*b*)	*β*	*p*-value
Years Incarcerated	0.48	0.11	.34	< .001
Race	-4.63	1.87	-.18	.014
Gender	6.40	3.86	.12	.099
Filed for Compensation	0.56	2.42	.02	.817
Granted Compensation	0.57	2.42	.02	.834
False Confession	-6.09	2.58	-.17	.019
Mistaken Eyewitness Identification	-5.46	2.19	-.20	.013
Official Misconduct	4.05	2.14	.15	.060
False or Misleading Forensic Evidence	0.96	2.21	.03	.665
Perjury or False Accusation	-2.87	2.30	-.11	.214
Inadequate Legal Defense	-1.21	2.54	-.04	.635

Notes. Race was coded as White (0) and non-White (1). Gender was coded as male (0) and female (1). All other variables are dummy coded to examine the presence (1) or absence (0) of each factor.

V Discussion

The observed effects illustrate the traumatic and enduring influence that wrongful convictions can have on individuals. Specifically, we found 186 exonerees who had passed, a number almost six times greater than would be expected based on U.S. death rates. Not only did we find evidence that exonerees are experiencing a risk to their mortality, we also found that exonerees passed, on average, more than 18 years earlier than would be expected given their age, gender, and race. Even accounting for the tax of incarceration, exonerees died more than 13 years sooner than would be expected. Thus, not only are more exonerees passing than would be expected compared to the general population, but they are dying sooner than their general population

counterparts. Our investigation suggests that non-White exonerees, exonerees whose cases involved a false confession, and exonerees whose case involved a mistaken eyewitness identification experience significantly shorter lifespans than their counterparts. Unexpectedly, we found a small positive impact of incarceration such that each additional year of incarceration increased lifespan by half a year. No other predictors (e.g., compensation, gender, other case variables) were statistically significant.

A. Theoretical and Applied Implications

Research consistently demonstrates that exonerees (i.e., innocent individuals who were wrongly convicted and later exonerated) suffer severe psychological consequences, physical pains, and post-exoneration struggles (e.g., Grounds, 2004; Westervelt & Cook, 2012), regardless of having received financial compensation. Our results lend support to this idea as neither the decision to pursue compensation or being awarded compensation had a significant effect on exonerees' lifespans. To be clear, there is a normative value to compensating the wrongfully convicted as well as the practical—and potentially psychological—benefit of financial compensation. It is possible that we did not find an impact of compensation on lifespan because of the way we dichotomized the variable (i.e., yes/no received compensation), a reflection of the limited information available about specific compensation amounts. Possibly, compensation could have a threshold effect. That is, for example, compensation below a specific amount may have no appreciable impact on lifespan, but once that threshold is met we would see a positive benefit to exonerees' health as the disposable income necessary for a healthier lifestyle is met. Previous research has found this type of threshold effect: Exonerees compensated less than $500,000 were significantly more likely to criminally offend post-release compared to exonerees compensated over $500,000 (Mandery et al., 2013). Future research should continue to investigate the very real impacts compensation may have on exonerees mortality and lifespan.

Overall, our results suggest that exonerees' post-exoneration struggles and victimization by the state (Westervelt & Cook, 2010) takes an innocence mortality tax. The concept of an innocence mortality tax is novel to the literature that has conceptualized harm to exonerees in terms of stigma (Clow & Leach, 2015), physical harm (Westervelt & Cook, 2010), mental health (Grounds, 2004), and inadequate resources post-release (Gutman & Sun, 2019; Scherr et al., 2018a; Scherr et al., 2020a). Perhaps it is not unexpected, however, given the documented detriments of a wrongful conviction which can linger post-exoneration.

Our results also support the Cumulative Disadvantage Framework (CDF), which demonstrates that false confessors are perceived as more responsible for their wrongful conviction, less likely to be innocent, and less deserving of financial and other compensation (Scherr et al., 2020b). The significant reduction in life expectancy found here for false confessors could be the ultimate culmination of the disadvantages laid out in the framework. It is unclear, however, why exonerees whose cases involved a mistaken eyewitness identification were also likely to pass sooner than exonerees whose cases did not involve a mistaken eyewitness identification. Like false confessions, mistaken eyewitness identifications are more likely to happen earlier in the criminal legal process in comparison to contributors like official misconduct and inadequate legal defense, so perhaps there is more time for the negative impacts of a mistaken eyewitness identification to

take effect (i.e., cumulative effects). Regardless, to some extent, the criminal legal system has the ability to minimize both false confessions and mistaken eyewitness identifications.

To that end, we echo calls to increase the transparency of criminal legal investigation and adjudication procedures. For example, scientific consensus papers on eyewitness misidentifications (Wells et al., 2020) and on police interrogations and confessions (Kassin et al., 2010) are clear that electronically recording eyewitness identification procedures and interrogations from start to finish is key to help prevent wrongful convictions. However, as of 2019, only eight states required recording eyewitness identification procedures; and, whereas 25 states require recording interrogations, most require this under certain circumstances (e.g., homicides or other violent crimes, or for juveniles only; Norris et al., 2019).

Our findings also revealed that non-White exonerees passed sooner than their White counterparts. The disparity in lifespan adds to the larger literature that has historically demonstrated racial and ethnic gaps in life expectancy at birth (e.g., Antonovsky, 1967) and specifically to research that suggest wrongful convictions represent a cumulative racialized experience (Umamaheswar, 2022b). Unfortunately, as the full impacts of COVID-19 are felt, we might expect the disparity among exonerees to grow given the wider impact of the pandemic on racial disparities (Woolf & Schoomaker, 2019). We ended our data collection in the middle of the pandemic, and as such only identified two exonerees who passed due to complications related to COVID-19 and are unable to speak to this possibility.

Perhaps related to the impacts of race/ethnicity, we also found that the number of years incarcerated was positively related to lifespan. Specifically, some researchers have suggested that incarceration can serve as a protective factor for the health of, in particular, young, Black men. The argument is that incarceration provides more regular access to food and medical care, and less exposure to gun violence, than young, Black men might experience in their neighborhoods (see Massoglia & Remster, 2019). Research on the relationship between morality and incarceration has also found that the association is stronger for women than men. Perhaps the over-representation of young, Black men—and men more generally—among the sample of exonerees could partially explain the counterintuitive finding that incarceration was associated with longer lifespans (by half a year). While we did not have the sample size to allow for the exploration of interaction effects, future research should examine the potential for race and/or gender to interact with years incarcerated when explaining lifespan.

B. Limitations and Conclusions

Our results suggest that wrongful convictions might result not just in years lost to incarceration but to lost years of life. Of course, being the first study—to our knowledge—to examine empirically the physical toll of wrongful convictions on lifespan, there are some limitations to make known. First, our regression analysis was limited to the variables we could access. However, there are several factors we could not access that could influence lifespan. For example, whether exonerees have stable housing or access to medical care could impact life expectancy. Second, future researchers should consider a more direct comparison of exonerees to factually guilty individuals, ideally with matched samples or using propensity score matching techniques.

The observed effects illustrate the traumatic and enduring influence that being a victim of wrongful conviction has on individuals. More exonerees have passed than would be expected given population estimates, and even accounting for an incarceration tax, exonerees died sooner than would be expected. Taken together, the results of this study emphasize the need to address the harm done by wrongful convictions. Specifically, the results of this study demonstrate that exonerees are losing years off their lives, even beyond what incarceration can explain, necessitating work to mitigate the innocence mortality toll. These results have implications for how the cost of wrongful conviction is conceptualized and policy recommendations aimed at mitigating these costs.

VI References

Allen, Scott A. et al, "Physicians in the US prisons in the era of mass incarceration" (2010) 6 Int J Prison Health 100.

Andrasfay, Theresa, & Noreen Goldman, "Reductions in 2020 US life expectancy due to COVID-19 and the disproportionate impact on the Black and Latino populations" (2021) 118 PNAS e2014746118.

Antonovsky, Aaron, "Life expectancy and overall mortality" (1967) 45 Milbank Q 31.

Centers for Disease Control and Prevention, 'Technical notes addendum for supplemental tables of 'Deaths: Final data for 2017'. National Vital Statistics Reports 2019, Vol. 68, No. 9.

Clow, Kimberley A., & Amy-May Leach, "After innocence: Perceptions of individuals who have been wrongfully convicted" (2015) 20 Legal Criminol Psychol 147.

Clow, Kimberley A., Rosemary Ricciardelli & Tanya L Cain, "Stigma-by-association: Prejudicial effects of the prison experience for offenders and exonerees" in Dale W Russell and Cristel Antonia Russell, eds, *The Psychology of Prejudice: Interdisciplinary Perspectives on Contemporary Issues* (New York: Nova Science Publishers, 2012) at 127.

Cole, Simon A., et al, "The contribution of forensic and expert evidence to DNA exoneration cases: An interim report (National Registry of Exonerations and Innocence Project)" (2022), online: <https://www.law.umich.edu/special/exoneration/Documents/The%20Contribution%20of%20Forensic%20and%20Expert%20Evidence%20to%20DNA%20Exoneration%20Cases%20An%20Interim%20Report.pdf>

Daza, Sebastian, Alberto Palloni, & Jerrett Jones, "The consequences of incarceration for mortality in the United States" (2020) 57 Demography 577.

Drummond, Clayton B., & Mai N Mills, "Addressing official misconduct: Increasing accountability in reducing wrongful convictions" (2020) 1 WCLR 270.

Estelle v. Gamble, 1976 429 U.S. 97.

Farrell, Michael & John Marsden, "Acute risk of drug-related death among newly released prisoners in England and Wales" (2008) 103 Addiction 251.

Goff, Ashley, et al, “Does PTSD occur in sentenced prison populations? A systematic literature review” (2007) 17 Crim Behav Ment Health 152

Greenbaum, Rosa, *Investigating innocence: Comprehensive pre-trial defense investigation to prevent wrongful convictions* [Master’s thesis] (University of California at Irvine, 2019).

Grounds, Adrian. “Psychological consequences of wrongful conviction and imprisonment” (2004) 165 Can. J. Criminol Crim Justice 168.

Gutman, Jeffrey S., & Lingxiao Sun, “Why is Mississippi the best state in which to be exonerated? An empirical evaluation of state statutory and civil compensation for the wrongfully convicted” (2019) 11 Northeast Univ Law J 694.

Hail-Jares, Katie, et al, “False rape allegations: Do they lead to a wrongful conviction following the indictment of an innocent defendant?” (2020) 37 JQ 281.

Harzke, Amy J., et al, “Leading medical causes of mortality among male prisoners in Texas, 1992-2003” (2011) 17 J Correct Health Care 241.

Houle, Brian, “The effect of incarceration on adult male BMI trajectories, USA, 1981-2006” 1 J Racial Ethn Health Disparities 21.

Kassin, Saul M., et al, “Police-induced confessions: Risk factors and recommendations” (2010) 34 Law Hum Behav 3.

Kieckhaefer, Andrea Arndorfer, & Jennifer Ayerza, “What’s next after freedom? Examining factors that impact exonerees’ lives and reintegration back into society in ‘The Aftermath of Innocence: Intake Processes, Mental Health, Compensation, and Reentry’” (Symposium presented at the annual conference at the American Psychology-Law Society, Philadelphia, PA, 16-18 March 2023) [unpublished].

Kouyoumdjian, Fiona G., et al, “Do people who experience incarceration age more quickly? Exploratory analyses using retrospective cohort data on mortality from Ontario, Canada” (2017) 12:4 PLoS One 1.

Kukucka, Jeff, Heather K. Applegarth, & Abby L. Mello, “Do exonerees face employment discrimination similar to actual offenders?” (2019) 25:1 Legal Criminol Psychol 17.

Kukucka, Jeff, et al, “Do exonerees face housing discrimination? An email-based field experiment and content analysis” (2021) 27:4 Psychol Public Policy, Law 570.

Kukucka, Jeff, & Andrew J Evelo, “Stigma against false confessors impacts post-exoneration financial compensation” (2019) 37:4 Behav Sci & L 382

Kukucka, Jeff, Ashley M. Horodyski, & Christina M Dardis,“The Exoneree Health and Life Experiences (ExHaLE) study: Trauma exposure and mental health among wrongly convicted individuals” (2022) 28:3 Psychol Public Policy, Law 387.

Lim, Sungwoo, et al, “Risks of drug-related death, suicide, and homicide during the immediate post-release period among people released from New York City jails, 2001-2005” (2012) 175:6 Am J Epidemiol 519.

Mandery, Evan J., et al, “Compensation statutes and post-exoneration offending” (2013) 103 J Crim Law Criminol 553.

Massoglia, Michael, “Incarceration as exposure: The prison, infectious disease, and other stress-related illnesses” (2008a) 49 J Health Soc Behav 56.

Massoglia, Michael, “Incarceration, health, and racial disparities” (2008b) 42 Law Soc Rev 275.

Massoglia, Michael, & William A. Pridemore, “Incarceration and health” (2015) 41 Annu Rev Sociol 291.

Massoglia, Michael, & Brianna Remster, “Linkages between incarceration and health” (2019) 134 Public Health Rep 8S.

Mumola, Christopher J, “Medical causes of death in state prisons, 2001-2004”, online: Washington, DC: Bureau of Justice Statistics <https://bjs.ojp.gov/content/pub/pdf/mcdsp04.pdf>

The National Registry of Exonerations, online: <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>

Norris, Robert J, *Exonerated: A history of the innocence movement* (New York: NYU Press, 2017).

Norris, Robert J. et al, “Thirty years of innocence: Wrongful convictions and exonerations in the United States” (2020) 1 WCLR 2.

Norris, Robert J., et al, “Preventing wrongful convictions: An analysis of state investigation reforms” (2019) 30 Crim Justice Policy Rev 597.

Nowotny, Kathryn M, “Health care needs and service use among male prison inmates in the United States: A multi-level behavioral model of prison health service utilization” (2017) 5 Health Justice 9.

Patterson, Evelyn J, “The dose-response of time served in prison on mortality: New York state, 1989-2003” (2013) 103 Am J Public Health 523.

Rosen, David L., Victor J. Schoenbach, & David A. Wohl, “All-cause and cause-specific mortality among men released from state prison, 1980-2005” (2008) 98 Am J Public Health 2278.

Reyes-Fuentes, Kateryn, Jeff Kukucka, & Christina Dardis, *Do mental health professionals discriminate against prospective exoneree clients?* Poster presented at the annual conference at the American Psychology-Law Society, Philadelphia, PA, 16-18 March 2023.

Scherr, Kyle C., et al, “False admissions of guilt associated with wrongful convictions undermine people’s perceptions of exonerees” (2020a) 26 Psychol Public Policy, Law 233.

Scherr, Kyle C., Christopher J. Normile, & Heidi Putney, “Perpetually stigmatized: False confessions prompt underlying mechanisms that motivate negative perceptions of exonerees” (2018a) 24 Psychol Public Policy, Law 341.

Scherr, Kyle C., Christopher J. Normile, & Maria C. Sarmiento, “Reluctant to embrace innocence: An experimental test of persevering culpability judgments on people’s willingness to support reintegration services to exonerees” (2018b) 14 J Exp Criminol 529.

Scherr, Kyle C., Allison D. Redlich, & Saul M. Kassin, “Cumulative disadvantage: A psychological framework for understanding how innocence can lead to confession, wrongful conviction, and beyond” (2020b) 15 Perspect Psychol Sci 353.

Schnittker, Jason, & Andrea John, “Enduring stigma: The long-term effects of incarceration on health” (2007) 48 J Health Soc Behav 115.

Sigelman, Carol K., et al, “Courtesy stigma: The social implications of associating with a gay person” (1991) 131 J Soc Psychol 45.

Spaulding, Anne C., et al, “Prisoner survival inside and outside of the institution: Implications for health-care planning” (2011) 173:5 Am J Epidemiol 479.

Umamaheswar, Janani, “Innocence as burden and resource: Adaptation and resistance during wrongful imprisonment” (2022a) Theo Crim, online first: <https://doi.org/10.1177/13624806221112167>

Umamaheswar, Janani, “Wrongful conviction as racialized cumulative disadvantage” (2022b) 63:3 Brit J Criminol 537.

U.S. Department of Health and Human Services Office of Minority Health, *Profile: American Indian/Alaska Native* (n.d.), online: <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62>.

Wells, Gary, et al, “Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence” (2020) 44:1 Law & Hum Behav 3.

Westervelt, Saundra D., & Kimberly Cook, *Life after death row: Exonerees’ search for community and identity* (New Brunswick, NJ: Rutgers University Press, 2012).

Westervelt, Saundra D., & Kimberly Cook, “Framing innocents: The wrongly convicted as victims of state harm” (2010) 53 Crime, Law Soc 259.

Woolf, Steven H., & Heidi Schoomaker, “Life expectancy and mortality rates in the United States, 1959-2017” (2019) 322:20 JAMA 1996.

Zalman, Marvin, & Robert J Norris, “Measuring innocence: How to think about the rate of wrongful convictions” (2021) 24:4 New Crim Law Rev 601.

Zannella, Lesley, et al, “The effects of race and criminal history on landlords’ (un)willingness to rent to exonerees” (2020) 44:4 Law & Hum Behav 300.

Canada's False Guilty Pleas: Lessons from The Canadian Registry of Wrongful Convictions

Kent Roach[1]
Professor of Law, University of Toronto
Toronto, Ontario
Canada

The Canadian Registry of Wrongful Convictions www.wrongfulconviction.ca, like similar registries in the United States and the United Kingdom, was designed to facilitate research on patterns and trends in wrongful convictions. As of its launch in February 2023, 15 of 83 remedied wrongful convictions or 17% were the result of guilty pleas by the accused. Forty percent of the guilty plea wrongful convictions were entered by women. Most of these involved the flawed expert testimony of Charles Smith about the cause of baby deaths. The majority of the 15 remedied guilty plea wrongful convictions were for imagined crimes that did not happen. Almost half (7 of 15) of Canada's false guilty pleas were taken from racialized people including three Indigenous men, one Black and Indigenous man, another Black man and a Brown man who had recently immigrated from India. Two of the fifteen false guilty pleas were taken from accused persons who had diagnosed with mental health and cognitive challenges. With the exclusion of one false guilty plea to a mandatory murder sentence of life imprisonment and ineligibility for parole for 10 years, the average sentence in the remaining 14 cases was 10 months. This is evidence of "lop-sided" plea deals producing lenient sentences. In two cases, the accused who pled guilty received sentences of time already served in pre-trial custody. A number of strategies to prevent false guilty pleas including abolition of mandatory sentences and better charge and pre-trial detention screening are examined. Nevertheless, it is argued that false guilty pleas are inevitable in high volume criminal justice systems that recognize a guilty plea as a reason to mitigate sentences. This article also raises concerns that both Canada's appeal courts and its proposed Miscarriage of Justice Review Commission are not well suited to remedying inevitable false guilty pleas.

I. Introduction
II. Key Findings
   A. Women are Disproportionately the Victims of False Guilty Pleas
   B. Indigenous People are Disproportionately the Victims of False Guilty Pleas
   C. Racialized People are Disproportionately the Victims of False Guilty Pleas

---

[1] Co-Founder Canadian Registry of Wrongful Convictions and Professor of Law, University of Toronto. I thank Amanda Carling and Joel Voss and all who have worked on the Canadian Registry of Wrongful Convictions for all their work that has made the Canadian Registry of Wrongful Convictions and this article possible. This article is a significantly expanded version of the Canadian Registry's first report: Kent Roach, "Canada Has a Guilty Plea Wrongful Conviction Problem: The First Report of the Canadian Registry of Wrongful Convictions" (Feb 2023), online: https://www.datocms-assets.com/75199/1676311113-report-on-the-guilty-plea-wrongful-convictions-in-the-canadian-registry-of-wrongful-convictions-feb-13.pdf

D. Canada's False Guilty Plea Problem Disproportionately Affects People Living with Cognitive Difficulties
E. In the Majority of Guilty Plea Wrongful Convictions, No Crime Was Committed
F. The Average Sentence Received by the Fifteen who Made False Guilty Pleas Was 10 Months Imprisonment
G. Guilty Plea Wrongful Convictions Generally Require Proactive Work by More than the Accused to Remedy

III. The Cases
A. C.F
B. C.M.
C. Sherry Sherett-Robinson
D. Maria Shepherd
E. Brenda Waudby
F. Richard Brant
G. Dinesh Kumar
H. O'Neil Blackett
I. Simon Marshall
J. Anthony Hanemaayer
K. Gerald Barton
L. Chris Bates
M. Clayton Boucher
N. Richard Catcheway
O. Wendy Scott

IV. What Can Be Done About False Guilty Pleas?
A. Eliminate Mandatory Sentences, Including for Murder
B. Regulate Sentencing Discounts
C. Make Searching Reviews of Guilty Pleas Mandatory and Place Less Emphasis on Plea Bargaining as the Solution to Trial Delay
D. Ensure Culturally and Medically Competent Defence Lawyers with Less Financial Incentives to Enter Guilty Pleas
E. Require Prosecutors to Screen Charges Even When They Do Not Know the Accused is Factually Innocent
F. Improve Bail Review and Remand Facilities
G. Create a Proactive and Well-Funded Commission to Review Convictions and Sentences
H. Those who Plead Guilty to Crimes that they Did Not Commit Should Not be Precluded from Compensation

V. Conclusion

I Introduction

Known to criminologists since the 1970's[2], false guilty pleas have only recently gained prominence in wrongful conviction scholarship. They have been documented as constituting

[2]See Steven Dell, *Silent in Court* (London: Bell, 1971); Anthony Bottoms & John McLean, *Defendants in the Criminal Process* (London: Routledge, 1976); Mike McConville & John Baldwin, *Courts, Prosecutions*

between 17% to over 30% of remedied wrongful convictions recorded in national registries in Canada, the United Kingdom and the United States.[3]

False guilty pleas are a critical part of any "criminology"[4] of wrongful convictions. They reveal deep and intractable flaws in high-volume justice systems that encourage plea bargaining about charges and sentences and that accept guilty pleas as a significant mitigating factor in sentencing. Guilty plea discounts, especially when combined with pre-trial detention, set up the possibility that accused persons may make rational decisions to plead guilty despite being innocent or having a valid defence.

Neither the courts, nor legislatures have been able effectively to remedy false guilty pleas. Criminal cases review commissions such as the Criminal Cases Review Commission (CCRC) of England and Wales also have encountered problems in remedying them.[5]

---

and Convictions (Oxford: Oxford University Press, 1981); Richard Ericson & Patricia Baranak, *The Ordering of Justice* (Toronto: University of Toronto Press, 1981). For recent work in Canada see Cheryl Marie Webster, "Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty" (2022) 3:2 Wrongful Conviction L Rev 128; Chloe Leclerc & Elsa Euvrard, "Pleading Guilty: A Voluntary or Coerced Decision?" (2019) 34(3) Can J L & Soc'y 457; Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64:3-4 *Crim LQ* 415; Christopher Sherrin, "Guilty Pleas from the Innocent," (2011) 30 Windsor Rev. Legal & Social Issues 1; Jerome Kennedy QC, "Plea Bargains and Wrongful Convictions" (2016) 63:1&2 Crim LQ 556 ; Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes and What Canada Must Do To Safeguard Criminal Justice* (New York: Simon and Schuster, 2023) Part 1.

[3] From 2010 to 2016, 38% of the cases that the CCRC referred to the Court of Appeal were guilty plea cases. Carolyn Hoyle and Mai Sato, *Reasons to Doubt: Wrongful Convictions and Criminal Conviction Cases Review Commission* (Oxford: Oxford University Press, 2019) at 104-109. As of May 6, 2023 guilty pleas cases were 85 of 467 cases in the University of Exeter's wrongful conviction registry as evidence of the guilty plea discounts that drive such false guilty pleas these cases resulted in an average of 0.37 years lost in prison whereas the average for all 467 wrongful convictions were 5.11 years, see "Case search map" (last visited 6 May 2023), online: https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/the-cases/case-search-map/. The American registry as of May 26, 2023 showed 803 of 3,319 wrongful convictions as false guilty plea cases, see "Exoneration Detail List" (last visited 26 May 2023), online: https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P.

[4] Richard Leo, "Rethinking the Study of Miscarriages of Justice: Towards a Criminology of Wrongful Convictions" (2005) 21 *J Contemporary Crim Justice* 201. See also Richard Leo, "The Criminology of Wrongful Convictions: A Decade Later" (2017) 33 *J Contemporary Crim Justice* 82.

[5] Juliet Horne reports that, from 1997 to 2013, guilty pleas constituted only 9% of referred cases, with the Court of Appeal quashing convictions in 39 of the cases, Juliet Horne, *A Plea of Convenience* (PhD, Warwick University, 2016) [unpublished] at 252. She also found inconsistency in reasons for rejecting guilty plea applications including one case worker who maintained that the only ground for referring a guilty plea was that the plea was not voluntary, *ibid* at 261. Dr. Horne also found inconsistency among Commissioners with some requiring innocence or duress in making the guilty plea and some stressing quick and efficient rejection of guilty plea applications in part to deal with the Criminal Cases Review

The first part of this article will set out key findings from the 15 remedied guilty plea wrongful convictions recorded in the Canadian Registry of Wrongful Convictions as of its launch in February 2023. These false guilty pleas were disproportionately made by women, Indigenous and other racialized persons and two were made by people facing cognitive challenges. The second part of this article will provide brief overviews of the 15 cases of these remedied false guilty pleas. The last part will discuss some possible remedial strategies to better protect and remedy guilty plea wrongful convictions. It will also raise concerns that neither Canada's appeal courts or its proposed Miscarriage of Justice Review Commission are well-equipped to provide remedies for false guilty pleas which appear to be inevitable given the benefits that many accused may receive for pleading guilty and the risks they face by claiming innocence or a defence at trial.

II Key Findings from the Registry's 15 Guilty Plea Wrongful Convictions

The late Ronald Dworkin made an important argument that equality considerations should play an influential role in examining whether reforms are required to prevent wrongful convictions. His argument was based on the assumption that while there was no absolute right to the most accurate criminal justice system, the risk of the moral harm of a wrongful conviction should be distributed equally. [6] In other words, there may not be a right to the most accurate criminal justice system, but the costs of the system's inaccuracies should not be on imposed on distinct and disadvantaged groups in a disproportionate manner. Given the overrepresentation of the disadvantaged in prison populations- the population most at risk of being wrongfully convicted- in many parts of the world and their overrepresentation among the wrongfully convicted, Dworkin's equality-based argument against wrongful convictions may have bite in most criminal justice systems.

The data from the Canadian registry suggests that the overrepresentation of distinct groups of the disadvantaged among those who have received remedies for their false guilty pleas may be even greater than among those who have received remedies for all wrongful convictions. Almost half of the victims of Canada's remedied guilty plea wrongful convictions are racialized and/or women. In contrast, 11 of all 83 remedied wrongful convictions involved women and 20 of all 83 remedied wrongful convictions involved racialized people (including 15 Indigenous people) and

---

Commission's (CCRC) backlog and budget constraints. Horne raised concerns that the CCRC did not always focus on vulnerabilities such as mental illness that may produce false guilty pleas, *ibid* at 263, 269. She also found disincentives in trying to exhaust appeal requirements from guilty pleas including a potential loss of time order if the Court of Appeal for England and Wales rejected the appeal as clearly unmeritorious, *ibid* at 275. The CCRC, however, was more willing to refer guilty plea cases where there was no appeal under its exceptional circumstance's jurisdiction, *ibid* at 280. As will be seen, there is no similar provision in the bill to establish Canada's proposed Miscarriage of Justice Review Commission.

[6] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) ch 3. Dworkin recognized that "it is never true, at any time, that all members of a society are equally likely to be accused of any particular crime. If there is economic inequality, the rich are more likely to be accused of conspiring to monopolize and the poor of sleeping under bridges." Ibid at 87. He went on, however, to conclude that "majoritarian decisions" about procedure and accuracy "can be faulted for serious unfairness only if these decisions discriminate against some independently distinct group….". ibid at 88.

these numbers include those who entered false guilty pleas.[7] In other words, there is evidence that distinct disadvantaged groups are especially subject to guilty plea wrongful convictions. This makes sense if one accepts that the women, Indigenous people and other racialized minorities and those with cognitive challenges may be at a disadvantage in being believed in court and that they are also aware of such a sad reality. Such an understanding of false guilty pleas follows Dworkin by stressing the importance of equality. It also shifts understandings of the wrongfully convicted from those who always maintain and fight for their innocence to those who, at least at the point that they plead guilty, admit defeat at the hands of a coercive and often alien criminal justice system that they do not trust to vindicate their innocence.[8]

A. Women are Disproportionately the Victims of False Guilty Pleas

Of the 15 recognized guilty plea wrongful convictions, six involved women (C.F., C,M, Sherry Sherett-Robinson, Maria Shepherd, Brenda Waudby, Wendy Scott). [9] All but one of these women were charged with murder which has a mandatory sentence of life imprisonment. Five of these women entered false guilty pleas when faced with expert testimony of Charles Smith, a now discredited pathologist but one who was regarded as an icon or star witness at the time of their

[7] "False Guilty Pleas" (last visited May 2023), online: https://www.wrongfulconvictions.ca/issues/false-guilty-pleas.

[8] Jamie Gladue, an Indigenous woman, pled guilty to manslaughter after having been charged with murder in the killing of her partner who had previously been convicted of assaulting her. Gladue entered this guilty plea only after been committed for trial at a preliminary inquiry and after a jury had been selected. She received a three year sentence but was allowed to serve the sentence close to her family and was released after 6 months. I represented Aboriginal Legal Services of Toronto that intervened in Ms. Gladue's unsuccessful sentencing appeal in the Supreme Court of Canada which nevertheless established an important precedent about the sentencing of Indigenous offenders. *R. v. Gladue* [1999] 1 SCR 688. For my subsequent concerns that Ms. Gladue might have had a successful self-defence claim that her lawyers had explored before her guilty plea see Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes and What Canada Must Do to Safeguard Justice* (New York: Simon and Schuster, 2023)at xxvi-xxix.

[9] A seventh woman, Tammy Bouvette, was added to the Canadian registry after its launch in February 2023. Bouvette, like most of the women wrongfully convicted in cases involving Charles Smith, was charged with second degree murder but pled guilty to manslaughter receiving a sentence of one year imprisonment minus time served and two years probation. In finding that the guilty plea was a miscarriage of justice that warranted a stay of proceedings, the British Columbia Court of Appeal stated: "at the time of the guilty plea, the appellant was facing a charge of second-degree murder and, upon conviction, an automatic life sentence with a minimum parole ineligibility period of 10 years. She is the mother of four young children. In short, she was facing the loss of her liberty for a substantial period of time, the stigma associated with a murder conviction, and the loss of her relationships with her children…. the Crown held out a powerful inducement: a guilty plea to a lesser charge and the certainty of a much-reduced sentence. Indeed, the Crown sought the imposition of a two-year custodial term on the appellant's plea of guilty to criminal negligence causing death. It is not difficult to imagine why, unarmed with critical information that could assist her, this marginalized, overwhelmed and intellectually challenged appellant would enter a guilty plea to a lesser offence." *R v Bouvette*, 2023 BCCA 152 at paras 108-111.

false guilty pleas.[10] The sixth involving a woman, Wendy Scott, who has significant cognitive challenges and pled guilty to second degree murder with a 10 year parole ineligibility period when charged with first degree murder which carries a mandatory sentence of life imprisonment and parole ineligibility for 25 years.

Although women make up half of the Canadian population, they make up only 6% of the federal prison population of those serving two years or more: the population at most immediate risk of being wrongfully convicted.[11] The majority of the 11 women in the Canadian registry who have had wrongful convictions remedied have entered false guilty pleas. Women have frequently explained their decision to plead guilty as one designed for their own good and the good of their family.[12]

In her 1997 self-defence review, Justice Ratushny commented that women might plead guilty for a range of "extraneous factors,"[13] including families to care for, regret, and concerns about testifying about the abuse they have endured. In 1997, Martha Shaffer found that the most frequent references to the *Lavallee*[14] case, the leading case recognizing battered woman's ability to claim self-defence, was in sentencing decisions.[15] In early May 2023 there were 1,140 reported cases on CanLii, the database of Canadian legal decisions, that cited *Lavallee*. Well over one third (444) also contained the word "sentence". [16] In addition, women who unsuccessfully claim self-defence at trial may be subject to a mandatory sentence for murder and lose the benefit of a guilty plea discount when sentenced for manslaughter. Debra Parkes and Emma Cunliffe have persuasively shown the limits of factual innocence paradigms by focusing on intimate homicide and baby death cases. They also joined with Dianne Martin in arguing that concerns about wrongful conviction should be extended "into the mundane world of the thousands of guilty pleas made every day."[17]

---

[10] On Charles Smith, see Hon Stephen Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Queens Printer, 2008). I served as the inquiry's director of research.

[11] "Statistics and research on women offenders" (last modified 16 May 2019), online: https://www.csc-scc.gc.ca/women/002002-0008-en.shtml.

[12] Debra Parkes & Emma Cunliffe, "Women and Wrongful Convictions: Concepts and Challenges" (2015) 11 Int JLC 219 at 230-237; Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes and What Canada Must Do to Safeguard Justice* (New York: Simon and Schuster, 2023) ch 2.

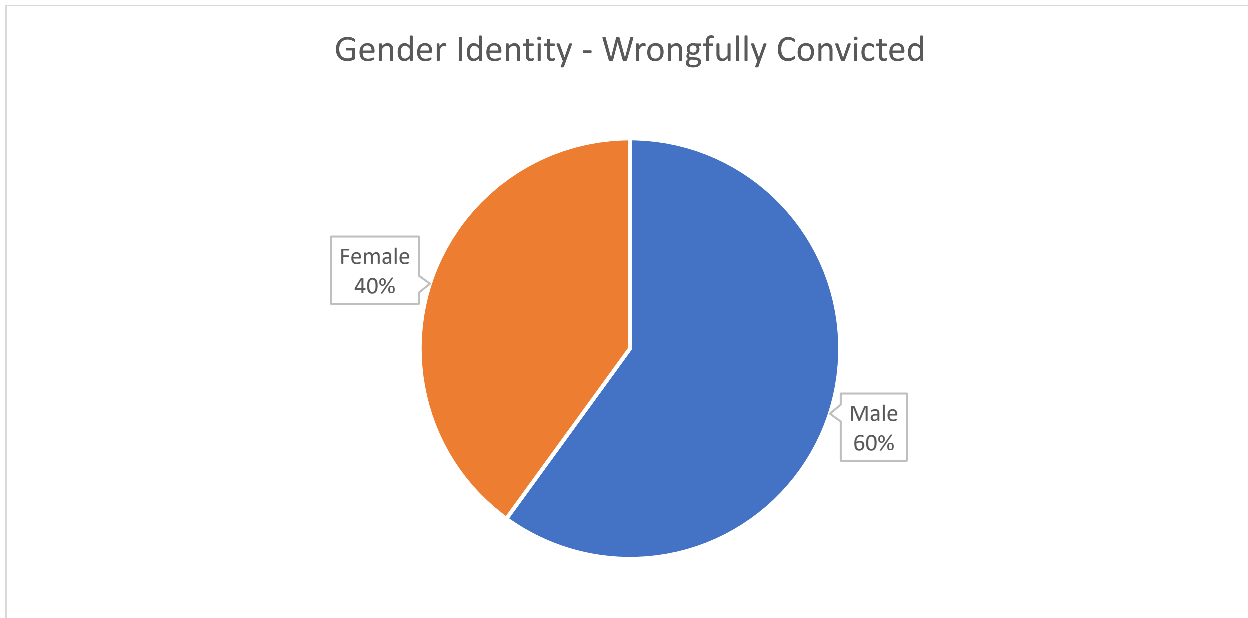
[13] Hon Lynn Ratushny, *The Self-Defence Review- Final Report* (Ottawa: Department of Justice, 1997) 10.

[14] [1990] 1 SCR. 852.

[15] Martha Shaffer, "The Battered Woman's Syndrome Re-Visited." (1997) 47 UTLJ 1.

[16] For a recent case where an Indigenous woman charged with murder who might have argued self-defence pled guilty to manslaughter and was sentenced to 11 years see *R v Dedam*, 2023 NBKB 24. For another example where a battered woman charged with murder pled guilty to manslaughter and eventually received a nine year sentence see *R v Naslund*, 2022 ABCA 6.

[17] Debra Parkes &Emma Cunliffe, "Women and Wrongful Convictions: Concepts and Challenges" (2015) 11 Int'l J L C 219 at 230; Dianne Martin, "Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences and Wrongful Convictions" (2001) 39 Osgoode Hall LJ 513 at 520.



B. Indigenous People are Disproportionately the Victims of False Guilty Pleas

Of the 15 recognized false guilty pleas, four or 27% (Richard Brant, Clayton Boucher, Gerald Barton and Richard Catcheway) involved Indigenous men. This is disproportionate to the about 5% of the Canadian population that is Indigenous. It is, however, slightly less than the about 30% of the prison population that is Indigenous. This suggests that Indigenous people, as the population most at risk for wrongful convictions, may face barriers in receiving remedies for guilty plea wrongful convictions.[18]

Strikingly, none of the 15 remedied guilty plea wrongful convictions involve Indigenous women even though Indigenous women constitute 40% of Canada's prison population and about 50% of the federal prison population for those serving sentences of two years imprisonment or more. This underrepresentation of Indigenous people and especially Indigenous women with respect to those who have received remedies for false guilty pleas likely represents access to justice problems including problems with respect to withdrawing guilty pleas and bringing appeals.

[18] The American registry records that Black accused were 478 of the 808 of guilty plea wrongful convictions recorded as of June 2023 with Black people even more overrepresented in group exonerations which are listed separately in the American registry. See National Registry of Exonerations. "Groups Registry" at https://www.law.umich.edu/special/exoneration/Pages/Group-Exonerations.aspx Black people are significantly overrepresented among those who receive remedies for wrongful convictions in the United States even compared to their overrepresentation in prison in the United States. The lack of similar overrepresentation of Indigenous people among those who have received remedies for wrongful convictions in Canada may suggest that Indigenous people face greater barriers in obtaining remedies for their wrongful convictions. For further discussion of overrepresentation of distinct groups of the disadvantaged among wrongfully convicted people see Kent Roach "The Wrongful Convictions of Indigenous People in Australia and Canada" (2015) 17 Flinders L.J. 203 at 223-228.

The Canadian registry does not include all Indigenous people who have pled guilty but may have been innocent or have had a defence.

In 1968, the Supreme Court of Canada with just one dissent upheld the guilty plea of Lawrence Brosseau even after the Cree man explained: "I only have a grade 2 education and my lawyer told me that if I didn't plead guilty to the charge they would sentence me to hang." To add insult to injury, his own lawyer not only participated in this plea but also told the court that in taking the plea his client was "an absolute primitive. I don't pretend to have any particular understanding of his mind or intent."[19]

Unfortunately, the *Brosseau* case remains a valid and relevant legal precedent. Justices Alvin Hamilton and Murray Sinclair in their 1991 Manitoba Aboriginal Justice Inquiry related "inappropriate guilty pleas" and "passivity" and "indifference" to the alienation of Indigenous people from a colonial criminal justice system. They heard testimony in the early 1990's from inmates who told them "It was easier to plead guilty because they don't really believe us".[20]

In 2011, Justice Frank Iacobucci noted that many Indigenous people in northern Ontario "plead guilty to their offences, rather than electing trial, in order to have their charges resolved quickly but without appreciating the consequences of their decision." He elaborated that many who he spoke to "have never known a friend or family member" who when charged ever risked a trial. Many Indigenous people "believe they will not receive a fair trial owing to racist attitudes prevalent in the justice system, including those of jury members".[21]

A 2017 Department of Justice study based on 25 interviews with court workers and lawyers from 2016 to 2017 similarly found that many Indigenous people, especially those with criminal records, pled guilty to "get it over with" with one participant concluding:

> Wrongful convictions happen every day in court when people are pleading guilty to things they didn't do because they're denied bail or their sense of responsibility is different from criminal responsibility and people are pleading guilty because they feel responsible for something even though they might not in fact be criminally responsible.[22]

Another respondent stated: "discrimination at the police level, Crowns, judges, JPs, even lawyers. They feel like the odds are stacked against them, so what's the point."[23] Others cited the costs of repeat court appearances. This study reported that one reason why an Indigenous court worker plan was instituted in the 1960's was a realization that Indigenous people were pleading

---

[19] *R v Brosseau,* [1969] SCR 181 at 185-186.

[20] Hon Alvin Hamilton & Hon Murray Sinclair, *Aboriginal Justice Inquiry* (Toronto: Queens Park, 1991) chs 6 and 7.

[21] Hon Frank Iacobucci, *First Representation on Ontario Juries* (Toronto: Ministry of the Attorney General, 2011) 372.

[22] Angela Bressan & Kyle Coady, *Guilty Pleas among Indigenous People* (Ottawa: Department of Justice, 2017) at 9.

[23] *Ibid* at 10.

guilty when they were not legally guilty.[24] Amanda Carling, a co-founder of the Canadian registry of wrongful convictions, has argued that Indigenous people may suffer from prolonged depression connected with the harms of colonialism and have a lack of faith in the colonial justice system.[25]

Despite Parliament adding in 2019 whether there is a factual basis to support a guilty plea as a factor for judges to consider when deciding whether to accept guilty pleas, matters do not seem to be improving. A failure to consider the factual basis for a plea is not fatal to the validity of a guilty plea.[26]

In 2021, the Ontario Court of Appeal ruled that the circumstances of an Indigenous accused need not always be considered when accepting a guilty plea from an Indigenous person. [27] It upheld a guilty plea made by an Indigenous man who was detained in solitary confinement and who fired his lawyer before he pled guilty. The man sought to reverse his guilty plea a day after it was made. The Court of Appeal was concerned that a more searching inquiry for Indigenous people seeking to plead guilty would both delay guilty pleas and be paternalistic.

In 2022, a five-judge panel of the British Columbia Court of Appeal did not allow an Indigenous man to re-open his guilty plea to assaulting a police officer. The court stressed that he was represented by counsel even though the man was in pre-trial detention at the time he pled guilty and had previously suffered trauma while in jail. The Indigenous man had argued that he did not intend to assault a police officer when he threw a hammer while the police officer was in an altercation with the man's mother who was concerned that the police would shoot her son.[28]

The British Columbia Court of Appeal also refused to reverse a guilty plea to second degree murder that Philip Tallio made when he was 17 years old on the basis that he had failed to prove on a balance of probabilities that he lacked the capacity to enter a guilty plea and had not established that another person had killed his 22-month-old cousin.[29]

A guilty plea can be entered and accepted by a criminal court in a matter of minutes. The adverse effects of the guilty plea can be life-long.

---

[24] *Ibid* at 6. Thanks to Amanda Carling for bringing this report (and many other things) to my attention.

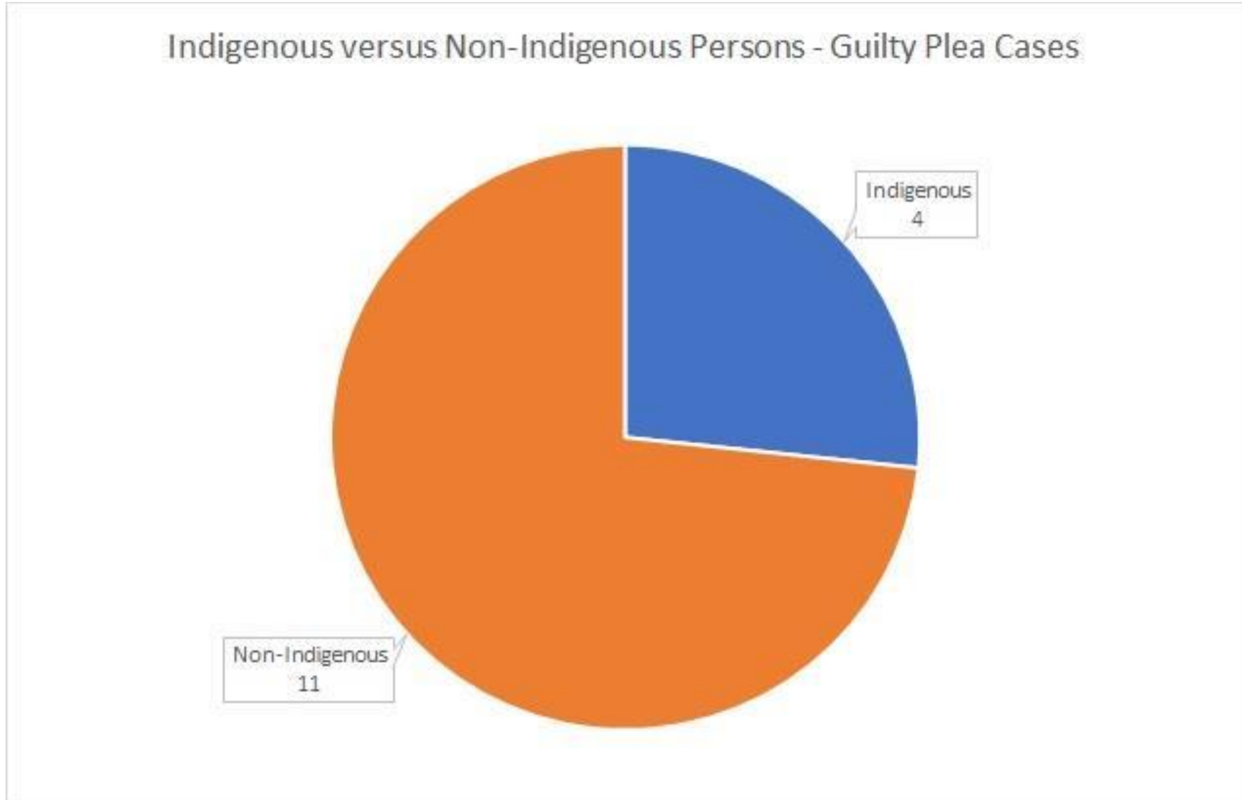
[25] Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64 Crim LQ 415 at 449.

[26] *Criminal Code*, RSC 1985, c C-46, s 606 (1.2).

[27] *R v CK*, 2021 ONCA 826.

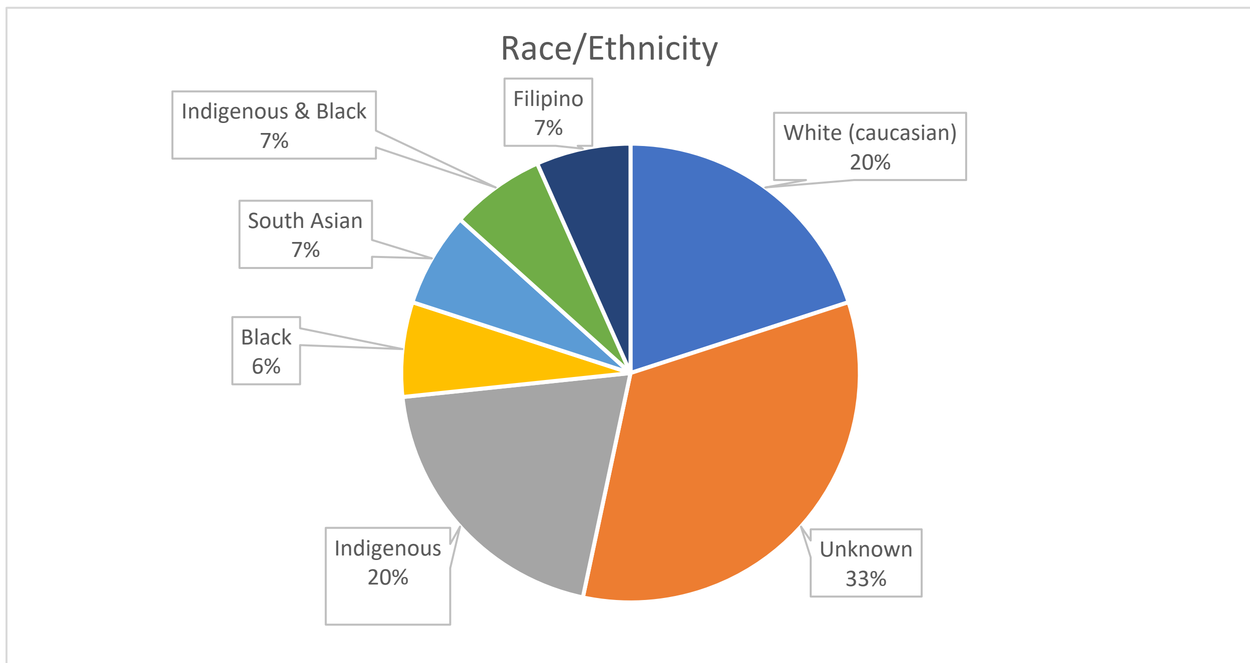
[28] *R v Zaworski*, 2022 BCCA 144.

[29] *R v Tallio*, 2021 BCCA 314; *Phillip James Tallio v Her Majesty the Queen*, 2022 CanLII 21676 (SCC) (leave to appeal denied).



C. Racialized People are Disproportionately the Victims of False Guilty Pleas

Of the 15 recognized false guilty pleas, two involve Black men (Gerald Barton (who is also Indigenous) and O'Neill Blackett); one involves a Brown man who had recently migrated from India (Dinesh Kumar) and one involved a woman of Filipino birth (Maria Shepherd) married to a Black man. The Canadian registry only contains one additional case of a Black man, Leighton Hay, receiving a remedy for his wrongful conviction and only one other case of a South Asian man, Gurdev Singh Dhillion, receiving a remedy for a wrongful conviction.



Data on the overrepresentation of Black and Brown people is less readily available in Canada than for Indigenous people. In 2020/21 Black people constituted 11% of admissions to custody in Nova Scotia where Barton's wrongful guilty plea occurred compared to 3% of the population. They were 14% of admissions to custody in Ontario compared to 5% of the population in Ontario where Blackett's wrongful conviction occurred. They also were 9% of admissions to federal custody compared to 4% of the Canadian population.[30] Such overrepresentation in prison is also reflected in that 2 of 15 or 13% of remedied wrongful convictions that have involved Black people. Given the difficulties of remedying guilty plea wrongful convictions, however, it is difficult to know whether Black people may be more inclined than other groups to plead guilty in cases where they are innocent or may have a valid defence. Black people, like Indigenous people, may have valid fears that they will not be represented on the bench or the jury and that the jurors in particular will not be adequately screened to prevent the use of racist stereotypes associating them with crime.

D. Canada's False Guilty Plea Problem Disproportionately Affects People Living with Cognitive Difficulties

Of the 15 recognized false guilty pleas, two involve people with diagnosed mental health and cognitive challenges. Simon Marshall's guilty plea to a series of well-publicized sexual assaults in a suburb of Quebec City were accepted by the trial court in 1997. Simon Marshall then served five years in jail during which he suffered horrific abuse. When released, he pled guilty to two more sexual assaults. These pleas were proven to be false by DNA testing. DNA testing was

[30] Research and Statistics Division Department of Justice *Overrepresentation of Black People in the Canadian Criminal Justice System* December 2022 at https://www.justice.gc.ca/eng/rp-pr/jr/obpccjs-spnsjpc/pdf/RSD_JF2022_Black_Overrepresentation_in_CJS_EN.pdf

then belatedly done on material from the earlier assaults and the results excluded Marshall. The wrong person had been arrested and allowed to plead guilty while the true perpetrator went free.

Wendy Scott has been diagnosed with an extremely low IQ. She confessed to a murder when she was presented with false evidence by the police, as is legal in Canada.[31] She was charged with first degree murder and subsequently pled guilty to second degree murder and received the mandatory minimum sentence of life imprisonment with parole ineligibility for ten years. Her guilty plea was overturned in 2015, but without the Alberta Court of Appeal issuing a published judgment.[32] Scott also was the star witness in Connie Oakes' trial for the same murder. Connie Oakes's conviction was overturned based on new evidence of the overturning of Scott's conviction.[33] Connie Oakes is one of 16 Indigenous people out of the present total of 83 people in the Canadian Registry of Wrongful Convictions.

The number of remedied false guilty pleas made by people with cognitive challenges may be undercounted even among the 15 false guilty pleas in the Canadian registry because the Registry is based solely on publicly available material and cognitive challenges are often under-diagnosed.[34]

One third of over 1,200 accused persons with mental health issues have reported that they pled guilty to an offence that they did not commit at some time during their life.[35] At the same time, Canadian courts, however, generally only require a basic awareness or operating mind for a person to be competent to plead guilty[36], thereby giving up their right to a trial, often for a reduced sentence.

E. In the Majority of Guilty Plea Wrongful Convictions, No Crime Was Committed

The power of the criminal justice system with respect to the disadvantaged is well demonstrated by its ability to wrongfully convict people for crimes that did not happen.

All of the eight guilty plea wrongful convictions related to Charles Smith's flawed expert testimony involved baby deaths where no crimes occurred. The same is true with respect to the guilty plea wrongful conviction of Clayton Boucher, a Métis man, who pled guilty to possession of illegal drugs and received a sentence of time served, reflecting his time in pre-trial detention. The RCMP lab results were that the substance Clayton Boucher possessed (in a baking soda

---

[31] Colin Sheppard, "The Connie Oakes Tragedy" (2020) 67 CLQ 523 at 534-5.

[32] Chris Purdy, "Senator says Alberta murder case 'screams' for an inquiry" *Global News* (18 Jan 2017), online: https://globalnews.ca/news/3188660/senator-says-alberta-murder-case-screams-for-review-calls-for-public-inquiry/.

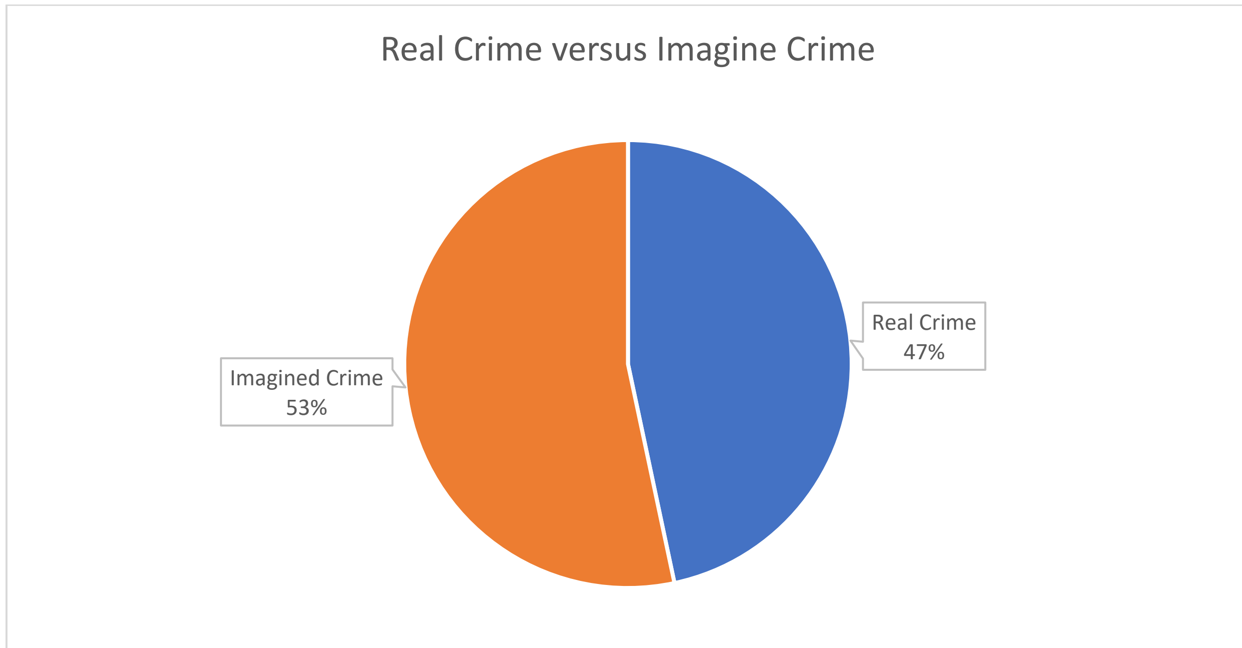
[33] *R v Oakes*, 2016 ABCA 90.

[34] On the under-diagnosis of fetal alcohol spectrum disorder see Jonathan Rudin, *Indigenous People and the Criminal Justice System* 2nd ed (Toronto: Emond Montgomery, 2022) at 259-269.

[35] Allison D Redlich et al, "Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness" (2010) 34 L & Human Behaviour 79 at 83-4, 88-9.

[36] *R v T (R)*, 1992 CanLII 2834 (ON CA); *R v Taylor,* 1992 CanLII 7412 (ON CA); *R v MAW*, 2008 ONCA 555, accepting the limited cognitive capacity test in *R v Whittle* [1994] 2 SCR 914.

container) were not illegal drugs. Mr. Boucher pled guilty in the wake of his wife's accidental death and having had to attend her funeral in shackles.



F. The Average Sentence Received by the Fifteen who Made False Guilty Pleas Was 10 Months Imprisonment

Guilty plea wrongful convictions result from sentence and charge bargains that are difficult for many accused and even the hypothetical "reasonable person" to decline.

The average 10-month sentence received by 14 victims of guilty plea wrongful convictions excludes the one remedied guilty plea wrongful conviction that involved a sentence of life imprisonment with the minimum period of parole ineligibility of 10 years (Wendy Scott). Even in that case, Scott had been charged with first degree murder, which has a mandatory 25 years of parole ineligibility and so received a significant sentence reduction by pleading guilty.

Four of the remaining 14 remedied false guilty plea cases (Brenda Waudby, C.F., C.M., Chris Bates) received a non-custodial sentence. Dinesh Kumar received a 90-day sentence to be served on the weekends. These are examples of what Deborah Turkheimer has identified as "lop-sided pleas" that she found in American cases dealing with expert evidence based on the controversial shaken baby syndrome.[37] They suggest that the legal system was accommodating the shaky basis of the underlying science in these cases not by acquitting the accused but by reducing their sentences. This is not how a system committed to giving the accused the benefit of any reasonable doubt is supposed to operation.

Both the Richard Catcheway and Clayton Boucher cases involved Indigenous men accused of a break and enter and possession of illegal drugs respectively who received "time served"

[37] Deborah Tuerkheimer, *Flawed Convictions* (New York: Oxford University Press, 2014) at 159ff.

sentences and who had been denied bail after being charged. This provides support for Professor Webster's recent argument that Canada's high rate of pre-trial imprisonment, particularly in the case of long-term pre-trial detention, may contribute to false guilty pleas.[38]

G. Guilty Plea Wrongful Convictions Generally Require Proactive Work by More than the Accused to Remedy

In 13 of the 15 cases, the guilty plea wrongful convictions were corrected primarily by actions by justice system participants other than the accused. Accused people who plead guilty will face many barriers overturning their plea and will often require some form of assistance from the state especially with respect to discovering new evidence that was not considered at the time of the guilty plea.

The eight cases related to Charles Smith's erroneous testimony required work by the coroners' office to commission opinions from better qualified experts and eventual agreement by prosecutors that the guilty plea in light of new evidence constituted a miscarriage of justice. The evidence that Richard Catcheway was in jail in Brandon at the time of the break and enter in Winnipeg he pled guilty to was originally obtained by a correctional official. A RCMP forensic lab conducted the analysis that established that Clayton Boucher was innocent of possessing illegal drugs. A Toronto police re-investigation of Paul Bernardo, a serial killer and rapist, was critical in overturning Anthony Hanemaayer's false guilty plea. Gerald Barton's false guilty plea was overturned after the complainant recanted after 38 years and the prosecutor agreed to entering the new evidence and reversing the convictions.

An important role of Canada's proposed Miscarriage of Justice Review Commission should be to reach out to those often-disadvantaged people who made false guilty pleas and to use public powers and funds to find new evidence. As will be discussed below, however, there are concerns that the bill that was introduced in the Canadian Parliament in February 2023 may impose high barriers by requiring applicants in every case, including guilty plea cases, to have appealed their cases to a Court of Appeal before they can apply to the new commission to request a new trial or new appeal. In summary conviction cases, this will require an accused who pled guilty to obtain decisions from two levels of appeal before the proposed Commission can consider their applications for assistance and relief.

III The Cases

The 15 false guilty pleas are not just statistics. The Canadian Registry of Wrongful Convictions attempts to tell their stories as fully and fairly as possible from the information provided in publicly available documents. The Registry relies on publicly available documents in an attempt to minimize the trauma that wrongfully convicted persons have already suffered.[39] This

[38] Cheryl Marie Webster, "Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty" (2022) 3: 2 Wrongful Conviction L Rev 128.

[39] For an account of the trauma that media reporting can itself cause see Tamara Cherry, *The Trauma Beat* (Toronto: ECW Press, 2023).

focus also allows the Registry to document media and official responses to wrongful convictions. At the same time, it may result in the under-reporting of relevant personal characteristics of the wrongfully convicted that are not recorded by the media or the courts. This may particularly be the case with respect to mental health and cognitive issues.

A. C.F.[40]

An 18-year-old who did not know she was pregnant gave birth to a baby in 1996 who was either still-born or died shortly after birth. Charles Smith, when asked for a second opinion, concluded the cause of death was asphyxia and "in the absence of an alternative explanation, the death of this baby girl is attributed to infanticide." C.F. was charged and pled guilty to infanticide. She received a 2-month conditional sentence to be served at home, 150 hours community service and 3 years probation.

C.F. received a pardon in 2006. With the prosecutor's consent her guilty plea was overturned by the Ontario Court of Appeal in 2010 with the prosecutor subsequently withdrawing the infanticide charge.[41]

B. C. M.[42]

A 21-year-old who did not know she was pregnant gave birth in November 1992. Charles Smith performed the autopsy and concluded that the cause of death was "asphyxia (infanticide)".

The woman was charged with second degree murder. She pled guilty to manslaughter, receiving a suspended sentence, 300 hours of community services and three years' probation.

With the prosecutor's consent, her guilty plea was overturned by the Ontario Court of Appeal in 2010 [43] with the prosecutor subsequently withdrawing all charges.

C. Sherry Sherett-Robinson[44]

A 20-year-old was charged in 1996 with first degree murder of her four-month-old baby on the basis of Charles Smith's conclusion that the baby had injuries to support a finding of intentional killing. In 1999, Sherry Sherett-Robinson pled guilty to infanticide and received a one-year sentence.

---

[40] For a fuller account see "C.F." (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/c-f.
[41] *R v CF*, 2010 ONCA 691.
[42] For a fuller account see "C.M." (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/c-m.
[43] *R v CM*, 2010 ONCA 690.
[44] For a fuller account see "Sherry Sherett-Robinson" (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/sherry-sherret-robinson.

In 2009, with the prosecutor's consent, the Ontario Court of Appeal admitted new evidence that the injuries were not a result of her actions and entered an acquittal.[45]

D. Maria Shepherd[46]

Maria Shepherd, as a young and pregnant mother, pled guilty to manslaughter in the death of her three-year-old stepdaughter. She received a sentence of two years less a day that allowed her to serve her sentence with contact from her family.

In 2016, with the prosecutor's consent, the Ontario Court of Appeal admitted new evidence discrediting Charles Smith's evidence of an intentional killing and entered an acquittal.[47]

E. Brenda Waudby [48]

Brenda Waudby was charged with murdering her 21-month-old daughter, Jenna, who died of injuries sustained when in the care of a teen-aged babysitter. Charles Smith maintained that the blunt force injuries could have been inflicted by Waudby because of a "honeymoon period where an infant appears essentially normal."

In 1993, Brenda Waudby pled guilty to child abuse and was given a non-custodial sentence. Waudby's conviction was overturned with the prosecutor's consent on the basis of new evidence, including a manslaughter conviction of the babysitter. Justice Fuerst stated that "There was no factual basis to the charge of child abuse or to Ms. Waudby's guilty plea to it. Her guilty plea along with the ensuing conviction of child abuse was a miscarriage of justice". The judge added that Waudby "should have been treated over these many years as the person she is- a victim, not a perpetrator, a loving mother who suffered the excruciating loss of her daughter's life at the hands of someone else." [49] Unfortunately, this judgment exonerating Brenda Waudby was not officially published and not extensively covered in the media.

---

[45] *R v Sherett-Robinson*, 2009 ONCA 886.

[46] For a fuller account see "Maria Shepherd" (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/maria-shepherd.

[47] *R v Shepard*, 2016 ONCA 188.

[48]For a fuller account see "Brenda Waudby" (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/brenda-waudby.

[49] "Brenda Waudby cleared of child abuse charges from 1997" *Peterborough This Week* (27 Jun 2012), online: https://www.thepeterboroughexaminer.com/life/brenda-waudby-cleared-of-child-abuse-charges-from-1997/article_e45ac486-58a8-542a-825d-2a4f600b80ed.html1997/article_e45ac486-58a8-542a-825d-2a4f600b80ed.html; Roach, *Wrongfully Convicted*, *supra* note 2 at 25-27.

F. Richard Brant [50]

Richard Brant, who is Mohawk, was charged with manslaughter of his infant son on the basis of a Charles Smith diagnosis of shaken baby syndrome even though an autopsy had concluded the infant died as a result of complications from pneumonia.

Brant pled guilty to aggravated assault and was sentenced to six months' imprisonment in 1995. In 2011, with the prosecutor's consent, new evidence was admitted and Brant was acquitted by the Ontario Court of Appeal. The Court of Appeal explained: "Although he had always maintained that he did not harm his son, an important consideration for the appellant choosing to plead guilty was the unequivocal opinion of Dr. Charles Smith that the infant had died from non-accidental head injury. In the fresh evidence Mr. Brant has explained why he pleaded guilty notwithstanding his belief that he was innocent. Moreover, there is some doubt that the facts agreed to at the time of the guilty plea could support the charge of aggravated assault and we note that the trial judge who accepted the plea indicated that it appeared to be the result of a compromise."[51]

G. Dinesh Kumar[52]

Dinesh Kumar, a recent immigrant from India was charged with second degree murder in the death of his son in 1991 on the basis of a diagnosis of shaken baby syndrome by Charles Smith and another doctor at the Hospital for Sick Children.

He pled guilty in 1992 to criminal negligence causing death and received a sentence of 90 days' imprisonment to be served on the weekends. Such a sentence also avoided the threat of deportation from Canada if he had been convicted of murder. Concerns were expressed in the press about the leniency of the sentence.

In 2011, with the consent of the prosecutor, Kumar's guilty plea was overturned on the basis of fresh evidence and an acquittal was entered. The Court of Appeal noted that Dinesh Kumar "explained that he was in a new country with its own culture, and he did not speak English very well. He was told that he would be deported if convicted of murder or manslaughter but assured that the police would not report his case to immigration if he accepted the plea."[53]

---

[50] For a fuller account see "Richard Brant" (last visted May 2023), online: https://www.wrongfulconvictions.ca/cases/richard-brant.

[51] *R v Brant*, 2011 ONCA 362 at para 1.

[52] For a fuller account see "Dinesh Kumar" (last visted May 2023), online: https://www.wrongfulconvictions.ca/cases/dinesh-kumar.

[53] *R v Kumar*, 2011 ONCA 120 at para 13.

H. O'Neil Blackett [54]

O'Neil Blackett, who is Black, was charged with the second-degree murder of 13-month-old Tamara on the basis of Charles Smith's opinion that she had died from strangulation or blunt force.

After 15 months of pre-trial detention, Blackett pled guilty in August 2001 to manslaughter. He received a sentence of 3.5 years' imprisonment. His lawyers had observed that "a jury was unlikely to be sympathetic to him because the case involved the alleged murder of an infant". They also believed Blackett "would not be an effective witness on his own behalf." At the same time, Blackett's lawyers told him he should not pled guilty to something he did not do.[55]

In 2018, with the prosecutor's consent, the Ontario Court of Appeal admitted new evidence that Smith's opinion was unreliable and ordered a new manslaughter trial.[56] The prosecutor subsequently withdrew the charges.

I. Simon Marshall[57]

Simon Marshall pled guilty to 13 sexual assaults committed between 1992 and 1996 in Ste. Foy Quebec. He was sentenced to 62 months in prison and served his full sentence.

Shortly after his release, Marshall, who had both mental disorders and cognitive difficulties, confessed and pled guilty to two subsequent sexual assaults. Fortunately, he was excluded by DNA testing of these sexual assaults as. There were plans to seek his indeterminate detention through a dangerous offender designation. DNA testing subsequently excluded him of the earlier sexual assaults. His guilty plea to these sexual assaults were overturned by the Quebec Court of Appeal on the basis of the new evidence and an acquittal was entered.[58]

J. Anthony Hanemaayer[59]

In October 1989, Anthony Hanemaayer pled guilty to breaking and entering and committing an assault after he was identified at the first day of his trial by a homeowner as the person who broke into her home and assaulted her daughter. He was sentenced to two years less a day's imprisonment. He had been told that if convicted at the completion of the trial, he might be sentenced to six years' imprisonment.

---

[54] For a fuller account see "O'Neil Blackett" (last visted May 2023), online: https://www.wrongfulconvictions.ca/cases/o-neil-blackett.

[55] *R v Blackett*, 2018 ONCA 119 at para 19.

[56] *Ibid*.

[57] For a fuller account see "Simon Marshall" (last visted May 2023), online https://www.wrongfulconvictions.ca/cases/simon-marshall.

[58] *Marshall c The Queen*, 2015 QCCA 852.

[59] For a fuller account see "Anthony Hanemaayer" (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/anthony-hanemaayer.

In 2008, with the consent of the prosecutor, the Ontario Court of Appeal admitted new evidence that Paul Bernardo was the perpetrator and acquitted Hanemaayer. Justice Marc Rosenberg stated: "the court cannot ignore the terrible dilemma facing the appellant. He had spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if he was convicted. The estimate of six years was not unrealistic given the seriousness of the offence. The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence."[60]

K. Gerald Barton [61]

Barton, who is Black and Indigenous, pled guilty in 1968 to having sex with a girl between 14 and 16 years of age after having been charged with rape. He was sentenced to one year of probation.

In 2011, his conviction was overturned on the basis of new DNA evidence excluding him and a recantation from the complainant. There were no published reasons for this decision. He later unsuccessfully sued for compensation.[62]

L. Chris Bates [63]

Chris Bates' conviction of second-degree murder, robbery and conspiracy to commit robbery was overturned by the Quebec Court of Appeal in 1998 on the basis of evidence that was not disclosed to him at his 1994 trial.

A new trial was ordered but Bates pled guilty to conspiracy to commit a robbery stating he was "tired of all this". He received a conditional sentence and probation. In 2014, the Quebec Court of Appeal refused to grant Bates an appeal out of time on the basis of new evidence that his plea was a result of post-traumatic stress disorder, emphasizing the importance of the finality of verdicts and that Bates was able to avoid prison by pleading guilty.[64] Although Bates has yet to receive a remedy this case was included in the Registry because it correlates with strong indicia of other guilty plea wrongful convictions and is subject to a pending application to the Minister of Justice for a new trial or new appeal.

---

[60] *R v Hanemaayer*, 2008 ONCA 580 at para 18.

[61] For a fuller account see "Gerald Barton" (last visted May 2023), online: https://www.wrongfulconvictions.ca/cases/gerald-barton.

[62] *Barton v Nova Scotia*, 2015 NSCA 34.

[63] For a fuller account see "Chris Bates" (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/chris-bates.

[64] *Bates c R,* 2014 QCCA 2269.

M. Clayton Boucher[65]

In 2017, Clayton Boucher, a Métis man, pled guilty to possession of drugs even though he claimed that a white substance found in a baking soda container after a search of house was baking soda. Boucher pled guilty and received a sentence of time served shortly after his wife has been killed in a car accident.

Subsequent analysis revealed that the substance was not illegal drugs. Clayton Boucher's drug conviction was overturned, and an acquittal entered by the Alberta Court of Appeal with the consent of the prosecutor but without published reasons.

N. Richard Catcheway [66]

In 2017, Richard Catcheway, an Indigenous man with cognitive difficulties, pled guilty to a break and enter and received a sentence of time served for his 6 months in pre-trial detention. A prison administrator subsequently forwarded evidence to Catcheway's lawyer that Catcheway had been in prison at the time of the break in. This new evidence was admitted with the Manitoba Court of Appeal stating that it "conclusively proves the accused's innocence".[67]

O. Wendy Scott[68]

In 2012, Wendy Scott, a woman with cognitive difficulties and an IQ of 50, was charged with first degree murder but pled guilty to second degree murder of a man in Medicine Hat. She had made incriminating but inconsistent statements when interrogated by the police. In 2015, the Alberta Court of Appeal, with the consent of the prosecutor, quashed her conviction and ordered a new trial without published reasons. The prosecutor subsequently stayed proceedings in 2017.

Summary

The wrongfully convicted people and the families affected by these 15 wrongful conviction guilty pleas matter. The injustices they suffered should inspire change in criminal justice policies. At the same time, these remedied false guilty pleas are likely only the tip of the iceberg of cases where people felt they had no choice but to pled guilty despite being innocent or having a defence for the crime committed. The absence of any published reasons for overturning guilty pleas in four of the 15 cases and the absence of an extended discussion of the dilemma faced by those who enter false guilty pleas in most of the cases (*R. v. Hanemaayer* being the most important exception) is regrettable because it fails to raise awareness of false guilty pleas among criminal justice participants and policy-makers.

---

[65] For a fuller account see "Clayton Boucher" (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/clayton-boucher.
[66] For a fuller account see "Richard Catcheway" (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/richard-catcheway.
[67] *R v Catcheway*, 2018 MBCA 54 at para 8.
[68] For a fuller account see "Wendy Scott" (last visited May 2023), online: https://www.wrongfulconvictions.ca/cases/wendy-scott.

IV What Can Be Done About False Guilty Pleas?

A. Eliminate Mandatory Sentences, Including for Murder

The majority of the remedied false guilty pleas were cases involving the flawed expert testimony of Charles Smith. In most of these cases, the accused was charged with murder, which carries a mandatory sentence of life imprisonment. All of the accused pled guilty to lesser offences that had no mandatory minimum penalty.

In 1997, Justice Lynn Ratushny, in her Self-Defence Review, noted that the threat of mandatory life imprisonment made it very difficult for women with self-defence claims who were charged with murder to refuse a plea bargain to manslaughter. Unfortunately, Justice Ratushny's 1997 recommendation to allow exceptions from mandatory life imprisonment in murder cases has still not been implemented more than a quarter of a century later even though many democracies do not require mandatory life imprisonment for murder.[69]

B. Regulate Sentencing Discounts

The remedied false guilty pleas involving Charles Smith, as well as the other remedied false guilty pleas in the registry, involve steeply discounted sentences as represented by the average sentence of 10 months. Canadian law makes no attempt to remedy the sentencing discount that an accused receives for a guilty plea. Such discounts also constitute *de facto* penalties for going to trial should, as happens in the majority of cases, the accused not receive an acquittal.

English law has attempted to regulate guilty plea sentencing discounts in an attempt to ensure that such discounts are not disproportionate or coercive. Nevertheless, it should be noted that false guilty pleas are a problem in the United Kingdom. Indeed, they constitute 85 of 466 recorded wrongful convictions recorded in the University of Exeter's registry. Sentencing discounts appeared to play a role in those false guilty pleas. In the 85 UK cases that involved a guilty plea, each accused served an average of 0.37 of a year's sentence compared to an average time served of 5.11 years in all 467 remedied miscarriages of justice. [70]

---

[69] Hon Lynn Ratushny, "Self-Defence Review" (11 July, 1997), online (pdf): https://www.publicsafety.gc.ca/lbrr/archives/ke%208839%20r3%201997-eng.pdf>. For similar and recent recommendations in the United States, see Thea Johnson, "Plea Bargaining Task Force Report" (2023) at 15-16, online (pdf): https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.

[70] "Case Search Graph" (last visited 8 Feb 2008), online: https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/the-cases/overview-graph/.
The 804 remedied guilty plea wrongful convictions in the American registry also feature many low sentences including orders of probation or a few months in prison. See "Exoneration Detail List" (last visited May 2023), online:
https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P.

C. Make Searching Reviews of Guilty Pleas Mandatory and Place Less Emphasis on Plea Bargaining as the Solution to Trial Delay

In 2019, Parliament, as part of Bill C-75, added a factual basis to provisions in the *Criminal Code* that also provide for an inquiry into whether a guilty plea is knowing and voluntary. Unfortunately, all of these provisions are subject to s.606(1.1) of the *Criminal Code*, which provides that the failure of a judge to make such inquiries does not affect the validity of the plea.

Reported cases on this new provision do not so far reveal that judges are engaging in substantial inquiries into the factual basis of a plea. One recent decision of the Prince Edward Island Supreme Court reveals a somewhat casual approach to this requirement that accepts agreed statements of facts at face value. In affirming the guilty plea, the judge stated: "I note parenthetically that at the June 16, 2020 hearing counsel presented an Agreed Statement of Facts signed by the Crown, defence counsel" and the accused. "Both the Crown and defence confirmed their submissions that the facts supported the charges for which Mr. Cudmore had offered the pleas of guilty. I was satisfied the agreed facts supported the charges for which Mr. Cudmore had offered pleas of guilty and as such, I accepted Mr. Cudmore's pleas of guilty in relation to the charges."[71] Some courts seem even to have accepted that the wording of the charge itself provides a factual basis and also presume that the plea is valid if the accused is represented by a lawyer.[72]

Unless judges become comfortable exercising inquisitorial powers at the guilty plea hearing stage or an accused goes "off script,"[73] it is unlikely that guilty plea hearings will often serve as a tool to prevent guilty plea wrongful convictions. As Justice Pomerance has stated: "false guilty pleas can be difficult to detect… It is relatively easy to divine what the "correct" answers are to the court's questions. The accused will invariably have been asked the same questions by his or her lawyer in the discharge of counsel's ethical obligations. Moreover, the traditional plea inquiry does not tend to concern itself with the substantive quality of a guilty plea."[74] Courts of Appeal also remain reluctant to overturn guilty pleas in the absence of clear evidence of a miscarriage of justice.[75] The 15 remedied false guilty pleas in the Canadian registry all had such clear evidence and in the vast majority of these cases, this evidence was produced by state officials with prosecutors often agreeing to reverse the conviction.

Despite its recognition of wrongful convictions as an inevitable reality that precludes extradition to face the death penalty,[76] the Supreme Court of Canada has facilitated plea bargaining in a way that may also facilitate false guilty pleas. In 2014, the Court noted that: "it is perfectly proper for the Crown to indicate that it will drop certain charges, grounded in the evidence, if the

---

[71] *R v Cudmore*, 2020 PESC 25 at para 13.
[72] *R v Harris*, 2022 BCPC 250 at paras 20, 27.
[73] For an example of a more searching inquiry that found that a guilty plea while voluntary and informed should be struck as a miscarriage of justice, see *R v McIlvride-Lister*, 2019 ONSC 1869.
[74] *Ibid* at paras 63-64. See also *Khanfoussi c R*, 2010 QCCQ 8687 at paras 9-10.
[75] *R v CK*, 2021 ONCA 826; *R v Tallio*, 2021 BCCA 314; *R v Zaworski*, 2022 BCCA 144; *R. v. King*, 2022 ONCA 665.
[76] *United States v Burns*, 2001 SCC 7.

accused pleads guilty."[77] In 2016, it stressed that trial judges should only depart from a joint submission on sentencing if the result would bring the administration of justice into disrepute.[78] The Supreme Court of Canada has stressed the need for increased efficiency and a rejection of a "culture of complacency towards delay"[79] but without adverting to the risks of guilty plea wrongful convictions. The Court's approach is consistent with what both Mirjan Damaska and Darryl Brown have argued is a laissez faire approach taken to plea bargaining by American courts that is based on free market assumptions about the minimal state that accepts the bargained decisions of the parties without putting much effort into ensuring that the result of the bargain is accurate. [80]

In 2018, the Supreme Court of Canada decided its first major guilty plea case since 1973 where the majority of the Court rejected Chief Justice Laskin's call in dissent to ensure that a factual basis for a guilty plea was established.[81] In the 2018 case, the majority of the Court refused to overturn a guilty plea on the basis that the accused permanent resident of Canada would still have pled guilty to selling a small amount of cocaine to an undercover officer had he known that as a result of his conviction and nine-month sentence, he would have been declared inadmissible to Canada and deported to China due to of serious criminality.[82] The majority reached this conclusion even though the United States Supreme Court requires that a person be informed of the collateral consequence of deportation before pleading guilty to a charge.[83]

If the Supreme Court of Canada's restrictive subjective test in *R. v. Wong* was applied to the eight people- five women and three racialized men- who pled guilty when faced with Charles Smith's faulty expert evidence, their challenges to their false guilty pleas might not have been successful. Why? Decades after their false guilty pleas, a number of these wrongly convicted person have publicly stated they would have enter false guilty again for the good of their families if they were again placed in similar difficult circumstances.[84]

---

[77] *R v Babos*, 2014 SCC 16 at para 59.

[78] *R v Anthony-Cook*, 2016 SCC 43.

[79] *R v Jordan*, 2016 SCC 27 at para 4.

[80] Mirjan Damaska, *Faces of Justice and State Authority* (New Haven: Yale University Press, 1986); Darryl K. Brown *Fair Market Criminal Justice: How Democracy and Laissez Faire Undermine Criminal Justice* (New York: Oxford University Press, 2016).

[81] *Adgey v The Queen*, [1975] 2 SCR 426. In 1991, the Court allowed a Crown appeal after a guilty plea to unlawful confinement was overturned subsequent to the acquittal of the accused's alleged accomplice and co-accused for both unlawful confinement and sexual assault from the same incident. *R v Hick*, [1991] 3 SCR 383.

[82] *R v Wong*, 2018 SCC 25, [2018] 1 SCR 696.

[83] *Padilla v Kentucky*, 559 US 356 (2010) 359.

[84] Maria Shepherd has stated that she was "terrified and pregnant" when she pled guilty and received a sentence that allowed her to be imprisoned in a provincial facility with touch visits from her family. She has explained that she pled guilty "with all intentions to save my family. In my view, under the circumstances, it was the right decision. Had I not done that I don't know if I would be where I am today" as quoted Roach, *Wrongly Convicted*, *supra* note 2, at 24. Brenda Waudby has similar explained that her guilty plea to child abuse "worked. I did save my family." *Ibid* at 27. On the other hand, Tammy Marquardt who turned down a manslaughter plea in another case involving Charles Smith was convicted of murdered

Many of those whose false guilty pleas were remedied after Charles Smith's testimony was debunked were given deals that were too good to refuse. This is especially true given that most of the eight wrongfully convicted faced mandatory life imprisonment if they went to trial and were convicted of murder. In these cases, mandatory sentences, steep sentencing discounts and the absence of provisions to ensure that the trial judges inquire into whether there was a factual basis for the guilty plea in every case all combined to produce miscarriages of justice.

D. Ensure Culturally and Medically Competent Defence Lawyers with Less Financial Incentives to Enter Guilty Pleas

Christopher Sherrin has demonstrated how private lawyers can make more money from their clients' guilty pleas than going to trial under Ontario's legal aid scheme.[85] When combined with the guilty plea discounts on sentencing, this presents compelling incentives built into the political economy of the criminal justice system for guilty plea wrongful convictions.

Despite 2018 recommendations by a Federal/Provincial/Territorial Heads of Prosecution Sub-committee on the Prevention of Wrongful Convictions[86], no ethical codes have been changed to provide defence lawyers with clear guidance in dealing with what the late Justice Marc Rosenberg called the "terrible dilemmas"[87] posed when accused who may be innocent or have a valid defence are offered a plea bargain with a heavily reduced sentence.

Existing ethical codes in Canada speak of clients being required voluntarily to admit guilt,[88] but this begs the question of whether the clients are actually guilty. Even if defence lawyers refused to pled a client who privately maintained their innocence guilty, the accused could seek other legal representation and be less candid with their new lawyer.

E. Require Prosecutors to Screen Charges Even When They Do Not Know the Accused is Factually Innocent

The Federal/Provincial/Territorial (FPT) Heads of Prosecutions Sub-committee on the Prevention of Wrongful Convictions suggested that prosecutors should never accept a guilty plea from an accused they know to be "factually innocent". The federal Director of Public Prosecution's deskbook similarly states that prosecutors should not accept guilty pleas if the prosecutor "has knowledge or concerns based on the evidence that suggest the accused may be factually innocent." This provision is intriguing because it demonstrates that even while Canadian courts have rejected

---

and served 11 years in jail, often in solitary confinement because other inmates thought she had murdered her child. She stated that the truth as determined at trial "didn't set me free; it gave me a life sentence." *Ibid* at 77.

[85] Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal & Social Issues 1.

[86] Federal Provincial and Territorial Heads of Prosecution, *Innocence at Stake* (Ottawa: Ministry of Justice, 2018) Chapter 8 – False Guilty Pleas

[87] *R v Hanemaayer*, 2008 ONCA 580 at para 18.

[88] Federal Provincial and Territorial Heads of Prosecution, *Innocence at Stake* (Ottawa: Ministry of Justice, 2018) 193.

the concept of factual innocence as creating two categories of not guilty verdicts,[89] it is used by prosecutors in the guilty plea context.

In my view, the high and often impossible factual innocence standard should not be the standard for prosecutors accepting guilty pleas. Prosecutors may often not be in a position to know whether an accused is or is not factually innocent when accepting a plea. Given this, they should, when possible, ensure that forensic tests are conducted as soon as possible. In the Simon Marshall case, prompt DNA testing would have prevented his wrongful conviction and suffering. In the Charles Smith or other cases involving forensic pathology or less definitive forensic science, however, prosecutors may rarely be in a position to know that the accused was actually factually innocent. Justice Pomerance has carefully distinguished between factual innocence as a fact and the belief of accused persons in their factual innocence while indicating that the latter factor is relevant to determining whether a guilty plea should be struck as a miscarriage of justice. [90] Prosecutors should also not offer or accept a guilty plea unless the relevant charge screening requirement in their jurisdiction is satisfied. They should also exercise special care in cases where an accused is charged with murder and is subsequently offered a sentence to a lesser offence and a deep discount from a mandatory sentence of life imprisonment.

Unfortunately, prosecutors may have incentives to offer a plea to avoid lengthy disputes in court about expert evidence that they present in a case. Prosecutors should be concerned about cases where they provide significant bargains that may induce an accused into pleading guilty. Prosecutors should also continuously review if there is a reasonable or in some jurisdictions substantial likelihood of conviction and never offer a plea if the relevant charge screening standard is not satisfied. They should not wait to halt plea bargains in the rare and easy cases where they know that the accused is or even might be factually innocent. Such a standard would likely have only prevented a false guilty plea in two (Richard Catcheway and Clayton Boucher) of the above 15 remedied false guilty plea cases.

Prosecutors are also in a position to ask the police or forensic experts to conduct additional investigations in cases where there are concerns about innocence. [91] Indeed, they often be in a

---

[89] *R v Mullins-Johnson,* 2007 ONCA 720.

[90] She explained: "The accused need not demonstrate innocence as a pre-condition for striking a plea. In this case, the accused seeks to strike the plea before a conviction has been registered, and before a sentence has been imposed. She asks, not that she be acquitted, but that she be given the right to a trial. To require a showing of innocence in this context is to set the bar too high. An accused need not prove innocence *at* a trial. She should not have to prove innocence to *have* a trial. Moreover, the issue of guilt or innocence is the very issue to be determined at a trial if the plea is struck. To require a showing of innocence would render the trial superfluous. Worse, it would supplant the trial with a process in which the onus is placed on the accused rather than on the prosecution. Therefore, the question is not whether the person who offered the plea is actually innocent, or can prove innocence. The question is whether the person who offered the plea believed that she was innocent and pleaded guilty despite that belief." *R v McIlvride-Lister,* 2019 ONSC 1869 at paras 69-71.

[91] For an interesting argument that prosecutors have an ethical duty to ensure that the expert evidence they present to the court is demonstrably reliable see Gary Edmond, "(Ad)ministering Justice and the Professional Responsibilities of Prosecutors" (2014) 37 UNSWLJ 921.

better position to prevent guilty plea wrongful convictions than defense counsel who may not have the resources to investigate. Even trial judges in the adversarial system are not equipped or inclined to act as investigators to determine the factual validity of the plea. This affirms the criminological insight that prosecutors are often the most powerful person in the courtroom. Through their control of plea discussions, they can act both as judge and sentencer.

The dangers of inducing false guilty pleas should also be considered by prosecutors when laying charges especially those such as murder that have mandatory minimum sentences. Care should also be taken with respect to pre-trial detention that equals or exceeds a realistic estimate of a sentence should the accused be convicted because this may place people in a situation where it is perfectly rational to pled guilty regardless of their guilt. Two Indigenous men, Clayton Boucher and Richard Catcheway, were denied bail despite being charged with less serious offences. They made rational decisions to make false guilty pleas which resulted in their immediate release with a time already served sentence.

The 2018 edition of the FPT report on wrongful convictions deserves credit for adding a new chapter on "false guilty pleas" and stating that "a false guilty plea is never acceptable in Canada's criminal justice system."[92]Citing the many false guilty pleas produced in the Charles Smith baby death cases, as well as the Anthony Hanemaayer case from Ontario and the Simon Marshall case from Quebec, the 2018 report acknowledged that guilty plea wrongful convictions have occurred in Canada, but concluded that "we simply do not know the scope of the phenomenon."[93] The data in the Canadian Registry now suggests that the false guilty plea problem is significant and that the weight of the problem is borne by the most disadvantaged. That said, the extent of wrongful convictions especially false guilty pleas, will never be known given how difficult it is to remedy them. It is possible that the vast majority of people who enter false guilty pleas simply accept such an injustice and never attempt to overturn their conviction. This may especially be true with respect to those who plead to less serious crimes and are not presented with evidence of innocence by other criminal justice system participants.

The 2018 FPT report takes an individualistic as opposed to a systemic approach to false guilty pleas.[94] For example, it describes many of the causes of false guilty pleas in psychological terms related to the accused. It suggests that these factors were matters for defense counsel to consider in part because "the state, as represented by the police and prosecutor, clearly has no control over many of these factors, beyond being attuned to them during police interrogations and during the Crown review of the file when assessing the prospect of conviction."[95] This ignores that

[92] Federal Provincial and Territorial Heads of Prosecution, *Innocence at Stake* (Ottawa: Ministry of Justice, 2018) 170.

[93] *ibid*.

[94] For arguments that increased pre-trial detention producing false guilty pleas are related to structural factors notably risk aversion in refusing to grant bail or bail reviews as opposed to the intentional fault of individual criminal justice actors see Cheryl Marie Webster, "Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty" (2022) 3: 2 Wrongful Conviction L Rev 128 at 152-155.

[95] Federal Provincial and Territorial Heads of Prosecution, *Innocence at Stake* (Ottawa: Ministry of Justice, 2018) at 178.

prosecutors do have control over how many charges the accused faces and what sort of charge and sentence bargain they are offered.

Prosecutors will defend themselves by arguing that they will not lay charges if there is no reasonable prospect of conviction. Fair enough, but prosecutors should also examine whether the public interest is served when scary top-end charges like murder are withdrawn and an accused who may be suffering in custody or on strict bail conditions is given an offer with a steep sentencing or charge discount that they cannot refuse. The FPT report focuses on ethical codes that guide defense lawyers, prosecutorial guidelines or deskbooks, judicial education and the need for additional research. Perhaps understandably from a report that emerged from the work of senior prosecutors and police officers, it did not attribute guilty plea wrongful convictions to systemic flaws in the justice system.

F. Improve Bail Review and Remand Facilities

Another systemic factor that contributes to false guilty pleas is the tendency to deny bail and the harsh conditions that those denied bail face. In 2001, about 38% of criminal cases in Ontario started in bail court but that number had increased to 46% in 2017.[96] Although most people are released at bail hearings, those denied bail constitute a majority of those imprisoned in provincial facilities. In Ontario remand prisoners constituted 71% of the daily inmate population. Moreover, they were on average detained for 43 days in 2018 while those who were convicted or pled guilty and were sentenced to a provincial facility were detained in custody on average 59 days.[97] This suggests that average pre-trial detention, especially if the 1.5 day credit for every day spent in remand is applied, may quickly reach the point where a rational accused who is not concerned about a criminal record will plead guilty and receive a sentence of time served even if they are innocent or have a valid defence. Professor Webster has identified those subjects to pre-trial detention for six months at more as most at risk for false guilty pleas. She notes that in 2016 there were 2,035 persons subject to such long-term detention in Canada. [98] Bail reviews need to be improved to reduce such incentives for false guilty pleas.

In a series of recent decisions, the Supreme Court of Canada has paid greater attention to the high numbers of people denied bail. It has stressed the importance of considering alternatives to detention[99] and mandatory reviews after 90 days of remand detention.[100] In the latter case, it noted that even in the 1972 bail reforms, the government had been attentive to the fact that people denied bail could be induced into pleading guilty. In 2010, an Ontario judge warned that:

---

[96] "Trends in Bail Courts Across Canada" (October 2018), online: https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2018/dec01.html.

[97] "Auditor General of Ontario report on Adult Correctional Institutions" (2018) at 16, online (pdf): https://www.auditor.on.ca/en/content/annualreports/arreports/en19/v3_100en19.pdf. See also Cheryl Webster, *'Broken Bail' in Canada: How We Might Go About Fixing It.* (Ottawa: Department of Justice, Canada, 2015).

[98] Cheryl Marie Webster, "Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty" (2022) 3: 2 Wrongful Conviction L Rev 128 at 146.

[99] *R v Antic,* 2017 SCC 27, [2017] 1 SCR 509.

[100] *R v Myers*, 2019 SCC 18, [2019] 2 SCR 105.

> Public confidence in the administration of justice, and in particular in the judicial interim release regime, would be substantially eroded by pre-trial incarceration of presumptively innocent individuals to the equivalency or beyond the term of what would be a fit sentence if [they were] convicted.[101]

Yet, there is no systemic means of ensuring that pre-trial detention does not exceed the time that the accused would serve if found guilty. This is a compelling concern given the relatively short time of many sentences. Most remedied wrongful convictions involve serious crimes and those who make false but rational guilty pleas to less serious offences once they have already been detained for as long as they likely to be sentenced will face many challenges in remedying their wrongful convictions.

People may plead guilty because of the poor and often violent conditions in jails where they are held when denied bail. For example, from January 2012 to July 2017, 174 people died in provincial facilities across Canada while denied bail and awaiting trial. Remand prisoners who had been denied bail were even more likely to die than sentenced prisoners in those facilities.[102] In 2018, three inmates in a London Ontario facility died in the course of six weeks.[103] In December 2019, there were 41 COVID cases at a Calgary remand center where inmates were tripled bunked, substantially increasing their chances of contracting this potentially deadly disease.[104] Overcrowding, high turnover rates in the pre-trial population and frequent lock-downs are also associated with self-harm[105] which in some cases could include the entry of a false guilty plea in the hope of being released from pre-trial detention. Prolonged, harsh and sometimes violent periods of pre-trial detention will create predisposing circumstances for false guilty pleas.

G. Create a Proactive and Well-Funded Commission to Review Convictions and Sentences

A guilty plea wrongful conviction can happen in a matter of minutes. Once the guilty plea is entered, however, it can take decades for the convicted person to correct the miscarriage of justice. As discussed above, in 14 of the 15 remedied cases, the convicted person needed assistance from prosecutors, prison officials, coroner's offices or forensic labs to correct their false guilty

---

[101] *R v White*, 2010 ONSC 3164 at para 10. For additional discussion see Christopher Sherrin, "Excessive Pre-Trial Incarceration" (2012) 75 Sask L Rev 55.

[102] In 50 of those cases the cause of death was suicide; nine were drug or alcohol related, four were homicides; and, in 46 cases, the cause of death was undetermined. See Anna Mehler Paperny "Canada's Jailhouse Secret" *Global News* 3 Aug 2017), online:https://globalnews.ca/news/3644735/canada-jail-prisoners-dying/.

[103] "Inmates are dying left, right and centre" *CBC News*(17 Jan 2018), online:https://www.cbc.ca/radio/thecurrent/the-current-for-january-17-2018-1.4490288/inmates-are-dying-left-right-and-centre-third-death-in-six-weeks-renews-criticism-of-ontario-prison-1.4490295.

[104] Meghan Grant, "Inmates tripled-bunked at Calgary remand centre" *CBC News*, (30 Nov 2020) online: https://www.cbc.ca/news/canada/calgary/calgary-remand-centre-covid-outbreak-1.5822434.

[105] Malcolm Horton et al, "Assessing the Predictability of Self-Harm" (2018) 6 Health Justice 18; Irina Frank et al, "Prison mental healthcare" (2009) 32 Current Opinion Psychiatry 342.

pleas. In many cases, they had to wait a decade or more before their false guilty plea was finally overturned.

In their 2021 report, Justices Harry LaForme and Juanita Westmoreland-Traoré stressed the need for an adequately funded proactive commission of at least nine persons that would have enhanced powers to investigate claims that either a conviction or a sentence constitutes a miscarriage of justice.[106] They stressed the need for a commission to conduct outreach to disadvantaged groups and to provide support for applicants. This equality-based approach was supported when the Canadian Registry was launched and revealed that the majority of Canada's 15 false remedied false guilty pleas were made by members of disadvantaged groups - women, Indigenous and other racialized groups and those with cognitive challenges.

In response to the LaForme and Westmoreland-Traoré report, the Canadian government introduced Bill C-40 for first reading in Parliament in February 2023. The bill would create a miscarriage of justice review commission to replace the role of the federal Minister of Justice in ordering new trials or appeals on the basis of new evidence. One problem with the bill, however, is that it deems inadmissible applications if "a court of appeal has not rendered a final judgment on appeal…".[107] This is contrary to Justices LaForme and Westmoreland-Traoré's recommendation that "the new commission have the flexibility to define its own acceptance and screening policies without rigid statutory requirements. We also do not think that there should be a rigid exhaustion of appeal requirement as required as under s.696.1 and that it should be subject to exceptions in circumstances defined by the commission."[108]

Unlike the Criminal Cases Review Commission in England and Wales, Bill C-40 does not allow the proposed commission to consider applications in "extraordinary circumstances" that were not appealed to the Court of Appeal. As written, it is possible that accused who had their leave to appeal denied by a Court of Appeal may not be eligible to apply to the new commission.[109] Those who have made false guilty pleas may have difficulty in presenting new evidence to the Court of Appeal that could to challenge their conviction. In this respect, it is significant that almost none of the accused in Canada's 15 remedied false guilty pleas found new evidence without assistance from other criminal justice actors. Finally, appellate courts have, even after changes to the Criminal Code that indicate that guilty pleas should not only be informed and voluntary but also have a factual basis, continued to be reluctant to allow appeals from guilty pleas.[110] This may make it difficult for applicants to obtain legal aid or leave to appeal from false guilty pleas.

---

[106] Hon Harry LaForme & Hon Juanita Westmoreland-Traore, "A Miscarriages of Justice Commission" (Oct 2021), online: https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/index.html.

[107] "Bill C-40, An Act to amend the Criminal Code, to make consequential amendments to other Acts and to repeal a regulation (miscarriage of justice reviews)", 1st Reading, *House of Commons Debates*, 44-1, 151 162 (16 Feb 2023), s.3 and proposed s.696.4(1)(a). For analysis, see Kent Roach, "The Proposed Canadian Miscarriage of Justice Commission" (2023) 71 CLQ 1.

[108] Hon Harry LaForme & Hon Juanita Westmoreland-Traore, *A Miscarriages of Justice Commission* (Oct 2021) at 144, Recommendation 31.

[109] See, for example, *Whittaker v R*, 2023 NBCA 8, denying leave to appeal a conviction where the accused pled guilty.

[110] *R v Zaworski*, 2022 BCCA 144; *R v Tallio*, 2021 BCCA 314; *R v CK*, 2021 ONCA 826.

Those who have entered false guilty pleas may often not be in a viable position to bring two levels of appeal in summary conviction cases or even one level of appeal in indictable offences. Bill C-75 enacted in 2019 made 118 previously indictable offences subject to summary conviction trials in provincial courts at the election of the prosecutor. It also encouraged the use of summary conviction procedures by raising the statute of limitation from 6 to 12 months and increasing the standard maximum penalty for summary convictions from 6 months to 2 years less a day. An unintended consequence of these changes that seems not to have been considered in the drafting of Bill C-40 is the requirement that those convicted under summary procedures must bring two levels of appeal, first to the provincial superior court and then to the Court of Appeal, before they are eligible to have the proposed commission even consider their application to receive a remedy of a new trial or a new appeal for a miscarriage of justice. Those who have received sentences under 2 years already have difficulty redressing wrongful convictions given the general lack of availability of legal aid or *pro bono* assistance from Canada's few Innocence Projects. The proposed restriction in s.3 of Bill C-40 will require potential applicants to have the resources to lose two levels of appeal before even being eligible to apply to the new commission which will have public funds and public powers to search for new evidence that a miscarriage of justice may have occurred. The reluctance of appellate courts to re-open guilty pleas may make it less likely that many people who have made false guilty pleas will try to appeal once, let alone twice.

The evidence in the Canadian registry suggests that victims of guilty plea wrongful convictions may be even more disadvantaged than other victims of wrongful convictions. All but one of the remedied false guilty pleas (Chris Bates) in the Canadian registry obtained remedies in the first appeal and Bates is still awaiting a decision from the Minister of Justice about his remedies. These 14 persons would have been unable to apply to the Miscarriage of Justice Review Commission proposed under Bill C-40 until they had been able to appeal their guilty plea to the Court of Appeal. If Bill C-40 is enacted in its current form, its promise of justice for the significant percentage of wrongfully convicted people who pled guilty, especially to offences prosecuted by way of summary conviction, may be illusory.

H. Those who Plead Guilty to Crimes that they Did Not Commit Should Not be Precluded from Compensation

A search of public availably information suggests that only 4 of the 15 people who were wrongfully convicted on the basis of false guilty plea received any compensation. Both the federal and Nova Scotia governments opposed Gerald Barton's claims of compensation. They did so through numerous court hearings and even after a judge assessed relevant damages at $75,000. The Nova Scotia Court of Appeal denied Barton relief, stating: "There is no guarantee in Canada that money will be paid to compensate a person who claims to have been wronged after an acquittal. This case demonstrates that fact."[111]

In their report, Justices LaForme and Westmoreland-Traoré recommended that the federal government should provide modest no-fault compensation for the wrongfully convicted. They also observed that the United Nations Human Rights Committee had found Canada's approach to

[111] *Barton v Nova Scotia (Attorney General)*, 2015 NSCA 34 at para 1.

compensation to have breached its international law obligations.[112] They also heard from the wrongfully convicted that having to litigate against governments after their wrongful convictions was a form of re-victimization.

Bill C-40 does not address compensation for the wrongfully convicted. Those who make false guilty pleas will continue to face special challenges in receiving compensation for their wrongful convictions. They may be blamed for having participated in their own wrongful convictions. Those who pled guilty to imagined crimes that never happened may face special challenges in establishing factual innocence which is still formally required in 1988 FPT guidelines governing compensation.[113]

V Conclusion

In its 2018 report, the FPT Heads of Prosecution subcommittee for the first time recognized that Canada has a false guilty plea problem. At the same time, it stated that "no Canadian studies to date have quantified, through empirical research, the scope of the phenomenon of accused persons in Canada choosing to plead guilty to crimes they did not commit." This has changed because of the work of the Canadian Registry of Wrongful Convictions. This work has made clear that false guilty pleas happen in 17% of all remedied wrongful convictions in Canada.

How many more false guilty pleas exist and could be remedied with the help of a proactive and well-resourced Miscarriage of Justice Commission is unknown. Unfortunately, the proposed Miscarriage of Justice Review Commission in Bill C-40 will be unlikely to discover many false guilty pleas given its proposed rigid requirement that applicants must have had their appeals rejected by the provincial Court of Appeal. Disadvantaged accused who have made false guilty pleas may have difficulty obtaining legal aid or leave to appeal to the Court of Appeal. Those who plead guilty in provincial courts to summary conviction offences will have to bring two unsuccessful appeals before they can apply to the Miscarriage of Justice Review Commission.

If applicants are able to bring such appeals, their appeals are likely to be rejected given the reluctance of courts of appeal to overturn guilty pleas. This same reluctance may make it more difficult for applicants, especially disadvantaged applicants including the women, Indigenous and other racialized people and those with cognitive challenge who made the majority of Canada's remedied false guilty pleas, to receive the legal aid funding necessary to bring such appeals in the first place.

Canada's remedied false guilty pleas required assistance from the state to correct their miscarriages of justice. It would be unfortunate if the proposed new Miscarriage of Justice Review Commission was not in a position to offer such assistance because of rigid and inflexible statutory

[112] LaForme & Westmoreland-Traore, *A Miscarriage of Justice Commission*, *supra* note 105 at 205.

[113] See generally Kathryn Campbell, *Miscarriages of Justice in Canada* (Toronto: University of Toronto, 2018) ch 11; Myles Frederick McLellan, *Compensation for Wrongful Convictions in Canada* (Moldova: Eliva Press, 2021).

requirements that require an unsuccessful appeal to a Court of Appeal before the new commission could offer its assistance.

Canada has, since the 1990's, accepted and encouraged plea bargaining as a way to ensure efficiency and compliance with speedy trial standards under the Charter. Too much confidence has been placed in existing legal and ethical standards to ensure that innocent people and those with a valid defence are not pressured into pleading guilty. It has been suggested in this article that the legal standards imposed on judges since 2019 to ensure that there is a factual basis for a guilty plea are inadequate because they are not mandatory. The available evidence suggests that trial judges and appellate courts remain reluctant to overturn convictions based on guilty pleas. It has also been suggested that FPT Heads of Prosecutions sub-committee's suggestions that prosecutors should not accept guilty pleas if they know the accused is factually innocent are inadequate. If observed, they would not have prevented the vast majority of Canada's remedied false guilty pleas.

Despite calls for clarity, the ethical restraints on defence lawyers when it comes to false guilty pleas remain murky. Even if defence lawyers refused to plead clients guilty who maintained their innocence, clients may resile from maintaining their innocence when offered a deal that is too good to refuse. More specific ethical regulation of defence lawyers could also impair candour in the solicitor-client relationship so long as an guilty plea remains a significant mitigating factor at sentencing and so long as the Criminal Code with its overlapping offences of varying seriousness encourages charge bargaining.

Recommendations made by Justice Ratushny in 1997 that mandatory life imprisonment sentences should be abolished because they induce false guilty pleas to crimes like manslaughter and infanticide have unfortunately been ignored by successive governments because they would be politically unpopular. The problem of disadvantaged people being forced into pleading guilty to crimes that they did not commit and often did not happen is a real one that the Canadian criminal justice system must urgently address. There are, however, no easy or simple solutions given the reality of charge and sentencing bargaining and the encouragement of plea bargaining as a means to make the Canadian criminal justice system more efficient. If the system is to continue to prioritize efficiency with plea bargaining, it should at the very least make remedies for the false guilty pleas it encourages much more accessible, efficient and effective.

Identifying How an Individual Becomes a Suspect: A Needed Addition to the Innocence Literature

Noah Barr*
John Jay College of Criminal Justice
City University of New York
U.S.A.

Glinda Cooper
Washington, D.C.
U.S.A.

Flawed eyewitness testimony, faulty forensics, and police misconduct are common factors that may contribute to wrongful conviction. However, what brings someone over the threshold of suspicion where these factors are used to build the case against them? To answer that question, we built upon the limited number of previous studies examining how someone becomes a suspect in serious crimes (e.g., murder, rape). This exploratory study utilized Innocence Project materials pertaining to 232 exonerated clients and 75 individuals for whom post-conviction DNA testing was found to be an "inclusion" (i.e., supportive of the prosecution's theory of guilt). Based on case files, we coded pathways to becoming a suspect. These pathways included tips, matched description, previous law enforcement encounters, physical evidence, and other scenarios; more than one pathway could be used for each individual. While several pathways were found to be similar in both groups, differences were seen in pathways related to physical evidence, officers putting individuals under duress during questioning, and proximity to the crime. This exploratory analysis provides a basis for designing future hypothesis-based research to further examine the observed associations and provide further insights into the investigative processes that can lead to wrongful convictions.

I. Introduction
II. Methods
  A. Sample
  B. Coding Procedures and Description of Pathway Categories
  C. Analysis
III. Results
  A. Single vs. Multiple Paths
  B. Frequency of Pathways Categories
  C. Analysis of Single Pathway Cases
  D. Analysis of Multiple Pathway Cases
IV. Discussion
V. Conclusion
VI. Appendix - Additional Examples of Subcategories and Discussion of Single and Multiple Pathways
  A. Tip-Public Tip

B. Tip-Friend Under Duress During Questioning
C. Tip-Accomplice Tip
D. Tip-Victim Tip
E. Matched Description-Officer Identification
F. Matched Description-Civilian Identification
G. Matched Description-Victim Identification
H. More Examples of Multiple Variable Pathways Cases

***Statements and Declarations:** Partial financial support was received from John Jay College of Criminal Justice to complete a research fellowship that resulted in this article for the corresponding author. At the time this work was conducted, Glinda Cooper was affiliated with the Innocence Project in New York, NY.

Acknowledgements: Vanessa Meterko, Innocence Project Research Manager, was vital in the preparation of this work and answering questions to further its analysis. Jamie Henderson, Innocence Project Director of Science and Research, and Prahelika Gadtaula, Innocence Project Data Coordinator, were essential in reviewing this piece.

I Introduction

Police officers have a large amount of discretion in making decisions on whom to arrest and how to investigate cases. However, most research in criminal investigations pertains to charging decisions or events that happen post-implication of a suspect (e.g., interrogation).[1] In innocence work, the same issue is faced. We have what Zalman[2] calls the innocence paradigm, i.e., variables that are said to be factors contributing to wrongful convictions. These factors include mistaken eyewitness identification, false confessions, tunnel vision, informant testimony, unsound forensics, prosecutorial misconduct, and ineffective assistance of counsel.[3] All these issues happen post-implication, meaning, after someone initially becomes a suspect. Minimal research has focused on what happens before someone becomes a suspect. We seek to analyze this specific portion of the investigatory process to identify how innocent individuals become a suspect.

---

[1] Melinda Tasca et al, "Police Decision Making in Sexual Assault Cases: Predictors of Suspect Identification and Arrest" (2013) Journal of Interpersonal Violence, 28(6), 1157-1177, DOI: <10.1177/0886260512468233> [*Tasca et al*].

[2] Marvin Zalman, "An Integrated Model of Wrongful Convictions" (2011) Alb L Rev, 74, 1465-1524 [*Zalman*].

[3] Jon B Gould & Richard A Leo, "One Hundred Years Later: Wrongful Convictions After a Century of Research" (2010) The Journal of Criminal Law and Criminology, 825-868 [*Gould & Leo*]; Kim D Rossmo & Joycelyn M Pollock, "Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective" (2019) NEULR, 11, 790 [*Rossmo & Pollock*]; Earl Smith & Angela J Hattery, "Race, Wrongful Conviction & Exoneration" (2011) Journal of African American Studies, 15(1), 74-94 [*Smith & Hattery*].

Researchers have also noticed the dearth of analysis in this line of questioning. In fact, Zalman and Larson[4] call for innocence researchers to examine the police investigation beyond the minutiae of eyewitness identification or interrogation. While the scholarship on individuals becoming suspects has been a neglected area, that does not mean it is nonexistent. First, we do have substantial knowledge about how police approach some specific crimes which gives us the ability to conjecture how suspects are identified. For example, there are many investigatory handbooks or pocket guides on responses to sexual assault. These detail how officers need to control the scene, identify physical evidence to be processed for possible forensic evidence, get detailed suspect descriptions to put out to the public or produce lineups, and get details of the assault itself to try to match to past crimes investigated.[5] This makes it reasonable to assume that people become suspects by leaving physical evidence, matching a description of a given suspect as identified by the public or others, or by matching a previous crime's modus operandi. Homicide investigation handbooks also stress the importance of collection of physical evidence and getting descriptions of possible assailants.[6] While these documents can help us hypothesize ways individuals become suspects, there have also been other pieces of literature that more directly touch on the subject albeit, not always with exonerees.

An example of this is a study published by the UK Home Office in 2007. This study examined 593 rape cases (with 640 assailants involved) looking at multiple variables including when the suspect was linked to the crime (e.g., at the time of the report) and victim-assailant relationship (i.e., 14% were strangers, 27% were acquaintances, and 22% were partners or ex-partners). They also examined how individuals became suspects. A suspect was identified through being named by the victim (67%), a victim description (6%), being named by an associate (4%), from being caught at the scene (3%), forensic match (2%), from their own admission (<1%), and from similarity to other offenses (<1%).[7] The authors did not analyze these frequencies in terms of the relationship between the victim and assailant, and it is likely suspect identification pathways differed for stranger compared to acquaintance and other types of relationships. To our understanding, this study focused largely on non-exoneration cases. To date, there is one such study we know of that examines this subject for exonerees.

---

[4] Marvin Zalman & Matthew Larson, "Elephants in the Station House: Serial Crimes, Wrongful Convictions, and Expanding Wrongful Conviction Analysis to Include Police Investigation" (2015) Alb L Rev, 79, 941 [*Zalman & Larson*].

[5] John Brooks et al, Pocket Guide for Police Response to Sexual Assault, (NCJRS), online: https://www.ncjrs.gov/ovc_archives/sartkit/tools/lawenforcement/Pocket%20Guide%20for%20Police%20Response%20to%20Sexual%20Assault.pdf.pdf [*Brooks et al*]; Jennifer M Brown & Sandra L. Walklate (Eds), *Handbook on Sexual Violence*, (Routledge, 2011) [*Brown & Walklate*]; Robert R Hazelwood & Ann W Burgess (Eds), *Practical Aspects of Rape Investigation: A Multidisciplinary Approach*, (Routledge, 2016) [*Hazelwood & Burgess*]; John O Savino & Brent E Turvey (Eds), Rape Investigation Handbook, (Academic Press, 2011) [*Savino & Turvey*].

[6] Fiona Brookman, Edward R Maguire & Mike Maguire (Eds), *The Handbook of Homicide* (John Wiley & Sons, 2017) [*Brookman, Maguire & Maguire*]; John A Eterno & Cliff Roberson (Eds), *The Detective's Handbook*, (CRC Press, 2017) [*Eterno & Roberson*]; Burt Rapp, *Homicide Investigation: A Practical Handbook*, (Loompanics Unlimited, 1989) [*Rapp*].

[7] Andy Feist et al, *Investigating and Detecting Recorded Offences of Rape*, (NCJRS, 2007) [*Feist et al*].

Lowrey-Kinberg, Senn, Dunn, Gould, and Hail-Jares[8] examined 396 cases: 231 wrongful conviction cases and 165 near miss cases (where the defendant was acquitted at trial or had charges dismissed due to facts pertaining to innocence). The cases occurred between 1980 and 2012 and were considered "state violent felony cases," which largely consisted of homicides and sexual assaults. They created eight mutually exclusive groups for how individuals became suspects by analyzing previous police literature and investigatory tactics. These groups were: victim or eyewitness identification, officer identification, civilian identification, intentional misidentification, physical evidence, criminal activity, physical proximity, and social proximity. They found that victim or eyewitness identification (24.24%), intentional misidentification (21.72%), and citizen identification (13.13%) were the top three ways individuals were first identified. The authors, utilizing multivariate logistic regression, also analyzed if certain characteristics like race, criminal history, or whether the victim survived the crime were related to how individuals became a suspect. Lastly, and important to note, is that it also appears that they did not separate their wrongful conviction and near miss cases within their analysis.

The purpose of our study was to expand on this growing literature by pursuing an exploratory study identifying how individuals become suspects. To do this we analyzed a set of Innocence Project cases compared to a set of cases where DNA was found to include the suspect at the scene, presumably supporting the prosecutor's theory of the crime. This study furthers the work Lowrey-Kinberg conducted in that it expands on ways to classify how individuals became suspects. Our work differs by allowing for the categorization of cases into two or more pathways of becoming a suspect. Also different is that our sampling design allowed a comparison of wrongfully convicted cases (exonerations) to cases in which the investigation had presumably correctly identified someone involved in the crime. In this way we sought to contribute to the growing scholarship on how individuals become a suspect and hope further research can expand upon our results.

II Methods

Becoming a suspect in this research was defined as when authorities amplified resources on an individual or when they decided to focus their attention on a certain person. A suspect is formally investigated, and someone considered suspicious by law enforcement.[9] Therefore, simply having your name brought up in an investigation did not constitute becoming a suspect in this research, even if that meant there was minor suspicion against you. To be considered a suspect, the individual had to have been brought in for a witness identification, been interrogated for a long period of time, or have done something that quickly led to suspicion and arrest. This differs from a person of interest, who police might want to speak with during an investigation, but the police

---

[8] Belen Lowrey-Kinberg et al, "Origin of Implication: How Do Innocent Individuals Enter the Criminal Justice System?" (2019) Crime & Delinquency, 65(14), 1949-1975, DOI: <10.1177/0011128718793618> [*Lowrey-Kinberg et al 2019*].

[9] Madison Stacey, "FBI names Brian Laundrie a person of interest in Gabby Petito murder case, but he's still not a suspect. What's the difference?", *WTHR* (21 September 2021), online: https://www.wthr.com/article/news/crime/brian-laundrie-is-still-a-person-of-interest-not-a-suspect-whats-the-difference/531-fd501730-5b86-488b-9511-2e5d97e17638 [*Stacey*].

do not have the evidence to charge them or put them under formal investigation. Thinking of it in terms of filling a cup to a certain line is a helpful metaphor: while some things can fill the cup, you must reach a certain level to become a suspect. We viewed the totality of the circumstances to make that decision, but note a degree of subjectivity exists in this process.

A. Sample

The sample for this research came from the records of the Innocence Project. The records examined included 232 clients who had been exonerated (mostly through the means of DNA testing) and 75 clients who had not been exonerated because new DNA was found that supported the prosecution's theory of guilt, meaning the client's DNA profile is found to be included in the physical evidence of the crime. In these situations, the Innocence Project closes that case and does not represent the client in further legal proceedings. Initial conviction dates ranged from 1976 to 2006 for the exonerated group and from 1974 to 2002 for the comparison (DNA inclusion) group. Case characteristics included murder, sexual assault (attempted and completed), and burglary.

B. Coding Procedure and Description of Pathway Categories

The Innocence Project's internal records on these cases were the first source used in the analysis. These records included things like case evaluations and opening and closing memos which directly gave background on the cases. Other records included information that was submitted to the court like post-conviction relief applications (PCR's) and legal briefs, information obtained during the investigation of the case, including from police reports, and court decisions providing background on cases. In some cases, how an individual became a suspect was explicitly stated or could be inferred from details provided in these records. In other cases, the records did not provide sufficient information on this question. In those cases, open-source information was found via the Innocence Project website, the National Registry of Exonerations website, online law documents, and online media sources and the same process of analyzing these files would occur to see if the narrative of the case identified how the individual was first identified as a suspect. In cases where the primary researcher could not identify how an individual became a suspect via these routes, a consensus among three reviewers was attempted to be reached and when that did not happen, the way someone became a suspect was left unknown.

Prior research on how suspects are identified[10] was used to help organize this information into specific categories. As noted previously, our analysis expanded upon the Lowrey-Kinberg et al.[11] piece, allowing for multiple origin of implication pathways for each suspect. Using the previous cup analogy again, we are coding everything that fills that cup to the line of becoming a suspect. To identify the categories, the Lowrey-Kinberg et al.[12] article was initially used but was amended and expanded to include seven general categories and additional subcategories, in addition to an "unknown" and "other variables likely" category. These categories are described below and summarized in Table 1, and the Appendix contains additional examples of the classification decisions.

---

[10] Lowrey-Kinberg et al 2019, *supra* note 8.

[11] *Ibid*.

[12] *Ibid*.

Table 1. Categories and Subcategories Used For Classification of Pathways For Becoming a Suspect

Category	Subcategories	Possible Paths
Tip	Public Tip	Single or Multiple
	Friend Under Duress During Questioning	Single or Multiple
	Accomplice Tip	Single or Multiple
	Victim Tip	Single or Multiple
Matched Description	Officer Identification	Single or Multiple
	Civilian (member of public) Identification	Multiple
	Victim Identification	Single or Multiple
Own Actions	None	Single or Multiple
Physical Evidence	None	Single or Multiple
Previous Law Enforcement Encounter	None	Single or Multiple
Proximity	None	Single or Multiple
Police Action	None	Multiple
Unknown	None	Single
Other Variable(s) Likely	None	Multiple

Tip refers to someone (i.e., the victim or public) offering information to law enforcement and this information resulted in a deeper investigation of the identified individual. The tip could be provided through a tip line or other electronic system used to report suspicious, nuisance, and criminal activity to the police, or in any other form.[13] The Tip pathway was further broken down by the source of the tip.

In the process of investigating crimes, especially stranger crimes, descriptions of a suspect's personal appearance and evidential characteristics (i.e., color of car used) can be obtained and used to create composites.[14] When an individual becomes a suspect due to a Matched Description, they become one because they are encountered during an investigation and match these personal or evidential characteristics provided previously from someone witnessing the crime (i.e., victim or eyewitness). Matched Description includes matching clothing and an earring a victim described, someone calling in saying a composite matches someone they know, or a police officer seeing someone on the street matching a description and bringing them in for an identification procedure. Matched Description was broken down into who identified the individual as matching a description: police employees, the public, or victims.

[13] Philadelphia Police Department, "Submit a Tip", online: https://www.phillypolice.com/forms/submit-a-tip/; "Project TIPLINE", online: *The Center for Evidence-Based Crime Policy (CEBCP)* <https://cebcp.org/tipline/>.

[14] Dawn McQuiston-Surrett et al, "Use of Facial Composite Systems in US Law Enforcement Agencies" (2006) Psychology, Crime & Law, 12(5), 505-517, DOI: <10.1080/10683160500254904> [Surrett et al]; Savino & Turvey, *supra* note 5; Sefanyetso, Justice T., *Personal Description: An Investigation Technique to Identify Suspects* (Doctoral Dissertation, University of South Africa, 2009) [Sefanyetso].

Own actions came into play when behavior that is perceived to be suspicious and strange brings a suspect to the attention of investigators.[15] Examples include people peering into parked cars that are not theirs or someone driving slowly and repeatedly around a crime scene.[16] It can also include things like emotional actions where lack of emotional reactivity to a murder might be perceived as guilt.[17] This category was used for individuals who became suspects because of physical, emotional, or verbal actions. Because these three categories are often seen together, there were no subsections for this group. An example of a case like this was when an individual was seen at all three wakes for the victim and seemed overly distraught over their death. Because of these actions, thought by police to be an out of proportion reaction, he became a suspect in the murder. This variable by no means was intended to place blame, it just describes that the actions of the person was part of what led to them becoming a suspect.

The Physical Evidence pathway was not very common and was not divided into subsections. To be placed here, physical evidence must have been discovered which led to the individual falling under police focus. Physical evidence can include things like forensic matches, through DNA or fingerprints, or physical possessions being found at scenes that can be traced back to the suspect.[18]

Previous Law Enforcement encounters were another route to becoming a suspect. Of concern in this section was any previous encounter a suspect had with law enforcement which led to them becoming a suspect in the current case. For example, a police perception of a previous crime matching a current crime could lead to an individual becoming a suspect.[19] This variable was also not called Previous Arrest because some individuals in our sample were suspects in other crimes but were not arrested; because they were suspects in these other crimes, they became

[15] Belen Lowrey-Kinberg et al, "PATHWAYS TO SUSPICION: CAUSES AND CONSEQUENCES OF INNOCENT SUSPECTS' ORIGIN OF IMPLICATION" (2018) California Western Law Review, 54(1), 2 [*Lowrey-Kinberg et al, 2018*]; Guillermo A. Martínez-Mascorro et al, "Criminal Intention Detection at Early Stages of Shoplifting Cases by Using 3D Convolutional Neural Networks" (2020a) Computation 2021, 9(2), 24, DOI: <10.3390/computation9020024> [*Martinez-Mascorro et al, 2020a*]; Guillermo A. Martínez-Mascorro, Jose C Ortiz-Bayliss & Hugo Terashima-Marín, "Detecting Suspicious Behaviour on Surveillance Videos: Dealing with Visual Behaviour Similarity between Bystanders and Offenders" (2020b) (2020 IEEE ANDESCON) 1–7, DOI: <10.1109/ANDESCON50619.2020.9272175> [*Martinez-Mascorro, 2020b*].

[16] Seattle Police Department, "Reporting Suspicious Behavior", online: https://www.seattle.gov/police/need-help/neighborhood-issues/reporting-suspicious-behavior.

[17] Wendy P Heath et al, "How the Defendant's Emotion Level Affects Mock Jurors' Decisions When Presentation Mode and Evidence Strength are Varied 1" (2004) Journal of Applied Social Psychology, 34(3), 624-664 [*Heath et al*]; Wendy P Heath, "Arresting and Convicting the Innocent: The Potential Role of an 'Inappropriate' Emotional Display in the Accused" (2009) Behavioural Sciences & the Law, 27(3), 313-332 [*Heath*].

[18] Savino & Turvey, *supra* note 5; Lowrey-Kinberg et al 2019, *supra* note 8.

[19] Mark T Willman & John R Snortum, "Detective Work: The Criminal Investigation Process in a Medium-Size Police Department" (1984) Criminal Justice Review, 9(1), 33-39, DOI: <10.1177/073401688400900106> [*Willman & Snortum*]; Lowrey-Kinberg et al 2019, *supra* note 8.

suspects in the current case. Note, this category was not used when an officer encountered someone before and thought they matched the description; in that scenario, the Matched Description-Officer Identification classification would be used.

For Proximity, the individual becomes a suspect due to some sort of closeness to the victim. That closeness can either be physical (lived with the murdered victim) or social (was an acquaintance of that victim). Opportunity theories in criminology allows for discussion on physical closeness to potential victims.[20] Knowing that you must have the opportunity to commit crime and to have the opportunity you must be in the proximity to commit it, police investigations often focus on those in physical proximity or social proximity to a victim.[21] Through our first analysis of the data, proximity was divided into subsections of physical and social proximity. However, these two subgroups overlapped quite a bit (i.e., a friend was last seen with a victim), so the variables were collapsed into one variable.

Police Action involved some sort of police action (other than recognizing a suspect from a description or putting a friend of the suspect under duress) including a mistake in judgement, mixing up a name provided by a public tip, or telling the victim that the next person they choose from a mugshot book will be brought in for a physical identification. This variable contained no sub-sections. This variable also includes law enforcement questioning someone they believe to be a person of interest, not quite a suspect yet, throughout the night to the point of confession. Direct statements of ridicule, lack of food and/or water, and lack of parental supervision for minors must be present to meet this variable description.

Sometimes, there is an unknown way individuals become a suspect. Criminal cases can be complex and much like evidence can be destroyed, so too can some important files.[22] Due to this, there was not always a complete picture on some cases leading to an imperfect system in classifying how someone becomes a suspect. For example, in one case someone was picked out of a lineup, but it was unclear how he ended up in said lineup. He believed it was because he was behind on probation fees and believed he was picked up because he was Black. However, due to lack of confirmation on this front, there was no way to determine how he was chosen for the lineup and therefore, no way to determine how he became a suspect. These cases were kept in their own category of Unknown.

Like the variable Unknown, Other Variable(s) Likely exists because there was not always a complete picture on how someone became a suspect. However, because we wanted to capture as

---

[20] Adam M Bossler & Thomas J Holt, "On-line Activities, Guardianship, and Malware Infection: An Examination of Routine Activities Theory" (2009) International Journal of Cyber Criminology, 3(1) [*Bossler & Holt*]; Bonnie S Fisher et al, "Crime in the Ivory Tower: The Level and Sources of Student Victimization" (1998) Criminology, 36(3), 671-710) [*Fisher et al*]; Bradford W Reyns & Billy Henson, "The Thief With a Thousand Faces and the Victim With None: Identifying Determinants for Online Identity Theft Victimization With Routine Activity Theory" (2016) International Journal of Offender Therapy and Comparative Criminology, 60(10), 1119-1139 [*Reyns & Henson*].

[21] Lowrey-Kinberg et al 2019, *supra* note 8.

[22] Cynthia E Jones, "Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes" (2005) Am. Crim. L. Rev., 42, 1239.

much information as possible, there were cases where we had some idea how someone became a suspect but there were clearly other reasons involved. For example, there was a rape case at an apartment complex where someone working on the landscaping crew was implicated as a suspect. Initially, this suspect was pointed out and the victim did not identify this person. A second unsuccessful identification of this person occurred again until a third time when a lineup was prepared, and he was picked out and arrested. It was reasonable to assume that, because he worked on the landscaping crew, Proximity came into play for why he became a suspect. However, it was also reasonable to assume that something else came into play. Because of this, we captured the proximity variable but also put him under Other Variable(s) Likely.

C. Analysis

We calculated frequencies and present summary statistics for each of the groups in our sample, and conducted separate analyses of cases in which a single pathway and those in which multiple pathways to becoming a suspect were seen. We did not conduct formal statistical tests because this was a descriptive study, rather than a test of specific hypotheses. For the comparison group in particular, the number of observations within some of these pathways was quite small (< 5). Thus, the differences that are highlighted in the results section should not be considered definitive differences, but are rather presented as findings warranting further investigation and replication.

III Results

A. Single vs. Multiple Paths

Table 2 presents the number of pathways (single or multiple) taken to becoming a suspect. Out of 232 in the exonerated group, 196 (84.4%) were able to be classified into a pathway to becoming a suspect. In the comparison (DNA inclusion) group, 64 of the 75 clients (85.3%) were able to be classified in a pathway to becoming a suspect. The frequency of single pathways was somewhat lower among the exonerated group (35.3%) than in the comparison (45.3%), with the opposite pattern seen with respect to frequency of multiple pathways (49.1% and 40.0%, respectively in the exonerated and comparison groups).

Table 2. Number of pathways to becoming a suspect, by group

Single or Multiple Pathways	Exonerated (n=232)	Comparison Group (DNA Inclusion) (n=75)
Single Path	82 (35.3%)	34 (45.3%)
Multiple Path	114 (49.1%)	30 (40.0%)
Unknown	36 (15.5%)	11 (14.7%)

Frequency of Pathway Categories

Table 3 presents the total number of pathways taken. The most common pathways for the exonerated group were Tip-Public Tip (20.0%) followed by Own Actions (12.0%), Matched Description-Officer Identification (10.3%), Tip-Victim Tip (10.0%), Proximity (8.9%), and Matched Description-Victim Identification (8.6%). In the comparison group, Tip-Public Tip (23.7%) was most common, followed by Matched Description-Officer Identification (18.6%), Tip-Victim Tip (13.4%), Own Actions (13.4%), and Physical Evidence (8.2%). Matched Description-Officer Identification and Physical Evidence pathways were seen more often in the comparison group than in the exoneration group (Figure 1). In contrast, the Tip-Friend Under Duress, Proximity, Police Actions, and Previous Law Enforcement Encounter pathways were found more often in the exoneration group, with the largest difference seen with Police Actions (6.9% and 0.0% of pathways in the exonerated and comparison groups, respectively).

Table 3. Number and Percentage of Suspects within each Pathway, by Group

Pathway	**Exonerated Group**	**Comparison Group (DNA Inclusion)**
Tip-Public Tip	70 (20.0%)	23 (23.7%)
Tip-Friend under Duress	19 (5.4%)	2 (2.1%)
Tip-Accomplice	5 (1.4%)	1 (1.0%)
Tip-Victim	35 (10.0%)	13 (13.4%)
Matched Description-Officer	36 (10.3%)	18 (18.6%)
Matched Description-Civilian	15 (4.3%)	5 (5.2%)
Matched Description-Victim	30 (8.6%)	6 (6.2%)
Own Actions	42 (12.0%)	13 (13.4%)
Proximity	31 (8.9%)	4 (4.1%)
Police Action	24 (6.9%)	0 (0.0%)
Physical Evidence	13 (3.7%)	8 (8.2%)
Previous Law Enforcement Encounter	14 (4.0%)	1 (1.0%)
Other Variable(s) Likely	16 (4.6%)	3 (3.1%)
Total Number of Pathways	350 (100%)	97 (100%)

Figure 1. Pathways with Differences Between Groups, Based on Total Number of Pathways

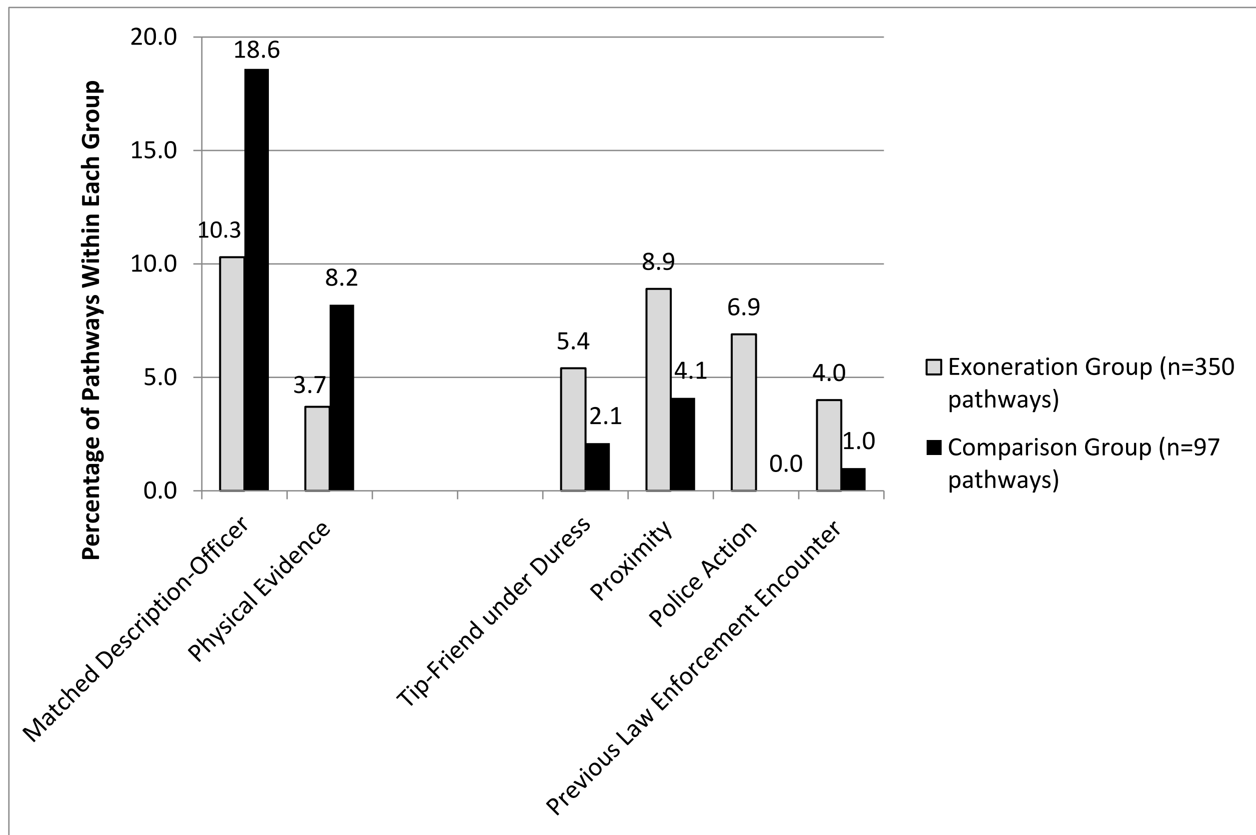


Figure 1 depicts the pathways in which there was an approximate two-fold difference in the frequency in the two groups. In the first set (Set A), the pathways were more common among people in the comparison group (i.e., cases for which DNA testing supported the prosecutor's theory of the crime). In the second set (set B), the pathways were more common in the exoneration group.

B. Analysis of Single Pathway Cases

Table 4 presents the pathways for the 116 individuals (82 exoneration group, 34 comparison group) who were categorized as having a single pathway through which they had become a suspect. In the exonerated group, the most common single pathways were Matched Description-Officer Identification (31.7%), Tip-Public Tip (17.1%), and Tip-Victim Tip (12.2%). In the comparison group, the most common paths here were Matched Description-Officer Identification (35.3%), Tip-Victim Tip (23.5%), Tip-Public Tip (14.7%), and Physical Evidence (11.8%). No one in either group had become a suspect due solely to Police Actions or from a member of the public recognizing a suspect from a description.

Among these single pathway cases, there were pathways that appeared to differ in frequency in the two groups (Figure 2). Matched Description-Victim Identification (e.g., when a victim looked through information like a mug book to see if they recognize their perpetrator) more often led to wrongful conviction (9.8% for the exonerated group compared to 2.9% for the

comparison group). However, Tip-Victim Tip (i.e., when the victim directly implicated the person by name) as the sole pathway to that person becoming a suspect more often led to the correct identification of the perpetrator (12.2% and 23.5%, respectively for the exonerated and comparison groups). The other large differences were seen with Proximity and Physical Evidence, albeit in different directions. Becoming a suspect solely because of being found in some sort of proximity to the crime or victim was a more common single pathway for the exonerated group (8.5%) than for the comparison group (0.0%). In contrast, having physical evidence in a case as the only support to suspecting an individual appeared more likely to indicate a true perpetrator (1.2% and 11.8%, respectively, for the exonerated and comparison groups).

Table 4. Number and Percentage of Pathways Among Single Pathway Cases, by Group

Path	**Exonerated Group**	**Comparison Group (DNA Inclusion)**
Tip-Public Tip	14 (17.1%)	5 (14.7%)
Tip-Friend under Duress	5 (6.1%)	1 (2.9%)
Tip-Accomplice	1 (1.2%)	1 (2.9%)
Tip-Victim Tip	10 (12.2%)	8 (23.5%)
Matched Description-Officer	26 (31.7%)	12 (35.3%)
Matched Description-Public (Civilian)	0 (0%)	0 (0%)
Matched Description-Victim	8 (9.8%)	1 (2.9%)
Own Actions	6 (7.3%)	1 (2.9%)
Proximity	7 (8.5%)	0 (0.0%)
Police Action	0 (0%)	0 (0%)
Physical Evidence	1 (1.2%)	4 (11.8%)
Previous Law Enforcement Encounter	4 (4.9%)	1 (2.9%)
Total Number of Pathways	82 (100%)	34 (100%)

Figure 2. Pathways with Differences Between Groups Among Single Pathway Cases

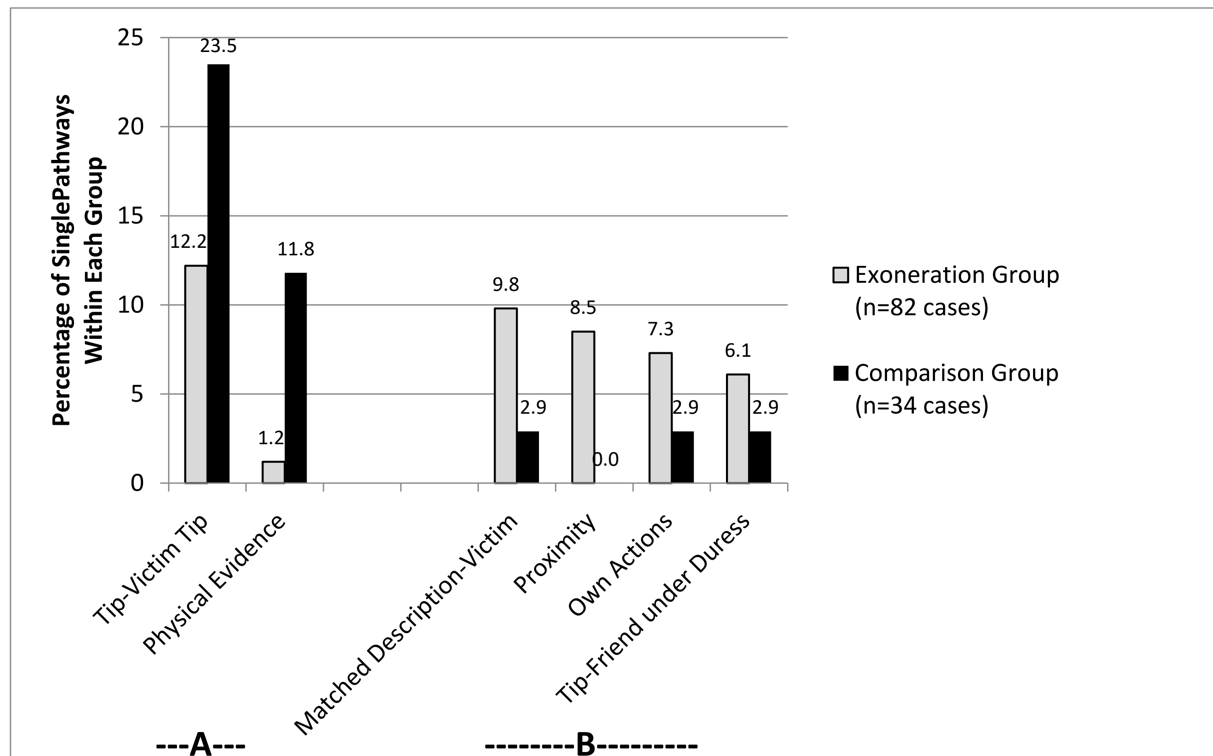


Figure 2 depicts the pathways in which there was an approximate two-fold difference or greater in the frequency in the two groups for pathways with 5 or more cases in total among the single pathway's cases. In the first set (Set A), the pathways were more common among people the comparison group (i.e., cases for which DNA testing supported the prosecutor's theory of the crime). In the second set (set B), the pathways were more common in the exoneration group

C. Analysis of Multiple Pathway Cases

Table 5 represents the most common categorizations for the 144 individuals (114 exonerations, 30 comparison group) classified as having become a suspect through multiple pathways. The exonerated group categories include every path with more than two clients and the comparison group categories include every path with two or more clients. The most common multiple path classification in the exonerated group was Tip-Victim Tip/Matched Description-Victim Identification (13.2%) followed by Tip-Public Tip/Matched Description-Civilian Identification (9.6%), and Tip-Public Tip/Tip-Friend under Duress During Questioning (7.9%). In the comparison group, Tip-Public Tip/Own Actions (20%) was the most common multiple pathway followed by Tip-Victim Tip/Matched Description-Victim Identification (10%), and Tip-Public Tip/Matched Description-Civilian Identification (10%).

The larger differences in frequency of multiple pathways between the groups are shown in Figure 3. Some multiple pathways were seen in the exonerated group, but not in the comparison group, suggesting these are particularly problematic in terms of correctly identifying perpetrators. The most common of these, seen in 7.9% of the exoneration cases, was a public tip coupled with

investigators putting someone under duress during questioning (Tip-Public Tip/Tip-Friend under Duress During Questioning). In contrast, a public tip coupled with an individual's own actions was somewhat more commonly seen in the comparison group than among the exonerated group.

Table 5. Most Common Multiple Path Categorizations

Path	Exonerated Group	Comparison Group (DNA Inclusion)
Tip-Victim/Matched Description-Victim	15 (13.2%)	3 (10%)
Tip-Public/Matched Description-Civilian	11 (9.6%)	3 (10%)
Tip-Public/Tip-Friend Under Duress	9 (7.9%)	0 (0.0%)
Tip-Public/Own Actions	6 (5.3%)	6 (20.0%)
Own Actions/Proximity/Police Action	5 (4.4%)	0 (0.0%)
Tip-Public/Matched Description-Officer	4 (3.5%)	1 (3.3%)
Proximity/Other Variable(s) Likely	3 (2.6%)	0 (0.0%)
Tip-Public/Other Variable(s) Likely	3 (2.6%)	2 (6.7%)
Tip-Accomplice/Own Actions/Police Action	2 (1.8%)	0 (0.0%)
Own Actions/Police Action/Other Var Likely	2 (1.8%)	0 (0%)
Tip-Public/Physical Evidence	1 (1.0%)	2 (6.7%)
Matched Description-Officer/Own Actions	0 (0.0%)	2 (6.7%)
Total	(53.5%)	19 (63.3%)

[a.] Percentages based on total number of multiple variable clients (114 for the exonerated group and 30 for comparison (DNA inclusion) group)

Figure 3. Pathways with Differences Between Groups Among Multiple Pathway Cases

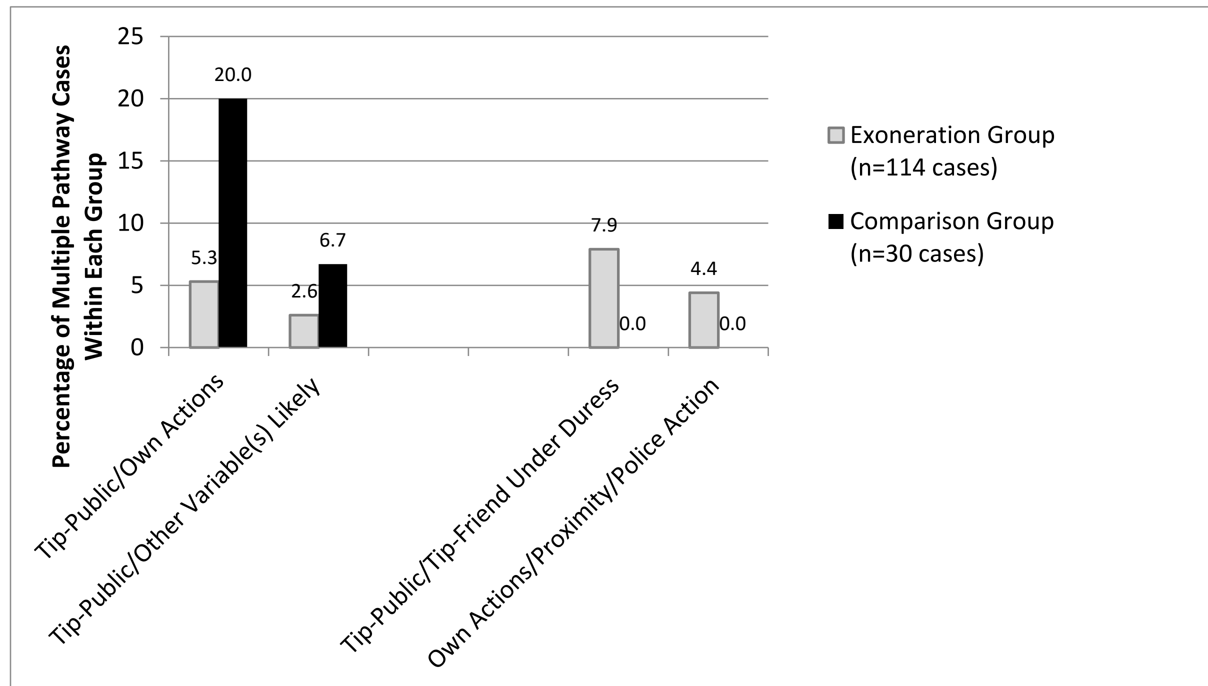


Figure 3 depicts the pathways in which there were an approximate two-fold difference or greater in the frequency in the two groups for pathways with 5 or more cases in total among the multiple pathways cases. In the first set (Set A), the pathways were more common among people in the comparison group (i.e., cases for which DNA testing supported the prosecutor's theory of the crime). In the second set (set B), the pathways were more common in the exoneration group

The results discussed above were for the exonerated group with initial conviction dates from 1976 to 2006 and the comparison group with initial conviction dates from 1974 to 2002. An additional analysis was done to constrict this to 1976-2002; results were similar to that of the full sample.

IV Discussion

The purpose of this analysis was to build upon the previous study by Lowrey-Kinberg et al.[23] pertaining to how people who were wrongfully convicted of a crime became a suspect. We were able to include a comparison group and allow for multiple pathways. This research has tangible impact because it allows for greater insight into police investigations and allows for the law enforcement community to question their current tactics and consider ways to change them. Research shows that there is little in the scientific literature that has a genuine impact on police

[23] Lowrey-Kinberg et al, *supra* note 8.

procedure, like how to prioritize suspects, and it is our hope that this research will do just that.[24] The below discussion goes in depth on what this research found and how it can impact the investigatory process of law enforcement today.

Some of the differences observed in the frequency of pathways may be indicative of potential areas of strength, and of weaknesses, in investigative processes. For example, the true perpetrator was found more when an officer identified someone as matching a description of a suspect (18.6% in the DNA inclusion group compared to 10.3% in the exonerated group). This finding may reflect the emphasis and training police receive on observational skills.[25] In contrast, turning to the Police Action variable, when police actions led to a suspect, correct identification of the perpetrator occurred less often (6.9% of the exonerated group and 0% of the comparison group). This variable included police actions against a person of interest where they question them for numerous hours and often restrict sleep, food and/or water, and directly accuse these people during that time. The Reid Technique is an interrogation technique widely used in North America. It is also a technique that emphasizes getting confessions through confrontations (forceful accusation) and minimizations (moral justifications for suspected actions). The idea of forceful accusations and the procedure of the Reid Technique has been criticized by many as leading to false confessions, and there was more evidence of that in this study (Hirsch, 2013; Kozinski, 2017; Moore and Fitzsimmons, 2011).[26] Also, looking to the pathway of Tip-Friend under Duress During Questioning where the wrong suspect was more often found, we see another pathway where duress led to the wrong person being implicated. Research shows that isolation, fatigue, and fear can lead to false confessions to escape from the situation an individual is in.[27] It seems reasonable to say that the same was true for someone under duress during questioning when they named someone they knew in order to remove themselves from a scenario that was isolating, fatiguing, and fear inducing.

Evidence can be divided into two separate groups: testimonial evidence and physical evidence. Testimonial evidence is evidence given from statements while physical evidence is any type of object (Fisher and Fisher, 2012). One important aspect of our findings was that physical evidence seemed to more often point to a true perpetrator (8.2% of the comparison group and 3.7% for exonerated group). The single path suspects data also reiterates the power of physical evidence to find the right person. When only one way an individual becomes a suspect was via physical evidence, that typically meant the suspect was part of the comparison (DNA inclusion) group

---

[24] Nadine Deslauriers-Varin & Francis Fortin, "Improving Efficiency and Understanding of Criminal Investigations: Toward an Evidence-Based Approach" (2021) Journal of Police and Criminal Psychology, 36(4), 635-638.

[25] Raymond A Dahl, "Importance of Observation in Law Enforcement" (1952) The Journal of Criminal Law, Criminology, and Police Science, 43(1), 103-113; CBS Interactive, "NYPD Cops Learn Skills of Observation -- in Museum Art Class", *CBS News* (25 October 2010), online: https://www.cbsnews.com/newyork/news/nypd-cops-learn-skills-of-observation-in-museum-art-class/.

[26] Alan Hirsch, "Going to the Source: The New Reid Method and False Confessions" (2013) Ohio St J Crim L 11, 803; Wyatt Kozinski, "The Reid Interrogation Technique and False Confessions: A Time for Change" (2017) Seattle J. Soc. Just., 16, 301; Timothy E. Moore & Lindsay C. Fitzsimmons, "Justice Imperiled: False Confessions and the Reid Technique" (2011) Crim LQ, 57, 509 [*Moore & Fitzsimmons*].

[27] Moore & Fitzsimmns, *ibid*.

(11.8% and 1.2%, respectively, in comparison and exonerated). There were qualitative differences, however, between the physical evidence involved in the exoneration cases compared to the evidence involved in the comparison group. Out of the 15 pieces of evidence identified as used to becoming a suspect in the exonerated group, hair and bitemark evidence was used four times, but were not used once in the comparison group. Hair and bitemark evidence are based on minimal empirical support for identification of individuals and have been implicated in numerous wrongful convictions.[28] Differences in the type of physical evidence used to implicate suspects should be examined in future research.

Another finding from our study is the relative ineffectiveness of specific types of testimonial evidence (i.e., matched descriptions on the part of victims or the public) as used to develop a suspect. Innocence scholars know well that eyewitness testimony can be faulty and a major contributor to wrongful convictions.[29] The separate analysis of single-path suspects provides additional support for the potential weakness of victim testimonials. Single path Matched Description-Victim Identification was seen more often when looking at the exonerated group (9.8%) compared to the DNA inclusion group (2.9%). A single pathway often consisted of someone looking through a set of pictures (often described as a mug book) or saying they "felt" like they recognized something about the suspect during their encounter. Research continually shows that eyewitness memory is flawed, human memory is fragile, and that we only have a set number of cognitive resources available at certain points.[30]

With eyewitness identification not being the most reliable form of evidence, there have been efforts to reform eyewitness identification and lineup procedures. One such specific reform mechanism is to get a confidence statement immediately following identification of a suspect. Confidence is a predictor of accuracy when choosing from a photospread.[31] Within our results

[28] Gould & Leo, supra note 3; Erica Beecher-Monas, "Reality Bites: The Illusion of Science in Bite Mark Evidence" (2008) Cardozo L Rev., 30, 1369; Vanessa Meterko, "Strengths and Limitations of Forensic Science: What DNA Exonerations Have Taught Us and Where to Go From Here" (2016) West Virginia Law Review, 119(2), 8.

[29] Stephen L Chew, "Myth: Eyewitness Testimony is the Best Kind of Evidence" (2018) Association for Psychological Science; Elizabeth F. Loftus, *Eyewitness Testimony* (Harvard University Press, 1996).

[30] Rachel E. Dianiska et al, "A Process Perspective: The Importance of Theory in Eyewitness Identification Research" (2021) Methods, Measures, and Theories in Eyewitness Identification Tasks, 136-168; Nancy K Steblay, "Eyewtiness Memory" in Brian L Cutler & Patricia A. Zapf (Eds), *APA Handbook of Forensic Psychology, Vol 2: Criminal Investigation, Adjudication and Sentencing Outcomes*, (American Psychological Association, 2015) 187-224, DOI: <10.1037/14462-007>; Gary L Wells & Deah S Quinlivan, "The Eyewitness Post-Identification Feedback Effect: What is the Function of Flexible Confidence Estimates for Autobiographical Events?" (2009) Applied Cognitive Psychology: The Official Journal of the Society for Applied Research in Memory and Cognition 23(8), 1153-1163.

[31] Candace McCoy & Jacqueline Katzman, "Raising the Standard of Evidence for Initiating an Identification Procedure" (2021) UCLA Criminal Justice Law Review, 5(1); Gary L Wells et al, "Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence" (2020) Law and Human Behavior, 44(1), 3, DOI: <10.1037/lhb0000359>; John T Wixted et al,

regarding victim identifications, we can see a spectrum of confidence regarding the identification itself, with some being extremely high in confidence and others being lower on that spectrum. For example, Tip-Victim Tip as a single path typically saw a victim directly implicating their perpetrator by name. Due to this implication, it is reasonable to assume they had high confidence in their choice. With this high confidence came a greater likelihood of choosing the correct assailant (Tip-Victim Tip 23.5% for comparison and 12.2% for the exonerated groups). Traveling down the spectrum of confidence you have Matched Description-Victim Identification as a single path variable. This path often saw victims choosing suspects out of large sets of photographs and identifying someone they believed was their assailant. This pathway saw the wrong person being picked more often in our sample, 9.8% to 2.9% for the exonerated group and comparison group respectively. In this same vein, Tip-Victim Tip coupled with Matched Description-Victim Identification often saw a victim seeing someone in the days or weeks following the crime and, believing they matched the description of their perpetrator, calling them into law enforcement. This scenario saw the incorrect perpetrator somewhat more often chosen with 13.2% in the exonerated group and 10% in the comparison group. What this illustrates is that when you can reasonably assume the victim to be high on the spectrum of confidence (directly naming their assailant) there is evidence that they will more often choose the correct person, supporting the potential usefulness of getting a confidence statement after an identification procedure.

Most of our cases are sexual assaults or homicides. In general, these crimes are more likely to be perpetrated by someone known to the victim,[32] but an important caveat to note, however, is that our sample largely consists of stranger crimes. Thus, it would be inappropriate to generalize the proximity pathway findings in this analysis (i.e., proximity led more often to an incorrect identification of a suspect) to the broader population of sexual assaults and homicides. This means, in general, it could be useful to look at people who have access to the victim to find suspects, but when you are dealing with a possible stranger crime, a broader approach could be the better option.

Some of our Proximity pathway suspects were found in the area the crime took place because of some actions known to police (i.e., an automobile accident), and it is this proximity which led to their implication as suspects. This type of situation is an example of an interesting assumption of innocent people who are convicted; that they were in the wrong place at the wrong time.[33]

The public tip pathway was rarely seen in the larger (i.e., two-fold or more) differences between the groups that we noted. In the multiple paths analysis, however, Tip-Public Tip was frequently seen. Tip-Public Tip/Own Actions occurred in 7.9% of the exonerated group and 20% of the comparison (DNA inclusion) group. What this variable illustrated was another possible qualitative difference between these two groups. The Tip-Public/Own Actions variable typically

---

"Initial Eyewitness Confidence Reliably Predicts Eyewitness Identification Accuracy" (2015) American Psychologist, 70(6), 515.

[32] FBI, "FBI - Expanded Homicide", (2019), online: https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/expanded-homicide; RAINN, "Perpetrators of Sexual Violence: Statistics", online: https://rainn.org/statistics/perpetrators-sexual-violence.

[33] Kenneth J. Weiss & Clarence Watson, "Wrong Place, Wrong Time: The Central Park Five" (2013) Journal of the American Academy of Psychiatry and the Law Online, 41(3), 470-473.

saw an individual confessing something about the crime to someone else and that person would turn them into investigators. The comparison (DNA inclusion) group had more individuals confessing or doing some sort of action leading to suspicion when compared to the exonerated group. Upon examination of the Tip-Public Tip pathways in each group, it seems plausible that Tip-Public Tips in the exonerated group are more circumstantial than direct. In the exonerated group we often saw things like an individual's truck possibly put at the scene, an individual calling in to say that someone they know matches a description, and someone telling investigators that someone they know owed money to the victim. However, for the comparison (DNA inclusion) group we often saw an individual directly confessing to friends, bragging about having a gun, or making comments about a crime. Therefore, the Tip-Public Tip pathway in the comparison group had evidence that seemed to have a greater connection to the crime than the exonerated group. Further analysis needs to consider possible qualitative differences on this topic.

While this was the second known study examining exonerated individuals, there are limitations to its analysis. First, the sample sizes were small, and some pathways contained very few cases. Drawing definitive conclusions and generalizations from these data is not advised. As noted previously, the differences between groups discussed above are findings we consider noteworthy and that warrant further investigation and replication. Second, our comparison group might not represent most individuals who are the true perpetrators. This was a group that wrote into the Innocence Project meaning, this was a group that was actively involved in their post-conviction (and post-appeals) process, and generally the circumstances of the cases and evidence included ambiguities and complexities. This sort of group might not be representative of more definitive cases. Lastly, coding cases is inherently a subjective enterprise.[34] While cases were coded in this research from a primary coder and coding was discussed and agreement reached when initial differences were noted after review, some uncertainty and subjectivity is inherent in the coding. We have attempted to describe our categories thoroughly to allow readers to understand the process and rationale for decisions.

V Conclusion

How an individual becomes a suspect is a research area that is in its infancy within innocence scholarship. There have been multiple calls for an examination of the entirety of the police investigation in relation to wrongful convictions.[35] This is the second study known to us addressing this question. Our study was able to examine a comparison group and, in the future, researchers need to continue to think of comparison groups of adequate size to perform hypothesis testing in this under-researched field. Future analysis could also partner with law enforcement to be able to get better access to details and insights regarding decision-making early in the investigative process. There were cases where no conclusion could be made on how individuals became a suspect and partnering with law enforcement could provide greater access to investigatory materials and narratives that could inform every case leading to a more complete

[34] Diane G Cope, "Methods and Meanings: Credibility and Trustworthiness of Qualitative Research" (1969) Number 1/January 2014, 41(1), 89-91; Mai S Linneberg & Steffen Korsgaard, "Coding Qualitative Data: A Synthesis Guiding the Novice" (2019) Qualitative Research Journal.
[35] Zalman & Larson, *supra* note 4.

analysis. While we saw differences in this study that could inform ways to improve investigations, those differences need to be confirmed with additional studies which could include questioning how specific crimes affect suspect recognition, how race and gender could come into the discussion, and how state or local areas could affect suspect pathways.

VI Appendix – Additional Examples of Subcategories and Discussion of Single and Multiple Pathways

A. Tip-Public Tip

Public Tip involved someone from the public (i.e., not the victim or law enforcement) offering information to law enforcement which made them further investigate the information leading to the arrest of that individual. Public Tip was a single or multiple path variable. An example of single path Public Tip suspect includes an acquaintance of the suspect calling law enforcement and saying that his co-worker owed money to the murdered victims and law enforcement then focusing on that suspect. A common multiple path Public Tip suspect was Tip-Public Tip/Matched Description-Civilian Identification. This path saw a civilian contacting law enforcement and naming a suspect after seeing a sketch. Prior research would simply classify this as something like civilian identification to keep categories mutually exclusive.[36] However, our analysis posits that there are two points of implication involved in a case like this. First, the member of the public must identify that a certain person matches a description (point one) and then they must call the police and give them this tip (point two).

B. Tip-Friend Under Duress During Questioning

This variable encompassed those who were implicated after someone known to them was questioned for hours and they mentioned or named the person in our sample as connected to the crime, making them a suspect. This fits under the tip category because this was an example of someone offering up a piece of information to law enforcement, implicating someone else, leading to resources focused on that individual. A single path example of this variable was seen when an individual was brought in during a murder investigation from a public tip. During questioning, this individual mentioned the name of the person in our sample and only then were resources focused on that person. A multiple path suspect was seen in the example of a murder where someone came forward, hoping to gain consideration for a friend in custody, and provided information about a murder that occurred. Over the course of the next few days, this person implicated a group of people including himself in a murder. The group he implicated included people in our sample whose path to becoming suspects were, therefore, Tip-Public Tip and Tip-Friend Under Duress During Questioning because the person who initially came in was providing a public tip by offering up information to law enforcement and then was subsequently questioned for two days and provided more statements and, likely due to duress, implicated these individuals in our sample.

[36] Lowrey-Kinberg et al, 2018, *supra* note 15.

C. Tip-Accomplice Tip

Tip-Accomplice Tip's typical scenario saw an accomplice (from events related to the crime under question or a previous one) contact law enforcement to offer information about a crime. This was a single or multiple path variable. A single path suspect was seen when an individual in our sample was arrested with others for a burglary in another state. An accomplice called prosecutors investigating a murder in another state and offered information that his accomplice in the burglary confessed to the murder, making this individual a suspect in the murder case. A multiple variable suspect involved police investigating a robbery at a Salvation Army where they arrested a group of people, including someone in our sample. One of the suspects in that group said the individual in our sample left the area for a short period of time during the robbery, putting him in the area of a sexual assault police were also investigating. Because of this, the individual became a suspect in that crime and his path to becoming a suspect was Tip-Accomplice Tip and Previous Law Enforcement Encounter.

D. Tip-Victim Tip

Victim Tip was when information was offered from the victim. It could be a single or multiple pathway. A single path Victim Tip existed when a victim directly implicated someone by name. This occurred when a victim went to a suspect's house to do laundry and later left and called the police and told them this suspect (directly implicating them) raped her. There was no matching a description here needed because they knew the person they were accusing. An example of a multiple path suspect was an individual categorized as Tip-Victim Tip and Matched Description-Victim Identification. In this case a rape victim saw an individual she believed was her rapist. This victim wrote down the license plate of the individual and provided that to authorities who then traced it to the suspect included in our sample. There are two points of implication here: 1). The victim believed the individual was her rapist (matching the description) and 2). The victim had to call that information in (make a tip).

E. Matched Description-Officer Identification

This path involved the suspect being brought in by law enforcement because they matched descriptive characteristics previously provided, officers noticed it, and officers made the arrest. Law enforcement employees can also be considered officers for this variable. A single path example involved an individual who was found in the area of a rape and matched the description given from the victim. This person was then detained and brought for a show-up and identified. This pathway can also include evidentiary material. For example, a robbery and murder occurred on a busy street and multiple witnesses described the getaway vehicle. Police saw a similar vehicle and arrested the people inside, bringing them in for an identification. This subcategory also included multiple pathways. An example of one such multiple pathway is a rape that occurred where the victim came in and helped create a composite by using a method of operation kit which overlayed facial features to create a likeness of the suspect. A civilian police employee then picked a series of photos from this likeness and created a lineup with them. Our suspect was subsequently picked out. This means the law enforcement employee had to pick out our suspect from the likeness (Matched Description-Officer Identification), the victim had to recognize someone in the group

(Matched Description-Victim Identification), and the victim had to provide information of what the suspect looked like to create the likeness (Tip-Victim Tip).

F. Matched Description-Civilian Identification

Matched Description-Civilian Identification was an identification by the public based on a description of the suspect provided to them. A common multi-path variable for this group was Tip-Public Tip and Matched Description-Civilian Identification. An example of this from our sample includes an individual who was identified by the public after the second victim in the case assisted law enforcement with creating a composite sketch. That sketch was broadcasted on TV and police received a call about the suspect believed to be matching the description leading to an arrest. There was no single variable suspect for this path.

G. Matched Description-Victim Identification

This variable was for when the victim(s) in the case identified a suspect based on their matching of a description of the perceived perpetrator. A typical single pathway example saw victims going to law enforcement precincts, viewing mug books, and identifying suspects from the mug books. This was only a s ingle pathway because law enforcement was providing photographs to victims. Therefore, law enforcement was providing victims with the information, not the other way around.

A common multiple pathway pairing for this variable was with Tip-Victim Tip and Matched Description-Victim Identification. An example of this was when a victim saw their suspected perpetrator around the area they were in, believed they recognized them, and called the police to say they saw their rapist.

H. More Examples of Multiple Variable Pathways Cases

Most of the pathways occurred as single pathways in some cases and as part of multiple variable pathways in others. For example, a multiple variable case involving Own Actions was someone being stopped because they matched the description of a suspect and then they said they were in the vicinity of the murder when it happened. There was more to this case, but this illustrates how more than one variable can be involved because they matched a description and their verbal actions led to suspicion. Another case involved Matched Description-Officer Identification and Physical Evidence. In this case, an individual was found matching the description of a rape suspect and was also in possession of a radio that was taken from the scene. Another multiple pathway case involved Own Actions and Prior Law Enforcement Encounter where an individual seen driving around where a body was found multiple times and became a suspect after it was found he had prior sex offenses on his record.

An example of a more complex set of pathways in our analysis is a murder case in which someone was stopped and brought in for questioning because he looked like someone police were looking for in connection with the murder. Police realized this person they brought in was not the person they were searching for yet questioned him anyway. During questioning, this individual said they were in the area of the murder and was questioned harder and therefore, this individual

became a suspect due to Matched Description-Officer Identification (because he looked like the person police were looking for), Own Actions (because he said he was in the area of the murder leading to more suspicion), and Police Action (because they brought in the wrong person and questioned them anyways).

Sometimes the Snitch Recants: A Closer Look at the Use of Jailhouse Informants in DNA Exoneration Cases

Wendy Pamela Heath*
Professor of Psychology, Rider University
Lawrenceville, New Jersey
U.S.A.

Joshua Robert Stein, Sneha Singh, Da'Naia Lynnette Holden
Undergraduate Students, Rider University
Lawrenceville, New Jersey
U.S.A.

The purpose of this study is to investigate further the role of jailhouse informants in U.S. DNA exoneration cases. Thus, for the first 375 DNA exoneration cases compiled by the Innocence Project ("IP"), we reviewed the IP information relevant to jailhouse informant testimony. We supplemented the information from the IP with that from the National Registry of Exonerations ("NRE") and the Convicting the Innocent ("CTI") databases. We found that 15% of these DNA exoneration cases included jailhouse informant testimony, with White people more likely than Black people to have an informant involved in their case. There was also a greater tendency for defendants incriminated by informants to be given the death penalty. In 13% of the cases, the only evidence supporting a conviction was the word of the jailhouse informant. We also found that in 24% of cases which had at least one jailhouse informant, the informant recanted. This has thus led to an effort in some jurisdictions for reform regarding informant testimony. While states should continue to consider adopting procedures to curb the reliance on unreliable informants, we recommend that any reform regarding the use of informants should include a consideration of recanting informants.

I. Introduction
II. The Types of Informants
III. Information from Informants can be Unreliable
IV. Research Regarding Jailhouse Informants
  A. How Influential are Jailhouse Informants?
  B. Does Knowledge of an Informant's Incentives to Testify Matter to Mock Jurors?
  C. Does Knowledge of an Informant's Testimony History Matter to Mock Jurors?
  D. Can Informant Testimony Affect Perceptions of Other Evidence?
  E. Is it Possible to Decrease the Influence of an Informant?
V. Jailhouse Informant Recantations
  A. Previous Research on Recantations
VI. The Present Approach
VII. Method
  A. Sample of DNA Exonerees
VIII. Results

A. Cases with Jailhouse Informants
B. Cases with Recanting Jailhouse Informants
C. Cases with Jailhouse Informants Who Did Not Recant
IX. Discussion
A. Limitations
B. Suggested Reforms
C. Future Research
D. Conclusion

*Corresponding Author: Wendy P. Heath, Rider University, 2083 Lawrenceville, NJ 08648, USA (e-mail: heath@rider.edu). A version of this work was presented at the Association for Psychological Science Conference in 2019.

I Introduction

In 1994 Donna Meagher was working the late shift at a saloon in Montana. As she was closing up, one or more individuals entered the saloon, emptied the Keno machines, kidnapped Meagher, killed her, then dumped her body in Colorado. The crime went unsolved until a jailhouse informant, hoping to collect a Crime Stoppers reward, told investigators that his son-in-law, Freddie Joe Lawrence, had admitted to committing these crimes with a man named Paul Jenkins. Based on this tip, police investigators interviewed Lawrence. He denied his involvement, but implicated Jenkins and attempted to implicate Jimmy Lee Amos, a mentally-challenged man whom Jenkins and his wife, Mary, cared for. In return for this information, Lawrence, who was in jail because of a traffic violation, asked to be moved to a different jail. Once he was transferred, Lawrence recanted his statement, but the police continued to pursue these leads.

The police interviewed both Paul and Mary Jenkins as well as Amos. Mary Jenkins was interviewed for eight hours during which time she detailed the crime the three of them committed against Meagher. Mary Jenkins had dementia and an IQ of only 70 but was found competent, and her testimony was seen as an important part of the prosecution's case. Amos was declared as incompetent to testify because of his diminished mental capacity. Ultimately, despite a lack of physical evidence linking either man to the crimes, both Jenkins and Lawrence were convicted and each was sentenced to 100 years in prison.

Twelve years later, the Montana Innocence Project filed a motion to seek DNA testing of the physical evidence in the case of Meagher's murder. While this testing was being conducted, a man named Fred Nelson reported to law enforcement that his uncle, David Nelson, had admitted to committing these crimes. Fred Nelson said that he had known this since 1994 and had revealed this information to lawyers and law enforcement in 1998, but was told that nothing could be due to lack of evidence. However, in 2017, forensic analysis revealed that the DNA left at the crime scene matched David Nelson and not Paul Jenkins and Freddie Joe Lawrence. In 2018, a judge vacated the convictions of Jenkins and Lawrence. They had spent 24 years in prison for crimes they did not commit (online:
https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5339).

We have recounted the cases of Paul Jenkins and Freddie Joe Lawrence because these cases included unreliable jailhouse informants, one of whom recanted his incriminating statement upon receiving the incentive he requested. We have chosen to focus this exploratory investigation on jailhouse informants in the United States, with a special focus on recanting jailhouse informants. To do this, we have examined the Innocence Project's ("IP") first 375 DNA exoneration cases. Each of the people in this database have been exonerated with the use of DNA; they are all factually innocent, thus the informants have all provided at least some false information. Before we examine the details of jailhouse informant use in these cases, we will review evidence which demonstrates the influence of jailhouse informants despite their potential unreliability."

II The Types of Informants

There are three kinds of informants: 1) a jailhouse informant (one who provides information about a crime obtained while incarcerated); 2) a co-conspirator informant (also known as an accomplice witness, a co-defendant or a co-perpetrator); and 3) an informant that is a member of the community (i.e., not in jail—also known as a cooperating witness or an incentivized witness). All types of informants offer information about crimes to authorities, typically in exchange for incentives such as money or a reduced sentence. Often the information provided is a confession allegedly made by the suspect. These confessions are called "secondary" confessions, as opposed to a "primary" confession which is provided by the suspect directly (Neuschatz et al., 2012a).

All three types of informants have been found to contribute to wrongful convictions. For example, Garrett (2011) analyzed 250 U.S. DNA exoneration cases and found that 52 of these cases (21%) included informants: 28 were jailhouse informants, 23 were alleged co-perpetrators, and 15 were cooperating witnesses (some cases included more than one type of informant). Additionally, Warden (2004) found that informants, most of whom were jailhouse informants, provided false information in 45% of 111 wrongful convictions in the U.S. in which the defendants had been assigned a death sentence. In 2015, The National Registry of Exonerations stated that 8% of all exonerees in their U.S. Registry (*N* = 1,566) included testimony from a jailhouse informant with severe crimes (e.g., murder) being more likely to include such testimony (online: https://www.law.umich.edu/special/exoneration/Pages/Jailhouse-Informants.aspx). Thus, while these researchers have considered the presence of informant testimony in different ways, it is clear that informants have played a substantial role in wrongful convictions in the U.S. We will use the present research to focus on the role that jailhouse informants (both recanting and not recanting) have played in DNA exoneration cases across the country.

III Information From Informants Can be Unreliable

Although not all informants lie (see Neuschatz et al., 2020), some cannot resist the offered incentive and will fabricate a secondary confession. Swanner et al. (2010) found that incentives actually increased the number of false secondary confessions.In other words, incentives motivated informants to lie. In particular, scholars such as Natapoff (2018) have questioned the credibility and truthfulness of jailhouse informants, who may have more to gain from providing information

that is useful to authorities. Authors of a policy review on jailhouse informants made the point well: "jailhouse snitches are so desperate to attain sentence reductions, snitch testimony is widely regarded as the least reliable testimony encountered in the criminal justice system" (*Jailhouse snitch testimony*, 2007, p. 1).

Providing convincing and incriminating evidence as an informant is not necessarily a difficult task. In some cases, the informant will actively work to gain information about a case. Consider Leslie Vernon White, a convicted criminal who frequently acted as an informant. He would pose as a law enforcement official and call various government agencies to learn about a defendant's case. On the U.S. TV news program, *60 Minutes*, he demonstrated how easy it is to get the information needed to concoct a convincing secondary confession (Rohrlich, 1988). Another way for an informant to get information is to obtain details about the crime from the defendant themselves, and then use this information to craft a detailed story (Garrett, 2011) Alternatively, an informant can follow the lead of the investigating officer or prosecutor and simply confirm information that was provided by law enforcement (see Gershman, 2002). In some cases, the police have been said to deliberately feed information to an informant for their future use in testimony. Obtaining information from sources such as the police or the prosecutor may explain why an informant's statement sometimes seems to be crafted to fill any holes in the prosecutor's litigation strategy (Garrett, 2011).[1]

IV Research Regarding Jailhouse Informants

A. How Influential are Jailhouse Informants?

A multitude of reputable studies have found the information obtained from jailhouse informants to be very influential. Several research teams have found, for example, that hearing testimony from a jailhouse informant (as opposed to not hearing such testimony) leads to more guilty verdicts. This is true in decisions by individual jurors (e.g., Golding et al., 2020; Wetmore et al., 2020), and in decisions made after deliberation by juries (Golding et al., 2022). Moreover, Wetmore et al. (2014) found that secondary confessions led to a similar percentage of guilty verdicts as primary confessions and both were generally seen as more influential than eyewitness evidence.

B. Does Knowledge of an Informant's Incentives to Testify Matter to Mock Jurors?

Several researchers have investigated how knowledge that the informant received an incentive affects mock jurors' decisions. For example, Neuschatz et al. (2008) found that those

[1] Raeder (2007) questions whether there are times that the lies in the testimony of jailhouse informants should be obvious to prosecutors. She wonders whether prosecutors are at fault for using informants that provide testimony that seems "too good to be true when it fills in the gaps that otherwise would likely derail the prosecution's case" (p. 1416). She encourages prosecutors to think about their ethical obligations to innocent defendants and "self-regulate prosecutorial reliance on such witnesses so that their appearance at trial is the exception, rather than the norm" (p. 1417). In other words, only use such witnesses when the "need is great and the factors support a reasonable belief that the jailhouse informant is telling the truth" (p. 1437).

presented with a secondary confession (from a jailhouse informant, an accomplice, or a community member (a classmate)) were more likely to vote guilty than those who were not privy to this information. Further, the percentage of guilty verdicts did not vary as a function of informant incentive, such as a reduction in sentence for the jailhouse informant and the accomplice or a reward for a community member. On the other hand, Maeder and Pica (2014) found that the presence versus the absence of an incentive *did* lower the likelihood of guilty verdicts, however the size of the incentive (amount of sentence reduction) did not have an effect on verdicts. Maeder and Yamamoto (2017) also found that when an informant received an incentive versus not, participants in the study were less likely to render a guilty verdict.

Although researchers have not consistently found that the knowledge of an informant's incentive has an impact on jurors' decisions, courts have recognized that the incentive may have an impact on the informant's motivation to testify honestly. Therefore, if a prosecutor provides an incentive to an informant, that incentive must be disclosed to the defense (*Brady v. Maryland*, 1963).[2] In an analysis of trial transcripts of DNA exoneration cases, Neuschatz et al. (2020) found that while a majority of informants (most of whom were jailhouse informants) were asked if they received an incentive in exchange for providing their testimony, very few (12.5%) admitted to receiving an incentive. It should be noted that often informants are not *explicitly* promised an incentive before the trial, but incentives are nevertheless expected. Thus, a statement in court that they have not received anything is technically true (see Natapoff, 2009a).

C. Does Knowledge of an Informant's Testimony History Matter to Mock Jurors?

Although legal scholars have argued that a person with a history of provide secondary confessions is the most "doubt-inducing" (see Lillquist, 2007, p. 922), Neuschatz et al. (2012b) found that conviction rates did not vary with the informant's testimony history. Neuschatz et al. (2020) found that most of the informants who testified for the prosecution (69%) were not asked for their testimonial history. In one case, during closing, the prosecution argued that since their informant had testified repeatedly, they knew that the information he provided was reliable.

D. Can Informant Testimony Affect Perceptions of Other Evidence?

Another concern is that informant testimony has been shown to have the power to influence perceptions of other forms of evidence. This has been demonstrated in at least two ways. Mote et al. (2018) had participants watch a video of a crime and then select a person from a line-up, after which participants received post-identification feedback. Some of the participants learned that a lineup member confessed, claimed he was innocent or was implicated by a jailhouse informant, while others did not receive feedback. Many participants who had originally made a line-up choice and received feedback about the potential guilt of another individual changed their choice after hearing that another lineup member was implicated. Similarly, Jenkins et al. (2021) found that an informant's testimony could change the perception of forensic evidence. Specifically, they found that information from a "reliable" jailhouse informant (as opposed to an "unreliable" one who did

[2] Note that defense attorneys are not allowed to provide incentives to informants. "Because the government rewards only those informants who provide evidence supporting the government's case, there is a strong disincentive for informants to reveal information that might help the defense" (Natapoff, 2009a, p. 186).

not provide details that mirrored the known details of the crime) affected how participants interpreted handwriting samples. Participants were more likely to perceive a match in the handwriting samples of a bank robbery note and the *Miranda* rights waiver after reading about a secondary confession from a reliable jailhouse informant. Thus, information from an informant has been shown to alter eyewitnesses' identification decisions and judgments regarding forensic evidence.

E. Is it Possible to Decrease the Influence of an Informant?

Given the often incorrectly incriminating and influential word of a jailhouse informant, researchers have searched for ways to dim the influence of an informant's testimony in the eyes of jurors. For example, Wetmore et al. (2022) found that a defendant's testimony that a jailhouse informant was lying reduced the number of guilty verdicts delivered by juries. DeLoach et al. (2020) found that when a defense attorney pointed out inconsistencies in statements made by a jailhouse informant or provided an alternative explanation for how the informant had come to know about the incriminating information, mock jurors' guilty verdicts decreased, although this was mediated by whether the mock jurors made dispositional ("he's testifying because it's the right thing to do") or situational attributions (e.g., he's testifying in exchange for a reduced sentence) for the informant's behavior.

Some researchers have explained belief in informant testimony within the framework of Ross' (1975) fundamental attribution error ('FAE") in which observers tend to discount the influence of situational factors (e.g., incentive) on an actor's actions and tend to attribute causes of behavior to dispositional factors (e.g., a desire to do the right thing). As indicated above, DeLoach et al.'s (2020) work suggested that testimony inconsistencies and alternative explanations led participants to believe their informant was situationally motivated (i.e., motivated by incentive), eventually leading them to see the defendant as less guilty. Interestingly, Neuschatz et al. (2020) found that in an analysis of real cases in which jailhouse informants testified for the prosecution, 78% explicitly provided a dispositional reason for their testimony, and 72% denied receiving something in return for their testimony (potentially explaining the strong influence of informant testimony in these cases).

Other attempts to diminish the influence of secondary confessions have not been as successful. For example, DeLoach et al. (2020) found that having the defense attorney point out the ulterior motives of the jailhouse informant (i.e., he was motivated by incentive) did not impact guilty verdicts. Wetmore et al. (2020) found that providing jurors with cautionary instructions about jailhouse informants did not decrease guilty verdicts. Neuschatz et al. (2012b) found conviction rates did not vary with the presence (versus absence) of testimony from an "expert" for the defense who explained how he, as an informant, previously provided false testimony. Neuschatz et al. (2008, 2012b) cite these results as support for Ross' (1975) FAE. Maeder and Pica (2014) further pursued this line of reasoning by having an expert explain the FAE to mock jurors and describe how jurors tend to ignore the influence of informant incentives. Despite this intervention, the jurors' verdicts were unaffected by the presence of this testimony. Collectively, this body of evidence suggests that some, but not all, attempts to impeach an informant's testimony may have an impact on jurors' verdicts.

V Jailhouse Informant Recantations

Informants, such as Darryl Moore, sometimes recant. Moore was a jailhouse informant who agreed to provide testimony against three murder defendants in return for cash, dropped charges, and immunity for a contract murder in which he acknowledged participation. Moore's mother testified for the defense, indicating that her son's word shouldn't be trusted. Even so, they were trusted, and all three defendants were convicted. Moore later recanted his testimony, claiming that he had no knowledge of the murders (Warden & Haller, 1987).

Courts have not generally looked favorably upon recantation (see e.g., Berman & Carroll, 1990). They are also typically reluctant to grant new trials after witnesses recant because inherently, recantation challenges not just the original testimony, but the personal credibility of the witness. Courts generally consider statements given in the courtroom, under oath, with cross-examination possible and witness demeanor available for properly-instructed jurors to judge, as sufficiently persuasive. Unfortunately, people do lie under oath. In addition, the use of witness demeanor as a reliable cue to deception has been questioned (see Heath, 2009; Kassin, 2022).

In some cases, the court has considered recanted testimony, but has found it to be unconvincing. Consider Troy Davis' case. Years after Davis was convicted of shooting a police officer, multiple prosecution witnesses recanted or changed their testimony. Three of the nine witnesses for the prosecution were jailhouse informants who all recanted, while four of the other witnesses recanted as well (*Amnesty International*, 2007). One of the two remaining witnesses who did not recant is suspected to be the actual killer (Natapoff, 2009b). When a judge did finally consider Davis' actual innocence claim, the judge rejected the recantations as insignificant. Davis was subsequently executed after serving more than 20 years in prison (see McDonell Hill, 2011 for a summary of this case). As Davis lay on the gurney in preparation for a lethal injection, he proclaimed his innocence one last time (Rankin, 2011).[3]

Courts are also reluctant to consider recantation evidence when other evidence supports the conviction. If the other evidence tying the defendant to the crime is physical evidence, upholding the verdict is considered more defensible. However, an analysis of 22 trial transcripts by Neuschatz et al. (2020) that included informants found that the second most-often cited factor supporting conviction was unvalidated/improper forensics. Neuschatz et al. (2020) found that the third most often contributing factor in these cases was eyewitness misidentification. As discussed earlier, both forensic evidence (Jenkins et al., 2021) and eyewitness testimony (Mote et al., 2018) have been shown to be potentially influenced by the word of an informant, and both have been demonstrated to be prone to error (online: https://innocenceproject.org/#causes).

The justice system's reluctance to consider recantation evidence is in line with a general tendency to prefer their original choice when making decisions. In other words, information that has affected judgments has been shown to continue to influence those judgments even after that information has been undermined (e.g., Ross et al., 1975). In the legal realm, the determined verdict could influence the decision-makers' subsequent thinking (i.e., confirmation bias—

[3] Note that Davis is not part of the current dataset (i.e., he was not exonerated). Still, there are those who question whether or not an innocent man was executed (e.g., Selby, 2020).

Nickerson, 1998), leading them to discount information that does not support the already-made decision. Pair these tendencies with the legal system's desire for finality in decisions, and it is not surprising that the result is often a rejection of recantations.

A. Previous Research on Recantations

A few researchers have attempted to estimate the general prevalence of recantations in cases in which the defendant has been exonerated. For example, Gross and Gross (2013) examined the incidence of recantation in cases from the National Registry of Exonerations (NRE) (i.e., those exonerated in the U.S. since 1989, not just those exonerated with the use of DNA). In an examination of 1,068 cases from the Registry's database, Gross and Gross found that 250 cases involved recantations (23%). Most of these cases were murder cases (56%), most often with recantation by eyewitnesses. Gross and Gross do note that some of these murder cases involved co-defendant and jailhouse informants who had been pressured by police and prosecutors to make statements that they later recanted, although they do not go into detail regarding the prevalence of these types of recanting witnesses. Warden (2004) did note that approximately 20% of the informants who implicated defendants in 50 reviewed capital cases had an informant who recanted.

VI The Present Approach

We reviewed the Innocence Project (IP) information relevant to jailhouse informant testimony for the first 375 U.S. DNA exoneration cases. We supplemented the information relevant to these cases from the IP with that from the NRE and the Convicting the Innocent (CTI) databases. Since we know definitively, as a result of DNA exoneration, that all the defendants within the IP database were wrongly convicted, we know that it is very likely that the informants in these cases provided at least some false information; these informants were certainly wrong when they incriminated these defendants.

We documented the percentage of cases that included jailhouse informants and cases in which the jailhouse informants recanted (to our knowledge, the latter has scarcely been investigated). After documenting the demographics of the cases in which jailhouse informants (recanting or not) played a role, we documented the evident reasons (whenever available in the examined databases) why the jailhouse informant incriminated the defendant. We also documented what other contributing factors (beyond the jailhouse informant(s)) played a role in the convictions. We provide these details both for recanting and non-recanting informants.

VII Method

A. Sources of Information

We used three sources of information: 1) the IP website (www.innocenceproject.org), the NRE website (https://www.law.umich.edu/special/exoneration/) and Garrett's CTI website (www.convictingtheinnocent.com).

The IP was the original source of information for the first 375 DNA exonerees. However, the IP *currently* only provides in-depth information for the exonerees whose cases they have worked on.[4] Although the IP still contains basic details for most of those 375 early cases, they now refer users to the NRE for more information on all non-IP cases. The NRE has information about those exonerated with the use of DNA and those exonerated by other means. At the time of this writing, the NRE has 3,290 exonerations represented in its database. The CTI website contains information regarding 367 DNA exoneration cases, most of which are represented in the first 375 DNA exonerees of the IP, and in many of these cases, trial materials such as materials from prosecutors or post-conviction attorneys. Thus, the three websites occasionally differ regarding the depth of details they contained.[5]

The IP, NRE and CTI websites each typically provide a multi-paragraph summary (the "long summary") detailing major components of each exoneree's case. In addition, for each exoneree, there is an abbreviated overview of the major details of the case (the “margin summary”). We considered a case to have one or more jailhouse informants if the NRE tagged a case as having a jailhouse informant or if the long summary at either the IP or the CTI websites indicated the presence of a jailhouse informant.

We first documented the demographics of the cases in which jailhouse informants played a role (e.g., was the defendant a juvenile). We documented the apparent reasons (i.e., an incentive was mentioned in one or more of the three databases reviewed for this project) why the informant incriminated the defendant and documented other contributing factors which played a role in the convictions. The summaries from the IP include “contributing causes of conviction.” According to the IP’s classification system at the time of this writing, the following items are considered contributing causes of conviction: eyewitness misidentification; false confessions; the use of informants; unvalidated or improper forensic science; inadequate defense; and government misconduct. The IP’s classification system was our source of information regarding contributing causes of conviction. Finally, we then considered all the details stated above for the subset of cases in which at least one jailhouse informant(s) recanted and those in which the informant(s) did not recant.

---

[4] In 2020, the IP changed its approach to tracking DNA exonerations nationwide. Prior to this date, all cases in the nation in which DNA testing was central to exoneration were counted in the IP’s total. As of early 2020, the IP decided that they would only track cases in which the IP played a role (e.g., DNA exonerations and exonerations with other evidence). Thus, after the first 375 cases, the IP stopped tabulating nationwide DNA exonerations (Vanessa Meterko, personal communication, February 10, 2022). This change in the IP’s focus occurred as we were working on this project. When we originally presented this data in 2019 at a conference, we had data from the 362 exonerees listed on the IP’s website. Given the above-noted change, we decided to update our project to include the IP’s first 375 cases.

[5] It is also important to note that there are differences between our three sources of information with regard to informants. The NRE only indicates that a case had an informant if the informant was a jailhouse informant. CTI lists three types of informants: 1) jailhouse informants, “co-defendants,” and “incentivized witnesses.” The IP, on the other hand, does not include co-defendants in their counts of informants. Thus, the three sites differed in their counts of cases involving informants.

The second and third authors were trained by the first author to code while navigating the IP, NRE and CTI websites. Once coders were trained, they pilot-coded a sample of 10 exonerees. There were no coding disagreements. The demographics for all exonerees with jailhouse informants were independently coded by the second and third authors; inter-rater reliability was acceptable (Cohen's $k = .95$). The remaining items were coded by the first author.

VIII Sample of DNA Exonerees

Demographics. As noted above, the IP's first 375 DNA exoneration cases were used as our sample. This list of exonerees is available from The NRE (https://www.law.umich.edu/special/exoneration/Pages/DNA.aspx). Basic information about this sample is included at the following website: online: https://innocenceproject.org/dna-exonerations-in-the-united-states/. This sample of 375 exonerees was composed of 370 males and 5 females. Approximately 61% were Black ($n = 227$), 31% were White ($n = 116$), 8% were Hispanic ($n = 29$), less than 1% were Asian ($n = 1$), and less than 1% was Native American ($n = 2$). Eleven percent ($n = 41$) were juveniles at the time the crime was committed. Thirty-four percent ($n = 126$) were given a life sentence, and 6% ($n = 21$) of the 375 exonerees had been given the death penalty. Overall, these exonerees served 5,284 years. The average time served for all 375 exonerees was 16.30 years ($SD = 7.97$).

We note that some defendants were given a sentence so lengthy that it had the practical effect of being a life sentence (e.g., Lawrence McKinney was assigned a 100-year-sentence); these sentences were not considered "life sentences" in the statistics noted above. We also did not include sentences that included 'life' as a potential extended option (e.g., 25 years to life). A defendant was only considered as having been assigned a life sentence if the starting point was "life" (e.g., life + 20 years; life + $5,000; 2 life sentences).

IX Results

A. Cases With Jailhouse Informants

Demographics. Fifty-five exonerees (15%) had at least one jailhouse informant involved in their case. Of the 15%, 29% of these cases ($n = 16$) had more than one jailhouse informant involved. See Appendix A for a list of these 55 exonerees and details regarding their cases. Fifty-five percent of the exonerees who were implicated by jailhouse informants were White ($n = 30$), 38% were Black ($n = 21$) and 7% were Hispanic ($n = 4$). Only 5% of these exonerees ($n = 3$) were juveniles at the time the crime was committed. All together, these 55 exonerees served 901 years (range = 36 years, $M = 16.38$ years, $SD = 7.92$). Fifteen percent of these exonerees ($n = 8$) had been sentenced to death and 35% ($n = 19$) had been sentenced to life in prison.

We sought to determine if there was a greater tendency for informant usage by race. Twenty-six percent of White defendants (30/116 White defendants had informants), 14% of Hispanic defendants (4/29 Hispanic defendants had informants) and 9% of Black defendants had cases that included informants (21/227). When Black defendants were compared to White

defendants and Hispanic defendants, the chi-square was significant, χ^2 (1, N = 372) = 16.84, $p <$ .0002, ϕ = .21. Further analysis revealed that White defendants were more likely than Black defendants to have an informant involved in their case, χ^2 (1, N = 343) = 15.45, $p <$ .0001, ϕ = .22. On the other hand, Black defendants were equally likely to have informants as Hispanic defendants, χ^2 (1, N = 256) = .20, p = .65, ϕ = .04; and Hispanic and White were also equally likely to have cases with informants, χ^2 (1, N = 145) = 1.27, p = .26, ϕ = .11.

There was also a greater tendency for those with informants to be given the death penalty, χ^2 (1, N = 375) = 7.87, $p <$ .005, ϕ = .16 (note that this is a statistically significant relationship, however it is relatively small—approximately 15% of the defendants who were implicated by at least one informant received a death penalty, while only 5% of those who were not implicated by an informant received a death penalty). There was not, however, a greater tendency for cases involving informants to result in life sentences, χ^2 (1, N = 345) = .01, p = .91, ϕ = .005 (with informant: 35% received a life sentence; without informant: 34% received a life sentence). In addition, informants were equally likely to be used in cases in which the defendant was a juvenile (5%) versus an adult (12%), χ^2 (1, N = 375) = 1.38, p = .24, ϕ = .07.

Evidence of Incentive. We considered whether there was evidence of an incentive for the jailhouse informant to provide testimony. Reasons were only available in 53% of cases (n = 29). In 51% of the cases in which a jailhouse informant was included, the informant was offered a deal (n = 28).[6] In 5% of cases (n = 3), a jailhouse informant cited police pressure as the reason for testifying in some cases included both a deal and police pressure.

Contributing Causes of Conviction. We also considered the causes contributing to conviction for cases that included jailhouse informants. We gathered this information from the IP. If that information was not available from the IP, we consulted the NRE. We first wondered what percentage of exoneration cases with at least one jailhouse informant relied on *just* the informant's testimony to convict. Overall, of the cases that included a jailhouse informant, 13% had *only* the informant providing evidence supporting a conviction. The seven men who were imprisoned based on just the word of a jailhouse informant spent a total of 121 years in prison (M = 17.30 years, SD = 10.10). Eighty-six percent of these men received a sentence of at least 40 years in prison.

Twenty-nine percent had at least one jailhouse informant and only one other type of evidence contributing to a conviction. In five cases this was a confession. In another five cases this was mistaken eyewitness identification and in six other cases, unvalidated or improper forensic evidence was the additional evidence.

Thirty-one percent of the exonerees (n = 17) had at least one jailhouse informant and two additional types of incriminating evidence, and the remaining 27% (n = 15) had at least one jailhouse informant and three or more additional types of evidence contributing to a conviction.

---

[6] An informant was considered to have been involved in a deal if there was information suggesting that a deal took place even if the informant was said to have denied the existence of a deal (e.g., in Miguel Roman's case, the jailhouse informant denied obtaining any additional leniency—however, he received [an] offer to plead guilty to burglary, drop larceny, get one year –and received time served" (online: https://convictingtheinnocent.com/exoneree/miguel-roman/).

B. Cases with Recanting Jailhouse Informants

Demographics. We then looked at cases in which a jailhouse informant recanted. Twenty-four percent of the 55 cases (n = 13) that included jailhouse informants had at least one jailhouse informant recant. Fifty-four percent of the exonerees who were implicated by jailhouse informants who later recanted were White (n = 7), and 46% were Black (n = 6). No juvenile had a recanting jailhouse informant. These 13 exonerees served 255 years (range = 32 years, M = 19.60 years, SD = 9.59). Eight percent of these exonerees (n = 1) had been sentenced to death and 46% (n = 6) had been sentenced to life in prison.

We attempted to determine if cases in which the informant recanted were different from cases in which the informant did not recant. There was not a significant difference as a function of race, χ^2 (1, N = 51) = .01, p = .92, ϕ = .06, life sentences, χ^2 (1, N = 55) = .45, p = .50, ϕ = .14, or death sentences, χ^2 (1, N = 55) = .12, p = .73, ϕ = .11.

For these 13 cases in which the informant recanted, most of the jailhouse informants (69%) had testified in exchange for a deal. One additional jailhouse informant had cited both a deal (he avoided prison after being charged with rape) and pressure from police as the reason for their testimony. A reason for implicating the defendant was not evident for 31% of these recanting informants.

We considered the types of evidence contributing to a conviction in cases in which the jailhouse informant recanted. Most notably, in three out of the 13 cases, once the jailhouse informant recanted, there were no other forms of evidence supporting a conviction; these three men collectively spent a total of 63 years in prison. An additional 23% of the 13 cases in which at least one jailhouse informant recanted had only one other type of evidence supporting conviction (one had an eyewitness, one had unvalidated forensic evidence, and one had a confession). Another 23% of the 13 cases in which at least one jailhouse informant recanted had two additional types of evidence remaining that supported conviction (all three of these cases had both eyewitness misidentification and unvalidated forensic evidence). The remaining 31% of cases in which at least one jailhouse informant recanted had three or more additional types of evidence remaining that supported conviction.

C. Cases With Jailhouse Informants Who Did Not Recant

Demographics. We also considered cases in which at least one jailhouse informant was involved, but none of the jailhouse informants were known to have recanted; this accounted for 76% of cases (n = 42). Fifty-five percent of the exonerees who were implicated by jailhouse informants who did not recant were White (n = 23), 31% were Black (n = 15), and 10% were Hispanic (n = 4). Three of these exonerees were a juvenile at the time the crime was committed. These 42 exonerees served 646 years (range = 32 years, M = 15.40 years, SD = 7.17). Seventeen percent of these exonerees (n = 7) had been sentenced to death, and 29% (n = 12) had been sentenced to life in prison. See Table 1 for a comparison of the demographics and sentencing for all considered groups.

For these 42 cases, 45% of the jailhouse informants (*n* = 19) had testified in exchange for a deal. Another 2% (*n* = 1) claimed to have testified because of pressure. An additional jailhouse informant had cited both a deal and pressure from police as the reason for their testimony. A reason for implicating the defendant was not evident for 52% of these informants.

We considered the types of evidence contributing to a conviction in cases in which the jailhouse informant testified and did not recant. Most notably, in 10% out of the 42 cases (*n* = 4), the jailhouse informant was the only evidence supporting a conviction; these four men collectively spent a total of 58 years in prison. An additional 31% of the 42 cases that had at least one jailhouse informant had only one other type of evidence supporting conviction (four had an eyewitness, five had unvalidated forensic evidence, and four had a confession). Another 33% of the 42 cases (*n* = 14) that included at least one jailhouse informant had two additional types of evidence remaining that supported conviction. The remaining 26% of cases (*n* = 11) that included at least one jailhouse informant had three or more additional types of evidence remaining that supported conviction.

X Discussion

With this research, we have taken a closer look at the use of jailhouse informants in the first 375 DNA exoneration cases in the U.S. It remains clear that jailhouse informants played a role in wrongful conviction as 15% of the cases in the IP database included incriminating testimony from at least one jailhouse informant.

Informant testimony proved to be very influential. We see this influence in at least a couple of ways beyond the fact that these defendants were wrongly convicted. In 13% of the cases, informant testimony appeared to be the only major evidence supporting a conviction. In another 29% of cases, the defendant had the word of an informant and only one additional contributing factor (e.g., confession, eyewitness misidentification, unvalidated/improper forensic evidence), evidence that can be potentially influenced by the words of an informant (Jenkins et al., 2021; Mote et al., 2018), and/or has been demonstrated as prone to error (online: https://innocenceproject.org/#causes). We also see evidence of the influential nature of informants when you consider that there was a greater tendency for defendants incriminated by informants to be given the death penalty.

Interestingly, White people were more likely than Black people to have an informant involved in their case. The reason why is not immediately apparent; however, one possible reason may be revealed when one considers the other evidence present in the cases. Jailhouse informants are often called upon when there would be little evidence other than their testimony (cf. Neuschatz & Golding, 2022). Future researchers may wish to investigate this further. Note also that it is not unusual to find racial inequities in those wrongly convicted and exonerated with DNA in the U.S. (e.g., see online: https://innocenceproject.org/news/facts-racial-discrimination-justice-system-wrongful-conviction-black-history-month/). For example, while Blacks represent about 13.6% of the overall population in the U.S. (census.gov), we have noted that 61% of the current sample of those wrongly convicted in the U.S. and exonerated using DNA are Black (see Gross et al., 2017 for more on the topic of race and wrongful conviction).

Interestingly, we found that multiple jailhouse informants were used in 29% of cases,[7] presumably to strengthen the prosecution's case (see Natapoff, 2018 for information about a case that involved 30 jailhouse informants, all of whom fabricated evidence to benefit themselves). One prosecutor even quoted the bible to drive home the point about how the jury should view multiple witnesses: "I believe the old rule is that in the mouth of two or three witnesses shall everything be established. This defendant committed those crimes." Fessinger et al. (2020) and Neuschatz et al. (2020) also found multiple informants in many of the reviewed DNA exoneration cases. Fessinger et al. (2020) found that their analyzed cases representing 28 defendants included 55 informants; Neuschatz et al. (2020) reviewed cases with 22 defendants that involved 53 informants. In both cases most were jailhouse informants.

We also considered the prevalence of recantation on the part of jailhouse informants. Overall, we found that 24% of cases included informants recanting the statement that implicated the defendant. In three of the cases in which at least one informant had recanted, informant testimony had been the only evidence supporting a conviction. In another three cases, only one type of additional evidence was said to have contributed to a conviction.

Thus, it is clear that jailhouse informants have contributed to the problem of wrongful conviction, and that some jailhouse informants have been willing to recant their false testimony. Unfortunately, these defendants still spent years of their lives behind bars, which is a testament to how powerful informant testimony can be. The seven men who were imprisoned based on *just* the word of a jailhouse informant spent a total of 121 years in prison.

Jailhouse informants are highly incentivized to lie, and thus the risk to innocent defendants can be great, but we did find that some informants do recant. Should we find a way to encourage more informants to recant? Informants are not typically prosecuted for perjury (Natapoff, 2018).[8] The threat of perjury may act as one form of encouragement against providing false testimony, although police and prosecutors have been known to threaten perjury charges against witnesses who wish to recant prior statements; this ultimately could lead to false statements in testimony (Covey, 2015). Perhaps we should strive to halt the problem where it appears to sometimes begin—at the officers or prosecutors who pressure or otherwise encourage the informant to lie (see e.g., *Bechtol v. Prelesnik*, 2012). For example, in Calvin Washington's case, a jailhouse informant suggested he felt forced to provide information when an investigator said he "might be charged with Capital Murder" if he didn't provide information (online: https://convictingtheinnocent.com/exoneree/calvin-washington/).

Pressuring an informant clearly is inappropriate; however, we did not find a lot of evidence here to indicate that this is a frequent occurrence. It is possible that this kind of activity does not readily come to light. Far more frequent was the case in which an informant was offered a deal in

[7] Note that our initial research plan did not include a consideration of whether cases included more than one jailhouse informant. However, during the analysis, we saw that a number of cases did have more than one jailhouse informant. Thus, information about this variable is not included in the introduction, but is presented in both the Results and the Discussion section.

[8] This is a far cry from what would happen in ancient Athens if an informant's information was determined not to be true; the informant would be put to death (Neuschatz & Golding, 2022).

exchange for testifying, and the informant chose to provide false information in light of that incentive. Is it possible to craft an incentive that does not compel a prospective informant to lie? The American Psychological Association maintains that "psychologists make reasonable efforts to avoid offering excessive or inappropriate financial or other inducements for research participation when such inducements are likely to coerce participation" (online: https://www.apa.org/ethics/code).

Certainly, we are not suggesting that research participation is akin to providing informant testimony, but the question we are posing is this: is offering an excessive incentive a form of coercion? Can a deal sometimes be too attractive to ignore? An exceedingly attractive offer to a jailhouse informant obviously can hurt a potentially innocent defendant, but there are risks to society as well. At times, jailhouse informants have been released because of a deal, only to go on and commit additional crimes. Often the punishment for these later crimes is reduced when the informant informs again and again. See, for example, the case of informant Paul Skalnick, who sent over 30 defendants to prison, even some to death row, while he continued to commit crimes each time that he was released (Colloff, 2019).

A. Limitations

There are some limitations to the research presented here. Since we limited our work to an examination of the summaries in the IP, NRE, and CTI, it is possible that the available information was not complete (e.g., a jailhouse informant recanted, but that recantation was not entered in any of these databases).

Another limitation is the fact that we only analyzed the circumstances in 375 U.S. DNA exoneration cases. We cannot tell, from this analysis, how often jailhouse informants are used overall, how often they are providing false testimony, and how often they are recanting their statements. There are ways to extend this analysis. For example, The National Registry of Exonerations (online: https://www.law.umich.edu/special/exoneration/Pages/about.aspx) includes additional U.S. DNA exoneration cases and cases of exoneration that are not based on DNA evidence. As of this writing, there are over 3,200 cases within this database. Researchers may wish to expand the present analysis to investigate the role of informants in both DNA and non-DNA exoneration cases. Researchers may also wish to investigate the role of jailhouse informants in other countries (see e.g., High, 2021).

Researchers may also want to explore further the role of jailhouse informants in DNA exoneration cases by reviewing case documentation such as trial transcripts. This general approach has been taken by Neuschatz et al. (2020) and Fessinger et al. (2020), who analyzed trial transcripts from 22 and 28 cases respectively. In addition, the CTI database included information from available trial transcripts. However, additional cases could still be considered. Prior to 2020, the Innocence Record was a searchable database of available public records for DNA exonerees (e.g., trial transcripts); it is not currently available. Future researchers may wish to consult this database or its yet-to-be announced replacement as an additional source of information.[9] Still, this just

[9] As of this writing, the Innocence Record website has been unavailable for at least the past two years as the website is currently in the process of undergoing reconstruction.

provides information regarding the use of informants in U.S. cases in which the defendant has been exonerated. It is, of course, possible that informants are inappropriately incriminating defendants who do not have the benefit of being able to establish their innocence definitively.

B. Suggested Reforms

Recently, there has been an effort in some jurisdictions for reform with regard to informant testimony, and different states have taken different approaches to this issue. Given our focus on jailhouse informant recantation, we will present examples of U.S. states which include a consideration of recantation in their rules.

For example, in recent years, Oklahoma and Nebraska created new rules for jailhouse informant testimony. These rules require that prosecutors reveal an informant's criminal history and informant history, and any incentives promised in exchange for testimony. Oklahoma and Nebraska also require that prosecutors reveal any information regarding whether the informant has recanted (Zavadski & Syed, 2019).

As of 2019, Illinois requires a hearing to determine the reliability of jailhouse informants in murder, sexual assault and aggravated arson cases before such testimony can be presented at trial. The information provided is required to include the informant's criminal history, what incentive was provided for the testimony, and details of any previous informant activities (Schoenburg, 2018). In addition, at least 30 days before the hearing, prosecutors must provide this key information to the defense (*Informing injustice*). Illinois's statue also requires the court to consider whether the informant had recanted and if so, requires a consideration of the circumstances surrounding that recantation (e.g., names of those present at the recantation) (online: https://codes.findlaw.com/il/chapter-725-criminal-procedure/il-st-sect-725-5-115-21.html).

California, Connecticut, Oklahoma and Utah also now require that certain jury instructions be used when jailhouse informant witnesses are included in a trial. These instructions are designed to encourage jurors to apply greater scrutiny when assessing the credibility of jailhouse informants. Thus, the instructions detail factors that jurors should consider including the informant's criminal history and history as an informant, expected incentives and whether the informant has recanted or changed his or her statements (*Informing injustice).*

Thus, as you can see, some of the recently enacted laws indicate that whether an informant has recanted should be considered when evaluating an informant's credibility. In 2018, the American Legislature Exchange Council put forth a proposal of model jailhouse informant reform legislation (online: https://alec.org/model-policy/jailhouse-informant-regulations-2/).

This document proposes evidentiary standards regarding the admissibility of jailhouse informant testimony, including a recommendation to consider whether the informant modified or recanted his or her testimony at any time. The results of the present work suggest that any reform should include a consideration of whether any informants in a case have recanted, and as noted above, some jurisdictions have followed this recommendation. We maintain that, at the very least, a freely offered recantation should provide sufficient basis to vacate a conviction if the state could not have won its case without the recanted testimony. This approach to informant testimony shows

promise as it would alleviate one of the problems seen in the DNA exoneration cases in the U.S. in which an exoneree was convicted *just* on the word of an informant.[10] Beyond that, the motive for recantation and the circumstances in which the recantation occurs should be evaluated in an effort to evaluate the credibility of the recanting witness. If one determines, for example, that the witness was pressured either to provide testimony, or to recant, that should help determine which statement is the more trustworthy (Covey, 2015).

C. Future Research

The recantation of jailhouse informants has scarcely been considered by researchers, thus there are still unaddressed questions. For example, one component of recantation that may be important is when the recantation occurs. Although information regarding the length of time before recanting is not typically provided in these summaries, we could ascertain that some informants recanted after a relatively short amount of time (e.g., in Paul Jenkins' case and in Freddie Joe Lawrence's case, the informant asked to be moved to a different jail, and once he moved, he recanted), while others waited years (e.g., the informant in William Dillon's case waited 27 years to recant (Garrett, 2011)). Would these differences matter to jurors and judges? Future researchers need to determine more definitively under what conditions recanting witnesses will likely be and should be believed.

Another area that needs further consideration is how people view other types of informants. All three kinds of informants (jailhouse, community and co-perpetrator) have played a role in the conviction of those who were wrongly convicted (see Fessinger et al. (2020); Neuschatz et al. (2020)). Indeed, other types of informants have also recanted. For example, in 2000, David Ayers was arrested for the murder of Dorothy Brown. Among the evidence against him was the word of a community witness, Kevin Smith, a friend of Ayers, who said that Ayers had called him prior to the body being discovered to report that Brown had been murdered. Ayers later recanted this statement indicating that he had been pressured by the police to make this statement (online: https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3868). This is just one example of a cooperating witness incriminating a defendant and then recanting; there are others, however few researchers have considered cooperating witnesses and co-perpetrator witnesses at all (as Roth, 2016 has noted). In addition, to our knowledge, no one has considered the effects of the recantation of these types of informants. Of course, all types of informants may be incentivized to lie and to recant, and thus researchers need to continue to consider how jurors view them and they need to understand how to help jurors become more discerning in their evaluations of this type of testimony.

---

[10] Note that California, among a few others, has enacted legislation indicating that a defendant may not be convicted solely on the basis of the "uncorroborated testimony of an in-custody informant" (see Cal. Penal Code § 1111.5 (West 2016), para 1). In addition, some states have "corroboration requirements for accomplice testimony in criminal trials" as well (see Saverda, 1990, p. 787). Roth (2016) maintains that such corroboration rules are not sufficient to protect against wrongful conviction as it is relatively easy to come up with other evidence to support a conviction (e.g., the word of another informant).

D. Conclusion

Jailhouse informants clearly have played a role in wrongful conviction, and the present research has revealed that sometimes the informant has recanted. While the number of jailhouse informants who have recanted is not large, the amount of time that exonerees spent in prison as a function of, at least in part, recanted informant testimony, certainly is. This work is meant to add to the call for reform with regard to the way the legal system works with jailhouse informants; any reform with regard to informants should consider the case of the recanting informant. We are not suggesting that courts should automatically see recantations as credible or incredible. Both extremes are unwarranted. As Heder and Goldsmith (2012) argue, there needs to be "a system in place, which automatically weeds out clearly unreliable recantations" but will "force courts to consider the veracity of a recantation independent of its historic untrustworthiness" (p. 130). Courts should not continue their tendency to disregard informant recantations, especially in cases in which the convictions are based solely on the word of an informant.

XI References

Bechtol v. Prelesnik, (2012). Case No. 1:09-cv-576 (W.D. Mich. Aug. 29.)

Berman, Frederic S, & Brian Carroll, "Witness recantation—how does it affect judgment of conviction?" (1990) 35:3 NYU L 593.

Brady v. Maryland (1963), 373 U.S. 83, 87.

Cal. Penal Code § 1111.5 (West 2016).

Colloff, Pamela, "How this con man's wild testimony sent dozens to jail, and 4 to death row," *The New York Times* (4 Dec 2019), online: <https://www.nytimes.com/2019/12/04/magazine/jailhouse-informant.html>

Covey, Russell D, "Recantations and the perjury sword" (2015) 79 Ala L Rev 861.

DeLoach, Danielle K, et al, "The role of ulterior motives, inconsistencies, and details in unreliable jailhouse informant testimony" (2020) 26:7 Psychol Crime Law 667.

Dodds, Emily Jane, "I'll make you a deal: How repeat informants are corrupting the criminal justice system and what to do about it" (2008) 50:3 William Mary law rev 1063.

Fessinger, Melanie B, et al, "Informants v. innocents: Informant testimony and its contribution to wrongful conviction" (2020) 48 Cap U L Rev 149.

Garrett, Brandon, *Convicting the innocent: Where criminal prosecutions go wrong* (Cambridge, Massachusetts: Harvard University Press, 2011).

Gershman, Bennett L, "Witness coaching by prosecutors" (2002) 23:3 Cardoza Law Rev 829.

Golding, Jonathan M, et al, "The perception of a jailhouse informant in a sexual assault case" (2020) 38 J Police Crim Psychol 281.

Golding, Jonathan M, et al, "The influence of jailhouse informant testimony on jury deliberation" (2022) 28:4 Psychol Public Policy, Law 560.

Gross, Alexandra E, & Samuel R Gross, "Witness recantation study: Preliminary findings" (2013), online:

<https://www.law.umich.edu/special/exoneration/Documents/RecantationUpdate_5_2013.pdf>

Gross, Samuel R, Maurice Possley, & Klara Stephens, "Race and wrongful convictions in the United States" (2017), online: <https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf>

Heder, Adam, & Michael Goldsmith, "Recantations reconsidered: A new framework for righting wrongful convictions" (2012) 1 Utah LR 99.

Heath, Wendy P, "Arresting and convicting the innocent: The potential role of an 'inappropriate' emotional display in the accused" (2009) 27:3 Behav. Sci. Law 313.

High, Anna, "The exclusion of prison informant evidence for unreliability in New Zealand" (2021) 25:3 IJE & P 217.

Jailhouse informant regulations, online: American Legislative Exchange Council, <https://alec.org/model-policy/jailhouse-informant-regulations-2/>

The Justice Project, *Jailhouse snitch testimony: A policy review* (2007), online: <https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf>

Jenkins, Baylee D, et al, "Testing the forensic confirmation bias: How jailhouse informants violate evidentiary independence" (2021) 38 J Police Crim Psychol 93.

Kassin, Saul M, "It's time to bury three justice-corrupting myths once and for all" (2022) 11:2 JARMAC 161.

Lillquist, Erik, "Improving accuracy in criminal cases" (2007) 41:4 U Rich L 897.

McDonnell Hill, Michael, "Seen but not heard: An argument for granting evidentiary hearings to weigh the credibility of recanted testimony" (2011) 46 Ga L Rev 213.

Maeder, Evelyn M, & Emily Pica, "Secondary confessions: The influence (or lack thereof) of incentive size and scientific expert testimony on jurors' perceptions on informant testimony" (2014) 28 Law Hum Behav 560.

Maeder, Evelyn M, & Susan Yamamoto, "Attributions in the courtroom: The influence of race, incentive, and witness type on jurors' perceptions of secondary confessions" (2017) 23:4 Psychol Crim Law 361.

Mote, Preston M, et al, "Secondary confessions as post-identification feedback: How jailhouse informant testimony can alter eyewitnesses' identification decisions" (2018) 33 J Police Crim Psychol 375.

Natapoff, Alexandra, *Snitching: Criminal informants and the erosion of American justice* (New York: New York University Press, 2009a).

Natapoff, Alexandra, "Troy Davis gets a hearing-recantation redux" (18 August 2009b), online: Snitching (blog), <https://snitching.org/?s=recantation>.

Natapoff, Alexandra, "The shadowy world of jailhouse informants: An explainer" *The Appeal* (2018), online: <www.theappeal.org>.

Neuschatz, Jeffrey S, et al, “The truth about snitches: An archival analysis of informant testimony” (2020) 28:4 Psychiatr Psychol Law 508.

Neuschatz, Jeffrey S, & Jonathan M Golding, *Jailhouse informants: Psychological and legal perspectives* (New York: New York University Press, 2018).

Neuschatz, Jeffrey S, et al, “Unreliable informant testimony” In Brian. L. Cutler, ed, *Conviction of the Innocent: Lessons from Psychological Research* (Washington, DC: American Psychological Association, 2012) at 213.

Neuschatz, Jeffrey S, et al, “The effects of accomplice witnesses and jailhouse informants on jury decision making” (2007) 32 Law Hum Behav 137.

Neuschatz, Jeffrey S, et al, “Secondary confessions, expert testimony, and unreliable testimony” (2012) 27 J Police Crim Psychol 179.

Nickerson, Raymond S, “Confirmation bias: A ubiquitous phenomenon in many guises” (1998) 2:2 Rev Gen Psychol 175.

Rankin, Bill, “Troy Davis, from gurney, proclaims innocence before execution”, *The Atlanta Journal Constitution* (22 Sept 2011), online: <https://www.ajc.com/news/local/troy-davis-from-gurney-proclaims-innocence-before-execution/fJuvsAwnEuOWPhdNDx6aQP/>.

Rock v. Arkansas (1987). 483, U.S. 44.

Rohrlich, Ted, “Review of murder cases is ordered: Jailhouse informant casts doubt on convictions based on confessions”, *Los Angeles Times.* (29 Oct 1988), online: <https://www.latimes.com/archives/la-xpm-1988-10-29-mn-329-story.html>.

Ross, Lee, Mark R Lepper, & Michael Hubbard, “Perseverance in self-perception and social perception: Biased attributional processes in the debriefing paradigm” (1975) 32:5 J Pers Soc Psychol 88.

Roth, Jessica A, “Informant witnesses and the risk of wrongful convictions” (2016) 53:3 Am Crim L 737.

Schoenburg, Bernard, “Law on informants designed to avoid wrongful convictions”, *Journal Star* (8 Dec 2018), online: <https://www.pjstar.com/story/news/crime/2018/12/08/law-on-informants-designed-to/6743263007>.

Selby, Daniele, “Nine years after the execution of Troy Davis, innocent Black men are still being sentenced to death” (21 Sept 2020), The Innocence Project, online: <https://innocenceproject.org/troy-davis-pervis-payne-race-death-penalty/>.

Swanner, Jessica K, Denise R Beike, & Alexander T Cole, “Snitching, lies and computer crashes: An experimental investigation of secondary confessions” (2010) 34:1 Law & Hum Behav 53.

Warden, Rob, *The snitch system*, Center on Wrongful Convictions (2004), online: <https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf>.

Warden, Rob & Patricia Haller, *Profile of a snitch.* Chicago Lawyer (1987), online:<https://wwws.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/profile-of-a-snitch.pdf>.

Wetmore, Stacy A, et al, "'The witness is lying!': The impact of a defendant countering a jailhouse informant's testimony" (2022) Psychol Crim Law. Online: <https://doi.org/10.1080/1068316X.2022.2049265>.

Wetmore, Stacy A, et al, "Do judicial instructions aid in distinguishing between reliable and unreliable jailhouse informants?" (2020) 47:5 Crim. Just. & Behav 582.

Wetmore, Stacy A, Jeffrey S Neuschatz, & Scott D Gronlund "On the power of secondary confession evidence" (2014) 20:4 Psychol Crim Law 339.

'*Where is the justice for me?' The case of Troy Davis, facing execution in Georgia*, online: Amnesty International <https://www.amnestyusa.org>

Yaroshefsky, Ellen, "Cooperation with federal prosecutors: Experiences of truth telling and embellishment" (1999) 68:3 Fordham Law Rev 917.

Zavadski, Katie & Moiz Syed, "30 years of jailhouse snitch scandals" *Propublica* (4 December 2019), online:<https://projects.propublica.org/graphics/jailhouse-informants-timeline#:~:text=30%20Years%20of%20Jailhouse%20Snitch%20Scandals%20More%20than,reforms%20that%20exist%20haMaryve%20yet%20to%20prove%20effective>.

Table 1. A Comparison of Demographics and Sentences for All Considered Groups

	Demographics	Sentences
Full Sample of DNA Exonerees (N = 375)	Asian n = 1 Black n = 227 Hispanic n = 29 Native American n = 2 White n = 116 Juveniles n = 41	Life Sentences n = 126 Death Sentences n = 21** Average time served: 16.30 years
Cases with Jailhouse Informants (n = 55)	Asian n = 0 Black n = 21* Hispanic n = 4 Native American n = 0 White n = 30* Juveniles n =3	Life Sentences n = 19 Death Sentences n = 8** Average time served: 16.38 years
Cases with Recanting Jailhouse Informants (n = 13)	Asian n = 0 Black n = 6 Hispanic n = 0 Native American n = 0 White n = 7 Juveniles n = 0	Life Sentences n = 6 Death sentences n = 1 Average time served: 19.60 years
Cases with Jailhouse Informants That did not Recant (n = 42)	Asian n = 0 Black n = 15 Hispanic n = 4 Native American n = 0 White n = 23 Juveniles n = 3	Life Sentences n = 12 Death Sentences n = 7 Average time served: 15.40 years

Note. * White defendants were more likely than Black defendants to have an informant involved in their case, $p < .0001$; ** There was a greater tendency for those with informants to be given the death penalty, $p < .005$.

Appendix A. Cases with Jailhouse Informants

Cases with Jailhouse Informants (*n* = 55) Compiled From the First 375 DNA Exonerees From the Innocence Project		Race of Defendant	Type of Incentive	Did Jailhouse Informant Recant?	Number of Jailhouse Informants Involved in Case	Factors Contributing to Conviction Beyond Informants
Last Name	**First Name**					
Adams	Kenneth	Black	Deal	yes	1	E,C,F
Allen	Donovan	White			2	C
Avery	William	Black		yes	3	C
Ayers	David	Black			1	
Barnes	Steven	White	Deal		1	E,F
Brown	Roy	White	Deal		1	G,F
Camm	David	White			3	C
Cruz	Rolando	Hispanic	3 Deals		3-5*	C,G,F
Davis	Ricky	White			1	C,F
Davis	Jeramie	White			1	
Davis	Cody	White			1	E
Dedge	Wilton	White	Deal		1	E,F
Dillon	William	White	Deal, Pressure	yes	1	E,F
Fain	Charles	White			2	F
Fogle	Lewis	White	Pressure		3-5*	C
Frey	Joseph	White			1	E
Fritz	Dennis	White	Deal		1	C,F
Gagnon	Richard	White		yes	1	
Gates	Donald E.	Black	Deal		1	F
Godschalk	Bruce	White	Deal		1	E,C,G
Gray	David A.	Black	Deal	yes	1	E,F
Gray	Paula	Black			1	E,C,I,F
Halstead	Dennis	White	2 Deals		2	C,F
Heins	Chad	White			2	F
Hernandez	Alejandro	Hispanic	2 Deals		5	C,G,F
Hicks	Anthony	Black			1	E,I,F
Hunt	Darryl	Black	2 Deals		2	E
Isbell	Teddy	Black			6	E,C,G
Jenkins	Paul	White	Deal	yes	1	
Jimerson	Verneal	Black			1	E,C,G,F
Kogut	John	White	Deal		1	C,F
Kussmaul	Richard	White		yes	1	E,G,I,F

Lawrence	Freddie Joe	White	Deal		1	
McCarty	Curtis	White			1	G,F
Mills	Damian	Black			1	E,C,G
Peterson	Jamie Lee	White			1	C
Peterson	Larry	Black	Deal		1	F
Rainge	Willie	Black	Deal	yes	1	E,C,I,F
Restivo	John	White	2 Deals		2	C,F
Rivera	Juan	Hispanic			1	E,C,F
Roman	Miguel	Hispanic	Deal		1	
Saecker	Frederic	White			1	C,F
Sagin	Jack	White		yes	1	
Sledge	Joseph	Black	Deal	yes	2	F
Tribble	Santae	Black	Deal		1	I,F
Wallis	Gregory	White			1	E
Washington	Calvin E.	Black	2 Deals, 1 Pressure		2	F
Watkins	Jerry	White	Deal	yes	1	G,F
Whitley	Drew	Black	Deal		1	E,F
Wilcoxson	Robert	Black			6	E,C
Williams	Dennis	Black	Deal	yes	1	E,C,I,F
Williams, Jr.	Larry	Black			1	E,C,G
Williamson	Ronald Keith	White			2	C,G,I,F
Wyniemko	Kenneth	White	Deal	yes	1	E
Yarris	Nicholas	White	Deal		1	E,C

Note. *Sources disagree on the number of jailhouse informants involved. E = Eyewitness Misidentification. C = False Confessions or Admissions. G = Government Misconduct. I = Inadequate Defense. F = Unvalidated or Improper Forensic Science.

Barred: Why the Innocent Can't Get Out of Prison

By Daniel Medwed
Distinguished Professor of Law and Criminal Justice, Northeastern University
Boston, U.S.A.
(New York; Basic Books, 2022)

Reviewed by Valena Beety,
Law Professor, Arizona State University Sandra Day O'Connor College of Law
Phoenix, U.S.A.

The United States is at a critical juncture. The American Supreme Court is stripping protections of certain long-standing rights, and actions that were previously legal can now be criminal, such as obtaining an abortion or even providing information about abortion. In this moment, what is innocence and guilt? How do we fight to prevent wrongful convictions and help people that have already been wrongly convicted? With the changing laws, there's a renewed sense that any of us can be wrongly convicted. Wrong state, wrong race, wrong time.

This is where *Barred: Why the Innocent Can't Get Out of Prison ("Barred"),* written by Professor Medwed, steps in. The book teaches us about the longer-standing struggle, the barriers enacted over decades at each stage of that struggle, and the long fight to free people from wrongful convictions. As Professor Medwed says, "*procedure* is the key." If the rules are going to change, these are the rules that need changing.

For three decades, the innocence movement has focused on proving "factual innocence" with DNA evidence. Bodily fluids collected and tested shows it wasn't Jon who committed the crime, it was James. Substance.

But as Professor Medwed details, far more people are wrongly convicted than those who can rely on exculpatory DNA evidence. DNA has been crucial to exposing the many causes of wrongful convictions: faulty forensic evidence, police and prosecutor misconduct, mistaken eyewitnesses, unreliable informants, false confessions, and racism. DNA opens the doors to recognizing these other causes of wrongful convictions. But what next?

Barred walks us through the procedural barriers at each step a wrongly convicted person takes toward freedom. As Medwed describes it, "the rule regime is stacked *against* the innocent, contrary to the popular belief that the post-conviction process is full of escape hatches from the prison cell, those imaginary 'technicalities' that let people loose[…] You can have evidence of innocence – and no one willing to hear it."

Professor Medwed does not come by his wealth of knowledge easily, nor by simply reading books. He has litigated with both winning and losing outcomes across his body of work. He has represented people as a defense attorney, a post-conviction litigator, and an innocence advocate. He has also, in his years as a professor, warned us of problems in the criminal legal system that

keep innocent people locked up. We are lucky to have his wealth of insight gathered together into one book: *Barred*.

Through the pages of *Barred,* Medwed turns to the topic of procedure for the next stage of innocence work. If it is procedure that creates the bars, then it is those bars we must bend to free innocent people. As Michelle Alexander says about the criminal legal system in *The New Jim Crow*, every birdcage has its door. That door can be the rules of criminal pre-trial and post-conviction litigation, which are rules which Medwed knows well.

Barred is handily divided into four sections: trial and direct appeal; post-conviction litigation; clemency or pardons through the executive branch; and paths forward.

Medwed's analysis of each stage of the criminal process and how it traps innocent people shines light on how *all* people are treated within the criminal justice system at these different stages. For example, plea bargaining is foisted on innocent people – as well as on 95% of the population, out of fear that a trial will mean they face a more severe sentence for exercising their constitutional right to a jury trial. As Medwed says, the jury trial "is practically extinct" and with it "what's lost is a public reckoning."

Medwed also shares a story when describing the procedural bar at each stage of a case. We fall into people's lives, captured by the insanity of their incarceration and the clarity of their innocence. But Medwed provides us an escape as well – suggestions for changing procedure. What about limiting the size of the trial tax? Making crime labs and other evidence equally accessible to all parties rather than relying on prosecutors to review and then disclose the evidence to defendants? Banning guilty pleas from including an automatic waiver of the person's right to appeal? All of these are doable.

Medwed identifies that the true culprit of wrongful convictions is the fixation by the criminal justice system on finality. Reviewing courts give tremendous deference to the decisions by the trial court, and even if something goes wrong, that error can be dismissed as "harmless." In reviewing DNA exonerations where the incarcerated person had previously challenged their conviction without success, Medwed shares "the most distressing thing about the harmless error doctrine is that its guilt-based approach lets wrongful convictions slip through the cracks because appellate courts misjudge the strength of the trial evidence."

In post-conviction litigation, we learn about the importance of state trial courts and the closed door of federal court. The barriers to relief in federal court include deference to said state courts, obstacles to appeal, and time restrictions.

These time restrictions are serious and damning. Medwed elucidates this point by discussing Jeff Deskovic's case. Jeff's attorney called the court clerk to determine if his client's habeas petition needed to be put in the mail and stamped by April 24, or received by April 24. He was told having it in the mail by April 24 was sufficient. It was not, and a federal court refused to hear Jeff's petition because it was "untimely." Nine years later, DNA evidence finally exonerated him. He could have been freed earlier had a federal court only reviewed his case, instead of dismissing it out of hand.

Jeff's case is but one of many shared in *Barred.* The stories of shared lives and struggles of the wrongly convicted can inform all of us about both problems and solutions.

In reading *Barred*, I'm reminded of author Alexis Pauline Gumbs advice, "listening is not only about the normative ability to hear, it is a transformative and revolutionary resource that requires quieting down and tuning in." It may be hard to tune in. It may be a challenge to hear the barriers laid out by Medwed. But it is through listening that we can ultimately communicate, with the goal of transforming those barriers into open doors. Medwed's insights and poignant stories leave my heart aching, but my spirit stirred for change.