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Addressing Official Misconduct:
Increasing Accountability in Reducing Wrongful Convictions

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Currently, the National Registry of Exonerations (NRE) states that official misconduct has been a contributing factor in 1,404 of 2,601 exonerations. The term "official" includes criminal justice professionals such as prosecutors, judicial officials, and law enforcement. Analyzing official misconduct and inadequate legal defense cases in the NRE, the goal of this article is to identify (1) officials who commit misconduct in murder exonerations, (2) types of misconduct conducted, and (3) impact on race of the exoneree. The findings of the study indicated that police and prosecutors committed more acts of misconduct than the number of exonerees included in the study. Additionally, African American exonerees were found to be disproportionately victimized by official misconduct. Policy implications and future research provide insight on how the findings reinforce calls for social justice and police accountability in wake of the killing of George Floyd and the shooting of Jacob Blake.

I Introduction

Erroneous convictions are grasping the attention of those in America as information becomes more prevalent. Documentaries on large streaming platforms and investigative podcasts are sparking conversations about wrongful convictions amongst the general population, bringing new faces to advocacy, scholarship, and change. Though the stories of exonerees are being told in movies, documentaries, and literary works, there is still much to be known about the occurrence of wrongful convictions. This includes the factors that contribute to wrongful convictions, as well as frequencies, characteristics, and themes of cases in which these factors exist. The National Registry of Exonerations (NRE) is a public database for known wrongful conviction exonerations in the U.S., serving as a comprehensive source for accomplishing the mission of furthering wrongful conviction scholarship. As of April 2020, the NRE recognized a total of 2,601 exonerations (2020a). Based on these cases of wrongful conviction, the NRE has composed a list of contributing factors, including mistaken witness identification, perjury, false confession, false/misleading forensic science, and official misconduct (2020b).

Though each of the five contributing factors listed by the NRE are of vast influence, both perjury and official misconduct are marginally more frequently occurring than the others. More specifically, the problematic nature of official misconduct provides support for analysis of the current study. Of the listed 2,601 exonerations, 1,404 cases consisted of factors related to official misconduct (54%). This is the second highest contributing factor following perjury (58%), both of which are nearly double the next highest factor (mistaken witness identification, 28%). Further, approximately 70 percent of all known exonerations of homicide cases involved official misconduct. The current study sought to identify (1) which officials are committing misconduct, (2) what types of misconduct are being committing, and (3) what racial disparities, if any, are present using the NRE database.

Defining official misconduct requires examination from several sources, which stem from legal and wrongful convictions research. First, there are more formal definitions for misconduct. The Cornell Legal Information Institute defined official misconduct as “when a public official act improperly or illegally in connection with their duties” (p.149). The NRE defined official misconduct as when “police, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree’s conviction” (NRE Glossary, para. 15).

Second, some scholars have sought to identify how misconduct occurs in the criminal justice profession. Norris, Bonventre, and Acker (2018) stated that competition can give way to three components of criminal justice error: mistakes, malpractice, or misconduct. Though all three factors may provide explanation for error, there is still much debate as to what is considered misconduct in wrongful conviction cases in comparison to how law inscribes official misconduct. Recent studies have examined official misconduct in cases of wrongful conviction, specifically addressing the overall misconduct that occurs in NRE exonerations. Gross, Possley, Roll, and Stephens (2020) published a report that addresses misconduct by police and prosecutors, including race of exonerees affected. The current study seeks to provide further evidence for official misconduct in wrongful convictions in murder cases. With the stakes being higher in murder cases, the misconduct in this study is analyzed by the officials involved, including causes of inadequate legal defense and the racial impact of the exoneree.

II Literature Review

To better understand official misconduct, it is important to recognize decision-making from the position of the individuals of power such as investigators, attorneys, and judges. Criminal justice professionals are faced with a variety of difficult tasks, which require long hours on the job and increased stress (Manzoni & Eisner, 2006). Notably, the American criminal justice system incarcerates more people than all other countries, reinforcing the growing debate on mass incarceration (The Sentencing Project). The age of mass incarceration is devastating for both civilians and criminal justice professionals, who are dealing with a higher case volume than preceding years. According to Sawyer and Wagner (2019), there are almost 2.3 million people in the American criminal justice system in prisons, jails, detention facilities, civil commitment centers, and state psychiatric hospitals. Perry and Banks (2011) stated that there were 43 state prosecutors' offices that served over one million people in 2007. Such caseloads, however, do not validate or give substance to any reasoning with misconduct among justice professionals. In order to better understand misconduct among criminal justice professionals, the literature on police and prosecutorial misconduct will be discussed, as well as inadequate legal defenses, judicial misconduct, and forensic misconduct.

Police Misconduct

Police misconduct has become a topic of immense debate in response to the killing of George Floyd, the shooting of Jacob Blake, and others unnamed yet as similar incidents continuously occurs in one of America's cities. Such actions of misconduct not only cast a shadow over the good work done by law enforcement agencies, but it sparks widespread doubt in trusting law enforcement. A recent study found police misconduct extends to acts such as improper searches, detaining without probable cause, and racial disparities in policing strategies (D'Souza, Weitzer, & Brunson, 2019).

Scholars have sought to identify the extent in which police misconduct contributes to wrongful convictions. Covey (2013) examined police misconduct in group exoneration cases. The data for the study came from two noteworthy cases of organizational police misconduct, the (1) Tulia and (2) Rampart incidents. Over 150 people were exonerated from the Rampart incident, and 37 due to the Tulia incident. Most of the data for the Rampart scandal in this study came from files within the Los Angeles District Attorney's office (Covey, 2013). Files included information relating to developments in cases, extending to writs by both the district attorney and the defense seeking relief on the basis of innocence. The remaining data was collected through articles and official reports. For the Rampart incident, the District Attorney's office had files containing case-specific data for 97 cases and detailed-case data for 87 of the 97. Not all of the individuals exonerated in the Rampart scandal were proven factually innocent, rather relief was sought based on the misconduct of the police involved.

The two cases analyzed for the Covey (2013) study provided insight on police misconduct in cases that resulted in a wrongful conviction. Notably, the Rampart case displayed how misconduct can directly influence the chain of events that follow innocent defendants. The data for the Tulia incident provided less variety in the circumstances of conviction, primarily due to almost all of the Tulia defendants being convicted on the testimony of a corrupt undercover agent

(Covey, 2013). The primary basis for exoneration in the Rampart scandal was due to misconduct unrelated to factual guilt or innocence of the defendant. Officers had lied about obtaining probable cause, location of searches, and suspect's consent to search. In 38 cases, police misconduct directly implicated the determination of guilt or innocence (Covey, 2013). These cases included the planting of drugs or guns on the suspect(s), lying about the observation of crime, or coercing confessions from innocent defendants. Of the 37 Tulia cases, 35 were pardoned by Rick Perry, who was governor of Texas and two convictions were vacated following writs of habeas corpus. There were other defendants wrongfully charged or convicted but were never pardoned (Covey, 2013). About six defendants in the Tulia cases stated they helped an undercover agent purchase crack cocaine, but none helped the agent purchase powder cocaine, which was the premise for their convictions. A sting that resulted in the arrest of 47 people found no evidence of drugs, and the subsequent investigation found no evidence to corroborate the alleged crimes.

An initial arrest of the officer and two terminations of employment were carried out in the Rampart case (Covey, 2013). Additionally, three officers were convicted of conspiracy to obstruct justice and filing false police reports, but their convictions were overturned (PBS, 2020a). One of the victims was awarded 15 million dollars, the largest recorded settlement in a police misconduct case (PBS, 2020a). Many officers involved in Rampart took plea deals in cooperation with law enforcement. A total of 132 indictments were made for 46 people in the Tulia case as a result of the undercover work of Thomas Coleman (PBS, 2020b). Coleman was later indicted on felony perjury charges and convicted, where he was sentenced to ten years of probation (Covey, 2013).

Scholarship on police misconduct has also included research on how the public views such misconduct when innocence is considered. Donovan and Klahm (2018) explored public perceptions of police misconduct, using innocence as a primer. An online survey was distributed to participants. The 2,119 respondents were a random sample of respondents, with a survey completion rate of 58 percent. Respondents were randomly assigned to receive one of the two versions of the survey, with half of the respondents receiving the primer on innocence. The primer included a statement on *The Innocence Project* and a summary of their mission. All respondents, regardless if they received the primer, were asked about the frequency of police misconduct (e.g., excessive use of force to obtain a confession, etc.) in their city (Donovan & Klahm, 2018). Questions also included how much time respondents spent consuming media (e.g., news, crime dramas), their political ideology, experiences with police, and residency information (i.e., urban or rural). Findings from the study suggest that those primed on innocence were significantly more inclined to believe that police misconduct influences wrongful convictions than those without the primer. When the issue of wrongful convictions was presented, respondents were seven percentage points more likely to believe police misconduct harms the administration of justice and eight percentage points less likely to say it never happens when reminded of wrongful convictions. Therefore, the role of police misconduct in the American criminal justice system has garnered some attention of the public in regards to its impact on wrongful conviction.

Studies have shown that police misconduct plays a role in racial disparities in the legal system and wrongful convictions. Such actions of misconduct harm the reputation of law and order by law enforcement agencies while the community suffers by an entity with the purpose of protecting. Recent public demonstrations have called for transparency by law enforcement officers along with the continued debate over the safety of American citizens. Police, however, are not the

only officials who have committed misconduct and been found to contribute to a wrongful conviction.

Prosecutorial Misconduct

Prosecutors have vast amounts of discretion and power in the American legal system. One of these powers is turning suspects into defendants (Norris et al., 2018). Forms of prosecutorial misconduct include the failure to disclose exculpatory evidence (or *Brady* violations), introducing false evidence, improper arguments, discrimination in selecting juries, interfering with a defendant's right to legal representation, improper communication with judges or jurors, improper use of media, failure to maintain systems of compliance, and failure to report violations to bar (The Open File).

In *Brady v. Maryland* (1963), the Court held that withholding exculpatory evidence violates the right to due process where the evidence is of substance regarding guilt or punishment. The petitioner Brady and companion Boblit were found guilty of murder and sentenced to death in two separate trials. It was later discovered that a confession by Boblit who admitted to the homicide was "withheld by the prosecution and not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed" (*Brady,* 1963, p. 84). On appeal to the Court of Appeals, Brady was denied a federal right when the Court of Appeals denied a new trial on the question of punishment. The Court found "that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment" (*Brady*, 1963, p. 86). *Brady* violations have been found to be among the leading causes of prosecutorial misconduct in wrongful conviction cases (Gross et al., 2020).

Court cases have also addressed improper statements by prosecutors, although the burden of proof for depriving due process or fair trial has proven quite difficult. For example, *Darden v. Wainwright* (1986) held that the weight of the evidence against the defendant was heavy enough for jurors to not be swayed by improper closing arguments. This finding by the Court came despite statements by the prosecutor that included the death penalty would be the only way to prevent these acts from recurring and calling the defendant an "animal," all of which the Court acknowledged as improper. Both due process (14th Amendment) and fair trial (Sixth Amendment) are meant to uphold the rights of U.S. citizens and the accused, though each pose issues among prosecutors and defense attorneys when confronting justice.

Recent research regarding how prosecutors and defense attorneys contribute to wrongful convictions have shed light on organizational issues. Webster (2020) conducted semi-structured interviews with 20 prosecutors who played an instrumental role in an exoneration post-2005. Nineteen defense attorneys who worked with cooperating prosecutors in exoneration cases post-2005 were also interviewed. The cases and attorneys were identified through the NRE and contacted through online access information. Attorneys were eliminated from the study if they had worked together on the same case and oversampling by state or case type (i.e., DNA exonerations) were also a cause of elimination. The interviews took place from April 2016 to November 2018, primarily by phone. Prosecutors and defense attorneys were interviewed concurrently. The total 39 respondents were asked about their experiences, decision-making practices, and view of postconviction practices in distinct exoneration cases. Findings of the study indicated issues that

occur during the postconviction process, including handling *Brady* violations, or the requirement that prosecutors must disclose all exculpatory evidence to the defense. Two prosecutors stated that innocence claims are directed to the prosecuting attorney who handled the original conviction (Webster, 2020). Five defense attorneys reported that the trial prosecutor had been the one responsible for responding to the claim of innocence. A public defense attorney addressed challenges that are present when working with the trial prosecutor on a claim of innocence, stating "the original trial prosecutor, who didn't turn over the *Brady* material, who made arguments that were not supported by the evidence, was the one who was tasked to respond. Now that's number one bad practice" (Webster, 2020, p. 283).

Notably, prosecutorial misconduct that is not on the trial record is considered new evidence and must be submitted in the postconviction process if it is to be appealed (Webster, 2020). One third of the respondents noted they had handled postconviction innocence claims that included alleged *Brady* violations. Four prosecuting attorneys reported the review of cases that involved forensic error or police misconduct (Webster, 2020). As a result of the findings, Webster (2020) addressed a potential conflict of interest with prosecutorial misconduct, including *Brady* allegations, in the event that the trial prosecutor so chooses to invest in denying misconduct allegations and upholding the conviction. This same conflict may arise if the trial prosecutor is consulted about a case involving a claim of innocence (Webster, 2020). Moving forward, prosecutors reviewing postconviction innocence claims could be trained to identify factors of false convictions and should embrace the role of safeguard. This includes utilizing the advantageous positioning to recognize misconduct actors, conduct internal reviews, and create a list of actors who are not to testify (Webster, 2020).

One of the more troubling issues stemming from a wrongful conviction is identifying the true perpetrator of the crime. Recent research has highlighted the association between identifying the true perpetrator and prosecutorial misconduct. Weintraub (2020) used DNA-based exonerations for identifying this association, including true perpetrator identifications by postconviction DNA testing. A total of 335 DNA exonerations were analyzed through collection from innocence organizations and independent collection. There were 172 cases where the true perpetrator had been identified in comparison to 163 cases where no true perpetrator had been identified. Cases were coded from the NRE for actual or alleged prosecutorial misconduct, which included 43 cases. Innocence databases, academic resources, data sources for academic articles, news pieces, and appellate transcripts were also coded, consisting of an additional 43 cases. A total of 86 cases (26%) contained alleged or proven types of prosecutorial misconduct and 231 contained no misconduct.

The results of the study by Weintraub (2020) indicated that prosecutorial misconduct can obstruct postconviction procedures, which more so favor the exoneree than the true perpetrator. Further, the presence of prosecutorial misconduct at trial was discovered to be associated with fewer odds that a true perpetrator would be identified in postconviction than cases in which no misconduct was discovered. Such association is not only detrimental to the pursuit of justice, but serves as a threat to the public in that true perpetrators still walk the streets when someone is wrongfully convicted.

Inadequate Legal Defense

One of the many challenges facing the accused is having an adequate legal defense. The Sixth Amendment states the right to speedy trial, an impartial jury, right to know one's accusers, and the right to an attorney (U.S. Const. amend. VI). Though the U.S. Constitution does not directly address the demand for an "adequate" defense, the Supreme Court has attempted to clarify standards of inadequate defense. *Strickland v. Washington* (1984) established that the court must prove: (1) deficient performance by the defense, and (2) that the outcome of the case would have been different had the performance not been deficient. Although standards have been established by the Court, many still suffer the consequences as exonerations continue to uncover the truth eventually.

In a study conducted by Gould, Hail-Jares, and Carrano (2014), cases of wrongful conviction were compared with cases where a factually innocent defendant was released prior to any convictions based on innocence, otherwise known as a "near miss" (p. 168). The sample included 460 total cases from the year range 1980 to 2012, each case involving a factually innocent defendant who was convicted of a felony crime against a person at the state level. Cases were also distinguished by "easy" and "hard" based on perceptions of guilt (p. 168). Bivariate and logistical regressions were used, in addition to a panel of criminal justice professionals to review 39 of the total 460 cases.

The study was able to identify ten significant factors that either harm or assist the innocent and found that a stronger legal defense minimized the chance of a wrongful conviction, with such cases tending to conclude in a dismissal or acquittal (Gould et al., 2014). The expert panel used for the study noted that "good lawyering" was a positive factor for the "near miss" cases (Gould et al., 2014, p. 169). Overall, poor representation (regardless of lawyer type) influenced the outcome. Cases that relied on family or friends as alibi witnesses were more likely to provide a wrongful conviction. The results of the study concluded that the occurrence of a wrongful conviction is a systematic failure, illustrating that "near misses" occurred because an individual stopped a wrongful conviction from occurring (including defense attorneys).

Prosecutorial misconduct and inadequate legal defenses are a recipe for disaster in the legal system. Research has revealed that both are proven contributors to wrongful convictions, thus providing that prosecutorial ethics and competent defense attorneys present a key issue in combating miscarriages of justice. It is possible, however, that a higher-ranked court official will engage in misconduct.

Judicial Misconduct

While judicial misconduct can vastly impact the outcome of a case, its place in wrongful convictions scholarship is less dense than other forms of misconduct research. It has, however, become the subject of increased oversight over recent years. As of 2007, all 50 states have formed a judicial conduct commission (Gray, 2007). The goal of the conduct commissions is to maintain and restore confidence in the "integrity, independence, and impartiality" of the judiciary (Gray, 2007, p. 405). Each state has different names for their commissions, which may be interchangeable by state with terms such as "board, council, court, or committee" (Gray, 2007, p. 405).

Nonetheless, their role is to investigate, prosecute, and rule on complains of judicial misconduct. Sanctions may be privately dispersed or made public, depending on the severity of the case and the state/jurisdiction in which it occurred. Sanctions may range from fines and reprimands to removal from office, required retirement, or disbarment. Though their presence is somewhat more obscure, the procedures that each commission utilizes differ and vary based on the state's experiences (Gray, 2007).

Wrongful conviction scholars have investigated judicial misconduct as a contributor to miscarriages of justice. Preceding the study conducted by Gould et al. (2014), "near misses" and cases of wrongful convictions were compared by Gould, Carrano, Leo, and Hail-Jares (2013). The 2013 study established factual innocence based on two parts: (1) judicial, legislative, or executive acknowledgement that the crime was not committed by the defendant, and (2) convincing evidence that a reasonable person would believe the crime was not committed by the defendant. A total of 260 wrongful convictions and 200 near misses made up the sample for the 2013 study. According to Gould et al. (2013), judicial error was alleged in five percent of cases and proven in five percent of wrongful conviction cases. The "near misses" had a rate of two and a half percent for alleged judicial error and less than one percent for proven cases. The results of the study showed that the sample of cases rarely contained any recognizable judicial misconduct or error.

Tunnel vision was mentioned in both the 2013 study and the updated 2014 version, which was found to be a factor for judges. Gould et al. (2014) used the definition of tunnel vision that is stated as "social, organizational, and psychological tendencies "that lead actors in the criminal justice system to 'focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt" (p. 504). According to Gould et al. (2013), judges fall prey to tunnel vision (like prosecutors). In multiple cases studied, judges failed to exercise their powers of discretion to examine the facts of the case and/or failed to actively protect the innocent. Though standards of proof are immensely high and make detecting judicial misconduct or error difficult, cases showed that judges failed to perform their function of "gatekeeping to prevent further injustice" when misconduct was earlier committed by police, prosecutors, defense attorneys, or eyewitnesses (Gould et al., 2013, p. 506). As the literature illustrates, accountability measures are in place for judges, but detecting it and establishing its occurrence provide many obstacles for legal professionals.

Forensic Misconduct

Acts of forensic misconduct have tremendously affected wrongful convictions on both in exonerating the innocent and convicting them. While forensic science exonerates some of their alleged crimes, it also convicts others. According to the NRE (2020b), 24 percent of known exonerations have occurred due to false or misleading forensic evidence. A multitude of factors influence the use of forensic science in criminal cases. Academic literature spans across these components, including forensic misconduct in wrongful convictions.

Garrett and Neufeld (2009) composed one of the earliest studies on forensic science testimony by experts of the prosecution in the trials of the wrongfully convicted. Trial transcripts were examined for 156 exonerees who had trial testimony by forensic experts, with 137 total cases being reviewed for the study. Cases had testimony involving serological (antibody) tests, hair

comparisons, bitemark, fibers, shoeprints, soil, fingerprints, and physical DNA testing. Findings of the study indicated that 60 percent of trials (n = 82) had invalid testimony from forensic experts, where the results from the forensic analyst were misstated or entirely unsupported empirically (Garrett & Neufeld, 2009). The defense counsel for the innocent defendant was found to have rarely cross-examined the analysts regarding their statements and failing to obtain a forensic expert for their defense team. As a result, Garrett and Neufeld (2009) suggested that oversight is not needed just for forensic analysts, but clear standards need to be set in place for reviewing forensic testimony.

Recent studies have looked further into the role of forensics in wrongfully conviction, specifically with decision-making. Scherr and Dror (2020) assessed ingroup bias of forensic experts as associated with more exonerations than wrongful convictions. The study's examination of ingroup bias stems from favoritism of those they consider similar, or "similar others" (p. 3). The participants in the study were 93 practicing forensic experts from the U.S., Canada, and the United Kingdom who work for government labs, mostly for the prosecution. Experts had an average of about 13 years of experience and included pathologists, criminalists, fingerprint analysts, DNA analysts, forensic lab technicians, identification technicians, forensic anthropologists, digital forensics, forensic investigators, and crime scene investigators (Scherr & Dror, 2020). Questions were asked pertaining to perceptions of (1) wrongful convictions and (2) exonerations in a survey format. The findings of the study indicated that forensic analysts perceive their work, and the work of those around them (prosecutors) are associated with more exonerations than wrongful convictions, despite base rate data showing that the opposite is true (Scherr & Dror, 2020). Overall, the study was able to conclude that an "inherent bias" exists in forensic analysis, which provide a further understanding of how forensic analysts can contribute to a wrongful conviction.

The review of the literature displays that official misconduct is a troublesome aspect of wrongful convictions that needs further research. The current study sought to fill the gaps in the literature by translating what was found through case analysis of known exonerations. The objective of this study is to identify the officials who have committed misconduct in murder exonerations, the types of misconduct being committed, types of inadequate legal defense in murder exonerations where official misconduct is present, and the racial implications of these cases. It is important to have a better understanding of official misconduct because little is known about its role in wrongful convictions, yet it has affected more than 50 percent of known exonerations.

III Methodology

This study analyzed cases of official misconduct and inadequate legal defense for murder exonerations recognized by the NRE. These cases were further analyzed through crosstabulations based on the impact of race of the exoneree. Murder cases were included in the analysis based on severity, punishment, and higher stakes when the death penalty is a factor. Gould et al. (2013) described this factor as "death penalty culture" or traits that potentially influence officials and the community to seek convictions regardless of innocence claims (p. 486). Exonerations by inadequate legal defense were also examined. According to Norris et al. (2018), defendants facing the death penalty are placed in a more critical situation for effective legal defense. Further, Gould

et al. (2013) stated that the presence of a poor legal defense increases the likelihood of a conviction. The inclusion of inadequate legal defense is pivotal, as this study serves to analyze the concept through the lens of misconduct. That is, inadequate legal defenses are studied as a parallel to misconduct based on (a) whether they mimic or correspond with official misconduct by act and (b) their frequency in cases of official misconduct, thereby reinforcing the need for adequate defense to combat misconduct. Scholars have shown that its role in wrongful convictions has become evident, thus supporting its inclusion in the current study.

The sample was collected in April 2020 from the NRE database as an Excel file. As of April 2020, there are a total 2,571 exonerations. Official misconduct contributed to 1,388 of 2,571 (54%). At the time the data was collected, 987 exonerations had a worst crime display of murder (38%). The 987 exonerations were filtered for (1) murder and (2) inadequate legal defenses, resulting in a final sample of 215. The spreadsheet includes the first and last name of the exoneree, their race, gender, and age. The descriptive table for age, race, and gender of the sample is included below.

Table 1. Age, Race, and Gender of Exonerees

Age	*f*	%
11 to 18	55	26
19 to 25	89	41
26 to 35	48	22
36 to 44	17	8
45 and older	6	3
Total	215	
Race	***f***	**%**
Asian	1	.50
Black	132	61
Caucasian	48	22
Hispanic	25	12
Native American	1	.50
Other	1	.50
Total	215	
Gender	***f***	**%**
Male	199	93
Female	16	7
Total	215	

The descriptive table of the sample indicates that 25 percent of exonerees were juveniles at the time of their conviction. Most exonerees were convicted between the ages of 19 and 25 (41%). Only six exonerees (3%) were convicted at the ages of 45 or older. More than 60 percent (61%; 132) of the exonerees included in the sample were Black, 48 (22%) were Caucasian, and 25 (11%) were Hispanic. Of the total 215 exonerees, 199 (93%) were male and 16 (7%) were female.

A. Content Analysis

The total sample for the study was 215, with the NRE no longer being classifying one case as official misconduct and 10 cases coded as *unknown*. Therefore, there are 204 applicable cases of exoneration involving misconduct. Using the case summaries of each exoneration included in the sample, a content analysis was conducted. The summaries were accessed on the NRE website and coded across five different variables for officials, comprising of a total 12 officials who committed misconduct either alone or in collaboration with other officials. The five variables for included (1) police misconduct, (2) prosecutorial misconduct, (3) judicial misconduct, (4) forensic misconduct, and (5) acts of inadequate legal defense. Official(s) responsible for the misconduct in this study were coded based on their role at the time the misconduct occurred as written in the NRE case summaries. These categories included (1) Not official misconduct (OM), (2) police, (3) police, forensic, (4) police, judicial, (5) police, judicial, forensic, (6) police, prosecutor, (7) police, prosecutor, forensic, (8) police, prosecutor, judicial, (9) prosecutor, (10) prosecutor, forensic, (11) prosecutor, judicial, and (12) unknown. The frequencies for this variable are as followed.

Table 2. Official(s) Responsible

Official	*f*	Percent	Cumulative Percent
Not OM	1	.5	.5
Police	62	28.8	29.3
Police, Forensic	4	1.9	31.2
Police, Judicial	6	2.8	34.0
Police, Judicial, Forensic	2	.9	34.9
Police, Prosecutor	63	29.3	64.2
Police, Prosecutor, Forensic	11	5.1	69.3
Police, Prosecutor, Judicial	3	1.4	70.7
Prosecutor	42	19.5	90.2
Prosecutor, Forensic	8	3.7	94.0
Prosecutor, Judicial	3	1.4	95.3
Unknown	10	4.7	100.0
Total	215	100.0	

B. Definitions

Each act of misconduct included in this study was defined based on the findings within the case summaries on the NRE website. The comprehensive definitions for each act can be found in the appendix. There are five acts coded for police misconduct, including (1) *witness or suspect tampering*, (2) *exculpatory evidence*, (3) *false information*, (4) *interrogation techniques*, and (5) *lineup procedure*. Acts of prosecutorial misconduct consisted of (1) *evidence or trial manipulation*, (2) *exchange for testimony*, (3) *exculpatory evidence*, (4) *improper statements*, (5) *interrogation techniques*, (6) *lineup procedure*, (7) *misrepresenting evidence*, (8) *presenting contradictory evidence*, and (9) *utilizing false evidence or testimony*. There were five types of judicial misconduct indicated, (1) *bribery*, (2) *conflict of interest*, (3) *erroneous finding or*

procedure, (4) *improper intervention*, and (5) *under the influence*. Forensic misconduct occurred as three acts, comprising of (1) *false observations or testimony*, (2) *misstated evidence*, and (3) *suggestive methods*. Inadequate legal defenses included eight acts, (1) *conflict of interest*, (2) *deficient performance*, (3) *failure to call witnesses*, (4) *failure to present challenges or dismissals*, (5) *failure to propose objections*, (6) *failure to sufficiently investigate*, (7) *ineffective witness examination*, and (8) *unknown*. Cases coded as *unknown* were listed as cases of inadequate legal defense in the NRE database but did not contain enough information to meet the criteria of coding.

The results section outlines the frequencies of each act of misconduct and the distribution of each act on the race of the exonerees included in this sample. This will consist of crosstabulations for (1) police misconduct, (2) prosecutorial misconduct, and (3) inadequate legal defense, as these are the only officials in this study to have committed more than one act of misconduct in an official misconduct exoneration. Crosstabulations are used for showing the frequency of two variables simultaneously, in this case race and type of misconduct.

IV Results and Discussion

The events of 2020 have called many social justice issues to light, two of which being police misconduct in the wake of the killing of George Floyd and shooting of Jacob Blake. Among the types of misconduct identified in this study, inadequate legal defenses were the most frequently occurring, followed by police and prosecutorial misconduct. Both judicial and forensic misconduct were observed at a considerably lower rate. First, police and prosecutorial misconduct crosstabulations will be shown and discussed. Next, judicial misconduct and forensic misconduct will be examined. A similar structure of frequency and racial impact will be presented for inadequate legal defenses.

A. Police Misconduct

Police misconduct was the second most frequently occurring form of misconduct among exonerees. Notably, the number of acts of police misconduct (n = 301) outweigh the number of applicable exoneration cases (n = 204) included in the sample. Thus, an average of 1.5 forms of police misconduct occur per exoneree where police misconduct is present. Five types of police misconduct were coded, *interrogation techniques* being the most persistent at 99 (33% of police misconduct). Some interrogation techniques were extremely harmful to exonerees, including physical/psychological torture and manipulation. *Lineup procedure* occurred in 31 cases. Examples of *lineup procedures* included law enforcement officials implicating suspects in lineups by making suggestions to lineup viewers. Therefore, 130 acts of misconduct were conducted prior to both trial or plea bargains (43% of police misconduct). It is noteworthy to point out that 200 acts of police misconduct were indicated among 132 African American exonerees. The frequencies for police misconduct are listed in Table 3 which includes the impact on race of exoneree by police misconduct.

Table 3. Race and Police Misconduct Crosstabulation

Race	Witness or Suspect Tampering	Exculpatory Evidence	False Information	Interrogation Techniques	Lineup Procedure	Total
Asian	1	0	1	1	0	3
African American	51	24	38	64	23	200
Caucasian	13	8	12	19	1	53
Hispanic	11	4	7	13	6	41
Native American	0	0	1	1	0	2
Other	0	0	0	1	1	2
Total	76	36	59	99	31	301

This analysis not only reinforces the large-scale issue of police misconduct, but it reveals the disproportionate rate of police misconduct victimization among African Americans. The total number of police misconduct acts (n = 301) outweighs the total sample (n = 204) in the study, bearing fruit to an increased demand in more education among law enforcement personnel, revisiting policies, and the unwritten practices of policing that may potentially harm citizens. More specifically, 200 of the 301 acts discovered (66%) victimized African American exonerees, outweighing other races near two-fold. Within the recognized acts of police misconduct, African American exonerees were mostly impacted by *interrogation techniques* (n = 64), which is 65 percent of the total acts of interrogation misconduct identified. Police misconduct impacted African American exonerees at least three times as more in each category in the study. This finding is immensely burdensome to American criminal justice, thereby providing supporting evidence for calls of police misconduct reform.

B. Prosecutorial Misconduct

Findings from the study indicated nine types of prosecutorial misconduct in a total 209 acts. Like the outcome of police misconduct, there are more acts of prosecutorial misconduct than applicable cases of exoneration. *Exculpatory evidence* (i.e. *Brady* violations) was found to be the most frequently recurring at 77, or 37% of prosecutorial misconduct. Withholding *exculpatory evidence* occurred higher than other acts of prosecutorial misconduct, the next most frequent being *exchange for testimony* (n = 32). The act of *exchange for testimony* included the exchange of leniency of other incentives for testimony in a case that helped convict the innocent. Prosecutorial misconduct also was found to affect African American exonerees more than any other race (n = 114). Table 4 displays the findings of prosecutorial misconduct, as well as the crosstabulation of impact on race by prosecutorial misconduct.

Table 4. Race and Prosecutorial Misconduct Crosstabulation

Act of Misconduct	Asian	African American	Caucasian	Hispanic	Native American	Other	Total
Evidence or trial manipulation	0	6	4	1	0	0	11
Exchange for testimony	0	22	7	3	0	0	32

Exculpatory evidence	0	45	24	7	1	0	77
Improper statements	0	12	12	4	1	0	29
Interrogation techniques	0	6	4	2	0	0	12
Lineup procedure	0	0	1	0	0	0	1
Misrepresenting evidence	0	5	4	1	0	0	10
Presenting contradictory evidence	0	3	3	2	0	0	8
Utilizing false evidence or testimony	0	15	9	5	0	0	29
Total	0	114	68	25	2	0	209

In similar fashion to the police misconduct results, acts of prosecutorial misconduct (n = 209) exceeded the study's sample. *Exculpatory evidence*, or *Brady* violations, present(s) many issues in the trial process comprehensively but serve as another hoop exonerees must jump through to obtain their freedom. While its frequency (n = 77) in this study is merely troubling based simply on its occurrence, the existence of this form of misconduct in capital cases constitutes accountability as a potential concern for prosecutors. Not only are those who fall victim to prosecutorial misconduct most often African American (n = 114, 55%), but the same can be said to those victimized by the withholding of exculpatory evidence (n = 45, 58%). In contrast to police misconduct, seven forms of prosecutorial misconduct (*improper statements*, *evidence or trial manipulation*, *interrogation techniques*, *misrepresenting evidence*, *presenting contradictory evidence*, *utilizing false evidence or testimony*) are near equal or marginally more proportionate across races. While this may give additional substance to the issue of police misconduct, it should not erode the idea that *exculpatory evidence* among prosecutors presents helpless obstacles at the trial level, especially for African American defendants.

C. Judicial Misconduct

There are a total of 14 acts (14 of applicable 204; 7%) of judicial misconduct present in cases of murder exonerations. Five acts of judicial misconduct are identified, *erroneous finding or procedure* being the most frequent. Such findings or procedures included judges applying incorrect decisions, misinterpreting the law, etc. The frequencies for judicial misconduct can be seen in Table 5.

Table 5. Judicial Misconduct

Act of Misconduct	*f*
Erroneous finding or procedure	8
Improper intervention	3
Bribery	1
Conflict of interest	1
Under the influence	1
Total	14

D. Forensic Misconduct

While forensic misconduct was observed more than judicial misconduct, it is still considered substantially less frequent than other forms of misconduct in this study. Three acts of misconduct were indicated, with *false observations or testimony* occurring most frequently in the category. *False observations or testimony* were problematic for exoneree's cases, including making observation statements during trial that were later not supported by science or false testimony entirely. Table 6 displays the forensic misconduct found in exoneree's cases.

Table 6. Forensic Misconduct

Act of Misconduct	*f*
False observations or testimony	20
Misstated or invalid evidence	4
Suggestive methods	1
Total	25

Though judicial and forensic misconduct appear in the findings, their occurrence on murder exonerees are not as frequent. This, however, does not constitute valid reasoning for undermining the effect it has on the cases being studied. The most common form of forensic misconduct discovered was *false observations or testimony* (n = 20), speaking to a bigger issue at hand: the rationality of using forensic experts in capital cases must come with careful consideration. Equally, miscarriages of justice carried out by judicial officials present a dilemma of both ethical reasoning and competency at the highest level in each given case. The most identified form of judicial misconduct in this study was *erroneous finding or procedure* (n = 8, 57%), thereby providing a need for assessing capability in positions proven to contribute to wrongful convictions.

E. Inadequate Legal Defense

Inadequate legal defenses were the most recurring form of misconduct found in this study (n = 313). As present in both police and prosecutorial misconduct, the inadequate legal defenses found outweigh the number of applicable cases (n = 204). *Failure to call witnesses* was the most common type of inadequate legal defense discovered (n = 75), followed by *deficient performance* (n = 58). The *failure to call witnesses* included not calling alibi, character, or expert witnesses. *Conflict of interest* (n = 14) and *failure to propose objections* (n = 10) were the least frequently occurring. *Conflict of interest* consisted of attorney's who had represented a relative of the defendant or victim, the attorney was also facing charges in a separate case, etc. Table 7 outlines the frequencies of inadequate legal defenses, including the crosstabulation of impact on race by inadequate legal defenses.

Table 7. Race and Inadequate Legal Defense Crosstabulation

Inadequate Legal Defense	Asian	African American	Caucasian	Hispanic	Native American	Other	Total
Conflict of interest	0	7	5	2	0	0	14
Deficient performance	1	28	19	10	0	0	58

Failure to call witnesses	0	47	17	11	0	0	75
Failure to present challenges or dismissals	1	23	8	3	0	1	36
Failure to propose objections	0	5	4	1	0	0	10
Failure to sufficiently investigate	0	27	12	7	0	0	46
Ineffective witness examination	0	16	5	3	1	0	25
Unknown	0	36	12	1	0	0	49
Total	2	189	82	38	1	1	313

This study was able to identify varying inadequate legal defenses among those wrongfully convicted of murder. Adequate legal defenses are not only a constitutional right, but they are crucial to the defendant's opportunity to clear their name. Following suit with prosecutorial and police misconduct, the occurrence of inadequate legal defenses (n = 313) surpassed the total sample (though 49 cases are unknown). *Failure to call witnesses* was the most recurring inadequate legal defense (n = 75, 24%) followed closely by *deficient performance* (n = 58, 19%). The distribution of inadequate legal defenses was much more marginal than police and prosecutorial misconduct. Despite this margin, African American exonerees were still disproportionally more likely to have inadequate legal defenses (n = 189, 60%) than all other races. The disproportionality of African American exonerees again exceeds other races two-fold in total, but also across acts, including (1) *failure to call witnesses*, (2) *failure to present challenges or dismissals*, (3) *failure to sufficiently investigate*, and (4) *ineffective witness examination.* Inadequate legal defenses are yet another challenge for innocent African American defendants to overcome when claiming their innocence when on trial for capital crimes.

This study is not without limitation. The cases analyzed only included those that are considered known exonerations. As exonerations become more prevalent, it has become increasingly evident that more innocent people will or will not be exonerated and not included in this study. Further, case summaries through the NRE were used to analyze and code exonerations. These summaries, while thorough, do not tell the full story of the exoneration and details may not be present. In addition, murder exonerations are potentially not representative of misconduct comprehensively, as more law enforcement resources are focused on these cases and can skew error rates. Such error could be more extensive based on pressure to solve and obtain a conviction or lower due to more oversight and awareness.

Using the NRE, the findings of this study indicated (1) officials committing misconduct in murder exoneration cases, (2) types of misconduct that officials are committing, and (3) the frequency in which misconduct impacts exonerees by race. Police and prosecutorial misconduct, as well as inadequate legal defenses, were found to disproportionately impact African American exonerees, presenting an additional disservice to an unjust system for minority groups. This study contributes to social science research significantly in breaking ground on misconduct in murder exonerations. In addition, the study further supports the firm differences in the experiences of African Americans in the criminal justice system. The future research and conclusion section will discuss policy implications and future research.

V Future Research and Conclusion

The year 2020 has made way for many calls in support of social justice. The killing of George Floyd and shooting of Jacob Blake have sparked nationwide cries for police reform. The findings of this study reinforce the need for reform among American policing. A key aspect of progress in policing comes from educating officers on the current issue: misconduct. Department resources should be allocated to further educating officials on their ethical decision making and correcting error. Next, error must come with accountability. Unpunished misconduct has the potential to lead to catastrophe, providing a demand for enforcement. Some jurisdictions have taken on approaches such as civilian complaint review boards, where the element of "officer policing other officers" is less impactful on accountability. Such review boards have value across all criminal justice professions, where civilians who are not affiliated with police, prosecutors, judges, or forensic analysts can provide input on accountability judgements.

The George Floyd Justice in Policing Act was proposed in June 2020 outlining increased accountability for law enforcement officials. This includes lowering the standard of criminal intent to convict officers for misconduct in federal prosecutions from willful to knowing and reckless. In addition, the act limits qualified immunity (a protection of officials based on discretion in civil actions) and give authorization to the Department of Justice to issue subpoenas to investigate police departments for patterns or practice of discrimination. The act also (1) established a framework to prohibit racial profiling practices, (2) creates the National Police Misconduct Registry, a database on complaints and records of misconduct, and (3) new policing procedures such as data reporting on use of force incidents, trainings on bias and racial profiling, and wearing body cameras.

The George Floyd Justice in Policing Act provides a framework that can apply to other forms of misconduct with criteria for policy changing based on the type of misconduct. Future research discusses this possibility, including those specific to wrongful convictions such as post-conviction review process.

Future Research

The three variables within this study in which race was evaluated provide that African American exonerees are more likely to be victimized by police misconduct, prosecutorial misconduct, and inadequate legal defenses. Though this study has achieved results that are significant to progress, a continuance of wrongful conviction research is needed to advance our knowledge of injustice. The public disclosure of police disciplinary records is a pivotal starting point in the pursuit of ending injustice. Such disclosure would not only provide for the further safety of American citizens, but it provides a multitude of opportunities for scholarship in the social sciences and beyond. In turn, reform can be an action taken to make police accountability a truth that holds its weight. Accountability measures should also be considered for prosecutors and judges, where citizens are at risk of being victimized when entering the process of criminal procedure at the trial level. Webster (2019) stated that if "prosecutorial ambivalence or resistance" is still motivated by police misconduct, forensic misconduct, violent crimes, or inadequate legal defenses, postconviction review can potentially address such insufficiencies (p. 346). The findings

of this study back Webster's (2019) conclusion, providing a demand for post-conviction reviews to continuously be utilized in restoring the integrity of justice when it fell short.

Future studies should consider analyzing misconduct at the individual and organizational level, raising question as to why professionals choose to engage in misconduct. Though there are many approaches to this form of research, many contributions have been made by scholars across many disciplines that have application towards the study of criminal justice professionals. In doing so, administration within each criminal justice profession can see to it that proper ethical and unbiased procedures are used across decision-making circumstances, allowing for equal justice to prevail over prejudice. Further, the findings of this study support that more weight should be given to the prospect of analyzing inadequate legal defenses as a contributor to both wrongful convictions and official misconduct. Inadequate legal defenses outweighed all other categories of misconduct, hence their occurrence in murder cases provides further opportunity to address trial outcomes with effective counsel regardless of innocence.

The results of this study echo the cry for social justice reform in wake of the killing of George Floyd, including scientific evidence that constitutes many calls for change, specifically addressing the African American experience with criminal justice professionals. The findings present the opportunity to bring change and social justice to form a more ethical legal system that does not judge by demographics. In order to advance American criminal justice and each of the respected professions of professionals, it is vital for leaders to consider accountability and competence when it comes to professions in criminal justice. Such considerations should resonate through the entire justice system, particularly to those involved in criminal procedure. When these considerations extend further than just mere deliberation and make way to organizational change, a more just and unbiased pursuit to justice awaits.

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Appendix

Definitions of Acts by Official:

Police Misconduct

(1) Witness or suspect tampering: feeding information, regardless of its validity, about the case to witnesses or suspects, including posing threats, exchange for testimony, refusing one's right to have a lawyer present, coaching, and prior involvement with defendants that present a conflict in the case.
(2) Exculpatory evidence: proven by court that evidence was withheld by police that could have potentially exonerated the accused.
(3) False information: includes when witnesses indicate someone other than the defendant committed the crime, false or misleading testimony by police personnel, errored reporting or cover-ups by police, collection of unrelated evidence, utilizing unlawful or unreliable techniques such as interrogating without proper *Miranda* procedure, and fabricating evidence.
(4) Interrogation techniques: abusive, coercive, or flawed practices are used to obtain confession or drive implication towards specific individual(s), such as continuing to interview suspects after they request a lawyer though one is not present.
(5) Lineup procedure: An erroneous or flawed procedure was used for lineup.

Prosecutorial Misconduct

(1) Evidence or trial manipulation: The prosecutor tampers or manipulates with the trial or any relevant evidence in a case. This can include improper jury selection, trying defendants separately to prevent potentially exonerating statements, or coaching witnesses.
(2) Exchange for testimony: leniency or other initiatives were offered to those testifying.
(3) Exculpatory evidence: withholding, destroying, or failing to disclose evidence that can be revealing of one's innocence or depriving of their rights.
(4) Improper statements: Comments, statements, or arguments made by the prosecution that have a negative impact on the exoneree's case.
(5) Interrogation techniques: The prosecutor is abusive, coercive, or uses flawed practices to obtain a confession. *Can include influencing witnesses not to recant, threatening suspects,*
(6) Lineup procedure: Prosecutor uses suggestive methods for lineups to influence identification.
(7) Misrepresenting evidence: hand-picking evidence contradictory to its true nature for usage in prosecutorial arguments.
(8) Presenting contradictory evidence: prosecutor presents differing evidence or theories across multiple trials, establishing a narrative that convicts the individual based more-so on impression rather than factual arguments.

(9) Utilizing false evidence or testimony: the prosecutor knowingly utilizes evidence or testimony that is incorrect or erroneous.

Judicial Misconduct

(1) Bribery: the judge accepted something of value for the purpose of an exchange during the trial's proceedings.
(2) Conflict of interest: a COI is present when judges have prior experience coinciding with participants in the current case,
(3) Erroneous finding or procedure: Court finds that the judge made an error in a finding or the procedure in which the case was conducted that contributed to the wrongful conviction.
(4) Improper intervention: the judge intervenes improperly and negatively impacts the case in terms of the defendant's guilt or innocence, including harming the defense's arguments and allowing evidence that, by standards set forth by the Court of Appeals, should not have been allowed.
(5) Under the influence: the judge was under the influence of a substance during the trial, thus limiting their competency.

Forensic Misconduct

(1) False observations or testimony: the forensic professional made an incorrect observation that was used to convict the exoneree.
(2) Misstated evidence: errors are present in the way in which evidence is stated by the forensic official.
(3) Suggestive methods: the forensic professional was found to have used suggestive methods in producing or examining evidence for trial.

Inadequate Legal Defense

(1) Conflict of interest: the defense attorney represented the exoneree with a conflict of interest present, such as prior relations with the exoneree, those involved in the case, or family.
(2) Deficient performance: can include withdrawing claim of innocence, failing to point out inconsistencies in testimony, allowing incriminating evidence, not providing information of client's mental incompetence, being unprepared, not presenting potentially exonerating evidence, provisions for material witnesses, or attempting bribery.
(3) Failure to call witnesses: the failure to call proper witnesses for defendant's case, including those who can confirm character, an alibi, or experts.
(4) Failure to present challenges or dismissals: the defense attorney does not adequately challenge or move to dismiss or suppress accounts/statements made during trial, including the failure to impeach testimony.
(5) Failure to propose objections: defense attorney fails to propose objections during trial.
(6) Failure to sufficiently investigate: defense does not adequately investigate on behalf of the defendant.
(7) Ineffective witness examination: the defense attorney does not sufficiently or adequately examine witnesses, including cross-examinations.
(8) Unknown

The Right to Silence and the Pendulum Swing:
Variations in Canadian and Scottish Criminal Law

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The right to silence is afforded to suspects in criminal cases as part of a number constitutional protections contained within Canadian law through the Charter of Rights and Freedoms. It is closely linked to other such rights, including the right to counsel, the right against self-incrimination and the presumption of innocence. Moreover, in some cases, the denial of this right has resulted in convictions in error through false confessions and wrongful convictions. Decisions by the Supreme Court in Canada in recent times can be viewed as a slow encroachment onto individual Charter rights in favour of the needs of law enforcement. In Scotland, until recently, while afforded a right to silence suspects could still be questioned for up to six hours without a lawyer present. While other measures existed to protect an individual's right to a fair trial, such practices were out of step with the European Convention on Human Rights Article 6(1) right to a fair trial. In the decision in Cadder v HMA, greater protections to suspects were introduced regarding the right to silence and the right to counsel, and the Criminal Justice (Scotland) Act 2016 later consolidated the relevant law on this matter. The focus of this paper will be to examine how the right to silence in both Canadian and Scottish law has evolved through statute and case law and the implications of this for law enforcement practices, the protection of rights and the safety of convictions.

I Introduction

When individual suspects are detained by police and questioned on their involvement in alleged criminal activity, they are placed in a vulnerable position. In many instances, such persons are ignorant of what their rights are regarding what questions they should or should not answer and what protections may be afforded to them in this respect. At the same time, law enforcement has the task of attempting to solve crime through collecting evidence, finding a suspect and charging them. Given the vulnerable state of the individuals questioned by the police, in juxtaposition to the power of the state, criminal procedure has evolved to the point where principles have been established that are aimed at protecting the rights of persons in such situations. In spite of these rights-based protections, increasingly the higher courts have interpreted their reach and it will be argued that decisions that tend to favour an increase in individual rights protections are often followed by further decisions that favour limiting those rights. The objective of this paper is to explore this metaphorical pendulum swing in the right to silence in the common law jurisdictions of both Canada and Scotland.[1]

Principle among the provisions protecting persons questioned by the police is the right to silence. The utility of the right to silence cannot be overstated. When questioned by the police, a suspect or accused person or witness has no obligation to help the police in their duties by making self-incriminatory statements. While it may appear rather straightforward, research has indicated that individuals do not always understand the meaning of this right, which may result in them being denied its protections.[2] Moreover, in its attempt to establish the right to silence as an individual human right guarantee [3], the European Court of Human Rights, recognized it not as an absolute right, but as largely dependent upon the setting in which it is sought. In fact, in her book Quirk underlines how the decline of the right to silence in England has been accompanied by a normative expectation of co-operation, which could be interpreted as a movement towards greater crime control.[4] Ultimately, police work demands a balance between effective law enforcement and effective defence rights,[5] a balance that is difficult to achieve given the competing forces on each side of the equation.

Essentially, this right functions to protect persons during police interview (and charged persons at trial) from making self-incriminating statements to those in authority. While statute and case law in both jurisdictions have established frameworks for protecting the right to silence, difficulties surrounding the protection of this right often emerge at the

[1] An earlier version of this paper was presented at the Gordon Seminar on Criminal Law, School of Law, University of Glasgow 2015. I would like to thank James McLean, Lewis Kennedy, Michael Crystal, Tara Santini, Fiona Leverick and Clive Walker for very helpful comments on early drafts.

[2] Joseph Eastwood, Brent Snook & Sarah Chalk, "Comprehending Canadian police cautions: Are the Rights to Silence and Legal Counsel Understandable?" (2010) 28 Behav Sci & L 366; Krista Davis, Lindsay Fitzsimmons & Timothy Moore, "Improving the Comprehensibility of a Canadian Police Caution on the Right to Silence" (2011) 26:2 J Police &Crim Psych 87.

[3] Mark Berger, "Self-incrimination and the European Court of Human Rights: Procedural issues in the Enforcement of the Right to Silence" (2007) 5 EHRLR 514 at 515.

[4] Hannah Quirk, *The Rise and Fall of the Right to Silence* (Routledge: London, 2016).

[5] Fenella Billing, *The Right to Silence in Transnational Criminal Proceedings: Comparative Law Perspectives* (Springer International Publishing: Switzerland, 2016) at 3.

first point of contact with law enforcement officials. It may be argued that it is at this juncture that the right to silence serves different functions. For the innocent person, possibly unfamiliar with the extent of their rights in this context, waiving the right to silence in a sincere attempt to help in the investigation may inadvertently supply police with further evidence against them. Similarly, for the guilty the right to silence may act as a shield that forces law enforcement and prosecutors to effectively make the case against them; it is not the suspect's responsibility to facilitate a conviction, nor should it be. However, the guilt or innocence of a suspect per se, from a rights perspective, matters little. The underlying issue is that this protection serves as a means of somewhat leveling the playing field where one of the players is at a distinct disadvantage.

In Canada, the right to silence is closely linked to the right to counsel and the right against self-incrimination, as well as the overriding presumption of innocence. In fact, these rights are so closely connected that it is difficult to ascertain where one begins and the other ends; absent the right to counsel, the right to silence is at times ignored and the right to silence in and of itself enhances the right against self-incrimination. Similarly, the presumption of innocence, on which much of criminal procedure is based, underlies all of these protections. In Canadian law the principle of fundamental justice with respect to the notion of fairness in the administration of justice is found in the *Canadian Charter of Rights and Freedoms* [6] (*Charter*) under section 7 and subsection 10 (b). Section 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." However, this section has been interpreted to be far more expansive than encompassing simply procedural rights, and includes, *inter alia*, protections around the right to silence. Further, subsection 10 (b) states that: "Everyone has the right on arrest or detention (b) to retain and instruct counsel without delay and to be informed of that right."

In Scotland similar protections are found in the *European Convention on Human Rights* [7] (*ECHR*) subsection 6 (1) Right to a fair trial: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Moreover, these protections are further reinforced by the right to counsel in subsection 6 (3) (c) whereby: "Everyone charged with a criminal offence has the following minimum rights: … (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." The *Criminal Justice (Scotland) Act* 2016 [8] outlines police powers for detaining and questioning individuals suspected of criminal activity. Provision for legal assistance during detention, however, only came about due to case law in 2009 and changes in this regard will be discussed below. Further protections of

[6] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, online: <http://canlii.ca/t/ldsx> (*Charter*).
[7] *European Convention on Human Rights*, as amended by Protocols Nos 11 and 14 supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16, Rome 4.XI.1950, online: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005r (*ECHR*).
[8] *Criminal Justice (Scotland) Act*, 2016, 2016 asp 1, online: http://www.bailii.org/scot/legis/num_act/2016/asp_20161_en_1.html, at s 3 (e) (i-ii).

these rights in Scotland can be found in the *Human Rights Act, 1998,* [9] where section 6 repeats the protections of *ECHR* and the *Scotland Act*.[10]

In an adversarial system the enshrinement of such rights through statute and the common law provides further protection to persons when evidence collected in the early stages of an investigation is used against them at trial. A brief examination of case law will demonstrate that right-to-silence protections in both Canada and Scotland have recently gone through a number of variations. The first half of this paper will present an overview of developments in criminal law protections [11] in the Canadian context including case law regarding the right to silence and the right to counsel. What becomes evident is that interpretations of these rights under section 7 of the *Charter* have resulted in an increasingly narrow application. How these rights are implemented in practice will also be discussed, as well as the controversies regarding the admission of evidence via contentious police interrogation methods. The second half of the paper will examine the shifts in Scottish criminal law in recent years that have resulted as both domestic courts and the European Court of Human Rights have interpreted the right to counsel under subsection 6 (3) (c), as well as through statutory changes. While it has become apparent that the courts in both jurisdictions have now established that protecting the right to silence and the right to counsel is an essential part of an overall greater recognition of human rights, at the same time significant erosions to those protections are also evident.

II Canada

Section 7 and subsection 10 (b) of the *Charter* offer protections to the right to silence and the right to counsel and include both procedural and substantive aspects.[12] In particular section 7 has been interpreted as conveying the right to silence both at the police investigative stage and also at trial.[13] Furthermore, so-called legal rights under the *Charter* comprise subsections 7-14 and while not specifically defined as such, include "…the rights of persons within the system of criminal justice, limiting the powers of the state with respect to investigation, search, seizure, arrest, detention, trial and punishment".[14] Amongst these legal rights, the right to silence essentially provides protection to individuals from the dominant power of the state.

A. Right to Silence

Given that the Canadian *Charter* was only enacted in 1982, the first case that examined this right to silence, in particular with respect to confession evidence was *R v*

[9] *The Human Rights Act*, 1998 c 42, online: http://www.bailii.org/uk/legis/num_act/1998/ukpga_19980042_en_1.html.
[10] *The Scotland Act*, 1998 c 46, online: http://www.bailii.org/uk/legis/num_act/1998/ukpga_19980046_en_1.html.
[11] The phrase "criminal law protections" refers to rights based protections afforded persons when questioned by the police. These terms, and the term "legal rights" will be used interchangeably.
[12] See eg, *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 SCR 486, online: <http://canlii.ca/t/dln> at 499.
[13] David Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015).
[14] Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2007) 1028.

Hebert.[15] While this case considered the right of a detained person to silence under section 7 within the context of the confessions rule, it also considered the privilege against self-incrimination, the philosophy of the *Charter* and the purpose of the right in question.[16] Here a robbery suspect made a number of incriminating statements to an undercover police officer in his holding cell, despite having told the police he did not want to make a statement to them. The Supreme Court of Canada later held that not only had Hebert's rights been violated by improper police questioning but also that the right to silence is the most important right to be advised of, which in effect allows the suspect the right to choose to speak to authorities, or not.[17] The Court outlined the limits to the right to silence and they include that this right only applies after detention (although not to suspects targeted in undercover operations), and that the police may question people in the absence of counsel (after counsel has been retained). Further, the right does not extend to voluntary statements made to a cellmate, and it is not violated even when undercover police observe a suspect, but do not "elicit information in violation of the suspect's choice to remain silent." [18]

While this decision only loosely defined the parameters of the right to silence, there continues to be little consensus within the legal community about the extent of its role in affording protection to criminal suspects.[19] The ruling in *Hebert* was unanimous that section 7 included the right to silence, however, there was less clarity around the contours of that right, in effect reflecting what has been called the "Canadian ambivalence towards confessions." [20] Being informed of the right to silence creates an assumption that such a right will offer protection against self-incrimination, however, it would seem that this is not always the case.

Another decision by the Supreme Court indicates that such rights are being gradually eroded. In *R v Singh* [21] the Supreme Court attempted to further clarify the right to silence under section 7. It also examined the intersection between the right to silence (from *Hebert*) and the common law confessions rule as found in *R v Oickle* [22] (to be discussed *infra*). Having been accused of second-degree murder, Singh made a number of incriminating admissions during questioning in spite of the fact that he had repeatedly attempted to end the interview. The issue before the Supreme Court was the admissibility of the statements made to the police on the grounds that they were involuntary and infringed

[15] *R v Hebert*, 1990 CanLII 118 (SCC), [1990] 2 SCR 151, online: <http://canlii.ca/t/1fst9> [*Hebert*]. While this case considered the right of a detained person to silence under s 7 within the context of the confessions rule, it also considered the privilege against self-incrimination, the philosophy of the *Charter* and the purpose of the right in question (at para 20).
[16] *Ibid* at 15.
[17] *Ibid* at 52, 80.
[18] Ronald Delisle & Don Stuart, *Evidence: Principles and Problems*, 7th ed (Toronto, Carswell Legal Publications, 2004) at 382.
[19] See eg, Richard Litkowski, "Silencing the right to remain silent" (2008) 29:1 Ontario Criminal Lawyers' Association Newsletter at 1.
[20] Guy Cournoyer, "Saying 'no' to interrogation: The Quebec Court of Appeal asserts a meaningful right to silence" (2001) 5th CR at 2.
[21] *R v Singh*, 2007 SCC 48 (CanLII), [2007] 3 SCR 405, online: <http://canlii.ca/t/1tf56> [*Singh*].
[22] *R v Oickle*, 2000 SCC 38 (CanLII), [2000] 2 SCR 3, online: <http://canlii.ca/t/525h> [*Oickle*].

his *Charter* right to silence.[23] In dismissing Singh's appeal, the Court was significantly divided on the intersection of the confessions rule regarding voluntariness and the right to silence. The majority found:

> …voluntariness, as it is understood today, requires that the court scrutinize whether the accused was denied his or her right to silence…In other words, if the Crown proves voluntariness beyond a reasonable doubt, there can be no finding of a Charter violation of the right to silence in respect of the same statement.[24]

The Court further argued that the confessions rule enhances or supplements the section 7 right to silence – rather than merely subsuming it.[25] Questions of voluntariness are closely linked to whether or not an accused person was denied his or her right to silence and both affect the admissibility of confession evidence.

Overall the finding in *Singh* could open the door to excessive police interrogation practices insofar as they permit the suspect to choose to remain silent and are not so extreme as to violate the operating mind principle.[26] In other words, persistent police practices are permissible in order to elicit admissions or confessions from the accused, as long as he/she is made aware of his/her right to silence and is capable of understanding the proceedings. However, the dissent in *Singh* found that his statements to the police did in fact violate his right to silence. Writing for the minority, Fish J stated that " … a confession that meets these common law standards does not invariably represent a 'free and meaningful choice' for the purposes of the *Charter*".[27] Thus, even if a confession could be considered voluntary under the confessions rule, at the same time it could have been obtained through state action that infringed section 7 of the *Charter*.[28] The dissenting opinion appears to reflect a greater concern with the abuse of police powers over individual rights, while at the same time recognizing that the police have a particular responsibility to investigate crime and interrogate suspects. While the majority decision in *Singh* affirms that the voluntariness of statements is closely tied to *Charter* rights, it has also been argued that it represents a blow to the right to silence.[29] Despite the fact that Mr. Singh asserted his right to silence 18 times, the ultimate question before the Court was whether or not he exercised free will in choosing to make a statement; [30] the Court decided he had.

B. Confessions Rule

Closely related to the right to silence is the confessions rule, established by the Supreme Court in *Oickle*. In this case Oickle admitted to setting a fire, after much questioning by the police. At their urging, the defendant agreed to a re-enactment of a number of other fires, was subsequently charged and convicted of arson. While the

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[23] Renée Weitzman & Kathryn Campbell**, "**The Admissibility of Confessions: A Review of Hebert, Oickle, Singh and Sinclair*"* (Nat Jud Inst – Inst nat de la magistrature, Quebec, 2012) at 8 [*Weitzman & Campbell*].
[24] *Singh*, *supra* note 21 at 37.
[25] *Ibid* at 39.
[26] *Weitzman & Campbell*, *supra* note 23 at 9.
[27] *Singh*, *supra* note 21 at 79.
[28] *Weitzman & Campbell*, *supra* note 23 at 9.
[29] *Ibid* at 1.
[30] *Singh*, *supra* note 21 at 53.

confessions were admitted at trial, they were excluded by the Nova Scotia Court of Appeal, but later restored by the Supreme Court. At that time, however, the Court restored the confessions rule, and acknowledged the need for vigilance around admitting questionable confessions given their role in contributing to wrongful convictions. What *Oickle* established was that for a confession made to a person in authority to be admissible, the Crown had to establish beyond a reasonable doubt that the defendant had not been overborne by inducements, oppressive circumstances, lack of an "operating mind" or police trickery [31] A contextual analysis is thus required in deciding the admissibility of a confession at trial. First of all, a confession will be deemed inadmissible if it came about due to threats, violence, a promise of leniency or inducements. Secondly, a confession is inadmissible if it results from oppression, or a desire to escape an oppressive circumstance to the degree that it overcomes the suspect's will. The operating mind doctrine, the third aspect of the rule, requires that the defendant have the cognitive capacity to understand what they are saying and understand the evidence against them. The final aspect of the confessions rule addresses what is considered to be other or unfair police trickery [32] – as a confession will be deemed inadmissible when actions to obtain that confession on the part of the police are so appalling that they "shock the community." [33]

C. Right to Counsel

The most significant decision regarding the right to counsel appears to further infringe up the right to silence. In 2010, the Supreme Court of Canada handed down three companion cases, all dealing with interrelated issues regarding the right to counsel, the right to silence, and the confessions rule. They included *R v McCrimmon,* [34] *R v Willier,* [35] and *R v Sinclair,* [36] with the latter being the most controversial of the three, given the strong dissent. In *Sinclair,* the accused was arrested for murder and spoke to counsel on two occasions. During police interviews that occurred over several hours Sinclair stated he had nothing to say, and although the police affirmed his right to silence they did not allow him to re-consult his lawyer. He later made incriminating statements to the police and to an undercover officer in his cell; he also participated in a re-enactment at the murder site. At trial, the judge ruled that the interview, statements to the police and the re-enactment were

[31] *Weitzman & Campbell, supra* note 23 at 6.
[32] *Ibid* at 7.
[33] From *Oickle: Rothman v The Queen*, 1981 CanLII 23 (SCC), [1981] 1 SCR 640, online: <http://canlii.ca/t/1mjl7>.
[34] *R v McCrimmon*, 2010 SCC 36 (CanLII), [2010] 2 SCR 402, online: <http://canlii.ca/t/2cvjx> [*McCrimmon*].
[35] In *McCrimmon* the accused was given the right to counsel upon arrest for assault; while he identified a specific lawyer as his choice, he was unable to reach him. He accepted the offer to speak to legal aid and after two hours confessed. At trial the statements were found to be voluntary and the Court of Appeal affirmed the judge's rulings. In *R v Willier*, 2010 SCC 37 (CanLII), [2010] 2 SCR 429, online: <http://canlii.ca/t/2cvjv> following his arrest for murder, Willier spoke to duty counsel on two occasions when unable to speak to his lawyer of choice and confessed to police one hour later. In his case, the trial found for a *Charter* breach as police did not allow sufficient time for him to reach his counsel of choice. The Court of Appeal, however, reversed his decision and found no breach. At the Supreme Court all the justices agreed that Willier had been given "ample opportunity to exercise his rights but had failed to do so.
[36] *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, online: <http://canlii.ca/t/2cvjs>, [*Sinclair*].

all admissible and that Sinclair's rights under subsection 10 (b) of the *Charter* had not been infringed.

While the British Columbia Court of Appeal affirmed this decision, the Supreme Court examined whether the right to counsel under the *Charter* (subsection 10 (b)) required that a lawyer be present at all times throughout an interrogation; the Court was ultimately split three ways on its understanding of this issue.[37] While the purpose of this section of the *Charter* was to support a detained person's right to choose whether or not to cooperate with the police, based on advice from counsel, the issue boiled down to differences of opinion as to when the right to consult counsel ends, following an initial consultation. The majority position rendered by Justice Charron and then Chief Justice McLachlin represented a belief in the need for a narrow degree of protection for the accused, where the right to re-consult counsel was only permitted if there had been a change in circumstances. That would include a polygraph test or a lineup identification, a change in jeopardy facing the suspect (material change in the charge) or if there was reason to believe that the suspect who had waived their right to counsel may not have understood the advice given by the police about that right.[38] The dissent, from Justices LeBel and Fish, conveyed a more expansive view, [39] where the right to counsel was viewed as a continuing right, to be asserted at any point and consistent with the notion of jeopardy. For them, the right protects the accused from self-incrimination and also ensures the presumption of innocence. Absent these protections, the chances of a guilty plea increase, as well as the admission of incriminating statements, all hallmarks of a possible wrongful conviction. Ultimately, for the dissent the right to counsel should reach beyond a one-time consultation; the suspect has an inherent right not to be part of building a case against him or herself.[40]

Justice Binnie's dissent was more intermediate as he argued for allowing the detainee "*reasonable* access to legal advice from time to time in the course of a police interrogation." [41] Sinclair's consultation with counsel over the phone constituted a total of 360 seconds of legal advice, which Binnie, J, argues was not "enough to exhaust his s.10 (b) guarantee." [42] Binnie's position reflects the belief that this and other cases (*Singh, Oickle*) have now lowered the bar so that:

> …an individual (presumed innocent) may be detained and isolated for questioning by the police for at least five or six hours without reasonable recourse to a lawyer, during which time the officers can brush aside assertions of the right to silence or demands to be returned to his or her cell, in an endurance contest in which the police interrogators, taking turns with one another, hold all the important legal cards.[43]

Considered in combination with the above cases, *Sinclair* is representative of a slow encroachment into individual *Charter* rights and a shift in the Court's view on subsection

[37] *Weitzman & Campbell, supra* note 23 at 10.
[38] *Sinclair, supra* note 36 at 36.
[39] Or "purposive" view, see *Weitzman & Campbell, supra* note 23 at 10.
[40] *Ibid* at 10.
[41] *Sinclair, supra note* 36 at 105.
[42] *Ibid* at 83.
[43] *Ibid* at 98

10 (b) rights, again in favour of the needs and interests of law enforcement.[44] The overall decision of the Court in *Sinclair* underlines the tension between balancing societal interests in solving crime and protecting the public, with the rights of accused persons under the *Charter*. Despite several lengthy, protracted considerations by the highest court in Canada, the law with respect to the right to silence and to ascertaining the voluntariness of confessions remains in dispute.

In practice, what the decision in *Sinclair* means is that following an initial consultation [45] with counsel, a suspect will only be permitted to re-consult counsel if there has been a material change in circumstance. This could include the introduction of new procedures or a change in jeopardy or if police are of the opinion that the first information was deficient.[46] For police this translates into what amounts to almost unfettered access to questioning suspects following the first consultation. Suspects do not have the right to have counsel present for the duration of the police interview; in Canadian law the right to counsel at this stage in the process is one of pre-questioning consultation and not one of representation during a police interview. In fact, some defense counsel when consulted advise clients over the phone to "curl up in a fetal position and don't say anything." [47] Others, state, "in the past I would frequently advise clients to take my card, put it between their teeth and bite down on it if the police wanted to take a statement from them".[48] While such advice is somewhat tongue in cheek, it reflects the reality of what occurs in these situations. A suspect would need to be incredibly resilient to stand up to relentless questioning by police officers, in the intimidating environment of the interrogation room of a police station. While there are certainly protections through section 7 of the *Charter* against an abuse of process on the part of the police, the extent of the limits of permitted police questioning of detainees have as of yet to be clearly established by the courts.

Further case law since the *Sinclair* decision has refined some of the questions that decision left unanswered.[49] In particular, some clarifications have occurred in terms of what a change in jeopardy requiring re-consultation with counsel means, [50] what a lack of understanding of legal advice means, [51] defining the limits of what facilitation of contact

[44] Vanessa A. MacDonnell, "R v Sinclair: Balancing individual rights and societal interests outside of section 1 of the Charter' (2012) 38 Queen's L J 137.
[45] Consultations can occur over the phone as it is not required that the suspect meet with counsel in person.
[46] *Sinclair*, *supra* note 36 at 2.
[47] Michael Crystal, criminal defense counsel, personal communication, 1 May 2015.
[48] From Douglas Quan. "Acquitted woman's emotional statement to police was admissible in murder trial, appeal court rules" (8 Jun 2015), *National Post*, online: http://news.nationalpost.com/toronto/womans-emotional-statement-to-police-was-admissible-in-murder-trial-appeal-court-rules.
[49] Joe Doyle & Claire Hatcher, "The *Sinclair* Trilogy: 'What are Defence Counsel For?'" Online at: http://www.cba.org/cba/cle/PDF/CRIM12_Paper_Hatcher.pdf [*Doyle & Hatcher*] 10-12.
[50] *R v Gonzales*, 2011 ONSC 543 (CanLII), [2011] OJ No 395, online <http://canlii.ca/t/hvjqb>; *R v Briscoe*, 2012 ABQB 111 (CanLII), [2012] AJ No 196, online: <http://canlii.ca/t/fqc7j>.
[51] *R v Wu*, 2010 ABCA 337 (CanLII), [2010] AJ No 1327, online: http://canlii.ca/t/2dfbc>.

with counsel of choice entails, [52] as well as underlining the limitations of the confessions rule.[53]

D. Police Interrogation

Furthermore, case law has underlined how the psychological interrogation methods of the Reid Technique, a method of police questioning used by some police in Canada,[54] can also function to erode the right to silence and produce confession evidence that may be later deemed inadmissible by the courts. It has been found, in fact to also produce false confessions.[55] The Reid Technique involves a detailed analysis of the facts of the case, as well as interviewing and interrogation of suspects. The psychological methods that form an essential part of it are confrontational, manipulative and suggestive; it has been referred to as "guilt-presumptive." [56] Custodial interrogation in and of itself is inherently coercive [57] and at the same time it has been well established that particular police psychological interrogation methods such as the Reid Technique have been known to produce false confessions. In fact, recent court rulings have indicated that the Reid Technique may be thus construed as an attempt to essentially override a suspect's right to silence. As Moore contends:

> …the social chemistry of the interrogation room is psychologically disconcerting from the outset. The suspect is informed that he need not say anything. If he opts to remain silent, the same agent who moments earlier informed him that he could remain silent proceeds to ask a litany of questions, and the questions persist, no matter how often the right to silence is invoked. On balance it does not appear to be providing much of a safeguard.[58]

Justice Stromberg-Stein asks in *R v Rhodes*, "When does no mean no? How many times must a suspect say no? Can a suspect simply be ignored until his or her will is broken down or over-ridden?" [59] Clearly, the repeated questioning of a suspect may serve to overcome his resolve, disorient and denigrate him, and at times ultimately invoke a confession simply to end the interrogation. It has been argued that "… persistent questioning, especially when coupled with the use of the Reid Technique, should lead to a finding that the statement was not made voluntarily." [60] In *R v Chapple*, [61] the accused

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[52] *R v Smith*, 2011 BCSC 1695 (CanLII), [2011] BCJ No 2381, online: <http://canlii.ca/t/fp9d2>; *R v Chung*, 2011 BCCA 131 (CanLII), [2011] BCJ No 446, online: <http://canlii.ca/t/fkl27>.

[53] *R v Leslie Somogyi*, 2010 ONSC 5585 (CanLII), [2010] OJ No 4350, online: <http://canlii.ca/t/2cxr9>; *R v Davis*, 2011 ONSC 5564 (CanLII), [2011] OJ No 5289, online: <http://canlii.ca/t/fp11k>.

[54] Due in part to these very criticisms the Reid Technique is being used less and less by Canadian police forces, including the RCMP, when questioning suspects.

[55] Saul Kassin, "The Psychology of Confession Evidence" (1997) 52 Am Psych 221.

[56] Timothy Moore & C Lindsay Fitzsimmons, "Justice imperilled: False confessions and the Reid Technique" (2011) 57(4) Crim LQ 509-542.

[57] *Miranda v Arizona*, [1966] 384 US 436 at 458.

[58] Timothy Moore, "The right to silence offers the only real protection during interrogations' (2008) 29:1 Ontario Criminal Lawyers' Association Newsletter at 17.

[59] *R v Rhodes*, 2002 BCSC 667 (CanLII), [2002] BCJ No 1113, online: <http://canlii.ca/t/1czr7> at para 110.

[60] *Singh, supra* note 21 at 18.

[61] *R v Chapple*, 2012 ABPC 229 (CanLII), [2012] AJ No 881, online: <http://canlii.ca/t/fsh9c>.

asserted her right to silence 24 times, yet it was ignored and a confession secured. In that case, Judge Dinkel, of the Provincial Court of Alberta reiterated Judge Ketchum's earlier denunciation of the Reid Technique from 12 years previous and found that "its use can lead to overwhelmingly oppressive situations that can render false confessions and cause innocent people to be wrongfully imprisoned… innocence is not an option with the Reid Technique."[62] In this case the subsequent confession was said to have been the product of oppression, where the suspect's will had been overborne, and it was therefore excluded as evidence.

In *R v Fitzgerald*,[63] an accused person stated 137 times that she wanted to remain silent when being questioned by the police. The court later found that the "right to silence was rendered meaningless"[64] and her statement subsequently rejected. In *R v Koivisto,*[65] the accused asserted his right to silence 28 times nonetheless the interrogating officer ignored these requests. In *R v Mentuck*,[66] police continued to question the accused in spite of the fact that he asserted his right to silence 75 times.[67] What these cases illustrate is that "persistent questioning" clearly occurs and it is difficult to ascertain not only to what extent these admissions occur because a suspect's right to silence has been overridden, or to what extent they represent the truth. Irrespective of the truth of their contents more often than not confessions obtained through this questionable technique are being admitted in Canadian courts.

In the Canadian context, the connection between the confessions rule, the right to silence and the right to counsel is simple.[68] The protections afforded by the right to counsel and the right to silence effectively prevent a suspect confessing during a police interrogation, especially to something they did not do – which is clearly linked to a number of wrongful convictions. Denial of those rights, in turn, could lead to the manipulation of an unsuspecting suspect on the part of the police, as well as opening the door to charge, conviction and sentence, all based on what is said during an interrogation. Once a suspect confesses to a crime, whether truthfully or falsely, it is very difficult to retract that confession. The confessions rule has been described as a "safety net"[69] as having counsel present to advise on remaining silent – which would include advising against confessions – is essential. A defendant is under no obligation to help police to make the case against him or her.

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[62] *Ibid* at 122.
[63] *R v Fitzgerald*, 2009 BCSC 1599 (CanLII), [2009] BCJ No 2333, online: <http://canlii.ca/t/26smh>.
[64] *Ibid* at 28.
[65] *R v Koivisto*, 2011 ONCJ 307 (CanLII), [2011] OJ No 2794, online: <http://canlii.ca/t/flxn2>.
[66] *R v Mentuk*, 2000 MBQB 155 (CanLII), [2000] MJ No 447, online: <http://canlii.ca/t/4vs3>.
[67] Kirk Makin, "Gag order obscures man's innocence" *The Province*, (23 Oct 2009), online: https://www.theglobeandmail.com/news/national/gag-order-obscures-mans-innocence/article25576991/.
[68] The cases discussed in this section (*Oickle*, *Singh* & *Sinclair*) have been referred to as the "interrogation trilogy" as they all raise questions about the lengths the police are allowed to go when attempting to obtain a confession from a suspect (*Sinclair*, *supra* note 36 at 77; *Weitzman & Campbell*, *supra* note 23 at 10).
[69] *Doyle & Hatcher*, *supra* note 49.

III Scotland

As in most common law jurisdictions, in Scotland the right to remain silent during police questioning is of great importance and is derived from the fundamental basis of a criminal justice system where an accused person is presumed innocent until proven guilty.[70] While the right to silence has long been afforded Scottish suspects, it was only until quite recently that the right to counsel was similarly provided. The effect of this was clearly problematic as an important rationale for the right to legal representation is that it can be of assistance in understanding and enforcing the right to silence.[71] Prior to the decision in *Cadder v HM Advocate* [72] (to be discussed *infra*) and recent legislative changes in 2010 and 2016, this situation seemed out of step with other developed nations and particularly other members of the Council of Europe. For the unrepresented suspect, it may prove too easy to answer questions of a persuasive and intimidating police officer in the confines of the rather hostile environment of a police station. While access to legal assistance may not necessarily protect against self-incrimination in all cases, the presence of a lawyer will allow a detainee to better exercise his or her rights and relieve pressures that may serve to induce a false confession.[73]

Prior to recent changes, the provisions to detain and question suspects were found in sections 14 and 15 of the *Criminal Procedure (Scotland) Act*, 1995.[74] These provisions permitted police, where there were reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment, to detain and question suspects for up to six hours, without access to legal assistance. This may be in part due to the fact that the right to silence was not considered necessary, as arrest per se was viewed as being for "arrest on charge".[75] While the Act allowed that a solicitor could be informed that a particular suspect was detained and questioned (subsection 15 (1) (b)), the suspect had no right of consultation with that or another solicitor. At the same time, the police officer was required to inform the person "…of his suspicion, of the nature of the offence which he suspects has been or is being committed and of the reason for the detention…" (subsection 14 (6)). Moreover, the detainee could be released prior to the six-hour timeline if the person was arrested, if detained pursuant to another matter or if the grounds for detainment no longer existed (subsection 14 (2) (a-c).

The sections 14 and 15 power to detain and question suspects originated from the Thomson Commission, established in 1975, that examined the law regarding pre-trial and

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[70] The Carloway Review: Report and Recommendations, (17 Nov 2011), online: http://www.gov.scot/resource/Doc/925/0122808.pdf. [*Carloway*].
[71] Fiona Leverick "The right to legal assistance during detention' (2011) 15:3 Edin LR 352 at 361 [*Leverick*].
[72] *Cadder v HM Advocate* [2010] UKSC 43, 2010 SLT 1125, online: *http://www.bailii.org/uk/cases/UKSC/2010/43.html* [*Cadder*].
[73] Lewis Kennedy, "Legal advice at police stations" (no date) online: http://www.mackinnonadvocates.co.uk/articles-cases/legal-advice-at-police-stations.aspx.
[74] *Criminal Procedure (Scotland) Act*, 1995, online: http://www.bailii.org/uk/legis/num_act/1995/ukpga_19950046_en_1.html at s 15 (1) (b).
[75] Clive Walker, "Post-charge questioning in UK terrorism cases: Straining the adversarial process' (2016) 20:5 Int'l J HR 649.

trial procedures in Scotland. The rationale for this short period of custody in detention (or rather arrest on suspicion) for six hours was to allow for the questioning of a suspect with a view to helping the police further their investigation.[76] The Thomson Commission had established that the purpose of detention may be "defeated by the participation of his solicitor" and allowed that it was a matter of police discretion whether a detainee could be interviewed by his solicitor; this right was affirmed however for an arrestee.[77] As Leverick points out, no adverse inferences could be drawn from silence during the interview but any answers provided by the suspect to police questioning could be used in evidence so long as the procedure was fair.[78] As per subsection 17 (2) of the *Criminal Procedure (Scotland) Act*, 1995, [79] it was only after being arrested and charged that a suspect had full right and access to consultation with counsel. While it is difficult to ascertain the impact that this so-called right to silence had on detainees, without the concomitant right to counsel, and the nature of what may have been revealed during police interviews, the recent common law and statutory changes that establish this right have significantly increased the protections of accused persons.

Other statutory provisions regarding the right to silence for detainees in Scotland are found in the *European Convention on Human Rights*,[80] *(ECHR)* with its advisory capacity over Scottish law and procedure. While the *Convention* itself does not expressly provide for the right to silence and the right against self-incrimination, it has been implied by the European Court as lying "at the heart of the notion of a fair procedure under article 6."[81] As discussed, the right to silence is subsumed under the right to a fair trial subsection 6 (1):

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

While the law regarding at what point access to counsel is guaranteed by subsection 6 (1) is not clear, it was left up to individual signatory countries to establish those parameters. The provisions of article 6 (1) on their face appear inconsistent with the lack of consultation with counsel for those first six hours of questioning for suspects/detainees under section 14 of the *Criminal Procedure (Scotland) Act*, 1995. In recent years, however, through a series of court decisions the parameters of this right became evident as it applied to Scottish suspects. While *Cadder* expressed the state of law in Scotland on these issues at

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[76] *Carloway, supra* note 70, at s 5.0.1.
[77] Thomson Commission, *Criminal Procedure in Scotland*, (October, 1975) at para 7.16., online: http://www.gov.scot/Resource/Doc/925/0110006.pdf.
[78] *Leverick, supra* note 71 at 356.
[79] *Criminal Procedure (Scotland) Act*, 1995, c-46, online: http://www.bailii.org/uk/legis/num_act/1995/ukpga_19950046_en_1.html.
[80] The *ECHR* has an advisory capacity over Scottish law and procedure and was brought into national law by the *Scotland Act*, 1998 and the *Human Rights Act*, 1998.
[81] From *Saunders v United Kingdom* (1996) 23 EHRR 313, [1996] ECHR 65, online: http://www.bailii.org/eu/cases/ECHR/1996/65.html found in *Carolway, supra* note 70 at s 7.09. In this case, the problem was an *offence* of silence, rather than a right to silence.

that time, it was a response to an appeal in *HM v McLean* [82] and also an affirmation of the *ECHR* decision in *Salduz v Turkey* that clarified its perimeters[83] For those reasons the cases will be discussed as they occurred chronologically.

A. Case Law

a. *Salduz v Turkey* [2008] - Right to Counsel on Detention (Europe)

The decision by the European Court of Human Rights (ECtHR) sitting as a Grand Chamber in the case of *Salduz* found that suspects should have access to a lawyer from their first interrogation, unless there were compelling reasons not to grant access. Yusuf Salduz, a Turkish national, was charged with aiding and abetting a terrorist organization by participating in an unlawful demonstration and hanging an illegal banner from a bridge.[84] Salduz was interrogated by police officers without access to a lawyer, although he was reminded of the charges against him and the right to remain silent; he made a number of admissions during the interview that were used in evidence against him.[85] Salduz later retracted the statements and claimed they had been made under duress. Doctors examined Salduz on two occasions shortly following his arrest (at 12:30 on 30 May 2001), approximately 14 hours after his arrest and again at 23:45 on 1 Jun 2001.[86] While the medical reports found no trace of ill treatment on his body on both occasions, the fact that he was examined at all and that Salduz claimed the statements were made under duress, raises questions as to how the statements were extracted from him. Salduz's appeal of his conviction, based on a breach of articles 5 (right to liberty and security) and 6 of the *Convention* was dismissed by the Ninth Chamber of the Court of Cassation in June 2002. Heard by the ECtHR in November 2008, the Court found that: "…in order for the right to a fair trial to remain sufficiently 'practical and effective' ... article 6 (1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect".[87] Further, even though Salduz had the opportunity to challenge the evidence used against him at trial and on appeal "the absence of a lawyer while he was in police custody irretrievably affected his defense rights".[88] Moreover, the right to a lawyer was recognized as beginning not with trial, but as soon as the suspect is in custody and being questioned, from the first interrogation – which is a much wider application of that right than had been previously envisaged.

b. *HMA v McLean* [(2009] – No Right to Counsel on Detention (Scotland)

In this case, Duncan McLean was 19 years old when detained for questioning under section 14 of the *Criminal Procedure (Scotland) Act,* 1995 regarding a motor vehicle theft

[82] *HM v McLean*, [2009] HCJAC 97, 2010 SLT 73, online: http://www.bailii.org/scot/cases/ScotHC/2009/2009HCJAC97.html [*McLean*].
[83] *Salduz v Turkey* [2008] ECHR 1542, (2009) 49 EHRR 19, online: http://www.bailii.org/eu/cases/ECHR/2008/1542.html [*Salduz*].
[84] *Ibid* at 12.
[85] *Ibid* at 14.
[86] *Ibid* at 13, 16.
[87] *Ibid* at 55.
[88] *Ibid* at 62.

and arson; he did not have, nor was he offered, legal advice or legal representation while interviewed.[89] During the police interview McLean made a number of admissions that the Crown intended to rely on at trial. When served with an indictment, McLean lodged a devolution minute[90] that leading such evidence in the absence of legal advice or presence of a lawyer during the interview was "…contrary to his rights conferred by Article 6 (3) (c) of the *European Convention on Human Rights*".[91] The Court found that the ECtHR ruling was not binding in Scottish courts and that sufficient safeguards existed in Scottish law and rules of evidence and procedure to protect detainees, as coerced confession evidence could be rendered inadmissible, an adverse inference from silence could not be drawn and any admissions made during an interview must be corroborated. In rejecting *Salduz*, the Scottish judges ruled that such questions require a consideration of all of the circumstances of the case and that the lack of legal representation during detention was not a violation of art. 6 given that the availability of the other safeguards was considered sufficient to guarantee a fair trial.[92]

c. *Cadder v HM Advocate* [2010] - Right to Counsel on Detention (Scotland)

The UK Supreme Court ruling in *Cadder* included an appeal against the decision in *McLean.* The link between the two cases was the fact both defendants had been detained under section 14 and each case gave rise to "the question whether the Crown's reliance on admissions made by a detainee during his detention while being interviewed by the police without access to legal advice before the interview begins is incompatible with his right to a fair trial".[93] Peter Cadder was detained and interviewed by the police in May 2007 based on suspicion of his involvement in a serious assault. After being cautioned twice, Cadder was interviewed by the police and declined to have a solicitor contacted on his behalf; during the interview Cadder made a number of admissions regarding the assaults that became the basis under which he was charged and ultimately convicted in May 2009 of two assaults and a breach of peace.[94] In July 2009, Cadder lodged his appeal based in part on the procurator fiscal deputy's [95] reliance on the contents of his interview which constituted a breach of the art. 6(1) right to a fair trial of the *ECHR*, as a solicitor was not present during

[89] *Mclean, supra* note 82 at 1.
[90] A "devolution minute" refers to the requirement in proceedings on indictment that written notice to raise a devolution issue must be given to the clerk of the court within certain time frames. Devolution refers to the process of transferring power from the central government to the regions and nations of the UK; one policy area that has devolved for Scotland is justice and policing, online: https://www.deliveringforscotland.gov.uk/scotland-in-the-uk/devolution/.
[91] *McLean, supra* note 82 at 2.
[92] SPICe Briefing, (2011). *Criminal Procedure: Responses to Cadder v HM Advocate*, online: http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S3/SB_11-20.pdf.
[93] *Cadder, supra* note 72 at 1.
[94] *Ibid* at 5.
[95] The role of this individual, similar to a Canadian prosecuting or Crown Attorney, involves taking decisions on criminal proceedings, conducting court and working closely with the police and other criminal justice partners, online: https://www.copfs.gov.uk/careers/job-profiles/legal-roles.

the interview.[96] At first sift stage [97] Cadder's appeal to the High Court was refused, based on the ruling in *McLean*; he later sought leave to appeal to the UK Supreme Court. After hearing the case in 2010, the Court ruled that in fact Scottish law and procedure for detention without access to legal representation was inconsistent with article 6 (1) of the *ECHR*; ultimately, Cadder's right to a fair trial had been breached. Additionally, the Court overruled the unanimous decision in *McLean* and found that the guarantees available under the Scottish system were not sufficient to secure a fair trial. The unanimous ruling in *Cadder* "set in motion a chain of events that could have extraordinarily wide implications for the Scottish criminal justice system".[98] Scottish courts needed to rectify the procedural gap that this ruling established; therefore detainees now have the right to legal advice and assistance prior to and during police interview.

d. Legislative change

Even before the release of the decision in *Cadder*, the Scottish government issued guidelines for police regarding detainee access to solicitors. The guidelines permitted the police to offer the detainee the possibility of consultation with a solicitor in person or by telephone. This was done in an attempt to protect prosecutions pending the Court's decision.[99] And shortly after the *Cadder* ruling the *Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act*, 2010 [100] came into force, under emergency legislation procedures, which provided a statutory right to legal advice for suspects being questioned by the police (subsection 15A) and extended the six-hour period during which a suspect can be detained for questioning by the police to twelve hours (subsection 14 (A) (2)). The twelve-hour detention period could also be extended to twenty-four hours (section 14A) in those cases where it was deemed necessary "(a) to secure, obtain or preserve evidence (whether by questioning the person or otherwise) relating to an offence in connection with which the person is being detained, (b) an offence in connection with which the detained person is being detained is one that is an indictable offence, and (c) the investigation is being conducted diligently and expeditiously." Moreover, this period was substantially less than the provisions already in place in England and Wales through the *Police and Criminal Evidence Act*, 1984, where police are permitted to hold a suspect for

[96] The other grounds related to the sheriff's directions in relation to breach of peace and the reliance of the prosecutor on dock identification evidence (*Cadder, supra* note 72 at 8).

[97] Criminal appeals in Scotland proceed when "a senior judge or appeal sheriff decides whether or not to grant permission for an appeal to proceed. This is called the sift process. There can be two parts to this. A single judge or appeal sheriff will consider whether there are 'arguable grounds' for an appeal to proceed based on legal matters and evidence. Where permission to appeal is refused at the first sift, an appeal can be made against that refusal to a second sift. This will be considered by two or three judges/sheriffs, depending on the type of appeal." Online at: https://www.scotcourts.gov.uk/the-courts/supreme-courts/high-court/criminal-appeals.

[98] James Chalmers & Fiona Leverick, "'Substantial and radical change'; A new dawn for Scottish criminal procedure?" (2012) 75:5 MLR 837 [*Chalmers & Leverick*].

[99] Police Services of Scotland, Solicitor Access Guidance Document (20 Mar 2015), online: http://www.scotland.police.uk/assets/pdf/151934/184779/psos_solicitor_access_guidance_document_ver_1.00.pdf. The guidelines permitted the police to offer the detainee the possibility of consultation with a solicitor in person or by telephone.

[100] *Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act*, 2010 asp 15, online: http://www.bailii.org/scot/legis/num_act/2010/asp_201015_en_1.html.

24 hours, extendable to 36 hours on the approval of a senior police officer, with extensions up to 96 hours possible with the approval of a magistrate.[101]

The Act also provided a mechanism that could be used (if necessary) to ensure that adequate legal aid arrangements were available for detained suspects (s 8A) and reinforced the principles of certainty and finality in cases referred to the Scottish Criminal Cases Review Commission (SCCRC) [102] (section 7) set out in the Supreme Court's decision in *Cadder*. While the changes allowed for a consultation with a solicitor to take place over the telephone where appropriate, it was not envisaged that anyone charged with a serious offence would rely solely on telephone advice.

Given that the decision in *Cadder* forced the Scottish government to quickly respond with legislative changes to assure the provision of legal assistance to detainees, an independent review commission chaired by Lord Carloway was mandated shortly thereafter to review the law and practice of questioning suspects in a criminal investigation in Scotland. Its task was to consider the implications of the recent decisions, and *inter alia,* the requirement for legal advice prior to and during police questioning. As noted by Carloway, the "long-lasting implication of *Cadder* is that the system must fully embrace and apply a human rights-based approach".[103] The recommendations stemming from the review were similarly wide ranging and far-reaching, addressed the requirements of the Convention and focused on arrest, detention, custody, investigation, evidence and appeals. Most controversial among them were the abolishment of subsection 14 detention, abolishment of the corroboration requirement in criminal cases and the requirement of the SCCRC to consider finality and certainty as justifications for referring cases to the High Court; many such recommendations were never implemented by the government. Chalmers and Leverick note that Carloway's proposals may have improved procedural safeguards for accused persons, but effectively ignored substantive safeguards, beyond the requirement of proof beyond reasonable doubt [104] - a limited protection at best. Given that the review's recommendations did not have the force of law, the government was slow to implement them legislatively and ultimately did not fully embrace Carloway's vision for change.

The more recent *Criminal Justice (Scotland) Act,* 2016, only fully enacted in 2018, introduced sweeping reform to Scottish courts and criminal procedure, stemming in part from Lord Carloway's review, as well as a need to bring procedure more in line with the *European Convention on Human Rights* and the UK *Police and Criminal Evidence Act,* 1984. This act has been described as providing a bold affirmation of the protection of the right to silence at the police station.[105] Regarding the police powers of arrest and interview, sections 14 and 15 of the *Criminal Procedure Scotland Act,* 1995 were replaced and the concept of detention was abolished in theory, but in practice the law uses the word "arrest" to by that very fact, replace detention. The police are permitted to arrest without warrant

[101] *Police and Criminal Evidence Act,* 1984 c 60 at s 4, online: http://www.bailii.org/uk/legis/num_act/1984/ukpga_19840060_en.html.
[102] The SCCRC is a public body that addresses miscarriages of justice including both conviction and sentence; it makes independent investigations and in some cases refers cases directly to the High Court for review.
[103] *Carloway, supra* note 70 at 2.
[104] *Chalmers & Leverick, supra* note 98 at 863-864.
[105] Robert Shiels, "Scots Criminal Law and the Right to Silence", (2018) 42:2 Dundee Stud LR No 3 at 13.

(subsection 1 (1)); also introduced under section 1 is the provision of arrest more than once for the same offence (subsection 2 (1)). The procedure to initially detain a suspect and then later arrest and charge has also been abolished. At the same time, the law allows, under sections 7-10 to keep a person in custody for 12 hours (and a further 12 hours in more serious matters) without charging them. The Act also introduced the concept of "post-charge questioning" (subsection 35 (1)), which allows for the court to authorize the police to interview a suspect again, following an official accusation of committing an offence. Thus, it would appear that while instituting many of Lord Carloway's provisions, the new law also spread the reach of investigating officers by allowing for an altered form of detention (sections 7-10) and through the possibility of post-charge questioning.

The law allows that a person in police custody has the right to consultation with a solicitor at any time, including consultation on the phone (subsections 44 (1), (4)). Moreover, the accused can have a solicitor present, before being questioned by the police or at any other time during the questioning (section 32; section 44). Outside of the requirement to provide personal details to the police, the statutory right to silence is absolute (subsection 34 (4)). Any statements made by a suspect are only admissible and used in evidence if they are truly spontaneous and voluntary.[106] The Crown must demonstrate the voluntariness of the statement, taking into account the whole circumstances.[107] Moreover, under Scots law, a suspect is advised that they are under no obligation to answer any questions (subsection 34 (4), and contrary to English law, no inference can be drawn from silence regarding the credibility of the evidence on matters that the accused declined to say anything about.[108]

e. Further Decisions

Subsequent to the ruling in *Cadder* a number of other cases [109] were decided by the courts that further interpreted the scope of the right to legal assistance during detention emerging from the original decision. In *HMA v P (Scotland),*[110] the Court considered whether the principle in *Salduz* extended to the use of other evidence that was discovered as a result of answers given by the accused while in custody without access to legal advice. On appeal, the accused submitted that his rights under article 6 (3) would be contravened if the Crown used this evidence – obtained as a direct result of his replies to police questioning that occurred absent the benefit of legal assistance. The evidence was ultimately found to be acceptable as there is "no absolute rule that the fruits of questioning of an accused without access to a lawyer must always be held to be a violation of his rights under Articles 6 (1) and 3 (c)".[111] Other issues arising in relation to the aftermath of *Cadder* were based on when and at what point access to legal assistance should be provided and whether the rule established in *Salduz* applies to questioning that occurs prior to being taken into

[106] *HM Advocate v Mair* 1982 SLT 471.
[107] *HM Advocate v Hawkins,* (2018) SCCR 1, [2017] HCJ 79, online: http://www.bailii.org/scot/cases/ScotHC/2017/[2017]_HCJ_79.html.
[108] *Larkin v HM Advocate* 2005 SLT 1087, [2005] HCJAC 28.
[109] These decisions have been referred to as "Sons of *Cadder*" as they followed from the original decision.
[110] *HMA v P (Scotland),* [2011] UKSC 44, 2011 SCCR 712, online: http://www.bailii.org/uk/cases/UKSC/2011/44.html [*HMA v P*].
[111] *Ibid* at 27.

custody. In three simultaneous cases referred by the Appeal Court of the High Court of Justiciary to the UK Supreme Court the question was whether the use of statements made outside the police station by the accused were in violation of the appellant's rights to a fair trial under articles 6 (1) and 6 (3) (c) of the *ECHR*. The Court found in those cases was that statements made prior to being "in custody" were admissible, but when incriminating statements were made while handcuffed, this was considered custody regardless of where it happened, and such statements were inadmissible.[112] While admittedly the Court has recognized a wider scope to the right to legal assistance, as these cases illustrate it still limits the situations where that is applicable.

At the same time, the law recognized that defendants have the right to waive legal assistance and required that a waiver must be "voluntary and unequivocal and in full knowledge of its consequences."[113] In cases where the issues under consideration had to do with waivers, the Scottish courts have ruled that not only is there no absolute rule to legal advice regarding waiving that legal advice but also neither is legal advice necessary for waiving the right to legal advice.[114] Currently there is no requirement to establish whether or not an accused person, in waiving the right to counsel, understands what that means and if is an informed and voluntary decision. Since *Cadder*, these decisions by the Court reflect a narrowing of recognized rights by allowing for the "fruits of questioning" to be used in some cases, and furthermore by not requiring a justification for waiving a right to counsel.

IV Discussion and Conclusions

In Canada the right to silence appears to be inextricably linked to the right to counsel, or the right to legal assistance as it is commonly referred to in Scotland. The right to silence is considered fundamental in many jurisdictions, and in Scotland it is an unqualified right and while not absolute [115] it is not fettered by the adverse inferences that may be drawn in England and Wales.[116] Leverick discusses four possible justifications for the right to legal assistance and protecting the right to silence is just one of them. They are: 1. Provision of emotional support, 2. Protection from ill treatment, 3. Assistance in understanding or enforcing the right to silence, and 4. Preventing wrongful convictions.[117] While Leverick rejects the first and second as unnecessary for protecting the right to silence as they can be achieved through other means such as through videorecording of interviews, she recognizes that the third justification is the most complex. The right to counsel facilitates the right to silence in three ways – by ensuring suspects understand the right to

[112] *Ambrose v Harris* [2011] UKSC 43 [*Ambrose*], 2011 SCCR 651; *HM Advocate v M.* [2011] UKSC 43, 2011 SCCR 651; *HM Advocate v G.* [2011] UKSC 43 online: http://www.bailii.org/uk/cases/UKSC/2011/43.html. [*Ambrose*].
[113] *Pishchalnikov v Russia*, [2009] ECHR 1357, online: http://www.bailii.org/eu/cases/ECHR/2009/1357.html at 77.
[114] *Birnie v HM Advocate* [2011] UKSC 54 at 28; *McGowan v B* [2011] UKSC 54, 2012 SCCR 109, online: http://www.bailii.org/uk/cases/UKSC/2011/54.html.
[115] Further, the ECtHR in *John Murray v United Kingdom*, [1996] ECHR 3, (1996) 22 EHRR 29, online: http://www.bailii.org/eu/cases/ECHR/1996/3.html at 655 has held that the privilege against self-incrimination was not absolute and in that case the concern was over drawing of inferences in the absence of legal advice.
[116] *Police and Criminal Evidence Act*, Code C, 2014.
[117] *Leverick*, *supra* note 71 at 362-375.

silence (3a), by assisting them in identifying their best interests (3b) and by assisting them in enforcing their choices (3c).[118] While Leverick further argues that if the right to counsel is premised on 3a and 3b it does not require the physical presence of the solicitor nor does is require assistance during the interview; those latter conditions are only necessary for 3c.

Leverick's position appears unsustainable as it fails to accept that the police interview, in and of itself, is a coercive experience and only those suspects with a particularly strong constitution may be able to effectively withstand the effects of forceful and insistent police questioning. In Scotland, the time limitations first imposed by section 14 of the *Criminal Procedure (Scotland) Act*, 1995 and now sections 7-10 of the *Criminal Justice (Scotland) Act*, 2016 of 12 hours will likely serve to restrict the length of such questioning, irrespective of its intensity. At the same time, the power to re-arrest someone on the same offence, as permitted by subsection 2 (1), may increase the opportunities for questioning by the police, and the 12-hour limit is effectively reduced on each successive interview. In Canada, however, given that the right to counsel in reality involves a "one-time" consultation, with re-consultation only on material change in the accused's situation, the right to counsel appears to be a necessary condition in ascertaining that the right to silence is respected.

Given these limits on the ability to consult with counsel, safeguarding the right to silence is of particular importance. The presence of a competent solicitor in such an environment, whether for a brief or extended period, could go a long way towards ensuring that the right to silence is respected, even in the face of powerful police questioning. Similarly, the simple physical presence of a solicitor may serve to fetter police actions, in immeasurable ways. Leverick also argues that her fourth justification for recognizing the instrumental value of the right to legal assistance, preventing wrongful convictions, is harder to justify. She believes that it is not always obvious how a solicitor could be effective in this way, save for preventing some types of coerced false confessions.[119] This appears to understate the value of effective counsel in not only preventing such confessions from occurring at all by assisting the suspect in invoking the right to silence, but also in making the case for preventing the suspect from contributing to the prosecution's case in other ways. Moreover, there are particular principled reasons for recognizing an absolute right to silence, reasons that overlap with Leverick's contentions. Roberts and Zuckerman believe the following three reasons justify recognizing an absolute right to silence: intrinsic rationales - such as protection of privacy and prevention of cruel choices; conceptualist rationales - such as the adversary procedure and the presumption of innocence; and instrumental rationales - prevention of wrongful conviction.[120] These considerations raise the important point that justifications regarding the application of this right serve multiple purposes and depending on the perspective, some are more convincing and significant than others.

It could be argued that the right to silence becomes watered down when not accompanied by a concomitant right to counsel. Most suspects in criminal investigations

[118] *Ibid* at 376.
[119] *Ibid* at 376.
[120] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press: 2010) at 549.

lack the sophistication and legal wherewithal to understand they are not obligated to answer police questions. Moreover, increasingly sophisticated forms and types of police interrogation methods (such as the Reid Technique, used in the past in North America and discussed earlier) can serve to induce false admissions and false confessions. In March 2015, the Law Society of Scotland issued a document entitled "Police Station Interviews: Advice and Information from the Law Society of Scotland" [121] where it outlined the role and obligations of a solicitor in this context, which is "to represent, protect and advance the legal interest and rights of the suspect". It also posits that a solicitor may intervene when the suspect is interrupted or when questions are considered improper, hypothetical, lies, leading, ambiguous, oppressive, threatening or when they imply inducements. The solicitor may also intervene when there is any attempt to put on record prejudicial or misleading observations and should be alert to the tone of the interview and intervene if it becomes oppressive.[122] While this may be a laudable attempt to address forms of obvious police misconduct in Scotland, in Canada the often psychologically-based police interrogation techniques routinely used have been permitted by courts and been described as forms of "other police trickery" in police questioning that fail to "shock the community."[123]

This article has attempted to lay the groundwork for the argument that changes in one area in criminal law and criminal procedure are often accompanied by concomitant and contrary changes in other areas. In Canada, the introduction of the *Charter* heralded a new era of recognition of individual rights; legal rights enshrined in sections 7-14 provided for protections from overzealous policing through the recognition of, *inter alia,* rights to silence, to counsel, against unreasonable search and seizure and to the presumption of innocence. The right to silence, subsumed under section 7 rights to life, liberty and security of the person, is recognized as being closely linked to the right to counsel (subsection 10 (b)) and a number of Supreme Court decisions illustrate how the courts have interpreted the scope of those rights. While the Court in *Hebert* first recognized the right to silence, the decisions in *Singh* and *Sinclair* served to substantially curb the parameters of that right by allowing for a single, initial consultation with a lawyer, followed by a second consultation only when there was a material change in circumstance. Case law has illustrated that in some cases dozens of invocations of the right to silence have little effect on police questioning, which has resulted at times in admissions being made that may later prove false; it would appear that in some instances the courts are willing to let the "police do their job". It could thus be argued that in Canada the pendulum has swung once again, this time away from enshrined rights and protections against the overwhelming power of the state and moved towards fewer impediments on law enforcement, allowing suspects to be

[121] The Law Society of Scotland, 'Police Station Interview: Advice and Information from the Law Society of Scotland', online: https://www.lawscot.org.uk/media/8819/police-station-advice-and-information-march-2015-section-f-division-advice.pdf.

[122] Accordingly oppression may result from "… continued repetition of questions which have already been answered or to which a 'no comment' answer has been given, from an officer raising his/her voice or becoming angry or from continued interruptions of the suspect by the officer", (at 6(B)) The Police Interview (A) The Solicitor's Role during the Police Interview, online: https://www.lawscot.org.uk/media/8819/police-station-advice-and-information-march-2015-section-f-division-advice.pdf. In the Canadian context this type of questioning occurs routinely and given that a solicitor/lawyer is not permitted to be present for the entire interview, it can go unchecked.

[123] *Oickle, supra* note 22 at 65, 91.

questioned with qualified impunity. The ramifications of this for the possibility of false admissions resulting in wrongful convictions are great.

In Scotland, to a degree, the opposite effect seems to have occurred. The provisions under sections 14 and 15 of the *Criminal Procedure (Scotland) Act*, 1995 allowed police to question suspects without the right to consult a solicitor for up to six hours, although a solicitor could be informed that a suspect was in custody. Following the ECtHR decision in *Salduz* in 2008 this could no longer stand; denying a suspect in custody the right to consult with a lawyer was contrary to the right to a fair trial under art 6 (1) and 6 (3) (c) of the *ECHR*. The Appeal Court appeared to reject this contention in *McLean* in 2009, however the UK Supreme Court's decision in *Cadder* in 2010 represented a sea change in Scottish criminal procedure. The decision in *Cadder* and the subsequent legislative changes through the *Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act,* 2010 (section 15A) and the *Criminal Justice (Scotland) Act,* 2016 (section 32) provided for a statutory right to legal advice for suspects when questioned by the police. This right begins with initial questioning and extends throughout the interview – an unqualified right as no adverse inference can be drawn from the exercise of the right to silence. In the aftermath of *Cadder* and the legislative change that followed, the independent review commission called by the Scottish government and chaired by Lord Carloway, further refined aspects of criminal law and procedure affecting that right. Moreover, a number of cases have been decided in the courts post-*Cadder* that illustrate the scope of that decision and it appears that the protections of a right to fair trial under articles 6 (1) and 6 (3) (c) do not always extend to the leading of evidence that is produced by the initial problematic questioning (see e.g. *HMA v P*).[124] Other case law demonstrates that the moment of "charge" that engenders these protections will vary and that the courts are reticent to extend the fair trial protections too far (see e.g. *Ambrose).*[125] It could thus be argued that in Scotland the pendulum swing towards greater rights protections began with the decision in *Cadder* and subsequent legislative change However, cases post-*Cadder*, and sections of the *Criminal Justice (Scotland) Act,* 2016 represent a narrowing of the application of these rights which may reflect a further pendulum swing back towards more powers for law enforcement in response to greater protections for suspects while detained and questioned. It would seem that currently, the right to a lawyer is more important normatively and more effective practically, than the right to silence.[126]

The implications for wrongful convictions of the right to silence, and concomitant right to counsel, are self-evident. People who falsely confess to crimes that they have not committed often end up convicted and sentenced for things they did not do. In fact, estimates from the New York-based Innocence Project indicate that in 29 percent of the over 375 DNA exonerations to date, the accused person made a false confession or false admission.[127] While it is not known whether the individuals who falsely confessed did so absent legal representation or without advice regarding their right to remain silent, common

[124] *HMA v P*, *supra* note 110.
[125] *Ambrose*, *supra* note 112.
[126] Clive Walker, personal communication, 16 Jul 2016.
[127] *Innocence Project*, "DNA Exonerations in the United States" online: https://www.innocenceproject.org/dna-exonerations-in-the-united-states/

sense would dictate the obvious. Police interrogations can be intimidating experiences, people are given mixed messages (in some cases informed of their right to remain silent and then immediately followed by hours of questions), and police can and do lie to suspects about evidence, about co-accused persons and about the implications of a confession ("Just tell us what you did and you can go home"). Consequently, the right to silence and the right to counsel can be eroded by police in their zeal to obtain a confession and ultimately a conviction, whether rightfully or wrongfully. In such situations, having accompanying legal representation throughout the process, could act to safeguard against such errors. In Scotland, the historically absent legal protections in this regard have now been reversed, in Canada, *Charter* protections of these rights have been increasingly eroded in favour of greater power granted to law enforcement. This comparative analysis has revealed that regardless of the different directions that case law and statute have taken in both Canada and Scotland, vigilance is required to hold state actors (police and prosecutors) accountable for respecting the rights of accused persons. To do otherwise runs the risk of further convictions in error and the accompanying suffering that invariably accompanies them.

Unintelligent Decision-Making?

The Impact of Discovery on Defendant Plea Decisions

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The disclosure of evidence, primarily from the prosecutor to the defense (i.e., discovery) is key to a fair and just legal system. Restrictive discovery policies have been criticized for contributing to innocent defendants pleading guilty (Alkon, 2014) and to uninformed plea decisions (Friedman, 1971). Open-file policies, in which prosecutors broadly share evidence with the defense, are a leading reform to address these issues. This study investigated the impact of guilt and access to discovery information (with or without exculpatory evidence) on plea decisions. We hypothesized that, in comparison to their counterparts, participants who had access to all of the evidence (i.e., those in open-file condition) and participants who were innocent would rate the evidence against them as significantly weaker, their probabilities of conviction at trial as significantly lower, and would be less likely to take the plea deal. We also hypothesized that ratings of evidence strength and probability of conviction would mediate expected relations between the plea decision and conditions. One-hundred participant-defendants were randomly assigned to open- vs. closed-file and guilt vs. innocence conditions and asked to review case materials that either contained full or partial discovery. They were then asked to rate the strength of the evidence against them, their probability of conviction, and to accept or reject a plea offer in a hypothetical case. Defendant guilt and access to discovery information impacted perceived evidence strength, which subsequently impacted plea decision-making. Our findings indicate that access to discovery information indirectly impacted defendants' plea decisions.

I Introduction

Evidence is one of the most important elements in the criminal justice system. Ideally, with enough inculpatory evidence guilty defendants should be convicted and conversely with adequate exculpatory evidence (i.e., evidence that points away from a defendant's guilt) innocent defendants should be acquitted. Despite the importance of evidence in the criminal justice system, however, rules that govern the disclosure of evidence during one of the most crucial phases—guilty pleas--are unclear. Guilty pleas account for the vast majority of criminal convictions in the United States (Bureau of Justice Statistics, 2010; Jones et al., 2018) and yet defendants' access to evidence during this phase can be restricted. The restriction of evidence (i.e., access to discovery information) in the context of guilty pleas raises concerns about the fairness and validity of pleading guilty, and also about the risk of wrongful convictions from innocent defendants pleading guilty to crimes they did not commit (Bibas, 2004; Yaroshefsky, 2008).

Such concerns became a reality for George Alvarez. Alvarez, at the time a special-education student in the ninth grade, was accused of and then pled guilty to, assaulting a peace officer (*Alvarez v The City of Brownsville,* 2018). Four years into his sentence, however, exculpatory video footage the prosecution never gathered from police officers came to light, and eventually led to a finding of "actual innocence" for Alvarez in the Texas Court of Criminal Appeals. Alvarez then sued the City of Brownsville, TX, arguing that his rights to exculpatory evidence were denied. However, the Fifth Circuit Court of Appeals reasoned that because Alvarez pled guilty, his constitutional right to exculpatory evidence did not apply and the city was therefore not liable (*Alvarez v The City of Brownsville,* 2018).

Open file discovery policies, or policies that require the prosecution to broadly share evidence with the defense early on in the criminal process, are the leading reform to address several criticisms of the pre-plea restriction of discovery information and situations like Alvarez's (Alkon, 2014; Prosser, 2006). To our knowledge, however, no research has examined if access to discovery information, particularly exculpatory information, influences defendant plea decision-making. In the present study, we examine the impact of access to full versus partial discovery on defendant plea decision-making. Additionally, we do so under the conditions of defendant guilt and innocence. One criticism of restrictive pre-plea disclosure is the risk that innocent defendants, like Alvarez, will plead guilty to crimes they did not commit because they lack adequate information before the plea must be entered (Alkon, 2014; Gregory, 2012).

II Discovery Policies

In the landmark case *Brady v Maryland* (1963) the Supreme Court ruled that material evidence pointing to a defendant's innocence (i.e., exculpatory evidence) must be turned over by the prosecution to the defense, reasoning that the suppression of such evidence violates defendants' due process rights. So-called *Brady* violations by prosecutors have led to an untold number of wrongful convictions. However, the Supreme Court's ruling in *Brady* (which has been extended to evidence not directly in possession of the state; *Kyles v Whitley*, 1995), involved the suppression of evidence during trials, and the application of *Brady* to the disclosure of exculpatory evidence during guilty pleas remains relatively unclear. What is exceedingly clear, however, is that our criminal justice system is one of pleas and not one of trials; approximately 97% of all convictions are resolved through pleas (Jones et al., 2018). Therefore, defendants' pre-plea access to discovery information remains an important issue, one with which many states have recently grappled with (e.g., Maryland, New York, and Virginia).

In 2002, the Supreme Court addressed the pre-plea disclosure requirements for one specific type of exculpatory evidence. In its decision in *United States v Ruiz* (2002), the Supreme Court reasoned that access to "exculpatory impeachment evidence" (i.e., evidence that speaks to the credibility of a witness) is necessary to ensure the fairness of a trial, but not necessary to ensure the voluntariness of a plea. Some lower federal and state courts have followed the Supreme Court's reasoning in *Ruiz* and further restricted the application of *Brady*, expressly stating that traditional exculpatory material (i.e., evidence that can directly support innocence) does not need to be turned over during the plea-bargaining process (see Zottoli et al., 2019). For example, in the Alvarez case described above, the Fifth Circuit Court of Appeals relied on *Ruiz* in their decision to not mandate disclosure of traditional exculpatory evidence pre-plea (*Alvarez v The City of Brownsville*, 2018).

There are many who argue that the pre-plea discovery standards, such as those established in the *Ruiz* and lower court decisions, are far too restrictive and jeopardize the fairness and validity of the plea process (Alkon, 2014; Friedman, 1971). For example, Ostrow (1981) argued that the plea process cannot be truly fair without a full disclosure of evidence. Additionally, the *Ruiz* decision specifically has been criticized for failing to appreciate the potential connection between the disclosure of impeachment evidence and support for claims of innocence, reasoning that under certain circumstances (e.g., evidence that speaks to the credibility of the prosecution's primary witness), impeachment evidence can be as damning to a case as traditional exculpatory evidence (McMunigal, 2007; see also Cassidy, 2011).

In contrast to policies that limit defendants' access to pre-plea discovery information, open-file policies generally involve the prosecution sharing their entire case file with the defense. For example, New York recently overhauled its discovery polices from "some of the most restrictive in the nation," to an open-file model in which prosecutors are required to turn over discoverable materials to the defense three days prior to the deadline for plea acceptance (Schwartzapfel, 2019). Open-file policies are a leading reform to address several criticisms of more restrictive discovery policies and offer a solution beyond extending *Brady* to the plea process (Alkon, 2014; Douglass, 2001; Prosser, 2006). A solution some argue is necessary, given that *Brady* requires the disclosure of evidence that is both favorable to the defense and material (i.e., important) to the outcome, arguably exempting much of the evidence in the prosecution's possession from disclosure

requirements (Douglass, 2001; Gregory, 2012). As of 2019, 18 states practiced an open-file model of discovery; however, only 11 states have explicit statutes about prosecutors' pre-plea discovery obligations (Zottoli et al., 2019).

III Discovery and Plea Decision-Making

Defendants who do not have access to discovery may also be especially susceptible to outside pressures and lack the necessary information to negotiate deals with the prosecution that represent the prosecution's case against them (Alkon, 2014). Plea bargaining has been described as inherently coercive, as it forces defendants to choose between a certain lesser punishment by pleading guilty or risk a far greater punishment if found guilty at trial (Kipnis, 1976; Langbein, 1992). Additionally, the perceived voluntariness of defendant plea decision-making can be impacted by numerous external factors, such as prosecutorial leverage (e.g., time-limited deals, overcharging) and the value of the bargain itself (Caldwell, 2011; Redlich, Bibas, Edkins, & Madon, 2017). For example, prosecutors may overcharge as a way to gain leverage during plea negotiations (Caldwell, 2011). External pressures (e.g., the value of the bargain itself) may be even more influential for innocent defendants (Bibas, 2004; Redlich et al., 2017). Faced with external pressures and limited discovery information, innocent defendants may plead guilty for fear of losing at trial and risking even harsher sentences than those offered during plea negotiations (Bibas, 2004). Evidence from laboratory studies suggests that fear of losing at trial and penalty fears are associated with innocent individuals accepting guilty pleas (e.g., Redlich & Shteynberg, 2016; Zimmerman & Hunter, 2018). Ultimately, the lack of pre-plea discovery information and the potentially coercive nature of the plea-bargaining process raises concerns not only about the fairness of guilty pleas, but also about the validity of plea decisions (Ostrow, 1981).

In order for plea decisions to be considered valid, guilty pleas must be entered knowingly, intelligently, voluntarily, and with a factual basis of guilt (*Boykins v Alabama*, 1969; *Brady v United States*, 1963; see Redlich, 2016). Yet defendants' limited access to discovery information before pleas are entered raises concerns about the validity of uninformed pleas. Friedman (1971) argued that in order for defendants to make fully informed decisions to plead guilty they must be able to "assess knowledgeably the likelihood of conviction at trial" (p. 528) and that this assessment is only possible with an evaluation of evidence held by the prosecution. In fact, plea bargaining with inadequate discovery has been equated to bargaining "blindfolded" (Bibas, 2004, p. 2495) and attributed to leading to "a fuzzy notion of the likely consequences of entering a guilty plea" (Covey, 2007, p. 217). For innocent defendants, making fully informed plea decisions without access to the evidence against them is presumably even harder than for guilty defendants, as they should have less knowledge (if any) of the crime they are being charged with and of the potential evidence that could implicate them (Bibas, 2004). Additionally, McConkie (2017) argues that factually guilty defendants also need to be aware of evidence in the prosecution's possession in order to realistically gauge the strength of the government's case against them, their chances of conviction at trial, and to understand the likely sentencing consequences of a plea.

The "shadow of the trial" theory predicts that plea decisions are based on defendants' perceived probability of conviction at trial, which is influenced by evidence strength (Bibas, 2004; Bushway, Redlich, & Norris, 2014). Research on defendant plea decision-making supports the argument that individuals consider the strength of the evidence against them and their probability

of conviction when making plea decisions (Bordens, 1984; Peterson-Badali & Abramovitch, 1993; Zimmerman & Hunter, 2018). Furthermore, some research suggests that prosecutors consider probability of conviction and strength of evidence when making plea decisions and may be more likely to offer plea deals in cases with lower probabilities of conviction (McAllister & Bregman, 1986) and with weaker evidence (McAllister, 1990; Pezdek & O'Brien, 2014). Kutateladze, Lawson, and Andiloro (2015) found that evidentiary factors had an impact on prosecutorial decision-making in New York, such that when prosecutors had more evidence available it led to more punitive plea offers (i.e., plea-to-charge rather than reduced charge offers). Therefore, defendants' access to evidence during this process may be especially important to ensure valid plea decisions.

While arguments have been made suggesting that plea decisions cannot be fully informed and fair without access to pre-plea discovery information, little research has been conducted examining the impact of discovery on decision-making. The few studies that have been conducted have largely focused on the decisions of prosecutors. Using a hypothetical scenario, Lucas, Graif, and Lovaglia (2006) found that greater case severity, importance of obtaining a conviction, and belief in defendant guilt impacted mock prosecutor's decisions to commit misconduct and withhold exculpatory discovery information. Additionally, using the same basic paradigm developed by Lucas and colleagues (2006), Luna and Redlich (2020) examined the impact of two discovery policies on mock prosecutor behavior. Specifically, mock prosecutors told about the *Ruiz* decision withheld significantly more discovery information overall and more exculpatory items than those not told about *Ruiz*, whereas information about open-file policies had the opposite effect. Similarly, Turner and Redlich (2016) surveyed prosecutors and defenders in Virginia and North Carolina, finding that the two states' disparate discovery policies impacted prosecutors reported pre-plea behavior. Compared to Virginia's restrictive discovery policies, North Carolina's open file polices promoted more informed guilty pleas; prosecutors and defense attorneys reported that defendants had access to more of the state's evidence against them (Turner & Redlich, 2016).

IV The Present Study

The purpose of the present study was to examine the impact of discovery information and guilt on mock defendant plea decision-making. Using a 2 (File Condition: Open- v Closed File Jurisdiction) x 2 (Guilt Condition: Guilty v Innocent) between-subjects study design, we examined how access to full v partial discovery and to potentially exculpatory information impacted true and false guilty plea decisions. Because restrictive or closed-file discovery policies have been criticized for not allowing defendants access to comprehensive discovery information to make fully informed plea decisions by evaluating the strength of the evidence against them and their probability of conviction at trial (Covey, 2007; Friedman, 1971), we hypothesized that ratings of evidence strength and probability of conviction at trial would mediate relations between our manipulated variables and plea decisions. In addition to evidence strength and probability of conviction at trial, we also explored the possibility that participants' reports of whether the interviews impacted their decisions would mediate relations between our manipulated variables and plea decisions. Furthermore, because participants in the Open-File Jurisdiction (OFJ) conditions had access to more discovery information, including potentially exculpatory evidence, we hypothesized that those in the OFJ conditions would rate the evidence against them as

significantly weaker and their probabilities of conviction at trial as significantly lower than participants in the Closed-File Jurisdiction (CFJ) conditions, and therefore would also be less likely to take the plea deal.

Finally, because a prominent criticism of restrictive discovery polices is that they place innocent defendants at risk for pleading guilty to crimes they did not commit (e.g., Bibas, 2004), we also examined plea-decision making when mock defendants were guilty and innocent. We hypothesized that participants in the guilty conditions would rate the strength of the evidence against them as significantly stronger and their probability of conviction at trial as significantly higher than those in the innocent conditions and would therefore be more likely to accept the plea deal (a very consistent finding in the literature; for a review, see Wilford & Khairalla, 2019). Further, we hypothesized that innocent participants who had access to potentially exculpatory evidence (i.e., in OFJ conditions) would have the lowest ratings of the evidence strength and probability of conviction at trial and would be the least likely to take the plea deal in comparison to those in the other three conditions.

A. Pilot Studies

Before proceeding with the main experiment, we conducted two pilot studies to refine our procedures. The purpose of the first pilot was to determine if the discovery instruction itself given to participants influenced plea decisions and therefore acted as a confound. More specifically, we examined if merely telling people their case was in an open-file jurisdiction was sufficient to influence plea decisions (as opposed to actual information provided). In the first pilot study (N=32) every participant received full discovery and only the discovery instruction was manipulated. Participants were informed that "some prosecutors work in what is called an Open-File jurisdiction and others have more discretion when turning over evidence" and then either told that the prosecutor in their case worked in an Open-File jurisdiction (OFJ) or were given an ambiguous instruction (AMB) that read: "The Prosecuting Attorney in your case does not work in an Open-File jurisdiction but rather can decide what evidence to turn over that he or she thinks you should see. In your case, the prosecutor is known to be unpredictable when it comes to sharing information. Therefore, you may or may not be reading about all of the evidence that the prosecution has on you." Plea decision was measured by asking participants if they were willing to accept the plea offered by the prosecution or not.

We did not find a significant difference between the OFJ and AMB conditions $\chi(1) = 0.667$, $p = .414$, $\phi = -.144$, indicating that the instruction given to participants did not influence their plea decision. Thus, we decided to use the OFJ instruction in the main experiment. In addition, five participants in the AMB condition failed the manipulation check question, whereas none did so in the OFJ condition.

The second pilot study was conducted to determine if the number of exculpatory items turned over to participants in the Closed-File jurisdiction (CFJ) instruction condition influenced plea decisions. Every participant (N=34) was given the same CFJ instruction and the number of exculpatory items given to participants was manipulated to be either two exculpatory items (2 exculpatory) or none of the exculpatory items (0 exculpatory). Two exculpatory items were chosen

for the first condition based on the average amount of discovery turned over by participants in a related, previous study (Luna & Redlich, 2020).

A significant difference between the 2 exculpatory and 0 exculpatory conditions was not found $\chi(1) = 0.486$, $p = .486$, $\phi = -.120$, indicating that the number of exculpatory items given to participants did not influence plea decisions. For the main experiment we used the no (0) exculpatory information in our Closed-File condition, as this allowed for a cleaner examination of access to exculpatory information or not. All participants in both exculpatory conditions correctly answered the manipulation check, with the exception of one respondent who took less than four minutes to complete the entire survey.

V Method

A. Participants

One-hundred and seven students from a large eastern university participated in the study. Of those participants, one was excluded due to a language barrier. An *a priori* power analysis conducted using the R pwr package for chi-square tests revealed that we would need at least 88 participants to have sufficient power (0.80) in order to detect a medium effect size (0.3) at $\alpha = 0.05$ with our main analyses on defendant plea decisions. Fifty-eight percent of participants were female, and the majority of participants were White (55.2%) followed by Asian (27.6%), Black (15.2%) and Other (1.9%). Participant age ranged from 18-41 years (M = 20.63, SD=3.35). Participant education level ranged from freshman in college (35.8%) to completed graduate degree (0.9%), and the average (current or past) college GPA was 3.35 (SD =0.42). Additionally, participants' experience with the criminal justice system (as a victim, witness, or defendant) ranged from no experience (46.2%, score of 1) to a score of 8 out of 10 (1.9%), with a mean response of 2.44 (SD = 1.84).

B. Materials and Design

We used a modified version of the Lucas et al. (2006) paradigm. The participant role was switched from a prosecutor in the original paradigm to a defendant in the current study. Additionally, the crime was held constant (robbery-burglary-malicious wounding) across conditions and instead discovery jurisdiction and defendant guilt were manipulated.

Participants playing the role of defendants were given several documents to familiarize themselves with their criminal case. Two versions of Packet 1 and Packet 2 were created, one for female participants (Michelle Kamen) and one for male participants (Michael Kamen). Both Michael and Michelle's cases were identical and only the first name and pronouns differed. Additional documents included a Plea Decision Form, the Juror Bias Scale (Kassin & Wrightsman, 1983), a Post-Study Questionnaire, and a Debriefing form.

Demographics Questionnaire. Participants were asked several demographics questions including gender, age, race, and ethnicity, as well as current level of education, grade point average (GPA), college major, and future career/occupation plans. Additionally, participants were asked

to rate their level of experience with the legal system as either a "victim, witness, or suspect/defendant." Participants responded using a 10-point scale where higher responses indicated more experience with the legal system.

Packet 1. "Packet 1" contained two documents: 1) "Your Role – Defendant" and 2) "Facts Relevant to the Case." The document "Your Role – Defendant" instructed participants that they would be acting as defendant Kamen (Michelle or Michael depending on participant gender), who was charged with "the robbery, statutory burglary and malicious wounding of Mr. Steven Davis." The document explained that as defendant Kamen, their job was "to decide whether to accept or reject a guilty plea offered by the prosecutor." Participants were also led to believe that other participants, assigned the roles of judge and prosecutor, would complete the study at different times. Participants were told that the prosecutor's job was to convict them by "either convincing the judge beyond a reasonable doubt" that they were guilty or "via a guilty plea." Additionally, they were told that the judge's job was to determine "whether he or she believes that you are making an informed and voluntary decision about the plea offer."

"Packet 1" was also manipulated by our independent variables. Participants were either told they were guilty or innocent of the crimes they were being charged with, based on condition. Additionally, participants in each condition were instructed that the prosecutor assigned to their case would be turning over case information and that*: Not all prosecutors have the same rules for turning over case information. Some prosecutors work in what is called an Open-File jurisdiction and others work in a Closed-File jurisdiction and have more discretion when turning over evidence*. Participants in the OFJ condition were told: *The Prosecuting Attorney in your case works in what is called an Open-File jurisdiction. This means that the prosecutor tends to broadly share information with the defense, and often turns over the whole case file to the defense. Therefore, you will be reading about all of the evidence that the prosecution has on you.* And participants in the CFJ condition were told: *The Prosecuting Attorney in your case works in what is called a Closed-File jurisdiction. This means that the prosecutor tends to be restrictive when turning over information to the defense. Therefore, it's likely you will not read all of the evidence that the prosecution has on you.* In addition to being told this, when reviewing the evidence, it was further made clear to participants in CFJ conditions that they were not privy to all of the evidence, as portions were blacked out.

In the "Facts Relevant to the Case" document participants learned that the victim, Steven Davis, was assaulted in his home. Steven Davis was reported missing by his employer and in response the police performed a wellness check. When officers arrived at the residence it appeared to have been ransacked and once inside the body of an unconscious white male was found in the hallway. Emergency medical personnel were called and the unconscious man (Davis) was admitted to the hospital for severe blunt force trauma to the head. The "Facts Relevant to the Case" document also included details of the case, some of which pointed away from the defendant, Kamen, and to the victim's estranged wife and her boyfriend as possible suspects. Information was also provided that pointed to Kamen as the assailant. For example, Kamen had a previous history of illegal entry and robbery, an eyewitness identification, the fact that his/her cousin used to work for Mr. Davis, as well as information that his/her alibi for the time of the assault was uncorroborated. The eyewitness identification described here stated that the victim's neighbor

recalled an "unusual individual loitering in the neighborhood on the day of the assault", which led to the creation of a sketch and eventually to Kamen being identified.

Packet 2. "Packet 2" contained instructions ("Interview Instructions"), a detective's notes ("Detective John Hensen's Typed-Up Notes") and five interviews of witnesses and the defendant. The "Interview Instructions" instructed participants that the prosecutor in their case had access to all interviews conducted by the police department and that they would not see that information unless the prosecutor shared it with them. In the OFJ condition participants were again told: *As mentioned, the prosecutor in your case works in an Open-File jurisdiction and is therefore likely to share the entire case file of information with you.* And participants in the CFJ condition were reminded: *As mentioned, the prosecutor in your case works in a Closed-File jurisdiction and is therefore unlikely to share the entire case file of information with you. In addition, to protect the identities of witnesses and other private information, certain information has been blacked out.* Thus, in the CFJ condition, participants read interviews with portions that were redacted, which was intended to make it more salient that there was discovery information they were not privy to. Participants had no way of knowing whether the redacted information was incriminating, exculpatory, or guilt-irrelevant, only that the prosecutor did not turn it over to them. "Detective John Hensen's Typed-Up Notes" included case information from the perspective of the detective assigned to the case. This document was only given to participants in the OFJ condition and included additional case information, such as the eyewitness identification of Kamen.

The five interviews given to participants consisted of four police interviews from the investigation into the assault of Steven Davis and one from the interrogation of defendant Kamen. As with the "Facts Relevant to the Case" document some of the information in the interviews pointed to Kamen as the assailant. However, there were four pieces of exculpatory information that pointed to the victim's estranged wife as a possible suspect. For example, the police interview of the victim's wife included*: Well, yes, he had an insurance policy worth a million dollars. And yes, I was the benefactor and would not have collected if he died after our divorce went through. I know what you're driving at, but I had absolutely nothing to do with what happened to him.* Participants in the OFJ condition were given all of the case information. Participants in the CFJ condition, however, were given redacted versions of the interviews. The redacted version of the interviews included the same interrogation as in the OFJ condition, however all four pieces of the exculpatory information and 25 of 48 interview questions were blacked out (i.e., redacted) so that participants could not read the information. Additionally, all names and identifiers were redacted in the CFJ version.

Plea Decision Form. The "Plea Decision Form" instructed participants that they were facing a potential maximum sentence of 75 years for the charges of robbery, malicious wounding, and burglary. Participants were also told that based on the "the average sentences of similarly situated defendants" they would likely face 10-17 years if convicted at trial.[1] Similar to other studies (e.g., Tor et al., 2010), participants were told an estimate of their probability of conviction at trial, i.e., 65% or two-in-three chance of being convicted. The plea offer outlined in the document was for one charge of robbery. Participants were instructed that if they agreed to a plea deal the prosecution would drop the malicious wounding and statutory burglary charges and they

[1] These numbers are based on guidelines retrieved from the Virginia Criminal Sentencing Commission, the state in which the research took place.

would likely receive a 2-5 year prison sentence. Participants indicated if they wanted to accept or reject the plea offer for robbery. Finally, participants were asked why they chose to accept or reject the plea deal in an open-ended question. A coding scheme was developed for this question. Interrater reliability was assessed between two coders on a sample of 80% of responses to this question, 90.3% agreement was obtained, and discrepancies were discussed until a consensus was reached.

Juror Bias Scale (JBS). The Juror Bias Scale measures individuals' inclinations towards the prosecution or defense (Kassin and Wrightsman, 1983), inclinations which may feed into plea decision-making, particularly when guilty. The scale consists of 22 items and contains a mixture of filler questions, probability of commission statements (e.g., "Out of every 100 people brought to trial, at least 75 are guilty of the crime with which they are charged"), and reasonable doubt statements (e.g., "For serious crimes like murder, a defendant should be found guilty if there is a 90% chance that he committed the crime"). The probability of commission and reasonable doubt statements are also classified as either a prosecution-biased statement (e.g., "Too often jurors hesitate to convict someone who is guilty out of pure sympathy") or a defense-biased statement (e.g., "Circumstantial evidence is too weak to use in court"). Participants responded to each of the 22 items using a 5-point Likert scale (1=*strongly agree*, 3=*agree and disagree equally*, 5=*strongly disagree*). Total JBS scores were calculated by adding the total value of reverse coded defense-biased statement responses and the total value of the prosecution–biased statement responses. The JBS scale was keyed in the direction of prosecution bias, thus higher JBS Total scores indicate a stronger prosecution bias. Cronbach's alpha for the JBS was .604.

Post-Study Questionnaire and Debriefing. The post-study questionnaire contained two manipulation checks. The first asked participants if they were guilty or innocent of the crimes they were charged with, and the second asked if the prosecutor in their case worked in an Open or Closed File jurisdiction. The questionnaire also included three questions that assessed participants' perceptions of their case. Specifically, participants were asked what they believed the probability was they would be convicted at trial using a 0-100% scale, how strong they thought the evidence was against them (1 = *weak*, 10 = *strong*). Additionally, participants were asked if the interview information impacted their decision to accept or reject the plea (yes/no) and why or why not (open-ended).

C. Procedure

Participants were recruited for the study through the SONA Experiment Management System. Interested participants scheduled an appointment through the SONA website for a one-time laboratory session in exchange for research participation credit. Prior to participation, individuals were randomly assigned to one of the four conditions. After obtaining informed consent, participants were asked to complete the demographics questionnaire. Next, participants were told that they would play the role of a defendant, judge, or prosecutor. They were assigned this role by drawing one of three slips of paper held by a research assistant. However, every piece of paper was labeled defendant, and thus every participant was assigned that role (see Lucas et al. (2002) paradigm for similar procedures). Participants were then asked to read "Packet 1" and to knock on the door when finished. After participants knocked on the door, letting the research assistant know that "Packet 1" was finished, they were given "Packet 2" to read. After reading "Packet 2", participants were administered the Plea Decision Form, JBS, and the Post-Study

Questionnaire, and then debriefed by a research assistant. Participants were then asked not to share the details of the study with others and thanked for their participation. Together "Packet 1" and "Packet 2" took an average of 22.04 minutes (SD = 9.39) to complete.

VI Results

Two manipulation check questions were asked (one for each condition). All but one participant got at least one question correct (99.1%), and most (94.3%) of the sample was accurate on both questions. The seven participants who did not pass one or both manipulation checks were replaced, resulting in a total *n* of 100 participants, and 25 participants in each of the four cells (i.e., OFJ/Guilty, OFJ/Innocent, CFJ/Guilty, and CFJ/Innocent).

Preliminary analyses were first conducted to determine if there were significant differences by participant characteristics and JBS scores on the main dependent variable, plea decision. Plea decision was not significantly related to: participant age, gender, race, grades, experience with the criminal justice system or JBS scores (*p*'s ≥.08). Therefore, these factors are not discussed further.

A. Plea Decision

Overall, 65% of the sample rejected the plea deal (n = 65) and 35.0% (n = 35) accepted. As expected, guilt significantly impacted decisions, $\chi(1) = 42.24$, $p = .001$, $\phi = -.650$. Specifically, among those in the guilty condition, 66.0% accepted the plea deal, compared to only 4.0% of those in the innocent condition. File condition did not impact plea decisions however, $\chi(1) = 1.099$, $p = .295$, $\phi = .105$. Of those in the OFJ condition, 30.0% chose to accept the plea deal versus 40.0% in the CFJ condition. Thus, although having more information reduced willingness to accept the plea offer (by ten percentage points), this reduction was not significant. When the influence of file condition is examined when guilty, the effect remains non-significant, though again in the anticipated direction. Specifically, among guilty participants in the OFJ condition, 56% pled guilty in comparison to 76% in the CFJ condition, $\chi(1) = 2.228$, $p = .136$, $\phi = .211$. Because too few participants pled guilty when innocent, it was not possible to do a similar analysis for the innocent condition. Therefore, it was not possible to test the hypothesis that innocent participants in the OFJ condition would be the least likely to accept the plea deal.

Participants were also asked an open-ended question why they chose to accept or reject the plea deal. Codes were developed separately for those who chose to accept versus reject the plea deal. For those who chose to accept the deal, seven themes emerged, and for those who chose to reject the plea deal, five themes emerged (see Table 1). All participants answered this question and most answers represented more than one code; 91.4% of participants who chose to accept the plea and 67.7% of those who chose to reject the plea supplied answers representing more than one code. Among the 35 participants who accepted the plea deal the most common reasoning was that the plea deal offered a reduced sentence and/or charge (85.7%). Among participants who rejected the plea deal (N=65), however, the most common rationale (69.2%) was that they did not feel that there was enough evidence against them. Relatedly, half of participants (50.7%, n = 33) who rejected the deal cited the existence of other potential suspects as the rationale behind their decisions; of these, most (n=27) were in the OFJ condition.

Table 1. Rationales for Why Participants Accepted or Rejected the Plea Deal Offered

Accepted the Plea Deal (n=35)			**Rejected the Plea Deal (n=65)**		
Code	Example	%	Code	Example	%
Reduced sentences/ charges	No matter if I did it or not, 2-5 instead of a possible 10-17 is nothing.	85.7%	Lack of evidence/ circumstantial/ reasonable doubt	The police have no evidence that I used my bat to hit Mr. Davis. They found none of the stolen items in my house. No fingerprints.	69.2%
High probability of conviction	I accepted based on the 65% chance of being convicted.	42.9%	Other suspects	Also, there are other potential suspects for the crime such as his wife and the boyfriend, whose car was also found on the scene.	50.7%
Mentioned potentially exculpatory evidence/wea k evidence	I considered pleading not guilty and hope that some evidence points to Charles, Mrs. Davis' boyfriend, of the crime. She and Charles had plenty of motive and there was a lack of good evidence against me.	42.9%	Innocent	I'm innocent and didn't commit this crime. I'm very confident that my innocence will be proven.	47.7%
Criminal history	I have prior convictions, I have been through the criminal justice system before, I have been around criminals and I understand that a jury wouldn't look favorably on the fact that I have been convicted of illegal entry and robbery and I have also been to prison	40.0%	Real assailant would get away	If I accept the deal, the real assailant would never come to trial and get away.	9.2%
Evidence points to me/defendant	I believe most of the evidence is directed towards the defendant considering the bat, the	40.0%	Mentioned that the plea deal would be	The safer option would be to take the plea deal.	7.7%

	description and the wrench		safer/trial is riskier
I am guilty/should be punished	I did it so I should take the deal.	34.3%	
Best interest to plea/more reasonable/better option/safer	Also, because there's so much "evidence" the prosecutor has, it would be safe to plead guilty.	25.7%	

B. Hypothesized Mediating Variables

We also examined three factors, along with our manipulated variables, that we expected to influence the decision to accept or reject plea offers.

Evidence Strength. Participants provided ratings of how strong they believed the evidence was against them (1-10). Perceptions of evidence strength ranged from 1 = weak (n=2; 2.0%) to 10 = strong (n=1; 1.0%), with an average rating of 4.92 (SD=2.01). We conducted a 2 (Guilt) x 2 (File Condition) ANOVA with perceptions of evidence strength as the dependent variable. Significant main effects emerged for both conditions, but the interaction was not significant, $F(1, 96)=1.39$, $p=.241$, $\eta p^2=.014$. Despite the evidence being exactly the same in both conditions, as expected participants in the guilty condition rated the evidence as significantly stronger (M=5.30, SD=2.00) than those in the innocent condition (M=4.54, SD=1.96), $F(1, 96)=4.15$, $p=.044$, $\eta p^2=.041$. Additionally, consistent with our hypothesis, participants in the OFJ condition rated the evidence against them as significantly weaker (M=4.24, SD=1.86) than those in the CFJ condition (M=5.60, SD=1.94), $F(1, 96) = 13.30$, $p = .0001$, $\eta p^2=.122$. In this instance, those in the CFJ conditions did have access to less information than those in the OFJ conditions.

Probability of Conviction at Trial. Participants also provided ratings of their perceived probability of conviction at trial (0-100%). The average rating for this was 58.36% (SD=20.1) with ratings ranging from 10% (n=1, 1.0%) to 100% (n=2, 2.0%) probability of conviction at trial. A 2 (Guilt) x 2 (File Condition) ANOVA was conducted on this measure and again significant main effects emerged for both conditions, but not for the interaction, $F(1, 96)=.710$, $p=.401$, $\eta p^2=.007$. Consistent with our hypothesis, participants in the guilty condition rated their probability of conviction at trial as significantly higher (M=64.10, SD=18.47) than those in the innocent condition (M=52.62, SD=20.20), $F(1, 96)=9.37$, $p=.003$, $\eta p^2=.089$. Additionally, as hypothesized those in the OFJ condition rated their probability of conviction as significantly lower (M=53.16, SD=21.70) than those in the CFJ condition (M=63.56, SD=17.04), $F(1, 96)=7.69$, $p=.007$, $\eta p^2=.007$.

Interview Impact. In addition to evidence strength and probability of conviction at trial, we also explored participants' reports of whether the interviews impacted their plea decisions. Most participants (n=80; 80%) stated that the interviews impacted their decision. We conducted chi-square analyses on this measure by condition. Guilt condition did not have a significant impact,

$\chi(1) = 2.25$, $p = .134$, $\phi = .15$. Among those in the innocent condition, 80.0% stated that the interviews impacted their decision compared to 74.0% in the guilty condition.

File condition, however, significantly impacted whether or not participants stated that the interviews impacted their plea decision $\chi(1) = 4.00$, $p = .046$, $\phi = -.20$. Among those in the OFJ condition 88.0% said that the information in the interviews impacted their decision versus 72.0% in the CFJ condition. Moreover, further chi-square analyses revealed that the effect of file condition held only for those in the innocent condition, $\chi(1) = 4.15$, $p = .042$, $\phi = .29$. When innocent, 24 of 25 participants in the open-file condition (96%) said that the interview impacted their plea decision. In contrast, among innocent participants in the closed-file condition, only 19 of 25 (76%) said the same. File condition did not affect interview impact among guilty participants, $\chi(1) = 0.94$, $p = .33$, $\phi = .14$.

C. Path Analysis

A path analysis was conducted to determine the pathways by which our independent variables (guilt and file condition) and hypothesized mediating variables (interview impact, evidence strength, and probability of conviction at trial) influenced plea decision. First, we conducted zero-order correlations between our variables of interest (see Table 2). Next, we conducted our path analysis using the Analysis of Moment Structure (AMOS) statistical package for SPSS. Analyses were based on the percentile bootstrap method with 1,000 samples. Our model included all hypothesized paths and had very good fit, $\chi 2(3, 100) = 0.104$, $p = .991$; IFI = 1.02; NFI = .999; and RMSEA = .0001 (Figure 1). Direct effects, indirect effects, CIs, and significance levels for the model are presented in Table 3.

Table 2. Spearman's Correlations Between Guilt Condition, File Condition, Interview Impact, Evidence Strength, Probability of Conviction, and Plea Decision

	1	2	3	4	5	6
1. Guilt condition	___	.000	-.150	.185	.283**	.650**
2. File condition		___	.200*	-.373*	-.286**	-.105
3. Interview impact			___	-.087	-.45	-.262**
4. Evidence strength				___	.598**	.384**
5. Probability of conviction					___	.319**
6. Plea decision						___

Note: Pearson correlations were used for the relationship between evidence strength and probability of conviction. * $p < 0.05$, ** $p < 0.01$

Figure 1 reveals that guilt condition had a significant direct effect on plea decision, such that compared to those in the innocent condition those in the guilty condition were significantly

more likely to accept the plea deal. Guilt condition also had a significant indirect effect mediated through evidence strength (β = 0.078, *p* = .019). In comparison to those in the innocent condition those in the guilty condition were more likely to rate the strength of the evidence as stronger; strength of evidence, in turn, increased willingness to accept the plea deal.

File condition did not have a direct effect on plea decision, but did have an indirect effect however, with evidence strength and interview impact acting as mediating variables (β= -0.13, *P* = .001). That is, in comparison to those in the CFJ conditions, participants in the OFJ conditions rated the strength of the evidence as significantly weaker and the impact of the interview information as significantly higher. The interview impact, in turn, significantly reduced willingness to accept the plea offer whereas the strength of evidence did the opposite. Contrary to our hypotheses however, probability of conviction at trial did not act as a mediating variable. However, evidence strength and probability of conviction were strongly correlated, *r* = .598. When evidence strength was removed from the model, probability of conviction at trial was a significant mediator for both guilt (β = 0.032, *p* = .014) and file conditions (β = 0.030, *p* = .005). Finally, we note here that when we reran the path model excluding guilt-innocence status, the significant, indirect paths from file condition to plea decision remained.

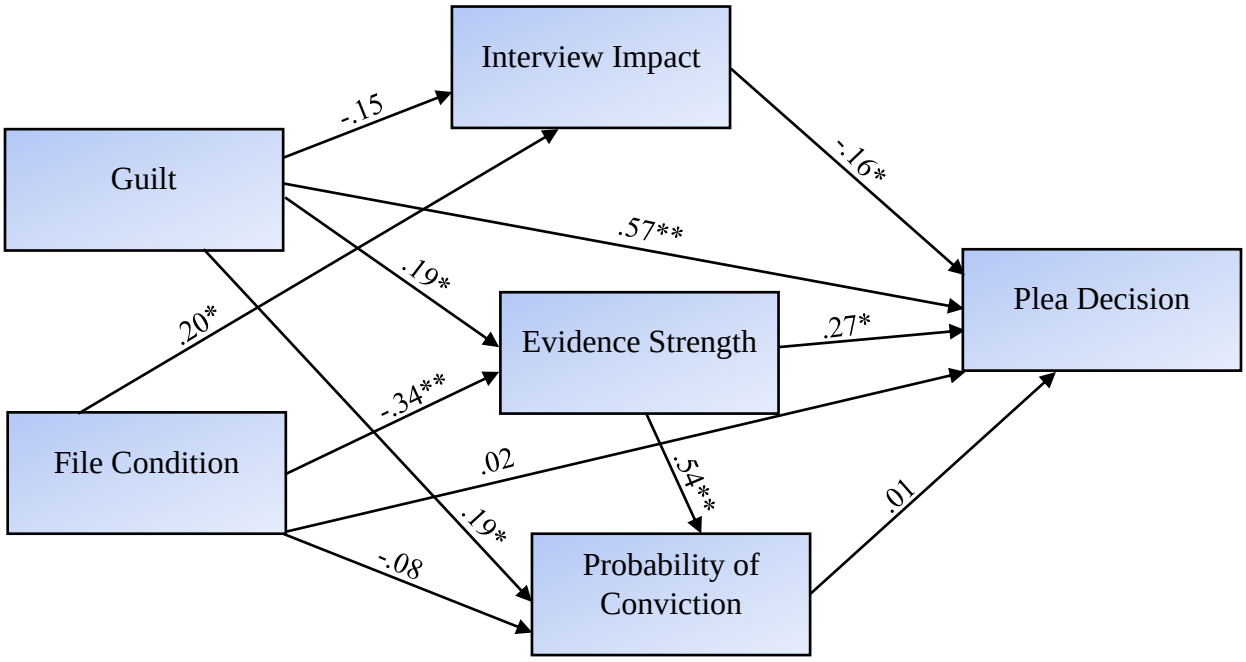

*Figure 1***.** Path model of the relations among guilt condition, file condition, interview impact, evidence strength, probability of conviction, and plea decision (0 = reject plea offer, 1 = accept plea offer). * $p < 0.05$, ** $p < 0.01$

Table 3. Direct Effects, Indirect Effects, 95% Confidence Intervals, and Significance Levels

	Estimate	Lower Bound	Upper Bound	*p*-value
Direct Effects				
Effects on interview impact				
Guilt condition	-.150	-.335	.049	.153
File condition	.200	.021	.398	.018
Effects on evidence strength				
Guilt condition	.190	.006	.356	.041
File condition	-.340	-.518	-.153	.002
Effects on probability of conviction				
Guilt condition	.185	.027	.342	.017
File condition	-.078	-.263	.094	.341
Evidence strength	.536	.355	.690	.002
Effects on plea decision				
Guilt condition	.571	.414	.713	.002
File condition	.021	-.136	.171	.817
Interview impact	-.161	-.295	-.037	.005
Evidence strength	.266	.071	.451	.008
Probability of conviction	.012	-.154	.190	.884
Indirect Effects				
Guilt condition	.078	.013	.171	.019
File condition	-.126	-.220	-.066	.001

VII Discussion

Defendants' limited access to pre-plea discovery information, such as established in the Supreme Court *Ruiz* decision, is a controversial issue and one that many argue limit defendants' ability to make fully informed plea decisions (Bibas, 2004; Covey, 2007; Friedman, 1971). Open-file discovery polices have been advocated as the leading reform for these issues, however, to our knowledge no research has examined if and how discovery information impacts defendant plea decisions. We examined the impact of discovery information, including possible exculpatory information, on mock defendant plea decisions. Additionally, because limited access to discovery has been criticized for contributing to wrongful convictions via false guilty pleas (Yaroshefsky, 2008), we also examined the impact of discovery when defendants were guilty and innocent. In brief, we found that amount of discovery information indirectly influenced plea decisions, whereas defendant guilt had both a direct and indirect effect on plea decisions.

A. Guilt-Innocence Status

Consistent with past research we found that guilty participants were more likely to accept the plea deal than innocent participants (Bordens, 1984; Henderson & Levett, 2018; Wilford & Khairalla, 2019). However, because plea decision-making is complex and involves the evaluation of various factors, we expected, and found, certain variables to mediate relations between guilt

(and file condition; see below) and plea decisions. The main theory of plea decision-making, Bargaining in the Shadow of Trial (see Bibas, 2004; Dezember & Redlich, 2019), and past research indicates that individuals consider the strength of evidence against them and their probability of conviction at trial when deciding whether to plead guilty (Bordens, 1984; Peterson-Badali & Abramovitch, 1993; Zimmerman & Hunter, 2018). Indeed, participants' own rationales in the current study for why they chose to accept or reject the plea deal offered further support that defendants consider both strength of the evidence and probability of conviction when making plea decisions. In answering an open-ended question, among those who chose to accept the plea deal, probability of conviction at trial and perceived evidence strength each emerged as themes over 40% of the time. Additionally, for those who chose to reject the plea deal, the perceptions of evidence strength theme emerged almost 70% of the time and the possibility of other suspects in the case (i.e., potentially exculpatory information) emerged about 50% of the time. When we included evidence strength and probability of conviction at trial as mediating variables in our path analysis, as well as participant ratings of the impact of the interviews (i.e., discovery material) on their plea decisions, we gained a deeper understanding of the impact of guilt and discovery on plea decisions.

As hypothesized, guilty participants rated the evidence against them as significantly stronger and their probability of conviction at trial as significantly higher than innocent participants. Strength of evidence, in turn, acted as a mediating variable and increased willingness to accept the plea deal. Although we did not find that probability of conviction at trial acted as a mediating variable between defendant guilt and plea decisions, when we excluded evidence strength from our path analysis, we did find the hypothesized effect of probability of conviction. Specifically, those in the guilty condition rated their probability of conviction as significantly higher than those in the innocent condition, probability of conviction, in turn, increased willingness to plead guilty. Because evidence strength and probability of conviction at trial were strongly correlated, the inclusion of both in our original path analysis likely suppressed the effect of probability of conviction at trial.

B. Open- v Closed-File Discovery

Although we did not find a direct effect of the amount of discovery information on plea decisions, we did find indirect effects that lend support to the argument that access to discovery information is important to making informed plea decisions (Friedman, 1971; Redlich, 2016). Specifically, participants' access to discovery information, including exculpatory information, significantly influenced both ratings of the strength of the evidence against them and their perceived probability of conviction at trial. As expected, participants in open-file conditions (i.e., with access to full discovery) rated the strength of the evidence against them as significantly weaker and their probability of conviction at trial as significantly lower than participants in closed-file discovery conditions. In addition, as noted, when evidence strength was excluded from the path analysis, probability of conviction at trial also significantly mediated the relation between file condition and plea decisions.

Participants in the open-file conditions were also more likely to state that the interviews (i.e., discovery information) impacted their plea decisions. This finding was especially true of innocent participants in the open-file condition; all but one participant in this condition stated that

the interviews influenced their decision, which was not the case among innocent participants in the closed-file condition. In turn, interview impact and evidence strength both acted as significant mediating variables, with interview impact reducing willingness to accept the plea deal and evidence strength having the opposite effect. This set of findings supports the complex relationship between discovery and defendant plea decisions, indicating that the evaluation and consideration of various factors, like evidence strength and probability of conviction at trial, are involved. Therefore, as McConkie (2017) notes, access to discovery information is important for both factually innocent and factually guilty defendants. Additionally, this set of findings suggests the possibility that if our sample size had been larger, we may have been able to detect significant differences between file conditions for plea decisions. Future research should examine if and how access to discovery information impacts defendants' ability to negotiate deals with the prosecution, and whether that information also leads to deals that more accurately represent the cases against them (Alkon, 2014). Future research should also examine the type of discovery information available to defendants, whether it be exculpatory impeachment evidence or traditional *Brady* material.

C. Limitations and Conclusions

To our knowledge, the current research is the first attempt to examine how open-file discovery policies, or access to discovery, influence defendant plea decision-making. While we were able to gain valuable insights into how discovery and guilt impact plea decisions, there are limitations that we note here. First is that this was a hypothetical scenario using mock defendants. Although the majority of guilty plea studies have used such experimental vignette methods, leading to a great deal of insight into plea decision-making behaviors (e.g., Bordens, 1984; Bushway, Redlich, & Norris, 2014; Edkins, 2011; Pezdek & O'Brien, 2014; Tor et al., 2010; Zimmerman, & Hunter, 2018), the extent to which findings generalize to actual plea decisions needs further investigation. This limitation is related to two others, one being the use of University students as defendants. Although we did not find that self-reported experience with the criminal justice system influenced our main dependent variables, future research should include samples with more extensive criminal justice experience. And two, was the lack of situational pressures and incentives, which have been shown to impact both true and false guilty pleas in actual cases (Caldwell, 2011; Redlich et al., 2017). Such pressures and incentives from prosecutors in the form of time-limited deals and immediate release from pretrial detention are present in real world plea negotiations but were absent from the present research. Because plea bargaining has been described as inherently coercive (Kipnis, 1976; Langbein, 1992), the impact of discovery information on plea decisions when situational pressures and incentives are present warrants further exploration.

A second limitation was the found floor effect of innocent participants pleading guilty, which precluded our ability to test the hypothesized interaction between innocence and the file conditions on plea decisions. However, we did find a significant interaction between guilt status and file condition on interview impact ratings. In line with our hypothesis, we found that file condition significantly impacted these ratings of the discovery information, but only when innocent. In addition, when guilt-innocence status was removed from the path analysis, perceived evidence strength and interview impact (and to a degree, probability of conviction), remained as significant mediators of plea decision through file condition. Finally, we conducted a preliminary,

online follow-up study (N=100) that addressed the floor effect and raised the false guilty plea rate to 20% (in contrast to the 4% in the current study). We found similar results to those reported here and we did not find a significant interaction effect on plea decisions as hypothesized.

Finally, the file jurisdiction instructions given to participants and the use of redacted information in our CFJ conditions may have introduced an unintended confound. Participants in the CFJ were informed that it was possible for them to be treated differently than defendants in other jurisdictions (i.e., OFJ), and because of the use of redacted information were able to see that they were not privy to certain information. These study procedures, while mimicking real-life, may have impacted participants' perceptions of fairness and thus our results. Past research has found perceptions of fairness to impact plea decisions (Gazal-Ayal & Tor, 2012; Tor, Gazal-Aval, & Garcia, 2010). It is important to note, however, that while perceptions of fairness may have differed in our OFJ and CFJ conditions (a construct we did not measure), we did not find an effect of file condition on plea decisions.

Despite these limitations, our findings shed important light on how access to evidence may directly and indirectly affect defendant plea decision-making. Defendants who plead guilty waive their rights to the majority of their constitutional safeguards afforded at trial (e.g., the presumption of innocence, proving guilt beyond a reasonable doubt, cross-examining accusers, etc.) (Redlich, 2016). Ensuring that plea decisions are valid, that is, made knowingly, intelligently, voluntarily, and with a factual basis of guilt, is one of the few safeguards in place during the plea-bargaining process. Safeguards that are necessary, as 20% of all known wrongful convictions in the United States involved false guilty pleas (National Registry of Exonerations, n.d.). Discovery policies vary considerably, however, and depending on the state, defendants can enter what are considered to be legally valid pleas without complete knowledge of the state's evidence against them (see Zottoli et al., 2019). As indicated by the title of this article, can plea decisions be intelligent without full knowledge of the evidence against one? Findings from the current study indicate that while plea decisions are complex, access to discovery information impacts defendants' ratings of the strength of the evidence against them and perceptions of the information itself, which in turn affects the decision to accept or reject pleas. Without access to full discovery information, particularly potentially exculpatory information, defendants necessarily have limited ability to make fully informed plea decisions, which raises concerns about the fairness and validity of bargaining and the wrongful conviction of innocents (Covey, 2007; Friedman, 1971).

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Dead Wrong:

Capital Punishment, Wrongful Convictions, and Serious Mental Illness

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WCLR Gold Prize

The Editorial Board of the ***Wrongful Conviction Law Review*** is pleased to award its inaugural gold prize for a student paper to Alexis E. Carl

Faculty Endorsement - *Marvin Zalman, Professor, Department of Criminology and Criminal Justice, Wayne State University, U.S.A: This article began as a term paper in CRJ 7405, Wrongful Convictions, a graduate course in the Department of Criminal Justice (now the Department of Criminology and Criminal Justice) at Wayne State University in the Fall 2019 semester. I endorse this article for publication in the Wrongful Conviction Law Review.*

I Background

This paper explores the relationship between serious mental illness (SMI), wrongful convictions, and capital punishment.

A. Capital Punishment

In the United States, for an individual to be dealt a death sentence, they must be convicted of a capital crime (Bureau of Justice Statistics, n.d.). Due to the bifurcated nature of the United States criminal justice system, an individual can be charged with a federal or state capital crime (Connor, 2010). In the past, these crimes included rape and armed robbery; however, the United States Supreme Court has since ruled that a sentence of capital punishment for these crimes is unconstitutional (*Coker v. Georgia*, 1977; *Kennedy v. Louisiana*, 2008). Additionally, since federally reinstating the death penalty in 1976, the U.S. Supreme Court has made it quite clear that the death penalty be reserved solely for persons convicted of homicide (*Gregg v. Georgia*, 1977). Even so, there are still federal and some state statues that list capital crimes other than homicide (i.e., espionage, treason, etc.) (Sentence of Death, 1994); however, all persons in the modern era who have received capital sentences have been convicted of murder (Death Penalty Information Center, 2020). Further, for an individual to receive a capital punishment sentence, following a guilty verdict the prosecution must, "Prove an additional statutory aggravating factor or satisfy an analogous special issue requirement before a jury or judge is authorized even to consider imposing a capital sentence" (Acker & Bellandi, 2014, p. 270). Common aggravating factors include having an extensive violent criminal record or committing a murder and another violent felony simultaneously (21 OK Stat § 21-701.12, 2015; AZ Rev Stat § 13-751, 2019; MS Code § 97-3-19, 2013; Acker & Bellandi, 2014).

a. Wrongful Convictions and the Death Penalty

An unintended consequence of capital punishment occurs when a sentence is imposed on an individual who is actually innocent. The Death Penalty Information Center (DPIC), which was founded in 1990, has compiled a list of individuals who have been given a capital sentence and have subsequently been exonerated since 1973 (Acker & Bellandi, 2014, p. 272). At present, this list contains 166 defendants (Death Penalty Information Center, 2020). Sadly, many exonerees have come very close, sometimes within hours, of being put to death. Some scholars believe that there are many individuals on this list that would have been executed if it were not for fortuitous delays in their cases (Acker & Bellandi, 2014, p. 272). Moreover, there are ten additional individuals on the DPIC's list of executed persons that are believed to be possibly innocent (Acker & Bellandi, 2014). Additionally, a study by Warden and Seasly (2019) found at least 25 individuals with sufficient case evidence suggesting that their death sentences were also erroneous and warranted exonerations.

Legal scholars argue that the injustice related to capital punishment requires data-driven estimates of capital punishment error-rates. By applying statistical analysis methods known as survival analysis—meaning if all death-sentenced defendants remained under sentence of death indefinitely, how many would have been wrongfully convicted and sentenced to death—Gross et al. has come the closest to accurately estimating this error rate (Gross et al., 2014). After looking

at death sentences and exonerations from 1973-2004, they calculated that, "The cumulative probability of exoneration for death-sentenced defendants who remained under threat of execution for 21.4 y[ears] was 4.1% (with a 95% confidence interval of 2.8–5.2%)" (Gross et al., 2014). This is extremely alarming, and the authors even note that this is a conservative estimate (Gross et al., 2014). Given this data, it is very plausible that some innocent persons have been executed (Gross et al., 2014). This study has been crucial at documenting the injustices related to capital punishment; however, an error rate can still never be accurately predicted, as it is impossible to truly know how many people are factually innocent (Acker & Bellandi, 2014). To further understand wrongful capital convictions, Bedau and Radelet (1987) studied wrongful convictions in capital and potentially capital cases from 1900-1985, revealing 350 wrongful convictions. They believed 23 of these convictions resulted in innocent people being executed, but their study was criticized since their definition of innocence was somewhat subjective (Acker & Bellandi, 2014). Additionally, Lofquist and Harmon (2008) studied wrongful convictions in executions that took place from 1972-2000, finding compelling claims of innocence for at least 16 individuals.

Capital cases also have high reversal rates. From 1973-1995, two-thirds of capital cases where individuals were sentenced to death were reversed (Liebman, et al., 2002). "Still, there is no guarantee that judicial review for legal error will identify factually innocent defendants; indeed, any number of appellate court opinions have concluded that evidence of guilt was 'overwhelming' in cases that subsequently resulted in DNA-based exonerations" (Acker & Bellandi, 2014, p. 275). Due to these and other factors, the United States Supreme Court has become aware of the dangers associated with capital punishment, and thus, has enacted safeguards surrounding its application, such as, ruling that a sentence of capital punishment for mentally disabled defendants is unconstitutional (Acker & Bellandi, 2014).

b. Atkins v. Virginia

The U.S. Supreme Court in *Atkins v. Virginia* (2002) held under the Cruel and Unusual Punishment Clause of the Eighth Amendment that a sentence of capital punishment for individuals with intellectual disabilities is unconstitutional. For a death sentence to be deemed constitutional it must not be excessive and must be viewed as serving some penological justification, so that no gratuitous suffering is imposed (*Atkins v. Virginia*, 2002; *Gregg v. Georgia*, 1976).

The Diagnostic and Statistical Manual of Mental Disorders Version 5 (DSM-5) defines intellectual disability as, "Significantly subaverage intellectual functioning accompanied by significant limitations in adaptive functioning that originated before the age of eighteen" (Blume et al., 2014). The Court agreed those with intellectual disabilities lacked the moral culpability and intellectual capacity to be deserving of such a punishment, as it would not serve penological justification (*Atkins v. Virginia*, 2002). The Court also found applying the death penalty to people with intellectual disabilities would be excessive, since persons with intellectual disabilities have, "Diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" (*Atkins v. Virginia*, 2002, p. 13).

Further, the Court noted that individuals with intellectual disabilities are at a higher risk of being wrongfully convicted and thus wrongfully executed, arguing that an innocent person with

an intellectual disability is more likely to falsely confess, struggles with communicating with their attorneys, has difficulty testifying, and has a demeanor that often falsely conveys lack of remorse (*Atkins v. Virginia*, 2002). When looking at *Atkins v. Virginia*, one can see that the Court gives great weight to an individual's functional and cognitive impairments in assessing culpability and vulnerability. With that being said, these same factors can thus be applied to individuals with serious mental illness, and in doing so, a strong argument can be made that imposing a capital sentence on individuals with serious mental illness would also be rendered unconstitutional.

B. Serious Mental Illness

Serious mental illness (SMI) is defined as a "Mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities" (National Institutes of Mental Health, 2019). Symptoms of SMI vary in severity, frequency, and duration, yet they can be disabling to the individual and impact their life greatly. Common symptoms of SMI include hallucinations; delusions; disorganized speech; catatonic or disorganized behavior; psychosis; exaggeration or distortion of perception of reality; blunted personality and emotions; inability to act in a goal-directed manner; inability to think; illogical thinking; memory deficits; inability to concentrate; inability to think abstractly; trouble with processing information; emotional dysregulation; and difficulty communicating (American Psychiatric Association, 2013; Izutsu, 2005; Slobogin, 2003). People with SMI often also have diminished occupational and social functioning, and have difficulties performing activities of daily living (APA, 2013; Izutsu, 2005; Slobogin, 2003). According to the National Alliance on Mental Illness, serious mental illnesses include: major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder, panic disorder, posttraumatic stress disorder, and borderline personality disorder (National Alliance on Mental Illness, 2019; Death Penalty Information Center, 2020). While people with SMI can often find relief by attending outpatient therapy and by taking psychiatric medications, SMI is seldom "cured;" rather it is managed (Izutsu, 2005; Slobogin, 2003). Further, people with SMI often require hospitalization when their symptoms are heightened (Slobogin, 2003; Izutsu, 2005).

a. Vulnerabilities among Individuals with SMI

Due to the cognitive and volitional impairments associated with SMI, people with SMI are extremely vulnerable to being wrongfully convicted of a crime and subsequently wrongfully sentenced to death (American Psychiatric Association, 2013; Slobogin, 2003; Izutsu, 2005). Common risk factors associated with having a diagnosis of SMI include: 1) falsely confessing; 2) struggling with assisting in one's defense; 3) being perceived as an unreliable witness; 4) falsely appearing to lack remorse; and 5) facing prejudices from judges and jurors; which all contribute to wrongful convictions (Kassin, 2015; Rogal, 2017; Johnson et al., 2019; Vinocour 2020; Hayman, 2016; Izutsu, 2005; Slobogin, 2003).

False confessions. Individuals with SMI have psychological vulnerabilities such as cognitive impairments, distorted perceptions and beliefs, communication deficits, and processing barriers, that place them at a greater risk to falsely confess to crimes that they did not commit (Gudjonsson, 2012; Izutsu, 2005; Rogal, 2017; Leo, 2009; APA, 2013). Other recognized traits of persons who are at risk of falsely confessing include: having a deficient memory, high anxiety,

low self-esteem, and low assertiveness, which are all common amongst persons with SMI (Leo, 2009). Generally, there are three types of recognized false confessions: voluntary false confessions, coerced-compliant false confessions, and coerced-internalized false confessions (Kassin, 2015). The first type, voluntary false confessions, include confessions where an individual confesses on their own free will without police inducement. The second type, coerced-compliant false confessions, include confessions where an individual feels the need to confess to escape the stress of the interrogation or confesses for some other additional gain. The last type, coerced-internalized false confessions, include confessions where an individual is convinced by a police officer, through the interrogation process, that he/she committed the crime, even if they do not remember committing the crime. Individuals who suffer from SMI are at a higher risk for making coerced-compliant and coerced-internalized false confessions (Rogal, 2017; Kassin; 2015; Leo, 2009). However, individuals with SMI are also vulnerable to making voluntary false confessions as a result from their impaired mental states (Gudjonsson, 2003).

Since people with SMI often have cognitive impairments, such as delusions or memory impairments, they may find it difficult to give detectives reliable statements (Gudjonsson, 2012). Additionally, they may find it hard to communicate to police their own version of events and struggle to provide them with exculpatory information, since people with SMI have trouble processing information and communicating effectively (Izutsu, 2005; APA, 2013). Further, when people with SMI are experiencing symptoms of mania, they display obliviousness to risk, recklessness, and grandiose self-belief, which can cause an individual to make impulsive and inaccurate decisions. In contrast, when people with SMI experience depressive symptoms, they can exhibit feelings of excessive or misplaced guilt, leading to a false confession (Rogal, 2017).

Next, individuals with SMI may not be able to handle the pressures of the actual police interview, since police interrogation tactics are psychologically coercive in nature (Johnson et al., 2019; Rogal; 2017). To protect an individual's Fifth Amendment right against self-incrimination, the U.S. Supreme Court in *Miranda v. Arizona,* concluded that its warnings safeguard should be extended to the pretrial interrogation process (*Miranda v. Arizona*, 1966). However, the *Miranda* precedent does not protect individuals from coercive interrogation tactics, thus it does not provide individuals with protection against falsely confessing (Leo, 2008).

The interrogation practice most used by police is the Reid Technique, which is a nine-step interrogation process that frequently uses tactics of deception, psychological manipulation, and coercion (Rogal, 2017; Trainum, 2016; Gudjonsson, 2012). In fact, the Reid Manual acknowledges that false confessions can happen; however, the authors refute any claims that their techniques are to blame, yet they do note their techniques may be overwhelming for persons with SMI (Trainum, 2016; Rogal, 2017). Deception tactics used by police often involve, "[i]nventing evidence, overstating certainty of guilt, and implying that suspects will somehow benefit from making admissions" (Rogal, 2017, p. 66). Since people with SMI have delusions and suffer from cognitive deficits which may alter their sense of trust, these deceptive tactics make them more suggestible and compliant, increasing their vulnerability to falsely confessing. In contrast, these same vulnerabilities can also make a person with SMI less compliant and more likely to confess as a means to end the interrogation (i.e., having a delusion that the interrogator is going to kill their family if they do not confess). Moreover, because individuals with SMI already distrust their memory—since it is undependable from frequent delusions and hallucinations—these individuals

may fully believe they were involved in a crime, even if they have no recollection of it (Johnson et al., 2019). Next, coercive tactics used by police, which may involve the use of threats, promises, or implications that one has no other choice but to confess, also make individuals with SMI especially vulnerable, since they have trouble thinking abstractly and often have an exaggerated or distorted sense of reality (Gudjonsson, 2012; APA, 2013; Izutsu, 2005). Also, persons with SMI may not even understand the questions being asked of them or consequences of their answers. Notably, research has shown that, "Inattentiveness to long-range consequences increases the risk of false confessions in order to obtain a short-term reward (such as the termination of the police questioning)" (Rogal, 2017).

Additionally, people with SMI may not understand their constitutional rights or may not know how to exercise them (Rogal, 2017). This is because those with SMI may have cognitive and volitional impairments (APA, 2013). Those with SMI struggle with thinking abstractly, which is needed when invoking and understating one's legal rights and Miranda warnings, since it is supposed to help protect against volatile police interviews that could lead to false confessions (Johnson et al., 2019; Rogal; 2017). In fact, research suggests that 80% of individuals waive their Miranda rights—which can contribute to coercive police tactics (Trainum, 2016; Kassin, 2010a). Overall, our current criminal justice system does not have the ability to correctly identify false confessions or to protect persons with SMI from having this evidence improperly used against them (Rogal, 2017).

Defense assistance. People with SMI often have difficulty communicating with their attorneys resulting from many different symptoms experienced by individuals with SMI, including impairments in memory, deficits in language, an inability to understand abstract legal concepts, and limitations in social functioning (Izutsu, 2005; APA, 2013; Slobogin, 2003). All of these symptoms make it difficult for those with SMI to assist their attorneys with their defense (Johnson et al., 2019; Vinocour 2020). People with SMI also often have an exaggerated or distorted perception of reality, making it difficult for them to even provide their story of events or any exculpatory information to their attorneys (Slobogin, 2003; Johnson et al., 2019). Further, "Because of delusions or impaired judgment, [defendants] may distrust or refuse to cooperate with defense counsel or believe that a defense is somehow unnecessary" (Izutsu, 2005).

Unreliable witness. Individuals with SMI are historically known as unreliable witnesses, thus they are not likely to be able to persuasively testify in their own defense (Johnson et al., 2019). Unfortunately, this is because individuals who have mental illness are seen to be erratic, impulsive, and untrustworthy, as they may at times be, as SMI symptoms can very much contribute to these behaviors. Further, some individuals with SMI may have a decreased sense of self, causing an inability to speak with conviction (Hayman, 2016). This can lead jurors to question the validity of their statements. Additionally, individuals with SMI may act or react in ways on the witness stand that can hurt their defense (Hayman, 2016). Lastly, an individual with SMI may even "Falsely contradict themselves out of confusion, fatigue or fear" (Hayman, 2016).

False appearance of lack of remorse. Individuals with SMI can also falsely appear to lack remorse. This has to do with the symptoms that individuals with SMI may encounter including catatonic or disorganized behavior, emotional blunting and dysregulation, and an inability to concentrate (APA, 2013; Izutsu, 2005; Johnson et al., 2019; Vinocour, 2020). Further, individuals

with SMI may have diminished facial expressions and appear apathetic which could cause jurors to misjudge their true demeanor and thus, mistakenly convict them of a crime (Izutsu, 2005; APA, 2013; Johnson et al., 2019).

Prejudices. People with SMI face prejudices from judges and jurors who ultimately have the ability to hand down a wrongful conviction (Vinocour, 2020). One research study, which looked at 128 Georgia capital cases during 1990, found an association between a failed insanity defense and a capital sentence and argued, "Given that defendants who raise the insanity defense generally present evidence of mental illness, this correlation suggests that juries and judges may be influenced to impose the death penalty even when mitigating evidence exists" (Izutsu, 2005). Further, research has found that it is not the culpability of the seriously mental ill person that is used by judges and juries to determine sentencing, but that it is the disproportionate, irrational, and inaccurate fear of these individuals that decides their fate—often leading to a wrongful conviction and sentence of death (Izutsu, 2005; Slobogin, 2003; Vinocour, 2020). Lastly, jurors often do not realize those with SMI can experience exacerbating symptoms even when they are medication compliant—which is important when considering culpability, as it may lead a juror to incorrectly assume that an individual with SMI has control over their illness (Izutsu, 2005).

C. Gaps in Previous Research & Current Study

Although previous research has laid out the vulnerabilities individuals with SMI experience in the criminal justice sector, there remains several gaps demonstrating the direct connection between having a SMI and being wrongfully convicted. Further, there is very limited research available on the actual cases of exonerees with SMI diagnoses, including exonerees with SMI diagnoses who were once on death row.

The aim of this study is to explore how having a SMI may increase an individual's risk of being wrongfully convicted and consequently given a capital sentence. First, data from the National Registry of Exonerations is analyzed, leading to a discussion of the disproportionate co-occurrences of wrongful convictions that are stimulated by SMI. Then, 26 cases of individuals who were wrongfully convicted due to their SMI are examined, creating the argument for why a death penalty sentence is not appropriate for individuals suffering from these disorders, based on the U.S. Supreme Court's findings in *Atkins v. Virginia*. Lastly, this paper suggests implementing further reforms to protect individuals with SMI from vulnerabilities in the criminal justice system.

II Wrongful Convictions and Serious Mental Illness

A. Data and Methods

a. Data Derived from the National Registry of Exonerations

The National Registry of Exonerations (NRE) has recorded detailed information about every known exoneration in the United States since 1989, including whether or not an offender had a mental disability (National Registry of Exonerations, n.d.). As of February 2019, the NRE listed 146 exonerated individuals who suffered from a mental disability out of 2,358 total

exonerations (National Registry of Exonerations, n.d.). However, the NRE records mental disabilities by grouping together serious mental illness and intellectual disabilities (this data can be accessed on the NRE's website under the Issues: False Confessions tab—Table: Age and Mental Statues of Exonerated Defendants) (National Registry of Exonerations, 2020).

Fortunately, a recent study completed by Johnson et al. (2019) combed through NRE data to separate serious mental illnesses from intellectual disabilities, thus, more detailed information on SMI can be reported. According to this study, out of the 146 exonerated individuals listed on the NRE who suffered from a mental disability, 45 of them suffered from a SMI (Johnson, et al., 2019, p. 107). Utilizing this information, this author created a SMI variable and analyzed the NRE data, to better understand the disproportionate co-occurrences of wrongful convictions that are stimulated by SMI. Using IBM SPSS Statistics, version 25, this data was analyzed at the bivariate level (SPSS Software, n.d.).

b. Known Cases

Next, in an attempt to explore how having a SMI can increase an individual's risk of being wrongfully convicted and consequently given a capital sentence, case specific information was sought to be analyzed for as many exonerees with SMI as possible - beginning with the NRE. Although the NRE does not "code" exonerations in their registry by mental illness, an advance search can still be performed on cases in their database. By entering the key words: "mentally ill," "mental illness," "bipolar," "depression," "psychosis," "borderline," "PTSD," and "schizophrenia," 23 exonerees who suffered from SMI were able to be identified. However, this list is not exhaustive, given that the NRE had at least 45 exonerees listed as having a SMI as of February 2019 (Johnson, et al., 2019; National Registry of Exonerations, n.d.). These 23 exonerees were: George Allen Jr., William Amor, James Blackmon, Carl Chatman, Tom Edwin Chumley, Henry Cunningham, William M. Kelly, Jr., Benjamin Harris, Eddie Joe Lloyd, Benjamin Miller, Stanley Mozee, Curtis Moore, Rickey Newman, Josue Ortiz, Laverna Pavlinac, Freddie Peacock, Jamie Lee Peterson, John Purvis, Frederic Saecker, Glenn Tinney, Mike Wilkerson, Rodney Woidtke, and Cathy Woods (National Registry of Exonerations, n.d.).

Next, an earlier study of false confessions by Drizin and Leo (2004), looked at electronic media, legal databases, police reports, trial transcripts, articles, and books, which uncovered 125 proven false confessions. Out of these cases, they found at least 12 persons suffered from SMI, noting it was likely an underestimate (Drizin & Leo, 2004). However, after closely examining their study, only five additional instances of wrongful convictions of persons with SMI with case specific information were able to be identified: Colleen Blue, Michael Bottoms, Eddie Joe Lloyd (previously mentioned above), Robert Lee Miller, Jr. (previously mentioned above), and Frank Lee Smith.

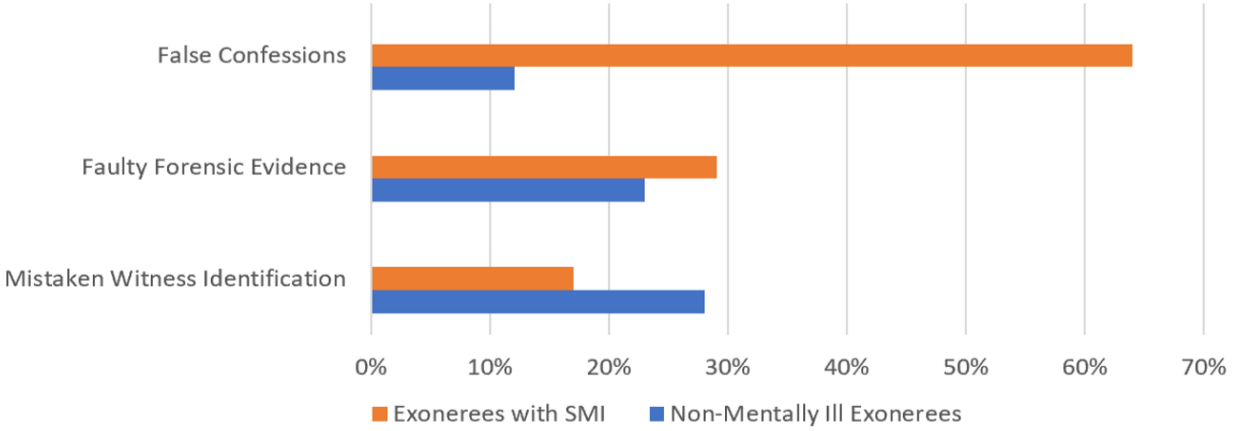
Lastly, in Convicting the Innocent, Brandon Garrett examined the first 250 cases of those exonerated by DNA evidence, in which he identified four individuals with SMI: Eddie Joe Lloyd, Freddie Peacock, and Frank Lee Smith (all previously mentioned above), and Ada Joann Taylor (Garrett, 2011). Both Smith and Taylor are listed on the NRE, but there is no mention of SMI's on their profiles, suggesting that the NRE's data on individuals with SMI is underinclusive.

B. Results

a. Data Derived from the National Registry of Exonerations

The data clearly demonstrated that individuals with SMI were overrepresented amongst those who falsely confessed, as 12% of non-mentally ill exonerees falsely confessed, whereas 64% of exonerees with SMI falsely confessed (Johnson, et al., 2019, p. 113). It is important to note that people with SMI were not overrepresented among causes of wrongful conviction that are not related to SMI including mistaken eyewitness identification (28% non-mentally ill; 18% SMI) and faulty forensic science evidence (23% non-mentally ill; 29% SMI) (see Figure 1) (Johnson, et al., 2019).

Figure 1. Disparities Between Sources of Wrongful Conviction Amongst Exonerees



**Note: Data from Johnson et al. (2019) based on information derived from the National Registry of Exonerations. The SMI variable was created by the author based on this information.*

Next, chi-square tests of independence were performed to further examine the relation between sources of wrongful conviction and exoneree mental health status (see Table 1). A chi-square test of independence confirmed that there was a significant association between exoneree mental health status and being wrongfully convicted due to falsely confessing ($X^2(1) = 105.65$, $p < .001$); however, there were no significant associations between mental health status and being wrongfully convicted due to faulty forensic evidence or due to mistaken witness identification.

Lastly, while it is quite difficult to study the other difficulties those with SMI face, such as, assisting in one's defense, testifying in their defense, and juror/judge prejudices or beliefs regarding remorse, if it were possible, this data could potentially reveal a plethora of information concerning the vulnerabilities associated with having a SMI and being wrongfully convicted.

Table 1. Bivariate Analysis: Assessing for Disparities Between Sources of Wrongful Conviction Amongst Exonerees (N = 2403)

Sources of Error	Exonerees with SMI (Total=45) N (%)	Non-Mentally Ill Exonerees (Total=2358) N (%)	χ^2	df	*p* value

False Confessions	29 (64%)	287 (12%)	105.65	1	< .001
Faulty Forensic Evidence	13 (29%)	551 (23%)	2.48	1	.115
Mistaken Witness Identification	8 (18%)	671 (28%)	.75	1	.387

**Note: Data collected from Johnson et al. (2019) based on information derived from the National Registry of Exonerations. The SMI variable was created by the author based on this information.*

b. Known Cases

A total of 26 cases of actual innocence were able to be identified from the NRE, Drizin and Leo's study, and Garrett's book combined (National Registry of Exonerations, n.d.; Drizin & Leo, 2004; Garrett, 2011). A brief summary of these 26 cases of exonerees with SMI (listed in alphabetical order by surname) can be found in the appendix. Of these 26 cases, males comprised the gross majority of the sample (84.6%). Table 2 displays a breakdown of the SMI diagnoses held by exonerees and Table 3 displays a breakdown of the sources of error that contributed to these exonerees wrongful conviction. Table 4 further displays the breakdown of the sources of error these exonerees experienced when they were wrongfully convicted by their SMI diagnoses.

Table 2. Type of SMI (N = 26)

Type of SMI	N (%)*
SMI (Unspecified)	4 (15.4)
Schizophrenia	15 (57.7)
Personality Disorder	2 (7.7)
Posttraumatic Stress Disorder	3 (11.5)
Bipolar Disorder	5 (19.2)
Depression	4 (15.4)
Total Diagnosis	33

Note: Total exceeds case number size of 26 due to some individuals having more than one SMI diagnoses.
** Each percentage was calculated based off of the 26 exonerees suffering from that condition.*

Table 3. Sources of wrongful conviction (N = 26)

Sources of Wrongful Conviction	N (%)*
False Confession	25 (96.2)
Ineffective Assistance of Counsel	2 (7.7)
Police Misconduct	6 (23.1)
Prosecutorial Misconduct	3 (11.5)
Mistaken Eyewitness Identification	3 (11.5)
Total Sources	39

*Note: Total exceeds case number size of 26 due to some persons having more than one source contribute to their wrongful conviction. * Each percentage was calculated based off of the 26 exonerees who experienced that source of error.*

First, SMI discovered in these exonerees cases included diagnose of schizophrenia, personality disorders, posttraumatic stress disorder (PTSD), bipolar disorder, depression, and unspecified SMI. More than half of all the diagnosed mental health conditions held by exonerees was schizophrenia (57.7%). Additionally, 11.6% of exonerees had more than one SMI diagnoses, while 7.7% of exonerees had three or more SMI diagnoses.

Next, the sources of error these exonerees experienced when they were wrongfully convicted included sources of false confessions, ineffective assistance of counsel, police misconduct, prosecutorial misconduct, and mistaken witness identification. Out of the 26 exonerees, 25 of them, (96.2%) became victims of wrongful convictions due to falsely confessing. Additionally, 34.6% of exonerees experienced more than one source of error that cumulated to cause their wrongful convictions, while 7.7% of exonerees experienced three or more sources of error that cumulated to cause their wrongful convictions.

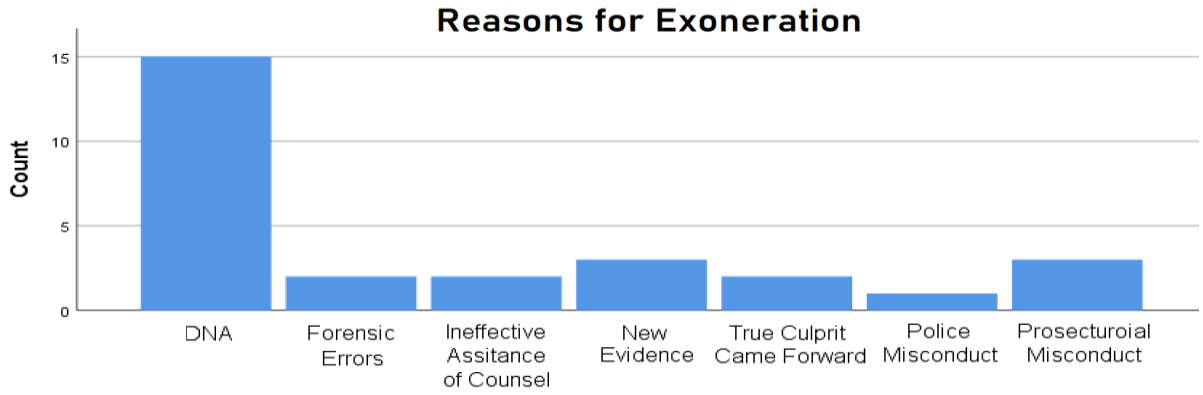
Table 4. Sources of wrongful conviction categorized by SMI (N =26)

Type of SMI	False Confession N	Ineffective Assistance of Counsel N	2 Error Sources N	3+ Error Sources N	Total N (%)
SMI (Unspecified)	1	1	2	0	4 (15.4)
Schizophrenia	6	0	4	2	12 (46.2)
Personality Disorder	1	0	0	0	1 (3.8)
Posttraumatic Stress Disorder	1	0	0	0	1 (3.8)
Bipolar Disorder	0	0	1	0	1 (3.8)
Depression	2	0	0	0	2 (7.7)
Two Diagnoses	2	0	1	0	3 (11.6)
Three+ Diagnoses	1	0	1	0	2 (7.7)
Total N (%)	14 (53.8)	1 (3.8)	9 (34.6)	2 (7.7)	**26 (100)**

Note: Cases with 2 or 3+ error sources contained the following: false confessions (11), ineffective assistance of counsel (1), prosecutorial misconduct (3), police misconduct (6), and mistaken eyewitness identification (3). Exonerees with 2 or 3+ diagnoses contained the following: schizophrenia (3), personality disorder (1), PTSD (2), bipolar disorder (4), and depression (2).

Figure 2 displays a breakdown of information on the errors that were uncovered which led to the exoneration of these factually innocent persons. Sources of exonerations for these cases included being exonerated based on the use of DNA evidence (57.7%), forensic errors (7.7%), ineffective assistance of counsel (7.7%), the introduction of new evidence (11.5%), the true culprit coming forward (7.7%), police misconduct (3.8%), and prosecutorial misconduct (11.5%). Additionally, 3.8% of exonerees were exonerated based on more than one source.

Figure 2. Sources of Exoneration (N = 26).



Note: Total exceeds case number size due to some individuals having more than one source contribute to their exoneration.

Lastly and most importantly, after examining all of the information available from these cases, it can be confirmed that at least three of these exonerees (11.5%), Benjamin Harris, Rickey Newman, and Frank Lee Smith, were given capital sentences (National Registry of Exonerations, n.d.). It is significant to mention that Smith died from cancer on death row and was later exonerated posthumously by the use of DNA evidence (National Registry of Exonerations, 2012a).

III Discussion

These cases show that those with SMI are at risk of being wrongfully convicted and consequently dealt a capital sentence due to cognitive and volitional impairments held by these individuals. Further, the data suggests that often times these wrongful convictions are due to individuals falsely confessing. While it is near impossible to prove reasons for wrongful convictions, a plausible case can be made that this occurs due to deceptive police tactics and coercion paired with the psychological vulnerabilities persons with SMI experience (i.e., cognitive impairments, distorted perceptions and beliefs, communication deficits, etc.) (Gudjonsson, 2012; Izutsu, 2005; Rogal, 2017; Leo, 2009; Johnson et al., 2019). While it is important to continue to research SMI and false confessions, future research should attempt to focus on other sources of wrongful convictions associated with SMI such as the struggles these individuals have in assisting with and testifying in their own defense. For example, perhaps qualitative research approaches focusing on interviews with death penalty lawyers could explore client and attorney interactions and retrieve pertinent information on how an individual's SMI may affect case outcomes.

Finally, it must be noted that no casual inferences should be derived from this data; however, the existence of at least 26 individuals wrongfully convicted with SMI should be a real cause for concern. To better understand the relationship between SMI and being wrongfully convicted, future research should also attempt to study "near miss" cases of individuals with SMI, which are cases in which an innocent person had charges against them dismissed or were acquitted before going to trial (Gould et al., 2013).

A. Strengthening Current Safeguards

Currently, there are some safeguards under state and federal law that do protect individuals with SMI, yet some argue they are inadequate (Izutsu, 2005; National Alliance on Mental Illness, 2019). First, a person with SMI may plead not guilty by "reason of insanity." The insanity defense protects those with SMI by allowing them to admit to the actions of their crime while asserting their lack of culpability based on their SMI (Legal Information Institute, n.d.). Still, this does not protect innocent individuals with SMI, as it requires them to admit to the actions. Next, the insanity defense has such high competency standards that a person with SMI must lack all ability to understand or, "Appreciate the nature and quality or the wrongfulness of his act" (Insanity Defense, 1984). Because of this, the insanity defense has low success rates, as many people with SMI are still found competent to stand trial as their symptoms do not fully detach them from reality (Vinocour, 2020; Izutsu, 2005). The current process in place just does not work, as it, "Systematically eliminates what is psychiatrically sound and psychologically workable, leaving us with a test for responsibility that may have no relationship at all to whether the offender needs help, punishment, confinement, or a combination of all three" (Vinocour, 2020, p. 189).

Further, it appears that the use of the insanity defense may actually be detrimental for individuals with SMI, as forensic psychological testimony is all too often, "Subverted by the application of the adversarial process to obscure and obfuscate crucial psychological factors" (Vinocour, 2020). Moving forward, it should not be permissible for prosecutors to obscure psychological testimony in an effort to develop an individual's SMI as an aggravating factor (Fluent & Guyer, 2006). Further, it would be beneficial for the insanity defense to be revisited and for competency standards to be changed to account for additional symptoms of SMI or to even reflect moral competence, which is now understood as a developmental deficit originating from impoverished environments and/or maltreatment in childhood (Walker et al., 2018). As Vinocour (2020) writes:

> Many people with severe mental illness "know" the difference between right and wrong in the abstract but still lack an accurate perception of reality and lack an understanding of the moral implications of their acts. How moral is it to convict and punish a person who is delusional and can't perceive reality accurately, or who is manic and unable to control their behaviors, or severely demented, with the pars of their brain that are responsible for inhibition and social judgment rotted away? (p. 76)

Next, mitigation specialists are another current safeguard in place for individuals with SMI. Mitigation specialists are trained professionals whose role is to investigate a defendant's background in an attempt to identify potential factors, such as SMI, that can assist defense counsel in creating an effective defense (Berrigan, 2008; Leonard, 2003). Since persons with SMI may distrust their attorneys and see them as threatening, it can be impossible for an attorney to develop an effective defense on their own, which is one reason mitigation specialists are so crucial (Payne, 2003). More importantly, attorneys lack the training and knowledge to recognize what signs and symptoms to look for when a defendant may be suffering from a SMI (Berrigan, 2008; Leonard, 2003; Vinocour, 2020). Thus, it is essential that mitigation specialists are utilized in capital cases, as they can offer protection for this vulnerable population. To strengthen this safeguard, it would

be beneficial to consider implementing widespread utilization of mitigation specialists in non-capital cases as well.

Further, the Court's decision in *Ford v. Wainwright*, also protects those with SMI. In this case, the Court held that it was unconstitutional for an individual with a mental illness to be executed if they could not comprehend the implications of their punishment (*Ford v. Wainwright*, 1986). Still, as with the insanity defense, the Court judges these standards too strictly. Further, the Court decided that if a person is deemed to have recovered from their SMI, then they can still be executed (National Alliance on Mental Illness, 2019). Evidently, however, serious mental illnesses are complex, with symptoms ranging in severity, frequency, and duration. If the U.S. Supreme Court were to apply the *Atkins* rationale to individuals with SMI, these issues would essentially dissolve, as protections for innocent persons with SMI would be secured.

B. Applying *Atkins v. Virginia* to SMI

The aforementioned information suggests that people with SMI are extremely vulnerable of being wrongfully convicted and facing a wrongful capital sentence. In fact, because of these vulnerabilities, the American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance on Mental Illness have endorsed ending capital punishment for those with SMI (American Bar Association, 2006). A strong argument can be made that the conclusions reached in *Atkins v. Virginia* should similarly be applied to cases where defendants have serious mental illnesses, as persons with SMI suffer from very similar incapacitating symptoms as do those persons with intellectual disabilities the *Atkins* rationale protects (Izutsu, 2005). Additionally, executing a person with SMI does not meet retributive and deterrent goals, since individuals with SMI have a decreased ability to comprehend and process information, to engage in rational thinking, or to control behavioral impulses (Izutsu, 2005; APA, 2013). Thus, this makes it less probable for these individuals to be able to processes the possibility of being executed as a form of punishment, as well as control their behaviors in light of that information (Izutsu, 2005).

Alternatively, those against adopting *Atkins* to protect individuals with SMI may argue that not all individuals with SMI lack moral culpability (Vinocour, 2020). While it is true that some persons with SMI—notably those with severe personality disorders—may in fact be capable of knowing right from wrong, the question is still whether or not the SMI caused the individual to engage in heinous behaviors. With that, regardless of whether or not some offenders with SMI need punishment or confinement, they all deserve treatment. Mental health treatment for those with SMI definitely meets deterrent goals and has the ability to be retributive when coupled with confinement. Nevertheless, executing individuals with SMI is a slippery slope, as there will always be some cases where the defendant's culpability cannot easily—or even accurately—be determined (Santa Maria, 2019). Additionally, the stories of those exonerees with SMI that spent time on death row should cause enough concern to warrant the exclusion of capital punishment for those with SMI.

C. Implementing Further Reforms

In addition to applying *Atkins v. Virginia* to individuals with SMI, we can also adopt additional criminal justice reforms to protect these individuals from being wrongfully convicted

in the first place. Reforms that have the potential to reduce the risk of false confessions, which is the leading cause of wrongful convictions for people with SMI (which is reflected in the data and known case exonerations), include: 1) taping interrogations; 2) altering interrogation techniques; 3) providing mandatory counsel during interrogations; and 4) conducting prompt DNA testing when available (Rogal, 2017). First, recording interrogation procedures provides accountability as it offers an unbiased and complete account of the interrogation that can be reviewed (Drizin & Leo, 2004; Trainum, 2016). Recording interrogations can reduce memory recall errors (Rogal, 2017; Drizin & Leo, 2004; Gudjonsson, 2012). This is important for persons with SMI, since these individuals may sometimes have trouble remembering exactly what happened during an interrogation, and without the recording, a judge or jury is left with only the interrogator's recollection of the interview (Rogal, 2017). Also, taping interrogations lessens the potential for individuals to falsely confess, as it can capture any police misconduct (Drizin & Leo, 2004; Gudjonsson, 2012). Further, recordings can be reviewed at trials, which helps to detect false confessions and makes interrogations more reliable (Drizin & Leo, 2004). Lastly, taping interrogations helps to show one's level of competency, which is vital for those with SMI, as it, "Showcases the understanding of their legal rights, their general understanding of the questions, their level of vocabulary, and how they cope with pressure in the interview, which can provide powerful evidence at trial or on appeal" (Gudjonsson, 2012).

Next, replacing current interrogation techniques with improved techniques, especially for those with SMI, can further protect these individuals from falsely confessing and subsequently from being wrongfully convicted. Some ways to do this include limiting the duration of interrogations, removing the use of false evidence tactics, and refraining from using suggestive or leading questioning (Trainum 2016; Kassin, 2010b; Drizin & Leo, 2004). An agency in Broward County, Florida, for example, took an extra step to protect people with intellectual disabilities, which could be applied to those with SMI in agencies worldwide. In this agency, as a check against false confessions, a confession from a person with an intellectual disability undergoes a "'Post Confession Analysis' by a unit supervisor, or, if there is no evidence corroborating the confession, by a team consisting of a psychologist, an assistant state's attorney, and a Criminal Investigation commander" (Drizin & Leo, 2004).

Similarly, after facing many false confessions, the British Parliament enacted the Police and Criminal Evidence Act in 1984, which initiated safeguards such as, "Recording of interrogations, mandated breaks for food and rest, and placed an affirmative burden of proof on law enforcement to show beyond a reasonable doubt that confessions were not obtained by 'oppression'" (Rogal, 2017). Then in the 1990s, they further developed a new interrogation model, PEACE, which uses an investigative interviewing, also known as the cognitive interview (CI), based on psychological science designed to enhance witnesses' recall of events through asking open-ended questions (Zalman, 2014). The goal of the PEACE model is to obtain and accurate and reliable account of events, unlike the Reid technique which focuses solely on retrieving a confession (Trainum, 2016). During CI, the interviewee attempts to mentally reconstruct the event by repeating every detail they can recall from different perspectives, working from start to finish, and then from end to beginning (Zalman, 2014). This technique takes a less confrontational approach and is a more relaxed interview style which asks individuals to recall what may have happened to them instead of employing accusatory or deceitful approaches (Rogal, 2017). In fact, CI has demonstrated its ability to significantly improve the amount of correct details an interview

suspect is able to recall (Zalman, 2014). Lastly, the PEACE model also has safeguards to protect individuals with SMI, as the model requires investigators to consult with their supervisors before interviewing an individual with a SMI (Trainum, 2016). While not widespread, investigative interviewing has fortunately begun making its way into the United States, as some law enforcement agencies are beginning to explore these methods (Zalman et al., 2017).

Next, providing mandatory counsel during interrogations can also reduce the risk of false confessions and thus, the rate of wrongful convictions for those with SMI. In fact, England has mandated that during interrogations, people with SMI have access to mental health professionals, lawyers/legal representatives, and "appropriate adults"—who are individuals whose main role is to offer advice, advocate for, facilitate communication, and ensure proper treatment of individuals with SMI during interviews (Gudjonsson, 2012; Trainum, 2016). Providing mandatory access to mental health professionals, lawyers/legal representatives, and "appropriate adults" would help to provide accountability in the interrogation room, as well as, provide those with SMI an ally to help them understand and invoke their constitutional rights. Finally, and importantly, because of the strength and accuracy of modern DNA testing, it is crucial that (when available) testing be conducted immediately, to ensure the exclusion of suspects from the start (Drizin & Leo, 2004).

Lastly, if we truly want to protect individuals with SMI, it is imperative that we improve education on mental illness. Defense attorneys, prosecutors, judges, and law students must receive thorough mental health training if they are to protect individuals with SMI against a system that offers little protection to vulnerable persons. Next, juror education also needs to be enhanced. It is imperative that the electorate be properly educated on mental illness, capital punishment, and the insanity defense. Additionally, while mental health experts usually agree on SMI diagnoses, conclusions reached about "insanity" often differ (Vinocour, 2020). Thus, mental health professionals asked to testify in court, should be forensically trained—and be certified to do so. Lastly, all Americans need greater education on SMI, as it is up to us to advocate for criminal justice policy change that protects this vulnerable group of people.

D. Conclusion

SMI greatly affects an individual's cognitive and functional capacities, causing diminished moral culpability and increasing susceptibility to vulnerabilities in criminal justice system processes, leading to wrongful convictions and erroneous capital sentences (Izutsu, 2005). The multiple wrongful conviction cases of individuals with SMI are telling and bear truth to this statement. When we refuse to protect those with SMI, we are paving the way for innocent people to be wrongfully executed. It is clear the United States Supreme Court is well aware of the dangers associated with capital punishment. It is time that the proper safeguards are enacted for people with SMI too.

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Appendix

Known Cases of Exonerees with SMI

George Allen, Jr.

Allen resembled the main suspect in a murder case; therefore, he was brought in by police for questioning. The original detective interviewing Allen ended the interrogation prematurely, noting the unreliability of Allen's statements, yet the arresting officer contacted another detective to keep interrogating Allen anyway. Allen, who suffered from schizophrenia, reported raping women during his interrogation, but later recanted his statements. At his trial, he denied involvement in the murder and stated he falsely confessed because he was convinced by the detective, "That they had evidence against him, that his claim of innocence was futile and that he had no choice but to admit to the crime" (Possley, 2018a). His first trial ended in a deadlock, but at the second trial in 1983, he was found guilty and sentenced to 95 years. In 2012, he was exonerated by DNA evidence (Possley, 2018a).

William Amor

In 1995, Amor's home caught fire, and his mother-in-law, who was the only one in the home, died of smoke inhalation. Amor, who suffered from depression, was interrogated for 15 hours. He eventually falsely confessed to setting fire to the home—only to immediately recant his statement. In 1997, he was convicted of murder and aggravated arson and sentenced to 45 years in prison. In 2018, he was exonerated due to faulty forensic science techniques (Possley, 2019g).

Michael Bottoms

Police conducted a mass investigation after a 13-year-old was murdered. They interviewed more than 200 people, but no suspect was identified. Bottoms, who suffered from schizophrenia, later turned himself in and falsely confessed to the murder, but then recanted his confession the next day. During his trial, Bottoms held that he was innocent, stating he only turned himself in to get out of the adult home he was living in because he, "Really didn't like it" (Blattner, 1992). Nevertheless, Bottoms was still convicted and sent to prison. Just months later, DNA evidence excluded Bottoms as the murderer, and he was freed (Blattner, 1992).

James Blackmon

In 1979, a student at St. Augustine's was murdered and police had no leads. Then in 1983, an individual from the state psychiatric facility contacted police and reported a patient, named "Brammer," stated he committed the murder at St. Augustine's. Police followed up on this lead, but there was no patient at the facility named Brammer. This led police to James Blackmon, who was the only patient at the facility that fit the general description of the culprit. Blackmon had diagnoses of schizophrenia, bipolar disorder, and other personality disorders. During interviews Blackmon, "Was never placed in custody, given any Miranda warnings, nor told he was a suspect in a murder investigation" (Otterbourg, 2019). Further, during interrogations Blackmon told police that he could levitate, was telepathic, could control other people's actions, had killed lots of people,

had never killed anyone, and that he could cause earthquakes. Blackmon eventually made a statement suggesting the murder location and that he "cut her," which led to murder charges. In 1988, Blackmon took an Alford Plea and was sentenced to life, but, in 2019, he was exonerated after a fingerprint from the crime scene excluded him as the killer (Otterbourg, 2019).

Carl Chatman

After a woman was raped in Chicago, she described to police that her rapist was a man wearing a Chicago Blackhawks jacket. This led to the arrest of Chatman, who was six blocks away, wearing a Blackhawks jacket—in Chicago. Chatman, who suffered from schizophrenia, falsely confessed. In 2004, he was convicted and sentenced to 30 years, despite DNA evidence. Chatman's appeal lawyers discovered that a building manager was present during part of his interrogation and learned this manager had filed a report—which was never disclosed to the defense—that stated he witnessed officers feed details of the crime to Chatman. Due to this new evidence, Chatman was exonerated in 2013 (Possley, 2019a).

Tom Edwin Chumley

Chumley's mother was murdered in 2003 and police had no physical evidence or murder weapon. In 2004, Chumley voluntarily went to police and confessed to the murder. Chumley suffered from posttraumatic stress disorder, depression, and bipolar disorder. During his trial in 2005, Chumley testified that he falsely confessed due to his depression. Nevertheless, he was still convicted of murder and sentenced to life in prison. In 2009, Chumley was acquitted and exonerated based on new testimonial evidence from a treating psychiatrist and police officer who both stated that Chumley confided in them he was going to falsely confess due to his depression resulting from his broken marriage and from being labeled from people in town as a suspect (Possley, 2013).

Henry Cunningham

In 1994, there was a case of mass sex abuse hysteria in Wenatchee, Washington. Cunningham, who suffered from bipolar disorder, was interviewed and falsely confessed to engaging in sexual acts with his children. In 1994, he was sentenced to 47 years in prison after pleading guilty to 23 counts. In 1999, he was exonerated when the Court of Appeals agreed with Cunningham's ineffective assistance of counsel claim which stated that Cunningham's attorney convinced him to plead guilty before allowing him to talk to a psychiatrist first (Possley, 2016b).

Benjamin Harris

After the murder of a local mechanic, Harris, who had a diagnosed mental illness, contacted police asking to help solve the case. Meanwhile, another man contacted police and reported Harris as a suspect. After failing a polygraph exam, Harris was arrested. In 1984, Harris was convicted of aggravated first-degree murder and sentenced to death, but in 1994, his conviction was overturned on the basis of inadequate assistance of counsel and he was granted a new trial. Charges were later dismissed at his new hearing in 1997 (Possley, 2012a).

William M. Kelly, Jr.

In 1990, a woman was murdered in Pennsylvania. Kelly, who suffered from manic depression, happened to fit the description of the suspect. Kelly was thus questioned and subsequently arrested after he made incriminating, although, contradictory, statements. Kelly knew that his confession was going to be used against him at trial, so he took a plea bargain. He was sentenced to 10-20 years in prison for murder, but in 1992, DNA testing excluded Kelly and inculpated another man (National Registry of Exonerations, 2012b).

Eddie Joe Lloyd

In 1984, a 16-year-old was brutally murdered in Detroit (National Registry of Exonerations, 2019). Lloyd contacted police about the publicized murder and offered to help solve it. Lloyd, who suffered from schizophrenia and bipolar affective disorder, made that call to police from a mental hospital—where he resided as an involuntary patient at the time (Rogal, 2017; Garret; 2011). Lloyd was questioned multiple times at the psychiatric hospital, during which, "Police officers allowed Lloyd to believe that, by confessing and getting arrested, he would help them 'smoke out' the real perpetrator" (National Registry of Exonerations, 2019). Accordingly, Lloyd confessed, was convicted of murder in 1985, and sentenced to life in prison. In 2002, DNA testing exonerated him (National Registry of Exonerations, 2019).

Benjamin Miller

During 1967-1971 six African American prostitutes were killed in Connecticut. A preacher, James Miller, contacted police and stated he received a call with the location of a body of one of the prostitutes that had not yet been found. Due to this call, police interviewed preachers with the last name Miller in the area, including Benjamin. Benjamin Miller, who suffered from schizophrenia, was interrogated several times. Although Miller initially maintained his innocence, he eventually inculpated himself when investigators coerced him to confess through the use of asking leading questions and showing Miller pictures of the murder scene. Miller later stated he falsely confessed because of threats from detectives and because he was scared of being beaten. In 1973, he was found not guilty by reason of insanity and was committed to a mental institution for a term of 25 years. In 1989, he was exonerated after it was found that the prosecution failed to disclose that there was clear evidence inculpating another man of the murders (Possley, 2012b).

Stanley Mozee

In 1999, a reverend was murdered in Dallas, Texas. During investigation, police learned that there were two men arguing with the reverend the day before the murder. Police were able to identify these two men through witnesses, but they were not solid leads. Thus, police instead decided to look into two homeless men who frequented the area, one of them being Mozee. Mozee, who suffered from schizophrenia, falsely confessed after being interrogated three times. Throughout the trial, he maintained his innocence, stating that during his interrogation he was intoxicated, had not slept, or been given his psychiatric medications, and was being fed details of the murder by detectives. Nevertheless, in 2000, he was convicted of capital murder and sentenced

to life in prison. In 2014, his conviction was vacated due to DNA evidence exculpating him (Possley, 2019f).

Curtis Moore

In 1975, a woman was murdered, but before she died, she was able to tell police her attacker was a black male. Therefore, police interrogated multiple African American men in the area, including Moore. Moore, who suffered from schizophrenia, did deny involvement in the murder, but he still made somewhat incriminating statements. In 1978, he was convicted of rape and murder and sentenced to life in prison, yet he was instead sent to a state mental hospital. In 1980, after filing a federal petition for a writ of habeas corpus, it was made clear that Moore was not read his Miranda rights until four hours into his interrogation. A U.S. District judge suppressed his confession and set aside the conviction, in addition to noting that the state failed to prove if Moore even understood his rights. In 1981, the U.S. Court of Appeals affirmed and dismissed the charges. Further, in 2008, DNA testing exculpated Moore and inculpated another man (Possley, 2019c).

Rickey Newman

In 2001, a woman, who was a rail rider, was brutally murdered in Van Buren, Arkansas. Police interviewed many individuals, including fellow rail rider, Newman, who suffered from major depression and posttraumatic stress disorder due to an extensive childhood history of trauma. He initially maintained his innocence, but ultimately ended up confessing after officers stated they had physical evidence of his involvement and that they would help get him mental health treatment if he confessed. Newman, however, was unable to provide detectives with any details about how the crime occurred. Nevertheless, he was still convicted of capital murder and sentenced to death in 2002. In 2017, his charges were dismissed, and he was exonerated due to DNA evidence excluding him and other collective factors, including forensic errors and police and prosecutorial misconduct (Possley, 2017c).

Josue Ortiz

In 2004, two brothers were murdered in Buffalo, New York. A few days after the murders, Ortiz, who suffered from schizophrenia and bipolar disorder, voluntarily flagged down police and confessed to the murders. Ortiz pled guilty to two counts of first-degree manslaughter and was sentenced to 25 years in prison. After the case was reexamined by the FBI in 2014, DNA evidence exculpated him and inculpated three men, and his conviction was vacated (Possley, 2017a).

Laverna Pavlinac

In 1990, a woman was raped and killed in Oregon. Pavlinac, who suffered from posttraumatic stress disorder after suffering years of abuse, read about the murder in the paper. Pavlinac believed this murder could help end her abusive relationship with her boyfriend, therefore, she called police and told them he was the murderer. However, Pavlinac later switched her story, stating that her boyfriend forced her to help kill the woman. During her trial she maintained her innocence, stating that she falsely confessed to escape her boyfriend. Nevertheless, she was still convicted of felony murder and sentenced to life in prison with a minimum of 10

years. In 1995, the real killer wrote police, providing inculpating information and confessing to the murder, resulting in Pavlinac's exoneration (Perry, 2019).

Freddie Peacock

In 1976, a woman was raped and wrongfully identified her attacker as her neighbor, Peacock. Peacock had a diagnosed SMI and informed detectives of this during his interrogation. Peacock originally maintained his innocence, but ultimately ended up confessing to the rape. Still, Peacock was unable to provide officers with details on when, where, or how the rape occurred. Additionally, during interrogation police officers wrote a confession statement, including the details of the rape, yet never asked Peacock to sign it. Nevertheless, Peacock was convicted of rape and sentenced to up to 20 years in prison. In 2010, DNA testing exonerated Peacock (National Registry of Exonerations, 2016b).

Jamie Lee Peterson

In 1996, a woman was murdered in Kalkaska, Michigan and the police had no solid leads. Later in 1997, police received a tip from a prisoner in the county jail that a fellow inmate, 22-year-old Jamie Lee Peterson, admitted to the crime. Peterson, who had a diagnosed mental illness, was in jail awaiting trial for a statutory rape charge. Peterson maintained his innocence until failing a polygraph exam, at which point he confessed. He then recanted his confession days later, stating he only confessed because he wanted to be sent to a state hospital. In 1998, he was convicted and sentenced to life, despite exculpatory DNA evidence, but in 2014, he was exonerated due to retesting of DNA evidence that inculpated the true culprit (Possley, 2019e).

John Purvis

In 1983, a woman was found murdered in her home and her 18-month-old baby was found dead from dehydration. Police questioned Purvis, who happened to be a neighbor of the woman, after other neighbors claimed he was a bother. Purvis, who suffered from schizophrenia, maintained his innocence, but later admitted to a psychiatrist that he committed the murder; however, he recanted his confession less than 24 hours later. Purvis was never once read his Miranda rights. Additionally, two psychiatrists testified at trial that Purvis was psychologically coerced into confessing. Further, Purvis reported at trial that, "He confessed because he thought they would let him go home if he did" (Possley, 2018b). In 1985, he was convicted and sentenced to life, despite any evidence linking him to the crime. In 1993, he was exonerated after the true killer contacted police and confessed to being hired as a hitman by the woman's husband (Possley, 2018b).

Frederic Saecker

In 1989, a woman was kidnapped from her home, raped, and then abandoned in Wisconsin—where she was found by police walking down a highway. At about the same time police found the woman, Saecker was seen near the same highway. Saecker, who suffered from schizophrenia, was initially arrested, and afterwards made some incriminating statements. During his trial in 1990, he maintained his innocence, yet was still convicted of second-degree sexual

assault, kidnapping, and burglary. He was sentenced to 15 years in prison. In 1996, he was exonerated due to DNA testing that exculpated him (Possley, 2019d).

Frank Lee Smith

In 1985, an eight-year-old was raped and murdered in her home by a burglar. A composite sketch was put together by neighbors and the victim's mother, which led to the arrest of Smith (National Registry of Exonerations, 2012a). Smith had a criminal history and suffered from schizophrenia. At Smith's trial, a detective reported that he tricked Smith into confessing (Garrett, 2011). In 1986, Smith was convicted and given the death penalty. Smith died of cancer on death row in January of 2000. Only after his death, a sample of his blood was finally tested against a DNA sample taken from the victim. Eleven months after his death, in December of 2000, he was exonerated by DNA evidence, which inculpated the true killer (National Registry of Exonerations, 2012a; Garrett, 2011).

Ada Joann Taylor

In 1985, a woman was raped and killed in her home in Beatrice, Nebraska. Six people, including Taylor, were convicted of committing the crime. The initial suspect was interrogated by police due to his car matching a car at the crime scene. What followed this interrogation, was a domino effect of suspects implicating suspects. Taylor herself being implicating and implicating two other innocent suspects during her interrogation (National Registry of Exonerations, 2016a). During deposition, it was reported Taylor suffered from a personality disorder. At one point, Taylor had also noted that she had "mental telepathy capabilities" (Garrett, 2011). Taylor plead guilty and testified against a codefendant for a reduced sentence of 10-40 years in prison. However, she was exonerated by DNA testing in 2009 (National Registry of Exonerations, 2016a).

Glenn Tinney

In 1988, a man was beaten and killed in his store in Ohio. After having no leads, police interviewed, Tinney, who was currently serving time in prison for robbery. Tinney, who suffered from schizophrenia, denied involvement in the crime, but eventually admitted to the murder, only offering to provide information (which was inconsistent with the known facts) once police provided him with coffee, cigarettes, and $250 so he could buy a radio. He accepted a plea deal to avoid a capital murder charge and was sentenced to 15 years to life in prison. In 2012, the case was remanded for an evidentiary hearing, during which three officers testified the evidence in Tinney's case points to his innocence. In 2014, Tinney was exonerated (Possley, 2016a).

Mike Wilkerson

In 1997, a woman was raped and murdered. A mistaken eyewitness identification led police to suspect Wilkerson. Wilkerson, who had a diagnosed mental illness, allegedly confessed. However, "Wilkerson later asserted that he never confessed, but only was responding to some of the detective's statements by asking, "I did that?" (Possley, 2017b). In 2000, he was convicted; however, he was found not guilty by reason of insanity and was committed to a mental health institution. In 2017, DNA tests exonerated him (Possley, 2017b).

Rodney Woidtke

In 1988, Woidtke, who suffered from schizophrenia, found a decomposed body. He originally maintained his innocence, but after being interrogated for three days and psychologically manipulated by interrogators, eventually falsely confessed. Woidtke was found guilty based on his false confession and sentenced to 45 years in prison. He was exonerated in 2001 after evidence emerged that another man committed the murder (National Registry of Exonerations, 2015).

Cathy Woods

In 1976, a woman, Michelle Mitchell, was murdered in Reno and police had no leads. In 1979, police received a call from Woods (who was a patient in a mental hospital at the time) that, "She had killed a girl named Michelle in Reno" (Possley, 2019b). Even though Woods, who suffered from schizophrenia, "Made various statements that were obviously false (she said that she worked for the FBI and her mother was poisoning her), police decided that she had killed Mitchell" (Possley, 2019b). In 1980, Woods was convicted of first-degree murder and sentenced to life without parole. In 2014, DNA testing excluded her and inculpated the killer (Possley, 2019b).

Smoke but No Fire: Convicting the Innocent of Crimes That Never Happened

By Jessica S. Henry, Professor, Justice Studies, Montclair State University, U.S.A.
Oakland, California: University of California Press, 2020

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In *Smoke but No Fire*, Jessica Henry discusses the phenomenon of "no-crime wrongful convictions," where individuals are convicted of crimes that never happened, such as when someone is convicted of homicide when the alleged victim is still alive. This is a remarkable and disturbing phenomenon that stands in contrast to the more commonly discussed situation where an individual is incorrectly identified as the perpetrator of a crime that was committed by someone else. In fact, one of the most surprising revelations in the book is just how common no-crime wrongful convictions are. Relying on the *National Registry of Exonerations*,[1] a database maintained by three American universities of wrongful criminal convictions in the United States since 1989, Henry asserts that "nearly one-third of all known exonerations of innocent people involve no-crime wrongful convictions." [2] This is clearly a phenomenon worth studying.[3]

Smoke but No Fire is an engaging read that offers a damning indictment of the American criminal justice system and its pervasive indifference to the possibility of innocence, perhaps especially in minor crime cases. As an academic study of no-crime wrongful convictions, however, the book falls a little short. While Henry sometimes isolates and analyzes the characteristics and causes of no-crime wrongful convictions specifically, the book for the most part addresses factors contributing to wrongful convictions more broadly – and sometimes unfairness or impropriety in the delivery of American criminal justice generally. In truth, it would be challenging to distinguish how something like cognitive biases play a role in a particular subset of wrongful convictions as diverse and extensive as no-crime wrongful convictions; analyses of mental states are almost always inferential and inexact. Henry also fairly notes that it is not surprising that a subset of wrongful convictions is "in general caused by the same factors as wrongful convictions or that there are some similarities between actual-crime and no-crime wrongful conviction exoneration data." [4] But the real value in isolating a subset of wrongful convictions lies in what it can reveal

[1] See online: https://www.law.umich.edu/special/exoneration/Pages/about.aspx.
[2] *Smoke but No Fire*, 4 [*Smoke*].
[3] I say this even though the Registry's criteria for labelling a case as an exoneration allow for inclusion of some cases in which the evidence of innocence is incomplete and, arguably, insufficient: see online: https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx. Indeed, Henry sometimes discusses cases where, based on the description given, it is not entirely clear that an innocent person was convicted. See, for example, *ibid* at 54 (discussion of the Anthony Cooper case). Nonetheless, even if one might quibble at the margins, it is clear that a large number of individuals have been convicted of crimes that never occurred. Henry also quite defensibly argues that, over and above the individuals listed in the Registry, many others have very likely been convicted of phantom crimes in misdemeanor cases.
[4] *Smoke*, *supra* note 2 at 11.

about the unique or distinctive characteristics of the subset, the factors that contribute to it, the ways in which those factors interact, and so forth. Indeed, that is Henry's stated goal.[5] For much of the book, however, Henry establishes what *can* cause a no-crime wrongful conviction without explicitly analyzing whether and how that differs from what can cause an actual-crime wrongful conviction.

This is not to say that the book offers no insights specific to no-crime wrongful convictions. The introductory chapter in particular includes some interesting data, such as the relatively high incidence of no-crime wrongful convictions in drug cases and child (but not adult) sex abuse cases[6] and the general irrelevance of eyewitness misidentification as a contributing factor. Perhaps most striking is the finding that women are disproportionately susceptible to being convicted of a crime that never occurred.[7] The ways that gender and sexual identity play a role in wrongful convictions, while not ignored, have not been the subject of sufficient study to date. Another chapter quite germane to an understanding of no-crime wrongful convictions is the one on police misconduct, which describes troubling incidents where police framed innocent individuals, sometimes to cover up their own crimes.

Some aspects of the book are of interest because of the issues addressed, irrespective of any demonstrated connection to no-crime wrongful convictions. The chapter on false accusations discusses some of the research on lie-detection. There is actually a treasure-trove of research on the subject,[8] research that is critically important to assessing and enhancing reliability in the criminal justice system. To the extent that credibility is at issue in cases, the system relies fundamentally on the truth- and lie-detection capacities of triers of fact. Triers are the last defence against untruthful and exaggerated testimony unnoticed (or ignored) by police, prosecutors and other actors in the system. Yet research consistently shows that people are not very good at detecting deceit and that they often rely on unhelpful and misleading cues (such as gaze aversion). This raises questions about the importance the legal system attaches to testimonial demeanour, the ability to see a witness' full face in court, the so-called preferred position of trial courts in determining credibility, and so forth.

The chapters on misdemeanors and judges are also of note. Wrongful convictions may be most common in minor crime cases, largely because of the prevalence of false guilty pleas. This is almost impossible to prove given that the ability and incentive to uncover factual error in such cases is so limited. But it is not hard to understand why an innocent defendant might falsely admit culpability for a relatively minor offence, even when the ultimate penal and collateral consequences are non-trivial. Years ago, Malcolm Feeley argued that in minor cases the process can be the punishment, referring to the sometimes overwhelming costs associated with contesting a charge (paying counsel, repeatedly missing work or child-care responsibilities for court dates, enduring bail restrictions for months on end, etc.). [9] Relying on her experience as a New York

[5] *Ibid* at 13: "Although the factors that contribute to actual-crime wrongful convictions are similar to those that cause no-crime wrongful convictions, this book examines how those contributing factors play out specifically in no-crime cases."
[6] Henry appropriately discusses the limitation of this finding: *ibid* at 12-13.
[7] *Ibid* at 25, 26.
[8] See, for example, Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities*, 2nd ed (Hoboken, NJ: John Wiley & Sons, 2008).
[9] *The Process is the Punishment*, (New York: Russell Sage, 1992).

public defender, Henry vividly describes a system in which defendants – especially poor and marginalized ones – routinely experience costs that would make a false guilty plea an entirely logical decision.

The role of judges in wrongful convictions has probably been too often disregarded. In truth, it is a complex topic and, in my view, Henry is not always sufficiently nuanced or careful in her remarks. She rightly calls out judges who display prejudice, bias, or incompetence. But she goes further and asserts that "[a]t every stage of the criminal process, judges have the power to prevent or correct no-crime wrongful convictions" yet "often fail to do so." [10] She argues that, most of the time, judges fail in their duty to respond to bad lawyering – "sleeping or drunk lawyers, lawyers who are unaware of the law or the facts, lawyers who did no investigation, lawyers who call the wrong witnesses or make the wrong arguments." [11] She claims that judges "accept pleas from innocent people without an established factual basis, such as in drug cases without lab tests,"[12] even though they "could ensure that defendants plead guilty to crimes that have a factual footing."[13] It is not clear to me that matters are so simple. Judges are neutral arbiters in an adversarial system of justice. The are usually presented with an incomplete and selective picture of the facts of a case, filtered by police and/or counsel. They are routinely confronted with accused individuals willing, even eager, to admit facts. They are limited in their ability to interfere with the decisions and tactics of (especially defence) counsel, and subject to what are sometimes liberal rules of evidence and procedure. Henry herself notes the lax standard for assessing the competence of counsel in *Strickland v. Washington*.[14] Once one moves past the proverbial bad apples, it can be hard to identify exactly when a judge contributed to a wrongful conviction, other than in a technical sense.

The final chapter in the book contains a series of recommendations for reform. Most of the recommendations are sensible but only a small number are new and a couple are curious.[15] Among the most significant are the recommendations to liberalize the bail system and expand the discovery rules in the United States. Unfortunately, Henry chose not to explore any individual reform in detail. Perhaps that is understandable in a book designed to introduce the world to an important and substantial phenomenon, but I would have preferred to see Henry examine in depth a smaller number of reforms of particular importance to the prevention of no-crime wrongful convictions.

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[10] *Smoke, supra* note 2 at 129.
[11] *Ibid* at 141.
[12] *Ibid* at 143.
[13] *Ibid* at 150.
[14] *Strickland v. Washington,* (1984) 466 US 668.
[15] For example, Henry says "prosecutors should decline to pursue cases that rely exclusively on forensic evidence": *Smoke, supra* note 2 at 176. Ignoring the fact that only a rare case would rely *exclusively* on forensic evidence, this recommendation seems overly broad. Some forensic sciences are reliable and it will sometimes be appropriate for a prosecutor to pursue a charge even when a particular science or its application in a case is contestable. Prosecutors should drop cases that have obvious weaknesses but we cannot expect them to withdraw from consideration all cases that rely heavily on a category of evidence, especially one as broad as forensic evidence. Prosecutors are not judges and they are entitled to bring forth claims that have a plausible basis in fact and law. If the trial system is too fallible to identify the inaccurate claims (as it sometimes appears to be), it is the trial system that must be changed.