

WRONGFUL CONVICTIONS: REASONS, REMEDIES, AND CASE STUDIES

A Thesis  
by  
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Submitted to the Graduate School  
at Appalachian State University  
in partial fulfillment of the requirements for the degree of  
MASTER OF SCIENCE

May 2014  
Department of Government and Justice Studies

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## **Abstract**

### **WRONGFUL CONVICTIONS: REASONS, REMEDIES, AND CASE STUDIES**

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Wrongful conviction is defined as the conviction of a factually innocent person and is estimated to occur in about 1 to 5 percent of all convictions in the United States. Wrongful convictions encompass both culpability issues and procedural issues found to have a substantial effect on the initial conviction. While an individual may be released and found not to be criminally liable, he/she may still face repercussions stemming from the charges, such as civil suits, as well as a criminal record indicating prison time served. In order for the charges, as well as possible prison time served, to disappear, a defendant must seek exoneration, which has been shown only to be granted in a small proportion of wrongful conviction cases (Smith, Zalman, & Kiger, 2011). Exonerations are official declarations of innocence by a governor's pardon, a court's dismissal of charges, acquittals after retrials, and acknowledgements of innocence for those inmates who died in prison (Konvisser, 2012; Smith et al., 2011). While eyewitness evidence has been suggested to be the

leading cause of wrongful convictions, there are many other sources of error that are likely to be possible causes of wrongful convictions. These sources of error include suggestive lineups, false confessions, perjured testimony, forensic error, tunnel vision by police and prosecutors, prosecutorial misconduct, ineffective assistance of counsel, issues with the criminal justice system, and the racial history of the United States (Davies & Hine, 2007; Gould & Leo, 2010; Penrod & Cutler, 1995; Smith et al., 2011). Each of these reasons can greatly affect the possibility of a false conviction alone or serve to combine with other issues to produce a culminating effect on individual cases. Wrongful conviction has been shown to have an incredible amount of human cost, both physical and monetary. Those who have been wrongfully convicted are subject to a loss of liberty and freedom, preventing many of them from taking part in normal daily activities, even after release, as well as the pains of imprisonment, including increased risk of psychological issues associated with incarceration (Konvisser, 2012). Additionally, it has been estimated that overall, as of 2011, about \$87 million has been spent on the 250 exonerates reported nationwide (Smith & Hattery, 2011). As it is clear that wrongful convictions are harmful to innocent citizens, as well as an already overburdened criminal justice system, it is even more important to right the wrongs of these mistakes and prevent future mistakes. Suggestions for improvement include increased use of compensation lawsuits for those wrongfully convicted, increased access to postconviction DNA testing, more reliable evidence preservation, eyewitness identification reforms, increased forensic oversight, recording of interrogations, and increased formation and use of innocence commissions nationwide.

## **Acknowledgments**

This project would not have been possible without the support of many people. Many thanks to my chairperson, Marian R. Williams, who read my numerous revisions and helped make some sense of the confusion. Also, thanks to my committee members, Catherine D. Marcum and Twila A. Wingrove, who offered guidance and support, even in the simplest of ways. And finally, many thanks to my boyfriend, uncle, friends, and classmates, especially Emily Ritchie, who endured this long and tedious process with me, always offering support, love, and guidance along the way, even in the hardest and most difficult of times.

## **Dedication**

This paper is dedicated to all of those who have been wrongfully convicted and have yet to receive justice or even acknowledgement for the harm done to them, as well their families, friends, and communities.

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## **Chapter 1: Introduction**

Previous literature has indicated that wrongful convictions are estimated to occur in about 1 percent to 5 percent of all convictions in the United States (Gould & Leo, 2010; Konvisser, 2012; Smith, Zalman, & Kiger, 2011). Annually, about 10,000 convictions handed down in the U.S. are thought to be wrongful convictions (Smith et al., 2011). Wrongful convictions are generally defined as the conviction of a factually innocent person. Typically, the person is found to be factually innocent by the revelation of DNA evidence or testimony that indicates flaws in the initial conviction. It is important to note that wrongful convictions may also encompass cases in which there were issues concerning culpability and procedural factors (Gould & Leo, 2010; Smith et al., 2011). Regarding culpability, for example, a person may have been known to perform the criminal act, but they are not culpable, or blameworthy, for the act. This is typically the case when the defendant is known to have committed the act due to insanity or any other particular mental state. Regarding procedural factors, for example, the defendant is convicted on the basis of constitutional or legal errors that were not found to be harmless by the court. If it is evident that one of these issues may have been a causal factor in the defendant's conviction, the defendant may later be released of his/her charges, which indicates that he/she was found not to be criminally liable for the said charges. Even if this occurs, whether it is on the basis of factual findings, culpability issues, or procedural issues, the defendant may not always be factually innocent, but he/she may be subject to later repercussions, such as civil liability.

Additionally, although a person may be released from past charges, the charges and repercussions of said charges do not always disappear after the release, as already indicated with the possibility of civil liability. In order for the charges, as well as possible prison time served, to disappear, a defendant must seek exoneration. Exonerations are official declarations of innocence by a governor's pardon, a court's dismissal of charges, acquittals after retrials, and acknowledgements of innocence for those inmates who died in prison (Konvisser, 2012; Smith et al., 2011). While there may be different ways in which an individual may gain an exoneration, each method must be based on evidence of innocence. This is important, in that exonerations do not address culpability or procedural issues. Although exonerating an individual would seem to be the morally right thing to do, especially for those defendants found to be factually innocent, they occur only in a small proportion of wrongful conviction cases (Smith et al., 2011).

Although it is thought that many of the exonerations that have been given in the past few decades have been based on the increase in the use of DNA evidence, it should be noted that fewer than 20 percent of violent crimes involve biological evidence (Gould & Leo, 2010). With this said, previous literature indicates that there are many other traditional sources of error that are likely to be a possible cause of wrongful convictions, which include eyewitness misidentification and change blindness, suggestive lineups, false confessions, perjured testimony, forensic error, tunnel vision by police and prosecutors, prosecutorial misconduct, ineffective assistance of counsel, and the racial history of the United States, specifically in rape cases (Davies & Hine, 2007; Gould & Leo, 2010; Penrod & Cutler, 1995; Smith et al., 2011). All of these reasons greatly affect the possibility of a false conviction for individual cases. According to Shermer, Rose, and Hoffman (2011), data from The

Innocence Project have indicated that an overwhelming majority of wrongful convictions are associated with eyewitness misidentifications; specifically, eyewitness errors were shown to be responsible for more than 75 percent of the DNA exoneration cases this group has handled. It is important to note that the issues surrounding eyewitness error can be compounded by other factors previously mentioned, such as prosecutorial misconduct, suggestive lineup procedures, and change blindness (Wise, Dauphinais, & Safer, 2007).

As it is evident that there are many sources of bias and error that can explain the wrongful conviction phenomenon, it is important that research address the problems that stem from this error. One of the most highly emphasized issues stemming from wrongful convictions is that those who are wrongfully convicted are denied the freedom to take part in actions that many people take for granted (Smith & Hattery, 2011). Examples of activities in which a person who is imprisoned may not be able to participate in can include getting married, having children, getting an education, or starting a professional career. It has also been indicated that these milestones in life are typically missed by those who are exonerated due to the fact that most of these defendants were charged and convicted at an early age, which can be a critical time for many of these stepping stones. It is important to note that not only are those who are wrongfully imprisoned denied certain freedoms, but families and communities are denied fathers, husbands, and sons, as well as an increasing number of mothers, wives, and daughters. The children of these families are those who are thought to suffer the most, as they face the same risk as all children of incarcerated parents suffer, which includes an increased likelihood of incarceration themselves (Smith & Hattery, 2011).

As deprivation of freedoms is a large issue surrounding wrongful conviction, it is even more problematic that there seems to be evidence of racial disparity among those who

are subject to wrongful conviction, which could lead to increased deprivation of freedoms among particular groups. Specifically, Smith and Hattery (2011) found that, of the 250 exonerations in the United States as of 2010, approximately 75 percent are members of minority groups. Additionally, it has been shown that African American men are disproportionately represented in the population of exonerees (Konvisser, 2012; Smith & Hattery, 2011). As previous research has indicated trends of increased incarceration levels of African Americans in general, it is even more problematic that it has also been shown that African American men account for about 70 percent of the current exonerees (Smith & Hattery, 2011). This could suggest that the increased incarceration rate among African Americans could be at least partially due to wrongful conviction. The issue of racial disparity among exonerees is highly problematic, especially as a large percentage of the current inmate population consists of minority groups.

Additionally, it has been shown that those who are wrongfully convicted are subject to the same psychological issues that result from incarceration of the guilty. Konvisser (2012) indicates that the trauma of wrongful conviction is comparable to trauma experienced by war veterans, torture survivors, and those who were imprisoned at concentration camps for long periods of time and then released back into society. While this comparison may seem somewhat extreme, it is important to note that these individuals could become subject to various psychological issues, such as anxiety, depression, or post-traumatic stress disorder. Konvisser (2012) indicates that these issues may arise due to the wrongfully convicted individual being subject to the pains of imprisonment. The “pains of imprisonment” refers to the idea that the inmate must adapt to the deprivations and frustrations of life inside prison. It has been suggested that, as the prison population has been increasing over the past few

decades, the effects of incarceration have increased as well, partly due to the increased peril as a result of overcrowding within the prison system. This process of adapting may also lead the individual to become institutionalized or subject to prisonization. This is important in that the individual can become accustomed to such a lifestyle and have extreme difficulties re-adapting to the outside lifestyle when they are released.

Konvisser (2012) also suggests that these effects are higher for women who are wrongfully convicted and incarcerated than for men. In regards to female incarceration, research has indicated that women face specific problems, including increased histories of substance abuse and mental health issues, greater need for treatment, and female specific health care services, including prenatal care and obstetric care if the inmate is pregnant upon entry. Women may also be more susceptible to sexual vulnerability and/or victimization within some institutions. Additionally, a large number of female inmates have children and families from whom they are separated, which causes much stress and anxiety for the inmate, as well as the inmate's family (Konvisser, 2012). While the overall effects of incarceration on both women and men are detrimental to a successful reintegration into society upon release, it is even more problematic that those who are wrongfully convicted are subject to these same issues.

Aside from the effects on the individuals who have been subject to wrongful conviction, Smith and Hattery (2011) indicate that there is an immense amount of money spent on incarceration of the wrong individuals. Overall, it has been estimated that, as of 2011, about \$87 million has been spent on the 250 exonerates reported nationwide. Aside from the cost of incarceration, it has been estimated that 7 million hours of work have been lost, along with \$42 million in lost wages of those who were factually innocent (Smith &

Hattery, 2011). This issue speaks large volumes about the many issues faced by the criminal justice system as a whole, especially due to the lack of funding and resources the system has become increasingly burdened with, especially the correctional system.

As it is clear that wrongful conviction has an incredible human cost, both physical and monetary, there is also evidence that there is still some doubt circulating about the general phenomenon of wrongful conviction. Specifically, Smith et al. (2011) found discrepancies in the estimated seriousness of specific causal factors linked to wrongful convictions by police, prosecutors, judges, and defense attorneys. While most individuals in these groups have been thought to believe that serious and intentional wrongdoing by forensic experts, police, and prosecutors is substantially less prevalent than negligent or good faith errors, there is a large amount of disagreement on the likelihood of error from each group. Although it has been shown that respondents in each group believe that potential causes of wrongful conviction occur, including within their own professional group, they have been known to disagree about the need for reform. Police, prosecutors, and judges have indicated that they are satisfied with the current procedures in place. On the other hand, nearly all defense attorneys indicate that wrongful conviction occurs frequently enough to warrant some type of reform (Smith et al., 2011).

Lastly, although there may be not be strong support from all participants of the criminal justice system for reform surrounding wrongful conviction, it is still apparent that wrongful conviction is a serious problem. While it is apparent that wrongful conviction is a large issue, it has been indicated that the issue is further complicated by a “dark figure” of wrongful convictions that actually take place (Poveda, 2001). This idea of a “dark figure” of wrongful convictions is used to describe the amount of unreported and undiscovered

wrongful convictions that occur within the criminal justice system. As a whole, it is known that criminal justice agencies do not keep statistics on errors made at the various stages of the criminal justice process, including wrongful convictions at the end of the process. Poveda (2001) proposes that there be two approaches to quantifying the problem, one being the examination of official agency records and the other relying on inmate self-reports of their own criminal record and possible wrongful conviction. Both of these methods lack reliability due to the fact that neither is directly examining wrongful conviction and both could be highly biased reviews. Official agency records have been shown to exclude errors made at each level, especially wrongful convictions. Generally, self-report data in and of itself is thought to be unreliable.

As previous research has pointed to a clear issue surrounding wrongful convictions, it is essential that this issue be further examined to determine the overall history of such cases, as to how often they actually occurs, the types of cases within which they occur, and the actual reasons for such wrongful convictions. Additionally, it is essential to uncover wrongful convictions by examining appeals, through lawsuits, with social movements, and by organizations aimed at addressing the issue, such as The Innocence Project. It is also important to indicate the findings of such appeals and to publicize the case law that has been developed to address wrongful conviction. Lastly, as the issue of wrongful conviction has become more commonly discussed in a general sense, it is important to address possible remedies or tactics that may help prevent the problem.

## **Chapter 2: History of Wrongful Convictions**

### **Occurrence of Wrongful Conviction**

Although wrongful conviction is an increasingly common topic of discussion for those in the criminal justice field and academics, it is difficult to determine how often it actually occurs. According to Zalman, Smith, and Kiger (2008), there is no specific way to measure these miscarriages of justice, but there are two common methods used to estimate the level of occurrence. These methods include enumerating specific cases and having criminal justice experts estimate how often it occurs. The count or catalogue of wrongful convictions typically underestimates its actual occurrence, as it is unlikely to be able to count each and every case, due to the fact that only a small number of wrongfully convicted individuals actually reach the appeal stage.

On the other hand, when using estimates from different experts in the field, there are likely to be significant differences between estimates in their own jurisdiction and the United States as a whole. For example, a sample of judges, prosecutors, police, and defense attorneys estimated that wrongful conviction occurred in about one half of one percent of cases in their own jurisdiction and in about 1 to 3 percent of cases in the United States as a whole (Zalman et al., 2008). This is significant in that this type of data could seem unreliable if these officials are hesitant to accept that the practice happens in their own jurisdiction. Both of these methods have been known to have their individual flaws; the biggest is the subjectivity behind each estimate. Additionally, counts of wrongful conviction by The Innocence Project and other similar agencies may be high due to hopes of raising awareness

of the issue, while estimates from criminal justice experts may be low in order to protect their status quo. It should also be noted that some studies have attempted to gather estimates of wrongful convictions from inmate self-report data (Poveda, 2001). While it is obvious that there could be many issues surrounding the reliability of their reports, it was surprising to find that these reports disprove the idea that inmates are likely to underreport their criminality. Although all of these methods have their flaws, it is clear that there is a serious problem with wrongful conviction. Of all of the issues associated with wrongful conviction, the largest issue is that, if there is no way to precisely estimate how large a problem there is, it is more difficult to advocate for reform. While there have been hundreds of people exonerated for multiple reasons, as shown by the data from The Innocence Project and other organizations, it is clear that some participants in the criminal justice field do not view wrongful conviction as a problem serious enough to warrant reforms (Smith et al., 2011).

### **Catalogue Estimates**

Although each method may seem to be biased, it is important to consider the estimates from each, as there are very limited options available when trying to quantify the occurrence of wrongful convictions. Specifically, The Innocence Project maintains a list of individuals exonerated by DNA evidence in both capital and non-capital cases. As of this year, The Innocence Project indicates that there have been 312 postconviction DNA exonerations in the United States since 1989 (Innocence Project, n.d.). As indicated by Zalman et al. (2008) and Webster (2012), the data from The Innocence Project are not completely conclusive of wrongful conviction estimates due to the fact that only a small number of criminal cases involve DNA evidence. While those that do involve DNA evidence tend to be capital murders or rapes, which are of large importance, this does not

take into account the totality of wrongful convictions that may occur with other types of crime as well.

While using The Innocence Project's data may have some downfalls, it is considered to be one of the leading sources for obtaining a count on wrongful convictions. Two other organizations that provide data on wrongful conviction cases, the Center on Wrongful Convictions and the Death Penalty Information Center, have long been criticized about their subjective and over-inclusive definitions of wrongful conviction (Webster, 2012; Zalman et al., 2008). The Center of Wrongful Convictions, which provides a state-by-state list of exonerations, does not specifically state their basis for inclusion on the lists. The Center on Wrongful Convictions is partnered with Northwestern School of Law to form the National Registry of Exonerations. According to the Center on Wrongful Convictions, as of 2014, there have been 1,283 exonerations, with the most current being January 10, 2014 in Illinois (The Center of Wrongful Convictions, 2014). Although these data seem to be the most recent, Zalman et al. (2008) indicated that the individual state lists are not conclusive; specifically there were 11 exonerations missing from the Florida list as of December 2006.

On the other hand, the Death Penalty Information Center (DPIC), which provides a list of death-sentence exonerations that meet an objective definition of wrongful conviction, has been known to include factually guilty persons and to exclude factually innocent persons (Death Penalty Information Center, n.d.; Zalman et al., 2008). Specifically, the DPIC includes individuals who may have been wrongfully convicted due to case factors, such as procedural issues, who may not necessarily be innocent. Although this may seem to be an issue for some, it can actually be beneficial, as it provides a rough estimate of those placed on death row who were not properly convicted, both due to actual innocence and to

procedural issues. The DPIC lists 117 persons sentenced to death between 1973 and 2004 who were later exonerated (Death Penalty Information Center, n.d.). As there were 7,529 individuals sentenced to death during this time period, this is indicative of a 1.55 percent exoneration rate in capital cases during this time.

This rate provided by the DPIC is similar to that found in outside research, including Poveda (2001) and Zalman et al. (2008), which indicated that the wrongful conviction rate in New York murder cases was about 1.4 percent. Similar research was conducted by Risinger (2007), in which he evaluated the factual rate of error in capital murder and rape cases nationwide in the 1980s. Risinger (2007) found that the overall empirical minimum rate of error for factually wrong convictions was 3.3 percent and the maximum was 5 percent nationwide. Risinger (2007) argues that while the increased use of DNA evidence and the closing window of DNA exonerations is a positive improvement stemming from the innocence movement, there may also be some side effects from this increased use of DNA testing, such as increased confidence of individual convictions and decreased chances of exoneration, for those wrongfully convicted, after the trial is over. This is problematic in that the majority of the wrongful convictions in non-DNA cases, such as murders and other crimes that rely heavily eyewitness testimony and false confessions, are still regarded as strong convictions and are subject to the decreased chance of exoneration (Risinger, 2007; Webster, 2012).

While the estimates by the previously mentioned organizations primarily recognize official exonerations, which include cases in which pardons, court dismissals, acquittals on retrial, and posthumous acknowledgement have been given, research by Gross and colleagues has included some subjective criteria of factual innocence in order to address

cases in which DNA evidence is not involved (Zalman et al., 2008). The research indicated that there were 340 exonerations between 1989 and 2003, but this number was not totally inclusive of all wrongful convictions (Zalman et al., 2008). It has been indicated that much of the data on wrongful convictions excludes mass exonerations, is exclusively limited to murder and rape cases where DNA is involved, does not include data on robbery and burglary cases that are much more numerous and have much less physical evidence, and does not include subjective evaluations, such as those involved in cases in which guilty pleas were given but the person was not guilty of the crime (Webster, 2012; Zalman et al., 2008). According to Webster (2012), if mass exonerations, which are typically due to police misconduct, were included, there could be up to 2,000 wrongful convictions between 1989 and 2012.

Although there have been noted downfalls in data on wrongful conviction, there has been a rise in the average annual number of exonerations. According to Zalman et al. (2008), from 1989 to 1994, there were about 12 per year, which increased to 19 per year from 1995 to 1998, then to 42 per year from 1999 to 2003. Much of the research suggests that the rising number of exonerations per year is due to the increased effort to uncover the error present in capital cases, particularly by way of innocence projects. Additionally, it should be noted that some states have passed the Justice for All Act that advocates for DNA testing for inmates who are claiming innocence (Zalman et al., 2008). These two factors in combination have recently begun to shed much light on the wrongful conviction phenomenon.

### **Estimates from Criminal Justice Officials**

As previously discussed, there have been studies that have requested estimates of wrongful convictions from officials within the criminal justice field. While this method is

wrought with as many issues as the counting method, there are many insights that can be gained from looking at the way different criminal justice actors view wrongful convictions. These officials were asked to estimate the rate at which persons convicted of felonies were later found to be factually innocent (Huff, Rattner, & Sagarin, 1986; Ramsey & Frank, 2007; Zalman et al., 2008). In the study conducted by Huff et al. (1986), which looked at responses from all state attorney generals, as well as Ohio judges, prosecutors, public defenders, and police chiefs on the status and occurrence of wrongful convictions, it was found that 5.6 percent of respondents denied that wrongful conviction existed, 71.8 percent indicated that the phenomenon occurred in less than one percent of all convictions, and lastly, 22.6 percent estimated that it occurred in more than one percent of all criminal convictions. Ramsey and Frank (2007) and Zalman et al. (2008) assessed the opinions of criminal justice officials regarding their estimates of wrongful conviction in felony cases in both their jurisdiction and the United States as a whole, as well as what an acceptable level of wrongful conviction would be. As previously indicated, the respondents in both studies predicted higher rates of wrongful conviction in the United States as whole in comparison to their own jurisdiction. Specifically, most respondents, which consisted of Ohio justice officials, estimated that wrongful conviction occurred in less than one-half percent of cases in their own jurisdiction compared to one to three percent of cases nationwide (Ramsey & Frank, 2007; Smith et al., 2011; Zalman et al., 2008).

In regards to the way in which each group responded to the survey, it was found that prosecutors provided the highest response to the zero percent category, indicating that they were skeptical about the existence of wrongful convictions in general (Zalman et al., 2008). On the other hand, defense attorneys were the least likely to agree with this assertion by

prosecutors and were the most likely to report a higher prevalence of wrongful convictions than any other group. Lastly, judges fell in the middle of prosecutors and defense attorneys by indicating higher rates of wrongful conviction than prosecutors but lower estimates than defense attorneys (Ramsey & Frank, 2007; Smith et al., 2011). It is important to note that these differences in views from each group are likely due to differing working personalities and norms for each occupation.

Although there are clear differences on estimates of how often wrongful convictions occur, Zalman et al. (2008) added that there was a high level of agreement among officials that there is no acceptable level of wrongful conviction. This agreement indicates the importance and increased awareness of the wrongful conviction phenomenon. Lastly, Zalman et al. (2008) indicates that the findings from their study, as well as from Ramsey and Frank (2007), show higher estimates of wrongful conviction than estimates taken two decades prior by Huff et al. (1986). As previously discussed, these increases in estimates of wrongful conviction could be caused by the increasing accessibility to DNA testing for inmates and the creation of multiple innocence projects, which is likely to bring about increased awareness of wrongful conviction by criminal justice officials, as well as the general public. Although there have been notable increases in estimates of wrongful conviction, Smith et al. (2011) note that a majority of police, prosecutors, and judges believe that wrongful convictions do not occur with sufficient frequency to warrant system reforms. This is problematic in that the culture among criminal justice officials is not changing even in light of this relatively new evidence of how large of a problem wrongful conviction actually is.

## **Inmate Self Report Data**

As previously indicated, there seems to be no way of concretely knowing how many wrongful convictions actually occur in the United States, which leads some researchers to consider the reliability of inmate self-reports of wrongful conviction. According to Poveda (2001), the RAND survey conducted in 1978 and 1979 in California, Michigan, and Texas, found that convicted male offenders were likely to report rates of conviction in line with official records. For instance, in California and Texas, the respondents reported six percent more convictions than official records, while in Michigan, they underreported by six percent. This similarity between inmate reports and official records is important when trying to prove the reliability of inmate self-report measures.

In regards to the inmate self-report of wrongful conviction, 197 of the 1,282 prison inmates questioned claimed that they had not committed the crime for which they had been convicted and imprisoned (Poveda, 2001). This equates to a 15.4 percent wrongful conviction rate. The finding did not vary widely by state, with 14.1 percent of Michigan prisoners denying having committed any crime, 14.6 percent in California, and 16.7 percent in Texas. According to Poveda (2001), the wide difference in the rate of wrongful conviction reported by inmates and those reported by court-ordered discharges could be due to inmate perceptions of their criminal conduct. For instance, research has suggested that post-event information could reshape or influence the inmates' memory of their criminal conduct, as well as their subsequent criminal conviction. Additionally, inmates' perception of their criminal conduct could vary from the legal definition of their crime. For instance, some inmates may not fully understand the legal definition of their crime or may even lessen the seriousness of their offense and argue that it does not meet the standards for that crime.

(Poveda, 2001). Although inmate estimates of wrongful conviction vary greatly from court records of wrongful conviction, it is important to consider such estimates as they can serve as an upper boundary of opinion about wrongful convictions (Poveda, 2001; Zalman et al., 2008).

### **Associated Types of Crimes**

While it is clear that wrongful conviction does occur, and possibly at alarming rates, it is important to discern what types of crimes are more likely to be subject to error.

Although The Innocence Project reports on convictions that have been overturned due to DNA evidence, research has indicated that DNA evidence only applies to a small number of criminal cases (Balko, 2011; Webster, 2012; Zalman et al., 2008). With this said, most of the current data has only addressed cases that involve DNA evidence, such as rape and murder (Risinger, 2007; Zalman et al., 2008). As previously discussed, Risinger (2007) indicated that the wrongful conviction rate for capital rape-murder cases from 1982 to 1989 was anywhere from 3.3 to 5 percent. Zalman et al. (2008) also states that wrongful conviction rates may be higher in capital than non-capital cases, which typically include murder and rape. According to Konvisser (2012), the false conviction rate for death penalty cases ranged from 2.3 to 5 percent from 1973 to 1989. While Risinger (2007) indicates that DNA evidence has aided in the reduction of many problems in stranger rape cases, there has also been much research that indicates that there are many other issues that can be compounded to produce a wrongful conviction, even in capital cases where DNA evidence is present, such as eyewitness evidence and false confessions.

In addition, Webster (2012) asserts that, while a majority of the registry cases involve violent crimes such as murder, rape, and sexual assault, exonerations for nonviolent crimes

are now better represented than ever. According to Zalman et al. (2008) other types of cases in which wrongful conviction may occur can include robbery and forgery. Roberts (2003) adds that the War on Drugs and other policies that focus on common law and street crime have led to increasingly crowded court dockets and a serious problem surrounding the practice of plea bargaining. This is important in that it suggests that wrongful conviction may also be occurring in less serious street crimes, such as non-violent drug offenses, by way of the increased use of plea bargaining. Roberts (2003) suggests that the practice of plea bargaining creates fictional crimes in the place of real ones. In this case, defendants may falsely confess to a crime in hopes of ending their case quickly and/or to avoid serious punishment. While there is not much evidence to indicate directly the other types of crimes in which wrongful conviction occurs, besides capital rape and murder cases, due to the lack of DNA evidence in many criminal cases, it has been suggested that the wrongful conviction rate is probably just as high, if not higher, for other types of crimes as it is for capital cases (Risinger, 2007; Roberts, 2003). This could potentially be the case, as Keene et al. (2012) suggest that false confessions, which are a leading cause of wrongful conviction, can occur for every type of crime.

### **Causes of Wrongful Conviction**

As previously discussed, wrongful conviction can have many causes, the most commonly cited being mistaken eyewitness identification (Clark, 2011; Orenstein, 2011; Webster, 2012). Other common errors include police misconduct, including faulty lineup procedures; false confessions; perjured or false testimony by witnesses, informants, and police; forensic error; prosecutorial misconduct; inadequate assistance of counsel for the defendant; racial disparity; and even issues within the criminal justice system, which include

overburdened caseloads and budget issues (Balko, 2011; Davies & Hine, 2007; Gould & Leo, 2010; Penrod & Cutler, 1995; Smith et al., 2011; Zalman et al., 2008).

### **Eyewitness Evidence**

According to Gould and Leo (2010) and Shermer et al. (2011), data from The Innocence Project has indicated that mistaken eyewitness identifications account for over three-quarters of wrongful convictions. Additional research suggests that, of the first 225 wrongful convictions documented by The Innocence Project, approximately 77 percent were due to mistaken eyewitness identification (Balko, 2011; Clark, 2011). With this said, it is clear that faulty eyewitness evidence is one of the primary causes of wrongful convictions in the United States (Clark, 2011; Orenstein, 2011; Webster, 2012).

As it is clear that eyewitness evidence is a large issue when discussing the factors of wrongful conviction, it important to note that there are many potential issues with eyewitness identification. Specifically, there are issues that may happen due to circumstances relating to the witness, such as memory and change blindness issues, as well as issues that stem from the prosecutors and police involved in the investigation, such as suggestive lineup procedures (Balko, 2011; Shermer et al., 2011; Vallas, 2011; Wise et al., 2007). Clark (2011) groups these factors into non-system variables, which include the limitation of witness memory, and system variables, which include the procedures used by police.

First, in regards to the memory of the witness, a general rule of thumb is that the longer the time period between acquisition, retention, and retrieval, the more difficulty individuals have retrieving a memory (Clark, 2011; Shermer et al., 2011). This is important in regards to eyewitness identification, as it can take days or weeks for the initial identification to take place during the investigation. Additionally, as trials in the United

States typically do not take place until at least 90 to 120 days have passed, it can be months before the witness is asked to testify at the trial (Shermer et al., 2011). These delays can allow for significant decay in memory and even confusion and replacement of memories. In this same regard, the increased length of time can cause the witness to become subject to misinformation and source monitoring errors (Wise, Fishman, & Safer, 2010). Specifically, since the eyewitness is likely to have a substantial amount of time to reconstruct his/her memory of the incident, he/she may receive additional information from other sources, such as other eyewitnesses, the police, the prosecutor, and the media. These sources could change his/her own memory of the crime and potentially alter or impair his/her ability to identify the perpetrator and explain the incident. In this same manner, the witness may become confused as to where he/she learned information or where he/she saw an individual and either incorporate this into the identification or change the story. This can be highly problematic as there have been situations where an individual could mistakenly identify a bystander to the crime or an individual they had seen in another situation as the perpetrator (Wise et al., 2010). Lastly, this addition of information after the fact has also been shown to lead to hindsight bias, in which the individual's memory can be altered by specific case-related factors, such as the indictment of a particular suspect. The witness may change his/her opinion of guilt about the suspect or even what he/she was thinking about when the crime occurred (Wise et al., 2010).

These issues with poor memory recall can be further compounded by stress, age, gender, stereotype expectancies, and personality factors the witness may have (Clark, 2011; Gould & Leo, 2010; Shermer et al., 2011; Vallas, 2011; Wise et al., 2010). Specifically, stressful situations can impair the perception of an event, especially if the witness has

observed a violent event. Research has suggested that the negative effects of stress on perception and memory recall can be highly increased in situations involving a weapon due to the fact that the witness will likely spend more time focusing on the weapon than other aspects of the event (Shermer et al., 2011; Vallas, 2011). In regards to personality factors of the witness, Wise et al. (2010) indicate that, when the witness reconstructs his/her memory of the crime, it is based on the eyewitness's expectations, attitude, beliefs, and knowledge of similar events. For instance, if the individual has certain stereotypes, he/she may be more likely to have difficulties when participating in cross-racial and cross-ethnic identifications. Shermer et al. (2011) indicated that this can pose an issue, especially when Caucasian eyewitnesses identify an African American suspect. While this eyewitness bias can be thought to cause the eyewitness to generalize or miss evidence, it can also cause them to focus only on specific factors, such as those that relate the most to their own life. Wise et al. (2010) provides the example of a hair stylist who may be more inclined to notice a specific hairstyle of the perpetrator, which is likely because he/she is used to paying more attention to this characteristic.

In addition to the stressors and factors that can affect a witness's memory of the situation, some research has suggested that these difficulties can be explained by a phenomenon termed change blindness (Davies & Hine, 2007). Change blindness refers to the difficulties observers face in detecting major changes in their perceptual environment. Davis and Hines (2007) indicate that, in most studies, only about one third of participants are able to notice differences in physical appearance, both when viewing media clips as well as in real-life situations. It has been found that, of those participants who are able to notice these changes, they are also more likely to be able to identify the correct people in the

experiment when given a line-up of potential individuals. Additionally, this phenomenon can be found within face processing tasks, in which participants were instructed to match a picture with the face of the individual they viewed in a video or met in person. Previous literature suggests that change blindness can be induced by social and cultural factors. For example, individuals are more likely to recognize someone more similar to themselves, especially in face processing tasks. Davies and Hines (2007) focused on change blindness by instructing participants to watch a two minute video presenting a burglary in progress, which included two different suspects. The second individual was introduced following a change in camera angle halfway through the clip. Only about 39% of individuals reported the change in suspects during the video. When the individual was instructed to pay close attention, more women than men detected the change. This goes along with the research by Shermer et al. (2011), which indicated that gender of the witness had an effect on the memory of the incident. Participants who detected the change also had a higher recall of events from the video and were more likely to be able to detect both suspects in a lineup. The change blindness found by Davies and Hines (2007) is a demonstration of the rather poor accuracy that can be exhibited by eyewitnesses. It is important to note that particular features of the incident can exacerbate change blindness, such as familiarity of the target person, exposure time, and race of the target person (Davies & Hines, 2007). Although change blindness is not widely discussed, it points to the great amount of unreliability within eyewitness evidence and how the issues with general memory limitations can be further compounded by situational factors such as quick changes in a fast moving and stressful situation.

Although it is clear that there are many biases and factors that can affect the witness's memory, Clark (2011) found that limitations of memory do not cause innocent people to be

misidentified. Specifically, although limitations in memory do undermine the evidence, when the witness's memory is less accurate or complete, it is only more likely that an identified suspect is in fact innocent. Clark (2011) found that the risk of false identification was .08 for better memory conditions and .085 for poorer memory conditions. This research can suggest that there may not be much difference in the probability of identifying the wrong suspect, regardless of favorable or unfavorable memory conditions (Clark, 2011). Overall, this is problematic, as it is almost as likely that someone with good memory conditions could identify the wrong suspect as someone with poor conditions.

While it is clear that memory limitations and other non-system variables can negatively affect the identification of the suspect and the recall of events, this issue can be compounded by issues relating to system variables, or the procedures by which police conduct the lineup or showup, as well as the investigation (Clark, 2011). Some of the major decisions on the part of the police in regards to eyewitness evidence include the decision of whether to conduct a lineup or showup, the decisions involved in the construction of the lineup, the decision of how to instruct the witness and how to present the lineup to the witness, as well as the decision about what the police officers and detectives say to the witnesses during the identification procedures. As previously mentioned, the witnesses can be highly influenced by outside information, especially information from police officers, as they are more likely to provide information on the target suspect in the case.

It is important to note the difference between a lineup and a showup, as these two methods may have some influence on the identification process. First, a showup is usually the quickest way in which police can ask the witness for an identification (Clark, 2011). The showup consists only of the suspect and contains no fillers or other individuals who resemble

the characteristics described by the witnesses. On the other hand, a lineup may take longer to arrange and consists of more steps, as the selection of fillers is not always simple. The fillers selected for a lineup must resemble the characteristics of the described perpetrator without specifically drawing the witness to the suspect based on non-case specific factors. The initial decision between a showup and a lineup is important as the showup consists of a one-on-one identification, whereas the lineup requires the witness to pick the suspect out a line of similar individuals. Showups are often used when the police find a suspect very soon after the commission of the crime. Although psychological research on eyewitness lineup methods is somewhat inclusive and highly debated, Clark (2011) indicates that there is a slight advantage for showups that are conducted immediately versus a lineup conducted one to three days later. This is likely due to the fact that the witness's memory typically weakens and he/she may become subject to additional and/or outside confusing information as time passes.

The issues surrounding the procedures put in place extend far beyond the decision of a showup or a lineup; the police must also choose the fillers to put in the lineup, if it is the selected method of identification and the way in which to conduct the lineup. The police must choose between a sequential lineup, in which each individual is presented one after another, or a simultaneous lineup in which all of the individuals are presented at the same time. Clark (2011) and Gould and Leo (2010) indicate that most police officers and departments prefer sequential lineups so that the witnesses cannot make comparisons between lineup members and make relative judgments. Additionally, in order to make sure comparative judgments are not made and there is not a direct indication of who the suspect is, it is important to make sure the correct fillers are chosen. According to Clark (2011),

meeting the standards for lineup, which include having similar fillers in order to make sure the suspect does not stand out, comes with a tradeoff. Specifically, increasing the similarity of the fillers does reduce the false identification rate, as hoped, but it also reduces the correct identification rate. Overall, it has been found that sequential lineups reduce the risk of false identification, but they also reduce the rate of correct identification (Clark, 2011). With this said, it has been shown that the most commonly advocated method is the sequential lineup procedure, due to the fact that there is not a direct suggestion of the suspect, and there is a decrease in the risk of false identification, although some departments may still use outdated simultaneous lineup procedures.

It is important that police abstain from providing biased instructions during the lineup procedure in order to refrain from appearing and actually being suggestive to the witness. As has already been indicated, since witnesses can be significantly influenced by outside information, it is important that the police do not provide any information that directly implicates the suspect in the case. Clark (2011) indicates that, if the police convey their expectations, the witness may conform to this to aid the investigation or to match the story with the police, but this can be a large problem for wrongful convictions, as it is known that the police do not always have the right person. This matching of the story is also likely to provide the witness with increased confidence in his/her identification, as well as in the testimony given at the trial (Clark, 2011; Gould & Leo, 2010). According to Clark (2011) and Shermer et al. (2011) eyewitness confidence has been shown to account for nearly 50 percent of the jurors' decisions of whether or not to believe the witness. This can be highly problematic, as the witness could exhibit false confidence if he/she has been subject to

suggestions and outside information from either police or prosecutors during the course of the investigation (Clark, 2011; Gould & Leo, 2010; Shermer et al., 2011).

As it is obvious that there is a culmination of factors that affect and hinder eyewitness identification, it is surprising that eyewitness identifications remain among the most commonly used and compelling evidence against criminal defendants (Shermer et al. 2011). This is extremely problematic, as eyewitness identifications are subject to the highest rate of human error when compared to other factors of wrongful conviction, due to the participation of many different parties in the process. The faulty eyewitness identification can be further compounded by other case issues, especially those that do not allow for the discovery of the true suspect, such as police and prosecutorial misconduct and forensic error in cases involving DNA.

### **Police Misconduct**

As previously discussed, police can be involved in wrongful conviction in many ways. It is important that police not only make the right decisions during the investigation of the case in regards to how to conduct lineup and eyewitness procedures but also maintain a clear, objective perspective throughout the case. Police misconduct can directly lead to wrongful conviction if they engage in suggestive practices or become subject to the tunnel vision phenomenon (Gould & Leo, 2010; Leo & Davis, 2010). Tunnel vision occurs when law enforcement officers become so convinced of a conclusion that they are less likely to consider alternative information and scenarios that conflict with their conclusion. This can be problematic, as the officer can focus on a suspect and filter the evidence that builds a case for conviction, while ignoring or suppressing the evidence that points away from guilt. According to Leo and Davis (2010), this idea of focusing on evidence to support their

conclusion is thought of as a confirmation bias. This confirmation bias is reinforced by the officer behaving in such a way that causes his/her expectations to be fulfilled, which is termed “self-fulfilling expectations” (Leo & Davis, 2010). Additionally, these practices can place the officer at risk for focusing on the wrong suspect without being aware of the bias or even ignoring it (Gould & Leo, 2010). Tunnel vision can also lead the officer to make suggestive comments or even reinforce eyewitness testimony in order to make sure the eyewitness evidence fulfills their own expectations (Leo & Davis, 2010).

While tunnel vision and suggestive lineup procedures can go hand in hand, it should be noted that the phenomenon can take place at any other stage in the criminal justice process. For instance, the police officer may be so set on prosecuting and convicting one suspect that he/she will ignore specific forensic evidence in light of evidence that confirms and supports his/her theory of the case. This practice of overlooking key pieces of evidence or failing to turn over potentially exculpatory evidence to the prosecution is thought to have been a large cause of wrongful conviction (Gould & Leo, 2010; Leo & Davis, 2010). Specifically, with the abundance of defendants who have been exonerated by way of DNA evidence, it is clear that the police either heavily relied on eyewitness evidence or even used suggestive procedures in order to gain a conviction. These suggestive procedures can include the lineup procedures, as well as aggressive methods of interrogation in which the police engage in the coaching and forcing of confessions. The practice of adding undue pressure during interrogation has been shown to be a leading cause of false confessions, which are substantially common in wrongful conviction cases (Gould & Leo, 2010; Keene et al., 2012; Leo & Davis, 2010; Orenstein, 2011). While this is not always the case for those wrongfully convicted, some research indicates that police are engaging in misconduct by focusing on one

suspect and ignoring or overlooking evidence that could have prevented a false conviction in the first place (Gould & Leo, 2010; Leo & Davis, 2010).

One of the main problems with police misconduct is that it is not considered to be important or a large problem within the system. According to the Smith et al. (2011) study, which looked at estimates from police, prosecutors, judges, and defense attorneys on the occurrence of the main types of error within the system, when criminal justice officials have been asked to estimate the frequency of police error, police and prosecutors gave the lowest estimate for using incorrect evidence. Judges gave higher estimates, indicating that it almost never happened or that it was infrequent. On the other hand, defense attorneys indicated that it was somewhere between infrequent and moderately frequent. These same findings were found for predictions of the police suppressing exculpatory evidence. Even more surprising was that the estimates for coaching witnesses and police using pressure to obtain a confession were much higher than other categories. Specifically, police and prosecutors estimated that such misconduct is less than but closer to infrequent. Defense attorneys indicated that witness coaching happened more than moderately frequently and pressure during interrogation was very frequent. On the other hand, judges fell in the middle of the spectrum, indicating that these two forms of misconduct occurred infrequently and moderately frequently.

Smith et al. (2011) also examined police error by way of inadequate investigation, which implies negligence rather than misconduct, and found that police made higher estimates of this type of error than any other form of deliberate misconduct. On the other hand, the estimates of prosecutors, defense attorneys, and judges were actually lower for this type of error than for police using excessive pressure in order to obtain a confession.

Although it is clear that there are substantial differences in the estimates of police error when considering the opinions of police, prosecutors, defense attorneys, and judges, which is also seen with general estimates of wrongful conviction, this is still evidence that there are overarching problems with how the police conduct themselves and their work during criminal investigations (Smith et al., 2011). These issues, which include falsifying evidence, failing to provide exculpatory evidence, coaching witnesses, pressuring suspects to obtain a confession, and inadequate investigation can all stem from and be compounded by the issue of tunnel vision, which has been shown to lead to wrongful convictions in a variety of ways (Gould & Leo, 2010; Leo & Davis, 2010; Smith et al., 2011). Alone, these errors on behalf of the police may not stand to do much harm, but when combined with incorrect eyewitness evidence, prosecutorial misconduct, false confessions, and many of the other culprits of wrongful conviction, there is a culminating effect that serves to increase the chance of the error.

### **False Confessions**

According to Keene et al. (2012), false confessions occur for every type of crime and can occur for a variety of reasons. Additionally, Balko (2011) indicated that false confessions happened in about one-quarter of the first 225 DNA exonerations. Keene et al. (2012) also indicates that about 65 percent of suspects in custody either fully or partially confess. It is important to note that false confessions are more common among suspects who are minors or who are mentally disabled but can also happen as a result of intensive or abusive police interrogations (Balko, 2011; Keene et al., 2012). Those more likely to falsely confess are generally young, intellectually impaired, low in self-confidence, naïve, mentally ill, dependent or anxious, always wishing to please others, angry, extroverted, or on some

type of psychiatric medication (Gould & Leo, 2010; Keene et al., 2012; Leo & Davis, 2010; Orenstein, 2011). Additionally, it is important to note that, of the juveniles who falsely confess, 85 percent are African American, which is much greater than the 53 to 73 percent of African American adults who falsely confess (Keene et al., 2012). Much research suggest that this overrepresentation of African Americans who falsely confess is due to the negative stereotypes placed on them and their individual attempts to overcome these stereotypes (Keene et al., 2012).

There are three common reasons that one would falsely confess, which include voluntary confessions, internalized false confessions, and compliant false confessions (Keene et al., 2012). First, a voluntary confession is either made to protect someone else, made because the person incorrectly thinks they committed the crime, or made because they are trying to attract attention to themselves. Second, internalized false confessions occur when the interrogation itself persuades the person to think that he/she did something that he/she did not actually do. This is typically the case when the suspect is a juvenile, mentally disabled, or is experiencing a great amount of grief or sleep-deprivation while under the pressure of the interrogators. This type of confession has been known to lead directly to wrongful convictions. Lastly, compliant false confessions are the largest category of false confessions, which occur when the person mentally and physically breaks down and confesses in order to escape the interrogation process (Keene et al., 2012). This process of breaking down the suspect is called the “wearing down process” (Keene et al., 2012; Leo & Davis, 2010). As previously discussed, this process is considered to be the result of undue pressure upon the suspect by the police. Typically, the police try to convince the suspect that he/she will be seen as a better person, will be less likely to suffer harsh legal outcomes, or that, if he/she

assigns blame to his/her co-perpetrator, he/she will avoid harsh punishment. During this process, the detainee may also be kept for hours without food, drink, and sleep, which can lead to poor decision-making, cognitive decline, and over-reactivity to stress. This wearing down process is likely to lead the suspect to become vulnerable, subsequently causing him/her to make short-sighted decisions, such as confessing in effort to quickly get out of the situation (Keene et al., 2012). Detainees who typically engage in these behaviors may assume that, if they confess, they will still be proven to be innocent in the long run by the other evidence in the case. This is problematic due to the fact that the detainees who are most likely to do this are innocent. Furthermore, as previously discussed, if the police become subject to tunnel vision or confirmation bias, they are less likely to pay attention to exculpatory evidence that would conflict with their theory of the case (Leo & Davis, 2010).

Aside from the three ways in which a false confession can occur, Keene et al. (2012) indicates that there are three common errors that the police may commit that are likely to lead to a false confession. These include misclassification errors, coercion errors, and the supplying of key details of the case (Gould & Leo, 2010; Keene et al., 2012; Leo & Davis, 2010). First, if the investigator enters the interrogation believing the suspect is guilty, the investigator will seek to confirm this bias, thus leading to coercion errors and the providing of key details. Coercion can range from implying guilt to direct threats in order to convince the suspect to confess (Gould & Leo, 2010). Additionally, the interrogator can knowingly or unknowingly provide the suspect with non-public details of the crime, which the suspect can then incorporate into a false confession (Gould & Leo, 2010; Keene et al., 2012; Leo & Davis, 2010). When the suspect incorporates these details, it is more likely it will strengthen the confession and it will be less likely that the confession will be disproved or even given a

second glance (Keene et al., 2012). Additionally, these deceptive strategies can be supplemented with false evidence or even lies from the police in order to coerce or convince the detainee that he/she committed the crime (Orenstein, 2011).

While most of those who falsely confess assume that their confession will be disproven by other evidence, and it will be obvious that they falsely confessed, it is actually quite difficult to distinguish between false and true confessions. Research shows that humans are very poor at detecting any type of deception. Specifically, only about 54 percent of people are able to tell the truth from lies when not using specialized techniques (Keene et al., 2012). While it is problematic that it is difficult for the police to detect false confessions, it is even more troubling that jurors and the courts have the same difficulty at trial. Much of this stems from the stereotype that “if you confess, you must have done it.” Additionally, the supporting non-public details and inside information contained in the confession strengthen the idea that the suspect was associated with the crime. The largest problem is that the system is not self-correcting, meaning that law enforcement and other departments will likely not identify the error because they tend to support the pre-existing errors rather than reviewing evidence individually and coming to their own conclusions (Keene et al., 2012). This is challenging because a false confession can lead directly to wrongful conviction if exculpatory evidence is not considered after a confession, whether it is ignored by police or prosecutors (Leo & Davis, 2010). Leo and Davis (2010) found that false confessions are highly likely to lead to wrongful convictions if introduced against the defendant at trial. Specifically, anywhere from 73 to 81 percent of false confessors were erroneously convicted at trial. It is important to note that false confessors are more likely to plead guilty than those who do not confess, thus voiding their chance for appeal and making it difficult to obtain a

postconviction review of their case. Leo and Davis (2010) note that around 78 to 85 percent of false confessors plead guilty rather than taking their case to trial. This is a large issue in regards to wrongful convictions, as these individuals are likely to be those who are not accounted for because they are not granted a case review and have no way of refuting their conviction. One of the most commonly suggested solutions to preventing false confessions is to require the recording of interrogations in order to curb police misconduct and to ensure suspects are not being pressured or coerced (Gould & Leo, 2010; Keene et al., 2012). This also would aid suspects in their defense if they later recant their confession.

### **Forensic Error**

While DNA testing has been responsible for the exoneration of hundreds of people, it has also uncovered the issues with other forensic methods previously used. Some of these methods, such as fingerprinting and hair comparison analysis, are still used today (Gould & Leo, 2010). Recent evidence has come to light about both of these practices that indicates that they should no longer be admissible as evidence in a criminal trial. First, fingerprint analysis has not been found to be valid or backed by any scientific evidence (Gould & Leo, 2010). Secondly, hair comparison analysis has been shown to be the weakest of all forensic laboratory techniques used, with error rates as high as 67 percent on individual samples. Additionally, it has been found that most laboratories that do utilize this type of testing reach incorrect results four out of five times (Gould & Leo, 2010). Additional problems have been shown in regards to carpet fiber analysis, blood spatter analysis, shoe print identification, and bite mark analysis (Balko, 2011). While some courts have ruled these types of evidence as inadmissible, it is problematic that they are still commonly analyzed pieces of evidence across the United States. Even if the evidence is deemed inadmissible in court, the evidence

can be used to investigate the case and support any leads or “hunches” that are present by investigators (Leo & Davis, 2010). The uncertainty of this evidence should exclude it from any investigation, as it can lead the investigators in the wrong direction and may further any type of tunnel vision problem that is already present. As previously mentioned, the culmination of these factors can lead to a wrongful conviction.

It should be noted that, while DNA evidence has been praised for its ability to exonerate and free many who have been wrongfully convicted, it is not without its own set of problems. First, there is always a small probability that the results will be inaccurate (Gould & Leo, 2010). More importantly, as mentioned previously, DNA evidence is only present in a small amount of criminal cases, with estimates suggesting that fewer than 20 percent of violent crimes involve biological evidence. With this said, law enforcement must rely on other evidence, including the previously mentioned forensic methods that carry much greater risks of inaccuracy (Gould & Leo, 2010).

Aside from the types of evidence used in criminal cases and their reliability, there is still the chance that the laboratory that is examining the forensic evidence is engaging in improper practices and providing incorrect forensic testimony. According to Gould & Leo (2010), the National Research Council concluded in 2009 that the forensic science system in the United States is fragmented and has an uneven quality of practice, which poses a threat to the quality and credibility of forensic science and its service to the criminal justice system. This idea of poor quality of forensic testing is also supported by Balko (2011), who states that much of forensic evidence that is used in the courtroom is either invented in police stations and crime labs or is refined only for the purpose of fighting crime and obtaining convictions. Most of the forensic evidence used for criminal convictions is not peer-

reviewed, is not subject to blind testing, and is susceptible to corrupting bias, whether it is intentional or unintentional. This is problematic due to the fact that The Innocence Project indicated that about half of the first 225 DNA exonerations were due to flawed or fraudulent evidence (Balko, 2011). The even larger issue behind faulty forensic evidence is that most police, prosecutors, and judges regard faulty forensic evidence and testimony as never or infrequently occurring (Smith et al., 2011). While defense attorneys tend to be more skeptical of forensic evidence, especially in regards to good faith and unintentional errors, it still may be a hard burden to overcome if the prosecution has compelling forensic evidence, which has been incorrectly assumed to be the most reliable evidence by the general public and jurors (Smith et al., 2011).

### **Prosecutorial Misconduct**

While most individuals consider misconduct occurring at the beginning of the investigation, there has also been evidence of misconduct in preparation and during the trial by the prosecutor. Prosecutorial misconduct was found in about one-quarter of the first 225 DNA exonerations in the United States (Balko, 2011). Prosecutors may engage in overly suggestive witness coaching alongside the investigators. Additionally, during preparation for the witness's testimony, they may offer inappropriate or suggestive closing arguments, or even fail to disclose critical evidence to the defense (Gould & Leo, 2010). According to Gould and Leo (2010), the most common transgression on the part of the prosecution is the failure to turn over exculpatory evidence to the defense. Exculpatory evidence can include any evidence, such as physical evidence, witness testimony, etc., that could be used to find the defendant not guilty of the crime. In some cases, the prosecutors may not get this information from the police, but the misconduct may also be intentional in some situations.

The same situation can be found with many of the other forms of misconduct that prosecutors may participate in, especially witness tampering or allowing witnesses to perjure themselves during their testimony.

While the prosecutors are typically responsible for preparing witnesses for trial, it is not surprising that they could engage in overly suggestive witness coaching and other forms of witness tampering. This type of behavior is associated with tunnel vision, which, as earlier indicated, can be described as when individuals become so convinced of a conclusion that they are less likely to consider alternative information and scenarios that conflict with their conclusion (Leo & Davis, 2010). This can be detrimental, as it may lead prosecutors to ignore or fail to turn over exculpatory evidence, which could include conflicts in witness testimony, in addition to DNA and other evidence previously mentioned (Leo & Davis, 2010). According to Balko (2011), prosecutors are known not only to utilize incorrect informants as key witnesses during trial, but also jailhouse informants. The problem with the use of jailhouse informants is that their motivation is to help the prosecutor obtain a conviction in order to have their own sentence reduced or even dismissed. This is highly problematic because the true motivation behind the evidence is driven by making a deal, not justice. In this case, a prosecutor who has the jailhouse informant at his/her disposal may be willing to have him/her lie on the stand or even tell the story that only conforms with his/her own, in order for them to guarantee the informant a sentence reduction or some other deal. This type of behavior is called witness tampering, which may take place in effort to secure a deal with the witness or even as a motivation to ensure a conviction (Balko, 2011). It is apparent that witness tampering and perjury could lead directly to wrongful conviction, as it may be hard for the defense to find evidence to contradict the testimony, especially if

physical evidence is not present or any type of exculpatory evidence has not been turned over to the defense. According to Balko (2011), the Center on Wrongful Convictions in Chicago indicated that false or misleading informant testimony was responsible for 38 wrongful convictions as of 2005.

Many of the problems that result from prosecutorial misconduct have been suggested to stem from the institutional culture of the job itself (Balko, 2011; Orenstein, 2011; Roberts, 2003). According to Roberts (2003), prosecutors may feel motivated to coerce plea bargains or even withhold evidence in order to meet the demands of their career. For instance, it is well known that prosecutors have long been subject to increasing caseloads and the pressures of the poorly funded and resourced criminal justice system. As such, they must find ways to take short cuts and quickly dispose of cases before they make it to trial. This increased pressure can be challenging, as it could drive prosecutors to cut corners and impede justice. Additionally, the pressure to meet a specific standard and hold a specific reputation can lead prosecutors to do anything in their power to increase their conviction rate. Roberts (2003) indicates that a prosecutor today who tries to give defendants the benefit of the doubt or tries to be fair is regarded as a failure. These internal pressures are likely to be reinforced daily, due to the fact that prosecutors are not likely to face any repercussions from these actions. Prosecutors may also feel as if they can get away with these types of misconduct, which include witness tampering, suggestive or inappropriate closing arguments, and failure to turn over exculpatory evidence. Prosecutors have long been able to experience an enormous degree of immunity from prosecution and/or civil lawsuits, even when these improper actions are exposed (Orenstein, 2011; Roberts, 2003).

It is important to indicate that, even after the misconduct has taken place, the lack of accountability and the importance of a “tough on crime” reputation has been thought to further impede the issue of overturning wrongful convictions. According to Orenstein (2011), there has been an issue with prosecutors not being willing to test DNA after the conviction. This can prevent those who have been wrongfully convicted from seeking justice. Additionally, there are many other hurdles these defendants face in regard to the prosecutor’s office and the courts, which include the exclusion of postconviction review for those who have pleaded guilty, failure to have sufficient protocols for preserving DNA evidence, lack of a sufficient appeals process, exclusion from postconviction DNA testing if the defendant has already served the sentence, and a failure to require speedy responses to requests for testing (Orenstein, 2011). While some of these issues have been mitigated by way of the Innocence Protection Act of 2004, which has been enacted in 48 states and requires rules and procedures to be put in place for inmates who are applying for DNA testing, creates a grant program to help states pay for postconviction DNA testing, and provides grants to states to help improve capital prosecution and capital defense quality, it has been widely agreed that there are still many problems with prosecutorial misconduct (Death Penalty Information Center, n.d.).

According to Smith et al. (2011), criminal justice actors, who include police, prosecutors, judges, and defense attorneys, estimated false testimony to occur almost never or to be slightly above infrequent, with defense attorneys estimating the occurrence significantly higher than prosecutors, police officers, and judges. On the other hand, it was estimated that the suppression of evidence occurred almost never to moderately frequently. Once again, police and prosecutors estimated this occurring the least, while judges fell about

halfway, and defense attorneys estimated the highest occurrence of the issue. The estimates of prosecutors prompting or being suggestive to a witness were significantly higher than the other issues examined. Regarding inadequate investigation, the results are similar to the estimates of suppression of evidence, ranging from slightly higher than infrequent to higher than moderately frequently. Lastly, in regards to estimates of undue pressure in plea bargaining, there was a disagreement seen between police and prosecutors, with prosecutors estimating the occurrence below infrequently, judges and police estimating it to happen between infrequently to moderately frequently, and defense attorneys indicating that it was between moderately frequently and very frequently (Smith et al., 2011). It is troublesome that, even with the increased use of plea bargaining in the system and the apparent awareness of the increased pressure placed on these defendants, there has not been anything done to protect those who become subdued to the pressure. As previously mentioned, those who plead guilty are unlikely to be able to appeal their case or even request a postconviction review of their case, which can further exacerbate the problem of identifying wrongful conviction.

### **Ineffective Assistance of Counsel**

As many assume that it is the responsibility of the defense attorney to protect the defendant from the mistakes of others, research has found that ineffective defense lawyering was the biggest contributing factor to the wrongful conviction or death sentence of criminal defendants in the last twenty-three years (Gould & Leo, 2010). Some of the reasons that have been indicated to be predictors of defense attorney error include not adequately challenging witnesses, unwarranted plea bargaining concessions, failing to file the proper motions, not adequately challenging forensic evidence, and inadequate investigation (Smith

et al., 2011). It is clear that, if the defense attorney does not challenge the witness, evidence, the plea offer, or even the investigation that the police conducted, the defendant may not be able to avoid the errors or even misconduct that took place during the early stages of his/her case by the police, prosecutors, investigators, witnesses, or even lab technicians who examined the physical evidence. These errors can be compounded by issues out of the control of the defense attorney, such as the prosecutor failing to overturn exculpatory evidence (Leo & Davis, 2010). The defense attorney is not likely to be aware of this issue until the trial has already begun or even after a conviction has been put in place. According to Gould and Leo (2010), the reasons behind inadequate assistance of counsel stem from inadequate funding, an absence of quality control, and a lack of motivation. It is important to note that these issues may be further exacerbated for indigent defendants who are represented by court appointed counsel or public defenders (Hartley, Miller, & Spohn, 2010; Williams, 2013).

While it is clear that defense attorneys may have an immense amount of work on their plate if they are up against the culmination of all the other errors that may take place in pursuit of a wrongful conviction, it is important to note that there is a difference between poor representation and inadequate representation under the law. It is actually rather difficult for a defendant to argue inadequate representation due to the subjective nature of the issue. According to Balko (2011), in many of the cases in which defendants have been exonerated, there has been an argument of poor lawyering, but many of the judges ruled that the poor lawyering did not prejudice the case because the evidence was overwhelming. While it is clear that the evidence was not as overwhelming as it appeared, due to the exoneration, it is even more apparent that there are few standards set for adequate representation, especially in

capital cases. According to the Death Penalty Information Center (n.d.), the Innocence Protection Act of 2004 hopes to improve the quality of capital defense by setting standards for adequate defense and providing grants to help states pay for training. While this may remedy some of the problems in capital cases, there are still a great number of wrongful convictions that take place in non-capital cases. Additionally, the policy may provide funding for training, but there are still large funding issues for defense attorneys when it comes to the investigation of the case, the hiring of expert witnesses, and the external examination of forensic evidence. As previously mentioned, these issues are exacerbated for indigent defendants as court appointed counsel or public defenders do not have much access to funding or outside resources to prepare for a trial or even fully investigate the case and may be subject to greater time and caseload restrictions (Hartley et al., 2010; Williams, 2013).

According to Smith et al. (2011), which looked at estimates from police, prosecutors, judges, and defense attorneys on the occurrence of the main types of system error within the system, defense attorney error received greater response on all five categories than any other group of error examined, which included police error, prosecutorial misconduct, judicial error, and evidence errors. Specifically, respondents indicated that defense attorney error occurs moderately frequently but not very frequently. Judges were the most critical when evaluating defense attorneys, while prosecutors and police were the least critical (Smith et al., 2011).

### **Racial Disparity**

As much of the literature indicates, there is a large disparate effect on minorities within the criminal justice system, which extends as far as wrongful conviction. According

to Gould and Leo (2010), there are serious race effects within the identification, prosecution, and sentencing of criminal suspects. Not only are minorities more likely to be stopped by police, as well as sentenced to longer sentences after being convicted, but they are also more likely to be subject to some of the sources of wrongful conviction. Although African Americans only comprise about 13 percent of the population in the United States, the overrepresentation of people of color in wrongful conviction ranges from 43 to 62 percent (Konvisser, 2012). The largest example of racial disparity is within eyewitness misidentification errors, as errors are more likely when the victim and perpetrator are of a different race (Gould & Leo, 2010). This is particularly the case in rape cases in which a white victim is raped by an African American or Hispanic man and unintentionally identifies an innocent person as the suspect during the lineup. The issue of racial disparity has also been found in regards to jury decision-making, as there have been a significant number of cases in which all-white juries have erroneously convicted African-American men based on questionable evidence without much deliberation (Gould & Leo, 2010). As it is clear that there is a significant issue of racial disparity throughout the criminal justice system, it is obvious that the disparity from each stage may combine to have an even larger and more detrimental effect, including wrongful conviction. This is not to suggest that one act of racial disparity always leads to wrongful conviction, but the culmination of these disparities could make it much more difficult for minorities to counter the odds of wrongful conviction.

According to Smith and Hattery (2011), approximately 75 percent of those who have been exonerated are members of minority groups and, on average, have spent 13 years in prison for a crime they did not commit. This simply cannot be explained by the fact that there are more African Americans, or minorities in general, in prison. Specifically, while

African Americans are disproportionately represented in the prison population, making up about 40 or 50 percent, African Americans alone account for 70 percent of the exonerees. This phenomenon is supported through the examination of disparity in rape cases. Specifically, African American men are four times more likely to be exonerated for raping white women compared to the number of times they actually commit this crime. Smith and Hattery (2011) associate this problem with the racial history of the United States. Specifically, accusations of the rape of white women by African American men have been at the center of the race relations and the justice system in this country. Additionally, it is indicated that this long standing myth of the black rapist has set the way in which police, the criminal justice system, and even the public deal with African American men, especially in rape cases. This continued disparity for minorities in the criminal justice system is problematic, as it is clear that this can be directly associated with the ultimate error in the criminal justice system— wrongful conviction. While it is not always the result of one act of disparity, it is clear that this problem lies much deeper than the policies the criminal justice system utilizes, but also as biases within the actors of the criminal justice system. As with other errors within the criminal justice system, the use of DNA evidence has helped to lessen the problem of racial disparities resulting in wrongful conviction, but there are many cases and defendants who may not be helped by forensic evidence, as it is not likely to be present in many criminal cases.

### **System Issues**

It has been known for quite some time that there are many issues with how the criminal justice system operates and functions, such as increased caseload problems, as well as lack of funding and resources. It has been argued that these issues within the criminal

justice system can inadvertently become a source of wrongful convictions. First, according to Roberts (2003), the funding and caseload problems in the system lead to an increased use of plea bargains. In turn, plea bargains can negatively impact defendants, as some of them may become subject to increased pressure from police and prosecutors to accept a deal for a crime they have not committed. Not only does this harm the defendant, it has also been indicated to undermine the value of the police investigative work. Essentially, the police assume that they will not have to use their evidence in trial, since a majority of cases are resolved by way of a plea bargain, which may make them become sloppy. This sloppiness can lead to the police obtaining the wrong defendant, which then starts the cycle of other problems to come for the defendant. Additionally, plea bargaining leads to an increase in cases that can be prosecuted. For instance, prosecutors threaten harsher charges and sentences to those who do not accept a plea bargain, which can lead to an increased conviction rate for the prosecutor and an increased amount of cases that actually make it into the court system, due to a net widening effect that allows more less serious cases into the system. With this said, Roberts (2003) indicates that plea bargaining itself may be a circulatory reason for the ever increasing caseload problem in the criminal justice system, specifically by way of increasing the severity of charges in hopes to coerce a plea bargain for lesser charges and secure a conviction. While this process is largely handled by prosecutors, it is clear that all actors of the system have some involvement in plea bargaining.

Additionally, it has been shown that these issues, specifically the lack of funding and resources, have been linked to wrongful conviction. Smith et al. (2011) indicated that lack of funding for adequate defense services may cause wrongful conviction, usually by way of inability to compete with the prosecution. As previously noted, if defense attorneys do not

have the funding and resources to investigate adequately and counter the resources of the prosecution, they may not be able to convince the court that their client is not guilty when he/she is not. This can be further exacerbated for indigent defendants who have court appointed counsel or public defenders, as they are even less likely to have funding and resources (Hartley et al., 2010; Williams, 2013). Not only can lack funding have a detrimental effect on wrongful conviction, wrongful conviction itself may lead to further funding issues. Overall, as of 2011, about \$87 million has been spent on the 250 exonerees reported nationwide (Smith & Hattery, 2011). It is clear that the already struggling criminal justice system is only losing more money when individuals are wrongfully convicted. It should be noted that these funding, resource, and caseload issues alone may negatively impact defendants directly, as well as indirectly, typically by way of plea bargaining, which has already been indicated to be subject to coercion and lead to depletion of postconviction rights for the defendant (Roberts, 2003; Smith et al., 2011).

## **Chapter 3: Uncovering Wrongful Conviction**

### **Appeals**

#### **Process**

The process of appealing a wrongful conviction in the United States is much harder and difficult than most would assume. Challenging a wrongful conviction in the United States, due to the introduction of new evidence or due to procedural issues, is very challenging and requires the defendant to jump through many hurdles. If a defendant presents new evidence, he/she has the opportunity to move for a new trial (Griffin, 2009). It is important to note that the defendant must make this motion before the same judge who heard the underlying criminal case. This can be problematic and difficult, especially for those defendants who are incarcerated. Additional barriers to this motion include the short statute of limitations, the high standard of proof (which requires a high likelihood that the new evidence would have produced a different outcome during the trial), and the large amount of discretion of the judge in hearing the motion. It is important to note that the judge may deny the motion without a hearing. State and federal courts differ on the length of time in which a motion for a new trial must be filed, as well as the standards for the consideration of such motions (Heder & Goldsmith, 2012). Specifically, federal law requires that the motions must be filed within three years of the initial verdict, while states range from several months to a few years. Additionally, federal law also leaves the decision to vacate, or set aside, the judgment or grant a new trial up to the judge who hears the case. Although state

and federal courts may have different statutes regarding the amount of time that can pass before the motion is heard, both generally rely on the standards found in *Larrison et al. v. United States (1928)* and *Berry v. State (1851)*. These standards essentially focus on whether the newly discovered evidence would have produced a different result during trial or not (Heder & Goldsmith, 2012).

If the defendant is not granted a new trial, whether it is due to denial by the judge or due to the time constraints for the motion, the next step would be for him/her to focus on the conviction itself, from a state or federal level, by way of a collateral review (Griffin, 2009; Heder & Goldsmith, 2012). Specifically, the defendant must file a motion stating that he/she could not have produced the newly discovered evidence with due diligence before trial. Additionally, the defendant must also demonstrate that the newly discovered evidence would produce a different result if it were to be admitted at the trial (Griffin, 2009). As with the original motion, the collateral motion must be filed with the same judge who heard the underlying criminal case, and the judge has the discretion of whether or not to grant a new hearing or any type of relief. It should be noted that the trial court's decision is only reviewed for abuse after the fact, which is a highly deferential standard of review. While every state offers some form of collateral review to convicted criminals, the rules involved differ from state to state (Griffin, 2009; Heder & Goldsmith, 2012). In federal court, the writ of habeas corpus constitutes the primary collateral remedy. Specifically, an analysis of the writ provides a way to determine the procedural challenges facing the defendant who is attempting to introduce newly discovered evidence via a collateral challenge. It may be particularly difficult for a defendant to introduce new evidence in this manner, as habeas relief is generally available only for defendants who can establish a constitutional error with

their convictions (Griffin, 2009; Heder & Goldsmith, 2012). It should be noted that the scope of the habeas corpus petition has become narrower over time, specifically through new legislation, such as the Anti-Terrorism and Effective Death Penalty Act, which was enacted in 1996. The U.S. Supreme Court has specified two situations in which the statute allows for federal habeas relief. First, federal habeas relief may be allowed if the “state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts” (Heder & Goldsmith, 2012, p. 113). Federal courts may also grant relief if the state court identifies the correct principle but unreasonably applies that principle to the facts in the defendant’s case. It is important to note that a freestanding claim of innocence based on newly discovered evidence may or may not involve a constitutional challenge that would be covered under the habeas petition. The U.S. Supreme Court has directly stated that the federal habeas rule is to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact (Heder & Goldsmith, 2012).

With this said, habeas corpus relief is generally not a viable option for defendants to challenge a wrongful conviction or even a state court’s denial of a new trial. While there are many difficulties for defendants attempting to argue a constitutional violation, Heder and Goldsmith (2012) argue that there are some ways in which defendants may make connections to violations of their constitutional rights, such as alleging police coercion or prosecutorial misconduct, especially when false or recanted testimony was presented at trial. Other cases of wrongful conviction may be associated with constitutional claims, such as the allegation of ineffective assistance of counsel, but may be more difficult to provide enough evidence to meet the high standard required for habeas relief. As it has already been indicated that there

are many procedural hurdles for the defendant to jump during a motion for a new trial, it has been found to be even more difficult for a defendant to file a motion for habeas relief. Specifically, a defendant may only seek federal habeas relief if he/she is not barred from doing so in state or federal court. This is problematic, in that a defendant who fails to introduce the new evidence within the applicable time frame or who is simply disallowed to present the motion in their jurisdiction would then be barred from pursuing habeas relief in a federal court (Heder & Goldsmith, 2012).

Although there are some limitations and exceptions for these rules discussed, it is clear that these procedural hurdles and limitations make it increasingly difficult for those who have been wrongfully convicted to argue for a new trial or for their sentence to be vacated (Heder & Goldsmith, 2012). It may be even more difficult for these defendants to pursue these types of relief as they are not always guaranteed an attorney or any type of aid in the process of filing these motions or throughout the appeals process. According to Heder and Goldsmith (2012), many defendants seeking postconviction relief on the basis of newly discovered evidence will never have a day in court. This is due to the fact that not all jurisdictions in the United States allow for postconviction relief, while others impose strict time limits, as mentioned above. These limitations can be even more detrimental for those who were wrongfully convicted, as it is not always easy for these defendants to prove that the conviction was incorrect, whether it is due to procedural factors or actual innocence.

### **Data on Reversals for Exonerees**

Garrett (2008) addresses the number of reversals after appeal for defendants later exonerated by DNA evidence compared to a matched group of defendants who applied for the same types of appeals. This study found that 18 of the 133 individuals who had been

exonerated by DNA evidence and had written decisions in their cases were granted reversals, which accounts for a 14 percent reversal rate. Additionally, 12 percent of the exonerees were retried after reversal of the original conviction, and nine percent were tried multiple times because they received multiple reversals and each time were convicted again by new juries. Furthermore, six more exonerees' convictions were vacated, but had no retrials due to the fact that their DNA testing exonerated them before their trial date. It is important to note that, if capital cases are excluded, the reversal rate drops to nine percent. This is surprising, as only 14 out of the 200 exonerees in this study received a capital sentence, yet this group had the highest rate of reversals of all of those in the innocent group (Findley, 2009; Garrett, 2008). The 9 percent non-capital reversal rate found by Garrett (2008) is higher than the rate of reversals during criminal appeals in general, which indicates that only about one percent of federal and state postconviction petitioners receive relief. In this study, the capital attrition rate among exonerees is 58 percent, which is similar to the 68 percent rate found in other studies. In regards to those who received life sentences, Garrett (2008) found that 10 percent of those in the study sentenced to life received a reversal. It is important to note that, within these eighteen exonerees who were granted a reversal that was upheld on appeal, statements were made by judges in eight of the cases that suggested that the defendant may be innocent. Additionally, in nearly two-thirds of these cases, the courts found error but indicated that the error was "harmless" and did not further investigate any claims of innocence. In 10 percent of the cases in which the defendant was later exonerated, the courts had ruled that there was an overwhelming amount of evidence of guilt against the innocent defendant (Findley, 2009; Garrett, 2008).

In regards to specific types of cases that received reversals, Garrett (2008) found that rape cases had a lower reversal rate than murder cases, with seven percent of the rape cases in the study being reversed, compared to the 11 percent of murder cases reversed. It has been suggested that this may be due to the fact that rape cases typically involve a victim identification, which may be more difficult to challenge, even when there are suggestive practices during the police investigation. It was found that rape-murder cases had a higher reversal rate than both rape and murder cases alone, which is surprising as many suspect that these cases contain more bodily fluid and blood evidence from the perpetrator which would lead them to be less likely to be reversed. In regards to the types of appeals granted for these individuals, it was found that more individuals received vacated convictions through direct appeal after the initial conviction than at state postconviction hearings or with federal habeas corpus petitions. Specifically, 10 percent of the 200 exonerees in the study received vacated convictions by way of direct appeal, while only one percent received a vacated conviction through state postconviction hearings, and three percent were granted vacated convictions during federal habeas corpus proceedings (Garrett, 2008).

On the other hand, in the matched comparison group, Garrett (2008) found a 10 percent non-capital reversal rate. This group was matched to the innocent group by locating 121 cases on Westlaw with an appeal in the same state, involving the same crimes of conviction, and having a written decision issued in the same year as each case in the innocent group. In total, the innocence group had just one fewer reversal. It can be suggested from this data that exonerees fare no better during review processes than matched rape and murder cases. With this said, it is also important to note that this similarity may be due to the fact that murder and serious rape convictions share a similar reversal rate overall, which is

estimated to be about nine percent. Subsequently, this could suggest that the reversal rates in these cases could have nothing to do with the judges detecting actual innocence, but rather the higher rates of procedural errors that may occur in these types of serious cases. Garrett (2008) also offers another explanation for the similarity in the reversal rates of the innocent group and the matched comparison group, which suggests that, in some of the exonerated cases, as well as the matched cases, the judge may be detecting actual innocence. This explanation is further supported by the idea that six of the twelve claims receiving reversal in the matched group involved a ruling that the jury was misled by unreliable or incomplete factual evidence. Since half of the rulings in the matched group had something to do with factual evidence, it is clear that there is a possibility that just as many in the matched group may be innocent or later exonerated. This may especially be the case as the study does not have clear evidence as to whether any of those in the matched group are actually innocent, since some of those who were factually innocent in the innocence group were not granted reversals. Overall, the similarity in reversal rates among the two groups suggests a common incidence of error in comparable appeals of rape and murder conviction; specifically, factual error. This is a cause for concern, as this study reveals that there are a sufficient number of cases in which postconviction DNA evidence has exonerated individuals who were initially denied appellate review or relief (Garrett, 2008). Additionally, this data is even more troubling when focusing on the results of the appellate process for those exonerated and those who have not been officially deemed as factually innocent. One would expect the appellate courts, both state and federal, to be more likely to reach a correct decision and be able to determine factual innocence or at least a notion that the defendant could potentially be innocent of the crime. As previously discussed, this is unlikely to be the case, as many

appellate courts have stated that the purpose of the appeal, especially habeas corpus petitions, is not to determine factual innocence, but to determine procedural or constitutional violations during the previous case (Findley, 2009; Garrett, 2008). With this said, it is still argued that the appellate system does not serve its intended purpose of sorting out the guilty from the innocent and identifying prior mistakes within the case (Findley, 2009; Garrett, 2008).

### **Issues with the Appellate System**

As it is apparent that there are issues and consequences associated with the failure for the appellate courts to be able to detect actual innocence and fix errors, it has been advocated that there are many underlying issues associated with the structure, nature of operation, and overall decisions of appellate courts. Specifically, according to Findley (2009), the appellate courts are not structurally suited to receive live testimony or other types of new evidence directly, which can hinder them from being able to consider new evidence before making rulings on individual cases. In this regard, it should be pointed out that, while this is an issue, it has commonly been suggested that there are other mechanisms for introducing new facts and claims on appeal that may work without radically restructuring the appellate courts. This inability to introduce new facts on appeal raises serious impediments for raising specific claims, such as ineffective assistance of counsel. While new evidence plays a large role in exoneration and the overturning of wrongful convictions, it has been shown that the reluctance and failure to examine and test existing evidence upon appeal is even more detrimental to those wrongfully convicted. As previously noted, according to Garrett (2008), 86 percent of the cases in his study showed situations in which the reviewing courts failed to recognize innocence or grant any type of relief in cases involving a wrongful conviction. In situations in which the appellate courts failed to recognize innocence by

looking at the existing evidence, they presented opinions about guilt, even if the defendant was not factually guilty. As previously indicated, in nearly one third of the cases in this study, the courts found error but affirmed that the error was “harmless” and typically asserted some implication of likely guilt. Additionally, in about 10 percent of the cases, the courts described the evidence of guilt against the innocent defendant as “overwhelming” (Findley, 2009; Garrett, 2008).

According to Findley (2009), when examining studies of DNA exoneration, it is clear that there are common types of procedural error and evidence claims that are overlooked by appellate courts. As previously discussed, these common types of errors that are present in wrongful convictions include eyewitness identification errors, false confessions, false or misleading forensic science evidence, perjured testimony from jailhouse informants, ineffective assistance of counsel, and prosecutorial misconduct. According to the data in the Garrett (2008) study, 79 percent of the first 200 DNA exonerations argued that mistaken eyewitness evidence was present, but the appellate system was unable to detect the flawed evidence in any of these cases. This same pattern was found within claims of false confessions, in which 16 percent of those in the study argued that they falsely confessed, and nine percent indicated that there were mistaken self-incriminating statements. The court did not reverse any of these claims of false confessions. Additionally, it should be noted that only about half of the defendants in the study were able to challenge their false confession due to procedural hurdles involved in the appeal process. In regards to faulty forensic evidence, 57 percent of the 200 cases involved some type of forensic evidence, while only 32 percent were able to bring valid challenges against this evidence. The study found that 19 of the 25 forensic science based challenges were rejected by the courts, although these

defendants were later exonerated by way of DNA evidence. Next, informant testimony accounted for 18 percent of the cases in the study, in which 12 percent of these cases involved jailhouse testimony. Of these cases, the appellate court did not recognize any of these claims as valid or rule the testimony as perjured when person was innocent. In regards to process errors, it was found that ineffective assistance of counsel played a role in 29 percent of the cases in the study, which seems to be low compared to the data in the 1994 study conducted by the National Center for State Courts that found that 41 to 45 percent of postconviction defendants presented this claim (Findley, 2009; Garrett, 2008). It should be noted that the data from the Garrett (2008) study is consistent with an earlier Department of Justice Study that found that 25 percent of petitioners in federal habeas corpus cases claimed ineffective assistance of counsel (Findley, 2009). Of the 38 postconviction DNA exonerees who claimed ineffective assistance of counsel, only four were granted relief on such claims. In regards to prosecutorial misconduct, specifically Brady claims that related to the withholding of evidence, only about 17 percent of those exonerated who asserted this claim were successful in the study (Findley, 2009; Garrett, 2008). It should be noted that a large reason that the appellate courts may not detect these issues is due to the fact that the courts are known to rely heavily on lower court decisions and pre-existing errors (Griffin, 2009; Keene et al., 2012).

While a majority of these claims would be detected with DNA testing at the appellate level, it has been argued that there is a widespread disagreement when allowing for postconviction DNA testing for inmates during appeals (Garrett, 2008; Griffin, 2009; Orenstein, 2011). According to Orenstein (2011), many states do not provide sufficient protocols for preserving DNA evidence or avenues for appeal on the grounds of the DNA

evidence. Garrett (2008) indicates that sixteen exonerees in his study were initially denied motions for DNA testing, some cases involving multiple denials. While this practice may be changing, specifically due to the Justice for All Act, which permits defendants convicted of a federal offense, who have been sentenced to imprisonment or death, to apply to the court where the original conviction was entered for DNA testing of specific evidence, there are still many hurdles for defendants requesting postconviction DNA testing for appellate reasons. Specifically, many states require difficult preliminary showings to obtain DNA testing and some may even require consent from law enforcement personnel. As previously noted, while many may not be able to guarantee DNA testing on their own, defendants are able to contact innocence projects or other state organizations aimed at protecting innocent defendants in the criminal justice system. In the Garrett (2008) study, 12 percent of the defendants initially pursued DNA testing on their own, independent of any legal counsel, while the remainder contacted legal counsel or outside organizations for assistance.

### **Developments in Appellate Assistance**

In addition to improvements on postconviction DNA testing accessibility, some states have enacted further statutes and organizations, outside of innocence projects, that are designed to investigate and review individual wrongful conviction claims (Griffin, 2009). Specifically, the North Carolina Innocence Inquiry Commission (NCIIC) is an independent state-funded body that is authorized to investigate and review individual wrongful conviction claims in North Carolina (Griffin, 2009; Innocence Project, n.d.). The organization has eight voting members who are a part of the criminal justice field in some manner, whether they are practicing attorneys, judges, law enforcement personnel, etc. Additionally, the commission is allowed to investigate claims of innocence through the use of subpoenas and other legal

methods. If the defendant is successful at the hearing, which would indicate that at least five members of the board concluded that there was sufficient evidence of factual innocence to merit judicial review, his/her case will be referred to a superior court judge for review. Then, the Chief Justice will appoint a three judge panel to hold a hearing to review the initial case and to seek testimony of any witnesses at the time, including the defendant. If the panel unanimously concludes that the convicted person is innocent by clear and convincing evidence, the defendant's conviction will be vacated and the charges will be dismissed (Griffin, 2009; Innocence Project, n.d.).

As previously mentioned, similar structures and organizations have been established in other states for the same purpose; specifically, Wisconsin developed an organization in which a defendant may return to the trial court after conviction and sentencing but before taking the case to the court of appeal (Findley, 2009). The defendant may file a motion, entitled a Notice of Intent to Pursue Postconviction Relief, which is part of a direct review process. This motion will entitle him/her to new postconviction/appeal counsel, which will be part of a review process that looks at the transcript of the initial proceeding to determine if the case presents issues with arguable merit for postconviction or appellate review. If the case does contain merit for further review, it will be directly referred to the court of appeals for appellate review of the specific issues noted. This process has been deemed helpful for defendants, as it allows for the introduction of new evidence into the direct appeal process. Additionally, the appointment of new counsel also allows the defendant to pursue claims of ineffective assistance of counsel. Findley (2009) indicates that this procedure benefits the court system, as it reduces the number cases taken into the court of appeals by resolving a high percentage of postconviction challenges at the motion stage.

## **Wrongful Conviction Organizations**

As it has been previously stated, there are many hurdles, both legal and financial, that defendants must cross in order to appeal a wrongful conviction or to seek compensation for the same. With this said, there has been a strong push for organizations, both state and public, to help individuals who have been subject to such miscarriages of justice. According to Schehr (2005), innocence projects have been in existence since 1983, but the innocence movement itself did not start until the late 1990s, particularly with the first national conference dedicated to the topic, which was held at Northwestern University in 1998. Currently, there are innocence projects in 35 states, with seven states having more than one innocence project. It should be noted that innocence projects typically start in one of four ways, which include university-based programs that operate within a law school, university-based programs that utilize both social science and/or liberal arts departments in combination with law school students and faculty to provide research and legal counsel, university-based programs that have no law school affiliation, or community based programs that draw on available resources (Schehr, 2005). Overall, innocence projects are created to investigate cases of wrongful conviction, and in some cases, correct miscarriages of justice. The increasing use and importance of innocence projects is clear by looking out how many of the first 200 exonerations received help from these organizations, with 79 percent seeking DNA testing by contacting an innocence project or requesting it through postconviction attorneys (Garrett, 2008). Many of the common organizations that are aimed at helping these defendants include The Innocence Project, the Center on Wrongful Convictions, the National Registry of Exonerations, and the Death Penalty Information Center. While each organization may not be directly involved in providing legal representation and resources to

these individuals, each is aimed at raising awareness about the real issues involving wrongful conviction and how common it actually is.

First, The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld at Benjamin J. Cardozo School of Law at Yeshiva University to assist prisoners who could be proven innocent by way of DNA testing (Innocence Project, n.d.). The Innocence Project later expanded to a nonprofit organization that operates nationwide. Since its founding, The Innocence Project has aided in the exoneration of more than 300 people in the United States through DNA testing, which includes 18 death row inmates. The organization currently has full-time staff attorneys working to exonerate the staggering number of innocent people who remain incarcerated, while also utilizing Cardozo Clinic law students to provide direct representation or critical assistance in individual cases. It should be noted that this nationwide project has expanded to many law schools across the nation, as North Carolina houses the North Carolina Center on Actual Innocence, which is a statewide project, as well as The Duke Center for Criminal Justice and Professional Responsibility located at Duke University School of Law, and the Wake Forest University Law School Innocence and Justice Clinic (Innocence Project, n.d.). Programs similar to these are also found nationwide as law schools are beginning to become aware of the issue of wrongful conviction and are training future attorneys to be aware and informed on how wrongful convictions may occur and how they should be remedied. It should also be noted that The Innocence Project maintains a list of all postconviction DNA exonerations throughout the United States, whether the case was handled by The Innocence Project or some other organization. To this date, The Innocence Project has a count of 312 postconviction DNA exonerations in the United States (Innocence Project, n.d.).

Second, the Center on Wrongful Convictions, located at Northwestern Law School, provides representation for imprisoned clients around the country with claims of actual innocence (Northwestern Law & Michigan, n.d.). The center faculty and staff partner with outside pro bono attorneys and students in the clinic at the law school to review requests for representation. The Center on Wrongful Convictions indicates that they receive about 200 requests per month. While the main focus is on postconviction cases, similar to The Innocence Project, the organization also participates in retrials of previously appealed cases. Overall, the organization focuses on raising public awareness about the prevalence, causes, and social costs of wrongful convictions, as well as seeking policy reforms to prevent and reduce future wrongful convictions. While the Center on Wrongful Convictions has been influential within many wrongful conviction reforms nationwide, with particular importance on the expansion of DNA testing in criminal cases and reforms to provide adequate funding for the defense of indigent clients, the organization has also started to look at wrongful conviction within youth and women. It should also be noted that the Center on Wrongful Convictions and Northwestern Law School is also the co-founder of the National Registry of Exonerations database. Northwestern Law and Michigan Law have partnered to catalogue and document the nation's roster of wrongful convictions. The database provides detailed information, such as the exoneree, conviction offense, the type of evidence responsible for the wrongful conviction, and the type of evidence used to exonerate the individual, as well as the location and year both the original conviction and the exoneration took place. To this date, the National Registry of Exonerations indicates that there have been 1,324 exonerations in the United States (The Center on Wrongful Convictions, n.d.).

Lastly, the Death Penalty Information Center is a national nonprofit organization that analyzes and publishes information on issues concerning capital punishment (Death Penalty Information Center, n.d.). In regards to wrongful conviction, the Death Penalty Information Center does not provide direct representation, but it does provide a great amount of data on the number of individuals who have been sentenced to death and later exonerated. The comprehensive list, most recently published in the organization's *Innocence and the Crisis in the American Death Penalty Report* in 2004, indicates that there have been 116 exonerations of death penalty inmates since 1973. The report also breaks down the exonerations of these death row inmates by state, race, and gender, as well as the use of DNA evidence and the basis for exoneration (Death Penalty Information Center, n.d.). As previously mentioned, while the organization does not provide direct legal assistance to those claiming innocence, it still plays a large role in public awareness of the issue and how wrongful conviction affects the death penalty. The occurrence of wrongful conviction in capital cases is shocking and continues to be an issue that needs to be addressed as capital punishment is a final punishment that cannot be reversed.

As previously mentioned, some states have established state run and funded innocence commissions that are aimed at identifying the causes of and remedies for wrongful conviction within that state or jurisdiction (Griffin, 2009; Innocence Project, n.d.; Norris, Bonventre, Redlich, & Acker, 2011). According to The Innocence Project (n.d.), the states that have established such organizations include California, Connecticut, Florida, Illinois, Louisiana, Oklahoma, New York, North Carolina, Pennsylvania, Texas, and Wisconsin. While each state has different formations, structures, mandates, and standards for review,

each individual commission reviews cases, identifies causes of wrongful convictions, and recommends remedial steps to avoid recurrence (Innocence Project, n.d.).

While each of the examples given for organizations that address wrongful convictions may follow different structural approaches, Norris et al. (2011) suggest that innocence commissions, in any form, should focus on error correction and systemic reform. Although some improvements have been made to these types of organizations and new organizations are continuously being established across the nation, the co-founders of the Innocence Project have called for the formation of permanent, systemic reform innocence commissions to examine wrongful convictions in specific jurisdictions only. This model is similar to the model previously put into place in North Carolina and other states but would further address the causes of wrongful conviction and propose reforms on how to prevent the issue in the future. This same recommendation was presented in 2006 by the American Bar Association Innocence Committee. The largest recommendation in regards to innocence commissions has been to make sure these organizations and committees are permanently put in place, which is important as some of the state level committees are temporary, so they may constantly monitor and review wrongful convictions (Norris et al., 2011). Although many of the recommendations set forth for innocence commissions and projects are slowly being implemented, which is evident by the large number of individuals who request the assistance of innocence projects, there are still many improvements and measures that need to be set forth to continue to identify past wrongful convictions and reduce future wrongful conviction incidents. Overall, innocence commissions and projects play a large role in assisting those who have been wrongfully convicted and are attempting to seek relief, especially due to the complicated legal nature of the appeals process and the various hurdles one must face after

conviction in order to start the process of appeal, including finding counsel, which is especially difficult for indigent defendants.

## **Chapter 4: Case Law**

### **Eyewitness Error**

As previously indicated, mistaken eyewitness identification accounts for over three-quarters of wrongful convictions (Gould & Leo; 2010; Shermer et al., 2011). According to Bazelon (2013), nearly 75 percent of the 250 convictions overturned by DNA evidence between 1989 and 2010 have been due to eyewitness misidentifications. As it is clear that eyewitness evidence is the primary cause of wrongful conviction in the United States, it is important to examine the effect eyewitness testimony has on individual cases.

In 2013, Kash Register was exonerated for the murder of 78 year old Jack Sasson, after serving 34 years in prison (Bazelon, 2013). The incident in question occurred on April 6, 1979, when Jack Sasson was robbed and shot five times in the carport of his home in California. Sasson died three weeks later due to the fatal wounds. Register was identified by two eyewitnesses who indicated that they had seen a black man running from the carport area of Sasson's home. Brenda Anderson indicated that she heard the gunshots, looked out her window, and saw a black man flee the carport. She said he also ran back to fire more shots and then ran off again. Three days after the incident, she identified Register, who was a former classmate of hers from high school. The other witness, Elliot Singleton, was shown the same photo array as Brenda Anderson and also identified Register. He indicated that he had been painting the house across the street when he witnessed the shooting; he then chased the armed shooter for blocks, only stopping when the man turned and pointed the gun at him (Bazelon, 2013).

It was obvious that this eyewitness testimony had heavy weight in this case, as there was no other direct forensic evidence linking Register to the incident (Bazelon, 2013; Northwestern Law & Michigan Law, n.d.). Specifically, the fingerprints on Sasson's car did not match Register's fingerprints, and there was never a wallet or a weapon recovered from the scene. The prosecution did present blood evidence at the trial, indicating that, when they searched Register's apartment, they found a pair of black pin-striped pants and a burgundy shirt, similar to the outfit Singleton identified, with a speck of blood on the pants. Although DNA testing did not exist in 1979, the blood was found to be Type O, which matched Sasson's blood type. The issue with this evidence was that Register himself had Type O blood, along with more than three million residents of Los Angeles at the time. It should be noted that Register could account for his whereabouts at the time of the incident; he was at the local unemployment office following a lead on a job. The unemployment office, as well as his girlfriend, Cheryl Perry, confirmed his account of the time he had spent there (Bazelon, 2013; Northwestern Law & Michigan Law, n.d.). There were also three other alibi witnesses who testified as to what Register was doing that day. Additionally, the employee at the unemployment office, Dorothy MacEntire, along with the other three alibi witnesses, testified that Register was not wearing clothing consistent with the description given by the two eyewitnesses, which consisted of the burgundy shirt and black pants, on the day of the incident (Northwestern Law & Michigan Law, n.d.).

Being that it was clear that the physical evidence against Register was weak, the case against him was based almost entirely on the eyewitness identifications of Anderson and Singleton (Bazelon, 2013). It is even more surprising that, during a preliminary hearing, which occurred within a month of Register's arrest, Anderson admitted that she was not sure

of her identification and that she had become confused during the lineup procedure because she recognized Register from high school. Anderson also admitted that she had not seen the suspect “that good.” With this said, the prosecutors set this aside and still took the case to trial. When Anderson took the stand at the trial in October 1979, she indicated that, without a doubt, she had seen Register fleeing the scene on the day of the shooting. Although Singleton had indicated that he did not know the height or build of the suspect, he specifically identified Register as the shooter (Bazelon, 2013).

After three days of deliberation, an all-white jury found Register guilty of first-degree murder, attempted robbery, and illegal use of a firearm (Bazelon, 2013; Northwestern Law & Michigan Law, n.d.). At the time of conviction, Register cried out that he did not do anything and proclaimed his innocence (Bazelon, 2013). He was subsequently sentenced to life in prison without parole. According to the Center on Wrongful Convictions, Register’s conviction was upheld on appeal in 1981, but later commuted to 27 years, in 1984, due to changes in California’s sentencing laws (Northwestern Law & Michigan Law, n.d.). In 1984, Register was re-sentenced to 27 years to life, with the option of relief, which came in 1993 (Bazelon, 2013; Northwestern Law & Michigan Law, n.d.). Over the next two decades, Register participated in 11 parole hearings, in which he maintained his innocence and indicated that a mistake had been made that no one wanted to correct. All of Register’s parole requests were denied, even his last request in 2012. The parole board indicated reasons for denial as failure to accept responsibility for his crime and lack of insight and remorse (Bazelon, 2013; Northwestern Law & Michigan Law, n.d.).

In 2011, the faulty evidence in the case came to the attention of Register’s attorney, Steve Sanders, and his associate Keith Chandler, who were working on a federal challenge to

the parole denial that Register had just faced (Bazelon, 2013). Brenda Anderson's sister, Sheila Vanderkam, contacted Keith Chandler after discovering that Register was still in prison while searching an online website of convicted felons. Vanderkam described being in horror when she realized Register was still in prison for the offense her sister had made an eyewitness identification in because she knew that her sister had not actually seen the shooter flee from the scene the day of the incident. She knew that her two sisters, Brenda and Sharon, had been outside at the time of the murder, heard the gun shots, and saw a man slumped over his steering wheel, but she also knew they did not see the gunman as they were trying to hurry home due to fact they were afraid they would be caught for stealing several hundred dollars' worth of Avon products from their neighbor's house. Vanderkam also noted that she had worked as a detective assistant at the West Los Angeles Police Station at the time of the incident. During the time of the investigation, Vanderkam approached the lead detective and informed him that her sister was lying about the identification and she was an unreliable witness, as she had been a serious drug user for some time (Bazelon, 2013; Northwestern Law & Michigan Law, n.d.). The detective responded to the information by placing his finger over her lips and saying "ssshh." After Vanderkam discovered the injustice was still taking place, she began to review the police reports from the incident and found more inconsistencies. First, the report indicated that her sister Sharon and mother Christine were also witnesses to the incident, which was not the case. She also recalled that, at the time of the photo lineup, Brenda Anderson and her younger sister Sharon were both taken in for questioning but were separated upon arrival at the police station. Vanderkam later discovered that the police had already indicated to Brenda that the shooter was Register and made a deal with her that, if she would identify Register as the shooter and insist he was

the man she had seen, they would refrain from sending her to juvenile detention for the Avon theft. Sharon also escaped punishment for the theft by telling no one about seeing the suspect or what had happened at the police station (Bazelon, 2013).

This information, along with sworn statements from Sharon and Vanderkam, was enough for Keith Chandler to petition the court to overturn Register's conviction, by way of a habeas petition (Bazelon, 2013; Northwestern Law & Michigan Law, n.d.). In 2012, after the court received the petition, they appointed attorney Herbert Barish to represent Register. Barish later became part of the Loyola Law School Project for the Innocent in Los Angeles. This benefited Register, as there were many lawyers and law students from the Project for the Innocent investigating the case and determining what went wrong (Bazelon, 2013). The innocence group found that the prosecution had failed to disclose many pieces of evidence, such as Brenda Anderson's criminal record, which included forgery charges just days before the identification of Register; the false documentation Patty Singleton, the wife of Elliot Singleton, as a witness, although she had not been mentioned in the police report or at trial; as well as the fact that Elliot Singleton did not actually run after the suspect as had been indicated in his testimony.

After review of this information presented by Barish and the Project for the Innocent, in July of 2012, Judge Mader ruled that Register was entitled to an evidentiary hearing (Bazelon, 2013; Northwestern Law & Michigan Law, n.d.). Just before the trial, Barish and The Project for the Innocent discovered an even more damning piece of evidence in the trial file, which indicated that no one was able to make a clear identification of the suspect, thus providing the reason the death penalty was not sought in the case (Bazelon, 2013). At the hearing, Brenda Anderson, Sharon Anderson, Vanderkam, and Singleton all testified as to the

nature of their identification and the role the police department played in the incident.

Finally, on November 7, 2013, Judge Mader vacated Register's conviction and ordered a new trial on the grounds that Brenda Anderson was an unreliable witness and lacked credibility, Singleton claimed that he no longer remembered anything about the case, and the prosecution repeatedly concealed relevant evidence that would have resulted in an acquittal instead of a conviction (Bazelon, 2013). The concealed evidence included Vanderkam's statement about the role of Brenda Anderson and Sharon Anderson's false statement, as well as the identity of another witness, Patty Singleton. Following this, the Register was finally released on November 8, 2013 and, on December 13, 2013, the prosecution dismissed all the charges (Bazelon, 2013; Northwestern Law & Michigan Law, n.d.).

This case exemplifies the role of false eyewitness evidence, as well as many other issues that may go wrong to obtain a wrongful conviction, such as the prosecution hiding the false eyewitness evidence and making deals to ensure cooperation and testimony of Sharon Anderson, as well as Brenda Anderson. While the information and drive to correct a mistake from Vanderkam was singlehandedly responsible for the new investigation of the case and the granting of the evidentiary hearing, it should be noted that, without help from the various attorneys on the case and the innocence project, Register would likely not have been granted release. Even with the validity issues surrounding eyewitness evidence and the multitude of cases that have been overturned due to this type of evidence, few states have revamped their standards for eyewitness testimony and police practices surrounding the eyewitness identification procedures (Bazelon, 2013). It is important to note that, in 2012, the U.S. Supreme Court declined to follow the lead of some states in overturning the admissibility standards for eyewitness testimony that were set in 1977, although new empirical evidence

has disproved many of the rules for admissibility. As previously mentioned, the problem with eyewitness evidence is further compounded when the prosecutors and police withhold important evidence, such as the credibility and motivation of the witness during the identification, which was evident in Kash Register's case (Bazelon, 2013).

### **Police Misconduct**

Police misconduct can influence wrongful conviction due to tunnel vision, confirmation bias, or even a self-fulfilling prophecy (Gould & Leo, 2010; Leo & Davis, 2010). Evidence of police misconduct was shown in the case of LaMonte Armstrong, who was wrongfully convicted of murder due to failure of the police to disclose evidence of contradicting witness statements (Northwestern Law & Michigan Law, n.d.). Armstrong was convicted for the murder of Ernestine Compton on July 12, 1988. Compton, a professor at North Carolina Agricultural and Technical State University, was found murdered in her home in Greensboro, North Carolina. She had been stabbed four times in the chest and strangled with an electrical cord. The evidence gathered at the crime scene included two bloody knives, a broken knife blade, hair and fiber samples, and a bloody piece of Compton's clothing. Armstrong, a former student and family friend of Compton's, was linked to the case due to a longtime police informant, Charles Blackwell, who called Crime Stoppers and gave a tip that Armstrong was involved. Although Blackwell was known as a habitual liar by the police, his initial tip to police was pursued, and his later information would be used in the case against Armstrong. When Armstrong was initially approached by police, he indicated that he had known the victim for about 23 years but had not been inside her home for quite some time, as he had moved to New York after graduation. He later returned to the Greensboro area after several years but still denied doing any odd jobs for Compton or being

in her home. During the investigation of the case, Blackwell contacted Armstrong multiple times on behalf of the police in an attempt to obtain incriminating evidence on Armstrong but was unsuccessful each time (Northwestern Law & Michigan Law, n.d.).

Due to lack of evidence and the fact that the physical evidence from the crime scene could not be linked to either Armstrong or Blackwell, the investigation went dormant about eight months after it had started (Northwestern Law & Michigan Law, n.d.). In 1992, another suspect, Christopher Caviness, who was in prison for the murder of his father in 1989, was thought to be connected to the incident, but the examination of the latent finger prints and palm prints at the scene did not indicate a match. After the inability to link Caviness, the case went dormant until 1994, when the detectives renewed interest in the case and started reexamining a statement from Blackwell shortly after the murder. Blackwell had stated that Armstrong asked to borrow money from him and, after he had turned him down, Armstrong requested Blackwell to take him to a payphone. After the phone call, Armstrong allegedly ran up the street and returned 45 minutes later, breathing very heavily, with cash and a woman's watch in his possession. In March of 1994, the police went to visit Blackwell in prison, where he was serving time for an unrelated conviction, to discuss these statements, and subsequently to charge him with murder. In order to avoid the murder charge, Blackwell agreed to plead guilty to an accessory to murder charge and testify against Armstrong. Blackwell was sentenced to five years for the accessory charge, in addition to the time he was already serving in prison (Northwestern Law & Michigan Law, n.d.).

Shortly after the incident with Blackwell, on April 14, 1994, Armstrong was charged with murder (Northwestern Law & Michigan Law, n.d.). He rejected two plea offers for sentences of 20 and 15 years. Throughout the process, Armstrong maintained his innocence,

even during the trial, which took place in August of 1995. During the time between the arrest and the trial, Blackwell had written letters to both Armstrong and Harold Murdock, an attorney in the Greensboro branch of the NAACP, in which he had recanted his statements and claimed that he lied in order to collect the reward offered by Crime Stoppers. Even with this said, Blackwell still testified at trial and was the key witness against Armstrong.

Blackwell later stated that the only reason he testified was due to the threat of a murder charge from the detectives if he did not cooperate. At the trial, Blackwell told his sixth version of the case, which stated that he and Armstrong had gone to Compton's house to borrow money that night to buy drugs and, when Compton would not let them, due to Armstrong's outstanding debt, there was a fight that broke out and Armstrong grabbed a cord off the top of the refrigerator. Blackwell indicated that, at this point, he fled the scene. The defense tried to prove that Blackwell was lying multiple times during the trial by presenting the letters he had written to Armstrong and Murdock, in which he said that he only implicated Armstrong for the money. In response to these claims, Blackwell told the jury he fabricated the story during the investigation to embarrass a Greensboro detective at whom he was angry around the time of the investigation (Northwestern Law & Michigan Law, n.d.).

There were also three additional witnesses for the prosecution, which included Timothy McCorkle, W. Dwight Blockem, and William Earl Davis (Northwestern Law & Michigan Law, n.d.). First, McCorkle claimed that he was painting a house across the street from Compton's home the day of the crime and saw Blackwell and Armstrong leave the victim's house, even stopping them to talk to them. Blockem was a jailhouse informant; he claimed that, while he shared a holding cell with Armstrong, he said "when he did it, he was by himself," in reference to the crime. Lastly, Davis indicated that he was a regular

informant of the Greensboro police, and he was housed in the same cell with Armstrong prior to Armstrong's trial. He testified that Armstrong admitted to murdering Compton and indicated that he had visited Compton's home earlier in the day with several other people and returned later that afternoon with Blackwell to kill her. These three witnesses were held in the same holding cell during the trial of Armstrong, which gave them an ample amount of time to discuss their testimony. When each witness was asked what benefits they were hoping to receive from their testimony, McCorkle admitted that, in 1986, he had been convicted of robbery and conspiracy based largely on testimony from Armstrong's brother, Kermit, and that he had been released from prison just four months before Compton was killed (Northwestern Law & Michigan Law, n.d.).

Although there were many cards stacked against the defense, specifically in regards to jailhouse informants, the defense had several witnesses who testified about the credibility of Blackwell's testimony and statements made during the investigation. The defense called the NAACP's Murdock, who visited Blackwell in prison after he had received the letter from him regarding the statement to the police (Northwestern Law & Michigan Law, n.d.). Murdock indicated that, during his visit with Blackwell, Blackwell told him that the police had fed him the information about the murder and that he had never been to Compton's home. Several other defense witnesses indicated that Blackwell had also admitted to them that he had made up Armstrong's involvement in the case, with one witness, Dolphus Cates, testifying that Blackwell had also told him he did it for the reward money. The defense also called for Armstrong to testify. Armstrong denied committing the murder, indicating that he had never borrowed any money from the victim and that he had been in Winston-Salem on the weekend the crime occurred. In his testimony, Armstrong also indicated that the police

had approached him prior to his arrest, asking him to implicate Blackwell in the crime, which he refused to do (Northwestern Law & Michigan Law, n.d.).

Even with the lack of credibility of the prosecution's star witness, Charles Blackwell, and the lack of physical evidence connecting Armstrong to the crime, the jury still convicted Armstrong of the murder of Compton on August 18, 1995 (Northwestern Law & Michigan Law, n.d.). Armstrong was sentenced to life in prison. Shortly after the conviction, Blockem, one of the jailhouse informants, wrote a letter to Armstrong's attorney admitting that he had falsified his testimony, but there was nothing done as result of the confession. Armstrong later appealed the conviction, but the conviction was upheld. According to the Center on Wrongful Convictions, after the denial of his appeal, Armstrong wrote a letter to the North Carolina Center on Actual Innocence concerning his case, which was later referred to the Duke Law Innocence Project (Northwestern Law & Michigan Law, n.d.).

As law students at the Duke Law Innocence Project began to take an interest in the case and started re-investigating the facts, the Greensboro Police Department began doing the same (Northwestern Law & Michigan Law, n.d.). The files found by the law students indicated many pieces of evidence that suggested Armstrong's innocence in the case. It was later discovered that much of this evidence had not been turned over to Armstrong's defense attorney. Key pieces of evidence found by the Innocence Project included multiple witnesses' statements to the police that indicated that Compton was seen alive after July 9 and her body was discovered on July 12, which contradicted Blackwell's testimony and the pathology report that indicated that Compton was killed on July 9, as well as a deal that was arranged between the police and Blackwell, which offered Blackwell \$200 for his services and help implicating Armstrong in the case, which included multiple arranged phone calls to

Armstrong. Additionally, the Innocence Clinic found a statement suggesting an alternative suspect, which was never turned over to the defense team. Following the discovery of this evidence, in 2010, Blackwell recanted his trial testimony and said that he had completely fabricated the testimony. Subsequently, in 2011, the Duke Law Wrongful Convictions Clinic filed a motion to overturn Armstrong's conviction. In March 2012, the Guilford County District Attorney's Office agreed to give Armstrong an evidentiary hearing, which would result in a revelation of more key evidence suggesting Armstrong's innocence. During preparation for the hearing, the prosecution had the latent prints found at the scene re-examined and found that a palm print on the door frame matched Christopher Caviness's prints. He was the individual police had originally questioned and performed a DNA test on in 1992. Although a match was found with the improved technology, which was not available at the time of the crime, Caviness could not be held accountable for the crime, as he was killed in a car accident in June 2010, shortly after being released from prison for his father's murder. After spending nearly 17 years in prison, on June 29, 2012, Armstrong was finally granted a motion for a new trial, and he was released on his own recognizance pending trial. When additional DNA testing, which was sought by the Duke Law Wrongful Convictions Clinic as well as the prosecutor's office, failed to link Armstrong to the crime, the prosecution decided to dismiss the charge against him. The murder charge was officially dismissed on March 18, 2013. Later, in December 2013, Armstrong received a pardon from North Carolina Governor Pat McCrory, based on actual innocence (Northwestern Law & Michigan Law, n.d.).

As it is clear that there were many points in the investigation that pointed to the innocence of Armstrong, the case still continued on for many years, particularly due to the

determination of the police to find someone guilty of the crime. With this said, this case is a perfect example of police misconduct and the potential of officers to develop tunnel vision. Although Armstrong was initially cleared from the case after no physical evidence was found to link him to the incident, the police still continued to push for him to confess or implicate himself in the many conversations he had with Blackwell. The police only focused on the evidence they had to support the claim that Armstrong had committed the crime, specifically the testimony and statements from Blackwell, and ignored the evidence that implicated that Armstrong was innocent. This was clear as Blackwell suggested that the police fed him the information he needed in order to contact Armstrong and convince him to implicate himself (Northwestern Law & Michigan Law, n.d.). Additionally, the police handling the investigation had three different jailhouse witnesses who proved to have unreliable testimony, which was evident when Blockem recanted his testimony in which he claimed that Armstrong admitted doing the crime and doing it alone (Northwestern Law & Michigan Law, n.d.).

In addition to the idea that the police may have had tunnel vision, which subsequently led to the continued pursuit of Armstrong as the suspect, this case exemplifies wrongful conduct on part of the police in regards to witness coaching, witness tampering, and even failure to turn over evidence to the defense. After the multiple times Blackwell recanted his testimony and shed doubt on his knowledge of the actual crime that took place, it became clear that the police were using him as a resource to try to convince Armstrong into confessing or implicating himself. This deal was also confirmed during the re-investigation of the case by the Duke Law Innocence Project, which found an actual record of \$200 being paid to Blackwell for his services and help in the case (Northwestern Law & Michigan Law,

n.d.). Aside from the witness coaching and tampering, as well as the use of suggestive procedures, evidenced in Blackwell's statements and testimony, the re-investigation also revealed that police failed to turn over a wealth of exculpatory evidence that suggested Armstrong's innocence. This is highly problematic, as the defense could have better prepared for trial and may have even been successful at clearing Armstrong of the charge the first time the case was taken to trial if they had had all of the evidence gathered in the case. While it is typically the job of the prosecutor to turn over evidence to the defense, the police must cooperate with the prosecution in making sure they have all of the evidence, not just the evidence necessary to convict. As the police are the gatekeepers of the criminal justice system and are responsible for determining who is a suspect and who is not, there is a great threat to justice if these officers engage in misconduct. In this case, Armstrong was doomed from the start; the police had him targeted as a suspect for the crime, and they were determined to have him prosecuted and convicted, even if it took continued persecution of Armstrong, after a failure to establish any physical evidence against him, or even witness tampering and/or coaching. In cases similar to these, if misconduct starts early on in the case, there is a greater likelihood of a wrongful conviction, as there are many other factors that may later be misconstrued and misinterpreted due to incorrect evidence presented during the beginning of the case.

### **False Confessions**

According to Balko (2011), false confessions occurred in about one-quarter of the first 225 DNA exonerations in the United States. Additionally, it has been shown that about 65 percent of suspects in custody either fully or partially confess (Keene et al., 2012). False

confessions may occur for a variety of reasons, such as mental state, fear of trial penalty, or even police misconduct or coerciveness.

In 2013, Stanley Wrice was exonerated after serving over 31 years in prison for the abduction, rape, and sexual assault of a Chicago woman on September 8, 1982 (Northwestern Law & Michigan Law, n.d.). The case of Stanley Wrice was not only one of great detail, but also brought to light the role police misconduct can play in false confessions. Wrice was sentenced to 100 years in prison for these crimes, after what he indicated to be a false confession caused by police torture. Additionally, his exoneration came after a landmark decision in the Illinois Supreme Court in February 2012, which held that the uses of a physically coerced confession as evidence of guilt at a criminal trial was not just a harmless error. According to Wrice, police brutality occurred from the very beginning of his case, when he had been severely beaten by Chicago Police Detective Peter Dignan and Sergeant John Byrne the day of his arrest for the charges. The incident for which Wrice was charged occurred in 1982. The victim, Karen Byron, a white female, alleged that she was walking home from the liquor store when several African American men offered her a ride. After accepting the ride, Byron indicated that she was taken to a two-story bungalow where she was later beaten, severely burned with metal objects, and repeatedly raped. Byron indicated that, when she was finally released, she stumbled into a gas station where the attendant called the police. Treatment at the hospital revealed that Byron had burns that covered over 80 percent of her body. The police were able to narrow down the location of the bungalow from the details Byron provided them (Northwestern Law & Michigan Law, n.d.).

After searching the area where the bungalow was suspected to be, the police arrested Wrice and three other men: Michael Fowler, Rodney Benson and Lee Holmes (Northwestern

Law & Michigan Law, n.d.). Byron was not able to identify Wrice specifically, but she did identify the three other men. The three other men later pleaded guilty in exchange for a plea agreement. Fowler was sentenced to four years in prison, while Benson and Holmes were each sentenced to just 30 months of probation. Wrice was subsequently charged based on his confession given during the investigation. Wrice's motion to suppress his confession before his 1983 trial included a description of a brutal beating by officers Dignan and Byrne, who had taken him to the basement of the police headquarters and repeatedly struck him in the head, arms, kneecaps, and groin with a 16-inch flashlight and a piece of rubber after he repeatedly denied involvement in the crime. A physician did examine Wrice the day after his arrest and corroborated this story, indicating that the injuries he sustained were consistent with his torture allegation. When the motion was put before the court, Dignan and Byrne denied the allegation, and Judge Thomas R. Fitzgerald denied the motion to suppress the confession (Northwestern Law & Michigan Law, n.d.).

At the trial, in addition to Wrice's confession, prosecutors called two eyewitnesses, Bobby Joe Williams and Kenneth Lewis (Northwestern Law & Michigan Law, n.d.). Both eyewitnesses testified that they had seen Wrice rape the victim and burn her with a hot spoon. Williams also indicated that Wrice had admitted to burning the victim. Aside from the confession, which had already been shown to be questionable, and the eyewitness testimony, there was no physical evidence linking Wrice to the crime or a positive identification from the victim. With that said, after only a short deliberation, the jury found Wrice guilty of rape and deviant sexual assault. Judge Fitzgerald sentenced Wrice to 60 years for the rape and 40 years for the sexual assault, which were to be served consecutively. It should be noted that, in 1985, Wrice's sentence was changed under an Illinois Appeals

Court decision, which ordered that his sentences be served concurrently, rather than consecutively, which reduced the total term to 60 years. Following this, Wrice filed a petition for postconviction relief, which was later denied by the Circuit Court. Then, he attempted to apply for appeal, which was subsequently denied as well. Although his appeal was denied, his public defender, Heidi Linn Lambros, felt so strongly about innocence and helping Wrice that she continued to work on the case on her own time (Northwestern Law & Michigan Law, n.d.).

Not much activity was seen in the case again until 2006, when a new special prosecutor, Edward Egan, who was appointed to investigate police torture, compiled a list of about a dozen officers under Burge, the former police commander who was fired in 1993, who had been involved in the systematic torture of black suspects to extract confessions in the 1980s (Northwestern Law & Michigan Law, n.d.). This list included both Dignan and Byrne, whom Wrice had accused of beating him to coerce a confession. With this information in hand, Lambros filed another petition for postconviction relief. Although the petition was denied, the Illinois Appeals Court reversed the decision and ordered a hearing. Following the approval for the hearing, the prosecutors appealed the Appeals Court decision to the State Supreme Court, which agreed to hear the case. Meanwhile, during the process of the appeal, Bobby Joe Williams, one of the eyewitnesses who testified for the prosecution at the original trial, recanted his testimony, by way of an affidavit that was submitted to the Chicago Innocence Project on March 7, 2011. In the affidavit, Williams alleged that Dignan and Bryne had also tortured him, forcing him to implicate Wrice falsely and that a female attorney from the Criminal Courts Building showed him photographs of Bryon's injuries and threatened to charge him for the crime if he did not assist the police in testifying against Wrice.

At the time, Williams did not know who the attorney was, but it was later suggested that Assistant State's Attorney Bertina Lampkin, the lead prosecutor on the case, matched his description. Two of the men who pleaded guilty in the crimes, Fowler and Benson, also provided affidavits to the Chicago Innocence Project, stating that neither Wrice nor Lewis, the second eyewitness who claimed to have seen Wrice at the scene, were present during the crime. It should be noted that by the time Fowler and Benson gave their affidavits, Lewis was deceased (Northwestern Law & Michigan Law, n.d.).

Finally, on February 2, 2012, the State Supreme Court, with a unanimous decision, affirmed the Appeals Court decision to order a hearing on Wrice's torture claim (Northwestern Law & Michigan Law, n.d.). Subsequently, the hearing resulted in Wrice's exoneration. On December 12, 2013, Judge Walsh vacated Wrice's conviction on the grounds that the torture evidence was un rebutted and that the key prosecution witness had recanted his trial testimony. The prosecution later dismissed all charges, and Wrice was released, at the age of 59, after serving 31 years in prison for a crime he did not commit. It should also be mentioned that, at the time of Wrice's release, the cases of 25 other prisoners who were convicted in part as a result of confessions obtained by Burge and his subordinates were pending review, in light of the State Supreme Court decision made in Wrice's case (Northwestern Law & Michigan Law, n.d.).

This case clearly exhibits an instance of police coercion that lead to a false confession. There was no doubt that detectives Peter Dignan and John Byrne engaged in police misconduct by forcefully coercing a confession out of Wrice. It was even more troublesome that it was not only these two officers who were found to be part of the misconduct, but also the police lieutenant at the time, Jon Burge, who was later promoted to

commander. The Center on Wrongful Convictions indicates that Jon Burge was later suspended in 1991 and fired in 1993 for systematically torturing black suspects (Northwestern Law & Michigan Law, n.d.). This evidence suggests that such practices were not treated as serious and were possibly thought to be permitted with some officers in the department. This type of culture among police can make officers more susceptible to using coercion, suggestibility, and misconduct.

As previously discussed, police misconduct in any form is detrimental to the criminal justice system and can greatly increase the chances of wrongful conviction. Specifically, coerced confessions, such as Wrice's confession, may be among the worst types of misconduct, as they are not easily disproven or stricken. This was the case in Wrice's situation, in which he was denied the right to have the confession removed. Many defendants assume that, if they confess, they will be still be proven to be innocent in the long run by the other evidence in the case, but this is not always the case as some of other evidence may not be strong enough or there may be a lack of physical evidence to prove the defendant was not involved in the crime. With this said, it is even more problematic that humans, including police and jurors, are poor at detecting a false confession from a true confession (Keene et al., 2012). Additionally, there tends to be a stigma within society, as well as the criminal justice system, that "if you confess, you must have done it." Even strong evidence of police brutality and misconduct, such as that in Wrice's case, may be difficult to prove or present against a confession, even if it is false. The power of false confessions in regards to wrongful convictions may be extremely hard to overcome for some defendants, especially when combined with other factors, such as police misconduct and brutality.

## **Forensic Error**

While many wrongful conviction cases involving forensic error have dealt with latent fingerprints and hair analysis, it has also been suggested that there are many other forensic practices that may lead to wrongful conviction; specifically noted is the use of forensic arson investigations. As previously mentioned, much of the forensic evidence used in courtrooms today is examined by practices that have either been invented in police stations and crime labs or have been established for the direct purpose of fighting crime and obtaining convictions (Balko, 2011). With the failure to use peer-reviewed forensic evidence or verified scientific practices, the chance of wrongful convictions may further increase as more forensic evidence is found in the case. As previously noted, The Innocence Project indicated that about half of the first 225 DNA exonerations were due to flawed or fraudulent evidence (Balko, 2011).

The case of Victor Caminata reveals a clear failure to use scientific-based practices in the investigation of a criminal case. Caminata was charged with arson following the delayed investigation of a home fire that occurred in the home that he and his fiancé, Nicole Vanderhoef, shared in Michigan (Northwestern Law & Michigan Law, n.d.). Caminata was at home at the time of the incident, along with Vanderhoef's 13 year-old son, Tyler, and her 7 year-old daughter, as well as his own daughter, Brooke. When the fire started, Caminata indicated that, as soon as he saw smoke coming through the walls, he instructed Tyler to take his younger sister, as well as Caminata's daughter, outside, and he would go into the basement and extinguish the fire. The fire had occurred in the wood stove, which Caminata, a former building contractor, had recently installed in the home. Caminata also indicated that he had stoked the fire twice that morning before the fire had started. After attempting to

extinguish the fire, he used a ladder to drop a flame retardant down the chimney, but to no effect. The fire continued to burn, and he had to call for help. By the time the fire was extinguished, the home was declared a loss. The fire was initially determined to be an accidental chimney fire (Northwestern Law & Michigan Law, n.d.).

While the investigation was ongoing, there was a tip given to the Wexford County Sheriff's department by an anonymous caller, which indicated that a few days after the fire, she had heard Caminata saying that, based on his firefighting experience, he knew how to burn a house down without getting caught (Northwestern Law & Michigan Law, n.d.). Even with this evidence in hand, the fire was initially determined to be an accidental chimney fire and the insurance company settled with Vanderhoef for the loss of the home and the furnishings in the amount of \$273,000. Shortly after this, Vanderhoef and Caminata split up, and Vanderhoef went to the police for the first time to tell them of the events that happened the night before the fire took place. Vanderhoef indicated that she and Caminata had gotten into an argument the night before the incident, and she instructed him to leave the home. Despite the alleged fight, Caminata stayed in the home, and Vanderhoef went to work the next day, leaving Caminata home with all three children. After this statement, a state fire investigator and the insurance company decided to re-examine the evidence in the case, even though the house had already been demolished by this time. Results of the re-examination indicated that the cause of the fire was arson, based on the indication of multiple points of origin and some of the ignition points, which appeared to be started by a blowtorch (Northwestern Law & Michigan Law, n.d.).

In light of the new evidence, Caminata was arrested and charged with arson in November 2008 and went to trial on the charges in 2009 (Northwestern Law & Michigan

Law, n.d.). During the trial, arson investigators for the prosecution indicated that the fire did not start inside the chimney, and it appeared to be intentionally set. The prosecution also argued that Caminata set the fire intentionally out of fear of losing his “meal ticket” as a result of his argument with Vanderhoef the night prior to the incident. Additionally, it was argued that Caminata saw the fire as a way for him to ensure a job of rebuilding the home, as he had prior experience as a building contractor. Although Caminata’s defense included an arson expert who testified that the fire did start in the chimney and it was not intentionally set, Caminata was still convicted of arson on May 14, 2009. Caminata was subsequently sentenced to 9 to 40 years in prison. He later appealed the conviction in October of 2010, which resulted in a Michigan Court of Appeals denying his claim and upholding his previous conviction. Following the denial of his appeal, Caminata requested the assistance from the Michigan Innocence Clinic at the University of Michigan Law School (Northwestern Law & Michigan Law, n.d.).

After re-investigating the case, the Michigan Innocence Clinic discovered that Vanderhoef had filed a false report with the Missaukee County Sheriff’s Department in 2003, claiming that her estranged boyfriend had made disturbing phone calls (Northwestern Law & Michigan Law, n.d.). It was later discovered that no such phone calls had been made and Vanderhoef had falsely made the claim in order to prevent her estranged boyfriend’s visit with their daughter. Additionally, the Michigan Innocence Clinic obtained arson experts to re-examine the prosecution’s evidence. These experts determined that the arson investigator for the prosecution produced a severely flawed analysis that was not based on scientifically proven fire standards. The experts used by the Innocence Clinic found that the photographs taken of the chimney indicated poor construction and a buildup of a flammable substance:

creosote. With this said, the experts determined that the fire was a result of an accident and an improperly installed stove, as well as fire code violations in the chimney and the walls surrounding the chimney. With evidence of Vanderhoef's false police report in the past, as well as a flawed forensic investigation in hand, the Michigan Innocence Clinic filed a motion for a new trial. Only July 2, 2013, at the hearing for the new evidence, the prosecution indicated that they believed the original conviction should be vacated. The judge subsequently vacated the original conviction and ordered a new trial. Pending the trial, the prosecution continued to investigate the case and, on January 22, 2014, decided to dismiss the charges, after Caminata had served five years in prison. This dismissal was due to lack of evidence to prosecute Caminata (Northwestern Law & Michigan Law, n.d.).

Although Caminata was not exonerated due to DNA evidence, as many who are wrongfully convicted are, it was still found that the evidence used in the original trial was flawed and not based on scientific standards set for arson investigations. The use of flawed and unscientific evidence in any trial or case is very troublesome for the criminal justice system, as it not only reduces the integrity of criminal investigations, but also increases the risk of wrongful convictions. As forensic evidence is considered to be the most reliable evidence by jury members, the general public, and even judges, it can be difficult for a defendant to contest incorrect and even poorly analyzed evidence during a trial (Smith et al., 2011). Additionally, it can be challenging to refute such evidence, as forensic examiners can be costly, which many defendants may not be able to afford without the assistance of outside programs, such as The Innocence Project or similar organizations. It should be noted that, while DNA may lead to many exonerations, it is not extremely common for DNA evidence to be gathered in criminal cases, as fingerprint, hair, and fiber evidence is much more

common. As in the Caminata case, there was no evidence that involved DNA testing, which made the process of refuting the arson conviction even more difficult. Overall, the practices of forensic testing and investigation in criminal cases in the United States lack quality scientific evidence and background, which in turn reduces the quality of the evidence and increases the chance of error and a wrongful conviction. It is even more problematic that these poor scientific practices are more common with more frequently used types of evidence, such as fingerprint, hair, and arson analysis.

### **Prosecutorial Misconduct**

According to Balko (2011), prosecutorial misconduct was found in about one-quarter of the first 225 DNA exonerations in the United States. Prosecutorial misconduct can include practices such as overly suggestive witness coaching, during investigation as well as trial preparation, inappropriate or suggestive closing arguments, or even failure to disclose exculpatory evidence to the defense (Gould & Leo, 2010).

The case of Daniel Taylor exhibits an example of prosecutorial misconduct, in the form of failing to turn over exculpatory evidence and witness tampering (Northwestern Law & Michigan Law, n.d.). Taylor was charged in the robbery, home invasion, and murder of Jeffrey Lassiter, a drug dealer, and Sharon Haugabook, a prostitute, which occurred on November 16, 1992, in Chicago. Taylor was implicated in the crime after the police questioned two individuals, Lewis Gardner and Akia Phillips, who were selling drugs on a street corner near where the murder took place. Fifteen year old Gardner, who had an IQ of 70, identified Deon Patrick as being involved in the murder and indicated that he was the person from whom he bought his drugs. Additionally, both Gardner and Phillips implicated Dennis Mixon, Paul Phillips, Rodney Mathews, Joseph Brown, and Daniel Taylor, who was

17 years old at the time, in the murder of the two victims. Both Gardner and Phillips indicated that they had been lookouts for those involved in the murder (Northwestern Law & Michigan Law, n.d.).

Taylor was taken into custody on December 3, 1992, at 3 a.m. from the juvenile home where he was residing (Northwestern Law & Michigan Law, n.d.). Three hours after being taken into custody, he gave a confession that was transcribed by a court reporter and placed into record. His confession stated that Matthews, Patrick, and Mixon went to the apartment to collect a drug debt that Lassiter owed to Mixon and that Gardner, Brown, and the Phillips brothers remained outside the home as lookouts. Additionally, Taylor also indicated that Patrick shot Lassiter when he refused to pay the debt and then turned to shoot Haugabook, as he and Mixon were holding her arms. Taylor indicated that, prior to the shooting, the group had met at the park around 7 p.m. to plan the visit to the home. During the same night that Taylor was brought into the station, Matthews, Brown, and the Philips brothers were also arrested and gave recorded confessions that confirmed Taylor's confession. Taylor almost immediately recanted this confession as he was being taken to lockup later that evening. He told the detectives that he was in jail at the time of the murders due to being caught fighting in a nearby park, which was later confirmed by jail records. Jail records indicated that Taylor had been arrested at 6:45 p.m. on November 16, 1992 and was bonded out at 10 p.m., which was more than an hour after the murders took place. Aside from this, the investigation continued and there were statements by two officers, on December 12<sup>th</sup>, which indicated that they had seen Taylor in an alley near the shooting location at about 9:30 p.m. on the night the incident took place. Additionally, three months after Taylor was placed in jail and confessed, Mixon was arrested and gave a recorded confession, which confirmed the same story the

others, as well as Taylor, had indicated in their confessions (Northwestern Law & Michigan Law, n.d.).

Taylor went to trial in August 1995 on the charges of murder, robbery, and home invasion (Northwestern Law & Michigan Law, n.d.). By the time of his trial, Matthews had already been acquitted by a jury after testifying that his confession was coerced and the charges against Akia Phillips and Brown were dismissed on the grounds of illegal arrest and improperly promising leniency in return for a confession. During Taylor's trial, the prosecutors presented his confession, along with the evidence that he had been placed in jail that night, but indicated that he may have been released earlier than 10 p.m., as the officer could have waited to sign off on the bond slip. The two officers who indicated that they had seen Taylor on the street shortly after the murders took place testified and indicated that they also saw him running into a nearby apartment after they arrived on the scene of the crime. It was subsequently indicated that the supposed apartment was the residence of Akia and Paul Phillips. The officers claimed that they had gone into the home and arrested Andrea Phillips, the mother of Akia and Paul Philips, for possession of cocaine, then dropped Taylor off at the youth shelter at 10 p.m. In addition to the police testimony locating Taylor on the streets, rather than in jail, near the time of the crime, the prosecution had Adrian Grimes, a convicted drug dealer, testify at the trial. Grimes indicated that he saw Taylor in the park at about 7:30 p.m., which was about an hour before the murders (Northwestern Law & Michigan Law, n.d.).

Taylor was convicted in September of 1995 and later sentenced to life in prison with the possibility of parole (Northwestern Law & Michigan Law, n.d.). He appealed the conviction but was denied. His case did not gather any more attention until December 2001,

when the Chicago Tribune published a series of articles that examined false and coerced confessions that were obtained by the Chicago Police Department. They found that there were nearly 250 murder cases that involved confessions by defendants who were acquitted or had charges dismissed. This series of articles also included newly discovered evidence in Taylor's case, which stated that four months before the two officers had written the statements about seeing Taylor in the alley after the time of the shootings, one of the officers, Berti, had been accused by a judge of lying under oath. As if this did not add enough suspicion, it was also found that Grimes, who testified to seeing Taylor just before the time of the murders, had recanted his testimony and indicated that he had only testified for promised leniency on a drug charge. Additionally, Mixon later admitted that he was present at the time Lassiter and Haugabook had been killed, but added that none of the seven others who gave confessions were involved in the crime. The newspaper later found computer reports at the youth center that proved that Taylor did not return to the center until 3 a.m., which discredited the officers' claim that they had returned him to the center at 10 p.m., after arresting Andrea Phillips. With this information in hand, the newspaper dug up the police lockup log book and located another individual who was in jail the same night that Taylor was, James Anderson, who indicated that he recalled being in lockup with Taylor that night (Northwestern Law & Michigan Law, n.d.).

In response to the series of articles, the Cook County State Attorney's office re-opened the investigation, but later indicated that Taylor was guilty (Northwestern Law & Michigan Law, n.d.). Based on the findings of the newspaper and the failed re-investigation by the Cook County State Attorney's office, Taylor filled numerous appeals but was unsuccessful. In 2011, Taylor's case was taken by the Northwestern University's Center on

Wrongful Convictions and a writ of habeas corpus petition was filed on his behalf. The petition indicated that the prosecutor had failed to disclose information that showed that, prior to the trial, the police had interviewed Anderson, who had indicated that he had been in lockup with Taylor the night of the murders, and ignored his statement. While the original petition was dismissed, the United States Court of Appeals for the Seventh Circuit reinstated the petition in October 2011. During the time in which the case was awaiting a new trial, the Illinois Attorney General's Office reviewed the State's Attorney's trial file and discovered pre-trial notes written by the prosecutor, after Taylor was charged, that indicated that seven different police officers, including the two who testified at the trial, had confirmed that Taylor was in fact in lockup at the time of the crime. These notes were turned over to Taylor's lawyers in federal court (Northwestern Law & Michigan Law, n.d.).

Finally, on June 28, 2013, the Cook County State's Attorney's Office filed a motion to vacate Taylor's conviction, which was granted and the charges were later dismissed after Taylor had served more than 20 years in prison (Northwestern Law & Michigan Law, n.d.). Additionally, in light of this decision, the case of one of the co-defendants, Deon Patrick, was re-opened and re-investigated, which resulted in the dismissal of the charges against him and his release. In January 2014, the Cook County Circuit Court Chief Judge Paul Biebel Jr. awarded Taylor with a certificate of innocence. Following this, in February 2014, Taylor filed a federal civil rights lawsuit against the city of Chicago and the eight Chicago police officers involved in the investigation and prosecution of his case (Northwestern Law & Michigan Law, n.d.).

This case provides clear evidence of prosecutorial misconduct in many ways, such as the failure to turn over exculpatory evidence, especially the reports confirming that Taylor

was in jail at the time of incident, witness tampering, by way of offering leniency for the testimony of Grimes, and even failure to dismiss or reinvestigate the case after finding that Taylor could not have been at the scene of the crime. It could be suggested that the prosecutors, as well as the police in this case, could have been subject to the tunnel vision phenomenon, as they overlooked multiple pieces of evidence that indicated Taylor's innocence. Not only did the prosecution continue on with the case, but it also proceeded to have witnesses testify at trial in exchange for leniency. This behavior on behalf of the prosecution not only led to the wrongful conviction of Daniel Taylor, but also led to more than 20 years of his life being taken away. This type of behavior has been directly linked to increased chances of wrongful conviction. Although prosecutorial misconduct to this extent has not been thought to occur commonly, it is still very detrimental to the integrity and accuracy of the criminal justice system, as it can greatly increase the chance of wrongful convictions, such as the wrongful conviction of Daniel Taylor.

### **Ineffective Assistance of Counsel**

According to Gould & Leo (2010), it has been suggested that ineffective defense lawyering was the biggest contributing factor to the wrongful conviction or death sentence of criminal defendants within the last twenty three years. There are many ways in which defense attorneys may inadequately represent their client, which include not adequately challenging witnesses, unwarranted plea bargaining confessions, failing to file the proper motions, failing to challenge forensic evidence, and inadequately investigating the case (Smith et al., 2011).

An example of inadequate defense is shown in the case of Daniel Larsen, who was convicted of possession of a concealed weapon in June 1999 and was sentenced to 28 years

to life, due, in part, to California's Three Strikes Law (Northwestern Law & Michigan Law, n.d.). The original incident occurred on June 6, 1998, when a fight broke out in the parking lot of the Gold Apple Cocktail Lounge in Northridge, California. The individual who called the police indicated that he/she saw a man with a green shirt and a ponytail waving a knife. When the officers arrived on the scene, there were more than a dozen people standing in the area. One of the officers indicated seeing a man with a green shirt, but with a shaved head, who took a knife from his waistband and threw it under a car. Following this, the knife was recovered, and the officers arrested 30-year-old Daniel Larsen as the man who threw the knife. Larsen was subsequently charged with possession of a concealed weapon, but the initial charge was dismissed, as the judge found no evidence of concealment, which was a required element of the crime. The prosecutor later charged Larsen a second time with the possession of a concealed knife, after the officer who identified Larsen as the suspect changed his testimony at the second preliminary hearing. At the second hearing, the officer indicated that Larsen's shirt was untucked and covered the knife, and that Larsen reached under his shirt, grabbed the knife and threw it under the car after the police had arrived (Northwestern Law & Michigan Law, n.d.).

After the second preliminary hearing, Larsen was officially charged in the case and went to trial in June 1999 (Northwestern Law & Michigan Law, n.d.). At the trial, the officer proceeded to testify to seeing Larsen pull the knife out from under his shirt and throw it under the car, although this was not what he had initially indicated. Larsen was convicted by a jury on June 23, 1999, and sentenced to 28 years to life in prison, due to the fact that he had three prior felony convictions, which required a life sentence under the Three Strikes Law in California (Northwestern Law & Michigan Law, n.d.).

Larsen's case did not receive any further attention until 2004, when the California Innocence Project at California Western School of law began working on his case (Northwestern Law & Michigan Law, n.d.). In 2005, a writ of habeas corpus was filed in the Los Angeles County Superior Court, after the initial appeal had been declined. The habeas petition indicated that Larsen had received a constitutionally inadequate defense, due to the fact that his trial lawyer, who was later disbarred, failed to investigate the case prior to trial and failed to discover the multiple witnesses who would have testified that Larsen did not have a knife at the scene of the fight. The petition indicated that Larsen's defense attorney failed to request a fingerprint analysis on the knife in question. In regards to the alleged witnesses who indicated that Larsen did not have a knife and did not throw the knife, there were multiple declarations from several witnesses attached to the petition, including one from James McNutt, a retired Army sergeant and former police chief. McNutt indicated that he was in the parking lot of the tavern at the time of incident and he saw a man named William Hewitt arguing with Daniel Harrison, his step-son. He also indicated that he witnessed Hewitt take the knife from his waistband and throw it under the car after the police had arrived. Another statement came from Hewitt's girlfriend, Jorji Owen, who indicated that, after the incident, he had told her that it was he who threw the knife and he felt so bad about the incident that he sold his motorcycle to get money to post Larsen's bond. Hewitt himself later submitted an affidavit confirming Owen's statement and indicating that the knife was his and that Larsen had not thrown it under the car. Even with the sworn affidavits and multiple witness statements, the petition for habeas corpus was denied. The denial was also later upheld on appeal by the California Court of Appeals and the California Supreme Court (Northwestern Law & Michigan Law, n.d.).

Following this, Larsen filed a federal petition for a writ of habeas corpus in 2008 (Northwestern Law & Michigan Law, n.d.). The prosecution appealed the petition, stating that it was filed beyond the one-year deadline for such petition after state challenges to a conviction are final; however, the federal court denied the prosecution's appeal and ordered a hearing on the petition to determine if the case qualified as an exception to the one-year requirement. The hearing was finally held in 2009. At this hearing, McNutt, the former police chief, testified that Larsen was not in possession of the knife nor did he throw the knife at the scene of the incident in question. McNutt also identified Hewitt as the person who threw a metal object under a car as the police arrived. McNutt revealed that he did not come forth sooner due to the fact that he and his wife had returned to their home in North Carolina, and he was not aware that Larsen was convicted. Following this hearing, the judge found that Larsen had established actual innocence, and he qualified for an exception to the one-year deadline. The judge also found that Larsen's trial lawyer had failed to provide adequate defense in the case. With this said, the judge vacated the original conviction and ordered a new trial. The prosecution appealed this ruling but was later denied by Ninth Circuit of the U.S. Court of Appeals in September 2013. On January 27, 2014, the Los Angeles County District Attorney's Office dismissed the charge against Daniel Larsen, after he had served 14 years in prison (Northwestern Law & Michigan Law, n.d.).

This case exhibits a clear example of inadequate legal representation, as Larsen would not have been convicted or spent any time in prison if the witness statements and forensic evidence would had been investigated or examined prior to the trial. If Larsen's defense attorney had received statements from other individuals at the scene, he would have likely found that Larsen was not the one who had the knife that night. While it has been

suggested that many of the problems with inadequate defense occur in cases with indigent defendants, these problems may occur in any defense case when specific factors are present, such as a lack of funding, an absence of quality control, and a lack of motivation in behalf of the defense attorney (Gould & Leo, 2010; Hartley et al., 2010; Williams, 2013). Inadequate legal defense has been suggested as one of the largest factors in wrongful convictions, as the defense attorney is supposed to protect the defendant from the mistakes of others that could have occurred early in the case, such as police misconduct, prosecutorial misconduct, or issues with eyewitness testimony. In the Larsen case, it was apparent that the officer who testified at both preliminary hearings did go back and change his account of the incident, whether it was done intentionally to ensure a charge or not. If the defense attorney for Larsen had suspected this issue or a threat to his client, he may have proceeded with more investigation, such as looking into and questioning the other witnesses at the scene of the incident. Overall, inadequate legal defense is a factor of wrongful conviction that can directly affect the outcome of the case, as the quality and amount of defense the defendant receives is directly associated with the ability to correct errors that may have occurred earlier in the case and, subsequently, prevent a wrongful conviction of the defendant.

### **Racial Disparity**

As previously discussed, research has found serious race effects within the identification, prosecution, and sentencing of criminal suspects (Gould & Leo, 2010). It has been found that minorities are more likely to be subject to some of the sources of wrongful conviction, as well as a wrongful conviction itself (Gould & Leo, 2010; Konvisser, 2012). The largest example of racial disparity is within eyewitness identifications, as it has been found that errors are more likely when the victim and the perpetrator are of a different race

(Gould & Leo, 2010). This was the cause in the well-known Ronald Cotton trial, in which an African American male was wrongfully convicted of two counts of rape and two counts of burglary in North Carolina (Innocence Project, n.d.). Both incidents in question occurred in July of 1984, when an assailant broke into an apartment, severed phone wires, sexually assaulted a woman, searched through her belongings, and stole money and other items from the home. Ronald Cotton was arrested for these two separate incidents on August 1, 1984, after a photo identification by one of the victims and a police lineup identification by the other victim. The other evidence against Cotton included a flashlight found in his home that resembled the one used by the assailant and a piece of rubber from Cotton's tennis shoe that was consistent with rubber found at one of the crime scenes (Innocence Project, n.d.).

With the eyewitness identifications and other minor physical evidence in hand, Cotton was convicted of the first offense, including one count of rape and one count of burglary, in January of 1985 (Innocence Project, n.d.). Following the conviction, Cotton appealed the case to the North Carolina Supreme Court, which resulted in the overturning of the original 1985 conviction, based on the fact that the second victim had identified another man in the lineup and the trial court had not allowed this evidence to be heard by the jury. In November 1987, Cotton was retried for both cases, due to the fact that the second victim later decided that Cotton was her assailant after the first trial. Before this retrial, it was found that there was a man in prison at the time who had confessed to have been the assailant in the crimes of which Cotton had been convicted. At the second trial, the superior court judge refused to allow this information into evidence, which resulted in Cotton being convicted of both rapes. Cotton was subsequently sentenced to life plus fifty-four years (Innocence Project, n.d.).

In 1988, Cotton's appellate defender filed a brief on his behalf, but failed to include the second suspect's confession, which resulted in an affirmation of Cotton's conviction (Innocence Project, n.d.). Due to this failure to include exculpatory findings, the chief appellate defender requested that two new lawyers take over Cotton's defense. These two lawyers filed a motion for appropriate relief on the grounds of inadequate counsel, as well as a motion for DNA testing, which was granted in October 1994. The DNA evidence in the case, including the assailant's semen, was turned over by the Burlington Police Department for testing in 1995. Although one of the victim's DNA samples had deteriorated too much to prove to be useful in the DNA testing, the other victim's vaginal swab and underwear were compared to Cotton's DNA and did not result in a match. With this finding in hand, the defense requested that the results be sent to the State Bureau of Investigation's DNA database, which consists of DNA of convicted violent felons in North Carolina prisons, in attempt to find a match. The state's database showed a match with the man who had earlier confessed to the crime prior to Cotton's second trial in 1987 (Innocence Project, n.d.).

As a result of the DNA test results, the district attorney and the defense filed a motion to dismiss all charges in May of 1995 (Innocence Project, n.d.). On June 30, 1995, Cotton was officially released from prison and cleared of all charges, after serving ten and half years in prison. Shortly after this, in July 1995, the governor of North Carolina officially granted a pardon for Cotton, which made him eligible for \$5,000 in compensation from the state for his time served in prison. This case was especially monumental as one of the victims, Jennifer Thompson, who had identified Cotton as the assailant, started a campaign to increase awareness of the dangers of eyewitness testimony and how it can affect a conviction, after Cotton's release from prison (Innocence Project, n.d.).

The case of Ronald Cotton has played a large role in the increased awareness of the inaccuracies of eyewitness testimony, as well as the role eyewitness testimony plays in wrongful convictions, and increased awareness for racial disparities that may occur within the criminal justice system. While there may not have been direct evidence of racial discrimination in the Cotton case, it can be suggested that the increased chances of eyewitness error that results from the defendant and the victim being of different races played a role in the conviction. It has been shown that this is particularly the situation in rape cases, such as that of Cotton, in which a white victim is raped by an African American or Hispanic man and unintentionally identifies an innocent person as the suspect during the lineup (Gould & Leo, 2010; Vallas, 2011). Smith and Hattery (2011) indicated that this problem is fairly common for African American men, as it is suggested that they are more than four times more likely to be exonerated for raping white women compared to the number of times they actually commit this crime. It has been suggested that the racial history of the United States has contributed to this phenomenon, which makes the problem more difficult to overcome. This case, as well as the events that occurred after the case, such as the advocacy and awareness campaign by Jennifer Thompson and Ronald Cotton himself, through books and multiple speeches, has led to a greater awareness of racial disparity within the criminal justice system and has provided an example of how multiple factors can culminate to produce a wrongful conviction, such as racial disparity within eyewitness identification.

### **System Issues**

As previously argued, there are many issues within the criminal justice system that may cause wrongful convictions, such as inadequate funding and lack of resources, increased caseload problems, and increased use of plea bargaining (Roberts, 2003). As it is well

known that plea bargaining may be a result of increased caseloads and lack of funding and resources, it has also been advocated that these issues can result in inadequate defense services, particularly by court-appointed and defense attorneys for the indigent (Smith et al., 2011).

An example of inadequate defense was presented in the case of Jimmy Ray Bromgard, who was convicted of three counts of sexual intercourse without consent and sentenced to three 40-year terms in prison, which were to be served concurrently (Innocence Project, n.d.). The incident in question occurred on March 20, 1987, when a young girl was attacked in her home by an intruder who broke into the home through a window. The intruder proceeded to rape the girl vaginally, anally, and orally. The intruder then stole a purse and a jacket and left the home. During the investigation, the police collected the girls' underwear and bed sheets, which contained semen and several hairs. The victim also assisted the police in producing composite sketch of the intruder. Following the production of the composite sketch, an officer familiar with Bromgard indicated that he resembled the individual in the sketch. Bromgard eventually agreed to participate in a lineup at the police station, which was videotaped. During the lineup, the victim picked out Bromgard but indicated that she was not sure if he was the right man, saying that she was only about 60 to 65 percent sure. Even with her uncertainty, she was still allowed to identify Bromgard in court as her assailant. It is important to note that Bromgard's assigned counsel never objected to the in-court identification (Innocence Project, n.d.).

During the trial, the prosecution's case revolved around the identification by the victim and the misleading testimony of the state's forensic expert, who testified that the head and pubic hairs found on the sheets were indistinguishable from Bromgard's hair samples

(Innocence Project, n.d.). After failing to type the semen found on the victim's underwear, the prosecution's forensic expert could only rely on the hairs found on the bed sheets, which led him to indicate that there was a less than a one in ten thousand chance that the hairs did not belong to Bromgard. This crucial testimony was found to be fraudulent, as there has never been a standard established to statistically match hairs through microscopic inspection. The state's forensic expert had forged the evidence and presented extremely misleading testimony. Other than this forensic evidence, the only other physical evidence presented by the prosecution included a checkbook from the victim's purse that was found on a street near Bromgard's home (Innocence Project, n.d.).

In regards to the defense's case, Bromgard testified that he was at home asleep when the crime occurred (Innocence Project, n.d.). Additionally, none of his fingerprints had been found in the victim's home or on the checkbook that was later discovered near his home. The defense had no further argument besides Bromgard's own testimony. At this point in the case, it was clear that Bromgard's defense was extremely inadequate, as his attorney did not investigate the case, failed to hire an expert to debunk the state's forensic expert, filed no motions to suppress the identification of the young girl, who indicated that she was only about 65 percent certain that she identified the right man, failed to give an opening statement, did not prepare a closing statement, and failed to file an appeal after Bromgard's conviction. With a lack of adequate defense, Bromgard was convicted in December 1987 of three counts of sexual intercourse without consent and sentenced to forty years in prison for each count (Innocence Project, n.d.).

In 2000, The Innocence Project started working on Bromgard's case, shortly after he was denied parole release due to a failure to participate in the sex offenders program in

prison (Innocence Project, n.d.). During the re-investigation, the students with The Innocence Project worked with Bromgard's postconviction attorney to have the initial evidence released and re-tested. The results of the new test conducted on the victim's underwear indicated that Bromgard was not a match to the sperm located on the underwear. Following the finding that Bromgard was not guilty, on October 1, 2002, he later became the 111<sup>th</sup> person in the United States to be exonerated by postconviction DNA testing. Overall, Bromgard spent fourteen and a half years in a Montana prison for a crime he did not commit. This case was monumental for the state of Montana, as the ACLU filed a class action lawsuit against the indigent defender system in seven Montana counties for not providing adequate counsel for indigent clients. Additionally, the forensic science division in the state was given much attention, as many advocated for an audit to be conducted by the Attorney General's office due to the junk science presented at trial and forensic science misconduct on behalf of the state's forensic science expert who testified at the trial (Innocence Project, n.d.).

In regards to inadequate indigent defense, it has been shown that the lack of funding for indigent defense or public defenders offices can lead to wrongful convictions, due to an inability to compete with the prosecution. Specifically, if defense attorneys do not have the funding and resources to adequately investigate and counter the resources of the prosecution, they may not be able to convince the court that their client is not guilty (Smith et al., 2011). As previously noted, these issues are likely to be even worse for indigent defendants who have court appointed counsel or a public defender, as these attorneys are less likely to have funding and resources (Hartley et al., 2010; Williams, 2013). In the Bromgard case, it did seem as though this could be an explanation for some of the failures on behalf of his court appointed defense attorney, but some of the other failures, such as failing to object to the in-

court identification or even file for appeal upon conviction, can only be attributed to bad lawyering (Innocence Project, n.d.). While system factors and issues, especially lack of funding, can attribute to wrongful conviction by way of inadequate defense services, it should be noted that system issues as a whole also have detrimental effects on individual cases and may lead to wrongful convictions. Not only can system issues lead to wrongful convictions, in multiple ways, wrongful convictions may also lead to further exacerbation of these system issues, typically by way of the large amount of funding spent on incarcerating wrongfully convicted individuals.

## **Chapter 5: Possible Remedies and Prevention Mechanisms**

### **Remedies**

#### **Lawsuits**

According to Brooks and Simpson (2012), there are hundreds of inmates who have been exonerated in the past twenty years and released back into society with no resources to start a new life. Kahn (2010) indicates that many of these inmates spend thousands of dollars funding their appeal, leaving them in substantial debt, deprived of job experience and wages they would have earned had they had not been in prison, facing unique impediments to securing employment, and being burdened by considerable emotional, psychological, and physical harm as a result of imprisonment. The culmination of these issues makes it exceedingly difficult for recently freed individuals to resume a normal life. While this is the case for all inmates upon release, it is even more difficult for those wrongfully convicted, as they cannot proclaim or indicate their innocence on government documents or job applications unless they have been fully exonerated, pardoned, or obtained a statement of innocence. A legal finding of innocence may still not be able to remedy physical and psychological consequences of imprisonment or be able to rid the individual of the social stigma caused by imprisonment. Although it seems clear that there is a loss of liberty, as well as many of the core components of a normal life, such as familial ties, job attainment, psychological health, and physical health, as a result of wrongful conviction, and that those who are wrongfully convicted should be compensated in some manner, there are still many

disagreements about how this should be done or how much should be given to these individuals. This inadequate or non-existent compensation leads many individuals to pursue legal or legislative alternatives, which can include constitutional or common law tort remedies, private legislative bills, and, more commonly, action under state compensation statutes (Kahn, 2010). Overall, while there seem to be a variety of ways in which individuals who are wrongfully convicted may seek compensation, these individuals are still likely to face many barriers and legal hurdles. The most common barrier to accessing all three methods tends to be the immunity of the government agencies against which these individuals are filing suits. In this regard, it is well known that, in these cases, the government immunity is likely to block most of these suits from ever seeing a courtroom or even a settlement mediation (Brooks & Simpson, 2012; Kahn, 2010).

#### **Constitutional and Common Law Tort Remedies.**

According to Kahn (2010), under 42 U.S.C. §1983, a wrongfully convicted person may sue the government for the deprivation of any right, privilege, or immunity secured by the Constitution and laws. The largest issue with this type of suit is that it is usually very difficult for wrongfully convicted persons to satisfy the requirements to succeed with such a claim. Specifically, the first step of such a claim is to identify the specific constitutional right allegedly infringed, which may be problematic for some wrongfully convicted individuals, as there may not have been one specific right covered under §1983 that was violated. An even larger issue with this type of claim is that the defendant must prove that there was culpable conduct on the part of the government. This is troublesome, as many wrongful convictions do not arise from misconduct on the part of the government, but are usually a culmination of factors such as unintentional misidentifications by eyewitnesses or false testimony by

jailhouse informants, etc. Even if there are cases in which there was direct misconduct from a government official, whether it was due to negligence or it was intentional, it is difficult to prove and is even more difficult to challenge official authority due to the complete or qualified immunity police and prosecutors are granted by the courts. Additionally, common law tort claims, such as malicious prosecution and false imprisonment, suffer from similar issues. Specifically, both of these claims require a showing of intent on the part of the government, in addition to an absence of probable cause for arrest. Specifically, if an individual were to bring up a claim of false arrest, he/she must show that he/she was intentionally confined without consent and justification. Additionally, these common law tort claims are subject to the same police officer and prosecutor immunity protections, which are difficult to defeat or bypass. It is important to note that, even if a defendant is successful at pursuing a constitutional or tort remedy, a favorable judgment may take years to recover, which will leave the wrongfully convicted individual to front the costs of yet additional legal counsel, while also attempting to make ends meet on the limited income that may be extremely difficult to find with prior arrests and prison time on his/her record (Kahn, 2010).

### **Private Compensation.**

When a wrongfully convicted individual seeks private compensation, he/she is seeking a private bill from the state legislature, which can allocate money to the individual directly (Kahn, 2010). This method seems to be difficult for many individuals who seek to obtain compensation, as many states interpret their constitution as precluding this type of recovery. Additionally, many state legislatures are simply not equipped to handle the growing number of wrongfully convicted individuals who are seeking compensation after the so-called “postconviction DNA testing boom” and innocence movement. Specifically,

legislatures do not have the time or resources to examine, debate, and vote on compensation for numerous individuals. This type of relief is rarely used. Lastly, a compensation bill, such as those pursued during private compensation efforts, is highly subjective to political climate and budgetary concerns. These two factors alone can be a determining factor in the fate of the bill and the merits of the claim for compensation, as well as the amount of compensation. As previously noted, these types of compensation claims are not commonly used, which is especially the case as many states have now established compensation statutes to handle such issues in a streamlined manner (Kahn, 2010).

### **Compensation Statutes.**

Twenty-seven states, the District of Columbia, and the federal government have enacted formal compensation statutes aimed at providing relief for those wrongfully incarcerated (Brooks & Simpson, 2012; Kahn, 2010). These statutes have been enacted “amid heightened awareness of instances of erroneous conviction and growing interest in providing new legal remedies for persons exonerated after serving time in prison” (Kahn, 2010, p. 135). These statutes are aimed at making it easier to establish and satisfy criteria for recovery, rather than only relying on negligence on behalf of the government. These statutes allow for recovery even in the absence of any government culpability and are available to anyone who meets certain eligibility requirements, regardless of political connections. It is clear that these statutes are aimed at fixing the direct issues of constitutional and common law torts, as well as private compensation claims.

The issue with these statutes, on a nationwide level, is that they are commonly flawed and misinterpreted, which hinders exonerees from being provided relief (Brooks & Simpson, 2012). Additionally, these statutes are likely to favor an administrative process rather than a

civil suit, which could affect defendants in a variety of ways. Specifically, the compensation amounts may vary and there may be a variety of caps placed on total compensation available in specific areas (Kahn, 2010). Similar to the appeals process, the defendants seeking compensation under these statutes may be faced with more legal issues, such as strict statutes of limitations or a high burden of proof to qualify for compensation. Kahn (2010) indicates that the even larger issue surrounding compensation statutes is that succeeding on such a claim is too difficult and takes too long for the compensation received. Meritorious claims are often defeated due to the burden placed on the defendants, which include the costs of litigation and the difficulty of producing evidence related to a crime that took place years ago. Even when the claimant does succeed, the process itself takes years to complete, which leaves the wrongfully convicted individual without any money, which is a similar issue seen with private compensation processes (Kahn, 2010).

Brooks and Simpson (2012) indicate that the statutes put in place in Alabama, Connecticut, Illinois, Maryland, New Hampshire, North Carolina, Tennessee, Nebraska, Oklahoma, Texas, and California require an administrative hearing to determine eligibility for compensation. Some of these states also allow compensation without a civil suit occurring. On the other hand, the District of Columbia, Maine, Massachusetts, Mississippi, Missouri, New Jersey, New York, Ohio, Vermont, and West Virginia all require wrongfully convicted inmates to bring civil claims against them rather than utilize an administrative process. It should also be noted that Florida, Iowa, and Utah utilize a combination of these approaches by using a three step process in which the defendant first files a claim in the courts, then the claim is reviewed by the administrative agency, which finally makes a recommendation to the court on the relief for the defendant. The court may accept or

completely dismiss the recommendation in these combined practices (Brooks and Simpson, 2012).

It seems that there is not a universal way in which an inmate may apply for compensation; since each state can differ greatly in their procedural guidelines, it has become even more difficult for some defendants in states such as Illinois, Maine, Maryland, North Carolina, Oklahoma, Tennessee, Texas, and Virginia due to highly restrictive requirements for seeking compensation (Brooks & Simpson, 2012). Specifically, these states require the inmate to have secured either a pardon or a finding of actual innocence before he/she can even become eligible for compensation (Brooks & Simpson, 2012; Kahn, 2010). It should be noted that, in some of these states where strict guidelines are followed, there is no method of relief for compensation for those convicted of misdemeanors, meaning only those convicted of felonies are able to petition for compensation (Kahn, 2010). It is clear that this may leave out a substantial number of wrongfully convicted individuals, as these smaller cases may be overlooked more often and pleas may be more likely to take place, as previously mentioned. Additionally, the implications of incarceration, even if it is within jail rather than prison, may still be detrimental or have negative consequences on the individual's life, especially in regards to job placement. These strict guidelines are likely to cause even more unnecessary difficulty for wrongfully convicted individuals, as it is very hard to secure a pardon, and it is even more difficult to meet the high burden required to secure a finding of actual innocence. Additionally, these processes may be even more difficult for those inmates who are not familiar with the procedures and rules that must be followed and who do not have any kind of legal assistance in seeking compensation or any type of relief (Brooks and Simpson, 2012).

Kahn (2010) indicates that another strict guideline that is used in about half of the compensation statutes is the exclusion of defendants who in some way caused or contributed to their own conviction. This is especially detrimental for those who are wrongfully convicted, as it has already been indicated that false confessions and coerced testimony from the defendant may play a large role in wrongful conviction. Additionally, this rule also applies to those who pleaded guilty, committed perjury, fabricated evidence, or made a false statement that contributed to the conviction (Kahn, 2010). Although similar requirements have been placed during the appeals process itself, these are still troublesome for those wrongfully convicted, as they may not be able to seek compensation, even if they were later exonerated by DNA evidence, if their initial case involved a guilty plea or any suggestive testimony on their behalf. While states such as New York have indicated that these provisions should not affect the ability of defendants who have cases involving coerced confessions and involuntary or invalid guilty pleas to seek recovery, it does not seem clear that they would stand a chance of making it far in the process if new evidence is not introduced and they are not given a chance to provide proof of innocence, which is unlikely even during the initial appeals process (Kahn, 2010)

#### **Number of Successful Compensation Lawsuits.**

As it is clear that statutes and processes for seeking compensation vary greatly by state, it is important to determine how many individuals have been successful at achieving compensation for wrongful conviction through these varying policies. According to Garrett (2008), only 41 percent of the 200 exonerees in his study have received some kind of compensation for their years of imprisonment for crimes they did not commit. It has been indicated that this low percentage of those receiving compensation may be due to the high

burden of proof; for instance, in order for an exoneree to pursue a federal civil rights action suit, he/she must be able to show that government officials acted with sufficient fault. In the Garrett (2008) study, 78 of the 200 filed civil claims, mostly in federal courts. With this said, only 49 of those who brought wrongful conviction lawsuits received a favorable judgment or settlement. Of those who did receive compensation, several of the suits were for many millions of dollars. The high amount of these settlements is thought to provide a deterrent effect to law enforcement and prosecutors so that they will not violate fair trial rights, although evidence has not been conclusive on this matter thus far. Additionally, 18 exonerees in this study received compensation by way of no-fault compensation statutes that have been put into place in some states, while 15 more have received compensation through special legislative bills (Garrett, 2008). While it seems that almost half of those in the study were able to receive compensation for wrongful conviction, it is still problematic that over half of those who were exonerated by way of DNA evidence still have not been compensated for their time in prison, away from their family, out of the work force, and with an overall loss of liberty. Garrett (2008) and Kahn (2010) indicate that even those who did receive compensation faced many obstacles in obtaining relief, such as meeting eligibility requirements for statutes, statutes of limitations, high burden of proof standards, and caps on recovery of damages, no matter the length of time wrongfully incarcerated. Lastly, according to Kahn (2010), more than half of those who do receive compensation nationwide wait two years or longer after exoneration for the first payment and typically leave prison with less help, such as pre-release counseling, job training, substance-abuse counseling, housing assistance, and other services, than those who have not been wrongfully convicted or are simply released on parole.

## **Access to Postconviction DNA Testing**

While the federal government has already put some provisions in place to protect defendants who have been charged and convicted of a federal offense, through the Justice for All Act, there is currently a lack of similar standards at the state level (Innocence Project, n.d.). As previously mentioned, the Justice for All Act permits defendants convicted of a federal offense, who have been sentenced to imprisonment or death, to apply to the court where the original conviction was entered for DNA testing of specific evidence. This statute also requires the preservation of biological evidence, which has been noted as another potential reform option for the issue of wrongful conviction. The Justice for All Act indicates that the court shall grant the defendant's motion to test the DNA evidence if specific requirements have been met. First, the applicant asserts that he/she is actually innocent of either a federal offense for which he is currently sentenced to imprisonment or death, or of a federal or state offense that was used as evidence during a death sentence hearing. Second, the evidence to be tested was obtained in connection with the investigation of the state or federal offense noted previously. Third, the evidence has been maintained by the federal government, has been subject to proper chain of custody, and remains to be suitable for testing. Fourth, the scope of the testing in question is reasonable and conforms with accepted scientific methods. Fifth, the applicant's theory of defense is not inconsistent with an affirmative defense at trial and would establish the actual innocence of the defendant. Sixth, during the trial that resulted in the conviction there was a question of the identity of the perpetrator. Seventh, testing of the DNA evidence would produce new material evidence that would support the defense theory and raise a reasonable suspicion that the defendant is innocent of the crime in question. Eighth, the applicant certifies that he/she will provide a

DNA sample. Finally, the motion is filed in a timely manner, which must be within 5 years of the enactment of the law, or three years of the conviction, whichever comes later. This act also allows for the appointment of counsel during these hearings, as well as payment for the DNA testing by the government, if the defendant proves to be indigent. This is a large improvement within the system, as many indigent defendants who have been wrongfully convicted face many barriers with regards to understanding the process of refuting wrongful convictions, requesting DNA testing, and even affording the postconviction testing (Innocence Project, n.d.).

While the Justice for All Act expanded the accessibility to postconviction DNA testing for defendants convicted of a federal offense, there are still many shortcomings of state statutes that are aimed at protecting defendants convicted of state offenses. According to The Innocence Project (n.d.), although all 50 states have postconviction DNA testing access statutes, they are limited in regards to scope and substance. For instance, some state laws present many insurmountable hurdles to the defendant by putting the burden on the wrongfully convicted person to solve the crime and prove that the DNA evidence in question implicates another individual. This can be especially difficult for individuals who are not familiar with how the criminal justice system works or the specific terminology used within many of these statutes. Additionally, many state laws do not allow for postconviction DNA testing of individuals who have pleaded guilty or confessed to the crime, despite the fact that approximately 30 percent of the 311 wrongful convictions proven by DNA evidence in the United States have involved a false confession, admission, or guilty plea. Although the federal statute specifies that better methods of preservation of DNA evidence must be put into place, many state statutes do not address this and do not present adequate safeguards for

preserving the evidence, which can lead to lack of access for some defendants. It has also been found that some states do not have time limitations or requirements for prompt hearings once the petition has been filed, which can leave some defendants remaining in prison for extended amounts of time as they await a decision on the petition. Lastly, several states do not allow for individuals to appeal denied petitions for testing. Although it cannot be argued that the federal statute for access to postconviction DNA testing is perfect, it has been shown that many of the state statutes present even more barriers for those who have been wrongfully convicted. In regards to cost to the state, it should be noted that the 2004 Justice for All Act allocates various justice-related funding to any state that grants DNA testing access to inmates claiming innocence, which should ideally remove one of the barriers to testing for the defendant (Innocence Project, n.d.).

In regards to the postconviction DNA testing access in North Carolina, the DNA Database and Databank Act of 1993 permits a defendant to make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing (Innocence Project, n.d.). If the testing in question complies with the FBI requirements and the data meets National DNA Index System standards, the profiles obtained from the testing will then be searched and/or uploaded to the FBI's national DNA identification index system, also known as CODIS, upon meeting the specified criteria. The criteria for North Carolina postconviction DNA testing includes a provision that the evidence must be material to the defendant's defense; is related to the investigation or prosecution that resulted in the conviction; and was either not previously tested or was previously tested with inaccurate or unreliable methods and results. Additionally, North Carolina does allow for the right to appeal denial of the motion for DNA testing. This statute

includes information as to the appointment of counsel for the hearing, as well as the appeal of a denial of the motion, if the defendant has been identified as indigent. Lastly, North Carolina does advocate for increased preservation of biological evidence collected in the course of a criminal investigation or prosecution. It should be noted that North Carolina does note the term of preservation depends upon the length of conviction or extent of conviction. Additionally, if a defendant was convicted after pleading guilty, the evidence in this case will only be preserved for up to three years from the date of conviction or three years after release, whichever is earlier. This is troublesome, as it has already been indicated that there are a substantial number of wrongfully convicted individuals who either confess, plead guilty, or admit to the commission of the crime, for a variety of reasons (Innocence Project, n.d.).

Overall, while postconviction DNA testing statutes exist in every state, as well within the federal government, there are still many issues with the limitations and barriers placed upon defendants requesting this service. Some of the key issues defendants face with the current statutes in place, both federal and state, include limits on testing for those who pleaded guilty, strict time limits for requesting the testing, failure of the states to preserve the biological evidence adequately, costs, and limits on the amount of time the biological evidence is kept (Innocence Project, n.d.). The Innocence Project (n.d.) indicates that an effective postconviction DNA access statute must allow for testing in cases where DNA evidence could establish innocence, even if the defendant pleaded guilty, must not include a “sunset provision” or an expiration date for access to testing, must require states to preserve and account for biological evidence, must eliminate the procedural barriers to DNA testing, which include appeals for a denied request, and must provide money to back up the new

statute so that it can actually be implemented. Although DNA testing is not extremely common in criminal cases, wrongfully convicted individuals should still be allowed to have access to postconviction testing, as it could exonerate them and help to find the actual perpetrator. While there have been many accomplishments and pushes for increased postconviction DNA testing access, it is clear by the continued rate of wrongful conviction that there are still many barriers that are difficult to overcome by defendants seeking to prove their innocence by way of DNA evidence (Innocence Project, n.d.).

### **Evidence Preservation**

Despite the increase in laws enabling inmates to seek postconviction DNA testing, there are still many limitations to these tests, especially if the evidence has been lost, destroyed, or contaminated due to improper storage. The Innocence Project (n.d.) indicates that more than half of the states, as well as the federal government, have passed legislation that compels for the automatic preservation of biological evidence upon conviction. The federal government, as well as most states, classifies biological evidence as sexual assault forensic examination kits, semen, blood, saliva, hair, skin tissue, and other identified biological material collected during the investigation of a crime; however, many of these laws are limited in regards to the timeframe of how long the evidence should be kept and which types of evidence should be preserved. An additional issue has started to arise from the passage of these statutes, as not all of these statutes advocate for the preservation of physical evidence that was collected prior the passing of the statute, meaning they only require the evidence that is gathered after the passage date to be kept. This issue has resulted in many states legally allowing old evidence to be destroyed, even if it is attached to innocence claims or old unsolved cases. On the other hand, some states do not have a

mandatory policy for keeping evidence, which results in some of these states only mandating preservation after a petition for re-testing of evidence has been filed in the case. As a result, in many states, there are large quantities of evidence that are destroyed between the time of the conviction and when the petition is filed. These states indicate that this practice is in place in order to make way for incoming evidence, due to concerns about storage space. The push for better standards of preserving physical evidence has become evident in the past few decades, especially with the passage of the Justice for All Act of 2004. This statute provides financial incentives for states to preserve evidence and withholds funding from those who do not adequately preserve evidence (Innocence Project, n.d.).

Although it has already been indicated that many states include preservation requirements within their DNA testing access statutes, including North Carolina, the Innocence Project (n.d.) indicates that not all of these states are fulfilling their mission. Specifically, The Innocence Project has come across multiple examples of cases in which the DNA evidence associated with the case has not been preserved. This has been more commonly found in cases in which the evidence was destroyed during the window of time between the conviction and the filing of a postconviction petition for testing or re-testing of the biological evidence. Additional shortcomings of current statutes for preserving evidence include the limits placed on the types of crimes for which evidence is preserved, the types of evidence preserved, the allowing of premature disposal of evidence, which is allowed by nearly every state with an existing statute, and the failure to sanction parties responsible for the disposal or corruption of evidence (Innocence Project, n.d.).

It has been recommended by The Innocence Project (n.d.) that all physical evidence should be properly preserved as long as the defendant is incarcerated, under any type of

supervision, including probation and parole, in civil litigation involving the crime in question, or subject to registration as a sex offender. Additionally, it has been suggested that all types of physical evidence relating to felony crimes should be preserved, regardless of whether the defendant files a motion for postconviction DNA testing or not. Other recommendations by The Innocence Project include the retention of all crime scene evidence in unsolved cases and increased sanctions for those who are responsible for the improper destruction of evidence. Additionally, it has been suggested that, in cases in which evidence has been improperly destroyed, the courts should take action, ideally by vacating the conviction, granting a new trial, and instructing the new jury that the physical evidence in the case was destroyed in violation of the law. Overall, the preservation of physical evidence is imperative to the increased use of postconviction DNA testing and determining innocence for wrongfully convicted individuals. If the evidence is not properly preserved, it could result in increased punishment for those wrongfully convicted, as there may not be another way for them to prove their innocence, and they may spend an even greater amount of time incarcerated, or even worse, face the death penalty, for a crime they did not commit (Innocence Project, n.d.).

## **Prevention Measures**

### **Eyewitness Identification Reforms**

While DNA testing and evidence preservation may lead to exoneration or a determination of innocence after the fact, it is important to look at ways to prevent wrongful convictions in the future. Since eyewitness error is the leading factor in wrongful conviction and still plays a large part in many cases today, it is imperative to look at the issues surrounding eyewitness identification. First, it has been suggested that the practice of

misleading lineups and outdated practices have led a large number of wrongful convictions. According to The Innocence Project (n.d.), most law enforcement agencies use the same methods for eyewitness identification that were in place decades ago, which consist of live and photo lineups, as well lineups conducted without a blind administrator or proper instructions. These methods have been shown to place stress on the victims and eyewitnesses as they attempt to force them to identify someone, even if they do not feel strongly about their identification. As previously mentioned, the eyewitness may also be faced with a gap in memory or the desire to make an identification at all costs, both of which can produce errors and false identifications. Additionally, error may come about if police are in any way suggestive towards a particular suspect, whether it is intentional or not. Even with the wide array of mistakes that may occur within the practice, eyewitness identifications remain among the most common and compelling evidence brought against criminal defendants (Innocence Project, n.d.).

According to The Innocence Project (n.d.), all of these mistakes are preventable and the reforms for the eyewitness identification procedures are simple to put in place. First, it has been widely suggested that the administration of the eyewitness identification should be completed by a blind administrator. Blind administration of the process has been shown to decrease the risk of misidentification sharply, partly due to the fact that the officer administering a photo or live lineup is not aware of whom the suspect is and will not be able to make indicative gestures or comments. Second, a change in lineup procedures has been advocated as a reform for eyewitness identification. This change would include the placement of better “fillers,” or non-suspects included in the lineup, who would resemble the eyewitness’s description of the perpetrator. Additionally, the suspect should not differ

greatly from the other individuals in the lineup, such as being the only one to have facial hair or being the only one of a different race. Next, reforms should include better and less suggestive instructions for the eyewitnesses during identification procedures. Specifically, the person viewing the lineup should be told that the perpetrator may not be in the lineup and that the investigation will continue regardless of the result of the lineup. The eyewitness should also be instructed that he/she should not look toward the administrator for guidance during the identification process. Fourth, it has been suggested that, as part of the identification procedure, the investigators should request a confidence statement from the eyewitness immediately after the process has been completed. The confidence statement from the witness would indicate, in his/her own words, the level of confidence in the identification he/she made. This could play a large role in the stability and credibility of the eyewitness testimony in court, as there have been a large number of exonerations that have later revealed that the eyewitness was less than 50 percent sure of the identification. If this confidence statement could be entered into the trial as testimony, along with the eyewitness identification itself, the identification may not carry as much weight during the trial. Lastly, some advocates have argued that recording the identification procedures can protect innocent suspects from any misconduct by the lineup administrator. The process of recording the lineup may also help the prosecution by showing a jury that the procedure was legitimate. It has been added by many advocates that, along with these improvements, jurisdictions should consider using sequential lineup procedures. As previously indicated, it has been shown that sequential lineup procedures, or the presenting of the lineup members one by one, can decrease the rate at which innocent people are identified. Research has indicated that, when a witness is viewing several suspects at once, he/she is more likely to choose the person who

looks most like the perpetrator, even though it may not be the perpetrator (Innocence Project, n.d.).

These recommended changes have been implemented in various places across the United States, including Wisconsin, New Jersey, and North Carolina, and have proven to be successful (Innocence Project, n.d.). Specifically, the recommendations in North Carolina include using sequential lineup procedures, the use of double-blind procedures, the instruction that that the suspect may or may not be in the lineup, the use of a minimum of eight photos for photo lineup procedures, the use of a minimum of six individuals in a live identification, no feedback from the administrator during or after the identification process, and the gathering of feedback and a confidence statement from the witness after the identification. North Carolina has also given specific guidelines and instructions for each type of procedure that can be used. Even with these guidelines recommended by the state, it is important that they are actually implemented to their full extent and monitored to make sure individual departments are making the necessary changes to their eyewitness procedures. While North Carolina, along with a handful of other states, has implemented these recommendations and changes from the federal government and The Innocence Project, there are many other states that are behind on new practices within eyewitness identification and continue to use outdated and faulty procedures. The failure of these other states to conform and adapt to the new research on this topic continues to threaten the reliability and accuracy of police investigations, as well as increase the risk of wrongful convictions, as the most common element in all wrongful convictions later overturned by DNA evidence has been eyewitness misidentification (Innocence Project, n.d.).

## **Forensic Science Oversight**

As previously discussed, in more than 50 percent of the DNA exonerations nationwide, unvalidated or improper forensic science contributed to the wrongful conviction (Innocence Project, n.d.). Improper forensic techniques can range from forensic techniques that have not been subject to rigorous scientific evaluation, such as shoe print comparisons, bite mark comparisons, hair microscopy, and firearm tool mark analysis, to testing that is improperly conducted or analysis that is not accurate, as well as forensic misconduct. While there have been many case examples of poor forensic testing on part of the experts, it has also been suggested that part of the issue stems from lack of funding to support growing caseloads and demand for forensic testing. Recommendations for improving the forensic science field include federal support for research and national standards and enforcement practices, increased research, assessment of the validity and reliability of existing practices, quality assurance, accreditation and certification procedures, state oversight commissions or advisory boards, and enforcement of the existing requirements in place (Innocence Project, n.d.).

First, federal support for research and national standards could lead to the creation of a national forensic science agency with comparable authority to other federal agencies, such as the Food and Drug Administration (FDA) (Innocence Project, n.d.). This agency could scrutinize the forensic devices and methods that are currently in use and in development to ensure that each one meets a specific standard. Additionally, this agency could improve the quality of forensics used in the criminal justice system by focusing on increased research, assessment of validity and reliability of current and new methods, as well as quality assurance, accreditation procedures, and certification of laboratories and practitioners. While

each of these three main foci would be important to a national forensic science agency, each is equally important for the field itself, even without the development of a national agency. The identification of research needs, the establishment of priorities, and the designing of criteria for reviewing forensic disciplines is important in expanding and improving the current practices. It has been suggested that, in order to complete this task, there would be a need for increased funding to expand basic and applied research and to help develop new technologies to solve crime. It is also equally, if not more, important to review existing and new research data to determine whether a technique, device, or procedure is scientifically valid and reliable. In this regard, it is essential for the national agency, or the scientific community, to ensure the discontinuation of any invalid or unreliable method. Within this agency, it has been suggested that there should be some type of quality assurance standards set for public and private laboratories, as well as for individuals conducting forensic tests and examinations with intended use in the federal and state courts. These quality assurance measures will secure the integrity of the ultimate forensic product in the laboratory and in the courtroom. In this same regard, quality assurance measures should be a part of the forensic oversight used to ensure compliance with accreditation and certification of laboratories and individual forensic scientists; meaning, if the rules are violated, there could be a loss of accreditation, individual certification, and a cessation of the business. As previously mentioned, the development of these standards and review process could be better facilitated through the use of a national forensic science agency, but it is also important to improve upon these topics within the general science community (Innocence Project, n.d.).

Outside of the scientific community and the development of a federal forensic science agency, it has been advocated that a state oversight commission or advisory board should be

established (Innocence Project, n.d.). The establishment of this board, which would consist of independent panels, separate from government entities, would allow for the securing of adequate resources for the forensic science field. Specifically, these independent panels would be made up of a wide range of experts in the field who understand the forensic science community, as well as the criminal justice system. It has been noted by The Innocence Project (n.d.) that several states have already created these types of commissions to increase the reliability and output of forensic science methods, as well as to ensure adequate funding and support for these essential resources.

Lastly, it has been advocated by those in the both the criminal justice system and the scientific community that the current requirements put in place should be better enforced (Innocence Project, n.d.). Specifically, every state receives federal grant money under the Paul Coverdell Forensic Science Improvement Grant Program, as well as the Justice for All Act, which both require that states have oversight mechanisms in place in order to receive money for their crime labs. These statutes indicate that the jurisdictions seeking federal funding must identify an independent external government entity with appropriate processes established to conduct investigations into allegations of negligence or misconduct affecting forensic results. According to The Innocence Project (n.d.), although the U.S. Department of Justice's Office of Justice programs hands out the grants, as of 2009, they have not given applicants the proper information and guidance they need to comply with these oversight requirements. While it is the responsibility of the states to develop these oversight mechanisms, it has been difficult for them to develop mechanisms that abide by the statutes' guidelines without much guidance from the federal government. As a result of this lack of instruction and guidance, as well as other factors, many states do not have the independence

and/or processes necessary to ensure the integrity of analysis from crime labs and other forensic facilities. With this said, many states have accepted the grants, but have yet to comply with the requirements, resulting in no improvement of forensic science mechanisms. This is important, as the government must fully enforce the current requirements and standards in place before implementing the new recommendations. For this reason, many suggest that the development of the national forensic science agency may better allow for enforcement of existing requirements, in addition to any new requirements. Overall, an efficient forensic science system that minimizes errors and focuses resources on identifying the guilty is beneficial to crime victims, police, prosecutors, and the courts (Innocence Project, n.d.).

### **Recording of Interrogations**

Balko (2011) and The Innocence Project (n.d.) indicate that about 25 percent of the wrongful convictions overturned by DNA evidence in the United States include some type of false confession, admission, or statement to law enforcement. As previously noted, it has been shown that there are specific factors that cause innocent people to confess falsely, ranging from young age, mental health issues, low self-confidence, and police coercion (Gould & Leo, 2010; Keene et al., 2012; Leo & Davis, 2010; Orenstein, 2011). With the wide range of factors that may influence a false confession and the great deal of weight a confession may play in a criminal case, it has been suggested that the recording of interrogations may reduce the number of false confessions that occur. As suggested by The Innocence Project (n.d.), the recording should begin as soon as the Miranda rights have been read and continue throughout the entire custodial interrogation in order to be credible and reliable. The recording of the interrogation can increase the credibility and reliability of

authentic confessions, while also protecting innocent suspects who may feel pressured or have been coerced to confess. This is particularly the case when it has been shown that the police feed the defendant information and later hold the knowledge of the information against him/her and indicate that being aware of these specific details is evidence of guilt. Another form of coercion or suggestibility can be seen through threats or promises made to the suspect off camera, then the camera will be turned on for the false confession. These examples of police misconduct during the investigation support the need for recording of interrogations from beginning to end. Specifically, the recording of interrogations can deter officers from using illegal tactics, such as those previously described, to secure a confession. Additionally, without the objective record of the interrogation, it is difficult to gauge the reliability of the confession, especially if the defendant is claiming that the false confession was coerced. Recorded interrogations may also benefit law enforcement personnel, as they may prevent disputes about how a suspect was treated, create a clear record of the suspect's statement, and even increase the public's confidence in the criminal justice system (Innocence Project, n.d.).

The recording of interrogations has been implemented in over 800 jurisdictions nationwide (Innocence Project, n.d.). The Supreme Courts of Alaska and Minnesota have put laws into place making the recording of custodial interrogations a matter of due process and requiring that defendants be entitled to the recording. In 2003, Illinois became the first state to require by law that all police interrogations of suspects in homicide cases must be recorded. In regards to individual counties, police departments in Broward County, Florida and Santa Clara County, California, as well as other counties across the nation, have begun to record interrogations without a law requiring them to do so. Proactive policies such as these

have been adopted due to the benefits that recorded interrogations provide to police and prosecutors, as well as innocent suspects. The Innocence Project (n.d.) indicated that a 2004 study conducted by Illinois officials in 200 locations found that police departments overwhelmingly embraced the reform and indicated that it was a measure of good law enforcement. The surprising receptiveness toward this policy from all of those involved offers a substantial amount of support for requiring interrogations to be recorded and the benefits that would follow.

### **Innocence Commissions**

Much research has called for the formation of innocence commissions in one form or another. The most commonly recommended form of innocence commissions is at the state level. Innocence commissions would be responsible for investigating wrongful convictions within their jurisdiction to determine their causes, assign responsibility, and recommend measures to prevent the error from happening again (Norris et al., 2011; Schehr, 2005). According to The Innocence Project (n.d.), these commissions would also help to implement improvements within investigations, lab operations, defense, prosecution, and judicial review necessary to help ensure the integrity of the criminal justice system. As previously mentioned, there are several states that have established these types of organizations, which include California, Connecticut, Florida, Illinois, Louisiana, Oklahoma, New York, North Carolina, Pennsylvania, Texas, and Wisconsin (Innocence Project, n.d.; Norris et al., 2011). Out of these 11 states that have put innocence commissions in place, there have been some signs of improvement within the arena of wrongful conviction. For example, the 30-member North Carolina Actual Innocence Commission that was created in 2002 has focused on the causes of wrongful conviction and is considered a national model for effectiveness and reform

(Innocence Project, n.d.). Additionally, in Pennsylvania, where nine men have been proven innocent by DNA evidence in recent years, the senate created an Innocence Commission in 2006. California, Connecticut, and Wisconsin have also followed suit in creating innocence commissions to investigate the causes of wrongful convictions, as well as Illinois, which in 2003 passed into law 85 different recommendations made by a special commission on capital punishment. These 85 recommendations that were placed in Illinois state laws were also found to be general safeguards against all wrongful convictions (Innocence Project, n.d.).

While there is clear evidence that attention to wrongful convictions has greatly increased over the past few decades, specifically by way of the creation of innocence commissions in eleven different states, there are still key areas where improvement is needed. It has been suggested by the co-founders of the Innocence Project and the American Bar Association Innocence Committee that there should be permanent innocence commissions in place across the nation, as many of the currently established state innocence commissions are temporary (Innocence Project, n.d.; Norris et al., 2011). If permanent innocence commissions were put into place, they could provide continual monitoring and review of wrongful convictions. Overall, it should be noted that innocence commissions do play a large role in assisting those who have been wrongfully convicted, but they could have an even larger effect if they were permanently established in each state throughout the nation. If more innocence commissions were established, it has been argued that they may be able to successfully prevent some wrongful convictions in the future, as they would be aware of the causes of wrongful conviction and could propose reforms to safeguard against these issues in the future (Norris et al., 2011).

## **Chapter 6: Conclusion**

As it has already been indicated that wrongful convictions may occur due to a variety of reasons or due to a culmination of errors, it is important to determine the effects of such errors. Wrongful conviction is not as uncommon as many people would assume, with an estimated 1 to 5 percent of all convictions in the United States being a wrongful conviction (Gould & Leo, 2010; Konvisser, 2012; Smith et al., 2011). Wrongful convictions not only cost the criminal justice system a lot of money, including the costs for the time and resources investigating the case, the costs of prosecuting the suspect, and even the costs of incarceration, but also places a heavy burden on those subject to wrongful conviction. Those who are wrongfully convicted may be subject to psychological issues, such as anxiety, depression, or post-traumatic stress disorder, as well as the other physical and lifestyle issues that may result from being wrongfully incarcerated (Konvisser, 2012). These individuals are subject to a loss of freedom, liberty, and even life, as they are no longer able to take part in a normal life, even after release from prison. The effects of wrongful conviction on the individuals subject to this phenomenon, as well as the criminal justice system, bring to light the importance of determining how to prevent these miscarriages of justice from occurring.

When estimating the actual occurrence of wrongful conviction, it is evident that there is a clear disconnect between catalogue estimates of wrongful convictions, estimates on behalf of criminal justice officials, and inmate self-report estimates. Catalogue estimates indicate that, as of 2014, there have been 312 individuals exonerated by DNA evidence alone

(Innocence Project, n.d.). The Center on Wrongful Convictions (2014) indicates that there have been 1,283 exonerations nationwide, which include exonerees who have been exonerated by DNA evidence, as well as other evidence, such as recanted eyewitness testimony. In regards to estimates of exonerations of those on death row, it has been shown that, between 1973 and 2004, there had been 117 persons sentenced to death who were later exonerated (Death Penalty Information Center, n.d.). On the other hand, criminal justice officials are more skeptical of a high rate of wrongful convictions, with 5.6 percent of officials in the Huff et al. (1986) study denying that wrongful conviction existed, 71.8 percent indicating that it only occurred in less than one percent of convictions, and 22.6 percent estimating that it occurred in more than one percent. Research shows that a majority of police, prosecutors, and judges believe that wrongful convictions do not occur with sufficient frequency to warrant system reforms (Huff et al., 1986). Lastly, inmate self-report data of estimates on wrongful conviction are significantly higher, with estimates suggesting that a wrongful conviction happens in 15.4 percent of cases (Poveda, 2001). Inmate self-report estimates are thought to be much higher than both catalogue estimates and estimates from criminal justice officials due to the inmates' perceptions of their criminal conduct (Poveda, 2001). The difference in these three estimates speaks to the lack of information regarding the extent to which wrongful convictions actually occur, as well as the reasons why they occur.

While the estimates of the overall rates of wrongful conviction vary, it has also been shown that the types of crimes in which wrongful convictions are more likely to occur may also vary. Specifically, many would assume that wrongful conviction is more likely in capital cases, as exonerations are more likely to occur due to the presence of DNA evidence. According to Risinger (2007), the wrongful conviction rate in capital rape-murder cases from

1982-1989 ranged from 3.3 to 5 percent. On the other hand, research suggests that exonerations for nonviolent crimes are now better represented than ever, specifically for crimes such as robbery, forgery, and drug related offenses (Roberts, 2003; Webster, 2012; Zalman et al., 2008). The presence of wrongful conviction in these cases is thought to be due to the increased use of plea bargaining and false confessions, which are used by defendants in an attempt to end the case quickly or to avoid serious punishment. While there is not as much evidence to specify a specific wrongful conviction rate for these non-violent offenses, it is suggested that the wrongful conviction rate may be much higher than we are estimating if these offenses are taken into account, as plea bargains happen every day, and these defendants are less likely to be successful with an appeal if they entered a guilty plea and a lack of DNA evidence exists (Risinger, 2007; Roberts, 2003).

Due to the nature of wrongful convictions and the factors associated with the phenomenon, it is difficult to indicate specific solutions to the problem. As previously noted, there are many factors that may lead to wrongful convictions, which include faulty eyewitness evidence, false confessions, forensic error, prosecutorial misconduct, ineffective assistance of counsel, racial disparity, and a variety of system issues (Balko, 2011; Davies & Hine, 2007; Gould & Leo, 2010; Penrod & Cutler, 1995; Smith et al., 2011; Zalman et al., 2008). While these factors alone may result in a wrongful conviction, it has been shown within multiple case studies of exonerees that many of these issues combine to result in the wrongful conviction of an individual. During the initial investigation, the wrongdoing or misconduct may start at the beginning of the case and become more severe as the case continues and subsequent errors are combined. In regards to police and prosecutors, this can be a result of tunnel vision, as they may be so focused on the prosecution of one suspect that

the other evidence is presented only in favor of their version of the crime story (Gould & Leo, 2010; Leo & Davis, 2010). As research has indicated, tunnel vision is not always an intentional practice on part of those investigating the crime, but it may have a large effect on the result of the case. Research findings also suggest that wrongful conviction is not only an issue caused by police and prosecutors, as there may be many other actors involved in the miscarriage of justice. Specifically, there may be outside influences, such as eyewitnesses or jailhouse informants, expert witnesses, in addition to the defendant's own attorney. The combination of these factors, as well as variety of participants within a criminal case, makes it even more difficult to target each underlying issue.

While it is difficult for many of these defendants to counter the evidence and power of those conducting the investigation and prosecuting the case, it is even more difficult for a wrongfully convicted individual to refute the conviction after it has already been entered. As previously indicated, an individual must overcome many hurdles to challenge a wrongful conviction, especially when attempting to introduce new evidence or claim the existence of a procedural error during the original trial. Common barriers include short statutes of limitations for the filing of motions, high standards of proof for the new evidence presented, and a large amount of discretion on part of the judge overseeing the hearing for the motion (Griffin, 2009). Even with the discrepancies in state and federal statutes on appeals, many defendants are not able to argue for a collateral review of their original case, as many statutes require the proof a constitutional error with their conviction. In regards to claims directly associated with the factors of wrongful conviction, such as ineffective assistance of counsel, prosecutorial misconduct, police coercion, etc., which are typically filed by way of habeas corpus petitions, it has been shown that these claims are even more difficult to prove (Heder

& Goldsmith, 2012). While the appeals process in and of itself provides many hurdles for defendants to overcome, it can become even more difficult, as many jurisdictions do not provide the right to counsel or any type of assistance during the process of filing these motions and throughout the appeals process. As previously noted, this is a huge issue for wrongfully convicted individuals, as these limitations can prevent them ever receiving their day in court, especially if they pleaded guilty during the original trial, which may prohibit participation in some methods of relief, or if they do not meet the strict guidelines and timelines specified in the appellate statutes.

Findings from the review of multiple case studies, as well as previous literature, show that only about 14 percent of those who were exonerated by DNA evidence received a reversal during the appeals process (Garrett, 2008). When capital cases were not included in this estimate, the reversal rate dropped to nine percent, which suggests that the group receiving a capital punishment had the highest reversal rate. When compared to a matched comparison group within the study, Garrett (2008) found similar rates of reversal between the innocent group, who had been exonerated by DNA evidence, and the comparison group, who had filed for appeals in similar types of cases but had not been exonerated. Overall, the data on reversals for those later exonerated is troubling, as the results show a sufficient number of cases involving postconviction DNA exoneration were initially denied appellate review or relief.

While it is clear that it is very difficult for wrongfully convicted individuals to seek appellate relief and rare for these same individuals to be granted a reversal or a new trial, it is even more problematic that the main issues with the appellate system are directly linked to the causes of wrongful conviction. Specifically, research indicates that the appellate system

does not focus on actual innocence, but rather constitutional and procedural violations, and overlooks many claims of misconduct and/or errors within the original case. It has been suggested by Garrett (2008) that the appellate courts have been unable to detect mistaken eyewitness evidence, false confessions, faulty forensic evidence, false informant testimony, prosecutorial misconduct, as well as ineffective assistance of counsel. These failures on the part of the appellate system in detecting these issues and errors in these cases speak to the difficulty in correcting and reforming the underlying issues of wrongful conviction.

While the appellate system may not always be successful in detecting these claims made by wrongfully convicted individuals, there has been a substantial amount of improvement within appellate assistance. Some states have enacted statutes, as well put new organizations in place, outside of innocence projects, that are designed to investigate and review claims of wrongful conviction (Griffin, 2009). While these organizations vary by state, many of these organizations, such as the North Carolina Innocence Inquiry Commission, review the case; if they have suspected actual innocence, they request testimony from eyewitnesses of the original incident, then decide if the convicted person is innocent by clear and convincing evidence. If the person is deemed to be innocent of the crime in question, the conviction will then be vacated or the charges dismissed against the person. It should be noted that some states even provide assistance of counsel, different from their original counsel, for the appellate process, which allows for these defendants to pursue claims of ineffective assistance of counsel (Griffin, 2009). These organizations at the state level have shown to be beneficial, as they reduce the numbers of cases taken into the court of appeals by resolving a high percentage of postconviction challenges at the motion stage (Findley, 2009).

Additional appellate assistance may come from various wrongful conviction organizations, which have been established throughout the country. Examples of these organizations include The Innocence Project, the Center on Wrongful Convictions, the National Registry of Exonerations, and the Death Penalty Information Center. While innocence projects and wrongful conviction organizations have been in place since 1983, the innocence movement that started in the 1990s has contributed to a large increase in the development of many of these organizations (Schehr, 2005). Currently, there are innocence projects in 35 states, with seven having more than one innocence project. Innocence projects may also be developed at universities, particularly law schools, which may help provide additional legal assistance through law students enrolled at the university (Schehr, 2005). The services provided by these organizations are not always directly related to individual appeals cases but typically provide both legal and financial assistance for those trying to seek appeals and compensation for wrongful convictions.

While the innocence movement has spurred the creation of additional innocence projects throughout the nation, it has also been attributed to increased advocacy for postconviction DNA testing access for all inmates, as well as increased focus on the individual factors of wrongful conviction. Review of case law for each factor of wrongful conviction shows the increased participation of innocence projects and wrongful conviction organizations, as well as how individual factors may combine to produce an even greater risk of wrongful conviction. The case law presented provides a deeper understanding of the wrongful conviction phenomenon and how it can take place in many types of criminal cases for a variety of reasons. These case examples show the difficulties a wrongfully convicted individual faces when attempting to seek compensation and/or relief. As exhibited in many

of the cases provided, it can take an extended amount of time to secure an appeal or even a new trial, with the amount of time individuals spend incarcerated ranging from 5 years to 34 years in prison for crimes they did not commit. Not only did these individuals lose time, freedom, and liberty, but they also faced many difficulties reintegrating into society and attempting to shed the reputation and label that had been previously applied to them by mistake. While a substantial amount of criminal justice research focuses on the disparate effects on indigent and minority defendants, these cases exhibit the true nature of wrongful convictions, showing that it can occur in a wide variety of cases, to a wide variety of people, not only minorities, and even for many different reasons.

In conclusion, while case law and previous research both show a large problem with wrongful convictions and many factors that may lead to the issue, it imperative to develop strategies to remedy and even prevent it from occurring in the future. Although 27 states, the District of Columbia, and the federal government have compensation statutes in place to provide some kind of relief for those wrongfully convicted, many of the statutes are commonly flawed and misinterpreted (Brooks & Simpson, 2012, Kahn, 2010). Additionally, according to the study conducted by Garrett (2008) only about 41 percent of the 200 exonerees in the study successfully received some kind of compensation for their years of imprisonment. Although this number does appear to be close to half of the study participants, it is still troublesome that over half of those who were exonerated by way of DNA evidence still have not been compensated for their time in prison, away from their family, out of the work force, and overall loss of liberty. Problems associated with compensation statutes include strict eligibility requirements, statutes of limitations, high burden of proof standards, and caps on recovery of damages, no matter the length of time

wrongly incarcerated (Garrett, 2008; Kahn, 2010). Being that lawsuits are the only direct way to compensate these individuals who have been wrongfully convicted, it should not be so difficult to pursue or successfully obtain some type of compensation, especially as these individuals have already faced many difficulties in appealing the case and having the conviction overturned.

Aside from lawsuits, many reform advocates have also pushed for increased access to postconviction DNA testing as a way of providing relief to wrongfully convicted individuals. Although the federal government has already put some provisions in place to protect defendants who have been charged and convicted of a federal offense, through the Justice for All Act, there is a lack of similar standards at the state level (Innocence Project, n.d.). These statutes, both federal and state, provide many limitations and barriers for defendants who have been wrongfully convicted. Some of the key issues include limits on testing for those who pleaded guilty, strict time limits for requesting the testing, failure of the states to preserve the biological evidence adequately, costs, and limits on the amount of time the biological evidence is kept (Innocence Project, n.d.). Although DNA evidence is not extremely common in criminal cases, wrongfully convicted individuals should still be allowed to have access to postconviction testing, as it could exonerate them and help to find the actual offender. In this same regard, advocates have pushed for increased evidence preservation standards. Recommendations include preserving all physical evidence as long as the defendant is incarcerated, under any type of supervision, including probation and parole, in civil litigation involving the crime in question, or subject to registration as a sex offender. Additionally, it has been suggested that all types of physical evidence relating to felony crimes should be preserved, regardless of whether the defendant files a motion for

postconviction DNA testing or not. Other recommendations for preservation of DNA evidence include increased sanctions for those who are responsible for the improper destruction of evidence (Innocence Project, n.d.). The preservation of DNA evidence, along with the ability for wrongfully convicted individuals to file lawsuits, allows for relief to be offered to those attempting to actively appeal a wrongful conviction or seek a life after incarceration for a crime they did not commit.

In regards to recommendations aimed at preventing wrongful convictions, the suggestions include the reform of eyewitness identification procedures, increased forensic science oversight, recording of interrogations, and increased use of innocence commissions (Innocence Project, n.d.). While each of these reforms would target a factor of wrongful conviction, they would also allow for increased reliability and integrity within criminal investigations, as well as the criminal justice system as a whole. As many efforts have been made to work towards each of these reforms, at the state and federal level, each of these individual issues continues to need treatment. Wrongful conviction happens too often, as it is estimated to occur in about 1 to 5 percent of all convictions, and serves as an injustice to all of those involved. The phenomenon not only affects those who are wrongfully punished, but also decreases the integrity of the criminal justice system, breaks apart families and communities, and serves as an injustice to victims of the crimes in question (Gould & Leo, 2010; Konvisser, 2012; Smith et al., 2011). While it is essential to be vigilant and provide compensation for the mistakes made with past wrongful convictions, it is even more important to address the current factors leading to the issue, from a variety of standpoints, to assure that the phenomenon does not continue to lead to the incarceration, and possibly the death, of the wrong person.

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doi:10.1080/074188208019545

## **Vita**

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