The Wrongful Conviction Law Review

Volume 2, Issue 1

Editorial Board

The Wrongful Conviction Law Review

Volume 2, Issue 1 **Cited as (2021) 2:1 Wrongful Conv L Rev**

Table of Contents

Advocacy and the Innocent Client: Defence Counsel Experiences with Wrongful Convictions and False Guilty Pleas

Caroline Erentzen
Department of Psychology
University of Toronto
Canada

Regina A. Schuller
Department of Psychology
York University
Canada

Kimberley A. Clow
Faculty of Social Science and Humanities
Ontario Tech University
Canada[1]

Much of our knowledge about wrongful convictions is derived from known exonerations, which typically involve serious violent offences and lengthy sentences. These represent only a small proportion of offences prosecuted in Canada each year, and little is known about how often innocent defendants may be wrongfully convicted of less serious offences. Relatedly, recent discussions have begun to focus on the problem of false guilty pleas, in which defendants knowingly plead guilty to a lesser offence due to the time and cost required to defend their innocence, which often outweigh the punishment itself. The majority of our knowledge of the factors contributing to wrongful convictions is based on American scholarship, with less empirical research exploring wrongful convictions within the Canadian context. The present research surveyed Canadian criminal defence lawyers about their experiences representing innocent clients, including their perspective on the underlying causes of wrongful convictions in Canada and recommendations for reform to the criminal justice system. Nearly three-quarters of respondents reported that they had represented at least one client who was convicted despite credible claims of innocence, with many reporting that they have personally seen probable wrongful convictions occur on a regular basis. Moreover, counsel described a system designed to elicit a guilty plea, with lengthy pre-trial delays, routine denial of bail, and inadequate funding of Legal Aid. This research expands our knowledge of wrongful convictions in Canada, their hidden prevalence, and systemic problems that increase the likelihood of their occurrence

[1] Acknowledgements: The authors would like to extend sincere appreciation to Anthony Laycock of the Criminal Defence Lawyers Association for his assistance with the distribution of study materials to counsel in the initial stages of data collection.

I Introduction and Literature Review

The Canadian criminal justice system is constructed around a sacrosanct assurance that those guilty of an offence will receive punishment for their crimes while the innocent will remain free from the pains of imprisonment.[2] This sentiment, originally proposed in Blackstone's celebrated maxim,[3] is enshrined as the presumption of innocence guaranteed by subsection 11(d) of the *Canadian Charter of Rights and Freedoms*.[4] Despite these assertions, we must consider the possibility of imperfection in any large social institution. Certainly, it is likely that true culprits go free, their guilt not established beyond the high threshold of reasonable doubt. Far more disconcerting is the possibility that the innocent become ensnared in the machinery of the law, convicted and imprisoned for another's crime or for a crime that did not occur at all.

An existing academic literature has attempted to explore the frequency of such wrongful convictions and their concomitant causal factors, with much of this knowledge coming from sensational and well-publicized cases, typically involving highly violent (but statistically rare) crimes such as aggravated sexual assault and murder.[5] Less attention has been paid to the frequency

[2] *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, online: <https://canlii.ca/t/1ftv6>; *R v Seaboyer; R v Gayme* 1991 CanLII 76 (SCC), [1991] 2 SCR 577, online: <https://canlii.ca/t/1fskf>.
[3] As in "it is better that ten guilty persons escape than that one innocent person suffers." in William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon, 1765) at 358.
[4] *Canadian Charter of Rights and Freedoms*, s.2, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11, online: <https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-40>.
[5] Canada, Lamer Commission of Inquiry, *Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken* (2006), online: <https://www.justice.gov.nl.ca/just/publications/lamerreport.pdf>; Canada, Royal Commission on the Donald Marshall Jr Prosecution, *Commissioner's Report* (Halifax, NS: Queen's Printer, 1989), online: <https://archives.novascotia.ca/marshall/report>.

of wrongful convictions from less serious offences or those obtained through a plea bargain.[6] Such estimates are extremely difficult to obtain. Given that most criminal convictions in Canada and the United States are the result of a guilty plea,[7] it is unknown how many of these pleas may have resulted in a wrongful conviction. By pleading guilty, it becomes difficult to prove innocence *ex post facto*.[8]

Standing between the state and the accused is the defence lawyer, often the only person protecting the rights and interests of those accused of crimes. Defence counsel may be best positioned to know whether clients have been charged and convicted despite credible claims of innocence, and how often this might occur on a more day-to-day basis. The goal of the present research was to solicit the unique perspectives of Canadian defence counsel regarding their experiences representing clients with credible claims of innocence. Despite the critical role played by defence lawyers, little is known about their personal experiences with the innocent and the factors that counsel believe increase the risk of a wrongful conviction.

A. Empirically Based Estimates of Wrongful Convictions

Early discussions on wrongful convictions addressed whether they occurred at all, historically believed to be rare or improbable events.[9] As early as 1912, the American Prison Congress Review concluded that there were no cases of innocent execution in America following a methodologically flawed survey of prison wardens across the country.[10] In 1923, Justice Learned Hand described the possibility of an innocent man's conviction as a spectre and "an unreal dream."[11] These early attitudes were eventually challenged as indisputable stories of wrongful convictions emerged. For example, Edwin Borchard [12] identified 65 American and British cases wherein the crime for which the accused was convicted never occurred, the true culprit was later identified, or new evidence emerged to exonerate the inmate. Similarly, Edward Radin [13] identified another 80 cases of wrongful conviction, and Adam Bedau and Michael Radelet [14] assessed 350 convicted persons between 1900 and 1986 who were determined to be innocent, 139 of whom had been sentenced to death. Some were exonerated only hours or days before their scheduled execution.

---

[6] See Allison D Redlich, Miko M Wilford & Shawn Bushway, "Understanding Guilty Pleas Through the Lens of Social Science" (2017) 4 Psychol Pub Pol'y & L 458, online: <https://psycnet.apa.org/doi/10.1037/law0000142>; Miko M Wilford & Allison D Redlich, "Deciphering the Guilty Plea: Where Research Can Inform Policy" (2018) 24 Psychol Pub Pol'y & L 145, online: <http://dx.doi.org/10.1037/law0000169>.

[7] Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal Soc Issues 1 [*Sherrin*].

[8] *Sherrin, ibid;* see also Kate Wynbrandt, "From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions" (2016) 126 Yale LJ 545, online: <http://digitalcommons.law.yale.edu/ylj/vol126/iss2/6> [*Wynbrandt*].

[9] Edwin M Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Injustice* (Garden City, NY: Doubleday, 1932) [*Borchard*]; Michael L Radelet & Hugo Adam Bedau, "The Execution of the Innocent" (1998) 61:4 LCP 105, online: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1108&context=lcp> [*Radelet*]; Robert J Ramsey & James Frank, "Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors" (2007) 53 J Res Crime & Delinq 436, online: <https://doi.org/10.1177/0011128706286554> [*Ramsey*].

[10] Robert H Gault, "Find No Unjust Hangings" (1912) 3 J Crim Law 131.

[11] *United States v Garrison,* [1923] 291 F 646 at 649.

[12] *Borchard, supra* note 9.

[13] Edward D Radin, *The Innocents* (New York, NY: William Morrow, 1964).

[14] *Radelet, supra* note 9.

In a perfect world, we would be able to separate the guilty from the innocent with precision. However, we know that factually innocent people have been tried, convicted, and sentenced for crimes they did not commit. We must thus acknowledge that wrongful convictions occur, but how often? Unfortunately, this is a profoundly difficult question to answer. If we could easily detect when wrongful convictions occurred, presumably they would not have occurred in the first place. We simply do not have a litmus test by which to identify a wrongful conviction. Despite these challenges, some American scholars have attempted to produce estimates based on data collected from known exonerations. These estimates include 2.3% for death row cases,[15] 2% to 5% for rape and murder cases,[16] 3% to 5% for capital rape-murder cases,[17] and 7% for death penalty cases.[18] Similarly, James Liebman and colleagues [19] determined that appellate courts detected serious and reversible errors in nearly 70% of capital cases reviewed between 1973 and 1995. Using survival analysis, Samuel Gross and colleagues estimated that 4% of defendants sentenced to death between 1973 and 2004 would have been exonerated if their sentence had not been commuted to life.[20] The authors offered this figure as a conservative estimate of the false conviction rate for death sentences in the United States.[21] In addition, a forensic review was undertaken of 714 sexual assault convictions in Virginia in the 1970s and 1980s for which there was physical evidence and viable DNA present. In more than 11% of these convictions, the DNA of the man convicted did not match the DNA recovered from the victim.[22]

B. A Focus on Severe Offences

Our knowledge of exonerations is largely based on convictions for rape and/or murder, relatively rare offences within criminal law. Far less is known about possible wrongful convictions associated with less serious offences. For instance, 95% of known DNA exonerations occurred in murder or rape cases, although these cases represent only 2% of convictions in the United States[23]

---

[15] Samuel R Gross & Barbara O'Brien, "Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases" (2008) 5 JELS 927, online: <https://doi.org/10.1111/j.1740-1461.2008.00146.x> [*Gross 1*].

[16] Samuel R Gross, "Convicting the Innocent" (2008) 4 Annu Rev Law Soc Sci 173, online: <https://doi.org/10.1146/annurev.lawsocsci.4.110707.172300> [*Gross 2*].

[17] Michael D Risinger, "Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate" (2007) 97 J Crim L & Criminology 761, online: <http://www.jstor.org/stable/40042842> [*Risinger*].

[18] James S Liebman, James S, Jeffrey Fagan & Valerie West, "A Broken System: Error Rates in Capital Cases, 1973-1995" (2000) 15 Public Law & Legal Theory Working Paper Group, online: <https://dx.doi.org/10.2139/ssrn.232712>.

[19] *Ibid.*

[20] Samuel R Gross, Barbara O'Brien, Chen Hu & Edward H Kennedy, "Rate of False Conviction of Criminal Defendants Who are Sentenced to Death" (2014) 111:20 PNAS 7230, online: <https://doi.org/10.1073/pnas.1306417111> [*Gross 3*]. The authors note that the death sentence is associated with the highest exoneration rate (12%) compared to other offences, likely due to the extremely high stakes for the accused. As many death sentences are commuted to a life sentence upon appeal or upon state legislation abolishing the death penalty, the author employed survival analysis to estimate how many of those commuted sentences would have resulted in an exoneration if still subject to the death penalty.

[21] *Ibid* at 7230.

[22] Kelly Walsh, Jeanette Hussemann, Abigail Flynn, Jennifer Yahner & Laura Golian, "Estimating the Prevalence of Wrongful Convictions" (2017) The Urban Institute Technical Report, online: <https://www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf> [*Walsh*].

[23] *Gross 1, supra* note 15.

and Canada.[24]. Similarly, Gross and colleagues[25] report that 96% of exonerations between 1989 and 2003 involved convictions for murder and/or rape; the remaining four percent involved other violent offences such as kidnapping or assault. This finding is of interest, as only approximately 10% of prisoners in the United States are incarcerated for rape or murder, whereas the majority are incarcerated for property, drug, or public disorder offences.[26] Very little is known about how often innocent persons are convicted or falsely plead guilty to these less severe offences.

One reason that known exonerations have been identified primarily in the most serious of offences pertains to the significant amount of time, emotional energy, and cost involved in pursuing an exoneration. The average length of time required to obtain an exoneration is more than a decade,[27] far beyond the length of most sentences. A person who is wrongfully convicted of a less serious offence may be unwilling or simply unable to pursue an exoneration. Moreover, in less serious offences such as theft or drug possession, there is unlikely to be any DNA evidence available to exculpate the defendant. These less serious crimes are nonetheless susceptible to eyewitness errors, police tunnel vision, and other factors known to contribute to miscarriages of justice.[28] Gross and colleagues note that the vast majority of innocent defendants go undetected, a figure that is "not merely unknown but unknowable."[29] The purpose of the present research was to find alternative ways to explore wrongful convictions in Canada, both in terms of frequency and nature, by exploring the experiences of defence counsel.

C. Known Causes of Wrongful Convictions

To understand the occurrence of wrongful convictions, it is first necessary to discuss the factors that are frequently associated with their occurrence. We note that much has been written on this topic in great detail elsewhere, so the present discussion provides only a brief overview of some of the factors commonly identified as contributing to wrongful convictions. Prominent among these are eyewitness misidentifications, which are particularly common among sexual assault and child sexual abuse cases.[30] A number of elements can contribute to eyewitness errors, including suggestive police questioning, problematic lineup procedures, and poor interview techniques.[31] The National Registry of Exonerations notes that perjured or false testimony is also

---

[24] Ashley Maxwell, "Adult Criminal Court Statistics, 2014/2015" (2015) Juristat catalogue No 85-002-X ISSN 1209-6393, online: <https://www150.statcan.gc.ca/n1/daily-quotidien/161031/dq161031e-eng.htm>.

[25] Stephen R Gross, Kristen Jacoby, Daniel J Matheson, Nicholas Montgomery & Sujata Patil, "Exonerations in the United States 1989 through 2003" (2005) 95 J Crim L & Criminology 523, online: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7186&context=jclc> [*Gross 4*].

[26] *Ibid.*

[27] *Walsh*, *supra* note 22.

[28] *Gross 4*, *supra* note 25.

[29] *Gross 3*, *supra* note 20 at 7230.

[30] National Registry of Exonerations (2019), online: <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>. Reviewing more than 250 exonerations made through the Innocence Project, Garrett (2011) determined that 76% could be attributed to mistaken identification: Brandon L Garrett, *Convicting the Innocent: When Criminal Prosecutions Go Wrong* (Cambridge, MA: Harvard University Press, 2011). Similarly, Gross *et al* observed that 66% of the exonerations under study between 1989 and 2003 involved at least one eyewitness misidentification: *Gross 4*, *supra* note 25.

[31] *Ibid*.

a common factor in documented wrongful convictions.[32] The power of forensic science before a jury is considerable, as many jurors perceive evidence such as fingerprints or hair samples as unambiguous and infallible.[33] There are, however, concerns about more interpretive forms of forensic science, such as hair/fiber evidence and bite mark analysis, as well as errors such as inadvertently switched samples, clerical errors, or contamination of samples.[34]

Noble cause corruption may occur where the adversarial system becomes psychologically transformed into a win-lose game mentality for police and prosecutors, wherein the ends (i.e., a conviction) justify the means (i.e., misconduct).[35] It may be characterized by the police withholding or suppressing evidence that would enable a full and proper defence, such as confirmed alibis, exculpatory evidence, or the existence of other suspects.[36] Standing against the prosecution and police are defence lawyers, the vast majority of whom provide competent and professional representation.[37] Many defendants are indigent or impecunious, relying on self-representation or public defenders,[38] with substantially less funding attributed to Legal Aid than to Crown prosecutors, the scales may seem heavily tipped against the accused.[39]

Despite the almost universal belief that no one would confess to a crime they did not commit, a consistent minority of exonerations have involved a false confession.[40] False confessions have been a regular contributory factor in wrongful convictions. The most common causes of false confessions include coercive interrogation techniques used by police[41] and

[32] Of the more than 2,500 exonerations in the Registry, approximately 58% involved some form of false accusation or perjured testimony, compared to 28% that involved an honest but mistaken eyewitness identification.
[33] William C Thompson, "Forensic DNA Evidence: The Myth of Infallibility" in Sheldon Krimsky and Jeremy Gruber (eds) *Genetic Explanations: Sense and Nonsense* HUP, online: <https://escholarship.org/uc/item/41j6x7v6>.
[34] Brandon L Garrett, "Judging innocence" (2008) 108 Colum L Rev 55, online: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6558&context=faculty_scholarship>; Gerald LaPorte, "Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science" (2018) 279 NIJ Journal 1, online: <https://www.ncjrs.gov/pdffiles1/nij/250705.pdf>; Joelle Vuille & Christophe Champod, "Forensic Science and Wrongful Convictions" in Quentin Rossy, David Decary-Hetu, Olivier Delemont & Massimiliano Mulone (eds), *The Routledge International Handbook of Forensic Intelligence and Criminology* (London: Routledge, 2017).
[35] Bruce Macfarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31 Man LJ 403, online: <http://netk.net.au/Canada/MacFarlane.pdf> [*Macfarlane*].
[36] Michael Caldero & JP Crank (eds), *Police Ethics: The Corruption of Noble Cause* (New York, NY: Elsevier, 2011); Jonathon A Cooper, "Noble Cause Corruption as a Consequence of Role Conflict in the Police Organisation" (2012) 22 Polic Soc 169, online: <https://doi.org/10.1080/10439463.2011.605132>; John Crank, Dan Flaherty & Andrew Giacomazzi, "The Noble Cause: An Empirical Assessment" (2007) 35 JCJ 103, online: <https://doi.org/10.1016/j.jcrimjus.2006.11.019>; Kim Loyens, "Rule Bending by Morally Disengaged Detectives: An Ethnographic Study" (2013) 15 Police Pract Res 62, online: <https://doi.org/10.1080/15614263.2013.770941>.
[37] Jerome P Kennedy, "Writing the Wrongs: The Role of Defence Counsel in Wrongful Convictions" (2006) 46 Can J Crim 197, online: <https://doi.org/10.3138/cjccj.46.2.197>.
[38] *Sherrin, supra* note 7.
[39] *Ibid*; Ronald F Wright, "Parity of Resources for Defence Counsel and the Reach of Public Choice Theory" (2004) 219 Iowa L Rev 219, online: <https://www.uclalawreview.org/pdf/58-6-5.pdf>.
[40] Professor Saul M Kassin, Sara C Appleby & Jennifer Torkildson Perillo, "Interviewing Suspects: Practice, Science, and Future Directions" (2011) 15 Legal Criminol Psychol 39, online: <https://doi.org/10.1348/135532509X449361> [*Kassin 1*]; Saul M Kassin & Gisli H Gudjonsson, "The Psychology of Confessions: A Review of Literature and Issues" (2004) 5 Psychol Sci Public Interest 33, online: <https://doi.org/10.1111%2Fj.1529-1006.2004.00016.x> [*Kassin 2*].
[41] Kassin and Gudjonsson identified a number of these problematic techniques, which may include questioning the suspect for long periods of time, withholding food or water, denial of bathroom facilities, refusing access to counsel, harsh interrogation style, presentation of false evidence, and promises of leniency: *Kassin 2, ibid.*

defendant vulnerabilities such as intellectual impairment, youth or intoxication.[42] Many wrongful convictions may be associated with a false guilty plea, in which an innocent person may elect to plead guilty in exchange for a lesser sentence than they may face at trial.[43] One factor contributing to the propensity of false guilty pleas is the plea bargain process itself, wherein a defendant facing a lengthy incarceration may be offered a lenient sentence or even a guarantee of no jail time for entering a guilty plea.[44] Little empirical research has explored the estimated prevalence of false guilty pleas, or the prevalence of these contributing factors.

D. Practitioner Estimates of Frequency and Causes of Wrongful Convictions

Only a handful of studies have explored the attitudes and experiences of criminal justice professionals regarding the prevalence of, and factors contributing to, wrongful convictions. An early attempt at estimation was conducted by Ronald Huff, Arye Rattner, and Edward Sagarin [45] who surveyed U.S. criminal justice actors in Ohio. Participants were asked to estimate the frequency of wrongful convictions and to rank order four causes of wrongful convictions by frequency. More than 5% of the sample believed that wrongful convictions never occur and 72% believed it happened less than 1% of the time. Eyewitness errors were identified as the most common cause, followed by police error, prosecutorial error, and finally judicial error. Ramsey and Frank[46] replicated and extended Huff *et al*'s research, surveying criminal justice professionals in Ohio, where sixty percent of defence counsel believed wrongful felony convictions occurred between 1-10% of all cases and in more than 20% of felony cases. Respondents also rated the frequency with which four types of professional errors occurred, including those attributable to police, prosecutors, defence counsel, and judges. Defence errors were rated to be the most common form of professional error, even as reported by defence lawyers themselves. Marvin Zalman, Brad Smith, and Angie Kiger [47] surveyed Michigan criminal justice professionals, finding that defence lawyers believed that wrongful convictions occur quite frequently, with 84% selecting a frequency estimate between 4% and 25% of all cases. Relying on the same sample, Marvin Zalman, Brad Smith and Angie Kiger [48] focused on perceived frequencies of professional and witness errors, with defence errors again perceived to be the most common form of error. Nearly all defence lawyers surveyed believed that wrongful convictions were frequent enough to require changes to

---

[42] Hugo A Bedau & Michael L Radelet, "Miscarriages of Justice in Potentially Capital Cases" (1987) 40 Stan L Rev 21-179, online: <https://doi.org/10.2307/1228828>; Steven A Drizin & Richard A Leo, "The Problem of False Confessions in a Post-DNA World" (2004) 82:3 North Carolina L Rev 891, online: <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://scholar.google.ca/&httpsredir=1&article=4085&context=nclr>; *MacFarlane*, *supra* note 35; Gross *et al* commented: "False confessions don't come cheap. They are usually the product of long, intensive interrogations that eventually frighten or break the will of a suspect to the point where he will admit to a terrible crime that he did not commit. Some of these interrogations stretch over days and involve relays of police interrogators." *Gross 4*, *supra* note 28 at 545.

[43] Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent" (2010) 56 Crim LQ 116 [*Brockman*].

[44] Added to these considerations are financial constraints and the prohibitive cost of maintaining your innocence to trial: *Sherrin*, *supra* note 7.

[45] Ronald Huff, Arye Rattner & Edward Sagarin, "Guilty until Proved Innocent: Wrongful Conviction and Public Policy" (1986) 32 Crime Delinq 518, online: <https://doi.org/10.1177%2F0011128786032004007>.

[46] *Ramsey*, *supra* note 9.

[47] Marvin Zalman, Brad Smith & Angie Kiger, "Officials' Estimates of the Incidences of "Actual Innocence" Convictions" (2008) 25 Justice Q 72, online: <https://doi.org/10.1080/07418820801954563> [*Zalman*].

[48] Brad Smith, Marvin Zalman & Angie Kiger, "How justice system officials view wrongful convictions" (2011) 57 Crime Delinq 663, online: <https://doi.org/10.1177%2F0011128709335020> [*Smith*].

the criminal justice system.

Despite the accumulating evidence that factually innocent persons have been sent to prison and in some cases to their death, many state actors incredibly deny its occurrence. Justice Antonin Scalia of the United States Supreme Court opined in 2006 that the American system had an "error rate of 0.027% - or to put it another way, a success rate of 99.973%."[49] Morris Hoffman, a district court judge in Colorado, criticized what he called the "myth" of wrongful convictions.[50] He argued that occurrences of factually innocent defendants being convicted are exceedingly rare and disagreed with the implication that there is a problem inherent in the criminal justice system. He claimed to be at odds with "the Chicken Littles of Innocence" who overestimate the prevalence of wrongful convictions.[51] Oregon District Attorney Joshua Marquis shared these sentiments, invoking comments made by Justice Jed Rackoff that cases of true exonerations of factually innocent persons may be in the range of 25 to 30 persons in all of American history.[52] It is hard to reconcile such incredibly low estimates with the fact that hundreds of people have been exonerated by DNA evidence alone since the mid-1980s.

Currently, there are few estimates regarding Canadian legal professionals, although Anthony Doob[53] provides a rare exception. Canadian defence lawyers (n = 219) were asked to report whether they believed that they had represented a client who was factually innocent, but who lost a contested trial and was sentenced to at least one year in prison. Nearly half of respondents believed that they had personally experienced at least one wrongful conviction in their career, most occurring in cases of homicide, sexual assault, or robbery. Approximately 70% of respondents identified at least one police factor (e.g., pressuring witnesses, perjury, mishandled evidence), and more than 40% identified at least one Crown factor (e.g., inadequate disclosure, pressuring witnesses, inflammatory opening/closing remarks) as contributing to a wrongful conviction. Eighty percent also believed at least one judicial factor had been at work (e.g., prejudice against the accused, error in law, errors in jury instruction), and more than 40% believed that defence errors were at fault (e.g., inexperience, lack of preparation). Nearly 25 years have passed since this single study provided a Canadian perspective in an already rare research area.

II Present Research

The present research provides an estimate of the scope and prevalence of wrongful convictions in Canada from the perspective of defence counsel. We chose to focus on defence counsel in particular as they have the best awareness of a defendant's claims of innocence, a party to the privileged solicitor-client communications with the accused. Defence lawyers also have unique insight into how frequently an innocent accused person might decide to enter a false guilty plea and the factors associated with this decision. As noted above, it is essentially impossible to

[49] *Kansas v Marsh*, 2006, 548 U.S. 163, at 188.
[50] Morris Hoffman, "The Myth of Factual Innocence" (2007) 82:2 Chi-Kent L Rev 663, online: <https://scholarship.kentlaw.iit.edu/cklawreview/vol82/iss2/10>.
[51] *Ibid* at 664.
[52] Joshua Marquis, "The Myth of Innocence" (2005) 95:2 J Crim L & Criminology 501, online: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7185&context=jclc>.
[53] Anthony Doob, "An Examination of the Views of Defence Counsel of Wrongful Convictions" (1997) Centre of Criminology, University of Toronto [*Doob*].

obtain exact figures on the actual prevalence of wrongful convictions, and thus practitioner insight is necessary to understand the potential scope of the problem. Although we do have some estimates derived largely from sexual assault and murder cases,[54] little is known about wrongful convictions for less serious offences (i.e., the vast majority of cases). To our knowledge there is no known research assessing professionals' perception of the prevalence of false guilty pleas in Canada, which have been identified by some as a potential epidemic in the justice system.[55] Given the scarcity of data on false guilty pleas, the present study explored whether they are perceived as a common phenomenon among defence lawyers, and the possible factors predictive of their occurrence.

A. Participants

Data were solicited from criminal defence lawyers working within the province of Ontario. We enlisted the assistance of the Canadian Criminal Defence Lawyers Association (CDLA) to distribute the survey to all Ontario members of the organization. This was done on three occasions across an 18-month period (Nov 2016, Jan 2017, and Jul 2018). An unknown percentage of the individuals affiliated with the CDLA were outside of our target sample, as this group included articling students, paralegals, clerks, professors, and non-practicing lawyers. Only responses from practicing lawyers were collected and analyzed. In total, 158 defence lawyers responded to the survey, with 121 giving complete responses. The sample had a mean age of 40.32 years (SD = 11.80), comprised of 67 men, 52 women, and 2 preferring not to answer. The majority of the sample identified as White (n = 93), with the remainder identifying with a variety of ethnic identities, including East Asian (n = 4), South/West Asian (n = 3), Black (n = 2), and mixed or other ethnicity (n = 9). The majority of the sample worked in large municipal settings, with two-thirds working in cities with 1 million or more persons (n = 78), fourteen percent in cities of 500,000 to 1 million residents (n = 17), and the remainder in smaller cities or towns (n = 26). Respondents had an average of 11.59 years of experience as defence counsel (SD = 11.33), ranging from 0.5 to 45 years.

B. Materials and Procedure

After providing informed consent, participants completed all study materials in an online format through the Qualtrics survey platform. Several study items were adapted from earlier studies addressing professionals' estimates of wrongful convictions, including Robert Ramsey and James Frank,[56] Brad Smith *et al*,[57] and Marvin Zalman *et al*,[58] and were modified for application in a Canadian context. Importantly, we made the novel addition of exploring counsel experiences with and estimates of false guilty pleas, which are understudied in Canada. We also solicited feedback from defence counsel regarding their recommendations for reform to the Canadian justice system, based on their personal experiences representing whom they thought were innocent clients. Participants were first presented with the following definition of a wrongful conviction:

[54] *Gross 1*, *supra* note 15; *Gross 4*, *supra* note 25; *Risinger*, *supra* note 17.
[55] *Sherrin*, *supra* note 7.
[56] *Ramsey*, *supra* note 9.
[57] *Smith*, *supra* note 48.
[58] *Zalman*, *supra* note 47.

> We are considering cases in which a person was convicted and sentenced when they did not in fact commit the crime. This may include persons who pled guilty or falsely confessed, as long as they did not actually commit the crime for which they were charged. This definition excludes any cases in which the defendant may have been legally innocent (e.g., acting in self-defence, suffering from mental illness), which is a more ambiguous category.

Following the response format of Robert Ramsey and James Frank and Marvin Zalman *et al*, respondents were asked to estimate the frequency of wrongful convictions in Canada, with a series of response options between 0% and 25% or more. Using the same frequency metric, participants indicated how often they believe innocent clients falsely plead guilty. Participants were asked whether they had ever personally been involved in a conviction that involved a defendant with credible claims of innocence (Yes/No), and if yes, how often this occurred (open-ended). Participants also reported on the frequency of various professional errors and to what extent they believed these errors contribute to wrongful convictions and false guilty pleas.

Finally, participants were asked whether they believed wrongful convictions occurred frequently enough to warrant changes to the criminal justice system and were invited to provide their recommendations for changes to the criminal justice system. The open-ended recommendations for reform were explored thematically for frequent concepts and commonly identified problems. Upon completion of all materials, participants were debriefed and thanked.

III Results

The results are presented below descriptively, with comments and insight from counsel included to provide additional context and perspective on each issue.

A. Prevalence Estimates of Wrongful Convictions

The estimated prevalence of wrongful convictions in Canada is presented in Figure 1. No participant selected the 0.0% frequency option, indicating that all defence counsel in our sample believed wrongful convictions occur at least some of the time. Rather, the majority of participants endorsed prevalence estimates at much higher frequencies. The modal response for wrongful convictions was 6% to 10% of all cases, although a large proportion of the sample selected prevalence rates at the higher end of the scale, with approximately 15% of the sample estimating that wrongful convictions occur in more than 20% of criminal cases.

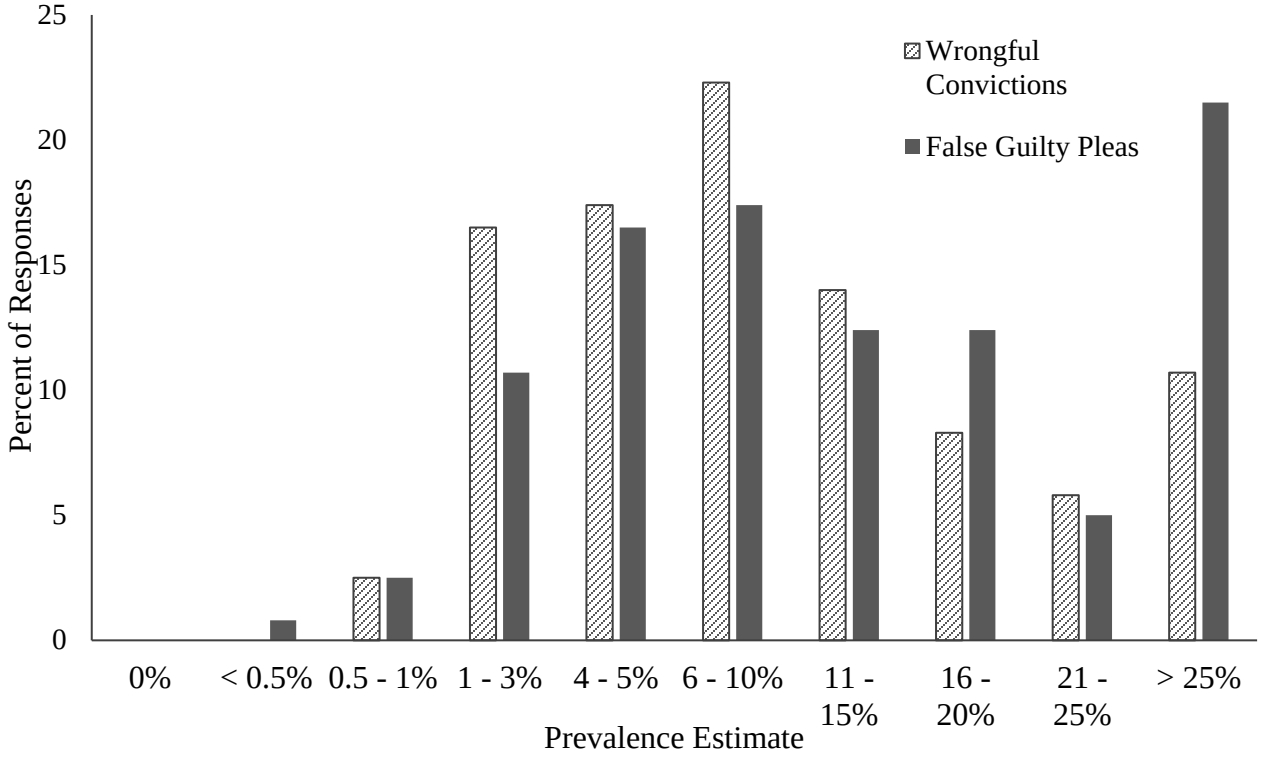
Seventy-two percent of our sample reported that they had personally been involved in a conviction that they strongly believed involved an innocent client. In an open-ended format, many reported that they occurred "frequently," "regularly", "dozens of times", were "relatively common," and that there were "100s of suspected cases over the years." One lawyer tragically recalled an innocent client who spent 12 years in jail for a murder he did not commit, and another reported a decade-old case that "still haunts me." There were some qualifications as well regarding severity of the offence. As one lawyer explained, "In serious murder cases, about 6 times. In less serious matters, especially when it comes to credibility-based verdicts, about 10-15%." These

experiences are not merely a function of having worked many years in defence. One respondent reported two cases while articling, and a newly called lawyer reported two cases despite having worked only five months. Another reported having five innocent clients convicted in their two years of defence work, and yet another suspected three clients of innocence in their three years.

B. Prevalence Estimates of False Guilty Pleas

Similar trends were observed with the estimated rate of false guilty pleas (see Figure 1). Again, no participant selected the 0.0% frequency. The most commonly selected rate was 25% or higher of all guilty pleas, with more than 20% of the sample selecting this highest prevalence estimate. Another 25% of the sample selected a false guilty rate of either 11-15% or 16 - 20% of all cases. These rates suggest that defence counsel believe they are encountering false guilty pleas on a regular and frequent basis. Some defence counsel reported that they had intentionally declined to represent innocent clients because they refused to knowingly commit a fraud against the court by admitting a false guilty plea. For example, one duty counsel lawyer reported "I would estimate that on an average day I decline to assist one to two clients on the grounds that they are not guilty of their charges. They proceed self-represented." Similarly, another lawyer explained that they had encountered credibly innocent clients "quite often because clients want to get out of jail. I can't assist them ethically of course, but they proceed self rep and plead." Another explained the ethical challenges of representing an innocent client who wants to enter a false guilty plea, noting that this occurs "…frequently. I tell them I can't assist with the plea, but I assist with sentencing." In this way, we see that defence counsel may be reporting an unacceptably high frequency of wrongful convictions, many driven by a high prevalence of false guilty pleas. One lawyer explained the difficulty with traditional definitions of wrongful convictions as occurring at trial, noting that "…anecdotally, it appears that the vast majority occur at the guilty plea stage, before a trial date is even scheduled." This reflects the concerns expressed in the scholarship that our current forensic estimates, based largely on known exonerations after contested trials, may largely underestimate the scope of the problem.

Figure 1: Counsel Estimates of the Frequency of Wrongful Convictions and False Guilty Pleas in Canada



C. Frequency of Various Errors and Contributory Causes

Frequency estimates are first presented in a descriptive manner, exploring general patterns in responses, followed by comparisons of means and inferential statistical analyses. Participants were presented with a series of professional errors and other factors that have been found to contribute to wrongful convictions and asked to estimate how frequently each occurred based on their own experiences. Recall that ratings were made on a 9-point scale, ranging from 1 (*Never*) to 9 (*Always*). Please see Table 1 for complete means and standard deviations of these measures. The highest prevalence rates were given to good faith eyewitness misidentifications, good faith forensic expert errors, and a variety of police errors such as overstating/bluffing about the strength of the evidence against the defendant, laying additional charges in order to leave room for bargaining, and failing to properly investigate a case due to tunnel vision.

The frequency estimates of prosecutorial errors were rated around the midpoint of the scale, including the use of undue pressure during plea bargaining, inadequate investigation, and prompting witnesses. Rated as far less common were practices such as bad faith eyewitness misidentification, bad faith forensic expert errors, police suppression of evidence, and the prosecution knowingly using false testimony. Judicial errors were also around the midpoint of the scale, showing that judges were believed to make errors on occasion regarding the admissibility of physical evidence, eyewitness evidence, and expert testimony. Defence lawyers believed that judges made errors resulting from pro-prosecution bias much more often than errors resulting from pro-defence bias, t (117) = 14.17, p = .001.

D. Factors Contributing to Wrongful Convictions

To get a rough comparison of defence attorneys' differential frequency estimates of errors as a function of profession, composite scores were computed by summing and averaging the frequency responses for each profession. We calculated a mean frequency for police errors (α = .77), prosecutorial errors (α = .73), defence errors (α = .84), and forensic expert errors (combining good faith errors and errors due to incompetence; α = .77). Eyewitness errors included those made in good faith and those made intentionally in bad faith; these were not combined as they were only moderately correlated (r (119) = .30) and were thus analyzed separately. Similarly, forensic errors made in bad faith were analyzed separately from the composite measure of good faith/incompetent forensic experts.

A repeated measures analysis of variance revealed that the estimated frequency of errors varied by error source, F (5.28, 581.22) = 118.37, p = .001, η_p^2 = .518 (Greenhouse Geisser corrections were used due to a significant Mauchly's test for sphericity). Good faith eyewitness errors were deemed to occur the most frequent of all sources measured (M = 6.30, SD = 1.33), followed by police errors (M = 5.96, SD = 0.97), defence errors (M = 5.07, SD = 1.19), prosecutorial errors (M = 4.83, SD = 1.02), good faith/incompetent forensic expert errors (M = 4.79, SD = 1.39), judicial errors (M = 4.61, SD = 0.95), bad faith eyewitness errors (M = 3.71, SD = 1.35), and bad faith forensic expert errors (M = 3.24, SD = 1.52).[59]

[59] All means differed from each other significantly (all p's < .01) with several exceptions: prosecutorial errors and good faith forensic expert errors received similar ratings (p = .94), good faith forensic errors were rated as marginally more frequent than judicial errors (p = .077), and defence errors were rated as marginally more frequent than prosecutorial errors (p = .052).

Table 1: Mean Frequency Estimates for Different Forms of Professional and Forensic Errors

	M	SD
Eyewitness Errors		
Misidentification in good faith	6.30	1.33
Intentional misidentification (bad faith)	3.71	1.35
Forensic Expert Errors		
Intentionally misrepresented evidence (bad faith)	3.24	1.52
Mean good faith/incompetent forensic expert errors	4.79	1.39
Misrepresented evidence in good faith	5.04	1.55
Misrepresented evidence due to incompetence	4.54	1.62
Police Errors		
Mean police errors	5.96	0.97
Overstating/bluffing about evidence during interrogation	7.53	1.35
Laying additional charges in order to leave room for bargaining	7.29	1.48
Failing to properly investigate a case due to tunnel vision	6.32	1.50
Conducting inadequate investigations	6.11	1.49
Using extreme pressure to obtain a confession	5.84	1.92
Laying charges prematurely due to departmental pressure	5.52	1.74
Coaching witnesses in pretrial identification procedures	5.23	1.73
Charging the wrong suspect due to good faith investigation errors	4.98	1.34
Suppressing exculpatory evidence	4.81	1.96
Prosecutorial Errors		
Mean prosecutorial errors	4.83	1.02
Using extreme plea-bargaining pressure	5.81	1.94
Inadequate investigation of case by the prosecutor	5.73	1.80
Prompting witnesses	5.56	1.51
Errors concerning the admissibility of expert testimony	5.07	1.47
Prosecuting the wrong person as the result of good faith errors	5.05	1.45
Suppressing exculpatory evidence	3.59	1.77
Knowingly using false testimony	2.93	1.52
Judicial Errors		
Mean judicial errors	4.61	0.95
Errors resulting from judicial bias in favour of the prosecution	5.72	1.56
Errors concerning the admissibility of expert testimony	5.12	1.43
Errors concerning the admissibility of eyewitness testimony	4.65	1.74
Errors concerning the admissibility of physical evidence	4.59	1.47
Errors resulting from judicial bias in favour of the defence	2.98	1.26
Defence Errors		
Mean defence errors	5.07	1.19
Failing to adequately challenge forensic evidence	5.53	1.48
Inadequate investigation	5.27	1.49
Making unwarranted plea-bargain concessions	4.96	1.59
Failing to file proper motions	4.96	1.44
Failing to adequately challenge witnesses	4.88	1.52
Encouraging innocent suspect to plead guilty to avoid trial or prison	4.81	1.97

E. Lawyer Insight and Experiences with Contributory Factors

Counsel took the opportunity to provide open-ended feedback and insight into the causes of wrongful convictions, based on their personal and professional experiences. A common theme emerging from counsel's open-ended responses was the issue of lengthy pre-trial detention, routine denial of bail, padded charges, and prohibitive costs of mounting a legal defence. Altogether, these factors make plea bargains particularly enticing even for the innocent client. For example, one lawyer explained that "many times, clients who are factually innocent plead guilty to offences simply to get out of custody after being denied bail." Given that pre-trial custody can often take a year or longer, many innocent persons elect to plead guilty just to go home. As one lawyer succinctly explained:

> A fundamental problem is the process costs of being caught in the criminal justice system. If you don't make bail on a relatively minor offence and you have a record, then oftentimes the time you'd spend in custody awaiting trial is longer than the time the prosecution is seeking on sentence. It's patently irrational in those circumstances to expect an innocent person to wait for trial.

One lawyer further explained that this, coupled with restrictions on access to Legal Aid, make the plea bargain process heavily persuasive. They explain:

> Pre-Trial detention is a major contributor to entice defendants to enter plea bargains. Changes to Legal Aid Ontario and its concerted effort to restrict defendants from getting a Legal Aid Certificate is resulting in an increasing amount of plea bargaining.

Other comments focused on police tactics that pressure an accused person into feeling they have no choice but to accept a plea bargain, even if innocent. As one lawyer outlined, a common and problematic practice involves the police laying additional charges against the accused to allow room to bargain downward. They explain:

> Police shotgunning is an issue - they lay 100 charges knowing the accused will plead guilty to only one of them. If defence lawyers were funded, we could run proper trials and defeat all 100 sometimes, but no one can afford to pay a lawyer to run a trial that long, so defendants are forced to take a plea deal.

Counsel also pointed to strategies employed by Crown prosecutors as leading to false guilty pleas. One lawyer noted that "there is a real problem with prosecutors using the threat of the mandatory minimum sentences to coerce the accused to pass up their trial and plead guilty to a lesser offence and to receive a lighter sentence."

These comments and accounts reflect a systemic problem in the Canadian criminal justice system that prioritizes guilty pleas without adequate or accessible safeguards for innocent clients. Denial of bail even on minor or routine charges keeps potentially innocent persons in jail pending resolution of their case. When faced with multiple, often unrealistic charges laid by police, an offer to remove those charges in exchange for a lighter sentence, and the financial inability to retain legal defence, there may be little meaningful option for the innocent accused.

F. Reform Recommendations

Approximately two-thirds of respondents in this study (*n* = 78, 64.5%) suggested recommendations for criminal justice reform that they believed might reduce the likelihood of wrongful convictions. Many respondents discussed the issue of false guilty pleas specifically (29.5%), and the requirement that a guilty plea be accompanied by an admission of all facts and charges. Presently in Canada, there is no option to enter a guilty plea while maintaining one's innocence, such as the Alford plea (available in many American states) or a plea of no contest.[60] The requirement that the accused admit guilt to all charges when entering this plea creates several problematic consequences for defence counsel. For instance, a defence lawyer who knows that their client is innocent must recuse themselves from representing that client at the plea stage. As officers of the court, defence counsel are not permitted to knowingly mislead the courts. As one lawyer explained:

> Oftentimes accused persons want the benefit of the plea but are adamant they did not commit the offence. In cases such as these, ethical considerations force me to fire that client (as I cannot knowingly assist a client in misleading the Court). Most often, these same clients retain other counsel to enter their plea of guilty, but this time elect to tell them only what they need to know.

Reform to the bail system was identified by one quarter of participants (25.6%). Many recounted examples of bail being denied for minor offences or cases with weak evidence of guilt. Coupled with this regular denial of bail was the problem of lengthy pre-trial custody, which was identified by 15% of respondents as a specific area in need of reform.

Roughly one-quarter (24.4%) recommended expanding eligibility and increased funding for Legal Aid. Many expressed frustration at the inability to properly explore and examine a case, conduct interviews, hire experts, research case law and prepare pleadings. They noted that the Crown, in opposition, does not face the same financial constraints or burdens, stacking the deck strongly in favour of the prosecution. One lawyer explained the difficulty this way:

> Defence counsel have their hands tied by Legal Aid tariff of hours to expend on a case, so they cannot do proper jobs. As such, accused innocent people are Underrepresented - they appear to have lawyers but the representation is woeful…If Legal Aid pays 10 - 12 hours of prep for a case, how can defence have a lengthy interview with client and LISTEN to all his rambling (some of which is very important), plus go through all the evidence with a

[60] In the United States, defendants are allowed to enter an *Alford* plea, in which they enter a plea of guilty but maintain that they are innocent of the crime (see *Brockman, supra* note 43; *North Carolina v Alford*, [1970] 400 US 25). The defendant does not admit any guilt for the action but believes that the state has enough evidence against him/her to convict. The logic and desirability of such a plea is beyond the scope of this discussion, other than to note that there is no corresponding plea in Canadian law. Rather, within Canada, s 606(1.1) of the *Canadian Criminal Code* seems to prevent a defendant to plead guilty if they are innocent. That provision states:

> 606 (1.1) A court may accept a plea of guilty only if it is satisfied that the accused
> (a) is making the plea voluntarily; and
> (b) understands
> (i) that the plea is an admission of the essential elements of the offence,
> (ii) the nature and consequences of the plea, and
> (iii) that the court is not bound by any agreement made between the accused and the prosecutor.

fine-tooth comb to get the gems that will exonerate the client?!

The use of padded and unwarranted charges (9.0%) was described as a form of "extortion," to force the accused to plead down to a lesser charge. Others suggested that there be disincentives for the state to use such pressure tactics, perhaps creating punishments and accountability for prosecutors who abusively pad charges and use pressure tactics to coerce a false guilty plea.

A number of lawyers (15.4%) called for meaningful consequences for police and witnesses who knowingly lie on the stand, and the development of an arms-length investigatory body to handle such complaints. For example, one lawyer explained:

> When police give misleading evidence there should be reports sent to the respective police tribunals for Disciplinary action that is meaningful to prevent recurrence. False evidence even by a police officer should be subject to criminal charges because they have violated both their oath as an officer as well as their testimonial oath.

Another argued that "we must remove all immunity afforded to police/crown in order to make the playing field less uneven." Presently, there is little if any consequence where police engage in misconduct, padded charges, or coercive interrogation techniques.

Some recommendations focused more on the law itself, with 16.7% identifying a specific change to the law. There were calls to eliminate the Reid Technique of interrogation, which has been associated with eliciting known false confessions but remains standard police procedure in Canada.[61] An overturning of *R v Oickle* [62] was also invoked, referring to a Supreme Court of Canada ruling that upheld the police's authority to engage in deceptive practices to elicit a confession. Pursuant to *Oickle*, police may misrepresent the nature of evidence against the accused and overstate the accuracy and strength of that evidence. Such dishonesty may mislead an innocent accused into thinking their case is hopeless, persuading them to take a plea deal they would never contemplate if provided with accurate evidence. Finally, some respondents expressed frustration with the use of mandatory minimums, which they believed were used strategically to ensure a guilty plea.

IV General Discussion

The present research provides a rare exploration into Canadian defence counsel's personal experiences with wrongful convictions. Although much is known from an academic perspective, the voices of frontline workers have rarely been heard. In both the present research and prior American studies,[63] the majority of defence lawyers believe that wrongful convictions occur between 1 – 10% of the time, with roughly ten percent of the sample estimating that they occur in 20% or more of cases. We make the novel introduction of estimating false guilty pleas, with nearly half of defence lawyers in our sample estimating they occur in 4-15% of all guilty pleas and nearly

[61] Timothy E Moore & C Lindsay Fitzsimmons, "Justice Imperiled: False Confessions and the Reid Technique" (2011) 57 Crim LQ 509 [*Moore*].
[62] *R v Oickle*, 2000 SCC 38 (CanLII), [2000] 2 SCR 3, online: <https://canlii.ca/t/525h> [*Oickle*].
[63] *Ramsey*, *supra* note 9; *Smith*, *supra* note 48; *Zalman*, *supra* note 47.

40% believing they occur even more frequently. These figures, even if reduced by half, are staggering and suggest a criminal justice system in crisis.

Anthony Doob [64] found that just under half of his sample of Canadian defence lawyers reported having first-hand experiences with a wrongful conviction, compared to 72% of the present sample. This discrepancy may be related to Doob's more restricted analysis, soliciting experiences with contested trials resulting in a sentence of one year or more. The present study imposed no such limitation, allowing lawyers to also discuss any experiences in which an innocent person pled guilty to avoid a trial or was convicted of less serious offences. Although it is difficult to draw firm conclusions from studies conducted more than twenty years apart, these results do suggest that wrongful convictions are occurring in a wide range of offences and with greater frequency than indicated in earlier forensic estimates. It appears that, from a defence lawyer's perspective, many of the factors known to contribute to wrongful convictions are indeed prevalent in Ontario, with the most common being good faith misidentifications by eyewitnesses, police/prosecutorial tunnel vision, and inadequate investigation of the case. Several other concerning items were rated as occurring with high frequency by participants, including police overcharging defendants, bluffing about the evidence against the accused, and using extreme pressure during plea bargaining.

There was discrepancy between the present data and the American data with regard to estimates of the frequency of defence errors. In the work of Robert Ramsey and James Frank,[65] Marvin Zalman *et al*,[66] as well as Brad Smith *et al*,[67] American defence lawyers estimated that defence errors were the most frequent form of professional error. This was not the case in the present study, in which defence errors tended to attract midpoint ratings of frequency, but police errors and good faith eyewitness errors received the highest frequency ratings. Interestingly, Doob [68] similarly found that Canadian defence lawyers did not rate defence errors as the most frequent form of professional error. The reasons that the Canadian and American data may diverge on this issue is unclear and warrants further investigation.

A. Recommendations for Reform

Defence counsel responses indicate that the day to day operations of the justice system create an ideal environment for eliciting guilty pleas, false or otherwise. These conditions involve denial of bail even for weak cases or minor charges, extreme pre-trial delays served in custody, police who misrepresent evidence and the likelihood of not succeeding at trial, padded charges with mandatory minimum sentences, very restrictive access to Legal Aid, and insufficiently funded Legal Aid certificates. Increased provision of bail and reduction in pre-trial custody were the most commonly identified areas in need of immediate improvement. This issue was considered recently by the Supreme Court of Canada in *R v Antic* [69] where Justice Wagner issued several directives to bail courts. Unconditional release on bail is now to be the default position of a bail court; anything more restrictive must be explained and failure to do so would amount to an appealable error of

[64] *Doob*, *supra* note 53.
[65] *Ramsey*, *supra* note 9.
[66] *Zalman*, *supra* note 47.
[67] *Smith*, *supra* note 48.
[68] *Doob*, *supra* note 53.
[69] *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, online: <https://canlii.ca/t/h41w4>.

law. Similarly, lengthy pre-trial delays were addressed by the Supreme Court of Canada recently in *R v Jordan*,[70] where the court placed an upper limit of 30 months for Superior Court trials and 18 months for provincial court trials. Provided the delays were not caused by the defence, any delay exceeding these limits is presumptively unreasonable and in violation of the accused's right to be tried within a reasonable time. It remains unclear whether these rulings have had a meaningful impact on the daily administration of justice.

Only those who are severely impecunious qualify for Legal Aid assistance, leaving a very large portion of the middle class unable to afford legal representation at all (or without serious hardship). For example, under the current Legal Aid guidelines,[71] a single person without children will not be eligible for Legal Aid assistance if his/her gross annual income is more than $14,453. Income between this amount and $16,728 may qualify the accused for a repayment plan, but anything above this will render the accused ineligible for assistance. A 2015 survey of Ontario lawyers indicated that the cost of a one-day criminal trial averaged $8,000, with the upper range as high as $50,000.[72] Costs will vary depending on the complexity of the case and the expertise and seniority of counsel, with a seven-day contested trial ranging from an average of $81,000 to a higher end of several hundred thousand dollars.[73] Appeals from trial decisions are additional to these expenses. One can imagine the financial hardship a full trial might impose on a person earning $17,000 per year (or even $60,000 per year), for whom a fully defended trial may be far out of reach.

The use of false evidence during the interrogation phase, sometimes termed a false evidence ploy,[74] is a problematic but legal tactic available to police. Following the Supreme Court of Canada's 2000 ruling in *Oickle*,[75] police retain wide latitude in the conduct of an investigation or interrogation. This includes presenting the accused with false evidence and exaggerating the reliability or accuracy of evidence. The use of misleading or fabricated evidence has been widely criticized by scholars as substantially increasing the possibility of a false confession or a false guilty plea.[76] The Reid Technique, considered the gold standard for police interrogation methods,[77] mandates similarly problematic tactics that increase the possibility of a false confession or plea. This technique allows for the use of false evidence, describing it as "clearly the most persuasive tactic within the area of deception,"[78] while simultaneously promising that it will not lead to a false admission of guilt. These assertions are in direct contradiction to well-established psychological research, which has found time and again that people do make false confessions and that false

[70] *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, online: <https://canlii.ca/t/gsds3>.
[71] Online: http://legalaid.on.ca/en/getting/eligibility.asp.
[72] Michael McKiernan, "The Going Rate" (2015) *Canadian Lawyer*, online: <https://www.canadianlawyermag.com/staticcontent/images/canadianlawyermag/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf>.
[73] *Ibid.*
[74] Richard Ofshe & Richard Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Denver L Rev 979 [*Ofshe*].
[75] *Oickle*, *supra* note 62.
[76] See *Ofshe*, *supra* note 74 and *Wynbrandt*, *supra* note 8 for excellent reviews of the use of false evidence ploys in false confessions and false guilty pleas.
[77] Fred E Inbau, John E Reid, Joseph P Buckley & Brian C Jayne, *Criminal Interrogation and Confessions*, 4th ed (Gaithersberg, MD: Aspen, 2001). The Reid Technique has been widely criticized by the psycho-legal community. See *Moore*, *supra* note 61 for an excellent overview of the risks associated with this technique.
[78] *Ibid* at 255.

evidence is a strong contributor to this outcome.[79] Due to the demonstrated risk of false confessions and false guilty pleas, a profound curtailment or abolition of such practices may be long overdue.

B. Research Limitations and Future Directions

As with all research, this study was not without limitations, many of which pertain to the difficulty of recruiting professional participants. Our present focus was on the experiences of defence counsel, although other members of the legal profession likely have insight and experiences with wrongful convictions. There were considerable constraints on accessibility of Crown counsel, police, and judges as well as institutional barriers to accessing these members. As our key interest focused on the experiences of advocates of the accused, we elected to focus our attention and resources on this group. In addition, the voluntary nature of participation in this study may have resulted in a selection bias, such that lawyers who experienced wrongful convictions or who had strong views about the subject might have been more likely to take part in the survey. Even if a selection bias is at work, the responses from this subset of lawyers alone reflect an unacceptably high number of wrongful convictions in Ontario. Relatedly, we note that the overall response rate was relatively low for this study. Given the importance of this research topic and the difficulty in recruiting participation, we have compiled the largest sample of defence lawyers possible. The prevalence estimates are not intended to provide objective or precise estimates of the occurrence of wrongful convictions. Rather, we were interested in the subjective experiences of defence counsel who have engaged with clients they believe to be innocent of the offence for which they were convicted, including their beliefs about ways to improve the legal system to avoid similar experiences.

Due to the survey nature of this study, we were not able to probe for more information or to allow participants to expand or clarify their responses. Future research may benefit from in-person interviews or small focus-group studies, where participants can discuss the subject at length, highlighting the issues they perceive to be most important. We designed many of our closed-ended measures to reflect the items employed in previous research[80] to allow for comparison of results across years and jurisdictions. Some scholars have raised concerns about this methodological approach to estimating prevalence. Gross and O'Brian described the process of surveying legal professionals as "collective guesswork"[81] unlikely to produce a verifiable count of exonerations. We note that the objective of this study was not to quantify prevalence rates with precision but to assess the more qualitative experiences of defence counsel and their experiences representing clients with credible claims of innocence. We were particularly interested in the recommendations for reform based on these experiences, and the value of the insight provided outweighs concerns of sampling bias and overall response rates.

C. Concluding Remarks

The present research provides insight into Ontario defence lawyers' experiences and perceptions of wrongful convictions. It appears that the face of wrongful convictions may be changing. Past discussions of wrongful convictions summoned images of innocent men

[79] *Kassin 1 & 2, supra* note 40.
[80] *Ramsey*, *supra* note 9; *Zalman*, *supra* note 47; *Smith*, *supra* note 48.
[81] *Gross 1*, *supra* note 15 at 929-930.

languishing for decades in prison for a murder they did not commit. Although these miscarriages of justice remain true, there may be a silent epidemic of wrongful convictions for lesser offences: innocence that was not asserted through a full trial but waived in an interrogation room or lawyers' chambers. What emerges from this study of defence counsel is a system in need of reform. All respondents expressed beliefs that wrongful convictions and false guilty pleas occur in the criminal justice system, with most believing they occur quite regularly. Counsel pointed to a number of common factors contributing to this outcome, which largely involve systemic issues and good faith errors. Rather than malicious and bad faith practices, it seemed that counsel experiences involved a criminal justice system stacked against defendants in general, innocent or otherwise. These results suggest that wrongful convictions are an ongoing problem in Canada and will remain so unless significant efforts at reform are made.

Wrongful Convictions and Mental Illness:
A Qualitative Case-Study of James Blackmon

Lauren Amos
Graduate, Harvard Law School
Harvard University
U.S.A.

People with a mental illness ("PWMI") are among society's most vulnerable populations, yet PWMI in America face a heightened risk of wrongful conviction for several reasons. At the onset of an investigation, PWMI are more likely to become suspects. Symptoms of mental illness breed fear and misunderstanding, arousing suspicion of PWMI in the first place. Once approached by police, PWMI are more likely to escalate the initial encounter, leading to arrest and further interrogation. Through the lens of the Reid Technique, police misinterpret symptoms of mental illness as signs of guilt. Police continue using the Reid Technique to extract a confession. Mid-interrogation, PWMI are less likely to invoke Miranda rights. Without counsel, PWMI are more susceptible to minimization and maximization techniques, leading to higher rates of false confessions and ultimately false convictions. These issues are significantly exacerbated for PWMI of color, who experience additional racial bias. From the beginning of an investigation to the end, the justice system seems perversely calculated to target innocent PWMI rather than protect them. The case of James Blackmon demonstrates how an innocent PWMI can be railroaded into a false confession and wrongful conviction. This paper details Blackmon's case, analyzes how each step of an investigation endangers PWMI, and examines possible solutions to protect innocent PWMI.

I Introduction

People with a mental illness ("PWMI"[1]) are among society's most vulnerable populations, yet PWMI are significantly overrepresented in the American criminal justice system.[2] According to the Department of Justice, 37% of state and federal prisoners and 44% of jail inmates have been diagnosed, at some point, with a mental health disorder.[3] This is markedly higher than the occurrence of mental illness in the general population, which hovers around 11%.[4] Studies vary on the extent and origin of the problem, but scholars tend to agree that PWMI are jailed at disproportionately high rates when compared to people without a mental health issue.[5]

Despite the frequency at which PWMI come in contact with the criminal justice system,[6] there are few protections recognizing the inherent vulnerability of this group. As a result, PWMI in America face a significantly heightened risk of wrongful conviction.[7]

Several factors contribute to this phenomenon. At the onset of an investigation, "strange" behavior attributable to mental illness can attract attention, both from the community and the

---

[1] For simplicity, this paper will also use PWMI to refer to a single person with a mental illness. PWMI are not a homogenous group, and a vast spectrum of mental disorders exist. But generally, a serious mental illness "refers to three diagnoses: (1) schizo-spectrum diagnoses, such as schizophrenia; (2) bipolar disorder; and (3) major depression." Allison Redlich & Steven Drizin, "Police Interrogation of Youth," in Carol Kessler & Louis Kraus, eds, *The Mental Health Needs of Young Offenders: Forging Paths Toward Reintegration and Rehabilitation* (Cambridge: Cambridge University Press, 2007) 61 at 70, online: <https://www.researchgate.net/publication/289783248_Police_interrogation_of_youth> [*Redlich 1*].

[2] See *ibid*. See also Matt Vogel, Katherine D Stephens & Darby Siebels, "Mental Illness and the Criminal Justice System" (2014) 8:6 Sociol Compass 627, online: <https://www.researchgate.net/profile/Matt-Vogel-2/publication/264806391_Mental_Illness_and_the_Criminal_Justice_System/links/59d78be2458515db19cba310/Mental-Illness-and-the-Criminal-Justice-System.pdf>. Seth Prins, "The Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review" (2015) 65:7 Psychiatr Serv 862, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4182175/>. This is not a uniquely American phenomenon, and the overrepresentation of PWMI in correctional facilities has been well-documented around the world. However, the scope of this paper is limited to the American justice system and the risk of wrongful conviction PWMI face in America.

[3] US Department of Justice, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12* by Jennifer Bronson & Marcus Berzofsky, (Bureau of Justice Statistics, Jun 2017) at 1, online: <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf> [*Bronson & Berzofsky*].

[4] US Department of Justice, *Mental Health Problems of Prison and Jail Inmates,* by Doris James & Lauren Glaze, (Bureau of Statistics Sep 2006) at 3, online: <http://biblioteca.cejamericas.org/bitstream/handle/2015/2829/Mental_Health_Problems_Prison_Jail_Inmates.pdf?sequence=1&isAllowed=y>.

[5] Prevalence estimates of mental illness in jail range anywhere from 3 to 12 times higher than in the general population. Prins, *supra* note 2 at 2.

[6] One systemic review found that roughly one in four PWMI have a history of police arrest. James D Livingston, "Contact Between Police and People with Mental Disorders: A Review of Rates" (2016) 67:8 Psychiatr Serv 850 at 851, online: <https://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.201500312>. However, surveys have found that as many as 40% of PWMI have been in jail at some point in their lives. See Donald M Steinwachs, Judith D Kasper & Elizabeth A Skinner, National Alliance for the Mentally Ill, *Final Report: NAMI Family Survey* (1992).

[7] See generally Lauren Rogal, "Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard" (2017) 47:1 NM L Rev 64, online: <https://digitalrepository.unm.edu/nmlr/vol47/iss1/4>. Allison Redlich, "Mental Illness, Police Interrogations, and the Potential for False Confession" (2004) 55:1 Psychiatr Serv 19 at 19, online: <https://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.55.1.19> [*Redlich 2*].

police. Such behavior singles out a PWMI as suspicious, and thus a potential suspect. Once approached by police, PWMI are more likely to escalate the encounter, leading to arrest and formal interrogation. Mid-interrogation, police may misinterpret symptoms of mental illness as signs of guilt. Convinced by the Reid Technique that a PWMI is guilty, officers continue using the Reid Technique to extract a confession. PWMI are more susceptible to both minimization and maximization techniques yet are less likely to understand their *Miranda* rights and the legal protections to which they are entitled. As a result, PWMI are more likely to proffer false confessions, leading to disproportionately high rates of wrongful conviction.[8]

From the beginning of an investigation to the end, PWMI face a higher risk of wrongful conviction than people without mental health issues. A qualitative case study of James Blackmon demonstrates how an innocent PWMI can be railroaded into a false confession and eventually a wrongful conviction. This paper will detail Blackmon's case (Section II), use Blackmon's case to illustrate how each step of an investigation endangers PWMI (Section III), and examine possible solutions to protect innocent PWMI (Section IV).

II The Case of James Blackmon

Around 6:15AM on September 28, 1979, an unidentified man stabbed Helena Payton in the bathroom of Latham Hall, her dorm at St. Augustine's University.[9] Witnesses described the suspect as a tall and thin black male in his twenties, clean-shaven with a short afro.[10] Additionally, they described his clothes as a "dashiki-style shirt."[11] The police recovered such a shirt in the woods behind the dorm, spattered with blood stains.[12]

The case went cold for four years, until Raleigh police received a confidential tip that a patient at Dorothea Dix Hospital—a local psychiatric hospital—had been talking about murdering several black women, including a woman at St. Augustine's.[13] The source was unsure of the patient's name, but thought it was possibly "Braemer or Brammer or Bramer, or something like [that], starting with the letter 'B.'"[14] No patient named "Brammer" resided at the hospital. Police instead focused on 28-year-old James Blackmon, the only patient at Dorothea Dix who fit the general physical description of the suspect.[15]

Detectives James Holder and Andrew Mundy were assigned to the case, and they began to study Blackmon's medical file and criminal history. They learned Blackmon had been diagnosed with paranoid schizophrenia, manic-depressive psychosis, and various other personality

---

[8] See *Rogal*, *supra* note 7. *Redlich 2*, *supra* note 7 at 19.
[9] See Ken Otterbourg, "James Blackmon: Other Exonerations with False Confessions" *The National Registry of Exonerations* (3 Sep 2019), online: <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5603> [*Otterbourg*].
[10] *Ibid.*
[11] *Ibid.* A dashiki is a style of West African pullover shirt; dashikis are often loose-fitting and colorful.
[12] *Ibid*.
[13] *Ibid.*
[14] North Carolina Innocence Inquiry Commission, *State v. James Blackmon Brief* (2019) at 228, online: <https://innocencecommission-nc.gov/wp-content/uploads/state-v-blackmon/state-v-blackmon-brief.pdf> [*NCIIC*].
[15] See *ibid*. See also *Otterbourg*, *supra* note 9.

disorders.[16] Medical files described Blackmon as hostile, grandiose, paranoid, and subject to powerful delusions.[17] He had cycled in and out of several psychiatric and correctional facilities and was currently residing at Dorothea Dix.[18]

The detectives formally interviewed Blackmon seven times and spoke to him informally on several other occasions.[19] Throughout the interviews, Blackmon displayed evidence of severe delusions. He believed he had powers, like witchcraft, telepathy (reading minds), and telekinesis (making events happen with his mind).[20] For example, Blackmon claimed he "called" a judge to fall out of his chair, and the judge retaliated by sending him to jail.[21] He also frequently wore a Superman cape during his interviews and claimed to levitate.[22]

Despite clear evidence of mental illness, the police continued their interrogations. Moreover, the detectives took advantage of Blackmon's delusions to extract a confession. They told Blackmon that while he may not remember visiting St. Augustine's, his body may have gone while his mind stayed behind.[23] The detectives also encouraged the delusion that Blackmon's "soul" could get loose of his body, and that this "Bad James" committed crimes without "Good James'" knowledge.[24] The detectives consistently asked what Bad James did at St. Augustine's, referring to Bad James in the third-person so as to distance Good James from any wrong-doing.[25] They insisted they believed Good James and they were Good James' friends.[26] Through this manipulation, the detectives led Blackmon to admitting Bad James had visited St. Augustine's, had cut a girl in the bathroom on the top floor, and had buried the knife afterwards.[27]

The police also took Blackmon to the crime scene at St. Augustine's and led him on a tour of Payton's dorm. They led him through the dorm and inside the bathroom where Payton was stabbed. Blackmon pushed open a stall door, and allegedly (the visit was not recorded) said, "This is where it happened." Detective Holder asked Blackmon "What happened, James? Where were you?" Blackmon did not give any details, merely saying "I was here and she was there." Blackmon then went to a sink and washed his hands, saying "This is what I did."[28] The police relied on these vague confessions to pursue a conviction, despite the fact that Blackmon got many details of the crime wrong. The stabbing occurred at around 6:15 in the morning. When the police asked Blackmon what time his body was at St. Augustine's, he responded, "It's about in the evening, at noon."[29] When the detectives asked how he ended Payton's life, he responded that he either "choked her or gave her some kind of drugs to mess up her forever to kill her or some poison."[30]

---

[16] *NCIIC*, *supra* note 14 at 230-231, 280.
[17] See *ibid*.
[18] *Ibid* at 228-33.
[19] *Ibid* at 14-15.
[20] *Ibid* at 280, 378-380, 387, 396.
[21] *Ibid* at 374-375.
[22] See *Otterbourg*, *supra* note 9.
[23] *NCIIC*, *supra* note 14 at 382-83, 396-98.
[24] *Ibid* at 380.
[25] *Ibid* at 416-28.
[26] *Ibid* at 422, 425, 427.
[27] *Ibid* at 417-18.
[28] *Ibid* at 405.
[29] *Ibid* at 386.
[30] *Ibid* at 391.

But Payton was stabbed. Blackmon consistently mentioned having sex with the victim, however there was no indication that Payton was raped.[31] Blackmon routinely flip-flopped and gave contradictory statements on multiple aspects of the case.[32]

Such inconsistent testimony is especially alarming because no physical evidence linked Blackmon to the murder, and an eyewitness could not pick Blackmon out of a lineup.[33] The prosecution relied solely on Blackmon's confessions to pursue a conviction.

Blackmon eventually entered an Alford plea, which allows a defendant to acknowledge that prosecutors have enough evidence to win a conviction but does not admit guilt.[34] After submitting his plea, Blackmon went to jail for more than two decades. In 2012, the North Carolina Prisoner Legal Services submitted Blackmon's case to the North Carolina Innocence Inquiry Commission. In 2013, advances in fingerprint technology allowed latent prints from the bathroom to be retested. The prints did not match Blackmon.[35] Five years later, the Commission voted unanimously that there was sufficient evidence of Blackmon's innocence to merit a judicial review. A three-judge panel met in August 2019 for three days of hearings, culminating in a declaration that Blackmon was innocent. After 36 years in prison, Blackmon was released to stay with family members.[36]

A cascading series of increasingly poor decisions led to Blackmon's wrongful conviction. Unfortunately, his case is not unique. On the contrary, it typifies how PWMI are at a higher risk of false conviction. The next section will use details from Blackmon's case to illustrate how PWMI are vulnerable to wrongful convictions at every step of an investigation.

III Problem: Innocent PWMI Face a Heightened Risk of Wrongful Conviction

A. Pre-Indictment: More likely to become a suspect

In the early stages of an investigation, misinterpretation of a PWMI's symptoms may increase the chance he is flagged as a suspect. Symptoms of mental illness often attract attention, leading the community and officers to deem a PWMI as suspicious. Once approached, officers tend to misconstrue symptoms of mental illness as guilt, especially when using the Reid Technique. Such misinterpretation leads to further questioning and eventually formal interrogation, rather than clearing the PWMI and moving on to the next suspect.

---

[31] *Ibid* at 406-408.
[32] *State of North Carolina v James Blackmon*, "Special Session Before the North Carolina Innocence Inquiry Commission Transcript" (14 Nov 2018) 1 at 428-29, 442, online: <https://innocencecommission-nc.gov/wp-content/uploads/state-v-blackmon/state-v-blackmon-hearing-transcript.pdf> [*NC Blackmon*].
[33] Associated Press, "False Confession Expert Testifies in NC Innocence Case", *WCTI News* (21 Aug 2019), online: <https://wcti12.com/news/state-news/false-confession-expert-testifies-in-nc-innocence-case>.
[34] Martha Waggoner, "North Carolina Man Exonerated by Panel in 1979 Dorm Slaying", *AP News* (22 Aug 2019), online: <https://apnews.com/93519aca1dfd4b0585e8a0feab93f51c>.
[35] Martha Waggoner, "NC Innocence Case Hinges on Mentally Ill Man's Confession," *AP News* (19 Aug 2019), online: <https://apnews.com/a7c0cce0f4a04bc8b7211e3529a9f8f3>.
[36] *Otterbourg*, *supra* note 9.

a. Attracting attention and suspicion

Due to their mental illness, innocent PWMI may behave in ways that are strange or off-putting to observers.[37] Such behavior attracts attention and suspicion and may create a reputation in the community that a particular PWMI is odd or dangerous. This preconceived idea that a PWMI is frightening and strange may lead a community to suspect that person when a crime occurs, especially if there are no other clear suspects. Generalized fear of a local PWMI narrows into particularized suspicion that he perpetrated a violent crime.

For example, police investigating Sabrina Buie's murder focused their investigation on 19-year-old Henry Lee McCollum because a local teenager thought McCollum was "crazy."[38] Buie, an 11-year-old girl, was murdered in Red Springs, North Carolina in 1983. Local 17-year-old Ethel Furmage informed police that she had heard rumours at school that McCollum's half-brother, Leon Brown, was responsible for the murder. However, she also pointed the police towards McCollum because he "stared at people" and "just [did] not act right."[39]

McCollum and his brother were wrongfully convicted for the murder and spent 30 years in prison before DNA evidence exonerated them.[40] Furmage had no personal knowledge that McCollum was involved in Buie's death, nor had she heard any rumours indicating he committed the crime.[41] No physical evidence or eyewitness testimony tied McCollum to the murdered girl.

---

[37] Mental illness varies widely, covering a vast spectrum of symptoms. However, some common symptoms of mental illness include:

1. Confusion, disorientation, and disorganization of thought.
2. Poor working memory and memory gaps.
3. Deficits in executive functioning, problems paying attention, and impaired decision making.
4. Unusual speech patterns or peculiar styles of speech, such as rambling, vaguely trailing off, speaking too quickly or too slow, or racing through thoughts that are not connected.
5. Bizarre or unusual thoughts, delusions, and belief in special powers (such as telepathy). This could include responding to voices or visions, or interacting with people who are not really there.
6. Inappropriate emotional responses to situations, or jumping from one emotional extreme to another.
7. Excessive movement, such as trembling, shaking, and fidgeting.
8. Aggression or hostility. Most individuals with mental illnesses are not violent. However, some mental illnesses, like personality disorders, can manifest in anger and belligerence.

See e.g., National Alliance on Mental Illness, *Know the Warning Signs*, online: <https://www.nami.org/learn-more/know-the-warning-signs>. Mayo Clinic, *Schizotypal Personality Disorder*, online: <https://kcms-prod-mcorg.mayo.edu/diseases-conditions/schizotypal-personality-disorder/symptoms-causes/syc-20353919>[*Mental Illness*]. Judges' Criminal Justice/Mental Health Leadership Initiative, *Judges' Guide to Mental Illnesses in the Courtroom*, online: <https://www.tmcec.com/files/1615/1440/5028/00_-_Spain_BINDER_Special_Populations.pdf>. *Redlich 1*, *supra* note 1 at 70.

[38] *State of North Carolina v Henry Lee McCollum*, "MAR Hearing Transcript" (2 Sep 2014) 1 at 21-23, online: <http://www.ncpolicywatch.com/wp-content/uploads/2015/05/Postconviction-Hearing-State-v.-McCollum-and-Brown.pdf1_.pdf> [*NC McCollum*].

[39] *Ibid* at 21-23. See also Sharon McCloskey, "Begging for a Pardon: Why Some of the Wrongfully Convicted could go Penniless", *NC Policy Watch* (5 Jun 2015), online: <http://www.ncpolicywatch.com/2015/05/06/begging-for-a-pardon-why-some-of-the-wrongfully-convicted-could-go-penniless>.

[40] Joseph Neff, "Innocent, Disabled and Vulnerable A judge protects an exonerated man from his lawyer." *The Marshall Project* (24 Oct 2017), online: <https://www.themarshallproject.org/2017/10/24/innocent-disabled-and-vulnerable>.

[41] *NC McCollum, supra* note 38 at 23.

Furmage pointed the police in his direction, and police began investigating him, simply because Furmage thought he was strange.[42]

McCollum, in fact, had severe emotional and intellectual disabilities.[43] Mental illness and intellectual disabilities are not synonymous, and require different legal analyses. Nonetheless, McCollum illustrates how citizens can change the course of an investigation by pointing police towards suspects they consider "odd." A reputation in the community as frightening or crazy can make PWMI a serious suspect in a crime he had nothing to do with.

Furthermore, abnormal actions may independently rouse the suspicion of the police. In 1989, high school student Angela Correa was raped and murdered in Westchester County, New York.[44] One of Correa's classmates, 16-year-old Jeffrey Deskovic, was distraught by the murder. He aroused police suspicion by "weeping openly" at Correa's funeral [45] and attending three out of four sessions of her wake.[46] Deskovic was eventually convicted of the crime and spent 16 years in prison. He was exonerated in 2006.[47]

Although hair and semen samples taken from the scene did not match Deskovic's DNA, detectives continued to believe he was guilty because he seemed "unusually distraught" after Correa's death and was "determined" to help solve the case.[48] However, police failed to take into account (or ignored) the fact that Deskovic had severe psychological problems. He was described as "emotionally handicapped" and "heard voices."[49] Although Deskovic's actions were likely the result of psychological issues, his "unusual" displays of emotion kept suspicion on Deskovic even after physical evidence cleared him of the rape.

Blackmon's case is slightly different than McCollum's or Deskovic's, since investigators were on notice of Blackmon's mental illness (at the time of the investigation, he resided at a psychiatric hospital). However, Blackmon's mental illness manifested as aggression and anger. This created a reputation for violence, and hospital staff and other patients believed Blackmon to be extremely dangerous. According to a confidential source, Blackmon was "real strange, people were afraid of him."[50] This reputation entrenched investigators' suspicions of Blackmon's guilt. Yvette Peebles, Blackmon's girlfriend's sister, further confirmed police suspicions. Peebles told the police she was "very fearful of [Blackmon]."[51] She knew there was "something wrong" with him, so she tried to stay away. The fear stemmed in part from Blackmon's delusions about

---

[42] See *ibid*. Edwin Grimsley, "Lessons about Black Youth and Wrongful Convictions: Three Things You Should Know", *Innocence Project* (5 Jan 2015), online: <https://www.innocenceproject.org/lessons-about-black-youth-and-wrongful-convictions-three-things-you-should-know-2>.
[43] *NC McCollum*, *supra* note 38 at 87.
[44] Alan Feuer, "Exonerated. Now What?" *The New York Times* (21 Feb 2014), online: <https://www.nytimes.com/2014/02/23/nyregion/exonerated-now-what.html> [*Feuer*].
[45] *Ibid.*
[46] New York, Westchester County District Attorney's Office *Report on the Conviction of Jeffrey Deskovic*, (2007) at 24, online: <https://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf> [*NY Westchester*].
[47] Feuer, *supra* note 44.
[48] Fernanda Santos, "Playing Down DNA Evidence Contributed to Wrongful Conviction, Review Finds" *The New York Times Times* (3 Jul 2007), online: <https://www.nytimes.com/2007/07/03/nyregion/03dna.html>.
[49] *NY Westchester*, *supra* note 46 at 11, 24-25.
[50] *NCIIC*, *supra* note 14 at 228.
[51] *Ibid* at 313-14.

witchcraft, in part from his tendency to "watch" Peebles, and in part from his generally aggressive demeanor. Peebles said Blackmon could act "like a madman . . . incoherent and everything, and he said he was going to kill just everybody . . . he was just wild."[52] When the police asked her if she thought Blackmon was capable of the St. Augustine murder, she responded, "Knowing him, I would say he's capable of doing it."[53]

Blackmon's mental illness caused him to act in a way that frightened others. While this reputation did not cause the community or police to single Blackmon out as a suspect (as was the case with McCollum and Deskovic), it did confirm that Blackmon was capable of a violent crime, reinforcing investigators' belief in his guilt.

In both McCollum's and Deskovic's case, "odd" behavior was misinterpreted as suspicious or indicative of criminality. Neither were a suspect until their respective intellectual disability and psychological problems drew attention. In Blackmon's case, mental illness created an aggressive reputation in the community, confirming police suspicions that they had found their man. In all three cases, community opinion of the suspect as "crazy" and "dangerous" turned investigators away from legitimate suspects and towards innocent PWMI. Had investigators recognized that their suspects were exhibiting symptoms of mental illness, they may have changed course early enough to catch the real perpetrator.

b. Misinterpreting symptoms of mental illness as signs of guilt

Once police develop suspects, innocent PWMI are less likely to be "cleared" because police interpret signs of mental illness as signs of guilt. Early in an investigation, a PWMI may not even be the main suspect. He may merely be a potential witness, or a person of interest the police want to look into. But during even casual police encounters, PWMI can act in a way police deem unnatural. These unexpected actions can be "misconstrued by officers or deputies as suspicious or illegal activity or uncooperative behavior."[54] Odd behavior deepens police suspicion, shifting the focus of the investigation away from real suspects and towards an innocent PWMI.

Additionally, PWMI are less likely to respond with deference to the police compared to non-mentally ill persons.[55] Most PWMI are not violent, and hostility is by no means a ubiquitous symptom of mental illness. Nonetheless, some mental illnesses, like personality disorders, can manifest in aggression and hostility.[56] As such, PWMI are statistically more likely to react to police questioning in a hostile or uncooperative way compared with non-mentally disordered suspects.[57]

---

[52] *Ibid* at 313-316.
[53] *Ibid* at 320.
[54] US Dept of Justice, *Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement* (2006), online: <https://www.ada.gov/q%26a_law.htm>.
[55] Camille A Nelson, "Frontlines: Policing at the Nexus of Race and Mental Health" (2016) 43:3 Fordham Urb L J 615 at 639-46, online: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2659&context=ulj> [*Nelson*].
[56] See "Mental Illness and Violence" (2011) 27:7 Harv Ment Health Lett 1, online: <http://www.biblioteca.cij.gob.mx/Archivos/Materiales_de_consulta/Drogas_de_Abuso/Articulos/55984270.pdf>. National Institutes of Health, *NIH Curriculum Supplement Series: Information about Mental Illness and the Brain*, National Center for Biotechnology Information, online: <https://www.ncbi.nlm.nih.gov/books/NBK20369>.
[57] See Kenneth Novak & Robin Engel, "Disentangling the Influence of Suspects' Demeanor and Mental Disorder on Arrest" (2005) 28:3 Policing 493, online:<https://doi.org/10.1108/13639510510614573>. Mental Health Commission of Canada, *A Study of How People with Mental Illness Perceive and Interact with the Police*, (2011) at 33, online:

Signs of mental illness, like verbal abuse, belligerence, and disrespect, may not be against the law, but such symptoms defy police behavioral expectations. Uncooperativeness or defiance can provoke an officer to respond more punitively than if a defendant simply complies.[58]

Hostility and uncooperativeness spiral, escalating the situation. When approached on the street for casual questioning, the probability of arrest is 67% greater for suspects exhibiting signs of mental disorder than for those who are not mentally ill.[59] The PWMI who was once merely a person of interest has become a full-blown suspect, if not the primary suspect. Officers proceed to formal interrogation and the Reid Technique.

Once a PWMI is brought in for questioning, investigators may misinterpret symptoms as signs of guilt. This kind of underdiagnosis is often inadvertent, and not always malicious. Even a well-intentioned officer may mistake mental illness for guilt if unfamiliar with common symptoms. This is especially true if the officer relies on the highly popular Reid Technique.[60]

Widely considered to be the Bible of American interrogation tactics, the Reid Technique urges investigators to look for verbal and non-verbal "behavior symptoms" like body language, facial expression, and tone of voice.[61] According to the Reid Technique Manual, guilty people are often anxious, evasive, agitated, worried, and nervous throughout the duration of the interview.[62]

These feelings, and the underlying feeling of guilt, can manifest through "acting aggressive, having a bitter attitude, appearing to be in a shocked condition, experiencing mental blocks, being evasive, having and extremely dry mouth, continually sighing or yawning, refusing to look the examiner in the eye, and moving about."[63] The Reid Technique posits that by recognizing these behavioral cues, investigators can either confirm innocence or detect deception and guilt.[64]

However, as detailed below, many of these "behavior symptoms" are highly likely to appear in PWMI, either as a symptom of mental illness or as a side effect of medication.[65] Indeed,

---

<https://www.mentalhealthcommission.ca/sites/default/files/Law_How_People_with_Mental_Illness_Perceive_Interact_Police_Study_ENG_1_0_1.pdf>.

[58] Linda Teplin, "Keeping the Peace: Police Discretion and Mentally Ill Persons" (2000) Nat'l Inst Justice J 9 at 12, online: <https://www.ncjrs.gov/pdffiles1/jr000244c.pdf>. See also Linda Teplin, "Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill" (1984) 39:7 Am Psychol 794, online: <https://psycnet.apa.org/doi/10.1037/0003-066X.39.7.794>.

[59] See *ibid.*

[60] See *Redlich 2*, *supra* note 7 at 20.

[61] See Fred Inbau *et al*, *Essentials of the Reid Technique Criminal Interrogation and Confessions*, 2nd ed (Burlington: Jones & Bartlett Learning, 2015) at chapter 7 [*Inbau 1*].

[62] *Ibid* at 106-107, 172.

[63] John E Reid & Richard O Arther, "Behavior Symptoms of Lie-Detector Subjects" (1953) 44:1 J Crim L Crimin & Pol Sc 104 at 105, online: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=4113&context=jclc>.

[64] See *ibid*. "During an interview the investigator should closely evaluate the suspect's behavioral responses to interview questions. The suspect's posture, eye contact, facial expressions, word choice, and response delivery may each reveal symptoms of truthfulness or deception." *Inbau 1*, *supra* note 61 at 4.

[65] *Redlich 1*, *supra* note 1 at 63-64.

Blackmon displayed many of these behavioral cues during his interrogation, which could have easily been misconstrued by Holder and Mundy as guilt.

Worrying, nervousness, and restlessness are three hallmarks of schizophrenia,[66] and paranoia is a common indicator of personality disorders.[67] The Chief of the Psychiatric Unit at Attica Correctional Facility, where Blackmon was held in 1974, reported that Blackmon "cannot take any pressures whatsoever."[68] He also acted "very suspicious and very paranoid towards the examiners."[69] To an untrained officer, this behavior could easily be misinterpreted as fear one has been caught.

As previously mentioned, many PWMI are non-violent and harbour no aggressive tendencies. Nonetheless, some mental illnesses can manifest in the form of belligerence and hostility.[70] For example, one doctor surmised that Blackmon "responds to a stressful situation by becoming angry and dominating."[71] The doctor continued that Blackmon's mood was

> …very changeable, and he can go very quickly from being friendly and cooperative to being angry and threatening . . . He has a very low tolerance for stress and frustration, and usually reacts by becoming angry and intimidating . . . He's extremely hostile-dependent, and gets angry when others don't meet his needs.[72]

Such hostility, in both Blackmon and other innocent PWMI, could easily be perceived as guilt.

Another common symptom of mood disorders and schizophrenia is "flat affect," which is the "reduced expression of emotions via facial expression or voice tone."[73] This may cause PWMI to appear disinterested in proceedings and detached from the result.[74] Police may misinterpret this lack of emotion as a sign the suspect has "given up," or resigned themselves to the fact they have been caught. In reality, it is a common sign of mental illness.[75]

Yet another indicator of mental illness is poor working memory and memory gaps.[76] A PWMI may not remember his whereabouts or activities on certain days or may give inconsistent statements on their past. For example, Blackmon did not remember when he was released from

---

[66] See Heinz Hafner & Kurt Maurer, "Early Detection of Schizophrenia: Current Evidence and Future Perspectives" (2006) 5:3 World Psychiatry 130, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1636122>.
[67] See Amy Vyas & Madiha Khan, "Paranoid Personality Disorder" (2016) 11:1 Am J Psychiatry Resid J 9, online: <https://ajp.psychiatryonline.org/doi/pdf/10.1176/appi.ajp-rj.2016.110103>.
[68] *NCIIC*, *supra* note 14 at 254-55.
[69] *Ibid* at 255.
[70] See *supra* note 56.
[71] *NCIIC, supra* note 14 at 240.
[72] *Ibid* at 300-302.
[73] Kimberly Holland, "What is Flat Affect?" *Healthline* (4 Aug 2017), online: <https://www.healthline.com/health/flat-affect>. *Schizophrenia*, National Institute of Mental Health, online: <https://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml> [*NIMH*]. Raquel Gur *et al*, "Flat Affect in Schizophrenia: Relation to Emotion Processing and Neurocognitive Measures" (2006) 32:2 Schizophr Bull 279 at 279, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2632232>.
[74] See *Mental Illness, supra* note 37. See *ibid* note 73.
[75] *Ibid*.
[76] *Ibid*.

prison in New York [77] or when he first went to Dorothea Dix.[78] To an investigator, the inability to remember such details indicates a lie, especially if the suspected PWMI cannot remember his alibi.

In his initial psychiatric assessment at Dorothea Dix, Blackmon experienced "flight of ideas" and was generally uncooperative.[79] He displayed similar behavior in his interrogations, rambling and jumping from one idea to another.[80] This kind of disorganized speech—including derailment, disconnected thoughts, and incoherence—is a common symptom of mental illness.[81] Confusion and general disorientation are also common, as well as a refusal to speak, trouble focusing, and trouble paying attention.[82] PWMI may also experience odd speaking patterns, such as stuttering, speaking too quickly, or speaking too slow.[83] Furthermore, PWMI may experience inappropriate emotional responses to situations, or jump from one emotional extreme to another.[84] Any of these erratic behaviors could easily be misinterpreted as guilt, or attempting to evade the question.

The shifty-eyed suspect is synonymous with guilt, and the Reid Technique urges investigators to look for a lack of eye contact.[85] However, such a trait is also a common symptom of mental illness.[86] For example, a psychological examiner at Dorothea Dix noted that Blackmon tended to avoid eye contact at the beginning of interviews but could warm up with encouragement.[87] Investigators may misinterpret this common trait as evasive or indicative of guilt.

Lastly, under the Reid Technique, fidgeting—i.e. excessive leg movement, blinking, foot wiggling, hand wringing, finger tapping, picking fingernails, or fumbling with objects—is often perceived as a physical manifestation of lying.[88] However, many PWMI suffer from symptoms that cause them to tremble and shake uncontrollably, or move around excessively. In fact, schizophrenia is often characterized by "movement disorders," such as agitated body movement.[89] In his initial psychiatric assessment at Dorothea Dix, Blackmon constantly paced the room and fidgeted.[90] This inability to sit still and focus could be perceived as nerves or guilt, when in fact it is a common symptom experienced by many PWMI.[91]

As demonstrated by Blackmon, the Reid Technique's behavior symptoms show alarming overlap with common symptoms of mental illness. Even if police are acting in good faith, relying on the technique risks confusing mental illness with guilt. Such a tactic creates a heightened risk

[77] *NCIIC*, *supra* note 14 at 454-56.
[78] *Ibid* at 376.
[79] *Ibid* at 295.
[80] *Ibid* at 409-411.
[81] See *Mental Illness, supra* note 37. See also *Redlich 1*, *supra* note 1 at 70. *NIMH*, *supra* note 73.
[82] See *Mental Illness, supra* note 37. See *NIMH*, *supra* note 73.
[83] See *Mental Illness, supra* note 37.
[84] *Ibid*.
[85] *Inbau 1*, *supra* note 61 at 82-84.
[86] See *Mental Illness, supra* note 37.
[87] *NCIIC*, *supra* note 14 at 244, 283.
[88] *Inbau 1*, *supra* note 61 at 82-83.
[89] See *Mental Illness, supra* note 37.
[90] *NCIIC*, *supra* note 14 at 295.
[91] See *Mental Illness, supra* note 37.

that police will move forward with the investigation and attempt to extract a confession, rather than releasing an innocent PWMI and searching for other suspects.

B. Mid-Investigation/Interrogation: More likely to make a false confession

Once a formal interrogation is underway, PWMI face a heightened risk of making a false confession. Mental illness is a well-recognized risk factor for false confessions,[92] and among the known pool of exonerees who have falsely confessed, PWMI are disproportionately represented.[93] Two factors likely contribute to this trend. First, PWMI are less likely to understand their legal rights under *Miranda*. Second, symptoms of mental illness make PWMI more susceptible to the Reid Technique.

a. Less likely to understand Miranda rights

Miranda v Arizona forms the cornerstone of American due process law, creating crucial protections against coercive police interrogations.[94] However, *Miranda*'s legal safeguards afford little protection for PWMI.

First, PWMI may not understand *Miranda* rights well enough to invoke them. *Miranda* rights are complex legal tools that require a suspect to weigh long-term consequences. Hallmarks of mental illness include confusion, disorganization of thought, deficits in executive functioning and attention, and impaired decision making.[95] These symptoms make it more likely that a PWMI simply does not understand the rights being read to him, or how he will be disadvantaged should he waive them. One study found that 41% of individuals with a psychotic disorder were impaired in their understanding of their legal rights.[96] The same study found that 24% of individuals with affective disorders (i.e., depression, bipolar disorder, anxiety) were similarly impaired.[97] If a PWMI does not understand his rights, it is highly unlikely he will invoke them for protection.

Furthermore, to invoke *Miranda* protections a PWMI must realize he is being questioned in the first place. Blackmon never considered that he was a suspect because the officers held

---

[92] *Redlich 2*, *supra* note 7 at 19. *Rogal, supra* note 7 at 70. Lisa E Hasel & Saul M Kassin, "False Confessions" in Brian L Cutler, ed, *Conviction of the Innocent: Lessons from Psychological Research* (American Psychological Association, 2012) 53 at 62, online: <https://www.researchgate.net/publication/326529372_False_Confessions> [*Hasel & Kassin*].

[93] Sheri L Johnson, John H Blume & Amelia C Hritz, "Convictions of Innocent People with Intellectual Disability" (2019) 82:3 Alb L Rev 1031 at 1043, online: <http://www.albanylawreview.org/Articles/Vol82_3/1031-Convictions-of-Innocent-People-with-Intellectual-Disability.pdf> [*Johnson*]. Samuel R Gross *et al*, "Exonerations in the United States 1989 through 2003" (2005) 95:2 J Crim L & Criminology 523 at 545, online: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7186&context=jclc> [*Gross et al*].

[94] See *Miranda v Arizona,* [1966] 384 US 436. Prior to an interrogation in police custody, a defendant is required to be warned that (1) he has the right to remain silent, (2) that anything he says can be used against him in a court of law, (3) he has the right to an attorney, and (4) if he cannot afford an attorney, one can be appointed for him.

[95] *Redlich 2*, *supra* note 7 at 20.

[96] See Jodi Viljoen, "An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology" (2002) 26:5 Law & Hum Behav 481 at 493, online: <https://www.researchgate.net/publication/11051727_An_Examination_of_the_Relationship_Between_Competency_to_Stand_Trial_Competency_to_Waive_Interrogation_Rights_and_Psychopathology>.

[97] *Ibid* at 493.

themselves out as his friends. He trusted them and believed they were helping him.[98] He voluntarily came to the station several times, often on his own volition.[99] The officers never told Blackmon his *Miranda* rights until after he confessed, and the court found that the officers did not violate the law because Blackmon was never "in custody."[100] The detectives should have realized that Blackmon did not comprehend the investigation that was going on, and he did not understand the gravity of the situation. This failure to recognize Blackmon's incapacity goes back to misinterpreting his symptoms and underscores the importance of recognizing mental illness early in the investigation.

Due to these limitations, *Miranda* is inadequate to protect PWMI from wrongful convictions. For the protections to function, a suspect must be able to comprehend one's rights and be aware that one is under investigation in the first place.

b. Susceptibility to Reid Technique: Minimization and Maximization

If a suspect fails to invoke his *Miranda* rights, he may still suppress the statement if he can show the confession was coerced. However, in *Colorado v Connelly*, the Supreme Court ruled that a suspect's mental condition alone is insufficient to find coercion.[101] Rather, the defendant must demonstrate that the police used "coercive techniques."[102] The Supreme Court has a narrow definition of "coercive techniques," and the Reid Technique is not considered coercive under this limited framework.[103]

This approach fails to take into account the reality of mental illness, and how common symptoms may manifest in the interrogation environment. Under the Reid Technique, police interrogators are taught to assume guilt and manipulate the suspect's emotions and expectations.[104] The approach relies on minimization techniques "such as feigning sympathy, offering a moral justification for the crime, or shifting blame" to create a false sense of security, and maximization techniques "such as presenting false evidence" to scare or browbeat the suspect into confessing.[105] PWMI are more susceptible to both strategies.[106]

As previously mentioned, common symptoms of mental illness include proneness to confusion, disorganization of thought, deficits in executive functioning and attention, and impaired decision making.[107] These symptoms make PWMI more susceptible to minimization for a few reasons.

---

[98] *NCIIC*, *supra* note 14 at 444-445. This theme is further developed in the Minimization Section.
[99] *Ibid* at 436-37.
[100] *Ibid* at 591.
[101] See *Colorado v Connelly*, [1986] 449 US 157.
[102] *Ibid.*
[103] *Redlich 2*, *supra* note 7 at 19-20.
[104] *Ibid* at 20.
[105] *Ibid* at 20.
[106] *Ibid* at 20. *Hasel & Kassin*, *supra* note 92 at 54-55, 62. *Rogal*, *supra* note 7, at 70. Gisli H Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Chichester: John Wiley & Sons, Ltd, 2003) at 218-224, 316-318 [*Gudjonsson*].
[107] *Redlich 2*, *supra* note 7 at 19-20. See *Mental Illness*, *supra* note 37.

First, PWMI who have deficits in social skills, struggle with a distorted sense of reality, and are prone to delusions may more readily believe—compared to persons without a mental illness—that an officer questioning them is a friend.[108] Where non-mentally disordered defendants tend to be on guard and wary of police, faulty reality monitoring can lead a PWMI to think a sympathetic officer is genuinely on his side, an ally who "has been there."[109] Misinterpreting or misunderstanding the context of an interrogation can lead a PWMI to comply when an officer asks for an incriminating statement, since the PWMI wrongly perceives the officer to be working in his best interest.[110]

This is precisely what occurred in Blackmon's case, where police purposefully cultivated a friendship in order to extract a confession. The detectives complimented Blackmon, telling him was "a very intelligent man" despite his second-grade education.[111] They gave him snacks and cigarettes, to the point where Blackmon began visiting the station when he needed food.[112] They drove him from Dorothea Dix to his grandmother's house and back.[113] When asked open-ended questions, Blackmon tended to ramble about his religious delusions and special abilities.[114] The detectives reassured Blackmon that they believed his delusions and even asked Blackmon to elaborate.[115]

Blackmon began to see the detectives as his confidants, "nice people" who helped him when he was struggling.[116] The detective once asked Blackmon why he came down to the police station so often, and he responded, "You all can help me, you know?" The officer clarified, "Am I making you come down here?" Blackmon responded, "No. You just asked me to come down out of the kindness of your heart, man, and I do it out the kindness of mine."[117] The officers told him they liked him, and asked him several times whether the officers were his friends.[118] Blackmon always responded they were.[119] He liked his prosecutor so much he brought her candy, and he trusted the detectives enough to ask them for money to buy his girlfriend a doll.[120] Due to symptoms of his illness, Blackmon genuinely believed the police were his allies; he did not understand their adversarial role in the justice process. By holding themselves out as friends in this fashion, police can gain a PWMI's trust, then use that trust to convince a PWMI like Blackmon that confessing is in his best interest.[121]

---

[108] *Redlich 2*, *ibid* note 7 at 20.
[109] *Ibid* at 20.
[110] *Ibid* at 20. *Rogal*, *supra* note 7 at 70 (detailing a PWMI in Detroit who falsely confessed to a murder in order to help the police "smoke out" the real perpetrator; the police both permitted and encouraged this delusion in order to obtain a confession). Richard A Leo, "False Confessions: Causes, Consequences, and Implications" (2009) 37:3 J Am Acad Psychiatry & L 332 at 336-37, online: <http://jaapl.org/content/jaapl/37/3/332.full.pdf> [*Leo*].
[111] *NCIIC*, *supra* note 14 at 370.
[112] *Ibid* at 440-41.
[113] *Ibid* at 447-48.
[114] *Ibid* at 380, 417, 432, 468.
[115] *Ibid* at 370, 374-75, 378.
[116] *Ibid* at 437. *NC Blackmon, supra* note 32 at 422-23, 438.
[117] *NCIIC*, *supra* note 14 at 444-445.
[118] *Ibid* at 474.
[119] *Ibid* at 364, 429.
[120] *Ibid* at 443-444.
[121] *Rogal*, *supra* note 7 at 70. *Redlich 2*, *supra* note 7 at 20. *NC Blackmon, supra* note 32 at 423-24, 438-39.

For many of the same reasons, a PWMI who struggles with distorted perceptions and delusional beliefs, as well as memory deficits that lead him to distrust his own sense of reality, may be more inclined to believe an officer who downplays the seriousness of a crime, or minimizes involvement in a crime.[122] In Blackmon's case, the officers encouraged a confession by repeatedly distancing Blackmon from the crime and downplaying his culpability.

Blackmon initially denied all responsibility, claiming the only time he "really" hurt someone was when he set fire to a house in New York.[123] He also denied several specific aspects of the case, claiming that he had never owned a knife like the one used in the murder [124] or a dashiki like the one found in the woods.[125] But most importantly, he claimed he had never been to St. Augustine's University and he did not know where the campus was located.[126]

The detectives ignored Blackmon's claims and encouraged the delusion that Blackmon's "body" had been to St. Augustine's even if his "mind" was somewhere else.[127] They told him, "Your body, separate from your mind, reformed into another James Blackmon over on the top floor of the dorm."[128] The detectives convinced Blackmon that his body could commit wrongdoing while his mind stayed behind. Blackmon agreed, and claimed it happened before.[129] By encouraging Blackmon's mind-body distinction, the detectives reassured Blackmon that they did not hold *him* responsible for the murder at St. Augustine's.

Closely linked to this delusion was the idea that Blackmon's "soul" could get loose of his body and commit crimes without his knowledge.[130] Early on, the detectives impressed upon Blackmon that "Bad James" could commit crimes independently of "Good James." The idea of dissociation immediately resonated with Blackmon, and he tied Bad James to his religious fantasies.[131] The detectives fed the Bad James delusion frequently, and dissociation became a staple of the interrogations.[132]

The detectives purposefully capitalized on Blackmon's mental illness—namely his delusions and his dissociative symptoms—to extract a confession. At one point, Blackmon asked the detectives point-blank, "Hey, do you think that my spirit body can go somewhere and do somebody some wrong or hurt somebody?" One of the detectives responded, "I do, James." Blackmon confirmed he shared the belief.[133] Both detectives were careful to ask what "Bad James" did at St. Augustine's, while simultaneously reassuring Blackmon they were not talking about the "Good James" currently in the police station.[134] They explicitly distinguished the two on more than one occasion, and insisted they were only interested in Bad James' actions, "not this [current]

[122] *Redlich 2*, *ibid* at 19-20. *Rogal, ibid* at 70.
[123] *NCIIC*, *supra* note 14 at 452.
[124] *Ibid* at 415-16.
[125] *Ibid* at 413-414.
[126] *Ibid* at 381.
[127] *Ibid* at 382-83, 396-98.
[128] *Ibid* at 403.
[129] *Ibid* at 380-83.
[130] *Ibid* at 380.
[131] *Ibid* at 399-402.
[132] *Ibid* at 399-402, 413-14, 417-19, 426-27, 431-33.
[133] *Ibid* at 400-401.
[134] *Ibid* at 413-414, 416-28.

James Blackmon."[135] By using dissociation to distance Blackmon from the crime, the detectives coaxed Blackmon into agreeing that Bad James hurt a woman at St. Augustine's.[136]

Post-confession, the detectives told Blackmon he must take responsibility for Bad James, "because you are actually one and the same."[137] Blackmon verbally agreed, but he clearly did not understand the consequences of his confession. He was confused when the officers told him he would be punished for Bad James' actions. Blackmon agreed "old James" must go to jail but clarified that the "new James" should not get any time.[138] When the detectives told Blackmon he would to go before a judge and jury, he continued to think the detectives were talking about Bad James.[139] Because of his mental illness, and its dissociative symptoms, Blackmon genuinely did not understand that he had implicated *himself* in a crime. To him, the distinction between Bad James and Good James was so complete that he could not fathom why he was being punished for a confession about Bad James.

Blackmon's symptoms are far from unique. Dissociation plays a key role in several kinds of mental illness, including schizophrenia and borderline personality disorder.[140] Symptoms of dissociation include significant memory loss, out-of-body experiences (such as feeling as though you are watching a movie of yourself), a sense of detachment from your emotions and a lack of a sense of self-identity.[141] Through the mind-body distinction and the Good James-Bad James distinction, the police intentionally promoted these symptoms. They built their entire interrogation strategy around Blackmon's illness and proneness to delusion, emphasizing that Blackmon had no control over what Bad James did to Payton.[142] By minimizing Blackmon's involvement, detectives wrongly led him to believe he would not be in trouble if he confessed. Blackmon believed them and provided the requested confession.

In doing so, Blackmon demonstrates how a disconnect from reality can lead a PWMI to fall for minimization techniques and falsely confess, especially if the PWMI already suffers from memory loss and dissociation. By constantly downplaying Blackmon's responsibility for the crime, officers made it appear as if he could go home if he agreed with them. As discussed in more detail below, erroneously believing that there are no consequences to a confession almost certainly contributes to higher rates of false confessions from PWMI.[143]

---

[135] *Ibid* at 422, 425, 427.
[136] *Ibid* at 389.
[137] *Ibid* at 480.
[138] *Ibid* at 481.
[139] See *ibid* at 482.
[140] See Ondrej Pec, Petr Bob & Jiri Raboch, "Dissociation in Schizophrenia and Borderline Personality Disorder" (2014) 10 Neuropsychiatr Dis Treat 487 at 487-490, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3964156>.
[141] See *Dissociative Disorders*, National Alliance on Mental Illness, online: <https://www.nami.org/learn-more/mental-health-conditions/dissociative-disorders>.
[142] *NC Blackmon*, *supra* note 32 at 423-24.
[143] Allison Redlich, Alicia Summers & Steven Hoover, "Self-Reported False Confessions and False Guilty Pleas among Offenders with Mental Illness" (2010) 34:1 Law & Hum Behav 79 at 80, online: <https://doi.apa.org/doiLanding?doi=10.1007%2Fs10979-009-9194-8> [*Redlich 3*].

Perhaps most importantly, mood disorders and schizophrenia are often characterized by "deficits in risk assessment and reward processing."[144] In general, this means PWMI struggle to weigh the costs and benefits of a decision.[145] In the criminal justice context, this means PWMI struggle to understand and properly weigh the long-term consequences of confessing.[146]

To a PWMI, a confession seems to be a rational trade-off in the short-term. Give the officers what they want (a confession) and the officers will give you what you want (the freedom to leave).[147] In one study of incarcerated PWMI who self-reported as false confessors, the majority (65%) "claimed to falsely take responsibility because they wanted to end questioning, get of jail, or go home."[148] A "common feature" among these false confessors was that the PWMI was either "told or incorrectly believed they could go home after admitting guilt."[149] For a PWMI with impaired decision-making ability, a confession seems a small price to pay to terminate a stressful interrogation and go home.[150]

This inability to process consequences may have contributed to Blackmon's false confession. One psychiatric assessment found that Blackmon's weaknesses included difficulty completing structured tasks, lack of insight into realistic goals, and difficulty completing problem-solving tasks.[151] Such symptoms made it difficult for Blackmon, and other PWMI with similar symptoms, to grasp the true consequences of a confession.[152]

These three factors likely work in tandem to drive PWMI towards false confessions. Where the general public is more likely to see through police deception, PWMI may believe an officer who identifies as a friend or claims there are minimal consequences to confessing. Based on these false notions, and an inability to weigh the consequences of a confession, PWMI are more inclined to believe that a false confession will end an interrogation, and that this benefit outweighs any long-term costs.[153]

As for maximization techniques, three common indicators of mental illness include memory gaps, distorted perceptions of events, and breakdowns in reality monitoring.[154] These symptoms often lead to heightened suggestibility and the "inability to distinguish fact from

---

[144] Ricardo Caceda *et al*, "Toward an Understanding of Decision Making in Severe Mental Illness" (2014) 26:3 J Neuropsychiatry Clin Neurosci 196 at 207, online: <https://neuro.psychiatryonline.org/doi/full/10.1176/appi.neuropsych.12110268>.
[145] *Ibid* at 207.
[146] Saul M Kassin *et al*, "Police-Induced Confessions: Risk Factors and Recommendations" (2010) 34:3 Law & Hum Behav 3 at 12, 14, online: <https://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20(2010).pdf> [*Kassin 1*].
[147] See *ibid* at 14. *Redlich 3*, *supra* note 143 at 87.
[148] *Redlich 3*, *ibid* at 87.
[149] *Ibid.*
[150] *Kassin 1*, *supra* note 146 at 21. Leo, *supra* note 110 at 336. Saul Kassin & Gisli Gudjonsson, "The Psychology of Confessions: A Review of the Literature and Issues" (2004) 5:2 Psychol Sci Public Interest 33 at 53, online: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.858.8042&rep=rep1&type=pdf> [*Kassin 2*].
[151] *NCIIC*, *supra* note 14 at 305.
[152] *Kassin 1*, *supra* note 146 at 21. *Redlich 3*, *supra* note 143 at 87. *Redlich 2*, *supra* note 7 at 20.
[153] *Redlich 3*, *ibid* at 87. *Redlich 2*, *ibid*.
[154] *Redlich 2*, *ibid*. *Mental Illness, supra* note 37.

fantasy."[155] Maximization techniques are particularly effective on PWMI with these symptoms, as they are more easily influenced than non-mentally disordered suspects, making it easier for officers to convince them of guilt that does not truly exist.[156]

For example, detectives slowly persuaded Blackmon to change his story by feeding him information and stating accusations as facts. As mentioned in the previous section, Blackmon was initially staunch in his declaration of innocence. Over and over, Blackmon repeated that he "never did nothing to really hurt nobody."[157] He even told detectives, "I never killed nobody in my life."[158] When they asked, "What's the only thing the bad James has really done, then?" Blackmon responded, "Commit adultery, steal, stick-up, beat people up, that's it."[159]

However, through detailed imagery and stressing visualization, the police were able to change Blackmon's statements.[160] The detectives repeatedly told Blackmon to imagine himself at St. Augustine's, to picture his body going up the stairway, walking around the top floor, and finding women.[161] Blackmon initially said, "I can't picture it, and I can't see her." [162] The detective ignored him and pressed on, asking, "What's happened to the girl. She gets hurt. What happens to her?"[163] The detectives described disturbing and visceral scenes, asking about blood and telling him that a girl was "screaming for help."[164] They told Blackmon, rather than asked him, "Something happened. Something you had no control over . . . Your body was there. You were re-formed . . . And, you know, somebody got hurt . . . What's happened to the girl. She gets hurt. What happens to her?"[165] Rather than letting Blackmon describe the events himself, the police carefully walked him through the confession.[166] They told him, "James Blackmon, the old James Blackmon and the girl were in the stall together, and the girl started screaming because she did not want James Blackmon to leave . . . What did James Blackmon do with the knife?"[167] Only after detectives painted the scene in his mind did Blackmon finally give a straightforward confession, saying that Bad James cut her and killed her.[168] The detectives' vivid imagery firmly planted the image of the murder in Blackmon's mind, and he became unable to distinguish it from his own memories.

By presenting accusations as facts and feeding Blackmon detailed mental images, the detectives slowly caused Blackmon to accept their version of events. Unable to separate his own memory from the scenes the police told him to visualize, Blackmon eventually agreed with their

---

[155] *Kassin 2*, *supra* note 150 at 49. *Redlich 2*, *ibid* at 20.
[156] *Redlich 2*, *ibid*. *Rogal, supra* note 7 at 70. *Gudjonsson*, *supra* note 106 at 194-195, 218-224, 316-318. *Hasel & Kassin*, *supra* note 92 at 54-55.
[157] *NCIIC*, *supra* note 14 at 451-52.
[158] *Ibid* at 451.
[159] *Ibid*.
[160] *Ibid* at 383.
[161] *Ibid* at 397-98.
[162] *Ibid* at 401.
[163] *Ibid*.
[164] *Ibid.*
[165] *Ibid* at 399-402.
[166] *Ibid* at 416-418.
[167] *Ibid* at 416.
[168] *Ibid*.

version of events. He internalized the accusations, accepted them as his own memory, and even began to regurgitate them back to the officers.

Such receptiveness highlights the danger of maximization techniques for PWMI. A PWMI like Blackmon who distrusts his own memories, and struggles to distinguish reality from delusion, presents a heightened risk of a false confession.[169] After being told a story several times, he may struggle to remember whether a fact actually happened or was just told to him by the police.[170] In Blackmon's case, a distorted sense of reality made it "quite easy" for detectives to flip his statements.[171]

Blackmon is not alone in this respect; he merely exemplifies how PWMI are less able to withstand the psychological pressures of the Reid technique. Although data is limited, the research that has taken place indicates that PWMI falsely confess at higher rates than non-mentally disordered suspects. One 2005 study found that out of all exonerees from 1989 through 2003, 11% falsely confessed to their crime.[172] But out of the ten exonerees who appeared to suffer from mental illness, seven had falsely confessed.[173] A later study examining exonerations through 2019 similarly found that 12% of non-mentally ill exonerees falsely confessed, but well over half of PWMI who were wrongfully convicted made a false confession.[174]

A different kind of study surveyed 1,249 PWMI currently involved in the American criminal justice system, and found that 22% claimed to have falsely confessed to the police, while 37% claimed to have falsely pleaded guilty.[175] These figures were notably higher than the percentage of non-mentally ill offenders who self-reported as false confessors in a comparable European study.[176] Although such research is far from conclusive, what little data has been

---

[169] *Gudjonsson*, *supra* note 106 at 218-224. *Hasel & Kassin*, *supra* note 92 at 54-55. *Kassin 1*, *supra* note 146 at 15.
[170] *Rogal, supra* note 7 at 70.
[171] Josh Shaffer, "Murder Convict Wore Superman Cape, Compared Himself to Dracula, During Confession," *The News & Observer* (20 Aug 2019), online: <https://www.newsobserver.com/news/local/crime/article234174577.html>. Allison Redlich, "In re: the State of North Carolina vs James Blackmon, case # 83CRS84695" (7 Nov 2018) at 19, online: <https://innocencecommission-nc.gov/wp-content/uploads/state-v-blackmon/handouts-provided-to-the-commission-during-the-hearing.pdf> [*Redlich 4*]. "Detectives also asked Blackmon to engage in a lot of speculation about how the crime may have occurred, how he got into or left the building, etc. In my expert opinion, these requests to speculate and imagine are dangerous when used with innocent suspects in that they can lead to false confessions. When used with innocent suspects who are susceptible to suggestion and easily confused, the risk increases."
[172] *Gross et al*, *supra* note 93 at 545.
[173] *Ibid* at 545.
[174] See *Johnson*, *supra* note 93 at 113. The NRE reported in February 2019 that out of roughly 2,400 known wrongful convictions, 146 exonerees had a reported mental or intellectual disability. Although the NRE did not distinguish between the two, Sheri Johnson "reviewed case information provided by the NRE and parsed out the intellectual disability and mental illness variable." She concluded that out of the 146 defendants with a reported mental impairment, 45 lacked evidence of intellectual or learning disabilities. Of these defendants, 29, or 64%, falsely confessed. Proportionally, this is far greater than the number of non-mentally ill defendants who falsely confessed (12%). For a more detailed breakdown of this statistic, see Alexis E Carl, "Dead Wrong: Capital Punishment, Wrongful Convictions, and Serious Mental Illness" (2020) 1:3 Wrongful Conviction L Rev 336 at 344, online: <https://wclawr.org/index.php/wclr/article/view/16/57>.
[175] *Redlich 3*, *supra* note 143 at 91.
[176] *Ibid* at 91.

collected indicates that PWMI like Blackmon proffer false confessions at a markedly higher rate than non-mentally disordered defendants.

A false confession is merely the capstone of an investigation that is heavily weighted against a PWMI from the start. Symptoms of mental illness breed fear and misunderstanding, arousing suspicion of a PWMI in the first place. Those same symptoms, misinterpreted through the lens of the Reid Technique, seem to confirm guilt during an interrogation. Mental illness decreases the likelihood of understanding and invoking *Miranda* and increases the likelihood of a false confession under minimization/maximization techniques. The whole approach seems perversely calculated to target innocent PWMI rather than protect them. Some states and cities have recognized this problem and have worked towards a solution to better protect innocent PWMI.

IV Potential Solution: Training Officers to Recognize Mental Illness

North Carolina responded to the broader problem of wrongful convictions by establishing the North Carolina Innocence Inquiry Commission. Started in 2006, the Commission examines cases of factual innocence, like Blackmon's.[177] Blackmon was the 12th exoneration, and the Commission will surely continue to exonerate innocent PWMI. Such an institution on the back-end of wrongful convictions is vital to rectify past misconduct. However, improvements are also needed on the front-end to avoid wrongful convictions of PWMI in the first place.

Many of the problems discussed in Section III share a common root cause: officers' inability to identify mental illness. If an officer is able to recognize symptoms of mental illness when he or she first approaches a PWMI on the street, that officer can avoid escalating the situation into an arrest. Or, if officers bring a mentally disordered suspect to the station for questioning but then later recognize symptoms of mental illness, those officers know not to rely on the Reid Technique's behavior symptoms to determine guilt. They are also aware that any "confession" they obtain under minimization or maximization could be false, and the true perpetrator may very well remain at large. Underdiagnosis causes ripple effects throughout an investigation, and those ripples culminate in wrongful convictions. To avoid snowballing harms in the first place, officers must become more familiar with the common signs of mental illness.

In theory, officers should already be on alert that PWMI are a special class. The Reid Manual nominally recognizes the danger of misinterpreting symptoms as signs of guilt and warns investigators to be "highly skeptical of the behavior symptoms of a person with a psychiatric history."[178] When suspects have delusions or hallucinations, "obviously little weight should be placed on that subject's behavior symptoms."[179]

---

[177] See Robert Mosteller, "NC Innocence Inquiry Commission's First Decade: Impressive Success and Lessons Learned" (2016) 94:6 NC L Rev 1725, online: <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4875&context=nclr>.

[178] *Inbau 1*, *supra* note 61 at 92.

[179] *Ibid* at 93.

However, the manual immediately reassures officers that through the process of patient questioning, a professional interrogator can "bring [...] to light the delusion" and separate legitimate confessions from false confessions.[180] Similarly, the Manual's companion book *Criminal Interrogation and Confessions* reassures officers that suspects with mental illness "are not skilled or confident liars and will often reveal the truth through the interviewing process."[181]

These kinds of warnings assume that mental illness is so obvious, officers will recognize it when they see it. Cases like James Blackmon demonstrate this is not a safe assumption.

Without proper training, the Reid Technique's warning rings hollow. Practical experience does not create sufficient familiarity to recognize mental illness in a suspect.[182] Unless states and cities invest in deliberate, specialized training to recognize mental illness, even well-intentioned officers risk confusing symptoms with signs of guilt.[183]

A. Implementing Crisis Intervention Team (CIT) Training

To that end, one way to address underdiagnosis is mandating that a certain number of training hours be dedicated to mental health recognition and management. Many states and cities have adopted this approach through the Crisis Intervention Team (CIT) model. The Memphis Police Department originally developed the CIT program in 1988 in response to an officer fatally shooting a PWMI.[184] The department collaborated with the University of Tennessee, the University of Memphis, and the National Alliance on Mental Illness to create a specialized training curriculum that would both familiarize officers with the symptoms of mental illness and provide de-escalation training, with the overall goal of redirecting PWMI towards treatment services instead of the judicial system.[185] The model was quickly adopted by other localities and can now be found in over a thousand police departments across the country.[186]

These programs have been found to have "a positive effect on officers' attitudes, beliefs, and knowledge relevant to interactions with [PWMI]."[187] This includes a reduction in negative stereotypes and stigma surrounding mental illness in officers who receive mental health training.[188]

---

[180] *Ibid* at 94.
[181] Fred Inbau *et al*, *Criminal Interrogation and Confessions*, 4th ed (Gaithersburg, MD: Aspen Publishers, 2001) at 431-32 [*Inbau 2*].
[182] See H Richard Lamb, Linda E Weinberger & Walter J DeCuir Jr, "The Police and Mental Health" (2002) 53:10 Psychiatr Serv 1266 at 1267, online: <https://ps.psychiatryonline.org/doi/10.1176/appi.ps.53.10.1266> [*Lamb*].
[183] See *Ibid*.
[184] Amy C Watson & Anjali Fulambarker, "The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners" (2013) 8:2 Best Pract Mental Health 71 at 72, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3769782/pdf/nihms500811.pdf> [*Watson 1*].
[185] Michael T Compton *et al*, "A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs" (2008) 36:1 J Am Acad Psychiatry & L 47 at 52, online: <https://pdfs.semanticscholar.org/7174/f4b1c49d645ea52b151eff00bb6040d4bf1c.pdf> [*Compton 1*].
[186] *Ibid* at 48. See also Matthew Epperson *et al*, "Envisioning the Next Generation of Behavioral Health and Criminal Justice Interventions" (2014) 37:5 Int'l JL & Psychiatry 427 at 433, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4142111/#S2title> [*Epperson*].
[187] *Compton 1*, *supra* note 185 at 52-53.
[188] Michael T Compton *et al*, "Crisis Intervention Team Training: Changes in Knowledge, Attitudes, and Stigma Related to Schizophrenia" (2006) 57:8 Psychiatr Serv 1199 at 1201-02, online: <https://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2006.57.8.1199> [*Compton 2*].

Furthermore, "CIT-trained officers have reported feeling better prepared in handling calls involving individuals with mental illness."[189]

In some cities, this shift in attitude has translated to measurably positive outcomes for both officers and PWMI.[190] In Chicago, officers who received CIT training were significantly more likely to refer individuals to mental health services.[191] In Memphis, officers who received training were less likely to use force when responding to a mental health call, and officer injuries were down 80% when responding to such calls.[192]

These programs, and CIT programs in general, show great promise. Widespread implementation of similar policies could greatly improve officer recognition of mental illness when officers encounter PWMI in the community.[193]

a. Factors maximizing success

Importantly, some research indicates that CITs are no silver bullet.[194] One meta-study found that CITs have no overall effect on arrests of PWMI or officer safety.[195] Interestingly, the article warns that these results "do not suggest that CIT programs should be discontinued."[196] Rather, the results indicate that all programs are not created equal, and in many programs, there

---

[189] *Compton 1*, *supra* note 185 at 52-53.
[190] *Watson 1*, *supra* note 184 at 74-75.
[191] See Amy C Watson, Victor C Ottati, Jeff Draine & Melissa Morabito, "CIT in Context: The Impact of Mental Health Resource Availability and District Saturation on Call Dispositions" (2011) 34:4 Int'l JL & Psychiatry 287 at 292, online: <https://indigo.uic.edu/articles/journal_contribution/CIT_in_Context_The_Impact_of_Mental_Health_Resource_Availability_and_District_Saturation_on_Call_Dispositions/10763180> [*Watson 2*].
[192] See *Crisis Intervention Team (CIT) Programs*, National Alliance on Mental Illness, online: <https://www.nami.org/get-involved/law-enforcement-and-mental-health>. See Randolph Dupont, Sam Cochran & A Bush, *Reducing Criminalization among Individuals with Mental Illness, Presented at the US Department of Justice and Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) Conference on Forensics and Mental Illness,* (Washington, DC: Jul 1999). See Randolph Dupont & Sam Cochran, "Police Response to Mental Health Emergencies – Barriers to Change" (2000) 28:3 J Am Acad Psychiatry & L 338, online: <https://www.ojp.gov/ncjrs/virtual-library/abstracts/police-response-mental-health-emergencies-barriers-change>.
[193] Michael T Compton *et al*, "The Police-Based Crisis Intervention Team (CIT) Model: I. Effects on Officers' Knowledge, Attitudes, and Skills" (2014) 65:4 Psychiatr Serv 517 at 521, online: <https://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.201300107> [*Compton 3*]. See also Susan M Godschalx, "Effect of a Mental Health Educational Program Upon Police Officers" (1984) 7:2 Research in Nursing & Health 111, online: <https://onlinelibrary.wiley.com/doi/abs/10.1002/nur.4770070207>. Lars Hansson & Urban Markstrom, "The Effectiveness of Anti-Stigma Intervention in a Basic Police Officer Training Programme: A Controlled Study" (2014) 14 BMC Psychiatry 1 at 5, online: <https://link.springer.com/content/pdf/10.1186/1471-244X-14-55.pdf> .
[194] See Michael S Rogers, Dale E McNiel & Renée L Binder, "Effectiveness of Police Crisis Intervention Training Programs" (2019) 47:4 J Am Acad Psychiatry & L, online: http://jaapl.org/content/jaapl/early/2019/09/24/JAAPL.003863-19.full.pdf.
[195] See Sema Taheri, "Do Crisis Intervention Teams Reduce Arrests and Improve Officer Safety? A Systematic Review and Meta-Analysis" (2016) 27:1 Crim Justice Policy Rev 76 at 92, online: <http://www.gocit.org/uploads/3/0/5/5/30557023/sept_19_event_meta-analysis_crisis_intervention_training_for_police.pdf>.
[196] *Ibid* at 76.

are improvements to be made. Certain tactics appear to work better than others, and a few factors, examined below, seem to maximize a CIT program's chance at success.

Many police departments only train a few specialized officers to deal with mental health crises, arguing that they do not have the time or budget to train everyone.[197] Some cities do not even assign CIT training, instead relying on officers who self-select into the program voluntarily.[198]

However, one three-city study found that 92% of officers reported at least one encounter with a PWMI within the past month, and 84% reported having more than one encounter.[199] On average, officers reported six encounters with PWMI during the previous month.[200] Nationwide, approximately 7-10% percent of all police encounters involve people affected by mental illness.[201] Departments cannot guarantee that a handful of specialists are the first officers on the scene in these situations. Every officer must be equipped to recognize mental illness and interact with PWMI lest the situation escalate before a "specialist" arrives.

Likewise, a few trained specialists cannot be expected to catch every single PWMI that comes through the department doors. If departments hope to avoid wrongful convictions of PWMI, then the detectives doing day-to-day investigations must be trained to recognize mental illness themselves. The officers tasked with pursuing convictions and given the discretion to focus on one suspect over another must be able to identify PWMI like Blackmon.

In the majority of states that have implemented CIT programs, the required training is 8 hours or less.[202] To ensure officers fully understand, recognize, and appreciate the symptoms of mental illnesses, states and cities must ensure that departments undergo the full CIT curriculum, which includes approximately 40 hours of training.[203] This burden is not unreasonable. For

---

[197] See Megan Pauly, "How Police Officers Are (or Aren't) Trained in Mental Health," *The Atlantic* (11 Oct 2013), online: <https://www.theatlantic.com/health/archive/2013/10/how-police-officers-are-or-aren-t-trained-in-mental-health/280485> [*Pauly*].

[198] See Michael T Compton, "Police Officers' Volunteering for (rather than being assigned to) Crisis Intervention Team (CIT) Training: Evidence for a Beneficial Self-Selection Effect" (2017) 35:5-6 Behav Sci & L 470, online: <https://cit-utah.com/resources/Documents/CIT%20Training%20Self-selecting%20Proves%20Better%20Outcomes.pdf> [*Compton 4*].

[199] Randy Borum, "Police Perspectives on Responding to Mentally Ill People in Crisis: Perceptions of Program Effectiveness" (1999) 16 Behav Sci & L 393 at 401, online: <https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1567&context=mhlp_facpub>.

[200] *Ibid* at 397.

[201] See Doris A Fuller, H Richard Lamb, Michael Biasotti & John Snook, *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters* (The Treatment Advocacy Center, 2015) at 5, online: <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf>.
Jennifer Wood, Amy Watson & Anjali Fulambarker, "The 'Gray Zone' of Police Work During Mental Health Encounters: Findings from an Observational Study in Chicago" (2016) 20:1 Police Q 81 at 82, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5342894>.

[202] See *Pauly*, *supra* note 197.

[203] See Ernie Stevens & Joe Smarro, "Why Crisis Intervention Team Training Should be the Standard" (13 Dec 2019), National Alliance on Mental Illness, online: <https://www.nami.org/Blogs/NAMI-Blog/December-2019/Why-Crisis-Intervention-Team-Training-Should-Be-the-Standard>. The standard CIT program - developed by the Memphis Police Department Memphis Police Department, the University of Tennessee, the University of Memphis, and the National Alliance on Mental Illness - is a 40-hour curriculum consisting of the following topics: "Active listening and

example, in Florida, officers undergo 40 hours of mental health training during the police academy.[204] Investing in training up front will ensure officers do not waste time down the line interrogating innocent PWMI.

Learning theorists have found that punishment is not the most effective method of changing behavior.[205] If CIT training is only required *after* an officer mishandles a situation involving a PWMI, the officer is more likely to fixate on the chore of CIT training rather than examining the behavior that led to the punishment.[206] Moreover, if officers see CIT training as punishment, they are more likely to develop negative feelings towards PWMI because they blame the PWMI for their punishment.[207] Bearing this in mind, an effective CIT program must focus on training officers before they encounter a PWMI. For example, Florida's approach of training officers while they are at the police academy is more effective than framing CIT training as punishment for a mistake.

Studies show that race-based implicit bias training fades.[208] In the same way, mental health training may fade over time. Police departments must ensure that mental health awareness is integrated into the department's continued training requirement. For example, Florida requires every officer to complete 40 hours of continued education or training every four years.[209] Florida already has various requirements built into these 40 hours, such as a mandatory "Use-of-Force" training.[210] CIT training and mental health awareness could be seamlessly incorporated into pre-existing requirements, decreasing the risk that mental illness awareness fades over time.

Officers should recognize that their unconscious biases against PWMI [211] intersect with biases against women [212] and people of color.[213] Without discussing these intersectional biases, officers may not recognize PWMI in a female suspect or suspect of color.[214] CIT training should not be considered comprehensive unless it specifically covers mental illness in minority populations and all genders.

---

de-escalation; Legal considerations; Mental illness basics; Various conditions including bipolar disorder, schizophrenia, depression, anxiety, PTSD, etc.; Suicide detection & prevention; police officer suicide; suicide by cop; Excited delirium; Local resources; Jail diversion [and] Role plays."

[204] See *Pauly*, *supra* note 197.

[205] See David Cherrington, "Crime and Punishment: Does Punishment Work?" (2007) 22:2 The Hayes Report on Loss Prevention 1 at 2-3, online: <https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=1953&context=facpub>.

[206] See *ibid.*

[207] See *ibid.*

[208] See Calvin K Lai *et al*, "Reducing Implicit Racial Preferences: II. Intervention Effectiveness across Time" (2016) 145:8 J Exp Psychol Gen 1001, online: <https://psycnet.apa.org/doiLanding?doi=10.1037%2Fxge0000179>.

[209] See Florida Criminal Justice Standards & Training Commission, *Florida Officer Mandatory Retraining Requirements* (2014), online: <https://www.fdle.state.fl.us/CJSTC/Documents/Officer-Requirements/Mandatory-Retraining-Update-12-2014.aspx>.

[210] See *ibid*.

[211] See *infra* note 222.

[212] See generally Alisha Ali, Paula J Caplan & Rachel Fagnant, "Gender Stereotypes in Diagnostic Criteria," in Joan C Chrisler & Donald R McCreaty (eds), *Handbook of Gender Research in Psychology Volume 2: Gender Research in Social and Applied Psychology* (New York: Spring Science Business Media, LLC, 2010) 91, online: <http://xyonline.net/sites/xyonline.net/files/2020-07/Chrisler%2C%20Handbook%20of%20Gender%20Research%20in%20Psychology%20Vol%202%20%282010%29.pdf>.

[213] See *infra* note 247.

[214] The complicated issue of racial bias and mental health is more fully explored in the Challenges Section.

Implementing a CIT program that accounts for all these variables could significantly boost awareness of mental illness within a police force, as well as train officers how to distinguish common symptoms of illness from signs of a guilty conscience.[215] The ability to recognize a PWMI early in the investigative process lowers the risk downstream that mental illness is misinterpreted as guilt, which in turn lowers the risk that an officer coerces a PWMI into a false confession. Accordingly, CIT training appears to be a valuable tool for any state or city seeking to avoid wrongful convictions of PWMI.

B. Challenges and Limitations of CIT Programs

That being said, states and cities that choose to adopt CIT programs must also recognize their inherent limitations. Comprehensive training may decrease the risk that symptoms are *accidentally* mistaken for guilt. But CIT programs cannot protect innocent PWMI from officers who recognize mental illness but choose to pursue a conviction anyway. In this sense, even the most successful CIT program is constrained by its reliance on officer discretion.

Such is the case with James Blackmon. Mundy and Holder knew beyond a shadow of a doubt that Blackmon had serious mental health problems, yet they continued to manipulate him into proffering a confession.[216] The detectives knew that Blackmon's mental illness had led to numerous involuntary commitments to state psychiatric hospitals.[217] They knew that he suffered serious delusions.[218] Blackmon admitted to committing murders in the same breath he took responsibility for "devastating" hurricanes, earthquakes, and catastrophes.[219] He admitted to sneaking out of the dorm while it was still dark, but rationalized the decision because he saw himself as Dracula.[220] The officers not only knew that Blackmon suffered from dissociation, they capitalized on and encouraged dissociation by talking about "Bad James" and "Good James."[221]

Despite deafening alarm bells signaling mental illness, Holder and Mundy never considered the possibility of innocence, or even diversion. The problem for these officers was not that they failed to recognize mental illness. They knew about Blackmon's mental illness and did not care. It is unlikely CIT training would have changed the outcome of this case. Indeed, the detectives were so confident that they were not engaged in wrongdoing that they memorialized Blackmon's interviews. They made amply clear on the record that Blackmon came to the station of his own accord and spoke to them voluntarily. These choices suggest the detectives believed they were doing nothing wrong when they recognized mental illness but continued to extort a confession anyway. Their decision was likely influenced by a convergence of biases.

a. Stigma against PWMI

To internally justify their decision, the detectives *must* have concluded that Blackmon warranted incarceration, despite his obvious mental illness. To Mundy and Holder, any person that

---

[215] See *Compton 1*, *supra* note 185. *Compton 2*, *supra* note 188.
[216] *NC Blackmon*, *supra* note 32 at 423-24.
[217] *NCIIC*, *supra* note 14 at 228-33.
[218] *NC Blackmon*, *supra* note 32 at 423-24.
[219] *NCIIC*, *supra* note 14 at 451-52.
[220] *Ibid* at 410.
[221] *Ibid* at 422, 425, 427.

dangerous—mentally disordered or not—needed to be jailed. The detectives overlooked signs of Blackmon's disability (and in turn, his innocence), and instead focused on his perceived aggression and capacity for violence.

This association between mental illness and crime, and the ensuing rationalization that Blackmon *belonged* in jail, is one facet of a broader social stigma working against PWMI. PWMI like Blackmon are seen, both by the police and the public, as inherently dangerous, unstable, and prone to acts of violence.[222] This deeply-rooted stigma does not stem from malice per se, but from fear of the different and difficulty empathizing with PWMI.[223] One study in 1964 confirmed that the level of social rejection for a PWMI was not based on his or her medical diagnosis, but rather "how visibly the [PWMI's] behavior deviated from customary role-expectations."[224] In other words, if a PWMI's actions still aligned with social standards, he or she was far less likely to be rejected, regardless of the pathology of their illness. Only when behavior *significantly deviated* from the norm did social rejection occur.[225]

On some level, this rejection is understandable. PWMI like Blackmon act in ways that are rational to themselves but can be frightening to others. As Richard Neutra explains, it is difficult, if not impossible, "to share the feelings of someone who does not who does not talk about the same subject at the end of a sentence as he did at the beginning, who sees and responds to things we do not see, whose mood, reason and very identity may change from moment to moment."[226]

Even so, the pervasive stigma of PWMI as inherently dangerous and inherently criminal is

---

[222] One 2013 public survey found that 46% of Americans believed PWMI were "by far, more dangerous than the general population." Colleen Barry *et al*, "After Newtown — Public Opinion on Gun Policy and Mental Illness" (2013) 368:12 N Engl J Med 1077 at 1080, online: <https://www.nejm.org/doi/full/10.1056/nejmp1300512>. Similar results have been replicated by a variety of sources. See Treatment Advocacy Center, *Stigma and Serious Mental Illness* (2016), online: <https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/stigma-and-smi.pdf>.

[223] See generally Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (New York, NY: Pantheon Books, 1965). Gerald Grob, *The Mad Among Us: A History of the Care of America's Mentally Ill* (New York, NY: The Free Press, 1994) at 4, 17, 51. The association between criminality and PWMI has been extensively studied and can be traced back centuries. Briefly, the 17th-century European medical community believed that health (mental as well as physical) resulted from a balance between man and the natural world. Madness did not strike arbitrarily but was seen as a divine punishment imposed upon those who transgressed the laws of nature. PWMI were therefore equivalent to criminals since any person afflicted with a mental illness must have deliberately chosen to violate God's law. PWMI became linked to immorality and vice, and this stigma traveled with European colonists to America. The Industrial Revolution only deepened the association between PWMI and criminality. PWMI were kept in public almshouses along with other "dependents" like the elderly, sick, poor, and physically and developmentally disabled. These same almshouses also served as prisons for vagabonds, prostitutes, and criminals. PWMI became inextricably linked to both society's unwanted "dependents" as well as its "deviants." This double association meant that PWMI were not only seen as part of society's dangerous, criminal faction, but also as part of the dependent sector draining the community. The combination cultivated an overarching, pervasive fear of PWMI and the threat they posed to "regular" society, one that lingers today.

[224] Derek Phillips, "Rejection of the Mentally Ill: The Influence of Behavior and Sex" (1964) 29:5 Am Soc Rev 679 at 686-687. See also Joint Commission on Mental Illness and Health, *Action for Mental Health: Final Report of the Joint Commission on Mental Illness and Health 1961* (Boston, 1961) at xxix.

[225] See *Ibid.*

[226] Morton Birnbaum, "The Right to Treatment: Some Comments on Its Development" in Frank J Ayd, ed, *Medical, Moral, and Legal Issues in Mental Health Care* (Baltimore, MD: Williams & Wilkins Col., 1974) at 97.

unfounded. PWMI are far more likely to be victims of violence than instigators.[227] Yet fear continues to subtly influence decisions, such as the detectives' choice to convict Blackmon. Before they had even met Blackmon, unconscious stigma against PWMI led Holder and Mundy to view Blackmon in a negative, criminally tinged light.

The detectives' background research on Blackmon merely corroborated this unconscious bias. Before interrogating Blackmon, the detectives read prison reports describing Blackmon as extremely hostile and assaultive, and requiring an inordinate amount of time and energy to keep from harming others.[228] They obtained similar reports from Dorothea Dix, which detailed Blackmon's history of threats and physical altercations.[229] The detectives also had access to criminal records detailing petty crimes such as trespass and narcotics possession, as well as violent crimes like armed robbery and assault.[230] Most importantly, the detectives knew Blackmon had a history of violence towards women. The second time Blackmon was referred to Dix, he had forcibly kissed a librarian, exposed himself, and tried to force her into a bathroom.[231]

This detailed mental picture of Blackmon as a violent criminal, one with a past of hurting women, only bolstered the underlying stigma that Holder and Mundy already harboured against Blackmon as a PWMI. This prejudice and preconceived notion of guilt overwhelmed any signs of innocence Blackmon displayed during his interviews.

b. Stigma against PWMI of color

The detectives' predilection to see Blackmon as a criminal was further exacerbated by his identity as a PWMI of color.[232] Even though people of color are statistically more likely to be involved with the criminal justice system, police are less likely to recognize mental illness in black

---

[227] See Marie Rueve & Randon Welton, "Violence and Mental Illness" (2008) 5:5 Psychiatry (Edgmont) 34, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2686644>. See also Jay Singh *et al*, "Structured Assessment of Violence Risk in Schizophrenia and Other Psychiatric Disorders: A Systematic Review of the Validity, Reliability, and Item Content of 10 Available Instruments" (2011) 37:5 Schizophr Bull 899, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3160213>.

[228] *NCIIC*, *supra* note 14 at 244, 280-83.

[229] *Ibid* at 244-46.

[230] *Ibid* at 232-33.

[231] *Ibid* at 299.

[232] For the purposes of this paper, I limit my examination to racial bias in the context of police officers recognizing mental illness in potential suspects. However, racial bias has profound and insidious implications for the entire field of healthcare. Racial and ethnic minorities have less access to mental health services than white people, are less likely to receive needed care, and are more likely to receive poor-quality care when they are treated. This backdrop informs the discussion of minorities receiving (or not receiving) healthcare in a criminal justice context. See generally Alan Nelson, "Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care" (2002) 94:8 J Nat'l Med Assoc 666, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2594273/pdf/jnma00325-0024.pdf>. See also Lonnie Snowden, "Bias in Mental Health Assessment and Intervention: Theory and Evidence" (2003) 93:2 Am J Public Health 239, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447723> [*Snowden*]. See also Office of the U.S. Surgeon General, *Mental Health: Culture, Race, and Ethnicity: A Supplement to Mental Health: A Report of the Surgeon General* (Rockville, MD: Substance Abuse and Mental Health Services Administration, 2001), online: <https://www.ncbi.nlm.nih.gov/pubmed/20669516>.

suspects.[233] As a black male, Blackmon's odds of pretrial diversion to a mental health facility were 44% lower than white suspects charged with similar offenses.[234] This phenomenon is mirrored in juvenile criminal justice systems. Black youths with mental health problems "are treated more harshly for equivalent offenses to which their white cohorts are either released from or unofficially treated through the mental health system."[235] Overall, white prisoners are significantly more likely than black prisoners to have *ever* been told they had a mental disorder.[236]

Further evidence of racialized underdiagnosis can be seen in mental health treatment once incarcerated. White prisoners exhibiting symptoms of mental illness are more likely than black prisoners to receive treatment, while black prisoners exhibiting identical symptoms are 2.52 times more likely to be punished and sent to solitary confinement.[237]

As a whole, the criminal justice apparatus fails to accurately diagnosis black PWMI. Interestingly, in a clinical setting, black men are over diagnosed with schizophrenia.[238] This begs the question: Why are black men over diagnosed in a clinical setting, yet underdiagnosed in the criminal justice setting?

The answer may lie at the complicated nexus of ignorance, bias against PWMI, and bias against people of color. Clinical psychiatrists are trained to look for mental illness, so they tend to find it.[239] Police officers, on the other hand, are unfamiliar with mental illness and its symptoms, but trained to look for guilt.[240] As discussed in Section III, when police use the Reid Technique to conduct this search, they risk mistaking mental illness for criminality.

This risk of underdiagnosis is dangerously heightened for suspects of color. Through implicit bias, police officers unconsciously associate people of color with criminality.[241] This

---

[233] Leah Pope, "Racial Disparities in Mental Health and Criminal Justice" (24 Jul 2019) National Alliance on Mental Illness (blog), online: <https://www.nami.org/Blogs/NAMI-Blog/July-2019/Racial-Disparities-in-Mental-Health-and-Criminal-J>.

[234] Traci Schlesinger, "Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts" (2013) 3:3 Race and Justice 210 at 223, online: <https://journals.sagepub.com/doi/full/10.1177/2153368713483320>.

[235] Todd Martin & Henry Grubb, "Race Bias in Diagnosis and Treatment of Juvenile Offenders: Findings and Suggestions" (1990) 20:4 J Contemp Psychother 259 at 269 [*Martin & Grubb*].

[236] *Bronson & Berzofsky*, *supra* note 3 at 4.

[237] See Fatos Kaba *et al*, "Disparities in Mental Health Referral and Diagnosis in the New York City Jail Mental Health Service" (2015) 105:9 Am J Public Health 1911 at 1911, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4539829> [*Kaba*].

[238] See Robert Schwartz & David Blankenship, "Racial Disparities in Psychotic Disorder Diagnosis: A Review of Empirical Literature" (2014) 4:4 World J Psychiatry 133 at 138, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4274585>. Schwartz found that even after controlling for other significant demographic and clinical characteristics, African Americans were over three times more likely to be diagnosed with Schizophrenia than whites. He posits that unconscious clinician bias may contribute to the misdiagnosis. Furthermore, an overdiagnosis of schizophrenia may stem from an underdiagnosis of Major Depressive Disorder and Bipolar Disorder in African Americans.

[239] See *Lamb*, *supra* note 182.

[240] See *ibid.*

[241] See *Nelson*, *supra* note 55. See Jon Hurwitz & Mark Peffley, "Public Perceptions of Race and Crime: The Role of Racial Stereotypes" (1997) 41:2 AJPS 375, online: <https://www.researchgate.net/profile/Mark_Peffley/publication/271674754_Public_Perceptions_of_Race_and_Crime_The_Role_of_Racial_Stereotypes/links/5833370d08aef19cb81cac38/Public-Perceptions-of-Race-and-Crime-

social tendency to perceive minorities as criminal or untruthful is abhorrent, but well-documented.[242] Race has "always played a central role in constructing a presumption of criminality."[243] Even without considering mental illness, implicit bias studies have shown that individuals harbor a "strong associations between Black and Guilty."[244] Studies repeatedly reveal that people "evaluate ambiguous actions performed by non-Whites as suspicious and criminal while identical actions performed by Whites go unnoticed."[245]

Put simply, racial bias causes police to overlook the mental illness aspect of a black PWMI's identity, and instead focus primarily on the PWMI's race.[246] Then, because officers inherently link "black" with criminality, officers tend to attribute guilty behaviors in black PWMI to membership in a "guilty" social group rather than to mental illness.[247] Symptoms that would be recognized in a white PWMI are written off as "normal" behavior in a black PWMI due to his cultural background.[248] White suspects displaying signs of mental illness are more likely to be seen as sick, and appropriately diverted. A black suspect with identical problems remains undiagnosed because displays of aggression or criminality are "characteristic of his culture."[249] Such behavior warrants punishment rather than treatment.[250]

This insidious bias has devastating consequences for all black PWMI, including Blackmon. Officers misinterpret signs of illness as signs of guilt. An unconscious association between minorities and criminality exacerbates this issue, leading officers to underdiagnose black PWMI far more than white PWMI. This means black, mentally ill, innocent suspects face multiple levels of prejudice and ignorance. Dual biases make it even more unlikely that the police will recognize a black PWMI's innocence and release him. Instead, like James Blackmon, the police are more likely to proceed to the interrogation stage and extract a false confession.

The-Role-of-Racial-Stereotypes.pdf>. See also Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies,* The Sentencing Project (2014), online: <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf>.

[242] See Kaba, *supra* note 237. See Ghandnoosh, *supra* note 241. See Hurwitz & Peffley, *supra* note 241.

[243] Angela Davis, *Are Prisons Obsolete?*, (New York: Seven Stories Press, 2003) at 28-33, online: <https://decolonisesociology.files.wordpress.com/2019/03/angela-davis-are_prisons_obsolete.pdf>.

[244] *Nelson*, *supra* note 55 at 635.

[245] *Ibid* at 634.

[246] See *Snowden*, *supra* note 232.

[247] *Martin & Grubb*, *supra* note 235 at 261. To explain racialized underdiagnosis in the criminal justice context, Martin and Grubb posit, "The major-culture in this nation upholds the primacy of the individual . . . The Black cultural perspective concerning the place of the member in his group is quite different. The member is understood to be *secondary to the group*." In other words, when a white PWMI exhibits symptoms of mental illness, observers consider that individual to be operating *separate* from his social group. Aggression in a white PWMI is perceived to be an aberration and classified as a mental illness. Conversely, when a black PWMI exhibits identical symptoms, observers consider him to be exhibiting behaviors *characteristic* of his culture. Symptoms that send up red flags for white PWMI are ignored in black PWMI because such behaviors are considered customary for that social group. See also Hava Villaverde, "Racism in the Insanity Defense" (1995) 50 U Miami L Rev 209 at 215-16, online: <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1797&context=umlr>. See *Kaba, supra* note 207.

[248] See *Mental Health Disparities: Diverse Populations*, American Psychiatric Association, online: <https://www.psychiatry.org/psychiatrists/cultural-competency/education/mental-health-facts>.

[249] *Martin & Grubb*, *supra* note 235 at 269.

[250] See *ibid*. See also Kimberly Kahn, Melissa Thompson & Jean McMahon, "Privileged Protection? Effects of Suspect Race and Mental Illness Status on Public Perceptions of Police Use of Force" (2017) 13 J Exp Criminol 171, online: <https://link.springer.com/article/10.1007/s11292-016-9280-0#citeas>.

Based at least in part on these dovetailing prejudices, the detectives concluded Blackmon was either malingering the degree of his illness or outright faking it.[251] Rather than someone who needed help, police viewed him as a dangerous murderer who gave a legally valid confession.[252]

CIT training has the potential to decrease *inadvertent* underdiagnosis. But it will not prevent a case like Blackmon's, where officers on notice of a diagnosed mental health disorder choose to ignore all signs of illness in pursuit of a conviction. And CIT training almost certainly will not prevent officers from actively capitalizing on an illness to extract a confession, as detectives did to Blackmon. In this sense, Blackmon's case highlights the fallibility of relying on officer discretion to protect PWMI and underscores a significant shortcoming of the CIT model.

c. Supplementing CIT Programs with Mandatory Legal Safeguards

To the extent that underdiagnosis can be attributed to good faith ignorance, CIT programs are a viable solution. But even in cities with robust mental health training, there will invariably be officers who identify mental illness in a suspect but, in their discretion, decide that the suspect is guilty and warrants incarceration anyway.[253] No amount of training could completely negate the decades, if not centuries, of stigma that worked against Blackmon in 1983. These biases continue to work against all PWMI today, especially PWMI of color. Therefore, any state or city that seeks to implement a CIT program should be aware of this shortcoming and consider supplementing its mental health training with automatic legal safeguards that kick in once a PWMI is identified.

One potential blueprint for such safeguards can be found in the United Kingdom. There, Code C of the Police and Criminal Evidence Act 1984 (Code C) requires an officer who "has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable" to treat the person as mentally vulnerable.[254]

Once vulnerability is identified, Code C places two requirements on the custodial officers. First, "[t]he custody officer must make sure a person receives appropriate clinical attention as soon as reasonably practicable if the person appears to be suffering from a mental disorder."[255] This requirement "applies even if the detainee makes no request for clinical attention and whether or not they have already received clinical attention elsewhere."[256]

Second, if a detainee is "mentally disordered or otherwise mentally vulnerable, the custody officer must, as soon as practicable," inform an "appropriate adult" of the grounds for detention

---

[251] *NCIIC*, *supra* note 14 at 436.
[252] *Ibid* at 529-530.
[253] *Mental Health and Fair Trial* (London: JUSTICE, 2017) (David Latham) at 27-28, online: <https://files.justice.org.uk/wp-content/uploads/2017/11/06170615/JUSTICE-Mental-Health-and-Fair-Trial-Report-2.pdf> [*Latham*].
[254] *Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, Police and Criminal Evidence Act 1984 Code C* (May 2014) at para 1.4, Annex E, [PACE] online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/364707/PaceCodeC2014.pdf> [*PACE*].
[255] *Ibid* Annex E.
[256] *Ibid* at para 9.5A.

and the person's whereabouts and ask the adult to come to the police station to see the detainee.[257] Distinct from an attorney, the main responsibilities of an AA are:

1. To support, advise and assist the detained person, particularly while they are being questioned;
2. To observe whether the police are acting properly, fairly and with respect for the rights of the detained person. And to tell the PWMI if they are not;
3. To assist with communication between the detained person and the police;
4. To ensure that the detained person understands their rights and that the AA plays a role in protecting their rights.[258]

An appropriate adult is either (1) a relative, guardian, or other person responsible for care; (2) someone experienced in dealing with mentally disordered or mentally vulnerable people but who is not a police officer or employed by the police; (3) or, failing these, some other responsible adult aged 18 or over who is not a police officer or employed by the police.[259]

Subject to a few exceptions, "[a] mentally disordered or otherwise mentally vulnerable person must not be interviewed or asked to provide or sign a written statement in the absence of the appropriate adult."[260] Importantly, "[u]nlike legal advice, this 'backstop' safeguard cannot be waived by . . . vulnerable adults."[261]

Proponents of the AA system claim that AAs, though not legal representatives, provide critical support to PWMIs during interrogations. An AA can help a PWMI understand various "aspects of the situation, including why they were in custody, how long they would be there, the questions that were being asked of them, and what their rights were."[262] AAs also provide emotional support through the stressful and often overwhelmingly negative experience of custody, and a much-needed feeling that someone is "on [the PWMI's] side."[263]

Such a program could compensate for some of the gaps identified in CIT training. Automatically requiring an AA's presence upon identification of mental illness, rather than requiring a PWMI to request help or an officer to recommend it, would avoid the issues associated with *Miranda* invocation as well as reliance upon officer discretion. Furthermore, making an AA's presence unwaivable, rather than an optional right that PWMI can be talked out of invoking, could prevent officers from manipulating PWMI through minimization techniques, as detectives did to Blackmon.

---

[257] *Ibid* Annex E.
[258] Chris Bath *et al*, *There to Help: Ensuring Provision of Appropriate Adults for Mentally Vulnerable Adults Detained or Interviewed by Police* (2015) National Appropriate Adult Network at 7, online: <http://www.appropriateadult.org.uk/images/pdf/2015_theretohelp.pdf> [*Bath*].
[259] *PACE, supra* note 254 at para 1.7.
[260] *Ibid*, Annex E.
[261] *About Appropriate Adults*, National Appropriate Adult Network, online: <https://appropriateadult.org.uk/information/what-is-an-appropriate-adult>.
[262] Tricia Jessiman & Ailsa Cameron, "The Role of the Appropriate Adult in Supporting Vulnerable Adults in Custody: Comparing the Perspectives of Service Users and Service Providers" (2017) 45 Br J Learn Disabil 246 at 248-50, online: <https://onlinelibrary.wiley.com/doi/pdf/10.1111/bld.12201> [*Jessiman & Cameron*].
[263] *Ibid* at 248-250.

This is especially true if American states and cities were to take the AA provision one step further than the UK and impose a statutory requirement on departments to find an AA for all vulnerable adults.[264] Statutorily guaranteeing an AA's presence for all identified PWMI, even PWMI whom interrogating officers believe to be guilty, could prevent a situation like Blackmon's. Even if an officer firmly believed his tactics were justified by a PWMI's guilt, the presence of an AA could ensure that the officer does not take advantage of extreme delusions or faulty reality monitoring to draw out a confession, as detectives did to Blackmon. Indeed, one study found that although AAs contributed little to police interviews in terms of verbal interactions, "their mere presence during the police interview [had] three important effects."[265] First, in the case of vulnerable adults, the presence of an AAN increased the likelihood that a legal representative will be present. Second, an AA was associated with less interrogative pressure in interview. Third, in the presence of an AA, the legal representative tended to take on a more active role.[266]

Based on these findings, one cannot help but wonder: how may James Blackmon's interviews had gone differently had an AA accompanied him into the interrogation room? The AA system is not perfect, and American communities would need to workshop significant issues raised by UK stakeholders.[267] Nevertheless, an automatic AA requirement in all cases involving mental illness could compensate for some of the aforementioned shortcomings of CIT programs, and ensure that meaningful legal protections follow identification of a PWMI in the justice system.

V Conclusion

James Blackmon's case is tragic, yet emblematic of many PWMI's experience with the justice system. Familiarity with mental illness could decrease the odds that such miscarriages of justice are repeated. Therefore, it is promising that over a thousand police departments have adopted the CIT model of mental health training.[268] States and cities that have not yet addressed the issue must consider the need for a comparable program. Until they do, PWMI in their communities face a heightened risk of wrongful conviction.

---

[264] One of the greatest criticisms of the UK's current AA provision is that there is no statutory duty to provide an AA for vulnerable adult suspects. This is in contrast to Section 38 of the *Crime and Disorder Act* 1998, which places a statutory duty on local authorities to "ensure the provision of persons to act as appropriate adults to safeguard the interests of children and young persons detained or questioned by police officers." No such duty exists for vulnerable adult suspects. If no family member or friend is readily available to act as AA, police can call upon a patchwork network of social workers, clinicians, or locally organized AA chapters comprised of volunteers, to serve as an AA. But these resources are limited, and without a clear legal obligation requiring departments to ensure an AA is found, the actual provision of AAs varies widely among UK municipalities. Many advocates have called on the UK government to amend PACE 1984 to "establish an explicit statutory duty on police officers to secure an AA for all mentally vulnerable adults; and to bring greater consistency to the approach of courts on the admissibility of evidence obtained in the absence of an AA." *Bath, supra* note 258 at 8, 11. *Latham, supra* note 253 at 36.

[265] See Sarah Medford, Gisli H Gudjonsson & John Pearse, "The Efficacy of the Appropriate Adult Safeguard During Police Interviewing" (2010), 8:2 Leg & Crim Psych 253, online: <https://bpspsychub.onlinelibrary.wiley.com/doi/abs/10.1348/135532503322363022>.

[266] See *ibid.*

[267] Specifically, critics of the AA requirement point out that the role is ambiguously defined, no uniform standards exist governing the qualifications of AAs, and police officers often have trouble procuring AAs for vulnerable adults, leading to wait times of several hours. See *Jessiman & Cameron*, *supra* note 262. See *Latham*, *supra* note 253. See *Bath*, *supra* note 258.

[268] See *Epperson*, *supra* note 186.

However, states and cities that choose to adopt CIT programs must also recognize their limitations. An increase in awareness alone is insufficient to protect PWMI. Mandatory procedural safeguards, ones that do not rely on officer discretion, are also necessary to counterbalance prejudice and stigma in individual actors. To adopt one and not the other leaves PWMI like Blackmon vulnerable to officers who continue to pursue a conviction in the face of clear mental illness (and indeed, may even choose to capitalize on that mental illness to obtain a false confession). In tandem, an increased awareness of mental illness, and mandatory legal safeguards for those identified, could rectify some of the harms identified in this paper, and make James Blackmon's fate far less common in the future.

Maintaining Innocence:
The Prison Experiences of the Wrongfully Convicted

Esti Azizi
Common Law Section, Faculty of Law
University of Ottawa
Canada

Modern research has been diligent and successful in discovering the causes wrongful conviction and its long-term consequences on the wrongfully convicted and their families. One area, however, remains relatively untouched by research efforts: the period between conviction and release, the period of incarceration itself. This paper outlines the experiences of wrongfully convicted persons in prison. While each incarceration term is an individualized experience, shared commonalities exist between these experiences. This paper considers the incarceration experience via two lenses: inmate and prison violence in Part I and mental health and segregation in Part II. The paper focuses largely on the Canadian perspective, with limited insights from other jurisdictions. Each section evaluates: (1) the general prison experience of all incarcerated persons, and (2) the distinct prison experiences of the wrongfully convicted as a result of maintaining their innocence. As little research exists on the unique experiences of the wrongfully convicted in prison, this paper looks to interviews and other sources where wrongfully convicted persons have discussed their prison experiences. These sources are few and far between and many wrongfully convicted persons echo the words of Thomas Sophonow (wrongfully convicted of the murder of a 16-year-old donut shop employee): "whatever happened in jail [is] nobody's business."[1]

Faculty Endorsement *– Stephen Bindman, Visiting Fellow, Faculty of Law, University of Ottawa, Canada: This article began as a final paper in the course Wrongful Convictions in the Faculty of Law (Common Law Section) University of Ottawa in the fall 2020 semester. I endorse this article for publication in the Wrongful Conviction Law Review.*

[1] Scott Edmonds, "Sophonow hurt in prison, wife says," *The Globe and Mail* (14 Nov 2000), online: www.theglobeandmail.com [*Edmonds*].

I Introduction

Modern cognitive and social psychology has been diligent and successful in discovering what causes a wrongful conviction.[2] These insights have been instrumental in modifying our criminal justice system to account for problematic practices. From the advent of disclosure in *Stinchcombe*[3] to ever-changing police confession techniques, it is clear that the area of wrongful convictions (*i.e.,* what causes wrongful convictions) is thriving. Similarly, researchers have also focused their efforts on the consequences of wrongful convictions and their long-term impacts on the wrongfully convicted and their families.[4] Areas such as compensation and societal re-integration are growing and have a direct impact on current legal and sociological changes. Also growing is the literature on the disproportionalities of *who* is being wrongfully convicted, with racialized and minority communities bearing the brunt of the impact.[5]

However, there is one area that remains relatively untouched by research efforts, the period between conviction and release, the period of incarceration itself. It is this period that is a direct result of the causes of a wrongful conviction; and it is also this period where long-term trauma likely originates. To date, there is little research on the experiences of the wrongfully convicted while incarcerated. Though we know that incarceration is difficult and can have long-term consequences, we do not know the specific effects of incarceration on wrongfully convicted persons. We especially do not know the specific effects of incarceration on wrongfully convicted persons who maintain their innocence in prison. Thus, while we can study the long term psychological and health effects of wrongful conviction, we will never truly understand the foundation of these effects unless we evaluate their origin: the prison experience.

The purpose of this paper is to outline the specific and distinct experiences of wrongfully convicted persons in prison. While each incarceration term is an individualized experience, there

---

[2] Kathryn M Campbell, *Miscarriages of Justice in Canada: Causes, Responses, Remedies*, (Toronto: University of Toronto Press, 2018) [*Campbell*].
[3] *R v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, online: <https://canlii.ca/t/1fsgp>.
[4] Samantha K Brooks & Neil Greenberg, "Psychological Impact of Being Wrongfully Accused of Criminal Offences: A Systematic Literature Review" (2021) 61:1 Med Sci Law 45 [*Brooks & Greenberg*]; Adrian Grounds, "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46:2 Can J Corr 164 [*Grounds*].
[5] See *Campbell*, *supra* note 2 at Appendix A. At least 10 of the 83 (12%) wrongfully convicted persons (or suspected wrongfully convicted persons) in Canada identified as indigenous, despite indigenous peoples representing only 4.9% of the Canadian population; Zieva Dauber Konvisser, "Psychological Consequences of Wrongful Conviction in Women and the Possibility of Positive Change" (2012) 5:2 DePaul J Soc Just 221 at 230-1 [Konvisser]; Samuel Gross, Maurice Possley & Klara Stephens, "Race And Wrongful Convictions In The United States" (7 Mar 2017) National Registry of Exonerations, online (pdf): www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf at para 1.

are many commonalities shared between these experiences. This paper considers the incarceration experience *via* two lenses: Part I looks at inmate and prison violence, and Part II explores mental health and segregation. The paper will focus largely on the Canadian perspective, with limited insights from other jurisdictions. Each section will also evaluate: (1) the general prison experience for all incarcerated persons, and (2) the distinct prison experiences of the wrongfully convicted as a result of maintaining their innocence. Because little research exists on the distinct experiences of wrongfully convicted persons in prison, this paper relies on interviews and other sources where wrongfully convicted persons discussed their prison experiences. These sources are few and far between and many wrongfully convicted persons echo the words of Thomas Sophonow (wrongfully convicted of the murder of a 16-year-old donut shop employee): "whatever happened in jail [is] nobody's business."[6]

II Part I: Inmate and Prison Violence

A. General Treatment of Prisoners

The Correctional Service of Canada (CSC) and individual provinces are responsible for the administration and control of Canada's federal and provincial prison population, respectively. Independent of correctional administration and staff, there also exists an internal mechanism of prisoner control—prison hierarchy. Prison hierarchy is the informal prison culture that governs inmate relations. In other words, prison hierarchy dictates the status of individual prisoners and how higher-ranking prisoners wield their influence over lower-ranking prisoners. While inmates often join together in social groups, and prison gangs remain pervasive,[7] the most common underlying system of prison hierarchy is based on offences committed.[8] Though variations and exceptions exist, the offence-based ranking of prisoners is as follows: murderers sit at the top, followed by organized crime affiliates and drug dealers, while abusers and rapists rate lowly and child predators rank at the bottom.[9] Higher-ranking prisoners are viewed positively; they are admired for their crimes, which are seen as intimidating and potentially fear-inducing to other inmates.[10] Conversely, low ranking inmates, child predators in particular, are not welcome; they are "acceptable targets for victimization."[11] Other factors that can contribute to increased status while imprisoned include access to contraband[12] and gang affiliations[13]. Overall, the prison

---

[6] *Edmonds, Supra,* note 1.
[7] John Winterdyk & Rick Ruddell, "Managing prison gangs: Results from a survey of U.S. prison systems" (2010) 38:4 J Crim Jus 730; Mark Nafekh & Yvonne Stys, "A Profile and Examination of Gang Affiliation within the Federally Sentenced Offender Population," Research Branch, Correctional Service of Canada (May 2004), online: www.csc-scc.gc.ca; Kathleen Harris, "Diverse mix of gangs and a growing security challenge for federal prisons," *CBC News: Politics* (25 Mar 2018), online: https://www.cbc.ca/news/politics/prison-gangs-diverse-csc-1.4590649.
[8] Rose Ricciardelli, *Surviving Incarceration*: *Inside Canadian Prisons* (Waterloo: Wilfred Laurier University Press, 2014) at 46 [*Ricciardelli 1*].
[9] *Ibid*, Joseph Michalski, "Status Hierarchies and Hegemonic Masculinity: A General Theory of Prison Violence" (2017) 57 Brit J Criminol 40 at 50-52 [*Michalski*].
[10] *Ricciardelli 1, supra* note 8 at 46; *Michalski, ibid* at 51.
[11] *Ricciardelli 1, ibid* at 47; Chantal van den Berg *et al*, "Sex Offenders in Prison: Are they Socially Isolated?" (2018) 30:7 Sexual Abuse 828 at 829.
[12] David B Kalinich & Stan Stojkovic, "Contraband: The Basis for Legitimate Power in a Prison Social System" (1985) 12:4 Crim J & Beh 435.
[13] *Ibid* at 447-8.

atmosphere is one where higher-ranking prisoners prey on the lower-ranking prisoners, simply on the basis of status. The lower a prisoner ranks, the more acceptable they are as a target of victimization. While aspects of this hierarchy have eroded somewhat in various regions, the disparity between the average prisoner and child abusers still exists.[14]

Prisoners also abide by a convict code.[15] This code can vary among prisons, but many of the basic principles remain the same: "(1) 'never rat on a con' and don't get friendly with the staff; (2) be dependable (not loyal); (3) follow daily behavior rules or else; (4) I won't see you, don't see me, and shut up already; and (5) be fearless or at least act tough."[16] The code provides safety for prisoners, reassuring them that if they follow the rules, they will be respected and stay out of harm's way.[17] The reverse is also true — violation of the code devalues one's status in the prison hierarchy, making non-conformers acceptable targets of victimization, and therefore, susceptible to violent attacks as punishment for breaching the inmate code.[18] Though the code is pervasive within most prison systems (and broader criminal subcultures), and most, if not all prisoners are aware of the code, not all choose to subscribe to the retaliatory aspects of the code.[19] Instead, some prisoners prefer to follow their own moral code, whether personal or religion-based. While the code works to enhance a prisoner's perception of safety, it effectively leads to more violence among the prison population.[20] In essence, inmate violence is controlled by both correctional officers, and the prisoners themselves, based on prison hierarchy and compliance with the inmate code.

a. Female Inmates and Prison Violence

All female institutions are multi-level (usually medium and maximum) security facilities. Female prisons also subscribe to a hierarchy, although not as rigid as those seen in male prisons. Like in male prisons, child predators are also low-status and targeted offenders in female prisons. For example, Maria Shepherd entered Brampton's Vanier Center for Women in 1992 after pleading guilty to manslaughter in the death of her 3 year old stepdaughter, Kassandra. While Mrs. Shepherd would later be exonerated for the crime, she recounts her experience: "I was barely in the doors of Vanier…and there was already inmates sitting in the same room as me…and very clearly told me that they had been waiting for me. I think had I not been pregnant, I may have been beaten and killed in there, because of the offence."[21] Among female facilities, two Ontario facilities are known for violence. First, the (now closed) Kingston Prison for Women (P4W). At P4W, Tammy Marquardt (wrongfully convicted for the murder of her infant son, Kenneth) recalls that

---

[14]Alison Liebling & Helen Arnold, "Social Relationships between prisoners in a maximum security prison: Violence, faith, and the declining nature of trust" (2012) 40:5 J Crim Jus 413 at 416.
[15] *Ricciardelli 1, supra* note 8 at 46.
[16] Rose Ricciardelli, "An examination of the inmate code in Canadian penitentiaries" (2012) 37:2 J Crim & Jus 234 at 234 [*Ricciardelli 2*]; Heith Copes, Fiona Brookman, & Anastasia Brown, "Accounting for Violations of the Convict Code" (2012) 34:10 Deviant Behav 841 at 846-48 [*Copes et al*]; Meghan M Mitchell, David C Pyrooz, & Scott H Decker, "Culture in prison, culture on the street: the difference between the convict code and code of the street" (2021) 44:2 J Crim & Jus 145 at 146-7 [*Mitchell et al*].
[17] *Copes et al, supra* note 16 at 847-8.
[18] *Mitchell et al, supra* note 16 at 149.
[19] *Copes et al, supra* note 16 at 848-9.
[20] *Mitchell et al, supra* note 16 at 149.
[21] Stella Acquisto, "Wronged: Episode 1: Maria Shepherd, convicted and exonerated of manslaughter," *CityNews Toronto* (2 Oct 2017), online: <www.citynews.ca> at 00h:07m:10s [*Acquisto*].

she "learned to go down quickly, turtling on the floor, her arms protecting her head, her legs pulled up tightly to protect her abdomen as a torrent of fists and feet pounded on her" [22] while the guards walked away or turned around. P4W was also the subject of a 1996 federal inquiry, the *Commission of Inquiry into Certain Events at the Prison for Women in Kingston,* regarding multiple instances of inhumane strip and body cavity searches of inmates by male correctional officers and Institutional Emergency Response Team (IERT) members.[23] Second, the Grand Valley Institution for Women made news in 2007 for the death of Ashley Smith, 19, and the subsequent inquest which ruled Ms. Smith's death a homicide due to the prison guards' failure to intervene amid a suicide attempt.[24] Thus, while male and female prisons hold different prisoners, the environment cultivated within the prisons is quite similar.

b. Prison-Specific Inmate and Prison Violence

Inmate and prison violence also varies significantly between prisons. There are two prison systems in Canada: (1) federal penitentiaries; for offenders serving sentences of greater than two years, and (2) provincial reformatory prisons; for offenders serving sentences less than two years. Since the majority of wrongfully convicted persons in this analysis served their sentence in federal penitentiaries, and because provincial reformatory prisons vary by province in their administration, the provincial system is largely excluded from this analysis.

Federal offenders are evaluated and assigned to a prison security level that ensures public, staff and offender safety. Canada has three main security levels: minimum, medium, and maximum security. Research shows that the level of security corresponds to an increase in inmate and prison violence, with maximum security prisons being the most violent.[25] Again, this is due to the offenders themselves as well as the more restrictive conditions of incarceration. In Canada, there are six federal maximum security institutions—Atlantic Institution (in New Brunswick), Donnacona Institution (in Quebec), Port-Cartier Institution (in Quebec), Millhaven Institution (in Ontario), Edmonton Institution (in Alberta) and Kent Institution (in British Columbia)—and six multilevel security institutions that house maximum security units—Dorchester Penitentiary (in New Brunswick), Collins Bay Institution (in Ontario), Stony Mountain Penitentiary (in Manitoba), Saskatchewan Penitentiary (in Saskatchewan), Edmonton Institution for Women (in Alberta) and Fraser Valley Institution for Women (in British Columbia). Interestingly, Canada's women's institutions have consistently seen the most prisoner complaints relative to inmate population[26], with the most frequent complaint among all federal inmates, both male and female, being health-

---

[22] John Chipman, "Falsely convicted, in maximum security and pregnant," *Toronto Star* (14 Jan 2017), online: https://www.thestar.com/news/insight/2017/01/14/falsely-convicted-in-maximum-security-and-pregnant.html [*Chipman 1*].

[23] Canada, *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 58-94.

[24] Lisa Kerr, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017) 32:2 CJLS 187 at 188.

[25] The John Howard Society of Canada, "Security level explains kinds of violence in Canadian prisons" (16 Aug 2018), online (blog): https://johnhoward.ca/blog/security-level-explains-kinds-violence-canadian-prisons/ Canada, *Office of the Correctional Investigator Annual Report 2018-2019, vol 46* (Ottawa: Office of the Correctional Investigator, 2019) at 43. [*OCI, 2019*].

[26] *OCI, 2019*, *ibid* at 129-131; *Canada*, *Office of the Correctional Investigator Annual Report 2017-2018, vol 45* (Ottawa: Office of the Correctional Investigator, 2018) [*OCI, 2018*]; *Canada, Office of the Correctional Investigator Annual Report 2016-2017, vol 44* (Ottawa: Office of the Correctional Investigator, 2017) [*OCI, 2017*].

care and conditions of confinement[27]. Furthermore, the maximum security institutions (and their accompanying maximum security Regional Psychiatric Centres) consistently rate highest for use of force incidents.[28] Millhaven Institution, built to replace Kingston Penitentiary (another infamously violent maximum security prison) is notorious for its forced lockdowns and significant inmate violence. Millhaven's J-unit is considered one of the most dangerous in Canada's correctional system— "riots happened almost every week, and [you] could smell the tear gas leaking through [the] vents. [You] woke up every Friday morning to the sounds of gunshots at the firing range"[29] says former inmate Karim Martin. Dorchester Penitentiary in New Brunswick, also has a long and violent past. In recent years, it has consistently seen the highest number of inmate complaints[30], and preventable deaths, most notably the 2015 case of Matthew Hines,[31] which sparked a federal investigation. In sum, prison violence varies by prison, and is largely mediated internally via prison hierarchy and respect of the inmate code.

c. Comparing to Other Democratic Nations

When compared to other democratic nations, Canada's prisons fare closer to the United States than the Nordic nations, seeing high incarceration rates, poor prison conditions and vocational opportunities, and overall high recidivism. In contrast, Nordic prisons evidence lower rates of incarceration, and more humane conditions.[32] The main differences between these systems appears to be the prioritization of offender rehabilitation[33] (in Nordic nations) rather than protection of the public (in Canada and the United States). [34] In prioritizing rehabilitation, Nordic nations have seen significant reductions in recidivism,[35] which in turn, protects the public at large.

This fundamental divergence in prison priority underlies many of the disparities between Nordic nations, Canada and the United States. First, both Canada and the United States have higher incarceration rates. While Canada's incarceration rate of 104 per 100,000[36] is much lower than the United States' 639 per 100,000,[37] both are significantly higher than that of most Nordic countries.[38]

---

[27] *OCI, 2017*, *ibid.*

[28] See *OCI, 2019*, *supra* note 23 at 43. For the 2018-19 year, the top 3 use of force institutions are: (1) Millhaven Institution (20.0%, 309), (2) Kent Institution (7.8%, 120), and (3) Regional Psychiatric Centre – Prairies (7.7%, 119). For the 2017-18 year, the top 3 use of the force institutions are: (1) Millhaven Institution (13.5%; 176), (2) Regional Psychiatric Centre – Prairies (8.4%, 109) and (3) Edmonton Institution (7.5%, 89).

[29] Karim Martin, "What It's Really Like to Spend Time in a Canadian Prison," *Vice* (27 May 2016), online: <vice.ca>.

[30] See *OCI, 2019*, *supra* note 25 at 129; *OCI, 2018*, *supra* note 26 at 107. In the 2018-19 year, Dorchester Penitentiary received 277 prisoner complaints. In the 2017-18 year, Dorchester Penitentiary received 282 prisoner complaints.

[31] *Canada, Fourth Independent Review Committee on Non-natural Deaths in Custody that occurred between April 1st 2014 to March 31st, 2017* (Ottawa: Correctional Service Canada, 2018) at 53.

[32] John Pratt, "Scandinavian Exceptionalism in an Era of Penal Excess, Part I: The Nature and Roots of Scandinavian Exceptionalism" (2008) 48 Brit J Criminol 119 at 119-20 [*Pratt*].

[33] Katie Ward *et al*, "Incarceration Within American and Nordic Prisons: Comparison of National and International Policies" (2013) 1:1 Engage: The Int J of Research & Practice on Student Engagement 36 [*Ward et al*].

[34] *Ibid* at 38.

[35] *Ibid.*

[36] Institute for Crime & Justice Police Research, "World Prison Brief Data," online: https://www.prisonstudies.org/ [*World Prison*].

[37] *Ibid* at United States.

[38] *Ibid* at Denmark, Norway, Finland, Iceland, Sweden, Germany, Netherlands. In 2018, the rate of incarceration in Nordic countries from highest to lower per 100,000 are: Norway (65), Denmark (65), Sweden (63) Finland (53), and Iceland (37). Similarly, Canadian and USA rates are higher than Germany (69) and the Netherlands (63).

Second, Nordic nations tend to have more facilities with less capacity when compared to Canada and the United States. For example, Canada's 53 federal facilities (excluding provincial/territorial facilities), average around 500+ per institute, with the largest institution housing 835 inmates.[39] Comparatively, Rikers Island, one of the largest American prisons can house 15, 000 prisoners across 10 smaller compounds (~1,500 per facility).[40] Nordic facilities tend to be smaller, housing ~100 (350 at most) offenders per institution.[41] Nordic prisoners in smaller environments allow greater control by prison administration, but permitting more freedoms for inmates.[42] Because these Nordic countries have smaller territories but many small facilities, offenders are often able to stay near their communities and maintain existing social relationships.[43] In contrast, Canadian prisons that restrict freedoms by security type and suffer from perpetual staff shortages mean frequent lockdowns. Seeing as Canada is a larger territory, many prisons (particularly federal prisons) are isolated and far from the rest of the population. Interestingly, and despite the difference in incarceration rate, the level of overcrowding in American, Canadian and Nordic prisons appear largely similar, with the exceptions of Norway and Iceland.[44] Last, the most fundamental difference is educational and vocational opportunities. While comparative statistics are not readily available, it is clear that opportunities are abundant in Nordic prisons and largely lacking in Canadian and American prisons.[45]

B. Treatment of Wrongfully Convicted Persons in Prison

Of the recognized wrongful convictions to date, most were sentenced to long prison terms and were often placed in some of Canada's most violent maximum security prisons. In other words, many wrongfully convicted persons entered into inherently violent environments. For example, Guy Paul Morin (wrongfully convicted of the rape and murder of his nine-year-old neighbour, Christine Jessop) served his sentence in Kingston Penitentiary, Donald Marshall Jr. (wrongfully convicted of the murder of his acquaintance, Sandy Seale) and Glen Assoun (wrongfully convicted of the murder of his former girlfriend, Brenda Way) both spent significant time at Dorchester Penitentiary, and Tammy Marquardt was held in the maximum security unit at Kingston's Prison for Women alongside notorious serial killer, Karla Homolka.[46] While many wrongfully convicted persons are later moved into medium, and sometimes even minimum security institutions, due to

[39] In Canada's six maximum security institutes, the capacities are as follows: Atlantic Institute (331), Donnacona Institution (451), Port-Cartier Institution (237), Millhaven Institution (495) Edmonton Institution (324) and Kent Institution (378) Correctional Services of Canada, "Facilities and Security," online: <csc-scc.gc.ca> (last modified 20 May 2021).

[40] *Facilities Overview*, online: City of New York Department of Correction <www.web.archive.org/web/20140924104701mp_/http:/www.nyc.gov/html/doc/html/about/facilities-overview.shtml>.

[41] *Pratt, supra* note 32 at 120.

[42] *Ibid* at 21-22; *Ward et al, supra* note 33 at 39.

[43] *Ward et al, ibid* at 38.

[44] *World Prison, supra* note 36. The capacity rates for the listed nations are as follows: Denmark (103.5%), Canada (102.2%), Sweden (101.6%), Finland (101.1%), United States (99.8%), Germany (78.7%), Norway (76.1%), the Netherlands (74.4%), and Iceland (68.2%).

[45] *Ward et al, supra* note 33 at 37.

[46] *Chipman 1*, *supra* note 22.

good behaviour,[47] the initial shock and violence experienced in any institution, but particularly the more violent institutions, is profound.[48]

Furthermore, all of the wrongfully convicted persons listed on Innocence Canada's website were wrongfully convicted of crimes against children and/or particularly violent crimes (15 individuals convicted of murder; 1 convicted of sexual assault).[49] For those convicted of crimes against children, they entered their institution at the bottom of the prison hierarchy. As mentioned, child abusers are always acceptable targets of violence, even those such as Maria Shepherd and Tammy Marquardt, who were pregnant while incarcerated.[50] Similarly, William Mullins-Johnson (convicted of the rape and murder of his four-year-old niece Valin) was vilified, and in constant danger; a target for "any hero keen to earn his jail house stripes by taking out a child killer."[51] Conversely, those convicted of violent crimes, such as James Driskell (wrongfully convicted of the murder of his friend, Perry Harder) and Romeo Phillion (wrongfully convicted of murdering an Ottawa firefighter, Leopold Roy), likely had higher-status within the prison hierarchy. However, this higher status is quickly lost by actively maintaining innocence. While committing a violent crime brings esteem and admiration, renouncing your affiliation with that crime also renounces the esteem and admiration that comes with it. Where before one's crime made them feared and capable of great harm to other offenders, this is no longer the case when one claims innocence. Suddenly, these innocent offenders are not violent, they are not feared, and they are not capable of causing great harm to other offenders. Their high-status in the prison hierarchy is lost.

In some prisons, publicly maintaining one's innocence can also be seen as a violation of the inmate code. Specifically, it is a violation of the "I won't see you, don't see me, and shut up already" rule. The essence of this rule is to mind one's own business and not get involved where one is not needed. Similarly, it is important to keep your own problems to yourself. There is an overall intolerance for "loud mouths"[52] and those who disrupt the *status quo*. As written by Oregon State Institution inmate James D. Anderson, "If you…keep your head down, don't bother anyone, and don't act like a wimp and whine about your wrongful conviction, you won't have to worry about prison violence."[53] This is not to say that wrongfully convicted persons must hide their innocence to avoid inmate violence. Guy Paul Morin maintained his innocence (albeit, through

---

[47] For example, Romeo Phillion spent seven years at Kingston Penitentiary's Regional Psychiatric Centre (maximum security), before being transferred to Warkworth Penitentiary (medium security), Joyceville Penitentiary (minimum security), Collins Bay Penitentiary (minimum/medium security), Frontenac Institution (minimum security) and eventually Bath Institution (medium security).

[48] Robert Simon, "The Psychological and Legal Aftermath of False Arrest and Imprisonment" (1993) 21:4 Bull Am Acad Psychiatry Law 523 at 525 [*Simon*]. More violent institutions increase the prevalence of traumatic experiences such as physical, psychological or sexual abuse, and can have serious mental health consequences, as will be explained below.

[49] *Exonerations*, online: Innocence Canada <www.innocencecanada.com> [*Exonerations*]. At least 12 individuals (O'Neil Blackett, Richard Brant, Tammy Marquardt, Guy Paul Morin, William Mullins-Johnson, Maria Shepherd and Sherry Sherrett-Robinson) were convicted of child-related crimes (most often child murder, rape or manslaughter), and all individuals except Jack White (convicted of sexual assault) were wrongfully convicted of murder-related offences.

[50] *Chipman 1*, *supra* note 22; *Acquisto*, *supra* note 21.

[51] David Bayliss, "The Mullins-Johnson Case: The Murder that Wasn't" (2006) 6 AIDWYC Journal 1 at 2 [*Bayliss*].

[52] *Ricciardelli 2*, *supra* note 16 at 247.

[53] James D Anderson, "How to Survive in Prison as an Innocent Man Convicted of a Sex Crime" (1997) 9:3 Issues in Child Abuse Accusations – Institute for Psychological Therapies.

legal proceedings) while incarcerated and many of his fellow inmates at Kingston Penitentiary were sympathetic.[54] In fact, due to inmate sympathy of his innocence, Morin was able to remain in general population, even though he was convicted of child sexual assault and murder, a crime that usually subjects an offender to violent attacks.[55]

The overall rule regarding maintaining one's innocence in prison seems to be this: if you are loud about your innocence, you become a target for violence. This is not because you are innocent, but because you have forfeited your prison status and violated the inmate code. If you maintain your innocence quietly, and only talk about it when asked, there is no reason to believe you will be subjected to more violence simply because you maintain your innocence. We will now consider this rule within the context of two cases: David Milgaard and Glen Assoun.

a. Case Study: David Milgaard

In 1970, David Milgaard was wrongfully convicted of the rape and murder of 20-year-old nurse Gail Miller. He was sentenced to life in prison (with no chance of parole for at least 10 years), and moved between prisons significantly, serving time at Prince Albert Penitentiary (now Saskatchewan Penitentiary), Stony Mountain Penitentiary, Dorchester Penitentiary, Millhaven Institution and Collins Bay Institution. He consistently maintained his innocence and spent almost 22 years in prison for a crime he did not commit, before being released in 1991. Milgaard has said, "I was just a young man inside a penitentiary, and the first thing I wanted to do was tell the whole world my story. I ended up getting a typewriter and I was typing inside the prison where everybody was open front cells, cages, and people could hear me and everybody was so upset at this young guy trying to type all night, and I'm lucky I'm still alive here to talk to you, today!"[56] While this suggests that maintaining one's innocence may lead to prison violence, it is more likely that this incident reflects inmate frustration at a violation of the inmate code. Specifically, it reflects a violation of the daily behaviour rules—do not be loud and typewrite during sleep hours.

There is nothing further in Milgaard's prison experience to conclude that any violence Milgaard experienced was the result of maintaining his innocence. It is well-known that Milgaard maintained his innocence primarily via legal proceedings and through the help of his mother, Joyce, who was instrumental in advocating for her son. It is possible that beyond this one incident, Milgaard did not loudly proclaim his innocence except at psychiatric evaluations, rehabilitation and therapy appointments, and parole applications. In fact, this is quite likely. At the beginning of his sentence, Milgaard was a troublesome inmate. In his first 18 months, prison officials recorded 31 institutional offences, including refusing orders and threatening guards.[57] This behaviour likely gained Milgaard status within the prison hierarchy as he learned to mind his own business and keep to himself, while rejecting the authority of the prison administration. He focused on his post-

[54] D'Arcy Jenish, "Morin fights back," *Macleans* (8 Jan 1993), online: https://archive.macleans.ca/article/1993/1/18/morin-fights-back.
[55] *Ibid*.
[56] Lauren Meister, "David Milgaard struggles daily after spending two decades behind bars while innocent," *Cochrane Now* (1 Oct 2020), online: <www.cochranenow.com>.
[57] D'Arcy Jenish, "The Survivors" *Macleans* (27 Apr 1992), online: https://archive.macleans.ca/article/1992/4/27/the-survivors.

secondary education and had "a desire to 'avoid problems.'"[58] Similarly, it is likely that Milgaard's successful prison escapes: one in 1973, from Dorchester Penitentiary, and one in 1980, following a day pass from Stony Mountain Penitentiary, gained him notoriety and thus higher status, despite his innocence. In a letter to his mother, Milgaard writes "back on the same range…all [prisoners] asked how I'd been and was I okay".[59] Thus, in David Milgaard's case, there is no evidence to suggest that maintaining his innocence while incarcerated influenced on the level of violence he experienced. Rather, Milgaard's case suggests that the manner of maintaining one's innocence, and related violations of the inmate code, may be potential instigators of violence.

b. Case Study: Glen Assoun

In 1999, Glen Assoun was wrongfully convicted of the murder of his former girlfriend, Brenda Way. He was sentenced to life imprisonment (with no chance of parole for 18.5 years) and served 17 years at Springhill Penitentiary and Dorchester Penitentiary, before being exonerated in 2019. Throughout his sentence, Assoun loudly and steadfastly maintained his innocence. "He was in the prison's face with his claim of innocence, going so far as wearing a baseball cap [and jacket] proclaiming his wrongful conviction [as the hat read 'Wrongfully Convicted 1998']."[60] He would continue to make these baseball hats, even though they were repeatedly taken away from him.[61]

Even Assoun's lawyer, Jerome Kennedy, was frustrated by Assoun's protests that he was innocent when meeting with Assoun for the first time to help him get his conviction overturned.[62] Assoun also recalls a time where he proclaimed his innocence after climbing to the top of a bell tower, an attempt that landed him in protective custody.[63] The decision to place Assoun in protective custody was likely two-fold: (1) to protect Assoun from himself, as prison officials likely saw his climbing the bell tower as a potential suicide attempt, and (2) to protect Assoun from other inmates, seeing has he violated the inmate code. By disrupting behaviour rules, being loud and calling unnecessary attention to himself and his innocence, Assoun made himself a target for inmate violence.

It also appears that Assoun's actions in proclaiming his innocence also made him a target for violence at the hands of prison officials. Assoun recalls a time that he was severely beaten by seven prison guards, who left him severely bruised, with a shattered ankle and gangrene quickly settling in.[64] He was not allowed to see a doctor for 11 days. By his own account, Assoun believes the reason for this attack was "standing up for my innocence, because I was protesting my

---

[58] *Canada, Commission of Inquiry into the Wrongful Conviction of David Milgaard, Penitentiary Placement Report* dated Feb 21, 1986, (Ottawa: Correctional Service Canada, 2006).
[59] *Canada, Commission of Inquiry into the Wrongful Conviction of David Milgaard, Letter from David Milgaard to Joyce Milgaard* dated November 30, 1985 (Ottawa: 11 May 2006).
[60] Tim Bousquet, "Prison was hell': Glen Assoun tells his story," *Halifax Examiner* (19 Jul 2019), online: <www.halifaxexaminer.ca> [*Bousquet 1*].
[61] Tim Bousquet, "CBC Uncover: S7 E5: The Cold Walls of Prison" *CBC Radio* (17 Jun 2020), online (podcast): https://www.cbc.ca/listen/cbc-podcasts/187-uncover/episode/15785982-s7-e5-the-cold-walls-of-prisonat at 00h:11m:44s [*Bousquet 2*].
[62] Tim Bousquet, "CBC Uncover: S7 E4: Fresh Evidence," *CBC Radio* (29 Jul 2020), online (podcast): <www.newsinteractives.cbc.ca> at 00h:06m:36s.
[63] *Bousquet 2*, *supra* note 61 at 00h:04m:02s.
[64] *Bousquet 1*, *supra* note 60.

innocence at the time"[65] and "they were teaching me a lesson."[66] Another time, a prison guard called Glen Assoun a 'rat' in front of other inmates.[67] As mentioned, not being a 'rat' (or informant) is one of, if not the most important rule, of the inmate code. A claim like this surely made Glen Assoun the victim of multiple violent attacks, many of which were likely attempts on his life rather than simple beatings. In Glen Assoun's case, it is clear that maintaining his innocence while incarcerated, and the manner in which he did so, had a direct influence on the level of violence that he experienced. Assoun's innocence made him a target for violence.

Thus, it appears that being innocent while incarcerated *can* influence prison treatment. However, there is a difference between maintaining your innocence and proclaiming your innocence. Where the former causes no harm, the second appears to make one a target for violence at the hands of both fellow inmates and prison officials.

III Part II: Mental Health and Segregation

A. Mental Health and Segregation in Prison Generally

Mental health is a significant and growing problem within Canada's prison systems. To date, the federal prison system has five Regional Psychiatric (or Treatment) Centres, each functioning as both a penitentiary and a hospital. These five centres have a combined ~675 bed capacity,[68] which is grossly insufficient for Canada's approximately 14 000 federal inmates.

"Mental illness rates are about 4 to 7 times more common in prison than in the community."[69]

This is comparable to reported prison mental illness rates in the United States (estimated to be about 3 to 12 times higher than in the community),[70] but above those reported in Europe.[71] The inflated mental illness rate in prison is multi-faceted. First, individuals with pre-existing mental illnesses are more likely to be criminalized because the circumstances that breed criminality, also breed mental illness. For example, experiences with poverty, substance abuse,

---

[65] *Ibid*.
[66] *Bousquet 2*, *supra* note 61 at 00h:23m:37s.
[67] *Ibid* at 00h:20m:53s.
[68] *Canada, Audit of Regional Treatment Centres and the Regional Psychiatric Centre* (Ottawa: Office of the Correctional Investigator, 2011) at 10.
[69] *Mental Illness and the Prison System*, online: Centre for Mental Health and Addition (CAMH), <www.camh.ca> [*CAMH*].
[70] Seth J Prins "Prevalence of mental illnesses in US state prisons: A systematic review" (2014) 65:7 Psychiatric Services at 862.
[71] *See* Eric Blaauw, Ronald Roesch, & Ad Kerkhof, "Mental Disorders in European Prison Systems: Arrangements for Mentally Disordered Prisoners in the Prison Systems of 13 European Countries" (2000) 23:5 Int J Law Psych 649. "Lifetime prevalence rates of mental disorders, including substance-related disorders and personality disorders, were found to be 71% in Denmark (Andersen, Sestoft, Lillebaek, Gabrielsen, & Kramp, 1996) and 71% in England (Birmingham, Mason, & Grubin, 1996). Current prevalence rates were found to be 64% in Denmark (Andersen *et al*, 1996), 62% in England (Birmingham *et al*, 1996), 63% in England and Wales (Brooke, Taylor, Gunn, & Maden, 1996) and 62% in Ireland (Smith, O'Neill, Tobin, Walshe, & Dooley, 1996)" Although outdated, this source provides insight into the levels of mental illness prior to any mental health interventions.

physical and emotional abuse and more, are risk factors for both mental illness and criminal behaviour.[72] Mental illness itself can also be a source of an individual's criminal behaviour.[73] Second, the conditions in prison directly encourage mental illness. The prison system fundamentally deprives individuals of their liberty. It restricts one's ability to choose what to do and when to do it and deprives them of a sufficient social support system[74]. Further, inmates often experience physical, emotional, and sexual abuse while incarcerated.[75] All of these are known risk factors that contribute to the high rate of mental illness in federal prisons.[76]

a. Segregation

The increase in violence in prisons has led to an increased use of segregation (or solitary confinement). In both federal and provincial prisons, men and women with serious mental health and behavioural issues may be confined to a "secure unit" within the larger institution.[77] In 2015, approximately 26 percent of all male offenders, and 46 percent of all female offenders were admitted into segregation at least once.[78] Segregation can be used as both a punitive and protective measure. As a punitive measure, individuals who instigate violence, or otherwise need to be disciplined, are placed in segregation. As a protective measure, segregation is used to isolate an inmate due to a medical condition or risk of violence. In Ontario, inmate protection was cited as the reason for segregation in 40 percent of cases. For example, if a threat is made against an inmate's life, that inmate will be placed in segregation. COVID-19 outbreaks have also led to an increase in segregation. Once segregated, the reason for segregation does not matter as all inmates are treated the same.

The conditions of segregation significantly impact mental health. While the overall length of stay in segregation in Canadian federal facilities decreased from an average 40 days in 2005[79] to 27 days in 2015,[80] this is still well above the United Nations standard of 15 days[81] and constitutes a human rights violation.[82] In segregation, inmates are held alone, in approximately six by nine

---

[72] *CAMH, supra* note 69.
[73] *Ibid.*
[74] *Brooks & Greenberg*, *supra* note 4 at 48; *Simon, supra* note 46 at 525; Konvisser, *supra* note 3 at 241.
[75] *Grounds*, *supra* note 4 at 170.
[76] *Ibid* at 169; Brooks & *Greenberg*, *supra* note 4 at 49-50; *Konvisser*, *supra* note 5 at 245.
[77] Correctional Service Canada, "Security Levels and What They Mean" (3 May 2015), *Let's Talk* (Blog), online: https://www.csc-scc.gc.ca/text/pblct/lt-en/2006/31-2/4-eng.shtml.
[78] Canada, Office of the Correctional Investigator, Administrative *Segregation in Federal Corrections 10 Year Trends* (Ottawa: Office of the Correctional Investigator, 2015) at Section 1 [*OCI Trends*].
[79] *OCI Trends*, *supra* note 78 at Section 2.
[80] *Ibid.*
[81] Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* UNGAOR, 66th Sess, UN Doc A/66/268 (2011) at 9 [*Mendez*].
[82] The overuse of segregation is not a problem unique to Canada. Many other nations are also guilty of gross human rights violations related to segregation. For example, in the United States, Kalieef Browder (a youth offender) spent approximately two years in solitary confinement at Riker's Correctional Centre (New York), awaiting a trial that never came. He later took his own life after struggles post-conviction. Similarly, Albert Woodfox spent four decades in solitary confinement in the Louisiana (Angola) State Penitentiary, a notorious maximum-security prison. In the United Kingdom, Gerry Conlon spent a total of 5 and a half years in solitary confinement (his single longest stretch being 10-months) at Long Lartin Prison in Worcestershire, England. Other jurisdictions have specific statutory protections for solitary confinement. In Germany, solitary confinement cannot exceed four weeks in any given year for any given offender, and in the Netherlands that number is reduced to two weeks.

foot cells for 20 plus hours a day, often without access to showers or clean laundry, programming (education, addiction support or spiritual services) and meaningful human contact.[83] Lockdowns are effectively segregation implemented on a unit- or prison-wide scale. In 2019, Canada supposedly abolished segregation and implemented structured intervention units (SIUs) and therapeutic ranges—these methods are effectively the same as segregation.[84] In fact, de-segregation has led to an increase in lockdowns and "dumping" of segregated inmates into therapeutic ranges, both of which are not subject to SIU rules, and thus, result in inmates spending more time in their cells (often more than 22 hours a day).[85] Humans are inherently social beings, and a chronic lack of social interaction has fundamental, long-lasting and irreversible negative effects on the human brain.[86] This is particularly true for younger offenders, whose brains are still developing. More specifically, segregation decreases the size of the hippocampus (the area responsible for learning, memory and spatial awareness) and increases the size of the amygdala (which controls fear and anxiety).[87] Thus, segregation fosters the perfect environment for mental illness.

Mental health and segregation are high risk factors for self-inflicted harm and suicide in prisons. The global rate of prisoner suicide is about three times higher than the general population.[88] Interestingly, in 2011-2014, the Nordic countries (excluding Denmark), France and Belgium, rated highest in suicide rates, followed by the rest of western Europe, Australasia and North America (both Canada and the United States).[89] Yet, in our federal penitentiaries, suicide is the leading cause of death after natural causes – in 2017-18, it accounted for approximately 11 percent of all prison deaths.[90] Approximately 1 in 5 inmates[91] have attempted suicide, and individuals who have experienced segregation are more likely to attempt suicide.[92] In fact, the majority of suicide attempts occur in segregation.[93]

Overall, mental illness is increasingly prevalent in Canada's prisons, and while Regional Treatment Centres exist to aid some prisoners, they are not sufficient to deal with all mental health care. Segregation is also a recognized practice that leads to mental illness and increases the risk of

---

[83] *OCI Trends*, *supra* note 78.
[84] See *Corrections and Conditional Release Act*, SC 1992, c 20, s 31(1)(b), online: <https://laws-lois.justice.gc.ca/eng/acts/C-44.6/index.html>. SIU and therapeutic ranges are effectively the same as segregation. Inmates are still confined to small cells with variable access to services; the only difference is "the opportunity to interact, for a minimum of two hours, with others, through activities."
[85] Canada, Office of the Correctional Investigator *Office of the Correctional Investigator Annual Report 2019-2020* (Ottawa: Office of the Correctional Investigator, 2020) at 55 [*OCI, 2020*].
[86] *Mendez, supra* note 81 at 26-27.
[87] Jules Lobel & Huda Akil, "Law and Neuroscience: The case of solitary confinement" (2018) 147:4 Daedalus 61 at 69-70.
[88] Seena Fazel, *et al*, "Prison suicide in 12 countries: an ecological study of 861 suicides during 2003-2007" (2009) 46:3 Soc Psychiatry and Psychiatric Epidemiology 191.
[89] Seena Fazel, Taanvi Ramesh & Keith Hawton, "Suicide in prisons: an international study of prevalence and contributory factors" (2017) 4:12 The Lancet Psychiatry at 949.
[90] *OCI, 2019*, *supra* note 25 at 23.
[91] Fiona Kouyoumdjian *et al*, "Health status of prisoners in Canada: Narrative review" (2016) 63:3 Can Fam Physician at 217.
[92] *OCI Trends*, *supra* note 77 at Section 3.
[93] Craig Haney & Mona Lynch, "Regulating Prisons of the Future: Psychological Analysis of Supermax and Solitary Confinement" (1997) 23:4 NYU Rev L & Soc Change at 525.

suicide and suicidal ideation. While actions have been taken against this practice, those actions are insufficient and the problems around mental illness in prison remain.

B. Mental Health and Segregation of Wrongfully Convicted Persons in Prison

Of the 22 individuals listed on Innocence Canada's website that served time in prison, five individuals spent time in one of Canada's Regional Psychiatric (or Treatment) Centres (RTC), five individuals conclusively did not, and information was not available regarding the remaining 12 individuals.[94] Even if we assume all outstanding individuals did not spend time in Canada's RTC, the prevalence of RTC time among the wrongfully convicted would be 22.7%, which is significantly above the national average of 0.05% (assuming maximum RTC bed capacity). The five individuals who spent time in Canada's RTCs are: Romeo Phillion (Kingston RTC, 7 years[95]), David Milgaard (Prairies RTC and Pacific RTC, length unknown but believed to be within a few weeks to a few months[96]), Glen Assoun (Shepody Healing Centre, 3 years),[97] Leighton Hay[98] (wrongfully convicted of the murder of Colin Moore; spent the majority of his 12 year sentence in psychiatric wings of two penitentiaries), and Tammy Marquardt (Queen Mental Health Centre, 3 months[99]). Interestingly, only Leighton Hay entered the prison environment with a pre-existing mental health condition.[100] The other four individuals were either diagnosed with, or developed, a mental illness while incarcerated.

The prison environment is the perfect breeding ground for mental illness, particularly for the wrongfully convicted. Some of the unique factors that contribute to mental health struggles within the wrongfully convicted prison population are trauma and adverse life experiences, social isolation, the consequences of maintaining legal innocence, uncertainty of release and segregation. Each of these factors will be considered in turn.

First, like all prisoners, wrongfully convicted persons face the traumatic realities of prison.[101] A significant number of wrongfully convicted persons experienced physical abuse, and many, such as David Milgaard[102] and Guy Paul Morin,[103] report experiences of sexual abuse. Others report additional traumatic experiences. For example, Thomas Sophonow "discovered the

---

[94] *Exonerations, supra* note 49.

[95] *Memorandum of Argument on behalf of Romeo Phillion,* Application for Judicial Interim Release following Application under section 696.1 of the Criminal Code, Superior Court of Ontario, 2003, at para 4.

[96] Canada, Commission of Inquiry into the Wrongful Conviction of David Milgaard, *Psychiatric File on David Milgaard*, 325166 (Ottawa: 1 Mar 2006).

[97] *Bousquet 1*, *supra* note 61 at 00h:05m:05s.

[98] Jesse Johnson, "Leighton Hay finally freed a decade after wrongful first-degree murder conviction", *National Post* (28 Nov 2014) online: www.nationalpost.com.

[99] John Chipman, *Death in the Family* (Toronto: Doubleday Canada, 2017) at 35 [*Chipman 2*].

[100] Alan Maki, "Wrongfully convicted of murder, Leighton Hay free after 12 years", *Globe and Mail* (28 Nov 2014) online: <https://www.theglobeandmail.com/news/national/wrongly-convicted-of-murder-leighton-hay-free-after-12-years/article21825039/>.

[101] *Grounds*, *supra* note 4 at 170. In a study of 18 wrongfully imprisoned men in the UK, 14 experienced terror of being assaulted or killed by fellow prisoners, 3 were victims of serious violence, 2 were sexually assaulted and one was stabbed. Many told stories of death threats, humiliation, abuse, segregation and other forms of distress.

[102] Michelle Ruby, "Milgaard continues to fight for wrongfully convicted", *Brantford Expositor* (12 Mar 2020) online: <brantfordexpositor.ca>.

[103] Cynthia J. Faryon, *Real Justice: Guilty of Being Weird: The Story of Guy Paul Morin* (Toronto: Lorimer, 2012) at 110.

body of a fellow inmate who had committed suicide"[104] and Kyle Unger (wrongfully convicted of the murder of 16-year-old Brigitte Grenier) had a cellmate who slit his own throat with a razor while Unger was sleeping.[105] Second, adverse life experiences are a factor common to all wrongfully convicted persons, and also a significant risk factor for mental illness. Each wrongfully convicted person was investigated by police, charged with a crime s/he did not commit (often a particularly violent or reprehensible crime), convicted of that crime (possibly more than once) and then placed in prison. It is hard to imagine a more traumatic adverse life experience than this. However short or long the experience, the effect of a false imprisonment or wrongful conviction can be profound and long-lasting.[106] Third, many wrongfully convicted persons feel 'out of place' and either do not want to associate, or have trouble associating, with the highly criminalized offenders they are imprisoned with.[107] This adaptation to prison life leads many wrongfully convicted persons isolate themselves and disconnect from their emotions.[108] This social isolation has significant mental health consequences, especially when coupled with the removal of a pre-existing social support network as a result of imprisonment.[109] A good example of social isolation in prison is Glen Assoun. Glen Assoun said that he "developed no friendships [in prison]— not with other prisoners, not with guards, no sympathetic social worker. He was alone."[110] Additionally, Dorchester Penitentiary is a three-hour drive from Dartmouth, which made it difficult for his family to visit. Glen Assoun's son, Glen Jr., only visited once in the 17 years due to issues with visitation applications.[111] As Assoun said, he was effectively alone throughout his prison experience. It is not surprising that all of these traumatic experiences would negatively affect one's mental health. In fact, at least 11 wrongfully convicted persons conclusively suffered from depression while incarcerated.[112]

It is also interesting to note the specific mental health consequences as a result of maintaining *legal* innocence while incarcerated. Almost all wrongfully convicted persons begin working on their appeal upon conviction, and for many, much (if not all) of their time in prison is spent finding a way to get out of prison.[113] This experience on its own is stressful, but becomes even more stressful for wrongfully convicted persons who must depend heavily on those outside the prison system—lawyers, family, friends and others—to advocate on their behalf, and whose preoccupation with preparing their legal case results in further isolation from other prisoners.[114]

---

[104] Sarah Harland-Logan, "Thomas Sophonow" online: *Innocence Canada* https://www.innocencecanada.com/exonerations/thomas-sophonow/#ftn31.
[105] Gabrielle Giroday, "A sort of freedom", *Winnipeg Free Press* (12 Sept 2009) online: <www.winnipegfreepress.com> [*Giroday*].
[106] *Simon*, *supra* note 48 at 523.
[107] *Konvisser, supra* note 5 at 241.
[108] *Ibid* at 257. In the words of Craig Haney, "the wrongfully convicted have a more difficult time making sense of their experience…[p]rison for some people robs them of the ability to feel joy and happiness…their agency, their decision-making ability and forced in a sense to be disconnected from their emotions" as a way of adapting to their new world.
[109] *Brooks & Greenberg*, *supra* note 4 at 49; *Konvisser*, *supra* note 5 at 241.
[110] *Bousquet 1, Glen Assoun*, *supra* note 61.
[111] *CBC Uncover, Glen Assoun*, *supra* note 61 at 00h:08m:40s.
[112] See *Exonerations*, *supra* note 94. These individuals include: Romeo Phillion, David Milgaard, Thomas Sophonow, Glen Assoun, Robert Baltovich, Anthony Hanemaayer, Tammy Marquardt, Kyle Unger, Maria Shepherd, William Mullins-Johnson, and Donald Marshall Jr.
[113] *Grounds*, *supra* note 4 at 177.
[114] *Ibid.*

Moreover, legal advocacy requires research, a lonesome task, and frequent communication with one's legal team (if s/he has one). Legal counsel can be difficult to obtain from prison, and often requires writing letters to anyone and everyone willing to help. Similarly, the lack of communication and access to phones and email makes it difficult for individuals with counsel to contact their counsel, thus potentially limiting one's involvement in his or her case. This inability to contribute to one's legal proceedings can leave individuals feeling helpless to their own plight, and more isolated in comparison to other prisoners.[115] With time, this can lead to overall feelings of frustration, helplessness or low self-efficacy.[116] All three of these – stress, helplessness and low self-efficacy – are risk factors for mental health challenges, and in particular, for anxiety and depression.[117]

Furthermore, a fixed prison sentence may positively influence one's mental health.[118] A fixed sentence provides a semblance of control within a prison environment designed to make one feel powerless. In effect, knowing when you will be released creates a "light at the end of the tunnel" and can motivate one to keep up their spirits. Wrongfully convicted persons do not benefit from this perceived sense of control. For them, there is uncertainty regarding their release, and this uncertainty causes stress and anxiety.[119] Wrongfully convicted persons do not see their prison sentence as something they must accomplish in order to be released. More often, they see their sentence as a roadblock hindering their release; a hindrance that must be removed via legal proceedings. In fact, wrongfully convicted persons are at significant mental health detriment due to their legal proceedings. The emotional rollercoaster of minor successes is often met with a devastating blow when appeals are unsuccessful, and less chances remain for release. For wrongfully convicted persons, the 'light at the end of the tunnel' is the appeals process, and when these proceedings fail, so can an individual's mental health. Psychologist Terry Kupers describes wrongful conviction as "the kind of hopelessness that can lead to suicide [which] is intensified by the knowledge that even though one is innocent, nobody cares about the unfairness of the punishment."[120] Based on the experiences of Romeo Phillion and David Milgaard, it is clear that the loss of an appeal can trigger a suicide attempt. Romeo Phillion attempted suicide multiple times while incarcerated at the Kingston RTC. Interestingly, Phillion's 7 year incarceration at Kingston RTC coincides almost perfectly with his appeals process as he was convicted in 1971 and his Supreme Court of Canada appeal was dismissed in 1977. Similarly, David Milgaard attempted suicide after his appeal to the Supreme Court of Saskatchewan was denied.[121] Thus, it appears that legal proceedings are a double-edged sword, while they provide much hope and benefit to mental health upon success, they are devastating to mental health when unsuccessful, leaving wrongfully convicted persons helpless and hopeless.

---

[115] *Ibid*.
[116] Self-efficacy is the belief in one's ability to succeed or accomplish a particular task(s).
[117] William R Miller, Martin E Seligman & Harold M Kurlander, "Learned helplessness, depression and anxiety." (1975) 161.5 J Nerv Ment Dis 347.
[118] Kathryn Campbell & Myriam Denov, "Burden of Innocence: Coping with a Wrongful Imprisonment" (2004) 46:2 Can J Corr 139 at 154.
[119] *Ibid.*
[120] *Konvisser*, *supra* note 4 at 248.
[121] Cynthia J. Faryon, *Real Justice: Sentenced to Life at Seventeen: The Story of David Milgaard* (Toronto: Lorimer, 2012) at 72 [*Faryon*].

a. Segregation

Segregation is also a noteworthy contributor to an inmate's mental health. Of the 22 individuals listed on Innocence Canada's website who spent time in prison, eight individuals spent time in segregation, three likely spent time in segregation, and information was not available regarding the remaining 11 individuals. The list of individuals who spent time in segregation includes two women: Tammy Marquardt[122] and Sherry Sherret-Robinson (wrongfully convicted of the death of her four-month-old son, Joshua).[123] At present, only three women have been exonerated. Thus, it would be premature to use this number to compare against the national average for women in segregation. However, the same situation is not true for the men. At least 42 percent of wrongfully convicted males were placed in segregation at least once, which is higher than the national average of 26 percent.[124] The men who spent time in solitary confinement include Robert Baltovich, David Milgaard, Glen Assoun, Thomas Sophonow, Kyle Unger, and William Mullins-Johnson. As mentioned, three men are thought to have spent time in solitary confinement. For Donald Marshall Jr., evidence that he spent time in segregation comes from the comments of a fellow inmate, Mike Grattan, who defines "confinement in segregation [as] common occurrence."[125] For Leighton Hay and Romeo Phillion, the belief that they spent time in segregation is based on the individuals having attended a Regional Psychiatric Institution, which often used segregation as a means to control mentally ill patients.[126] While all of these individuals experienced segregation throughout their incarceration, they do not share the same segregation experiences.

Whereas some individuals only spent time in segregation once, others had multiple segregation experiences. The length, conditions, and reasons for segregation vary significantly between individuals, and between individual segregation experiences. For example, the experiences of the wrongfully convicted suggest that punitive segregation is shorter than protective segregation. Sherry Sherret-Robinson and David Milgaard were both placed in punitive segregation at least once. Sherret-Robinson was placed in segregation for a few days[127] following an altercation with another inmate. Milgaard was placed in segregation for 10 days after prison officials discovered a homemade alcoholic mixture Milgaard created to help with the pain of a gunshot wound.[128] In contrast, the experiences of those in protective custody are much longer, darker, and more restrictive. Robert Baltovich (wrongfully convicted of the murder of his girlfriend, Elizabeth Bain) says, "basically, I was locked up for 24 hours a day for months and months. I got the occasional visit but it was very difficult."[129] Glen Assoun was placed in protective segregation twice at Dorchester Penitentiary. The first time, prison officials decided to segregate

---

[122] *Chipman 2*, *supra* note 99 at 82.
[123] Derek Finkle (re-posted by Sherry Sherret-Robinson) "Falsely Accused A Mother Fights Back – December 2007" (9 Feb 2008), *Sherry Sherret's Journal for Closure,* online: <http://sherrysherret.blogspot.com> [*Sherret-Robinson*].
[124] *OCI Trends*, *supra* note 77 at 2.
[125] Nova Scotia, Royal Commission on the Donald Marshall Jr. Prosecution, *Commission of Inquiry Concerning the Adequacy of Compensation Paid to Donald Marshall, Jr*., by Gregory T Evans (Halifax, 1990) at 22.
[126] *OCI Trends*, *supra* note 77 at 23.
[127] *Sherret-Robinson*, *supra* note 123.
[128] See *Faryon*, *supra* note 121 at 82. Milgaard was shot by police when re-captured following a 77-day escape.
[129] University of Guelph, "Wrongful Conviction Day 2020 with guest exoneree Robert Baltovich - Text Transcript" (1 Oct 2020), online: *University of Guelph: Criminal Justice and Public Policy* <https://cjpp.uoguelph.ca>.

him for 90 days because they thought other prisoners intended to kill him.[130] The second time, Assoun was segregated for 90 days at his own request, after a prison official openly called him a 'rat' in front of other inmates.[131] Thomas Sophonow was placed in solitary confinement throughout his entire stay at Stony Mountain Penitentiary. He spent 97 days "in a cell that measure[d] 5.5 feet by 10 feet for 23 hours a day, every day…the conditions were harsh and…during the one hour when he was let out of his cell for exercise and a shower there was no allotted place of exercise."[132] Kyle Unger was also effectively in segregation, experiencing lockup for 23 hours and 50 minutes per day in a cell with no windows. He said, "I never seen the light for two years."[133] Based on these experiences, we can conclude that the average length of segregation for wrongfully convicted men is significantly above the national average of 27 days (as of 2015).[134] While it is clear that the wrongfully convicted spent more time in segregation than the average offender, it is unknown whether this fact is related to their innocence.

However, there are some reasons to suspect that the segregation of these individuals *could* be related to their wrongful conviction. First, as mentioned, Glen Assoun was not liked by prison officials and inmates because he constantly proclaimed his innocence. Thus, Assoun's innocence was the beginning of the chain of events that would eventually land Assoun in protective segregation. Similarly, David Milgaard's experience in segregation is linked to his prison escape, which he attempted because of his frustration and desperation at being an innocent man in prison. Moreover, any individual who was placed on suicide watch was likely placed in segregation, as individuals on suicide watch are often placed in segregation cells, or cells with similar conditions to segregation cells. Annu Saini, who was placed on suicide watch at Vanier's Centre for Women says "suicide watch is one of the many paradoxes of prison life. You go in wanting to kill yourself and the conditions just make you want to kill yourself more."[135] Thus, it is safe to assume that anyone who attempted suicide while incarcerated was placed on suicide watch (or *de facto* segregation) following medical attention. Tammy Maraquardt was placed on suicide watch following a suicide attempt in July 1998. This attempt was triggered by Tammy's permanent inability to see her two children because it upset the adoptive mother and Tammy had no parental rights.[136] Even if Tammy won her appeal (which she did not), the adoption was final and she had no legal recourse to regain custody. In effect, her wrongful conviction caused her to permanently lose her children, which triggered her suicide attempt and landed her in *de facto* segregation. As previously mentioned, Romeo Phillion also attempted suicide and was placed on suicide watch multiple times, often coinciding with his appeal losses. Phillion's *de facto* segregation is a direct result of his wrongful conviction. The same is true for David Milgaard, who attempted suicide and was placed on suicide watch following his appeal loss.[137] For these individuals, their segregation was either directly or indirectly related to their innocence.

---

[130] *Halifax Examiner, Glen Assoun*, *supra* note 60.
[131] *Ibid.*
[132]Manitoba, The Inquiry Regarding Thomas Sophonow, *Thomas Sophonow Inquiry Report* (Winnipeg: Manitoba Justice, 2010) at 189 [*Sophonow Inquiry*].
[133] *Giroday, supra* note 103.
[134] *OCI Trends*, *supra* note 76 at 8.
[135] Annu Saini, "Prison Notes: my time in suicide watch and solitary confinement", *Now Toronto* (7 Mar 2018), online: < https://nowtoronto.com/news/prison-notes-suicide-watch-solitary-confinement>.
[136] *Chipman 2, supra* note 99 at 215.
[137] *Faryon*, *supra* note 121 at 72.

Regardless of the specifics, segregation itself has had clear psychological effects on the wrongfully convicted. This is seen via the recognized effects of segregation both in prison and post-release. For example, segregation is known to increase the rate of depression, suicidal ideation, and suicide.[138] Almost all wrongfully convicted persons listed as having spent time in segregation were diagnosed with depression while incarcerated, with the exception of Leighton Hay and Sherry Sherret-Robinson. This is not to say that these individuals did not suffer from depression, only that there is no evidence to support a claim that they did. Similarly, all wrongfully convicted persons who report having (1) contemplated suicide, or (2) attempted suicide, have spent time in segregation. For example, Kyle Unger admits, "I wanted to kill myself every day, but I could not put my parents through that. Not with the support they gave me."[139] Segregation is also one of the factors that influences post-release mental health. Research recognizes that segregation can lead to trouble concentrating, memory loss, visual and auditory hallucinations, and more.[140] Interestingly, these are also many of the same recognized symptoms for post-traumatic stress disorder (PTSD). Evidence suggests that the wrongfully convicted may suffer from high rates of PTSD,[141] and many individuals who spent significant time in segregation, such as Thomas Sophonow[142] and Glen Assoun,[143] have suffered from symptoms of PTSD. Therefore, segregation is one of the many contributors to mental health challenges, both in prison and beyond.

b. Case Study: William Mullins-Johnson

The case of William Mullins-Johnson is a great example of the decline of an individual's mental health due to wrongful imprisonment. More specifically, this case evidences many of the specific factors that we have mentioned that lead to mental illness. For example, Mullins-Johnson experienced significant adverse life effects and social isolation after he was wrongfully convicted following his niece Valin's death. First, he had to cope with the news of Valin's death and sexual assault. Because Mullins-Johnson knew he was not responsible for the crime, he began to suspect that his brother Paul may have committed the offence.[144] This was especially distressing as William and Paul were close since childhood. In reality, there was no sexual assault, and there was no crime. Second, not only was Mullins-Johnson investigated, charged, and convicted of the rape and murder of his niece; both offences that he did not commit, but he was shunned by his entire family. All four of his brothers, their wives and children, cut contact with Mullins-Johnson following his arrest because they all believed he was guilty. In this, Mullins-Johnson lost his entire support network, which added strain to his sentence. The only person who stood by him was his mother—she was his lifeline to the outside world and supported him during the 10 years he was incarcerated.

---

[138] *Mendez, supra* note 81 at 26-27.
[139] Richard Brignall, *Real Justice: A Police Mr. Big Sting Goes Wrong: The Story of Kyle Unger* (Toronto: Lorimer, 2015) at 103.
[140] Ibid.
[141] *Grounds*, *supra* note 4 at 169.
[142] *Sophonow Inquiry, supra* note 132 at 138.
[143] Joan Bryden, "Wrongfully Convicted Halifax man's case sat on Wilson-Raybould's desk for months", *CBC* (28 Mar 2019) online: <https://www.cbc.ca/news/canada/nova-scotia/wrongly-convicted-glen-assoun-case-delay-jody-wilson-raybould-1.5074732>.
[144] "The Fifth Estate: A Death in the Family" *CBC News* (7 Jan 2009) at 00h:01m:23s, online (video): <https://www.cbc.ca/player/play/1367250888>.

Mullins-Johnson also experienced significant mental health struggles while incarcerated due to segregation, trauma, and maintaining his legal innocence. When he was arrested, William Mullins-Johnson was held in solitary confinement at the Algoma Treatment and Remand Centre in Sault Saint Marie for almost a year.[145] He was targeted by other inmates and prison guards, which continued following his conviction and transfer to Warkworth Institution where he was held until his release. Looking back, he recalls being "thrown in the hole [segregation] for frivolous things…guards saying that they should kill me; that I should die."[146] He spent many long stretches in solitary confinement cells.[147] In fact, Mullins-Johnson was depressed and helpless—there was a "about a 3-4 year period where months on end…when I would lie in my bed and shake and cry, shake and cry, day in, day out, from sun up until whenever I went to sleep."[148] It was the appeals process that kept him going, but following the denial of his Supreme Court of Canada appeal, he considered "slitting his wrists."[149]

As seen in his recounts, William Mullins-Johnson was significantly affected by his prison experience, and his mental health suffered as a result. Many of these struggles originated via his conviction, segregation, and prison sentence, and persist to this day. He says, "I know for a fact that I could be diagnosed with something, post-traumatic stress, whatever it is, I'm suffering it and I suffer it daily."[150] It is for this reason that it is important for us to study the prison experience that lies at the root of these struggles.

Therefore, it is clear that wrongfully convicted persons experience more mental health struggles while incarcerated compared to the average prison population. This is seen in the increased prevalence of the wrongfully convicted in Regional Treatment Centres, and largely results from the unique struggles of being a wrongfully convicted person in prison, such as the emotional toll of legal proceedings and the lack of a fixed sentence. The statistics also reflect the fact that wrongfully convicted males are more likely to experience segregation in prison than convicted offenders. However, further research is needed to establish whether this fact is related to, or independent from, the unique circumstance of being an innocent person in prison.

IV Limitations and Future Research

Given the lack of available information on the prison experiences of wrongfully convicted persons in Canada, it is prudent to acknowledge the limitations of this study. First, this study is focused on the prison experiences of 22 individuals exonerated with the help of Innocence Canada. While there is no agreed upon number of wrongful convictions in Canada, that number is certainly more than the 22 included here. Kathryn Campbell identifies 70 wrongful conviction cases (and

[145] Robson Hall (University of Manitoba), "William Mullins-Johnson: A Terrible Miscarriage of Justice – January 15, 2010" (2 Sept 2015) at 00h:15m:15s, online (video): https://www.youtube.com/watch?v=mD-hHz-7614&ab_channel=RobsonHall [*Robson Hall*].
[146] *Ibid* at 00h:12m:05s.
[147] *Bayliss*, *supra* note 50 at 38.
[148] *Robson Hall*, *supra* note 145 at 00h:09m:50s.
[149] *Ibid* at 00h:20m:50s.
[150] *Ibid* at 00h:11m:45s.

13 suspected wrongful convictions)[151] and states that "these approximations are rough at best"[152]. This author is also aware of an initiative, led by Kent Roach and Amanda Carling at the University of Toronto, to create a "Canadian Registry of Wrongful Convictions" similar to the American National Registry of Exonerations database. Upon completion, it is believed that the Canadian Registry will include at least 83 wrongful conviction cases, and 164 data points including, gender identity, education, criminal record, immigration status, race, language, mental illness, and more. Similarly, the Criminal Conviction Review Group (CCRG), an initiative run by Canada's Department of Justice, may also provide some insight into the number of suspected wrongful conviction cases in Canada. The CCRG reviews applications made by individuals suspected of being wrongfully convicted. While the lengthy process may deter individuals from applying and the process itself is not yet well-known, the CCRG "continues to experience a significant increase in new completed applications, averaging 17 per year over the past four years, up from an average of five per years in 2003 to 2015."[153] Again, these numbers reflect only the known or speculated wrongful conviction cases in Canada. Researchers believe that the number of unacknowledged or unknown wrongful conviction cases in the United States falls within the range of 0.5-1%.[154] Using this American upper estimate of 1%, one researcher has posited that of the 87,214 Canadian custodial sentences in 2010, approximately 872 were wrongfully convicted.[155] Thus, the present sample of 22 cases is only the tip of the iceberg.

Second, there is a lack of existing research on the prison experiences of the wrongfully convicted. Even within a limited sample of 22 wrongfully convicted persons, there is a dearth of information. Imprisonment is a uniquely personal and sensitive experience for all inmates, much less wrongfully convicted persons for whom imprisonment reflects a period of unique emotional turmoil. Many wrongfully convicted individuals have not been given the opportunity to share their experiences, while others are unwilling to share, hoping to leave the circumstances of their wrongful conviction and all related experiences behind in an attempt to forge a new path.[156] The resources relied on in this study, largely newspaper articles, interviews and books, provide glimpses into the lives of wrongfully convicted persons while incarcerated. While together they can provide important insights, they do not provide a full and complete account of one person's prison experience. In the same vein, a small number of cases that draws primarily on news accounts

[151] *Campbell, supra* note 2 at Appendix A.
[152] *Ibid* at 10.
[153] Canada, *Applications for Ministerial Review – Miscarriages of Justice – Annual Report* (Ottawa: Criminal Conviction Review Group) online: < www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/>. According to the CCRG's annual reports, the number of applications (and completed applications, *i.e.,* documentation ready for review) per fiscal year (Apr 1 to Mar 31) are as follows: 2009-10: 22 applications (7 completed); 2010-11: 9 applications (3 completed); 2011-12: 16 applications (11 completed); 2012-13: 12 applications (3 completed); 2013-14: 13 applications (8 completed); 2014-15: 11 applications (5 completed); 2015-16: 7 applications (5 completed); 2016-17: 17 applications (15 completed); 2017-18: 27 applications (18 completed); 2018-19: 31 applications (18 completed) and 2019-20: 23 applications (16 completed).
[154] Marvin Zalman, "Qualitatively Estimating the Incidence of Wrongful Convictions" (2012) 48:2 Crim Law Bulletin 221 at 245-6. Zalman's estimate of 0.5-1% (*i.e.,* 1%) is the most accepted value in the United States, however other estimates exist and are far-ranging. For example (and as noted by Kathryn Campbell in *Miscarriages of Justice in Canada* at 9-10), Justice Antonin Scalia proclaimed an error rate of 0.027% while in a study in the UK concluded rate of 6% (John Carvel, "Many Prisoners Could be Wrongly Jailed", *Guardian Weekly* (5 Apr 1992).
[155] *Campbell*, *supra* note 2 at 10, citing Myles F McLellan, "Private, Public and Prerogative Remedies to Compensate the Wrongfully Convicted." (2012) Unpublished Report, at 6 (now found at Myles Frederick McLellan, "Innocence Compensation: The Private, Public and Prerogative Remedies" (2014) 45:1 Ottawa L Rev 57).
[156] *Edmonds, supra* note 1.

does not, and cannot, represent a complete picture of the prison experiences of the wrongfully convicted as a group.

More research into the prison experiences of wrongfully convicted Canadians is needed to correct current shortcomings. The limitations of this study reveal potential avenues for future research. There are at least two methods that can be used to expand the number and reliability of wrongfully convicted persons' prison experiences. One method is a survey or interview study of wrongfully convicted persons that poses a range of specific questions to probe the full range of in-prison experiences, whether positive, neutral or negative. While Kathryn Campbell and Myriam Denov's 2004 interviews with five wrongfully convicted persons provide some insight into the imprisonment experiences, this was not the fundamental purpose of this dated study. For this reason, updated and more specific data about prison experiences is needed to better understand whether these preliminary trends identified by Campbell and Denov continue to hold true, and whether they are felt broadly among the wrongfully convicted community in Canada. Another method could be a comprehensive review of the extensive and growing literature of wrongful convictions. Such a study could apply qualitative research techniques or "softer" literary criteria to draw information about the prison experiences of the wrongfully convicted. While such a method probably provides a less reliable assessment of prison experiences than a survey of a larger number of wrongfully convicted persons, the number of in-depth memoires and accounts of prisoners could provide a deeper appreciation of this side of the issue of imprisonment of the wrongfully convicted. In effect, more research is needed to both generate academic research, and consolidate existing non-academic resources to better understand the unique experiences and struggles faced by wrongfully convicted individuals while imprisoned.

V Conclusion

In sum, there is very little information presently available to understand the hardships faced by wrongfully convicted persons in prison, and more specifically, the hardships faced as a result of maintaining their innocence while incarcerated. A preliminary socio-legal analysis of public information provided by Innocence Canada exonerees in various interviews and news articles suggests that there are significant differences between the average offender's prison experience and that of a wrongfully convicted person. For example, it appears that maintaining one's innocence, in and of itself, does not increase the risk of violence in prison. Instead, an increased risk of violence emerges when one is persistent and vocal about their innocence within the prison system. Furthermore, there are unique mental health risk factors present among the experiences of the wrongfully convicted, such as the emotional toll of legal proceedings and the lack of a fixed sentence. These factors contribute to the increased prevalence of mental illness and time spent in a Regional Psychiatric (or Treatment) Centre among the wrongfully convicted population compared to the average prisoner. It is unknown whether innocence is also a factor in the increased rate of segregation among the wrongfully convicted male population. Again, these are preliminary results based on the information available to the public. A more thorough investigation of the prison experiences of wrongfully convicted persons is needed to verify and expand on these preliminary findings. Until we understand the experiences of wrongfully convicted persons while incarcerated, we will be unable to provide them adequate treatment and compensation post-release.

References

The following references pertain to footnote 71:

Anderson, Henrik S.; Sestoft, Dorte; Lilllebaek, Tommy; Gabrielsen, Gorm & Kramp, Peter, "Prevalence of ICD-10 psychiatric morbidity in random samples of prisoners on remand" (1996) 19:1 Int J Law Psychiatry 61 at 70.

Birmingham, Luke; Mason, Debbie & Grubin, Don, "Prevalence of mental disorder in remand prisoners: Consecutive case study." (1996) 313: 7071 Br Med J 1521 at 152.

Smith, Charles; O'Neill, Helen; Tobin, John; Walshe, David & Dooley, Edna, "Mental disorders detected in an Irish prison sample" (1996) 6:2 Crim Behav & Mental Health 177.

Inconsistent Verdicts and the Possibility of Innocence: A Comment on *R v RV*

Christopher Sherrin
Associate Professor, Faculty of Law
Western University, Canada

A jury delivers inconsistent verdicts when, in a multi-count indictment, they render judgment that finds the accused guilty and not guilty of the same conduct. Why a jury would do this is open to multiple explanations.[1] The jury could have been confused or mistaken about the evidence or the law. The jury could have decided to offer leniency to save an accused from what they consider to be an excessively harsh outcome (a form of partial jury nullification). Importantly, the jury also could have convicted for reasons that undermine the need for proof beyond a reasonable doubt. A jury, unable to achieve unanimity for either total acquittal or conviction, could have compromised and achieved unanimous support for a negotiated mix of convictions and acquittals, with some jurors acquiescing despite having a reasonable doubt. A jury, unpersuaded of guilt to the requisite degree, could also have convicted out of hostility, to punish an accused considered loathsome (even if not definitely a criminal).[2]

Any conviction in the face of reasonable doubt raises the risk of wrongful conviction. A reasonable doubt does not necessarily equate to proof of factual innocence, but it does establish legal innocence[3] and at a minimum offers a warning signal that the accused may be innocent in a broader sense. The need for proof beyond a reasonable doubt must be scrupulously safeguarded in any system that seeks to avoid wrongful convictions.

---

[1] See Eric Muller, "The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts" (1998) 111 Harv L Rev 771 at 781-786, 796 [*Muller*].

[2] See *ibid* at 803-806. Muller discussed the possibility of jury hostility in the context of multi-accused cases, where one accused was potentially perceived as less worthy of the law's protection. His reasoning, however, can be applied to the case of a single accused facing multiple counts. The law has long been concerned about jurors convicting an accused because he is thought to be a bad man: see David Tanovich, Louis Strezos, and Casey Hill, *McWilliams' Canadian Criminal Evidence*, 5th ed, loose-leaf (Carswell: Toronto, 2013-) at 5.20, 60.10.

[3] *Grdic v The Queen*, 1985 CanLII 34 (SCC), [1985] 1 SCR 810 at 825, online: <https://canlii.ca/t/1cxms>.

In *R v RV*,[4] the Supreme Court of Canada upheld convictions for two sexual offences in the face of an inconsistent acquittal for a third sexual offence. It did so by attributing the acquittal to the jury's understanding of an erroneous legal instruction that, it said, did not affect the convictions. The Court, in other words, purported to be able to divine the jury's reasoning and thereby make sense of the apparent inconsistency. The law has long allowed courts to dismiss an inconsistency by reference to how a jury could have evaluated the evidence. *RV* conclusively established, for the first time, that it is also permissible to dismiss an inconsistency by reference to the jury's understanding of legal instructions.

The Court's analysis of the jury's reasoning might have been correct but ultimately it could be nothing more than a plausible guess that could discount the possibility of compromise or hostility. To make matters worse, the Court ignored reasons to think its guess was wrong, all while purporting to apply an exacting standard of proof. It did this in the context of legal rules that make it very hard to establish an inconsistent verdict in the first place. In the end, therefore, we are left with legal rules that concentrate more than ever on protecting the chance of a proper conviction rather than avoiding the risk of an improper one. This does not safeguard the need for proof beyond a reasonable doubt.

I The Decision

RV was charged with three offences: sexual assault, sexual interference, and invitation to sexual touching. He was alleged to have sexually abused his partner's daughter when the daughter was between the ages of 7 and 13. The daughter was the only witness at trial. She testified to a variety of incidents in which RV had contact with her in circumstances of a sexual nature and seemingly for a sexual purpose.

If RV was guilty of one offence, he was guilty of the others. Given the age of the complainant and the details of the allegations, the evidence (if proven) satisfied the elements of all the offences. The charges were not particularized by time or in any other way that would have offered any basis for distinguishing between them.[5]

Despite this, the jury found RV not guilty of sexual assault but guilty of sexual interference and invitation to sexual touching. The Crown conceded that the verdicts were apparently inconsistent.[6] Every judge in the Ontario Court of Appeal and Supreme Court agreed.[7]

The normal outcome of such a finding would either be an acquittal or a retrial on all counts.[8] The majority of the Supreme Court, however, upheld the convictions for sexual interference and invitation to sexual touching. It also set aside the acquittal for sexual assault and stayed further proceedings on the charge.

---

[4] *R v RV*, 2021 SCC 10 (CanLII), [2021] SCJ No 10 (QL), online: <https://canlii.ca/t/jdpb6> [*RV SCC*].
[5] *R v RV*, 2019 ONCA 664 (CanLII) at para 5, online <https://canlii.ca/t/j23v5> [*RV ONCA*].
[6] *RV SCC, supra* note 4 at para 49.
[7] *RV SCC*, *ibid* at paras 50, 81; *RV* ONCA, *supra* note 5 at paras 131-133, 152.
[8] *R v Pittiman*, 2006 SCC 9 (CanLII), [2006] 1 SCR 381 at para 14, online: <https://canlii.ca/t/1mv05> [*Pittiman*]; *R v JF*, 2008 SCC 60 (CanLII), [2008] 3 SCR 215 at paras 38-42, online:<https://canlii.ca/t/21bgx>; *R v Catton*, 2015 ONCA 13 (CanLII), [2015] OJ No 184 at para 25, online: <https://canlii.ca/t/gfxxx>.

The Court reached this unusual outcome by holding that it was able to discern the reasoning of the jury that led it to an apparently inconsistent and thereby unreasonable outcome.[9] In the minds of the majority:

> The jury mistakenly believed that sexual assault, but not the other two charges, required force beyond mere touching. As a result, the jury acquitted RV of sexual assault: they were not satisfied beyond a reasonable doubt that he applied force, in the colloquial sense, to the complainant. On the same evidence, they convicted the accused of sexual interference and invitation to sexual touching because they were satisfied that he touched the complainant in circumstances of a sexual nature.[10]

The majority explained that the jury was misled into thinking that the sexual assault charge required the use of force in the colloquial sense – that is, "physical strength, violence, compulsion, or constraint exerted upon or against a person"[11] – by language in the jury charge and in documents given to the jury. Since the jury was not similarly misled on the other charges, the inconsistency between the verdicts was reconciled and the convictions on the sexual interference and invitation to sexual touching counts could be upheld. This marked the first time that a majority of Canada's highest court was willing to sustain a conviction, despite an apparently inconsistent acquittal, by reference to how a jury understood and applied the trial judge's instructions on the law.

II The Problems

The majority's decision in *RV* can be criticized for not being faithful to precedent or the strictures of the *Criminal Code* and for producing a result where the accused was technically found guilty and not guilty of the same conduct (on the basis that staying the sexual assault charge is, in law, tantamount to finding him not guilty).[12] Here, however, I will focus on more substantive problems with the decision.

A. A Systemic Issue

The majority claimed that they knew why the jury decided as they did. Indeed, they claimed that they knew this with a high degree of certainty.[13] But they could not actually know what the jury did. Juries deliberate in secret. They provide no explanation for their verdicts. Jury reasoning is invariably opaque.[14]

What the majority offered was a guess. It may have been an educated guess. It may have been a reasonable guess. It may have been a plausible guess. But it was ultimately a supposition. We can never know for certain what was in the minds of the jury members.

---

[9] When a jury delivers inconsistent verdicts, it necessarily acts unreasonably: *RV SCC*, *supra* note 4 at para 30.
[10] *RV SCC*, *ibid* at para 66.
[11] *RV SCC, ibid* at para 52.
[12] These issues are discussed in the dissenting opinion of Justice Brown.
[13] *RV SCC*, *supra* note 4 at paras 65, 69.
[14] *Muller, supra* note 1 at 789.

The majority correctly pointed out that appellate courts regularly consider the likely impact of jury instructions on a jury's reasoning and verdict when engaging in harmless error review.[15] But what the majority failed to recognize is that appeals from inconsistent verdicts are not like most other appeals. In most cases, there is no reason to suspect that at least some members of the jury were not satisfied of the accused guilt; indeed, there is usually reason to believe the opposite. When verdicts are inconsistent, however, there *is* reason to suspect that members of the jury harboured doubts. We cannot know whether they actually did, but in a situation where innocence is a live possibility one must ask whether, from a systemic perspective, it is better to err on one side or the other The majority in *RV* was willing to err on the side of safeguarding the possibility of a valid conviction. In a system that continues to uncover cases of wrongful conviction,[16] it seems wiser to err on the side of safeguarding the possibility of a valid acquittal.

It is important to keep in mind that safeguarding the possibility of a valid acquittal does not necessarily spell the end of the story for the prosecution. An appellate court can order a retrial on all counts; indeed, the Supreme Court has said this is to be the usual remedy.[17] A conviction, therefore, can still ultimately be obtained. The approach of the majority in *RV*, however, finalizes the story for the accused. He or she is denied the opportunity to have the outcome determined by a fresh jury, untainted by judicial error (or deadlock or hostility).

One must also consider the broader context of inconsistent verdict appeals. They often fail at the threshold stage of inconsistency. The appellant (who is almost always the accused)[18] bears the onus to show that no reasonable jury whose members had applied their minds to the evidence could have arrived at the conclusion they did. This is recognized to be a "difficult" onus to meet.[19] Apparently inconsistent verdicts can be reconciled on the basis that the strength of the evidence on counts differs, because the offences are temporally distinct, or because the proof of different charges depends on different witnesses. The appellant must demonstrate that, on any realistic view of the evidence, the verdicts cannot be reconciled on any rational or logical basis.[20] The reality is that the system already strains to find reasons in the evidence to explain away an apparent inconsistency. Do we really need to protect the possibility of guilt so much that we should dare to assume we can know how a jury understood and applied the jury charge?

B. Setting a Low Bar

Perhaps the decision in *RV* might be more palatable if the majority had truly been cautious before drawing conclusions about the reasoning of the jury. But, despite purporting to apply an exacting standard, the majority actually rested its conclusion on shaky grounds.

---

[15] *RV SCC*, *supra* note 4 at para 37.
[16] See, for example, the recent decision in *R v Hayman*, 2021 ONCA 242 (CanLII), [2021] OJ No 1930, online: <https://canlii.ca/t/jfb3h>
[17] *Pittiman*, *supra* note 8 at para 14.
[18] The Crown usually has no interest in appealing inconsistent verdicts, except in response to an appeal by the accused. Inconsistent verdicts include at least one conviction and a guilty verdict on the remaining charges would have no effect on sentence.
[19] *Pittiman*, *supra* note 8 at para 7.
[20] *Pittiman*, *ibid* at paras 7-8.

The majority held that the Crown can reconcile apparently inconsistent verdicts by showing, *to a high degree of certainty*, that 1) the acquittal was the product of a legal error in the jury instructions, 2) the legal error did not impact the conviction, and 3) the error reconciles the inconsistency by showing that the jury did not find the accused both guilty and not guilty of the same conduct. It is their reasoning on the first branch that is open to question.

As noted above, the majority found that the trial judge erroneously led the jury to believe that sexual assault requires more than touching, but rather the use of force in the colloquial sense. The Justices noted that, after instructing the jury that the application of "force" is required for sexual assault, the trial judge stated that for the other offences "touching" or an invitation to "touch" (for a sexual purpose) is required. They further noted that the trial judge twice mentioned that touching does not require force. This language and order of presentation could lead a jury to believe that force requires more than touching, but the trial judge also twice told the jury force includes any physical contact, even a gentle touch. In other words, the trial judge as often told the jury that force includes a gentle touch as she told them that touching does not require force. Combined, these instructions are confusing, but they do almost nothing to establish how the jury resolved the confusion. The majority of the Supreme Court relied on the fact of inconsistent verdicts to assume the jury followed one instruction and forgot or ignored the other This, at best, seems to offer weak circumstantial evidence – especially in a legal system that explicitly assumes jury members understand and apply the legal instructions they are given.[21]

The majority also relied on the fact that the trial judge gave the jury two documents (a verdict sheet and a decision tree) that told them to acquit of sexual assault if they did not find that RV intentionally applied force to the complaint and to find RV guilty of only simple assault if they found that RV intentionally applied force to the complaint but not in circumstances of a sexual nature. The majority explained that the "inclusion of simple assault in the decision tree and verdict sheet emphasized the difference between the use of the word 'force' for sexual assault and the use of 'touching' for the other two offences."[22] The repeated use of different terms can imply and even emphasize that there is a difference between them, but it says little if anything about the nature of the difference. The majority assumes that the jury would have concluded that there was a significant difference, whereas the jury could have concluded that the difference was relatively minor, as would be the case if force meant sustained contact whereas touching meant contact that was fleeting (i.e., that the difference rested on the length of contact rather than something else). This reasoning could have allowed the jury to rationalize why they were twice told that force includes a gentle touch but touching does not require force; a touch can be gentle yet sustained.

The majority also made much of the fact that the jury did *not* find RV guilty of simple assault. This indicated that the jury did not acquit of sexual assault because they were not satisfied that force was applied *in circumstances of a sexual nature* but because they were not satisfied that *force* was applied. This was, they said, the "rational inference."[23] It is a rational inference, but it is

[21] See, e.g., R v NA, 2015 NWTCA 8 (CanLII), [2016] 1 WWR 677 at par 32, online: <https://canlii.ca/t/glvcp>; *R v Puddicombe*, 2013 ONCA 506 (CanLII), [2013] OJ No 3507 at para 93, online:<https://canlii.ca/t/fzzdt>; *R v Forknall*, 2003 BCCA 43 (CanLII), [2003] BCJ No 108 (QL) at para 33, online:<https://canlii.ca/t/5f23>.
[22] *RV* SCC, *supra* note 4 at para 63.
[23] *RV SCC, ibid* at para 68.

not the only one. An alternative rational inference is that the jury acquitted because of a compromise verdict.

It is almost always possible to pick apart an argument. While I am inclined to think otherwise, perhaps all I have shown so far is that the majority might have erred. Even if that is so, there is an additional important reason to doubt that the majority got it right.

Implicit in the majority's judgment is the assumption that the jury would have found that the incidents of sexual abuse perpetrated by RV did *not* meet the colloquial definition of force: "physical strength, violence, compulsion, or constraint exerted upon or against a person." The evidence, however, makes that quite unlikely.

The complainant alleged that the abuse occurred over a period of six years. During that time, RV perpetrated a variety of different acts. Amongst others, RV held the complaint's hand and used it masturbate himself, pushed her head down towards his penis, and laid underneath her while one of them was unclothed and simulated intercourse, sometimes to the point of ejaculation. How could a jury find that none of those acts involved physical strength, compulsion, or constraint exerted upon or against the complainant? All of them would have involved substantial physical contact during a compelled interaction. Most of them would have involved extended – even lengthy – contact. Bodies were moving. Multiple body parts were involved. The complainant was literally pushed. All of this in the context where an adult seemingly in a quasi-parental relationship is imposing himself on a vulnerable pre-adolescent child.

The majority seems to be assuming that the jury in *RV* understood force to require significant physical violence. That is possible, but it seems rather odd to think that a group of twelve citizens would all conclude that a person is not the recipient of force when she is placed on top of another person or made to move a part of her body in various ways.

The point of this is not to prove that the majority necessarily got it wrong. The point is not even to prove that the majority did not establish its conclusion to what is considered in law to be a high degree of certainty. The point is to raise the concern that in setting a precedent for what *can* amount to proof to a high degree of certainty, the majority in *RV* set a low bar that could enable and encourage later courts to dismiss too easily the possibility of jury compromise or hostility – of innocence – whenever they can contemplate something in the jury charge that could make sense of an apparently non-sensical verdict.

III Conclusion

I do not know whether RV is factually innocent. I do not know why the jury in his case delivered the verdicts that it did. What I do know is that the verdicts they delivered are facially inconsistent and that this raises the real possibility that at least some members of the jury were not convinced of RV's guilt. The Supreme Court of Canada seemed too willing to ignore this possibility in order to safeguard the possibility that the entire jury thought he was guilty.

Courts are already willing to dissect the reasoning behind inconsistent verdicts by reference to possible ways the jury might have viewed the evidence. Given what inconsistent verdicts can indicate, we should be hesitant to extend this by permitting *another* way to rationalize away inconsistency, this time by reference to how a jury understood and applied a confusing jury instruction. At a minimum, we should demand truly exacting proof of how a jury reasoned. This might come from something like a jury question that supplies direct evidence that the jury was thinking what we surmise it was thinking.[24] On the other hand, maybe the best answer is not to surmise at all and just give both parties an opportunity to receive verdicts from a new jury who will (hopefully) give no indication that they may have convicted despite harbouring doubts about guilt.

[24] The jury in *RV* asked about a contradiction between the verdict sheet and the decision tree regarding the availability of finding the accused guilty of simple assault rather than sexual assault: *RV* SCC, *supra* note 4 at para 17. There is no indication that the jury asked for a new definition of the word 'force' or for an explanation for the confusing definition previously provided.

Compensation for Wrongful Convictions in Canada

By Myles Frederick McLellan, Professor of Law and Justice,
Algoma University, Canada
Eliva Press, 2021

Reviewed by Robert Home
Emeritus Professor
Anglia Ruskin University (UK)

Wrongful conviction cases seem to have increased in number over recent years, publicized through popular TV documentaries, like Netflix's 'Making a Murderer' regarding the Avery case in the USA. Innocence Projects originating in the USA have spread to other countries, particularly those following the common law tradition, and new approaches to clinical legal education are being developed in the area.[1] Professor McLellan has made a substantial contribution to wrongful conviction legal scholarship. Through his work, McLellan investigates an array of criminal justice issues, including the often-neglected matter of compensation.

McLellan applies Michel Foucault's theory of governmentality to develop a 'state harm risk paradigm' and draws upon the legal scholarship of John Rawls and Ronald Dworkin to show that criminal justice systems have come to favour public safety as opposed to due process. 'Exonerees' (the clumsy term for those successfully challenging conviction) create a risk for state liability to pay compensation as a moral obligation. The philosophical idea of a social contract requires a balance between the protection of individual rights and the prevention of crime in a society that is increasingly sensitive to risk. Human rights case law is expanding in the UK due to its domestication of the European Convention on Human Rights, whereas Canada has its own Charter of Rights and Freedoms. McLellan mainly focuses on Canada, but he includes a chapter on the UK and USA in his book. This reviewer, while reluctant to comment on the Canadian content, discusses the UK situation, which has continued to develop since the publication of the book.

The potential number of criminal offences that could give rise to challenge also continues to develop, as successive UK governments legislate to create new ones (although conviction challenges usually relate only to the most serious crimes).[2] As a response to widely publicised miscarriages of justice, such as the Guildford Four and the Birmingham Six, the *CCRC* started work in 1997. In these cases, the wrongfully accused were freed after serving long prison sentences for terrorist murders linked to the violent politics of Northern Ireland, receiving multi-million pound compensation payments because police evidence had been fabricated. The *CCRC* can refer a case back to the Court of Appeal where there is a real possibility that the Court will quash the conviction (the real possibility test). Over a twenty-year period between 1997-2017, the *CCRC* referred 634 cases back to appeals courts and about

[1] In the UK the Innocent Network, and the work of Michael Naughton (University of Bristol) for reform of the Criminal Cases Review Commission [*CCRC*].
[2] The potential number of criminal offences has been estimated in the UK at over 7,200, and probably many more. Justice report, *Breaking the rules*, British Section of the International Commission of Jurists, London (1980).

two-thirds of those cases succeeded (and a further 64 appeals from 2019-2020).[3] The *CCRC* determines its workload case-by-case, allowing scope for discretion and variability, and reflecting the different professional backgrounds and personalities of its staff.[4]

Until 2006 awards could be made at the discretion of the Home Secretary (the so-called *ex gratia* scheme), but this was abolished in that year, with the intention of 'rebalancing' the criminal justice system away from the rights of defendants and towards victims; the view of the government at the time was that the biggest miscarriage of justice was when the guilty went unpunished. With many more citizens being victims of crime than those wrongfully convicted, the European Union and UK government have moved towards more support and funding for victims of crime.[5] Importantly though, miscarriages of justice and wrongful conviction create victims who often experience severe psychological problems (similar to the post-traumatic stress disorders found in many war veterans). In addition to psychological damage, the Citizens Advice support service reported that a third of its clients found themselves homeless after being exonerated.

In the UK a miscarriage of justice was not defined in the Criminal Justice Act 1988, and only in the Adams case (2011, discussed by McLellan on pp 189-191), did the Supreme Court attempt to categorise it into different kinds. It identified four, as follows: where fresh evidence shows that the defendant is innocent (category 1); where fresh evidence shows that no reasonable jury could have properly convicted the defendant (category 2); where fresh evidence renders the conviction unsafe (category 3); and where something has gone seriously wrong in the investigation or the conduct of the trial (category 4). A new fact (or newly discovered fact) might show that the person could not have committed the crime in question, an example being the 'elusive silver bullet of exculpatory DNA evidence' (in McLellan's words, p 51).

Following the Adams judgment, the UK government then introduced, buried among numerous other changes in the *Anti-Social Behaviour, Crime and Policing Act 2014* (Part 13), an amendment to the 1988 Act that severely restricts eligibility for compensation after miscarriages of justice. These were now confined to only the first category in the Adams judgment: 'if and only if the new or newly discovered fact shows *beyond a reasonable doubt* that the person *did not commit the offence*'.[6] The perfunctory government impact assessment that preceded this change had offered only two options: 'do nothing' (continue to rely upon case law), and legislation 'to ensure that eligibility to the scheme is limited to applicants who can show that they are clearly innocent'. The government arguing that this would ensure 'a more predictable and consistent approach', give a 'settled meaning' to the term miscarriage of justice, and reduce 'unmeritorious claims' and legal challenges.[7] The change, which was severely

[3] United Kingdom, House of Commons, *Justice – Twelfth Report* (UK: Criminal Cases Review Commission, 2015), online: <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85002.htm>. See also Jon Robins, "The Law is Broken" (2018) 168:7792 New LJ 7.

[4] Annabelle James, Nick Taylor & Clive Walker, "The Criminal Cases Review Commission: Economy, effectiveness and justice" (2000) Crim L Rev 140 at 140-153.

[5] UK Government, *Victims Strategy*, (2018), Cmd. 9700. EU Council Directive 2004/80/EC (compensation to crime victims) and *EU Strategy on victims' right 2020-2025*, COM (2020) 258. Fifteen million serious offences occurred in the EU in 2017.

[6] By amending section 133 of the 1988 Act with subsection 1ZA. See Carolyn Hoyle & Laura Tilt, "Not Innocent Enough: State compensation for miscarriages of justice in England and Wales" (2019) 2020:1 Crim L Rev 29 at 29-51

[7] Impact assessment: Clarifying the circumstances under which compensation is payable for Miscarriages of Justice (England & Wales) (UK: Ministry of Justice, 2013), online:

criticised at the time by lawyers specialising in such cases, had the effect of significantly reducing the number of compensation applications and the value of payments: the Ministry of Justice received a mere 157 applications in 2018-19 and paid out only £10,000, compared to the hundreds of successful cases and millions paid out in earlier years.[8] Over the last five years there has been only five successful applications for compensation, which is determined by an independent assessor. Payments are now not to exceed £1 million when the claimant had been detained in prison or hospital for over ten years, or £500,000 in all other cases; there are caps on loss of earnings, and deduction for 'saved living expenses' while in prison (which could have made claimants better off than if they had remained free).

The issue of compensation subsequently arose with the Nealon and Hallam cases (discussed by McLellan, pp 191-193). These individuals succeeded in getting their convictions quashed because of poor forensic evidence, no CCTV footage, and disclosure failures, but received no compensation, no apology, nor even an explicit acknowledgment that they were innocent. The conjoined cases went to the UK Supreme Court, which rejected their arguments, finding in 2019 by a majority of five to two that the UK compensation scheme complied with Article 6 (2) of the European Convention on Human Rights (the presumption of innocence).[9] The cases involved complex jurisprudence and divergent judicial interpretations, and are currently under referral to the European Court of Human Rights; this leads to long delays due to a backlog of cases.[10] (The UK remains under that court's jurisdiction even after Brexit, under the political declaration accompanying the 2018 withdrawal agreement.)

The wider issue remains controversial and it is unfortunate (although no fault of his) that Professor McLellan's book was published before the UK All-Party Parliamentary Group on Miscarriages of Justice published its 'Westminster Commission' report in February 2021.[11] That study by high-level judicial experts, meticulously researched and evidenced, showed that the risk of wrongful conviction in the UK is as great now as it was before the *CCRC* was created as the place of last resort when all else fails. The timing of the report's publication was unfortunate, as the country was still under the Covid-19 lockdown, and the criminal justice system was experiencing severe stress because of sustained under-investment and a court backlog of cases. The Covid-19 pandemic is contributing to a rise in domestic violence and other crimes, and its future impact upon public finances is expected to be huge. Meanwhile the compensation system in Canada, the US and UK (and doubtless elsewhere) still needs overhaul if it is to ensure public confidence in the judicial system, yet politicians and legislators show

---

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/197579/DOC002.PDF>. See also Miscarriages of Justice: compensation schemes (UK: House of Commons Library Note SN/HA/2131, 2015), online: <https://commonslibrary.parliament.uk/research-briefings/sn02131/>

[8] Jon Robins, "Shameful: Just £10,000 Paid Out to Victims of Wrongful Conviction in Two Years," *The Justice Gap* (23 Oct 2020), online: <https://www.thejusticegap.com/shameful-just-10000-paid-out-to-victims-of-wrongful-conviction-in-three-years/>

[9] *R (Hallam) v Secretary of State for Justice*, and *R (Nealon) v Secretary of State for Justice*, [2019] UKSC 2, [2020] AC 279, online: <https://www.supremecourt.uk/cases/docs/uksc-2016-0227-judgment.pdf>. One of the Supreme Court judges suggested that Hallam, a teenager at the time, was the architect of his own misfortune because of his 'dysfunctional lifestyle'.

[10] Jon Robins, "Miscarriage of Justice Body's Workload Doubled Despite Severe Cuts – Report," *The Guardian* (5 Mar 2021), online: <https://www.theguardian.com/law/2021/mar/05/miscarriage-of-justice-bodys-workload-doubled-despite-severe-cuts-report>. See also Hannah Quirk, "Compensation for Miscarriages of Justice: Degree of Innocence" (2020) 79:1 Camb LJ 4 at 4-7, online: <https://doi.org/10.1017/S0008197320000136>.

[11] United Kingdom, The Westminster Commission on Miscarriages of Justice, *In the Interests of Justice: An Inquiry into the Criminal Cases Review Commission* (London: All-Party Parliamentary Group, 2021) at 1-89, online:<https://appgmiscarriagesofjustice.files.wordpress.com/2021/03/westminster-commission-on-miscarriages-of-justice-in-the-interests-of-justice.pdf>

little appetite for further reform. A post-Brexit UK wants to be in charge of its own legal rights, and in doing so, diminishes the ability of citizens to challenge their government. As such, miscarriages of justice in the UK today are as likely to occur as when the *CCRC* was created a quarter of a century ago. A mature criminal justice system is one with humility, unafraid to admit and apologise for its mistakes, and allow an independent body to quash convictions and determine compensation – but that seems unlikely for some time.

The difficulty of correcting and compensating for wrongful convictions is compounded by both a human and an institutional reluctance to admit being wrong. The so-called Semmelweis reflex applies: when Hungarian doctor Ignaz Semmelweis discovered in 1847 that hand-washing by hospital doctors dramatically reduced child-birth mortality rates, his recommendations were rejected despite overwhelming empirical evidence.[12] A similar concept is belief perseverance (or conceptual conservatism): the tendency for people to retain strongly-held beliefs long after these beliefs have been discredited; this is due to the difficulty in rearranging their conceptual and cognitive framework.[13] The discovery of important scientific fact may be punished, as happened to Galileo when the Catholic Church found heliocentrism (that the planet revolved around the sun) foolish, absurd, and heretical because it contradicted holy scripture.[14] Psychiatrist Thomas Szasz wrote about his own 'deep sense of the invincible social power of false truths', and those false truths were demonstrated by the conspiracy theorists and Trump supporters attacking the US Capitol building in January 2021.[15] Not only people - professionals and scientists - but also institutions may refuse to admit mistakes. A belief culture among police, prosecutors, and courts that too many guilty individuals are getting acquitted can lead to the rules of due process being perverted and wrongful convictions going uncorrected and uncompensated for even when corrected.

Myles McLellan has done the legal community, both in Canada and elsewhere, a service with this well-researched and argued book. The discussions of case law, and the appendices that produce statements of claim in three Canadian cases which illustrate (respectively) issues of malicious prosecution, negligent investigation, and constitutional tort, are particularly strong. He also presents a model for a 'Compensation for Wrongful Convictions Act', drafted as if for the Canadian province of Manitoba, although the road to legislative reform may prove long and hard. Minor criticisms of the book are that the index and bibliography could be easier to use, but this should not detract from his achievement. By including more on the experience of other jurisdictions beyond the common law systems, future editions could reach a wider readership.

[12] Some doctors refused to believe that a gentleman's hands could transmit disease. Semmelweis' continued rejection made him mentally ill, and he died in 1865 in an asylum, ironically of septicaemia after being beaten by his warders. Timothy Leary & Robert A Wilson, *The Game of Life*, (USA: New Falcon Publications, 1991).

[13] Moti Nissani, "Conceptual conservatism: An understated variable in human affairs?" (1994) 31:3 Soc Sci J 307 at 307.

[14] Christopher M Graney, *Setting Aside All Authority: Giovanni Battista Riccioli and the Science against Copernicus in the Age of Galileo*, 1st (USA: University of Notre Dame Press, 2015).

[15] Thomas S Szasz, *The Myth of Mental Illness: Foundations of Theory of Personal Conduct*, (NY: Harper Perennial, 1980).