CHAPTER 1
SAFEGUARDING INNOCENCE AND PROTECTING AGAINST WRONGFUL EXECUTION

On October 25, 2013, Reginald Griffin became the 143rd person exonerated from death row in the United States. Griffin is the fourth person exonerated in Missouri. He was sentenced to death for the 1983 murder of James Bausley, a fellow inmate, while serving a twenty-year sentence for an armed assault conviction in 1981.

Two other prisoners and co-conspirators, Doyle Franks and Arbary Jackson, were also charged with the murder, and they consistently maintained that another inmate, Jeffrey Smith, was the third person involved in the stabbing, not Griffin. Franks and Jackson were also convicted of the murder, but Griffin was the only one sentenced to death. No physical evidence implicated Griffin in the murder, and evidence that was uncovered after trial revealed that guards had confiscated a sharpened screwdriver from Smith as he was leaving the area where the stabbing occurred. Griffin's conviction was based largely on the testimony of two prisoners who testified in exchange for promises from the prosecution regarding their own convictions. Ultimately, one prisoner recanted his testimony and the other prisoner's testimony was disproven.

In August 2011, the Supreme Court of Missouri ordered a new trial, finding that the prosecution violated Griffin's constitutional right to a fair trial by withholding evidence and stating that Griffin's conviction was no longer "worthy of confidence." In December 2012, Griffin was released on bond pending retrial, and less than a year later the prosecution dismissed the charges.

Recommendation 1. Jurisdictions should require post-conviction review of credible claims of innocence.

a) Jurisdictions should adopt legislation to establish that, if it is more likely than not that no reasonable jury would convict in light of the new evidence, the defendant should be released.

b) Jurisdictions should adopt legislation to establish that, if it is more likely than not that the jury would not have convicted in light of the new evidence, the defendant should be given a new trial.

c) Exculpatory evidence relevant to a credible claim of innocence or wrongful conviction should be allowed in post-conviction proceedings notwithstanding procedural bars.

Since 1973, over 140 people in 26 states have been released from death row based on evidence of their innocence, with some having served up to thirty years for crimes they did not commit. Still more have had their convictions reduced or their sentences commuted because of doubts about their guilt. Most disturbingly, there is evidence that defendants have been put to death despite significant questions regarding their innocence, undermining confidence in the entire criminal justice system.[1] There can no longer be any doubt that innocent people do get convicted of horrific crimes, spend years in prison and even face execution.

Some have argued that, rather than proving the fallibility of our system, exonerations of the innocent demonstrate that the system is working. For instance, Justice Thomas' majority opinion in the 2006 case *Kansas v. Marsh* stated, "Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success."[2] This sentiment ignores the damage caused when an innocent person is convicted of a crime. Wrongful convictions undermine society's confidence in the ability of the criminal justice system to perform its most basic function – to convict the guilty and acquit the innocent. Overturning a wrongful conviction, when possible at all, can take decades, during which time the true perpetrator often remains free to commit other offenses. The psychological trauma of wrongful

[1] For example, significant questions have been raised about the potential innocence of Cameron Todd Willingham, who was executed in 2004, and Carlos de Luna, who was executed in 1989, both by the state of Texas. *See* Cameron Todd Willingham: Wrongfully Convicted and Executed in Texas, at http://www.innocenceproject.org/Content/Cameron_Todd_Willingham_Wrongfully_Convicted_and_Executed_in_Texas.php; *see also* Investigation Reveals Texas Likely Executed An Innocent Man: Points to Eyewitness Misidentification, at http://www.innocenceproject.org/Content/Investigation_Reveals_Texas_Likely_Executed_An_Innocent_Man_Points_to_Eyewitness_Misidentification.php.

[2] *Kansas v. Marsh*, 548 U.S. 163, 193 (2006).

conviction on defendants, their families and victims' families is beyond measure. Wrongful convictions are also expensive. Innocent people, incarcerated at government expense, are prevented from making any meaningful contribution to society, while countless hours and resources are spent in the judicial system trying to correct the mistake. Moreover, often, it is only as a result of some fortuitous event that a defendant's innocence is discovered, which undermines the public's confidence in the accuracy and reliability of the system.

In many death penalty jurisdictions, including at the federal level, there are significant procedural bars that a person claiming innocence must overcome in order to present such a claim and high burdens of proof that are incredibly difficult to meet. The result is that claims of innocence are extremely difficult to litigate, even in those states where they are permitted.

Further, the U.S. Supreme Court has not definitively recognized what is called a "freestanding" actual innocence claim under the Eighth Amendment. In *District Attorney's Office of the Third Judicial District v. Osborne*,[3] the Court held that the "actual innocence claim" issue was an "open question."[4] But two months later, the Court ordered a hearing in the case of Georgia death row inmate Troy Davis on the issue of "actual innocence." Finding that the "substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing," the Court directed a federal district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[5] In a vehement dissent, Justice Scalia wrote, "[t]oday, without explanation and without any meaningful guidance, this Court sends the District Court for the Southern District of Georgia on a fool's errand."[6] Justice Scalia insisted "[t]his Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[7] After conducting an evidentiary hearing, the district court found that Davis had

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[3] 557 U.S. 52 (2009).

[4] *Id*. at 71.

[5] *In re Davis*, 557 U.S. 952, 952 (2009).

[6] *Id*. at 957 (Scalia, J., dissenting).

[7] *Id*. at 955 (emphasis in original).

failed to establish his "actual innocence" by "clear and convincing evidence," and Davis was executed on September 21, 2011. As a result, it appears that for individuals to successfully present claims of actual innocence in federal court they must meet the exceedingly high "clear and convincing" burden of proof.[8]

With due regard for the interest of finality, the system must be willing to acknowledge errors that could result in the execution of an innocent person. Each jurisdiction should adopt legislation that sets standards to facilitate the review of credible post-conviction claims of innocence. Specifically, jurisdictions should adopt legislation to establish that, if no reasonable jury would convict in light of the new evidence, the defendant should be released. The legislation should require that in cases where it is more likely than not that the jury would not have convicted in light of the new evidence, the defendant should be given a new trial. Statutes of limitation and other procedural rules should not bar introduction of credible evidence of innocence, regardless of when it is discovered. These recommendations strike the appropriate balance between the interests in preserving the finality of the verdict and in ensuring that convictions are accurate and just.

Recommendation 2. If a prosecutor becomes aware of new, credible, material evidence that it is reasonably likely that an innocent person has been convicted, the prosecutor should be required to:

a) notify the court and the defendant of that likelihood,

b) disclose the arguably exonerating evidence, and

c) agree to set the conviction aside if it is more likely than not that no reasonable jury would convict in light of the new evidence.

If a prosecutor becomes aware of "clear and convincing" evidence that an innocent person has been convicted, the prosecutor must pursue the applicable remedy to right the wrong.

Our judicial system has long placed before the prosecutor the "twofold aim… that guilt shallnot escape or innocence suffer."[9] To the first end, a prosecutor is required to "prosecute

[8] *In re Davis*, No. CV 409-130, 2010 WL 338508, at *45 (S.D. Ga. Aug. 24, 2010), *cert. denied*, 131 S. Ct. 1787 (mem.) (2011). *Sawyer v. Whitley*, 505 U.S. 333 (1992), set the standard of proof for showing "actual innocence" in the context of an erroneous jury verdict with respect to the sentencing phase of a capital trial. The *Sawyer* standard requires a petitioner to show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [State] law." *Id.* at 348. On remand in *In re Davis*, the district court applied this same "clear and convincing" standard to a "freestanding" innocence claim. *See generally In re Davis*, 2010 WL 3385081.

[9] *Berger v. United States*, 295 U.S. 78, 88 (1935).

with earnestness and vigor," and to the second, the U.S. Supreme Court cautions that a prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones."[10]

Over time, the legal profession has developed rules governing a prosecutor's *pretrial* obligation to avoid a wrongful conviction, but little guidance exists in the post-conviction setting. In 2008, the American Bar Association ("ABA") adopted a model rule outlining a prosecutor's disclosure and investigation obligations in the post-conviction context when new evidence is discovered.[11] To date, Wisconsin is the only state to have adopted the ABA's model rule, though New York implemented a similar rule in 2006.[12]

In the absence of explicit guidance, prosecutors' offices across the country have taken widely divergent approaches to post-conviction claims of innocence. Institutional disincentives, however, are likely to impede a wrongfully convicted prisoner's effort to obtain full disclosure from prosecutors' offices absent an explicit requirement:

> The institutional focus of a prosecutor's office is upon closing current cases, not reevaluating old ones, and the time and resources devoted to the latter task necessarily take away from the former. Prosecutors also may face a political climate that responds favorably to a "tough on crime" message and thereby discourages the prosecutor from devoting resources to anything but the pursuit of new convictions.[13]

There also may be institutional resistance to the very idea that the prosecutor's office is responsible for the prosecution and conviction of an innocent person.[14]

The U.S. Supreme Court recognized in *Imbler v. Pachtman* that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."[15] When a prosecutor becomes aware of new, credible and material evidence suggesting a reasonable likelihood of a convicted defendant's innocence, a prosecutor's responsibilities should include a duty

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10 *Id.*

11 Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post Conviction Claims of Innocence: DNA and Beyond?*, 7 Ohio St. J. Crim. L. 771, 771 (2010) (citing *In the Matter of Amendment of Supreme Court Rules Chapter 20, Rules of Prof'l Conduct for Attorneys*, No. 08-24 (Wis. 2009), *at* http://www.wicourts.gov/sc/rulhear/DisplayDocument.html?content=html&seqNo=36849); *see also* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35, 56 n.91 (2009).

12 Ginsburg & Hunt, *supra* note 12, at 771.

13 *Id.* at 776-77.

14 *See id.*

15 *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976); *see also, e.g.*, *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988).

to disclose the evidence, to conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it. Evidence in the possession of a prosecutor at the time of trial that would tend to prove the defendant's innocence but was never disclosed to defense counsel would not be considered "new" evidence and therefore it would not be covered by this recommendation. Of course, that situation should not lead to an execution, as this report discusses further in Chapter 9.

Recommendation 3. The government should be required to disclose to the defense, as soon as practicable, all post-conviction forensic testing results.

The government should be required to disclose to the defense, expeditiously and without a request, all post-conviction forensic testing results. Compelling such disclosures is necessary, as demonstrated by the recent situation involving the U.S. Department of Justice's failure to disclose to defendants and their attorneys the results of a nine-year review of forensic evidence. The review of approximately 6,000 cases, which was in response to an inspector general's investigation of misconduct at the FBI crime lab in the 1990s, uncovered numerous crime lab errors and revealed certain forensic evidence to be unreliable. These results were made available only to the prosecutors in the affected cases. *The Washington Post* found that while many prosecutors made swift and full disclosures, many others did so incompletely, years late or not at all.[16]

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[16] *See* Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Department*, Wash. Post, Apr. 16, 2012, at http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html. In another analysis of forensic testing methods, the National Academy of Sciences ("NAS") conducted a review of the FBI's bullet-lead analysis, a forensic technique the FBI employed for more than three decades. The FBI used bullet-lead analysis, for example, when a gun had been used in a crime but the bullet fragments obtained from the crime scene were too small or mangled to analyze the marks on the fragment to compare them to the gun in question. The 2004 report found that "variations in the manufacturing process rendered the FBI's testimony about the science 'unreliable and potentially misleading'" and stated that conclusions about links between a particular bullet and those found in a suspect's gun or a box of cartridge "were so overstated that such testimony should be considered 'misleading under federal rules of evidence.'" *See* John Solomon, *FBI's Forensic Test Full of Holes*, Wash. Post, Nov. 18, 2007, at http://www.washingtonpost.com/wp-dyn/content/article/2007/11/17/AR2007111701681_pf.html. Although the FBI abandoned the use of bullet-lead analysis in 2005, it communicated in a news release that it continued to stand behind the

Justice Department officials said that they met their legal and constitutional obligations when they learned of specific errors by alerting prosecutors, and that they were not required to inform defendants directly. As a result, hundreds of defendants nationwide remained in prison or on parole for crimes that might merit exoneration, retrial or retesting of evidence using DNA, because FBI forensics experts may have misidentified them as suspects.

The lack of notification prolonged the term of wrongful imprisonment for at least one exonerated person. Donald Gates spent 28 years in prison before DNA testing exonerated him in 2009, although prosecutors knew 12 years prior that the forensic findings that contributed to his conviction were flawed.[17] Benjamin Herbert Boyle was executed in 1997 – more than a year after the Justice Department began its review – even though a prosecutor's memorandum stated that he would not have been eligible for the death penalty without the FBI's flawed work.

Partly as a result of the Justice Department's handling of its reviews, the ABA and others have proposed stronger ethics rules that would require prosecutors to act on information that casts doubt on convictions and would open laboratory and other files to the defense. The proposed rules would also promote clearer reporting and evidence retention, greater involvement by scientists in setting rules for testimony at criminal trials and more scientific training for lawyers and judges.

Recommendation 4. Jurisdictions should establish procedures for systemic review of exonerations and for avoiding future errors.

a) Jurisdictions should provide mechanisms for the review of capital cases in which defendants were exonerated, for the purpose of identifying the causes of the error and for correcting systemic flaws affecting the accuracy, fairness and integrity of the capital punishment system.

b) The U.S. Department of Justice should establish and Congress should appropriate money for a specific office tasked with reviewing innocence claims.

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scientific foundation of the analysis. The FBI has been criticized for downplaying the NAS's conclusions and failing to "call attention to the magnitude of the FBI's internal concerns." *See id.* Only as a result of a joint investigation and news report on the subject conducted by *The Washington Post* and *CBS News* did the FBI expand its alert and increase its specificity regarding concerns about bullet-lead analysis. *See* FBI, Press Release, FBI Laboratory to Increase Outreach in Bullet Lead Cases, Nov. 17, 2007, at http://www.fbi.gov/news/pressrel/press-releases/fbi-laboratory-to-increase-outreach-in-bullet-lead-cases.

[17] *See* Spencer S. Hsu, *D.C. Man Served 28 Years. Then the Evidence that Sent Him to Prison Fell Apart*, Wash. Post, Apr. 16, 2012, at http://www.washingtonpost.com/local/crime/2012/04/16/gIQAbndgMT_story.html.

c) Jurisdictions (including the U.S. Department of Justice) should provide mechanisms to identify, on an ongoing basis, process improvements that could help to avert wrongful convictions before they happen.

d) All stakeholders should work to increase sensitivity to innocence and wrongful conviction issues in capital cases in high schools, colleges, law schools, police academies, judicial training programs and among the broader American public.

When the criminal justice system fails in its most critical function – convicting the guilty and exonerating the innocent – the government should step in to determine the causes of the failure and identify appropriate reforms. For this reason, experts in the criminal justice system have advocated the establishment of "innocence commissions" in jurisdictions where wrongful convictions have occurred. Three possible models have emerged.

Moreover, it is important to ensure that, no matter how or by whom such commissions are established, they are not subject to political pressures over their creation, appointment of members, investigations, or findings.

The first provides extra-judicial procedures for examining individual claims of innocence. North Carolina became the first state to create an agency specifically charged with investigating and evaluating post-conviction claims of factual innocence. Similarly, the Dallas District Attorney's Office established a Conviction Integrity Unit in 2007, intended to review and re-investigate legitimate post-conviction claims of innocence. This special division was the first of its kind in the United States. These and other state conviction review units have identified a number of innocent convicted defendants, some in cases where no post-conviction claim of innocence had even been made.

The second model uses individual cases as a springboard for investigating and correcting systemic flaws. For instance, Canada has authorized the appointment of Public Inquiry Commissions, which are independent, temporary, non-governmental bodies created to investigate the causes of a particular mistaken conviction. Likewise, individual jurisdictions, including Santa Clara County, California, have created departments specifically designed to review cases of alleged prosecutorial misconduct and set protocol to prevent future errors. Several states, including Florida, also have appointed either permanent or temporary commissions designed to study the causes of error and unfairness in the administration of the criminal justice system. These types of commissions recognize that review of individual cases, alone, cannot solve systemic flaws.

In the third model, jurisdictions have created independent commissions to both identify and correct the causes of wrongful convictions in individual cases and maintain pressure for continual systemic improvement. District Attorney Cyrus Vance, Jr. established an organization with these two goals in New York County, New York. New York's "Conviction Integrity Unit" consists of a Conviction Integrity Committee, a Conviction Integrity Chief, and an outside Conviction Integrity Policy Advisory Panel. The Conviction Integrity Unit evaluates the merits of each innocence claim, reviews practices and policies related to case assessment, investigation, and disclosure obligations, and provides insight on national best practices and evolving issues in the area of wrongful convictions.

Governors, attorneys general and legislatures have the power to appoint any of these types of commissions and state supreme courts also can do so pursuant to their inherent supervisory powers. Appropriate authorities should immediately adopt institutional mechanisms to address the multifaceted problem of wrongful convictions. Moreover, it is important to ensure that, no matter how or by whom such commissions are established, they are not subject to political pressures over their creation, appointment of members, investigations, or findings. In addition, they must have the transparency and vigilance needed to promote implementation of recommendations or monitor the need for future reforms.

Some jurisdictions have Innocence Projects, usually associated with university law or journalism schools, in which students, practicing attorneys and journalists investigate wrongful conviction claims, represent those with credible innocence claims, and develop initiatives to raise public awareness and create and implement systemic solutions. Although these Innocence Projects initially focused on DNA exonerations, they have expanded their mission to include numerous other ways to identify and correct wrongful convictions. Most rely on volunteers or students working for academic credit to handle their caseloads. Many jurisdictions have no such projects at all. Given their ability to promote citizen monitoring of actual and potential abuses, these projects should become adequately funded, integral parts of the criminal justice system in all jurisdictions.

Citizen monitoring can also be promoted by expanding public education on the dangers of convicting the innocent. High school and college courses should address these issues, police officers should be trained in identifying them and lawyers must know how to uncover and cure existing or impending errors. Law schools in particular might establish courses, as some are starting to do, focusing on the causes of and cures for wrongful convictions and on educating the public and the legal profession about the problem.