

EXPERT REPORT OF TRICIA ROJO BUSHNELL

I, Tricia Rojo Bushnell, hereby state as follows:

I. Background and Qualifications

I am 40 years old and reside in Kansas City, Missouri. I am fully competent to testify as to the facts and opinions set forth herein.

I am currently the Executive Director of the nonprofit the Midwest Innocence Project, headquartered in Kansas City, Missouri, where I have been employed since 2013. As Executive Director, I am responsible for managing all aspects of the Midwest Innocence Project's work, and I serve as its lead attorney. I am also currently the President and an Executive Board Member of the Innocence Network, an affiliation of 71 innocence organizations around the country and world.

I have spent 16 years working in the field of wrongful convictions as both an attorney and law professor. After graduating from Bucknell University in 2004 with a degree in Political Science and German, I received my J.D. from NYU School of Law in 2007. While in law school, I began working on the case of Emmanuel Gissendanner, an individual who had been sentenced to death in Alabama for a crime our investigation revealed he did not commit. I continued to work on Mr. Gissendanner's case pro bono when I began my legal career as an associate at the law firm of Kirkland & Ellis. I left that position in 2008 to begin a fellowship with the Equal Justice Initiative of Alabama, where I represented individuals sentenced to death, juveniles sentenced to life without parole, and sex offenders challenging the collateral consequences of their conviction. Upon completion of that fellowship, I took a position as an Assistant Clinical Professor at the University of Wisconsin Law School, where I taught in both the Wisconsin Innocence Project and Criminal Appeal Project clinics. I transitioned from the law school to my

current organization, the Midwest Innocence Project, in 2013. More information about my career and qualifications is detailed in my resume, attached hereto as Exhibit A.

The Midwest Innocence Project (“MIP”) is one of many innocence organizations across the United States that investigates claims of wrongful conviction and pursues exoneration for the wrongfully convicted in state and federal prisons. Founded in 2001 through the University of Missouri-Kansas City School of Law, MIP operates primarily in Kansas, Missouri, Iowa, Nebraska, and Arkansas. I have served as MIP’s lead litigator since joining in 2013, first in my role as Legal Director and continuing in my current role as Executive Director. In my time with MIP, I was a member of the legal teams that secured the exonerations of Floyd Bledsoe, Lamonte McIntyre, and Olin “Pete” Coones, Jr., three innocent Kansans who served over 67 years combined for crimes they did not commit. I was also involved in the exoneration or release of ten other innocent clients in MIP’s region and continue to litigate cases today. In addition to legal work, I am also responsible for overseeing all aspects of the organization, including research and policy initiatives, and I continue to teach in law school clinics, most recently at Washington University-St. Louis School of Law.

II. Scope of My Testimony as an Expert Witness

I have been retained to analyze and provide expert testimony regarding the topics of wrongful convictions, “actual innocence,” and exonerations in Kansas and in the United States as a whole. I am not being compensated for my time, and I am issuing this report in my individual capacity, not on behalf of the Midwest Innocence Project or any other organization.

III. Data on Death Penalty and Innocence

A. Nationwide Data Shows the Threat of Wrongful Convictions

1. History of wrongful convictions

The criminal legal system does not have a 100% success rate. Not only does the system fail to convict factually guilty individuals, it also convicts innocent people for crimes they did not commit. The work of innocence organizations and wrongful conviction scholars has focused on this second instance, seeking to identify the scope of the problem, the causes of wrongful convictions, and ways to prevent such convictions in the first place.

One of the first studies of wrongful conviction in the United States, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*,¹ was published in 1932 by attorney and Yale law professor Edwin Borchard. Borchard identified many of the same factors in wrongful convictions that are still prevalent today, including official misconduct, eyewitness identification, and false confessions. In the 90 years since Borchard publish his study, our understanding of wrongful convictions has only grown, especially since the advent of DNA testing and the first DNA-based exoneration in 1989.²

DNA-based exonerations are exonerations in which DNA testing of physical evidence from the crime scene, such as a weapon left behind by the perpetrator or semen in a rape kit, excludes the defendant as the individual who could have left the DNA behind or, in some instances, conclusively identifies the real perpetrator. Since the first DNA-based exoneration in 1989, 568 individuals have been exonerated with the use of such scientific evidence.³ However, DNA is just one avenue to exoneration and the limited availability of physical evidence that can be tested for probative DNA in a criminal case means that the vast majority of individuals who

¹ Edwin Borchard, *CONVICTING THE INNOCENT. SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1931).

² Rob Warden, *First DNA Exoneration: Gary Dotson*, NORTHWESTERN PRITZKER SCHOOL OF LAW CTR. ON WRONGFUL CONVICTIONS, <https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html> (last visited Jan. 2, 2023).

³ See *Exonerations By Year: DNA & Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> (last visited Jan. 2, 2023).

are exonerated do not have DNA evidence in their case. As such, in the first ten years following the first DNA exoneration, a total of 67 individuals in the United States were exonerated by DNA,⁴ representing but a fraction of the 397 total known exonerations in that time.⁵ In the decades since, those numbers have grown to a total of 568 DNA exonerations since 1989, as compared to 3,351 total exonerations respectively.⁶ Those 3,351 exonerations include the exoneration of 190 death sentenced individuals. When compared to the number of individuals who have been executed, this equals a rate of one exoneration of an individual from death row for roughly every 8 individuals executed.⁷

Despite this increased awareness of wrongful convictions,⁸ the exact number of innocent individuals currently incarcerated is still unknown. Scholars in the field often refer to this unknown population as a “dark number.” There are obvious difficulties in estimating the number of wrongfully accused, including the limited access to counsel to investigate and prove

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ The Death Penalty Information Center (DPIC), a nonprofit that tracks data about death sentences given and executions carried out across the U.S. along with other data reports that a total of 8,770 death sentences have been issued since 1973. *Sentencing Data*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> (last visited Jan. 2, 2023). Of the 8,770 individuals sentenced to death, 1,558 were executed. *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> (last visited Jan. 2, 2023).

The DPIC also reports 190 exonerations of death row inmates in the same time period. *See Innocence Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence-database> (last visited Jan. 2, 2023).

⁸ Claims of innocence and wrongful convictions can be seen in many places of popular culture, from movies to Netflix series to podcasts. *See* A.O. Scott, ‘*Just Mercy*’ Review: Echoes of Jim Crow on Alabama’s Death Row, N.Y. TIMES (Jan. 10, 2021), <https://www.nytimes.com/2019/12/24/movies/just-mercy-review.html>; *What to Expect from ‘The Innocence Files,’ Netflix’s New Documentary Series*, INNOCENCE PROJECT (Apr. 15, 2020), <https://innocenceproject.org/netflix-innocence-files-documentary-series-bite-marks-wrongful-conviction/>; *In the Dark*, APM REPORTS, <https://features.apmreports.org/in-the-dark/>.

innocence,⁹ the high legal standards and barriers a defendant must overcome, and the length of time it takes to secure an exoneration.¹⁰ Estimating the number of wrongfully convicted persons is therefore not as simple as dividing the number of exonerated persons by the number of felonies committed in the years those exonerees were convicted.¹¹ Instead, because the specific number of wrongfully convicted is an unknowable quantity, researchers have attempted to arrive at an estimation of the wrongfully convicted as a percentage of the U.S. prison population as a whole based on available data. Researchers using any of the various methodologies are conscious of the obvious limitations of their studies and have taken steps to ensure their estimate is a conservative representation rather than an over-estimation of the wrongfully convicted.

2. Methodological challenges

Researchers seeking to quantify the number of wrongfully convicted individuals in prison have used a variety of methodologies. All of the studies are in agreement—no matter the calculation methods, the risk of wrongful convictions is real and the rate of wrongful convictions

⁹ As of writing, there are 71 member organizations in the Innocence Network, an affiliation of organizations working to exonerate wrongfully convicted individuals in the US and around the world. *Member Directory*, Innocence Network, <https://innocencenetwork.org/directory> (last visited Jan. 2, 2023). Within prosecutor's offices, there are currently 43 conviction integrity units that have secured at least one exoneration. *Conviction Integrity Units*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (last visited Jan. 2, 2023). Comparatively, there are almost 2 million individuals incarcerated in the United States. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (MAR. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

¹⁰ Among the first 3,302 exonerations recorded by the National Registry of Exonerations, the average time spent in prison before exoneration is 8.6 years. *Exonerations in the United States*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Jan. 2, 2023). The average time served for exonerated Midwest Innocence Clients is 26 years. The vast majority of MIP's cases take years to resolve. In the case of Emmanuel Gissendanner, which I began working on as a law student in 2006, his case was not resolved and he was not released until 2019, 13 years after his post-conviction appeal began.

¹¹ This method of calculation was the method used in an op-ed by prosecutor Joshua Marquis to arrive at the unquestionably low estimate of 0.027% which Justice Scalia cited in his concurrence in *Kansas v. Marsh*, 548 U.S. 163 (2006). See also *How Many Innocent People Behind Bars? Nobody Knows*, Innocence Project (Mar. 25, 2008), <https://innocenceproject.org/how-many-innocent-behind-bars-nobody-knows/>.

is non-zero. A 2007 study, for example, analyzed the level of agreement between judges and juries post-verdict and estimated a wrongful conviction rate of 3%.¹² Another examined newly-available DNA evidence and its exculpatory effects.¹³ While still vulnerable to the “dark number” bias, this second methodology capitalized on recent scientific developments and led to an estimated wrongful conviction rate of 8–11.6%.¹⁴

Outside these two studies, researchers have historically followed two known methodologies: the survey method and the exoneree method. The first methodology—the survey method—relies on anonymized reports by people who are incarcerated or practitioners in the criminal legal system. This method involves one of two forms: anonymous surveys of incarcerated people about whether the validity of their conviction, and surveys of law enforcement and legal professionals in the criminal legal system regarding their perceptions of the rate of wrongful convictions. Researchers using the survey method correct for expected inaccuracies in the reported data, though the numbers reported may still be vulnerable to response biases.¹⁵

The second methodology relies on using the known number of individuals exonerated of a particular crime in a particular time frame and extrapolating to the general population of

¹² Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305 (2007).

¹³ See, e.g., John Roman et al., *Post-Conviction DNA Testing and Wrongful Conviction*, URB. INSTITUTE JUSTICE POL’Y CTR. (June 2012), <https://www.urban.org/sites/default/files/publication/25506/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.PDF>; Kelly Walsh et al., *Estimating the Prevalence of Wrongful Conviction*, URB. INSTITUTE (Sept. 2017), <https://www.ojp.gov/pdffiles1/nij/grants/251115.pdf> (estimating an 8-15% wrongful conviction rate in Virginia); *Id.* (analyzing Roman study and adjusting to estimate 11.6% wrongful conviction rate).

¹⁴ Walsh, *supra* note 13, at 10.

¹⁵ Researchers have long known and understood the problem of response bias in self-reported survey results and have developed a number of ways to statistically detect and correct for reporting bias. See, e.g., Robert Rosenman, Vidhura Tennekoon, & Laura G. Hill, *Measuring Bias in Self-Reported Data*, 2 INT’L J. OF BEHAV. HEALTHCARE RES. 320 (Oct. 31, 2011), <https://dx.doi.org/10.1504%2FIJBHR.2011.043414>.

persons convicted for those or similar crimes within the relevant time period. Because it relies only on confirmed exonerations (thus risking the existence of a high “dark number”), this methodology—called the “exoneree calculation” method—almost certainly underestimates the wrongfully convicted.

The exoneree calculation method, despite its flaws, has led to one of the most scientifically rigorous estimates of wrongful conviction: a study by Samuel Gross which was published by the National Academy of Sciences.¹⁶ The Gross study is published in a peer-reviewed scientific journal rather than a law review, and provides the most precise estimate to date for a specific population. This study estimated that 4.1% of criminal defendants who are sentenced to death are wrongfully convicted. The study also determined that individuals on death row are more likely to be exonerated than those removed from death row and resentenced to life or a term of years.¹⁷ This means that the population sample chosen is likely to have a small dark number and a significant assurance of accuracy. It is my opinion that the 4.1% identified by the Gross study is the most accurate and relevant estimate of the number of wrongfully convicted individuals on death row. The study in question was focused directly on capital murder cases and the estimate was the result of a rigorous and peer-reviewed methodology. The estimate falls on the lower end of the broad estimates arrived at by earlier studies and is rigorously defensible based on the data.

B. Posthumous Exonerations

¹⁶ Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants who are Sentenced to Death*, 111 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. 7230 (May 20, 2014), <https://www.pnas.org/content/111/20/7230>.

¹⁷ “We find, consistent with expectations that death-sentenced defendants who are no longer under threat of execution had a rate of exoneration approximately one eighth of that for defendants who remained on death row” *Id.* at 7232.

The issue of wrongful convictions sheds light on, but does not answer, the ultimate question of whether a state or the federal government has executed persons who are innocent of the crime for which they were convicted. Based on all available information to us, the answer to this question is an undeniable yes. Applying the previously-discussed 4.1% estimated wrongful conviction rate to the 8,770 death sentences imposed across the United States since 1973 indicates a total of 360 individuals have been wrongly convicted and sentenced to death across the United States¹⁸—almost twice the 190 individuals that have been exonerated and released from death row.¹⁹ Since the Supreme Court reinstated the death penalty in 1976, the federal government and the states have executed 1,558 people.²⁰ In my opinion, with the data we have available, including not only rates of wrongful convictions but facts and questions surrounding known executions, the idea that every single one of the 1,558 persons executed have all been guilty and properly deserving of the death penalty is unsupportable. Such an argument would require that the system catch 100% of its errors and correct them before they are too late to remedy. The length of time of time and procedural posture of known non-death sentenced capital exonerations prove otherwise.²¹ The criminal legal system is a human one, relying upon a

¹⁸ *Sentencing Data*, *supra* note 7.

¹⁹ *Innocence Database*, *supra* note 7.

²⁰ *Execution Database*, *supra* note 7

²¹ Take, for example, the case of MIP client Kevin Strickland, who was exonerated in Missouri on November 23, 2021, after spending 43 years in prison for a crime he did not commit. *A Man who was Wrongfully Convicted of 3 Murders in 1979 is Now Free*, NPR (Nov. 24, 2021, 7:49 AM), <https://www.npr.org/2021/11/24/1058811665/kevin-strickland-released-wrongful-conviction>; Alisha Ebrahimji, *After Spending 43 Years in Prison for a Triple Murder He says He Didn't Commit, a Missouri Man is Finally Free*, CNN (Nov. 25, 2021, 9:23 AM), <https://www.cnn.com/2021/11/23/us/kevin-strickland-triple-murder-wrongful-conviction-freed-trnd/index.html>; Mr. Strickland had been convicted of capital murder, but the State had waived the death penalty. At the time of his exoneration, Mr. Strickland had filed over 16 unsuccessful appeals, including a direct appeal and numerous postconviction and state and federal habeas appeals. Had he been sentenced to death, Mr. Strickland would have already exhausted the appeal process required before an execution date is set and he would not have lived to see his own exoneration.

multitude of human actors in different positions to act as checks on the system to “catch” wrongful death sentences, but none of those humans are perfect, nor is the criminal legal system as designed infallible.²²

While no person in the U.S. executed since 1973 has been formally exonerated by the legal system posthumously, this is not because no innocent persons have been executed in that time. On the contrary—the lack of legal exoneration post-execution rests more squarely on the limits of the legal system and the lack of resources to continue pursuing an exoneration when there are others who still seek help. In regard to the limits of the legal system, under most of the legal mechanisms used to obtain an exoneration, a court would no longer have jurisdiction to hear a case because the individual’s death would render them no longer in the custody and control of the state.²³ Indeed, this same limitation has prevented the exoneration of innocent individuals like MIP client Laquanda “Faye” Jacobs, who was forced to choose between pursuing her exoneration in federal court or to accept an offer of time-served when she was resentenced pursuant to *Miller v. Alabama*.²⁴ Ms. Jacobs chose to accept the offer for immediate release to return home to care for her ailing mother, meaning the only mechanism available for

²² The pardon process, for example, which is said to be a check on the system is inherently a political choice, and one that takes electoral expediency and political pressures more into account than the interests of justice. See, e.g., Editorial Board, *Missouri’s Governor Uses His Pardon Power – but Not for Two Innocent Black Men in Prison*, WASH. POST. (Aug. 5, 2021, 3:03 PM), <https://www.washingtonpost.com/opinions/2021/08/05/missouri-governor-pardon-power-mccloskeys-innocent-black-men-prison/>; Editorial Board, *Short Takes on Pardons and Pleas for Pandemic Precautions*, ST. LOUIS POST DISPATCH (Aug. 6, 2021), https://www.stltoday.com/opinion/editorial/editorial-short-takes-on-pardons-and-pleas-for-pandemic-precautions/article_1fe80887-67d3-576f-9455-3a8451e53aaa.html.

²³ See Samuel Wiseman, *Innocence after Death*, 60 CASE W. RES. L. REV. 687 (2010), available at <https://scholarlycommons.law.case.edu/caselrev/vol60/iss3/16>.

²⁴ Marlisa Goldsmith, *Arkansas Native Fights to Have Her Name Cleared from Crime She Says She Didn’t Commit*, THV11 (Nov. 16, 2021, 12:41 PM), <https://www.thv11.com/article/news/local/arkansas-fights-name-cleared-crime-she-says-didnt-commit/91-6432419c-01f9-4daa-b6c0-757eebf12b22#:~:text=Faye%20Jacobs%20was%20released%20from,says%20she%20didn't%20commit.&text=LITTLE%20ROCK%2C%20Ark.,says%20she%20didn't%20commit>.

exoneration—like the only mechanism available to most executed individuals—is to have her conviction overturned by a pardon.

In light of these limitations, it is no wonder that most organizations that focus on exonerations and death penalty defense choose to devote their limited resources to fighting for the living. Once the state has carried out an execution, the rights of the condemned are extinguished and there is no avenue for judicial exoneration.²⁵

C. Posthumous Pardons

For the executed then, the only path to a formal recognition of innocence is a posthumous pardon. On the federal level, the power to pardon rests with the President. In the states, the pardon power is vested in the governor, or a board appointed by the governor.²⁶ There is little to no constitutional or statutory process required by law for a pardon, and in most states the act is entirely discretionary with no requirements that a request even be reviewed or acknowledged in any way. This level of discretion has led to a pardon process that can be highly political, allowing politicians to earn political favor without directly addressing of injustice in the criminal legal system.

Beyond the limits of the clemency process in general, most states and the federal government have no defined process for requesting or receiving a pardon posthumously. The

²⁵ There are incredibly rare instances of posthumous DNA testing, but even those avenues are not generally available to an executed defendant. In the case of Tim Cole, the court entertained a motion for DNA testing posthumously, and after Cole died in prison while serving a 25-year sentence. *Timothy Cole*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/timothy-cole/>. See also Wiseman, *supra* note 23. Post-humous DNA testing was also conducted in the case of Ledell Lee, who was executed in Arkansas. Although such testing revealed the presence of an unknown man’s DNA on the murder weapon. Despite this, Lee has not been exonerated. Heather Murphy, *4 Years After an Execution, a Different Man’s DNA Is Found on the Murder Weapon*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/07/us/ledell-lee-dna-testing-arkansas.html>.

²⁶ In Kansas this power is vested in the Governor. Kan. Const. Art. 1, § 7. Procedures for review of pardon requests and administrative timelines are laid out by statute. KAN. STAT. ANN. § 22-3701.

Department of Justice Office of the Pardon Attorney’s policy is to not accept or investigate requests for posthumous pardons, although several presidents have granted them in recent years.²⁷ This policy suggests posthumous pardons are not issued with a frequency that would enable researchers to use them as a metric of wrongful convictions. However, historic examples where known innocents were executed and later pardoned prove the risk of executing an innocent person is not speculative.²⁸ In 1987, Nebraska pardoned William Jackson; Jackson had been hanged in 1887 for the murder of man who was later found alive.²⁹ In 2009, South Carolina pardoned Thomas and Meeks Griffin; the Griffins were electrocuted in 1915 based on perjured testimony.³⁰ And in 2011, Colorado pardoned Joe Arridy, executed in 1939 by lethal gas; an “overwhelming body of evidence” supported Arridy’s innocence, “including false and coerced confessions, the likelihood that Arridy was not in [town] at the time of the killing, and an admission of guilt by someone else.”³¹

States have been more willing to admit to the execution of an innocent when the execution took place many decades ago, but a shocking number of recent executions also feature the hallmarks of wrongful convictions.³² The Death Penalty Information Center has identified nine persons executed since 2015 who were likely innocent, including two who were executed in

²⁷ A total of 6 posthumous pardons have been granted by U.S. Presidents since 1999, primarily to prominent historical figures. Recipients of posthumous pardons from presidents include Susan B. Anthony, boxer Jack Johnson, and first African American graduate of the Army War College Henry Ossian Flipper. *Policies*, OFFICE OF THE PARDON ATTORNEY, <https://www.justice.gov/pardon/policies>.

²⁸ *Posthumous Pardons*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence/posthumous-pardons> (last visited Feb. 2, 2022).

²⁹ *Id.* Notably, when found, the victim was alive and living in Kansas. *Id.*

³⁰ *Id.*

³¹ *Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s*, OFFICE OF GOV. BILL RITTER, JR., 1 (Jan. 7, 2011), <https://files.deathpenaltyinfo.org/legacy/documents/ArridyPardon.pdf>.

³² *The Case Against the Death Penalty*, ACLU (2012), <https://www.aclu.org/other/case-against-death-penalty> (last visited Feb. 2, 2022).

2020.³³ Despite the evidence of innocence in those cases, posthumous pardons have been less likely to occur in the case modern day executions. Although every state's governor or a commission of some sort have the power to grant posthumous pardons, only around 175 have been issued in the entirety of U.S. history; of that 175, approximately 21 have been granted to executed individuals and none were for executions in the post-Furman era.³⁴

D. Wrongful Executions in the U.S.

As noted above, 1,558 people have been executed since 1976, or the “modern death penalty era.”³⁵ Death penalty proponents seeking to deny wrongful convictions and wrongful executions argue that science and scientific evidence have progressed in the last several decades to the point where errors could not happen today. This argument overlooks several key points. First, it is uncertain whether future scientific developments will be able to conclusively disprove any “bad science” currently used to convict. Indeed, as discussed more fully in Section IV.C below, the limits of many forensic sciences, such as toolmark and fingerprint evidence, are still in flux and have yet to be established. Second, even in the face of “good science” proving innocence, the challenges with actually obtaining an exoneration in a legal system that bars the presentation of such evidence still loom large.

³³ *Executed But Possibly Innocent*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent> (last visited Jan. 2, 2023). Consider just one egregious example: In 2018, Georgia executed Carlton Michael Gary despite substantial physical evidence of innocence. DNA testing excluded Gary as the origin of semen on the clothing of a victim who identified him at trial, and a suppressed police report revealed that the victim had initially said her room was dark and she could not describe her attacker. Prosecutors consulted with an expert regarding a bite mark on a victim, but they did not call the expert after he concluded Gary could not have made the markings. Finally, size 10 shoeprints from a crime scene were suppressed because they could not have belonged to Gary, who wore size 13½ shoes.

³⁴ Scott D. Seligman, *Justice for the Dead*, THE ATLANTIC (Oct 26, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/posthumous-pardons-justice-dead/620485/>; *Posthumous Pardons*, *supra* note 28.

³⁵ *Sentencing Data*, *supra* note 7.

Death penalty proponents further point to the rise of acceptance and use of DNA evidence and the fact that individuals have been exonerated from death row through DNA evidence as proof that there is little to no risk of an innocent person being executed. This view ignores the reality that DNA testing and other forms of “fool-proof” evidence are far from available in every case. Further, DNA evidence, long considered the gold-star standard of scientific evidence, is itself subject to interpretation and has and will continue to lead to wrongful convictions.

In short, there is no evidence to support the notion that an innocent person has not been executed in America since the re-institution of the death penalty post-*Furman*. On the contrary, the limits of the criminal legal system and the known causes of wrongful convictions make it exceedingly likely. One need look no further than national headlines surrounding cases like Troy Davis and Cameron Todd Willingham for examples.³⁶

IV. The Death Penalty Increases The Chance of a Wrongful Conviction

The very existence of the death penalty leads to more wrongful convictions. Whether the individual is sentenced to death or not, the use of the death penalty as an option itself increases the likelihood of a wrongful conviction. Innocent defendants will do anything they can to avoid such a penalty, including pleading guilty or confessing to crimes they did not commit. Prosecutors feeling pressure to obtain a conviction in a death-eligible crime may use the death penalty as a tool to secure a conviction. A sentence legally limited to use in “the worst of the worst” crimes, cases where the death penalty are involved are high stakes and high stress,

³⁶ See Maurice Possley, *A Dad was Executed for Deaths of His 3 Girls. Now a Letter Casts More Doubt.*, WASH. POST (Mar. 9, 2015), https://www.washingtonpost.com/politics/letter-from-witness-casts-further-doubt-on-2004-texas-execution/2015/03/09/d9ebdab8-c451-11e4-ad5c-3b8ce89f1b89_story.html; Sara J. Totonchi, *Too Much Doubt to Execute: Remembering Troy Davis, 10 Years Later*, SOUTHERN CTR. FOR HUMAN RIGHTS (Sept. 21, 2021), <https://www.schr.org/too-much-doubt-to-execute-remembering-troy-davis-10-years-later/>.

creating a scenario ripe for error and exacerbating already known causes of wrongful convictions.

At its most basic level, the use of the death penalty has led individuals to plead guilty to crimes they did not commit. A 2019 study by the Innocence Project in New York revealed that 11% of exonerations obtained through DNA evidence absolved persons who pleaded guilty.³⁷ The problem of coerced guilty pleas in the U.S. is widely known, and data shows that roughly 95% of felony convictions are obtained via pleas.³⁸ Thus, while some innocent persons end up on death row because they reject a guilty plea to maintain their innocence, many are still incarcerated because they chose to take a guilty plea rather than face possible execution. Of the first 3,302 known exonerations since 1989, 857 were of people who pleaded guilty. Of those, 59 involved murder charges and many of them involved persons who pleaded guilty specifically to avoid the death penalty.³⁹ Tragically, these guilty pleas can be incredibly difficult to unwind, not only because of the effect of the plea on legal mechanisms for relief, but because in most states, individuals not sentenced to death are not entitled to post-conviction counsel and will thus not have resources to prove their innocence.

³⁷ Glinda Cooper & Vanessa Meterko, *Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases*, 31 FED. SENT'G REP. 234 (2018–2019).

³⁸ Lindsey Devers, *Plea and Charge Bargaining*, U.S. DEP'T OF JUST. BUREAU OF JUST. ASSISTANCE (Jan. 4, 2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf>.

³⁹ *See, e.g.*, Johnny Lee Wilson, a man with intellectual disabilities who confessed after hours of interrogation and pled guilty for a murder in Missouri in 1986; John Sosnovske who pled no contest to avoid the death penalty for a murder actually committed by serial killer Keith Jespersion in 1990; and Derrick Allen who entered an Alford plea to avoid the death penalty in 1999. These cases are by no means the only examples of cases where exonerees entered a guilty plea to avoid death, and there exist among the incarcerated population an unknown number of innocent but un-exonerated persons who also pled guilty to avoid capital punishment. *See also Exonerations in the United States*, *supra* note 10.

Moreover, Black defendants are more likely to be erroneously convicted of capital offenses than white defendants.⁴⁰ Black and Hispanic defendants are exonerated at disproportionately high rates, even to their overrepresentation among prisoners.⁴¹ Critically, the risk of wrongful conviction is greatest when the defendant is nonwhite and the victim is white.⁴²

There is also substantial reason to believe that wrongful convictions are more prevalent in death penalty cases. This increased prevalence is due to a combination of factors, including community and political pressures on police and prosecutors in high stake cases that exacerbate known causes of wrongful convictions,⁴³ which include police and prosecutorial misconduct, use of false confessions,⁴⁴ eyewitness misidentifications, and faulty forensic evidence. A review of each of these factors is below.

A. Official Misconduct

Official misconduct is a leading cause of wrongful convictions, having been a contributing factor in 54% of known exonerations.⁴⁵ And the rate of misconduct has been found

⁴⁰ Talia Roitberg Harmon, *Race For Your Life: An analysis of the role of race in erroneous capital convictions*, 29 CRIM. JUST. REV. 76, 78 (2004); *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 114, 118 (Saundra Westervelt & John Humphrey eds., 2001)

⁴¹ Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 66 (2008).

⁴² See Samuel Gross & Robert Mauro, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 12 (Northeastern University Press 1989) (“Something about capital cases makes them particularly susceptible to racial prejudice, at least with respect to the race of the victim.”).

⁴³ Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).

⁴⁴ An analysis of death penalty exonerations between 2007 and 2017 found that among death penalty exonerations, the most common factors contributing to the wrongful conviction were official misconduct (misconduct by a police officer, prosecutor or related government official) in 28% of cases, Perjury or False Accusation in 76% of cases, and false or misleading forensic evidence in 32% of cases. *DPIC Analysis: Causes of Wrongful Convictions*, DEATH PENALTY INFO. CTR. (May 31, 2017), <https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions>.

⁴⁵ Samuel Gross, Maurice Possley, Kaitlin Jackson Roll & Klara Huber Stephens, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and other Law Enforcement*, NAT’L REGISTRY OF EXONERATIONS (Sept. 1, 2020),

to be higher in cases involve more serious crimes,⁴⁶ putting cases that involve a potential death sentence at even higher risk of some form of misconduct. Indeed, the death penalty is intrinsically linked to official misconduct. Of the first 186 death row exonerations that have occurred since 1973, 69.2 percent (128) involved misconduct by police, prosecutors, or other government officials.⁴⁷ Official misconduct was even more likely in cases involving defendants of color and cases in which exonerations took a decade or more, suggesting both a high degree of racial bias and a low degree of remorse among those responsible.⁴⁸ And in counties with multiple wrongful convictions, either official misconduct or perjury was present in 90.3 percent of all death row exonerations.⁴⁹

Research also suggests the relationship between the death penalty and misconduct also flows the other way—simply having the death penalty as an option facilitates official behavior that increases the risk of wrongful convictions, even if the prosecutor chooses not to pursue capital charges. False confessions occur at a higher rate when the accused is threatened with death, and prosecutors frequently leverage the threat of death to secure guilty pleas.⁵⁰ It is incredibly difficult to maintain one’s innocence when, for example, officials display photos of death row, point to the location on the arm where the needle is inserted during a lethal injection, then promise life in exchange for a confession.⁵¹

https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

⁴⁶ *Id.* at IV.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1062–65, 1097 (2010); Lauren Morehouse, *Confess or Die: Why Threatening a Suspect With the Death Penalty Should Render Confessions Involuntary*, 56 AM. CRIM. L. REV. 531, 533–34 (2019).

⁵¹ Morehouse, *supra* note 50, at 538.

Johnson County District Attorney Steve Howe provided firsthand insight into the cold calculations that lead to such behavior during testimony before the Kansas legislature in 2017. After touting the usefulness of the death penalty as leverage to obtain guilty pleas in return for life without parole, Howe stated that such plea bargains helped his office “*avoid[] the costs of four trials and the appeals process.*”⁵² This logic prioritizes efficiency over accuracy; when combined with the effectiveness of the threat of death in procuring confessions and guilty pleas, it ensures that as long as the death penalty remains a tool in the prosecutor’s belt, there will be a greater risk of wrongful convictions, regardless of whether capital charges are ever filed.

And Kansas is no stranger to official misconduct. Of the four Kansans recently exonerated with assistance from the Midwest Innocence Project and its partners, three were convicted of crimes qualifying for capital murder: Floyd Bledsoe, Lamonte McIntyre, and Olin “Pete” Coones, Jr. And all three of those convictions, described in more detail below, were obtained through state misconduct.

Similarly, in June 2021, a three-person disciplinary panel of the Kansas State Bar voted unanimously to disbar prosecutor Jacqie Spradling for her intentional misconduct in the criminal trials of Dana Chandler and Jacob Ewing.⁵³ In the opinion for the appeal of one of the two cases, Kansas Supreme Court Justice Biles remarked, “Taken as a whole, this prosecution unfortunately illustrates how a desire to win can eclipse the state’s responsibility to safeguard the fundamental constitutional right to a fair trial owed to any defendant facing criminal prosecution in a Kansas courtroom.”⁵⁴ The disciplinary panel found further that Spradling knowingly and intentionally

⁵² *Hearing on HB 2167 Before the House Comm. On Corrections and Juvenile Justice*, Feb. 13, 2017 (emphasis added).

⁵³ Chandler and Ewing were not exonerated but were granted new trials for the misconduct.

⁵⁴ *State v. Chandler*, 307 Kan. 657, 695 (2018). Tim Carpenter, *Panel urges disbarment of Kansas attorney for deliberate misconduct in two high-profile trials*, KAN. REFLECTOR (Jun. 4, 2021),

engaged in a deliberative pattern of serious misconduct.⁵⁵ Spradling was also one of the prosecuting attorneys in the case of Amman Reu-El King Phillip f/k/a Phillip Cheatham, whose death penalty conviction was overturned in 2013 and who pleaded guilty to avoid another trial and possible death sentence.⁵⁶

Finally, because wrongful death sentences are strongly correlated with official misconduct, locations with higher rates of misconduct run a higher risk of executing an innocent.⁵⁷ In Kansas, Wyandotte County is an area of particular concern due to the pattern of misconduct revealed in Lamonte McIntyre's case (discussed in more detail below). Wyandotte and Sedgwick are the two counties with the most capital cases,⁵⁸ and Wyandotte and Sedgwick together make up six (6) of the 17 exonerations in Kansas so far.⁵⁹ Larry Lucas was exonerated of his Sedgwick County conviction just last year.⁶⁰ And the dramatic and persistent misconduct revealed in Lamonte McIntyre's case makes clear that other, undiscovered wrongful convictions have occurred in Wyandotte County.⁶¹

<https://kansasreflector.com/2021/06/04/panel-urges-disbarment-of-kansas-attorney-for-deliberate-misconduct-in-two-high-profile-trials/>.

⁵⁵ *Id.*

⁵⁶ Steve Fry, *Cheatham Defense Attorney Challenges Death Penalty in Kansas*, TOPEKA-CAP. J. (Mar. 7, 2014, 1:31 PM), <https://amp.cjonline.com/amp/16677514007>.

⁵⁷ Location matters in the context of the death penalty generally, with most death sentences concentrated in only a handful of counties due to factors like the authority and discretion of the local prosecutor and political pressures on local officials. *Glossip v. Gross*, 576 U.S. 863, 918–21 (2015) (Breyer, J., dissenting). These same factors naturally have a similar influence on rates of official misconduct.

⁵⁸ Kansas Judicial Council, *Report of the Kansas Judicial Council Death Penalty Advisory Committee on Certain Issues Related to the Death Penalty* (Nov. 12, 2004), pgs. 9–11. *See also* Kansas Judicial Council, *Report of the Judicial Council Death Penalty Advisory Committee* (Feb. 13, 2014).

⁵⁹ NAT'L REGISTRY OF EXONERATIONS, Kansas, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View=%7BB8342AE7-6520-4A32-8A06-4B326208BAF8%7D&FilterField1=State&FilterValue1=Kansas> (last visited Jan. 2, 2023).

⁶⁰ *Id.*

⁶¹ The Kansas City Kansas Police Department recently announced it will conduct a review of the 155 cases that had been investigated by Detective Roger Golubski, one of the individuals responsible for Lamonte McIntyre's wrongful conviction. Golubski has since been charged with federal crimes in relation to his

B. Eyewitness Misidentification

There is little testimony more damning and weighted more highly by the jury than victim or a witness on the stand pointing to the defense table and indicating the defendant as the perpetrator. However, once thought to be the gold standard in evidence presented at trial, science has shown that eyewitness identifications of a person unknown to the witness can be one of the least reliable forms of evidence available.⁶² Eyewitness misidentification was a factor in 26% of known exonerations (862 of the 3,302) recorded by the Exoneration Registry, and a factor in 69% of the first 375 DNA exonerations (258 of 375).⁶³ Both the prevalence of misidentification in these cases, as well as numerous scientific and psychological studies, have proven there are severe limitations on humans' ability to remember visual information about, and details of, events.⁶⁴

A now commonly understood problem with eyewitness identifications occurs when the witness is identifying a person of a different race than themselves, referred to as a cross-racial identification. Research shows that people are far worse at identifying a person of a race not their own, as when a white witness identifies a black suspect.⁶⁵ For example, a 1998 study of

misconduct as a police officer. *See* Luke Nozicka, *KCKPD will review 155 Roger Golubski cases. Lawyers say someone else should do it.* KANSAS CITY STAR (Nov. 21, 2022),

<https://www.kansascity.com/news/local/crime/article268941122.html>

⁶² *See* John T. Wixted, Laura Mickes & Ronald P. Fisher, *Rethinking the Reliability of Eyewitness Identification*, *PERSPS. ON PSYCHOL. SCI.* (2018), doi: 10.1177/1745691617734878.

⁶³ *DNA Exonerations in the United States*, THE INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/>.

⁶⁴ Scholars have long known of the issues with eyewitness misidentification despite the fact that courts and jurors give so much weight to such testimony. Edwin Borchard who investigated 65 cases of wrongful conviction in 1932 found eyewitness misidentification was responsible for roughly 45% of his 65 case studies. Borchard, *supra* note 1. Despite this, courts throughout the last century and even now have failed to correct problematic identifications or allow experts to testify on the science of eyewitness identifications.

⁶⁵ *See* Gary L. Wells and Deah S. Quinlivan, *The Eyewitness Post-Identification Feedback Effect: What is the Function of Flexible Confidence Estimates for Autobiographical Events?*, *APPLIED COGNITIVE PSYCHOL.*

conducted in convenience stores found that two to three hours after interacting with a customer, clerks could correctly identify customers of their own race 53–64% of the time.⁶⁶ When asked to identify customers of a different race, however, the accuracy dropped precipitously, to as low as 25%.⁶⁷ Other studies since have obtained similar results, confirming that witnesses are far better able to identify members of their own racial group than members of another racial group, a phenomenon which compounds the problem of an already low accuracy rate for eyewitness identifications.⁶⁸ This phenomenon is borne out in the exoneration data: of the DNA exonerations in which eyewitness identifications were a factor, 42% involved a cross-racial identification.⁶⁹

In 2014 the National Academy of Sciences (NAS) issued a report entitled “Identifying the Culprit: Assessing Eyewitness Identification.”⁷⁰ This report was the culmination of an effort to review the existing research on eyewitness identification and its accuracy. Based upon a

(2009); Gary L. Wells et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, J. OF EXPERIMENTAL PSYCHOL. APPLIED 42 (2003), <https://doi.org/10.1037/1076-898X.9.1.42>

⁶⁶ White and Hispanic clerks had a same racial group accuracy of 54% and 53% respectively while African American clerks had an accuracy of 64%. Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: a Field Study*, 18 J. OF APPLIED SOC. PSYCHOL. 972 (Sept. 1988), <https://doi.org/10.1111/j.1559-1816.1988.tb01187.x>.

⁶⁷ White clerks identified Black customers with only 40% accuracy and Hispanic customers with 34% accuracy. Black clerks identified Hispanic customers with 45% accuracy and white customers with 55% accuracy. Hispanic clerks identified white customers with 36% of white customers correctly, and 25% of Black customers correctly. *Id.*

⁶⁸ See, e.g., Peter J. Hills & J. Michael Pake, *Eye-Tracking the Own-Race Bias in Face Recognition: Revealing the Perceptual and Socio-Cognitive Mechanisms*, COGNITION 586 (Dec. 2013), <https://doi.org/10.1016/j.cognition.2013.08.012>.

⁶⁹ “Cross-racial identification” means the identification of one person by a person of a different race. *Cross Racial Identification and Jury Instruction*, THE INNOCENCE PROJECT (May 20, 2008), <https://innocenceproject.org/cross-racial-identification-and-jury-instruction/#:~:text=Cross%2Dracial%20identification%20is%20when,racial%20bias%20exists%20in%20ide ntification.>

⁷⁰ *Identifying the Culprit: Assessing Eyewitness Identification*, NAT’L ACADEMIES OF SCI (2014), <http://nap.edu/18891>.

review of both the scientific literature about vision and memory as well as applied research directed at the specific problem of eyewitness identification, the report identified the key variables—“system”⁷¹ and “estimator”⁷² variables—that contribute to the accuracy of eyewitness identifications, and issued a series of best practice recommendations for police and criminal justice practitioners to avoid future misidentifications and wrongful convictions, such as recording the circumstances and procedures used in every eyewitness identification, to allowing expert testimony on the science of vision and memory. The report also discussed significant issues with the standard for reviewing eyewitness identifications under the current legal test in practice.⁷³

While providing a series of recommendations to make eyewitness identification procedures less prone to error, the report recognizes that there is no way to make eyewitness identification error-proof, and significant risk remains in deriving a high level of certainty from eyewitness identifications.

C. Flawed Science

⁷¹ System variables are variables that can be controlled during an identification, such as the procedures used to obtain an identification like a lineup or “6-pack” photo identification that is controlled by police. *Id.* at 16.

⁷² Estimator variables are conditions related to the actual crime that are not controlled by the police such as the race of the perpetrator compared to that of the victim, level of light available, viewing angle, etc. In other words, estimator variables are those conditions that affect how the memory is imprinted in the mind of the witness, while system variables are those that may distort the memory of the witness or affect their recollection of the event at a later date. *Id.* at 16.

⁷³ The test used by the courts requires judges to examine five factors including (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the identification procedure. All of the DNA exonerees mentioned above who were convicted with an eyewitness identification had this test applied in their case and still arrived at an erroneous result, leading the NAS to call for reform of the legal framework for eyewitness ID. *Manson v. Braithwaite*, 423 U.S. 98 (1977); *Identifying the Culprit*, *supra* note 70, at 31–44.

Faulty forensic “science” is another significant source of wrongful convictions. Although some areas of forensics, most notably DNA or chemical analysis, are reliable,⁷⁴ many other areas lack the study; objectivity, neutrality, and repeatability necessary to truly be called a science.⁷⁵ Invalid forensic evidence was a factor in 23% of the total number of exonerations known by the Exoneration Registry, 46% of exonerations achieved with the use of DNA testing, and 42% of exonerations of persons who were charged with murder.⁷⁶

In 2009, the NAS released a report summarizing a massive effort to analyze the state of forensic practices in the U.S. and the validity of conclusions drawn by experts in various fields therein.⁷⁷ The report was a damning indictment of the accuracy and use of forensics nationwide. The report broadly concluded that outside of nuclear DNA analysis, many of the most commonly

⁷⁴ Despite the fact that these practices do qualify as “scientific,” they are themselves still prone to error and abuse, as in the cases of forensic laboratory technician Fred Zain in West Virginia who falsified hundreds of serology reports to obtain convictions, Annie Dookhan, the Boston forensic chemist who falsified results in drug chemistry tests leading to her own prosecution and conviction, and Sonja Farak, the Massachusetts state chemist who stole control samples to feed her methamphetamine habit. Jeremy C. Fox, *Nearly 110 Drug Convictions Vacated in Connection with Annie Dookhan Scandal*, THE BOS. GLOBE (Jun. 25, 2021), <https://www.bostonglobe.com/2021/06/25/metro/nearly-110-drug-convictions-vacated-connection-with-annie-dookhan-scandal/>; Maggie Mulvehill, *More Cases Connected to Sonja Farak’s Drug Lab Work Expected to be Dropped* THE BOS. GLOBE (Oct. 25, 2020), <https://www.bostonglobe.com/2020/10/25/metro/more-cases-connected-sonja-faraks-drug-lab-work-expected-be-dropped/>; *A Trail of Misconduct and the Need for Reform*, THE INNOCENCE PROJECT (May 7, 2010), <https://innocenceproject.org/a-trail-of-misconduct-and-the-need-for-reform/>. See also MARYLAND COMMISSION ON CAPITAL PUNISHMENT: FINAL REPORT TO THE GENERAL ASSEMBLY (Dec. 12, 2008) (recognizing the hazard of intentionally false forensic testimony and analysis, including in 11 cases of persons who had been executed across the country), http://fbaum.unc.edu/teaching/POLI195_Fall09/MD_death-penalty-commission-final-report.pdf.

⁷⁵ For example, the NAS has said of bite mark analysis, microscopic hair comparison, shoe print comparisons, handwriting comparisons, and firearm and tool-mark comparisons do not “have the capacity to consistently and with a high degree of certainty demonstrate a connection between evidence and a specific individual or source.” Committee on Identifying the Needs of the Forensic Scis. Community, Nat’l Res. Council, *Strengthening Forensic Science in the United States: A Path Forward*, NAT’L ACADEMY OF SCIS., 87 (2009), <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf>.

⁷⁶ *Interactive Data Display*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>; *DNA Exonerations in the United States*, *supra* note 57.

⁷⁷ *Strengthening Forensic Science in the United States: A Path Forward*, NAT’L ACAD. SCIS. (2009), <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf>.

used forensic techniques used at trial had not undergone the necessary testing to establish the reliability and validity to support the claims made by experts testifying about them in court.⁷⁸ Even when an expert uses a scientifically-accepted method of analysis, there exists a risk that experts may overstate what the evidence actually shows. Likewise, experts may exaggerate or misrepresent their findings in response to pressure from police or prosecutors, or in effort to gain additional engagements with the attorney or office that hired the expert.⁷⁹

Forensic evidence carries special weight with juries, and thus special danger of wrongful convictions, because of what has commonly been termed the “CSI effect.”⁸⁰ Popular culture is rife with television and movies portraying forensics as an actual science with almost infallible omniscient capacity to solve crimes and bring perpetrators to justice, despite the reality being far from that vision.⁸¹ Society and prospective jury members are inculcated in the belief that these sort of presentations are commonly made at trial and in some studies have been found to be less likely to convict if no forensic evidence of the sort they expect was presented at trial.⁸² Similarly it can be inferred that jurors are societally inclined by these same influences to believe individuals presented to them as forensic experts far above and beyond any weight that should be given to their testimony, and studies have shown that jurors give expert witnesses more weight than their testimony objectively provides.⁸³

⁷⁸ See *id.* at 7–8.

⁷⁹ Belinda Buscombe, *When the Evidence Lies*, TIME MAG. (May 13, 2001).

⁸⁰ See N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction about Forensic Science Affects the Public's Expectations about Real Forensic Science*, 47 *Jurimetrics J.* 357 (2007).

⁸¹ Several of the largest television franchises of all time, including *Law and Order*, *CSI*, *NCIS* and their various spinoffs and derivatives all prominently feature forensics as a feature to help catch the killer.

⁸² Schweitzer & Saks, *supra* note 74, at 116.

⁸³ Brian C. Smith et al., *Jurors' Use of Probabilistic Evidence*, 20 *L. & HUM. BEHAV.* 49, (1996), <https://psycnet.apa.org/doi/10.1007/BF01499132>.

D. False Confessions

False confessions were a factor in 393 (12%) of known exonerations, 135 (24%) of DNA exonerations, and 269 (23%) of known exonerations for murder.⁸⁴ False confessions may only relate to part of an alleged crime and often are admitted at trial over objections of the defense. In some cases, a false confession by one individual ends with others being wrongfully convicted.⁸⁵ To juries, and likely to the courts who are evaluating whether the evidence should be admissible, a confession is indicative of guilt, even if recanted later. Once entered into evidence, a false confession can seal the fate of the defendant.

According to an analysis from 2019, 36% of exonerations for people under the age of 18 at the time a crime was committed involved a false confession, compared to about 10% of cases for exonerees over the age of 18.⁸⁶ The power dynamic at play when a police officer interviews a juvenile may often induce them to say what they think the interrogator wants to hear, or what they think will allow them to finally go home. This effect may often be at work on adults who

⁸⁴ % Exonerations By Contributing Factor, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>. The higher prevalence in cases involving murder or DNA exonerations may exist because individuals are more likely to plead guilty to avoid a threatened death penalty even when innocent. *Id.*; see also *DNA Exonerations in the United States*, *supra* note 57.

⁸⁵ See, e.g., the case of Christopher Ochoa, whose coerced confession to a rape-murder resulted in the wrongful conviction and sentence to life imprisonment for both himself and his friend Richard Danziger, *Christopher Ochoa*, Innocence Project, <https://innocenceproject.org/cases/christopher-choa/> (last visited Feb. 3, 2022), and the case of the "Beatrice Six," where several Nebraskans were wrongfully convicted for a rape-murder after authorities coerced confessions from three of them using threats and false promises. *Civil Trial Begins for "Beatrice Six"*, INNOCENCE PROJECT (Jan. 8, 2014), <https://innocenceproject.org/civil-trial-begins-for-beatrice-six/>.

⁸⁶ *Age and Mental Status of Exonerated Defendants who Confessed*, NAT'L REGISTRY EXONERATIONS (Mar. 17, 2020), <https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf>; see also *False Confessions More Prevalent among Teens*, INNOCENCE PROJECT (Sept. 9, 2013), <https://innocenceproject.org/false-confessions-more-prevalent-among-teens/>.

falsely confess, and even more often on those with a mental disability.⁸⁷ Of the exonerees with intellectual disabilities in that 2019 analysis, 70% of their cases involved a false confession, indicating that the coercive power of the interrogator played a strong role in inducing the false confession.⁸⁸ Indeed, a review of multiple DNA exonerations revealed that defendants convicted for “knowing facts only the perpetrator could know” often had been interrogated for hours, with police coercing the defendant into parroting back information or phrases as part of the defendant’s “confession.”⁸⁹

⁸⁷ *Age and Mental Status*, *supra* note 80.

⁸⁸ *Id.*

⁸⁹ Fabiana Alceste et al., *Facts Only the Perpetrator Could Have Known? A Study of Contamination in Mock Crime Interrogations*, 44 L. & Hum. Behav. 128 (2020). For example, David Vasquez was wrongfully convicted for murder after hours of police interrogation where officers fed him information, as evidenced by following excerpt from the interrogation:

Det. 1: Did she tell you to tie her hands behind her back?

Vasquez: Ah, if she did, I did.

Det. 2: Whatcha use?

Vasquez: The Ropes?

Det. 2: No, not the ropes. Whatcha use?

Vasquez: Only my belt.

Det. 2: No, not your belt... Remember being out in the sunroom, the room that sits out to the back of the house? ...and what did you cut down? To use?

Vasquez: That, uh, clothesline?

Det. 2: No, it wasn't a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember cutting the Venetian blind cords?

Vasquez: Ah, it's the same as rope?

Det. 2: Yeah.

Det. 1: Okay, now tell us how it went, David – tell us how you did it.

Vasquez: She told me to grab the knife, and, and, stab her, that's all.

Det. 2: (voice raised) David, no, David.

Vasquez: If it did happen, and I did it, and my fingerprints were on it...

Det. 2: (slamming his hand on the table and yelling) You hung her!

Vasquez: What?

Det. 2: You hung her!

Vasquez: Okay so I hung her.

Death Row Exonerations for People with Intellectual Disabilities, ACLU, <https://www.aclu.org/other/death-row-exonerations-people-intellectual-disabilities> (last visited Feb. 3, 2022).

While the young and intellectually disabled are over-represented in the pool of exonerated false confessors, they are not the only members. Other factors such as threats of the death penalty and lies by the interrogator can also induce sound-minded adults to falsely confess. Take the case of Chris Ochoa, who not only falsely confessed and pleaded guilty to a crime he did not commit to avoid the death penalty, he also falsely testified against his innocent co-defendant. Both Chris and his co-defendant were exonerated by DNA evidence in 2002.⁹⁰ Chris did not otherwise experience intellectual limitations, and, after exoneration, Chris attended law school and became a lawyer in hopes of helping others like him.⁹¹

False confessions have also occurred in Kansas, including in the case of Eddie Lowery, whose wrongful conviction took over twenty years to correct.⁹² In 1982, when he was just 22 years old, Eddie was convicted of the rape of a 74-year-old woman after detectives coerced him into making a false confession.⁹³ Eddie served 10 years in prison before being paroled in 1991. Twelve years later, Eddie and his counsel secured DNA testing which excluded Eddie as the perpetrator, and his conviction was vacated.⁹⁴

E. Jailhouse Informants

⁹⁰ Maurice Possley, *Christopher Ochoa*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3511> (last updated May 26, 2020).

⁹¹ Dennis Chaptman, *Christopher Ochoa, Exonerated in Texas Crimes, Earns Law Degree*, U. WISC.-MADISON NEWS (May 10, 2006), <https://news.wisc.edu/christopher-ochoa-exonerated-in-texas-crimes-earns-law-degree/>.

⁹² Hurst Laviana, *Settlement Reached in Wrongful Conviction*, THE WICHITA EAGLE (Aug. 08, 2014), <https://www.kansas.com/news/local/crime/article1026672.html>.

⁹³ *Eddie Lowery*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3394> (last updated Mar. 14, 2019).

⁹⁴ *Id.*

Jailhouse informants or “snitches” can, and do, lead to wrongful convictions. An analysis from 2015 found that 8% of the known exonerees at that time were convicted with a jailhouse informant.⁹⁵ A 2015 analysis found that 15% of all the exonerees of murder known at the time were convicted using a jailhouse informant. Twenty-six of them had been sentenced to death.⁹⁶ Jailhouse informants often come forward on their own with information they claim to have overheard or have been told voluntarily by the defendant. In many other cases, like the case of MIP client Olin “Pete” Coones discussed more in depth below, they are intentionally contacted or placed by police and prosecutors with the goal of obtaining a confession from the defendant. In either circumstance there are substantial reasons beyond just the proven cases of lying informants and corruption to worry that a jailhouse informant has fabricated a statement from the defendant.

V. The Death Penalty & Wrongful Convictions Across The U.S.

Capital punishment is not imposed consistently across the United States. As of December 2022, 23 states and the District of Columbia have abolished the death penalty, while three other states and the federal government have declared a moratorium on the carrying out of death sentences.⁹⁷ In the 24 states that continue to use capital punishment, however, a great deal of disparity exists in how it is imposed.

Pursuing the death penalty is a prosecutorial choice and counties with the highest use of the death penalty consistently have the highest reversal rates; in some cases, serious signs of

⁹⁵ Samuel Gross & Kaitlin Jackson, *Snitch Watch*, NAT'L REGISTRY EXONERATIONS (May 13, 2015), <https://www.law.umich.edu/special/exoneration/Pages/Features.Snitch.Watch.aspx>.

⁹⁶ *Id.*

⁹⁷ *State by State*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last accessed Feb. 2, 2022).

sustained prosecutorial misconduct have led to multiple death row exonerations. And while geographic differences in use of the death penalty indicate issues of arbitrariness, differences over time in the rate of exonerations indicate that the risk of wrongful execution since 1976 is far greater than researchers once thought. As discussed *supra* the best estimate for the rate of wrongful conviction in the U.S. is the 4.1% identified in the Gross study, but the true rate is unknown.⁹⁸ Since this estimate was established, the rate of exonerations nationwide continues to rise. In the first 10 years after the first DNA exoneration in 1989, the Exoneration Registry has documented 397 exonerations.⁹⁹ From 1999 – 2008 that number reached 757, and from 2009 – 2018, 1,333 individuals were exonerated in the U.S.¹⁰⁰ In 2014, the year Gross' 4.1% statistic was published, the Exoneration Registry documented 156 exonerations for the calendar year. The following year in 2015, 173 exonerations took place, followed by 183 in 2016, 172 in 2017, 174 in 2018, and 155 in 2019.¹⁰¹

B. States' and National Reaction to the Wrongful Conviction Crisis

Despite the procedural reforms and protections put in place in the modern death penalty era, a good number of states have decided to abolish the death penalty altogether. Since 1972, 15 states have abolished the death penalty either by a legislative statute or court ruling, a further 4 states have put in place moratoriums on the carrying out of death sentences by executive order, and just last year another commuted all death sentences within the state although the death penalty

⁹⁸ *Rate of False Conviction*, *supra* note 16.

⁹⁹ *Interactive Data Display*, *supra*, note 9.

¹⁰⁰ *Id.*

¹⁰¹ The drop off in exonerations recorded in 2020 and 2021 (143 and 132 exonerations recorded respectively) is most likely caused by the Coronavirus crisis and ensuing lengthy court delays, closures, and extended timelines across the criminal justice system, however both of those years still had more recorded exonerations than any year preceding 2014, the highest of which was 120 in 2012. *See Exonerations in the United States*, *supra* note 10.

is still on the books.¹⁰² The federal government also maintained a moratorium on executions until 2020 when outgoing President Donald Trump authorized 13 executions before the moratorium was reinstated by President Joe Biden.¹⁰³ These abolishing states and governors widely cited the risk of wrongful executions as a reason for abolishing the death penalty.

Indeed, the unavoidable risk of executing an innocent led Illinois to abolish the death penalty in 2011. While Illinois had reinstated the death penalty after the Supreme Court's decision in *Gregg v. Georgia*, by 2000, the state had exonerated more inmates than it had executed.¹⁰⁴ Alarmed, Illinois imposed a moratorium on executions, during which it exonerated seven additional persons on death row, for a total of twenty.¹⁰⁵ As a result, on March 9, 2011, Governor Pat Quinn signed legislation abolishing the death penalty, citing "the numerous flaws that can lead to wrongful convictions."¹⁰⁶

Similarly, in 2008, the Maryland Commission on Capital Punishment, a body created by the legislature to investigate the death penalty found that "Despite the advance of forensic sciences, particularly DNA testing, the risk of execution of an innocent person is a real

¹⁰² States that have abolished the death penalty since 1972 include Colorado, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Virginia, and Washington. California, Oregon and Pennsylvania have instituted moratoriums. *State by State*, *supra* note 91. The Governor of Oregon commuted all of the state's 17 death sentences in 2022. See Andrew Selsky, *Oregon governor commutes all 17 of state's death sentences*, ASSOCIATED PRESS, (Dec. 13, 2022), <https://apnews.com/article/crime-prisons-oregon-kate-brown-salem-eca820b1dcd2b51f0ad623f13f9e0387>

¹⁰³ Alana Wise, *The Justice Department is Pausing Federal Executions After they Resumed under Trump*, NPR, (July 1, 2021), <https://www.npr.org/2021/07/01/1012366520/the-justice-department-is-pausing-federal-executions-after-they-resumed-under-tr>.

¹⁰⁴ *Illinois*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/illinois>.

¹⁰⁵ *Id.*

¹⁰⁶ John Schwartz and Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 9, 2011, available at <https://www.nytimes.com/2011/03/10/us/10illinois.html>.

possibility.”¹⁰⁷ Maryland went on to impose the strictest death penalty requirements in the nation and eventually abolishing the death penalty completely by legislation in 2013.¹⁰⁸ In New Jersey, the legislature enacted a moratorium on executions in 2005 and abolished the death penalty in 2007 after the New Jersey Death Penalty Study Commission found “[t]he penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.”¹⁰⁹

Still other states have imposed moratoriums on executions after similar government investigations into the risk of wrongful executions. After a seven-year study on wrongful executions in Pennsylvania concluded in 2018, Governor Tom Wolfe enacted a still-ongoing moratorium on executions in the state, announcing “If the Commonwealth of Pennsylvania is going to take the irrevocable step of executing a human being, its capital sentencing system must be infallible. Pennsylvania’s system is riddled with flaws, making it error prone, expensive, and anything but infallible.”¹¹⁰ Likewise, California Governor Gavin Newsom enacted a still-ongoing executive moratorium on executions in 2019,¹¹¹ and a November 2021 report released by the legislature-created Committee on Revision of the Penal Code concluded that the death penalty is

¹⁰⁷ *Final Report to the General Assembly*, MARYLAND COMM. ON CAPITAL PUNISHMENT (Dec. 12, 2008), <https://www.ncsl.org/Portals/1/Documents/cj/Maryland2008Report33956.pdf>.

¹⁰⁸ *Maryland*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/maryland>.

¹⁰⁹ *New Jersey Death Penalty Study Commission Report*, N. J. DEATH PENALTY STUDY COMMISSION, (Jan. 2, 2007), https://www.njleg.state.nj.us/committees/dpsc_final.pdf at 1.

¹¹⁰ *Death Penalty Moratorium Declaration Memorandum*, PENNSYLVANIA OFFICE OF THE GOVERNOR (Feb. 13, 2015), <https://www.governor.pa.gov/newsroom/moratorium-on-the-death-penalty-in-pennsylvania/>.

¹¹¹ Scott Shafer & Marisa Lagos, *Gov. Gavin Newsom Suspends Death Penalty in California*, NPR, (Mar. 12, 2019), <https://www.npr.org/2019/03/12/702873258/gov-gavin-newsom-suspends-death-penalty-in-california>.

“beyond repair” and recommended the abolition of the death penalty, due in part to the immense risk of wrongful executions and past sentences of innocent California defendants to death.¹¹²

Legal organizations such as the American Bar Association (ABA) and the American Legal Institute (ALI) have also raised significant concerns about states’ use of capital punishment. In 2007 the ABA completed a three-year study on death penalty systems in eight states and renewed its call for a moratorium on the use of the death penalty, calling all such systems “deeply flawed.”¹¹³ Likewise, in 2009 the ALI council issued a final report to the membership that recommended withdrawing Section 210.6 of the Model Penal Code, the section providing for capital punishment for murder.¹¹⁴

Each of these state and organizational investigations supports the proposition that the death penalty comes with the sobering and inherent risk of executing an innocent person.

It is my professional opinion, in accordance with these studies and reports, that there is no system for carrying out the death penalty will completely eliminate the risk of executing another innocent person. This opinion is further supported by the evidence that jurisdictions with a higher use of the death penalty are more error prone, as well as by the increasing number of exonerations over time as science improves and awareness rises.

VI. Wrongful Convictions in Kansas

¹¹² *Id.*

¹¹³ *ABA Reports on Flawed Death Penalty Systems and Calls for Nationwide Moratorium*, ACLU OF NORTHERN CALIFORNIA (Oct. 29, 2007), <https://www.aclunc.org/publications/aba-reports-flawed-death-penalty-systems-and-calls-nationwide-moratorium-article>.

¹¹⁴ *Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty*, AM. L. INST. (Apr. 15, 2009), https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf.

Kansas is not immune to wrongful convictions. Since 1989, the Exoneration registry has recorded 14 Exonerations within the state of Kansas.¹¹⁵ However, this number is indicative more of the level of resources available to innocent defendants than it is the number of innocent people convicted in Kansas. Currently, the Midwest Innocence Project is the only innocence network member operating in Kansas and its seven attorneys simultaneously manage cases in 4 other states. Comparatively, California has three Innocence Network Member organizations active in the state, as well as other Innocence organizations with dozens of attorneys and staff.¹¹⁶ Likewise, as a smaller state with fewer resources, no state-specific effort to estimate the wrongful conviction rate within Kansas alone has been attempted. As such, the best estimate of wrongful convictions in Kansas remains the 4.1% from Samuel Gross' 2014 study of death row exonerees.

The 17 exonerees who have been freed in Kansas do however provide helpful insight into the wrongful conviction issue in Kansas. As experienced nationally, Kansas has also seen an increase in the rate of exonerations in recent years. Twelve of the 17 exonerations in Kansas have been obtained in the last decade. Fifteen involved serious criminal convictions, including murder, sexual assault, and attempted murder. Three involved a false or mistaken eyewitness identification. Nine involved official misconduct of some kind. Thirteen involved perjury or a false accusation by a witness, expert, or informant.

Moreover, while there has yet to be an exoneration of an individual sentenced to death in Kansas, that does not mean there is not a wrongfully convicted person on death row within this

¹¹⁵ *Interactive Data Display, supra*, at note 9.

¹¹⁶ Innocence Network member organizations in California include the Northern California Innocence Project, The California Innocence project and the Loyola Law School Project for the Innocent, a Clinic at Loyola Law School. *Member Directory, supra* note 9.

state's boundaries or that this will never happen in the future. The same issues that led to the incarceration and execution of innocent individuals in other states exist in Kansas, as well. In fact, of the four Kansans recently exonerated with assistance from the Midwest Innocence Project and its partners, three were convicted of crimes qualifying for capital murder: Floyd Bledsoe, Lamonte McIntyre, and Olin "Pete" Coones, Jr. And all three of those convictions were obtained through state misconduct. Floyd, Lamonte, and Pete were at risk of being murdered at the hands of the very state whose misconduct led to their wrongful convictions.

A. Floyd Bledsoe

Floyd Bledsoe served over sixteen years for a crime the State knew from the beginning he had not committed. In 2000, Floyd was convicted of first-degree murder, aggravated kidnapping, and aggravated indecent liberties with a child in the shooting death of his 14-year old sister-in-law. Had the State chosen to, it could have pursued the death penalty, as the aggravated indecent liberties with a child charge made the crime eligible for a capital murder charge under K.S.A. 21-3439(7)(b).

In November 1999, just north of Oskaloosa, Kansas, the body of Floyd's sister-in-law was found under a pile of trash with four gunshot wounds. Floyd's brother, Tom, initially confessed to the brutal rape and murder, but once in jail, recanted and blamed Floyd. All of the evidence pointed to Tom: he was unaccounted for during the time the victim disappeared, the murder weapon was a gun from Tom's truck, Tom led police to the body, and he confessed not only to police, but also to his minister and his parents. Floyd had an alibi, and no physical evidence connected him to the crime. Yet the State ignored all of this, instead choosing to support Tom's jail-cell recantation and pursue charges against Floyd. At trial, the prosecution's entire case hinged on the testimony of Tom. After officers who testified they believed Tom's

recantation, the jury ultimately convicted Floyd, and he was sentenced to life in prison.

After his conviction, Floyd repeatedly and consistently continued to assert his innocence in appeal after appeal. In 2004, after the Kansas Supreme Court upheld Floyd's convictions on direct appeal, a hearing was held on a K.S.A. 60-1507 motion for new trial alleging that Floyd's trial counsel provided him with a constitutionally inadequate defense for failing to present the evidence implicating Tom. Although the motion was denied, the Kansas Supreme Court found that the prosecution had nonetheless improperly discussed facts not in evidence and misstated facts and that Floyd's defense attorney made numerous mistakes. Yet, while the court determined that Floyd's counsel's performance fell below "the constitutional threshold of objective reasonableness," it ruled that the errors were not sufficiently prejudicial.

In 2008, Floyd received temporary relief; a United States District Court judge granted Floyd's federal habeas petition on the grounds of ineffective assistance of counsel and he was released on bond while the state appealed the decision.¹¹⁷ Tragically, a year later, the 10th Circuit Court of Appeals reversed the decision, and reinstated Floyd's conviction and sentence.¹¹⁸ As a result, Floyd—who had already served 9 years for a crime he did not commit—returned to prison, his hope for the future unclear.

At that moment, in 2009, Floyd had exhausted all his appellate avenues—direct appeal, post-conviction, and federal habeas. And had he been sentenced to death, he would have been eligible for the State to set an execution date. Had that occurred, he would not have been alive to pursue the DNA testing that ultimately proved his innocence six years later.

In 2015, Floyd was exonerated after the results of DNA testing of semen taken from the

¹¹⁷ *Bledsoe v. Bruce*, No. 07-3070-RDR, 2008 WL 2549029 (D. Kan. June 23, 2008).

¹¹⁸ *Bledsoe v. Bruce*, 569 F.3d 1223 (10th Cir. 2009).

victim's vaginal swab exclude Floyd and implicated Tom. After the results of the test were known, Tom, knowing he would soon be investigated for the murder, committed suicide. In his suicide note, Tom confessed to raping and killing the victim and claimed that the County Attorney urged him to pin the crime on Floyd. The County Attorney had "told [Tom] to keep [his] mouth shut." Tom's letter included a diagram he drew of the murder scene and details that led detectives to an empty shell casing left at the scene that had never been uncovered during the initial investigation. Tom wrote, "Floyd is innocent... tell [him] I am sorry."

Additional evidence of State misconduct emerged, including an undisclosed order signed by the prosecutor, the sheriff, and the Kansas Bureau of Investigation prior to Floyd's trial, agreeing that there would be no DNA testing on the evidence they had collected. For 15 years, the prosecutor's office knew it had the means to prove Floyd's innocence and definitively identify the perpetrator, and it said nothing.¹¹⁹

B. Lamonte McIntyre

Lamonte McIntyre similarly was convicted of a crime he did not commit because of law enforcement and prosecutor misconduct. On April 15, 1994, victims Donald Ewing and Doniel Quinn were shot and killed as they sat in a car in Wyandotte County, Kansas.¹²⁰ No physical evidence or motive connected Lamonte to the crimes. Yet, the investigation conducted by Detective Roger Golubski was closed just six hours later with Lamonte's arrest; witness interviews lasted just 19.5 minutes.

Lamonte's conviction was the direct result of misconduct that would take another 23

¹¹⁹ Karen Dillon, *Web of lies, indifference to justice led to wrong Kansas brother being imprisoned for more than 15 years*, LAWRENCE JOURNAL-WORLD, Dec. 13, 2015, available at <https://www2.ljworld.com/news/2015/dec/13/web-lies-and-indifference-justice-led-wrong-brothe/>

¹²⁰ *State v. McIntyre*, 259 Kan. 488, 489 (1996).

years to come to light. It is now clear that for decades, Golubski terrorized poor Black women, making them submit to sexual acts through force or with threats of arrest or harm to them or their loved ones, and coercing them to fabricate evidence to close his cases.¹²¹

Lamonte's was one of those cases.¹²² Several years before the 1994 double homicide, Golubski sexually assaulted Lamonte's mother by threatening to arrest her and her then-boyfriend. Out of fear, she moved and changed her number to get away. Later, when Golubski needed to close the double murder of Ewing and Quinn, Golubski, with the help of prosecutor Terra Morehead, framed her son, Lamonte.¹²³

Lamonte was ultimately convicted based upon the testimony of two eyewitnesses who saw the shooting and testified that Lamonte was the shooter. Golubski used coercion or improper suggestion to force both of them to identify Lamonte. One of those witnesses, Niko Quinn, immediately recanted, and went to Morehead to tell her that Lamonte looked nothing like the perpetrator. Morehead also threatened Niko, who ultimately succumbed and testified to support the State's false narrative. A third witness, Stacey Quinn, recognized the shooter as someone other than Lamonte, and told police and Morehead, but there is no record of any interview of Stacey; the prosecutor sent her away without ever disclosing her existence to the defense. The false and fabricated testimony of two coerced witnesses and years of misconduct from Golubski ended in Lamonte behind bars for a crime he did not commit.

Twenty-three years later, during a 2017 post-conviction evidentiary hearing, "in the face of a cascade of evidence of police and prosecutorial misconduct, Wyandotte County District

¹²¹ Complaint at 2, *McIntyre v. United Government of Wyandotte County*, 2020 WL 1028303 (D. Kan. Mar. 3, 2020) (2:18-cv-02545-KHV-KGG).

¹²² *Id.*

¹²³ *Id.*

Attorney Mark Dupree abruptly rose and announced that the prosecution agreed that [Lamonte's] conviction should be vacated.”^{124, 125}

While Lamonte is now free, the end of this case could have been very different. Had the crime occurred just a few months later, Lamonte would have turned 18 years old and Kansas would have reinstated the death penalty. Because this was a double murder, it would have been eligible to be charged as a capital crime under K.S.A. 21-3439(6). Given the corruption and fabrication of evidence, there is no reason to believe the prosecutor would not have sought death in this case. Like many death row exonerations, Lamonte's wrongful conviction took decades to correct, which could be far too late for the State to correct a manifest injustice.

C. Olin “Pete” Coones, Jr.

Exoneree Olin “Pete” Coones, Jr., was also a victim of official misconduct in Wyandotte County, Kansas who could have been charged with capital murder under K.S.A. 21-3439(6) and sentenced to death.¹²⁶ In January 2009, Coones was convicted and sentenced to 50 years to life in prison. In a bizarre plot, Kathleen Schroll killed her husband and committed suicide, but staged their deaths to frame Coones.

Prosecutor Edmond Brancart concealed evidence of Schroll's lack of credibility and motive to lie in order to convict Coones. Schroll was in serious debt, facing imminent arrest for embezzlement, and under investigation for elder abuse against Coones' grandfather. Police had

¹²⁴ *Lamonte McIntyre*, NAT'L REGISTRY EXONERATIONS (updated Feb. 24, 2020), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5216>.

¹²⁵ Dupree also announced, in light of Lamonte's case, he would be establishing a conviction integrity unit within his office. Roxana Hegeman, *Prosecutor Wants Probe Of KCK Detective In Wrongful Conviction*, NPR KCUR, Nov. 10, 2017, <https://www.kcur.org/community/2017-11-10/prosecutor-wants-probe-of-kck-detective-in-wrongful-conviction>.

¹²⁶ *Olin Coones*, NAT'L REGISTRY EXONERATIONS (updated Feb. 22, 2021), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5866>.

obtained 120 checks written on Coones' grandfather's account, and a handwriting analyst testified there was "strong evidence" 115 of them were forged by Schroll; Schroll had also embezzled more than \$11,000 from the credit union where she worked and was going to be confronted by her supervisor just hours before her death.

The prosecution also knowingly presented false testimony from a jailhouse informant, Robert Rupert. Rupert claimed that Coones confessed to him while they were briefly in the same jail pod. Many of the details of the "confession" did not match the evidence, and the Butler County District Attorney's Office told Brancart that Rupert was unreliable and mentally unstable. Nonetheless, Brancart threatened to jail Rupert if he didn't cooperate against Coones, and he put Rupert's false tale in front of the jury.

Following Coones' post-conviction evidentiary hearing in 2020, Wyandotte County District Judge Bill Klapper found "rife" prosecutorial misconduct: Brancart failed to disclose threats and promises he made to Rupert and Rupert's full criminal history, and he suborned perjury related to whether he'd previously interviewed Rupert.

Coones' case follows the pattern of others exonerated after a sentence of death. The testimony of jailhouse informants like Rupert are a leading cause of wrongful capital convictions.¹²⁷ As is the case with the State's allowance of Rupert's testimony against Coones and their suppression of exculpatory evidence, more than half of all death row exonerations involved both official misconduct *and* perjury or false accusation.¹²⁸

In November of 2020, after a re-investigation by Wyandotte County District Attorney

¹²⁷ *The Snitch System*, CENTER ON WRONGFUL CONVICTIONS (Winter 2004-2005), <https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf>.

¹²⁸ See *Innocence Database*, *supra* note 4.

Mark Dupree's Conviction Integrity Unity, and with the assistance of MIP and private attorneys, Coones was exonerated after serving more than 10 years in prison. He passed away just five days ago, only 108 days after his release. Had Coones been sentenced to death, he may never have experienced freedom at all.

VII. Wrongful Convictions and Executions Have Significant Collateral Effects

The effects of a wrongful conviction are staggering, and are by no means limited to the wrongfully convicted person. Family of the wrongfully convicted are irreparably damaged or traumatized; the community loses trust in the criminal justice system; and victims must face the fact that their real attacker remains free and they may have helped put an innocent person behind bars. There is no way to lessen most of this impact beyond reducing wrongful convictions to the maximum extent possible.

A. Effect of Wrongful Convictions on the Individual

The wrongfully convicted have their freedom taken away, their reputation destroyed, and are thrown into one of the worst incarceration systems in the developed world. If they are extremely lucky, someday their case may get picked up by an attorney or organization that is willing to investigate their case. If they are luckier still there may be evidence available that can help prove their innocence. But for every minute in between, the wrongfully convicted person languishes in an environment that damages their body and their mind. In addition, the exonerated person faces significant difficulty in returning to normal life.

Psychological research into the effects of incarceration shows the immense toll that the years of imprisonment the wrongfully convicted have suffered. Long term incarceration can result in dependence on an institutional structure, hyper-vigilance, distrust of others, and

suspicion, as well as social withdrawal and isolation.¹²⁹ For the wrongfully convicted, the trauma can be even worse than for those who committed the crime for which they were convicted. In one study, 14 of 18 participants met the diagnostic criteria for “enduring personality change following catastrophic experience.”¹³⁰ No one comes out unscathed and several studies examining the psychological effects of wrongful conviction have noted a high incidence of Post-Traumatic Stress Disorder (PTSD).¹³¹ For some, the psychological effects and depression caused by their time in prison prove too much even though they eventually win exoneration. Suicide rates among the formerly incarcerated are higher than the public at large, likely due to the trauma they suffered and long-term impacts, and the wrongfully convicted do not escape that trend.¹³²

A recent review of academic scholarship identified eight key themes with respect to the “extreme and long-lasting” psychological impact of being wrongfully accused of a crime.¹³³ The review revealed negative impacts on the accused in areas of self-identity, stigma, psychological

¹²⁹ Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, NATIONAL POLICY CONFERENCE PAPER: FROM PRISON TO HOME (Jan. 30, 2001), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//42351/Haney.pdf.

¹³⁰ Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, CANADIAN J. OF CRIMINOLOGY AND CRIM. JUSTICE (Jan. 2004), <https://doi.org/10.3138/cjccj.46.2.165>.

¹³¹ Samantha K. Brooks & Neil Greenberg, *Psychological Impact of Being Wrongfully Convicted: A Systematic Literature Review*, MED., SCI. & L. (2020), <https://journals.sagepub.com/doi/pdf/10.1177/0025802420949069>.

¹³² Anne Bukten & Marianne Riksheim Stavseth, *Suicide in Prison and After Release: a 17 Year National Cohort Study*, EUROPEAN JOURNAL OF EPIDEMIOLOGY (Aug. 24, 2021), <https://link.springer.com/article/10.1007/s10654-021-00782-0>; Axel Haglund et al, *Suicide after release from prison - a population-based cohort study from Sweden*, J. OF CLIN. PSYCHIATRY (Oct. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4520329/>. Even well-known exonerees who have been out for years are not immune. In 2016, beloved advocate and exoneree Darryl Hunt died by suicide, 13 years after his exoneration. Max Blau, *Tragedy of Darryl Hunt: how exonerated man came to take his own life*, THE GUARDIAN (Mar. 19, 2016), <https://www.theguardian.com/us-news/2016/mar/19/darryl-hunt-exonerated-self-inflicted-gunshot>. His case is sadly not unique. See Matthew Clarke, *Tragic Justice: Wrongfully Convicted Prisoners Die Shortly After Exoneration*, PRISON LEGAL NEWS (Mar. 9, 2017), <https://www.prisonlegalnews.org/news/2017/mar/9/tragic-justice-wrongfully-convicted-prisoners-die-shortly-after-exoneration/>.

¹³³ Brooks & Greenberg, *supra* note 125 at 44–54.

and physical health, relationships with others, attitude towards the justice system, impact on finances and employment, lasting impacts of traumatic experiences in custody, and adjustment difficulties upon release.¹³⁴ Victims of overturned convictions have described deep resulting trauma from the experience of wrongful imprisonment, with a 2003 study of sixty exonerees imprisoned for an average of twelve years finding that “nearly half [of the exonerees] suffer[ed] from depression, anxiety disorder or some form of post-traumatic stress disorder.”¹³⁵

No exoneree comes out unscathed. In a recent conversation at a Midwest Innocence Project virtual event, exonerees Floyd Bledsoe and Ricky Kidd and MIP client Laquanda “Faye” Jacobs discussed their continued struggles post-incarceration.¹³⁶ Each of them acknowledged their struggles with PTSD and its impacts on their relationships and day-to-day life. Ricky described having nightmares of still being locked up and drinking coffee to stay up and prevent the nightmares. “It continues to show re-show itself on a regular basis,” he explained. Floyd expressed an inability to have close relationships and a default of keeping people at arm’s length. “All three of us will smile,” he said, “but behind smiles, we have a lot of pain.”

Physically, years or decades of inadequate nutrition and healthcare leave many exonerees with debilitating health conditions. In 2021, MIP client and exoneree Pete Coones died just 108 days after his exoneration. While he was only 64 years-old, he re-entered the free world in a body that was broken, having succumbed to cancer that went undiagnosed and untreated during

¹³⁴ *Id.*

¹³⁵ Leslie Scott, *It Never, Ever Ends: The Psychological Impact of Wrongful Conviction*, AM. U. CRIM. L. BRIEF 5, no. 2 (2010):10-22 at 13 (citing Ann Zimmerman, *A Convict Freed By DNA Evidence Tries to Find a Life*, WALL ST. J., Oct. 30, 2007) (brackets in original).

¹³⁶ 2021 *Faces of Innocence Virtual Gala*, MIDWEST INNOCENCE PROJECT at 1:17, <https://youtu.be/5sV43IISogg?t=4652> (last visited Jan. 2, 2023).

his 12 years of wrongful incarceration.¹³⁷ Just two months before, exoneree and MIP client John Brown died of congestive heart failure that was the result of decades of untreated high blood pressure while he was incarcerated.¹³⁸ He had been exonerated just 109 days earlier. Most recently, exoneree Kevin Strickland has filed a lawsuit against the prison's healthcare provider for failing to provide adequate health care, the results of which have left him in a wheelchair.¹³⁹

In addition to suffering the negative and well-documented physical and mental health impacts of incarceration, wrongfully convicted persons suffer the additional harm of knowing that they should not be in prison and that they have done nothing wrong. Says Professor John Wilson of Cleveland State University: "Looking at the spectrum of traumatization to [the wrongfully convicted's] psyche—the many ways in which these injuries permeate their being—I believe that the injuries from a wrongful conviction and incarceration are permanent. I think they're permanent scars. And even though counseling and psychotherapy and treatments are helpful, I don't think you can undo the permanent damage to the soul of the person, to their sense of self, to their sense of dignity."¹⁴⁰ Professor Adrian T. Grounds of the University of Cambridge identified similar results from a clinical study of eighteen wrongfully-convicted men who were released from long-term imprisonment, finding "a pattern of disabling symptoms and psychological problems, one often compounding the next, that were severe and similar in all

¹³⁷ Emily Crane, *Kansas man, 64, who spent 12 years in prison after a wrongful murder conviction dies of cancer - just 108 days after being exonerated and released*, DAILY MAIL (Feb. 22, 2021), <https://www.dailymail.co.uk/news/article-9287645/Kansas-man-exonerated-murder-dies-108-days-release.html>.

¹³⁸ *John Brown Story MIP Faces of Innocence Gala*, MIDWEST INNOCENCE PROJECT, <https://www.youtube.com/watch?v=cGIhi2g2lio> (last visited Jan. 2, 2023).

¹³⁹ Luke Nozicka, *Kevin Strickland sues Missouri prison healthcare provider for neglecting medical needs*, KANSAS CITY STAR (Jan. 18, 2022), available at <https://www.kansascity.com/news/local/crime/article256890752.html>.

¹⁴⁰ Scott, *It Never Ends*, *supra* note 129 at 13.

eighteen cases” and dividing the results into “five basic categories of common mental health problems suffered by the participants: Post-Traumatic Stress Disorder (PTSD), Enduring Personality Change, Other Psychiatric Disorders, Psychological/Physical Suffering, and Re-adjustment Issues.”¹⁴¹ Wrongfully convicted individuals may additionally struggle to re-connect with family members or their communities, which results in further isolation and trauma, and can be additionally harmed by perceptions of outsiders who do not acknowledge the validity of their exonerations.

Lost in these studies are the stories of marriages and relationships that fell apart—or never happened because of the wrongful conviction. Love was lost or extinguished as family and friends moved on with their lives or mistakenly concluded, perhaps, that their loved ones really were guilty. Birthdays, anniversaries, holidays, and the milestones of life that are all missed because of a life the State stole away.

And these impacts are all the more severe for those on death row. Researchers have noted a common trend popularly termed “Death Row Phenomenon” which encapsulates a series of psychological effects of being placed on death row, from mental and physical deterioration, hopelessness, depression, and psychotic delusions to suicidal tendencies.¹⁴² For the wrongfully convicted who end up on death row, the torment may be even more extreme. To date, there have been 186 exonerations from death row, with the average time served before exoneration being

¹⁴¹ *Id.* at 14 (citing Adrian Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUSTICE 1, 22–41 (2005)).

¹⁴² Karen Harrison & Anouska Tamany, *Death Row Phenomenon, Death Row Syndrome, and their Affect on Capital Cases in the US*, INTERNET J. OF CRIMINOLOGY (2010), https://web.archive.org/web/20110713050059/http://www.internetjournalofcriminology.com/Harrison_Tamony_%20Death_Row_Syndrome%20_IJC_Nov_2010.pdf; Hans Toch et al, *Living on Death Row: The Psychology of Waiting to Die*, AM. PSYCHOLOGICAL ASSOC., (2018).

11.5 years.¹⁴³ Exonerees from death row face lifelong mental health issues and difficulties that persist for the remainder of their lives. Like exonerees from lesser sentences, death penalty exonerees face lasting impacts from their wrongful convictions that go far beyond the obvious and apparent.

In addition to the mental and physical damage, formerly incarcerated people also face substantially higher rates of unemployment and reliance upon government programs or family, as well as being nearly 10 times more likely to experience homelessness than the general population.¹⁴⁴ Even exonerated individuals experience difficulty in obtaining housing, work, medical care, and a stable economic foundation. Convictions, even though vacated, still appear in records and they must explain away decades of missing credit, work, and housing history. Because of these continued support needs, the Midwest Innocence Project has added social workers to its team.

Kansas is one of the few states that does compensate the wrongfully convicted to the tune of \$65,000 per year for each year wrongfully imprisoned and \$25,000 per year for each year wrongfully on parole.¹⁴⁵ This financial assistance cannot make up for the emotional toll of incarceration, however, nor can it erase what the wrongfully convicted missed, such as opportunities for personal and educational growth, time with family members, some of whom may pass away during their time incarcerated, and drastic changes in society and culture that

¹⁴³ *About Innocence*, WITNESS TO INNOCENCE, <https://www.witnesstoinnocence.org/innocence>. (last visited Jan. 2, 2023).

¹⁴⁴ Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INSTITUTION, (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf; Lucious Couloute, *Nowhere to Go, Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INST. (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html>.

¹⁴⁵ K.S.A. § 60-5004.

impede finding work, housing, or basic necessities. Despite their legal vindication, exonerees may also still face hatred and distrust from members of their community or even family who still believe them guilty.

B. Effect of Wrongful Convictions on Family Members

The impacts of a wrongful conviction go beyond the wrongfully convicted person themselves. Family members most often experience negative psychological stresses similar to and related to what has occurred to their loved one. In addition, families of the wrongfully accused face societal stigma because of the supposed actions of their loved ones, as well as financial difficulties, both from the costs imposed on families by incarceration, the potential loss of breadwinner, and oftentimes the tremendous burden of appeals and lawyers in an attempt to free their family member.

Still other studies have documented the psychological effects of wrongful convictions on the accused's family members. These studies have noted "secondary trauma" and higher than average instances of anxiety and depression.¹⁴⁶ Effects differ from romantic partners to parents or children based on their relationship with the wrongfully convicted as well as such factors as their age at the time of the conviction, length of wrongful sentence served, and other factors. Some research indicates the impact on children of the wrongfully accused is likely more extreme than other family members, noting that children too young to understand at the time of conviction often by the time they reach 5th or 6th grade begin to experience, "involvement in criminal behaviors, poor education, social isolation, bullying victimization, suicidal ideation,

¹⁴⁶ Grounds, *supra* note 124.

reduced levels of professional accomplishment and development, fear-of-intimacy, and fear of speaking out.”¹⁴⁷

The financial impact on families of the wrongfully convicted is one of the most apparent, and most obvious, consequence of wrongful convictions. The majority of defendants in the United States are represented by appointed attorneys or public defenders, indicating they qualify for indigent defense,¹⁴⁸ and those who do not qualify often choose to retain private counsel in hopes of a better outcome. These families who already qualify for indigent services must face the prospect of moving forward without the income of the incarcerated family member and with the additional expense of providing for that family member, including the cost of telephone calls. And for families who believe in their loved ones’ innocence, they may seek additional appeal and post-conviction counsel, accumulating legal costs that are often unrecoverable even if their loved one is eventually exonerated.¹⁴⁹

C. Effect of Wrongful Convictions on the Community

Wrongful convictions have a corrosive effect on communities and their trust for the criminal justice system, a fact the federal government acknowledges in its “Upholding the Rule of Law and Preventing Wrongful Convictions” program.¹⁵⁰ Every time the wrong person is

¹⁴⁷ St. Jean Jeudy, *Dissertation: Psychosocial Consequences of Wrongful Conviction on Children*, WALDEN UNIVERSITY (2019), <https://www.proquest.com/openview/ff15489bc5189abfe91ee35ceb85878b/1?pq-origsite=gscholar&cbl=18750&diss=y>.

¹⁴⁸ R. Greenbaum, *Investigating Innocence: Comprehensive Pre-trial Defense Investigation to Prevent Wrongful Convictions*, UC IRVINE (2019).

¹⁴⁹ Rosalie Chan & Belle Lin, *The High Cost of Phone Calls in Prisons Generates \$1.4 Billion a Year, Disproportionately Driving Women and People of Color Into Debt*, BUSINESS INSIDER, (Jun. 30, 2021), <https://www.businessinsider.com/high-cost-prison-communications-driving-debt-racial-wealth-gap-2021-6>; Katrina Vanden Heuvel, *The Staggeringly High Price of a Prison Phone Call*, THE WASH. POST, (Nov. 30, 2021), <https://www.washingtonpost.com/opinions/2021/11/30/staggeringly-high-price-prison-phone-call/>.

¹⁵⁰ The program description notes: “While experts widely acknowledge that wrongful convictions constitute a small percentage of all findings of guilt by our nation’s court systems, irreversible damage is sustained by those who are wrongly convicted. This damage extends far beyond the individuals wrongfully convicted, as

convicted, the real perpetrator goes free. In 165 of the 375 DNA exonerations, the true perpetrator was identified.¹⁵¹ Those 165 actual perpetrators went on to be convicted of 154 additional violent crimes, including 83 sexual assaults, 36 murders, and 35 other violent crimes while the innocent sat behind bars for their earlier offenses.¹⁵²

In addition to this human cost, there is a financial one. The United States spends nearly \$80 billion a year on prisons,¹⁵³ and the estimated lost wages of incarcerated persons nationwide surpasses \$70 billion per year.¹⁵⁴ According to a report requested by the Kansas state legislature, the average cost per-inmate, per-year in the Kansas Correctional System is \$30,100/year in an adult correctional institution, and \$154,285/year in the juvenile system.¹⁵⁵ Under this assumption, the state of Kansas spent \$3,190,600 on just the 14 known exonerees—who collectively spent over 106 years wrongfully imprisoned—not including other wrongfully convicted persons who undoubtedly are still incarcerated in the Kansas correctional system, or the additional \$6,890,000.00 in restitution costs they would be entitled to under the State’s compensation law, or the State’s missed opportunity for property and income taxation.

systemic errors cause harm to all those involved in the case, including the families of wrongfully convicted people and the victims of the original crimes. Wrongful convictions also erode the public’s confidence in the criminal justice system. In addition, wrongful convictions impact public safety by delaying or preventing the identification of the persons who actually committed these crimes. BJA’s URLPWC Program seeks to address all these areas.” *Upholding the Rule of Law and Preventing Wrongful Convictions (URLPWC) Program*, BJA, <https://bja.ojp.gov/program/urlpwc/overview> (last visited Feb. 2, 2022).

¹⁵¹ *DNA Exonerations In The United States*, *supra* note 57.

¹⁵² *Id.*

¹⁵³ *Following the Money of Mass Incarceration*, PRISON POL’Y INST. (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

¹⁵⁴ *The Economic Burden of Incarceration In the United States*, INST. FOR JUSTICE RESEARCH & DEV. F.S.U., https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/Economic_Burden_of_Incarceration_IJRD072016_0_0.pdf.

¹⁵⁵ *Follow-Up Information: Cost Per Inmate and Age of Correctional Facilities*, REPORT TO THE KANSAS LEGISLATURE HOUSE COMMITTEE ON APPROPRIATIONS (2020), http://kslegislature.org/li/b2021_22/committees/ctte_h_apprprtns_1/documents/testimony/20210224_05.pdf.

D. Wrongful Convictions for Death Eligible Offences in Kansas

To date, at least three of the 17 Kansas exonerees were convicted for offenses that could have been death penalty eligible if the prosecutor had chosen to pursue it. As discussed extensively throughout this report, however, it is unlikely that these are the only persons wrongfully convicted for death eligible offences in the entire state. The dark number of unknown wrongfully convicted persons in Kansas is large, given the few resources in the state to pursue post-conviction relief for the wrongfully convicted and the lack of academic study aimed directly at the issue as it stands in Kansas. It is my professional opinion, there is no system for carrying out the death penalty that will completely eliminate the risk of executing another innocent person or eliminate the harms such wrongful convictions create.

Dated: January 3, 2023

A handwritten signature in blue ink that reads "Tricia J. Rojo Bushnell". The signature is written in a cursive style and is positioned above a horizontal line.

Tricia Rojo Bushnell

Exhibit A

Tricia J. Rojo Bushnell, J.D.
Midwest Innocence Project, Kansas City, MO

PROFESSIONAL PROFILE

Tricia J. Rojo Bushnell is the executive director at the Midwest Innocent Project, where she serves as the organization's lead attorney.

Ms. Bushnell is an appellate attorney specializing in wrongful conviction and death penalty cases. She has written and filed briefs on these topics in state and federal courts, including the United States Supreme Court, in addition to her litigation and appellate work.

ACADEMIC CREDENTIALS

- NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY , J.D., May 2007
- BUCKNELL UNIVERSITY, Lewisburg, PA, B.A., May 2004
- UNIVERSITY OF ZURICH, Zurich, Switzerland, October 2002 - July 2003

LEGAL EXPERIENCE

MIDWEST INNOCENCE PROJECT, Kansas City, MO

Executive & Legal Director, June 2016–Present

Legal Director, December 2013–Present

Responsible for the oversight of all staff, programing, and development. Serve as lead counsel and investigate and litigate postconviction and state and federal habeas cases for individuals claiming innocence of the crimes for which they were convicted. Responsible for the exonerations of six wrongfully convicted individuals following successful litigation and the release of two others through clemency and resentencing proceedings. Participated in efforts leading to the commutation of Missouri death sentence in 2015 and the stay of execution and appointment of a board of inquiry into an additional Missouri death penalty case in 2017. Draft amicus briefs on behalf of the Innocence Network.

Notable cases include: Strickland v. State, Case No. 16CR79000361 (Jackson Co. 16th Circuit 2021) (Finding the defendant actually innocent under a new law permitting prosecutors to file a motion to vacate a judgement); Jimerson v. Payne, 957 F.3d 916 (8th Cir. 2020) (Affirming reversal of convictions on basis of a Youngblood violation); Coones v. Kansas, Case No. 2019 CV 727 (Wyandotte Co. Dist. Ct.) (The first case involving a conviction integrity unit in the state of Kansas resulting in a reversal of conviction based upon new evidence of innocence and state misconduct.); Ex rel Kidd v. Korneman, Case No. 18DK-CC00017 (DeKalb Co. Cir. Ct.) (Finding actual innocence is a claim for relief in Missouri and overturning conviction on that basis.).

UNIVERSITY OF WISCONSIN LAW SCHOOL, Madison, WI
Assistant Clinical Professor, February 2012 - December 2013
Clinical Instructor/Staff Attorney, May 2010 - February 2012

Supervised and instructed Wisconsin Innocence Project and Criminal Appeals Project clinic students in investigating and litigating criminal postconviction and appellate cases. Taught seminar on Race, Poverty, and the Criminal Justice System. Responsible for the exoneration of 1 wrongfully convicted individual and the reversal of 2 other convictions on constitutional grounds. Drafted and filed amicus briefs on behalf of the Innocence Network in Bullcoming v. New Mexico and Williams v. Illinois, two United States Supreme Court cases considering the testimony of surrogate forensic analysts.

EQUAL JUSTICE INITIATIVE, Montgomery, AL
Fellow, October 2008 - May 2010

Represented indigent clients facing the death penalty, juveniles sentenced to life without parole, and sex offenders facing residency restrictions in postconviction and § 1983 litigation. Provided research for merits brief in Sullivan v. Florida, a United States Supreme Court case considering life without parole sentences for juveniles. Drafted and edited the fifth edition of the *Alabama Capital Postconviction Manual*. Researched and drafted a report on juror discrimination in the Southeast.

KIRKLAND & ELLIS, Los Angeles, CA
Associate, September 2007 - October 2008
Summer Associate, May 2006 - August 2006

Drafted and filed pleadings and motions, conducted depositions, completed discovery, and participated in hearings in white collar criminal proceedings, complex commercial matters, and constitutional litigation. Represented pro bono clients in death row postconviction case, prisoners' rights litigation, and guardianship matters.

PROFESSIONAL APPOINTMENTS

May 2021 - Present, Adjunct Professor, Washington University in St. Louis School of Law

April 2020 - April 2021, Adjunct Professor, Drake University School of Law

December 2015 - August 2018 - Subcontractor, Habeas Resource Counsel, 8th Circuit Court of Appeals

January 2015 - May 2018, Adjunct Professor, UMKC School of Law

December 2015 - August 2018, Consultant, multiple cases involving wrongfully convicted individuals

BAR ADMISSIONS & PROFESSIONAL ASSOCIATIONS

- Admitted to practice in Missouri, Iowa
- Inactive bar admissions in California, Alabama, and Wisconsin
- Innocence Network Executive Board (2018- Current), President (2019-Current)
- Founding Board Member, LEC Acts (Latinx Education Collaborative), (2020-Current)
- Pinnacle Prize Recipient (2021)
- Missouri Lawyers Media, 2021 Legal Champion (2021)
- Diverse Business Committee, Greater Kansas City Chamber of Commerce (2016-2020)
- Board of Directors, ACLU-MO (2013-2018); President (2016-2018)
- Kansas City Business Journal “Best of the Bar,” (2018)
- Board of Directors, ACLU-WI (2011-2013)
- Member, National Association of Criminal Defense Lawyers
- Member, National Hispanic Bar Association

REPRESENTATIVE PRESENTATIONS

Innocence in Missouri, State of Litigation, Lathrop Gage, Kansas City, MO (July 2021).

Keynote, *Leading United: Diversity & Inclusion Panel*, 2020 Midwest Leadership Conference, Central Exchange, Kansas City, MO (July 2020).

Race As An Estimator Variable In Wrongful Convictions, 2019 Innocence Network Conference, Atlanta, GA (April 2019).

Presenter, Restorative Justice Symposium, Kansas Journal of Law & Public Policy (March 2019).

Incarceration & Sentencing, Federal Bar Association Conference, Kansas City, Kansas (February 2019).

Faculty, *Capital Mitigation Skills Workshop*, Bureau of Justice Assistance, Kansas City, MO (January 2016-2019).

Interview with Robin Steinberg, TedxKC, Kansas City, MO (December 2018).

Culturally Competent Case Narratives, Film and the Law Series, UMKC School of Law, Kansas City, MO (May 2018).

The Collateral Consequences of Wrongful Convictions, 2018 Innocence Network Conference, Memphis, TN (March 2018).

All Mixed Up: Probabilistic Genotyping and Innocence Cases, 2017 Mid-America DNA Conference,

Columbia, MO (April 2017).

2016 Annual Meeting of the Missouri Bar, *Plenary: Spotlight on Justice: Addressing the Causes and Prevention of Wrongful Convictions*, Lake Ozark, MO (September 2016).

Faculty, Missouri State Public Defender, *Litigating Eyewitness Misidentifications*, Columbia, Missouri (August 2016).

Lawyers Association of Kansas City, Young Lawyers Division, *Annual Luncheon Keynote*, Kansas City, MO (July 2016).

Faculty, *Appellate Advocacy Training*, Ohio Public Defender, Dayton, OH (March 2016).

Faculty, Missouri State Public Defender, *Post-Conviction Training*, Kansas City, MO (November 2015).

Nebraska Crime Labs: An Overview and What Lawyers Need to Know, 2015 Nebraska State Bar Annual Meeting, Omaha, NE (October 2015)

Innocence: What Is It and How Do We Pursue It? 2015 Mid-America DNA Conference, Columbia, MO (April 2015)

Innocence: The DNA Exonerations, Bacon-Thomas Lecture, Shook, Hardy & Bacon, Kansas City, MO (December 2014)

Using DNA to Exonerate in Complicated Cases, 2013 Innocence Network Conference, Charlotte, North Carolina (April 2013).

First Monday Supreme Court Review: A Review of Miller/Graham, University of Wisconsin Alumni Weekend CLE Program, Madison, WI (October 2012).

Teaching Legal Resilience: Perseverance in the Face of Loss, The Evolving Art of "Practice-Ready": The Past, Present, and Future of Clinical Education, Saint Louis University School of Law (November 2012).

Criminal Injustice: Racial Disparities, Dane County, and the Death Penalty, University of Wisconsin Black Law Student Associations' 2nd Annual Event Series in Honor of Black History Month, University of Wisconsin Law School (February 2012).

Alternatives to the Prison-Industrial Complex, 30th Annual Civil Liberties and Public Policy Conference: From Abortion Rights to Social Justice, Hampshire College (April 2011).