

A POSTCONVICTION MENTALITY:  
PROSECUTORIAL ASSISTANCE AS A PATHWAY TO EXONERATION

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## **ABSTRACT**

In the wake of identifiable errors, many prosecutors are beginning to acknowledge wrongful convictions. They have the discretion to overturn wrongful convictions, and they are uniquely positioned to do so. Still, very little scholarship has explored how, when, and why prosecutors choose to assist with exoneration. Therefore, the three broad aims of the present study include: 1) examining the determinants, motivations, and processes influencing prosecutors' decisions to assist with innocence claims that have resulted in exoneration; 2) exploring the successes and challenges of postconviction collaboration between prosecutors and defense attorneys; and 3) identifying how prosecutorial assistance could open pathways to exoneration. To meet these aims, the study employs a mixed methods research design, featuring semi-structured interviews with 19 prosecutors and 19 defense attorneys and multivariate regression analyses of a large sample of state exoneration cases. Interviewees are selected from cases identified in the National Registry of Exonerations (NRE). All prosecutor respondents have assisted with an innocence claim that resulted in full exoneration, and all defense attorney respondents have represented a client who was exonerated with the help of a prosecutor. For the quantitative component, data collected by the NRE (N=1,610) measures prosecutorial assistance using an ordinal variable to capture differing levels of assistance. Analyses reveal a range of case-related factors that influence prosecutors' receptivity to assist with exoneration. Overall, findings indicate that although prosecutors have become more responsive to acknowledging and correcting factual errors, they still respond within the context of a legal structure that has not been established to correct these kinds of

errors. This has implications for the nature, degree, and quality of postconviction assistance that prosecutors provide. Their postconviction decision making appears to be motivated by a desire to do justice, to protect professional relationships and reputations, and to optimize efficiency. This research investigates an underexplored area and offers both theoretical and practical value. The results will aid system actors as they develop best practices for uncovering wrongful convictions efficiently and build collaborative working relationships in the postconviction setting.

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## CHAPTER 1: INTRODUCTION

Exonerations prove the criminal justice system works, or so goes the popular misconception. The mistake was corrected. The innocent prisoner was released. This interpretation overlooks the extraordinary effort required to secure the exoneration and the many missed opportunities to rectify the error. Appellate courts commonly view errors contributing to wrongful convictions as “harmless” (Garrett, 2008; King, 2014; Scheck, 2010). Over 2,100 exonerations since 1989 have been recorded<sup>1</sup> with an average time to exoneration of about 10.6 years (NRE, 2017). Innocence Network groups estimate that it takes an average of six years from postconviction case acceptance to exonerate a client.<sup>2</sup> While some of this time is unavoidably consumed with reinvestigation, consulting experts, postconviction forensic testing, and other fact finding, much of it is wasted through frivolous legal opposition, procedural obstacles, and the glacial pace of the legal filing system. Just as surely as the errors that brought about the wrongful conviction, these unnecessary obstacles on the path to exoneration are system failings too.

If local prosecutors reflexively oppose the claim—citing the finality of the jury conviction or challenging it on procedural grounds—the case may become tied up in the courts for years. Indeed, how long it takes to correct the error may depend more on the cooperation of the local district attorney than on the strength and circumstances of the

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<sup>1</sup> National Registry of Exonerations, accessed February 26, 2018, [www.exonerationregistry.org](http://www.exonerationregistry.org)

<sup>2</sup> According to FAQ from the Florida Innocence Project and the Oklahoma Innocence Project. Accessed 12/14/15, [http://floridainnocence.org/content/?page\\_id=9785](http://floridainnocence.org/content/?page_id=9785) and <http://innocence.okcu.edu/index.php/about/frequently-asked-questions/> The national Innocence Project FAQ states that after representation, exoneration may take “between a year and a decade.” Accessed 12/14/15 <http://www.innocenceproject.org/faqs/how-many-cases-do-you-currently-have-how-many-lawyers-work-on-the-cases-and-how-long-does-each-case-take>

individual claim. Psychological and institutional pressures have been thought to influence prosecutors' willingness to assist. Legal scholarship examines the "conviction mentality" inherent to the role (Fisher, 1988, p. 202), the cognitive biases confronting prosecutors (Bandes, 2006; Burke, 2005; Burke, 2006; Findley and Scott, 2006) and the institutional pressures of the office toward maintaining the status quo (Green and Yaroshefsky, 2008; Levenson, 2013, 2016; Medwed, 2004, 2009, 2012; Orenstein, 2010; Swisher, 2012; Zacharias, 2005). Together, this research catalogs the many factors that lead prosecutors to discount, and in some cases actively oppose, innocence claims. Prosecutors' refusal to negotiate has real consequences: prolonging the period of wrongful incarceration or supervision, allowing for the real perpetrators to remain at large and possibly continue to offend, and wasting taxpayer dollars on the costs of detaining an innocent prisoner and paying for legal expenses to fight the innocence claim (Forst, 2004). In some cases, prosecutorial recalcitrance may "serve the death knell" to the ability of the defendant to find relief (Medwed, 2012, p. 126).

Nevertheless, prosecutors are ideally situated to facilitate exoneration (Zacharias, 2005). They are often the first to learn of new exculpatory evidence, and they have both the resources and the power to act (*ibid*). Greater involvement from the prosecutor's office to investigate and address actual innocence claims may help identify errors sooner, dispose of them more efficiently, and improve the public's confidence in the criminal justice system.

## PROSECUTORS AND WRONGFUL CONVICTIONS IN CONTEXT

Historically, prosecutors have been tasked with a quasi-judicial duty to seek justice, reflected in the 1935 U.S. Supreme Court opinion penned by Justice Sutherland in

*Berger v. United States*: “guilt shall not escape or innocence suffer.”<sup>3</sup> Ethical obligations for prosecutors’ postconviction behavior, developed by the American Bar Association, stipulates that prosecutors have an obligation to “remedy the conviction” when he/she becomes aware of “clear and convincing evidence” demonstrating that the defendant did not commit the offense (ABA Model Rule 3.8). In addition, the National District Attorney Association (NDAA) has also issued postconviction standards,<sup>4</sup> including the duty to “cooperate in post-conviction discovery proceedings” and to notify the court and seek the release of the defendant if the prosecutor “is satisfied that a convicted person is actually innocent.” The standards establish a baseline for ethical behavior, rather than clear guidance for best practices.

Despite the lack of guidance, some prosecutors have long recognized these ethical obligations in their response to credible innocence claims. One of the very first DNA exonerations, before the establishment of the Innocence Project, came about with the help of a prosecutor in 1989 (Norris, 2017). In 1994, Attorney General Janet Reno commissioned a report from the NIJ “Convicted by Juries, Exonerated by Science” examining the first known DNA exonerations with an eye toward criminal justice reforms.<sup>5</sup> In this effort, Reno built upon her own professional experience investigating an innocence claim and advocating for a prisoner’s exoneration during her tenure as the district attorney of Miami (Norris, 2017).

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<sup>3</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935)

<sup>4</sup> See National District Attorneys Association, “National Prosecution Standards, Third Edition.” Approved by the NDAA board in November 2016. Available at: <https://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>

<sup>5</sup> Journalist Jim Dwyer writes about the impact of this report in a *New York Times* article “Janet Reno was Unafraid of Science that Could Exonerate the Innocent,” to honor Reno’s life achievements after her passing in 2016. Available at: <https://www.nytimes.com/2016/11/11/nyregion/janet-reno-was-unafraid-of-science-that-could-exonerate-the-innocent.html>

Today, in jurisdictions across the country, police and prosecutors are assisting with a growing number of exoneration cases (NRE, 2016b). Select prosecutors have expressed willingness to work within the innocence movement and have also allocated resources to uncovering wrongful convictions. Receptive district attorneys willing to invest staff and resources to the effort can open a new pathway to exoneration for worthy claimants in a variety of ways. Publicly at least, this shift has allowed for the possibility of a *postconviction* mentality in which prosecutors fulfill their obligation to seek justice by facilitating exonerations of those who have experienced a wrongful conviction.

For example, with the recent emergence of Conviction Integrity Units (CIU) in district attorneys' offices nationwide, prosecutors have publicly affirmed their intention to review credible innocence claims. CIUs have allowed district attorneys to establish an official, institutional mechanism for this purpose. At the close of 2017, 33 CIUs had been created throughout the US mostly in large, urban jurisdictions such as Dallas, Houston, Brooklyn, Chicago, and Los Angeles (NRE, 2017). Framed against the backdrop of prosecutors' historical resistance to innocence claims, this is encouraging news.

Prosecutors need not be attached to a CIU or other official enterprise to assist with an innocence claim. District attorneys facilitating exonerations independent of a CIU will have ample authority and privileged access to information as well. Prosecutors and defense attorneys can collaborate on postconviction cases and case review in a formal, systematic way—as in the relationship between some Innocence Projects and District Attorney CIUs—or on a case-by-case basis. Either way, an efficient exoneration often requires teamwork between actors more accustomed to being adversaries. Select prosecutors' offices across the country have demonstrated a commitment to engaging in

the postconviction process and to just this type of collaboration. It is also likely that some prosecutors do more postconviction work than has been recognized, since their efforts may only become public if they result in an exoneration.

## THE NEED FOR EMPIRICAL RESEARCH

Like many other decisions prosecutors make—whether or not to bring charges in a case, whether to continue post-indictment, how to approach plea negotiations—postconviction decisions are made behind closed doors. Very little is known about prosecutors' motivations and decision-making processes at any stage (Metcalf and Chiricos, 2017; Pfaff, 2017; Shermer and Johnson, 2010; Worrall, 2008), but especially in the postconviction stage.

Empirical research of CIUs has just begun to appear (see, for example, Hollway 2015) and no study has yet explored prosecutorial postconviction assistance outside the context of a CIU. While legal scholarship has helped establish the many psychological, professional, and institutional barriers that explain prosecutorial *resistance* to innocence claims, the motivations for prosecutorial *assistance* in overturning wrongful convictions remains an open question. For example, prosecutors may be compelled by an ethical duty to do justice, a political interest in satisfying constituents, a professional interest in appealing to judges and defense attorneys, or by requests from local Innocence Network groups. Existing research cannot explain how or why prosecutors assist with exonerations, or how this cooperation might be encouraged, sustained, and developed. Although we know little about the selection processes under which prosecutors operate to assist with innocence claims, we do know that some of these claims have merit. A

starting point then is to examine the presumably most meritorious claims—those eventually resulting in exoneration.

## STUDY DESIGN

This study seeks to answer a series of research questions centering on how and why prosecutors assist with exoneration cases and whether this assistance is equitable. The study employs a mixed methods design of qualitative interviews and quantitative analysis of data drawn from the National Registry of Exonerations (NRE). The NRE is an open source, online database tracking exonerations nationwide.<sup>6</sup> Quantitative analysis of NRE cases (N=1,610) explores factors that influence prosecutors' willingness to assist and the level of assistance in known exoneration cases. Semi-structured interviews drawing from this same dataset solicit detailed descriptions of postconviction processes with 19 defense attorneys and 19 prosecutors who have each worked on a successful exoneration case.

This mixed methods approach offers four points of comparison: between the quantitative and qualitative results, between prosecuting attorney respondents and defense attorney respondents, among prosecuting attorneys, and finally among defense attorneys. These multiple points of comparison allow for an examination of the similarities and differences in prosecutors' motivations for assisting as well as the unique types of postconviction actions, processes, and practices employed in the postconviction arena. It also allows for an analysis of how defense attorneys describe successful

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<sup>6</sup> The National Registry of Exonerations is a project of the University of California Irvine Newkirk Center for Science and Society, University of Michigan Law School and Michigan State University College of Law. It can be accessed online at: [www.exonerationregistry.org](http://www.exonerationregistry.org)

postconviction collaborations compared to how prosecutors envision them. The study design enhances validity and reliability so that practitioners can gain meaningful insight from the results.

One potential contribution of the study is its ability to examine prosecutorial assistance in various settings. Existing research reflects an interest in official prosecutor-led efforts such as CIUs (Boehm, 2014; Hollway, 2015; Scheck, 2010, 2016) over smaller, more episodic efforts. This study has purposively sampled respondents working both out of official exoneration shops—such as innocence organizations and CIUs—and those working more independently. Respondents come from a wide variety of jurisdiction types (by size, demographics, and region). The qualitative study takes advantage of the opportunity to analyze the influence of institutional and contextual factors that may not be evident except through qualitative methods.

Results of the study shed light on the quality and fairness of postconviction innocence review as conducted by prosecutors. These findings should be of interest to attorneys engaged in postconviction case selection and litigation. They may aid in the development of best practices as prosecutors' offices adapt to an enhanced role in wrongful conviction case review. Attorneys may also appreciate greater knowledge of what their colleagues in other jurisdictions are doing so that they might strengthen their own procedures or identify potential pitfalls. In addition, this dissertation research will contribute to a large body of scholarship on prosecutorial discretion that has been almost uniformly focused on the pre-conviction stages of criminal case processing.

Given the current climate, the opportunity to observe prosecutors' postconviction impact would seem to be greater than ever before. The emerging phenomenon and rapid

growth of CIUs suggests an unprecedented level of prosecutorial receptivity to innocence claims. Existing social science research has not considered prosecutors' role in the postconviction stage, much less prosecutors' efforts on behalf of the wrongfully convicted. Therefore, this study has the potential to inform postconviction procedures amidst a dearth of research and at a time of great receptivity for innovation and change.

## DISSERTATION OUTLINE

In the following chapter, I discuss the social science and legal scholarship that informs the research questions and hypotheses for this study. Legal research extends an understanding of the prosecutors' postconviction role and obligations. Social science research contributes empirical studies of prosecutorial discretion, though it largely neglects the postconviction stage. Chapter 3 describes the mixed methods employed to answer the research questions. Chapter 4 presents the results of the quantitative analysis. Reported findings address the question of which types of exoneration cases are more and less likely to receive prosecutorial assistance, and explores what these cases might reveal about prosecutors' underlying motivations. In Chapter 5, I extend the analysis by exploring contextual factors contributing to prosecutorial assistance in exoneration cases. In this first chapter reporting qualitative findings, I move beyond case-related factors to understand the legal architecture influencing prosecutors' postconviction decision making. Chapter 6 explores prosecutors and defense attorneys' various explanations for *why* prosecutors assist in exoneration cases. It describes how prosecutors described their motivations in normative terms while defense attorneys pointed to instrumental incentives as well. Finally, Chapter 7 draws on both quantitative and qualitative findings

to conclude that though prosecutors have become more responsive, their decision making continues to be embedded in an adversarial legal system that perceives error as procedural rather than factual. This has implications for which defendants can prevail, as well as the form of relief that they may receive. Most importantly, it diminishes the ability of postconviction processes to discover and remedy factual errors.

## CHAPTER 2: LITERATURE REVIEW

Social science research studying criminal justice actors' discretion examines various decision-making points up until conviction, but rarely beyond into the postconviction stage (see for an exception, Gould and Leo, 2016). The empirical research on prosecutorial discretion has naturally gravitated toward charging decisions and plea bargaining, since decisions made at these stages dominate the criminal justice system. Therefore, prosecutors' postconviction discretion has become the province of legal scholars interested in the sources of prosecutorial *resistance* to innocence claims (see for example, Bandes, 2006; Burke, 2006; Green and Yaroshefsky, 2008; Levenson, 2013; Levenson, 2016; Medwed, 2004, 2009, 2012; Orenstein, 2010; Ritter, 2005; Swisher, 2012), rather than *assistance*. Neither body of literature, criminological or legal, speaks directly to the topic under investigation. Therefore, I turn to the social science research for a theoretical foundation of prosecutorial discretion and to the legal scholarship for a basic understanding of how discretion functions in the postconviction arena, particularly when making decisions about potential wrongful conviction cases.

### FACTORS WEIGHING ON CRIMINAL JUSTICE DECISIONS WRIT LARGE

The popular notion of criminal justice system processes considers only legal factors: decision makers are guided by the rule of law, an interest in controlling crime, and ensuring due process to each defendant (Eisenstein, Flemming, and Nardulli, 1988). Criminological research acknowledges that extra-legal factors also influence case outcomes, including: the race, gender and age of the defendant or victim (Baumer, Messner and Felson, 2000; Frederick and Stemen, 2012; Keil and Vito, 2006;

Kutateladze et al 2014, 2016; Metcalfe and Chiricos, 2017; Spohn and Holleran 2000; Steffensmeier et al, 1998; Ulmer et al, 2007); the professional ambitions of the actor (Albonetti 1986, 1987); the actor's relationships with other courtroom actors (Cole, 1970; Eisenstein and Jacob, 1977; Eisenstein, Flemming, and Nardulli, 1988; Haynes, Ruback and Cusik, 2010); limitations of time and resources (Johnson, 2005; Frederick and Stemen, 2012), and more. For example, practitioners may ask themselves, "What kind of case is this? Can it be handled like a typical case?" (Sudnow, 1965) or "What kind of defendant is this?" (Steffensmeier et al, 1998). They may wonder "Will I be able to get a conviction at trial? How will this decision affect my professional reputation?" (Albonetti, 1986), or "How will this decision affect my relationship with the judge and defense bar?" (Cole, 1970), or, "How can we efficiently dispose of this case?" (Eisenstein and Jacob, 1977). Considering both legal and extra-legal factors, one can begin to get a sense of the wide array of interests potentially weighing on any one decision. In short, criminological theories offer perspective into how actors sort it all out to arrive at a decision in individual cases.

#### APPLYING PRE-CONVICTION THEORIES OF DISCRETION TO THE POST-CONVICTION CONTEXT

Imagine the postconviction stage as a mirror image of the pre-conviction stage. The prosecutor steps outside his normal role of securing convictions and considers overturning them instead. Rather than building a case, the prosecutor dismantles it. The adversarial role adopted in the courtroom and in negotiations with defense becomes a collaborative project of seeking justice. Though the analogy of the mirror image has its limits, still it provides a convenient conceptual starting point. I will consider how the

research conducted on pre-conviction decisions and processes might be reversed for application to postconviction decisions. I'll also explore when the concept is useful, and when it is overly simplistic.

According to Albonetti (1986, 1987) prosecutors are principally motivated by the need to maintain their professional reputations and to further their career ambitions. Therefore, they will dismiss cases featuring characteristics that might jeopardize the chances of winning at trial. This process of “uncertainty avoidance” requires the prosecutor to imagine how the jury will react to the case. The same could be said for the postconviction stage. Investigating an innocence claim involves risk and uncertainty also, only the source of uncertainty differs. Rather than wondering how the jury will react, the prosecutor may wonder how the public will react. Will involvement with the claim be politically expedient? Innocence claims, like a trial, may be perceived as either winnable or losable. The individual prosecutor may also consider whether the elected district attorney or other superiors will support his or her recommendation to assist. How much time and effort will be involved in verifying the claim? Some independent analysis at the outset would be justified to ensure that resources will not be wasted on a false innocence claim. In Albonetti's framework, those factors contributing to uncertainty of success at trial decrease the chances that the prosecutor will proceed with the case. Applied to the postconviction stage, factors contributing to uncertainty of a successful exoneration should ostensibly discourage the prosecutor from assisting with the claim. With limited resources and more pressing responsibilities—such as securing convictions rather than overturning them—prosecutors may not be willing to risk the lost expenditure necessary for a “loser” case.

Studying the prosecutor's decision to proceed to trial, Albonetti (1986, 1987) finds that prosecutors rely upon a variety of legal factors—such as the number of witnesses, the presence of exculpatory evidence, and the defendant's criminal history—to decide whether a case will convince the jury, or not. If we simply reverse Albonetti's findings for our postconviction theory, the prosecutor looks for innocence claims involving few witnesses, a great deal of exculpatory evidence, and little to no criminal history. The prosecutor's decision about whether or not to assist on an innocence claim, then, might take those factors empirically shown to advance a case forward and flip them on their head. Albonetti also finds that prosecutors are more willing to proceed to trial when the case involves use of a weapon or potential harm to a person. In the postconviction stage, prosecutors may therefore be more willing to proceed with an exoneration of a lesser offense, one in which no one was seriously harmed.

Theoretically, prosecutors should want to minimize the uncertainty of exonerating a potentially violent offender. The political risks involved in releasing another “Willie Horton”<sup>7</sup> would be grave, since “no amount of success can top one spectacular failure” (Pfaff, 2017, p. 171). Given the political necessity of appearing tough on crime, prosecutors may avoid assisting with any exoneration case in which the defendant could be perceived as violent or a threat. The same logic extends to defendants who have pled guilty; prosecutors may be reluctant to work to free a defendant who previously admitted his or her guilt in earlier stages of case processing.

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<sup>7</sup> See, *Crime and the Politics of Hysteria: How the Willie Horton Story Changed American Justice*, (Anderson, 1995). While serving a sentence of life in a Massachusetts prison, Horton was released on a weekend furlough program supported by then-Governor Michael Dukakis. He absconded from the program and brutally attacked a white couple in their home. Horton was black. This tragedy was sensationalized and exploited for political purposes in the 1988 presidential campaign, which Dukakis lost as the Democratic nominee.

How else might prosecutors' postconviction discretionary decisions operate as a mirror image of the pre-conviction stage? Steffensmeier's notion of "blameworthiness" as a "focal concern" (1980, 1998) presents a natural parallel to the process of postconviction case review. According to Steffensmeier and colleague's framework of judicial discretion at sentencing, the actor considers three focal concerns: "offender's blameworthiness and the degree of harm caused the victim, protection of the community, and practical implications of sentencing decisions" (1998, p. 766). Judges may consider both legal and extra-legal factors to assess defendant blameworthiness or dangerousness, including: the defendant's criminal history, offense type and severity, and characteristics of the offender such as race, sex, and age (Steffensmeier et al, 1998). Therefore, judges at sentencing consider the defendant's level of *blameworthiness*, prosecutors at postconviction case review may consider the defendant's *blamelessness*. While a prior criminal record increases the sentence it would, hypothetically, decrease the chance of prosecutorial assistance with an innocence claim. The postconviction stage may also present other ways to consider blamelessness that would not be available in earlier stages, such as how strenuously the defendant has protested his innocence in the intervening years, whether s/he pled guilty to the crime, and whether s/he testified in his/her own defense at trial.

However, the "mirror image" metaphor cannot hold up against the many legal and extra-legal factors shown to be relevant to prosecutorial decision making. For example, the role of defendant characteristics—race, gender, age—in influencing discretion pre-conviction is too complex and cannot simply be reversed for application to the postconviction arena. A body of research suggests that prosecutors are more punitive

when handling cases involving non-white defendants (but see, Franklin, 2010). This racial disparity is reflected in the decision to proceed with a case after indictment (Baumer, Messner and Felson, 2000), negotiate plea agreements (Kutateladze, Andiloro and Johnson 2016; Metcalfe and Chiricos, 2017), bring capital charges (Keil and Vito, 2006; Paternoster, 1984; Sorensen and Wallace, 1999), file drug charges (Hartley, Madden and Spohn, 2007), and in the application of mandatory minimums (Ulmer, Kurleychek and Kramer, 2007). The finding of racial disparity is best established by the sentencing literature of judicial discretion (Franklin, 2010). Steffensmeier argues that judges develop a “perceptual shorthand” (1998) to facilitate quick calculations of blameworthiness and dangerousness and that this includes stereotypical attributions. Applying the concept of the perceptual shorthand to Albonetti’s theory of uncertainty avoidance, the prosecutor would consider defendant characteristics only in as much as these characteristics are likely to influence the jury. Therefore, prosecutors’ own biases are less relevant here than their assumptions about jury biases (Franklin, 2010). Postconviction, the prosecutor may attempt to predict how the public will react to the case and to the defendant. Will the prosecutor appear soft on crime for releasing this person back into society? Or will constituents appreciate the prosecutor’s efforts to undo the legacy of racial discrimination in the jurisdiction? Not enough is known about the role of race in exonerations, as opposed to wrongful convictions, to understand how defendant characteristics might influence these considerations.

Perhaps prosecutors develop a “perceptual shorthand” for assessing postconviction innocence claims as well. If so, what role would defendant and case characteristics play? To borrow the concept of “normal crimes” from Sudnow (1965),

prosecutors may look to those “normal exonerations” that fit within established patterns and have been shown to hold up against public scrutiny. When caseloads are heavy and cases must be processed efficiently, prosecutors default to those tried and true “normal crime” scenarios that fall within expectations and easy categorization. Normal exonerations may operate similarly. Uncovering a single wrongful conviction often requires reconsidering a lot of rightful convictions (Boehm, 2014). This “needle in a haystack disincentive” (Medwed, 2004, p. 149) may discourage prosecutors from reviewing any postconviction claims at all. Prosecutors may be attracted to cases that contain readily identifiable issues such as a single witness identification, or certain types of exculpatory evidence such as DNA. Innocence claims that defy easy categorization, no matter how compelling, may be perceived as not worth the political and economic risks and/or steeped with uncertainty.

Another key distinction between the pre-and-postconviction stages lies in the relationships between prosecutors and other criminal justice practitioners, especially defense attorneys. As Levenson (2016, p. 372) explains: “prosecutors who may have become accustomed to serving as ‘opposing counsel’ in criminal cases, are expected to cross the great adversarial divide and actually team up with the defense to help the wrongfully convicted.” Therefore, close working relationships between actors, which already appears to be influential in earlier stages of processing (see Cole, 1970; Eisenstein and Jacob, 1977; Eisenstein, Flemming, and Nardulli, 1988; Frederick and Stemen, 2012; Haynes, Ruback and Cusik, 2010) could prove even more influential in the postconviction stage.

Cole's (1970) understanding of the "exchange relationship" between actors or Eisenstein and colleagues (1977, 1988) metaphor of courtroom communities and courtroom workgroups highlight how working relationships and local interdependencies influence discretion. Cole's study of the King County Office of Prosecuting Attorney, recognizes the interdependencies between police, courts, defense attorneys and community. He argues that the interdependencies between actors creates an exchange relationship that influences decision-making. For example, prosecutors and defense attorneys may negotiate plea bargains as part of a "package deal" in which reduced charges for some are exchanged for greater prosecutorial discretion in others (Cole 1970, p. 340). The discretionary powers of the prosecutor are therefore moderated by "police, court congestion, organizational strains, and community pressures" (Cole 1970, p. 342).

Eisenstein and Jacob (1977) introduce the concept of the "courtroom workgroup"—the prosecutor, defense attorney, and judge—which prioritizes the "shared goals" of the group, including efficient case disposal, maintaining working relationships, and doing justice. Eisenstein and colleagues (1988) then extend this framework to other courtroom actors and the surrounding community with the metaphor of "courtroom communities" and the "county legal culture." Their research, comparing nine different counties in three states, investigates the influence of such localized dynamics as the size of the legal community, the familiarity between actors, political motivations, and more.

Eisenstein and colleagues find important distinctions in courtroom communities based on jurisdiction size. Actors in smaller jurisdictions, where local gossip "grapevines" spread quickly may feel more accountable to each other and to the public than those from larger jurisdictions. Small town actors may more quickly arrive at a

consensus about a case as their success depends on maintaining long-term collegial relationships. In contrast, large jurisdictions may foster more combative litigation styles wherein actors from diverse backgrounds and political inclinations know each other professionally, but not socially. Applied to the postconviction stage, we might theorize that prosecutors from smaller jurisdictions are more cooperative with defense and therefore exonerations come about more easily.

The notion of courtroom interdependencies takes on special significance in the postconviction stage, when prosecutors and defense should, ideally, adopt a collaborative—rather than adversarial—approach to investigating and resolving the innocence claim. For those actors who live in the same jurisdiction and who already share a working relationship, this collaboration may reinforce the “exchange relationship.” However, postconviction defense attorneys who work with innocence groups take cases statewide or even nationwide. Collaborations between these attorneys and the prosecutor from the local jurisdiction may not resemble the typical courtroom workgroup dynamic. Rather, as Eisenstein and colleagues (1988) point out, outsider attorneys can present special problems to the courtroom community. They are not subject to the rules of the exchange relationship in the same way and they may not be viewed as trusted collaborators.

The concept of the courtroom workgroup could be broadened to include any criminal justice system actor who shares these goals and who works with the prosecutor regularly; for example, police, forensic analysts, and even informants. Moreover, the postconviction workgroup may include not only the current legal team, but also the actors involved in the original conviction. If maintaining close working relationships is an

important consideration, both sets of actors (pre-and post-conviction) could influence the decision to assist with the claim.

For example, prosecutors might fear exposing a member of the workgroup to the possibility of civil liability through revelations of misconduct (Levenson, 2016). While prosecutors are usually protected from lawsuits through absolute immunity, police and forensic analysts enjoy only qualified immunity, making them more vulnerable to civil litigation (Levenson, 2016). Moreover, a prosecutor's decisions about an exoneration case will be more subject to public scrutiny than is his or her charging and plea-bargaining decisions, which are typically hidden from public view. Thus, evidence of misconduct that threatens to implicate the district attorneys' office could damage the prosecution's public profile.

Also relevant to the courtroom workgroup perspective are considerations of resource allocation, efficiency, or disposing of caseload. How might the need for efficiency manifest in the postconviction stage? Overturning a single wrongful conviction often requires reconsidering a lot of rightful convictions (Boehm, 2014; Medwed, 2004). Still, some convictions may be reconsidered more efficiently than others. For example, claims that have already been vetted by an innocence organization may be more attractive to a busy prosecutor than claims coming from public defenders, or from the defendant himself, his family, and friends.

Eisenstein and Jacob make at least one other essential contribution to the literature—they acknowledge that prosecutors may be motivated by a moral obligation to “do justice.” Much of the criminological research recognizes that prosecutors can be self-interested (Albonetti 1986, 1987), biased (Keil and Vito 2006; Kutateladze et al, 2014,

2016; Metcalfe and Chiricos, 2017; Ulmer et al, 2007), and busy (Cole, 1970; Eisenstein, Flemming, and Nardulli, 1988; Engen and Steen, 2000). A postconviction theory of prosecutorial discretion must also recognize that prosecutors can be just. For the purposes of the present study, prosecutors' obligation to act as a "minister of justice"<sup>8</sup> must not be overlooked. The prosecutors under observation have all taken some initiative on behalf of a wrongfully convicted defendant even though they were not legally bound to do so. Fisher's (1988, p. 214) advice to "regard prosecutors as heterogeneous and malleable individuals, not as a mass of zealots" is particularly appropriate when considering postconviction settings. A complete understanding of the variation in prosecutorial motivations or the quality of prosecutorial assistance must start with the acknowledgment that some prosecutors do indeed live up to their calling.

#### PATHWAYS TO EXONERATION AND POSTCONVICTION DISCRETION

Scholars interested in errors of justice have called for research on pathways to exoneration (Gould and Leo 2016, p. 7). Jon Gould and Richard Leo write: "...we still know very little about how wrongful conviction errors are discovered, how they are responded to and by whom, the methods through which they are rectified and the mechanisms of exoneration in a legal system that is highly averse to post conviction challenges based on factual innocence." The authors assert that law enforcement needs to "take a more active role" in facilitating exoneration. As these and other legal scholars

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<sup>8</sup> See American Bar Association "Special Responsibilities of a Prosecutor" Rule 3.8. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Available at: [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor/comment\\_on\\_rule\\_3\\_8.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8.html)

have observed, very little attention has been paid to postconviction processes and discretion although a host of weighty issues can arise postconviction. Green and Yaroshefsky (2008, p. 481) have found postconviction processes difficult to study because of prosecutors' lack of transparency: "Certainly, there have been many reported cases in which prosecutors learned of new evidence, investigated or failed to investigate, and made or opposed efforts to secure the defendant's release...But because prosecutors' internal processes are not transparent, very little is known about the internal deliberations and rationales for what prosecutors have done." Zacharias (2005) provides a useful categorization of the ways in which a prosecutor may learn that a conviction has been challenged. New evidence of innocence may come to light, a defendant with an innocence claim may request assistance, or a change in the law or simply the passage of time may compromise the conviction. Perhaps by analyzing the process through which prosecutors discover these claims and choose to assist with them, we can better understand the conditions that make such assistance possible or probable.

In most states, prosecutors are not legally compelled to revisit possible wrongful conviction cases. American Bar Association (ABA) Model Rules "Special Responsibilities of a Prosecutor" establishes a baseline protocol for postconviction responses to new evidence of innocence, but as of 2017, only 17 states had adopted these rules, most in modified form.<sup>9</sup> Dana Carver Boehm (2014, p. 623) sums it up nicely:

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<sup>9</sup> The American Bar Association CPR Policy Implementation Committee regularly updates adoption information online. As of September 29, 2017: [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8\\_g\\_h.a.uthcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.a.uthcheckdam.pdf)

“Beyond the Model Rules, the ‘law’ mandating prosecutorial postconviction conduct is effectively nonexistent.”

Psychologically, prosecutors are disinclined to wrongful conviction case review as well. As Orenstein (2010, p. 426) explains “Once the State decides to charge a defendant and a prosecutor has invested a lot of time in a case, the prosecutor has made an intellectual, moral, and personal commitment to the accused’s guilt.” Faced with the evidence of an identified error, the prosecutor may have to confront beliefs about the fallibility of the criminal justice system itself. This can be particularly challenging for senior prosecutors, whose years of experience working with colleagues in the police department and on the bench can lead to an inflated sense of trust (Levenson, 2016). Prosecutors’ postconviction obstructionism serves as an illustrative example of cognitive bias. Through processes of confirmation bias, selective information processing, and belief perseverance, prosecutors can reject new evidence that challenges initial beliefs—no matter how conclusive that evidence may appear to others (Burke, 2005). Prosecutors who obstinately resist exoneration may be struggling to reconcile the evidence of wrongful conviction with their trust in their colleagues, or their own self-image as a champion of justice. A prosecutor’s faith in the integrity of her colleagues may persevere in spite of new evidence suggesting mistakes or even misconduct.

The institutional culture of many district attorney’s offices further discourages prosecutors from reconsidering convictions. Institutional culture encourages young prosecutors to be “gung-ho,” (Medwed, 2004, p. 139) while conviction statistics determine raises, promotions, and recognition (Albonetti, 1986; Albonetti, 1987; Boehm, 2014). Trial lawyers’ success depends on excelling in an adversarial system, while

postconviction processes often require working together collaboratively.<sup>10</sup> Postconviction processes may also require challenging an attorney's work on a former case. Potential wrongful convictions occurring under the current leadership carry obvious professional risks but, even when convictions occurred under previous leadership, "conformity effects" can predispose the office to stick with the status quo and assume that he or she would have acted no differently from his or her predecessor (Medwed, 2009, p. 53). In this way, a new set of eyes may not result in a new perspective.

While legal research establishes the legal, psychological, and institutional barriers to acknowledging and addressing postconviction innocence claims, it does not sufficiently articulate the incentives that might facilitate prosecutorial assistance. For example, prosecutors may be motivated by an ethical duty to do justice, a desire to restore faith in the office, a political interest in satisfying constituents, a professional interest in appealing to judges and defense attorneys, or by requests from local innocence organizations. Considering the essential role that prosecutors play in exoneration cases, their increased involvement comes as a welcome development. Still, we know very little about the conditions under which this involvement has occurred or how it might be sustained and enhanced.

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<sup>10</sup> Emily Maw, Director of the Innocence Project of New Orleans writes: "The adversarial system is where each side puts on its best case, hides its weaknesses and tries to win. That is exactly what should not be happening when there is a chance that someone has been wrongfully convicted." See her op-ed in *The Guardian*, April 15, 2015, available at: <http://www.theguardian.com/commentisfree/2015/apr/16/we-shouldnt-make-innocent-prisoners-wait-decades-to-be-free>

### CHAPTER 3: METHODOLOGY

Since research on postconviction prosecutorial discretion and involvement with innocence claims is scant, I employ a mixed methods study with a broad scope. I examine known exoneration cases in which prosecutors have lent assistance. The term “assistance” is imperfect, meant to capture a spectrum of positive involvement from mere facilitation to sincere advocacy. In some cases, the prosecutor assists the wrongfully convicted claimant directly, whereas in other cases she assists a defense attorney or a third-party advocate.

Chapter 4 presents quantitative analyses which explore which types of exoneration cases are more likely to receive prosecutorial assistance and which are more likely to be neglected. These analyses help answer the question: what case-related factors are associated with prosecutorial assistance? Relatedly, what do these factors reveal about prosecutors’ motivations? The results of the multivariate ordinal logistic regression analysis suggest that prosecutors’ interest in protecting their professional reputations and relationships, and optimizing efficiency influences discretion in the postconviction stage just as in earlier stages of case processing.

Building upon the quantitative findings, I employ qualitative semi-structured interviews in Chapters 5 and 6 to develop an understanding of *how* and *why* prosecutors assisted in a subset of these same exoneration cases. Qualitative analyses help answer the questions: how do prosecutors decide how to respond to innocence claims? What motivates prosecutors to assist with exoneration? What factors do defense attorneys associate with prosecutorial assistance? These mixed method analyses examine both broader patterns and nuanced accounts of the processes of postconviction prosecutorial

discretion. Interviews with defense attorneys and prosecutors active in the postconviction arena enhance the opportunity to observe variation in prosecutors' responses to postconviction claims of innocence and to help contextualize the quantitative results.

## DATASET

Both the quantitative and qualitative analyses in this dissertation draw from the National Registry of Exonerations (NRE). The NRE counts only those cases since 1989, when DNA testing was first used to exonerate. Exonerations come about in a variety of ways: through a pardon or certificate of innocence, an acquittal on retrial, a posthumous exoneration, or, most commonly, the prosecution or judge's decision to dismiss charges postconviction.<sup>11</sup> The NRE definition of "exoneration" depends upon evidence of innocence, but not upon an explicit declaration of innocence. When highly probative material evidence like DNA exists, the defendant may receive a pardon based on innocence. Conversely, the exoneration may take the form of an acquittal at retrial. In these cases, prosecutors pursued a new conviction, but the new evidence of innocence sufficiently convinced the jury of reasonable doubt. The NRE does not include cases in which the defendant has been cleared of the original conviction but remains guilty of lesser charges related to the same incident. In addition, the NRE does not claim to know whether every exonerated person listed is factually innocent (Gross and Shaffer, 2012). Prosecutors' perceptions about the defendant's factual guilt or innocence in these cases may vary widely, as do their responses to the innocence claim.

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<sup>11</sup> The full NRE definition of exoneration can be found on the Registry's Glossary page: <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx>

The NRE compiles cases in one of two ways: new exonerations appear in the news and are publicized by legal advocacy groups, or low-profile exoneration cases that have not been publicized are discovered by NRE researchers through internet media research, legal research, or outreach to public officials. Jurisdictions do not maintain systematic records of exonerations. For this reason, the dataset may over-represent those cases from jurisdictions that better publicize exonerations, as well as those capturing the attention of the media and of innocence organizations (Gross, 2017). Exonerations represent a small sample of wrongful conviction cases, and the NRE does not discover every exoneration. Nevertheless, it represents the most comprehensive and reliable source of exoneration data presently available. Narrative case profiles are provided for each case, as are a host of quantitative measures, many of which are publicly available, and others—such as the measure for prosecutorial assistance—may be made available upon request. Quantitative measures are employed for the statistical analysis, while the active recruiting of attorney respondents is culled from the attorneys of record in the narrative case profiles.

## QUANTITATIVE ANALYSIS

The following five hypotheses are offered as an initial exploration into an underdeveloped area of study. They respond to previous theoretical and empirical contributions in related areas, such as prosecutorial resistance to innocence claims and prosecutorial discretion in the pre-conviction stage. The rationale underlying these hypotheses is detailed in the following chapter.

H1: Prosecutors will be less likely to assist in cases where law enforcement or forensic misconduct is a factor in the wrongful conviction.

H2: Innocence organization involvement will increase the likelihood that a prosecutor will be willing to assist with the claim.

H3: Prosecutors will be less likely to assist in exonerations involving violent offenses.

H4: Given the assumption of culpability that a guilty plea brings, prosecutors will be less likely to assist with exoneration if the defendant pled guilty.

H5: Prosecutors will be more likely to assist at the postconviction stage in more recent exonerations than in earlier ones.

To test these hypotheses, I employ a multivariate ordinal logistic regression model predicting prosecutorial assistance. Ordinal logistic regression models estimate the effect sizes of the independent variables on levels of prosecutorial assistance in exoneration cases. Ordinal logistic regression provides an ideal model to estimate the relative strengths of various legal and extra-legal factors on the likelihood that a prosecutor will assist with the exoneration. Moreover, it allows for variations in the degree of prosecutorial assistance provided.

To capture the degrees of assistance offered by the prosecutor, and to verify the accuracy of the NRE prosecutorial assistance code, I reviewed each NRE exoneration to create an ordinal measure for the dependent variable (see Appendix 3.1 for coding instructions). I consulted NRE case profiles (based on secondary sources such as news reports and legal documents) and NRE coding notes to aid in this process. The prosecutorial assistance variable distinguishes cases in which prosecutors engaged in any one of a variety of actions that contributed to the exoneration. Assistance ranges from

moving to dismiss the case after the defense had already presented a strong case for innocence to initiating their own reinvestigations and publicly declaring the defendant's innocence.

In addition to the five independent variables—law enforcement or forensic misconduct, innocence organization involvement, violent offense, guilty plea, and year of exoneration—the model controls for a variety of factors that may influence prosecutors' willingness to assist in an exoneration. Controls include evidentiary issues contributing to the original wrongful conviction (eyewitness misidentification, false confession, perjury, and more), the presence of other types of advocates (such as law enforcement, family members, the media, and more), offense type, and demographic characteristics of the defendant. I also developed two additional control variables for the purposes of capturing 1) whether the district attorney in office at the time of the wrongful conviction was still in office for the exoneration, and 2) whether the state had adopted the ABA model rules for postconviction professional conduct at the time of the exoneration. Further explanation of these variables, as well as reported findings, appear in Chapter 4.

The quantitative analysis provides a broad overview of what prosecutors have done to assist with exoneration cases and some indication of the factors weighing on their expansive discretion in the postconviction stage. However, a myriad of legal and extra-legal factors is unaccounted for in the available quantitative dataset. Additional factors may include: the extent of the defendant's criminal history; size of the prosecutors' office; prosecutors' relationships with the local defense bar, and more. Qualitative research may discover that these considerations, or others, also influence prosecutors' decisions to assist with exonerations. Yet even if every conceivable factor could be

identified and quantified, the data still could not explain *why* prosecutors assist in some types of cases or under certain types of conditions and not others. What accounts for their cooperation? Is it a procedural matter of efficient disposal of claims, an ethically motivated attempt to correct an injustice, and/or a political response to public pressure? Interviews with attorneys involved in exoneration cases shed light on the decision-making processes at work.

## QUALITATIVE ANALYSIS

Much of the empirical research on prosecutorial discretion analyzes case-related factors and outcomes at various pre-conviction decision-making points using quantitative methods (Frederick and Stemen, 2012). This approach does not always lend itself to an understanding of the role of “contextual factors,” such as resource and organizational constraints or relationships between actors that can have an even greater influence on outcomes (ibid). Moreover, research relying on aggregate statistics tends to homogenize prosecutors, obscuring differences between offices (Wright et al, 2014).

The qualitative component of this study explores how and why prosecutors assist with exoneration cases. To that end, semi-structured interviews were conducted with 19 defense attorneys and 19 prosecutors between April 2016 and February 2018. Average interview length was 80 minutes and the range was between 33 and 157 minutes. Transcribed interviews were then analyzed using grounded theory methods. Defense attorney insights enhance our understanding of postconviction processes as described by prosecutors. Most of the defense attorney respondents could reference a variety of experiences and interactions with different prosecutors in the postconviction arena. In

order to participate in the study, prosecutors and defense attorneys must have worked on at least one case that resulted in the exoneration of a wrongfully convicted defendant, as recognized by the NRE, and that featured some level of prosecutorial assistance. Though all attorneys could speak generally about their practices and experiences in the postconviction stage, not all of them chose to provide details about a specific exoneration case. Some attorneys spoke in more general terms out of confidentiality concerns, out of deference for ongoing civil litigation involving the exonerated defendant, or because they preferred to reference a set of exoneration cases (for example, all those handled by the conviction integrity unit). Ultimately, 27 specific exoneration cases were discussed at length, 14 by defense attorneys and 13 by prosecutors.

In the following section, I describe the sampling, recruiting, interviewing and analyzing processes in more detail.

### *Sampling*

Guided by the case profiles in the NRE, I sought out attorney respondents who had contributed some level of assistance with an exoneration case (i.e. coded as a 1 or a 2 in the quantitative dataset; see Appendix 3.1). Defense attorney respondents had all served as one of the chief postconviction attorneys on an exoneration case featuring prosecutorial assistance since 2005. Prosecuting attorney respondents had each assisted with defense counsel or else proactively identified and investigated an innocence claim that culminated in exoneration since 2005. Though the NRE contains all exonerations since 1989, older exoneration cases were avoided to prevent problems with hazy memories and retrospective reinterpretation.

The resulting subset included 330 cases from 132 unique jurisdictions. No more than one prosecutor was interviewed from each jurisdiction. With one exception, defense attorneys and prosecutors were not interviewed about cases in the same jurisdiction. Case selection was further narrowed to avoid overly sampling attorneys from any one state. For example, over half of the cases (177 of 330) came from just three states: Texas, New York, and Illinois. Another factor that effectively limited the sample was the prevalence of DNA exonerations (101 of the 330 cases). Since decision making processes in DNA exoneration cases may follow a similar pattern, (culminating in forensic evidence of innocence) I also avoided over sampling attorneys who had worked on these 101 cases. Finally, I took special care to avoid cases in which the exonerated defendant was still engaged in ongoing civil litigation to protect against any possibility of the data being used by either party to a lawsuit.

After conducting online research to verify the name of the attorney and the status of the defendant, I recruited participants by phone and/or email. While a handful of respondents were known to me through professional contacts, most were recruited “cold,” resulting in a response rate of 86% for defense attorneys (19 of 22 contacted) and 49% (19 of 39 contacted) for prosecutors.<sup>12</sup>

Using an iterative grounded theory approach, I incorporated emerging concepts and theories discovered through data collection into the sampling strategy as the study progressed. After the preliminary interviews, I feared that the attention to diversity of case characteristics may have come at the expense of recognizing the diversity among

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<sup>12</sup> Low response rate for prosecutors is not inconsistent with previous studies. Ramsey and Frank (2007, p. 448) report a 47% response rate for prosecutors responding to a survey that asked for estimates of the wrongful conviction error rate. A similar survey conducted by Zalman et al (2008) reports a 28% response rate among prosecutors.

interpersonal and professional relationships between the prosecution and the defense. Case-related characteristics such as the race of the defendant or the identification of an alternate suspect, while potentially influential, appeared secondary to institutional and contextual factors, such as jurisdiction size. While case-related differences could be assessed through the quantitative analysis, the qualitative approach provided an opportunity to explore attorney dynamics. Ultimately, two dimensions of diversity were considered, diversity among the exoneration cases as well as among the attorneys. Nevertheless, due to the gendered and racial dynamics of the legal profession, the majority of respondents were white males.<sup>13</sup> See Tables 3.1 and 3.2 for information on attorney characteristics.

**Table 3.1. Defense Attorney Respondents (N = 19) (Response Rate = 86%)**

<i>Race</i>		<i>Career Stage as an Attorney</i>	
White	17	Early (< 10 yrs)	2
Non-White	2	Mid (10 > 20 yrs)	8
<i>Gender</i>		Late (< 20 yrs)	9
Male	10	<i>Geographic Region</i>	
Female	9	Northeast	6
<i>Type</i>		Midwest	4
Private	5	South	6
Public	6	West	3
Innocence Org	8	<i>Experience as opposing counsel</i>	
		Yes	3
		No	16

<sup>13</sup> Homogeneity among elected prosecutors reflects these dynamics. According to a 2015 report from the Womens' Donor Network, 95% of elected prosecutors are white and 79% are white men. Available at: <http://wholeads.us/justice/>

**Table 3.2 Prosecutor Respondents (N=19) (Response Rate = 49%)**

<i>Race</i>		<i>Career Stage as an Attorney</i>	
White	17	Early (< 10 years)	0
Non-White	2	Mid (10 > 20 years)	10
<i>Gender</i>		Late (< 20 years)	6
Male	13	Retired	1
Female	6	No longer a prosecutor	2
<i>Type</i>		<i>Geographic Region</i>	
Elected District Attorney	5	Northeast	5
Appellate unit	2	Midwest	5
Trial Felony unit	4	South	5
CIU	8	West	4
<i>Experience as opposing counsel</i>		<i>Jurisdiction Size</i>	
Yes	5	Small (< 500k)	3
No	14	Medium (500k > 1 mil)	7
		Large (> 1 mi)	9

One of the potential contributions of this study is its ability to examine prosecutorial assistance in various settings. Existing research reflects an interest in official prosecutor-led efforts such as conviction review and conviction integrity units (Boehm, 2014; Hollway, 2015; Scheck, 2010; Scheck, 2016) rather than focusing on smaller, episodic efforts. Therefore, I sampled purposively according to attorney affiliation, seeking respondents working out of official exoneration shops—such as innocence organizations and conviction review units—but also those working more independently. Purposive sampling led me to CIU prosecutors who were primarily engaged in wrongful conviction case review, as well as appellate prosecutors, felony chiefs, and elected district attorneys who had assisted in a single exoneration case.

A trend among some urban jurisdictions has been to select a former defense attorney to head the CIU.<sup>14</sup> In this sample, such CIU heads are considered prosecutors,

<sup>14</sup> The practice was first popularized by the Dallas County District Attorney's Conviction Integrity Unit in 2007, which established close working relationships with local innocence organizations and public defenders' offices. For more on these developments, see Scheck 2010 and Ware 2010.

not defense attorneys. Similarly, some defense attorney respondents actually have accumulated more years of experience as prosecutors. For ease of discussion, these two categories of “defense attorney” and “prosecuting attorney” are rendered static. In fact, the sample includes prosecutors with significant defense experience and defense attorneys with experience at every level of the hierarchy in the prosecutors’ office. Twenty-one percent (8 of 38) of the attorney respondents have experience as opposing counsel.

I intentionally did not select attorneys who worked together on the same exoneration case. Though this design would have strengthened internal validity by triangulating information through at least two participants, it would also seriously complicate efforts to guarantee confidentiality. Furthermore, given the already narrow criteria for inclusion, a design requiring 19 sets of prosecuting and defense attorneys both agreeing to participate could have imposed an insurmountable constraint by placing an undue burden on the qualifications for participation (see Table 3.3). Nevertheless, the external validity of the study was strengthened by sourcing a wider variety of jurisdictions, representing geographic difference, and a wider variety of attorneys. See Table 3.3.

<b>Table 3.3. Sampling Criteria</b>	
<i>Respondent criteria:</i>	
<ul style="list-style-type: none"> <li>• A practicing, former, or retired attorney, who worked on a postconviction innocence claim resulting in complete exoneration (as recognized by the NRE) since 2005.</li> </ul>	
<i>Case criteria:</i>	
<ul style="list-style-type: none"> <li>• A state-level case exonerated in year 2005 or later.</li> <li>• The exonerated defendant must not be <del>in the midst of</del> a lawsuit.</li> </ul>	
<i>Cases vary according to:</i>	
<ul style="list-style-type: none"> <li>• geographic region of the United States</li> <li>• jurisdiction size</li> <li>• offense type</li> <li>• case disposition: trial or plea</li> <li>• defendant demographic characteristics</li> <li>• exonerating evidence: DNA, non-DNA forensics, recantations, etc.</li> <li>• whether the defendant had a criminal record prior to the wrongful conviction</li> <li>• presence of alternative suspect</li> </ul>	
<i>Defense attorney respondents:</i>	<i>Prosecuting attorney respondents:</i>
<ul style="list-style-type: none"> <li>• A director or staff attorney of an innocence organization</li> <li>• A public defender</li> <li>• A private attorney</li> </ul>	<ul style="list-style-type: none"> <li>• The head of a CIU or an active attorney working out of a CIU</li> <li>• An elected district attorney</li> <li>• A prosecutor assigned to the appellate or postconviction review division</li> <li>• A prosecutor assigned to the trial division</li> </ul>

### *Recruiting*

In January 2016, I received approval from the Rutgers Institutional Review Board to conduct human subjects research (protocol # 16-428M, received Jan. 26, 2016). The IRB approved consent forms and recruitment documents are available in appendices 3.2 and 3.3. Some of the defense attorneys were former professional contacts of mine. Of the 19 defense attorneys interviewed, four of them were people with whom I had interacted with professionally over the years. Regardless of my previous relationship with respondents, I arranged interviews in much the same way, through phone and email.

The recruitment process began with online research of both the case and the attorney, over a period of nearly two years from April 2016 to February 2018. Names of

the attorneys involved in the exoneration are not always included in an NRE case profile, so background legal and media research of the case was occasionally necessary. Media research was also helpful in determining whether the exonerated defendant intended to pursue civil litigation in the wrongful conviction, as these cases were avoided. Such research proved helpful in other, unexpected ways. For example, when a prosecutor was in the midst of reelection, a high-profile trial, or a professional allegation, I made a note of it and waited for a more opportune time before attempting to make contact.

Contact information for individual attorneys, or an attorney's assistant, was accessible online. Typically, first contact was made by phone. I briefly explained the study and then asked if I could send additional information via email. The IRB-approved "email invitation to participate" (with separate versions for prosecutors and defense attorneys), is included in Appendix 3.3. Defense attorney interviews were typically scheduled shortly thereafter. Prosecuting attorneys either readily agreed to an interview, or in several cases, called to discuss follow-up questions or concerns before deciding whether or not to participate. Two prosecutor interviews were arranged with the help of a defense attorney liaison who made the introductions. The remaining prosecutors were recruited through "cold calling."

In general, defense attorneys were more interested in the project and more willing to participate. Only one of the potential defense attorney respondents actively declined participation, and she was a former prosecutor. The others simply never responded. Prosecutors also didn't respond. After a few failed attempts, I interpreted their silence as disinterest. Prosecutors stated a variety of reasons why they declined to participate, and these explanations provided useful information on their own. A sample of some of these

reasons include lack of interest in the subject, not considering the case to be an exoneration, requiring superiors' approval, or simply not having time for the interview. Not all prosecutors who declined to participate were approached about a specific case. However, for the majority of those prosecutors who were approached about a specific case they may have declined, at least in part, due to case-related reasons. First, prosecutors appeared more willing to discuss DNA exonerations than non-DNA exoneration cases—37% (10/27) of the cases prosecutors agreed to be interviewed about involved DNA, compared to only 12% (2/16) of the cases that prosecutors declined to be interviewed about. Prosecutors also responded more favorably to requests to be interviewed about rape and murder exoneration cases than less serious violent crimes and nonviolent crime exonerations. Of the cases prosecutors agreed to be interviewed about, 77% (21/27) were sexual assault or murder exonerations, compared to 56% (9/16) of the cases prosecutors declined to be interviewed about.

The low response rate (49%) of prosecutors may illustrate a selection bias. These results cannot be generalized to all prosecutors, or even, all prosecutors assisting with exoneration claims. Instead, findings represent that subset of prosecutors who not only have assisted, but were also willing to talk about postconviction processes at length. They might, therefore, be more amenable to innocence claims than the average prosecutor. They may also be more experienced, or at least, enjoying enough professional autonomy to feel comfortable. As Table 3.2 shows, none of the respondent prosecutors had fewer than ten years of experience.

### *Interviewing*

Data collection began with a pilot round of interviews in April 2016 and ended in February 2018. Defense attorney and prosecutor interviews were conducted concurrently. Statements made by each group informed an evolving understanding of the other, which produced revisions to both sets of interview guides. Each of the two interview guides (see Appendix 3.4) begin by referencing a specific case experience in which the respondent was involved that aims to generate responses about the step-by-step process leading to the exoneration. The interview then seeks to elicit rich detail about participants' postconviction experiences outside of that specific case, as well as their perceptions about postconviction prosecutor and defense relationships more generally.

Interviewing practitioners using “grounded theory” methods (Glaser and Strauss, 1967) allow new concepts to emerge through the data collection process. Grounded theory requires an inductive, iterative process of simultaneous data collection and analysis “to make early stops to analyze what you find along your path” (Charmaz, 2014, p. 1). The researcher develops tentative “sensitizing concepts” (Blumer, 1969) in advance which may be based on existing theories and scholarship; however, extant research cannot anticipate everything, particularly in an understudied area like postconviction prosecutorial discretion.

Grounded theory is also constructivist, meaning that rather than attempting to assume a neutral, objective outcome, it instead acknowledges that the research is a construction created from the researcher's reality (Charmaz, 2014, p. 13). As a former Innocence Project staffer, I have insider knowledge of how exoneration cases unfold from a defense perspective. Being an insider brings access, which can be advantageous,

and provides fluency with relevant legal, procedural, and technical issues. However, insiders may also be disadvantaged by assumptions developed through their prior involvement with the subject (Bucerius, 2013).

While I am an insider to the defense community, I am an outsider to the prosecutors' community. My difficulty accessing prosecutors is evident in the imbalanced rate of response. Some prosecutors viewed my requests to be interviewed with skepticism or even apprehension. However, by asking prosecutors about positive examples of the postconviction process, I could put most respondents at ease and encourage open-ended responses. The grounded theory style of intensive interviewing encourages this approach, as the interviewer is guided to provide a positive experience (Charmaz, 2014, p. 70) and to bring the interview to a close on a positive note (p. 66). Interviews were conducted in person whenever possible. In total, 12 of the defense attorneys and four of the prosecuting attorneys were interviewed in person. The rest were conducted over the phone. All but one of these interviews was audio recorded and transcribed soon after the recording. Every participant was asked if they consented to the recording; one participant declined. During the 55-minute phone interview I took notes digitally. I also took fieldnotes after each interview, and, depending on communication with the respondent, sometimes before as well. For example, several defense attorneys began telling the story of their client's exoneration before the interview had even been scheduled. Likewise, several prosecutors began sharing their perspective on the subject of wrongful convictions and exoneration immediately upon learning about the study.

Intensive interviewing recognizes that pre-prepared questions may not sufficiently accommodate the inter-personal dynamics of the interview or the processes under

investigation. Rather, relevant concepts and areas of inquiry may arise organically during the interview (Charmaz, 2014, p. 86). Though I prepared an interview guide, I was also willing to engage in a flexible interchange, permitting the participant to shape the direction of the interview. As data collection progressed, certain interview questions were posed every time, while others depended on the interests of the individual respondent and their time constraints. The interviews lasted an average of 78 minutes for prosecutors and 82 minutes for defense attorneys. Interviews with prosecutors varied in length from 33 to 106 minutes, and with defense attorneys they varied from 39 minutes to 157 minutes. Some interviews could be concluded naturally, while others were accommodated to meet the constraints of the respondents' schedule.

Twenty-nine respondents described a specific exoneration case, and 27 total cases were discussed in detail. Twice, a pair of defense attorney respondents were jointly interviewed. Both times, this came about at the suggestion of the lead defense attorney who invited co-counsel to join them for the interview. Exoneration cases occurring in 18 states from 2005 to 2017 were discussed (see Table 3.4 for case characteristics). Participants spoke about their experiences collaborating with attorneys from the other side of the courtroom on postconviction innocence claims and their perceptions about the postconviction process in these types of cases.

The interview guide, specifically designed to generate a step-by-step recounting of prosecutorial involvement in postconviction proceedings, elicited lengthy responses about the exoneration case. In addition, it also elicited rich detail about the respondent's experiences outside of the instant case as well as their perceptions about postconviction prosecutor and defense relationships more broadly. When attorney respondents chose not

**Table 3.4. Exoneration Case Sample from Qualitative Interviews (N = 27)**

<i>Defendant Race</i>		<i>Year Exonerated</i>	
White	10	2005 – 2009	6
Black	15	2010 – present	21
Hispanic/ Other	2	<i>Exonerating Evidence*</i>	
<i>Defendant Gender</i>		DNA	10
Male	27	Non-DNA Forensic	5
Female	0	New witness	2
<i>Defendant Prior Criminal History</i>		Recantation	8
No	1	Alt suspect identified	4
Yes	24	Other	3
Unknown	2	<i>Postconviction Review Assistance*</i>	
<i>Case Disposition</i>		CIU	4
Plea	5	Innocence org	13
Trial	22	Private attorney	5
<i>Offense</i>		Public attorney	4
Murder	12	Reporter	5
Sexual Assault	9	Prosecutor only	2
Other	6	<i>Geographic Region</i>	
<i>Contributing Factor (as listed by NRE)*</i>		Northeast	6
Eyewitness Misidentification	15	Midwest	8
Perjury or False Accusation	11	South	9
Official Misconduct	11	West	4
Inadequate Legal Defense	7	<i>Jurisdiction Size</i>	
False or Misleading Forensic Evidence	7	Small (< 500k)	8
False Confession	3	Medium (500k > 1 mil)	9
		Large (> 1 mil)	10

\* Will not total to 27

Note: Data is drawn from the National Registry of Exonerations (NRE). The NRE is an open source, online database tracking exonerations since 1989. It is a project of the University of California Irvine Newkirk Center for Science and Society, University of Michigan Law School and Michigan State University College of Law. It can be accessed online at: [www.exonerationregistry.org](http://www.exonerationregistry.org)

to provide in-depth information about a single, specific exoneration case, they were asked to describe processes involved in a series of cases, or office policies regarding the handling of innocence claims and other postconviction claims in general.

Interview guides for both prosecuting and defense attorneys are available in Appendix 3.4. Interview questions for defense attorneys probe four main topic areas:

1) How would you describe the prosecutor's involvement with the exoneration in the instant case?

2) How do you perceive the nature of the working relationship with the district attorney's office in the jurisdiction where the exoneration occurred? How has this evolved?

3) How would you compare your working relationship with the district attorney's office in the jurisdiction we have discussed already with other jurisdictions where you provide legal representation?

4) When do you believe the postconviction process is at its most efficient/productive?

Interview questions for prosecutors probe many of these same areas:

1) How would you describe your office's involvement with the exoneration of the instant case?

2) How do you perceive the nature of your working relationship with the postconviction defense attorneys (or innocence organization) in your area?

3) How would you characterize your involvement in wrongful conviction cases more generally?

4) When do you believe the postconviction process is at its most efficient/productive?

### *Analysis*

Qualitative analysis of each of the 36 qualitative interviews<sup>15</sup> provided at least five layers of experience: interviewing; checking the transcript against the audio recording and removing identifying details; open coding; focused coding; and finally, revisiting and developing theories through the memo writing process. I found it helpful to listen to the audio recording while analyzing the data for two reasons: to correct errors of transcription and, to code for the tone and tenor of respondent remarks. For example, when respondents' used sarcasm, expressed deep frustrations, or made a joke, these sentiments were not always evident from the transcript.

Grounded theory methods incorporate initial coding and focused coding of the qualitative data. First, I employed line-by-line coding to break apart the data into discrete actions (Charmaz, 2014, p. 125) and to help establish a deep familiarity with the interviews. As much as possible, I coded for actions using gerunds, rather than for concepts or themes as yet to be determined. This method was well suited to the process-focused data. Initial coding was performed using a word processing "comment" feature, which facilitated a large number of codes, but also encouraged brevity of the code.

Simultaneously, memo writing facilitated development of emergent themes across interviews. I returned to the memos repeatedly throughout initial coding to interrogate and update these developing themes. Quite often, a pattern that had been identified in early interviews became less prominent, or more nuanced, as interviewing and initial coding progressed.

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<sup>15</sup> Though there are 38 respondents (19 prosecutors and 19 defense attorneys), I count only 36 interviews in the analyses since two of the interviews featured two attorneys speaking about the same case and jurisdiction(s).

Next, focused coding was performed using computer software data analysis program, NVivo. I converted each de-identified, coded interview transcript into a PDF to retain the initial coding and uploaded this PDF document to NVivo. This method made both initial codes and focused codes visible at once. The program greatly assisted in the process of organizing the categories into relevant reference folders. Focused codes are identified for their usefulness, not necessarily their prevalence (Charmaz, 2014, p. 145). This directive eased the process of identifying outliers and exceptions. Focused codes were refined throughout in a process of sorting and re-sorting, determining which codes had proven to be redundant, which folder or sub folder should house each code, and which useful concepts had yet to be coded. Each interview produced new focused codes and built upon previous ones. Towards the end of the focused coding process, it became clear that saturation had been reached since there was very rarely a need to develop a new focused code.

Two different types of focused codes were developed; I refer to these as theoretical codes and process codes. Theoretical codes emerged from substantive, yet abstract, patterns and themes (suggesting blame, seeking legitimacy, times have changed). Then, to track processes such as how prosecutors communicated with victims about postconviction decisions, or how prosecutors and defense attorneys shared the results of an investigation, I developed process codes capturing the variety or consistency of postconviction practices. Ultimately, I captured data under 345 discrete analytic codes, available in Appendix 3.5.

I then returned to my research questions. In particular, I wanted to address questions that could only be answered through the qualitative interviews, namely, how

and why prosecutors had assisted with exoneration and also how defense attorneys perceived that assistance. With this criteria in mind, I isolated some codes as more applicable than others. For example, process codes relating to discretion and communication appeared most relevant to explaining *how* prosecutors assisted with exoneration, while theoretical codes relating to perceptions and motivations appeared most relevant for answering *why* prosecutors assisted with exoneration.

As I reviewed the focused codes best suited for answering these questions, I continued to sort the data into finer categories by exporting data from NVivo and creating code memos. For example, prosecutors' interest in "doing the right thing" quickly emerged as a dominant theme, appearing in a variety of different responses. In the form of a memo, I resorted the codes under subheadings to better distinguish meaningful variations in how exactly each prosecutor had invoked this theme. I then repeated this process for other dominant codes. Exporting data from NVivo helped reveal a deeper layer of variation in respondents' meaning. At this late stage in the analysis, I wanted to avoid the tendency to treat the code as a simple count of a theme's occurrence. The code memos were helpful in preparing the data for the writing phase as well.

## SUMMARY

The mixed methods approach of this study provides a broad view of prosecutorial assistance in a large sample of exoneration cases and a closer look at how and why prosecutors assisted in a subset of these cases. It explores the perceptions and experiences of both defense attorneys and prosecutors engaged in postconviction litigation. Three empirical chapters follow: Chapter 4 reports the results of the quantitative analysis and

Chapters 5 and 6 report findings of the qualitative analysis. Together, these empirical results begin to establish a nascent area of research: the determinants and motivations of prosecutorial postconviction assistance with exoneration cases.

## **CHAPTER 4: CASE-RELATED FACTORS INFLUENCING PROSECUTORIAL ASSISTANCE WITH EXONERATION CASES**

In this chapter, I describe the results of a statistical analysis testing the effect of various case-related factors on prosecutorial assistance in exoneration cases. Studying these effects in a large sample of known exoneration cases is a logical first step towards understanding prosecutors' postconviction decision making. Although we know little about the selection processes under which prosecutors operate to assist in innocence claims, we do know that some of these claims have merit. A starting point then is to examine the presumably most meritorious claims—those eventually resulting in exoneration. Results provide a broad view of the type of exonerations that are more, and less, likely to benefit from prosecutorial assistance.

Two theoretical areas of interest guide the analysis: the prosecutor's desire to protect his or her professional reputation by avoiding uncertainty about an exoneration case, and the prosecutor's interest in accomplishing the shared goals of the courtroom workgroup by maintaining professional relationships, disposing of cases, and doing justice. These areas of interest naturally intersect, since a prosecutor's professional reputation may impact his or her professional relationships, and vice versa, and efficient case disposal may be impacted by either or both.

### *Hypotheses*

The first hypothesis predicts that prosecutors will be less likely to assist in exoneration cases that involve official misconduct on the part of police, prosecutors, or forensic analysts. If an exoneration exposes misconduct, it may tarnish the reputation of the district attorney's office and strain relationships with colleagues to a much greater extent than cases in which the wrongful conviction can be cast as an honest mistake.

Prosecutors wishing to maintain workgroup relationships may hesitate to assist with an exoneration that would expose misconduct. Cognitive biases, such as conformity effects, could further dissuade prosecutors from considering these types of claims.

The second hypothesis relates again to the prosecutors' postconviction workgroup relationships. Ongoing working relationships on exoneration cases are possible chiefly through prosecutors' collaboration with local innocence organizations. These organizations may approach the district attorney's office for assistance on a case, or vice versa. In some jurisdictions, such collaborations can be quite productive, facilitating case disposal (Hollway, 2015). The prosecutor's power to investigate is matched by the defense attorney's ability to identify and support strong innocence claims. Postconviction workgroups stand to be even more collaborative, and less adversarial, than the workgroup of earlier stages. Therefore, innocence organization involvement will increase the likelihood that a prosecutor will be willing to assist with the exoneration. Innocence organization cases may also offer more efficient and less resource-intensive disposition of innocence claims.

The third hypothesis is that prosecutors will be less likely to assist in exoneration cases of violent crimes involving harm to a victim. National Registry of Exonerations (NRE, 2013) analyses suggest that police and prosecutors cooperate less frequently in serious felonies as opposed to property and drug crimes (NRE, 2013). In the pre-conviction stage, prosecutors have been found to be less likely to drop charges involving potential harm to a victim (Albonetti, 1986). If prosecutors feel *more* certain of obtaining a conviction in a violent offense case, they should feel *less* certain of overturning a conviction in these cases—or at least less certain about how an exoneration would be

perceived. Prosecutors pursuing exoneration behind closed doors, may also feel less certain about avoiding publicity if the case involved harm to a victim.

Similarly, when a defendant has pled guilty, prosecutors may doubt the credibility of the innocence claim. Evidence of innocence in these cases may not be enough to overcome a former admission of guilt. Indeed, some CIUs categorically eliminate guilty pleas from consideration for review as case-selection criteria, and others implement more stringent criteria for establishing innocence in false guilty plea cases (Hollway, 2015). Therefore, the fourth hypothesis is that prosecutors will be less likely to assist in the exoneration of defendants who pled guilty.

Finally, a core assumption of the current study is that prosecutors have become more receptive to exoneration over the years. The growing trend of CIUs as well as NRE reports of increasing police and prosecutorial cooperation (2016) support the assumption, but it should be empirically tested. Therefore, the fifth and final hypothesis posits that prosecutors will be more likely to assist with more recent exonerations than with earlier ones.

### *Data*

As of June 2016, 1,825 exonerations had been recorded in the NRE. However, two types of exonerations were eliminated from the sample in order to preserve the local focus and national scope of the present study. First, all federal cases, all District of Columbia, Puerto Rico, and Guam cases and all military cases (N=116) were removed from the sample. Unlike most district attorneys, the 93 U.S. Attorneys are appointed, rather than publicly elected officials, and their discretion is likely influenced by the oversight and training that federal prosecutors receive from the centralized federal entity.

Second, a group of Harris County, Texas, exonerations were removed out of concern that they might unduly influence the sample based on common group dynamics (N=99).<sup>16</sup> The remaining 1,610 official exoneration cases in the NRE constitute the sample for the reported analyses. This same dataset is used to cull respondents for the qualitative interviews as well.

## DESCRIPTION OF VARIABLES

### *Dependent Variable*

The dependent variable is *prosecutorial assistance*. The term “assistance” is broad, capturing everything from mere facilitation to staunch support. For instance, the prosecutor may assist the wrongfully convicted claimant directly, or he/she may lend assistance through a defense attorney or a third-party advocate. Some have simply dismissed charges in cases already extensively investigated by the defense, while others reinvestigated the case themselves, acting as the key players in establishing the exculpatory evidence that leads to exoneration.

The National Registry of Exonerations (NRE) maintains a non-public variable capturing prosecutorial assistance, as well as a short description of the nature of the assistance provided. A second variable, capturing the form of exoneration—whether a dismissal, acquittal, or pardon—also provides insights into the prosecutor’s role. The NRE provided these fields to the author upon request. For each of the 1,610 cases, I

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<sup>16</sup> Prosecutors from the Postconviction Review Section of the Harris County District Attorney’s Office brought about a wave of exonerations in guilty plea cases for drug possession or sale when they discovered that in some of the cases—despite the admission of guilt—substances assumed to be drugs had failed to test positive for drugs. Harris County prosecutors immediately worked to expedite overturning the convictions in these cases, leading to dozens of drug crime exonerations (NRE, 2015).

consulted the NRE data as well as the narrative accounts in the NRE case profiles.

Whenever necessary, I supplemented this information by researching news articles and legal documents online. I then recoded the prosecutorial assistance measure into three ordinal categories: 0 for no assistance (e.g., ambivalence or opposition), 1 for minor assistance (e.g., facilitation) with the exoneration, and 2 for major assistance (e.g., support) with the exoneration. Minor assistance involves cases in which the prosecutor autonomously dismissed charges without prior resistance, or joined a defense motion for dismissal or pardon. In these cases, a defense attorney or a third party often provided greater advocacy and did more of the legwork. A case was deemed to include major assistance only when the prosecutor conducted a reinvestigation, paid for postconviction forensic testing, or engaged in other supportive actions in addition to dismissing or joining the defense motion to dismiss the case. This coding scheme better captures the wide range of involvement and the range of actions that might be considered assistance.<sup>17</sup>

Prosecutors provided some level of assistance with the exoneration in 32.5% or 524 of the 1,610 cases in the sample. In 229 cases (14.2%) they provided minor assistance, and

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<sup>17</sup> The NRE coding instructions for prosecutorial assistance served as the point of departure. The code recognizes prosecutors' positive role for the following actions: reinvestigating, conducting DNA testing, pursuing evidence of defendant's innocence and promptly sharing with the defense, stating their belief in the defendant's innocence, and filing a motion (or joining the defense motion) to dismiss the case. The final ordinal measure employed in this dissertation differs in two important respects: 1) According to the NRE, cases in which federal officials or attorneys general assisted with an exoneration would count as prosecutorial cooperation even when county-level officials fought the exoneration effort. For the purposes of the present study, these types of cases were considered counter to the spirit of local cooperation and were coded zero. 2) The author recognized certain forms of prosecutorial resistance as disqualifying the case for assistance (either facilitation or advocacy) regardless of any subsequent attempts to assist. For example, if prosecutors blocked efforts to secure postconviction DNA testing, the case would not be coded as featuring prosecutorial assistance *even if* the prosecution eventually joined in a defense motion to dismiss or other related actions. This rule holds true for the actions of previous administrations as well. For example, a district attorney who fights DNA testing for years may be voted out of office and replaced by an incumbent who consents to testing. The incumbent in this scenario may have quite different motivations than the newly elected prosecutor, particularly as it concerns exposing misconduct, and these become obscured when coding only for the latter's decisions. Therefore, under the author's coding scheme, this type of exoneration would be coded zero for lacking prosecutorial assistance. Additional explanation of the coding scheme, with examples, is provided in Appendix 3.1.

in 295 cases (18.3%) they provided major assistance (see Table 4.1 for all descriptive statistics).

Note that while these coding criteria distinguish degrees of prosecutorial assistance in known exoneration cases, the details of the litigation—such as whether the prosecutor opposed postconviction DNA testing, and whether earlier administrations resisted the claim—may not have been preserved or available in every case. Where such details were mentioned by the NRE, or discovered in media or legal accounts, they were incorporated into the coding scheme.

### *Independent Variables*

In the analyses that follow, five measures are predicted to influence postconviction prosecutorial discretion:

The dichotomous measure for *law enforcement or forensic misconduct* captures allegations of misconduct by any official state actor, principally prosecutors, police, or forensic analysts. It includes a large category of behaviors including: perjury, threatening witnesses, improper use of informants, coercive interrogation practices, tampering with evidence, and concealing exculpatory evidence from the defense (Gross and Shaffer, 2012). Cases coded for misconduct are allegations rather than legal determinations. For the purposes of the present study, allegations are sufficient to capture the phenomenon under investigation since even alleged misconduct may dissuade a prosecutor from reopening a postconviction case. Law enforcement or forensic misconduct appeared in 53.6% of the exoneration cases.

<b>Table 4.1. Descriptive Statistics (N=1,610)</b>	<b>N</b>	<b>Percent</b>
<b>Dependent Variable</b>		
<i>Prosecutorial Assistance</i>		
No prosecutorial assistance with exoneration	1,086	67.5
Minor prosecutorial assistance (e.g., facilitation)	229	14.2
Major prosecutorial assistance (e.g., advocacy)	295	18.3
<b>Independent Variables</b>		
Law enforcement or forensic misconduct	863	53.6
Innocence organization	340	21.0
Guilty plea	193	12.0
<i>Offense Severity</i>		
Violent crime	1,348	83.7
Non-violent crime*	262	16.3
<b>Control Variables</b>		
Inadequate legal defense	413	25.7
Postconviction DNA evidence	416	25.8
<i>Region</i>		
South	629	36.8
Midwest*	436	25.5
East	364	21.3
West	280	16.4
<i>Prosecutorial regime</i>		
Same DA in office at the time of the exoneration	653	40.6
Successor in office at the time of the exoneration*	957	59.4
<i>Sentence</i>		
Non-death in a death penalty state*	1,117	69.4
Non-death in a non-death penalty state	377	23.4
Death	116	7.2
<i>Evidentiary Issues</i>		
Mistaken witness identification	552	34.3
Perjury or false accusation	948	59.0
False confession	224	13.9
False or misleading forensic evidence	352	21.9
<i>Advocacy</i>		
Police	52	3.2
Other advocate	228	14.2
<i>Demographic characteristics of defendant</i>		
<i>Race</i>		
White*	638	40.0
Black	759	47.1
Hispanic	184	11.4
Other	29	1.8
<i>Gender</i>		
Male*	1,468	91.2
Female	142	8.8
	<b>Mean</b>	<b>Range</b>
<b>Linear Independent Variables</b>		
Exoneration Year	2005	1989 - 2016

\*Reference category

*Note: Data is drawn from the National Registry of Exonerations (NRE). The NRE is an open source, online database tracking exonerations since 1989. It is a project of the University of California Irvine Newkirk Center for Science and Society, University of Michigan Law School and Michigan State University College of Law. It can be accessed online at: [www.exonerationregistry.org](http://www.exonerationregistry.org)*

Note: Table 4.1 reprinted from “A Postconviction Mentality: Prosecutorial Assistance in Exoneration Cases,” by Webster, Elizabeth, 2017, *Justice Quarterly*, p. 12.

The NRE records a wide variety of offense types, but for the purposes of the present study these have been collapsed into a single dummy variable: *Violent crime*.<sup>18</sup> Violent offenses such as murder and sexual assault are over-represented in this dataset (83.7%) compared to their proportion of convictions in the system at large (18.2%)<sup>19</sup> (Rosenmerkel et al, 2009). The non-violent crime category (16.3%) captures mostly property crimes, drug-related offenses, and various misdemeanors. *Guilty plea* exonerations make up a small, but growing, number of known exoneration cases. Twelve percent of sample cases involve a guilty plea.

Any case featuring the involvement of an organization or entity that reviews postconviction claims of actual innocence on behalf of criminal defendants is captured by a dichotomous variable: *Innocence organization*. Most of these organizations, like the Innocence Project, provide legal representation; still, they need not be the counsel of record in a case to be identified under this variable. Like Conviction Integrity Units (CIU), innocence organizations have steadily grown over the years. Starting with only a few groups in the 1990s such as the Innocence Project, Centurion Ministries, and the Center on Wrongful Convictions, their numbers have now grown to 55 in the United States with additional organizations abroad.<sup>20</sup> Twenty-one percent of the cases featured innocence organization involvement.

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<sup>18</sup> Including murder, attempted murder, sexual assault, assault, child sexual abuse, manslaughter, and kidnapping.

<sup>19</sup> According to Bureau of Justice Statistics, “Felony Sentences in State Courts, 2006.” Available at: <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2152>

<sup>20</sup> With but a few exceptions, these innocence organizations belong to the Innocence Network. See Innocence Network website for a complete listing of member groups: [www.innocencenetwork.org](http://www.innocencenetwork.org)

The measure for *exonerated year* captures the year in which the legal action resulting in exoneration occurred. As a general pattern, exonerations have increased over time. Though the earliest exoneration in the dataset occurred in 1989 and the latest in 2016, the mean for this measure is 2005.

### *Control Variables*

Defendants in the sample are distinguished as *white* (40%), *black* (47.1%), *Hispanic* (11.4%), or *other* (1.8%), which includes people of Arab and Asian descent as well as Native Americans. Defendants are also overwhelming *male* (91.2%). They are from all 50 states, which have been divided into four regions: *South* (36.8%), *Midwest* (25.5%), *East* (21.3%), and *West* (16.4%).<sup>21</sup> “Midwest” was selected as the reference category since its largest city, Chicago, is generally regarded as the birthplace of the innocence movement (Norris, 2017).

The NRE recognizes contributing factors to the original wrongful conviction, such as erroneous case evidence. The following are included as dummy coded controls: 1) *mistaken witness identification* (34.3%); 2) *perjury or false accusation* (59%); 3) *false confession* (13.9%); and 4) *false or misleading forensic evidence* (21.9%). In addition, *inadequate legal defense* during the adjudication phase of case processing was present in 25.7% of the cases.<sup>22</sup> While any of these factors may correlate with prosecutorial assistance with exoneration, the direction of the effect may depend on relationships with and/or reputations of individual actors—defense attorneys, victims, witnesses, informants, forensic analysts, and police officers. For example, prosecutors may hesitate

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<sup>21</sup> Regions reflect those defined by the national census, except the District of Columbia, which has been excluded from this sample.

<sup>22</sup> Data on the type of defense counsel—whether public, private, or appointed—is not available.

to expose the inadequate representation of a defense attorney who has been a valued courtroom workgroup colleague. However, if a wrongful conviction can be attributed to the poor quality of the defense, rather than the misdeeds or misconduct of trusted law enforcement, prosecutors may be less hesitant to assist with the exoneration.

The NRE data includes categories of actors involved in assisting and advocating in an exoneration, of which prosecutor is one. Like the dependent variable, these data are non-public and were provided to the author on request. Other actors coded as advocates include police, family members, judges and jurors, the media, and fellow exonerees as well as particularly steadfast defense attorneys. *Police*, who act as law enforcement partners with prosecutors, advocated for exoneration in 3.2% of all cases. Because of the unique relationship between police and prosecutors, this measure has been distinguished from the other types of advocacy. All remaining types of advocates have been aggregated into one category: *other advocate*. Involvement of these other types of advocates was featured in 14.2% of cases.

*Postconviction DNA evidence* suggesting innocence has contributed to the exoneration of 25.8% of the cases in the sample. In these cases, DNA evidence may constitute the decisive proof of innocence, or only one piece of a puzzle in which other types of exculpatory evidence bear more weight in the final decision to exonerate.

A newly elected district attorney, especially one who has beaten a disfavored incumbent, may challenge his or her predecessor's convictions more readily than those occurring during his or her tenure. The goal of establishing public trust in the system is met when a new administration rights the wrongs of the former one. On the other hand, a conviction overturned under the existing administration raises questions and calls for

additional reforms. To represent this distinction, I supplemented the NRE data with a measure for *prosecutorial regime* that identifies whether the district attorney in each of the 504 jurisdictions in the sample at the time of the wrongful conviction remained in office at the time of the exoneration. This additional control variable is coded 1 if the district attorney was the same at the time of conviction and exoneration, and 0 otherwise. In 40.6% of the cases, the same district attorney remained head of the office at the time of both events.

Convictions in death penalty cases require additional resources and engagement from the prosecutor's office, and therefore a deeper commitment to the defendant's guilt. Similar to the hypothesized effect of violent crime cases, death penalty exonerations may inspire more resistance from the prosecutor. The sentence variable has been coded to reflect the existence of the death penalty in some states but not others. As such, death penalty sentences can be compared directly to sentences in states with and without the death penalty option—since the choice of imposing the death penalty does not equally exist for all prosecutors. The three categories include: 1) *death sentence*; 2) all other sentences in states where the death penalty existed at the time of conviction: *non-death sentence in a death penalty state*; and 3) all other sentences in states that did not impose the death penalty at the time of conviction: *non-death sentence in a non-death penalty state*. Non-death sentence in a death penalty state is the modal category (69.4%) and serves as the reference for the purposes of comparison. In total, 116 death sentences (7.2%) were imposed upon defendants in the sample and 23.4% of defendants were convicted and sentenced in a non-death penalty state.

## ANALYTICAL APPROACH

Ordinal logistic regression models estimate the effect sizes of the independent variables on levels of prosecutorial assistance in exoneration cases. The standard interpretation of the ordered logistic response model relies on the assumption that the probability of crossing each threshold is the same and that the slopes are equivalent. In this case, the first threshold represents minor or major prosecutorial assistance (vs. no assistance) and the next threshold represents receiving major assistance (vs. no assistance or minor assistance). A diagnostic Brant test revealed that most, but not all, of the coefficients conformed to this parallel regression assumption.<sup>23</sup> Consequently, the model was re-estimated using generalized ordered logistic regression, which allows some measures to be equivalent across the ordinal categories of the dependent variable and others to differ. For ease of interpretation, generalized logistic regression results are reported as odds ratios rather than coefficients.<sup>24</sup> A model VIF of 1.37 and individual VIFs not exceeding 1.97 suggest that multicollinearity is not an issue.

Since cases from the same jurisdiction may share many similar characteristics, a clustering correction by jurisdiction was used for the 504 different district attorney jurisdictions represented in the model. The prevalence of exonerations in any given

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<sup>23</sup> The Brant test is a Wald test that evaluates each regressor. The five regressors that violated the null hypothesis at the  $p = .05$  level were: DNA evidence ( $p = .006$ ), police advocacy ( $p = .004$ ), violent crimes ( $p = .006$ ), Hispanic ( $p = .004$ ) and East ( $p = .001$ ). Using generalized ordered logistic regression, I then specified that the model produce two sets of coefficients for each of these five regressors.

<sup>24</sup> Odds, which range from 0 to positive infinity, are determined from probabilities, which range from 0 to 1. An odds ratio is the ratio of the odds of an outcome on any given measure to the odds of the same outcome for the reference category (i.e. the odds of the outcome for black defendants vis-à-vis white defendants, when white defendants are the reference category). An odds ratio of less than 1 indicates a negative relationship; the odds of the outcome are less likely for the included category than for its reference. An odds ratio of greater than 1 signifies a positive relationship; for example, an odds ratio of 2.00 indicates that the odds of the outcome for the included category are two times that of the reference category. The closer the odds ratio is to 1, the smaller the effect size, indicating that the outcome is no more or less likely for the category included in the model than for its contrast.

jurisdiction ranged from 1 to 126. Chicago (Cook County, IL) has the most exonerations; other urban jurisdictions also heavily represented include Dallas County, TX; Kings County, NY (Brooklyn); and Los Angeles County, CA. If the subset of Harris County, TX, exoneration cases had not been removed from this sample, Harris County would top the list.

## RESULTS

Which types of exoneration cases demonstrated a likelihood of benefiting from prosecutorial assistance, and which did not? Table 4.2 shows the full logistic regression model. Some support was found for four of the five hypotheses: law enforcement or forensic misconduct, violent offenses, innocence organization involvement, and prosecutorial willingness to assist over time. The result for guilty pleas ran counter to hypothesis 4.

### *Effect of Independent Variables*

Consistent with the first hypothesis, findings indicate that prosecutors are less likely to assist with exoneration when the wrongful conviction involved law enforcement or forensic misconduct (OR = .652). In accordance with the second hypothesis, prosecutors are shown to be more likely to assist with exonerations involving innocence organizations (OR = 1.56). The local innocence organization may seek collaboration or consultation from the district attorney's office on a possible wrongful conviction, or the other way around. The two entities may then work in tandem, or one or the other may spearhead the case review. Therefore, these findings should not be narrowly interpreted to suggest that prosecutors are merely responding to innocence organization requests for assistance. Rather, it suggests that the presence of an innocence organization enhances

**Table 4.2. Generalized Ordered Logistic Regression Predicting Degree of Prosecutorial Assistance in Exoneration Cases (N=1,610)**

	<i>No assistance vs. minor or major assistance</i>		<i>No assistance or minor assistance vs. major assistance</i>	
	<i>b (robust s.e.)</i>	<i>Odds Ratios</i>	<i>b (robust s.e.)</i>	<i>Odds Ratios</i>
<b>Independent Variables</b>				
Law enforcement or forensic misconduct	-.428**(.163)	.652	--	--
Innocence organization involvement	.445*(.184)	1.56	—	—
Violent crime	-.647***(.166)	.524	-.226(.197)	.798
Guilty plea	.783***(.213)	2.19	—	—
Exoneration year	.039**(.012)	1.04	—	—
<b>Control Variables</b>				
Inadequate legal defense	-.795***(.167)	.452	—	—
Postconviction DNA evidence	.236(.183)	1.27	-.134(.217)	.874
<i>Region*</i>				
South	.642**(.246)	1.90	—	—
East	.461(.296)	1.59	.806**(.306)	2.24
West	.336(.311)	1.40	—	—
<i>Prosecutorial regime*</i>				
Same DA in office at the time of exoneration	-.032(.171)	.969	—	—
<i>Sentence*</i>				
Death	-.670(.360)	.512	—	—
Non-death sentence in a non-death penalty state	.187(.231)	1.21	—	—
<i>Evidentiary issues</i>				
Mistaken witness identification	.264(.169)	1.30	—	—
Perjury or false accusation	-.203(.184)	.816	—	—
False confession	-.077(.208)	.926	—	—
False or misleading forensic evidence	.122(.177)	1.13	—	—
<i>Advocacy</i>				
Police advocacy	.959*(.374)	2.61	-.228(.667)	.796
Other advocacy	.083(.200)	1.09	—	—
<i>Demographic characteristics of defendant*</i>				
Black	.728***(.160)	2.07	—	—
Hispanic	1.08***(.222)	2.94	.676**(.243)	1.97
Other race	-.539(.564)	.583	—	—
Female	-.112(.220)	.894	—	—
<b>Pseudo R<sup>2</sup></b>	.119			

Note: clustered by counties (504 clusters)

\*p<.05 \*\*p<.01 \*\*\*p<.001

\*Reference category is identified in Table 4.1

Note: Table 4.2 reprinted from "A Postconviction Mentality: Prosecutorial Assistance in Exoneration Cases," by Webster, Elizabeth, 2017, *Justice Quarterly*, p. 17.

the likelihood of prosecutorial assistance in exoneration cases.

Exonerations for violent offenses are shown to be less likely to benefit from at least minor prosecutorial assistance (OR = .524). However, violent offenses are not shown to be predictive of major assistance. This result provides partial support for the third hypothesis. It may be the case that exoneration in violent offenses requires additional evidence of innocence, therefore motivating prosecutors to conduct further forensic testing or reinvestigation.

Contrary to the expectation established in the fourth hypothesis, those who falsely pled guilty are found to be over two times more likely to benefit from prosecutorial assistance than cases that went to trial. Prosecutorial assistance appears to be highly correlated with guilty plea cases (OR = 2.19). In effect, the 12% of defendants who pled guilty in the sample were significantly more likely to benefit from at least some prosecutorial assistance in their eventual exoneration than were the 88% of defendants who were tried by a judge or jury.

Finally, the findings support the fifth hypothesis indicating that prosecutors are increasingly willing to assist in more recent exoneration cases between 1989 through 2016 (OR = 1.04). Therefore, the central assumption of the study holds true. In general terms, and all else held constant, prosecutors have become more receptive to exoneration over time.

#### *Effect of Control Variables*

Defendant race, but not gender, is shown to increase the likelihood of prosecutorial assistance in exoneration cases. Blacks are more than two times likely (OR = 2.07) and Hispanic defendants nearly three times more likely (OR = 2.94) to receive at

least minor prosecutorial assistance when compared to white defendants. Both groups are also more likely to receive major assistance, but for Hispanic defendants the effect size is reduced (OR = 1.97).

In terms of region, prosecutors in the South are shown to be nearly two times more likely to provide assistance when compared to prosecutors in the Midwest (OR = 1.90). This finding may say as much about assistance in the South as it does about the lack of assistance in the Midwest. In an alternate model, using the South as the reference group produced insignificant findings except as related to the Midwest. Regional variation may implicate factors such as punitiveness, racial demographics, presence of Innocence Network groups, and more, that may help explain these results. The Eastern region appears influential as well, but the effect is more difficult to interpret. While findings indicate that Eastern prosecutors are more likely than Midwestern prosecutors to provide major assistance (OR = 2.24) they are not more likely to provide at least minor assistance. Said differently, the effect observed in the second threshold does not hold for the first. As for prosecutors in the West, they are shown to be no more or less likely to provide assistance than are those in the Midwest. Therefore, the Midwest appears to differ from some regions, but not others, in how its prosecutors respond to exoneration cases. The finding cannot be explained with the available data.

Prosecutors also appear over two times more likely to provide at least minor assistance with exoneration in cases involving police advocacy (OR = 2.61). However, police advocacy is not found to be a significant indicator of major prosecutorial assistance. Police work may relieve prosecutors of the need to provide major assistance, since police support for an exoneration would often include a reinvestigation and

gathering of exculpatory evidence. Still, no specific causal ordering can be inferred from this correlation. Police advocacy may motivate prosecutors to become involved in cases involving innocence claims, but the same could be true in reverse as well.

A defense attorney's negligence or misconduct at trial is also shown to influence the likelihood of prosecutorial assistance with exoneration; such cases are less likely to receive assistance (OR = .452). Such a finding suggests that cases involving critiques of courtroom work group members may operate to inhibit prosecutors from lending assistance. Also possible is that this finding is a byproduct of postconviction case processing, as explained in more detail in the discussion section, which follows.

## DISCUSSION

The purpose of this chapter is to explore prosecutorial decision making when evaluating innocence claims and to identify the factors that might influence prosecutors' willingness to assist with exonerations. Prosecutors may facilitate an exoneration effort or cause it to be indefinitely stalled. These findings confirm that prosecutors have become more willing to assist with exoneration over the years. Still, prosecutors' increasing receptivity to exoneration cases might represent a temporary phenomenon subject to shifting political winds and the discretion of the elected district attorney. What, then, do case-specific factors correlated with prosecutorial assistance suggest about the motivations and determinants of prosecutors' postconviction discretion regarding innocence claims? The general impression conveyed by these results is of prosecutors' prevailing concern for protecting professional reputations, maintaining relationships, and efficiently disposing of cases.

### *Protecting Reputations and Relationships*

The prosecutor who assists with the exoneration of a violent offense takes a greater professional risk than the prosecutor assisting with the exoneration of a property or drug-related offense. Colleagues and constituents are more likely to object to exoneration in a case involving harm to a victim and, in some cases, victims or their families provide vocal opposition to any such assistance. Postconviction processes of uncertainty avoidance, in which the prosecutor imagines how the community will react to the exoneration, may therefore play a role in prosecutors' relative disinclination in assisting with violent offense exonerations. The exonerated individual in such cases will be considered more of a threat to the community upon release and the prosecutor may encounter more obstacles in the exoneration effort.

Prosecutors' reluctance to support exoneration in cases involving law enforcement or forensic misconduct suggests an interest in maintaining the status quo and deflecting blame from the district attorney's office. Any exoneration may be perceived as a "public relations embarrassment" (Ware, 2011), but an exoneration exposing official misconduct could be particularly damaging to a prosecutor's professional advancement and political ambitions. Whether the misconduct was committed by a fellow prosecutor, a police officer, or a forensic analyst, prosecutors may avoid supporting any allegation of wrongdoing. Damaging the relationships may have professional consequences. As such, these concerns may be calculated into a conscious process of uncertainty avoidance, or they may represent the subconscious working of cognitive biases.

Prosecutors' reticence to assist in exoneration cases featuring inadequate legal defense lawyering (during the adjudication phase) reinforces the salience of maintaining

professional relationships. They may sympathize with their courtroom workgroup counterparts and conclude that the defense did the best job possible with a heavy workload and limited resources (Levenson, 2016). Even when prosecutors concede that counsel was ineffective, they may yet be wary of damaging relationships with the defense bar by exposing the issue. Private defense attorneys are often former prosecutors, and as such, they may be well known in the district attorney's office and even highly regarded. At the same time, current prosecutors know that they may one day join the ranks of the private defense bar. Thus, exonerations that result in finger pointing could prove problematic for prosecutors for many reasons.

### *Efficient Case Disposal*

Prosecutors' resistance or ambivalence toward cases featuring inadequate legal defense at trial might also be motivated by efficient case disposal. One way to dispose of innocence claims is to re-route them. Since ineffective assistance of counsel represents a viable constitutional claim, prosecutors may default to the traditional appeals or habeas process (Scheck, 2016). Prosecutors may not perceive these cases as requiring innocence review. If the claimant can potentially find relief in other ways, it may not matter to the prosecutor whether it comes in the form of a dismissal based on due process or an actual innocence finding. In the eyes of the defendant, however, it can matter a great deal. Without a finding of actual innocence, the defendant may lose the chance to be vindicated and may also be less likely to succeed with a civil claim.

Motivations to dispose of cases and maximize efficiency may also dissuade prosecutors from reconsidering innocence claims involving misconduct. Reinvestigating a single wrongful conviction requires time and resources, but the obligation would be

minimal compared to the task of reopening and reinvestigating a series of wrongful convictions. If a pattern of misconduct casts doubt on a specific actor, the district attorney's office may uncover more problematic convictions than they bargained for, and more than they are willing or able to accommodate.

Innocence organization groups help prosecutors process and dispose of innocence claims while simultaneously maintaining collaborative, symbiotic professional relationships. Compared to courtroom workgroup relationships between prosecutors and defense attorneys in pre-conviction stages, close, long-term collaborations will be less common in wrongful conviction case review. These relationships may also be especially subject to the longevity of the leadership in the district attorney's office, resource allocation, and case processing priorities of the two entities. Just as strong working relationships may act as a disincentive to prosecutors for assisting with exoneration in some cases, in other cases relationships may compel prosecutors to act. The district attorney's office might be more responsive to innocence claims that have been vetted and presented by innocence organizations than those coming directly from prisoners or their family members. Conversely, prosecutors may initiate collaboration with the innocence organization by referring cases, or by jointly conducting large-sale case reviews.

Finally, efficiency considerations could impact prosecutors' response to innocence claims in violent offense cases and in cases that went to trial. Findings suggest that prosecutors are less likely to pursue exoneration in these types of cases, perhaps because of concerns about releasing violent offenders as previously discussed, but also because of the organizational demands on time and resources. Violent offenses resulting

in a jury's guilty verdict will require both a greater commitment to defendant culpability on the front end and a greater investment to the innocence claim on the back end.

*Additional Explanations and Limitations*

The unexpected finding that prosecutors are more likely, rather than less, to assist with exoneration in cases featuring a false guilty plea requires further discussion. Recall that the sample provides a glimpse of prosecutors' responses to innocence claims that result in exoneration, and not to all innocence claims. Claims that fail to result in exoneration are not represented. The implication is that prosecutors may have rejected or overlooked a great number of innocence claims in guilty plea cases, but these claims do not otherwise appear in the data. Guilty plea cases are likely to be overlooked by innocence organizations as well, since these groups must prioritize the cases of prisoners serving lengthy sentences or facing execution. Guilty plea negotiations often result in a reduced sentence. Therefore, defendants with false guilty pleas may remain forever in the ranks of the thousands, if not tens of thousands, of unknown wrongful convictions. The higher standards that some CIUs have implemented for accepting false guilty plea cases provides support for this proposition, as does the relatively small percentage of guilty plea exonerations (12%) in the sample. Thus, guilty plea cases appear to receive more prosecutorial assistance because the prosecutor's involvement is crucial to achieve exoneration.

The guilty plea finding serves as just one example of how data on innocence claims that fail to become exonerations could alter the findings reported here. The process of reviewing innocence claims may play out in a variety of ways, and exoneration is only one of many possible outcomes. A prosecutor may have

reinvestigated a conviction but ultimately chose not to dismiss it, or negotiated a lesser sentence. In other cases, prosecutors might have successfully fought an innocence claim in court. Findings may also be affected by data on exonerations that never become public. Prosecutors, not to mention defendants and victims, might not wish to publicize some exonerations. These unpublicized exonerations may vary in meaningful ways from those included in the sample. Low-profile exonerations are especially likely to escape the attention of the Registry (Gross, 2017).

Limitations of the data may also explain the finding that black and Hispanic defendants are more likely to be assisted by prosecutors in their exoneration efforts than are white defendants. Research on prosecutors' decision-making in other stages suggests that minority defendants are at a disadvantage (Baumer, Messner and Felson, 2000; Frederick and Stemen, 2012; Hartley, Madden and Spohn, 2007; Kutateladze, Andilorio and Johnson 2016; Metcalfe and Chiricos, 2017; Steffensmeier et al, 1998; Ulmer et al, 2007). There are reasons to doubt the easy conclusion that the postconviction stage is an exception to the rule. African Americans are more likely to be wrongfully convicted (NRE, 2017), increasing the probability that the most credible innocence claims will involve an African American defendant. Research of erroneous capital convictions supports this argument (Harmon, 2004). Prosecutors may assist white defendants postconviction more often than is evident here, but these defendants' claims may be less likely to result in exoneration when compared to the claims of black and Hispanic defendants.

Jurisdiction demographics may contribute to the effect since urban jurisdictions with greater minority populations also have greater resources to commit to wrongful

conviction case review through, for example, conviction review units. A closer look at exonerations featuring prosecutorial assistance from the four counties most represented in the sample—Cook (Chicago), Kings (Brooklyn), Dallas, and Los Angeles—shows black and Hispanic defendants make up between 74 to 94% of these 131 cases. Prosecutors in urban jurisdictions with racially diverse demographics may have the constituent support needed to conduct postconviction case reviews and assist with exoneration. CIUs have emerged in each of these jurisdictions and each unit has been directed by an African American or Latina district attorney.<sup>25</sup> However, the influence of these four jurisdictions, alone, cannot explain the observed effects. An alternate regression model omitting them yielded similar results.

Other factors, yet unidentified, may also challenge the results. These include: extent of the defendant's criminal history; presence of a viable alternative suspect (or true perpetrator); and the victim or victim's family response. For example, if an alternative suspect has been presented, the prosecutor seeks a new conviction while overturning the old one. The exoneration in such a case may serve as an additional step in the effort of indicting and convicting the newly discovered suspect, thus fulfilling the prosecutors' traditional crime fighting function. A better understanding of the "county legal culture" (Eisenstein, Flemming, and Nardulli, 1988), and relationships between actors, office dynamics, and professional considerations may also contribute to developing a clearer portrait of the circumstances surrounding prosecutors' willingness to assist.

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<sup>25</sup> For example, Craig Watkins, the former Dallas County District Attorney, created the Conviction Integrity Unit there; Ken Thompson of the Kings County (Brooklyn) DA's office, recently deceased, oversaw an administration that exonerated 14 people; Former Cook County State's Attorney Anita Alvarez created the unit in Chicago, and Jackie Lacey, the first African American Los Angeles District Attorney, recently created a CIU in her office.

## SUMMARY

In conclusion, this analysis has provided an initial and systematic exploration of the factors that influence prosecutorial assistance in innocence claims resulting in exoneration. Fisher's advice to "regard prosecutors as heterogeneous and malleable individuals, not as a mass of zealots" (1988, p. 214) comes to mind as we observe that prosecutors have become more receptive to exonerations over time. The motivation to do justice, and to fulfill the calling that "guilt shall not escape or innocence suffer,"<sup>26</sup> should also be considered a factor in prosecutors' decisions to assist in overturning wrongful convictions. In some important respects, however, prosecutor-initiated innocence reviews do not appear equitable. If cases involving law enforcement or forensic misconduct, violent crimes, or inadequate defense lawyering still inspire prosecutorial ambivalence or resistance, that deficiency merits further investigation.

While the quantitative analysis has provided a valuable first glimpse of prosecutors' postconviction discretion in exoneration cases, it raises more questions than it answers. We now know that certain types of cases have a greater likelihood of benefitting from prosecutorial assistance than others, yet we can only guess at why. Similarly, we do not know the decision-making processes that prosecutors employ to determine the appropriate response to an innocence claim. Qualitative research can further explore prosecutors' motivations and processes. The interviews with prosecuting attorneys, and the defense attorneys they have worked with, that are analyzed in the following two chapters will help to shed light on the context in which these decisions are made.

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<sup>26</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935)

## **CHAPTER 5: PROSECUTORIAL DISCRETION AS THE FINAL SAFEGUARD AGAINST FALSE CONVICTIONS**

Much of the social science research on discretion focuses on individual drivers and independent decisions, such as the prosecutor's interest in advancing professionally (Albonetti, 1986, 1987) and her susceptibility to bias (Baumer, Messner and Felson, 2000; Franklin, 2010; Hartley, Madden and Spohn, 2007; Kutateladze, Andiloro and Johnson 2016; Spohn and Holleran, 2000). Legal research tends to explore either external institutions, such as judicial review, or internal dimensions such as the prosecutor's psychology (Levine and Wright, 2013). This focus on the individual fits early stage decision making better, as line prosecutors may have the discretion to charge and plea bargain without supervision. However, postconviction decisions, particularly the decision to overturn a false conviction, are not likely to be made at the lower levels of the office hierarchy. Decisions to assist with exoneration are enacted by the individual prosecutor, organized by the executive team, and informed by the larger legal structure of the appeals process.

These multiple levels of discretion emerged in prosecutor and defense attorney respondents' statements about decision-making processes. Prosecuting attorney respondents invoked not only the procedures of the appellate system, but also its organizing principles. Prosecutors and defense attorneys described how the district attorney office's structure for reviewing innocence claims could shape postconviction outcomes, and they emphasized the limited discretion of the line prosecutor in making outcome decisions. These responses suggest that an analysis of postconviction prosecutorial discretion on the individual level would be inadequate for explaining how decisions to assist with exoneration are made.

The literature on organizational accidents provides a broader perspective. Criminal justice system “accidents”—such as the wrongful conviction of an innocent defendant—has been compared to accidents in other industries such as aviation, medicine, and business (Bogue, 2009; Doyle, 2013; Doyle, 2014; NIJ, 2014). Reason (1997) traces the source of the accident to decisions made at the organizational level. He identifies three levels: “the person,” “the workplace,” and “the organization.” Applied to criminal justice decision making, we might say that decisions made by the individual attorney reviewing the case reside on the person level. The next level, the workplace, represents the influence of the key decisionmakers in the prosecutor’s office, including the elected district attorney and the executive team. Legislatures and courts reside on the organizational level. The person may push the buttons and pull the levers, but they do not design the machine. While their actions, oversights, and “active failures” impact the potential for error, they are rarely solely responsible for it (p. 10). Organizational accidents are rarely the province of a single mistake but are best understood as a sequence of failures occurring on multiple levels. Therefore, accident investigations that explore causes must look beyond the “active failures” of an individual (such as the pilot, surgeon, or attorney) to organizational influences to propose solutions that will prevent future events.

The intention of this analysis is not to conduct an accident investigation that analyzes causes, but rather to explore prosecutors’ effectiveness in avoiding accidents. In this undertaking, I pre-suppose that the failure to discover a wrongful conviction is an accident in and of itself. The prosecutors under investigation here have all experienced some success in avoiding these types of accidents. Following an organizational accident

theory approach, I look beyond the individual prosecutor to better understand the influences and processes underlying the decision making. I explore prosecutor's postconviction discretion to assist with exoneration in three dimensions: the organization, the workplace, and the attorney.<sup>27</sup>

I begin by exploring how organizational accident theories can be applied to the discovery of wrongful convictions in the appeals process. Next, I provide an analysis of the role of the district attorney's office and administration in determining postconviction outcomes, including decisions about how innocence claims will be reviewed, and by whom. This is followed by an exploration of parameters of the individual prosecutor's discretion to assist with exoneration. I close with a discussion of the implications of these levels of discretion on postconviction prosecutorial discretion and the ability of the prosecutor to operate as a final safeguard against false convictions.

#### DISCOVERING ORGANIZATIONAL ACCIDENTS THROUGH APPELLATE REVIEW

Much like other industries, the criminal justice system establishes safeguards against accident. Safeguards or "screens," may include "police supervisory screen, a crime lab screen, a prosecutorial barrier, a grand jury process, an advisory trial screen, and an appellate review screen" (Doyle, 2013, p. 56). One important difference is that criminal justice system errors are almost never as obvious as a plane crash or a market

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<sup>27</sup> See Kay Levine and Ronald Wright's "Prosecution in 3-D" for an introduction to the multi-dimensional nature of prosecutors' work. "When deciding how to do their jobs, prosecutors do more than simply listen to their own consciences or respond to (or ignore) outside legal, environmental, or policy pressures. They also work within the particular social architecture of their office and immerse themselves in attitudes about the job that come with membership in an organization" (2012: p. 1128).

crash or a dead patient.<sup>28</sup> For that very reason, criminal justice system accidents might be especially likely to pass undetected. Appellate review, and especially postconviction stage review, serve as the final protective screens against the system maintenance of false convictions. When errors slip through holes in every other screen, they may still be discovered by this final barrier. Through this conceptual framework, we can evaluate the efficacy of the appeals process and of the prosecutor's ability to identify and correct wrongful conviction "accidents" through appellate review.

A wealth of legal research suggests that the appellate system serves as an insufficient safeguard against the preservation of false convictions. Indeed, the shortcomings of the appellate system for factually innocent defendants has been well established (Findley and Scott, 2006; Garrett, 2008; Leventhal, 2012; King, 2014, 2017; Medwed, 2005; Medwed, 2012). Historically, the purpose of the appeals process was not to remedy factual errors (that was what clemency was for) but rather to correct procedural ones (King, 2014). Findley and Scott (2006) explain: "One of the most startling revelations to newcomers to the justice system is that appeals have almost nothing to do with guilt or innocence. Appellate courts, as a matter of principle, decide legal questions and focus on process, not the accuracy of factual determinations" (p. 348).

Moreover, the US Supreme Court does not recognize freestanding actual innocence claims based on newly discovered evidence as sufficient legal justification for relief (*Herrera v. Collins, 1993*).<sup>29</sup> In the *Herrera* case, the Court ruled that actual innocence does not entitle defendants to federal habeas relief "absent an independent constitutional violation." In short, the constitution guarantees the right to a fair trial, not

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<sup>28</sup> With the exception of unjustified killing of civilians or inmates by law enforcement

<sup>29</sup> *Herrera v. Collins*, 506 U.S. 390 (1993)

to one that produces the right result (Brooks et al, 2015). Without some claim of trial error, such as ineffective assistance of counsel, the defendant has no basis for relief. Based on *Herrera*, prosecutors would be legally accurate in determining that their postconviction obligations do not necessarily include discovering or correcting factual errors, even if failure to do so may undermine their role obligations in *Berger*.

Nevertheless, this ruling does not preclude state courts from recognizing newly discovered evidence of innocence as a valid basis for a claim, and most of them do (Brooks et al, 2015). State caselaw and statutes often provide legal mechanisms for relief on newly discovered evidence of innocence alone, without also having to establish a procedural grievance or a constitutional violation (Leventhal, 2012), but these remedies have their own shortcomings. Brooks and colleagues (2015) survey of state laws finds many to be DNA-centric, and to set a high legal standard for relief that puts the burden on the defendant to effectively establish his own innocence. Furthermore, in most states, after a brief window when defendants can file for a new trial, new evidence of innocence will not be considered until defendants have completed their direct appeal and entered the postconviction stage (Levenson, 2013). This process will take years, meaning that only those serving lengthy prison sentences can avail themselves of the remedy (King, 2014). Finally, most states do not provide indigent defendants with an attorney in the postconviction stage. Without the legal knowledge or the ability to investigate from behind bars, filing pro se leaves indigent prisoners at a disadvantage (Garrett, 2011).

As suggested by *Herrera*, and by the shortcomings of existing state remedies, prosecutors' obligation to correct factual errors of wrongful conviction is poorly defined. Yet, prosecutors can play an integral role in remedying false convictions. Despite "long-

standing judicial and legislative concerns about reexamining old cases” prosecutors can ask the court to grant relief (Medwed, 2012, p. 124). Alternatively, they can oppose relief, appeal court decisions, and delay justice indefinitely. Defendants are unlikely to prevail in court against the prosecutors’ opposition (Green and Yaroshefsky, 2008).

According to ABA Model Rules, prosecutors have a responsibility to reinvestigate the claim and take steps to remedy the wrongful conviction when confronted with “clear and convincing” evidence of innocence. When I asked prosecutor respondents about the model rules for postconviction conduct, most admitted that they did not know whether their state had adopted these rules.<sup>30</sup> (Seven of the 19 respondent prosecutors work in states that have adopted some element of 3.8 (g) and (h).) While they were unfamiliar with the rules, they were indeed familiar with the rationale behind them. Two respondents spoke about resisting the passage of these rules in the legislature. Only one, an elected district attorney with defense experience, spoke plainly in favor of them.

Beyond the model rules, some states constrain prosecutors’ postconviction discretion in certain limited ways, for example, by requiring that they retain physical evidence (Green and Yaroshefsky, 2008), that they agree to DNA testing when results could be probative<sup>31</sup>, or that they continue to share exculpatory evidence with the defense postconviction (Laurin, 2014). By and large, courts and legislatures have established minimal expectations for prosecutors’ postconviction responses to wrongful convictions (Boehm, 2014; Green and Yaroshefsky, 2008; Zacharias, 2005).

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<sup>30</sup> Seventeen states have adopted some element of the 3.8 (g) and (h).

<sup>31</sup> See “Access to Post-Conviction DNA Testing” on the Innocence Project website for information on state post-conviction DNA access statutes. Available at: <https://www.innocenceproject.org/access-post-conviction-dna-testing/>

In sum, prosecutors have broad discretion in the postconviction stage, but they also have little guidance. The appellate system corrects errors of procedure far better than errors of factual innocence. Prosecutors must therefore deviate from the standards set by appellate review and create new processes in order to operate as reliable final safeguards for correcting false convictions. Legal scholar Zacharias writes, “Once appeals are complete, the prosecutor may be the only participant in the criminal justice system in a position to rectify a wrong” (2005, p. 175). Thus, the legal system depends upon prosecutors to administer this function, yet it does little to promote it. From an organizational accidents perspective, the organization not only fails to prevent accidents, it allows them to pass undetected. Furthermore, it demonstrates little urgency in correcting them.

With this context, I now turn to the district attorney’s office and the centrality of executive-level decisions.

## THE WORKPLACE: MANAGEMENT DECISIONS

Little is known about how a typical prosecutor’s office directs its innocence claims (Green and Yaroshesky, 2008; Medwed, 2012). Management may implement the structure and process they prefer. How were innocence claims directed in this study? Respondents’ descriptions of processes revealed the centrality of decisions made by the executive team, including 1) where to direct postconviction innocence claims, 2) how to negotiate work flow, and 3) how outcome decisions will be made.

### *Where to Direct Postconviction Innocence Claims*

The prosecutors' offices represented here have already demonstrated a willingness to rectify wrongful convictions; as such, we might reasonably expect postconviction processes in these offices to be more effective than those in the typical prosecutor's office. In nine of the 19 offices described by prosecutors in this sample, postconviction innocence claims were reviewed by a CIU. Postconviction processing of innocence claims is not as easy to define or identify when the office has not established a unit for this express purpose. In other jurisdictions, prosecutors described processes revealing that postconviction innocence claims were typically handled by: an appellate or postconviction review unit (4); a supervising felony chief (2); the prosecutor who originally handled the trial (2); or the elected district attorney (2).

The process depends, in part, on the size of the jurisdiction. Having a separate unit for appeals—not to mention a CIU—might not be feasible in small jurisdictions. Of the four respondents who stated that their postconviction innocence claims were reviewed in appeals, only one worked in a small jurisdiction (population less than 500,000). Of the nine CIUs in this study, six were in large offices (jurisdiction population over 1 million). The three CIUs in medium-sized offices (jurisdiction population between 500,000 and 1 million) did not have the caseload to justify devoting a full-time staff person to the unit. Instead, these offices either divided the CIU caseload between innocence claims and other types of postconviction claims, or else they employed CIU staff on a part-time basis.

### *Conviction Integrity Units*

The nine prosecutors working in CIUs offered a variety of explanations for why the district attorney had established their conviction integrity unit: a desire for “good community juju” (Prosecutor 6), to keep pace with a neighboring jurisdiction, in response to a high-profile exoneration, in response to new legislation, or in response to an increase in actual innocence claims from the defense bar. The development of the CIU adapts to a shifting legal landscape, marked by new expectations of prosecutors from the public, legislators, and defense lawyers. While wrongful convictions are as old as the criminal justice system itself, CIUs are a recent phenomenon, only emerging in the last fifteen years.<sup>32</sup> Due to the novelty, chief prosecutors, and the CIU attorneys they appoint, must work to define the CIU shape and structure from whole cloth. Nearly every CIU attorney described an adjustment period in establishing protocols.<sup>33</sup> One referred to her CIU as an “ongoing aspiration” and a “work in progress” (Prosecutor 33). Several defense attorneys who had ongoing relationships with a CIU observed the same work-in-progress element of its evolution, or as one innocence organization attorney put it: “They have significant growing pains” (Defense attorney 36).

About half of the defense attorney respondents could share experiences working directly with a CIU (or even multiple CIUs), or in collaboration with prosecutors just prior to the establishment of the CIU. Respondents recognized a qualitative difference in the CIU approach, or at least, a genuine *attempt* to approach innocence claims

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<sup>32</sup> See “Figure 1: Number of Conviction Integrity Units in Operation by Year” in the “Exonerations in 2017” report from the NRE. This figure charts the first CIU in 2003, with a steady incline beginning in 2009. Accessible here:

<https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf>

<sup>33</sup> I describe any respondent prosecutor working in a CIU as a “CIU attorney” or “CIU prosecutor.” However, some of these prosecutors balanced a mixed caseload including more traditional appeals as well.

differently—with a few exceptions. One defense attorney believed that the creation of the unit didn't change much about how the office conducted postconviction business anyway. "I can't believe there's that much difference, they're just calling it integrity" (Defense attorney 2). Two others called out the hypocrisy of district attorneys who they believed had implemented the CIU for publicity purposes. "It's insane... The balls on that guy are unbelievable. I'm like, 'Hey, [DA], we've been fighting with you guys for years on this case'" (Defense attorney 3). Despite these exceptions, many of the other respondents recognized that the CIU represented a new approach for prosecutors in responding to innocence claims. Possibly the clearest statement of praise came from this public defense attorney:

Here, within a relatively short period of time...there were actual innocent people getting out. As much as we say we'd like more to have been done, no other district attorney's office in the state would have done what they did (Defense attorney 12).

Nevertheless, the actual processes described by CIU attorneys did not differ dramatically from those described by other prosecutors. Both groups of prosecutors described building relationships with innocence organization attorneys, readily sharing information with defense, re-interviewing witnesses and defendants, and engaging in extended deliberations as to whether reinvestigations culminated in persuasive evidence of innocence. The qualitative difference between CIU review and a review conducted by other types of prosecutors was characterized more as a matter of mindset than of process. In particular, CIU attorneys and the defense attorneys who worked with them regularly distinguished the CIU approach from the appeals approach.

### *Appellate Divisions*

In different states, and depending on the size of the office, attorneys may refer to the division as “appeals,” “postconviction review,” “PCR,” “habeas,” or “writs.” Respondents often described it as an undesirable assignment. One appellate prosecutor said: “I try to explain to my friends what I do. It’s like ‘so you do what? These are old cases? Who cares about these things?’” (Prosecutor 21). Another confessed, “I was actually hired under the no-whining clause. I had to agree to do appeals without whining for two years without wanting to do trial work” (Prosecutor 32). This common preference for trial work was substantiated when I asked a prosecutor who works in trials whether he had ever worked in appeals, and he responded “No, thank goodness” (Prosecutor 22).

Ten of the prosecutors interviewed did not have a CIU in their office, though some worked in offices large enough to accommodate such a unit. Two of the prosecutors expressed doubts that their office needed any large-scale conviction review because of its strong “history” or “reputation.” Two others believed resources were better allocated towards the front end, preventing false convictions. Three of the prosecutors working in offices where appeals divisions handle their innocence claims believed that these divisions served that function already.

Several prosecutors asserted their faith in their office’s appellate division. However, CIU prosecutors and defense attorneys regularly characterized the work of appellate prosecutors to be at cross purposes with innocence review. When I pressed one of the CIU attorneys to imagine the appeals division in her office playing a larger role in innocence review, she said:

It's a great idea. Is it a realistic idea? Maybe at some point in the future, but I don't think we're going to get there for a long time. Appellate prosecutors are trained so differently...It's almost like this huge cognitive bias.

She added:

People talk in terms of appellate lawyers go in with a presumption that the conviction is valid. They don't go in with a presumption, they go in with absolute confidence...They see a conviction, and there's not going to be, 'Oh, this person may not be guilty.' They're going to say, 'this person is guilty' (Prosecutor 5).

This CIU attorney spent months investigating an innocence claim (for which her office invested considerable resources), only to have the appellate division attorneys nearly succeed in undermining her recommendation that the defendant be exonerated. This experience suggests that prosecutors accustomed to working in appeals approach case review with a fundamentally different mindset. Rather than consider the innocence claim on its merits, they identify procedural reasons to justify rejecting it.<sup>34</sup> Or, in the words of one innocence organization attorney: "procedural landmines that blow up people" (Defense attorney 1).

Prosecutor 5 also suggests that individual appellate prosecutors may experience cognitive bias—an accusation that at least one appellate prosecutor seemed prepared to respond to:

At the end of the day I have the same interest as anybody else does. I don't want the wrong person in jail, nor do I want the actual killer out on the street. So, I mean, I care about my cases and I care about what goes on with them...And at some point, you have more knowledge of the case than a traditional person. Some of my cases, I've been involved for over ten years. I mean, you can't replace that. But, of course, by the same token, somebody could say, 'Oh, you looked at it for ten years, you're jaded by that.' And I would disagree only knowing who I am. I'm not built that way (Prosecutor 21).

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<sup>34</sup> Such reasons often include arguing that the defense attorney could have discovered the evidence of innocence at the time of trial. For more on how this appellate strategy fails innocent defendants, see Brooks et al, 2015 or Scheck 2016.

While this prosecutor believes in his own objectivity, he simultaneously raises the source of his potential bias. Having already reviewed previous versions of the defendant's appeal, he has "more knowledge," but his knowledge stems from having rejected the appeal in the past. The appellate attorney's direct experiences on the case risk biasing him against it. This "status quo bias," in which "people are especially reluctant to second-guess their own choices" is simply human nature (Medwed, 2012, p. 128). Findley and Scott (2006) describe a tendency towards "hindsight bias," and by extension, the "reiteration effect" in the context of appellate processes. In effect, people become more confident in an assertion when it is repeated, becoming more entrenched in their original position. With this context, the appeals process seems almost designed to foster a reiteration effect. By the time most defendants introduce new evidence of innocence, the assertion of their guilt has been pursued, established, and repeated.

Still, this focus on individual cognitive bias risks overlooking the system-level forces at work in appellate prosecutors' decision making. Several CIU attorneys explained the distinction between appeals (or postconviction/ habeas) without value judgment or any insinuation of a deficiency on the part of the appellate prosecutors. One explained: "You don't have a [CIU] actually just kind of being an appellate unit or habeas unit. They need to be distinct to look at different things a little bit more holistically" (Prosecutor 26). Another CIU attorney described the attitude of the appeals division in her office as "how can I make this claim go away, how can I defeat this claim, how can I stand by the conviction?" (Prosecutor 6). A third CIU attorney characterized the work of the postconviction unit saying, "we're there to defend our conviction" (Prosecutor 33). Even some defense attorneys acknowledged the drudgery and daily realities of the

appeals division. For example, one innocence organization attorney explained: “They get thousands of postconviction petitions by prisoners. Most of them are frivolous. They’re trying to find procedural ways to make them go away. That’s the main thing that they do” (Defense attorney 4). These statements raise the possibility that prosecutors who fail to identify factual errors are merely responding to a legal structure that was not designed with this purpose in mind. If appellate prosecutors reject innocence claims as a result of their training and supervision, then that might be more appropriately attributed to professional socialization rather than psychological bias.

The goal of a CIU should be to identify and correct wrongful convictions and, as such, CIUs have been constructed as a safeguard against accident maintenance (Doyle, 2013). These units expressly intend to establish a mechanism for discovering false positive errors. In an appellate unit, the goal is less about discovering errors and more about finding legal arguments to undermine the appeal and maintain the conviction.

Thus far, we have seen that prosecutors in large jurisdictions tend to direct their innocence claim to either a CIU or the appeals division. Most prosecutors from small jurisdictions described different processes. Some referred innocence claims to the original trial prosecutor, or to a supervising felony chief. Some elected district attorneys handled the claims themselves. Others outsourced innocence review to an independent attorney. These options are explored below.

#### *Options for Smaller Jurisdictions*

Neither the size of the office, nor the lack of a CIU, inhibited prosecutors from engaging in the extrajudicial review of innocence claims. In two separate cases, innocence organization attorney respondents experienced their postconviction

collaboration with the prosecutors' office as being "like a CIU." Both were medium-sized offices where the elected district attorney hand-picked prosecutors to lead the review with "fresh eyes" (Defense attorney 8). One of the case reviews was jointly handled by special prosecutors from both the trial and appellate divisions; in the other case, the felony chief conducted the investigation. Both defense attorneys described appreciating the refreshing emphasis on factual, rather than procedural, issues:

They actually were charged with independently reviewing whether this was a valid conviction and really focused on the evidence. He wanted to know, do you think that [the defendant] did it or not? (Defense attorney 8).

Let me say, it's very similar to what conviction integrity units do, right? Because the conviction integrity units, they're not worried as much about whether there are claims of ineffective assistance of counsel. They're saying like, what are our facts? Do the facts portray a potential mistake here? (Defense attorney 1).

These examples suggest that management can promote objective, fact-based analyses of innocence claims outside the context of a standing CIU. Admittedly, these were episodic efforts and should be distinguished from the more dedicated, systematic practices that might be established in a larger office. Prosecutors working in smaller offices may not have the postconviction caseload to justify establishing systematic practices.

In the face of a lack of data about how postconviction innocence claims are directed, some have speculated that they might typically go to the trial attorney (Green and Yaroshefsky, 2008; Medwed, 2012). Therefore, the practice could be more widespread than the offices (2 of 19) described by prosecutors in this sample would suggest.<sup>35</sup> From a management perspective, the advantage of assigning review to the trial

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<sup>35</sup> A sampling bias exists here. Trial prosecutors were intentionally not included in the study in order to protect them from possible civil litigation and also out of confidentiality concerns. None of the prosecutor respondents were personally involved in securing the wrongful conviction that they later helped to overturn. The two prosecutors who reported that innocence claims would typically be reviewed by the

prosecutor is that he will not need as much time to get up to speed on the facts (Medwed, 2012). Also, she may use her existing knowledge of the case to evaluate the credibility of the claim (Green and Yaroshefsky, 2008). The disadvantage of such a practice is that the trial prosecutor has a vested interest in denying that the conviction is flawed.

Five defense attorney respondents related experiences in which the trial prosecutor had been tasked with responding to the claim of innocence. Several others encountered the trial prosecutor on their client's case in various other contexts. Specific problems these defense attorneys faced included: trial attorneys impeding the reinvestigation, biasing the victim against the defendant, defaming the defense attorney, exerting influence to prevent the exoneration, and successfully preventing the exoneration until which time the trial prosecutor left the office. The following statement from an innocence organization attorney summarized the challenges of working with the trial prosecutor on an innocence claim:

It's always incredibly difficult for any prosecutor who personally tried a case to, 10 or 20 years later, even in the face of probative DNA, admit that they prosecuted and convicted the wrong person. It's just like psychologically, there are a lot of reasons why that is the case. In our experience, it's critical to have somebody else take a fresh look and ideally not to have those people too involved in the process. In part because they are witnesses in a way, and in part because they can't be making the decision about whether to throw out their old conviction (Defense attorney 8).

Assigning trial prosecutors to review their own cases may also put them in the precarious position of recognizing and calling out their own misconduct. One of the

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original trial prosecutor (provided the attorney still worked in the office) were not themselves the original trial prosecutors. Even without this intentional exclusion, the representation of original trial attorneys in this sample would likely have been minimal. Recruitment was limited to prosecutors who had been personally involved in an exoneration, not just innocence claim review. If it is true that original trial prosecutors are less likely to identify errors in their own cases, then it follows that most innocence claims directed to trial prosecutors would not culminate in exoneration.

public defense attorneys related his experiences working on a case in which the trial prosecutor he suspected of misconduct was the same one to respond to the claim.

The original trial prosecutor who didn't turn over the Brady material, who made arguments that were not supported by the evidence was the one who was tasked to respond. Now that's, number one, bad practice... You really should not be having the trial prosecutor who worked on the case be the one who responds in the collateral proceeding (Defense attorney 25).

Postconviction innocence claims regularly include allegations of prosecutorial misdeeds, particularly Brady violations. In *Brady v. Maryland* (1963)<sup>36</sup> the US Supreme Court ruled that prosecutors must disclose to the defense any relevant, exculpatory evidence that could be favorable to the defendant. A Brady violation, then, refers to prosecutors' failure to do so. The violation could be the result of intentional misconduct, or it could be the inadvertent oversight of an overworked prosecutor (Gershowitz and Killinger, 2011). Brandon Garrett (2008) reviewed the written judicial decisions of 133 DNA exoneration cases and found that 16, or 21%, of them raised Brady allegations as part of their appeal (p. 96).

Two prosecutor respondents conceded that it may not be possible in a small office to avoid the trial attorney's influence. Yet, the two offices that spoke about directing postconviction innocence claims to the trial prosecutor as a matter of course were not small offices. In fact, the three prosecuting attorney respondents from small jurisdictions all spoke of processes that suggested innocence claims were handled by the elected district attorney, or an appellate prosecutor. Of course, conflicts may arise when the elected district attorney or deputy district attorney formerly prosecuted the case, and this

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<sup>36</sup> *Brady v. Maryland*, 373 US 83, 87 (1963)

scenario may be more common in smaller jurisdictions. Here's one such example, shared by an innocence organization attorney:

We had another case where I think maybe a different prosecutor we would've gotten farther with, but the prosecutor who we have in the case is now second in charge in the office, and he was the trial prosecutor, so he has a thing for our client. We lost (Defense attorney 1).

In general, the practice of directing innocence claims to the trial attorney seemed to inhibit the discovery of false convictions. Nevertheless, trial prosecutors were not always described as hostile to the case review. Defense attorneys reported several anecdotes about amenable trial prosecutors. These anecdotes typically involved postconviction DNA exonerations, in which the defendant had been proven innocent.

In two offices, innocence claims were directed to a supervising prosecutor such as the felony chief of trials. One such prosecutor explained why his office had decided to redirect innocence claims from the original trial prosecutor: "If I did something wrong the first time, to ask me to take a look at it and see if I did anything wrong, I'm probably going to say, 'Well no.' Because I'm making the same mistake I made the first time" (Prosecutor 19). Prosecutor 19 presents a sound alternative to directing innocence claims to the trial prosecutor. As he explained it, the felony chief can review innocence claims as a check on the junior prosecutors working under him, functioning as part of his supervisory and training responsibilities. Moreover, the felony chief will have the authority and autonomy to acknowledge errors and bring them to the attention of the elected district attorney.

For these same reasons, the elected district attorney may choose to review innocence claims herself. The five district attorney respondents had all reviewed innocence claims on an ad hoc basis; two of them did so as a matter of course. One

elected district attorney from a small jurisdiction expressed an open-door policy for defense attorneys on postconviction claims, saying: “If there is a defense attorney that felt our appellate team wasn’t giving them the due diligence they should get, they can always bring it to a supervisor or my attention, too” (Prosecutor 34). A few defense attorneys described jumping the chain of command and taking their claim directly to the elected district attorney. This private defense attorney, who had previous experience working in the prosecutors’ office, describes a careful and conscientious approach.

Again, having worked in the district attorney’s office it is based upon almost a military chain of command. The prosecutors, the trial lawyers are lieutenants. And there are division chiefs, which are captains. Then there are majors who are over things. Then the District Attorney is like go and see the general or the president. Well I am of the belief that if you go over and you want to talk to the District Attorney about every case you have, you're like the little boy who cries wolf. I go to them on cases where I have a good faith, strong basis in doing it, but the other ones I can resolve with the lieutenants and the people in the chain of command. They want us to do that and I respect that (Defense attorney 28).

In this instance, the district attorney had not officially established a policy of personally reviewing postconviction innocence claims, but was apparently willing to do so at the request of a trusted defense attorney.

One elected district attorney expressed misgivings about the prospect of reviewing convictions that had been won by prosecutors under his supervision. His concerns for objectivity shaped his decision in structuring case review practices. He said:

I see some concerns in terms of the bias issue because my office, there's [a small number of] attorneys. Everybody knows each other, respects each other. We function like a big family here, which is all good. The downside to that is if I'm called upon to review a case from somebody that I know personally, I'm going into that review biased. It's a natural thing (Prosecutor 35).

This prosecutor was unique among respondents in his willingness to acknowledge his own potential for bias. He also acknowledged that his decision to outsource innocence

claims, while innovative, was not without its growing pains. Nevertheless, this organizational style provides an alternative for district attorneys in small jurisdictions who might otherwise have to conduct the case review in spite of potential conflicts.

### *How to Negotiate Work Flow*

Management design regarding how to negotiate work flow in the office also impacted the treatment of innocence claims and the feasibility of discovering factual errors. For example, when CIUs are established, postconviction innocence claims are often re-routed from appellate units to the new CIU. In some offices, the CIU is developed as an extension of the appellate division. Two CIU prosecutors said that they continued to handle other types of postconviction claims, such as habeas petitions. The key distinction being that traditional postconviction claims would be processed through the courts, whereas a CIU would also handle claims out of court, working directly with defendants or their counsel. One defense attorney reported that the CIU attorneys in her jurisdiction brought their appellate caseload with them when they transferred to the CIU. A CIU chief described a similar scenario, in which the appellate unit had retained some of their postconviction innocence claims even after the implementation of the CIU. Efficiency interests may compromise the ability to transfer cases from one unit to another or from one attorney to another. However, this difficulty in redirecting cases to the CIU once they had come in through other channels, stymied at least one innocence organization attorney, who said: “I have a case that went to the appeals unit, and they're opposing us. Whereas if it had gone to the new [CIU] we would have a much better chance and opportunity” (Defense attorney 3).

Some attorney responses suggested that how and when a claim arrived could influence the outcome as much as the actual merit of the claim. In the words of one public defense attorney “unless it gets in their little [CIU] they’re still fighting tooth and nail to save those convictions” (Defense attorney 12). One CIU prosecutor worried that defense attorneys with innocence claims might file a habeas petition rather than approach the CIU:

What needs to happen, the way they deal with some of these problems is defense lawyers need to become more educated about how the office works, so they don't file the [motion]. Instead, they come directly to me. If they come directly to me, it's my case. Period. But if they file the [motion], it goes to them, and I have to rely on them to send it to me to look at (Prosecutor 5).

Therefore, in some offices, a case settles into the docket of a specific prosecutor, and it remains there. Work flow between units is hampered by bureaucratic habits. Innocence organization attorneys and others who regularly litigate postconviction claims might strategize exactly where in the prosecutor’s office they want their case to land; pro se defendants filing behind bars are much less likely to be able to predict the best course. In short, decisions about how claims will be routed through the office could make or break a claimant’s chance of success.

### ***How to Make Outcome Decisions***

Executive decisions about the process through which outcome decisions are made may also influence the effectiveness of postconviction review. In most jurisdictions, if the elected district attorney is not conducting the postconviction case review himself, he is likely to be consulted about key developments, and he will almost certainly be the one to make the final decision. One CIU attorney explained:

These decisions, concerning exoneration, are always a big deal. And they usually are going to involve multiple points of view. We've had internal disagreements in cases...and ultimately the DA will then make the decision of what he or she wants to do (Prosecutor 16).

Similarly, each of the 19 offices included in a 2015 study of CIUs reported that their elected district attorney made the final decision in felony cases (Hollway, 2015).

Prosecutors working out of CIUs reported making outcome decisions with a team of attorneys. Typically, this took the form of an extended meeting (or even series of meetings) between the CIU attorney, the elected district attorney, and select members of the executive team. The meeting, termed “DEFCON 5”<sup>37</sup> by one CIU attorney, culminated in a decision about whether or not the prosecution would agree to dismiss the defendant’s conviction or grant some other form of relief. As Prosecutor 16 describes “we've had internal disagreements in cases,” and these could be explored through DEFCON 5.

A CIU prosecutor provided a good example of this process. In this example, the district attorney assembled the entire CIU, the executive staff, a team member specializing in policy, and a team member specializing in ethics:

The district attorney is going to want all the facts, she's going to have questions. Let's say it's an investigation I ran. I'll be sitting there just answering questions, giving my opinion and obviously my recommendation. We don't always agree. You put three adults in a restaurant and they might fight about something. Can you imagine talking about something like this? People have different opinions. What's great is that without doubt...every single time we've had these roundtable discussions, somebody brings up something that...I didn't think about. These discussions are very beneficial...There's a lot of talking that goes on long before these final decisions are made because these are big decisions...It's a lot of thinking, it's a lot of caring. I don't think anyone realizes how much of that's done. (Prosecutor 27)

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<sup>37</sup> DEFCON 5 refers to “DEFense readiness CONdition,” a system employed in the military to determine levels of alertness. Five is the least severe, before strengthening security measures.

The complexity of the decision is evident in this CIU prosecutor's account. As exonerations increasingly hinge on non-DNA evidence, such as witness recantations, confessions of alternate suspects, and less probative forms of forensic evidence, the prosecutors' decision to dismiss the conviction will require more deliberation, and possibly, the diverse expertise of multiple team members.

Occasionally, management chooses to invite the defense attorney, though only three defense attorney respondents from this sample described attending a meeting at which an outcome decision was expected to be made. One invited innocence organization attorney described how a DEFCON 5 decision was resolved with little debate. "The DA was just super receptive to it...it was pretty much everybody on the same page as far as we're going to agree to this" (Defense attorney 3). Notably, the only prosecutor who was not "on the same page" at this meeting, was the original trial prosecutor. In the defense attorney's words "she was very adamant that she had not gotten the wrong guy."

Several CIU prosecutors' spoke about how disagreements over cases could lead to office discord. These prosecutors feared that their recommendation for relief would not survive the dissent within the ranks. Such fears may be well founded when trial and/or appellate prosecutors are invited to participate in the outcome decision. Even trial and appellate prosecutors who had not been involved in the case review or the investigation were sometimes invited to the DEFCON 5 meeting. A couple of prosecutors reported that the original trial prosecutor would typically be invited to the final decision meeting. "They'll be asked to assess our investigation and the new information that was obtained and what should be done with the conviction" (Prosecutor 26). Team meetings may put the CIU attorney in the unfortunate position of trying to persuade the trial prosecutor, for

example, that the weight of the evidence points to innocence.

Respondents' descriptions of the office structure and inter-office communication illustrate how management decisions shape the treatment and outcome of postconviction innocence claims. Every one of the prosecutors' offices described here did, ultimately, contribute to an exoneration. However, some workplace organizational structures enabled more sustainable and reliable innocence review than others. Workplace policies that aimed to achieve objectivity and that emphasized factual, rather than procedural, issues in case review were preferred by defense attorney respondents and many prosecutors as well. Organizational processes that involved either appellate or trial prosecutors in case review (whether leading the review or participating in final decision making) were more likely to be criticized.

#### THE ATTORNEY: INDIVIDUAL DECISIONS

In the prosecutor's office, the hierarchy begins with the "line attorney." An innocence organization respondent explained the position:

Not a supervisor, not the elected person, but someone who's on the front lines doing the cases. When you look at a legal brief, usually if you see a bunch of names on it, the top person is the highest in the office hierarchy, the bottom person is the one who actually did the work, that's usually the line attorney (Defense attorney 4).

The limited discretion of the line prosecutor emerged as a common theme across interviews, and even during the recruitment process for this study. A couple of prosecutors I reached out to suggested interest but told me that they would need to clear it with their boss first, or "run it up the chain." I never heard from them again. Several other prosecutors were effectively unreachable except through the press office. If the press

office declined the interview, it was difficult to know whether the prosecutor had participated in the decision, or not. None of the defense attorney respondents—whether innocence organization attorneys, public defenders, or private attorneys—mentioned needing to check with their boss first and none redirected me to their press office.<sup>38</sup> This need to obtain approval may contribute to the low response rate of prosecutors (49%) as compared to defense attorneys (86%). Of the 19 prosecuting attorney respondents interviewed, 10 were assistant district attorneys who made recommendations about a case for her superiors to decide, four were veterans reporting directly to the elected district attorney, and five described experiences as the elected district attorney.

An appellate prosecutor from a medium-sized jurisdiction described the process of going up “the chain of command” when she reported a colleague’s misconduct. This experienced, career prosecutor was still separated from the district attorney by at least three degrees. In her own words: “Letting somebody out of prison is not something a line prosecutor has the power to do” (Prosecutor 32). A less well-established prosecutor may not have had the confidence to report this misconduct, or the standing to be taken seriously.

Defense attorney respondents usually characterized the limited discretion of the line prosecutor as a hindrance that caused delays in case resolution and complicated communication with the district attorneys’ office. The following comments are representative:

Line prosecutors...don’t get to make decisions. They’re down here, and someone above them has to approve it, so they may want to do the right thing. They just

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<sup>38</sup> Admittedly, I knew some of these defense attorneys through professional relationships forged in my former position at the Innocence Project. Nevertheless, like prosecutor respondents, the majority of defense attorney respondents were recruited without any previous contact or referral.

don't have the authority to do it.... They're not going to tank the prosecution because then they'll get fired (Defense attorney 12).

It's not even him...he has to report to even more higher ups. That's even more problematic because he may actually see the merits in the cases, but he's constantly trying to figure out how he's going to defend his action of 'letting somebody go,' is the way they see it, to his higher ups (Defense attorney 36).

You know sometimes you just have to...in this business, you just have to recognize that you're dealing with a person who has no authority to make a decision, and there's nothing to be gained by trying to get mad at them or put them in a spot (Defense Attorney 31).

A rigidly hierarchical structure may stifle the discovery of errors. Aviation industry practices of “crew resource management” empowers subordinates to come forward when they discover something amiss.<sup>39</sup> According to this model, when the hierarchy is too rigid, junior prosecutors can be afraid to come forward or to argue with a resistant boss, thus perpetuating the error. Institutional structure and lack of job security may make junior prosecutors especially wary. As one defense attorney explained:

The associate DA's that you're going to deal with are very fearful of the elected DA and they don't want to cross them.... You're never going to deal with the elected DA on any of these cases. You're always going to be down there with the associates. Their job is at the whim of the elected DA whether they're going to keep their job or not (Defense attorney 2).

Or, from the perspective of a senior, supervising prosecutor:

We're not protected by any personnel act here, we work exclusively at the will of the elected DA, so when a new person gets elected, if he doesn't like you, as long as it's not because of your race, color, religion or national origin, he can fire you. So that happens sometimes when we get a new elected person (Prosecutor 19).

If prosecutors' jobs are most vulnerable during regime change, then maintaining the status quo works to the benefit of every prosecutor in the office—except perhaps a

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<sup>39</sup> See, Dr. Geza Bodor featured on “The Aviation-Medicine Connection.” The Best of Our Knowledge #1354. Available at: <http://wamc.org/post/1354-aviation-medicine-connection>

disgruntled one. Line attorneys rest at the bottom of the hierarchy, but even experienced prosecutors in supervisory positions work in an environment of limited job security. Although every prosecutor in this sample worked in an office that cooperated with at least one exoneration, some spoke more favorably about the management than others. Defense attorneys also split in terms of the credit that they gave to the management in agreeing to relief for their client. In short, some exonerations were produced *because of* the leadership, and others came about *in spite of* the leadership.

While the level of autonomy varied from office to office, assistant district attorneys invariably made important decisions in their postconviction work such as how to select and process cases, i.e. sorting, reviewing, and occasionally investigating. In these areas, the line prosecutor's discretion is perceptible. Assistant district attorneys make many more decisions than can be enumerated here. Discussion is therefore limited to the decisions that best inform how prosecutors decide to pursue postconviction innocence claims.

### *Selecting Cases*

CIU prosecutors described limiting case review in various ways, including: cases must have gone to trial; cases must involve serious, violent felonies; defendants must still be in custody; defendants must be represented by counsel; and, cases must have no other pending appeal. Four CIUs (out of the nine) described intake processes suggesting that innocence claim would be accepted and given, at least, a cursory review. Some non-CIU prosecutors described rather subjective case criteria, for example, "case-by-case basis," (Prosecutor 34); or, cases that had passed the smell test (Prosecutor 19, "smell is obviously not a legal term"). Others had set specific parameters for postconviction

innocence review, such as cases must be “outcome determinative” if tested forensically or by polygraph, (Prosecutor 9); or, cases must be pre-screened by the innocence organization (Prosecutor 18). Though executive-level decisions may have determined case selection criteria, the responsibility for the implementation of the criteria usually fell to subordinates.

For example, all prosecuting attorney respondents provided examples of cases that could be quickly screened out including: requests for assistance with a conviction outside the jurisdiction; requests for a sentence reduction rather than an innocence investigation; or, as one CIU prosecutor lamented, “Sometimes you can’t even make any sense out of what they’re saying” (Prosecutor 5). Innocence claims came from a variety of sources: prisoners and parolees, family members and other advocates, attorneys, judges, and reporters. A few prosecutors also reviewed cases for forensic error or police misconduct in the wake of a scandal.

Prosecutors expressed the strong belief that every claimant should be provided with equal access to postconviction review. Several prosecutors related efforts that they had taken on behalf of pro se claimants that had fizzled out. Several others independently helped exonerate pro se defendants (two of these were responses to postconviction DNA testing requests). However, many respondent prosecutors expressed great skepticism about pro se innocence claims: “Unfortunately, everyone claims they didn't do it” (Prosecutor 21); “The vast majority of these claims are filed pro se by defendants, and they have absolutely no merit to them” (Prosecutor 19); “When I say merit, I mean it's not a laughably ridiculous position” (Prosecutor 32).

CIU descriptions of intake processes revealed the logistical challenges of pursuing pro se claims. Despite the large number of requests from prisoners claiming innocence, respondents reported that few of them followed up after their initial inquiry. When pro se claimants did respond, the process was still inevitably delayed due to the lagged communication. In theory, all claims were treated fairly; in practice, some claims could be handled more readily than others.

Compare the challenges prosecutors described with pro se claims to the relative ease they experienced when receiving innocence organization cases. Ten respondents (both defense attorneys and prosecutors) said that the defense had presented their case to prosecutors in person. Most often, the defense team came to the prosecutors' office to "pitch the case" (Prosecutor 5) rather than defense hosting prosecutors. At this pitch meeting, defense could identify credible, potential errors in the case, they could share results of their initial reinvestigation, and they could answer questions on the spot. Such opportunities are simply not available to defendants and their family members. The distinction is made clear in this private defense attorney's description of his presentation to prosecutors:

Prosecutors are going to think that every defendant is going to profess and claim his innocence over and over again. If it were just based upon [the defendant] coming back and saying 'yeah, I didn't do this and somebody else did it.' But again, this was a lot of detective work. When you lay all this out to them, showed them the pictures...and laid this out in a cognitive, organized, objective analysis. They came pretty quickly to the conclusion that this needed to be undone (Defense attorney 28).

CIUs receiving a large volume of postconviction innocence claims spoke of a "triage" system in which innocence organization and defense attorney claims took priority over pro se claims.

Part of me when I first started is like, 'I'm going to look at every single case and I'm going to give everyone the same kind of consideration.' You really can't do that just because the resources aren't available and you have to learn how to triage the cases...I still think it's kind of unfair that just because someone has an attorney that maybe their cases jump to the front of the line. We used to do things as they came in, but then we had to triage things more because we had so much coming in, we have to look at the ones...where we might be doing something on the case, giving relief (Prosecutor 27).

Triage is, as everyone who has ever visited a hospital's emergency room knows, a medical term referring to how medical professionals organize care according to the level of urgency of the patients' need. Boehm (2014) suggests that prosecutors take up the triage approach by handling claims from those with the most serious offenses or the longest sentences first. By prioritizing claims from innocence organizations and postconviction defense attorneys, this is not quite what prosecutors are doing. Although innocence organizations tend to themselves prioritize serious convictions with lengthy sentences, not every case with this urgent level of need will be accepted by the innocence organization. Moreover, some innocence organizations struggle to make ends meet through grants and private donations (Medwed, 2012). Some states do not have a resident innocence organization, or the one that they have can barely meet the demand without a growing backlog. Innocence organizations cannot always be depended upon as a fail-safe for innocent defendants, and private attorney fees are out of reach for most defendants. In sum, the potential hole in the screen lies in how the level of urgency is assessed, not necessarily with the triage approach.

Two veteran prosecutors acknowledged that defendants they helped exonerate had been writing to their office for years prior to any substantial case review. One said, "[he] had been writing to me for, oh my god, 20 years. I'm innocent. I'm innocent. All this

stuff. He had a whole slew of defense attorneys...anyway, I took the case” (Prosecutor 17). Another described the defendant as “a fairly active pro se litigant...I actually recognized his name just because he filed lots of papers” (Prosecutor 9). In both instances, it seemed to require years (if not decades) of claiming innocence before the prosecutor felt compelled to act. A less persistent defendant, especially one with a shorter sentence, might have been overlooked entirely.

Similarly, one CIU prosecutor defined the work of her unit as a “last resort.” She explained:

If all else fails, you've got the [CIU]. That's really where I see us going at this point is that we are really a last resort option. Because if you think about it, if you follow a postconviction, that's adversarial. We're there to defend our conviction. It's adversarial by nature. Not everything can be resolved outside of the courtroom. However, let's say that the information or the evidence that you have doesn't fit squarely in that postconviction arena, as in maybe you've already had your postconviction. Maybe your attorney, while their performance wasn't something that was super star worthy, you're not entitled to the best defense possible (Prosecutor 33).

By the time this defendant's attorneys approached the CIU, he had exhausted his appeals. He had filed a postconviction petition, and it was denied. Once he reached the CIU, and with the help of an innocence organization, his case received the extraordinary amount of attention it deserved. By then, many years had passed since his initial wrongful conviction and failed appeals.

For this prosecutor, every stage prior to innocence review initiates an adversarial response. Therefore, innocence cases are those that do not “fit squarely in that postconviction arena.” What *does* fit squarely in the postconviction arena? Prosecutor 33 provided a clue in the reference to ineffective assistance of counsel claims. Postconviction appeals often involve ineffective assistance of counsel and Brady

allegations since these types of claims are rarely available to petitioners on direct appeal. Therefore, prosecutors engaged in postconviction innocence review may reflexively perceive these types of traditional postconviction claims as falling into the appellate/postconviction/ habeas bucket rather than the actual innocence bucket. Empirical support for this theory comes in the finding that prosecutors are less likely to assist with exoneration when wrongful conviction cases involve inadequate legal defense or law enforcement or forensic misconduct (see chapter 4; Webster, 2017). Unfortunately, ineffective assistance of counsel and prosecutorial misconduct are quite prevalent in wrongful conviction cases. Defendants can, of course, be factually innocent *and also* have a bad defense lawyer at trial. These two categories are not mutually exclusive.

Nevertheless, the prosecutor conducting postconviction review must establish case selection criteria that balances the task of discovering past mistakes with the need to avoid creating new ones. The prosecutor reviewing postconviction claims should not assume that false convictions have been detected through previous screens, but they cannot start challenging sound convictions either. The tension lies in identifying false positives without creating false negatives. A CIU prosecutor explained:

If you have new and credible evidence that the jury didn't hear when they were rendering their decision, then you have a legitimate basis to look at a conviction. If you don't have anything new, and you don't have anything credible and you're just reviewing convictions, then you're nothing more than a 13<sup>th</sup> juror...and why is your analysis any better than the original DA, original defense attorney, original judge, or original appellate court, or original judge that saw a habeas evidentiary hearing? You're outside the realm of the criminal justice system. I don't like that (Prosecutor 26).

As this statement suggests, even prosecutors who approached discovering errors as part of their job description recognized the danger of becoming overzealous in this pursuit. Several prosecutors raised the specter of the "13<sup>th</sup> juror" as a cautionary character. These

prosecutors viewed their discretion as endowed within the confines of the legal structure and endeavored not to step outside of it.

In summary, the individual prosecutor's discretion to identify and correct false convictions is constrained by the district attorney administration as well as the larger legal structure. Defense attorney respondents often framed her lack of discretion as a hindrance. Some respondents would have preferred to work directly with the district attorney, while others believed that the junior prosecutor was stymied by interventions from her superiors. Though most decisions regarding the treatment of postconviction innocence claims were described as outside of her control, she does have the power of first refusal in many cases. Still, her decisions in selecting these cases cannot be understood without the context of the appellate structure, specifically, the lack of representation for postconviction claimants leading to a profusion of pro se claims, and the emphasis on cases outside of the postconviction arena. These structures may impede her ability to act as an effective final safeguard.

## CONCLUSIONS

Prosecutors conducting wrongful conviction case review, or establishing structures for others to conduct such reviews, do so in the context of a system that prioritizes procedural errors over factual ones and that fails to clearly articulate the parameters of prosecutors' postconviction discretion. While prosecutors may recognize their ethical responsibility to correct wrongful convictions in principle (and certainly all the prosecuting attorney respondents in this study did), they operate within an appellate system that allows for a narrow and belated discovery of factual errors.

The influence of this system can be observed in respondents' remarks about appellate prosecutors, in the challenges they experienced with pro se defendants relative to defendants represented by counsel, and in the restrictions on case selection criteria. Many of the respondent prosecutors, and some of the defense attorneys as well, describe a viable innocence claim as one that has transcended the traditional appellate trajectory. Prosecutors separate the role of appeals (as adversarial) from the role of reviewing innocence claims (as quasi-judicial). However, it is almost always true that the innocence claimant is simply a defendant who has exhausted his appeals. If the system provided for earlier recognition of factual errors, prosecutors may utilize their authority, subpoena power, investigative tools, and relationship to law enforcement, to correct false convictions in the course of appellate review.

Of all the decisions district attorneys make about postconviction innocence review, deciding where to direct claims appeared to be the most influential. Routing postconviction innocence claims to the appellate division would seem to be a logical course for offices that lack a CIU. Appellate prosecutors might have an advantage through their knowledge of the relevant case law and their experience with the judicial review process. Appellate attorneys may more readily identify common, underlying problems across petitions, including bad actors or bad procedures. They may have a greater awareness of persistent defendants who steadfastly maintain innocence. They may signal problem cases sooner, reducing the delay between wrongful conviction and exoneration.

Yet, respondents' remarks do not support these assertions. Rather, many respondents suggested that the appellate prosecutor may be limited in their outlook

through their professional focus on procedural errors and biased through their personal familiarity with individual appellants. CIU attorneys argue that they serve a distinct function that is not met through traditional postconviction review. It is for this reason that the Quattrone Center report issuing recommendations for CIU best practices suggests maintaining separation from the appeals division (Hollway, 2015, p. 24). It follows that *any* office seeking to remedy wrongful convictions should establish a system separate from appeals or else devote resources to training appellate attorneys how to recognize and investigate factual errors.

Outsourcing innocence claims to independent, external reviewers has been recommended as a solution for small jurisdictions (Hollway, 2015; Scheck 2016). One of the prosecuting attorney respondents has implemented the practice. External review could help foster a legal culture in which the goal of postconviction innocence review is to identify factual errors, rather than to expedite case disposal (as when management directs innocence claims to the trial prosecutor), or to maintain the conviction (as when management directs innocence claims to the appeals division). One potential downside is that external reviewers may tend to overly specialize, reviewing only innocence claims in violent offenses, or only those brought by innocence organizations. The project of outsourcing may discourage referral of the types of claims most routinely received. Still, this practice could offer a viable means of incorporating innocence review in small jurisdictions, where the risk of bias is, arguably, most acute.

Overall, respondents reported that the most successful processes were those operating outside the appellate structure. The prosecutors' efficacy in discovering false convictions appeared to depend on their ability and willingness to innovate. Many

prosecutors from this sample lead the way. CIUs have been recognized for their potential to act as a final safeguard. Several other offices without CIUs described similar processes. Whether the case review was conducted by the district attorney, the felony chief prosecutor, or external reviewers, prosecutors from small and medium jurisdictions are replicating the CIU model on a case-by-case basis. Nevertheless, as helpful as these processes appeared to be for identifying errors in extraordinary cases, they could not be said to provide a uniform solution for innocent defendants. Postconviction innocence claimants most likely to be overlooked include those wrongfully convicted of non-violent offenses, serving shorter sentences, and seeking relief through common appellate remedies such as ineffective assistance of counsel. Such defendants are also less likely to attract pro bono assistance from innocence organizations. If they receive relief through the appellate process, it will be based on procedural grounds, not actual innocence.

In closing, this analysis has demonstrated how multiple decision makers determine prosecutors' ability to identify and rectify wrongful convictions. The postconviction stage, though often overlooked, serves a critical function in criminal justice system processing as the final safeguard before wrongful convictions escape correction. Even among this sample, which only explores processes that have culminated in exoneration, respondents described larger systems that would fail to reliably and consistently aid in the discovery of factual errors. While individual prosecutors can, and do, play an important role in discovering erroneous convictions, individual decisions carry less weight than workplace policies and legal structures. As organizational accident theory suggests, we must look beyond the individual to organizational influences in order to propose solutions. Therefore, this analysis of how decision making on several levels

influences the postconviction discovery of factual errors can provide valuable context for informing policy recommendations.

## CHAPTER 6: THE RIGHT (AND WRONG) REASONS TO DO THE RIGHT THING: WHY PROSECUTORS ASSIST WITH EXONERATION

Apart from Eisenstein and Jacob (1977), social science theories of prosecutorial discretion tend to overlook the possibility that prosecutors act out of a desire to “do justice.” For the purposes of the present study, prosecutors’ normative motivations to fulfill the duty of their calling as reflected in *Berger* must not be overlooked. Each of the prosecutors in this sample acted on behalf of a wrongfully convicted defendant and each expressed an interest in doing justice for justice’ sake. More specifically, prosecutors spoke of assisting with an exoneration case because “it was the right thing to do.”

Prosecutors duty to do justice can be understood in either quasi-judicial or adversarial terms. As adversaries, prosecutors seek punishment for the guilty. They win convictions, and in the postconviction stage, uphold the finality of those convictions. The quasi-judicial role is less easily defined. It has not been clearly articulated (Fisher, 1988), nor sufficiently enforced by the courts (Gershman, 2010). Discussion of quasi-judicial values typically “begins with broad platitudes and ends with an idealized notion of the prosecutor’s character” (Fisher, 1988, p. 220). Put simply, the quasi-judicial role requires prosecutors to “govern impartially.”<sup>40</sup> In light of these competing and even incompatible roles, the question becomes: The right thing according to whom? The quasi-judge, or the adversary?

When defense attorneys spoke of prosecutors doing the right thing, they generally meant agreeing to relief, or otherwise assisting their defendant. For prosecutors, doing the right thing must mean more than simply facilitating defense requests. Rather, prosecutors spoke of “doing the right thing for the right reasons.” Consistent with their duty to seek

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<sup>40</sup> See, *Berger v. United States*, 295 U.S. 78, 88 (1935)

justice, prosecutors enumerated “the right reasons” as acknowledging errors and protecting the public. These normative motivations were raised by respondents as obvious and self-explanatory. They explained their assistance with the exoneration by appealing to the values intrinsic to their chosen profession. In addition, some prosecutors alluded to what they considered the *wrong* reasons: appeasing innocence organizations, pandering to the media, or seeking professional and political benefit.

Defense attorney respondents often suspected that instrumental incentives also played a role in the prosecution’s decision to join them in seeking relief for their clients. They highlighted prosecutors’ underlying interests in saving face and framing the narrative about the exoneration. These types of incentives suggest prosecutors’ intentions may extend beyond the simple duty to do justice.<sup>41</sup> Prosecuting attorney respondents, answering questions about their own motivations and processes, likely felt a greater impulse to provide socially desirable responses than did defense attorneys. Therefore, interviews with defense attorneys enable a fuller understanding of prosecutors’ postconviction behavior.

In this chapter, I explore prosecutors’ motivations for assisting with exoneration cases by contrasting the responses of 19 prosecutors with 19 defense attorneys. I begin by further developing the contrast between the prosecutors’ two roles—using prosecutors’ own statements to examine the tension between doing justice postconviction as an adversary and/or as a quasi-judge. Then, I explore prosecutors’ normative values

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<sup>41</sup> In the interest of expanding the sample of cases and jurisdictions, I did not directly compare defense attorney and prosecutors’ perceptions about the same case. Rather, I analyze variations in how defense attorneys and prosecutors perceive prosecutor’s motivations to assist with exoneration more generally. All attorney respondents were asked about their general perceptions and experiences and some were asked about experiences working on a specific exoneration. Twenty-seven cases were discussed in detail.

undergirding the “right reasons” to facilitate or advocate for exoneration; and relatedly, I evaluate what they perceived as the wrong reasons. Finally, I present defense attorneys’ perspectives of why prosecutors assist and discuss implications.

#### BALANCING QUASI-JUDICIAL AND ADVERSARIAL ROLES POSTCONVICTION

You want to be accurate, you always want to keep an open mind and make sure that you're being accurate. On the other hand, endlessly opening up cases over and over again is really bad public policy. It's bad for the community, it's bad for victims, and it doesn't necessarily improve the quality of justice (Prosecutor 18).

The felony chief quoted above describes postconviction review as manifesting a “tension” between finality and accuracy. Accuracy requires “an open mind,” and a quasi-judicial stance, while upholding the finality of convictions requires an adversarial stance. In the postconviction arena, these competing values establish a useful framework for understanding how prosecutors operationalize their adversarial and quasi-judicial roles.

Early stages of case processing may require prosecutors to adopt a quasi-judicial posture, but once a prosecutor has decided whether and how to charge, she may zealously pursue conviction as an adversary (Fisher, 1988). After sentencing, prosecutors may be particularly reluctant to re-engage as a quasi-judge. Although the postconviction stage provides an opportunity to exercise quasi-judicial values through reviewing cases and collaborating with the defense, it is far from clear that the average prosecutor welcomes this opportunity. Rather, prosecutors tend to assume that cases are final after the direct appeal (Levenson, 2013). While there is an important role for finality in the system, some prosecutors have invoked it as a justification against reconsidering convictions even

when probative postconviction DNA testing could be performed (Scheck, 2016). This is a circular argument to say that cases should be finalized because they are final.

Therefore, it is helpful to know *why* prosecutors value finality. A handful of prosecutor respondents in this sample spoke to the issue directly. Most often, they invoked finality as a matter of protecting victims and witnesses (“you want victims of crime to have finality,” Prosecutor 23). Prosecutors’ greater contact with victims at earlier stages of case processing may foster an adversarial tendency to prioritize victims’ interests over defendants in the postconviction stage as well. In the words of one senior prosecutor:

What seems to be lost oftentimes is that there is a victim somewhere...This constant reopening a case and filing motions, and claiming that someone else might have done it...I think we have to take their [the victim’s] thoughts and their concerns more into consideration (Prosecutor 17).

A prosecutor working in the appeals department of his office raised finality as a matter of resource allocation, saying: “I have a couple hundred cases assigned to me at any given time...there has to be some finality in the system” (Prosecutor 21). Other prosecutors feared that reviewing frivolous postconviction claims consumes resources that could be better applied to preventing erroneous prosecution at the outset.

Nevertheless, these same prosecutors who invoked finality also spoke of conducting quasi-judicial, fact-based reviews of innocence claims. For example:

Regardless of the type of claim, whether you think it has merit or not, you got to spend the time to investigate the claim yourself. I get that there is sometimes a reluctance to look at things again, but you have to pick it out and look at it, and make your own call (Prosecutor 23).

Whether you like the facts or don't like the facts, you have to find out what the truth is (Prosecutor 16).

Stop being an advocate and just think (Prosecutor 27).

These prosecutors devoted considerable time and resources to investigating the merits of an innocence claim, which, in the interests of finality, they may have resisted examining altogether.

Therefore, prosecutor respondents described postconviction processes as requiring both adversarial and quasi-judicial responses. While some invoked values—like finality—that align better with an adversarial stance, they also acknowledged the role for quasi-judicial review in promoting accuracy. In what follows, prosecutors describe their motivations for agreeing to exoneration in select cases. These quasi-judicial motivations are best understood within the larger context of this balance or “tension” between prosecutors’ two distinct roles. Rather than imagine that prosecutors exercise one or the other roles depending upon the stage of criminal justice system processing, we should instead perceive these two roles operating simultaneously.

## THE RIGHT REASONS

The 19 prosecutors interviewed for this study come from a wide variety of different jurisdictions across the United States with diverse demographics, political leanings, crime rates, and population sizes. Postconviction experiences and practices varied a great deal from one jurisdiction to the next. The type of supportive actions that prosecutors took in the cases also varied, as did the strength of the evidence of innocence. Others responded to a defense or media investigation, joining an effort already underway. The diversity of the sample challenges attempts to generalize.

The strongest theme to emerge was prosecutors’ stated interest in “doing justice” and “the right thing.” In this regard, prosecutors’ explanations for why they acted on the

defendant's behalf were remarkably similar. Readers who study and work with prosecutors (not to mention prosecutors themselves), will not find this in the least bit surprising. As John Pfaff (2017) writes: "Talk to any prosecutor, and he or she will tell you that the goal is to 'do justice'" (p. 54). Yet, our knowledge of how prosecutors interpret, define, and enact "justice" is limited. Speaking about doing justice in wrongful conviction cases, prosecutors invoked normative motivations including acknowledging errors and protecting the public.

### *Acknowledging Errors*

As discussed in Chapter 5, prosecutors are accustomed to scrutinizing criminal justice system processes for procedural errors. Recognizing and acknowledging the potential for factual errors, in which innocent people have been wrongfully convicted, is another matter. Some prosecuting attorney respondents expressed greater acceptance of the notion of system fallibility than others. Idealized notions of a virtuous prosecutor appeared in a few prosecutors' responses. A veteran prosecutor who described himself as a "purist" explained:

If you are a prosecutor, you believe in truth and justice. You believe that, you know, you want the right person in prison. You want to do everything you can to get some wrongfully convicted person out... You want to seek justice. You know when you have to do that. You know when it requires it to be done (Prosecutor 17).

This prosecutor invokes the "minister-of-justice" role by speaking not only for himself, but for all prosecutors. In this familiar characterization, the prosecutor is "the community savior, but also the community representative of morality, the embodiment of doing the right thing" (Levine and Wright, 2017, p. 44). In short, the prosecutor does the right thing because she is righteous. The characterization appears flawed in the context of a

discussion about wrongful convictions, however, since it seems to suggest system infallibility—at least on the part of the prosecution.

Most respondents did not take such a lofty view. Though they invoked the goal of doing justice, they were more likely to describe it as an obligation to acknowledge and correct mistakes. These prosecutors acknowledged not only system fallibility, but also the potential for prosecutor error specifically. As one CIU prosecutor explained “It's all about making sure we did it right. If we didn't, accepting responsibilities and making it right. That's it” (Prosecutor 27). Another CIU prosecutor described how his office is adjusting to the reality that mistakes have been made:

We found cases that we, my office, made mistakes on, and as a [CIU] we investigated those cases and made recommendations to vacate the conviction, release the inmates, and find those people factually innocent. That is a new concept that hasn't existed in my office before (Prosecutor 26).

This CIU prosecutor's statement reveals the lingering resistance of his colleagues.

Prosecutor 26 and 27 are both CIU prosecutors who might be especially receptive to the shifting winds of the profession. Yet, their sentiments were also echoed by the other types of prosecutors in the sample, including this elected district attorney: “Since we're all ... human beings, there are mistakes made. So, prosecutors that say, ‘We don't make mistakes,’ they are just wrong. The system, because we're all human, makes mistakes” (Prosecutor 9). Another elected prosecutor expressed a sense of professional responsibility for the error, though he was not involved in the wrongful conviction.

If you've been on the other side of one of these [wrongful convictions] though, and you have to concede that your jurisdiction has been detaining or was responsible for the detention of an innocent person for a very long period of time, it tends to humble you and make you come to terms with your fallibility (Prosecutor 20).

For most of the prosecuting attorney respondents, therefore, recognizing and

correcting mistakes contributed to their perception of what it means to do justice. In this, they may stand apart from the average prosecutor who has never been involved in an exoneration. Nevertheless, as we will see, prosecutors acknowledging errors as “mistakes” should be distinguished from prosecutors acknowledging errors as misconduct.

### *Protecting the Public*

About half of the respondent prosecutors framed their postconviction duty to do justice as a public safety issue. While protecting the public may include consideration for the protection of the defendant against the hazards of wrongful incarceration, prosecutors did not express it in these terms. Instead, they invoked a real perpetrator figure who had escaped justice. The following quotes are representative:

I don't want to get the wrong guy. Most people I know don't want to get the wrong guy. If you get the wrong guy, the right guy is still out there (Prosecutor 22).

You want [the truth] that supports the criminal justice system, which is fair and balanced prosecutions, where the right person's in custody and/or convicted or punished and deters others, and the wrong person is not on the street (Prosecutor 27).

That's what we're all about, making sure the right guy is in jail for the right crime (Prosecutor 9).

As these quotes demonstrate, prosecutors' representation of doing justice often failed to include explicit consideration of the defendant, or of what the defendant endured as a result of the wrongful conviction. The problem with “getting the wrong guy” is that the “right guy” will remain at large. Left unsaid: the “wrong guy” will also be unjustly and unnecessarily subjected to punishment. Similarly, Prosecutor 27 raises the issue of general deterrence as a matter of public safety. When the right person is “in custody” and “not on the street” then the public will be deterred from crime. Left unsaid: the injustice

done to the wrongfully convicted defendant also hurts the community by damaging public trust in the criminal justice system.

Prosecutors conceptualized their public safety goal in the interests of apprehending and prosecuting the real perpetrator. However, such efforts are often complicated in exoneration cases by statutes of limitations or the death of the suspect (Irazola et al, 2013). Sometimes, the exoneration hinges on a finding that no crime was committed at all. In short, it is not possible or necessary to bring charges against an alternate suspect in any number of exoneration cases.

By overlooking the defendant, prosecutors may ignore the harms that he suffered due to the wrongful conviction, but they also accept the harms that the community might suffer should he become criminally active upon release. In 24 of the 27 cases described by prosecutors and defense attorney respondents, defendants had a criminal history prior to the wrongful conviction including four who had violent criminal convictions.<sup>42</sup> A defendant's prior criminal activities may have created some concern for public safety upon his release. While the fact that a defendant had a criminal history did not appear to deter prosecutors from assisting, the defendant's criminal history may have impacted prosecutors' perception of the degree of harm he suffered. In two cases, defendants were suspected or convicted of a violent offense after exoneration.

In sum, prosecutors' responses suggest that they assist in overturning wrongful convictions because they become convinced that it is the right thing to do: to

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<sup>42</sup> Defendant's criminal history was assessed by asking the attorney respondent and by consulting NRE case profiles and news reports. Some, but not all, narrative accounts of the exoneration case include information revealing criminal charges or convictions. The incomplete information prevented me from including criminal history as a variable in the quantitative models. Defendants were counted as having a criminal history for both arrests and convictions since prosecutors making the decision about lending assistance in the exoneration case would have access to this information.

acknowledge errors and protect the public. Doing justice in the postconviction stage was rarely described in terms of defendant's rights. As one would expect, prosecutors present their motivations in normative terms. Still, it is illustrative to observe which norms they choose to emphasize. Acknowledging errors promotes accuracy, and a quasi-judicial stance, while protecting the public provides an opportunity to re-engage as an adversary. Prosecuting the real perpetrator will bring the victim closure, and is therefore an acceptable tradeoff for reopening an otherwise closed case. As such, prosecutors invoked both adversarial and quasi-judicial values in their discussion of "the right reasons" for doing postconviction justice.

#### THE WRONG REASONS

The notion of "doing the right thing for the right reason" raises the question: what might be the *wrong* reason to do the right thing? Some prosecutors suggested at answers by distancing themselves from influences that they perceived to pose a risk to their independence and objectivity in decision making. In his "search of the virtuous prosecutor," Stanley Fisher (1988) employs the concept of "moral autonomy" to describe one aspect of the prosecutor's duty to moral values and reasoning (p. 239). According to the principle of moral autonomy, Fisher writes, prosecutors should make their own assessments (though this may occur after consulting others) and then act upon them consistently (ibid). In an adversarial system, moral autonomy requires that prosecutors not be unduly influenced by opposing counsel, the defendant, the victim, or any other actor or factor. As prosecutors described their postconviction decision making and relationships to others, they repeatedly asserted their moral autonomy.

In the postconviction stage, prosecutors are invited to “cross the great adversarial divide” and collaborate with their counterparts on the defense side (Levenson, 2016, p. 372). Yet, this element of postconviction stage processing seemed to oblige some prosecuting attorney respondents to clarify the boundaries around these collaborations. As one felony chief who works regularly with an innocence organization explained, “We try not to fight about stuff needlessly; on the other hand, we don’t want to open up old cases just to make the [innocence organization] feel good either” (Prosecutor 18).

Though not all prosecutor respondents collaborated with defense attorneys in these exoneration cases, those who did, and especially those who collaborated with innocence organizations, clarified that they had acted independently of the defense. For example, this elected district attorney described his relationship with an innocence organization as follows:

We had lots of face-to-face interaction, and when we disagreed, we disagreed amicably and when we agreed...it was not driven by flattery or ego. It was agreement over merit or, you know, merits and facts. So, there was nothing that I could do for those people and nothing they could do for me save, if the facts were there. And I, in good faith and in good conscience, saw facts that mitigated innocence or guilt, I would share my opinions along those lines with them. And there have been plenty of instances where, you know, they have approached me with cases and I said...I just don't see this (Prosecutor 20).

The insight resonates in over half of the prosecutors’ remarks about working relationships with defense. With a few exceptions, prosecutors spoke of appreciating their interactions with innocence organization attorneys and of enjoying a good relationship when they collaborated. Nevertheless, these statements were often followed up with a clarification that “sometimes we don’t agree” (Prosecutor 26). The mention of these disagreements seemed to provide a counterweight to any possible supposition that prosecutors had acted out of deference to the innocence organization.

Prosecutors sought to assert their moral autonomy in other ways that underscored their normative motivations and their commitment to their job. While some spoke of making decisions independently of defense counsel and defendants, several others spoke of independence from the press: “That’s the worst thing to be playing to the press” (Prosecutor 18). One CIU prosecutor described trying to ignore a variety of critics: “There’s always going to be fault finders, and we try to ignore that and just do the right thing” (Prosecutor 24). Another spoke of freedom from the influence of professional incentives:

My salary doesn't change. My office doesn't get better. Nothing changes whether I get people out of custody or keep people in custody. I have absolutely no stake in this except for doing my job (Prosecutor 27).

This prosecutor asserts that her postconviction decisions are not motivated by the desire for professional advancement. Just as concerns that tracking conviction rates can lead to a system that rewards overzealousness, using exonerations as a measure of CIU success might motivate prosecutors to take shortcuts in the other direction.<sup>43</sup> Moral autonomy applies to other stages as well, and prosecutors can apply what they have learned to the postconviction stage.

Five prosecutors also faced the challenge of establishing moral autonomy from their own colleagues, or more broadly, members of the local legal community. These problems seemed to affect CIU prosecutors the most. Several of them experienced pushback from other prosecutors in the office and spoke of having to defend their recommendations to support the exoneration. Prosecutor 26 explained: “It pits you

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<sup>43</sup> Quattrone Center Annual Symposium 2017, “Common Ground on Conviction Review” panel. Remarks of Bexar County prosecutor, Rico Valdez. Available for viewing here: <https://www.youtube.com/watch?v=GOXfujqYMRI&list=PLR5Q3wC5nyVkVC9R4yP4IV3N5wvJLmO7z&index=10>

against the rest of your office and that is not a necessarily a good feeling, especially if your office, for whatever reason, is reticent to follow your recommendations.” Prosecutor 5 described an unpleasant meeting with her colleagues: “What they did is they grilled me. Grilled me, grilled me, grilled me. And, ‘That’s not Brady,’ ...and, ‘This will never be an actual innocence case.’ I was furious, but I didn’t let them know that.” Prosecutor 6, though she said that she believed the district attorney supported her work, also joked about feeling like she was in “ad-seg<sup>44</sup>” in her CIU department.

These prosecutors demonstrate their moral autonomy in decision making by acting despite negative consequences and even painful interactions. As Kenneth Thompson, who exonerated 21 men and women during his three-year tenure as Brooklyn District Attorney has said, “There is going to be someone who is going to be upset...so I think it’s important to be able to get past the fear, the political fear, the fear of criticism to do what you think is right.”<sup>45</sup> A prosecutor can seek to avoid negative consequences, but she will be discouraged to find that there is probably no way to emerge unscathed. Independence in decision making, then, requires getting “past the fear” to do the right thing.

In summary, regarding their responses to postconviction innocence claims, most of the prosecutors conveyed that they aimed to do the right thing for the right reason, and not because they had been influenced to do it. This portrayal of prosecutors independently and objectively arriving at a decision evokes a quasi-judicial process,

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<sup>44</sup> “Ad-seg” short for “administrative segregation” a euphemism in correctional terms for disciplinary confinement, the prison within the prison, as distinguished from “general population.”

<sup>45</sup> Remarks of the late Kenneth Thompson at Brooklyn Law School, October 2015. Available for viewing at: <https://www.youtube.com/watch?v=XiCfSkWL4zc>

made more difficult by the many different players involved. Defense attorneys, the press, other prosecutors, members of the local legal community, and the public at large may all exert influence on the decision to assist with exoneration. Moral autonomy in decision making may be the goal, but is it the practice? Defense attorney narratives provide a more nuanced portrayal.

#### DEFENSE PERCEPTIONS OF PROSECUTORS' MOTIVES

Most defense attorneys spoke highly of individual prosecutors, appreciated their efforts, and sometimes even attributed their client's freedom to the prosecution. Yet, while defense attorneys attributed good intentions to the prosecutor liaison or assistant district attorneys with whom they closely collaborated, they were not so sanguine when speculating about the motivations of the office at large. As described in Chapter 5, decisions to dismiss a case are often executive-level decisions, and the final call may be made by the elected district attorney with whom the defense has little direct contact. These hierarchical processes meant that defense attorneys had to apply their knowledge of the office, and not just their knowledge of the individual actor, when speculating about the impetus behind the prosecution's response. Some defense attorney respondents were bewildered by prosecutors' postconviction behavior. One concluded that the prosecutor's actions in his client's case "made no sense" (Defense Attorney 25). Another said that trying to understand the prosecutor was like "reading tea leaves" (Defense Attorney 7). Trying to compare decisions across cases frequently baffled defense attorneys who had litigated multiple postconviction petitions within the same jurisdiction: "There's no sort of rhyme or reason on this stuff" (Defense Attorney 13).

Still, some patterns emerged that shed light on prosecutors' incentives for agreeing to "dismiss," "drop" or "kick" a case, through the eyes of the defense attorney. In contrast to prosecuting attorney respondents, who often described their assistance with exoneration in normative terms, defense attorney respondents generally suspected that instrumental incentives had also contributed to the decision. By "instrumental," I mean to suggest that the assistance served a purpose beyond the simple duty to do justice. Defense attorneys described how assisting with the exoneration had helped the prosecutor avoid a negative consequence. I have distinguished these instrumental reasons into two categories: saving face and framing the narrative.

### *Saving Face*

Defense attorney respondents sometimes suspected that prosecutors had agreed to help facilitate the exoneration because it would allow them to recover from a previous embarrassment, or else, forestall an impending one. "Saving face" takes a variety of forms. First, previous embarrassments, often revelations of misconduct, were thought to have exerted influence on the prosecutor's assistance in a subsequent case. For example, one private defense attorney described an exoneration in which the prosecutor recommended dismissing the conviction to prevent further investigation into her own alleged misconduct:

The state already had problems with concealing exculpatory evidence and the same prosecutor. She already was on notice....in this particular case, she was certainly trying to cover her own ass (Defense attorney 10).

In another case, an innocence organization attorney believed that the prosecutor had agreed to help only because he was embarrassed about previous misconduct from the office. "They were distancing themselves from a bad past, where they had corruption in

their office and they knew it” (Defense attorney 7). Thus, the motivation to save face could influence decision making for an individual prosecutor, or for an entire office.

When cases are covered by the press, the prosecutor saves face through their handling of a present case. The majority of defense attorney respondents mentioned the role that the press plays in shaping prosecutors’ responses. In 5 of the 27 cases discussed in detail with respondents, reporters either contributed to the investigation, or covered it extensively prior to the exoneration. Prosecutors claiming moral autonomy will, of course, deny the influence of the press. The complicated dynamics of the media influence became more perceptible through interviews with defense attorneys. Defense attorney respondents described the role of the press as generally exerting pressure on prosecutors through the threat of bad publicity. Some defense attorney anecdotes suggested that prosecutors were more likely to dismiss a case when it had received significant press coverage, while other anecdotes suggested the very opposite. Such varied responses were attributed to the profile of the case (higher profile cases described as inviting more adversarial response), the district attorney’s electoral platform (whether the prosecutor’s assistance was consistent with her stated objectives), and whether or not the defendant was characteristically sympathetic. The underlying finding is that the media bears influence on the prosecutor’s response, although the direction of that influence may vary considerably dependent on other factors.

Allegations of misconduct along with the prospect of press exposure appeared to influence prosecutors to help exonerate an innocence organization client:

Where we've had the least resistance from that office, one is a Brady case that was so bad that even they understood how bad they would look opposing it. What kind of enormous media fuss we would get if we filed. They were over a barrel...it was outright perjury and dreadful misconduct for decades (Defense attorney 13).

This defense attorney's expectation of "enormous media fuss" suggests that the prosecution's interest in avoiding negative publicity motivated their assistance. In the words of a private defense attorney: "it's the fear of how the media will respond, rather than the actual response" that motivated prosecutors (Defense attorney 10).

These combined examples seem to suggest that a prosecutor's postconviction assistance in exoneration cases can be understood largely as the belated reaction to evidence of misconduct in either the present case or previous ones—damage control, so to speak. However, some prosecutors also proactively reviewed and confronted misconduct. In this sample, one prosecutor respondent sought to dismiss a conviction after she discovered a colleague's misconduct in the case. Several other prosecutors stated that they readily review innocence claims involving the alleged wrongdoing of their fellow prosecutors as well police officers, forensic analysts, and defense attorneys. Prosecutors who conduct postconviction review may even become sensitized to allegations involving certain troubled actors or agencies.

Still, as defense attorney interviews suggest, how a prosecutor chooses to proceed with claims that involve misconduct may vary. Even credible claims may not culminate in exoneration; prosecutors can offer the defendant a new plea agreement that would release him based on time served, or an "Alford" plea that allows the defendant to maintain innocence for the record while still accepting the terms of a plea agreement.<sup>46</sup> A veteran private defense attorney described how these tactics also provide a means of saving face.

Sometimes prosecutors play games with people. Sometimes they say, okay, well I got to save face here. How about your client pleading guilty to trespass or

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<sup>46</sup> See ProPublica series "Ignoring Innocence: The Wrongfully Convicted Forced into Plea Deals," Available at: <https://www.propublica.org/series/ignoring-innocence>

something like that so we can show we got a conviction of something in this case? (Defense attorney 31).

Such “games” reveal an adversarial instinct to preserve a conviction. The incentive to save face, therefore, may motivate prosecutors to forego exoneration altogether.

Therefore, prosecutors stated willingness to review a claim cannot be interpreted as an increased willingness to exonerate. Moreover, even those cases that do result in exoneration can be negotiated so that the prosecutor avoids addressing any allegation of ineffectiveness or misconduct. Defense attorneys explain this practice in the following section.

#### *Framing the Narrative*

When prosecutors agree to dismiss a conviction, they may have a greater opportunity to shape how the case will be presented than if they had opposed it. In the words of one innocence organization attorney: “The smart prosecutor takes the bull by the horns and controls the narrative. All of a sudden, they go from being someone who people think is a cretin to someone who cares about justice” (Defense attorney 1).

Through negotiating with defense attorneys, the prosecution can omit mention of alleged negligence or misconduct on the part of police, prosecutors, or defense attorneys. Several defense attorneys spoke of ways in which prosecutors attempted to influence what appeared in the legal record. The prosecution may inform the defense attorney about how they wish to present the case, or the defense attorney may proactively offer to present it a certain way. One private defense attorney explained how the prosecution asked him to keep a Brady violation, a common form of prosecutorial misconduct, off the record.

There was Brady violations all over the place, so I had to allege Brady. Even though they were cooperative, they said ‘well, we’re never going to agree that there was a Brady violation.’ I said, ‘you know, I’ve heard that before, and

normally I would fight you saying that. I want a hearing and I want to be able to establish the Brady, but the way this is going if I'm going to get the result I want without going down this big Brady path,' so I agreed (Defense attorney 2).

The practice described here indicates that prosecutors may exchange their cooperation on a case for the right to frame the narrative about it in a certain way. Without the evidentiary hearing establishing the Brady violation, the misconduct remains off the record and prosecutors can forego the trouble of disciplining the prosecutor or arguing the issue in court.

A felony chief related a similar process:

The course we proposed was...we will consent that [the defendant] is entitled to relief based upon newly discovered evidence, but we're not admitting to any of the violations you've set out in your motion. We're not admitting to Brady violations or anything like that, but we're admitting there's newly discovered evidence that would have changed the outcome of his case...And they said "Fine, we'll go with that," as opposed to having a long, drawn-out hearing on all those other issues, because we had one clear issue...so it seemed kind of wasteful to spend our time chasing these other things (Prosecutor 19).

It should be noted that, in both examples, the prosecution succeeded only in keeping Brady allegations out of the legal record, and not out of the press. In cases like these, prosecutors may not save face so much as they save time and protect themselves from legal admonishment or disciplinary hearings. Allegations of prosecutorial misconduct or ineffective assistance of counsel can set in motion a legal response that leads to additional work, i.e. the "big Brady path," and a "long, drawn-out hearing."

The threat of opening the floodgates, however plausible or implausible, may further deter prosecutors from substantiating ineffective assistance of counsel or misconduct claims. One public defense attorney describes the prosecution's handling of an ineffective assistance of counsel claim in his client's case: "They didn't want to sort of open the floodgates. Which I think is a stupid thing. I mean it's pretty clear that she was

ineffective here, but they didn't want to do anything that would make it easier for defendants to raise ineffective assistance of counsel claims” (Defense attorney 25). A successful postconviction claim implicating a specific legal actor or legal error may inspire other defendants with similar circumstances to try their luck as well. The defendant’s first shot at appealing, the direct appeal, cannot introduce new evidence outside of the court record. Defense ineffectiveness and Brady violations are unlikely to be evident from the trial court record. Defense failings are often “sins of omission” marked by defense attorneys’ lack of investigation and trial preparation (Gross and Shaffer, 2012, p. 42). A defendant’s claim that, for example, the defense attorney failed to call alibi witnesses and that these witnesses would have cleared the defendant cannot be supported or refuted by the trial record and therefore, cannot be raised on direct appeal. The same can be said for a defendant’s claim that the prosecutor failed to turn over exculpatory evidence that, if revealed, would have implicated an alternate suspect. Both types of claims are common in the postconviction stage (King 2017), and both are also regular contributors of wrongful convictions (Garrett, 2011). Prosecutors’ motivation to keep misconduct and ineffectiveness from the legal record may therefore reflect concerns to moderate and manage postconviction case intake.

Former prosecutor and current director of an innocence organization, Laurie Levenson (2016) identifies the presence of a Brady allegation as one among a list of “questionable tools” that senior prosecutors use to evaluate habeas claims (p. 20). Prosecutors may ask themselves: “How will admitting a *Brady* violation affect them on other cases?” Levenson’s explanation echoes that of defense attorney respondents. “Prosecutors worry about whether a concession made in one postconviction case will lead

to a cascade of other challenges” (ibid). Therefore, some prosecutors may see a threat to efficiency in these types of legal challenges.

In addition, there is the obvious threat to collegial relationships. Prosecutors reviewing innocence claims may subject their colleagues to professional embarrassment and disciplinary actions, if not lawsuits. The doctrine of absolute immunity<sup>47</sup> protects prosecutors from civil litigation, even in response to intentional misconduct, as long as they act in their official capacity as prosecutors. Still, internal sanctions may include being demoted, or being asked to resign.

As a result, defense attorneys can encourage prosecutors to “do the right thing” in some cases by helping to mitigate these potential threats to relationships and efficiency. Defense attorneys and prosecutors negotiate the terms of a joint motion to dismiss the conviction. The following quotes illustrate how this process worked in several cases described by defense attorney respondents:

We actually do try really hard to work with prosecutors and to just say, what are your thoughts? Do you need me to tweak something? For example...here's a very bare bones petition I will file that we can file jointly, otherwise here's the long petition I can file that has all of your police misconduct claims in it (Defense attorney 7).

We decided that we didn't want to file something that was blaming them with the Brady violation because we thought that would kind of turn them off. And we thought that would anger them and make them not want to work with us (Defense attorney 25).

He said, ‘So we're going to waive the requirement that you put a [#] motion in writing,’ which is huge. ‘And we're going to agree, we're going to join in your application to dismiss, not on the basis of the Brady.’ They punted on Brady. ‘But because based on what we've learned, newly discovered evidence, we wouldn't be able to meet our burden of proof’ (Defense attorney 15).

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<sup>47</sup> See, *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976), and *Connick v. Thompson*, 563 U.S. 51, 09-571 (2011)

In any one of these cases, if the prosecution had opposed the innocence claim, the defense may well have continued to pursue misconduct allegations. The prosecution might then have to accommodate whatever negative consequences came about as a result: bad publicity, an increase in postconviction claims, and more allegations.

Defense attorneys' perceptions can augment our understanding of what motivates prosecutorial assistance in exoneration cases. In addition to normative motivations of doing justice, prosecutors appear to be interested in protecting their reputations by saving face, either as an office or as an individual actor, and also in preventing an increase in their postconviction case load. That prosecutors appear to be motivated to mitigate negative consequences does not imply that they are devoid of moral autonomy. Rather, outside influencers such as cooperative defense attorneys and the press can help make a certain course of action more, or less, palatable as prosecutors seek the path of least resistance.

## SUMMARY

By examining prosecutor's postconviction decisions to assist with exoneration, this chapter sheds light on how prosecutors interpret the abstract obligation to do justice, thus expanding theories of prosecutorial discretion. The prosecutor respondents characterized doing justice in terms of acknowledging errors and protecting the public. Principally, they spoke of their obligation to do justice for the community and for victims, and less often, for defendants. Many of the prosecutors also emphasized the autonomy of their decisions, namely, their freedom from outside influences. In this regard, defense attorney and prosecutor narratives conflicted since defense attorneys

believed that prosecutors could be persuaded by offers to negotiate the narrative and to alleviate media pressure.

Overall, defense attorney insights revealed that prosecutors may balance quasi-judicial and adversarial roles in their postconviction collaborations with defense counsel. The practice of negotiating terms with defense attorneys, even while cooperating to secure an exoneration, suggests an adversarial tendency that may obstruct the discovery of additional factual errors, and undermine the prosecutors' stated goal of doing the right thing. Defense attorneys should take note that normative appeals may be just as persuasive to prosecutors as instrumental ones. However, moral arguments that rely on generating empathy for the defendant are likely to be less effective. Such appeals may also ultimately backfire if future clients are less sympathetic. For prosecutors, the takeaway is that the goal of doing justice might be compromised by attempts to mitigate ineffectiveness or misconduct.

Prosecutors can open new pathways to exoneration by increasing their receptivity to these types of innocence claims. This may take the form of addressing allegations as they arise through innocence claims. Rather than "punting" on Brady or ineffectiveness, for example, prosecutors may consider these claims separately from the new evidence of innocence. In doing so, they may invite additional claims to be reviewed, or they may initiate a proactive review involving a particular actor, agency, or problematic practice. While most of the respondent prosecutors expressed a readiness to acknowledge criminal justice system errors (even those attributable to prosecutors) defense attorney interviews revealed prosecutors' lingering hesitation to acknowledge and confront intentional errors in the form of misconduct.

From the defense attorneys' perspective, prosecutors were partially motivated by the desire to avoid the negative consequences of an exoneration. At the same time, prosecutors' narratives revealed that many of them had assisted with exoneration *despite* negative consequences. The most recurrent of these included the difficult task of breaking the news to upset victims and victim's family members, and pushback from the prosecutor's own colleagues or members of the local legal community. In summary, findings suggest that prosecutors who help to clear wrongfully convicted defendants are more inclined to do justice when they can also exert some level of control over the consequences. Prosecutors may be incentivized by the opportunity to frame the legal record, frame the media response, and minimize the possibility of an increase in their future caseload.

## CHAPTER 7: CONCLUSION

This dissertation combines quantitative analysis of known exoneration cases since 1989 and qualitative analysis of a subset of these cases since 2005 with the purpose of understanding how, when, and why prosecutors assist with exoneration. This study does not attempt to test any particular theory of prosecutorial discretion (social science theories were not designed with postconviction processes in mind), nor does it attempt to present aggregate data on prosecutors' responses to postconviction claims (such data is not always collected, much less shared). Rather, it applies a broad-brush approach to a nascent area of research. The three broad aims of the study include: 1) examining the determinants, motivations, and processes influencing postconviction prosecutorial decisions to assist with innocence claims that have resulted in exoneration; 2) exploring the successes and challenges of postconviction collaboration between prosecutors and defense attorneys; and 3) identifying how postconviction prosecutorial assistance could open pathways to exoneration.

In general, findings suggest that prosecutors' exoneration efforts, even those conducted through most CIUs, are still largely reactive and episodic. Although prosecutors have become more responsive to acknowledging and correcting factual errors, they still respond within the context of a legal structure that has not been established to correct these kinds of errors. This has implications for whether defendants with credible innocence claims will receive relief, as well as what form that relief will take. The legal structure shapes local institutional attitudes regarding postconviction innocence claims as well as the mindset of the individual actors reviewing these claims.

Looking beyond the individual decision maker's interior decision-making process, we can see the importance of system-level influences.

The very notion of criminal justice system fallibility is a novel concept, gaining acceptance only in the past three decades with the growing number of exonerations, particularly DNA exonerations (Norris, 2017). Administering justice in this near-infallible system, the prosecutor is the "good guy" who "wears the white hat" like the Sheriff in an old Western movie (Levine and Wright, 2017). The discovery of wrongful convictions challenged that public image. Many of the more senior prosecuting attorney respondents referenced this development in their interviews: "Those were the days when the prosecutors and policemen were all the guys in the white hats, and today we're not" (Prosecutor 19). Another said, "It's just a different world than what I started in...Folks look on authority differently, and they're not really sure of it" (Prosecutor 22).

As the criminal justice system grapples with its capacity for error, state petitions for postconviction relief have increased. Retributive sentencing laws of the 1980s and 1990s increased the population of prisoners with lengthy custodial sentences, and by extension, the population of prisoners who reached the postconviction stage while still behind bars. This shift in the legal landscape made postconviction claims much more common. In the words of one CIU prosecutor: "We deal with the legal climate as it comes to us, and certainly the actual innocence claims have become much more consistent and more frequent" (Prosecutor 29).

In response to the rise in petitions, and to the increasing legal and legislative recognition of wrongful convictions, some prosecutors' offices have innovated procedures to systematically uncover factual errors, while others have proactively

corrected individual wrongful convictions. Such initiatives and innovations do not appear without “growing pains,” to use the phrase of one defense attorney respondent. The growing pains experienced by prosecutors engaging in postconviction innocence review accommodate a new outlook as well as a new practice. Prosecutors work to resolve factual errors within a legal system that emphasizes procedural ones. They work to adopt a collaborative approach within a system defined as adversarial. Prosecutors’ postconviction discretion cannot be understood outside the context of this legal structure. It is perhaps *because* of the law’s inadequacy at correcting factual errors, that prosecutors have become such an integral player in the postconviction process. Under the current system in most states, prosecutors have unmatched authority, power, and position, to correct false convictions (Zacharias, 2005).

In this final chapter, I review, compare, and summarize the findings of the mixed methods analyses. Findings are presented in each of the three categories established by the study’s aims—examining determinants and motivations, exploring postconviction collaboration, and pathways to exoneration. This is followed by a discussion of the limitations of the study and finally, its impact.

## EXAMINING DETERMINANTS AND MOTIVATIONS

Quantitative findings from this study have identified several determinants of prosecutorial assistance in exoneration cases but could not uncover prosecutors’ motivations. To that end, I examine how the interview data can help strengthen, expand, or challenge statistical results. While some findings were not supported in both sets of

analyses, those that were supported present strong empirical evidence of when and why prosecutors choose to assist with exoneration.

Both sets of analyses revealed that the presence of misconduct or inadequate defense lawyering in the wrongful conviction could impact treatment of the claim. Results of the regression analysis indicate that prosecutors are less likely to facilitate or advocate for exoneration in these types of cases. Qualitative interviews with defense attorneys reveal that prosecutors often attempt to downplay such allegations when agreeing to relief. Thus, defense attorney respondents revealed another possible explanation for the negative relationship between prosecutorial assistance and misconduct and bad lawyering from the quantitative findings. Prosecutors might be less likely to agree to exoneration in these cases, but they may also be less likely to concede to the misconduct and/or defense inadequacy when they do agree to exoneration. It follows that the incidence of inadequate defense lawyering and police, prosecutorial and forensic misconduct in the NRE sample could be underreported. Indeed, this is an assertion that the NRE has already made (Gross and Shaffer, 2012). Since a defense attorney's ineffectiveness often reflects "sins of omission" more than active failures, inadequate defense issues may never be litigated or reported (ibid: 42). As for misconduct, it can only be reported if it's discovered. Respondent interviews revealed that prosecutors and defense attorneys' postconviction negotiations may include an agreement to omit the negligence or misconduct from the official narrative.

Prosecutors' motivations to downplay negligence and misconduct are likely two-fold: defense and prosecuting attorney respondents emphasized prosecutors' relationships with other actors and invoked the prosecution's fear of "opening the floodgates" of

postconviction claims. Either explanation implicates the “shared goals” of the courtroom workgroup: one, to maintain relationships; and two, to dispose of cases efficiently.

Respondents who emphasized maintaining relationships suggested either a broad sense of camaraderie akin to the “thin blue line” (“the courthouse is a clubhouse;” Defense attorney 36) or else a close relationship between specific actors. A couple of prosecuting attorney respondents described how they would be less inclined to consider allegations of negligence or misconduct depending on the reputation of the actor or agency in question. Other respondents invoked efficiency interests by describing how negligence or misconduct could prolong the exoneration process (“seemed kind of wasteful to spend our time chasing these other things;” Prosecutor 19) as well as lead to an increase in the postconviction caseload down the road (“they didn’t want to, sort of, open the floodgates;” Defense attorney 25).

Egregious cases of misconduct, however, could be *more* likely to benefit from prosecutorial assistance in the exoneration. In this aspect, interviews with respondents challenged the quantitative results. Defense attorneys described how prosecutors confronted with obvious misconduct could more readily concede the case, while prosecutors asserted that evidence of misconduct or negligence might make them more likely, rather than less, to consider the innocence claim. Still, an important distinction must be made between prosecutors agreeing to an exoneration and agreeing to other forms of relief. Habeas and other postconviction claims routinely allege prosecutorial misconduct or ineffective assistance of counsel as constitutional violations (Garrett, 2011; King, 2017; Levenson, 2013; Levenson, 2016). Therefore, prosecutors can grant relief on constitutional grounds rather than assess the new evidence of innocence. Both

prosecutors and defense attorney respondents reported scenarios in which defendants had given up on exoneration and accepted a deal on time served, often without elaborating upon the profound difference between an exoneration and a plea deal.

In contrast to the conclusions drawn from the quantitative results, qualitative interviews did not support the notion that prosecutors would be more receptive to false guilty pleas rather than wrongful convictions obtained through a jury verdict. Most prosecuting attorney respondents asserted that false guilty plea claims would be treated no differently, while a minority suggested that they would be less likely to review false guilty plea claims. This was explained in terms of efficiency interests in setting priorities, or else, simply because a claim of innocence from a defendant who had pled guilty would be deemed less credible.

At the same time, anecdotal evidence supports the results of the regression analysis. For example, the Harris County Conviction Integrity Unit has proactively dismissed over 130 false guilty pleas in drug possession cases.<sup>48</sup> Likewise, in the Los Angeles Rampart Scandal of 1999-2000, prosecutors filed habeas petitions to clear defendants who had falsely pled guilty as a result of police misconduct (Levenson, 2016). Ultimately, between 100 and 150 convictions were dismissed (Gross and Schaffer, 2012). More recently, in 2017, the Cook County State's Attorney's Office has assisted in dismissing a series of false guilty pleas based on drug charges fabricated by corrupt Chicago police officers.<sup>49</sup> Though these cases are not reflected in the statistical analysis,

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<sup>48</sup> See NRE "Browse the Cases," search by Harris County, CIU, and Drug Possession or Sale. Accessed March 2018: <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx>

<sup>49</sup> See Jason Meisner "State's Attorney to dismiss 18 convictions tied to former Chicago police sergeant." Chicago Tribune, Nov. 17, 2017. Available at: <http://www.chicagotribune.com/news/local/breaking/ct-met-ronald-watts-cases-20171115-story.html>

they should not be overlooked. They demonstrate prosecutors' grand gestures to systematically correct false guilty pleas, perhaps particularly in response to the discovery of egregious police misconduct.

Some prosecuting attorney respondents also acknowledged their hesitation to second guess a jury verdict. Two invoked the "13<sup>th</sup> juror" metaphor to describe the potential for abuses of prosecutorial discretion in reopening old convictions ("I'm not like a 13<sup>th</sup> juror;" Prosecutor 16). Two others spoke of the importance of defending the jury verdict or upholding the finality of the jury trial. Cases disposed through plea agreement would not include this added disincentive. After all, there is no juror, let alone a "13<sup>th</sup> juror," in a plea negotiation.

On the other hand, perhaps it is not so much that false guilty pleas are more likely to receive prosecutorial assistance, but that they are less likely to receive postconviction defense representation. Being less likely to attract the attention of innocence organizations, and less suitable for traditional postconviction remedies, false guilty pleas may never be rectified at all except for the intervention of a helpful prosecutor. Indeed, none of the five false guilty plea claimants in the qualitative dataset were represented by innocence organizations.

Qualitative interviews revealed additional determinants not captured in the quantitative data, among these the importance of the type of prosecutor tasked with performing the case review. The prosecutor's role in the office and relationship to the case was described as influential. Both prosecuting and defense attorney respondents remarked upon the distinction between a CIU attorney's approach and an appellate attorney's approach, framing appellate attorneys as inherently adversarial. Moreover,

prosecutors involved in the original trial were generally perceived to be unfit to lead an impartial investigation, although most of the prosecuting attorney respondents believed that trial prosecutors should play some role in the case review. Two respondents reported that their office routinely directed postconviction innocence claims to the original trial prosecutor.

Legal scholarship on cognitive biases can help explain these findings. Still, it is necessary to look beyond individual decision making to the administration and the broader legal structure to understand the processes that produce these inequitable results. Appellate prosecutors' reduced ability to identify factual errors may be more a matter of professional socialization than of psychological bias.

Most of the prosecuting attorney respondents from smaller offices, without the staffing or resources for a CIU, reported that the elected district attorney or a felony chief was responsible for reviewing innocence claims. Variations in office culture, leadership style, hiring, and training practices may impact how innocence claims are received and reviewed. Such variations are too numerous in a national study to identify consistent patterns. Notwithstanding the unobserved role of such variations, may it suffice to say that prosecutors in every region of the country and from offices of all sizes described conducting quasi-judicial, fact-based reviews of innocence claims.

Defense attorney respondents also spoke of the role of the press in postconviction prosecutorial decision making. The complicated dynamics of this influence, impossible to capture through statistical modeling, became more perceptible through interviews with attorneys about specific cases. In five cases, the press either investigated the claim or advocated for the exoneration in advance. In many of the other cases, defense attorney

respondents described the role of the press as generally exerting pressure on prosecutors through the threat of bad publicity. Some defense attorney anecdotes suggested that prosecutors were more likely to dismiss a case when it had received significant press coverage, while other anecdotes suggested the very opposite. Such varied responses were attributed to the profile of the case (higher profile cases described as inviting more resistance), the district attorney's electoral platform (whether the prosecutor's assistance was consistent with her stated objectives), and whether or not the defendant was characteristically sympathetic. The underlying finding is that the media bears influence on the prosecutor's response, although the direction of that influence may vary considerably dependent on other factors.

The influence of the press reveals the prosecution's motivation to "save face" for the public and the local legal community. These may be political influences, as elected prosecutors are ultimately accountable to the public for their decisions. Nevertheless, bad publicity is not reserved for elected prosecutors. The motivation to protect one's professional reputation as established by Albonetti (1986) appears in this qualitative finding as well. Elected prosecutors save face to support a reelection bid or to advance as a judge. Line prosecutors and supervisors, with limited job security, save face to maintain the status quo.

## EXPLORING COLLABORATIONS

With a heavy caseload, many prosecuting attorney respondents said that they rely upon trustworthy defense attorneys to identify those most credible claims of innocence. In larger jurisdictions, this often took the form of an innocence organization presenting

CIU staff with carefully selected, vetted, and pre-investigated cases. In smaller jurisdictions, it typically meant that trusted, local defense attorneys would take their case directly to the elected district attorney, thus bypassing the office's appeals unit. In either scenario, close relationships mattered. Innocence organizations working on cases outside of their own jurisdiction often appointed local counsel, partly for the legal expertise, and partly for the value of relationship building. Private defense attorneys working statewide described having stronger relationships with prosecutors within the jurisdiction than outside of it.

This finding reinforces the notion that “*outsider* attorneys,” who are not local or not well established, may be at a disadvantage (Eisenstein, Flemming, and Nardulli, 1988). More to the point, *insider* attorneys appeared to have an advantage, which seemed to apply regardless of the defense attorney's affiliation. Defense attorney respondents sustaining regular working relationships with prosecutors described, separately: having attended the same law school and even, the same law school parties; having children that attended the same schools and family members who worked together; encountering each other at civic engagements and continuing legal education training sessions; even enduring calamitous local events together. Proximity between the offices of the different courtroom workgroup members has been found to affect sentencing outcomes (Haynes, Ruback and Cusik, 2010); it appears to affect exoneration outcomes as well. These defense attorneys perceived that the years of building trust, in the community as well as in the courtroom, had opened a door to collaborative professional relationships even in the context of an adversarial system.

Both prosecutors and defense attorneys described the dynamics of an “exchange relationship” (Cole, 1970) in postconviction cases. Prosecutors, agreeing to relief, could barter for the right to frame the narrative about the case. A trusted defense attorney could forego the battle over misconduct allegations in exchange for her client’s freedom. Trusted defense attorneys could also be diplomatic about when and how to discuss the case with the press. They could actively assist prosecutors in framing the narrative by praising their actions publicly and by omitting potentially controversial details.

Trusted defense attorneys approaching prosecutors with credible, out-of-court, innocence claims—the preferred model in these exoneration cases—is nevertheless an extraordinary course. Prosecutors may continue to systematically pass over those wrongful convictions claims that are received in normal course, especially those requests coming directly from prisoners and their family members. Routinely conducted appellate and postconviction review remain reflexively adversarial. Both types of respondents agreed that prosecutors receive a large volume of meritless claims. More prosecutors reviewing postconviction claims might result in fewer prosecutors conducting pre-trial investigations that could help prevent wrongful convictions before they occur. On the other hand, resources are also consumed when prosecutors oppose, appeal, and litigate cases even though relief may be warranted. Defense attorneys can assist prosecutors in their stated objective to “do the right thing,” by effectively sorting, identifying, and investigating innocence claims first. While prosecutors have the authority to do this work independently, they might lack the will or the resources.

## PATHWAYS TO EXONERATION

The pathway to exoneration does not appear well worn through the standard postconviction filing process. While most of the prosecutors in this study have demonstrated that they can and do engage in quasi-judicial reviews of credible innocence claims brought by trusted defense attorneys—it is far from clear that they conduct quasi-judicial review of standard postconviction claims. Postconviction pro se claimants do not appear to be advantaged by the development of CIUs, or by the trend towards greater prosecutorial assistance with exoneration cases in general.

Indeed, resource limitations may prevent a more systemic practice. Prosecuting attorney respondents described requiring the assistance of unpaid interns, civil asset forfeiture funds, and other precarious sources of funding and labor to meet the demands of their postconviction ethical obligations. Prosecutors often juggle caseloads exceeding the recommended limit (Gershowitz and Killinger, 2011). Postconviction cases, which are considered final and closed, are not likely to be prioritized above the ongoing obligation to ethically dispose of cases on the front end.

Resource constraints exist, but resources are also systematically misapplied. The system allows for multiple levels of review only to delay and prolong consideration of factual errors. The volume of direct appeals alleging trial errors might diminish if appellants had a better chance of prevailing under new evidence of innocence claims earlier in the appeals process. The postconviction stage invites allegations of ineffective assistance of counsel and prosecutorial misconduct, encouraging defense attorneys and pro se litigants to engage in “thermal nuclear habeas warfare” (Levenson, 2013, p. 572), thus eliciting an adversarial response from prosecutors.

True, prosecutors have the discretion to resolve individual wrongful convictions, but they do not have the discretion to alter the rules of the state appellate system—only the legislatures and the courts can do that. Local prosecutors might be more inclined to reopen questionable convictions if the state provides the legal structure to support these efforts. State-based policy reforms aimed at providing pathways to exoneration for the wrongfully convicted may also help foster a legal culture that values accuracy as much as finality. In theory, prosecutors are called upon to prevent the suffering of innocents; in practice, the appellate system does not support systematic, quasi-judicial postconviction review. The failure of the appellate system surfaces empirically in several ways: 1) appellate prosecutors appear to be poorly qualified for innocence review and some are even resistant to CIU efforts to identify factual errors; 2) prosecutors may be prone to neglecting misconduct and ineffective assistance of counsel claims for fear of increasing their postconviction caseload; and 3) prosecutors typically prefer innocence claims vetted and delivered by defense attorneys—some of these claims having already come through their offices and failed during earlier stages of appeals.

Nevertheless, the credible innocence claims brought to the attention of those prosecutors interviewed in this study tended to inspire a quasi-judicial, collaborative response irrespective of region, jurisdiction, or office size. Interviews with prosecutors and defense attorneys from a wide variety of jurisdictions suggest that such review is not confined to the establishment of CIUs. Prosecutors in both small and large jurisdictions reinvestigated cases and collaborated with defense attorneys. Indeed, several defense attorneys and prosecutors described engaging in similar processes whether it was through a CIU, or through collaboration with district attorneys and felony chiefs. The rapid

emergence of CIUs signals a shift in the prosecutorial mindset towards acknowledging the possibility of factual errors and the responsibility to correct them, and that mindset is not confined to the CIU.

## LIMITATIONS

Though the rate of wrongful convictions is unknown, criminal justice professionals such as prosecutors, judges, defense attorneys, and police estimate it at one to three percent (Zalman et al, 2008). This would mean that approximately 11,000 to 34,000<sup>50</sup> innocent people are convicted each year of crimes that they didn't commit (Rosenmerkel et al, 2009). The NRE provides but a glimpse of this sample. One limitation of this study design is that the only cases available for analysis in the NRE are those that have resulted in successful exoneration. Data about prosecutors' responses to postconviction innocence claims that fail to become exonerations could reveal important information about prosecutorial assistance or cooperation not represented in the NRE sample. However, such data is unavailable. Assuming that innocence claims resulting in exoneration might appear more promising at the outset, the data can effectively reveal prosecutors' assistance—or failure to assist—even in those most promising of actual innocence claims. Recall that even in these cases that result in an exoneration, three-quarters of prosecutors failed to assist in any way (and some may have actively resisted the claim).

Qualitative interview questions attempted to account for the deficiency in the quantitative data by asking prosecuting attorney and defense respondents to provide an

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<sup>50</sup> According to Bureau of Justice Statistics, "Felony Sentences in State Courts, 2006." Retrieved from: <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2152>

example of an innocence claim that had failed to become an exoneration. In this effort, defense attorney respondents were often more helpful than prosecutors, who tended to provide general information rather than details of a specific case. This lack of detail prevented further analysis of demographic differences between cases, such as the role of defendant or victim race. Moreover, no qualitative interviews were conducted with prosecutors who had *never* assisted in a successful exoneration case. It might be useful to compare the types of innocence claims rejected by prosecutors who have assisted with exoneration against those who have not. The data does not provide an opportunity to make such comparison.

A second limitation of the NRE dataset is that it may fail to capture every known exoneration, and those exoneration cases escaping the NRE's attention may deviate in non-random ways. Low-profile cases are especially likely to escape the attention of the Registry (Gross, 2017). As the NRE's latest annual report explains: "The great majority of the exonerations are, as always, for serious and typically violent crimes with lengthy prison sentences" (NRE, 2017). Such biases were exacerbated in the qualitative sample. Prosecutors involved in non-violent, low-level felony exonerations (many of which are guilty plea cases), found the case sufficiently unremarkable to be remembered, much less to be the subject of a lengthy interview. Approximately half of the prosecutors who declined to participate were being asked to speak about a case with a non-custodial or average sentence.<sup>51</sup> The average custodial sentence for a felony in state courts is three years (Rosenmerkel et al, 2009). Of the 13 cases that prosecutors did consent to be

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<sup>51</sup> Nineteen prosecutors declined to be interviewed, either directly or through their lack of response. Some were asked to speak about a specific case and others were invited to speak more generally. Of the 15 invited to speak about a specific case, seven of those exoneration cases involved relatively short sentences.

interviewed about, none involved a sentence of under three years. In sum, prosecuting attorney respondents involved in exonerations of more serious, violent offenses expressed a greater interest in the case and a greater willingness to be interviewed.

This study was designed to sample broadly on a national scale and to recruit a variety of attorneys working in different capacities and different jurisdictions. Such design trades gains in external validity for losses in internal validity. For example, empirical research of prosecutorial discretion often samples a set of attorneys working within the same office and then compares results across a small number of different offices (e.g. Eisenstein, Flemming, and Nardulli, 1988; Frederick and Stemen, 2012; Wright et al, 2014; Levine and Wright, 2017). The present study samples only one attorney in each office, relying upon one attorney's perceptions of how that office works. This design assumes accuracy of the data (that the individual attorney's perceptions are valid), but it also allows for broad, generalizable findings in a greater variety of settings and contexts.

In addition, the defense attorney sample is limited in one important respect. Defense attorney respondents necessarily focused on prosecutors' responses to defense initiatives rather than prosecutors' own proactive efforts to rectify a wrongful conviction. Defense attorneys may thus underestimate prosecutors' receptivity and involvement. Some of the prosecuting attorney respondents had proactively assisted in an exoneration case. These prosecutors initiated overturning the wrongful conviction and then dismissed the case. Defense attorneys largely could not speak about prosecutors' actions in these types of exoneration cases.

Interviewing issues may also complicate the findings. Both types of attorneys struggled to recall details about cases that had been finalized, in some instances, a decade or more earlier. The semi-structured interview style promoted general perceptions over strict historical accuracy. When attorneys could recall specific details, these details occasionally threatened to identify the case—and by extension, the attorney(s)—and therefore had to be redacted. For confidentiality reasons, interviews were de-identified extensively, even at the risk of losing valuable data. Such precautions were required as a result of the small pool from which to recruit respondents, ethical obligations to provide confidentiality, and the respondents' own expressed interest in maintaining confidentiality. While these efforts have provided access to respondents where it might not otherwise have existed, it has also obscured some of the details and nuances of the data. Concerns about confidentiality also may have influenced the information that attorney respondents were willing to share. This potential dynamic arose in more than one interview as prosecutors inquired about my relationship with the defense attorneys or innocence organizations in their area. In one instance, the prosecuting attorney respondent initially spoke of a close working relationship with the innocence organization. When I clarified that I did not intend to interview the innocence organization attorneys (and if I did, would not mention that he and I had spoken), he openly shared his ambivalence about the relationship.

Finally, as a former Innocence Project staffer, I have insider knowledge of how exoneration cases unfold from a defense perspective. Being an insider brings access, which is advantageous to the work, and provides fluency with relevant legal, procedural, and technical issues. However, insiders may also be disadvantaged by assumptions

developed through their prior involvement with the subject (Bucerius, 2013). For example, prior professional experiences researching misconduct cases for the NRE, or soliciting press attention for Innocence Project exonerations may have primed my focus on the role of the press and the incidence of misconduct to the exclusion of other factors. The grounded theory methods employed in the qualitative research does not assume a neutral, objective outcome. Instead, it acknowledges that the research is a construction created from the researcher's reality (Charmaz, 2014, p. 13). I would argue that while a different researcher may find greater interest, and perhaps even greater relevance, in other factors, they would not fail to find ample support for the research results reported here.

#### IMPACT AND IMPLICATIONS

This research study has strong theoretical and practical implications. It advances a criminology of wrongful conviction by exploring a theoretical framework for postconviction prosecutorial discretion. It challenges traditional constructions of prosecutorial power by recognizing the limited discretion of the line prosecutor. It also presents the beginning of a conceptualization of how prosecutors view the abstract duty to "do justice," thus building upon courtroom workgroup theories of discretion. This consideration of postconviction practices, long overlooked in empirical research, enhances knowledge of prosecutorial discretion and informs an understanding of earlier stages as well.

The quantitative analysis establishes an overview of the trends in prosecutorial assistance in exoneration cases while the qualitative interview data explores the motivations and processes underlying this assistance. Both quantitative and qualitative

datasets draw from the same database, thus informing and strengthening both sets of results. The mixed methods analysis connects prosecuting and defense attorney respondents to individual cases. Statistical data, alone, is generally not able to do this (Wright and Levine, 2014). Research of prosecutorial discretion often employs only aggregate statistics, homogenizing prosecutors. The present study avoids treating “prosecutors like widgets, one the same as the next” (Wright and Levine, 2014, p. 1067).

Results may aid system actors as they develop practical solutions for uncovering wrongful convictions fairly and efficiently, facilitate case selection and processing, and help build collaborative working relationships in the postconviction setting. Results may also aid policymakers in evaluating state postconviction procedures and remedies. This research has practical implications for both state policymakers and local system actors.

State policymakers should consider reevaluating and restructuring their postconviction appeals process (King, 2017; Levenson, 2013; Medwed, 2005). The findings reported here further establish the disadvantage faced by postconviction pro se litigants and suggest that prosecutors rarely review innocence claims until the defendant has already exhausted other options. This inefficiency taxes the appellate system as much as it harms the wrongfully convicted. In order to “narrow the error correction gap” in the appeals process, Nancy King recommends allowing defendants to file a postconviction motion before completing the direct appeal (2017, p. 267). Some states already do this, others have created a loophole for defendants to file ineffective assistance of counsel claims sooner. Such remedies are necessary to ensure that defendants can raise postconviction innocence claims in a timely manner and with the assistance of defense counsel.

State legislatures may also establish or strengthen new evidence statutes for defendants to file “freestanding” actual innocence claims based on new evidence. In the past two decades, postconviction DNA statutes have been adopted in every state, and some of these statutes include a provision for appointing defense counsel. The options for wrongfully convicted defendants who lack DNA evidence are much more limited (Medwed, 2005). Defendants may introduce new evidence in a new trial motion, but most states impose a statute of limitations as short as 10 days from the entry of judgment (Brooks et al, 2015). In contrast, New York and New Jersey allow inmates to challenge their conviction based on newly discovered evidence at any time. Other states might follow suit and eliminate this arbitrary statute of limitations. New evidence, such as the confession of an alternate suspect, evidence concealed by police or prosecutors, or even a new forensic discovery, may emerge at any time. In many states, after the filing deadline for the new trial motion has passed, defendants cannot present facts outside the court record until the postconviction stage, when they will not be provided with counsel. Legislative and court remedies recognizing non-DNA based new evidence of innocence provide prosecutors with the legal mechanism to dismiss false convictions as well as the institutional support to do so.

In addition, states might establish an innocence commission for reviewing postconviction innocence claims. Such claims regularly feature allegations of misconduct or negligence on the part of prosecutors and the defense attorneys, police officers, and forensic analysts with whom they work. This research study finds that prosecutors are more likely to minimize evidence of misconduct or negligence than they are to investigate it. The instinct runs counter to a good faith effort to identify and correct the

errors that commonly lead to wrongful convictions. Putting aside the question of whether prosecutors can investigate themselves or not, system legitimacy will be enhanced through the outside review of certain innocence claims. The North Carolina Innocence Inquiry Commission (NCIIC), which was created after a high-profile case of prosecutorial misconduct, has been lauded as a model for other states to follow (Hollway, 2015; Scheck, 2016; Wolitz, 2010). A state commission could save prosecutors the need to establish their own local, external, review boards for handling cases that present a potential conflict of interest. A standing state institution would also introduce some much-needed continuity to innocence review as district attorney agendas shift from one administration to the next.

Still, state-based commissions cannot replace the local prosecutors' level of access to new information, nor their knowledge of local criminal justice practitioners. Moreover, local prosecutors are better positioned to identify problems in lower-level felony convictions and guilty pleas than a state commission. For example, the NCIIC reviews serious, mostly violent, felonies and imposes a higher standard for case acceptance in guilty plea cases.<sup>52</sup> Therefore, the creation of state commissions need not eliminate the need for local CIUs. Creating a local CIU will not always be practical, nevertheless, there will always be the need for local prosecutor-led innocence review. District attorneys in small jurisdictions can establish a legal culture of quasi-judicial innocence review by directing innocence claims to a neutral reviewer (such as the felony

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<sup>52</sup> The commission's case selection criteria are listed on its homepage under "apply." Accessed June 26, 2018. See <http://innocencecommission-nc.gov/>

chief prosecutor), and also by minimizing the role of the trial prosecutor, original investigators, and other actors involved in the potential wrongful conviction.

Despite the misgivings of CIU prosecutors, there may be tangible benefits of finding a way to involve the office's appellate division in postconviction innocence review. For rookie prosecutors, appeals can provide an opportunity to learn about courtroom dynamics before arguing cases in court. If such prosecutors are encouraged to identify meritorious claims, rather than assuming every claim is frivolous, they may serve the important function of flagging postconviction claims for innocence review, and they may also take more satisfaction in their jobs. Appeals and CIU prosecutors could work more efficiently together, with CIU as the investigative arm and the appeals division conducting the intake.

Any effort to establish uniform policies for prosecutors nationwide will be complicated by a wide range of variables: jurisdiction size, existing state remedies for postconviction innocence review, role of the Attorney General, budgetary constraints, presence of local innocence organization(s), and more. Therefore, it is to be expected that postconviction innocence review policies will vary considerably across states and even within states. Prosecutors who clearly and publicly communicate these policies assist defense attorneys and pro se litigants in strategizing how to proceed with a claim. They also assist state lawmakers in identifying potential gaps in postconviction innocence review that may be filled through a state innocence commission, statewide appellate office, or other mechanism. CIUs may experience growing pains prior to implementing systematic innocence review practices. Transparency, even throughout these periods of trial and error, may result in more sustainable solutions.

Finally, I hope that this study will reinforce the importance of engaging prosecutors as partners in the mission of criminal justice reform. As reform-minded prosecutors continue to upset old-guard incumbents in elections across the country,<sup>53</sup> a multi-dimensional representation of prosecutors will also upset the image of the overzealous district attorney determined to maintain his conviction rates at any cost. Prosecutors engaged in reinvestigating potential wrongful convictions can help other jurisdictions implement similar practices. A prosecutor-led effort may follow the example of successful police reforms that have worked to improve eyewitness identification procedures<sup>54</sup> and custodial interrogation procedures. As ministers-of-justice, prosecutors are endowed with considerable discretion in determining how to uphold their mission that “guilt shall not escape or innocence suffer.”<sup>55</sup> The prosecutors’ power to dismiss a false conviction provides a compelling example of how this discretion can be justified.

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<sup>53</sup> Chammah, Maurice. “New Strategy for Justice Reform: Vote out the DA.” The Marshall Project. October 18, 2016. Available at: <https://www.themarshallproject.org/2016/10/18/new-strategy-for-justice-reform-vote-out-the-da>

<sup>54</sup> See, for example, the International Association of Chiefs of Police Model Policy for Eyewitness Identification to prevent false identifications that contribute to wrongful convictions, established in 2010. Accessed June 26, 2018. Available at: [http://www.theiacp.org/model-policy/model\\_policy/eyewitness-identification/](http://www.theiacp.org/model-policy/model_policy/eyewitness-identification/)

<sup>55</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935)

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## APPENDIX 3.1

### Coding Instructions – Prosecutorial Assistance

0 = no evident assistance; 1 = facilitated the exoneration; 2 = advocated for exoneration

#### Most Common Scenarios

The prosecutorial assistance code hinges on the prosecutor’s decision to dismiss the case or join defense in dismissing the case. Recommending defendant’s pardon counts as well. Exonerations occurring as a result of an acquittal or a court dismissal are therefore automatically coded 0. The prosecutor may dismiss proactively after new evidence of innocence arises, or he/she may dismiss after a court has vacated the conviction (or ordered a retrial). If the available evidence affirmatively suggests that the prosecutor did not oppose defense motions to vacate (or request retrial) and then moved to dismiss, the prosecutor should be considered as having assisted with the case, and code 1. See this representative case:

Ray Valentine: convicted in 2014. The DA’s office later learned that the police officer involved had pled guilty to stealing drugs and they moved to vacate the conviction. Two months later, the prosecution dismissed the case. Valentine was exonerated in 2015.

If, on the other hand, the available evidence suggests that prosecutors opposed the motion for retrial, and/or appealed motions for retrial, code 0. For example:

Harold Hall: convicted in 1990. In 1995, the trial court overturned his conviction. The prosecution appealed and the California Court of Appeals upheld the conviction. In 2004, the Ninth Circuit ordered a new trial. The prosecution dismissed three days before the retrial was set to begin in 2005.

#### New Exculpatory Evidence Rule

Prosecutorial resistance that occurred *before* new, probative, exculpatory evidence came to light does not preclude the possibility of prosecutorial assistance. (Unless prosecutors blocked the process that allowed this evidence to emerge such as in opposing requests for forensic testing). When new evidence of innocence—not presented at trial—arises and motivates the prosecution to dismiss or join in the dismissal, code 1. This rule applies in a variety of scenarios.

1. Many defendants have already exhausted their appeals before they succeed in exoneration. In the normal course of appeals, prosecutors may have opposed defense motions. This type of scenario may be distinguished from the events initiated after discovery of new evidence of innocence. A prosecutor’s opposition during the normal course of appeals should be considered distinct from the prosecutor’s opposition after new evidence of innocence arises. Thus, the following scenario characterizes a case coded 1, despite prior prosecutorial opposition:

Ronald Cotton: convicted in 1985, his conviction was overturned on appeal and he was retried. In 1987, he was convicted again. In 1994, postconviction DNA evidence was requested. In 1995, results cleared him of the crime. Prosecutors soon moved to dismiss, and he was exonerated.

2. New exculpatory evidence may also arise between conviction and sentencing. Prosecutors who move to dismiss as a result should be considered as having assisted. See this representative case coded 1:

David Quindt: convicted in 1999. Prior to sentencing, an informant implicated the real perpetrators. The prosecution moved to vacate and then dismissed in 2000.

3. New exculpatory evidence may come about as a result of an external investigation that uncovers police misconduct. When prosecutors dismiss after learning that the conviction was compromised by corruption, planting or fabricating evidence, etc, code 1. For example:

Terrance Thompson: convicted in 2003. In 2005, the conviction was reversed by the court for procedural error. After the conviction was reversed, the police officer was indicted on corruption charges. The prosecution then dismissed the case and Thompson was exonerated in 2006.

4. New evidence may come about as a result of a reinvestigation conducted in preparation for retrial. If the defense uncovers the evidence and prosecutors dismiss, code 1. If the prosecution's reinvestigation uncovers new exculpatory evidence that moves prosecutors to dismiss the case in lieu of retrial, code 2. Even if the prosecution initially opposed the motion for retrial, they have assisted in the exoneration by acknowledging the strength of the new evidence and foregoing further litigation. For example:

Amine Baba-Ali: convicted in 1989. In 1992, the court ordered a retrial based on prosecutorial misconduct and ineffective assistance of counsel. In preparing for the retrial, prosecutors discovered evidence that refuted medical testimony presented at trial, and they moved to dismiss. Baba-Ali was exonerated in 1992.

### **Actions Constituting Advocacy**

The minimum standard has been exceeded and the case should be coded as 2, when prosecutors take any or more of the following actions:

- Reinvestigated the case, even at defense request\*
- Conducts (pays for) DNA testing, even if the defense has already done so, but not if the testing was done secretly.
- Assists or supports the conviction review efforts of other government officers: federal prosecutors, states attorney general, prosecutors from another state or county to reinvestigate, FBI or local police agency.

- Pursues postconviction evidence of innocence and shares with defense upon discovery
- Publicly asserts belief in defendant's innocence or apologizes either at the time of exoneration or soon afterwards.

\*In some cases, the court's order for retrial initiates prosecution's reinvestigation of the case. If the reinvestigation uncovers *new*, material evidence (i.e. new DNA results, new witnesses not previously discovered by defense) which leads the prosecution to proactively dismiss, then such cases may be coded 2, despite evidence of previous prosecutorial opposition. If such a reinvestigation produces nothing new and only confirms evidence already identified by the defense, then code 0.

### **Actions Precluding Consideration for Prosecutorial Assistance**

In some cases, prosecutors' supportive actions are undermined by other forms of resistance. When the available evidence suggests that prosecutors have obstructed the path to exoneration in any one of the following substantive ways, the case should be coded 0 even if prosecutors also moved to dismiss the case:

- Opposed retrial in exonerated co-defendant's case (or prosecutors dismissed defendant's case only after co-d was acquitted on retrial)
- Opposed motions for DNA or other forensic evidence
- Challenged exculpatory DNA test results or other postconviction probative forensic evidence
- Concealed new exculpatory evidence postconviction (pre-conviction Brady issues do not preclude prosecutors from assisting with exoneration)
- Dismissal was conditional on a deal that defense would not sue, or other unjust deal. Prosecutors attempted to coerce defendant into accepting such a deal prior to dismissal.

## APPENDIX 3.2

### **Interview Consent Form** **with Audio/Visual Recording**

I am a doctoral student in the School of Criminal Justice at Rutgers University, and I am conducting interviews for my dissertation research, which is funded by the National Institute of Justice (2017-IJ-CX-0012). I am studying prosecutor's assistance and cooperation with postconviction claims of wrongful conviction. The insights gained from this study may aid system actors as they develop best practices for uncovering wrongful convictions efficiently and for building collaborative working relationships in the postconviction setting. You have been chosen to participate because of your experience assisting with a wrongful conviction case that culminated in exoneration. Approximately 30 prosecuting attorneys and 30 defense attorneys will be interviewed.

During this study, you will be asked to answer some questions as to your experiences connected to a specific exoneration case (or series of cases), including how your office came to be involved, what criteria you used to decide to become involved, and your relationships with other stakeholders on the case. You will also be asked, in more general terms, about your experiences reviewing wrongful conviction cases and about your experiences with the district attorney's office or with the postconviction defense attorney. This interview was designed to be approximately 60 to 90 minutes in length. However, please feel free to expand on the topic or talk about related ideas. Also, if there are any questions you would rather not answer or that you do not feel comfortable answering, please say so and we will stop the interview or move on to the next question, whichever you prefer.

This research is confidential. Confidential means that the research records will include some information about you and this information will be stored in such a manner that some linkage between your identity and the response in the research exists. Some of the information collected about you includes your working relationships with other criminal justice actors, your handling of exoneration cases, and your office policies with regard to these cases. Please note that we will keep this information confidential by limiting individual's access to the research data, by removing details that would identify you or others involved in the cases we discuss, and by keeping data in a secure location. The data gathered in this study are confidential with respect to your personal identity unless you specify otherwise.

The research team and the Institutional Review Board at Rutgers University are the only parties that will be allowed to see the data, except as may be required by law. If a transcriber is hired to transcribe your interview, they will be asked to sign a confidentiality form first. When the results of the research are published or shared at professional conferences, no information will be included that could reveal your identity or that of the defendant; only group results will be stated. All participants will be kept confidential. Transcribed interviews, stripped of identifying information, will be archived indefinitely on the researcher's password protected computer.

You are aware that your participation in this interview is voluntary. You are aware that audiorecording the interview is voluntary. You understand the intent and purpose of this research. If, for any reason, at any time, you wish to stop the interview, you may do so without having to give an explanation.

There are no foreseeable risks to participation in this study.

You have been told that the benefits of taking part in this study may include increased knowledge about postconviction processes and practices, which may potentially lead to greater efficiency in handling postconviction claims of wrongful conviction. However, you may receive no direct benefit from taking part in this study.

Unless you request that the researcher take electronic notes, the interview will be audiorecorded. The audio recording(s) will be used for scientific analysis and for no other purpose. The transcribed recording(s) will not include your name or any other obvious identifier such as your jurisdiction or the name of your organization. If you say anything that you believe at a later point may be hurtful and/or damage your reputation, then you can ask the interviewer to rewind the recording and record over such information OR you can ask that certain text be removed from the dataset/transcripts. A copy of your transcribed interview will be available to you upon request. If you would prefer that the researcher take electronic notes of the interview, the interview notes will be stripped of identifying information and kept on the researcher's password protected computer indefinitely. These interview notes are available to you upon request.

The audio recordings will be erased shortly after transcription. The investigator will not use the recording(s) for any other reason than that/those stated in the consent form without your written permission.

Signed consent forms, which cannot be linked to the transcribed interviews, and researcher fieldnotes will be kept in a locked file cabinet for three years after completion of the project and then shredded. Email correspondence will be deleted unless you indicate that you would like to be notified of future developments, such as research publications.

If you have any questions about the study or study procedures, you may contact me at 718-810-9481 or [liz.webster@rutgers.edu](mailto:liz.webster@rutgers.edu). You may also contact my faculty advisor Dr. Elizabeth Griffiths at 973-353-3303 or [elizabeth.griffiths@rutgers.edu](mailto:elizabeth.griffiths@rutgers.edu).

If you have any questions about your rights as a research participant, you can contact the Institutional Review Board at Rutgers (which is a committee that reviews research studies in order to protect research participants).

Institutional Review Board  
Rutgers University, the State University of New Jersey  
Liberty Plaza / Suite 3200

335 George Street, 3<sup>rd</sup> Floor  
New Brunswick, NJ 08901  
Phone: 732-235-9806  
Email: humansubjects@orsp.rutgers.edu

You will be offered a copy of this consent form that you may keep for your own reference.

Once you have read the above form and, with the understanding that you can withdraw at any time and for whatever reason, you need to let me know your decision to participate in today's interview.

Your signature on this form grants the investigator named above permission to record you as described above during participation in the above-referenced study. The investigator will not use the recording(s) for any other reason than that/those stated in the consent form without your written permission.

Subject  
(Print ) \_\_\_\_\_

Subject Signature \_\_\_\_\_  
Date \_\_\_\_\_

Principal Investigator Signature \_\_\_\_\_  
Date \_\_\_\_\_

*This informed consent form was approved by the Rutgers University Institutional Review Board for the Protection of Human Subjects on 11/16/2017; approval of this form expires on 11/15/2018.*

### APPENDIX 3.3

#### **Email Invitation to Participate:**

**Principal Investigator: Elizabeth Webster**

**Title: Prosecutorial Assistance as a Pathway to Exoneration**

Dear [NAME of defense attorney],

Hello. I'm Liz Webster, a PhD student at the School of Criminal Justice, Rutgers University- Newark. I'm writing to invite you to participate in a research study about prosecutorial assistance as a pathway to exoneration in wrongful conviction cases. The purpose of the study is to guide prosecutors and defense attorneys by offering examples of successful strategies and potential pitfalls of postconviction collaboration; examine the processes influencing postconviction prosecutorial decisions to assist with innocence claims; and ease the burden on the wrongfully convicted by identifying ways in which prosecutorial assistance can open pathways to exoneration. Participation in this study is voluntary, and you would be free to terminate it at any time.

I am conducting in-depth, semi-structured interviews with approximately 25 defense attorneys and approximately 25 prosecuting attorneys who have worked on exoneration cases featuring prosecutorial assistance and advocacy. If you agree to participate, I will soon contact you about scheduling a 60-90 minute phone interview. During the interview, I will ask about your experiences working with prosecutors on the [NAME] case. This case was chosen because it features some level of prosecutorial assistance as identified by the National Registry of Exonerations. I will also ask about your general experiences working with the district attorney's office in [JURISDICTION] beyond the instant case, and finally, when and how you believe the postconviction case review process works best.

Those who participate in the project to completion can rest assured that their participation will remain confidential. When the results of the research are published or shared at professional conferences, no information will be included that could reveal your identity or that of your client. A copy of your transcribed interview will be available to you upon request. If you decide to be removed from the project, I will destroy any records of what we have discussed and provide you with written confirmation that I have done so.

If you have any questions about the study, please don't hesitate to reach me at 718-810-9481 or [liz.webster@rutgers.edu](mailto:liz.webster@rutgers.edu) or my advisor Dr. Elizabeth Griffiths at [elizabeth.griffiths@rutgers.edu](mailto:elizabeth.griffiths@rutgers.edu). If you have any questions about your rights as a research participant, you may contact the Sponsored Programs Administrator at Rutgers University at:

Institutional Review Board  
Rutgers University, the State University of New Jersey  
Liberty Plaza / Suite 3200  
335 George Street, 3<sup>rd</sup> Floor  
New Brunswick, NJ 08901

Phone: 732-235-9806

Email: [humansubjects@orsp.rutgers.edu](mailto:humansubjects@orsp.rutgers.edu)

I hope that you will agree to participate. The insights gained from this study may help inform the wrongful conviction case review efforts of prosecutor's offices, enhance collaborative postconviction working relationships between defense and prosecutors, and identify mechanisms that could ease the path to exoneration for innocent defendants. If you wish to discuss this study or set up an interview, simply respond to this email. Thank you for your consideration,

Liz Webster

PhD Student, School of Criminal Justice

Rutgers University, Newark, NJ 07102

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Dear [NAME of prosecuting attorney],

Hello. I'm Liz Webster, a PhD student at the School of Criminal Justice, Rutgers University- Newark. I'm writing to invite you to participate in a research study about prosecutorial assistance as a pathway to exoneration in wrongful conviction cases. The purpose of the study is to guide prosecutors and defense attorneys by offering examples of successful strategies and potential pitfalls of postconviction collaboration; examine the processes influencing postconviction prosecutorial decisions to assist with innocence claims; and ease the burden on the wrongfully convicted by identifying ways in which prosecutorial assistance can open pathways to exoneration. Participation in this study is voluntary, and you would be free to terminate it at any time.

I am conducting in-depth, semi-structured interviews with approximately 25 defense attorneys and approximately 25 prosecuting attorneys who have worked on exoneration cases featuring prosecutorial assistance and advocacy. If you agree to participate, I will soon contact you about scheduling a 60-90 minute phone or in-person interview. During the interview, I will ask about your experiences working on the [NAME] case. This case was chosen because it features some level of prosecutorial assistance as identified by the National Registry of Exonerations. I will also ask about your general experiences working with postconviction defense attorneys in your jurisdiction; and finally, when and how you believe the postconviction case review process works best.

Those who participate in the project to completion can rest assured that their participation will remain confidential. When the results of the research are published or shared at professional conferences, no information will be included that could reveal your identity or that of the defendant. A copy of your transcribed interview will be available to you upon request. If you decide to be removed from the project, I will destroy any records of what we have discussed and provide you with written confirmation that I have done so.

If you have any questions about the study, please don't hesitate to reach me at 718-810-9481 or [liz.webster@rutgers.edu](mailto:liz.webster@rutgers.edu) or my advisor Dr. Elizabeth Griffiths at [elizabeth.griffiths@rutgers.edu](mailto:elizabeth.griffiths@rutgers.edu). If you have any questions about your rights as a research

participant, you may contact the Sponsored Programs Administrator at Rutgers University at:

Institutional Review Board  
Rutgers University, the State University of New Jersey  
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I hope that you will agree to participate. The insights gained from this study may help inform the wrongful conviction case review efforts of prosecutors' offices, enhance collaborative postconviction working relationships between defense and prosecutors, and identify mechanisms that could ease the path to exoneration for innocent defendants. If you wish to discuss this study or set up an interview, simply respond to this email. Thank you for your consideration,

Liz Webster  
PhD Student, School of Criminal Justice  
Rutgers University, Newark, NJ 07102

### APPENDIX 3.4

#### Qualitative Study of Prosecutorial Assistance in Exoneration Cases INTERVIEW GUIDE FOR DEFENSE ATTORNEYS

**Would it be okay with you if I record our discussion? I just want to make sure that I capture what you say as accurately as possible. The recording will not be shared and is just for the purposes of my own research. As I mentioned, I expect the interview to last about 60 to 90 minutes, but let me know if you have any time constraints, so that we can try to work within the time frame that you have today.**

I have a few basic questions to start:

1. What is your age?
2. How would you describe your race/ethnicity?
3. Where did you attend law school?
4. When did you earn your JD?
5. What is your current title and position?
6. How many years have you held your current position?
7. What was your position immediately prior to your current position?

**Thank you. As I explained when we set up the interview, I would like to start by asking you some questions specifically about the case of county and your experiences working with prosecutors in that county. Then I'd like to hear about your experiences working with prosecutors on innocence claims more broadly. Let's start with a few basic questions to fill out the data that the NRE does not collect:**

1. How would you describe the defendant's criminal record before the wrongful conviction?	a) extensive b) minor c) none d) don't remember
2. In terms of the defendant's family background, were they...	a) poor b) working class c) middle class d) upper class e) don't remember
IF APPLICABLE 3. In terms of the victim's family background, were they...	a) poor b) working class c) middle class d) upper class e) don't remember
4. What was the quality of the media coverage prior to exoneration?	a) favorable to innocence b) not favorable to innocence c) there was no media d) don't remember
IF APPLICABLE	

5. At what point was a viable alternative suspect identified?	a) before case review b) through case review c) never identified a viable alternative suspect d) don't remember
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8. How did your office become involved in the \_\_\_\_\_ case?

9. What criteria did your office use to decide to take the case?

What evidentiary issues were under review?

About how many open cases did you have on your docket at that time?

Had your client already appealed the case? If so, on what grounds?

10. Did you speak with the original defense attorney during the case review? How often?

IF YES: How would you describe that communication?

How would you characterize the quality of the defense at trial/ adjudication?

IF NO: Was that something that your office sought to do? Why/ why not?

What do you know about the quality of the defense at trial/ adjudication?

11. Were you in communication with the person who originally prosecuted the case?  
How often?

Was the individual who originally prosecuted the case still working at the prosecutor's office?

Were you in communication with anybody from the previous administration about this case?

IF YES: What was the outcome of that communication?

IF NO: Did you try to reach out to that person?

What did you learn, if anything, about their response to the innocence claim?

12. Could you describe the process through which the prosecutor's office initially became involved?

How was the information sharing/ discovery process?

Did prosecutors readily share files? Provide what you requested?

Did you feel that prosecutors responded in a timely manner?

Any Brady issues?

13. What was your relationship with this prosecutor's office [CIU] like prior to the instant case?

Had you ever worked with them before and what was that experience like?

Did you know any one there socially?  
 What, if anything, did you hear from the defense community about their reputation?  
 Did you anticipate cooperation?  
 Why/why not?

14. How did you communicate with prosecutors during this process (by phone, email, in-person meetings, etc.)?

How regularly did you or your office communicate with the prosecutors' office?  
 Was this communication fruitful? How so/ why not?  
 How many different people did you speak with in the prosecutors' office about the case?  
 Who attended in-person meetings?

15. Who communicated with the victim/ witnesses?

Did your office reach out to them about the case review or to reinvestigate?  
 Do you know if the prosecutor's office contacted them?  
 IF YES: Who from the prosecutor's office made contact?  
 What, if anything, did you learn about the outcome of the communication with the prosecutor's office?

Do you believe that the victim/witnesses received a consistent message about the case review?

16. Who, if anyone, communicated with law enforcement about the case review?

Was the police department cooperative, assist, with the reinvestigation?  
 What was their role?

How would you characterize the quality of the original investigation?  
 What do you know about the relationship between your office and the police department at the time of the original investigation?

17. The district [state's] attorney at the time of the exoneration was \_\_\_\_\_. What was his/her role in this process?

18. During what phase of the DA [SA] administration did the case review occur?

- A newly elected DA [SA]? Did s/he work under the previous administration?
- A longstanding DA[SA]?
- An election year? Was the DA [SA] running with opposition?
- What was the DA/SA reputation in the community/ popularity at that time?

19. How long did you anticipate it taking to win exoneration and how long did it actually take? [from the time you began representing \_\_\_\_\_].

What do you imagine the outcome being for your client if the prosecutor had not lent some assistance?

20. What was the media coverage like?

Who was involved in shaping the media coverage?

Who was quoted?

How was the public response?

21. What was the DA [SA] official statement upon exoneration?

Acknowledge innocence?

Reinvestigation to identify the real perp?

Issue apology?

Privately apologize?

Did the prosecutors' response/ statement affect your client?

22. Has the prosecutor's office [CIU] provided any assistance post-exoneration?

Assist or support the compensation claim or a pardon application?

How is the client doing now?

Does the prosecutor's office interact with your client independently?

23. Did your office's relationship with the prosecutor's office change at all as a result of this case?

Have you worked with them since?

Do you anticipate their continued cooperation?

Can you give an example of a case that they have not been/ would not be as receptive to?

24. How would you describe the level of cooperation in the county district attorney's office under the current administration?

What influences guide this cooperative (OR adversarial) culture?

OR if the current administration is the same as the one at the time of exoneration:

Has the culture changed? Evolved? How so/ why/ why not?

How has the current administration been received by the legal community?

Popular with the public?

**Now I'd like to ask about your experience working with prosecutors on innocence claims more generally.**

25. How does \_\_\_\_\_ county prosecutor's office compare with other DA [SA] offices you have worked with on other cases?

26. Can you give an example of another time when prosecutors were cooperative? Have you found that prosecutors are more receptive to certain types of postconviction claims?

Which? Why?

Does this have an impact on how you approach the office or on whether or not you seek their assistance?

27. Can you give an example of a time when prosecutors were uncooperative? Are there certain case dynamics that you believe inspire resistance among prosecutors?

Evidentiary issues? Plea or trial? Offense type? Type of sentence (LWOP/death/period of incarceration/other)? Identification of real perp? Criminal background of the defendant?

What impact, if any, does this have on your ability to assist your clients?

28. Are you familiar with prosecutors' process of assessing false guilty pleas?

Have you had any experience working on those types of innocence claims?  
IF YES: Can you describe that process?

29. Have you ever worked on an exoneration case with a CIU?

How was that experience different/ if at all?

30. What external factors might influence prosecutorial cooperation?

Election cycle? Anticipated public response? Relationship to the victim?  
Anticipated success of compensation claim/ lawsuit?

31. Have you ever felt prosecutors have too much authority/ power in responding to innocence claims or postconviction evidence of innocence?

IF YES: Under what circumstances?

32. Have you ever felt prosecutors have too little authority/ power in responding to innocence claims or postconviction evidence of innocence?

IF YES: Under what circumstances?

33. IF MODEL RULES: What, if any, changes came about as a result of your state's adoption of the model rule (3.8 g and h) governing postconviction rules of conduct?

Do you believe that the model rules are stringent enough? Too stringent?

Would you change anything about the wording or the intent of that model rule?

34. In your experience, would you say that prosecutors have become more receptive to postconviction innocence claims over time?

IF YES: Under what circumstances?

How do you hope to see your collaboration further develop?

IF NO: What specific challenges remain?

35. When is the postconviction process most effective?

36. How do you think that prosecutors might be encouraged to take a more active role?

37. What do you think prosecutors should know in approaching/ maintaining relationships with postconviction defense attorneys?

38. What do you think that defense attorneys could learn from your experience about approaching/ maintaining relationships with prosecutors?

What do you like about this work?

What knowledge would you like to share with other postconviction defense attorneys?

39. Is there anything I didn't ask you about that you think is important for me to know?

**Qualitative Study of Prosecutorial Assistance in Exoneration Cases  
INTERVIEW GUIDE FOR PROSECUTING ATTORNEYS**

**Would it be okay with you if I record our discussion? I just want to make sure that I capture what you say as accurately as possible. The recording will not be shared and is just for the purposes of my own research. As I mentioned when we set up the interview, I expect it to last about 60-90 minutes, but let me know if you have any time constraints, so that we can try to work within the time frame that you have today.**

I have a few basic questions to start:

1. What is your age?
2. How would you describe your race/ethnicity?
3. Did you attend law school in the state where you currently practice?
4. About what year did you earn your degree?
5. What is your current title and position?

**IF STILL A PROSECUTOR:**

How many years have you held your current position?

Have you served your entire career in \_\_\_\_\_ County?

What other positions have you held in that office?

**IF NO LONGER A PROSECUTOR:**

What years did you serve as a prosecutor?

Did you serve as a prosecutor only in \_\_\_\_\_ County?

What other positions have you held in that office?

How did you decide to leave?

6. What would you like to do next?

**Thank you. As I explained when we set up the interview, I would like to start by asking you some questions specifically about the \_\_\_\_\_ case. [In larger jurisdictions, particularly those with a CIU, these questions may be phrased in the plural and will ask about a series of cases, for example, all those exonerated post-CIU.] Then I'd like to hear about your experiences working with prosecutors on innocence claims more broadly.**

**Let's start with a few basic questions about the case to help fill out the data that NRE does not collect:**

1. How would you describe the defendant's criminal record before the wrongful conviction?	a) extensive b) minor c) none d) don't remember
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2. In terms of the defendant's family background, were they...	a) poor b) working class c) middle class d) upper class e) don't remember
IF APPLICABLE 3. In terms of the victim's family background, were they...	a) poor b) working class c) middle class d) upper class e) don't remember
4. What was the quality of the media coverage prior to exoneration?	a) favorable to innocence b) not favorable to innocence c) there was no media d) don't remember
IF APPLICABLE 5. At what point was a viable alternative suspect identified?	a) before case review b) through case review c) never identified a viable alternative suspect d) don't remember

7. How did your office become involved in the case?

**IF REFERRED BY A DEFENSE ATTORNEY/ POLICE/ MEDIA:**

What prompted you to consider the referral?

Prior to this case, had you ever worked with [referring body] before?

**IF PROACTIVELY IDENTIFIED:**

What prompted the case review?

8. How did you choose whether or not to become further involved [reinvestigate]?

What evidentiary issues were under review?

How did you weight these issues?

What was your workload at that time?

9. What was the elected DA [SA] role in the exoneration?

How often did you speak to him/ her?

In what contexts would you consult with him/ her?

10. At what stage did the defense become involved?

How did you communicate with the defense during this process (by phone, email, in-person meetings, etc.)

How regularly did you or your office communicate with defense during this process? Was this communication helpful?

IF NOT: What might have improved the communication?

11. What was your relationship with this defense attorney [public defenders' office or innocence project] like prior to the instant case?

Had you ever worked with them before and what was that experience like?  
Did you know any one there socially? Or in other professional contexts?  
Did that have any bearing on your decision to assist with the case? Make communication easier/ harder?

12. How did you communicate with defense attorneys during this process? (by phone, email, in-person meetings, etc.)

How regularly did you or your office communicate with \_\_\_\_\_ during this process?

Was this communication helpful?

13. What other actor/ stakeholder(s) did you speak with during this process (outside of the DA [SA]'s office)? Ex: defendant, crime victim, original defense attorney, original prosecuting attorney, law enforcement, journalist, family member? (*See follow up questions for probes*)

13a. Did you speak with the defendant during the case review? How often?

IF YES: How would you describe that communication? Did you find it useful?

IF NO: Was that something that your office sought to do? Why/ why not?

13b. How and when did your office approach the crime victim during the case review? (IF APPLICABLE) How often?

Did you speak to the victim personally? Which person in the office did?

What did you seek to communicate?

How would you describe the communication?

What was the reaction?

IF NO: Was that something that your office sought to do? Why/ why not?

13c. Did you speak with the original defense attorney during the case review? How often?

IF YES: How would you describe that communication?

Did you find it useful?

How would you characterize the quality of the defense at trial/ adjudication?

IF NO: Was that something that your office sought to do? Why/ why not?

What do you know about the quality of the defense at trial/ adjudication?

13d. Did you speak with the original line prosecutor during the case review? How often?

IF YES: How would you describe that communication?

Did you find it useful?

How would you characterize the line prosecutor's work?

IF NO: Was that something that your office sought to do? Why/ why not?

13e. Did you speak with law enforcement about the case review? How often?

IF YES: How were the officers you spoke to involved?

How would you describe that communication?

Did you require law enforcement resources in the reinvestigation? (IF APPLICABLE)

IF NO: Was that something that your office sought to do? Why/ why not?

How would you characterize the quality of the original investigation?

What do you know about the relationship between your office and the police department at the time of the original investigation?

14. Describe the public response to the exoneration.

What accounted for the public's response?

Was this response anticipated? How so/ why not?

15. What was the office response to the exoneration?

Any follow up meetings/ celebrations?

Continued case review?

Renewed investigation?

16. What was the office's official statement upon exoneration?

Acknowledge innocence?

Reinvestigation to identify the real perp?

Issue apology? Personally apologize?

17. Have you had (further) contact with the exoneree after the exoneration?

IF YES: How is the exoneree doing now?

IF NO: Do you know how the exoneree is readjusting?

18. How long did it take to win the exoneration? Were there any particular challenges your office faced in that effort that we haven't already discussed?

What do you imagine the outcome being for \_\_\_\_\_ if your office had not lent some assistance [initiated case review, initiated reinvestigation]?

**Now I have some questions about your office's involvement in wrongful conviction cases more generally.**

19. The district [state's] attorney at the time of the initial case review was \_\_\_\_\_. How long had s/he been in office at that time?

What was his/her previous position?

Did s/he have a different role in the office prior to being elected DA [SA]?

Did s/he remain in office until the exoneration?

20. Was the conviction in the \_\_\_\_\_ case won under the same administration that assisted with the exoneration?

IF YES: How did that impact the decision to assist with the case? Present any challenges or provide any benefits?

What resources/ support did the DA [SA] provide to assist with case review?

Were these sufficient?

IF NO: Were you in communication with the administration who prosecuted the original case? How did they respond?

What resources/ supports did they provide?

21. During what phase of the DA [SA] administration did the case review occur?

A newly elected DA [SA]?

A longstanding DA[SA]?

An election year?

Was the DA [SA] running with opposition?

**Now I have some questions about your office's involvement in wrongful conviction cases more generally.**

ASK THE FOLLOWING QUESTIONS IF THE OFFICE HAS A CONVICTION INTEGRITY UNIT. OTHERWISE, SKIP TO # 27

22. When did the office create the CIU and what was the impetus for creating it?

What goals did it hope to accomplish?

Did the creation of the CIU change how the office handled postconviction case review? Did it change how the office communicated with the public about these cases?

Did it change how the office communicated with the Innocence Project about these cases?

23. What is the structure of the CIU?

How many attorneys are designated to handle possible wrongful convictions?  
 Is the CIU their sole responsibility or do they have additional roles?  
 What is the race/ethnicity/gender breakdown of these attorneys? Other staff available?

24. About how many cases has the CIU reviewed?

How many innocence claims do you receive?  
 How many from prisoners themselves? Family? Attorneys?  
 How do you feel about the quality of the innocence claims you receive?  
 What challenges do you face in responding to these claims?

ASK THE FOLLOWING QUESTIONS IF THE OFFICE DOES NOT HAVE A CIU.

25. Could you summarize the criteria that the office uses to decide how to respond to postconviction evidence of innocence?

What other factors influence the office's decision making in these cases?  
 What challenges do you face in responding to these claims?

26. How do you feel about the quality of the innocence claims you receive?

How many from prisoners themselves? Family? Attorneys?

27. Does your office have a procedure for investigating claims of actual innocence?

Do you have specific attorneys who are designated to handle these cases?  
 What is their expertise?  
 About how often does your office receive information that might challenge a conviction?  
 Do you have a way of tracking the cases that do not culminate in exoneration?  
 How many have resulted in exoneration?

28. Has your office considered [would your office consider] creating a CIU?

Why/ why not?

ASK ALL:

29. What is the process for reviewing the guilty plea cases? Is it a different/ separate process?

What proportion of the postconviction cases you review were won by jury trial, bench trial or guilty plea?  
 Does the absence of a trial transcript pose a problem?  
 Would your office consider reviewing [more] guilty plea cases?

IF YES: Under what circumstances?

30. Could you provide an example of a claim that your office pursued that did NOT result in an exoneration?

May I ask a few basic questions about that case?

31. What kinds of resources/ supports does the district attorney's office provide to assist you in your conviction review efforts?

Are these resources/ supports sufficient? Why? Why not?

32. How well integrated are these efforts with the broader goals of the DA's office?

Do you ever feel that the efforts to overturn convictions are at cross purposes with the effort to win convictions?

Why/ why not?

33. How often do you interact with the postconviction defense attorney [Innocence Project in your area]?

Who initiates communication?

In what contexts do you communicate?

Is that communication limited to cases that you're working on together or are there other occasions that might bring you together?

Community events? Etc.

34. How much of your postconviction case review do you do in conjunction with defense attorneys?

What advantages/ obstacles are presented by this arrangement?

Do you feel that you're getting involved at the right stage?

Would you like to be involved sooner/ later?

35. How do you feel about the quality of the cases that you receive from the postconviction defense attorney/ Innocence Project?

Do you prioritize these cases?

Do you feel that they have merit?

Are there certain types of cases that are maybe not appropriate for your office to be involved with?

36. How do you think this relationship has evolved since earlier administrations [since the current DA's/SA's predecessor?]

Was there a relationship prior to your office's involvement?

Has the relationship evolved since your involvement?

Ways in which you would like to see the relationship evolve?

37. Legally, what is required of your office in response to postconviction evidence of innocence?

IF MODEL RULES: To what extent do you think that prosecutors consider these legal requirements when deciding how to proceed on a case?

In addition to legal requirements, what else do you feel is required of a prosecutor in response to a postconviction claim?

IF NOTHING: Do you think the lack of legal requirements makes a difference in prosecutors' responses? Why/ why not?

What do you think does compel prosecutors to respond?

38. IF MODEL RULES: What, if any, changes came about as a result of your state's adoption of the model rule (3.8 g and h) governing postconviction rules of conduct?

Do you believe that the model rules are stringent enough? Too stringent?

Would you change anything about the wording or the intent of that model rule?

39. Have you ever felt prosecutors have too much power/authority in responding to innocence claims or postconviction evidence of innocence?

IF YES: Under what circumstances?

IF NO: Have you ever felt prosecutors have too little power/authority in responding to innocence claims or postconviction evidence of innocence?  
Under what circumstances?

40. What do you think postconviction defense attorneys should know in approaching/maintaining relationships with prosecutors?

What have you learned from your previous interactions?

41. When is the postconviction process most effective?

42. What distinguishes the postconviction case review efforts of your office compared to other prosecutor's offices? What has motivated your office to engage in these efforts when others are not?

What do you like about this work?

What knowledge would you like to share with other prosecutors about postconviction work?

43. Is there anything I didn't ask you about that you think is important for me to know?

### APPENDIX 3.5. Qualitative Analytic Codes

Name	
	role of elected DA
advice for defense	role of trial prosecutor
communication	smell
flexibility	teamwork
honesty	what other prosecutors do
patience	Brady
respect	Brady allegations violations
transparency	building pros community
trust	DA assoc
advice for prosecutors	Case related factors
assessing claims	bureacratic error
accepting ambiguity	eye misID
appointing a lawyer	false conf
assessing and reassessing	ineffective assistance of counsel
assessing DNA claims	not IAC
DNA inclusions	junk science
evidence problems	analyst integrity
testing problems	jury acquittal
assessing innocence	one on one
brought by defense	pros misconduct
brought by IP	snitches
brought by prosecutors	thin weak
categorizing wc claims	tunnel vision
considering retrial	violent crime
considering victim	characterizing jurisdiction
decision to reinvestigate	crime
process of reinvestigation	collateral consequences
joint reinvestigation	compensation
defcon five	conviction mentality
elements of credible claim	D appeals
feelings	asserting innocence
frivolous claims	failure of appeals
guilty pleas	parole
large scale review	D criminal activity
pc claims not pursued - example	after release
pc proceedings	behind bars
prioritizing claims	D demographics
pro se	D release from prison
procedural vs actual	urgency of

death penalty  
 defense mystification  
 defense processes
 

- decision to represent
- defense caseload
- meeting with pros
- reinvestigation

 definition of exoneration  
 discretion
 

- arbitrary subjective
- consistency
- constraints
  - courts
  - legislation
  - limiting discretion of junior pros
  - time limitations for filing
- discretion for junior pros
- in outlying counties
- in smaller jurisdictions
- independence
- leaving decision to the courts
- question confusing
- to dismiss
- to grant relief
- to overturn jury verdict

 dismissing
 

- conceding
- motivation for
- standard for
  - constitutional basis

 efficiency interest
 

- the case went away

 elected prosecutor regime  
 ethical obligations
 

- in training subordinates
- model rules 3.8 gh
  - conflict about adopting
  - not familiar with

 experience
 

- all in same county
- being a career prosecutor
- case knowledge
  - from JD to pros office
  - in developing relationships
  - inexperienced
  - pc unit
  - Pros experience as defense atty

 finality  
 framing the narrative  
 getting it wrong  
 gut feeling  
 handling pc claims
 

- in appellate division
- interactions w defense
- less desirable
- screening out
- support from the DA
- unit structure

 Innocence Org
 

- acting as IP liaison
- agreeing with IP
- case selection criteria
- disagreeing with IP
- finding consensus
- initial contact with IP
- local counsel
- meetings with IP
- process with IP
- referring cases to
- reputation of IP

 instrumental motivations  
 intake defense
 

- backlog
- frivolous claims
- increase after exoneration

 intake prosecutor
 

- backlog
- increase after exoneration

 interviewing witnesses
 

- challenges in old cases
- defense difficulty
- time and expense

 legal culture  
 low hanging fruit

meeting D  
   after exoneration  
   apology  
   feelings  
   humanizing defendants  
   importance of  
 new evidence of innocence  
   alibi  
   alternate suspect  
   DNA  
   forensic non-DNA  
     finding experts  
   new witnesses  
   recants  
     perjury charges in  
   witness discredited  
 normative motivations  
   accuracy  
   doing the right thing  
   public safety  
 not taking credit  
 office culture  
   office hierarchy  
   office size  
 office policies - postconviction  
   change with new DA  
   CIU  
     case selection criteria  
     explaining lack of CIU  
     growing pains  
     hiring  
     impetus for  
     metrics of success  
     modeled after other CIUs  
     process  
     relationship with appellate division  
     staffing  
     stats  
   contacting victims  
   disagreement over  
   pc unit process  
   separate handling of DNA claims  
   pardon process  
   perceptions of law enforcement  
   perceptions of prosecutors  
     defense perceptions  
     grapevines  
     reputation of  
     seeking legitimacy credibility  
       embarrassed about wc  
       saving face  
   politics  
     elections  
     red blue  
   polygraph  
   power of the state  
   pre-trial review  
   procedural justice  
   pros accountability  
   pros as last resort  
   pros collaboration  
     change of heart  
     communication  
     defense characterization of  
     defense expectations of  
     flexibility  
     innovation  
     pleading down  
     pros liaison  
     recognizing bad actors  
     recognizing cognitive bias  
     rewards  
     stakes involved  
     to grant relief  
     w compensation  
     w DNA requests  
   pros occupational  
     caseload  
     job instability  
     job responsibilities  
     stress  
   pros resistance  
     cognitive bias  
     gang cases

generational  
 lawsuits  
 not setting precedent  
 w DNA requests  
 pushback  
 quality of the US criminal justice system  
   fairness  
   injustice  
 quasijudicial open minded  
 racial bias  
 real perp  
   codis  
   discovery of  
   not identified  
 relationships  
   adversarial mode  
   attended law school in the jurisdiction  
   defense w pros  
   exchange relationship  
   extracurricular events  
   law school  
   proximity  
   regular working relationship w defense  
   w defense bar  
   w IP  
   w police agencies  
 reputation with judiciary  
 resources  
   personnel  
   resource deprived  
 respondent demographics  
 responses to exoneration  
   finding fault  
   implementing reforms  
   improved relationship w atty  
   more exonerations  
   public  
 role of judges  
   judicial cooperation  
   judicial resistance  
 role of police  
   acting as intermediary with police dept  
   Brady material  
   officer integrity  
   opposition  
   reinvestigating  
   w evidence and testing  
 role of the press  
   after exoneration  
   bad publicity  
   bringing about exoneration  
   good publicity  
   press releases  
   pressuring pros  
 sharing information  
   attorney client privilege  
   discovery law  
   discovery process  
   NOT sharing information  
   open discovery law  
   open file on both sides  
   w forensics  
   w trial defense  
 smoking gun of innocence  
 suggesting blame  
   exonerating colleague  
   exonerating self  
   exonerating team  
   team responsibility  
 third party assistance  
   Attorney General  
   third party interference  
 timeline of exoneration  
   delays advantageous  
   frustrating delays  
 times have changed  
   actual innocence claims # of  
   crime  
   discovery rules  
   DNA exhausted  
   evidentiary hearings  
   indigent defense  
   judging by today's standards  
   juries

perceptions of law enforcement  
pros more cooperative  
recognizing trends in wc review  
scientific standards  
technology  
true believer  
Victims  
assistance

child  
opposition or upset  
postconv communication with  
race of the victim  
reopening wounds  
responsibility to  
status class  
victim closure