FATAL FLAWS

Innocence, Race, and Wrongful Convictions

ACLU

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Contents

BACKGROUND

In a criminal legal system created and administered by humans with enormous power and discretion — including police, prosecutors, and judges — the risk of error and arbitrariness is inherent and inescapable. This is true even in the administration of the death penalty, where the stakes are a matter of life or death. Since the modern period of the death penalty began in 1973, at least 200 innocent people have been exonerated from death rows across America.[1] These are hundreds of people that have experienced the terror of wrongful arrest, wrongful conviction, condemnation by their communities, and years trapped on death row, living under the grim shadow of execution even though they are innocent. Despite this harsh reality, 27 states and the federal government still retain the death penalty, disregarding evidence about the sentencing and execution of innocent people.

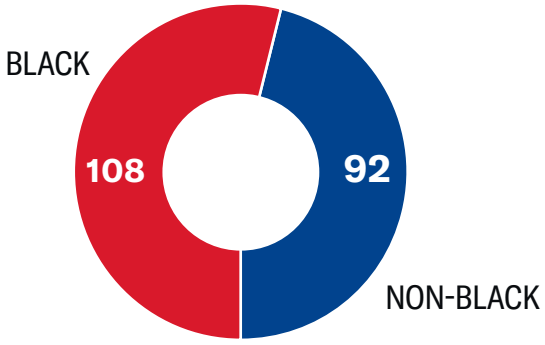
Imposing the death penalty requires a host of steps and decisions, from investigating a homicide, to charging, trying, sentencing, and eventually scheduling an execution. Whether these decisions are made in good faith or bad faith, they are all made by fallible humans, which means they are vulnerable to error and bias at best and malice and overt animus at worst. Because of this, any capital punishment system necessarily risks sentencing innocent people to death. In America, this risk is not only a defining feature of the modern death penalty, but it also results in the disproportionate conviction and execution of innocent Black people.

According to a 2022 report by the National Registry of Exonerations (NRE), Black people are over seven times more likely to be wrongfully convicted of serious crimes compared to white people.[2] And while it is impossible to say how many innocent Black people have been capitally tried and sentenced to death, over half of the people exonerated from death row — 108 — have been Black.[3]

The race of victims also affects who gets wrongfully sentenced to death in this country. Murder cases with white victims have a disproportionately higher risk of wrongful conviction.[4] Conversely, though Black people represent over 50% of murder victims in the United States, their cases account for only a small percentage of executions.[5]

FIGURE 1

Exonerations From Death Row by Race



Source: Death Penalty Info Center

Even when factual innocence seems manifestly apparent, true exonerations remain hard to come by for many Black men, and especially those wrongfully convicted of killing white victims. Take, for instance, the case of American Civil Liberties Union (ACLU) client Levon "Bo" Jones, a Black

man wrongfully convicted and sentenced to death for the 1987 murder of a white man.[6] Even after the key witness against him admitted in 2007 that much of her testimony was "simply not true" and the prosecutor therefore dismissed all charges against Mr. Jones, that same prosecutor maintained that Mr. Jones "received a fair trial."[7] To this date, Mr. Jones still has not received an official Pardon of Innocence or a dime of compensation.[8]

And after a true exoneration is given, race still continues to play a role in when that exoneration comes about. A recent report by the Death Penalty Information Center found that it takes Black death row exonerees *over four years longer* on average to be cleared than their white counterparts.[9]

RACE AND THE EARLY DEATH PENALTY

Race and wrongful accusations have been intertwined throughout the history of lynchings and executions. During the 1800s, race affected issues like whether an act was considered a crime, the degree of certainty required for a determination of guilt, and the tolerance of wrongful death. For instance, early slave code laws made the attempted rape of a white woman a capital offense for Black defendants, but not white men.[10] "Black Laws," adopted in the wake of the civil war, prohibited Black citizens from testifying in criminal court cases, unmistakably prioritizing white supremacy over fact-finding. [11]

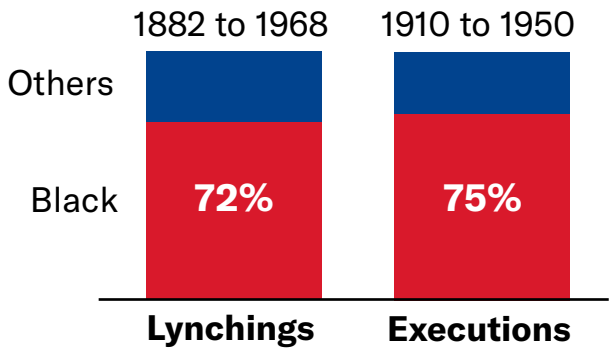
The death penalty grew out of this country's brutal practice of lynching, with the former gradually replacing the latter in the early 1900s.[12] In the years and decades following the Civil War, lynchings against Black Americans skyrocketed, particularly in the South. Early death penalty trials echoed characteristics of lynchings. Most prevalent among these was the race of those killed: Around 72% of lynching victims in the United States were Black,[13] a number that closely resembles the 75% of executions that were of Black people in the South between the years 1910 and 1950.[14]

Lynching was commonly justified as a defensive act to protect white women from sexual assault by Black men.[15] This justification rang hollow, in large part because it is now commonly understood — and was even at the time — that an overwhelming number of these accusations were fabricated.[16] Nevertheless, a person could be lynched based on the word of a single white person,[17] a truth that persisted as white lynch mobs turned into the often all-white juries of death penalty trials.

The strong relation between lynching and the death penalty influenced the very structure of early capital trials. Many early death penalty trials happened so quickly that a number of disproportionately Black men arrested often

FIGURE 2

Executions and Lynchings by Race



Source: NAACP & Equal Justice USA

received a "trial" in name only.[18] Defendants were commonly pulled from their own communities and pushed into courtrooms where the judge, witnesses, prosecutor, and defense attorney were all white. They were often subject to rampant misconduct by the police, prosecutor, or both.[19] This misconduct would typically go unchallenged by defense attorneys who provided less than fulsome representation and would often culminate in a guilty verdict by an all-white jury.

These experiences — of misconduct, perjury, mistaken witnesses, and non-diverse juries — didn't just lead to many convictions in the past; they continue to contribute to wrongful convictions to this day.

DRIVERS OF WRONGFUL CONVICTIONS

Many of the patterns that emerged in the early death penalty cases have continued leading to factual, legal, and moral errors that produce wrongful convictions. These factors, along with others that have since emerged, influence the cases of people of all races, but continue to disproportionately affect Black defendants.

These patterns include, but are not limited to, official misconduct by police officers and/or prosecutors, perjury and false testimony, eyewitness misidentification, unreliable expert testimony, and non-diverse juries. While each description of the factors in this report is accompanied by a case example, the unfortunate truth is that countless examples of cases infected with these issues exist.

Factor 1: Misconduct by Police and Prosecutors

Official misconduct by police and prosecutors is the leading cause of wrongful death penalty convictions and has overwhelmingly contributed to the wrongful convictions of Black people.[20] Examples of official misconduct by police include actions like influencing witnesses, falsifying reports, and eliciting false confessions (present in 16.2%[21] of exoneration cases) through the usage of coercive and improper interrogation tactics. For prosecutors, official misconduct ranges from things like knowingly condoning perjury to failure to disclose "exculpatory" information that would support a person's claim of innocence.

In an analysis of 185 death penalty exonerations from 1973-2017, the Death Penalty Information Center (DPI) found that official misconduct factored in 69% of exonerations, and that misconduct was more likely in cases where a Black person was accused and convicted.[22] Another study of documented capital murder exonerations by the NRE from 1989-2022 found that official misconduct by police and/or prosecutors played a role in 85% of death row exonerations involving an innocent Black person, compared to 70% of cases involving white exonerees.[23]

COMMON DRIVERS OF WRONGFUL CONVICTIONS

- Official misconduct by police & prosecutors
- Perjury or false testimony
- Eyewitness misidentification
- Unreliable expert witness
- Non-diverse juries

Although official misconduct is widespread,[24] some localities have particularly high rates of wrongful convictions, raising questions about local prosecutorial and police practices and the disproportionate impact on Black communities.

For instance, of the 12 innocent people exonerated from death row in Louisiana since 1973, nine were Black, and official misconduct played a role in every single case.[25] And on a county level, Cook County, Illinois[26] led the nation with 15 wrongful death penalty convictions, 13 of which were of Black people.[27] Official misconduct played a role in 86%[28] of those wrongful convictions, many a direct result of police abuses under disgraced Chicago police commander Jon Burge, whose squad of officers tortured people into false confessions until years of organizing led Chicago to become the first U.S. city to formally apologize for police violence.[29] These pervasive acts of misconduct and errors factored greatly in Illinois' decision to abolish the death penalty in 2011.[30]

The most well-publicized type of official misconduct occurs when police or prosecutors intentionally conceal "exculpatory" evidence that would benefit the accused person — evidence that only police or prosecutors have access to or knowledge of.[31] Prosecutors are constitutionally and ethically required to turn this evidence, often referred to as Brady material, over to the accused person's attorney.[32] Too often, they fail to comply, even when life and death are at stake.

CASE STUDY

Orleans Parish District Attorney's Office and Rampant Brady Violations Under the Administration of Harry Connick Senior

The Orleans Parish District Attorney's Office of New Orleans, Louisiana, committed repeated prosecutorial misconduct under the decades-long leadership of Harry Connick, Sr. from 1973-2002, when 36 people were sentenced to death.[33] Orleans Parish prosecutors withheld exculpatory evidence in **nine** of those cases, and four people were ultimately exonerated from death row.[34]

For instance, Shareef Cousin, a Black 17-year-old from New Orleans, was wrongfully accused, convicted, and sentenced to death for killing a white man after Connick's office withheld the fact that their key eyewitness told police officers she was not wearing glasses and was not able to discern the people who had killed the victim.[35] After Mr. Cousin was granted a retrial based on this misconduct, Connick's office dropped the charges. Mr. Cousins' family pursued a disciplinary complaint against the prosecutor, Roger Jordan, who was suspended from practice for three months in 2005.[36]

John Thompson, another innocent Black man wrongfully convicted under Connick's leadership, was almost executed in 1999. Thirty days before Mr. Thompson's execution date, an investigator working on his case found exculpatory evidence that had been deliberately concealed by Connick's office for 15 years.[37] After receiving a new trial and subsequent acquittal, Mr. Thompson sued Connick and his office, winning a $14 million jury verdict that was ultimately overturned by the Supreme Court in a 5-4 ruling.[38] In a vigorous dissent, Justice Ruth Bader Ginsburg wrote, "What happened here... was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of Brady's disclosure requirements were pervasive in Orleans Parish."[39] In his freedom, Thompson founded the first exoneree-led re-entry program in the country, received two prestigious fellowships, and advocated against the death penalty.[40] He died from a heart attack in October 2017 at the age of 55.[41] Connick died at age 97 without ever apologizing to those he wrongfully convicted.[42]

Factor 2: False Testimony and Perjury

False accusation or perjury occurs in a majority — 67.6% — of wrongful conviction death penalty cases.[43] As in the early cases of the death penalty, people who commit perjury do so for a host of reasons, ranging from outside intimidation to personal grievances. No matter the reason, the statistics show that false testimony is the single most common factor in exoneration cases for Black and Latine exonerees, present in 70.7% of Black exonerees' cases and 93.8% of Latine exonerees' cases.[44]

CASE STUDY

Walter McMillian

Walter McMillian was a Black man from Monroeville, Alabama, wrongfully convicted for the murder of a young white woman in 1986.[45] Although there was no evidence connecting him to the murder, Mr. McMillian was likely targeted due to a previous romantic relationship with a white woman.[46] Police focused on him six months into the investigation when a white man, who was himself accused of an unrelated murder, was pressured to make false statements about Mr. McMillian by police who threatened him with the death penalty.[47] Although Mr. McMillian had an alibi and told police this, the sheriff on the case reportedly told him, "I don't give a damn what you say or what you do. I don't give a damn what your people say either. I'm going to put 12 people on a jury who are going to find your goddamn black ass guilty."[48]

The coerced informant falsely testified against Mr. McMillian at his trial, along with two others who falsely implicated him.[49] Although a dozen Black witnesses supported Mr. McMillian's alibi that he was at a fish fry at the time, this testimony was ignored, and Mr. McMillan was convicted of murder.[50] His jury, including 11 white jurors and one Black juror, sentenced him to life without parole, but this sentence was overridden by the judge, who sentenced him to death.[51]

Mr. McMillian spent six years on death row before civil rights attorney Bryan Stevenson took his case, reasserting Mr. McMillian's innocence by highlighting the witnesses' perjury as well as the misconduct of the prosecutor who withheld exculpatory evidence.[52] This advocacy led, in 1993, to the Alabama Court of Criminal Appeals throwing out Mr. McMillian's conviction.[53]

Walter McMillian's story is told in a best selling book by Bryan Stevenson, "Just Mercy," as well as the movie it inspired.[54] Mr. McMillian became an advocate against the death penalty, testifying before the U.S. Senate Judiciary Committee: "I am [] deeply troubled by the way the criminal system treated me and the difficulty I had in proving my innocence. I am also worried about others. I believe there are other people under sentence of death who like me are not guilty."[55]

Factor 3: Eyewitness Misidentification

Eyewitness misidentifications have contributed to more than one-fifth of wrongful death penalty convictions, accounting for 42 innocent people wrongfully convicted and condemned to die.[56] Race plays a role in eyewitness misidentifications, too; while these misidentifications can occur for numerous reasons, they are most likely to occur in cases involving cross-racial identification.

Some misidentifications are made for relatively straightforward reasons involving problems of perception and memory. A number of factors can

affect a witness' perception like lighting, distance, and duration of observation, as well as their visual acuity and emotional state.[57] And, because memory is malleable, it does not resemble a static photograph imprinted in our brain. Rather, as discussed by a report by the National Academy of Sciences (NAS), "We regularly encode events in a biased manner and subsequently forget, reconstruct, update, and distort the things we believe to be true."[58] Several factors can influence how we encode a memory and later recall an event.

Scientific evidence shows that identifying a person of a different race is particularly error prone, even absent intention to deceive.

Humans are generally unskilled at identifying unfamiliar faces,[59] and scientific evidence has taught us that the process of identifying a person of a different race is particularly error-prone, even absent intention to deceive.[60] And, unfortunately, witnesses often feel *more*, rather than less, confident in their false identification "as a result of learning more information about the case, participating in trial preparation, and experiencing the pressures of being placed on the stand."[61]

Notably, how police question an eyewitness about their memory of an event and a suspect can influence the eyewitness' recollection. Too often, police seek mere confirmation that an eyewitness can positively identify the person police believe is the suspect.[62] "An eyewitness might learn from the police or some other source that a potential suspect has a moustache and then attribute that knowledge to the witnessed event."[63]

Eyewitness identifications can also be influenced by cues and biases communicated by police investigators, whether unconsciously or consciously, when they administer lineups or photo arrays. Each lineup or array generally contains 6-9 people or photos, including one suspect and a group of similar-looking "fillers." These can be shown to the eyewitness all at once (simultaneously) or one after the other (sequentially).[64] If the police officer conducting the lineup or array is involved in the investigation and knows the order in which the photos or people are shown, they can either inadvertently or intentionally suggest to the eyewitness who the police have identified as a suspect, biasing the identification.[65] If the eyewitness positively identifies the suspect, that identification can then be used as evidence during trial.[66] But if the eyewitness is unable to identify the person or provides unreliable identifications, the *Brady* decision requires that such evidence be turned over to the defense.

The NAS recommends that police departments use a "double-blind" identification procedure, meaning the lineup or array administrator shouldn't have a hand in picking the photos or persons, nor should they know who the suspect is.[67] Where that is not possible, a "blind" procedure is recommended, meaning the administrator shouldn't know the order in which the photos or persons are presented.[68] Additional recommendations include: providing standard instructions to the eyewitness, informing them that the suspect may or may not be included and that the investigation will continue regardless of whether or not the they select a suspect;[69] recording the eyewitness' confidence in the identification at the time of the police lineup;[70] and videotaping the witness identification procedure.[71] But these best practices are not mandatory, and most are certainly not widely adopted and implemented across our nation's thousands of police departments and investigative agencies, leaving many identification processes more susceptible to bias and error.[72]

CASE STUDY

The Longest Time Served for a Wrongful Conviction

At 48 years, one month, and 18 days, Glynn Simmons is believed to have served the longest wrongful incarceration of any wrongfully convicted person in the United States.[73]

Mr. Simmons, a Black man, was wrongfully convicted in 1975 for killing a white female liquor store clerk in Edmond, Oklahoma. He was 22 years old.[74] His conviction was based on unreliable eyewitness testimony from an 18-year-old white teenager who had suffered a traumatic brain injury after being shot in the head during the liquor store robbery.[75]

Although the 18-year-old eyewitness testified at trial about identifying Mr. Simmons as the shooter multiple times, what police and prosecutors didn't reveal despite Brady obligations, and what Simmons' eventually disbarred trial counsel never requested, were records of the multiple lineups in which the 18-year-old eyewitness identified four other people as suspects.[76] After appeal, in July 2023, a judge vacated Mr. Simmons' conviction and ordered a new trial. Ultimately, the Oklahoma County District Attorney dismissed the charges. Mr. Simmons was 70 and had spent almost **half a century** wrongfully imprisoned.[77]

"There is life after prison," Mr. Simmons told a Washington Post reporter, "and there is a good life after prison."[78] In August 2024, Mr. Simmons won a $7 million settlement against the City of Edmond, Oklahoma, while his claims against other government defendants remained pending.[79]

Factor 4: Reliance on Junk Science

A study of death penalty exonerations between 1973 and 2021 found that "false or misleading" forensic evidence contributed to almost one-third (31.9%) of exonerations.[80] Much of this evidence, commonly referred to as "junk science," has not been subjected to scientific rigor. Rather, as a landmark 2009 report by a committee of the NAS notes, "With the exception of nuclear DNA analysis, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."[81] The unproven techniques surveyed in the committee's report include fingerprint and other kinds of pattern identification, firearms identification, microscopic hair analysis, bitemark analysis, and bloodstain pattern analysis.[82]

The purported experts using these untested and unproven methods claim not only reliability but unfounded certainty in their conclusions. As a 2016 follow-up report by the President's Council of Advisors on Science and Technology noted, "... reviews have found that expert witnesses have often overstated the probative value of their evidence, going far beyond what the relevant science can justify. Examiners have sometimes testified, for example, that their conclusions are '100 percent certain;' or have 'zero,' 'essentially zero,' or 'negligible,' error rate. As many reviews — including the highly regarded 2009 National Research Council study — have noted, however, such statements are not scientifically defensible: all laboratory tests and feature-comparison analyses have non-zero error rates."[83]

As with the factors above, faulty science is hard to disentangle from the systems of bias that work in this country to disadvantage Black people. After all, "The vast majority of those prosecuted using junk science are not monied corporate defendants, but poor people of color."[84] In other words, such evidence is more likely to be used against those with less resources to challenge its accuracy.

CASE STUDY

The Danger of Hair Microscopy

As discussed above, one of these debunked forensic techniques is microscopic hair analysis, or hair microscopy, which assumes that the physical characteristics of hair can exculpate, or inculpate, the person accused.[85] However, as noted by the NAS, no set scientific standards govern hair microscopy, making any findings highly subjective based on the particular examiner.[86]

The NRE found that between 1989 and 2023, at least 126 wrongful convictions were secured in part by discredited hair analysis, and its detailed report on this topic identifies hair analysis as "among the top four forensic disciplines" contributing to wrongful convictions.[87] The Washington Post also released a harrowing investigation in April 2012 revealing that Department of Justice (DOJ) officials quietly started reviewing hair microscopy cases in the 1990s because of reports that "sloppy work by examiners at the FBI lab was producing unreliable forensic evidence in court trials."[88] The study cautioned that "hundreds of defendants nationwide remain[ed] in prison or on parole for crimes that might merit exoneration, a retrial or a retesting of evidence using DNA because FBI hair and fiber experts may have misidentified them as suspects."[89]

One of the people convicted and currently facing execution, in part, because of misleading microscopy evidence is Willie Jerome Manning, a Black man on Mississippi's death row. Mr. Manning — a man already convicted and exonerated for another capital crime — has always maintained his innocence in the 1994 killings of two white college students.[90] Days before his initial execution date in May 2013, the DOJ intervened with letters urging the state to halt the execution because its hair analysis expert and its firearms expert provided misleading testimony at Mr. Manning's trial. After receiving a stay of execution, Mr. Manning moved for the hair evidence and other physical evidence to undergo DNA testing, but the results were inconclusive.[91] Mr. Manning moved again to re-test the hair in 2020 at a more sophisticated lab, but a state court denied the motion and the Mississippi Supreme Court upheld the denial in 2022.[92] The next year, Mr. Manning filed a successive petition with the Mississippi Supreme Court including dozens of affidavits and letters from the FBI, DOJ, and others that showed erroneous testimony regarding both hair analysis and "toolmark analysis" ballistics testing. [93]However, in a 5-4 decision in September 2024, the court denied Mr. Manning a new trial, paving the way for the state to set an execution date. The ACLU filed an amicus brief in support of rehearing that discussed the role of racial bias in Mississippi's false convictions and in this case in particular.[94]

Factor 5: Non-Diverse Juries

Another holdover from the early days of the death penalty that contributes to wrongful convictions is the prevalence of non-diverse juries. For example, in North Carolina, almost half of those on death row were sentenced by juries that were either all-white or nearly all-white.[95] This, in turn, facilitates wrongful convictions, particularly for non-white defendants as non-diverse juries are more likely to make errors, including factual errors, than their diverse counterparts.[96] White-dominated juries are also more conviction-prone against non-white defendants compared to more diverse juries.[97] Conversely, more racially diverse juries engage in fairer and more fulsome decision-making. For example, mock jury groups composed of two Black jurors and four white jurors in one study

deliberated longer, discussed more facts from the case, and were less likely to assert inaccurate facts during deliberations compared to all-white groups.[98]

The factors leading to non-diverse capital juries are many. To start, the groups of potential jurors called from the community — known as venires — often do not reflect their communities' diversity due to the sources from which people are called.[99] However, even after making it into a venire, people of color are disproportionately affected by financial concerns that keep them from serving on a jury, such as missing work or the relatively low pay for jurors.[100] Next, those who are called and can afford to serve as jurors have to undergo the harrowing and racially discriminatory practice of death qualification, as discussed in this recent ACLU report.

A 2020 study examining 89 criminal cases in one district in Mississippi found prosecutors were more than four times more likely to strike Black jurors compared to white jurors.

After death qualification, there is another stage of jury selection equally to blame for the prevalence of non-diverse capital juries: the usage of peremptory strikes[101] when prosecutors disproportionately excuse jurors of color. Even though purposefully excusing jurors of color is itself a form of prosecutorial misconduct, and even though the landmark 1986 Supreme Court decision in *Batson v. Kentucky* held that it is unconstitutional to use peremptory strikes to exclude jurors on the basis of their race, the disproportionate striking of jurors of color — and Black jurors in particular — has continued. A number of empirical studies have established that prosecutors use peremptory strikes to remove Black jurors far more frequently than they do white jurors. A 2020 study examining 89 criminal cases in one Mississippi judicial district found prosecutors were more than four times more likely to strike Black jurors compared to white jurors.[102] A study reviewing jury selection in the trials of every person on North Carolina's death row as of July 1, 2010 found prosecutors were more than twice as likely to strike Black jurors compared to white jurors.[103] As the study authors note, "There is less than a one in one thousand chance that we would observe a disparity of this magnitude if the jury selection process were actually race neutral."[104]

In part, these disparities are because prosecutors can overcome a *Batson* challenge by citing any "race-neutral" reason for their strike. Entire training manuals in prosecutors' offices have been dedicated to providing race-neutral reasons for striking Black jurors and circumventing *Batson*.[105] For example, "The Inquisitive Prosecutor's Guide" lists 77 race-neutral reasons for striking a juror. The guide states that a prosecutor may use both the fact that a prospective juror had "too much or too little education" as a race-neutral reason to strike a juror. Similarly, a prosecutor may strike a juror for "lack of community or family ties or too many of those relationships."[106]

Another study, in California, found that even when *Batson* challenges went up to the appeals court or state supreme court, these reviewing courts rarely determined that there were instances of unconstitutional discrimination.[107] The study authors coded the reasons prosecutors gave for striking Black jurors in 480 cases; the most common reasons prosecutors gave were demeanor-based reasons (37.5% of cases), including things as vague as not making eye contact, sitting with arms crossed, or giving short answers. Prosecutors also cited distrust of law enforcement or the criminal legal system (34.8% of cases) and jurors' close relationships with someone who had a negative

interaction with the criminal legal system (33.3% of cases).[108] In other words, prosecutors are often allowed (and sometimes encouraged by their own office) to dismiss jurors of color for reasons that are either hard to disprove or intertwined with race.

CASE STUDY

Marcus Robinson and the North Carolina Racial Justice Act

In an effort to address racial discrimination in the death penalty, the North Carolina General Assembly passed the Racial Justice Act (RJA) in 2009. The law allowed people on death row to challenge their sentence if they could show race played an impermissible and significant role in their conviction and sentence.

The ACLU and co-counsel represented Marcus Robinson, a Black man, who was convicted of the murder of a white person. Mr. Robinson had just turned 18 years old at the time of the crime and, at the time of his conviction and sentence, was the youngest person on North Carolina's death row.[109] Mr. Robinson's defense team presented statistical evidence showing that, statewide, prosecutors struck Black potential jurors from the panel more than twice as often as they did white potential jurors.[110] Mr. Robinson presented other statewide evidence too, including evidence that North Carolina prosecutors received training "to circumvent" Batson by articulating "facially neutral" reasons for striking Black jurors and that prosecutors did, in fact, use the tactics they learned in training during trials held in Cumberland County.[111] The statewide evidence revealed hand-written prosecutor notes evincing discriminatory intent and disparate treatment, including one prosecutor's notes calling a Black juror with a criminal record a "thug" but referring to a white juror with a criminal record as a "fine guy."[112]

The trial court hearing Mr. Robinson's challenge found that race factored significantly in the prosecution's use of peremptory strikes to exclude Black jurors.[113] Despite this abundant evidence, the North Carolina Supreme Court reversed the trial court's order and remanded for a new hearing to allow the State an additional opportunity to rebut the evidence.[114]

In response to Mr. Robinson's and three other petitioners' successful RJA challenges, the North Carolina legislature, then overtaken by a conservative majority, repealed the RJA in 2013 and made its repeal retroactive.[115] At the attorney general's request, a trial court hearing the ongoing RJA challenges (after the high court's remand) reinstated the death sentences of Robinson and the three others who had initially won relief. Robinson challenged the retroactive application of the RJA repeal, done after he had already won relief while the RJA was in effect.[116]

In a landmark ruling, Chief Justice Cheri Beasley, the first Black woman to lead North Carolina's Supreme Court, reinstated Robinson's sentence reduction. The North Carolina Supreme Court found that the retroactive application of the RJA repeal violated Robinson's constitutional right to be free from double jeopardy.[117]

EXECUTION OF THE INNOCENT

Not every innocent person on death row escapes alive. While it is impossible to determine just how many innocent people have been executed since the modern death penalty was introduced in 1973, innocent people have, almost certainly, been executed.[118] As Justice Harry Blackmun noted, we have created a system "that we know must wrongly kill some defendants."[119]

The Death Penalty Information Center identifies 21 people who very likely were innocent and were wrongfully executed in the modern era, but there may be others.

Of the identified cases, 11 — over half — were cases in which people of color were wrongfully executed, and 16 of the cases (76%) involved a white victim.[120] This section highlights documented stories of credible innocence in the cases of three people of color who were nevertheless executed, and the factors that contributed to their wrongful convictions and wrongful executions.

The Execution of Leo Jones

In 1998, Florida executed Leo Jones, a Black man. An all-white jury had convicted Mr. Jones for the killing of a white police officer based, in part, on a coerced confession. Under Florida's unique perversion of the American jury right that allows, even today, non-unanimous death sentences, the jury's 9-3 vote for death sufficed to condemn Mr. Jones to lethal injection.

Mr. Jones always maintained his innocence and said police beat him to coerce a confession. In the years after his conviction, his attorneys uncovered more evidence of police misconduct in the Duval County Sheriff's Department. One of the officers, Officer Lynwood Mundy, bragged that he had beaten Mr. Jones and extracted a confession. It was common knowledge in the sheriff's office that Mundy used violence and assaults to extract confessions and then lied to cover up his conduct. Additionally, multiple people identified another person as the likely suspect in the police officer's killing.[121]

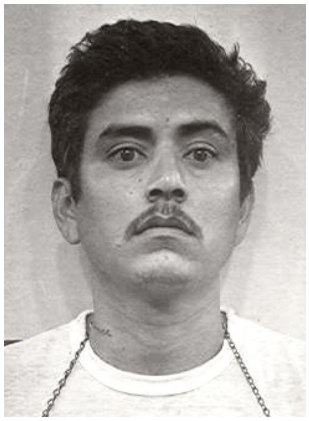
One of the officers, Officer Lynwood Mundy, bragged that he had beaten Mr. Jones and extracted a confession.

Despite this evidence of official misconduct and the identification of another suspect, the Florida Supreme Court denied Mr. Jones a new trial and an opportunity to present a full picture of the case. The court found that the new evidence did not "weaken the case against Jones so as to give rise to a reasonable doubt as to his culpability."[122]

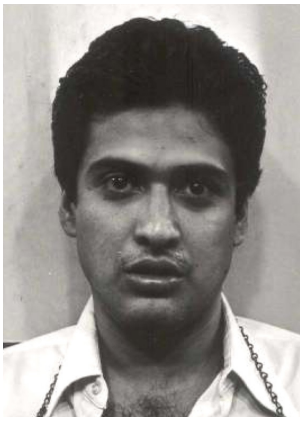
One of the jurors in Jones' case, Robert Manley, heard about the execution on the radio while driving to work. He pulled over, reflecting on his role: "He remembered how certain he had

been at trial, how he had been impressed by the strength of the evidence, how the prosecutors had systematically erased his doubts. Then Manley began to think how the certainty he once felt had eroded over the years as he learned more and more about Jones' case. 'It just hit me that something I'd been a part of had come to fruition,' he said. 'I felt horrible.'"[123]

The Execution of Carlos DeLuna



Carlos DeLuna



Carlos Hernandez

Credit: The Innocence Project

Carlos DeLuna always maintained his innocence in the 1983 knife killing of a gas station clerk in Corpus Christi, Texas. Mr. DeLuna, a Latine man, said another man whom he knew, Carlos Hernandez, was the perpetrator. When Mr. DeLuna's defense counsel told the jury this was a case of mistaken identity, the prosecutor told the jury that this "other Carlos" was an invention of Mr. DeLuna's.[124]

After Texas executed Mr. DeLuna in 1989, multiple independent investigations confirmed that what Mr. DeLuna had said from the start was almost certainly true: He was very likely innocent. And worse, police and prosecutors knew of Carlos Hernandez, who had a long record of violent assaults using a knife, similar to the gas station killing, and who looked uncannily like Carlos DeLuna.[125] Columbia University Professor James Liebman and 12 of his students extensively investigated Mr. DeLuna's case and concluded that Mr. DeLuna was "almost certainly was innocent."[126] Liebman and his students chronicled a string of investigatory failures, including the following:

1. Carlos DeLuna and Carlos Hernandez looked remarkably similar, so much so that their family members mistook their photographs for each other's. And, during the police investigation, an eyewitness reported that he wasn't sure about the identification. Yet investigators never followed up.[127]

2. Powerful forensic evidence could have resolved this confusion. Yet despite copious blood at the crime scene, police investigators conducted no blood analysis to determine the perpetrator's blood type and failed to examine other objects, like a cigarette butt, beer cans, and chewing gum, for blood or saliva. When Liebman later asked to review the evidence and subject it to DNA testing, authorities stated that it had "disappeared."[128]

3. Police and prosecutors knew Carlos Hernandez, "the other Carlos." And they knew he had a history of violence, including assaulting women with a knife. But as a police informant, he remained protected from prosecution and incarceration despite multiple arrests and crimes. [129]

More information about Carlos DeLuna's wrongful conviction and execution is available in the 2014 book, "The Wrong Carlos: Anatomy of a Wrongful Conviction," and a Netflix documentary released in 2021 called "The Phantom."

The Execution of Marcellus Williams

Missouri executed Marcellus Williams, a Black man, in September 2024 for the 2001 robbery and murder of a white woman. Although no physical evidence linked Mr. Williams to the crime, he was convicted largely based on the testimony of two witnesses who claimed that Mr. Williams had confessed to them — one of whom had been

paid $5,000 for his testimony.[130] Mr. Williams' jury consisted of 11 white people and one Black person (after a jury selection process wherein the prosecutor admitted to striking one of the jurors for physically resembling Mr. Williams).[131]

At trial and after conviction, Mr. Williams steadfastly maintained his innocence. DNA testing on the murder weapon conducted in 2015 showed not only that Mr. Williams was definitively excluded as the DNA's source, but that the prosecutors had contaminated it with their own DNA. Nevertheless, his conviction remained.[132] Later, in 2017, then-Governor Eric Greitens convened a Board of Inquiry to review Mr. Williams' case.[133] However, the Board was dissolved in June 2023 by Governor Mike Parson without a known report being issued.[134]

DNA testing on the murder weapon showed prosecutors had contaminated it with their own DNA.

In January 2024, St. Louis Prosecutor Wesley Bell filed a motion to vacate Mr. Williams' conviction, citing potential weaknesses in Mr. Williams' defense counsel and police investigation, as well as bias in jury selection.[135] However, the motion was denied by Missouri courts, including the Missouri Supreme Court, which set a final execution date for September 24, 2024.

A month before the execution was to take place, on August 21, 2024, Mr. Williams accepted an Alford plea so he could receive a sentence of life without parole but still maintain his innocence.[136] However, Missouri Attorney General Andrew Bailey sought a writ of prohibition, and the Missouri Supreme Court blocked the agreement.[137] Mr. Williams was executed on September 24, 2024 — a recent reminder that racial bias and wrongful death sentences remain inextricably intertwined.

CONCLUSION AND RECOMMENDATIONS

After just over five decades of the modern death penalty, at least 200 innocent people have been exonerated from death rows across America. Each exoneration represents many years — sometimes multiple decades — of false imprisonment and wrongful condemnation for those wrongfully accused. This is to say nothing of the costs for those wrongfully convicted but never exonerated.

While it is impossible to say how many innocent Black people have been capitally tried and sentenced to death, 108 death row exonerees — more than half — have been Black. Factors like official misconduct by police officers and/ or prosecutors, perjury and false testimony, eyewitness misidentification, unreliable expert testimony, and non-diverse juries contribute to wrongful convictions of people of all races but continue to disproportionately harm Black defendants.

Each exoneration represents many years—sometimes multiple decades—of false imprisonment and wrongful condemnation.

The scope of injustice documented in this report is undeniable, but not unpreventable. There are actions that local and federal elected leaders can take to stamp out racial bias in capital cases and prevent people from being wrongfully sentenced, convicted, and put to death.

State Legislative Action

1. Enact legislation repealing the death penalty.

The only true protection against wrongful convictions and executions based on racial bias is abolition of the death penalty.

2. Expand Post-Conviction Relief and Accountability

- Pass or strengthen Racial Justice Acts (RJA) allowing claims showing racial bias in jury selection or sentencing, with retroactive application.
- Remove procedural barriers by eliminating restrictive deadlines and defaults that prevent review of meritorious claims.
- Establish independent oversight boards to investigate racial bias and prosecutorial misconduct with authority to recommend relief.
- Guarantee access to counsel and expert support for individuals pursuing RJA or wrongful conviction claims.

- Expand access to post-conviction DNA testing and innocence review procedures in all serious felony cases.
- Establish and expand the use of Innocence Commissions, like in North Carolina.

3. Ensure Fair and Diverse Juries

- Restrict prosecution's peremptory strikes and collect and publish data on jury composition, peremptory strikes, and sentencing outcomes by race and geography.
- Strengthen judicial review of racially motivated juror exclusions by adopting provisions like those enacted in California and Washington.
- Mandate transparency by requiring public reporting of jury demographics and strike rates.
- Increase juror pay and expand hardship exemptions to promote broader participation.
- Prohibit death qualification.

4. Strengthen Forensic and Investigative Integrity

- Ban 'junk science' and require accreditation for all forensic laboratories and analysts.
- Mandate full disclosure of error rates, limitations, and exculpatory evidence (Brady compliance).
- Adopt best practices for eyewitness identification, including double-blind lineups and recorded witness statements and adopt jury instructions on cross-racial identifications, like those in Massachusetts and New York.
- Mandate continuous audio-video recording of all custodial interrogation in capital-eligible cases in their entirety—from the moment a suspect enters the interrogation room until its conclusion.
- Prohibit the use of high risk interrogation tactics, such as lengthy interrogations, deception about evidence, and threats or promises of leniency and require judges to conduct pretrial "confession reliability hearings" where the prosecution must demonstrate, by clear and convincing evidence, that a confession is voluntary and corroborated by independent, material evidence.

5. Provide Meaningful Remedies for Wrongful Convictions

- Create a uniform statutory right to compensation of at least $200,000 a year that automatically compensates exonerees without requiring proof of misconduct.
- Include reparative support such as mental health services, housing assistance, and tuition waivers.
- Make restitution statutes retroactive so all death row exonerees — regardless of when they were released — can apply.
- Remove legal and procedural barriers that require exonerees to waive civil rights claims in exchange for compensation.
- Provide appointed counsel to assist in navigating compensation claims.

Executive Actions and Federal Actions

6. Promote Executive Clemency and Transparency

- Create a formal pardon process for exonerated individuals with automatic expungement.
- Establish automatic eligibility for a pardon of innocence once exoneration is established by the courts or prosecutors.
- Proactively grant pardons of innocence to exonerated persons, not merely upon application.

- Publish annual reports on pardon applications, outcomes, and demographic data to ensure equity.
- Require public acknowledgment through formal pardons of innocence and apologies upon exoneration.
- Establish independent innocence review commissions to re-investigate cases involving racial bias or misconduct.
- Pair pardons of innocence with automatic expungement and destruction of related criminal records, ensuring exonerees are not penalized in employment, housing, or licensing.
- Implement a statewide moratorium on executions until racial disparities, wrongful convictions, and prosecutorial misconduct in capital cases are independently reviewed.
- Establish statewide programs to investigate post-humous wrongful executions tainted by racial bias.

7. Federal Actions

- Enact legislation to end the federal death penalty.
- Enact a federal Racial Justice in Capital Sentencing Act to ensure that the death penalty is not disparately applied based on the race of the offender or victim.
- Fund national data collection and research on racial disparities and wrongful convictions.
- Maintain the federal execution moratorium pending comprehensive reform.
- Fully Fund in the Commerce, Justice, Science, and Related Agencies appropriations bill for DOJ Bureau of Justice Assistance grant programs the Wrongful Conviction Review program for grants to local innocence organizations to exonerate persons who have been wrongfully convicted, and the Kirk Bloodsworth Post-Conviction DNA Testing Grant program that provides states and localities with grants to provide access to post-conviction DNA testing in cases of likely innocence and to review and correct system errors in this area, and forensic science research to validate forensic science techniques to increase their reliability and accuracy at the National Institute of Standards & Technology (NIST) at the Dept. of Commerce.

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