Mass Exonerations: Protocols for Reviewing Convictions for Serious Crimes in Cases of Systemic Misconduct

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ABSTRACT

The discovery of one "bad actor" in the criminal legal system often has a ripple effect, calling into question a host of potentially impacted cases. To date, the National Registry of Exonerations has recorded thirty-nine "group exonerations"—defined as "the exoneration of a group of defendants who were convicted of crimes as a result of a large-scale pattern of law enforcement perjury and corruption." In many of these cases, upon the discovery of a pattern of misconduct, the appropriate prosecuting agencies undertook an affirmative effort to identify other impacted cases and to remedy the harm caused by the misconduct, including through the mass dismissal of charges and vacatur of convictions.

But the recorded group exonerations to date involve almost exclusively low-level crimes. The criminal legal system has thus far failed to move with the same urgency and efficiency in cases where a large number of convictions for serious crimes—murder, sex crimes, and violent felonies—are at issue. There may be good reasons for this: in serious crimes the risks of moving too hastily to vacate convictions and dismiss charges include the risk of a "wrongful acquittal" and the possibility of releasing criminal defendants who may reoffend or who did, in fact, receive a fair process. But the current approach—typically a cautious, painstaking, case-by-case, individual review, focused on proving factual innocence — may take years to achieve resolution in any one case and thus does not adequately balance the (valid) concerns for

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public safety and principle of finality with every defendant's right to due process and a just and accurate outcome in their case. The current approach also fails to adequately restore public trust in the criminal legal system, which is degraded not only by the discovery of repeated misconduct but also by the failure to remedy these system breakdowns.

This article proposes an approach for the systematic review of serious cases following the discovery of a pattern of misconduct. That approach is derived from the successful protocols used in previous group exonerations involving low-level crimes, tailoring those protocols to account for the particularities of reviewing convictions for serious crimes. This article makes the case that prosecutors should "err" on the side of vacatur—even in the most serious cases—where a pattern of misconduct has been uncovered and should create independent review panels to assist with the investigation of a large number of potentially impacted cases.

INTRODUCTION

"Al, Loony runs with Eddie aka Bo . . . says he was present at shooting and saw Loony shot [*sic*] white guy in head," read the beginning of a handwritten note in a decades-old file from the Indianapolis Metropolitan Police Department (IMPD). The note was written by an IMPD detective in August 1998 to "Al"—Detective Alan Jones—the lead detective investigating the recent shooting death of a young man named Kasey Schoen—the "white guy" referenced in the note. By the time my colleagues at the University of San Francisco (USF) Racial Justice Clinic and I first read the note, our client, Leon Benson, had been in an Indiana prison for twenty-four years. He was serving a sixty-year sentence for Kasey Schoen's murder.

But Mr. Benson was not the person known as "Loony," and based on our review of the case up to that point, he was almost certainly innocent. After scouring the police file, which contained page after page of evidence pointing to the "Loony" mentioned in the note, we were baffled. *How had Leon Benson been convicted of this crime? How had his attorney failed to investigate or present this mountain of critical evidence pointing to someone else as the shooter*? The answer, we discovered, was that Mr. Benson's attorney didn't have it. Detective Jones had withheld substantial portions of the file—including the bombshell information in the handwritten note—and failed to hand over critical evidence even to the prosecutor's office.

Twenty-four years after Leon Benson's conviction, in a nearly unbelievable turn of events, Detective Jones sat down with us to discuss

the case—and his discovery practices. He explained that he considered handwritten notes "work product." In a sworn declaration, Detective Jones would later attest: "*It was not my practice* to provide my work product, including handwritten notes, to the prosecutor's office. . . . Similarly, I considered handwritten notes produced by me or other law enforcement officers in the course of the investigation to be work product that I would not have ordinarily turned over to the prosecutor's office."[1] The problem, however, is there is no "work product" exception to *Brady v. Maryland*,[2] the landmark United States Supreme Court case that held that the suppression of material, favorable evidence by the State violates due process.[3]

This admission was a critical turning point in the joint reinvestigation between the USF Racial Justice Clinic and the Marion County Prosecutor's Office Conviction Integrity Unit that ultimately led to the exoneration of Leon Benson in March of 2023. Based on the mountain of evidence pointing to "Loony's" guilt and Mr. Benson's innocence, the State agreed to overturn Mr. Benson's conviction and dismiss the charges against him with prejudice. But Detective Jones's admission was bigger than Leon Benson's case. Detective Jones explained that withholding handwritten notes was his *practice*. It became clear that there were likely other cases—perhaps *many* other cases—over Jones's decades-long tenure at the IMPD in which he failed to turn over material, exculpatory evidence under the misapprehension (sincere or otherwise) that it was his "work product." His admission gives rise to serious concerns about the integrity of the other convictions obtained by the Marion County Prosecutor's Office based on investigations led by Detective Alan Jones, and perhaps of cases investigated by other members of the IMPD who shared his practice of withholding their supposed "work

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[1] Declaration of Detective Alan Jones (May 11, 2022) (on file with the author) (emphasis added).

[2] 373 U.S. 83, 87 (1963).

[3] *Brady* violations happen to be one of the most common forms of official misconduct and a leading cause of wrongful convictions. *See, e.g.*, Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 276, 278, 285 (2004); Jessica Brand, *The Epidemic of Brady Violations: Explained*, THE APPEAL (Apr. 25, 2018), https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/; *% Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS [hereinafter NRE] (July 31, 2023), https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (official misconduct is a contributing factor in 60% of wrongful convictions recorded by the National Registry of Exonerations).

product."

The discovery of one "bad cop" often has a ripple effect, calling into question a whole host of potentially impacted cases. Since the National Registry of Exonerations (NRE)[4] began recording individual exonerations in 1989, it has also tracked "group exonerations"—"the exoneration of a group of defendants who were falsely convicted of crimes as a result of a large-scale pattern of police perjury and corruption."[5] The NRE has recorded 39 group exonerations, amounting to nearly 35,000 criminal defendants to date.[6] Most if not all of these group exonerations[7] resulted from revelations in a single case which gave rise to

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[4] The NRE is a joint project of three universities: its original home, the University of Michigan Law School; the Michigan State University College of Law; and the Newkirk Center for Science & Society at the School of Social Ecology of the University of California, Irvine. This article would not have been possible without the data gathered by the National Registry of Exonerations. The work of the NRE is absolutely vital to recording the history of wrongful convictions as it unfolds and to understanding the factors that contribute to wrongful convictions in order to prevent future miscarriages of justice.

[5] Samuel R. Gross et al., *Race and Wrongful Convictions in the United States*, NRE 31 (Sept. 2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf. Notably, some of these group exonerations resulted from *both* police and (related) prosecutorial misconduct. *See*, *e.g.*, *Minnesota 2019*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/minnesota-2019 (last visited Aug. 2, 2023) (the group exoneration out of Cloquet, Minnesota, which resulted, in part, from the prosecutor's repeated failure to disclose previous misconduct of officers involved in the defendants' cases); *Michigan 2020*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/michigan-2020 (last visited Aug. 2, 2023) (in one case, the group exoneration resulted from faulty blood alcohol testing devices, and the related misconduct concerned failure to follow proper inspection and calibration protocols); *Massachusetts 2017*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/massachusetts-2017 (last visited Aug. 2, 2023); *Massachusetts 2018*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/massachusetts-2018 (last visited Aug. 2, 2023) (mass exonerations resulting from misconduct by crime lab technicians, including the Massachusetts lab scandals involving Annie Dookhan and Sonja Farak which resulted in the vacatur of over 32,000 criminal convictions for drug-related crimes.)

[6] THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations (last visited Aug. 2, 2023). Some additional group exonerations have not yet been recorded in the registry as of the date of this writing or have been omitted for reasons unknown to the author, including some of the group exonerations involving serious crimes discussed *infra* Section III(B).

[7] The terms "group exoneration" and "mass exoneration" are used interchangeably

concerns about a possible pattern of misconduct.[8] Once the pattern was confirmed, appropriate prosecuting agencies did in some of those instances assume their rightful responsibility of identifying other impacted cases and taking appropriate action to address the misconduct, including through the mass dismissal of charges and vacatur of convictions.[9]

But the recorded group exonerations to date involve almost exclusively low-level crimes—predominantly, crimes involving drug possession or sale, and some involving traffic offenses.[10] Naturally, patterns of official misconduct impact more than just these low-level cases, but our legal system has thus far failed to move with appropriate urgency and efficiency in cases where a large number of convictions for more *serious* crimes—including murder, sex crimes, and violent felonies—are at issue. Group exonerations rarely include cases involving serious felony convictions.[11] There may be good reasons for this: in cases involving serious crimes, the risks of moving too hastily to vacate convictions and dismiss charges include the risk of a "wrongful acquittal" [12] and the possibility of releasing from custody criminal defendants who may reoffend or who did, in fact, receive a fair process. But the current approach—typically a cautious, painstaking, case-by-case, individual review, focused on proving factual innocence— may take *years* to achieve resolution in a single case and thus does not adequately balance the (valid) concerns for public safety and finality with every defendant's right to due process and a just and accurate outcome in their case.

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throughout this article.

[8] *See, generally*, GROUPS REGISTRY, *supra* note 6.

[9] *Id.*

[10] *See generally Mass Exonerations and Group Exonerations Since 1989*, NRE, Conference on: Mass Exoneration and Ethics, VILL. U. SCH. OF LAW (Apr. 9, 2018), https://www.law.umich.edu/special/exoneration/Documents/NREMassExonConf4418.pdf; GROUPS REGISTRY, *supra* note 6.

[11] *Id.*

[12] For the purposes of this article, the term "wrongful acquittal" is generally used to refer to a vacatur resulting in a criminal defendant's release from custody where that person is factually guilty of some or all of the charged offense(s). As discussed in greater detail herein, following the vacatur of a criminal conviction, the prosecutor has the option to dismiss charges, retry the case, offer a plea, or arrange some other negotiated resolution. In some states, the prosecutor also has the related option to initiate resentencing. The purpose of the term "wrongful acquittal" as used herein is to allude to the possible implications should the prosecutor elect to take ameliorative action in the wake of the discovery of a pattern of official misconduct that results in the release of someone who is factually guilty of the crime at issue.

This article proposes that there are opportunities to learn from and adapt the successful protocols used in past group exonerations for low-level crimes to craft appropriate methods for identifying and rectifying wrongful convictions in serious cases following the discovery of systemic misconduct that may have impacted a large number of cases.[13] At the same time, such adapted protocols must also account for the particularities of the review—and, potentially, the vacatur—of convictions for those serious crimes.

Section I of this article discusses the scope of the problem of wrongful convictions and the difficulty of correcting erroneous outcomes in the criminal legal system, underscoring the disadvantages inherent in applying the adversarial, case-by-case approach in cases where there are doubts about the integrity of a large number of convictions. Section II provides a survey of mass exonerations to date, identifying features common to past group exonerations, including the processes for determining the scope and standard of review to identify impacted cases following the discovery of a pattern of official misconduct. This section also examines the limited number of group exonerations to date that involve the vacatur of convictions for *serious* crimes, including violent felonies and murder. Section III addresses particular considerations when applying mass exoneration frameworks to convictions for serious crimes, including a weighing of both the risks of wrongful conviction and those of so-called "wrongful acquittal," and makes a case for "erring" on the side of vacatur—even in the most serious cases—where systemic misconduct is uncovered. Section IV proposes an approach for the systematic review of serious cases following the discovery of a pattern of official misconduct, including the creation of independent review panels to assist the prosecuting agency with the review and investigation of a large number of potentially impacted cases.

I. THE SCOPE OF THE PROBLEM AND THE DIFFICULTY OF RECTIFYING

[13] This article takes its inspiration, in part, from the call to action articulated by Valena Beety et al. in their excellent guide *Miscarriages of Justice: Litigating Beyond Factual Innocence*. VALENA BEETY, KAREN NEWIRTH & KAREN THOMPSON, MISCARRIAGES OF JUSTICE: LITIGATING BEYOND FACTUAL INNOCENCE 34 (Arizona State University Sandra Day O'Connor College of Law Academy for Justice, 2023), https://academyforjustice.asu.edu/wp-content/uploads/2023/01/20230123-A4J-MoJ-Report-digital.pdf ("Wrongful conviction practitioners can go further and craft protocols for handling the inevitable discovery of a bad actor, so that one part of the automatic response to such revelations is a full case review.")

WRONGFUL CONVICTIONS

The development of DNA testing and use of DNA evidence in criminal cases over the last 40 years have inspired a national reckoning concerning the problem of wrongful convictions.[14] Those landmark DNA exonerations beginning in 1989 convincingly demonstrated that the criminal legal system sometimes produces erroneous outcomes. They also lent credence to other claims of wrongful conviction in cases where no DNA evidence was available, and helped establish that other "system breakdowns" in the criminal legal system do, in fact, lead to unjust convictions.[15]

Estimates of the rate of wrongful convictions vary, from two to five percent.[16] Today, there are just under two million people incarcerated in the United States.[17] An error rate of two percent would mean that there are approximately 40,000 wrongfully convicted people in custody. The invaluable data on wrongful convictions collected and maintained by the NRE demonstrate that the causes of wrongful conviction are systemic and varied, with typically more than one identified cause contributing to each wrongful conviction.[18]

In spite of the compelling evidence and growing awareness that wrongful convictions happen, along with greater clarity about what causes them, the criminal legal system has not fundamentally changed—it is not

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[14] *See* Robert J. Norris, *Framing DNA: Social Movement Theory and the Foundations of the Innocence Movement*, 33 J. CONTEMP. CRIM. JUST. 26 (2017); Daniele Selby, *DNA and Wrongful Conviction: Five Facts You Should Know*, THE INNOCENCE PROJECT (Apr. 25, 2023), https://innocenceproject.org/news/dna-and-wrongful-conviction-five-facts-you-should-know/; Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, 53 CRIME & DELINQUENCY 436, 439-40 (2007) (discussing how development of DNA technology helped shed light on the frequency of wrongful convictions).

[15] Ramsey & Frank, *supra* note 14 at 439-41.

[16] *See id.*; Marin Zalman, Brad Smith & Amy Kinger, *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 JUST. Q. 72 (2008).

[17] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POLICY INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html#bigpicture.

[18] Stephanie Roberts Hartung, *The Confluence of Factors Doctrine: A Holistic Approach to Wrongful Convictions*, 51 SUFFOLK U. L. REV. 369, 370-72 (2018); Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 ALB. L. REV. 717, 732-34 (2016) (stating in 52% of DNA exonerations examined, more than one factor was identified as giving rise to the wrongful conviction). *See also % Exonerations*, *supra* note 3.

designed to right its wrongs and has yet to come up with efficient, reliable, and just methods to identify and rectify wrongful convictions.[19] The criminal legal system prioritizes finality, and the burden to overturn a wrongful conviction remains a heavy one.[20]

At the federal level, the Supreme Court has found that even factual innocence may not be sufficient to earn the petitioner the opportunity to return to court to present their claims;[21] also apparently insufficient to warrant review is a change in the law that renders the underlying crime. . .

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[19] *See, e.g.*, Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, J. CRIM. L. & CRIMINOLOGY 857, 862-63 (2010) (explaining why wrongful convictions occur and that they are difficult to correct); Elizabeth Webster, *The Prosecutor as a Final Safeguard against False Convictions: How Prosecutors Assist with Exoneration*, 110 J. CRIM. L. & CRIMINOLOGY 245, 257 (2020) ["After direct appeal, the system is invested in maintaining the conviction and expending few (if any) resources on continued litigation. Postconviction procedural rules reveal an 'institutional bias in favor of preserving convictions at all costs' that applies on both the state and federal level."]. *See also* Carrie Leonetti, *The Innocence Checklist*, 58 AM. CRIM. L. REV. 97, 102-103, 115 (2021) (discussing the barriers to postconviction relief for most defendants, including those who claim innocence, which "range from high to insurmountable;" "In many countries, especially the United States, the leading cause of wrongful convictions may very well be the high procedural barriers to exoneration of likely innocent defendants."); Donald P. Lay, *The Writ of Habeas Corpus A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1018-19 (1993) (describing habeas review as a system that "breeds judicial inefficiency, delay, public misunderstanding, and fundamental unfairness"); Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 75 (2017) (describing postconviction review systems as "procedural labyrinths").

[20] *See, e.g.*, George C. Thomas II., Gordon G. Young, Keith Sharfman & Kate B. Briscoe, *Is It Ever Too Late for Innocence - Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 272-73 (2003) ("Thus, in the interest of finality, it is made exceedingly difficult for a defendant to obtain relief based on the discovery of new evidence, absent procedural error of some kind").

[21] Herrera v. Collins, 506 U.S. 390, 390 (1993) (holding that a claim of actual innocence does not necessarily entitle a petitioner to federal habeas corpus relief); McQuiggin v. Perkins, 569 U.S. 383, 384 (2013) (stating the Supreme Court has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence"). *See also* Lara Bazelon, *Scalia's Embarrassing Question*, SLATE.COM (Mar. 11, 2015), https://slate.com/news-and-politics/2015/03/innocence-is-not-cause-for-exoneration-scalias-embarrassing-question-is-a-scandal-of-injustice.html ("The Supreme Court has repeatedly declined to hold that the federal Constitution allows for so-called freestanding claims of innocence, that is, the right to be let out of prison simply because you didn't do it, without any other 'technical' violation to back up your argument. In the United States, the inmate who raises a compelling case of innocence after a constitutionally proper trial may well be doomed.").

not a crime.[22] The wrongfully convicted have fared somewhat better in state courts, where advocates nationwide have had some limited success in removing procedural barriers to presenting new evidence that undermines confidence in the integrity of a conviction.[23] Some states, however, still limit post-conviction claims and remedies to exclude "[defendants] whose persuasive proof of innocence is *not* DNA evidence, or defendants who pleaded guilty rather than going to trial."[24]

The wheels of justice continue to turn slowly and rarely backward. Even where a defendant is one of the lucky few who are able to secure post-conviction representation, the investigation and litigation of a typical wrongful conviction case can take years.[25] The adversarial process and emphasis on finality in the criminal legal system encourage the State to reflexively defend convictions it has won, even in the face of compelling

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[22] Jones v. Hendrix, 599 U.S. 465, 470 (2023) (holding that a federal prisoner cannot challenge a sentence even if subsequent rulings show that courts misinterpreted the law and convicted the person for conduct that wasn't actually a crime). *See generally* Leonetti, *supra* note 19 at 102-103 (discussing the barriers to postconviction relief for most defendants, including those who claim innocence, which "range from high to insurmountable").

[23] *See, e.g.*, Jon Campbell, *NY lawmakers vote to make it easier to challenge wrongful convictions*, GOTHAMIST (Jun. 20, 2023), https://gothamist.com/news/ny-lawmakers-vote-to-make-it-easier-to-challenge-wrongful-convictions; Justin Brooks, Alexander Simpson & Paige Kaneb, *If Hindsight Is 20/20, Our Justice System Should Not Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALB. L. REV. 1045, 1058 n.93 (2015) (A majority of jurisdictions—twenty-nine states—apply new evidence standard ordering a new trial if new evidence "probably" or "more likely than not" would have changed the outcome at trial.).

[24] *See, e.g.*, Nancy J. King, *Appeals*, in 3 REFORMING CRIMINAL JUSTICE 253, 270 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf (emphasis added); Barry Scheck, *NY Governor Kathy Hochul Should Sign the Challenging Wrongful Convictions Act Into Law*, THE INNOCENCE PROJECT (Oct. 2, 2023), https://innocenceproject.org/ny-governor-kathy-hochul-should-sign-the-challenging-wrongful-convictions-act-into-law/ (Explaining that New York is one of the remaining handful of states that won't allow people convicted of crimes to obtain post-conviction relief using non-DNA evidence of innocence).

[25] Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012*, NRE 24 (June 2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf ("With a few exceptions, exonerations take a long time. The overall average is 11.9 years from conviction to exoneration, 13.0 years from arrest."); Jon Gould & Richard A. Leo, *The Path to Exoneration*, 79 ALB. L. REV. 325, 356 (2015) (stating time between conviction and exoneration took a median 159 months or more than 13 years for a factually innocent defendant to be exonerated).

evidence casting serious doubt on those convictions.[26]

As in our client Mr. Benson's case, these individual exonerations often uncover a pattern of misconduct, potentially compromising a significant number of cases.[27] But the current system is not designed to address that larger problem. As noted above, the primary method of undoing wrongful convictions for serious crimes is the individual review—one case at a time, investigated and reconsidered with painstaking care and caution, usually over the course of several years.[28] There may be compelling reasons for this measured, meticulous approach: it is a serious thing to upset the factual and legal conclusions of twelve jurors and (almost always) an appellate court.[29] Finality serves important

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[26] *See generally* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006) (discussing prosecutors' reticence to reevaluate convictions even after evidence of guilt has been discredited); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 518 (2007) (arguing that prosecutors resist acknowledging exculpatory DNA evidence because of cognitive biases); Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015) (arguing that senior prosecutors become cynical about innocence claims); DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACTS ON THE INNOCENT 150 (New York University Press, 2012) (discussing various reactions by prosecutors to post-conviction innocence claims); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004); Keith A. Findley, Maria Camila Angulo Amaya, Gibson Hatch & John P. Smith, *Plea Bargaining in the Shadow of a Retrial: Bargaining away Innocence*, 2022 WIS. L. REV. 533, 541-42 (2022) (finding in post-conviction litigation involving defendants with a high likelihood of being actually innocent and wrongly convicted, in 62% of these cases, prosecutors sought to preserve a conviction; prosecutors offered plea bargains in 23% of cases; those offers were "uniformly steep"); Gould & Leo, *Path to Exoneration*, *supra* note 25 (observing based on review of exonerations to date, "the adversarial nature of the criminal justice system continues from the trial level to subsequent efforts to exonerate the innocent." "Police and prosecutors maintain their role orientations, infrequently taking a central role in investigating or advocating for exoneration and serving as the largest combined source of opposition to exonerations,"); Lara Bazelon, *The Innocence Deniers*, SLATE.COM (Jan. 10, 2018) https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html.

[27] For example, see discussion of Det. Scarcella's cases (*infra* Section II(B)(2)(a)) and Det. Guevara's cases (*infra* Section II(B)(2)(b)).

[28] Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L & CRIMINOLOGY 523, 524, 535-36 (2005); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (Harvard Univ. Press 2011) at 150; s*ee generally* NRE, *supra* note 6.

[29] *See, e.g.*, Leonetti, *supra* note 19 at 102-103, 115 (discussing barriers to overturning wrongful convictions, including reluctance to disturb jury verdicts).

functions in the criminal legal system, including promoting confidence in the system and offering closure for crime victims.[30]

At the same time, however, wrongful convictions decrease public confidence in the integrity of the criminal legal system and especially in its component law enforcement agencies, particularly when official misconduct is a contributing cause to those wrongful convictions (as it so often is).[31] When systemic misconduct is uncovered in scores of cases involving serious crimes, the traditional method of ferreting out wrongful convictions and providing relief one case at a time is wholly inadequate.

The disturbing reality is that systemic misconduct is *more likely* to occur in more serious cases.[32] Exonerations for murder—particularly those that are death penalty eligible—reveal the *highest* rates of official misconduct at 79%.[33] Higher error rates in murder cases may be attributable to the "extraordinary pressure to secure convictions for heinous crimes" as well as the difficulty of investigating crimes without victims available to testify.[34] Whatever the exact cause, this fact has potentially devastating consequences. The people serving the longest

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[30] Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 409 (2002) ("In a theoretical sense, finality is necessary to maintain the legitimacy and integrity of the criminal justice system. In a practical sense, victims of violent crime seek finality as a way of promoting closure.")

[31] *See, e.g.*, Yaroshefsky, *supra* note 3 at 299 ("Wrongful conviction cases have decreased public confidence in the integrity of the criminal justice system, and, to the extent that police and prosecutors are responsible for wrongful convictions, in those government offices."); Samuel R. Gross et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, NRE (Sept. 1, 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

[32] *See* Gross et al., *Race*, *supra* note 5 at 15 ("Misconduct is generally more common the more extreme the violence, ranging from 38% and 39% for robbery and sexual assault cases to 72% for exonerations from death sentences. These numbers reflect both higher rates of official misconduct in the most serious crimes, and more diligent post-conviction reinvestigations."); Gross et al., *Government Misconduct*, *supra* note 31 at 15-17 ("[w]rongful convictions are *more likely* to occur in murder cases because police and prosecutors work harder to secure murder convictions in cases with weak evidence than they do for lesser crimes," "false murder convictions are *more likely to be identified* . . . because [advocates, et al.] devote much more time and many more resources to doing so, especially if the defendant might be put to death").

[33] Gross et al., *Government Misconduct*, *supra* note 31 at 15.

[34] Samuel R. Gross, *Convicting the Innocent*, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 1, 8 (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100011#; Gross et al., *supra* note 31.

sentences for the most serious crimes are more likely to have been wrongfully convicted due to official misconduct. It makes it more likely that the true perpetrator escaped punishment and may still pose a risk to public safety. It also suggests that some number of the "factually guilty" may have been deprived of a fair and legal process.[35]

Whether a wrongful conviction impacted by misconduct arises from a minor or serious crime, it is the state's error that has infected the process and it is the state that has vastly more resources than the harmed parties. Moreover, it is the state which must uphold the rule of law and assure the public that the criminal legal process has integrity. It is the state that must balance finality and public safety with the need for swift action so that the wrongfully convicted do not languish in prison. With this in mind, the next section examines recorded group exonerations to date and what can be gleaned from the processes and standards previously used by prosecuting agencies to identify impacted cases and provide appropriate relief.

II. MASS EXONERATIONS TO DATE

A "mass" or "group exoneration" as defined by the National Registry of Exonerations is the exoneration of a group of defendants who were falsely convicted of crimes as a result of a large-scale pattern of police perjury and corruption.[36] As noted above, the NRE has recorded 39 group exonerations, amounting to nearly 35,000 criminal defendants.[37] Other than the records maintained by the National Registry, little research or scholarship has been devoted to the shared features of mass exonerations, their primary contributing factors, or the similarities and differences in the frameworks used to identify and rectify them.[38] This section examines those shared features, contributing factors, and review processes.

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[35] *See* Sarah A. Crowley & Peter J. Neufeld, *Increasing the Accuracy of Criminal Justice Decision Making*, COMPARATIVE DECISION MAKING 353, 357 (Thomas R. Zentall & Philip H. Crowley eds., 2013) ("An unjust conviction may be a conviction obtained in violation of a defendant's procedural rights or one that is factually inaccurate, whether or not these two phenomena occur together.").

[36] Gross et al., *supra* note 5 at 31. *See* GROUPS REGISTRY, *supra* note 6.

[37] GROUPS REGISTRY, *supra* note 6.

[38] Notable exceptions to the dearth of scholarship on mass exonerations include: Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1133 (2013); Symposium, *Mass Exoneration and Ethics*, VILL. U. SCH. OF LAW (Apr. 9, 2018) https://www1.villanova.edu/villanova/law/newsroom/webstories/2018/0205.html.

A. Common Features of Previous Mass Exonerations

1. Types of Crime and Misconduct: Non-Violent or "No-Victim" Crimes

Almost all of the group exonerations recorded to date—thirty-two out of thirty-nine groups, or about 82%—involve *only* nonviolent crimes,[39] and nearly 40% of those instances involve *only* drug-related crimes.[40] In most cases, the defendant served no time in custody for the erroneous charges, or the exonerations took place after the defendant was out of custody.[41] The vast majority of these convictions were overturned because of official misconduct—specifically, police misconduct.[42] Consistent with general trends in the criminal legal system,[43] the defendants in a significant number of these group exonerations pleaded guilty.[44]

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[39] Here, "non-violent crimes" include drug possession/sale, non-violent felonies, non-violent misdemeanors, traffic offenses, and weapon offenses. *See* GROUPS REGISTRY, *supra* note 6..

[40] *Id.*

[41] *See generally id*.

[42] *Id*.; Gross et al., *supra* note 31 at iii-iv. While the majority of the recorded mass exonerations involve police misconduct, the *largest* mass exonerations resulted from systemic misconduct involving forensic evidence. These include the 2017 and 2018 lab scandals in Massachusetts and the 2013 misconduct at a regional crime lab in Texas. Both exposed systemic mishandling of drug-related evidence, including "dry labbing." Dry labbing" refers to a practice whereby laboratory-based research or analysis is claimed to have been completed but was not; fictional but plausible results are provided in lieu of performing the requested analysis or experiment. *See, e.g.*, *Speaking of Error in Forensic Science*, NAT'L INST. ON STANDARDS & TECH. (Sept. 5, 2017), https://www.nist.gov/news-events/news/2017/09/speaking-error-forensic-science; *Massachusetts 2017*, *supra* note 5; *Massachusetts 2018*, *supra* note 5; *Texas 2013*, THE GROUP REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/texas-2013 (last visited Aug. 2, 2023).

[43] *Innocents Who Plead Guilty*, NRE (Nov. 2015), https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf (95% of felony convictions in the United States and at least as many misdemeanor convictions are obtained by guilty pleas).

[44] *See, e.g.*, *Texas 2003*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/texas-2003 (last visited Aug. 2, 2023) (twenty-four defendants pled guilty); *California 1999*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/california-1999 (majority of 171 impacted defendants pled guilty); Concepción de León, *108 Convictions Tied to Massachusetts Chemist's Misconduct May Be Vacated*, N.Y. TIMES (Nov. 17, 2020), https://www.nytimes.com/2020/11/17/us/annie-dookhan-massachusetts-convictions.html (discussing dismissal of a subgroup of impacted cases, including dozens

Mass exonerations generally stand in contrast to individual exonerations in a number of notable ways. Of the 3,338 *individual* exonerations recorded by the NRE, most exonerees were convicted of very serious crimes resulting in significant terms of imprisonment or death sentences.[45] By contrast, as discussed above, most group exonerations have involved low-level crimes where defendants spent little if any time in custody.[46] While only 15% of known "individual exonerees" pleaded guilty, a significant number of "mass exonerees" pleaded guilty.[47]

2. Mass Exoneration Procedures

The protocols previously applied to identify and rectify wrongful convictions in jurisdictions where systemic misconduct has been uncovered share key features in their approach. In most of these recorded mass exoneration cases, the local prosecuting agency assumed responsibility for identifying cases impacted by the misconduct. The prosecuting agency's first step is typically to establish (1) the appropriate scope of the review, (2) the appropriate notification process, and (3) the appropriate standard of review to determine if relief is warranted. Because the vast majority of mass exonerations to date are the product of police misconduct, this article focuses on trends in the scope and standards of review applied in those cases.

a. Scope of Review: Identifying Likely Impacted Cases

When a pattern of officer misconduct is identified, the number of possible cases impacted is often vast. Defense advocates may reasonably argue that *every* case "touched" by an officer who has committed misconduct should be subject to scrutiny. However, a review of that scale is often not feasible—a single officer may be involved in hundreds or even thousands of cases over the course of their career before their misconduct is discovered, and incidents of systemic misconduct often involve

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of defendants who pleaded guilty).

[45] Gross et al., *Exonerations*, *supra* note 28 at 524, 535-36; GARRETT, *supra* note 28. *See generally* NRE, *supra* note 6.

[46] See discussion *infra* Section II (A)(1); GROUPS REGISTRY, *supra* note 6.

[47] *Innocents*, NRE, *supra* note 43; *Guilty Pleas in "Group Exonerations,"* NRE (Nov. 24, 2015), https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article2.pdf.

multiple officers within a single jurisdiction.[48] In group exonerations involving officer misconduct, prosecuting agencies often apply reasonable limiting principles to capture the cases most likely impacted by a particular officer's (or group of officers') misconduct. In some cases, the appropriate limiting principle is more obvious than in others given the factual context.

For example, in 2018 in Jackson County, Florida, nearly 90 defendants had their convictions vacated after a sheriff's deputy planted drugs and falsified arrest reports concerning traffic stops he had personally conducted.[49] In light of his misconduct, the Jackson County State Attorney's Office dismissed pending charges and identified defendants who had been convicted in cases where the officer in question was the "arresting officer."[50]

In another set of cases out of Hennepin County, Minnesota, a police officer provided false testimony about the contents of a search

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[48] *See, e.g.*, *Philadelphia 2013*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/pennsylvania-2013 (last visited Aug. 2, 2023) (seven officers involved in making false arrests for drug charges; over 2,000 cases reviewed; over 1,000 cases dismissed as of 2018); *New York 2021(1)*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/new-york-2021-1 (last visited Aug. 2, 2023) (nearly 1,000 cases reviewed and over 450 convictions vacated and charges dismissed following discovery of misconduct of former New York detective Joseph Franco); Press Release, Dist. Att'y Kings Cnty., Brooklyn DA Eric Gonzalez to Dismiss 378 Convictions That Relied on 13 Officers Who Were Later Convicted of Misconduct While on Duty (Sept. 7, 2022) http://www.brooklynda.org/2022/09/07/brooklyn-da-eric-gonzalez-to-dismiss-378-convictions-that-relied-on-13-officers-who-were-later-convicted-of-misconduct-while-on-duty/ (announcing thirteen officers convicted of misconduct while on duty); Ali Winston & Darwin Bondgraham, *Real-Life 'Training Day': Inside the Corruption Scandal That Brought Down the Oakland PD*, ROLLING STONE (Jan. 9, 2023) https://www.rollingstone.com/culture/culture-features/police-scandal-oakland-bd-training-day-1234657683/ (stating squad of Oakland PD officers known as the "Riders" charged with assault, making false arrests, and other crimes).

[49] *Florida 2018 (1)*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/florida-2018-1 (last visited Aug. 2, 2023) (announcing 88 convictions overturned due to officer misconduct); Jeff Burlew, *'He thought he could get away with it': An inside look at Zachary Wester drug planting trial*, TALLAHASSEE DEMOCRAT (May 7, 2021) https://www.tallahassee.com/story/news/local/2021/05/07/zach-wester-drug-planting-trial-florida-deputy-cop-police-meth-jackson-marianna/4863140001/ (reporting 120 cases dismissed).

[50] *Id.*

warrant application and falsified related police records.[51] Hennepin County Attorney Mike Brown vacated convictions in cases where that officer was the affiant on the search warrant, but also expanded the review to cases where the officer was "otherwise critical to the case" in light of the pattern of his misconduct falsifying records.[52]

Variations on the "otherwise critical to the case" criterion have been applied in other cases involving more generalized misconduct and where the potential impact on other cases was more difficult to precisely define. For example, in 2021, prosecutors from Manhattan, Brooklyn, Queens, and the Bronx recommended dismissals and vacaturs in over 500 cases after a detective and several officers were found responsible for perjury and other misconduct. The errant officers were "essential witnesses" in the impacted cases, meaning those cases "could not have been prosecuted without them."[53] Similar limiting principles in past group exonerations have included cases where the officers in question "provided the principal testimony" against the defendant[54] or "played an essential

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[51] *Minnesota 2018*, The Groups Registry, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/minnesota-2018 (last visited Aug. 2, 2023); *Attorney: More Than 30 Cases To Be Dismissed After Officer Travis Serafin Doctored Search Warrant*, CBS MINNESOTA (Oct. 12, 2018), https://www.cbsnews.com/minnesota/news/eden-prairie-travis-serafin-hennepin-county-doctored-warrant/

[52] *Minnesota 2018*, *supra* note 51.

[53] *New York 2021(1)*, *supra* note 48; Brooklyn DA to Dismiss 378 Convictions (Misconduct), *supra* note 48 ("A review by Brooklyn's CRU did not uncover misconduct, but the District Attorney has lost confidence in cases where these officers served as essential witness, i.e., cases that could not have been prosecuted without them."); Carlos Sanchez & Barton Gellman, *D.C. Officer's Drug Test May Imperil Some Cases*, WASH. POST (Sept. 16, 1989), https://www.washingtonpost.com/archive/local/1989/09/16/dc-officers-drug-test-may-imperil-some-cases/064cb61d-4276-495e-8ecd-62c79356a4ce/ ("any case in which King played a major role would be dismissed, including those in which she was the undercover buyer, the sole arresting officer or part of the chain of custody of the evidence").

[54] *Florida 2019*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/florida-2019 (last visited Aug. 2, 2023) (stating the prosecutor's office reviewed cases where the three officers provided the principal testimony in drug cases); Press Release, Bronx District Attorney Darcel D. Clark Announces 257 Convictions Reliant on Ex-Detective Joseph Franco Have Been Dismissed After Review by Conviction Integrity Bureau (Jan. 20, 2022), https://www.bronxda.nyc.gov/downloads/pdf/pr/2022/4-2022%20DA-dismissed-257-Franco-cases.pdf ("We did not want to dismiss or vacate out of hand all cases [Det. Franco] was involved in; we investigated those that hinged on his testimony and sworn statements. His compromised credibility suggests a lack of due process in the prosecution of these defendants, and we cannot stand behind these convictions.").

role in the arrest and prosecution"[55] and cases where an errant officer was "the only state witness."[56] In the broadest possible construction, all cases "handled by" the errant officer(s) were reviewed.[57]

This is not to say, however, that a more expansive case review is impossible or unadvisable. Considerations like the recordkeeping practices and the state of the file storage technology used by the relevant law enforcement agencies may impact the scope of the review that is feasible. In Harris County, Texas, in 2018, the investigation of an officer-involved shooting resulting from the issuance of a no-knock warrant revealed that at least two officers repeatedly falsified police records and engaged in other misconduct.[58] The Harris County DA's Office took an expansive approach, reviewing more than 2,200 cases "handled by" the two officers and later expanding the review to some 14,000 cases involving other members of the same narcotics unit.[59] Ultimately, the Harris County DA sought to overturn over 160 cases as a result of the review.[60] This broad approach is ideal for identifying as many impacted cases as possible.

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[55] *New York 2022*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/new-york-2022 (last visited Aug. 2, 2023) (stating prosecutors reviewed cases involving 20 officers who had been convicted of crimes, and vacated convictions in cases where the officers played an "essential role" in the arrest and prosecution).

[56] *Texas 2003*, *supra* note 44.

[57] *Kentucky 2002*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/kentucky-2002 (last visited Aug. 2, 2023) (reviewing cases "handled by" the errant detectives, among other cases).

[58] *Texas 2020*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/texas-2020 (last visited Aug. 2, 2023).

[59] There is limited publicly available information about what these reviews actually entailed—whether they were cursory or painstaking or something in between. St. John Barned-Smith, *Harris County DA Kim Ogg seeks to overturn 91 more cases tied to disgraced ex-HPD cop Gerald Goines*, HOUS. CHRON. (May 21, 2020), https://www.houstonchronicle.com/news/houston-texas/houston/article/DA-Kim-Ogg-seeks-to-overturn-another-90-Goines-15285534.php (In a first tranche of cases identified, Harris County DA Kim Ogg decided that in 70 of the cases reviewed defendants should be entitled to a "presumption that the [errant officer] lied to secure their convictions." After identifying an additional 91 cases warranting remedial action, Ogg's office conceded that they "did not investigate the facts of each conviction. . . . Instead the list [of cases where that office recommended remedial action] reflects cases in which [the errant officer] signed affidavits used to obtain search warrants used in each defendant's conviction.").

[60] *Id.*

b. Notification

In light of the difficulties of narrowing the scope of potentially impacted cases, another common aspect of mass exoneration protocols is providing adequate notice to potentially impacted defendants.

The Massachusetts Supreme Judicial Court addressed minimum requirements for effective notification when it considered the tens of thousands of Massachusetts drug cases impacted by chemist Annie Dookhan. Dookhan—who worked in a Massachusetts Forensic Drug Laboratory for nearly 10 years—admitted to "dry labbing,"[61] forging co-workers' initials on lab reports, and violating lab quality control protocols.[62]

Prosecuting agencies in eight impacted counties identified over 24,000 cases connected to Dookhan's misconduct. After several years of delays during which district attorneys from the impacted counties failed to offer redress to potentially impacted defendants, they attempted to discharge their duties, in part, by providing notice to a group of impacted defendants and advising them that they would have the opportunity to reopen their cases.[63]

Thousands of these defendants never received notifications, however, and fewer than 1% of the recipients filed motions for post-conviction relief in response to the notice.[64] Prosecutors argued that this outcome did not demonstrate deficiencies in their notification process, but rather that the low response rate "reflects that many defendants may conclude that they face no adverse impact at all from this closed chapter in their lives and feel no urgency to reopen their case[s] . . . ."[65] The prosecutors also used this outcome as a basis to argue that the Massachusetts Supreme Judicial Court—which was then considering whether to grant a mass vacatur requested by another group of impacted defendants—should *not* grant such a vacatur, and that the low response rate demonstrated that the defendants were exaggerating the burden on

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[61] *See, e.g.*, *Speaking of Error*, *supra* note 42.

[62] Katie Mettler, *How a lab chemist went from 'superwoman' to disgraced saboteur of more than 20,000 drug cases*, WASH. POST (Apr. 21, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/04/21/how-a-lab-chemist-went-from-superwoman-to-disgraced-saboteur-of-more-than-20000-drug-cases/ (In 2013, Dookhan pleaded guilty to tampering with evidence and obstruction of justice, among other charges).

[63] Bridgeman v. Dist. Att'y for Suffolk Dist., 67 N.E.3d. 673, 698 (Mass. 2017).

[64] *Id.*

[65] *Id.* at 686 (internal quotations omitted).

the court that would arise from a case-by-case adjudication of their motions for a new trial.[66]

The court was unpersuaded and held that the notice was "wholly inadequate." Among other deficiencies, the envelopes were printed in a way that made the notices look like "junk mail," and the notices themselves failed to inform the Dookhan defendants of critical information including: (1) that they had a right to counsel, (2) that the Supreme Judicial Court had already determined that they were entitled to a presumption that the drug analysis in their cases had been "tainted by egregious government misconduct," and (3) that defendants were entitled to a new trial or to withdraw their guilty pleas.[67]

The prosecuting agencies were directed to provide adequate notice and to assume complete responsibility for the cost of notification.[68] Later that year, the Supreme Judicial Court ultimately granted the petitioners' request, dismissing over 21,500 convictions in what is recognized as the largest dismissal of convictions in U.S. history.[69]

c. Standard of Review Focused on the Pattern of Misconduct

In mass exonerations to date, the next critical task undertaken by the reviewing agency in the wake of the discovery of systemic misconduct has been to establish the appropriate standard of review to determine whether the prosecutor should pursue some type of relief on behalf of the impacted defendants. In other words, what is the appropriate basis for taking ameliorative action when a large number of cases *may* have been impacted by officer misconduct and where—given the volume of cases potentially impacted—an exhaustive case-by-case review is not feasible?

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[66] *Id*.

[67] *Id*. at 689-90.

[68] *Id*. at 698 ("The failure of a district attorney to bear the district's proportionate share of the [costs of notification]," the court ruled, "shall be deemed a failure to provide defendants with exculpatory information, with the sanctions appropriate to such a failure.").

[69] Though at first the court maintained that case-by-case adjudication was both necessary and proper, even in light of the volume of potentially impacted cases identified, the court ultimately reconsidered in light of the prosecuting agencies' failure to move with adequate urgency to provide relief. *Bridgeman*, *supra* note 63 at 698; *Report Shows More Than 24k Wrongful Convictions Dismissed in Drug Lab Scandal*, ACLU MASS., https://www.aclum.org/en/news/report-shows-more-24k-wrongful-convictions-dismissed-drug-lab-scandal;
Mettler, *supra* note 62.

Significantly, in previous mass exonerations for low-level crimes, prosecuting agencies regularly abandoned the case-by-case, factual-innocence-focused review in favor of a standard of review that more expediently balanced the interests of justice with other priorities, including public safety and the appropriate allocation of limited State resources.[70] In several instances, prosecutors conceded that the *fact of the pattern of official misconduct alone* was sufficient to undermine confidence in the integrity of a group of convictions and warranted group relief in the interest of justice, even when there was no specific evidence that the misconduct in question actually occurred in each particular case. This standard is consistent with the prosecutor's ethical obligation to prosecute only those cases that they believe they can prove beyond a reasonable doubt, with lawfully obtained, competent evidence.[71] After discovering law enforcement misconduct, prosecutors in these instances justly concluded that they no longer had confidence in the investigations or evidence underlying these convictions, and that they could no longer prove the remaining charges beyond a reasonable doubt.[72]

In Wake County, North Carolina in 2020, it was discovered that a confidential informant provided false information to Raleigh Police Officer Omar Abdullah in a number of drug-related cases.[73] Officer Abdullah and the informant worked together on more than a dozen cases where they alleged the defendants had sold heroin. All of the defendants pleaded guilty to the charges, though all maintained their innocence and denied selling heroin.[74] Lab tests later revealed that some of the samples of the alleged contraband collected by police were actually negative for heroin, and a review of Officer Abdullah's case files revealed other irregularities in regard to evidence of the alleged drug sales.[75]

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[70] *See, e.g.*, *North Carolina 2020*, THE GROUPS REGISTRY, NRE, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/north-carolina-2020 (last visited Aug. 2, 2023); *New York 2021(1)*, *supra* note 48.

[71] *Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N (4th ed. 2017) ("After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt." "If a prosecutor has significant doubt about . . . the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case.")

[72] *See, e.g.*, Consent Motion for Appropriate Relief, State v. Blackwell (May 6, 2022).

[73] *North Carolina 2020*, *supra* note 70.

[74] *Id.*

[75] *Id.*

The Wake County District Attorney's Office agreed to dismiss eleven pending cases linked to the unreliable informant and to vacate the convictions of five additional defendants whose cases were also linked to that informant, even though the convicted defendants had pleaded guilty. "Given the State's determination following the entry of a guilty plea that the confidential informant cannot be relied upon," the District Attorney's office stated in motions filed with the court, "and without additional corroborating evidence . . . the State believes it is in the interest of justice to vacate the judgements. . . . Had the State and the Defendant known at the time of the Defendant's plea that the Confidential Informant was not a reliable source, the Defendant would not have pleaded guilty and the State would have dismissed the charge."[76] Rather than seeking to determine whether each defendant was factually innocent in light of the discovery of the misconduct (for example, by testing every single piece of "drug" evidence collected, or exhaustively re-investigating each particular conviction), the prosecutor determined that the evidence undermining the credibility of the informant and the integrity of the involved officer was sufficient to warrant vacatur of this group of convictions.

In New York in 2021, the Bronx District Attorney's Office applied this approach, dismissing 257 felony and misdemeanor convictions impacted by detectives who pleaded guilty to perjury and other misconduct.[77] Bronx District Attorney Darcel D. Clark agreed to overturn over 250 convictions involving the errant detectives.[78] She explained, "[E]ven though the Conviction Integrity Bureau *was not able to ascertain whether these defendants were actually innocent*, that the People had relied on evidence from a government actor with compromised credibility suggests *a lack of due process* in the prosecution of these defendants, and the District Attorney cannot stand behind these convictions."[79] Rather than performing a case-by-case review to determine whether the defendants were "actually innocent," or whether the identified detectives actually committed misconduct in each of these cases, the district attorney concluded that the *fact of the pattern of misconduct* was sufficient to undermine confidence in the integrity of these cases and the prosecutor's office could no longer stand behind those

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[76] Consent Motion, *supra* note 72.

[77] *New York 2021(1)*, *supra* note 48; *Bronx Dist. Att'y*, *supra* note 54.

[78] *Bronx Dist. Att'y*, *supra* note 54.

[79] *Id* (emphasis added).

convictions as a result.[80]

Similarly, Kings County District Attorney Eric Gonzalez did not oppose vacating the convictions of ninety defendants and dismissing the underlying charges where a delinquent detective was an "essential witness."[81] In some cases, District Attorney Gonzalez vacated convictions that *predated* the known misconduct. He conceded, though his office "ha[d] not discovered that the defendant's conviction was based on fabricated evidence or that the defendant [wa]s in fact innocent," nor had they "discovered evidence to suggest that probable cause did not exist with the defendant's arrest[,]" that "[n]evertheless, pursuant to prosecutorial discretion, the [P]eople d[id] not oppose vacating defendant's conviction and dismissing the [remaining charges]."[82]

District Attorney Gonzalez also noted that many of the Brooklyn cases were over a decade old, a fact that "limited [the office's] ability to reinvestigate them." Based on the established pattern of police misconduct, however, DA Gonzalez concluded that he "[could] not in good faith stand by convictions that principally relied on [the errant detective's] testimony."[83] Under the circumstances, the District Attorney concluded that mass vacatur "serves the interest of justice, preserves limited resources, enhances public safety and strengthens trust in the criminal justice system."[84]

In these cases, all three District Attorneys explicitly acknowledged that these vacaturs and dismissals were not based on factual innocence findings or even based on specific evidence that misconduct actually occurred in each of the identified cases. Rather, vacatur was appropriate because the discovery of the *pattern of official misconduct alone* undermined confidence in the integrity of the convictions. Other important considerations for the prosecuting agency also influenced these decisions, including the interests of justice, allocation of law enforcement resources, public safety, and restoring confidence in the criminal legal system.[85]

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[80] *Id* (emphasis added).

[81] Press Release, Dist. Att'y Kings Cnty., Brooklyn DA Eric Gonzalez to Dismiss 90 Convictions That Relied on Former Narcotics Detective Later Charged with Multiple Perjuries (Apr. 7, 2021), https://exonerations.newkirkcenter.uci.edu/groups/sites/default/files/2021-05/Gonzalez_Statement_4-7-2021.pdf.

[82] *New York 2021(1)*, *supra* note 48 (emphasis added).

[83] Brooklyn DA to Dismiss 90 Convictions (Perjuries), *supra* note 81.

[84] *New York 2021(1)*, *supra* note 48.

[85] *See, e.g., id.*

B. Previous Mass Exonerations in Serious Cases

In the above-described mass exonerations, prosecuting agencies demonstrated the ability to reconsider questionable convictions undermined by misconduct where a large number of *low-level* crimes were concerned. However, the system has not managed to move with the same urgency and efficiency in cases where systemic misconduct has undermined a number of convictions for *serious* crimes. Only an extremely limited number of "mass exonerations" involve any serious crimes including "violent felonies" or, rarer still, homicides.[86]

1. Previous Mass Exonerations Including Violent Felony Cases

a. Cloquet, Minnesota 2017

In Carlton County, Minnesota, Cloquet Police Officer Scott Beckman knowingly provided false information on a search warrant application and, in at least one instance, failed to accurately document witness statements in a police report.[87] Upon the discovery of this misconduct in 2017, the Assistant County Attorney dismissed all pending cases "involving" Officer Beckman *without prejudice* "pending a comprehensive review." If the review demonstrated that charges could be successfully prosecuted, the prosecutor would have discretion to re-file those cases.[88]

"The fair trial of a defendant depends on complete truthfulness by everyone involved," said Assistant County Attorney Jeffrey Boucher. "[W]e are committed to a fair and transparent review of the integrity of

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[86] State definitions of "violent felony" vary. 18 U.S.C. § 924(e)(2) defines the term "violent felony" as: "any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that— (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . ."

[87] Jana Peterson, *Police officer's actions trigger dismissal of criminal cases*, PINE KNOT NEWS (Dec. 21, 2018) https://www.pineknotnews.com/story/2018/12/21/news/police-officers-actions-trigger-dismissal-of-criminal-cases/302.html; *Minnesota 2019*, *supra* note 5.; Letter from Cloquet Admin. Offs. (Aug. 10, 2016), https://exonerations.newkirkcenter.uci.edu/groups/sites/default/files/2020-10/Beckman_suspension_letter.pdf (suspending Corporal Beckman).

[88] There is no publicly available information indicating whether the prosecutor re-filed charges in any of those cases.

all impacted prosecutions . . . ."[89] Ultimately, twenty pending criminal cases linked to Officer Beckman were dismissed; those cases included numerous felony drug charges, domestic assault charges, and weapons charges.[90] Seven additional defendants, whose convictions were final when the misconduct was uncovered, had their convictions vacated.[91]

Though the affected cases included some with charges for more serious crimes, including violent felonies, the prosecutor opted to dismiss *all* pending cases involving Officer Beckman, erring on the side of protecting the defendants' rights and the integrity of the criminal legal system, and placing the burden on the prosecutor's office to affirmatively re-review the cases to determine which, if any, should be refiled.[92]

b. Dade County, Florida 2018-2021

In 2018, former police chief Raimundo Atesiano and three officers were arrested and charged with framing three Black men on felony charges related to a series of burglaries in the village of Biscayne Park, Florida.[93] The officers first falsely claimed that defendant Peter Jean-Gilles confessed to the burglaries, though there was no recording of his statement.[94] The officers then falsified an arrest affidavit which they used to detain a second defendant, Clarens Desrouleaux, whom they also claimed confessed to the burglaries.[95] Once again, his alleged confession

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[89] Peterson, *supra* note 87 (emphasis added).

[90] *Id.*

[91] *Minnesota 2019*, *supra* note 5 (only one of those seven defendants had been incarcerated after their conviction). The author was not able to locate any publicly available information about the review process for the convictions that were already final upon the discovery of Officer Beckman's misconduct or any limiting principle applied to identify those seven cases in particular.

[92] There is no publicly available information indicating whether the prosecutor re-filed charges in any of those cases.

[93] Press Release, U.S. Att'y's Off., S. Dist. of Fla., Former Biscayne Park Police Chief Sentenced for Conspiracy to Deprive Persons of Civil Rights by Ordering Officers to Make False Arrests (Nov. 27, 2018) https://www.justice.gov/usao-sdfl/pr/former-biscayne-park-police-chief-sentenced-conspiracy-deprive-persons-civil-rights; *Peter Jean-Gilles*, NRE, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6168 (last visited Aug. 2, 2023).

[94] *Id.*

[95] *Man's Burglary Convictions Vacated After He Was Already Deported*, THE INNOCENCE PROJECT (Aug. 14, 2018) https://innocenceproject.org/news/mans-burglary-convictions-vacated-after-deported/; David Ovalle, *He did 5 years in prison, then got deported. Why? Cops framed him, prosecutors admit*, MIAMI HERALD (Aug. 10, 2018) https://www.miamiherald.com/news/local/crime/article216371835.html.

was neither written down nor recorded.[96] Instead, the officers gave sworn depositions stating that Desrouleaux confessed. Desrouleaux spent over four years in prison before being deported to Haiti. Jean-Gilles was sentenced to five years in prison. [97] The third falsely accused individual was a 16-year-old minor who was also charged with a series of burglaries, though *no evidence* connected him with the crimes.[98]

In 2014, the year after these falsified arrests, members of the Biscayne Park Police department came forward alleging that Chief Raimundo Atesiano devised and implemented a scheme to arrest Black men with previous criminal records and charge them with unsolved burglaries without any evidence connecting them with those crimes. These allegations were confirmed by a joint investigation by the Florida Department of Law Enforcement and the Miami-Dade State Attorney's Office.[99]

In the aftermath of these revelations, the Miami-Dade Public Defender's Office identified 2,000 cases from Biscayne Park warranting review.[100] By December 2018, four years after the discovery of the misconduct, only *seven* wrongful conviction cases had been reviewed and rectified.[101] "That isn't even a small dent into all the cases," said chief Public Defender Carlos Martinez.[102] Publicly available information indicates that the Miami-Dade State Attorney's Office directed its Justice

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[96] Ovalle, *supra* note 95.

[97] K Barrett Bilali, *Fallout from false arrests*, MIAMI TIMES (Dec. 12, 2018), https://www.miamitimesonline.com/news/fallout-from-false-arrests/article_0c8f28cc-fe22-11e8-950b-0b485f8f0173.html; *Jean-Gilles*, *supra* note 93; *Clarens Desrouleaux*, NRE, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5464 (last visited Aug. 2, 2023).

[98] John Dorschner, *The Mess Left Behind by Dirty Cops*, BISCAYNE TIMES, https://www.biscaynetimes.com/news/the-mess-left-behind-by-dirty-cops/ (last visited Aug. 2, 2023).

[99] Jay Weaver & David Ovalle, *For framing innocent black men, a Florida police chief gets three years in prison*, MIAMI HERALD (Nov. 27, 2018), https://archive.li/xfxTQ; Press Release, Dep't of Just., Off. of Pub. Affs., *Three Former Biscayne Park Patrol Officers Sentenced for Deprivation of Civil Rights by Intentionally Making False Arrests* (Oct. 18, 2018), https://www.justice.gov/opa/pr/three-former-biscayne-park-patrol-officers-sentenced-deprivation-civil-rights-intentionally.

[100] Miami Times Editorial Department, *Make reviews of Biscayne Park police arrests priority*, MIAMI TIMES (Dec. 13, 2018), https://www.miamitimesonline.com/opinion/columnists/make-reviews-of-biscayne-park-police-arrests-priority/article_7e5d5c1e-fe25-11e8-b4c0-67fb7efc0da4.html.

[101] *Id.*

[102] *Id.*

Project[103] to review cases involving Chief Atesiano and other Biscayne Park officers.[104] By 2021, the State Attorney's Office had vacated convictions and dismissed the underlying charges against thirty-six people convicted of felonies and six people convicted of misdemeanors out of Biscayne Park. [105] Notably, by the time of the review, none of these defendants remained in custody.[106]

2. Systemic Misconduct Resulting in Group Vacatur of Murder Charges: Case-by-Case Reviews Focused on a Pattern of Officer Misconduct

Only an extremely limited number of "group exonerations" involve the vacatur and dismissal of murder charges following the discovery of a pattern of law enforcement misconduct.[107] One set of cases—those impacted by the misconduct of former New York detective Louis Scarcella—illustrate some of the problems with the individual, case-by-case review. Those problems include the time-consuming nature of that approach and the waste of prosecutorial resources expended defending dubious convictions where evidence of the misconduct would likely have led to a more favorable outcome for the defendant at trial.[108]

A second set of cases involve disgraced Chicago detective Reynaldo Guevara whose systemic abuses included beating confessions out of defendants, threatening witnesses, and pressuring child witnesses to provide false testimony.[109] These cases are regarded as the *only* mass dismissal of murder charges in modern U.S. history. While State's Attorney Kim Foxx's office employed an individual case-by-case review, her office applied a standard of review focused on the "taint" of the

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[103] *Justice Project*, OFF. MIAMI-DADE STATE ATT'Y, https://miamisao.com/our-work/signature-programs/justice-project/ (last visited Aug. 2, 2023) (explaining that the Justice Project is a unit formed in 2003 to examine cases that may have resulted in wrongful convictions).

[104] Miami Times, *supra* note 100.

[105] *Id.* No additional information is publicly available about the process used to review the 2,000 identified cases or the specific criteria for review.

[106] *Florida 2018 (2)*, *supra* note 49; Bilali, *supra* note 97; *Jean-Gilles*, *supra* note 93; *Desrouleaux*, *supra* note 97.

[107] *See Mass Exonerations* Conference, *supra* note 10; GROUPS REGISTRY, *supra* note 6.

[108] *See* discussion of Det. Louis Scarcella cases, *infra* Section II(B)(2)(a).

[109] Melissa Segura, *A Chicago Cop Is Accused of Framing 51 People For Murder. Now, The Fight For Justice.*, BUZZFEED NEWS (Apr. 4, 2017), https://www.buzzfeednews.com/article/melissasegura/detective-guevaras-witnesses?bfsource=relatedmanual.

official misconduct.[110] Her office concluded, even absent affirmative evidence of innocence in each individual case, that the evidence of the pattern of misconduct was sufficient to undermine confidence in the integrity of those convictions and warranted vacatur in the interests of justice.[111]

a. New York 2022 – Detective Louis Scarcella

Over a nine-year period, the Brooklyn District Attorney's office vacated a total of nineteen convictions for murder and other serious crimes. The office began the process after discovering that former Brooklyn detective Louis Scarcella engaged in a pattern of misconduct, including using force to induce false confessions. Scarcella was additionally found to have manipulated and coerced the testimony of alleged eyewitnesses. [112] In some cases, Scarcella used unreliable confidential informants to manufacture false evidence.[113]

In July 2013, following the discovery of Scarcella's misconduct, then-Brooklyn District Attorney Charles Hynes created a Conviction Integrity Unit (CIU) and a special panel—comprised of various members of the New York legal community, including former prosecutors, law professors, and retired judges—to review forty potentially impacted cases.[114] Though Hynes may have initiated the review process in good faith, his office was criticized for moving too slowly and "clinging to

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[110] Melissa Segura, *Seven People Who've Served Decades in Prison Had Their Murder Convictions Overturned Over Alleged Abuse by a Chicago Cop*, BUZZFEED NEWS (Aug. 9, 2022) https://www.buzzfeednews.com/article/melissasegura/guevara-chicago-murder-exoneration (emphasis added).

[111] *Id.*

[112] *Scarcella cases in the Registry*, NRE, https://www.law.umich.edu/special/exoneration/Documents/Scarcella%20cases%20in%20the%20Registry.pdf (last visited Aug. 2, 2023); Jennifer Peltz, *After years of scrutiny of NY detective, a case gets retried*, ASSOCIATED PRESS (Aug. 21, 2022) https://apnews.com/article/nypd-detective-convictions-questioned-e88e8f9438cc49f934e1ac8cbb2fb1f5; Beety et al., *supra* note 13 at 34; Stephanie Clifford, *Scarcella Takes Stand in Defense of His Actions in Disputed '91 Murder Case*, N.Y. TIMES (Sept. 24, 2014) https://www.nytimes.com/2014/09/25/nyregion/scarcella-takes-the-stand-to-defend-his-actions-in-a-1991-murder-case.html (a 2013 *New York Times* exposé reported that one Scarcella witness, Teresa Gomez, was a drug addict who had testified as an eyewitness in six separate murder cases).

[113] Clifford, *supra* note 112.

[114] Frances Robles, *Panel to Review Up to 50 Trial Convictions Involving a Discredited Detective*, N.Y. TIMES (July 1, 2013), https://www.nytimes.com/2013/07/02/nyregion/panel-to-review-up-to-50-trial-convictions-involving-a-discredited-brooklyn-detective.html.

convictions even after they were discredited."[115] Hynes was unseated in November 2013 by Kenneth Thompson, who rebranded the CIU as the Conviction *Review* Unit (CRU). Thompson continued the Scarcella investigations, and vacated the first set of convictions (those of Darryl Austin, Alvena Jennette, and Robert Hill) in 2014.[116] "Based on a comprehensive review of these cases," Thompson's office stated, "it is clear that testimony from the same problematic witness undermined the integrity of these convictions and resulted in an unfair trial for each of these defendants."[117]

The investigations continued after the election of District Attorney Eric Gonzalez. Under DA Gonzalez, the CRU's analysis turned on "the facts of the individual case, *mindful* of past findings regarding Scarcella's conduct."[118] This approach—something closer to the innocence-focused, case-by-case review process, and placing less emphasis on the evidence of the pattern of law enforcement misconduct—may explain why the Brooklyn DA's office continued to defend convictions in cases with troubling facts and even where the defendant alleged specific misconduct by Scarcella.[119]

One of those cases was *People v. Moses*. Sundhe Moses served eighteen years for the shooting death of a four-year-old girl. Mr. Moses, who was nineteen years old at the time of his arrest, allegedly confessed to Detective Scarcella during a police interview, but only, Mr. Moses claimed, after Scarcella "struck him in the face, choked him while pressing his head against a wall and blew cigar smoke in his face."[120] Mr. Moses testified that other detectives were also present and held him down during the interrogation.[121] After being released on parole in 2013, Mr. Moses filed a motion to vacate his convictions, citing evidence of

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[115] Vivian Yee, *As 2 Go Free, Brooklyn Conviction Challenges Keep Pouring In*, N.Y. TIMES (Feb. 6, 2014), https://www.nytimes.com/2014/02/07/nyregion/at-new-brooklyn-district-attorneys-door-a-tidal-wave-of-wrongful-conviction-cases.html.

[116] *See Darryl Austin*, NRE, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4427 (last visited Aug. 2, 2023).

[117] Megan Taros, *Brooklyn Judge Exonerates Three Men in 1980s Killings*, PATCH (May 7, 2014) https://patch.com/new-york/prospectheights/brooklyn-judge-exonerates-three-men-in-1980s-killings.

[118] Peltz, *supra* note 112 (emphasis added).

[119] *Id.*

[120] People v. Moses, 2018 N.Y. Slip Op. 50282(U) at *2 (Sup. Ct., Kings Cnty Jan. 11, 2018).

[121] *Id.*

Scarcella's misconduct and other new evidence pointing to his innocence.[122] The Brooklyn District Attorney's CRU reviewed the case and "ultimately determined that [Mr. Moses's] conviction should remain undisturbed."[123]

Mr. Moses challenged his conviction with new evidence that other witnesses had also recanted their inculpatory statements. He asked the court to consider the evidence of Detective Scarcella's history of similar misconduct in light of Mr. Moses's claim that his confession had been coerced. The court sided with Mr. Moses and overturned his conviction, finding that the new evidence concerning Detective Scarcella's history of misconduct "would undoubtedly provide the jury with a different lens through which to view both defendant's testimony and Detective Scarcella's testimony about how his confession was obtained."[124] Had the jury heard this evidence, along with the other new evidence produced by Mr. Moses, the Court concluded, "there is a reasonable probability that . . . the result [at trial] would have been more favorable to the defendant."[125] Following the court's ruling, the DA's office dismissed the charges and declined to retry the case against Mr. Moses.[126]

The cases involving Detective Scarcella illustrate some of the problems with the traditional post-conviction review process. First, in spite of the revelations about Detective Scarcella's history of brazen misconduct, the prosecutor's office only affirmatively sought relief in a limited number of cases.[127] They fought to preserve dubious convictions like that of Mr. Moses, despite the compelling evidence of egregious misconduct by Scarcella, new evidence of his innocence, and the fact that

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[122] *Sunde Moses*, NRE, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5282 (last visited Aug. 2, 2023).
[123] *People v. Moses*, slip op. at *2.
[124] *Id.*
[125] *Id.*
[126] *Sunde Moses*, *supra* note 122.
[127] *Derrick Hamilton*, NRE, https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4601 (last visited Aug. 2, 2023) (stating prosecution and defense jointly asked for the conviction to be vacated); *Roger Logan*, NRE, https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4438 (reporting prosecution asked that the conviction be vacated) (last visited Aug. 2, 2023); *Jabbar Washington*, NRE, https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=5170 (expressing CRU filed a motion to vacate and dismiss); *see also* Peltz, *supra* note 112.

he was already out of custody.[128] As a result, prosecutorial and judicial resources were needlessly consumed in the adversarial process, and wrongfully convicted defendants like Mr. Moses were deprived of justice for even longer.

Second, the traditional case review process is slow. This is especially true in wrongful conviction cases involving official misconduct, because there is often a substantial lag between the actual misconduct and its discovery.[129] Here, the overturned convictions arose from cases between 1988 and Detective Scarcella's retirement in 1999, but his pattern of misconduct was not officially acknowledged or investigated until over a decade later in 2013.[130] From the time Detective Scarcella's misconduct was officially discovered, it took nearly a decade to review and rectify fewer than twenty[131] wrongful convictions—a rate of fewer than two cases per year. The defendants who were exonerated due to the discovery of Scarcella's misconduct spent an average of 22.5 years in custody.[132] Some never made it home.[133] One of those exonerees was Darryl Austin who was exonerated posthumously in 2014.[134] Mr. Austin had been incarcerated since 1988 and was convicted based on evidence falsified by Detective Scarcella.[135] Unfortunately, Mr. Austin died in prison thirteen years before Detective Scarcella's misconduct was officially discovered.[136]

b. Chicago 2022 – Detective Reynaldo Guevara

On August 9, 2022, in what may be the only mass dismissal of murder charges in modern U.S. history to date, seven people who were wrongfully convicted due to the actions of Chicago detective Reynaldo Guevara had their convictions overturned at the direction of Cook County State's Attorney Kim Foxx.[137]

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[128] *Sunde Moses*, *supra* note 122.
[129] *See* Gross et al., *Race*, *supra* note 5 at 6-9.
[130] Sean Piccoli, *A Former Detective Accused of Framing 8 People for Murder Is Confronted in Court*, N.Y. TIMES (Apr. 1, 2019), https://www.nytimes.com/2019/04/01/nyregion/nypd-detective-louis-scarcella.html.
[131] The NRE has recorded eighteen exonerations linked to Scarcella to date. *See Scarcella cases*, *supra* note 112.
[132] *See Scarcella cases*, *supra* note 112.
[133] *Darryl Austin*, NRE, *supra* note 116.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] Segura, *supra* note 110.

The defendants were represented by the University of Chicago's Exoneration Project, including attorneys Anand Swaminathan, Steve Art, and Josh Tepfer. Tepfer had previously secured exonerations for nearly 200 clients whose drug cases were tainted by the misconduct of another errant law enforcement officer, former Chicago Police Sergeant Ronald Watts.[138] In those cases, Tepfer and the defense team emphasized that the evidence of the *pattern* of Watts's misconduct—rather than evidence of factual innocence in each individual case—was sufficient to undermine confidence in the integrity of their convictions.[139] They filed petitions seeking group exonerations—first for a group of eighteen clients, then 100 more. In total, over 200 "Watts defendants" were exonerated as a result of his pattern of misconduct.[140] Tepfer and his team took a similar approach with the Guevara cases.

Detective Guevara's systemic abuses were chronicled in an explosive 2017 Buzzfeed News report.[141] Guevara's alleged misconduct included beating confessions out of defendants, threatening witnesses, and pressuring child witnesses to provide false testimony.[142] In their own investigation, Tepfer and his colleagues learned from residents of Humboldt Park—a predominantly Latino neighborhood on Chicago's West Side—that Guevara had "terrorized the neighborhood by coercing false identifications and confessions in murder cases."[143] The attorneys identified dozens of people who they believed had been sent to prison for murders they did not commit as a result of Guevara's misconduct.[144] Some of these individuals were sentenced to death. As in the Detective Watts cases, the attorneys focused on evidence demonstrating the *pattern of misconduct* by Guevara to underscore the credibility of their defendants' claims.[145] As many as fifty-one people claim that Guevara

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[138] Melissa Segura, *A Chicago Attorney Is Getting Justice for Hundreds of Wrongfully Convicted People All a t Once*, BUZZFEED NEWS (Jan. 11, 2023), https://www.buzzfeednews.com/article/melissasegura/josh-tepfer-mass-exonerations-wrongfully-convicted.

[139] *Id.*

[140] *8 more exoneration cases tied to disgraced former CPD sergeant to be considered*, ABC7 Chicago, (Oct. 2, 2022) https://abc7chicago.com/chicago-police-sergeant-ronald-watts-cpd-cook-county/12288188/#:~:text=So%20far%2C%20more%20than%20200%20convictions%20tied%20to%20Watts%20have,went%20to%20prison%20for%20corruption.

[141] Segura, *A Chicago Cop*, *supra* note 109.

[142] *Id.*

[143] Segura, *A Chicago Attorney*, *supra* note 138.

[144] *Id.*

[145] *Id.*

framed them for murders from the 1980s through the early 2000s.[146]

Following these revelations, Cook County State's Attorney Kim Foxx's office began a "comprehensive case-by-case review" of Guevara's cases in 2020.[147] In August 2022, her office announced that the review confirmed "police misconduct by Guevara that called the validity of these convictions into question."[148] State's Attorney Foxx was apparently receptive to the defense approach focused on the evidence of the pattern of misconduct: "When it became clear that the allegations of misconduct against Guevara had significant merit," she said, "we could no longer stand behind these convictions. . . ."[149] Significantly, State Attorney Foxx conceded, "Even in cases *where we still have questions about guilt*, where we are not affirming actual innocence, the taint of detective Guevara is such that we cannot stand behind them any further."[150] Foxx's office concluded that there was insufficient evidence to retry any of the cases.[151] To date, the Cook County SAO has vacated *thirty-nine convictions* linked to Detective Guevara.[152] Importantly, though Foxx's office still applied a case-by-case review, relief was expedited because of the standard of review her office chose to apply.

The vacatur of these convictions hinged on the impact of the evidence demonstrating the pattern of official misconduct rather than affirmative evidence of innocence in each individual case. The prosecuting agency took seriously their duty to do justice—to see that criminal defendants are "accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to rectify the conviction of innocent persons."[153] But these processes were still flawed and slow-moving, and followed years of delay in uncovering the underlying misconduct. On average, the defendants in the

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[146] Segura, *A Chicago Cop*, *supra* note 109.

[147] Press Release, Cook Cnty State's Att'y, Cook County State's Attorney Kimberly Foxx Announces Dismissal of Murder Cases Tied to Former Chicago Police Detective Reynaldo Guevara, (Aug. 9, 2022), https://www.cookcountystatesattorney.org/news/cook-county-state-s-attorney-kimberly-foxx-announces-dismissal-murder-cases-tied-former-chicago.

[148] *Id.*

[149] *Id.*

[150] Segura, *Seven People*, *supra* note 110 (emphasis added).

[151] Cook Cnty. State's Att'y, *supra* note 147.

[152] Leah Hope, *11 exonerees file federal lawsuits against former Chicago detective for coercing false confessions*, ABC7 CHICAGO (Mar. 21, 2023), https://abc7chicago.com/chicago-police-detective-reynaldo-guevara-federal-lawsuit-false-confession/12988050/.

[153] Model Rules of Pro. Conduct R. 3.8 cmt. 1.

Scarcella and Guevara cases spent over twenty years in custody. Dozens of cases are still under review by these offices, and there are likely more cases impacted by the misconduct that have not been uncovered.[154] In the wake of the discovery of systemic misconduct, prosecutors must build on the (limited) success of their predecessors and colleagues in Brooklyn and Chicago to deliver swifter and broader justice.

III. SPECIAL CONSIDERATIONS FOR APPLYING MASS EXONERATION FRAMEWORKS TO THE REVIEW OF CONVICTIONS FOR SERIOUS CRIMES

A fundamental duty of the prosecuting agency is to use discretion to decide whether to pursue criminal charges, what charges to pursue, and when to maintain or dismiss those charges. American Bar Association guidelines (adopted in whole or in part by most states) instruct prosecutors to maintain criminal charges after they have been filed "only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt at trial."[155] If a prosecutor has "significant doubt" about the "quality, truthfulness, or sufficiency of the evidence in any criminal case," the prosecutor should "disclose those doubts . . . [and] determine whether it is appropriate to proceed with the case."[156] Prosecutors are also instructed to consider factors such as their own doubt that the accused is in fact guilty, "any improper conduct by law enforcement," "the impact of prosecution or non-prosecution on the public welfare," and "the fair and efficient distribution of limited prosecutorial resources," among other factors, in deciding whether to dismiss a criminal charge.[157]

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[154] Segura, *A Chicago Cop*, *supra* note 109 (stating 51 people say Guevera framed them for murder); Segura, *Seven People*, *supra* note 110 (stating 70 people claim Guevara and his partners and other officers committed misconduct in their cases); Troy Closson, *After Case Dissolves, Man Who Languished in Prison Wins $10.5 Million*, N.Y. TIMES (May 5, 2022) https://www.nytimes.com/2022/05/05/nyregion/shawn-williams-falsely-accused-brooklyn.html ("More than 70 [Scarcella] cases have now fallen under scrutiny, with several inquiries continuing.");
Segura, *A Chicago Attorney*, *supra* note 138 (reporting seven people exonerated who'd served a collective 174 years behind bars).

[155] *Criminal Justice Standards*, *supra* note 71. *See generally Prosecutors and the Press: Ethical and Practical Guidance*, PROSECUTORS' CENTER FOR EXCELLENCE (Oct. 2022), https://pceinc.org/wp-content/uploads/2022/10/20221013-Prosecutors-and-the-Press-Ethical-and-Practical-Guidance-PCE-and-PAAM.pdf.

[156] *Criminal Justice Standards*, *supra* note 71.

[157] *Id.* Standard 3-4.4(i-xiv).

The seriousness of the alleged crime is, of course, another important consideration.[158] In the case of the vast majority of mass exonerations recorded to date, the nature of the charged crimes no doubt contributed to the decisions by prosecuting agencies to "err" on the side of exoneration rather than requiring affirmative evidence of factual innocence or even specific evidence that the discovered misconduct impacted each specific case.[159] As discussed above, the vast majority of those mass exonerations involved low-level, drug-related crimes where the defendants served little or no time in custody.[160] Most "mass exonerees" were not in custody at the time that the misconduct impacting the integrity of their convictions was uncovered.[161] Accordingly, it is fair to assume there was a much lower perceived risk on the part of the prosecutor in exercising their discretion to grant sweeping relief.[162]

This article suggests that some of the frameworks previously applied in mass exonerations involving *low-level* crimes might be applied to expedite the systemic review and resolution of much more *serious* crimes, even including cases involving convictions for murder. As they have done before in mass exonerations for low-level crimes, prosecutors should vacate convictions for serious crimes if evidence of a pattern of official misconduct alone would have led to a different outcome at trial had it been known to the jury. This includes cases where an errant police officer played "an essential role in the arrest and prosecution," or where the type of misconduct was so egregious, and the independent evidence of guilt so limited, that *any* involvement by such an officer undermines the integrity of the conviction.[163]

It must be acknowledged, however, that the risks of "getting it wrong" are different in serious cases. A "wrongful acquittal" in a serious case presents a risk that a criminal defendant actually guilty of a serious crime will be released and reoffend.[164] At the same time, there are also serious consequences to allowing unjust convictions to remain intact and to forcing the wrongfully convicted to languish in custody for years when

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[158] *Id.* Standard 3-4.4(iii).

[159] *See, e.g., Mass Exonerations* Conference, *supra* note 10 (". . . many group exonerations involve comparatively minor false convictions that would never be reinvestigated on their own . . ."); *See infra* Section II(A)(1).

[160] *See generally* GROUPS REGISTRY, *supra* note 6.

[161] *See infra* Section II(A)(1).

[162] *Id.*

[163] *See infra* Section II(A)(2)(a).

[164] Though this may be more accurately described as a perceived risk than an actual one, as discussed in greater detail *infra* in Section III(B)(2).

there is credible evidence that undermines the integrity of their convictions. Moreover, the potential consequences of a "wrongful acquittal" may, in fact, be mitigated by other factors specific to serious cases, as explained below. Finally, applying a standard of review that focuses on whether evidence of the misconduct would have led to a more favorable outcome for the defendant had it been presented at trial is consistent with the prevailing "new evidence" standard applied in a majority of jurisdictions to determine whether vacatur is warranted.

A. The Case for "Erring" on the Side of Vacatur in Serious Cases

Adopting a review model that prioritizes urgency and the defendant's due process rights over an innocence-focused, case-by-case evaluation raises the risk of "wrongfully acquitting" some number of people who are "factually guilty." Concerns about releasing the "factually guilty" include notions of fairness and justice (that the guilty deserve to serve their time) and public safety (concerns that the factually guilty may go on to commit other crimes). These concerns have their merits. However, there are equally if not more compelling reasons for the prosecutor to err on the side of vacatur even in serious cases.

1. Misconduct Leads to a "Cascade of Error"

Research on wrongful convictions has demonstrated that official misconduct is *more prevalent* in cases involving serious violent felonies.[165] Higher error rates in serious cases may be attributable to the added pressure to secure conviction for the most harmful, heinous crimes.[166] Investigations can be particularly challenging in murder cases because they are often based on circumstantial evidence and the main witness to the crime was the decedent.[167] Those challenging investigations

[165] Gross et al., *Race*, *supra* note 5 at 15 ("Misconduct is generally more common the more extreme the violence, ranging from 38% and 39% for robbery and sexual assault cases to 72% for exonerations from death sentences. These numbers reflect both higher rates of official misconduct in the most serious crimes, and more diligent post-conviction reinvestigations.").

[166] Gross, *supra* note 34 at 8; Gross et al., *Government Misconduct*, *supra* note 31 at 17.

[167] Gross, *supra* note 34 at 8 ("But the same forces that increase the number of accurate murder convictions are likely to increase the number of false convictions. Many homicide investigations are difficult because, by definition, the victims are unavailable; the authorities pursue murder investigations where the evidence is less than overwhelming and the risk of error is substantial – cases that would have been abandoned if nobody had been killed; the extraordinary pressure to secure convictions for heinous crimes tempts

may motivate law enforcement—consciously or otherwise—to commit misconduct.[168] Consistent with these theories, exonerations for murder—particularly those that are death penalty eligible—reveal the *highest* rates of official misconduct at 79%.[169]

Misconduct by law enforcement at the investigation stage tends to lead to or create other errors—a "confluence of factors"—resulting in a wrongful conviction.[170] These errors do not typically occur in isolation,

> "[i]nstead, *each error has the potential to affect other aspects of the pretrial and trial procedure*, resulting in cross-contamination of evidence. For example, suggestive police procedures may lead to a misidentification by an eyewitness. That misidentification may generate a false confession when the interrogator reports to the suspect that he has been definitively identified as the perpetrator. The coerced and potentially false confession can, in turn, lead to 'tunnel vision'—confirmation bias among law enforcement—causing detectives and forensic analysts to seek out evidence supporting the suspect's guilt, while ignoring evidence that contradicts it."[171]

Because of this "cascade of error," a faulty piece of evidence can "taint the rest of the case" and result in a wrongful conviction.[172] Because misconduct is more likely to occur in serious cases, it follows that a

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police officers and prosecutors to cut corners . . . [E]verybody involved . . . is reluctant to release a defendant who seems likely to have committed a vicious murder even if the evidence of guilt is open to doubt."); Gross et al., *Government Misconduct*, *supra* note 31 at 47 (arguing that misconduct in the form of persuading and manipulating a suspect to falsely confess is more likely to occur in "the most serious cases where there is no other evidence sufficient to convict—which usually means a murder with no surviving eyewitnesses.").

[168] Gross et al., *Government Misconduct*, *supra* note 31 at 17.

[169] *Id*. at 15.

[170] Hartung, *supra* note 18 at 370.

[171] *Id.* at 378 ("studies of wrongful convictions and exonerations suggest that the conviction of an innocent person does not usually depend on a single error, but a series of interconnected, causally-related errors . . ."); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292-93, 295 (discussing impacts of "tunnel vision" can lead to "flawed procedures" and produce wrongful convictions); *see also* Paul C. Giannelli, *Cognitive Bias in Forensic Science*, CRIM. JUST. 61, 61-62 (2010) (discussing role of cognitive bias among forensic analysts in criminal justice system).

[172] Hartung, *supra* note 18 at 378; Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1160 (2005) ("[O]nce the process against an innocent suspect begins, there is little chance that a case will be derailed against the prosecutor's wishes before trial because of a lack of evidence.").

"confluence of errors" is also more likely. The discovery of a pattern of misconduct by one or more law enforcement officers should raise concerns about all of the cases they were involved in—*especially the most serious cases*—and undermines confidence in the integrity of those convictions in particular.

2. Factors Specific to Wrongful Convictions in Serious Cases Mitigate the Risks of a "Wrongful Acquittal"

Factors specific to persons convicted of serious crimes, including homicide and other violent felonies, may mitigate the risks of a "wrongful acquittal" and warrant "erring" on the side of vacatur in these cases. The lengthy amount of time between a questionable conviction and the discovery of systemic misconduct, the research demonstrating that people age out of crime, and the low recidivism rates for those who have served time in custody for homicide and other violent crimes all suggest that the public safety risks of erroneously releasing someone who *actually* committed a serious offense are low.

Study of the exonerations recorded to date indicates that it generally takes longer to discover and correct miscarriages of justice when official misconduct was a contributing factor than when the wrongful convictions were the result of other factors.[173] Exonerations across all types of crime take an average of 11.6 years.[174] In murder exonerations involving official misconduct, the average time to exoneration is 17.7 years.[175] The unfortunate reality is, it is more difficult and often takes substantially more time to uncover official misconduct, and even longer to identify the possible number of impacted cases. By the time systemic misconduct is discovered and efforts to address impacted convictions are underway, criminal defendants have often already served lengthy prison terms and a substantial portion of their sentences.[176]

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[173] Gross et al., *Race*, *supra* note 5 at 8 ("Murder exonerations with known misconduct do take longer than those without, 17.7 to 12.2 years, on average.").

[174] *Id.*

[175] *Id.*

[176] *See generally* GROUPS REGISTRY, *supra* note 6. *See also Longest Incarcerations*, NRE, https://www.law.umich.edu/special/exoneration/Pages/longestincarceration.aspx (last visited Aug. 2, 2023) (Nearly 20% of the total U.S. prison population has already served 10 years in custody as of 2019. In California and Washington, DC, those numbers were even higher at 29% and 39% respectively.); *How Many People Are Spending Over a Decade in Prison?*, THE SENTENCING PROJECT 1 (Sept. 2022), https://www.sentencingproject.org/app/uploads/2022/10/How-Many-People-Are-Spending-Over-a-Decade-in-Prison.pdf.

Research demonstrates that recidivism rates fall substantially after about a decade of imprisonment.[177] Because of the length of time it takes to discover systemic misconduct, many (if not most) of the impacted defendants will have spent years in custody,[178] suggesting that their likelihood of recidivating—even if factually guilty of the convicted offense(s)—is substantially lower.

This may be because criminal "careers" are relatively short—lasting only about ten years—and that, as time passes, people tend to age out of crime.[179] This pattern is consistent among people who have committed and served time for violent crimes—a population that may be even *less* likely to reoffend after their release from custody than those with other offenses.[180] Thus, even assuming *the majority* of people

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[177] U.S. SENTENCING COMM'N, LENGTH OF INCARCERATION AND RECIDIVISM (2022), https://www.ussc.gov/research/research-reports/length-incarceration-and-recidivism-2022 ("The odds of recidivism were approximately 29 percent lower for federal offenders sentenced to more than 120 months [ten years] incarceration compared to a matched group of federal offenders receiving shorter sentences.").

[178] *How Many People*, SENTENCING PROJECT, *supra* note 176.

[179] Ashley Nellis, *Mass Incarceration Trends*, THE SENTENCING PROJECT (Jan. 25, 2023) https://www.sentencingproject.org/reports/mass-incarceration-trends/#life-and-long-term-imprisonment ("Evidence shows that criminal careers are relatively short, in the range of 10 years, meaning that continued incarceration beyond that point produces diminishing returns on public safety . . ."); Emily Bloomenthal, *The Older You Get: Why Incarcerating the Elderly Makes Us Less Safe*, FAMM, https://famm.org/wp-content/uploads/Aging-out-of-crime-FINAL.pdf ("[A]rrests drop steeply by the early thirties, and almost three-quarters of arrests are of people below the age of 40. . . . Similar trends are seen with recidivism rates, which also decline dramatically as people age."); Alexi Jones, *Reforms without Results: Why states should stop excluding violent offenses from criminal justice reforms*, PRISON POLICY INITIATIVE (Apr. 2020), https://www.prisonpolicy.org/reports/violence.html (arrest rates for violent offenses spike before age 24 and then decline).

[180] Ben Feldmeyer & Darrell Steffensmeier, *Elder Crime: Patterns and Current Trends, 1980-2004*, RESEARCH ON AGING 297, 313 (July 2007); Ashley Nellis, *A New Lease on Life*, THE SENTENCING PROJECT (Jun. 30, 2021), https://www.sentencingproject.org/reports/a-new-lease-on-life/#v-coming ("Most people who commit homicide are unlikely to do so again and overall rates of violent offending of any type is also rare."); J. J. Prescott, Benjamin Pyle, & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1645 (2020) (". . . [C]ompared to the reoffense rates of individuals released following incarceration for nonviolent crimes, overall recidivism rates are lower among released individuals who have been incarcerated for homicide offenses."); JUSTICE POLICY INSTITUTE, *The Ungers, 5 Years and Counting* 3 (Nov. 2018), https://justicepolicy.org/wp-content/uploads/2021/06/The_Ungers_5_Years_and_Counting.pdf ("We can safely release people who have committed a serious, violent offense. The [studied] group was convicted of homicide and rape; however, after serving decades in prison they have safely

convicted of a violent crime are factually guilty, the research demonstrates that only an extremely small number of those people go on to reoffend after being released from custody.[181] The factors specific to the most serious cases—specifically, the longest delays before misconduct is uncovered and the lowest recidivism rates—suggest that erring on the side of vacatur where systemic misconduct has finally been uncovered is *less likely* to result in a risk to public safety. At the same time, the failure to expeditiously identify and rectify wrongful convictions causes substantial individual and community harm.

3. The Risks of Wrongful Conviction in Serious Cases: Individual and Community Harm

a. "Individual" Harm

Wrongful convictions in serious cases cause both substantial individual and public harm. Perhaps the most obvious harm is to the wrongfully convicted individual. Individuals who are wrongfully convicted of serious crimes typically spend years or even decades in prison before the wrongful conviction is uncovered and remedied.[182] There is no shortage of research or anecdotal evidence demonstrating the impact of years of incarceration. Like many who have survived lengthy prison terms, exonerees suffer from post-traumatic stress disorder, so-called "institutionalization,"[183] and depression; many are victims of

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been reintegrate into the community. . . . As of today, [the subjects] have posted a less than 1 percent recidivism rate, a fraction of the overall Maryland rate of 40 percent."); Robert Weisberg, Debbie A. Mukamal, & Jordan D. Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, STAN. CRIM. JUST. CTR. 17 (Sept. 2011) ("In a cohort of convicted murderers released [between] 1995 [and 2011] in California, the actual recidivism rate is in fact minuscule. In particular, among the 860 murderers paroled [since] 1995, only *five* individuals have returned to jail or returned to the California Department of Corrections and Rehabilitations for new felonies since being released, and none of them recidivated for life-term crimes. This figure represents a lower than one percent recidivism rate, as compared to the state's overall inmate population recommitment rate to state prison for new crimes of 48.7 percent.") (internal quotations omitted).

[181] Jones, *supra* note 179 ("People convicted of violent offenses have among the lowest rates of recidivism;" "[P]eople convicted of violent offenses are less likely to be rearrested in the years after release than those convicted of property, drug, or public order offenses.").

[182] *See generally* GROUPS REGISTRY, *supra* note 6. *See also Longest Incarcerations*, *supra* note 176. .

[183] Johanna Crane, *Becoming Institutionalized: Incarceration and "Slow Death"*, SOCIAL SCIENCE RESEARCH COUNCIL (Jul. 16, 2019), https://items.ssrc.org/insights/becoming-

violence and harassment while in custody.[184] It is also well established that people who have served lengthy prison terms have more medical and mental health problems because of the conditions of incarceration.[185] The formerly incarcerated—wrongfully convicted or otherwise—have difficulty finding housing and legal work, and reintegrating into their communities because of the stigma of a criminal conviction.[186]

The families and immediate communities of the wrongfully convicted, sometimes referred to as "secondary victims" of wrongful conviction, also suffer.[187] These secondary victims endure their own psychological torment, including emotional estrangement from their loved one, that often persists even after the exoneration of the lucky few who are able to win their freedom and return home.[188] Families and loved ones of the wrongfully convicted may also incur substantial legal costs in

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institutionalized-incarceration-and-slow-death/ ("Institutionalization" refers to "the chronic biopsychosocial state brought on by incarceration and characterized by anxiety, depression, hypervigilance, and a disabling combination of social withdrawal and/or aggression." The formerly incarcerated describe this state of "institutionalization" as "remaining with them even after release, adding to the already numerous challenges of re-entry after prison.")

[184] *Key Provisions in Wrongful Conviction Compensation Laws*, NRE (Updated May 27, 2022), https://www.law.umich.edu/special/exoneration/Documents/IP%20-%20Key%20Provisions.pdf; *see also Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT 3, https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf; *see* Leslie Scott, *"It Never, Ever Ends": The Psychological Impact of Wrongful Conviction*, AM. U. CRIM. L. BRIEF, 10, 13 (2010), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1063&context=clb ("In addition to being punished for crimes they did not commit, the wrongfully imprisoned can expect to experience the standard adverse psychological symptoms attendant to being detained for many years, separate from loved ones, and divorced from any sense of autonomy.")

[185] *See* National Research Council, *Health and Incarceration: A Workshop Summary*, NAT'L ACADS. PRESS (2013) (stating poor value of meals, poor sanitation, infestations with bugs and vermin, prevalence of smoking, poor ventilation, overcrowding, and stress may exacerbate chronic health conditions and be harmful to inmate health).

[186] *See generally* URB. INST. JUST. POL'Y CTR., *Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute's Prisoner Reentry Portfolio* (Jan. 2006), https://www.urban.org/sites/default/files/publication/42981/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF.

[187] *See* Michael Naughton, *Criminalizing Wrongful Convictions*, BRIT. J. CRIMINOLOGY 1148, 1152-53 (Nov. 2014); Sion Jenkins, *Secondary victims and the trauma of wrongful conviction: Families and children's perspectives on imprisonment, release and adjustment*, AUSTL. & N.Z. J. CRIMINOLOGY 119 (2013).

[188] *Id.*

the fight for their loved one's freedom.[189]

Crime victims, which include surviving family members in homicide cases and family members closely connected to survivors of crime, are also harmed by wrongful convictions. Crime victims suffer profound anguish and sometimes guilt after the revelation of a wrongful conviction.[190] Crime victims also report ongoing fear of the actual perpetrator(s) after learning that their case resulted in a wrongful conviction where the wrongfully convicted person had no involvement in the crime.[191] When credible evidence suggests that the wrong person has been incarcerated for a serious crime, law enforcement can do little to bring the true perpetrator to justice while an erroneous conviction still stands. Thus, efficient review processes are necessary to help limit the substantial harm caused to individuals and communities "touched" by a wrongful conviction.

b. Public and Community Harm

Wrongful convictions also cause public or community harm. First, and perhaps most obviously, when the factually innocent are convicted, the guilty go free. In the first 375 recorded DNA exoneration cases reported by the Innocence Project through 2020, the actual perpetrators were identified in almost half of those cases.[192] Those true offenders are known to have committed at least 154 additional violent crimes, including 36 murders, and 83 sexual assaults.[193] Moving too slowly through the process of identifying and reviewing cases when systemic misconduct is uncovered—or, worse yet, having no process at all—poses a real risk to the safety of the community because it prevents law enforcement from investigating, identifying, and prosecuting the true perpetrators of serious crimes.

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[189] Janani Umamaheswar, *The Relational Costs of Wrongful Convictions*, CRITICAL CRIMINOL. (2023).

[190] Seri Irazola et al., *Addressing the Impact of Wrongful Convictions on Crime Victims*, NAT'L INST. JUST. J. (2014), https://www.ojp.gov/pdffiles1/nij/247881.pdf; Seri Irazola et al., *Study of Victim Experiences of Wrongful Conviction*, Nat'l Inst. Just., Off. Just. Programs, U.S. Dep't of Just. 44 (Sept. 2013), https://www.ojp.gov/pdffiles1/nij/grants/244084.pdf.

[191] Irazola, *Victim Experiences*, *supra* note 190 at 12.

[192] *DNA Exonerations in the United States (1989-2020)*, THE INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jul. 14, 2023).

[193] *Id*. *See generally* James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1632 (2012).

Wrongful convictions—whether based on factual innocence or because of fundamental unfairness in the legal process—also undermine public confidence in the criminal legal system and even in the government itself. This is perhaps most often the case when the wrongful conviction is caused by official misconduct—which is true in about 54% of exonerations.[194] This lack of confidence in the criminal legal system can produce "instrumental costs" such as discouraging witnesses or crime victims from coming forward to report crimes or provide other important information to law enforcement.[195] When the criminal legal system demonstrates not only that it produces erroneous outcomes but also that it is unwilling or unable to act with appropriate urgency to remedy them, the public's skepticism and mistrust persists and deepens.

Finally, the monetary costs of wrongful conviction also harm the public and the community at large. These costs derive from the cost of prosecution, the cost of incarceration, and the cost of civil settlements arising from wrongful convictions. A 2016 report by UC Berkeley and the Quattrone Center on the Fair Administration of Justice at the University of Pennsylvania estimated that in California alone the wrongful convictions identified to date had cost taxpayers $221 million dollars.[196] Another more recent study roughly estimated the legal costs of a *single* exoneration to fall between $500,000 and $2 million.[197] That study found that in a four-year period between 2014 and 2018, there were approximately 160 individuals exonerated annually nationwide, bringing the total legal costs of exonerations to $80-320 million nationally each year.[198]

The government's tendency to reflexively defend bad convictions creates a further drain on funds and resources better applied to limiting the negative impacts of those convictions through a robust review process. Added to the legal costs of defending erroneous convictions is the restitution that some states (rightfully) offer to the wrongfully convicted.

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[194] Gross et al., *Government Misconduct*, *supra* note 31 at iii.

[195] Paul G. Cassell, *Tradeoffs between Wrongful Convictions and Wrongful Acquittals: Understanding and Avoiding the Risks*, 48 SETON HALL L. REV. 1435, 1444 (2018).

[196] Rebecca Silbert, John Hollway & Darya Larizadeh, *Criminal Injustice: A Cost Analysis of Wrongful Convictions, Errors, and Failed Prosecutions in California's Criminal Justice System*, C.J. EARL WARREN INST. ON L. & SOC. POL'Y (2015), http://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI_Criminal_InJustice_booklet_FINAL2.pdf.

[197] Mark A. Cohen, *Pain, Suffering and Jury Awards: A Study of the Cost of Wrongful Convictions*, CRIMINOLOGY & PUB. POL'Y 691, 720 (Nov. 2021).

[198] *Id.*

The longer it takes to discover and rectify a wrongful conviction, the greater the restitution required to make exonerees whole and the greater the burden on already-strained public resources.[199]

B. Applying the Prevailing "New Evidence" Standard in Large-Scale Reviews of Convictions for Serious Crimes

The typical post-conviction review process—like the wrongful conviction movement in general—is focused on factual innocence,[200] though post-conviction relief is most often delivered through claims based on procedural error or due process grounds rather than on the basis of a legal "factual innocence" finding.[201] Even when process-based claims are established, prosecutors often hesitate to take remedial action in the absence of affirmative evidence of innocence, which are typically uncovered only through an exhaustive, fact-intensive investigation.[202] Instead, in the review of serious cases potentially impacted by systemic misconduct, prosecutors should err on the side of vacatur, foregoing the exhaustive case review and "factual innocence" investigation, if evidence of the *pattern of misconduct alone* would have more likely than not led to a different outcome had that evidence been presented to the jury at trial.

This approach is consistent with the prevailing "new evidence" standard applied in a majority of jurisdictions.[203] Courts in jurisdictions

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[199] Notably, not all exonerees are entitled to compensation. Thirty-eight states and Washington, DC, have wrongful conviction compensation statutes. Some require findings of factual innocence before paying out. Others require that exonerees waive possible civil claims in order to quality for relief. The path to compensation via civil rights litigation is equally if not more fraught. Generally, only official misconduct is actionable, and prosecutors have nearly absolute immunity from liability. *See Key Provisions*, NRE, *supra* note 184; *Making Up For Lost Time*, *supra* note 184.

[200] *See* Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety about Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 323-326 (2009) (discussing the focus on factual innocence as the "chief currency in criminal justice reform"); Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449 (2001) (discussing the wrongful conviction movement's focus on factual innocence).

[201] *See, e.g.*, John Hollway, *Conviction Review Units: A National Perspective*, FAC. SCHOLARSHIP PENN CAREY L., 1, 45 (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (" . . . [I]t's a lot easier to get relief on a due process ground that it is actual innocence because the standard is higher."); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 Ohio St. J. Crim, L. 467, 475 (" . . . it is made exceedingly difficult for a defendant to obtain relief . . . absent procedural error of some kind.").

[202] *See* Gould & Leo, *Path to Exoneration*, *supra* note 25.

[203] *See* Brooks et al., *supra* note 23 at 1045, 1058 n. 93, 1065 (a majority of jurisdictions

across the nation recognize evidence concerning official misconduct as "newly discovered evidence" that may undermine confidence in the integrity of a conviction and warrant vacatur and a new trial. [204] In some cases, courts have found that "newly discovered evidence" can include the discovery of a pattern of law enforcement misconduct even when there is no direct evidence of misconduct in the specific case before them.[205] Prosecuting agencies can and should apply this standard to the post-conviction review of serious cases where the evidence of a pattern of official misconduct alone would more likely than not have changed the outcome at trial. Prosecutors should not hesitate to seek relief in these cases. This standard is also consistent with the prosecutor's ethical obligation to prosecute only those cases that they believe they can prove beyond a reasonable doubt, with lawfully obtained, competent evidence.[206]

In the aftermath of the discovery of the pattern of misconduct by former New York Detective Louis Scarcella, discussed in Section III(B)(2)(a) *supra*, defendant Rosean Hargrove's murder conviction was vacated even without evidence that Scarcella committed misconduct in Hargrove's case. *People v. Hargrove* involved the 1991 shooting death of a law enforcement officer. The case hinged on a single eyewitness identification obtained by Detective Scarcella.[207] Though the eyewitness did not recant the identification, and there was no specific evidence that Scarcella or others had pressured witnesses in Mr. Hargrove's case, the court vacated the conviction anyway and ordered a new trial.[208] The court concluded that "evidence of prior police misconduct, if known to the court and the jury, would have created a probability of a more favorable verdict

grant new trials based on new evidence that would "probably" or "more likely than not" have changed the result at trial).

[204] *Id*.

[205] Beety et al., *supra* note 13 at 34; People v. Hargrove, 26 N.Y.S.3d 726 (N.Y. Sup. Ct. 2015).

[206] *See Criminal Justice Standards*, *supra* note 71 ("After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt;" "If a prosecutor has a significant doubt about . . . the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case.").

[207] People v. Hargrove, 162 A.D.3d 25, 25 (N.Y. App. Div. 2018)

[208] *Id*. at 29.

to the defendant."[209] "Through it all," the court opined, "*we cannot say whether the defendant is guilty or whether justice has ultimately been done in this case. But that is precisely why the defendant is entitled to a new trial.*"[210]

In another of Detective Scarcella's cases, *People v. DeLeon*, the same appellate court vacated another conviction based on newly discovered evidence of the detective's misconduct. The court held that the evidence of misconduct "would have furnished the jury with a different context in which to view all of the evidence in this case . . . and further, that evidence of [police] misconduct was of such a character to create a probability that, had such evidence been received at trial, the verdict would have been more favorable to the defendant."[211] In each of these cases, the court concluded that evidence of the *pattern* of law enforcement misconduct alone—even absent evidence that the misconduct in fact occurred in each case at issue—would have probably led to a different outcome at trial had it been heard by the jury.

A majority of jurisdictions—more than thirty states and the District of Columbia—apply some variation of this "new evidence" standard: that relief is warranted where new evidence would "probably" or "more likely than not" have changed the result at trial.[212] This standard balances the competing interests of finality, accuracy, and a just process in the criminal legal system.[213] In most states, when a court grants a newly discovered evidence claim, the petitioner is entitled to a new trial.[214] It is then up to the discretion of the prosecuting agency to determine whether there is sufficient evidence to retry the case, or whether the dismissal of charges or other negotiated resolution is more appropriate in light of the remaining evidence and in the interests of justice. Prosecutors should apply this legal standard to identify cases warranting vacatur.

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[209] *Id.*

[210] *Id.* at 74 (emphasis added). The court made clear, however, that this ruling was "confined to the particular facts of this case" and that "each case [involving Detective Scarcella] must be reviewed on its own facts." In other words, the court did not intend for its decision in *Hargrove* to mandate vacatur in every case involving Detective Scarcella. This is consistent with the modified case-by-case approach proposed *infra* Section IV.

[211] People v. DeLeon, 190 A.D.3d 764, 765 (N.Y. App. Div. 2021).

[212] Brooks et al., *supra* note 23 at 1058 n.93; *see also, e.g.*, Cal. Pen. Code § 1473(b)(1)(C)(i).

[213] *See, e.g.*, Brooks et al., *supra* note 23 at 1065.

[214] *Id.*

IV. PROPOSALS FOR SYSTEMATIC REVIEW OF CONVICTIONS FOR SERIOUS CHARGES: A MODIFIED "CASE-BY-CASE" APPROACH

Following the discovery of systemic misconduct, prosecutors must establish a protocol for identifying impacted cases and an appropriate standard of review to determine which defendants are entitled to relief from their convictions. In this section, and benefitting from the frameworks described *supra*, this article offers a starting point for constructing the basic components of such a protocol. The principles from the mass exoneration frameworks detailed above can serve to expedite the review process, even where a case-by-case or partial case-by-case investigation may ultimately be necessary. The prosecuting agency must also ensure that the review and investigation is unbiased, independent, and thorough. To achieve these ends, prosecuting agencies should create independent review bodies to assist with the investigation of cases impacted by systemic misconduct as discussed below.

A. Proposed Framework to Review Systemic Police Misconduct in Serious Cases

1. Establish Appropriate Scope & Criteria for Review

Following the discovery of systemic misconduct, as in the previous low-level mass exonerations described above, the necessary first step is to establish the appropriate scope and criteria of cases for review. As discussed in greater detail *supra*, in previous instances where systemic officer misconduct has been uncovered, prosecutor's offices have generally sought to apply reasonable limiting principles aimed at capturing the cases most likely to have been impacted by the particular officer's (or officers') misconduct.[215] The broadest scope would plainly be to review all cases "involving" the officer(s) in question if feasible. Other appropriate limiting principles include: cases where the officer(s) "played an essential role in the arrest and prosecution,"[216] or cases where the officer(s) in question were "essential witnesses."[217] The particular

[215] See discussion *supra* Section (II)(A)(2)(a).

[216] *New York 2022*, *supra* note 55 (stating prosecutors reviewed cases involving 20 officers who had been convicted of crimes, and vacated convictions in cases where the officers played an "essential role" in the arrest and prosecution).

[217] *New York 2021(1)*, *supra* note 48; Brooklyn DA to Dismiss 378 Convictions (Misconduct), *supra* note 48, Press Release, District Attorney Kings County, *Brooklyn DA Eric Gonzalez to Dismiss 378 Convictions That Relied on 13 Officers Who Were Later Convicted of Misconduct While on Duty* (Sept. 7, 2022) http://www.brooklynda.org/2022/09/07/brooklyn-da-eric-gonzalez-to-dismiss-378-

pattern of misconduct and the number of (*e.g.*) officers involved should be considered in determining the appropriate scope of review. Case and context-specific factors may mandate other limiting criteria. For example, in the review of cases based on misconduct of a group of officers where the misconduct included coercing false confessions from criminal defendants, an appropriate limiting principle may be to review cases where any of the identified officers was actually involved in obtaining the defendant's statement.

Returning to a hypothetical review of the cases of Detective Jones—the Indianapolis police detective who withheld exculpatory evidence in Leon Benson's case and admitted it was his practice to withhold handwritten notes which he claimed were his "work product"—the Marion County Prosecutor's Office (MCPO) should seek to review every case where Detective Jones was the lead detective. This would capture cases where Detective Jones (a) produced a substantial portion of the investigative notes and other materials; and (b) was in a position to make decisions about what materials to produce to the prosecutor's office. Detective Jones worked for the Indianapolis Metropolitan Police Department ("IMPD") for over thirty years.[218] In the course of his work as an IMPD law enforcement officer, he estimated that he investigated over fifty homicides.[219] He likely assisted with the investigations of potentially hundreds of cases. Contrary to the typical practices for investigations into pattern misconduct, the MCPO should prioritize the review of cases involving *serious* crimes—cases where the stakes are highest, where defendants served or are serving the longest sentences, and where the injustice resulting from the misconduct is therefore the most egregious.

Detective Jones's admissions also give rise to grave concerns that withholding so-called "work product" was not a practice limited to him but rather that it was the widespread practice of the IMPD during the years of Detective Jones's employment (and, perhaps, beyond). Accordingly, it is necessary for the MCPO to conduct further investigation—including, at a minimum, "spot checking" other cases and interviewing other personnel from that era—to establish whether other IMPD officers in fact

convictions-that-relied-on-13-officers-who-were-later-convicted-of-misconduct-while-on-duty/ ("A review by Brooklyn's CRU did not uncover misconduct, but the District Attorney has lost confidence in cases where these officers served as essential witness, i.e., cases that could not have been prosecuted without them.").

[218] Declaration Jones, *supra* note 1.

[219] *Id.*

engaged in the practice of withholding their handwritten notes and other potentially exculpatory material. A recommended course of action for the MCPO is to begin by identifying the other named detectives in the Benson case file who worked under Detective Jones's supervision, and by obtaining the police training manuals and other policy materials from the era that Detective Jones was active.

The prosecuting agency reviewing a large number of serious cases may also consider establishing "triage" criteria to prioritize certain cases for review. If a substantial volume of potentially impacted cases is identified, it may be advisable to limit an initial review to homicides and other serious cases in order to preserve law enforcement resources. Focusing on the most serious crimes affords prosecutors the opportunity to identify those cases where a wrongful conviction due to misconduct is most likely to have occurred,[220] the cases in which the wrongfully convicted are serving or have served the longest sentences, and cases where a possible wrongful conviction poses the greatest risk to public safety (because, in the case of the "factually innocent," this would mean that the real perpetrator remains at large). Relatedly, the prosecuting agency should prioritize the review of cases where the petitioner is currently in custody, as is the practice for some conviction integrity and conviction review units.[221] Finally, the prosecuting agency should review and consider cases regardless of whether the petitioner pled guilty or whether the petitioner has already exhausted other legal avenues for relief.[222]

2. Notifying Potentially Impacted Defendants

Once the scope of the review has been established, the prosecutor's office should use the most expansive principles to notify the greatest possible number of defendants that official misconduct may have impacted the investigation or adjudication of their case. Notification should advise the defendants about the type of misconduct as well as the scope, criteria, and prioritization for the prosecutor-initiated review, as

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[220] See *infra* Section II.

[221] *See, e.g.*, SFDA Innocence Commission Charter (on file with the author) ("The IC will prioritize review of applications from Applicants who were convicted of a felony, are currently in custody, and are of those serving the longest sentences.").

[222] Hollway, *supra* note 201 at 19, 43 (commenting that rejecting cases for review that were originally resolved by guilty plea is an example of how conviction review units may "prize form above substance" and render the unit a "CRINO" – "conviction review in name only").

well as any relevant judicial decisions that may impact the adjudication of their cases.[223]

In the case of Detective Jones, assuming it is established that he failed to disclose material, exculpatory evidence in more than one case, the MCPO should take steps to individually notify all defendants in cases where Jones was the lead detective that this pattern of misconduct has been discovered. If the practice of withholding so-called "work product" extended beyond Detective Jones, the true number of impacted cases may be impossible to know with certainty. In that case, the prosecutor's office should cast a wide net to identify and notify potentially impacted defendants, including by providing public notice through local and statewide media channels and by posting information in state correctional facilities with instructions for seeking legal assistance and how to request consideration by the prosecutor's office for review. The notices should name any individual detectives known to have engaged in the identified misconduct and should be updated and redistributed as additional errant officers come to light.

3. Apply "Newly Discovered Evidence" Analysis in a Partial Case-by-Case Review

Next, prosecutors should evaluate the identified and "triaged" cases using the prevailing "new evidence" standard discussed *supra* in a partial case-by-case review. Under this model, in cases where there is overwhelming evidence of guilt—such that the introduction of even case-specific evidence of misconduct would likely be insufficient to upset the verdict—no affirmative remedial action (beyond notification) is required. In cases where the existing evidence of guilt raises a question as to whether evidence of the pattern of misconduct would have changed the outcome at trial, additional investigation may be warranted. In those cases, it may be necessary to determine whether the identified misconduct directly impacted the case in question or whether there are other reasons to doubt the integrity of the conviction. In cases like *Hargrove*, however, where the dearth of evidence of guilt suggests that, had the jury known about the pattern of official misconduct it more likely than not would have produced a different outcome at trial, the prosecuting agency should take immediate action to vacate the conviction.[224]

Following vacatur, each case returns to its pretrial status and the

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[223] As in *Bridgeman*, *supra* note 63 at 690.

[224] People v. Hargrove, 26 N.Y.S.3d 726 (N.Y. Sup. Ct. 2015).

charges remain pending. The prosecuting agency then has the responsibility to determine whether it will retry the case, negotiate a plea, or dismiss the case outright. At that stage, the prosecutor may decide that further investigation is necessary to determine whether to pursue prosecution. However, charges should be maintained "*only* if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt."[225]

B. Who Does the Work?: Methods and Resources for Conducting Large-Scale Case Reviews

The discovery of a pattern of misconduct involving even a single police officer may impact a significant number of cases. If the pattern of misconduct includes more than one officer, or the practices of an entire police force for a particular time period, the number of actually impacted cases may be impossible to know with certainty. This places a significant burden on the prosecuting agency to swiftly, fairly, and thoroughly review a potentially vast number of cases and to provide speedy relief to any meritorious claims of wrongful conviction. It also puts prosecuting agencies in the difficult position of investigating alleged misconduct by a partner law enforcement agency.[226] These challenges can be addressed by creating independent review panels or commissions to assist with the process. This section argues that independent review panels are the optimal model in cases where a pattern of official misconduct is discovered, and applies the model to a hypothetical review of Detective Jones's cases.

1. Independent Review Panels

Though the independent post-conviction review panel model has been implemented in only a limited number of jurisdictions, it features critical aspects of the most successful post-conviction review processes and merits more widespread implementation. [227] Successful features of independent post-conviction review panels include independence,

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[225] *Criminal Justice Standards*, *supra* note 71.

[226] Hollway, *supra* note 201 at 23, 27, 99.

[227] MASS. CONVICTION INTEGRITY WORKING GROUP, CONVICTION INTEGRITY PROGRAMS: A GUIDE TO BEST PRACTICES FOR PROSECUTORIAL OFFICES 20 (March 2021), https://www.law.upenn.edu/live/files/11615-conviction-integrity-programs-massachusetts-bar (stating experts in post-conviction review stress that the priority is to structure the review process to "maximize its independence, efficacy, and transparency and to reduce the risk of cognitive and confirmation bias . . .").

efficiency, and transparency.[228] In typical *internal* review processes, independence may be compromised when prosecutors are faced with the challenge of scrutinizing the work of current and former colleagues and law enforcement partners.[229] Those relationships, perhaps understandably, can impact the integrity of the review process. Where a pattern of official misconduct is the catalyst for the review of a potentially large number of cases, independence in the review process is even more vital. Review panels that operate outside of the prosecutor's office are able to operate with greater neutrality and without institutional bias.[230]

Post-conviction review processes have been found to be most effective when the attorneys tasked with reviewing potential wrongful convictions are able to specialize and focus on post-conviction review alone; they should not be prosecutors assigned to multiple units. [231] Rather, the review effort requires dedicated, singly focused personnel. Finally, the most successful conviction review processes are led by attorneys with experience in criminal defense and post-conviction litigation—attorneys who have expertise in identifying, investigating, reviewing, and making recommendations regarding claims of wrongful conviction.[232]

The first (and, to date, only) statewide independent review panel was created in North Carolina in 2006: the North Carolina Innocence Inquiry Commission (NCIIC).[233] The NCIIC is charged with providing "an independent and balanced truth-seeking forum for credible post-conviction claims of innocence in North Carolina."[234] The Commission members, who are appointed by the Chief Justice of the North Carolina Supreme Court and the Chief Judge of the North Carolina Court of

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[228] *Id.*

[229] *See generally* Hollway, *supra* note 201 at 32-33.

[230] *See* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1074-75 (2010). *See generally* David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91 (2000).

[231] Horan, *supra* note 230.

[232] Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 738, 741 (2017) ("The best Conviction Integrity Units have either been run by defense attorneys working on a full-time basis or defense attorneys working on a part-time basis with substantial oversight authority for the operation of the unit. This might well be the single most important best practice to assure that the CIU runs well and is perceived as credible by the legal community and the public."); Hollway, *supra* note 201 at 32-33.

[233] *About*, N.C. INNOCENCE INQUIRY COMM'N, https://innocencecommission-nc.gov/about/ (last visited Aug. 2, 2023).

[234] *Id.*

Appeals, include: a superior court judge, a prosecuting attorney, a victim advocate, a criminal defense attorney, a representative from law enforcement, and a representative from the community, along with a handful of "discretionary members."[235] The Commission was created by statute and has the authority to compel document production. It is supported by an executive director and small staff compensated through state funds, and receives additional support through a partnership with the University of North Carolina School of Law in which law students provide *pro bono* assistance.[236] Since its founding, the Commission has exonerated 15 individuals.[237]

The San Francisco District Attorney's Innocence Commission represents a similar model operating at the county level.[238] Former San Francisco District Attorney Chesa Boudin created the Commission in 2020 to assist the SFDA's office with the review and investigation of potential wrongful conviction cases in San Francisco county.[239] The Commission's work is supported through a partnership with the University of San Francisco School of Law Racial Justice Clinic, directed by Innocence Commission Chair Professor Lara Bazelon.[240] The Commission members—who also serve *pro bono*—include a retired judge, a representative from an innocence organization, a representative for the San Francisco District Attorney's Office, a representative from the criminal defense community, and an expert on the intersection of mental health and the criminal legal system.[241] This model resulted in the first

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[235] *The Commissioners*, N.C. INNOCENCE INQUIRY COMM'N, https://innocencecommission-nc.gov/commissioners-2/ (last visited Aug. 2, 2023).

[236] *2020 Report on the Work of the North Carolina Innocence Inquiry Commission*, N.C. JUD. BRANCH, (Dec. 31, 2020), https://webservices.ncleg.gov/ViewDocSiteFile/24259.

[237] *15-Year Anniversary Celebration*, N.C. INNOCENCE INQUIRY COMM'N, https://innocencecommission-nc.gov/15-year-anniversary-celebration/ (last visited Aug. 2, 2023).

[238] *Law Clinics*, U. S.F. SCH. OF LAW (last visited Mar. 13, 2023) (showing the author serves as the Staff Attorney for the San Francisco District Attorney's Innocence Commission through a partnership between the SFDA's Office and the University of San Francisco School of Law Racial Justice Clinic.)

[239] *See* Press Release, S.F. Dist. Att'y's Off., District Attorney Boudin Announces Formation of Post-Conviction Unit and Innocence Commission, (Sept. 17, 2020), https://www.sfdistrictattorney.org/archive-press-release/formation-of-post-conviction-unit-and-innocence-commission/.

[240] *The Innocence Commission*, S.F. DIST ATT'Y'S OFFICE, https://www.sfdistrictattorney.org/policy/innocence-commission/ (last visited Dec. 2, 2023).

[241] *Id.*

collaborative exoneration in San Francisco history.[242]

A comparable model was also used for a specific case review in Minnesota in 2020. [243] A special independent panel of attorneys was formed to review the conviction of Myon Burrell out of Hennepin County. The case was fraught—Burrell was just 17 years old when he was convicted of the tragic shooting death of 11-year-old Tyesha Edwards.[244] After the conviction in his first trial was overturned by the Minnesota Supreme Court, Burrell was tried and convicted a second time.[245] Over a decade later, an in-depth investigation by the Associated Press uncovered new evidence casting doubt on his conviction and the investigation that led to it.[246] Senator Amy Klobuchar, who had served as Hennepin's County Attorney at the time of his first trial and had frequently pointed to Burrell's case as an example of her tough-on-crime policies, joined activists in the community calling for an independent investigation into Burrell's conviction and sentence.[247]

The panelists appointed to undertake the investigation—who represented key stakeholders in the criminal legal system, including prosecutors, advocates from innocence organizations, and legal experts from academia—served *pro bono* and received additional resources and support through a partnership with the law firm Greene Espel in Minneapolis.[248] The panel's findings cast doubt on the integrity of the investigation underlying Burrell's conviction, and it was concluded that

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[242] Lara Abigail Bazelon, *USF Racial Justice Clinic: Providing Legal Assistance and Promoting Change*, 17 CAL. LEGAL HIST. J. 26, 39 (October 4, 2022).

[243] Hilary Hurd Anyaso, *Independent panel of national legal experts to review conviction of Myon Burrell*, NORTHWESTERN NOW (Jul. 13, 2020), https://news.northwestern.edu/stories/2020/07/independent-panel-of-national-legal-experts-to-review-conviction-of-myon-burrell/.

[244] Robin McDowell & Margie Mason, *Imprisoned for life as a teen, Myon Burrell finds his voice*, ASSOCIATED PRESS (Mar. 3, 2020) https://apnews.com/article/3c663b1b141029c7a4b17b6c9dfd12bd.

[245] *Id.*

[246] Lou Raguse, *Conviction Review Unit begins evaluating Myon Burrell case as former prosecutor speaks out*, KARE11 (Feb. 2, 2023) https://www.kare11.com/article/news/local/conviction-review-unit-begins-evaluating-myon-burrell-case-former-prosecutor-speaks-out/89-2f7d8501-a486-45dc-9fd1-2ce904d6b691.

[247] McDowell & Mason, *supra* note 243; Keith Findley et al., REPORT OF THE INDEPENDENT PANEL TO EXAMINE THE CONVICTION AND SENTENCE OF MYON BURRELL 2 (Dec. 2020), https://wwws.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/2020-12-02-burrell-report-master.pdf.

[248] *Id.*

Burrell's continued incarceration was no longer in the interests of justice.[249] The investigation conducted by the panel was extremely thorough and efficient—the panelists began their investigation in July 2020 and published their report in December 2020.[250] In that time, they reviewed what appear to be hundreds of pages of documents and interviewed a dozen witnesses.[251] The Minnesota Board of Pardons commuted Burrell's sentence and he was released December, 14, 2020.[252] Here, the assistance of an independent panel, along with support from private organizations, served to expedite the review process while preserving limited state resources. The Board of Pardons' quick action following the panel's report appears to be a testament to their confidence in the integrity and independence of the review process.

2. Case Study: Special Panel to Review IMPD Misconduct

An independent review panel like the examples described above is an especially appropriate model for the review and investigation of a subset of cases impacted by police misconduct such as perpetrated by Detective Jones during his tenure at the IMPD. The Marion County Prosecutor should create such a panel and appoint members chosen for their particular experience, expertise, and reputation in the community. The Prosecutor should also empower the panel to partner with independent organizations such as a law school clinic and/or private law firm offering *pro bono* support to assist with the review.[253]

a. Composition & Appointment

The members of the panel should be appointed by the elected prosecutor and should represent key stakeholders and perspectives in the criminal legal system as well as the Marion County community. The Marion County Prosecutor's Office Conviction Integrity Unit already consults with such a panel in the review and investigation of wrongful conviction cases.[254] Those "Advisory Panel" members have been

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[249] Keith Findley et al., *supra* note 246 at 4.
[250] *Id.*
[251] *Id.*
[252] Ricardo Lopez, *Minnesota Pardons Board grants Myon Burrell a commutation on his life sentence for killing of 11-year-old girl*, MINN. REFORMER (Dec. 15, 2020), https://minnesotareformer.com/2020/12/15/minnesota-pardons-board-grants-myon-burrell-a-commutation-on-his-life-sentence-for-killing-of-11-year-old-girl/.
[253] *See S.F. Innocence Commission*, *supra* note 240.
[254] *Conviction Integrity Unit*, "*What is the Conviction Integrity Unit's Advisory Panel?"*,

appointed by the elected prosecutor and consist of a retired judge, a practicing attorney, and a member of the clergy.[255] The current role of the Advisory Panel is fairly limited: the Conviction Integrity Unit (CIU) currently meets with the panel on a quarterly basis "to advise the CIU on selected cases and guide the CIU on legal, community, and systematic criminal justice issues that should be addressed by the CIU."[256] The Marion County Prosecutor's Office could either establish a new panel for the purpose of reviewing the Detective Jones cases or expand the role of the existing Advisory Panel and request its assistance with such a review. In the latter case, it would be advisable for the Prosecutor to add additional panel members, including a representative from an innocence project or community organization with extensive experience in wrongful conviction work, and/or an academic with expertise in either criminal defense, post-conviction investigation, or criminology.[257] The panel members may continue to serve *pro bono*[258] or can be appointed as special prosecutors and compensated accordingly under Indiana law.[259]

b. Additional Support from Private Partnerships

To support the panel with an efficient and thorough review of a potentially high volume of cases, the panel should partner with a law

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INDY.GOV, https://www.indy.gov/activity/conviction-integrity-unit (last visited Aug. 2, 2023).

[255] *Id*.

[256] *Id*.

[257] MASS. CONVICTION INTEGRITY WORKING GROUP, *supra* note 227 at 23 (stating CIU should include at least one person with criminal defense or post-conviction innocence experience; "[I]t is important for the CIU to include 'outside' perspectives . . . whether from people with defense or innocence experience . . . [to] help reduce implicit bias and increase the CIU's credibility with the public.").

[258] As in the case of both the Myon Burrell Panel and the SFDA's Innocence Commission. Anyaso, *supra* note 242 ("The panelists are donating their time pro bono and will be assisted in their efforts by the Greene Espel law firm in Minneapolis, which is also providing support pro bono,"); Press Release, University of San Francisco School of Law Professor Lara Bazelon Appointed to Chair the San Francisco District Attorney's New Innocence Commission (Sept. 17, 2020), https://www.usfca.edu/news/university-san-francisco-school-law-professor-lara-bazelon-appointed-chair-san-francisco ("Working pro bono and assisted by [USF RJC] the Innocence Commission will review credible claims of wrongful conviction . . .").

[259] For example, under Indiana Code Section 33-39-10-2, "If a special prosecutor is not regularly employed as a full-time prosecuting attorney or full-time deputy prosecuting attorney, the compensation for the special prosecutor's services shall be paid, as incurred, to the special prosecutor, following an application to the county auditor, from the unappropriated funds of the appointing county . . ."

school clinic and/or private law firm. A partnership with a law school clinic provides additional resources, including additional person-power to assist with the review. Law students, under the supervision of licensed attorneys, can assist with the review of case files and undertake factual and legal research as necessary to support the work of the panel. The most effective law school partnership would involve a local law school that houses a legal clinic with experience in the review and investigation of post-conviction cases.[260]

An example of this type of partnership is the USF School of Law Racial Justice Clinic's partnership with the San Francisco District Attorney's Office to support the SFDA's Innocence Commission and the prosecutor-initiated resentencing efforts under former SFDA Chesa Boudin. This partnership resulted in the first collaborative exoneration in San Francisco history[261] and the resentencing of more than forty incarcerated Californians.[262] The USF Racial Justice Clinic now has a similar partnership to support the Alameda County District Attorney's Office in reviewing eligible cases for resentencing.[263]

A law firm offering *pro bono* support can also play a vital role. Law firms provide additional administrative support as well as attorneys offering their time for legal and factual research.[264] Like the law school partnership, law firms offer additional personnel and resources that are independent from the prosecuting agency.

c. Implementation of the Modified Case-by-Case Review Protocol for IMPD Cases

In Leon Benson's case, Detective Jones withheld material, exculpatory evidence and failed to preserve other potentially exculpatory evidence.[265] Assuming it is established that this was a pattern of conduct

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[260] *See, e.g.*, MASS. CONVICTION INTEGRITY WORKING GROUP, *supra* note 227 at 23 (discussing the importance of including "outside" perspectives, "whether from people with defense or innocence experience" to "help reduce implicit bias and increase the CIU's credibility with the public . . .").

[261] Lara Abigail Bazelon, *USF Racial Justice Clinic: Providing Legal Assistance and Promoting Change*, 17 CAL. LEGAL HIST. J. 26, 39 (October 4, 2022).

[262] *Id* at 30.

[263] *See* Pamela Y. Price, MOE Budget 2023-2024, Alameda County District Attorney's Office Presentation 20, https://budget.acgov.org/Content/pdf/FY23-24/District%20Attorney%20%20FY%202023-24%20Early%20Budget%20Work%20Session%20Presentation.pdf.

[264] *See, e.g.*, Anyaso, *supra* note 242.

[265] Order Granting Leon Benson's Petition for Post-Conviction Relief (March 8, 2022)

that Detective Jones repeated in other cases, the independent review panel should apply the "new evidence" standard in a partial case-by-case review of the other identified Detective Jones cases to determine whether the evidence of misconduct undermines confidence in the integrity of the conviction, whether further investigation is required to make a recommendation, and whether the prosecutor should pursue remedial action. In cases requiring further investigation, the law school and/or private law firm can assist the panel with the review and investigation process.

For each case referred by the MCPO to the independent review panel for consideration, the panel, assisted by a law school clinic and/or private law firm, should review the trial record and any appellate decisions to evaluate the evidence presented at trial, along with the evidence gathered to date establishing that Detective Jones engaged in a pattern and practice of misconduct. The panel should first identify cases comparable to *Hargrove*, discussed *supra*, where the weight (or, perhaps, paucity) of the evidence presented at trial suggests that, had the jury known about the *pattern of official misconduct alone* it more likely than not would have produced a different outcome at trial. In those cases, the panel should recommend that the prosecutor "err" on the side of vacatur and take affirmative action to overturn the conviction without further investigation. In other words, in cases where the trial was close and where evidence of guilt is limited, the fact of the misconduct alone warrants vacatur even absent evidence that specific misconduct occurred in the case in question.[266] It is then the responsibility of the Marion County Prosecutor's Office to determine whether there is sufficient evidence to retry the case or if outright dismissal is warranted.

In cases where there is *some* evidence of guilt but where there remains a question about whether the introduction of evidence of the pattern of official misconduct would have changed the outcome at trial, additional review is warranted. In such "middle ground" cases, it is necessary for the panel to investigate whether there is, in fact, evidence that official misconduct was actually present in the case in question or

(on file with the author).

[266] *See, e.g.*, *In re* Sagin, 39 Cal. App. 5th 570, 579-802 (2019) (interpreting the post-conviction "new evidence" standard: "The statute creates a sliding scale: in a case where the evidence of guilt presented at trial was overwhelming, only the most compelling new evidence will provide a basis for habeas corpus relief; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner.")

whether there may be other reasons to doubt the integrity of the conviction. In these cases, the law school clinic and/or private law firm should assist with further investigation, including the review of the police file and the prosecutor's file to determine whether material, exculpatory evidence was withheld or if other evidence suggests the conviction is unsound. In such cases, the panel's partnerships with these independent organizations will be especially vital.

Following this investigation, the panel should weigh the impact of any case-specific misconduct discovered—along with any other evidence or circumstances tending to undermine confidence in the integrity of the conviction—against any remaining evidence supporting a guilty verdict. If the exculpatory evidence and the evidence of misconduct itself taken together would "more likely than not" have changed the outcome at trial had it been presented to the jury, the panel should advise the prosecutor to take ameliorative action, vacate the conviction, and dismiss the pending charges.

In cases where there is overwhelming evidence of guilt—such that even case-specific evidence that Detective Jones withheld or failed to preserve would likely have been insufficient to upset the verdict—the panel should recommend no affirmative remedial action. Defendants in such cases, who have presumably been notified about the alleged pattern of misconduct, still have the opportunity to seek representation, further investigate additional sources of new evidence or possible bases for relief on their own, and advocate for consideration for review by the prosecutor's office through the ordinary channels—in the case of Detective Jones's Marion County cases, through the Marion County CIU or by filing a petition for post-conviction relief in the appropriate court.

V. CONCLUSION

It is not an exaggeration to say that every day since Leon Benson walked out of the Pendleton Correctional Facility, I have thought about the misconduct of Detective Jones. Perhaps more accurately, I have thought about the effect Detective Jones's notes might have had on the outcome of Leon Benson's trial if Detective Jones had not failed to share the crucial evidence they contained. I have thought about how many people like Leon Benson were wrongfully convicted because buried notes (from Detective Jones, from his colleagues) are sitting in IMPD files, in an office or a warehouse in Indianapolis, and were never turned over to the defense. I imagine the Marion County Prosecutors are thinking about those notes too. If they are ever going to find them—if they and other

conscientious, justice-serving prosecutors are ever going to identify the other cases impacted by systemic misconduct—they are going to need a place to start.

The modified case-by-case review model described here is that starting place. It borrows from the successful frameworks previously used to review large groups of cases impacted by systemic misconduct. It balances concerns for public safety and finality with the defendant's right to a fair process and a just and accurate outcome in their case, and with the need to restore public trust in the criminal legal system. It eschews the painstaking, individual, case-by-case review in favor of a modified case-by-case approach that encourages "erring" on the side of vacatur following the discovery of systemic misconduct that "more likely than not" would have changed the outcome at trial, consistent with the prevailing "new evidence" standard applied by a majority of jurisdictions.

This approach is fitting in light of the evidence that systemic misconduct is *more likely* in more serious cases, and the evidence that "wrongful acquittals"—even for serious crimes—are less likely to pose a risk to public safety. A more efficient approach is particularly necessary in cases like Leon Benson's, where there has been a substantial delay in the discovery of the misconduct and where the defendant has already spent a significant amount of time in custody. Importantly, this approach is consistent with the prosecutor's duty to do justice and to maintain or restore public trust in the integrity of the criminal legal system. For criminal defendants to be accorded procedural justice, guilt must be decided upon the basis of sufficient, legal evidence, and unjust convictions must be uncovered and rectified with the urgency the endeavor deserves.