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EXONERATIONS IN THE UNITED STATES

1989 THROUGH 2003

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On August 14, 1989, the Cook County Circuit Court in Chicago, Illinois, vacated Gary Dotson's 1979 rape conviction and dismissed the charges.¹ Mr. Dotson – who had spent 10 years in and out of prison and on parole for this conviction – was not the first innocent prisoner to be exonerated and released in America. But his case was a breakthrough nonetheless: he was the first who was cleared by DNA identification technology. It was the beginning of a revolution in the American criminal justice system. Until then, exonerations of falsely convicted defendants were seen as aberrational. Since 1989, these once-rare events have become disturbingly commonplace.

This is a report on a study of exonerations in the United States from 1989 through 2003. We discuss all exonerations that we have been able to locate that occurred in that fifteen-year period, and that resulted from investigations into the particular cases of the exonerated individuals. Overall, we found 328 exonerations, 316 men and 12 women;² 145 of them were cleared by DNA evidence, 183 by other means. With a handful of exceptions, they had been in prison for years. More than half had served terms of 10 years or more; 80% had been imprisoned for at least 5 years. As a group, they had spent more than 3400 years in prison for crimes for which they should never have been convicted – an average of more than ten years each.³

As we use the term, “exoneration” is an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted. The exonerations we have studied occurred in four ways: (1) In 42 cases governors (or other appropriate executive officers) issued pardons based on evidence of the defendants' innocence. (2) In 254 cases criminal charges were dismissed by courts after new evidence of innocence emerged, such as DNA. (3) In 28 cases the defendants were acquitted at a retrial on the basis of evidence that they had no role in the crimes for which they were originally convicted.⁴ (4) In 4 cases, states posthumously acknowledged the innocence of defendants

1. Rob Warden, *The Rape That Wasn't: The First DNA Exoneration in Illinois*, Center on Wrongful Convictions, available at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Dotson.htm>.

2. Because men make up over 95% of the total, we generally refer to exonerated defendants using male pronouns.

3. This is a conservative estimate of the direct consequences of these wrongful convictions. We have not counted time spent in custody before conviction. Nor have we included time spent on probation or parole, or time on bail or other forms of supervised release pending trial, retrial, or dismissal, even though all of these statuses involve restrictions on liberty, some mild some onerous.

4. We have excluded any case in which a dismissal or an acquittal appears to have been based on a decision that while the defendant was not guilty of the charges in the original conviction, he did play a role in the crime and may be guilty of some lesser crime that is based on the same conduct. For our purposes, a

who had already died in prison: Frank Lee Smith, exonerated in Florida in 2000; Louis Greco and Henry Tameleo, exonerated in Massachusetts in 2002; and John Jeffers, exonerated in Indiana in 2002.⁵

This is the most comprehensive compilation of exonerations available,⁶ but it is not exhaustive. The criminal justice system in the United States is notoriously fragmented – it is administered by fifty separate states (plus the federal government and the District of Columbia) and by more than 3000 separate counties, with thousands of administratively separate trial courts and prosecuting authorities. There is no national registry of exonerations, or any simple way to tell from official records which dismissals, pardons, etc., are based on innocence. As a result, we learned about many of the cases in our database from media reports. But the media inevitably miss some cases – and we, no doubt, have missed some cases that were reported. We are continuing to gather information, and plan to update the data that are reported here.

In the great majority of these cases there was, at the end of the day, no dispute about the innocence of the exonerated defendants. This is not surprising. Our legal system places great weight on the finality of criminal convictions. Courts and prosecutors are exceedingly reluctant to reverse judgments or reconsider closed cases; when they do – and it's rare – it's usually because of a compelling showing of error. Even so, some state officials continue to express doubts about the innocence of exonerated defendants, sometimes in the face of extraordinary evidence. Two brief examples:

- When Charles Fain was exonerated by DNA in Idaho in 2001, after 18 years on death row for a rape murder, the original prosecutor in the case said “It doesn't really change my opinion that

defendant who is acquitted of murder on retrial, but convicted of involuntary manslaughter, has not been exonerated. We have also excluded any case in which a dismissal was entered in the absence of strong evidence of factual innocence, or in which – despite such evidence – there was unexplained physical evidence of the defendant's guilt.

5. See Sydney P. Freedberg, *He Didn't Do It*, St. Petersburg Times, 1/7/01, at 1A (Frank Lee Smith); J.M. Lawrence, *Ex-prosecutor apologizes to Salvati, Limone*, The Boston Herald, 5/12/02, p.6., and Ralph Ranalli, *Congressional Probe; FBI Used Hit Man as Informant Transcripts Reveal Bureau Recruited Killer Despite Past*, The Boston Globe, Dec. 4, 2002, at A30 (Louis Greco and Henry Tameleo); Jon Yates and Kevin Lynch, *Confession Leads to 2 Arrests in '75 Killing; Man Convicted in Indiana Case Died in Prison*, Chicago Tribune, 8/29/02, p.1. (John Jeffers).

6. Most of the exonerations we include in this database are listed on one or more the web cites that are maintained by three organizations: The Death Penalty Information Center, <http://www.deathpenaltyinfo.org>; the Innocence Project at Cardozo Law School, <http://www.innocenceproject.org>; and the Center on Wrongful Convictions at Northwestern University Law School, <http://www.law.northwestern.edu/depts/clinic/wrongful>. We have gathered additional information on most of the cases from these three lists, reviewed them carefully, and excluded some cases that do not meet our own criteria for an exoneration.

much that Fain's guilty."⁷

- On December 8, 1995, at the request of the prosecution, the DuPage County, Illinois, Circuit Court dismissed all charges against Alejandro Hernandez, who had spent 11 ½ years in prison for an abduction, rape and murder in which he had no role. By that time DNA tests and a confession had established that the real criminal was an imprisoned serial rapist and murderer by the name of Brian Dugan; a police officer who provided crucial evidence had admitted to perjury; and Hernandez's co-defendant, Rolando Cruz, was acquitted by a judge who was harshly critical of the investigation and prosecution of the case. Nonetheless, when Hernandez was released, the prosecutor said: "The action I have taken today is neither a vindication nor an acquittal of the defendant."⁸

Needless to say, we are in no position to reach an independent judgment on the factual innocence of each defendant in our data. That is not our purpose in this report. Instead, we look at overall patterns in the exonerations that have accumulated in the past fifteen years and hope to learn something about the causes of false convictions, and about the operation of our criminal justice system in general. It is possible that a few of the hundreds of exonerated defendants we have studied were involved in the crimes for which they were convicted, despite our efforts to exclude such cases. On the other hand, it is certain – this is the clearest implication of our study – that many defendants who are not on this list, no doubt thousands, have been falsely convicted of serious crimes but have not been exonerated.

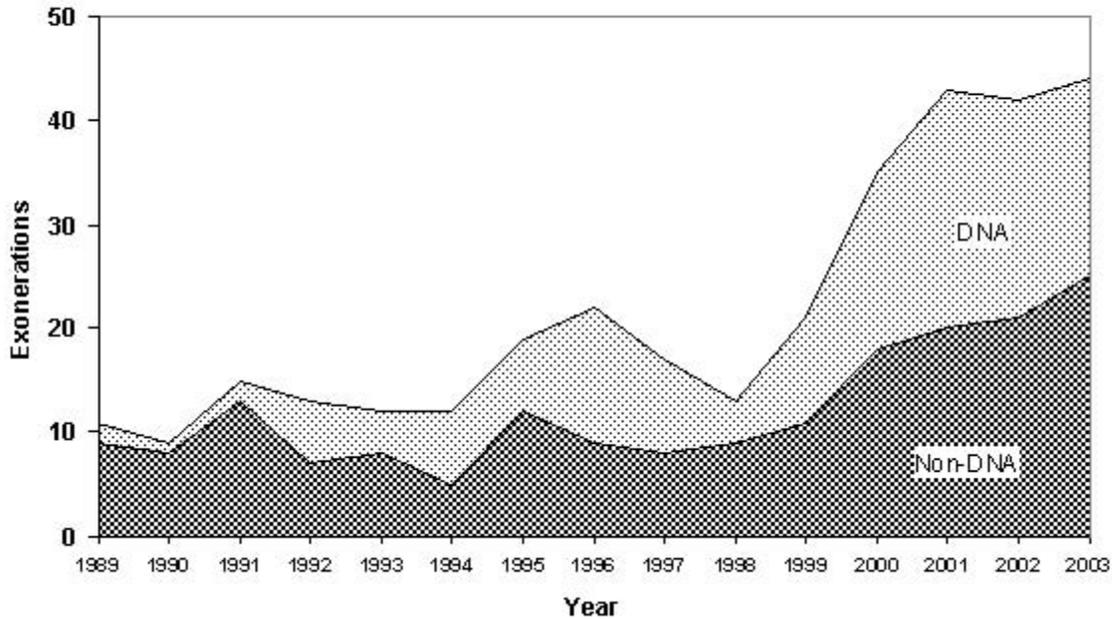
7. Raymond Bonner, *Death Row Inmate Is Freed after DNA Test Clears Him*, New York Times, Aug. 24, 2001, at A11. This is hardly the only example of prosecutors and police officers refusing, against all logic, to believe that a defendant they once charged and prosecuted could possibly be innocent. In 1993, in Baltimore County, Maryland, Kirk Bloodsworth became the first defendant in the United States who had been sentenced to death to be exonerated by DNA evidence. Nine years later the chief prosecutor of the county said that the police "still believe [Bloodsworth] did it" and that she herself was "not sure." Lori Montgomery, *Eliminating Questions of Life or Death; Prosecutor's Policy Raises Questions in Md.*, The Washington Post, 5/20/02, p. B1. Over a year later – more than a decade after Bloodsworth was released – the police finally, after inexplicable delays, used the DNA evidence at their disposal to identify the real killer – a Maryland prisoner serving a 45-year sentence for burglary, attempted rape and assault with intent to murder. Susan Levine, *Ex-Death Row Inmate Hears Hoped-for Words: We Found Killer*, The Washington Post, 9/6/03, p. A1. In 2000, Virginia Governor Jim Gilmore pardoned Earl Washington after DNA tests cleared him of a rape murder for which he had been sentenced to death, and implicated a convicted serial rapist, Kenneth Tinsley. The Governor ordered a new investigation; four years later, nothing has happened in that investigation and the law enforcement officers involved continued to consider Washington a suspect. Recently, new DNA tests, commissioned by Washington's attorneys over the state's objections, conclusively confirmed Tinsley's guilt and reconfirmed Washington's innocence. Maria Glod, *Lawyers Say DNA Clears Ex-Va. Death Row Inmate; State Defends Testing by Forensic Lab*, The Washington Post, 4/6/04, p. B1.; Frank Green, *Justice Undone in 1982 killing; Victim's Husband Blasts Lack of Progress After Washington's Pardon*, The Richmond Times-Dispatch, 3/31/04.

8. Jeffrey Bills and Ted Gregory, *"I Just Want To Go Home: A Nightmare Ends, One Continues in Nicarico Case,"* Chicago Tribune, 12/9/95 p. 1.

I. Exonerations Over Time

The rate of exonerations has increased sharply over the fifteen-year period of this study, from an average of 12 a year from 1989 through 1994, to an average of 43 a year since 2000. The highest yearly total to date was 44, in 2003. See Figure 1.⁹

Figure 1: Exonerations By Year, 1989-2003



There has been a steady increase in the number of DNA exonerations, from one or two a year in 1989 to 1991, to an average of 6 a year from 1992 through 1995, to an average of 21 a year since 2001. Non-DNA exonerations were less rare initially, and remained relatively stable through the 1990s, averaging 9 a year. Their numbers have increased rapidly in the last several years. There were 18 non-DNA exonerations in 2000, and they've averaged 22 a year since 2001, about the same rate as DNA exonerations in that period.

9. The numbers of exonerations by year, and by basis, are:

| Basis | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | TOTAL |
|-------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|-------|
| DNA | 2 | 1 | 2 | 6 | 4 | 7 | 7 | 13 | 9 | 4 | 10 | 17 | 23 | 21 | 19 | 145 |
| Other | 9 | 8 | 13 | 7 | 8 | 5 | 12 | 9 | 8 | 9 | 11 | 18 | 20 | 21 | 25 | 183 |
| TOTAL | 11 | 9 | 15 | 13 | 12 | 12 | 19 | 22 | 17 | 13 | 21 | 35 | 43 | 42 | 44 | 328 |

This rapid increase in reported exonerations probably reflects the combined effects of three interrelated trends. First, the growing availability and sophistication of DNA identification technology has, of course, produced an increase in DNA exonerations over time. Second, the singular importance of the DNA revolution has made exonerations increasingly newsworthy; as a result, we are probably aware of a higher proportion of the exonerations that occurred in 2003 than in 1989. And third, this increase in attention has in turn led to a substantial increase in the number of false convictions that in fact do come to light and end in exonerations, by DNA or other means. More resources are devoted to the problem – there are now, for example, 41 Innocence Projects in 31 states¹⁰ – and judges, prosecutors, defense lawyers, and police officers have all become more aware of the danger of false convictions.

10. Calculated from list available at <http://www.innocenceproject.org/links/index/php>.

II. The Crimes for which Exonerated Defendants were Convicted

Ninety-seven percent of the known exonerations of individual defendants since 1989 were either for murder – 61% (199/328)¹¹ – or for rape or sexual assault – 37% (120/328). Most of the remaining 9 cases were crimes of violence – 3 robberies, 2 attempted murders and a kidnapping – plus a larceny and two drug cases.¹² See Table 1.

Table 1: Exonerations by Crime and Basis

| CRIME | NUMBER OF EXONERATIONS | BASIS | |
|-----------------------------------|------------------------|------------|------------|
| | | DNA | Other |
| Murder | 199 (61%) | 40 | 159 |
| <i>Death Sentences</i> | 73 (22%) | 13 | 60 |
| <i>Other Murder Cases</i> | 126 (38%) | 27 | 99 |
| Rape | 120 (37%) | 105 | 15 |
| Other Crimes of Violence | 6 (2%) | 0 | 6 |
| Drug & Property Crimes | 3 (1%) | 0 | 3 |
| TOTAL* | 328 (101%) | 145 | 183 |

* The total adds up to 101% because of rounding

This highly skewed distribution tells us a great deal about the relationship between exonerations – those erroneous convictions that are discovered and remedied, at least in part – and the larger group of all false convictions, the vast majority of which are never discovered. We consider that relationship by examining the two major categories of crimes for which exonerations are comparatively common.

11. Including three defendants who were convicted of manslaughter.

12. We coded cases with multiple charges by the most serious crime for which the defendant was convicted, on the following descending scale: murder, rape, other violent crimes, non-violent crimes. For example, if the exonerated defendant was convicted of murder and rape, we classified the exoneration as a murder; if he was convicted of robbery and rape, we classified it as a rape.

III. The Relationship Between Known Exonerations and all False Convictions

1. *Why Do So Many Exonerations Involve Rape?*

At the end of 2001, about 118,000 prisoners in state prisons were serving sentences for rape and sexual assault, less than 10% of the total prison population. There were also over 155,000 prisoners who had been convicted of robbery, nearly 119,000 who were in prison for assault, more than 27,000 for other violent felonies, and over 600,000 for property, drug and public order offenses.¹³ Why are 93% of the exonerations for non-homicidal crimes concentrated among the rape cases?

The comparison between rape and robbery is particularly telling. Robbery and rape are both crimes of violence in which the perpetrator is often a stranger to the victim. As a result, robberies and rapes alike are susceptible to the well-known dangers of eyewitness misidentification. In fact, there is every reason to believe that misidentifications in robberies outnumber those in rapes, by a lot:

(1) Robberies are more numerous than rapes. In 2002, for example, the FBI estimates that 95,136 forcible rapes and 420,637 robberies were reported to police departments in the United States, leading to 20,126 arrests for rape and 77,342 arrests for robbery.¹⁴

(2) Eyewitness misidentification is almost entirely restricted to crimes committed by strangers, which includes about three quarters of robberies, but only a third of rapes.¹⁵

(3) The nature of the crime of rape is such that the victim usually spends a considerable amount of time in close physical proximity to the criminal; robberies are frequently quick, and may involve less immediate physical contact.

In 1987, a detailed study analyzed all known cases of eyewitness misidentification in the United States from 1900 through 1983, 136 in all.¹⁶ That study found that misidentifications in robberies outnumbered those in rapes by more than 2 to 1; in fact, robberies accounted for more than half of *all* known cases of proven misidentifications. The pattern in our study could hardly be more different. We have 120 exonerations in rape cases; in 88% of them (106/120) the defendant was the

13. Calculated from Bureau of Justice Statistics, *Prisoners in 2002*, Table 15 (July 2003).

14. Federal Bureau of Investigation, *Crime in the United States 2002, Uniform Crime Reports*, Tables 1, 38. The arrest figures are limited to the agencies participating in the FBI's Uniform Crime Reporting Program.

15. Bureau of Justice Statistics, *Criminal Victimization in the United States 2002*, Table 29.

16. Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 *Journal of Legal Studies* 395, 413 (June 1987). The misidentifications in that study did not all involve convictions. They were unevenly spread across the twentieth century, with the largest number – 36 – in the decade 1970-79.

victim of eyewitness misidentification. But we have only 3 robbery exonerations, all of which include eyewitness misidentifications. What changed?

The answer is obvious: DNA. In 1987, the first DNA exoneration in the country was two years in the future. Since 1989, however, 88% of exonerated rape defendants were cleared by DNA evidence. Only 20% of murder exonerations included DNA evidence (and none of the other non-rape exonerations), and all but a couple of those murders also included rape as well.

The implication is clear. If we had a technique for detecting false convictions in robberies that was comparable to DNA identification for rapes, robbery exonerations would greatly outnumber rape exonerations, and the total number of falsely convicted defendants who were exonerated would be several times what we report. And even among rape cases, DNA is only useful if testable samples of biological evidence were preserved and can be found, which is not always true.

In short, the clearest and most important lesson from the recent spike in rape exonerations is that the false convictions that come to light are the tip of an iceberg. Beneath the surface there are other undetected miscarriages of justice in rape cases without testable DNA, and a much larger group of undetected false convictions in robberies and other serious crimes of violence for which DNA identification is useless.

2. Why Are Exonerations Heavily Concentrated among Murder Cases, and Especially among Capital Murders?

What about exonerations that are not based on DNA? In 2001, about 13% of state prisoners were serving sentences for murder or non-negligent manslaughter,¹⁷ but 87% of non-DNA exonerations (159/183) are found among this group. For prisoners under sentence of death the contrast is even more stark. The death-row population in America peaked in 2001, at about a quarter of 1% of the American prison population¹⁸ – and yet 73 exonerations in the past 15 years, 22% of the total, were drawn from this tiny sliver of the prison population. What accounts for this enormous over-representation of murder defendants, and especially death-row inmates, among those who are exonerated?

There are only two possible explanations:

- One possibility is that *false convictions are not more likely to occur in murder and death penalty cases, but only more likely to be discovered* because of the comparatively high level of attention that is devoted to reviewing those cases after conviction. This is no doubt true, at least in part.

17. Calculated from Bureau of Justice Statistics, *Prisoners in 2002*, Table 15.

18. There were 3,577 prisoners on American death rows at the end of 2001 (Bureau of Justice Statistics, *Capital Punishment, 2002*, Table 4), and approximately 1,404,032 prisoners in federal and state adult correctional facilities. Bureau of Justice Statistics, *Prisoners in 2002*, Table 3.

Because of the seriousness of their consequences, murder convictions – and especially death sentences – *are* reviewed more carefully than other criminal convictions. In 1999, for example, Dennis Fritz was exonerated by DNA evidence and released from a life sentence for a rape murder he did not commit. But he was exonerated as a by-product of an intensive investigation that led to the exoneration of his co-defendant, Ron Williamson, who had been sentenced to death. If Williamson had not been sentenced to death, Fritz would probably be in prison to this day.¹⁹

But could this be the entire explanation? Could it be that false convictions in capital cases really are no more common than in other cases? If that were the whole story it would mean that if we reviewed prison sentences with the same level of care that we devote to death sentences, there would have been *over 28,500 non-death row exonerations* in the past fifteen years rather than the 255 that have in fact occurred – including more than 3,700 exonerations in non-capital murder cases alone.²⁰ This is a shocking prospect.

- On the other hand, if this first explanation is not the whole story, that inescapably means that *false convictions are more likely to occur in murder cases, and much more likely in death penalty cases*, than in other criminal prosecutions. There are several reasons (apart from the evidence presented here) to believe that this too is almost certainly true: the extraordinary pressure to secure convictions for heinous crimes; the difficulty of investigating many homicides because, by definition, the victims are unavailable; extreme incentives for the real killers to frame innocent fall guys when they are facing the possibility of execution.²¹ Whatever the causes, this is a terrible prospect: that we are most likely to convict innocent defendants in those cases in which their very lives are at stake.

Considering the huge discrepancies between the exoneration rates for death sentences, for other murder convictions, and for criminal convictions generally, the truth is probably a combination of these two appalling possibilities: We are both much more likely to convict innocent defendants of

19. Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* (Signet, 2001) pp.163-203.

20. There were 3,577 prisoners on American death rows at the end of 2001(see above, note 18). The 73 death-row exonerations since 1989 amount to 2.04% of that population. There were a total of 1,404,032 inmates in American prisons at the end of 2001(see above, note 18); if exonerations from that population had occurred at the same rate as on death row, there would have been 28,642 non-death row exonerations since 1989. (If we restrict our focus to prisoners who were convicted of murder, the expected number of exonerations would be 13% of that total or about 3,723.) This is a conservative estimate, since death-sentenced defendants spend more time in prison than the average inmate, and therefore are an even smaller proportion of the total population of defendants who are convicted of felonies and pass through prisons in any given time period.

21. See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law And Contemporary Problems 123, 129-133 (Autumn 1998). See generally James S. Liebman, *The Overproduction of Death (procedural incentives which lead to more death sentences and a reform plan)*, 100 Columbia Law Review 2030 (2000).

murder – and especially capital murder – than of other crimes, *and* a large number of false convictions in non-capital cases are never discovered because nobody ever seriously investigates the possibility of error.

3. *What Are We Missing Entirely?*

We have only counted individual defendants who were *exonerated* – those whose convictions were nullified by official acts by governors, courts or prosecutors because of compelling evidence that they were not guilty of crimes for which they had been convicted. Several categories of falsely convicted defendants are entirely missing from this count.

(a) Mass exonerations.

Our data include only defendants who were exonerated because of evidence of innocence that focused on their individual cases. We also know of two incidents of mass exonerations of innocent defendants who were falsely convicted as a result of large scale patterns of police perjury and corruption:

- In September 1999, Officer Rafael Perez, who was awaiting re-trial on charges of stealing six pounds of impounded cocaine, made a deal with his prosecutors: a five year sentence in return for information on the criminal activities of officers in the CRASH (“Community Resources Against Street Hoodlums”) unit of the Rampart division of the Los Angeles Police Department. Over the next nine months Perez revealed that he and other Rampart CRASH officers had routinely lied in arrest reports, shot and killed or wounded unarmed suspects and innocent bystanders, planted guns on suspects after shooting them, fabricated evidence, and framed innocent defendants. In the aftermath of this scandal, at least 100 criminal defendants who had been framed by Rampart CRASH officers – and possibly as many as 150 – had their convictions vacated and dismissed by Los Angeles County judges in late 1999 and 2000. The great majority were young Hispanic men who had pled guilty to false felony gun or drug charges.²²

22. For an in-depth look at the Rampart scandal, including links to official reports and reviews and a summary of the scandal's aftermath, see, *L.A.P.D. Blues*, P.B.S. Frontline, (2001) at <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/bare.html>; see also, *Report of the Rampart Independent Review Panel* (Nov. 16, 2000), available at <http://www.ci.la.ca.us/oig/rirprpt.pdf>; Lou Cannon, *One Bad Cop*, N.Y. Times Magazine, October 1, 2000, at 32; Anna Gorman, *For Some, It's Too Late to Overturn Convictions: Judges are refusing to review cases involving tainted officers if inmate is no longer in custody*, L.A. Times, May 19, 2002, at Metro pg. 1 (nearly 150 convictions overturned); Stephen Yagman, *Bada Bing, L.A. City Hall Has a Rico Ring*, L.A. Times, April 25, 2001, at B9 (more than 110 convictions overturned); Scott Glover and Matt Lait, *Lack of Funds Stalls Rampart Probe; The LAPD seeks private donations so that an independent panel can begin investigating the department's handling of the scandal*, L.A. Times, November 6, 2003, at B1 (\$42 million in settlements paid out in civil settlements); David P. Leonard, *Policing the Criminal Justice System: Different Worlds, Different Realities*, 34 Loy. L.A. L. Rev. 863, 872-79, (2001) (Rampart residents overwhelmingly Latino).

- In 1999 and 2000, 39 defendants were convicted of drug offenses in Tulia, Texas, on the uncorroborated word of a single dishonest undercover narcotics agent. In 2003, 35 of them were pardoned when it was shown that the undercover officer had systematically lied about these cases, and charged the defendants with drug sales that had never occurred. (The remaining 4 Tulia defendants were not eligible for pardons because their convictions had been dismissed, or because they were also imprisoned on unrelated charges.)²³

The Rampart and Tulia cases are exonerations in every sense of the word. We do not include them here because the processes that produced the false convictions and the mass exonerations in these singular episodes are fundamentally different from those in the individual cases on which we focus, and mixing them in – 135 cases or more – would distort the patterns we can observe. However, by the same token, these extraordinary exonerations provide a glimpse into a more general category of false convictions that is missing from our data – as we will see.

(b) Comparatively light sentences.

With a handful of exceptions, everyone on our list of exonerees was sentenced to death or to a long term of imprisonment.²⁴ Ninety-five percent were sentenced to ten years in prison or more; 80% were sentenced to at least 25 years;²⁵ more than half were sentenced to life imprisonment or to death. This is a highly atypical group. Most criminal defendants are convicted (if at all) of misdemeanors; and of those who are convicted of felonies, most are sentenced to probation or to months in jail rather than to years in prison.

Exonerations are the end products of a lot of work, usually over a long period. The average time from conviction to exoneration is more than eleven years. A falsely convicted defendant who has served his time for burglary and been released has little incentive to invest years of his life keeping the case alive in the hope of clearing his name – and if he wanted to, he'd probably have a hard time finding anybody to help. Our data reflect this: nobody, it seems, seriously pursues exonerations for defendants who are falsely convicted of shop lifting, misdemeanor assault, drug possession, or routine felonies – auto thefts or run-of-the-mill burglaries – and sentenced to probation, a \$2000 fine,

23. See Laura Parker, *Texas Scandal Throws Doubt on Anti-Drug Task Forces*, USA Today, March 31, 2004, at 3A; Adam Liptak, *\$5 Million Settlement Ends Case of Tainted Texas Sting*, N.Y. Times, March 11, 2004, at A14; Polly Ross Hughes, *Perry Pardons 35 in Tulia Sting*, Houston Chronicle, August 23, 2003, at A1. Details on the numbers of the Tulia defendants and their outcomes of their cases were provided by Ms. Vanita Gupta, a lawyer for the NAACP Legal Defense and Educational Fund, who represented them in the proceeding that led to their exoneration.

24. In one of the murder exonerations and four of the rape cases the defendants were exonerated before they were sentenced; one additional rape defendant was sentenced to probation only.

25. About half of the sentences – other than death or life imprisonment – included a maximum and a minimum, e.g., “10 to 25 years.” In those cases, we have reported the minimums.

or even six months in the county jail or 18 months in state prison.²⁶

But obviously such errors occur. It is well known, for example, that many defendants who can't afford bail plead guilty in return for short sentences, often probation and credit for time served, rather than stay in jail for months and then go to trial and risk much more severe punishment if convicted.²⁷ This is one facet of a system in which about 90% of defendants who are convicted plead guilty rather than go to trial.²⁸ Some defendants who accept these deals are innocent, possibly in numbers that dwarf false convictions in the less common but more serious violent felonies, but they are almost never exonerated – at least not in individual cases.

Only nineteen of the exonerees in our database pled guilty, less than 6% of the total: 15 innocent murder defendants and 4 innocent rape defendants who took deals that included long prison terms in order to avoid the risk of life imprisonment or the death penalty. By contrast, 31 of the 39 Tulia defendants pled guilty to drug offenses they did not commit, as did the majority of the 100 or more exonerated defendants in the Rampart scandal in Los Angeles. Most of the Rampart and Tulia defendants had been released by the time they were exonerated, 2 to 4 years after conviction.²⁹ They were exonerated because the false convictions in their cases were produced by systematic programs of police perjury that were uncovered as part of large scale investigations. If these same defendants had been falsely convicted of the same crimes by mistake – or even because of unsystematic acts of deliberate dishonesty – we would never have known.

(c) Innocent defendants who have not been exonerated.

(i) *Pending cases.* Some falsely convicted defendants have not been exonerated – at least not yet – because government officials are dragging their feet. On March 12, 2003, for example, Josiah Sutton

26. The case of Robert Farnsworth, Jr., who was exonerated in Michigan in 2000, is an exception that illustrates this rule. Farnsworth was arrested for grand larceny and confessed under police pressure after a cash deposit bag belonging to his employer went missing. He immediately recanted his confession and claimed that he had placed the bag in a night deposit box at the company's bank, but a jury convicted him and he was sentenced to a six-months suspended sentence and 3 years probation. Ordinarily, that would have been the end of the story. By a fluke, another cash bag deposited in the same night drop box was lost almost a year after the first, and the owner of the business in question knew the bank president and asked him to have the drop box opened and inspected – and both cash bags were found stuck in the mechanism (plus a third that hadn't been missed). See AP, *Bank Finds Lost Cash Stuck in Vault, Ex-Wendy's Manager Convicted of Stealing is Vindicated*, Detroit Free Press, 3/13/2000.

27. See, e.g., Barbara Taylor, *Trapped on Rikers Island*, The New York Times, 9/7/1996, p. 21.

28. In 1998, for example, 90% of those convicted of violent felonies in large urban counties pled guilty. For all felonies, 96% of those convicted pled guilty. Recalculated from Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 1998*, Table 23.

29. See above, notes 22 and 23.

was released from prison in Texas after DNA tests cleared him of a rape conviction for which he had served 4½ years of a 25 year sentence. Over a year later, Sutton remains free on bail, with his case theoretically pending, because the Houston District Attorney, who agrees that Sutton should be pardoned, won't say that the pardon should be "based on innocence" – apparently because that classification would subject the state to liability for Sutton's wrongful imprisonment.³⁰ Although there is no doubt that Sutton was falsely convicted, he has not been exonerated and is not included in this study.

(ii) *Pleas of guilty or no contest.* Sometimes a defendant who has protested his innocence for years, and who had obtained a reversal of his conviction, accepts an offer from the state to plead guilty to a lesser crime and go free immediately, rather than stay in jail and risk a re-trial that could result in another false conviction. For example, in 1978 Curtis McGhee was convicted of murder in Council Bluffs, Iowa, on the basis of a confession from a supposed accomplice. In February, 2003, the Iowa Supreme Court reversed the convictions because the police had concealed the fact that they had questioned another suspect who was seen near the scene of the crime, and who failed a polygraph test. By then the confessor, and all other key prosecution witnesses, had recanted their testimony. McGhee was offered a deal: plead guilty to second degree murder and go free; he decided to play it safe, took the deal, and was released.³¹ We have not included McGhee in our data, nor any other defendant who pled guilty in order to be released, regardless of the evidence of the defendant's innocence. We are examining exonerations, and the final official act in such a case is not an exoneration but a conviction, however nominal or misleading.³² (We have included McGhee's co-

30. Mary Ann Fergus, *Josiah Sutton Still Waits for Legal Exoneration*, Houston Chronicle, March 7, 2004, available at <http://www.chron.com/cs/CDA/prinstory.mpl/metropolitan2435555>.

31. Mark Siebert, *Case Dismissed Against Man who Served 25 Years*, Des Moines Register, Oct. 25, 2003, at 1A. Available at <http://www.truthinjustice.org/Harrington.htm>.

32. For these purposes, a plea of "no contest" (or "nolo contendere") is equivalent to a guilt plea. McGhee himself entered an "Alford" plea, which means that he was allowed to deny participation in the crime and state that he was pleading guilty, despite that denial, to avoid the risk of trial. All the same, that plea – like any other plea of guilty or no contest – was the basis of a judgment of conviction, which is not an official exoneration.

We have included three cases in which the exonerated defendant did plead guilty or no contest, but to a charge that is factually distinct from the crime for which he was originally convicted. Medell Banks, for example, was charged with capital murder and pled guilty to manslaughter in Alabama. He was released in 2003, after homicide charges were dropped because of incontrovertible evidence that the supposed victim – a newborn infant who had never been seen, alive or dead, by any trustworthy witness – could not have existed: the ostensible mother, Mr. Banks' wife Victoria, had a tubal ligation that made pregnancy impossible. See below, text at note 33. In the process, Mr. Banks agreed to plead guilty to a misdemeanor, tampering with evidence. Carla Crowder, *Accused in Killing of Newborn Who Likely Never Existed, Choctaw County Man Makes Plea Deal*, Birmingham News, Jan. 11, 2003, at 1A. Since that charge (whether true or false) involved conduct totally distinct from the original homicide charge, we count his case as an exoneration.

defendant, Terry Harrington, who refused to take a similar deal, and got a dismissal after the state's star witness at the original trial recanted once more.)

(iii) *Inexplicable failures to exonerate.* In some cases there is no rational explanation for the fact that an innocent defendant has not been exonerated. There is no doubt, for example, that Victoria Banks was falsely convicted of manslaughter in 2001. She is a mentally retarded woman who confessed to killing her newborn baby; but there is no physical evidence that the baby ever existed, and medical tests confirm that she had a tubal ligation that was intact throughout the relevant period, making pregnancy impossible. But Ms. Banks – who confessed to her imaginary crime and pled guilty to manslaughter after being charged with capital murder – does not dispute her guilt, and the state of Alabama, to its shame, continues to imprison this mentally deficient and delusional woman for manslaughter as well as unrelated charges. One of her two co-defendants – who is also mentally retarded – was exonerated and released in 2003 after three and half years in prison; a second retarded co-defendant had her sentence reduced and was released in 2002.³³

(iv) *The childcare sex abuse and satanic ritual cases.* Finally, in one major set of false conviction cases the patterns of injustice are so complex and murky that we can hardly ever say that specific defendants were “exonerated,” even though there is no doubt that most were falsely convicted. We’re referring here to the epidemic of child sex abuse prosecutions that swept across the country in the late 1980s and early 1990s, focusing especially on childcare centers, and frequently including allegations of bizarre satanic rituals.³⁴

In almost all of the exoneration cases that we consider in this report there is no question that the murder, rape or other crime did occur. The problem is that someone other than the defendant did it. In these mass child molestation prosecutions the identity of the perpetrators is not an issue. The question, rather, is: Did the crimes really happen at all?

In many of these child-molestation cases, the accusations were bizarre if not impossible on their face. Some children at the Little Rascals Day Care Center in Edenton, North Carolina, for example said that they had seen babies killed at the daycare center, children taken out on boats and thrown overboard to feed sharks, and children taken to outer space in a hot air balloon.³⁵ In Kern County, California, children described mass orgies with as many as 14 adults who forced groups of children to inhale 18-inch lines of cocaine or heroin, gave them injections with syringes that left large bruises,

33. See Carla Crowder, *Accused in Killing of Newborn Who Likely Never Existed, Choctaw County Man Makes Plea Deal*, above, note 32.

34. For a comprehensive analysis of several of the major childcare and satanic ritual abuse cases and the phenomenon of allegations of ritual abuse generally, see Debbie Nathan and Michael Snedeker, *Satan's Silence: Ritual Abuse and the Making of a Modern American Witch Hunt* (1995).

35. See, *Frontline: Innocence Lost*, (PBS television broadcast, May 27, 1997) tapes, transcripts and additional information, including subsequent developments available at: <http://www.pbs.org/wgbh/pages/frontline/shows/innocence/>.

and hung the children from hooks as the adults repeatedly sodomized them.³⁶ Needless to say, no physical evidence ever corroborated any of these unlikely claims. In other cases, the accusations were merely implausible, and appear to have been generated by over-eager prosecutors and therapists who demanded that the young children they examined tell them that they had been molested, and would not take No for an answer.

Overall, more than 150 defendants were initially charged in at least ten major child sex abuse and satanic ritual prosecutions across the country, from 1984 to 1995, and at least 72 were convicted. It is clear that the great majority were totally innocent; almost all were eventually released by one means or another before they completed their terms.³⁷ It is possible, however, that some of these defendants did commit some acts of sexual molestation, incidents that later grew into implausible and impossible allegations as the children were interviewed repeatedly by prosecutors and therapists. We have included only one of these cases in our database, a case in which we know that all of the supposed victims now say that they were never molested in the first place – that the crime never occurred. Otherwise, none of the wrongfully convicted victims of this terrible episode in American

36. See Debbie Nathan and Michael Snedeker, above, note 34 at 95-96; see also, *People v. Pitts*, 223 Cal. App.3d 606, 637-56 (1990); John Johnson, “Kids Don’t Lie”: Faith in This Assumption Led to Dozens of Unjust Molestation Convictions in Bakersfield. Today One Man Remains in Prison Even After Four of His Original Accusers Said He Never Touched Them, L.A. Times Magazine, August 10, 2003, at 16.

37. In the largest set of ritual sex abuse cases, the Kern County sex abuse rings prosecutions, at least 18 of the 26 convicted defendants have had their convictions reversed and the charges dismissed – in at least seven cases, for gross prosecutorial misconduct. Prosecutors declined to retry the cases in which convictions were reversed. The Kern County defendants, who had been sentenced to as many as 100 years in prison, served between 3 and 15 years. John Stoll is one of the very last defendants to remain in prison, and by all accounts, the person who has served the longest time of all those convicted in ritual sex abuse cases across the country; he received a hearing in February of this year to determine whether he should receive a new trial. Four of the six children, now adults, who testified against him, now say the abuse never happened. A fifth has no memory either way. See, John Johnson, *New Hearing Is Granted in Child Abuse Conviction*, L.A. Times, December 21, 2003, at B6; *Kern County Justice; a Tragic Chapter in Our Justice System Closes with the Release of Four People from Prison 14 Years after Being Convicted of Child Molestation*, Fresno Bee, August 16, 1996, at B4; Tom Kertscher, *Molestation hysteria left sad legacy; Painful lessons learned in overzealous Kern County prosecutions*, Fresno Bee, September 10, 1995.

In fact, nearly all of those initially convicted in the childcare and ritual sex abuse cases have since been reversed, and prosecutors have declined to retry defendants in almost every case. See, *Frontline: Innocence Lost*, (PBS television broadcast, May 27, 1997), <http://www.pbs.org/wgbh/pages/frontline/shows/innocence/etc/chronology.html> (all charges against Bob Kelly, the last remaining defendant in the Little Rascals case, were dropped in 1999); *Id.*, <http://www.pbs.org/wgbh/pages/frontline/shows/innocence/etc/other.html#3> (conviction of Kelly Michaels, a 23 year old day care worker, charged with 115 counts of child sexual abuse overturned in 1993); *Update on the Wenatchee, Washington, Child Abuse Case*, (National Public Radio broadcast, August 2, 2001) (of the 18 individuals convicted, all have had their convictions overturned); *When Children Accuse, Who to Believe?* (ABC News Broadcast on January 28, 1999) (across the country, at least 140 people – about three-quarters of the accused in wave of ritual sex abuse cases – have been acquitted, had their convictions overturned or charges against them dropped).

legal history are included on this list because they have not been officially exonerated.

IV. Exonerations by State

The exonerations we found occurred in 38 states and the District of Columbia, but the top four states – Illinois, New York, Texas and California – account for more than 40% the total (139 of 328), and the top 10 (those four plus Florida, Massachusetts, Louisiana, Pennsylvania, Oklahoma and Missouri) include about two thirds (217/328). See Table 2.

Table 2: Exonerations by State

| Rank | State | Number of Exonerations |
|----------------|----------------------|-------------------------------|
| 1 | Illinois | 54 |
| 2 | New York | 35 |
| 3 | Texas | 28 |
| 4 | California | 22 |
| 5 (tie) | Florida | 15 |
| 5 (tie) | Massachusetts | 15 |
| 7 (tie) | Louisiana | 14 |
| 7 (tie) | Pennsylvania | 14 |
| 9 | Oklahoma | 11 |
| 10 | Missouri | 9 |

This ranking corresponds in part to the sizes of state populations. The five most populous states – California, Texas, New York, Florida and Illinois, in that order – include five of the six with the largest numbers of recent exonerations. These numbers may also be influenced by the use of the death penalty; all but two of the top ten states have – or, in the case of Illinois, recently had – large death row populations. It is also probably no coincidence that the two leading exoneration states, Illinois and New York, are home to the two largest and best established organizations in the United States that work to identify false convictions and obtain exonerations – The Center on Wrongful Convictions at Northwestern University Law School in Chicago, and The Innocence Project at Cardozo Law School in New York City; that these two states were the first to authorize post-conviction DNA testing for inmates;³⁸ and that both include major metropolitan media markets in which the issue of wrongful conviction has received extensive coverage.

38. Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* (Signet, 2001) p.360.

V. Some of the Causes of the False Convictions

One way to think of false convictions is as a species of accidents. Like many accidents, they are caused by a mix of carelessness, misconduct, and bad luck. We don't claim to be able to describe with any precision the causal mechanisms that produce these tragic errors, but even with the limited information at our disposal, some basic patterns are apparent.

1. *Rapes and Murders: Mistakes versus Lies*

The most common cause of wrongful convictions is eyewitness misidentification. This is not news. It was first shown in 1932 by Professor Edwin Borchard in his classic book *Convicting the Innocent*,³⁹ and it is apparent again in our data: In 64% of these exonerations (209/328) at least one eyewitness misidentified the defendant. The pattern, however, is heavily lopsided. Almost 90% of the rape cases (106/120), but only about half of the homicides (97/199), included at least one eyewitness misidentification.

The gap in the frequency of misidentification reflects a fundamental difference between police investigations of rapes and of homicides. In a non-homicidal rape there is always a surviving witness – the victim – and she is usually able to attempt to identify the criminal. As a result, almost all the false rape convictions that led to exonerations involved mistakes that occurred in that identification process. A murder, on the other hand, frequently leaves no surviving eyewitness, which forces the police to search for other types of evidence – evidence that is usually more difficult to obtain than eyewitness identifications.

Because the stakes in murder cases are so high, the police invest far more resources in investigating them than they devote to other crimes of violence. This is as it should be. The main effect is that the clearance rate for murders is higher than for other crimes – killers are more likely than rapists to be caught and brought to justice.⁴⁰ These same high stakes, however, can also produce false evidence. The real perpetrator is at far greater risk, and far more motivated to frame an innocent person to deflect attention, for a murder than for a rape – particularly if he might be sentenced to death. Co-defendants, accomplices, jail house snitches and other police informants, can all hope for substantial rewards if they provide critical evidence in a murder case – even false evidence – especially if the police are desperate for leads. The police themselves may be tempted to cut corners and falsify evidence to convict a person they believe committed a terrible murder.⁴¹

39. Edwin M. Borchard, *Convicting the Innocent*, at xiii (1932).

40. For example, the FBI estimates that in 2002 the clearance rate for reported murders in the United States was 64%, for reported rapes 45%, for reported burglaries 13%, and for reported auto thefts 14%. Federal Bureau of Investigation, *Crime in the United States 2002, Uniform Crime Reports*, Figure 3.1.

41. See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law And Contemporary Problems 123, 133 -140 (Autumn 1998).

In 72% of the rape exonerations the victims and all other eyewitnesses who testified were strangers to the falsely convicted defendant. By contrast, 86% of exonerated murder defendants knew the victim, or at least one supposed eyewitness, before the crime. The central problem in most rape investigations that go wrong is the mistaken identification of a defendant who is otherwise unknown to those involved. The common problem in the investigations of the murder cases we studied is deliberately false evidence implicating an innocent defendant with a known relationship to the victim or the lying witness.

An eyewitness misidentification by a stranger is easy to spot, once you know that the person identified is innocent. Detecting a deliberate lie is harder; there may be no simple way to tell if a statement was false, and if so whether the falsehood was intentional. As a result, our information on perjury understates the extent of the problem. Even so, known perjury is a surprisingly common feature of the trials that led to the convictions of these exonerated defendants.

In at least 58 of the 328 exonerations the defendant was falsely accused at trial by someone who claimed to have witnessed the crime: a supposed victim, participant, or eyewitness. About a quarter of these false accusations (13/58) occurred in rape cases; in each, the false accuser was a complaining witness who lied about the occurrence of the crime. In 43 cases the exonerated defendant was falsely accused of murder; in two cases the false accusers were surviving victims; most of the rest were (or claimed to be) participants in the crimes. In other words, in nearly half the murder exonerations in which the defendant was misidentified by one or more eyewitnesses, we also have information that the defendant was deliberately misidentified by at least one witness (43/97).

In 5 of the exonerations that we have studied there are reports of perjury by police officers. In an additional 24 we have similar information on perjury by forensic scientists testifying for the government. In at least 17 exoneration cases the real criminal lied under oath to get the defendant convicted; in at least 94 cases a civilian witness who did not claim to be directly involved in the crime committed perjury – usually a jailhouse snitch or another witness who stood to gain from the false testimony.

Overall, in 44% of all exonerations (145/328) at least one sort of perjury is reported – including 57% of murder exonerations (114/199), and 24% of rape exonerations (29/120). See Table 3.

**Table 3: Causes of False
Convictions for Exonerations
in Murder and in Rape Cases***

| | Murder (199) | Rape (120) |
|---|------------------------|----------------------|
| Eyewitness Misidentification | 49% | 88% |
| Reported Perjury | 57% | 24% |
| False Confession | 21% | 8% |

* The columns add up to more than 100% because some false convictions had multiple causes.

2. False Confessions: Youth and Mental Disability

In 51 of the 328 exonerations since 1989 – 15% – the defendants confessed to crimes they had not committed. In most of these cases it is apparent that the false confessions were coerced by the police.⁴² One defendant falsely confessed to larceny; 9 falsely confessed to rape; and 41, more than four fifths, falsely confessed to murder. See Table 3. Twenty-one percent of murder exonerations involve false confessions, but only 8% of rape exonerations, and that comparison understates the difference. Five of the false confessions in rape exonerations – more than half of the total – were in the Central Park jogger case in New York City in 1989. But when those confessions were taken the investigation was being treated as a homicide because the victim was in a coma from her injuries and was expected to die.

False confessions don't come cheap. They are usually the product of long, intensive interrogations that eventually frighten or deceive or break the will of a suspect to the point where he will admit to a terrible crime that he did not commit. Some of these interrogations stretch over days and involve relays of police interrogators. Not surprisingly, this expensive procedure is generally reserved for the most serious cases where there is no other evidence sufficient to convict – which usually means a murder with no surviving eyewitnesses.

False confessions are heavily concentrated among the most vulnerable groups of innocent defendants.⁴³ Thirty-two of the exonerated defendants were under 18 at the time of the crimes for which they were convicted, and 14 of these innocent juveniles falsely confessed – 44%, compared

42. In over half the false confessions (28/51) coercion is apparent from the record we have; in about 10% (5/51) it appears that the false confession was volunteered; and in about a third (18/51) we have too little information to say.

43. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 2004 North Carolina L. Rev. 892, 963.

to 13% of older exonerees. Among the youngest of these juvenile exonerees – those aged 12 to 15 – 75% (8/12) confessed to homicides (and 1 rape) that they did not commit.

False confessions are even more prevalent among exonerees with mental disabilities.⁴⁴ Our data indicate that 16 of the 328 exonerees were mentally retarded; 69% of them— over two thirds – falsely confessed. Another 10 exonerees appear to have been suffering from mental illnesses; 7 of them falsely confessed. Among all other exonerees (some of who may also have suffered from mental disabilities of which we are unaware) the false confession rate was 11% (33/302). Overall, 55% of all the false confessions we found were from defendants who were under eighteen, or mentally disabled, or both. Among adult exonerees without known mental disabilities, the false confession rate was 8%. See Table 4.

**Table 4: False Confessions
by Age and Mental Disability**

| Age and Mental Status of the Exonerated Defendants | Proportion who Falsely Confessed |
|---|---|
| Juveniles - under 18 at time of crime (32) | 44% |
| <i>12 - 15 Year Olds (12)</i> | <i>75%</i> |
| <i>16 - 17 Year Olds (20)</i> | <i>25%</i> |
| Mentally Ill or Mentally Retarded (26) | 69% |
| Adults Without Known Mental Disabilities (275) | 8% |

False confessions have more impact on false convictions than their numbers suggest, since quite often they implicate other innocent people in addition to the confessor. Terry Harrington, a 17-year old African American charged with killing a white retired police captain, did not confess to murder in Iowa in 1978 – but his 16-year-old friend Kevin Hughes did, and that confession, which was later repeatedly retracted, led to false murder convictions for Harrington and his co-defendant Curtis McGhee. Hughes was never prosecuted.⁴⁵ Similarly, in 1978 Paula Gray, a 17-year-old borderline retarded girl, falsely confessed to participating in a double murder and rape in Chicago, and implicated four innocent men. After she recanted, she was prosecuted for rape, murder and perjury, and sentenced to 50 years in prison. The four men she named were also all convicted, and two were sentenced to death. All five were exonerated after DNA testing cleared the men of the rape; the real

44. See id.

45. See above, note 31.

killers have since been identified, linked to the rape by DNA, and confessed.⁴⁶ Similarly, in 1988 in Austin, Texas, Christopher Ochoa falsely confessed to rape and murder in order to avoid the threat of the death penalty – and along the way falsely implicated his friend, Richard Danzinger; both were sentenced to life in prison, and both were exonerated by DNA in 2001, three years after the real criminal sent a letter to Governor Bush confessing to their crimes.⁴⁷

46. Laura Sullivan, *Three Students Track Down Killers*, The Baltimore Sun, June 27, 1999, at 1C.

47. UPI, *Judge Frees Wrongly Convicted Man*, 1/16/01; Henry Weinstein, *DNA Testing Clears Texas Murderer and "Accomplice;"* L.A. Times 10/14/00 p. A1; John Cloud, *Guarding Death's Door*, Time, 7/8/03. (In 2003, Ochoa was awarded a scholarship to the University of Wisconsin Law School. See Louie Gilot, *Law School Offers Grant to Grant Falsely Imprisoned*, El Paso Times, 5/30/03 p. 1B. Danzinger, tragically, received permanent disabling brain injuries as a result of an attack by another inmate in prison.)

VI. Race

1. *Race and Rape*

Over two-thirds of the exonerated defendants we studied were minorities, 55% African Americans and 13% Hispanics. Sadly, this is not altogether surprising; blacks and Hispanics comprise about 62% of all American prisoners. But only part of this pattern can be explained by the pervasive over representation of minorities in general, and African Americans in particular, among those arrested and imprisoned for serious crimes.

At the end of 2002, 35% of state prisoners serving sentences for murder were white, 48% were black and 17% were Hispanic.⁴⁸ The proportions of exonerations in murder cases are very similar: 34% whites, 50% Blacks and 15% Hispanics.

For rape, however, the story is different. A majority of rape prisoners in 2002 were white, 58% ; only 29% were black; and 13% were Hispanic.⁴⁹ But for rape exonerations the proportions are reversed: almost two thirds of the defendants are black, 65%; only 27% are white; and 8% are Hispanic. See Table 5.

Table 5: Race of Exonerated Defendants, by Crime

| | Murder (188) | Rape (106) | All Cases (301) |
|-----------------|-------------------------|-----------------------|----------------------------|
| White | 34% | 27% | 31% |
| Black | 50% | 65% | 55% |
| Hispanic | 15% | 8% | 13% |
| Other | 1% | 0% | 1% |
| TOTAL | 100% | 100% | 100% |

Why are blacks so greatly over-represented among those defendants who were falsely convicted of rape and then exonerated, mostly by DNA? The key is probably the race of the victims. We know the race of the victim for 75% of the 69 rape exonerations with black defendants, and in 75% of those cases the victim was white. (We see a similar pattern, on a smaller scale for Hispanic exonerees: we know the race of the victim for 7 of the 8 who were falsely convicted of rape, and in

48. Recalculated from Bureau of Justice Statistics, *Prisoners in 2002*, Table 15.

49. Id. The proportion of whites is slightly higher among those arrested for rape – 63% in 2001. Recalculated from *Sourcebook of Criminal Justice Statistics*, Table 4.10.

4 of those cases the victim was white.) Most women who are raped are victimized by members of their own racial or ethnic groups. Inter-racial rape is uncommon, and rapes of white women by black men in particular account for well under 10% of all rapes.⁵⁰ But among rape exonerations for which we know the race of both parties, almost exactly half (39/79) involve a black man who was falsely convicted of raping a white woman.

There are many possible explanations for this disturbing pattern. Of all the problems that plague the American system of criminal justice, few are as incendiary as the relationship between race and rape. Nobody would be surprised to find that bias and discrimination continue to play a role in rape prosecutions. Still, the most obvious explanation for this racial disparity is probably also the most powerful: the perils of cross-racial identification. Virtually all of the inter-racial rape convictions in our data were based, at least in part, on eyewitness misidentifications,⁵¹ and one of the strongest findings of systematic studies of eyewitness evidence is that white Americans are much more likely to mistake one black person for another than to do the same for members of their own race.⁵²

2. Race and Age

The juveniles on our list of exonerated defendants are overwhelmingly members of minority

50. According to the Bureau of Justice Statistics' *Criminal Victimization in the United States, 1996-2002*, Table 42 (available at <http://www.ojp.usdoj.gov/bjs/abstract/cvusst.htm>.) – based on the National Criminal Victimization Survey – black offenders accounted for an average of approximately 10% of all rapes and sexual assaults of white victims between 1996 and 2002. (The statistic fluctuates from year to year because for each year it is extrapolated from a sample of 10 or fewer survey responses.) Another Bureau of Justice Statistics study – based on the National Incident-Based Reporting System, reports that in 88% of rapes the victim and the offender are of the same race, and that the victims of rape are approximately evenly divided between whites and blacks. Bureau of Justice Statistics, *Sex Offenses and Offenders*, p. 11 (February 1997), available at <http://www.rainn.org/Linked%20files/soo.pdf>. It follows that the proportion of all rapes that have white victims and black offenders is about 5 to 6%.

51. Consider the case of Ronald Cotton, a black man, who was convicted of raping Jennifer Thompson, a white woman in 1985, in Burlington, North Carolina. Thompson was the only eyewitness at the trial, and by all accounts she was very effective. She was absolutely confident of her identification, in part because she spent a considerable amount of time with the rapist and was determined to observe him closely so that she would be able to identify him later on. She was equally confident when Cotton was retried 1987, convicted again, and sentenced, a second time to life in prison. Even so, she was wrong. Cotton was pardoned in 1995 after DNA tests proved that he was innocent, and that the real rapist was a different black man, who was in prison on other charges. What makes the case most remarkable is what happened after the exoneration. Ms. Thompson went to great lengths to make amends to Mr. Cotton, and to speak out and publicize the case and the terrible mistake she had made, so others could learn from it – which is why she is identified here by name. See Helen O'Neill, AP, *The Perfect Witness*, Washington Post, 3/4/01 p. F1; National Institute of Justice, *Convicted by Juries, Exonerated by Science, Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, (1996).

52. C. A. Meissner & J.C. Brigham, Thirty Years of Investigating Own-Race Bias in Memory for Faces: a Meta-Analysis, *7 Psychology, Public Policy and Law* 3 - 35 (2001).

groups. Ninety percent of exonerated defendants who were under 18 at the time of arrest were black or Hispanic. There are virtually no non-Hispanic white juveniles among the exonerated defendants we have studied – 3 out of 328, less than 1% of the total. See Table 6.

Table 6: Juvenile Exonerations by Race and Crime

| | Juvenile Murder Exonerations (22) | Juvenile Rape Exonerations (7) | All Juvenile Exonerations (31) |
|-----------------|--------------------------------------|-----------------------------------|-----------------------------------|
| White | 14% | 0% | 10% |
| Black | 77% | 86% | 77% |
| Hispanic | 9% | 14% | 13% |
| Total | 100% | 100% | 100% |

As we have seen, minorities, and African Americans in particular, are over-represented among all exonerations, especially the rape cases. Even so, white defendants account for 34% of all murder exonerations and 27% of all rape exonerations – but only 14% of *juvenile* murder exonerations, and not a single *juvenile* rape exonerations. A majority of the teenagers arrested for these two crimes are white – 62% of juvenile rape arrests in 2002, and 46% of juvenile murder arrests⁵³ – and yet white juveniles are all but entirely absent from our list of exonerees. Why?

In part, this disparity reflects general racial patterns in juvenile justice in America. Many juveniles who are arrested are not prosecuted at all but returned to the custody of their parents or guardians for less formal discipline; among those who are prosecuted, only a small fraction are treated as adults and punished accordingly. The juvenile exonerees in our data are all drawn from the small group of juvenile suspects who are prosecuted as adults and sentenced to long terms in prison – or, in 3 cases, to death. Race plays a major role at each stage of the sorting process that produces this rarified group.

For example, although only 27% of *all juveniles arrested* in the United States in 1990, 1992 and 1994 were black,⁵⁴ a Department of Justice study found that 41% of *defendants in juvenile courts*

53. Federal Bureau of Investigation, *Crime in the United States 2002, Uniform Crime Reports*, Table 43.

54. This statistic reflects the average of the numbers reported by the FBI in its annual *Crime in the United States, Uniform Crime Reports* for 1990, 1992 and 1994 (see Table 42 in 1992 and 1994; Table 38 in 1990). These three years were used to be consistent with the sample in a 1998 Bureau of Justice Statistics report on juvenile defendants in criminal courts. See below, note 55.

in those three years were black, and 67% of *juveniles prosecuted as adults* were black.⁵⁵ In other words, white teenagers who are arrested by the police are less likely than blacks to be prosecuted in juvenile court, and much less likely to be prosecuted in felony court as adults.

All but one of the juvenile exonerees in our database were convicted, as adults, of rape or murder. For these two extremely serious crimes, the racial winnowing of juvenile offenders is severe. In 1990-94, 59% of murder defendants *in juvenile court* were white and 36% were black; but among juvenile murder defendants who were *tried as adults* the proportions were more than reversed: 69% were black and only 25% were white.⁵⁶ For rape, the proportion of blacks went from 44% of juveniles arrested,⁵⁷ to 53% of those prosecuted for rape in juvenile court, to 72% of juvenile rape defendants prosecuted as adults.⁵⁸ There are, no doubt, false convictions among the cases that remain in juvenile court, and a substantial proportion of them may involve white defendants. Like other false convictions with comparatively light sentences, these are errors that are unlikely to ever be corrected by formal exoneration. None appear in this database

Even so, 25% of juvenile murder defendants prosecuted in adult courts in the early 1990s were white, as were 28% of juvenile rape defendants⁵⁹ – but only 10% of juvenile exonerees. The disparity could be due to chance; the number of cases is not large. It could also be due to systematic racial differences in the process of investigation. Black juvenile rape defendants, like all black rape defendants, face a special danger of cross-racial misidentification. In many of the juvenile murder exonerations (and in some of the rapes) the primary evidence against the defendant was a false confession. Eight-five percent of the juvenile exonerees who falsely confessed were African American (12/14). It may be that police officers are more likely to use coercive interrogation tactics on black juveniles than on white juveniles – that would explain the high proportion of blacks among the innocent juveniles who falsely confessed – but there is no way to tell directly from these data.

The broad picture, however, is no mystery. We have a dual system of juvenile justice in this country, one track for white adolescents, a separate and unequal one for black adolescents. The sharp racial differences in exonerations of falsely convicted juvenile defendants are just one manifestation of that racial divide.

55. Bureau of Justice Statistics, *Juvenile Felony Defendants in Criminal Courts*, p. 1 (September 1998), available at <http://www.ojp.usdoj.gov/bjs/abstract/jfdcc98.htm>. Data for the report were combined from the Bureau of Justice Statistics' 1990, 1992, and 1994 State Court Processing Statistics project.

56. See *id.*

57. See above, note 54.

58. See above, note 55.

59. See *id.*

VII. Conclusion

We can't come close to estimating the number of false convictions that occur in the United States, but the accumulating mass of exonerations gives us a glimpse of what we're missing. We have located 328 exonerations since 1989, not counting at least 135 defendants in the Tulia and Rampart mass exonerations, or more than 70 convicted childcare sex abuse defendants. Almost all the individual exonerations that we know about are clustered in two crimes, rape and murder. They are surrounded by widening circles of categories of cases with false convictions that have not been detected: rape convictions that have not been reexamined with DNA evidence; robberies, for which DNA identification is useless; murder cases that are ignored because the defendants were not sentenced to death; assault and drug convictions that are forgotten entirely. Any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands.

We can see some clear patterns in those false convictions that have come to light: who was convicted, and why. For rape the dominant problem is eyewitness misidentification – and cross-racial misidentification in particular, which accounts for the extraordinary number of false rape convictions with black defendants and white victims. For murder, the leading cause of the false convictions we know about is perjury – including perjury by supposed participants or eyewitnesses to the crime who knew the innocent defendants in advance. False confessions also played a large role in the murder convictions that led to exonerations, primarily among two particularly vulnerable groups of innocent defendants: juveniles, and those who are mentally retarded or mentally ill. Almost all the juvenile exonerees who falsely confessed are African American. In fact, one of our most startling findings is that 90% of all exonerated juvenile defendants are black or Hispanic, an extreme disparity that, sadly, is of a piece with racial disparities in our juvenile justice system in general.

APPENDIX

EXONERATIONS, 1989 -2003, BY STATE AND YEAR OF EXONERATION

(Exonerations based on DNA Evidence marked by *)

ALABAMA

Walter, McMillian, 1993
Randall Padgett, 1997
Michael Pardue, 1997
Dale Mahan, 1998*
Ronnie Mahan, 1998*
Gary Drinkard, 2001
Mendell Banks, 2003

ARIZONA

Jimmy Lee Mathers, 1990
Ray Girdler, Jr., 1991
James Robison, 1993
Robert Charles Cruz, 1995
Larry Youngblood, 2000*
Ray Krone, 2002*

CALIFORNIA

Patrick Croy, 1990
Clarence Chance, 1992
Melvin Mikes, 1992
Benny Powell, 1992
Mark Diaz Bravo, 1993*
Frederick Daye, 1994*
George Franklin, 1996
Kevin Green, 1996*
Troy Lee Jones, 1996
Jeffrey Modahl, 1999
Elmer Pratt, 1999
Herman Atkins, 2000*
Arthur Carmona, 2000
DeWayne McKinnery, 2000
Albert Johnson, 2002*
Gloria Killian, 2002
Leonary McSherry, 2002*
Antoine Goff, 2003
Jason Kindle, 2003
Glen Nickerson, 2003

John Tennison, 2003
Quedillis Ricardo Walker, 2003

COLORADO

Alarico Joe "Rico" Medina, 1995

CONNECTICUT

Rickey Hammond, 1992*
Mark Reid, 2003*

DISTRICT OF COLUMBIA

Edward Green, 1990*
Anthony Bragdon, 2003

FLORIDA

Robert Cox, 1989
James Richardson, 1989
Derrick Robinson, 1991
Bradley P. Scott, 1991
John Purvis, 1993
Andrew Golden, 1994
Thomas E. Smolka, 1995
Robert Hayes, 1997
Joseph Nahume Green, 2000
Frank Lee Smith, 2000*
Joaquin Jose Martinez, 2001
Jerry Frank Townsend, 2001*
Juan Roberto Melendez, 2002
Tim Brown, 2003
Rudolph Holten, 2003

GEORGIA

Gary Nelson, 1991
Terry Lee Wanzer, 1991
Calvin Johnson, 1999*
Douglas Echols, 2002*
Samuel Scott, 2002*

IDAHO

Charles Fain, 2001*

ILLINOIS

Robert Brown, 1989
Gary Dotson, 1989*
Elton Houston, 1989
Rogelio Arroyo, 1991
Isauro Sanchez, 1991
Ignacio Varela, 1991
Joaquin Verla, 1991
David Dowaliby, 1992
Steven Linscott, 1992*
Ronnie Bullock, 1994*
Joseph Burrows, 1994
Terry Nelson, 1994
Rolando Cruz, 1995*
Alejandro Hernandez, 1995*
Lionel Lane, 1995
James Newsome, 1995
Kenneth Adams, 1996*
Ralph Frye, 1996
Gary Gauger, 1996
Verneal Jimerson, 1996*
Richard Johnson, 1996*
Carl Lawson, 1996
Willie Rainge, 1996*
Dennis Williams, 1996*
Donald Reynolds, 1997*
Billy Wardell, 1997*
David Gray, 1999*
Ronald Jones, 1999*
Anthony Porter, 1999
Steven Smith, 1999
John Willis, 1999*
Xavier Catron, 2000
Algie Crivens, 2000
Steve Manning, 2000
Marcellius Bradford, 2001*
Miguel Castillo, 2001
Calvin Ollins, 2001*
Larry Ollins, 2001*
Omar Saunders, 2001*

Rodney Woidtke, 2001
Omar Aguirre, 2002
Alejandro Dominguez, 2002*
Robert Gayol, 2002
Paula Gray, 2002*
Luis Ortiz, 2002
Edar Duarte Santos, 2002
Michael Evans, 2003*
Madison Hobley, 2003
Dana Holland, 2003*
Stanley Howard, 2003
Leroy Orange, 2003
Aaron Patterson, 2003
Paul Terry, 2003*
Franklin Thompson, 2003

INDIANA

Charles Smith, 1991
James Cameron, 1993
Dwayne Scruggs, 1993*
Jerry Watkins, 2000*
Richard Alexander, 2001*
Larry Mayes, 2001*
John Jeffers, 2002

IOWA

Terry Harrington, 2003

KANSAS

Joe Jones, 1992*
Eddie James Lowery, 2003*

KENTUCKY

William Gregory, 2000*
Larry Osborne, 2002

LOUISIANA

Isaac Knapper, 1991
Roland Gibson, 1993
Hayes Williams, 1997
Curtis Kyles, 1998
Clyde Charles, 1999*
Shareef Cousin, 1999

Albert Burrell, 2000
Michael Graham, 2000
Dwight LaBran, 2001
Gene Bibbins, 2003*
Gregory Bright, 2003
John Thompson, 2003
Earl Truvia, 2003
Calvin Willis, 2003*

MASSACHUSETTS

Harold Sullivan, 1989
Louis Santos, 1990
Marvin Mitchell, 1997*
Donnell Johnson, 2000
Neil Miller, 2000*
Marlon Passley, 2000
Eric Sarsfield, 2000*
Ulysses Rodriguez Charles, 2001*
Angel Hernandez, 2001*
Peter Limone, 2001
Joseph Salvati, 2001
Louis Greco, 2002
Henry Tameleo, 2002
Kenneth Waters, 2001*
Dennis Maher, 2003*

MARYLAND

Kirk Bloodsworth, 1993*
Anthony Gray, 1999*
Michael Austin, 2002
Bernard Webster, 2002*

MICHIGAN

Robert Farnsworth, Jr., 2000
Dwight Love, 2001
Eddie Joe Lloyd, 2002*
Kenneth Wyniemko, 2003*

MINNESOTA

Richard Paul Dziubak, 1989
Keith Bullock, 1992
David B. Sutherlin, 2002*

MISSOURI

Johnny Lee Wilson, 1995
Steven Toney, 1996*
Clarence Richard Dexter, Jr., 1999
Ellen Reasonover, 1999
Eric Clemmons, 2000
Armand Villasana, 2000*
Larry Johnson, 2002*
Joseph Amrine, 2003
Lonnie Erby, 2003*

MISSISSIPPI

Sabrina Butler, 1995

MONTANA

Chester Bauer, 1997*
Jimmy Ray Bromgard, 2002*
Paul D. Kordonowy, 2003*

NORTH CAROLINA

Timothy Hennis, 1989
Ronald Cotton, 1995*
Keith Brown, 1997*
Alfred Rivera, 1999
Lesley Jean, 2001*
Terence Garner, 2002

NEBRASKA

Jeremy Sheets, 2001

NEW JERSEY

Damaso Vega, 1989
David Shepard, 1994*
Earl Berryman, 1997
Vincent James Landano, 1998
McKinley Cromedy, 2000*
John Dixon, 2001*
Clarence Moore, 2001

NEVADA

Roberto Miranda, 1996
Jack Ray Broam, 1998
Jay Cee Manning, 1998

NEW YORK

Charles Dabbs, 1991*
Leonard Callace, 1992*
Shirley Kinge, 1992
Kerry Kotler, 1992*
Terry Chalmers, 1995*
Victor Ortiz, 1996*
Clarence Braunskill, 1997
Jeffrey Blake, 1998
Luis Kevin Rojas, 1998
Betty Tyson, 1998
Collin Woodley, 1998
Warith Habib Abdal, 1999*
Timothy Crosby, 2000
John Duval, 2000
Lee Long, 2000
James O'Donnell, 2000*
Anthony Faison, 2001
Ruben Montalvo, 2001
Jose Morales, 2001
Charles Shepard, 2001
Colin Warner, 2001
Lamont Branch, 2002
Lazaro Burt, 2002
Hector Gonzalez, 2002*
Sami Leka, 2002
Angelo Martinez, 2002
Antron McCray, 2002*
Kevin Richardson, 2002*
Yusef Salaam, 2002*
Raymond Santana, 2002*
Kharey Wise, 2002*
Dennis Halstead, 2003*
Michael Mercer, 2003*
Diomedes Polonia, 2003
John Restivo, 2003*

OHIO

Dale Johnston, 1990
Brian Piszczek, 1994*
Walter Smith, 1996*
Danny Brown, 2001*
Anthony Green, 2001*

Jimmy Williams, 2001
Timothy Howard, 2003
Gary Lamar James, 2003

OKLAHOMA

Gregory Wilhoit, 1993
Adolph Munson, 1995
Thomas Webb, 1996*
Timothy Durham, 1997*
Robert Lee Miller, Jr., 1998*
Dennis Fritz, 1999*
Ronald Williamson, 1999*
Jeffrey Pierce, 2001*
Arvin McGee, 2002*
David Johns Bryson, 2003*
Calvin Lee Scott, 2003*

OREGON

Santiago Ventura Morales, 1991
Christopher Boots, 1995
Laverne Pavlinac, 1995
Eric Proctor, 1995
John Sosnovske, 1995
Pamela Sue Reser, 2002

PENNSYLVANIA

Matthew Connor, 1990
Bruce Nelson, 1991*
Jerry Pacek, 1991
Jay C. Smith, 1992
Dale Brison, 1994*
Vincent Moto, 1996*
Edward Ryder, 1996
Willie Nesmith, 2000*
William Nieves, 2000
Edward Baker, 2002
Steven Crawford, 2002
Bruce Godschalk, 2002*
Thomas Kimbell, Jr., 2002
Nicholas Yarris, 2003*

RHODE ISLAND

Jeffrey Scott Hornoff, 2003

SOUTH CAROLINA

Perry Mitchell, 1998*
Warren Douglas Manning, 1999

TENNESSEE

Ronnie Marshall, 1996
Robert Spurlock, 1996
Clark McMillan, 2002*

TEXAS

Randall Dale Adams, 1989
Clarence Brandley, 1990
Joyce Ann Brown, 1990
John Skelton, 1990
Muneer Deeb, 1993
Frederico Macias, 1993
Gilbert Alejandro, 1994*
Debbie Loveless, 1994
John Miller, 1994
Kevin Byrd, 1997*
Ricardo Aldape Guerra, 1997
Ben Salazar, 1997*
Susie Mowbray, 1998
Jason Barber, 2000
A.B. Butler, 2000*
Roy Criner, 2000*
Ronnie Mark Garipey, 2000
Carlos Lavernia, 2000*
Anthony Robinson, 2000*
Richard Danziger, 2001*
Lacresha Murray, 2001
Christopher Ochoa, 2001*
David Shawn Pope, 2001*
Victor Larue Thomas, 2001*
Calvin Washington, 2001*
Mark Webb, 2001*
Joe Sidney Williams, 2001
Wesley Tuley, 2002

VIRGINIA

David Vasquez, 1989*
Walter Snyder, 1993*

Edward Honaker, 1994*
Troy Webb, 1996*
Earl Washington, 2000*
Marvin Anderson, 2001*
Jeffrey Cox, 2001
Julius Earl Ruffin, 2003*

WASHINGTON

Benjamin Harris, 1997
Mark Clark, 1999
Jeff Schmieder, 1999
Ross Sorrels, 2003

WISCONSIN

Frederic Saecker, 1996*
Anthony Hicks, 1997*
Mike Piaskowski, 2001
Steven Avery, 2003*
Eugene Glenn, 2003

WEST VIRGINIA

Glen Dale Woodall, 1992*
Dewey Davis, 1995*
Gerald Davis, 1995*
William O'Dell Harris, 1995*
James Richardson, 1999*
Larry Holdren, 2001*