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Wrongful Convictions in Japan: Causes, Challenges, and Preventive Measures

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This study provides a broad overview of the current state of wrongful conviction research in Japan and derives several key lessons from its findings. The criminal justice system heavily relies on interrogations, reinforced by systemic flaws. With an exceptionally high conviction rate, judges' role in determining guilt is largely limited, making prosecutors the key decision-makers. Once arrested and indicted, innocent individuals face detention, prolonged interrogations, and inherently unequal circumstances. These structural issues often lead to wrongful convictions, as investigators extract false confessions and accomplice statements based on their mistaken assumptions. Failure to address these causes has allowed wrongful convictions to recur in the same patterns. Psychological factors and types of evidence recognized globally as causes of wrongful convictions also play a role in Japan. This highlights the universality of wrongful conviction risks and underscores the need for international collaboration. Since transitioning away from interrogation-dependent investigations is difficult, developing an alternative investigative model is essential and also calls for global research. For the prevention of wrongful convictions, Japan has traditionally refined fact-finding through evidentiary evaluation guided by the Cautionary Principle, grounded in the knowledge base developed from past judicial rulings. A new approach has been proposed that integrates risk management principles, aiming to prevent future errors by continuously analyzing the causes of wrongful convictions and systematizing the lessons learned. The idea of "learning about and from wrongful convictions" is emerging as a critical theme in global wrongful conviction research.

I Introduction

The United States has played a leading role in research on wrongful convictions. In addition to exonerating numerous individuals, it has implemented reforms based on these cases, leading to improvements in its criminal justice system. These developments have been widely recognized internationally. However, wrongful convictions are a concern not only in the United States but across various jurisdictions. International collaboration, facilitated through the exchange of research findings between countries, can contribute to a more effective approach to reducing such convictions globally.

This study examines the causes and prevention of wrongful convictions in Japan for readers around the world. Identifying factors in Japan that align with those observed in other countries would support the universality of such causes and highlight the potential for collaborative research. At the same time, findings unique to Japan may offer valuable insights applicable in other contexts.

The rest of this article proceeds in three parts. Section 2 provides an overview of Japan's criminal justice system and some of the salient issues in it. Although Japan is frequently commended for its high level of public safety, this section shows that the system also has serious weaknesses and vulnerabilities. Section 3 examines the causes of wrongful convictions in Japan. In addition to identifying causes that also occur in other national contexts, this section highlights Japan's heavy reliance on interrogations, which leads to false confessions and false statements by accomplices. The salience of these causes is one of the main Japanese distinctives to emerge both from this study and from prior research. Section 4 outlines two of the measures that have been proposed to prevent wrongful convictions in Japan, including the Cautionary Principle, a framework for evidence evaluation, and a more recent approach that incorporates insights from the study of risk management. Section 5 presents the lessons drawn from wrongful convictions in Japan and indicates the necessity, significance, and direction of international research aimed at preventing future wrongful convictions.

II Issues in Japan's Criminal Justice System

A. Integrity of the Judicial System

Japan follows the principle of separation of powers, dividing authority among the legislative, executive, and judicial branches. While instances of judicial corruption such as bribery are rare[1], official misconduct has been regarded as a serious concern. In particular, cases involving the coercion of confessions, falsification of evidence, and fabrication of evidence by prosecutors and police have been documented (e.g., *Hakamada Jiken* [Case No. 19]; *Kōrosho Moto Kyokuchō Enzai Jiken* [Case No.37][2]).

B. Criminal Investigation Issues

Japan's investigative system is notably dependent on interrogations. This practice has been credited with enabling efficient investigations and maintaining public safety (Keisatsuchō, 2012), but it has also faced criticism for contributing to wrongful convictions through false confessions and coerced statements (Foote, 1991; Johnson, 2002; Hōsēshingikai, 2013).

Several factors underlie this emphasis on interrogations, including historical developments, the prioritization of investigative efficiency, the aim of uncovering the full truth, including motives, and relatively limited authority to collect objective evidence compared to other countries[3].

This reliance has resulted in the widespread use of prolonged interrogations. A 2010 Ministry of Justice survey involving 8,223 cases found that the average interrogation time per

[1] According to Trace International, Japan ranked tenth worldwide for low bribery risk in 2024, making it the most transparent country in Asia (Trace International, 2025).

[2] Case numbers referenced throughout the article correspond to the cases listed in Table 1, below.

[3] For example, in Japan, plea bargaining, criminal immunity, wiretapping, and undercover operations are restricted by legislation or judicial precedent.

suspect was approximately 22 hours, with the average for murder cases being around 51 hours (Hōmushō, 2011)[4]. Among the 1,692 cases (21%) in which suspects initially denied the charges during prosecution questioning, 861 eventually confessed before the final decision, compared to 831 who maintained their denial. This pattern raises two concerns: first, that confessions obtained following an initial denial may be coerced and unreliable; and second, that extended interrogation durations can erode denials regardless of their accuracy.

Regarding the criminal justice system, the framework of detention facilitates interrogations. In 2023, the rate of physical detention for cases referred to the public prosecutor's office was 34.8%. Under this framework, suspects may be detained for up to 72 hours after arrest, and prosecutors may then request pre-indictment detention of up to 20 additional days. In total, suspects can be held for as long as 23 days before indictment. More than 90% of pre-indictment detention occurs in police stations, a practice criticized as a form of "substitute prison" (*daiyō kangoku*) that allows investigators to exercise continuous control over suspects. Detention is carried out on a case-by-case basis rather than per individual. Consequently, if additional charges are brought, arrests and pre-indictment detention can be repeatedly extended for up to 23 days. For example, a suspect initially arrested on suspicion of theft may be re-arrested for fraud, enabling authorities to reset the detention period and prolong custody.

Barriers to interrogation are minimal. While suspects are legally entitled to remain silent, Japanese law has been interpreted to impose a "Duty to Submit to Questioning" (*torishirabe junin gimu*) on those in detention. Although detainees are not required to speak, they cannot refuse to attend interrogation sessions. This interpretation is derived from applying an *a contrario* approach to the Code of Criminal Procedure. The Supreme Court has ruled: "it is evident that interpreting a suspect under detention as having a duty to appear for and remain in interrogation does not immediately mean depriving the suspect of the freedom to refuse to make a statement against their will."[5] Hence, interrogations continue even when suspects refuse to answer, often under the guise of "persuasion" (Foote, 1991). Defense counsels are not legally entitled to be present during interrogations, and prosecutors almost invariably deny requests for such attendance. Video recording of interrogations was introduced in 2019, but the requirement applies to only about 3% of criminal cases, primarily those subject to lay judge trials (Nihon Bengoshi Rengōkai, 2024b; Kensatsuchō, 2025). Moreover, interrogations outside physical detention, such as pre-arrest questioning or witness interviews, remain unrecorded.

The results of interrogations are typically summarized by investigators in written statements rather than recorded verbatim. If signed and sealed by the suspect, these statements may be admitted as evidence under certain conditions. Because investigators draft them, the content often reflects prosecutorial priorities, omitting inconvenient details (Nihon Bengoshi Rengōkai, 2024b; Ibusuki, 2024). Despite longstanding criticism (e.g., Hirano, 1985 [1989 English trans.]), Japanese judges have traditionally relied on "*document-based trials*" (*chōsho saiban*), determining verdicts by reviewing written statements in chambers rather than through live

[4] According to another survey by the Ministry of Justice, interrogations in Western countries on average typically last from several minutes to a few hours (Hōmushō, 2011).

[5] Supreme Court of Japan. (1999, March 24). *Minshū*, 53(3), 514.

testimony. While the introduction of the lay judge system has reduced this practice, written statements continue to play a significant role in criminal trials.

Japan also introduced a plea bargaining system in 2018, but it has been rarely utilized[6]. Courts have held that statements by co-defendants under plea agreements risk being tailored to meet prosecutorial expectations, making their admissibility uncertain. Moreover, prosecutors are often able to obtain favorable statements through conventional interrogations, further limiting the use of plea bargaining.

C. Criminal Trials Issues

Criminal trials in Japan are generally presided over by professional judges, who determine both guilt and sentence. Since 2009, however, cases punishable by death or life imprisonment, along with intentional crimes resulting in death, have been subject to the lay judge system. With few exceptions, all cases in this category must be tried before a mixed panel of three professional judges and six lay judges, and defendants cannot opt out. In 2023, 807 defendants (1.8%) were tried under this system, while the vast majority of cases continued to be adjudicated solely by professional judges (Saikō Saibansho Jimusōkyoku, 2024). Japanese criminal trials also face distinctive challenges, as discussed below.

i. High Conviction Rate

Japan's conviction rate is exceptionally high, prompting criticism that prosecutors effectively determine outcomes, while courts merely confirm their decisions (Hirano, 1985 [1989 English trans.]). Although this is partly explained by the prosecution's strict indictment standards, it may conceal numerous wrongful convictions (Johnson, 2002, 2019).

In 2023, police and other investigative bodies reported 703,351 Penal Code offenses, of which 269,550 cases (involving 183,269 individuals) were cleared (Hōmushō Hōmu Sōgo Kenkyūjo, 2024). As a general rule, cleared cases are referred to prosecutors, although minor offenses may instead be concluded with a strict warning. In 2023, 48,292 individuals (26.4%) were processed in this way.

Prosecutors typically indict only when there is a high probability of conviction (Shihō Kenshūjo Kensatsu Kyōkan Shitsu, 2023). Accordingly, the 2023 indictment rate was 36.9%, with 64,695 individuals prosecuted (Hōmushō Hōmu Sōgo Kenkyūjo, 2024). More than half (56.1%; 444,261 individuals) of referred cases resulted in suspended prosecution, in which prosecutors acknowledged the facts but declined to indict due to mitigating circumstances. Additionally, Japan

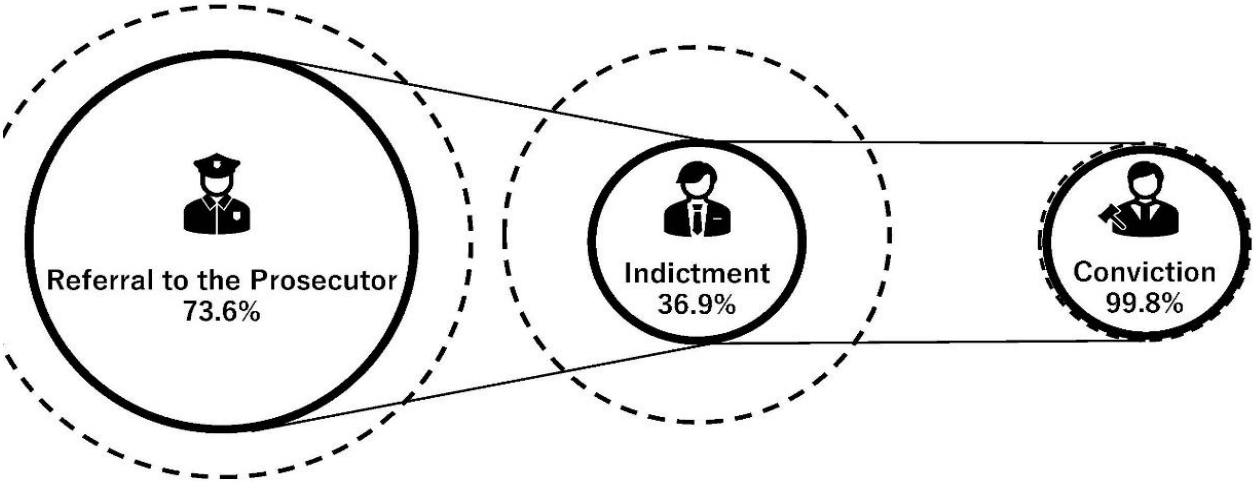
[6] It has been used in only five cases from 2018 to February 2025 (Sankei Shimbun, 2025). For example, in the case involving former Nissan chairman Carlos Ghosn for the underreporting of executive compensation, Gregory Kelly was convicted at both the trial and appellate levels for his alleged involvement. However, concerning the testimony obtained through plea bargaining from Nissan's former head of the secretary's office, the Tokyo High Court emphasized that such testimony "carries the risk of being tailored to the prosecutor's expectations in the hope of receiving favorable treatment," and declined adoption for most of it.

employs a summary procedure allowing fines to be imposed without a formal trial if the offense is minor and the suspect consents. This differs from the police practice of issuing warnings for minor cases, as the summary procedure is prosecutorial and results in a court-issued fine. In 2023, 162,761 individuals (20.6% of those finalized by prosecutors) were processed under this procedure (Hōmushō Hōmu Sōgo Kenkyūjo, 2024).

According to 2023 statistics, 43,880 first-instance cases were concluded (Saikō Saibansho Jimusōkyoku, 2024). Excluding procedural dismissals, 42,106 cases remained, of which 42,033 resulted in guilty verdicts, yielding a conviction rate of 99.8%. In jury trials, 807 cases were decided, and 795 ended in guilty verdicts, for a conviction rate of 98.5%.

Two points qualify for these figures. First, Japan does not recognize guilty pleas as in the United States, and even full-confession cases are processed as trials. When limited to contested cases, the conviction rate is about 96%, which is still high, but less extreme than 99.8%. Moreover, if guilty plea cases were included in U.S. statistics, conviction rates there would also exceed 99% (Aronson, 2021). Second, Japanese criminal statistics are difficult to reconcile, as they mix "cases" and "individuals," are separately compiled by police, prosecutors, and courts, and are based on annual tallies that do not always correspond to the timing of arrests, indictments, and trials. Although precise figures are difficult to obtain, the accompanying chart illustrates how cases are filtered successively by police, prosecutors, and courts. Notably, what distinguishes Japan is that the primary "screening" of cases occurs not in court but by investigative authorities.

Figure 1: Screening in criminal justice



ii. Inequality in Criminal Trials

Once indicted, defendants in Japan occupy a markedly disadvantageous position, with only a 0.2% chance of acquittal. Criminal trials follow an adversarial format in which the court presides over proceedings and determines guilt based on arguments and evidence presented by both sides. Because prosecutors are generally assigned consistently to each court panel, the exceptionally high conviction rate raises concerns that judges may develop a predisposed trust in the prosecution (Kitani, 2017).

Defense representation is widespread: in 2022, the appointment rate was 70.7% before indictment and 99.5% after indictment, combining both court-appointed and privately retained attorneys (Nihon Bengoshi Rengōkai, 2024a). Nonetheless, criminal defense carries little financial incentive compared to civil practice. A 2020 survey found that attorneys spent 36.4% of their time on civil litigation, but only 5.6% on court-appointed criminal defense and 2.2% on privately retained defense (Nihon Bengoshi Rengōkai, 2021). Coupled with the near impossibility of acquittals and the lack of results despite the effort, these conditions discourage many attorneys from specializing in criminal defense, and those who do often leave the field (Muraoka, 2017; Okabe, 1998).

Bail is another serious concern. Although defendants have a legal right to bail, the overall bail rate is 31.9%, while the detention rate in district courts is 72.8% (Hōmushō Hōmu Sōgo Kenkyūjo, 2024). This system has been criticized internationally as the "*hostage justice system*" (*hitojichi shihō*) (Ibusuki & Repeta, 2020; Takano, 2021; Human Rights Watch, 2023). Defendants who deny charges are more likely to be detained and held longer than those who confess (Nishi, 2025). In 2023, the bail rate before the first trial date was 26.5% for confession cases, but only 11.7% for denial cases (Nihon Bengoshi Rengōkai, 2024b). Evidentiary rules provide insufficient safeguards. While involuntary confessions are inadmissible and the Constitution prohibits conviction based solely on confession, corroboration requirements can be met when statements are shaped to fit other evidence. Moreover, convictions may rest solely on accomplice or witness testimony if deemed credible. Although perjury is a crime, proof of intent is required, therefore, mistaken testimony is rarely punished.

Evidence disclosure is also limited. Since 2005, evidence has been subject to disclosure in pretrial arrangement proceedings, but this procedure applies to only two to three percent of cases (Nihon Bengoshi Rengōkai, 2024b). Outside such proceedings, prosecutors disclose only the evidence they intend to use or choose to provide voluntarily, creating a systemic risk that exculpatory evidence remains hidden. Furthermore, because interrogations are not consistently recorded at all stages, problematic practices are often unverifiable, compounding the risk of wrongful convictions.

iii. Multiple Layers of Risk for Conviction

Prosecutors in Japan are permitted to appeal acquittals. The appellate court, as a fact-finding body, reviews the judgment and evidence from the first instance. If the factual findings are deemed unreasonable under logical or experiential rules, the court may overturn the judgment. The Supreme Court, primarily a court of law, generally refrains from reviewing factual issues. However, it may intervene if a significant factual error is found and failure to correct it would cause serious injustice. Thus, while appellate and Supreme Court review can result in exoneration, the system also allows acquittals to be reversed into convictions.

In retrial proceedings, judgments cannot be altered to the detriment of the defendant, but prosecutors may present arguments and evidence to preserve the original conviction. Retrials are granted only when "newly discovered evidence clearly proving that a not guilty verdict should be rendered" is found. This standard is interpreted extremely narrowly, making retrials extremely difficult (Foote, 1993a; Nihon Bengoshi Rengōkai, 2024b). Moreover, there is currently no legal

framework mandating disclosure of evidence in retrial proceedings, leaving disclosure to judicial discretion. As a result, obtaining new evidence necessary for retrial remains a substantial challenge.

D. Issues Relating to Wrongful Convictions

i. Limited Recognition of Wrongful Convictions

Japan's high indictment standards reduce the likelihood of innocent individuals being prosecuted. At the same time, the strict requirements for acquittal and retrial equally limit opportunities for the wrongfully charged to be acquitted and the wrongfully convicted to secure exoneration and increase the risk and harm in cases of wrongful conviction. Consequently, the number of officially recognized wrongful convictions remains low (Johnson, 2015).

Fewer than 100 acquittals are issued annually, with only zero to one retrial initiated per year, and retrial acquittals are rare. Since World War II, there have been only 20 retrial acquittals that were supported by the Japan Federation of Bar Associations (Nihon Bengoshi Rengōkai, 2024a). Japan also lacks a comprehensive database documenting wrongful conviction.

There have been five cases wherein finalized death sentences were later overturned in retrial acquittals. The most recent case, the *Hakamada Jiken* (Case No. 19), concluded with an acquittal in 2024. Mr. Hakamata spent 45 years in detention, making him the world's longest-incarcerated death row inmate, a record certified by Guinness World Records. The court ruled that key evidence used for his conviction had been fabricated (Johnson, 2024; see Foote, 1993b for earlier cases).

ii. Insufficient Public Awareness of Wrongful Convictions

The Japanese term "冤罪" (*enzai*) is broader than "wrongful conviction" or "miscarriage of justice" in English. It encompasses wrongful arrests and indictments as well as convictions (Shōgakukan, 2001), reflecting the Japanese context because of the high probability of conviction once charges are filed and the lengthy detentions that may occur even in wrongful arrest or indictment cases.

Because officially recognized wrongful convictions are few, they are often mistakenly regarded as rare exceptions, with limited relevance to the wider public.

iii. Political Inaction on Wrongful Convictions

The National Diet has historically been reluctant to legislate against wrongful convictions. A conservative ruling party has dominated postwar politics and has not prioritized criminal justice reform, partly because public awareness of such issues is low and reforms yield little electoral benefit.

Since 2021, however, public concern has grown following several high-profile exonerations and increased recording of interrogations, which exposed problematic practices. In

2024, the *Hakamada Jiken* (Case No. 19) acquittal had a particularly significant impact. In response, Diet members formed a parliamentary coalition, and legislative efforts to revise retrial procedures are underway.

Nonetheless, the Ministry of Justice, substantially influenced by the Public Prosecutors Office, has consistently opposed reforms restricting investigative authority. Major legal reforms, including amendments to the Code of Criminal Procedure, traditionally require consultation with the Ministry's Legislative Council, further slowing progress. Consequently, retrial law reform was again postponed and was not enacted during the 2025 ordinary session.

iv. Lack of Systematic Examination of Wrongful Conviction Causes

When wrongful convictions are revealed, investigative bodies seldom conduct internal reviews and publish findings. To date, the National Police Agency has reported on only six cases, and the Public Prosecutors Office also reported on six cases, but these internal reviews are often inadequate, and they seem more like attempts to avoid criticism and resist reform than sincere efforts to explain the causes of wrongful convictions [*Hakamada Jiken*(Case No.19); *Ashikaga Jiken* (Case No.27); *Himi Jiken* (Case No.32); *Shibushi Jiken* (Case No.34); *Kōrosho Moto Kyokuchō Enzai Jiken* (Case No.37); *Pasokon Enkaku Sōsa Jiken* (Case No.39); *Ōkawara Kakōki Jiken*].

Courts, however, have refrained from reviewing wrongful convictions, citing judicial independence. This is because the Court relies on the view that reviewing wrongful convictions would infringe on the independent and free judgment of the judges who handled the case and judges who may serve in the future.

Although the Japan Federation of Bar Associations has long advocated for an independent body to investigate wrongful conviction causes (Nihon Bengoshi Rengōkai, 2010b), realistically, there is limited prospect of its establishment because of the lack of political momentum.

While individual organizations have conducted study sessions and legal professionals have published their own analyses, no comprehensive system has been developed to coordinate insights across all three branches of the legal profession.

v. Limitations in Wrongful Conviction Research

Research on wrongful convictions in Japan has traditionally relied on court rulings, as judgments must provide detailed reasoning for verdicts and can extend to dozens of pages in complex cases. While not all rulings are public, many are uploaded to court websites or included in legal databases. However, access to trial evidence is severely restricted for both the public and researchers, and the use of past trial evidence for research may even incur criminal penalties. Consequently, empirical research on wrongful convictions in Japan faces significant constraints.

Despite these limitations, judges, attorneys, and scholars have critically examined wrongful convictions by analyzing past rulings, highlighting investigative and judicial errors that contributed to them. The tragic nature of wrongful convictions has spurred ongoing efforts to raise

awareness and advocate for reform. However, discussions have often focused on criticizing individuals or institutions rather than examining the underlying causes and mechanisms of wrongful convictions. Wrongful convictions are often explained by incompetence or personal failings, while proposed preventive measures remain at a conceptual level, emphasizing ideals such as "being humble toward evidence," "listening carefully to defendants," or "avoiding prejudice."

In recent years, research in the United States drawing on cognitive psychology has been introduced to Japan. Building on major prior research both in the United States and internationally, an approach referred to as "冤罪学" (*enzai gaku*; Wrongful Conviction Studies) has emerged, synthesizing these insights and analyzing the cause, prevention, and exoneration of wrongful convictions in an academic, interdisciplinary, and comprehensive manner (Nishi, 2023, 2024). This perspective frames wrongful convictions not as failures of specific individuals or organizations but as errors that anyone can commit, consistent with the saying "*to err is human.*" It distinguishes between accountability and causal analysis, aiming to prevent future wrongful convictions through systematic study of past cases. In these ways, the study of wrongful convictions in Japan echoes some of the most insightful and promising research about wrongful convictions elsewhere.

III Causes of Wrongful Convictions in Japan

A. Psychological Tendencies Contributing to Wrongful Convictions

The application of cognitive psychology to wrongful conviction research has highlighted the role of bias in Japan, confirming its universality. Beyond bias, there are also attempts to explain the causes of wrongful convictions scientifically through other concepts from cognitive and social psychology, such as heuristics, cognitive consistency, cognitive dissonance, and prejudice (Nishi, 2023, 2024). While many findings align with international research, some reflect unique features of the Japanese context. This section examines both.

i. Confirmation Bias

Confirmation bias, which is the tendency to selectively perceive information that supports one's expectations, has received particular attention in Japan. When investigators assume that a suspect is guilty, they may focus on evidence confirming this view while disregarding contradictory information (Simon, 2012). Confirmation bias makes us view new information through a warped lens and is a critical factor that leads to tunnel vision and other forms of investigative error (Godsey, 2017). This bias is made worse by the step-by-step structure of Japan's criminal justice process: cases advance from police to prosecutors, from prosecutors to courts, and from trial to appeal. Each stage produces a formal decision, reinforcing prior conclusions and amplifying confirmation bias (see Medwed, 2022).

Patterns recognized in U.S. research mirror those observed in Japan. Investigators often test hypotheses by imagining what would occur if they were true and then searching only for supporting evidence (Simon, 2012). In Japan, wrongful conviction cases have revealed so-called

black investigations, where police pursued only evidence consistent with their assumptions, neglecting alternative explanations or falsification, known as *white investigations* (Kanagawa Prefectural Police, 2012)[7].

Another pattern is applying stricter scrutiny to information contradicting investigators' conclusions while more readily accepting supporting evidence (Simon, 2012). Reports on Japanese wrongful convictions consistently note that incriminating evidence, especially confessions, was insufficiently tested through corroborative investigation (Nishi, 2023).

Investigative agencies have also long been criticized for overvaluing evidence consistent with case theories while discounting contradictory information (Shihō Kenshūjo Kensatsu Kyōkan Shitsu, 1997). Case reviews document instances where investigators relied heavily on multiple consistent confessions while neglecting exculpatory evidence such as alibis (Saikō Kensatsuchō, 2007).

Confirmation bias is not limited to investigators and judges. Defense attorneys, too, may presume guilt. In the *Ashikaga Jiken* (Case No. 27), the Japan Federation of Bar Associations reported that the defense attorney dismissed the client's claims of innocence as implausible, failing to provide adequate representation (Nihon Bengoshi Rengōkai, 2010a). Similarly, in the death penalty *retrial Menda Jiken* (Case No. 6), defense counsel assumed guilt from the outset and provided ineffective representation (Foote, 1993b).

ii. Heuristics

In Japan, intuitive and impression-based judgments in criminal cases have long been criticized, and recent analyses interpret these errors through heuristics (Nishi, 2023, 2024).

Human cognition operates through two systems: intuitive (*system 1*) and deliberative (*system 2*). However, deliberation does not always prevail, and intuitive thinking can lead to errors (Kahneman, 2011). A well-documented example is the *representativeness heuristic*, whereby people instinctively categorize objects or individuals based on their similarity to a prototype. In criminal investigations, when evidence resembles characteristics commonly associated with a crime, investigators or judges may intuitively infer guilt. Another relevant shortcut is the *availability heuristic*, in which judgments rely on readily accessible information, such as vivid or frequently encountered cases. Investigators or judges may thus assume guilt when a case resembles a well-known crime or prior experience, even without objective support.

For judges, concerns about *prejudgment*, forming a presumption of guilt before evaluating evidence, and *prejudice*, distorting interpretation, can be understood through heuristics. Prejudgment often arises when extraneous information, such as media reports or co-defendant trials, primes intuitive associations. Representativeness and availability heuristics may then

[7] For example, former Supreme Court Justice Dando Shigemitsu voiced a similar concern in his writings. In a death penalty case, his Petty Bench upheld the conviction based on the available evidence; however, he observed that had the police pursued a broader investigation rather than narrowing their focus prematurely, they might have identified another suspect (Dando, 1991).

reinforce confirmation bias, narrowing attention to incriminating evidence. In Japan, the media's tendency to treat arrest as guilt contributes to this presumption. Moreover, the same judge often presides over related cases, including those involving co-defendants, yet recusal is rarely granted. Although judges are assumed to remain unaffected, unconscious influence cannot be excluded.

Prejudice stems from categorization in everyday cognition, which can produce inaccurate generalizations and negative stereotypes. When heuristics operate on such stereotypes, they may yield impression-based judgments of guilt. In Japan, prejudice concerning criminal records, disabilities, foreign nationals, and gender has been recognized as a contributing factor in wrongful convictions [e.g*., Kotō Kinen Byōin Jiken* (Case No.35); *Fukawa Jiken* (Case No.20); *Tōden Josei Shain Satsugai Jiken* (Case No.30); *Hakamada Jiken* (Case No.19)].

iii. Fraud Triangle Theory

Humans tend to seek *cognitive consistency* among emotions, thoughts, and actions. When confronted with contradictions, they experience *cognitive dissonance* and are motivated to reduce the discomfort (Festinger, 1965). These mechanisms can lead to conclusion-driven judgments or denial of errors and, in extreme cases, misconduct such as fabricating evidence to preserve internal consistency (Nishi, 2023, 2024).

Such misconduct can be explained through the *Fraud Triangle Theory*, which posits that fraudulent behavior arises when motivation, opportunity, and rationalization converge (Cressey, 1953). When investigators mistakenly identify a suspect and experience cognitive dissonance, these three elements can align, creating a strong risk of misconduct. Thus, misconduct can potentially occur in any criminal case.

Japan has witnessed recognized instances of such misconduct. In the *Kōrosho Moto Kyokuchō Enzai Jiken* (Case No. 37), a prosecutor tampered with a floppy disk; in the *Presansu Moto Shachō Enzai Jiken* (Case No. 41), an interrogator shouted and pounded a desk continuously for 15 minutes; and in the *Hakamada Jiken* (Case No. 19), the bloodstained clothing admitted as decisive evidence was, in fact, fabricated.

Because misconduct occurs in secrecy, it is extremely challenging to prove, yet it often concerns decisive evidence and can profoundly affect trial outcomes.

iv. Tunnel Vision

The interaction of psychological factors can produce *tunnel vision*, a cognitive narrowing in which investigators fixate on guilt and disregard alternative explanations (Godsey, 2017; FPT Heads of Prosecutions Committee Working Group, 2021). When evidence is gathered under such assumptions, errors escalate: false evidence accumulates, reinforcing the initial mistake and creating a self-perpetuating cycle of wrongful conviction (Simon, 2012; Hamada, 2013).

Exculpatory evidence is often neglected, distorted through tampering, or undermined by coerced statements, leaving it concealed within the evidentiary framework (Nishi, 2023, 2024).

This process can also mislead defense attorneys into assuming their client's guilt, weakening their representation.

In adversarial trials, judges cannot independently collect evidence and must base decisions on what is presented. When the evidentiary framework itself is flawed, judicial error is almost unavoidable. This chain of mistakes across investigators, prosecutors, defense attorneys, and judges culminates in wrongful convictions.

B. Evidentiary Factors Contributing to Wrongful Convictions

i. Four Key Types of Evidence

In Japan, four types of evidence have long been recognized as major contributors to wrongful convictions: false confessions, false accomplice statements, mistaken eyewitness testimony, and erroneous scientific evidence.

A study examined 42 Japanese cases regarded as factual innocence (Table 1. Nishi, 2023). Although objective truth is ultimately unknowable, the study focused on cases that ended in acquittals or dismissals, including those finalized after multiple appeals or retrials, those acknowledged by investigative authorities with formal apologies, and those in which the actual perpetrator was later identified. In this research, "eyewitness testimony" encompassed perpetrator identification and statements placing defendants near crime scenes, while "scientific evidence" referred broadly to forensic or expert analyses. Official misconduct is not included in this study because the analysis focuses solely on the types of evidence used to support convictions, rather than on misconduct itself. The study's findings are limited by small sample size, selection bias toward highly publicized cases, and the difficulty of determining factual innocence, yet, in the absence of a wrongful conviction database in Japan, they provide valuable insights into general tendencies.

The results showed that confessions appeared in 69% (29 cases), accomplice testimony in 35.7% (15 cases), eyewitness testimony in 45.2% (19 cases), and scientific evidence in 62.7% (27 cases). Combined, confessions and accomplice testimony featured in 83.3% (35 cases), underscoring the centrality of testimonial evidence. In 30 of these 35 cases, multiple forms of evidence were present, suggesting that confessions or accomplice testimony often served either as a basis for gathering additional mistaken evidence or were themselves elicited in response to other flawed evidence. In contrast, among 350 exonerations handled by the U.S. Innocence Project, wrongful convictions involved confessions in 21%, informant in 22%, eyewitness in 72%, and forensic evidence in 74% (Garrett, 2017). Another analysis of the first 2,939 cases in the National Registry of Exonerations (as of 2022) found false confessions in 12%, erroneous scientific evidence in 24%, and mistaken eyewitness testimony in 28% (Norris et al., 2023). Compared to these findings, Japan is distinguished by its high reliance on confessions, while the significant role of scientific evidence is a shared characteristic (Nishi, 2023, 2024).

Overall, 78.5% (33 cases) of Japanese wrongful convictions involved multiple types of flawed evidence, with an average of 2.14 per case. This aligns with U.S. research showing more than two erroneous evidence types per wrongful conviction (Saks & Koehler, 2005). The presence

of multiple flawed evidentiary forms illustrates error escalation: one mistake often triggers the creation or collection of further faulty evidence (Simon, 2012). In Japan, this dynamic frequently stems from practices where false confessions or accomplice testimony generate additional mistaken evidence, or corroboration is sought to reinforce already false statements.

Table 1: Enzai cases in Japan (n = 42) and four key types of wrongful conviction evidence

Cases/Evidence	Confession	Accomplice Testimony	Eyewitness Testimony	Scientific Evidence	Year of Crime	Year of Final Exoneration
1. 巌窟王事件 (*Gankutsuō Jiken*)		○		○	1913	1963
2. 加藤事件(*Katō Jiken*)		○		○	1915	1977
3. 八丈島事件 (*Hachijōjima Jiken*)	○	○			1946	1957
4. 井村事件 (*Enaimura Jiken*)		○	○		1946	1994
5. 幸浦事件 (*Sachiura Jiken*)	○	○			1948	1959
6. 免田事件 (*Menda Jiken*)	○		○	○	1948	1983
7. 弘前大学教授夫人殺人事件 (*Hirosaki Daigaku Kyōju Fujin Satsujin Jiken*)			○	○	1949	1977
8. 松川事件 (*Matsuura Jiken*)	○	○	○	○	1949	1961
9. 二俣事件 (*Futamata Jiken*)	○			○	1949	1956
10. 財田川事件 (*Saitagawa Jiken*)	○			○	1950	1984
11. 小島事件(*Ojima Jiken*)	○				1950	1959
12. 梅田事件 (*Umeda Jiken*)	○	○		○	1950	1986
13. 八海事件(*Yakai Jiken*)	○	○		○	1951	1968
14. 米谷事件 (*Yoneya Jiken*)	○		○	○	1952	1978
15. 徳島ラジオ商殺し事件 (*Tokushima*	○	○	○	○	1953	1985

Cases/Evidence	Confession	Accomplice Testimony	Eyewitness Testimony	Scientific Evidence	Year of Crime	Year of Final Exoneration
Rajioshō Goroshi Jiken)						
16. 島田事件 (*Shimada Jiken*)	○		○	○	1954	1989
17. 仁保事件 (*Niho Jiken*)	○		○		1954	1972
18. 松山事件 (*Matsuyama Jiken*)	○		○	○	1955	1984
19. 袴田事件 (*Hakamada Jiken*)	○			○	1966	2024
20. 布川事件 (*Fukawa Jiken*)	○	○	○	○	1966	2011
21. 鹿児島夫婦殺し事件(*Kagoshima Fūfu Goroshi Jiken*)	○			○	1969	1986
22. 山中事件 (*Yamanaka Jiken*)		○		○	1972	1990
23. 甲山事件 (*Kabutoyama Jiken*)	○		○	○	1974	1998
24. 遠藤事件(*Endō Jiken*)	○		○	○	1975	1989
25. 旭川日通事件 (*Asahikawa Nittsū Jiken*)	○				1981	1985
26. 松橋事件 (*Matsubase Jiken*)	○			○	1985	2019
27. 足利事件 (*Ashikaga Jiken*)	○			○	1990	2010
28. 大阪指紋混入事件(*Osaka Shimon Konnyū Jiken*)	○			○	1990	1992
29. 東住吉事件 (*Higashi Sumiyoshi Jiken*)	○	○		○	1995	2016
30. 東電女性社員殺害事件(*Tōden Josei Shain Sastugai Jiken*)			○	○	1997	2012
31. 宇和島事件	○		○		1998	2000

Cases/Evidence	Confession	Accomplice Testimony	Eyewitness Testimony	Scientific Evidence	Year of Crime	Year of Final Exoneration
(*Uwajima Jiken*)						
32. 氷見事件(*Himi Jiken*)	○		◯		2002	2007
33. 平野母子殺害事件(*Hirano Boshi Satsugai Jiken*)			◯	◯	2002	2017
34. 志布志事件 (*Shibushi Jiken*)	○	◯			2003	2007
35. 湖東記念病院事件(*Kotō Kinen Byōin Jiken*)	○			◯	2003	2020
36. 大阪市強姦虚偽証言再審事件 *(Ōsakashi Gōkan Kyogi Shōgen Jiken*)			◯		2004	2015
37. 厚労省元局長冤罪事件(*Kōroshō Moto Kyokuchō Enzai Jiken*)		◯			2004	2010
38. 泉大津コンビニ強盗事件*(Izumi Ōtsu Konbini Gōto Jiken*)			◯		2012	2014
39. パソコン遠隔操作事件(*Pasokon Enkaku Sōsa Jiken*)	○				2012	2012
40. 山内事件 (*Yamauchi Jiken*)				◯	2016	2019
41. プレサンス元社長冤罪事件 (*Presansu Moto Shachō Enzai Jiken*)		◯			2017	2021
42. スナック喧嘩犯人誤認事件 (*Sunakku Kenka Hannin Gonin Jiken*)			◯		2020	2023
Total	29 cases	15 cases	19 cases	27 cases		
Percentage	69%	35.7%	45.2%	62.7%		

ii. False Confessions

False confessions are widely regarded as the most critical contributor of wrongful convictions in Japan. Given the heavy reliance on interrogations, the risk of coerced or fabricated statements is particularly high. Contributing factors such as coercive interrogation practices and the detention system have been extensively criticized (Nihon Bengoshi Rengōkai Jinken Yōgo Iinkai, 2009).

Hamada (2005) identifies several mechanisms underlying false confessions in Japan. According to the study, innocent suspects, lacking any awareness of suspected offense, often experience a sense of unreality during interrogation and assume that recounting their memories will be sufficient to prove innocence. Yet demonstrating innocence constitutes a "devil's proof," an almost impossible task requiring proof of nonexistence. Investigators convinced of guilt may intensify questioning, interpreting denials as deliberate lies. As suspects realize their statements are not believed, prolonged detention and interrogation produce exhaustion and despair. Many come to underestimate the consequences of a false confession, believing the truth will later emerge in court, and focus instead on escaping the immediate stress of interrogation. In this state, they yield to confession. Once a false confession is made, the suspect's relationship with the interrogator often shifts to a cooperative dynamic. Guided by interrogator suggestions and feedback, suspects search for "correct" answers, refining their accounts. In the *Himi Jiken*, later overturned by DNA evidence, the innocent suspect eventually led investigators to the crime scene after observing their cues. Multiple elaborate statements were produced, which judges mistakenly treated as containing "concrete" and "vivid" details that only the true perpetrator could provide, thereby contributing to conviction.

Several cognitive and psychological mechanisms explain this process. For suspects, the *illusion of transparency* leads individuals to overestimate others' understanding of their internal states (Vrij, 2008). *Belief in a just world* fosters confidence that innocence will eventually be recognized. Prolonged stress can result in *learned helplessness*, in which repeated failures to escape a situation lead to resignation. These universal mechanisms strongly contribute to the decision to falsely confess.

For interrogators, coercive practices can be understood through *cognitive dissonance* (Festinger, 1965). When suspects deny guilt despite interrogators' belief in their culpability, the resulting dissonance creates a strong motivation to secure a confession. Prolonged questioning in closed settings without legal counsel provides both the means and opportunity to exert pressure. Such behavior is often rationalized as necessary to elicit truth, consistent with the fraud triangle, where motivation, opportunity, and rationalization converge. Structural features of Japan's system, including prolonged interrogations, substitute prisons, "hostage justice," and the duty to submit to questioning, further create conditions conducive to coerced confessions (Nishi, 2023, 2024).

A distinctive feature of criminal investigations in Japan, compared to other jurisdictions, is the practice of prolonged interrogations, reflecting the system's reliance on confession-based methods. The average interrogation lasts about 22 hours, a duration that inherently places pressure on suspects. Research in the United States shows that the risk of false confessions rises sharply after six hours, with most occurring between six and twenty-four hours of questioning (Drizin &

Leo, 2004). Beyond heightening the risk of coercion, prolonged interrogations allow investigators to compel and refine confessions, elaborate their content, and obscure meaningful analysis of recorded footage. These dynamics, reinforced by judicial interpretations that tolerate prolonged interrogations, collectively underscore the dangers of extended interrogation practices.

iii. False Testimony by Alleged Accomplices

For an innocent suspect, an "accomplice" does not exist. However, wrongful convictions may result when alleged accomplices provide false statements implicating them. Because accomplices are also arrested and interrogated, the risk of false implication is considered as serious as false confessions in Japan's interrogation-heavy system. In jurisdictions where plea bargaining is common, such risks should also be recognized as significant.

In Japan, *hipparikomi* (false implication by an accomplice) has long been identified as a risk of wrongful conviction (Shihō Kenshūjo, 1996). Alleged accomplices may fabricate statements to shift blame, protect the true perpetrator, or frame another person. To secure such benefits, they must ensure their fabrications remain undetected, often making their statements increasingly elaborate.

Prolonged detention and interrogation exacerbate these risks. Even truthful denials may be interpreted as lies, leading to harsher questioning. In such circumstances, accomplices may recognize that truthful testimony will not be believed, exposing them to threats of liability or perjury charges. Conversely, false statements implicating another are typically accepted by investigators and may even reduce the accomplice's own liability, present them as cooperative, or spare them further interrogation. This *reversal of credibility* increases the likelihood of false statements by alleged accomplices (Nishi, 2023; see Hamada, 2005).

A notable example occurred in the *Presansu Moto Shachō Enzai Jiken* (Case No.41). An accomplice who initially denied the company president's involvement was subjected to aggressive tactics, including an interrogation in which the investigator slammed the desk and shouted for 15 minutes. The following day, further pressure was applied: "You are a heinous criminal who has disgraced the company" and "Can you compensate for the company's losses? It won't be just one or two billion yen (6.7–13.4 million USD)." Under this pressure, the co-defendant falsely implicated the president. Despite initially telling the truth, the accomplice was accused of lying and threatened with both criminal and civil consequences, prompting a false statement to deflect responsibility.

Unlike false confessions, accomplice statements are seldom retracted in court, making them more likely to remain consistent. Their motives are often difficult to identify, and their accounts, blending fabrications with partial truths, can appear credible. Judges may therefore fail to detect falsity, increasing the risk of wrongful conviction.

iv. Erroneous Eyewitness Testimony

Concerns about eyewitness testimony in Japan largely mirror those identified internationally. Errors typically arise at three stages: encoding (misperceptions during observation), retention (memory distortion or forgetting), and retrieval (inaccurate recall).

For example, there have been cases where identification procedures became problematic. In Japan, flawed practices, such as showing one or two photographs suggestively or failing to provide proper instructions, have contaminated witnesses' memories and led to wrongful convictions and false accusations [e.g., *Himi Jiken* (Case No.32)*; Sunakku Kenka Hannin Gonin Jiken* (Case No.42)].

Because Japanese investigations place heavy reliance on testimonial evidence, repeated questioning can further distort memory. *Post-event misinformation* and *repetition-induced confidence* strengthen inaccurate recollections (Loftus, 1979). Interviews may also induce conformity, aligning witness statements and spreading error.

One case illustrates this process: seven eyewitnesses initially gave widely varying age estimates for the perpetrator, ranging from 20–35. As the investigation progressed and a suspect was identified, their estimates gradually converged to a narrower range of 24–28 (Hō to Shinri Gakkai, 2005). This example demonstrates how repeated exposure and investigative influence can contaminate memory, reinforcing inaccurate testimony and contributing to wrongful convictions.

v. Erroneous Scientific Evidence

The risks associated with scientific evidence are recognized internationally. A major concern is the *aura of scientific infallibility*, which may lead non-expert judges to place excessive trust in forensic analyses (Shihō Kenshūjo, 2013; Norris, 2021).

In Japan, many concerns relate to structural and organizational issues (Hiraoka, 2022). Forensic evidence is produced by internal divisions of investigative agencies, creating vulnerability to bias and preconceptions. Most forensic methods are not standardized, lack ISO certification, and omit error rate assessments. Even when samples are entirely consumed in testing, no video or record is kept, yet the results are still accepted in court. In forensic medicine, a shortage of experts has been acknowledged. Because prosecutors and defense attorneys retain their own experts, adversarial dynamics emerge, and experts who testify for the defense may be avoided by investigative authorities in future cases. Interaction between scientific and legal communities remains limited, and miscommunication between them has been identified as a significant risk.

The *Ashikaga Jiken* (Case No.27)[8] exemplifies these concerns. A defendant was wrongfully convicted on the basis of early-stage DNA analysis with limited discriminatory power, yet the "scientific" character of the evidence led to its decisive acceptance[9].

[8] The defense arranged for the defendant to mail a strand of his hair, which was subjected to the latest DNA analysis. The results indicated that the DNA type did not match that of the actual perpetrator. Nevertheless, the Utsunomiya District Court dismissed the retrial request without even ordering a re-examination, reasoning that there was no corroboration that the hair sample belonged to the defendant. The Tokyo High Court later conducted a new DNA test, and experts for both the prosecution and the defense confirmed that the defendant's DNA type was inconsistent with that of the perpetrator, resulting in the decision to grant a retrial.

[9] Similar concerns have been raised in other high-profile cases as well (Kidera, 2024).

Another problematic area is child abuse cases involving *shaken baby syndrome* (SBS) or *abusive head trauma* (AHT). When infants or children suffer severe medical events without external trauma, the so-called triad, including subdural hematoma, cerebral edema, and retinal hemorrhage, is often interpreted as evidence of violent shaking. This assumption frequently directs suspicion toward the caregiver present at the time. However, SBS or AHT-based wrongful convictions have increasingly been challenged, and since 2018 more than ten acquittals have been issued in Japan (Akita et al., 2023; e.g., *Yamauchi Jiken* [Case No. 40]).

C. Societal Factors Reproducing Wrongful Convictions

Wrongful convictions are not simply the result of errors in individual stages of the criminal process. When underlying causes remain unaddressed, similar convictions recur under the same conditions. Recent research has sought to explain this cycle from a psychological perspective (Nishi, 2023, 2024).

i. Denial of Wrongful Convictions within Society

Japan's investigative authorities and courts have been described as exhibiting a *culture of denial*, resisting acknowledgment of their own errors (Johnson, 2015, 2019). This tendency is reinforced by institutional secrecy and a preoccupation with self-preservation. Excessive attachment to the belief that wrongful convictions must not exist has led to avoidance of confronting those that do.

A defining feature of wrongful convictions is their invisibility: unless the true perpetrator is later identified or an alibi conclusively proven, innocence cannot be objectively confirmed. An acquittal alone does not necessarily establish that a wrongful conviction occurred. Psychological mechanisms such as cognitive dissonance further discourage individuals and institutions from admitting mistakes, contributing to ongoing denial (Nishi, 2023; cf. Givelber & Farrell, 2012).

ii. Failure to Prevent the Recurrence of Wrongful Convictions

Even after a wrongful conviction is recognized, various psychological factors hinder appropriate systemic correction (Nishi, 2023, 2024). One such factor is *optimism bias*, the belief that negative events are unlikely to happen to oneself. This leads individuals to assume they will never become victims of wrongful conviction. The *normalcy bias* causes people to underestimate anomalies, viewing them as extensions of everyday experiences. Consequently, wrongful convictions are often dismissed as rare exceptions rather than systemic issues requiring reform.

The *status quo bias* reinforces inertia, discouraging efforts to investigate wrongful convictions or introduce preventive measures. Within Japan's criminal justice system, characterized by fragmented roles, responsibility tends to be deflected, with actors shifting blame onto others. As a result, no one is held fully accountable, and comprehensive systemic reviews are avoided (Garrett, 2011). This phenomenon is aptly captured by the phrase: "*no single snowflake in an avalanche ever feels responsible*".

iii. Neglect of Underlying Causes of Wrongful Convictions

The causes of wrongful convictions are rarely investigated, and where reviews do occur, their scope is typically narrow. For example, the Supreme Public Prosecutors Office's 2024 review of the *Hakamada Jiken* (Case No.19) did not acknowledge prosecutorial error. Instead, it framed the court's finding of fabrication as mistaken and rather than proposing preventive measures, presented a self-protective and self-preserving narrative (Saikō Kensatsuchō, 2024). In the *Matsuyama Jiken* (Case No. 18), another death penalty retrial acquittal, the court raised suspicions that bloodstains had been added post-seizure, possibly indicating fabrication. Yet, the Prosecutors Office's internal review assumed no fabrication occurred and simply recommended clarifying evidence-handling procedures to avoid misunderstandings (Gohan Mondai Kenkyūkai, 1989). As these examples show, past reviews of wrongful convictions have often functioned as exercises in self-preservation.

Fundamental legal obstacles, such as judicial independence, confidentiality obligations, restrictions on evidence use, and the secrecy of investigative methods, create substantial barriers to examining the causes of wrongful convictions. Even in lawsuits seeking compensation, fear of liability often deters key witnesses from providing full testimony, hindering efforts to uncover how the conviction occurred. Courts, for their part, restrict rulings to the issue of compensation without addressing the underlying causes or considering preventive measures.

As a result, the structural and procedural flaws behind wrongful convictions remain unexamined. This stagnation perpetuates the same conditions under which similar convictions continue to be repeated.

D. Reflections on Interrogation-Dependent Investigations

Testimonial evidence offers more interpretative information than objective evidence, as it can provide reasonable explanations that go beyond mere inference, making interviews and interrogations a valuable investigative tool. However, such evidence allows for a wider range of interpretation than objective evidence, which makes it particularly susceptible to bias. Erroneous testimonial evidence, therefore, poses a heightened risk of leading to wrongful convictions.

In Japan, excessive reliance on testimonial evidence has contributed to wrongful convictions. Suspects are often arrested based on flawed assumptions, coerced into false confessions, and subsequently subjected to confirmatory investigations aimed at reinforcing guilt. This investigative approach has been criticized for prioritizing narrative construction over objective fact-finding (Nihon Bengoshi Rengōkai Jinken Yōgo Iinkai, 1998). In such cases, evidence is shaped to fit investigators' preexisting beliefs, rather than informing an impartial determination of facts. This process reverses the principle of evidentiary trials, whereby judgments should be based on evidence, not vice versa (Hamada, 2013). The convenience of testimonial evidence has thus produced an unstable investigative model prone to error escalation.

These challenges are not confined to institutional behavior alone. The interrogation-dependent model is reinforced by legal structures that facilitate such practices and by judicial passivity that fails to restrain them. Japanese courts tend to focus narrowly on evidence bearing on guilt or absence of guilt, as opposed to investigating the broader causes behind wrongful

convictions. Statements obtained during interrogations and trial testimony are prioritized, while broader scrutiny of investigative procedures is generally avoided. Judges have further legitimized the interrogation-dependent approach by relying on written statements in document-based trials, endorsing the duty to submit to questioning, tolerating pressure on suspects who remain silent, and easily approving detention (Hirano, 1985 [1989 English trans.]; Foote, 2010). Hence, they have conformed to investigative norms rather than exercising independent oversight.

This model is further entrenched by cultural norms. Interrogation-dependent investigations have been normalized in public consciousness, often reinforced by media portrayals in crime dramas, where suspects are routinely detained and confessions are central to uncovering the truth. Interrogators are frequently depicted as shouting in the name of justice. The public tends to regard those who are arrested as criminals and to believe that they should endure the disadvantages.

Judicial systems, shaped by historical and institutional context, are subject to *path dependency*, where past decisions constrain future change (Vanoverbeke, 2024). As a result, practices like prolonged interrogations and the duty to submit to questioning are largely tolerated by both professionals and the public, despite their problems.

Evidently, wrongful convictions in Japan largely stem from testimonial evidence, a product of this interrogation-based model. Preventing future wrongful convictions requires transitioning toward an investigative framework that prioritizes objective evidence. However, this shift presents significant challenges. Japan lacks a clear conceptualization of what an objective-evidence-driven investigation entails. Moreover, such a model may carry its own risks, including privacy violations and abuse of investigative powers, which prevent unconditional adoption.

Ultimately, identifying the flaws in the current model is not enough. Research may also need to move toward articulating what an ideal investigative system should look like. This effort cannot rely solely on domestic reflection. Comparative studies of global investigative and judicial systems are essential for shaping a more effective framework, highlighting the critical role of international collaboration in criminal justice research. For example, concrete alternative proposals are needed on how to detect and prosecute crimes such as bribery that occur behind closed doors, without relying excessively on interrogations and testimonial evidence.

IV Strategies for Preventing Wrongful Convictions

A. Fact-Finding Methods and the Cautionary Principle

This section introduces Japan's fact-finding methods and the Cautionary Principle as preventive measures against wrongful convictions. In Japan, judges bear primary responsibility for determining guilt or absence of guilt. Given the number of wrongful convictions that have occurred, the judiciary must also bear responsibility for such errors. In response, based on past judgements, judges and researchers have sought to confront this responsibility by studying *fact-finding* methods; that is, how conclusions are drawn from evidence, and by developing *cautionary principles* that identify key considerations to avoid erroneous judgments. Specifically, with regard

to confessions, accomplice statements, eyewitness testimony, and scientific evidence, which are types commonly associated with wrongful convictions, the Legal Training and Research Institute (LTR) of the Supreme Court of Japan has examined past rulings to formalize Cautionary Principles (Shihō Kenshūjo, 1991, 1996, 1999, 2013; see Shihō Kenshūjo Keiji Saiban Kyōkan Shitsu, 2012, on fact-finding).

In other countries, such principles and jury instructions may also be developed through case law or rulemaking. In Japan, a distinctive feature is the systematic effort to incorporate these principles into the knowledge base of the legal profession. This approach secures the principles of free evaluation of evidence without binding judges by rules, while preventing impression-based decisions. By requiring judges to provide detailed written judgements that justify their conclusions and enable future review, it promotes logical consistency. Not only judges but also defense attorneys use Cautionary Principles in their arguments to make them more plausible. This model does not assume that judges possess superior fact-finding abilities compared to lay judges[10]. Rather, it illustrates how lessons from past trials have been softly integrated into the criminal justice system.

However, Cautionary Principles have limitations. Fundamentally, they are drawn from judicial reasoning and reflect what judges considered in past cases. They are not empirically validated against objective truth and may themselves contain biases or errors. Furthermore, if a judge becomes subject to tunnel vision, they may fail to apply the principles effectively, allowing wrongful convictions to occur. Critics question whether judges truly follow these principles in practice, noting that safeguards like the presumption of innocence, the burden of proof, and proof beyond a reasonable doubt are often only nominally respected (Nihon Bengoshi Rengōkai, 2024b). Thus, Cautionary Principles alone are insufficient to fully prevent such outcomes.

Nonetheless, these Cautionary Principles may also prove valuable for international efforts. Unless otherwise noted, the following section introduces the principles compiled by the LTR, while acknowledging their inherent limitations (Shihō Kenshūjo, 1991, 1996, 1999, 2013; Shihō Kenshūjo Keiji Saiban Kyōkan Shitsu, 2012).

i. Methods of Judicial Fact-Finding

In fact-finding, when *direct evidence*, such as eyewitness testimony or crime footage, is available, the key issue is assessing its credibility. In the absence of direct evidence, and where only *circumstantial evidence* exists, fact-finding proceeds by identifying objective, undisputed facts and progressively constructing a reliable interpretation through reasonable *inferences*. Judicial precedent establishes that in cases relying solely on circumstantial evidence, the established facts must be such that the case would be inexplicable, or at least extremely difficult to explain, if the defendant were not the perpetrator[11].

[10] In lay judge trials, judges may introduce Cautionary Principles to lay judges by presenting them as perspectives. However, if judges take on the role of instructors, it would undermine equal discussion. Therefore, these principles are not considered binding rules but rather viewpoints, the validity of which should be subject to discussion.

[11] Supreme Court of Japan. (2010, April 27). *Keishu*, 64(3), 233.

Evaluating the weight of established facts requires assessing both their direction, whether they support guilt or absence of guilt, and their evidentiary value (*probative force*), the degree of strength they hold. Facts do not hold value in isolation; their meaning often emerges through connections with other established facts.

Particular caution must be taken with regard to narrative-driven fact-finding used to compensate for insufficient evidence. This goes beyond reasonable inference and increases the risk of unjust convictions. Moreover, deeming a defendant guilty solely because their statement is considered unreliable is regarded as self-defeating in criminal trials.

ii. Cautionary Principles for Assessing Confessions

Modern judicial practice generally follows a two-step approach to evaluate confession credibility and prevent excessive reliance. First, the existence of the alleged fact must be assessed based on evidence other than the confession, and only then should the confession's credibility be examined.

When assessing consistency between a confession and objective evidence, it is important to determine whether discrepancies exist beyond a reasonable margin. If inconsistencies concern material parts and lack a plausible explanation, the confession's credibility is diminished. Since even coerced or manipulated confessions may appear consistent with objective facts, credibility must not be judged solely on such alignment. The conditions under which the confession was obtained must be scrutinized. Conversely, if corroborative evidence that should ordinarily exist is absent, this also weakens the confession's credibility.

Regarding changes in confessions, credibility is not necessarily denied if a reasonable explanation exists. However, if the confession undergoes changes without justification, its credibility is more likely to be rejected.

A confession that includes facts known only to the true perpetrator and later confirmed as objective facts is referred to as a "disclosure of secret information" (himitsu no bakuro) and is generally considered strong evidence of credibility. However, wrongful conviction cases have shown that investigators may already have inferred or known such information and then deliberately led the suspect to "reveal" it, creating the illusion of genuine disclosure. Therefore, whether the information was truly secret must be critically examined based on the investigation's progress, the state of evidence collection, and the investigators' prior knowledge (Watanabe, 1992). Conversely, innocent individuals trying to describe events they have not experienced may unknowingly construct incoherent or contradictory statements based on information provided to them afterward (see Hamada, 2018). These inconsistencies may indicate a false confession and should be carefully examined.

iii. Cautionary Principles for Assessing Accomplice Testimony

When evaluating accomplice testimony, general factors such as corroboration by objective evidence and internal coherence are essential. However, particular attention must be paid to any benefits the accomplice may receive from providing the testimony. Since such benefits are

often hidden unless voluntarily disclosed, an approach that actively seeks to uncover potential motives is crucial. While incentives influencing an accomplice's statement are difficult to assess without their admission, examining the context in which they named the defendant during the investigation may offer valuable insights.

Regarding the incentive to shift responsibility, the greater the reduction in the accomplice's own criminal liability, the stronger the incentive becomes. This incentive is particularly high when the accomplice's liability remains undetermined and can be displaced onto the defendant. Conversely, if the accomplice's liability is unaffected by the statement, or if the statement does not serve to shift responsibility, the incentive is weak. Moreover, if shifting responsibility disadvantages the accomplice; for example, if the defendant is a close relative or if there is a risk of organizational retaliation, the incentive is diminished.

The incentive to protect the actual perpetrator tends to be stronger when the true perpetrator shares a close relationship with the accomplice or poses a threat of retaliation. Thus, it is necessary to determine whether such an individual exists and to assess their relationship with the defendant.

The incentive to falsely implicate an innocent person may arise even from a seemingly minor personal grievance, which can result in significant animosity. As it is difficult to assess what level of hostility may lead to false statements, careful scrutiny is warranted. Because the defendant is often best placed to recognize hostility from the accomplice, their testimony should be considered when evaluating the presence or absence of such antagonism.

iv. Cautionary Principles for Assessing Eyewitness Testimony

Erroneous eyewitness testimony can arise from either intentional falsehoods or unintentional errors. Regarding witnessing conditions, a witness who directly observes the crime is more likely to perceive the event as distinctive, increasing the likelihood of memory retention. However, attention may be diverted due to factors such as *weapon focus*, and stressors, including fear, panic, shock, or alcohol intoxication, can impair visual perception. If the witness only saw the perpetrator near the crime scene, the experience may have seemed ordinary, making conscious observation less likely. Unless something memorable was associated with the event, memory retention may be weak. Events are often recalled due to narrative structures, but physical features do not form a coherent story and may not be encoded unless deliberately noticed. Therefore, the vividness of the witness's account should be evaluated separately from the reliability of their identification.

The initial identification is the most critical point, as all subsequent identifications are influenced by the first and merely confirm its accuracy. Accordingly, the focus should be on the accuracy of memory at the initial identification and the appropriateness of the procedure. The credibility of trial testimony should be assessed not only through the final statement but also by considering the initial identification, subsequent changes, and the conditions under which identification occurred, all of which must be examined as evidence.

If more than one week has passed since the incident, eyewitness testimony is generally considered unreliable unless a reasonable basis exists to conclude that the witness had sufficiently observed and retained the perpetrator's appearance or corroborative evidence is available. Additionally, memory naturally deteriorates over time and becomes more vulnerable to post-event information, which can distort recall and align it with the characteristics of the defendant. As the risk of memory distortion increases with time, testimony should be obtained as early as possible, and direct and cross-examinations should occur without undue delay. When visibility conditions are in question, it is important to verify, under the same conditions at the actual scene, whether identification was realistically possible. Moreover, the confidence expressed by a witness does not directly correlate with the accuracy of their testimony.

v. Cautionary Principles for Scientific Evidence

When assessing scientific evidence, it is crucial to distinguish between what it can and cannot prove. For example, even if a substance linked to the defendant is found in a sample related to the crime, its probative value remains limited if it could reasonably have been deposited independently of the offense. Such evidence must therefore be evaluated with caution.

Scientific findings are derived from human knowledge and interpretation, both of which have inherent limitations. Hence, scientific evidence should not be regarded as absolute. A six-stage, eight-factor framework has been proposed as a guideline for evaluating the reliability of scientific evidence.

Table 2: Six-stage, eight-factor framework

Stage	Factor
1.	Reliability of the fundamental scientific principles and knowledge
2.	Reliability of the theories and techniques used to apply scientific principles in practice
3.	Reliability of the specific examination • Reliability of sample collection and processing • Accuracy of the specific examination methods and procedures
4.	Skill level and expertise of the examiner
5.	Reliability of the evaluation of examination results • Reliability of the principles and standards used in evaluation • Reliability of the application of those principles to the specific case
6.	Integrity of the examination materials (e.g., proper collection, transportation, and storage of samples)

In DNA profiling, a mismatch at even one locus generally precludes a common origin. Although exceptions such as organ transplants or mutations exist, selectively highlighting favorable results undermines fairness and must be avoided. If certain loci are ambiguous, their causes and implications should be carefully assessed with expert guidance.

B. Emerging Approaches to Preventing Wrongful Convictions

Recently, studies have proposed applying *risk management* principles to wrongful conviction prevention (Nishi, 2023, 2024). This perspective emphasizes the need for systemic prevention within the judiciary and encourages continuous review of the justice system through the analysis of past errors and implementation of countermeasures (cf. Doyle, 2014). The overarching aim is to eliminate the recurrence of wrongful convictions through institutional learning, as in aviation and medical safety.

i. Risk Management

Risk management offers a structured framework for institutionally addressing wrongful convictions. It involves identifying risks requiring intervention, analyzing them, implementing countermeasures, and conducting monitoring to evaluate effectiveness. This evaluation then informs further countermeasures, forming a continuous cycle.

Wrongful convictions constitute one of the most serious failures within the judicial system and, due to their impact and systemic vulnerabilities, must be treated as a priority risk. When such a conviction occurs, an independent audit should be conducted and made public. Measures to prevent recurrence must be adopted, and the justice system should be continuously refined based on evaluation outcomes.

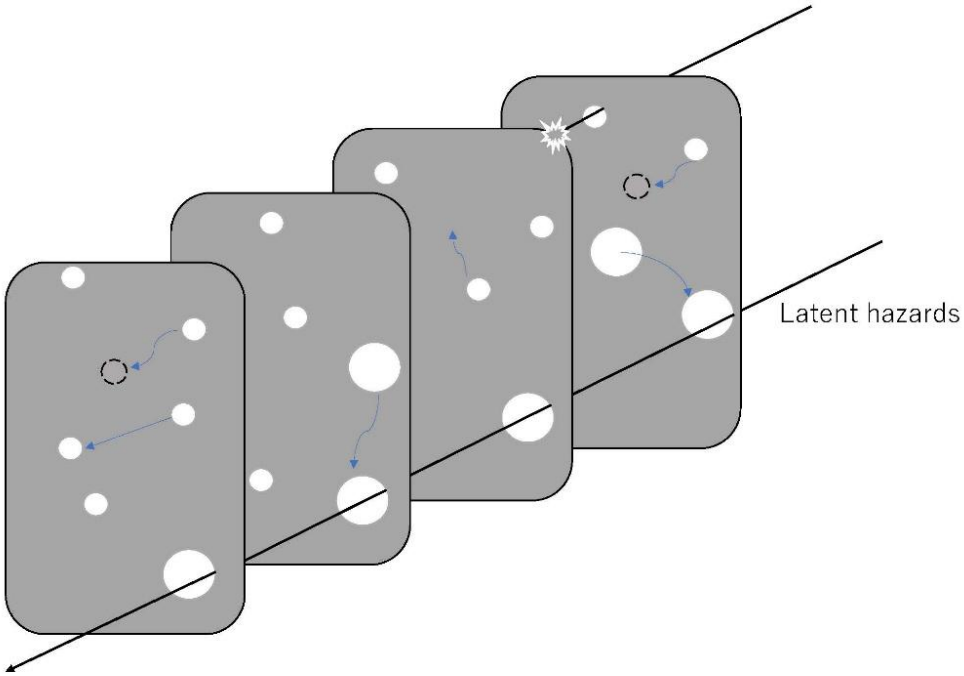
In practice, wrongful convictions have persisted because past causes were not adequately investigated or because preventive measures, even when adopted, became ineffective or symbolic over time. This represents a failure of risk management within the justice system. While risk management has been successfully applied in the private sector, the same logic should be extended to wrongful conviction prevention to enhance reliability.

In future, an independent commission should be established to institutionalize reviews of wrongful convictions. Its role would not only be to identify errors but to analyze their causes, systematize lessons learned, and integrate those lessons into legislation and judicial practice.

ii. Swiss Cheese Model

Research on *human error* also offers valuable insights for preventing wrongful convictions. According to the S*wiss Cheese Model*, every system contains latent hazards, but multiple layers of defense usually prevent failure. However, when the “holes” in these layers align, failure can occur (Reason, 2000). To reduce the risk of wrongful convictions, it is vital to minimize these gaps or increase the number of protective layers through systematic safeguards.

Figure 2: Swiss Cheese Model



The causes of these gaps can be broadly classified into two categories: *active errors* and *latent errors*. Active errors refer to human mistakes, such as lapses, forgetfulness, or rule violations, which can often be addressed individually to prevent recurrence. Conversely, latent errors arise from systemic weaknesses or long-term deficiencies, such as staffing shortages or structural flaws in the system. Unlike active errors, latent errors are difficult to detect and tend to persist over time, creating conditions that increase the likelihood of active errors and posing a serious threat to the integrity of the system. Therefore, in preventing wrongful convictions, special attention must be directed to latent errors, particularly deficiencies in legal frameworks and review mechanisms, as these underlying flaws perpetuate systemic failures.

iii. Preventive Measures against Misconduct

Misconduct can be addressed by targeting the three elements of the fraud triangle: motivation, opportunity, and rationalization. Prevention efforts should try to: (1) make the act more difficult to commit, (2) increase the likelihood of detection, (3) reduce the rewards of the act, (4) decrease inducements for the act, and (5) prevent justifications for the act (Jōho Shori Suishin Kikō, 2013).

iv. Countermeasures against Cognitive Bias

Countermeasures against bias and similar cognitive distortions can be divided into preventive and mitigating approaches. To prevent bias, individuals can undergo training to raise awareness of bias and enhance their ability to recognize when they may be affected by it. This increased awareness may help individuals detect and correct their own biases.

To mitigate bias once it has occurred, methods include articulating and documenting the reasons behind one's judgments, evaluating competing hypotheses (Dhami et al., 2019), and incorporating dialogue and deliberation with others during the decision-making process.

Double-checking from alternative perspectives is also useful as a safeguard against cognitive bias. In Japan, in fact, cross-checks by trial prosecutors, top-down reviews by organizational superiors, and reviews of statements by the officers in charge have been institutionalized as measures to prevent the recurrence of wrongful convictions and false accusations. However, these systems do not function effectively and have become perfunctory, which is another serious problem (e.g. *Presansu Moto Shachō Enzai Jiken* (Case No. 41), *Pasokon Enkaku Sōsa Jiken* (Case No.39)).

V Conclusion: Lessons Derived from Wrongful Convictions in Japan

This study has tried to provide a broad overview of the current state of wrongful conviction research in Japan. Based on the findings, there are five key lessons to learn.

First, the psychological tendencies and types of evidence contributing to wrongful convictions in Japan are broadly consistent with those identified in the United States and other countries. This suggests that the causes of wrongful convictions may be universal, and it means it should be possible to share research findings and promote international collaboration in order to better prevent such errors.

Second, wrongful convictions are closely linked to the structural features of a country's criminal justice system. In Japan, the heavy reliance on interrogations has played a central role in producing false confessions and accomplice statements. But the challenge is not merely to improve the investigative practices, because these are sustained and reinforced by the wider judicial framework, especially through the actions and inactions of judges.

Third, once established, an investigative model becomes deeply embedded within a country's legal culture, making reform difficult, even when serious flaws are evident. Transforming such a model requires the construction of an ideal alternative framework, which may require learning from the other criminal justice systems.

Fourth, wrongful convictions continue to recur due to persistent underlying causes. Breaking this pernicious cycle of reproduction requires the systematic examination of past wrongful convictions and the application of lessons learned to prevent recurrence.

Finally, although human limitations remain, developing and refining methods to prevent wrongful convictions and sharing such knowledge internationally is an important approach to their prevention. By cultivating a global effort to "*learn about and from wrongful convictions*," the first steps can be taken toward meaningful reduction. I hope that the Wrongful Conviction Studies in Japan will contribute to that foundation.

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Psychiatric Diagnosis as Newly Discovered Evidence in Ireland

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This article considers how courts in Ireland have responded to newly discovered evidence that a defendant was suffering from a mental disorder at the time of the offence. Where such evidence was not known to the jury, there is a risk that a wrongful conviction may have occurred. When psychiatrists examine a defendant for the purposes of criminal proceedings, they may only have had limited time to study and diagnose the defendant. Sometimes, the defendant's subsequent symptoms and presentation can lead to a psychiatrist revising their original diagnosis. In Ireland, a defendant can make an application arguing that this newly discovered fact shows that there has been a miscarriage of justice in relation to the original conviction. It appears that Irish courts will only accept such applications in exceptional circumstances. This article discusses the recent Court of Appeal decisions in People (DPP) v Abdi (no 2) and People (DPP) v McGinley. It analyses the reasoning of the judgments and seeks to identify what general principles can be derived from the decisions that can be used to inform future applications.

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I Introduction

In Ireland, a special verdict of insanity can only be returned after hearing evidence from a consultant psychiatrist relating to the mental condition of the defendant.[1] This evidence is to assist the tribunal of fact and not supplant its role as the ultimate decision maker.[2] Having a condition that qualifies as a mental disorder[3] is an essential element of the defences of insanity[4] and diminished responsibility;[5] however, the tribunal of fact will lack the necessary expertise to diagnose the defendant and will be reliant on the consultant psychiatrist's diagnosis to help them establish if the defendant satisfies this criterion.

A psychiatrist's diagnosis is a subjective opinion based upon their expertise and experience and is not capable of being scientifically certain.[6] Occasionally, psychiatrists in an insanity trial will differ slightly on the diagnosis but still agree that the defendant should not be held criminally responsible.[7] On rarer occasions, they might agree on the actual diagnosis, but differ on the issue of whether the defendant was legally insane.[8] Sometimes, the opposing psychiatrists will not be in agreement on either aspect of the defence. When either of the latter two scenarios represent the psychiatric evidence at trial, the defence almost always fails.[9]

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[1] *Criminal Law (Insanity) Act*, IR 2006, s 5(1).

[2] *DPP v. Abdi, (no 1)*,2004 IECCA 47 [*Abdi (no 1)*].

[3] A mental disorder is defined as including "mental illness, mental disability, dementia or any disease of the mind but … [excluding] … intoxication"; *Criminal Law (Insanity) Act, supra* note 1 at s 1.

[4] The tribunal of fact must also be satisfied that, in addition to suffering from a mental disorder, the defendant did not know the nature and quality of the act (cognitive limb), or did not know the act was wrong (evaluative limb), or was unable to refrain from committing the act (volitional limb); *Criminal Law (Insanity) Act, supra* note 1 at s 5(1)(b).

[5] The tribunal of fact must also be satisfied that, in addition to suffering from a mental disorder, "the mental disorder was not such as to justify finding him or her not guilty by reason of insanity but was such as to diminish substantially his or her responsibility for the act"; *Criminal Law (Insanity) Act, supra* note 1 at s 6(1)(c).

[6] See Murrah J's comments in *Wion v. United States:* "[s]anity and insanity are concepts of incertitude … no expert can speak with scientific certainty and no jury can or does act on the assumption that some of the experts in the case have done so"; *Wion v. United States,* 1963 325 F 2d 420 (1963) at 427–428. Also see *Leland v. Oregon,* 1952 343 US 790 (1952) 803 .

[7] See for example, *DPP v. Alchimionek,* 2019 IECA 49 where the defence psychiatrist diagnosed the defendant with Schizophrenia, and the prosecution's psychiatrist had diagnosed with psychotic depression. Despite the differing diagnoses, it was not regarded as a "major clash" and both were of the opinion that the defendant was insane.

[8] See for example, *DPP v. McKenna,* where the defence and prosecution psychiatrists agreed on the diagnosis, but differed on whether it was responsible for her behaviour; Natasha Reid, "'I sliced her like a goat': woman guilty of attempted murder despite insanity plea", *Court News Ireland* (3 May 2019), online: <https://courtsnewsireland.ie/sliced-like-goat-woman-guilty-attempted-murder-despite-insanity-plea/2019/03/05/>.

[9] In the last twenty years, only one trial could be identified where the prosecution psychiatrist testified that the defendant was not insane, but the jury still returned the special verdict: Eoin Reynolds, "Man not

If the convicted defendant had not had previous contact with psychiatric services prior to the commission of the offence, the amount of time to study his behaviour and condition prior to trial might be limited. An extended time period after a defendant's trial could provide further insight into his condition, and perhaps evidence suggesting a different diagnosis might emerge that was either not known, or in dispute, at the time of the original trial. In the cases of *DPP v Abdi (no 2)*[10] and *DPP v McGinley*,[11] the Court of Appeal had to consider whether a subsequent diagnosis of a psychiatrist was enough to constitute a new or newly discovered fact under section 2 of the *Criminal Procedure Act 1993* allowing the Court of Appeal to declare the conviction a miscarriage of justice.

This article will analyse the judgments in *Abdi* and *McGinley* and discuss the implications that the Court of Appeal judgments might have on the defences of insanity and diminished responsibility in the future.

II Newly Discovered Evidence

A. The Test for Admissibility of Newly Discovered Evidence

Section 2(1) of the *Criminal Procedure Act 1993* provides that a person who has been convicted of a criminal offence and alleges that a "new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction" can apply to the Court of Appeal for an order quashing the conviction if the court has previously rejected an appeal or application for leave to appeal. Demonstrated or actual innocence is not required for an order to be made, as it is based on the "administration in a given case of the justice system itself ".[12] Prior to the Act's enactment, the only recourse available to a convict was to petition the President for a pardon.[13]

The Act makes a distinction between new facts and newly discovered facts. A new fact is one which was known to the defendant at the time of the earlier proceedings but not adduced as evidence. There must be a reasonable explanation for the defence's failure to adduce this evidence previously.[14] A newly discovered fact is a fact not known to the defendant at the time of the relevant proceedings, or alternatively a fact which was known to the defendant, but its significance was not appreciated.[15]

In *DPP v. Willoughby*, the Court of Criminal Appeal established a four-tier test which must be satisfied before newly discovered facts could be admitted into evidence. Firstly, there must

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guilty of partner's attempted murder by reason of insanity", *The Irish Times* (27 April 2018), online: <https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/man-not-guilty-of-partner-s-attempted-murder-by-reason-of-insanity-1.3476580>.

[10] *DPP v. Abdi (no 2),* 2019 IECA 38 [*Abdi*].

[11] *DPP v. McGinley,* 2022 IECA 239 [*McGinley*].

[12] *DPP v. Meleady (No 3),* 2001 4 IR 16 (CCA) 33.

[13] Constitution of Ireland, Art 13.6.

[14] *Criminal Procedure Act 1993,* s 3.

[15] *Ibid* at s 4.

be exceptional circumstances established, particularly in the case of expert testimony, as the public interest requires that a defendant submits his entire case at trial and a multitude of expertise is available at this time.[16] Secondly, the evidence must be credible and it must be such that it might have an important and material influence on the result of the case.[17] Thirdly, the materiality and credibility is to be assessed by reference to the other evidence at the trial and not in insolation. Finally, the evidence must also not have been known at the time of trial and the circumstances must be such that it could not have been reasonably known or required at that time.[18]

B. When can Opinion Evidence be regarded as Newly Discovered Evidence?

The 1993 Act allows for only newly discovered facts to be admitted. It does not expressly allow for the introduction of new opinion evidence. In *People (DPP) v Kelly,* the Court of Criminal Appeal adopted the Concise Oxford Dictionary definition of a fact as being "a thing that is indisputably the case" and contrasted it with an opinion which is "not necessarily based on fact or knowledge".[19] Opinion Evidence was held to be incapable of constituting a newly discovered fact. Kearns J held that allowing the admissibility of new opinion evidence would:

> …have the effect of rendering virtually every conviction … open to later challenge if a further or new expert could be found to offer an opinion which went further than a defence expert had done at trial, or which tended to contradict or undermine experts called on behalf of the prosecution at trial.[20]

However, Kearns J went on to state that in limited circumstances opinion evidence may be admissible where it is necessary to properly interpret new facts. This may include cases where scientific knowledge at the time of trial has been cast into doubt by new scientific research, and where an original expert testimony is shown to have been rendered unreliable by bias, dishonesty or incompetence.[21]

For psychiatric testimony, the decision in *Kelly* indicates that expert psychiatric testimony would only be admissible if needed to interpret a new fact that had come to light. Thus, if a new psychiatrist diagnosed the defendant with a different mental disorder after the trial, this diagnosis alone would still be an opinion and inadmissible, unless it was based on a fact that was only discovered after the trial. Under the *Willoughby* criteria, this fact must also not have been capable of being reasonably known or discovered at the time. This sets a very high threshold for a defendant who wishes to argue that their claim of insanity or diminished responsibility should be reconsidered due to a new diagnosis.

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[16] *DPP v. Willoughby*, 2005 IECCA 4 approved by the Supreme Court in *DPP v. O'Regan,* 2007 IESC 38 at para 69.

[17] *Ibid.*

[18] *Ibid.*

[19] *DPP v. Kelly*, 2008 IECCA 7, 2008 3 IR 697 at para 34.

[20] *Ibid* at para 41.

[21] *Ibid* at para 44.

III The Decision in People (DPP) v Abdi (No 2)

A. Summary of the Case

Mr Abdi was convicted on 28 May 2003 in the Central Criminal Court for the murder of his 20-month-old son by a majority 10-2 jury verdict. His defence at trial was that he was insane at the time of committing the act.

His wife, Ms Bailey, gave evidence that the defendant had begun to display paranoid behaviour three months after their son's birth following an altercation between Mr Abdi and members of the Gardaí, for which Abdi was convicted of assault and sentenced to community service.[22] The defendant's mental state worsened after he returned from a trip to Kenya and his paranoia began to be directed towards his wife, culminating in a physical assault on 21 February 2001. It is not clear exactly when Ms Bailey left the family home, but on 17 April 2001 she met with Mr Abdi so he could spend time with his son. Ms Bailey and their son stayed in Mr Abdi's house that night in the bedroom, whilst the defendant slept in the living room. At around 4:20 am Mr Abdi collected his son from the bedroom and brought him into the living room.[23] The defendant locked the door and then swung his son by his legs into the wall several times. After praying for some time, he moved his son's body to the sofa and called an ambulance.

The defendant's explanation for his son's death was revised several times. He originally told Gardaí and ambulance attendants at the scene that his son suffered the injuries in a fall. Later, in an interview with Gardaí, he stated that he could not remember the events.[24] When he was first admitted to the Central Mental Hospital in October 2001, he claimed that he was sleepwalking at the time of the crime.[25] Later in 2001, he told psychiatrists that he had been hearing voices, and explained that he had not mentioned it earlier because he had not trusted them.[26] At trial, Mr Abdi described feeling like a "zombie or possessed" and alleged that a voice in Bajuni commanded him to hit the child.

Two consultant psychiatrists for the defence, Dr McCaffrey and Dr Washington-Burke, testified that Mr Abdi was suffering from schizophrenia. Dr McCaffrey based his diagnosis on the defendant's self-reported olfactory hallucinations and paranoid behaviour, believing that the only credible explanation was schizophrenia. Both psychiatrists also felt that the defendant's reaction to the treatment he was given in the Central Mental Hospital was suggestive of schizophrenia.[27]

Dr Mohan from the Central Mental Hospital, testifying for the prosecution, disagreed. He believed that Abdi's actions were motivated by the prospect of losing custody of his son and being unable to raise him in his own religious faith, and also partly provoked by racial abuse and taunts that he had been subjected to earlier that evening. He testified that there was no objective or

[22] *Abdi, supra* note 10 at para 17.
[23] *Ibid* at para 21.
[24] *Ibid* at para 41.
[25] *Ibid* at para 28.
[26] *Ibid* at para 23.
[27] *Ibid* at para 26.

professional evidence which confirms that the defendant was suffering from a psychotic mental disorder, although there was evidence of depression and PTSD. Dr Mohan pointed to the defendant's activities that day, and his action of locking the door to the living room before the murder as evidence that he knew, and was in control of, what he was doing.

He also gave evidence of the defendant's treatment in the Central Mental Hospital from October 2001 to June 2003. Mr Abdi was prescribed Risperidone to help sedate him and reduce the risk of suicidal behaviour, although an initial assessment had expressed a suspicion that he was exaggerating his symptoms. Throughout 2002, he continued to display paranoid behaviour and reported hearing voices. After Professor Kennedy concluded that the medication had led to no obvious improvement in the defendant's condition, it was stopped in November 2002. According to Dr Mohan, there was an "instant deterioration" when the medication was withdrawn in circumstances where the relapse would have been expected to occur over a week or two. Additionally, improvement was immediate when the defendant was given the drugs again. This compounded the suspicion that his alleged symptoms were not genuine. In May 2003, after further observation, the treatment team held a case conference and concluded that the applicant was not suffering from schizophrenia. Coincidently that same evening, the defendant made suicidal threats, and the decision was made to keep him at the Central Mental Hospital until his trial.[28] In June 2003, he was transferred to prison after his conviction with a diagnosis of depression.[29]

B. Events after the Conviction

Mr Abdi sought leave to appeal the verdict on the grounds that evidence from Dr Mohan regarding motive was improperly admitted as his testimony was only relevant to the accused's psychiatric condition, and that the trial judge compounded the error by referring to this evidence in his charge to the jury. This was rejected by the Court of Criminal Appeal, holding that Dr Mohan's view was rebutting opinion evidence given by the defence psychiatrists, such as Dr McCaffrey's argument that "only a person in an acute psychotic state could perform the crime".[30]

On 3 June 2005, approximately six months after his appeal had been dismissed, Mr Abdi was admitted to the Central Mental Hospital, primarily due to suicidal behaviour.[31] He also alleged he was being poisoned and was hearing voices. At the time of admittance, Dr Ferguson was of the view that Mr Abdi was malingering at least some of his symptoms. Mr Abdi was returned to prison on 8 September 2005, and prescribed 10 mgs of Olanzapine.[32]

On 25 May 2007, Mr Abdi assaulted a prison officer and was admitted to the Central Mental Hospital for a third time.[33] He claimed that he was hearing voices which ordered him to hurt other people, that he had cancer, and he also engaged in self-harming behaviour. At the time of the admittance, Dr Linehan's opinion was that the "subjective complaints are not supported by

[28] *Ibid* at para 29.

[29] *Ibid* at para 30.

[30] *Abdi (No 1), supra* note 2.

[31] *Abdi, supra* note 10 at para 49.

[32] *Ibid* at para 50.

[33] *Ibid* at para 51.

objective observations that would be consistent with a psychotic illness".[34] Mr Abdi was returned to prison on 12 September 2007, and prescribed Venlafaxine, and Olanzapine.[35]

On 20 May 2013, Mr Abdi was admitted to the Central Mental Hospital for a fourth time, claiming he was hearing voices and that he had been raped by prison officers. During this admission, he was diagnosed with paranoid schizophrenia and antisocial personality disorder. This was the first time a psychiatrist providing in-patient care had given him a diagnosis of schizophrenia. He was discharged in October 2013 and has been on increased doses of Risperidone since his return to prison. Dr O'Connell from the Central Mental Hospital examined the defendant in 2016 and also concluded that schizophrenia was an appropriate diagnosis.[36] There have been no further incidents of violence to third parties, although the defendant's suicidal behaviour has continued.[37]

C. The Application under section 2 of the 1993 Act

Following his diagnosis of schizophrenia, Mr Abdi applied to the Court of Appeal to have his conviction quashed on the grounds of newly discovered facts which render the trial verdict a possible miscarriage of justice. The applicant argued that his psychiatric history, symptoms and presentation after his trial were newly discovered facts. Whilst his condition itself was not new, the changed diagnosis was based on more extensive evidence than was available at the time of the first trial.[38] The applicant further argued that this subsequent history establishes that the diagnosis made by Dr Mohan was wrong.[39]

Counsel for the Director of Public Prosecutions (DPP) argued that the diagnosis was an opinion. It drew a distinction between the diagnosis taking place, which was a fact, and the actual diagnosis itself, which was an opinion. The evidence sought to be adduced was not that a diagnosis had taken place, but the actual content of that diagnosis.[40] They further argued that the diagnosis of schizophrenia was not a newly discovered matter, it was the same diagnosis advanced by the defendant at his original trial.[41] Essentially, the defence was merely seeking to introduce another opinion which was already expressed by the defence psychiatrists. The fact that more experts are on one side than the other, the DPP argued, does not mean that a miscarriage of justice has occurred.[42]

For the purposes of the appeal, two reports were submitted which reviewed the entire psychiatric history of the applicant. Both reports concluded that the evidence established that Mr Abdi had been suffering from schizophrenia at the time of the killing. The first was by one of the

[34] *Ibid* at para 33.
[35] *Ibid* at para 51.
[36] *Ibid* at para 52.
[37] *Ibid* at para 33.
[38] *Ibid* at para 64.
[39] *Ibid* at para 58.
[40] *Ibid* at para 78.
[41] *Ibid* at para 79.
[42] *Ibid* at para 80.

original defence psychiatrists, Dr Washington-Burke. The report speculated that the medication prescribed by the Central Mental Hospital during the applicant's first admission may have masked symptoms of schizophrenia which would have been obvious if he was not on the drug.[43] It urged the court to consider if it was acceptable to provide treatment for Mr Abdi in prison rather than a hospital.[44] Such a view is also present in the second report, which was compiled by Dr Quinn, who stated that he held a:

> …clear view that [the applicant] should have received a hospital disposal … [t]he issue of insanity and disposal should be considered separately. One is clear (that of hospital disposal) and the other is less so. The evidence for his mental illness is clear, corroborated and consistent over time hence the reason for my views on his disposal.[45]

Both reports seem to slightly misunderstand the law. In Ireland, a hospital order can only be directed by the Court when a special verdict of insanity has been returned by the tribunal of fact, so the suggestion that disposal and responsibility should be treated separately does not help resolve the legal issues. Provisions exist to transfer prisoners to the Central Mental Hospital when it is necessary for treatment.[46] The prisoner is only transferred back when the clinical director is of the view that in-patient care or treatment is no longer required.[47] This procedure was used for Mr Abdi four times. Even after the 2013 diagnosis, doctors at the Central Mental Hospital were of the view that the applicant did not require any care that could not be provided in a prison.

Dr Quinn's report also criticised Dr Mohan for not interviewing Mr Abdi's family and for not giving significant weight to Ms Bailey's evidence.[48] Dr Quinn attached great significance to Ms Bailey's description of how the applicant went "from a sensitive, gentle man to a paranoid, deluded and suspicious individual".[49] Dr Mohan, under cross-examination at the original trial, had noted that the behaviour of the applicant prior to the killing was unusual, but had questioned the weight that it should be given, as it did not come from independent medical professionals.[50]

Dr Quinn's report did demonstrate that the applicant is an unreliable historian. It was acknowledged by Dr Quinn, that Mr Abdi's various accounts have made it difficult to interpret his mental state at the time of the killing.[51] The applicant's accounts to Dr Quinn alone featured inconsistencies and, in parts, contradicted his trial testimony. Dr Quinn felt that it was clear that the applicant was mentally ill but concluded that: "although it is clear that the events leading to

[43] *Ibid* at para 34
[44] *Ibid*.
[45] *Ibid* at para 54.
[46] *2006 Act*, s 15.
[47] *2006 Act*, s 16.
[48] *Abdi*, *supra* note 10 at para 53.
[49] *Ibid* at para 54.
[50] *Ibid* at para 28.
[51] *Ibid* at para 54.

the killing of Nathan were in large part driven by psychosis it is difficult to be quite so certain that they would reach the high bar set for insanity."[52]

D. The Court of Appeal Decision

The court concluded that the circumstances of the case were exceptional but did not fall under either of the exceptions suggested by Kearns J in *Kelly*.[53] However, Edwards J, delivering the Court of Appeal judgment, determined that the instances mentioned were not intended to be exhaustive, but offered as helpful examples.[54]

Edwards J went on to state that the new diagnosis took account of the extensive psychiatric history that had occurred since the trial, and this was not the same evidence that the opinions offered at trial were based upon.[55] The court also placed emphasis that this new diagnosis was provided by a doctor who was treating him, rather than preparing an opinion for court proceedings.[56] The court also felt that Dr Quinn's report, which was based on interpreting the defendant's behaviour before the offence to the present, was a newly discovered fact, in that it placed evidence heard at trial into a new context.[57]

The court admitted that a medical diagnosis was an opinion of the doctor but stated the existence of that diagnosis is a fact, and a diagnosis cannot easily be divorced from the investigation or history which led to it. If the symptoms and history were not the same in each investigation, then each diagnosis is different regardless of the conclusion.[58] The court concluded that the current diagnosis was a newly discovered fact.[59] They also declared that the fact that doctors at the same hospital as Dr Mohan and Professor Kennedy regard their diagnosis as incorrect is a newly discovered fact.[60] The court also felt that the symptoms, presentation and treatment experienced by the defendant also qualified as newly discovered facts.

The court then considered whether a miscarriage of justice had occurred. They considered a scenario where the 2003 trial had been postponed until 2013 due to a hypothetical series of events. They considered whether the evidence between 2003 and 2013 would have been relevant at trial and concluded that the fact the defendant's diagnosis changed in 2013 was a relevant issue for the jury to consider.[61] The newly discovered facts were held to have the potential to influence the outcome.[62] The jury verdict was quashed and a re-trial was ordered.[63]

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[52] *Ibid* at para 54.
[53] *Ibid* at para 83.
[54] *Ibid* at para 84.
[55] *Ibid* at para 85.
[56] *Ibid* at para 87.
[57] *Ibid* at para 88.
[58] *Ibid* at para 89.
[59] *Ibid* at para 90.
[60] *Ibid.*
[61] *Ibid* at para 93.
[62] *Ibid* at para 94.
[63] *Ibid* at para 97.

E. Analysis of the Court's Decision

Edward J's view that *Kelly* did not provide for an exhaustive list of circumstances where opinion evidence could be considered is a reasonable interpretation of the case. However, it could be argued that he appears to put little emphasis on the context of the remarks. Kearns J does not seem to be providing examples of when opinion evidence was capable of being a newly discovered fact, he appears to be discussing circumstances where new opinion evidence may be admissible to aid in the interpretation of a fact. As such, the conclusion that Dr Quinn's report was a newly discovered fact seems to be possibly inconsistent with *Kelly*. It could be strongly argued that it is opinion evidence. The same applies to the view that the 2013 diagnosis is a newly discovered fact. The fact that a new diagnosis was made is indeed a factual occurrence, but only in the same way that anybody offering a new opinion is something that factually happened. This fact of occurrence is meaningless on its own without knowing the actual opinion. It's an attempt to disguise opinion as fact just because the opinion was expressed.

Furthermore, parts of the court's reasoning are not explained as clearly as it could have been. The court's view that the 2013 doctor felt that the original diagnosis offered by Dr Mohan and Professor Kennedy was incorrect and was a newly discovered fact also seems to be opinion evidence. Additionally, it appeared to be without foundation. There did not seem to be any evidence before the court to state that this was the doctor's opinion. The evidence that the court discussed was that he diagnosed the defendant with schizophrenia in 2013, but there was nothing to suggest that he felt that the diagnosis made by his colleagues 10-years earlier was incorrect.

Kelly does not permit a new diagnosis to be admissible, unless it is based on newly discovered facts. That the applicant was eventually able to find another psychiatrist who would diagnose him with schizophrenia is neither surprising nor grounds for quashing the jury verdict. Applying *Kelly* correctly involves considering if the symptoms, treatment or presentation of the defendant between 2003 and 2018 were capable of being regarded as newly discovered facts. In summary, there are two distinct steps to be taken. The first is to determine if new facts exist, and if so, whether the opinion evidence is admissible to aid in the interpretation of the new facts. The second is to determine if these new facts themselves meet the threshold for admissibility to declare that there has been a miscarriage of justice.

If the applicant displayed new symptoms which were not evident or discussed at the time of trial then this would be a newly discovered fact. However, it could be argued that in Mr Abdi's case, there was not really any significant new symptoms or behaviour. Hearing voices, suicidal behaviour, delusions, paranoia and violent behaviour were all symptoms that the defendant displayed prior to his trial and were discussed in the psychiatric testimony at that time. Effectively, the issue to be determined is whether the fact that these symptoms continued to recur makes them capable of constituting a newly discovered fact, thus making the 2013 diagnosis relevant and admissible.

This is a difficult matter to resolve because of the unique circumstances of the case. The prosecution's case at trial was that the applicant's complaints were malingering, and this is the version of events that seemed to be accepted by the jury. Psychiatrists in 2005 and 2007 had also reached the same conclusion. It should be considered if the fact that the applicant continued to

complain of the same symptoms make it less likely that he was being dishonest. The mere fact that a defendant might continue to stick to his story after his conviction does not necessarily make his narrative any more believable, nor would a jury likely be surprised to learn of it.

The applicant's case seemed to rely on the 2013 diagnosis providing context as to why his continuation of symptoms is a newly discovered fact. However, this would only be the case if the psychiatrist in 2013 believed the defendant was likely suffering from schizophrenia in 2001. There does not appear to be any evidence introduced in the course of the appeal that the Central Mental Hospital doctors who examined the applicant in 2013 and 2016 were of this opinion. Studies have found that persons with a traumatic stress disorder have an increased risk of developing schizophrenia, and this risk increases with time.[64] This means that it is perfectly conceivable that Dr Mohan's diagnosis of PTSD in 2003 was accurate, and the applicant subsequently developed schizophrenia. As such it must be concluded that the 2013 diagnosis on its own should not have been considered admissible. It does not provide the necessary information that allows the subsequent psychiatric behaviour of the applicant to be considered as a newly discovered fact.

However, the reports submitted by Dr Washington-Burke and Dr Quinn, particularly the latter, are a different matter. Both reports are opinion evidence but contained the critical conclusion that the 2013 diagnosis when considered in context with the applicant's displayed symptoms since 2001, made it likely that he was suffering from a mental disorder at the time of the 2001 killing. Their analysis was based on fifteen years more observation of Mr Abdi's symptoms than was available at the time of the original trial. As their opinion evidence provided the necessary interpretation for why the applicant's subsequent psychiatric history should be considered as a newly discovered fact, both reports are admissible.

The second question is whether the newly discovered facts (as interpreted by the opinion evidence in the reports) meet the threshold for admissibility. There are no grounds for doubting the credibility of Dr Quinn's report, and it was not possible to have known what the applicant's subsequent psychiatric history would have been at the time of the trial. Thus, under the *Willoughby* rules, admissibility depends on the effect that this information might have had on the outcome of the original trial. It is particularly noteworthy that no evidence was introduced by counsel for the DPP which contradicted the view of Dr Quinn (who was their own expert). The court had two reports which believed the applicant had been suffering from schizophrenia at the time of the offence, and nothing to contradict these views. However, the issue is not whether the applicant was suffering from a mental disorder at the time, but rather whether he was legally insane. Although both reports do conclude that the applicant was likely insane at the time of the offence, Dr Quinn's report is not as definitive:

> If the account he gave to me were to be considered truthful, however, I would be of the view that he would have met the criteria for insanity under M'Naghten's Principles now enshrined under Irish law in the 2006 Insanity Act. Although he knew the nature of the

[64] See for example, Niels Okkels et al, "Traumatic Stress Disorders and Risk of Subsequent Schizophrenia Spectrum Disorder or Bipolar Disorder: A Nationwide Cohort Study" (2017) 43:1 Schizophrenia Bull at 180.

> act, he describes acting under an irresistible impulse, and given that he thought that his son was possessed by some sort of Jin or devil that was trying to harm him and take his life, he would not have known that what he was doing was wrong.[65]

The DPP could have argued that there was insufficient reason to suspect that either of these reports would be enough to influence the jury if the prosecution's witnesses continued to assert that he did not satisfy the test of legal insanity at the time of the killing, however they chose not to argue this point. In the absence of such evidence, it is difficult to argue that the Court of Appeal had no option but to order a re-trial. It is noteworthy that Dr. Mohan testified in the subsequent re-trial that, with the benefit of subsequent psychiatric history of the accused, he now agreed that the applicant had schizophrenia at the time of the offence and that he "was unable to refrain from committing the act".[66] At the re-trial, which was uncontested by the prosecution, the jury unanimously found the defendant not guilty by reason of insanity after just 17 minutes of deliberation.[67]

One issue that was not fully clarified is the threshold for a miscarriage of justice in cases of insanity. The court cited Keane J in *People (DPP) v Meleady & Grogan,* who stated that the provision is "intended to afford relief to those who could point to materials which, if they had been available at the trial, might — not necessarily would — have raised a reasonable doubt in the mind of the jury".[68] This was the threshold that counsel for the applicant also argued in their submissions. One could argue that because the burden of proving insanity is on the defence to a standard of a balance of probabilities, the test of the new evidence potentially raising a reasonable doubt should be different where the issue is insanity. The Court of Appeal did not directly address whether the threshold was different but seemed to indicate the possibility by stating that the newly discovered facts "at least [have] the potential to influence the outcome".[69] Because it was so clear in *Abdi* that the threshold had been met regardless, the point did not need to be decided. However, it may be an issue that needs to be clarified in a future case.

IV The Decision in People (DPP) v McGinley

A. Summary of the Case

In *People (DPP) v McGinley*, the applicant was convicted by a jury of murder on 3 April 2014 and was sentenced to life imprisonment.[70] He had offered to plead guilty to manslaughter, but the plea was not accepted by the prosecution. His defence at trial was that this was a "robbery

[65] *Abdi, supra* note 10 at para 54 .

[66] "Psychiatrist now agrees that man jailed for 16 years for murder had mental disorder", *Court News Ireland* (12 December 2019), online: <courtsnewsireland.ie>.

[67] "Man who spent 16 years in jail for murdering infant son is found not guilty by reason of insanity", *Court News Ireland,* (13 December 2019), online: <courtsnewsireland.ie>.

[68] *DPP v Meleady & Grogan,* 1995 2 IR 517.

[69] *Abdi, supra* note 10 at para 94.

[70] He had also pled guilty to burglary and false imprisonment; "McGinley guilty of murdering Sligo pensioner", *Court News Ireland* (3 April 2014), online: <courtsnewsireland.ie>.

gone wrong" and that he had not intended to kill the victim.[71] The applicant admitted punching the victim a few times and tying him up using shoelaces on 19 September 2012.[72] He also admitted stealing approximately €60.[73] At trial, evidence was heard that the victim had suffered severe injuries, including a fractured skull and jaw.[74] In addition, had he lived, he would have lost the use of one of his hands because they had been bound so tightly.[75]

After the burglary, the applicant burned the clothes that he was wearing.[76] The following day, he called the emergency services with details of the victims address and informed them that the victim had been tied up.[77] Gardai went to an incorrect address and the victim was found two days later by relatives.[78] The victim died on 22 September 2012 in hospital from "bronchial pneumonia due to coma due to blunt force trauma".[79]

Prior to the murder conviction, the applicant had 21 previous convictions,[80] and was sentenced to a term of imprisonment for various offences of assault causing harm in 2005, 2006,[81] and 2007.[82] At the time of the murder, he was also signing on at the local Garda Station due to an unconnected burglary charge.[83] The applicant also had a history of drug and alcohol abuse. In the twelve months prior to the murder, he reported that he was drinking 7.5-10 litres of beer every day, smoking up to 20 joints of cannabis, as well as regular daily consumption of vodka, whiskey, diazepam, cocaine, and ecstasy.[84] He had also used heroin in the past.[85] On the day of the murder, the applicant admitted to having consumed both diazepam and cannabis.[86]

There was no attempt at trial to introduce either the insanity defence or the partial defence of diminished responsibility. However, the applicant was on antipsychotic medication at the time of the murder and the trial. The applicant's medical records demonstrate a history of mental illness

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[71] *Ibid*.
[72] *McGinley*, *supra* note 11 at para 41.
[73] *Ibid* at para 60.
[74] Aine Hegarty "His gentle soul was terrorised and savaged by anger and violence", *Irish Mirror,* (3 April 2014), online: <www.irishmirror.ie>.
[75] *Ibid*.
[76] *McGinley*, *supra* note 11 at para 60.
[77] *Ibid* at para 41.
[78] "Sligo man sentenced to life for murder", *Irish Times,* (4 April 2014), online: <https://www.irishtimes.com/>.
[79] Hegarty, *supra* note 74.
[80] *Ibid*.
[81] *McGinley*, *supra* note 11 at para 40.
[82] "Stabber is jailed for three years", *Irish Independent,* (25 March 2009), online: <https://www.independent.ie/regionals/sligo/news/stabber-is-jailed-for-three-years/27563600.html>.
[83] *McGinley*, *supra* note 11 at para 60.
[84] *Ibid* at para 41.
[85] *Ibid* at para 39.
[86] *Ibid* at para 41.

that began approximately 2 years prior to the murder.[87] In early 2011, the applicant was assessed at a psychiatric unit in Sligo after he had reported being depressed.[88] He was diagnosed with "mild depressive episode with predominant anxiety symptoms"[89] and was prescribed antidepressants and benzodiazepine.[90] In August and November 2011, the applicant reported to his GP that he had been hearing voices and was having paranoid thoughts. He was prescribed Quetiapine, which is an antipsychotic drug.[91] The applicant also reported feeling paranoid in January 2012 after he had been charged with an unconnected burglary offence.[92] As a result of his condition not improving, his dose of Quetiapine was doubled.[93] The patient's history between March 2012 and September 2012 is unclear, but at the time of committal to prison in September 2012, he had a prescription for Seroquel.[94]

The applicant did not display any active symptoms of psychosis during his interactions with the Gardai. After learning that the victim had died, the applicant turned up at the local Garda Station and confessed to the offence on 28 September 2012.[95] He was described as "crying and extremely distressed".[96] The interviewing Garda believed that he was intoxicated and stated that he was "difficult at times to understand".[97] He was examined by two doctors over the next 3 hours and was deemed unfit to be interviewed. He admitted to the second doctor that he was taking Seroquel and had a prior psychiatric admission.[98]

After being charged with the murder and remanded in custody, the applicant was subsequently examined by a prison psychiatrist, who noted that he was presenting with depression and was currently taking Seroquel. The prison records incorrectly describe the drug as an anti-depressant.[99] The applicant denied experiencing any psychotic symptoms. He also denied having any prior psychiatric illness or attending a psychiatric hospital or clinic, which was untrue and contradicted what he had told the Garda doctor.[100] It is unclear if the prison psychiatrist was aware of this. On 25 October 2012, the prison psychiatrist requested a forensic assessment of the applicant, although it was noted in the written request that he did not display any symptoms of a major psychiatric disorder.[101] The same day as this letter was sent, it is noted in his prison medical

[87] There was some contact with psychiatrists in 2008 and 2009 during a period of imprisonment.
[88] *McGinley, supra* note 11 at para 42.
[89] *Ibid* at para 42 .
[90] *Ibid* at para 61.
[91] *Ibid* at para 55.
[92] *Ibid* at para 43
[93] *Ibid* at para 61.
[94] *Ibid*.
[95] *Ibid* at para 59.
[96] *Ibid*.
[97] *Ibid*.
[98] *Ibid*.
[99] *Ibid* at para 52.
[100] *Ibid*.
[101] *Ibid* at para 44.

records that a nurse observed him stating that he was hearing voices.[102] It is not clear whether the requested forensic assessment ever occurred, but the prison psychiatrist determined in November 2012 that he did not require psychiatric medication and did not renew the prescription for Seroquel.[103]

In 2013, the applicant was recorded as continuing to present as depressed. There was an incident in December 2013 where the applicant was transferred to a general hospital after consuming an "illicit substance".[104] When he returned to prison, he started to present as "delusional and paranoid".[105] He was prescribed Olanzapine by the prison psychiatrist on 16 December 2013, but the notes state "that it was not being prescribed as an antipsychotic medication".[106] As Olanzapine is an antipsychotic medication, approved for treatment for schizophrenia or manic episodes in patients with bipolar disorder, it is uncertain why it would have been otherwise prescribed.[107]

B. Events after the Conviction

Following the applicant's conviction in April 2014, he "continued to experience intermittent mood and psychotic symptoms" over the next two years and was treated with various antidepressant and antipsychotic medication.[108] In November 2015, after the applicant complained of "persecutory auditory hallucinations", a consultant psychiatrist requested his GP records. The applicant also disclosed to a nurse that he had heard voices when he was previously imprisoned in 2005.[109] In the GP record's request, the psychiatrist's initial impression was that the applicant was experiencing pseudo hallucinations rather than suffering from a psychotic illness.[110] The applicant continued to hear voices, with nurses documenting such symptoms in February, March, and April of 2016.[111] After a change of legal team, he unsuccessfully appealed the conviction to the Court of Appeal in November 2016 on a number of grounds relating to the judge's charge regarding intent.[112] Similar to the original trial, there was no evidence introduced regarding his history of mental illness.

After the appeal was rejected, the applicant's condition continued to deteriorate and by May 2017, he was claiming that "the HSE psychologist [was] communicating with him and

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[102] *Ibid* at para 52.

[103] *Ibid* at para 53.

[104] *Ibid* at para 56.

[105] *Ibid*.

[106] *Ibid*.

[107] Health Products Regulatory Authority, "Information for the user: Olanzapine", online: <https://www.hpra.ie/img/uploaded/swedocuments/670288ac-f417-4769-8809-5031c847bd64.pdf>.

[108] *McGinley, supra* note 11 at 61.

[109] *Ibid* at para 57.

[110] *Ibid* at para 45 .

[111] *Ibid* at para 58.

[112] *DPP v McGinley*, 2016 IECA 424 at para 19.

carrying his child".[113] That same month, a barrister contacted the prison governor expressing concern about the applicant's mental condition after he had appeared "distressed, paranoid and incoherent".[114] Following this letter, the applicant's antipsychotic treatment was changed in July 2017 to 10mg of olanzapine.[115]

In November 2017, the applicant was formally diagnosed with schizophrenia "with a drug related exacerbation, now much improved".[116] In 2018, consultant psychiatrist Dr Monks noted that the applicant was presenting "with chronic delusional ideas that he is possessed and controlled by an HSE psychologist operating from outside the prison".[117] Noting that cannabis use might be complicating the applicant's symptoms, Dr Monks changed his treatment from olanzapine to amisulpride and placed him on the waiting list for admission to the Central Mental Hospital.[118]

C. The Application under section 2 of the 1993 Act

In October 2018, the applicant's mother engaged the services of another new legal team and a letter of instruction was sent to the Central Mental Hospital in May 2019 requesting an examination of the applicant. The applicant was examined in January 2020 by Dr Monks. Two reports were issued by Dr Monks in June and August 2020. On the basis of these reports, the applicant sought an order quashing his conviction on the grounds that the contents of Dr Monks' report are a newly discovered fact which might have influenced the jury verdict.[119]

In Dr Monk's initial report in June 2020, he stated that it was possible that the applicant had schizophrenia at the time of the offence, but that it was "difficult to establish any causal nexus between mental illness and his behaviour at the material time".[120] He noted that the applicant admitted intoxication, but there was nothing else in his account to suggest that his mental capacity had been diminished.[121] Dr Monks concluded that "[a]t the very least it can be said that Mr McGinley was in a prodromal phase of schizophrenia from late 2011." He also concluded that the antipsychotic medication may have reduced the applicant's psychosis, and that the presence of psychotic symptoms "may have been attributable in part to heavy and persistent consumption of drugs and alcohol."[122]

In response to the first report, the applicant's legal team raised seven questions with Dr Monks, which were answered in a second report in August 2020. In this report, Dr Monks confirmed that in his view "prodromal schizophrenia would come under the definition of mental

[113] *McGinley, supra* note 11 at para 58.
[114] *Ibid* at para 46.
[115] *Ibid* at para 47.
[116] *Ibid* at para 48.
[117] *Ibid* at para 49.
[118] *Ibid*.
[119] *Ibid* at para 9.
[120] *Ibid* at para 54.
[121] *Ibid*.
[122] *Ibid* at para 61.

disorder as defined in section 1 of the Criminal Law (Insanity) Act 2006."[123] He also confirmed that it was probable that the applicant was also suffering from alcohol and drug dependency syndrome at the time of the offence.[124] He further stated that it was probable that the applicant was experiencing psychosis at the time of the offence, but noted that it was difficult to comment on the severity or degree of such psychosis, as there was no contemporaneous documentation of such symptoms occurring at that time.[125] He stated that "with hindsight I think it is likely that he would have met the diagnostic criteria for schizophrenia in the year before the offences".[126]

Although not mentioning diminished responsibility specifically, Dr Monks went on to state that:

> …while it doesn't appear that Mr McGinley's decision making processes at the time of the robbery and assault on Eugene Gillespie were specifically influenced by delusions or hallucinations, active psychotic illness may have impaired his reasoning, judgment and behaviour (for example impulsivity and aggression) in a more general sense. This would have relevance in addressing the question of whether Mr McGinley intended to cause serious injury to Mr Gillespie.[127]

D. The Court of Appeal Decision

The Court of Appeal dismissed the application. The court held that, even when considering the evidence of Dr Monks at its height, it still fell "far short of what would be required for a successful application pursuant to [section] 2 of the 1993 Act".[128] Ní Raifeartaigh J, in delivering the judgment of the court, acknowledged that there may be exceptional cases where a subsequent diagnosis shows that a person had a mental disorder at the time of the offence, but generally such applications "must be treated with considerable caution, and such cases will be exceptional".[129] The court agreed that *Abdi* was an exceptional case, but distinguished it on a number of grounds.

Firstly, the insanity defence had been raised at the original *Abdi* trial whereas in *McGinley*, neither insanity or diminished responsibility was raised. Secondly, there were a number of expert reports in *Abdi* which concluded that the applicant satisfied the legal test for insanity, including the original prosecution expert. In *McGinley*, there was only a single expert, and "his views are much less definitive".[130] Thirdly, the court noted that the purpose of introducing this expert evidence in *McGinley* was unclear. Counsel had not mentioned in their written submissions whether the purpose of the evidence was to support a partial defence of diminished responsibility or that the defendant lacked the *mens rea* for murder.

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[123] *Ibid* at para 55.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*.
[128] *Ibid* at para 83.
[129] *Ibid* at para 65.
[130] *McGinley, supra* note 11 at para 66.

The court emphasised that the applicant's conduct after the offence did not raise any "alarm bells" with his legal team, the doctor who examined him at the Garda station, or prison staff.[131] The court also considered the nature of the offence. It argued that the applicant in *Abdi*'s conduct "could not in any way be described as goal-oriented behaviour".[132] In the present case, they emphasised that the offence was committed for "personal gain" and he had taken "various steps to conceal his involvement in the offence".[133] It also stated that there was a "significant question-mark [raised by Dr Monks initial report] around whether any such episode was causally connected with the offences committed".[134]

E. Analysis of the Court's Decision

The judgment avoids many of the theoretical issues that arose in *Abdi,* by immediately clarifying that that the application is based on the argument that Dr Monk's report is evidence which demonstrates that the "manifestation of the applicant's schizophrenia tells us something useful … about his mental state/illness at the time of the killing".[135] However, the decision seems to indicate a very strict approach will be taken by the court in future applications.

The court's emphasis on diminished responsibility or insanity not being raised at the original trial is problematic. The medical records establish that the applicant was on anti-psychotic medication at the time of the offence and trial, so there is no question about whether the applicant had a mental disorder at the time of the offence. These details were disclosed to a Garda doctor at the time. Whilst the public interest requires that a defendant raises his entire case at trial, it needs to be remembered that it is common for patients with conditions such as schizophrenia to lack insight into their conditions and therefore there is an argument that further details of their condition emerging should be considered as an exceptional circumstance. The applicant's medical history demonstrates that his accounts about his past psychiatric issues were not always accurate and although prior to the trial, he denied having psychotic symptoms to the prison psychiatrist, he did admit to a nurse that he was hearing voices.

Secondly, whilst it is true that there were two expert reports in *Abdi,* the judgment does not mention a report from the original prosecution expert as the court claimed. As stated previously, it is true that Dr Mohan gave such evidence at the re-trial, but not at the section 2 hearing. The evidence given by Dr Monks in the *McGinley* hearing was not contested, so it should be questioned whether the defence should really have been under an obligation to hire a second psychiatrist in these circumstances. Surely that should be the responsibility of the prosecution. In *Abdi,* one of the reports was from the DPP's witness, so it seems unfair to regard the DPP's decision not to present their own psychiatric report against the applicant in these circumstances.

The court's comment on the nature of the offense was also surprising. It seemed to adopt the view that offences committed for personal gain or acts designed to conceal the crime were

[131] *Ibid* at paras 79–80.
[132] *Ibid* at para 81.
[133] *Ibid*.
[134] *Ibid* at para 69.
[135] *Ibid* at para 64.

incompatible with the defences of diminished responsibility or insanity. However, the insanity defence has been successful in cases where there was evidence that the act was deferred until a time where it would be easier to dispose of the body,[136] and also where there has been significant evidence of planning and deliberation.[137] In both cases there was undisputed psychiatric testimony that the accused had no meaningful control over their behaviour because of a mental disorder.

When drawing comparisons with *Abdi,* the court also did not seem to appreciate that the evidence establishing a causal nexus between a mental disorder and an offence is inevitably going to be much stronger in a case where insanity is pleaded rather than diminished responsibility. Unlike insanity, it should also be emphasised that the defence of diminished responsibility does not require evidence from a consultant psychiatrist before the finder of fact can consider the defence, although it would be true to say that it is unlikely to be successful without this evidence.[138]

Furthermore, there is some debate over whether there actually needs to be a causal link between the criminal act and the mental disorder in order for the defence of diminished responsibility to be successful.[139] In the academic literature, comparisons have been drawn to infanticide,[140] which requires only contemporaneity,[141] to argue that requiring a causative connection would substantially limit the scope of the defence.[142] Prendergast suggests that the words "for the act" may "provid[e] guidance on the magnitude of the mental disorder rather than its causal connection."[143] He suggests that to read a causal connection into clause (c), makes clause (b) redundant as "all the important proofs for the defence in establishing diminished responsibility are packed into clause (c)".[144] In *People (DPP) v McDonald,* the trial judge directed the jury that substantially diminishing responsibility for the act "does not mean that the mental disorder had to cause him to do what he did because if it caused him to do what he did, then we would be in the

[136] Alison O'Riordan, "Galway man who strangled brother with bungee cord found not guilty of murder by reason of insanity", *Court News Ireland* (22 April 2016), online: <courtsnewsireland.ie>.
[137] Andrew Phelan, "Man found not guilty by reason of insanity of attempting to murder pregnant sister", *Irish Independent* (12 October 2017), online: <independent.ie>.
[138] See *Criminal Law (Insanity) Act*, IR 2006, s 5(1) which states: "Where an accused person is tried for an offence and, in the case of the District Court or Special Criminal Court, the court or, in any other case, the jury finds that the accused person committed the act alleged against him or her and, having heard evidence relating to the mental condition of the accused given by a consultant psychiatrist, finds that…"
[139] Kennefick argues that "it would appear that the mental disorder must essentially amount to a significant contributory factor in causing the diminishment in responsibility"; Louise Kennefick, "Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law" (2011) 62 Northern Ireland Legal Q 269 at 285-286.
[140] *Infanticide Act 1949,* Number 16/1949, s 1(3)(c) as amended by *Criminal Law (Insanity) Act*, Number 11/2006, s 22(a).
[141] David Prendergast, "The Connection between Mental Disorder and the act of killing in the defence of diminished responsibility" (2013) 49:1 Irish Jurist 202 at 207.
[142] *Ibid* at 208.
[143] *Ibid* at 206.
[144] *Ibid*.

area of insanity".[145] The Court of Appeal in 2019 did not indicate any disapproval with that wording.[146] Furthermore, even if a causal connection is required, a weak causal connection should not preclude the defence but rather be a factor that is relevant to sentencing as suggested by O'Malley.[147]

V Conclusion

Whilst the reasoning process of the Court of Appeal in *Abdi* is open to criticism, the overall result was the correct one. It is a difficult authority to apply to future cases, because of its unique facts. However, both cases analysed in this article establish that a subsequent psychiatric diagnosis will only be a basis for a new trial in truly exceptional cases. It appears that the following will *usually* be required in order for a future application to be successful.

1. The defence must have been raised at the original trial.
2. There must be subsequent symptoms, treatment or presentation.
3. Opinion evidence by a psychiatrist must be presented to establish that these "subsequent symptoms, treatments or presentation" are a newly discovered fact because they prove that the diagnosis argued by the defence at the original trial was correct.
4. The prosecution must not contest the opinion evidence.
5. These newly discovered facts as interpreted by the opinion evidence must be such that they might have had a material impact on the jury's decision had it known about them at the time of the original trial.

Critical to the final ground would be whether the defendant's behaviour and statements at the time of the offence and first trial are inconsistent with the grounds required by the defence. In an English case, *R v Gibbons*, the defendant was diagnosed with schizophrenia a few years after his conviction for attempted murder.[148] The court accepted that the defendant was suffering from this condition at the time of the offence but still refused to overturn the conviction.[149] The court placed great weight on what the defendant said at the time of the incident, stating that

> …there has been no satisfactory explanation that a jury could accept, as to how he could have said that, if he did not appreciate what he was doing and did not have the intention to be doing that to which he referred, when he said: "I can't do this, I can't go through with it". "I can't go through with it" implies that there was something to be finished and the only possible thing to which he could have been referring was the attack … When he said [to the police]: "I tried to kill somebody tonight but I couldn't do it", he clearly then appreciated what he had physically sought to do. Both of the statements show that he appreciated that what he was doing was wrong, that he understood the nature and quality

[145] *Director of Public Prosecutions v McDonald*, 2019 IECA 298 at para 15 (CA Ireland).

[146] Note that it was not relevant to the issues raised in the appeal.

[147] Thomas O'Malley, *The Criminal Process* (Dublin: Round Hall, 2009) at paras 22-13.

[148] [2009] EWCA Crim 2988.

[149] *Ibid* at para 24.

> of what he was doing, appreciated that it was wrong and indeed that he did in fact have a specific intent.[150]

Where the defence was not argued at the original trial, the position is unclear. Providing that the other elements are present, this should not defeat a claim. Defendants may lack insight into their conditions and should not be penalised where the newly discovered evidence clearly shows that there was a relevant mental disorder at the time of the offence. In particular, where the diagnosis was not made until after the original trial as in *McGinley*, it is potentially unfair to penalise the defendant or his legal team for not raising a defence based on a diagnosis that he had not yet received.

If the prosecution decides to dispute the opinion evidence, it seems likely that it will be more difficult to convince the Court of Appeal that the newly discovered evidence will have the necessary material impact on the jury. However, even if the prosecution decides not to introduce conflicting evidence, this does not mean that the application will automatically be successful as seen in *McGinley*. Given the view of the Court of Appeal in *McGinley*, it might be wise for applicants to arrange for a second report even when the prosecution does not challenge the first report.

Some further uncertainty exists as to the appropriate threshold when the defence is diminished responsibility. Whilst the opinion evidence of Dr Monks was described as falling short, it was uncontested, and the supplemental report clearly stated that it was probable that the applicant was psychotic at the time of the offence and that psychosis may have impaired the applicant's reasoning and judgment in a general sense. The defence did not have the opportunity to examine Dr Monks in the same way that they would at a trial, and this should have been taken into account. The defence exists simply to allow a sentencing judge to consider the mental disorder rather than having to impose an automatic life sentence and should not have been ruled out simply because the Court of Appeal determined that the causal connection was too weak. In *R v Gibbons*, the English Court of Appeal refused to overturn the conviction, ruling that no reasonable jury could find the defendant insane, but did quash the life sentence, as the original sentencing judge did confirm that the evidence of the mental disorder would have affected the sentence that was imposed.[151]

[150] *Ibid* at para 26.

[151] *Ibid* at paras 29–31.

The Story David Milgaard Wanted Told

By Lisa Joy
(Self-published, 2025)
Book Review by Gary Botting[1]
Chair, Miscarriage of Justice Canada
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After serving 23 years in prison for a crime he did not commit, David Milgaard craved more than anything establishment of a board of review with the power to prevent other innocent accused from suffering a similar fate. "Canada needs an independent Board that is not part of the criminal justice system or the government that looks at all cases where anyone claims to have been wrongly convicted," he wrote in the "Foreword" to *Wrongful Conviction in Canadian Law* (LexisNexis, 2010). "When this Board finds that the person is innocent, the government should quickly free them and give them compensation."

On 17 December 2024, 55 years after his wrongful conviction for the murder of nursing assistant Gail Miller and more than 20 years after the Government of Saskatchewan first ordered an inquiry into the classic miscarriage of justice that kept David in jail for half his adult life, David's primary wish was finally granted—posthumously—with the passage of the *David and Joyce Milgaard Law* creating the Criminal Case Review Commission.

"Was his wrongful conviction incompetence—or a coverup?" journalist Lisa Joy asks rhetorically on the cover of *The Story David Milgaard Wanted Told.* By the end of the book, she has demonstrated that it was *both*. From the outset, the investigation exemplified not only tunnel vision on the part of police and prosecutors, but also a decided lack of professional ethics, relying as it did on the bullying of impressionable, and therefore malleable, teenagers terrified of themselves being accused as accomplices in the brutal rape and murder of Gail Miller.

Her murder was a heinous crime they knew David, then 16, could not possibly have committed since—as they initially told the police—they were with him the whole time on 31 January 1969, except for a few minutes too brief to reconcile with any aspect of the crime.

They were his alibi.

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[1] Legal analyst Dr. Gary Botting is the author of *Wrongful Conviction in Canadian Law* (NexisLexis 2010), for which David Milgaard wrote the Foreword. David was godfather to Botting's grandson, Phoenix Gagnon. Dr. Botting's more recent books include *Dangerous Offender Law* (2021); *Canadian Extradition Law* (2023); and *Halsbury's Laws of Canada: Extradition and Mutual Legal Assistance* (2024). Formerly a journalist with *South China Morning Post* and the *Sunday Post-Herald*, he was a professor of English literature and creative writing for 20 years and a barrister for 30 years before retiring to write full time. Dr. Botting is now also the Chair, *Miscarriage of Justice Canada.*

The police would have none of it. They bullied and cajoled the teens until, hours later, they broke, and were prepared to say—even write out—whatever garbage the police dictated. This was not merely incompetence; it was a failure of ethical police interrogation.

Lisa Joy names names and provides photographs of the true villains of this story: not only Larry Fisher, the undoubted rapist/murderer, as was eventually proven by DNA evidence (he even bragged to fellow prisoners about raping a dying woman—in minus 40 degree weather, no less), but also the senior police officers and Crown counsel who, convinced there is no such thing as a coincidence, robbed a teenager of his youth and 23 years of freedom.

The most damning indictment in Joy's account is against the Saskatchewan director of public prosecutions, Serge Kujawa, who, as Joy documents, "handled Milgaard's appeals to the Saskatchewan Court of Appeal at the same time as he secured a direct indictment against Fisher, which allowed the case to avoid media attention, and he moved the [Fisher] case to Regina court even though the crimes were in Saskatoon."

Kujawa obviously knew Larry Fisher had sexually assaulted several women in Gail Miller's neighbourhood before and after her murder, when David Milgaard was demonstrably nowhere near Saskatoon. By shielding Fisher and allowing him to avoid a formal trial for the Saskatoon rapes, Kujawa effectively, whether intentionally or not, thwarted efforts to link Fisher to his victim. "Kujawa oversaw Fisher's and Milgaard's cases, at one point at the same time, but insisted he never connected Fisher's rapes to Milgaard's conviction," says Joy.

"But critics saw something darker at play. Had the justice system buried Fisher's crimes to protect Milgaard's conviction?"

That question had been asked very early on by Staff Sergeant Tom Vanin of the Saskatoon Police Major Crimes Unit—who was demoted to Patrol for his pains. "I strongly believed that David Milgaard was innocent," Vanin later testified to the Royal Commission of Inquiry conducted by Justice Edward P. MacCallum, explaining why, two decades later, he shared his views with David Asper, David Milgaard's lawyer. "As a police officer, I just felt it was my duty to do what I could…. It was my obligation to see an innocent man get set free."

Commissioner MacCallum appeared more interested in giving absolution to the police and prosecutors for their undoubted incompetence, chalking up their "mistakes" to tunnel vision rather than malice—thereby dodging the question as to whether there was a concerted cover-up. He suggested that the Milgaards' forthrightness in sharing information with the press had been, and continued to be, counterproductive, echoing the attempts by police and prosecutors to cast aspersions on David and his mother, Joyce Milgaard, for their indefatigable media campaign.

As Joy documents, in 1990, Sgt Vanin asked the permission of Saskatoon Police Chief Owen Maguire to interview Fisher, but was told that the Fisher case was closed, period! Nonetheless, Vanin searched for the Fisher files, only to find "no checkout logs. No traces. Just empty spaces where crucial evidence should have been." The *Globe and Mail* quoted their police source (Vanin?) as saying that for every detail of a multiple sexual assault file to vanish was "bizarre." "Somebody's tampered with the system," the source said.

The Fisher files weren't the only ones that were missing. In April 2005, former Saskatoon Police Chief Joe Penkala "handed over approximately 250 pages of documents related to the 1969 murder of Gail Miller," says Joy. "The documents, stored in two weathered binders, had been in Penkala's possession for 36 years. Their sudden appearance raised troubling questions about transparency, accountability, and the handling of evidence."

Under the subheading, "Missed Connections: Willful Blindness?" Joy notes, "The police had locked onto Milgaard early, and no amount of new evidence could shake their resolve." Penkala "admitted that before Milgaard's arrest, investigators believed the same man committed both the rapes and the murder. But once Milgaard became the prime suspect, the theory evaporated"—thus contradicting Kujawa's testimony.

Murray Brown, director of public prosecutions at the time of the Inquiry, testified that the police were reluctant to turn their attention to anyone other than Milgaard "because police, by that time, didn't have just an intellectual investment, they had an emotional one." The same can be said of the prosecutors, who, astonishingly, blamed the media for their own tunnel vision. At the Commission hearing, Brown singled out Dan Lett of *Winnipeg Free Press*, who (he said) was used by the Milgaard defence team "like a cheap whore in respect of disseminating the point of view of the Milgaard camp. Anything you guys said, Dan Lett was more than happy to publish."

To which Betty Ann Adam responded in the Saskatoon *Star-Phoenix* "Tell me, if an accurate reporter is a cheap whore, what does that make people who imprisoned and kept imprisoned an innocent man?"

"For every Don Lett shining a glaring light on injustice," writes Joy, "there was a Serge Kujawa, wary of the power of the press. But one thing is certain, without the media's relentless coverage, David Milgaard might have died in prison, a victim of a system unwilling to confront its mistakes." Besides Lett, Joy credits Cecil Rosner and Carl Karp of the CBC with the Milgaards' ultimate success, suggesting that when the police and prosecution sabotage justice by trying to hide and obfuscate their "mistakes," they become agents of injustice rather than justice. In such circumstances, turning to the fourth estate is the only remedy, she suggests.

Where there are villains, there are also heroes, not least of which were private investigators Paul Henderson and Jim McCloskey of Centurion Ministries Inc., an American non-profit group dedicated to investigating claims of wrongful conviction; and Hersh Wolsh, the barrister who represented David in his appeal to the Supreme Court of Canada. Together, they connected the dots between the 1969 murder and the rapes to which Larry Fisher had confessed.

Joy 's many illustrations and reprinted newspaper clippings are well chosen to support her narrative, and she has added a helpful who's-who and timeline at the back of the book; but there is no index. An index would have been particularly useful, since the chapters resemble news stories presented in a series, resulting in unnecessary repetition of names and situations. The volume would benefit from the services of a professional editor and book designer. Nonetheless, *The Story David Milgaard Wanted Told* is riveting investigative journalism, with short, punchy chapters (51 of them, averaging five pages each) resembling a series of vignettes: great for reading on the run!