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Investigating Innocence:
Comprehensive Pre-trial Defense Investigation to Prevent Wrongful Convictions

THESIS

submitted in partial satisfaction of the requirements
for the degree of

MASTER OF ARTS

in Social Ecology

by

Rosa Ellis Greenbaum

Thesis Committee:
Professor Simon A. Cole, Chair
Professor Mona Lynch
Professor Elliott Currie

2019

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ACKNOWLEDGEMENTS

I would like to acknowledge my appreciation for my committee members, research assistant Kaylee Wiseman, and my parents Paul and Susan Greenbaum. Financial support was provided by the University of California, Irvine, by the National Science Foundation Graduate Research Fellowship Program under Grant No. DGE-1321846, and by the University of California Consortium on Social Science and Law.

ABSTRACT OF THE THESIS

Investigating Innocence:
Comprehensive Pre-trial Defense Investigation to Prevent Wrongful Convictions

By

Rosa Ellis Greenbaum

Master of Arts in Social Ecology

University of California, Irvine, 2019

Professor Simon A. Cole, Chair

The inability of public defense systems to provide sufficiently zealous legal representation to indigent clients is a long-standing and pervasive problem in the United States. The issue of excessive caseloads for public defenders is much discussed and studied, while the relatively more extreme deficit of public defense investigators is rarely mentioned. A competent defense investigation can forestall overcharging and excessive punishment as well as lay groundwork for dismissals and acquittals. Disproportionate consequences for defendants who have been falsely accused or whose charges are inflated arguably stem as much from anemic fact-finding practices of the defense as from limited or unexercised legal expertise. Indigent defendants, represented by lawyers whose access to investigative resources is frequently denied or severely truncated, may be at heightened risk of wrongful conviction and excessive punishment specifically as a result of this lack. My findings, drawn from a qualitative analysis of 366 cases listed in the National Registry of Exonerations in which Inadequate Legal Defense was deemed a contributor to a wrongful conviction, are consistent with such an assertion. Investigative failures were far more frequent than other types of legal inadequacies in the NRE's ILD cases, appearing in 80.6% of

cases, while trial errors were found in just 50.8% of these wrongful convictions. In 34.7% of cases, the failures were solely investigative. The larger implication is that the relative dearth of investigators in public defense systems is a problem deserving similar attention as the more commonly understood issue of too few lawyers handling too many cases.

Introduction[1]

The Sixth Amendment bestows the right to the assistance of counsel upon defendants in criminal prosecutions, but it does not guarantee effective representation in court or a complete investigation of relevant facts before trial or plea bargain. At its inception, the right only applied in federal court proceedings and referred to privately retained counsel subject to a defendant's ability to pay. It was the landmark decision in *Powell v. Alabama* (1932) that began to enlarge the conception of the right to counsel beyond the letter of the amendment. *Powell* held that counsel must be provided for defendants in capital cases regardless of ability to pay. It can be argued that this shift in the United States Supreme Court's Sixth Amendment jurisprudence was a response to the apparent innocence and flagrant framing of the Scottsboro defendants and the political campaigning on their behalf. Part of the basis for relief in *Powell* was that "No attempt was made to investigate" that innocence (1932, p. 58).When *Gideon v. Wainwright* (1963) was decided three decades later, the creation of a positive right of publicly funded counsel for all felony defendants in state court was a watershed event in the elaboration of defendants' rights. Yet, fifty years later, the right to state-paid, effective assistance of counsel remains largely illusory (Chemerinsky, 2013). The *Strickland v. Washington* (1984) test for effectiveness is so lax as to suggest that not only is there no remedy, perhaps there is not even truly a right.

Blume and Johnson (2013) warn that, "Even when his counsel is competent and diligent, a defendant may be deprived of the promise of *Gideon* due to a lack of investigative and expert services" (p. 2143). The defense investigator's primary function is fact development and testing: reviewing discovery and supplemental records, interviewing clients and witnesses, viewing and documenting crime scenes and physical evidence, and conducting collateral research related to factual issues. A competent and well-trained investigator will also identify the appropriate experts to consult based on the specifics of a case. Unfortunately, in many jurisdictions the

[1] This material is based upon work supported by the National Science Foundation Graduate Research Fellowship Program under Grant No. DGE-1321846. Any opinions, findings, and conclusions or recommendations expressed in this material are those of the author and do not necessarily reflect the views of the National Science Foundation.

assistance of a fact investigator is promised only in the most serious cases, and even in those places its provision may be haphazard. Many public defense offices do not employ enough investigators to handle their caseloads, and others employ no investigators at all. If a skilled and zealous lawyer is critical to securing a defendant's legal rights, then arguably a complementary investigator is critical to establishing the necessary facts required to achieve outcomes that give substance to those rights. I argue that the data from known exonerations supports the idea that expanding the use of well-trained defense investigators to perform more comprehensive pre-trial defense investigations has the potential to reduce convictions of factually innocent people, and to mitigate many other injustices implicated in the criminal legal system as well.

Right to assistance of counsel

Prior to *Powell*, the federal constitutional right to assistance of counsel was construed as the right of a defendant to hire a lawyer—so long as he could pay. Where nine young black men were facing death sentences for capital rape, *Powell* held that "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment" (1932, p. 71). But the ruling applied only to capital cases and the Court minimized its effect, professing that most states were already in the habit of providing counsel for those unable to pay in serious criminal cases[2]. The Court framed the ruling as reflecting an extant right, rather than the establishment of a new one (*Powell v. Alabama*, 1932, p. 73). A few years later, *Johnson v. Zerbst* (1938) held that all indigent federal defendants must be afforded state-paid counsel. *Gideon* extended this provision to the states, although it was unclear at the time whether this applied to all crimes or only felonies. *Argersinger v. Hamlin* (1972) clarified that counsel for the indigent must be provided for all charges which carry a sentence of potential imprisonment.

Right to effective assistance of competent counsel

Powell also marked the first time that the Court endorsed the "nascent legal principle that

[2] In fact, thirteen states had no such provision when *Powell* was decided (Blume & Johnson, 2013).

attorney incompetence could be grounds for a new trial" (Mayeaux, 2014, p. 2181). Still, for many years after *Powell*, the right to counsel was interpreted as a bare, yes-no proposition; if counsel made appearance that was generally sufficient—counsel had been effected. In *Diggs v. Welch* (1945)[3] a federal circuit court found that "…subsequent negligence [of appointed counsel] does not deprive the accused of any right under the Sixth Amendment" (p. 668). A common early test for reversal adopted by some lower courts required that counsel's performance must be so deficient as to make a "mockery of justice" and shock the conscience of the court; "[the] 'mockery' test [was] itself a mockery of the sixth amendment" (Bazelon, 1973, p. 28).

In a footnote to *McMann v. Richardson* (1970) the Court insisted that: "It has long been recognized that the right to counsel is the right to the effective assistance of counsel" (fn14), and went on to list a number of cases standing for the principle: *Reece v. Georgia* (1955); *Glasser v. United States*, (1942); *Avery v. Alabama* (1940); and *Powell*. However, *Reece* involved absence of counsel at a critical stage, and *Glasser* concerned the right to conflict-free counsel. Only *Avery*, another capital case, included any extended discussion of whether counsel's performance was not "mere formalit[y]" but was objectively "earnest and zealous" (1940, p. 451). Avery's counsel was appointed on the day of his arrest, March 21, 1938, requested and was denied a continuance to investigate his mental health, and proceeded to trial on March 24 (*Avery v. Alabama*, 1940, p. 448). Avery's conviction and death sentence were affirmed; an "earnest and zealous" capital defense could be accomplished in three days decreed the Court as it also referenced its "[v]igilant concern for the maintenance of the constitutional right of an accused to assistance of counsel" (p. 445). In practice, and for decades thereafter, appellate standards of enforcement of the right to effective, competent counsel were so low as to render them functionally meaningless (Bazelon, 1973)

Two decisions published on the same day in 1984 ostensibly provided more exacting federal standards by which to judge counsel's performance. *United States v. Cronic* (1984)

[3] Later upheld by the Supreme Court in *Diggs v. Welch*, 325 U.S. 889 (1945).

established that the complete absence of counsel at a critical stage compromised the adversarial process and created a per se presumption of ineffectiveness. *Strickland* created a two-prong test for ineffective assistance where counsel had been constructively present. The first prong required that counsel's performance must have been deficient based on prevailing standards of reasonably effective assistance. The second prong required a showing of prejudice, namely that counsel's unprofessional errors undermined confidence in the outcome of the proceeding (*Strickland v. Washington*, 1984, p. 688). The test could be done backwards; if no prejudice could be shown then it was not necessary to evaluate whether counsel's performance had been deficient. Great deference to counsel's strategic decisions and a presumption of reasonableness was to be afforded to counsel's actions (*Strickland v. Washington*, 1984, pp. 690, 698). David Washington's attorney conducted virtually no capital penalty phase investigation into his life history and did not request a psychiatric examination. The attorney had made the decision not to present such evidence before discovering to what extent it existed, based on his belief that the existence of Washington's confession had made such an effort an exercise in futility; his "strategic decision" was that a show of remorse would be more persuasive with the trial judge (*Strickland v. Washington*, 1984, p. 700). The Court found neither prejudice nor deficient performance, and Washington's death sentence was upheld. The Court declined to create specific standards of performance.

The *Strickland* test for ineffectiveness creates such a heavy burden of proof for an appellant that it is nearly impossible to win on such a claim. It essentially turns on hindsight evaluation of attorney performance against a harmless error test. Ineffective assistance of counsel claims are rarely successful. Of 4,000 such claims decided in state and federal courts between 1970 and 1983, only 3.9% found ineffective assistance (Klein, 1986). A 1995 study found a success rate of less than one percent (Klein, 1999). In light of these jurisprudential realities, it is imperative that cases be correctly defended from the outset**.**

Counsel's duty to investigate and the crisis in indigent defense (investigation)

Gable and Green (2004) assert that the rare relief that issues from *Strickland* is reserved for defendants claiming factual innocence or challenging death sentences. It is not a vehicle for assuring that indigent defendants receive effective assistance of counsel, including necessary investigations. In order to be effective, counsel must investigate facts as well as legal issues (see Zeitlan, 1977). As the Supreme Court noted in *United States v. Nixon* (1974): "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive" (p. 709). An examination of the state of public defense over the last five decades shows that the promise of *McMann* remains unevenly fulfilled; specifically, criminal defendants are not reliably receiving adequate preparation and investigation of their cases (Backus & Marcus, 2006; Joy & McMunigal, 2003; National Right to Counsel Committee, 2009).

One observer calls *Strickland* "a doctrine of enormous proportions, but with little impact-- a legal tyrannosaurus rex without teeth" (Rigg, 2007, p. 78). There was much excitement within the defense bar after the Court's rulings in *Williams v. Taylor* (2000) and, later, *Wiggins v. Smith* (2003) and *Rompilla v. Beard* (2005). Lawyers had done more in these cases than *Strickland* defendant David Washington's trial attorney had done, yet their incomplete investigations were deemed deficient and prejudicial. Roberts (2004) noted that these principles applied to non-capital as well as death penalty cases. In her estimate, "The Wiggins' Court's decision… signals a clear move towards greater scrutiny of failures to investigate…" (Roberts, 2004, p. 1120). The applause for the Court appears to have been premature. It may now be easier to prevail on an ineffective assistance of counsel (IAC) claim alleging failure to conduct an adequate capital penalty phase investigation, and professional standards for capital case defense have clearly become more stringent since 1984. But while the aforementioned decisions apply to non-capital cases in theory, for the vast majority of criminal defendants, they do little to assure that effective representation, including the background and fact investigation typically required for true adversarial testing, will actually occur. The American Bar Association (1993) Defense Function

Standards[4] insist that "defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction" (4- 4.1.a). But the Standards are non-specific and not binding, and the Supreme Court's ruling in *Strickland* suggested that feeling "hopeless" (1984, p. 699) about what might be gained from conducting a full investigation was a reasonable basis for declining to do so. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" (*Strickland v. Washington*, 1984, pp. 690-691).

At the time that *Gideon* was decided, 43 percent of criminal defendants qualified as indigent (Stuntz, 1997); by 2005 that figure was more than 80 percent (Backus & Markus, 2006). For this reason, it might make sense to regard the crisis in indigent defense more generally, as simply a crisis in *criminal* defense. By the late 1970s, criminal dockets had begun to explode as defense budgets shrank. Plea bargaining became the predominant method of adjudicating colossal criminal caseloads. All of these trends have had a negative impact on the ability of criminal defendants to mount fact-based defenses, the pain of which is felt particularly by those whose charges are false or exaggerated. Many of the barriers to comprehensive fact investigation are institutional; excessive caseloads and lack of funding may render counsel ineffective, if not to the level required to satisfy *Strickland* then certainly when operating under a less forgiving definition of the term, such as that which might be gleaned from the ABA (1993) Defense Function Standards on the duty to investigate. Though the literature directly addressing the

[4] "(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." ©1993 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

question is rather sparse, empirical evidence suggests that the adequacy of fact investigation has been lacking, both pre- and post-*Strickland*.

In Zemans and Rosenblum's (1981) survey of over 500 Chicago lawyers, respondents rated two skills (out of 21) as the most critical to the practice of law: "fact gathering" and "capacity to marshall [sic] facts and order them so that concepts can be applied" (cited in Lowenthal, 1981, p. 469). Lowenthal (1981) interviewed 173 criminal defense lawyers in Phoenix, Arizona. Many of the items in that survey focused on fact development as a distinct category of legal practice, and Lowenthal (1981) noted that this skill set is not part of the typical training in legal education (citing Zemans & Rosenblum, 1981). Lowenthal (1981) found that 14.6 percent of the respondents interviewed none of the prosecution's witnesses and that 21.4 percent of those said the reason for not conducting interviews was that they knew what the witness would say from police reports (Steiner, 1981). And although almost all attorneys were diligent in obtaining police reports, names of prosecution witnesses, and statements of their clients, they were less likely to obtain their clients' criminal records[5] (85.2%), examine physical evidence (75%), or review test results (65.7%) (Steiner, 1981). Freedman (2005) cites a study (Mirsky & McConville, 1989) that examined the vouchers submitted by court appointed defense attorneys in New York City and found that reimbursement was requested for investigation in only 27 percent of homicide cases and only 12 percent of other felonies. Reflecting on the results of these studies, Luban (1993) notes that "…it is perhaps unsurprising that defense lawyers do very little factual investigation of their cases, but we are nonetheless entitled to get depressed over just how little" (p. 1734).

The National Legal Aid and Defender Association, since 1976, has recommended a ratio of one investigator to every three attorneys (NLADA, 1976)[6]. A 2007 census of county based

[5] Failure of his attorney to obtain the transcript from a previous conviction that the state intended to present in aggravation at his capital penalty phase proceeding was the basis upon which the U.S.S.C. upheld a lower court's finding that Terry Williams had been denied effective assistance of counsel, *Williams v. Taylor.* 529 U.S. 362. (2000).

[6] At the state capital defender where I was employed as an investigator, active cases were typically assigned a lead attorney, second-chair attorney and an investigator. For cases coming to evidentiary hearing or under a death warrant, often a third attorney and second investigator would also be enlisted to assist. In the homicide unit of the

and local public defender offices found that 40 percent had no full-time investigators on staff at all, and that, overall, there were approximately 1.5 investigators for every 10 attorneys; only seven percent of offices had the recommended one-to-three ratio (Farole & Langton, 2010). In their census of state public defender programs, the average ratio was better, at about one to six[7]; however, the ratio in Arkansas was less than one to thirty (Langton & Farole, 2010). In Michigan, appointed attorneys routinely had requests for investigative assistance denied and in one county, investigative assistance is so rare that a common practice of defense attorneys is asking law enforcement officers to conduct their investigations for them (National Right to Counsel Committee, 2009). This is the antithesis of independent adversarial testing and fails even the archaic "farce-and-mockery" test.

In an op-ed, staff attorney Tina Peng (2015) described the hurdles to investigation confronting the Orleans Public Defenders:

> "[M]y office considers how serious [clients'] cases are before deciding how many resources to devote to them. We have only nine investigators to handle more than 18,000 felony and misdemeanor cases each year. One investigator describes being so overwhelmed that he is often unable to canvass for relevant surveillance footage until it has already been deleted. Another investigator said that recently, in a span of a week and a half, she was assigned three cases carrying sentences of mandatory life without parole…Working around the clock, the investigator completed full investigations for two of those cases. For the third, she was able only to knock on one witness's door twice."

Decades after it was documented in Phoenix and New York City, the failure to fully investigate the cases of poor defendants seemingly remains a problem in many areas. Echoing

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Philadelphia Defender Association, each client is assigned two attorneys and at least one investigator (Anderson & Heaton, 2012). Many cases involve complex factual issues, even where the potential penalty is less than a sentence of life imprisonment or death, and all felony convictions have serious central and collateral consequences.

[7] A statistical analysis of state-administered public defense systems updated to 2013 found an average ratio of investigators to line attorneys in those jurisdictions to be slightly higher, at 1:5.5 (Strong, 2017). The updated county-based analysis is said to be forthcoming.

the work of McConnville & Mirsky (1989) on court-appointed attorneys, Beeman & Riggs' (2004) study of public defense practices in North Dakota found that investigators were rarely requested and often denied, although one contract attorney they interviewed told them that "his clients benefited every time he has hired an investigator, either through a reduced sentence or a dismissal" (p. 15). California has long been seen as a pioneer in providing quality criminal defense to the indigent; it established the first public defender office in the country in Los Angeles County in 1914[8] (Bliss, 1956). Yet Benner (2009) found fact gathering problems in California that echo those found by researchers thirty years earlier. Benner (2009) consulted court statistics and surveyed judges, indigent defense providers and private attorneys engaged in criminal practice. In addition to excessive attorney caseloads, Benner (2009) found that every single respondent from the public defender category said that investigator workloads were excessive, and more than three-quarters said this was a serious problem. Ninety percent of judge respondents said that fees for appointed counsel were insufficient for proper case investigation (Benner, 2009). Analyzing 121 successful California state and federal appellate ineffective assistance claims (about five percent of 2,500 claims raised), Benner (2009) found that in 44 percent of these cases, relief was granted based on "failure to conduct an adequate investigation"[9] (p. 324) and concludes that, "The most important finding from our study is the discovery that indigent defense providers in many California counties lack the resources necessary to conduct adequate defense investigations" (p. 277). As Levine (1984) contends, "even the best trained and most highly motivated defense attorneys can perform only as well as the available facts permit" (pp. 1396-1397).

Inadequate counsel, failure to investigate, and wrongful convictions

In contrast to the general and somewhat vague ABA (1993) Defense Function Standard on the duty to investigate (see fn4), the organization's guideline for guilt phase investigation in

[8] However, that office did not hire paid investigators until 1946, having previously relied on volunteers (Bliss, 1956).
[9] Benner (2009) notes that "…in the majority (74%) of these cases, counsel's failure went directly to the heart of guilt or innocence" (p. 324)

capital cases (2003)[10] is specific and detailed. The accompanying commentary "states explicitly that it is the developing understanding about the causes of wrongful conviction that has driven the evolving standards. Such concerns 'underscore[ ] the importance of defense counsel's duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses'" (Roberts, 2004, p. 1119, quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 2003, Guideline 10.7 Commentary). This duty to take potential innocence seriously and investigate inheres in the vastly larger number of non-capital cases as well[11].

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[10] "…elements of an appropriate investigation include the following:

1. Charging Documents: Copies of all charging documents in the case should be obtained and examined in the context of the applicable law to identify: a. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable; b. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty; c. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) that can be raised to attack the charging documents; and d. defense counsel's right to obtain information in the possession of the government, and the applicability, extent, and validity of any obligation that might arise to provide reciprocal discovery.

2. Potential Witnesses: a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to: (1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself; (2) potential alibi witnesses; (3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including: (a) members of the client's immediate and extended family (b) neighbors, friends and acquaintances who knew the client or his family (c) former teachers, clergy, employers, co-workers, social service providers, and doctors (d) correctional, probation, or parole officers; (4) members of the victim's family. b. Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

3. The Police and Prosecution: Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports together with the underlying data therefor. Where necessary, counsel should pursue such efforts through formal and informal discovery.

4. Physical Evidence: Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.

5. The Scene: Counsel should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions)" (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.7, 2003, pp. 1018-1020 [footnotes omitted]. ©2003 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

[11] For a discussion of how standards for capital penalty phase investigation have begun to penetrate some non-capital cases, see Mundy, 2013.

Scholars have frequently cited ineffective assistance of counsel as a leading contributor to wrongful convictions, along with other common problems such as mistaken eyewitnesses, police and prosecutorial misconduct and false confessions. Radelet, Bedau, and Putnam (1992) describe many instances of inadequate defense counsel in their study of over 400 wrongful convictions in potentially capital cases, including one in which the lawyer "had no investigator to dig up leads (much less follow them), paid no serious attention to the possibility that [another suspect] rather than [the defendant] was guilty, and never contested the improprieties of the police line-up…" (p. 42). The errors cited throughout fall into both the advocatory and the investigatory realms (Radelet, Bedau & Putnam, 1992). Many books on wrongful convictions written for a popular audience include chapters on ineffective assistance of counsel, and tend to offer a handful of case examples that detail some drivers of IAC and demonstrate how serious its consequences can be [12]. According to Gould and Leo (2010), "The central reason behind ineffective representation is inadequate funding, an absence of quality control, and a lack of motivation" which may manifest in "narrow or shallow investigation" (p. 855) among other deficits. Huff, Rattner and Sagarin (1996) also note that "excellent investigations" may be precluded by insufficient funding resources (p. 77). Such investigations may also be impeded by "norms that include the presumption that most clients are in fact guilty" (Worden, Davies & Brown, 2014, p. 210).

Inadequate counsel in the context of wrongful conviction has not been specifically subject to the same type of extended discussion and empirical investigation as some of the other commonly cited contributors. Unlike false confessions and eyewitness misidentification, which are the subject of what Leo (2005) calls "specialized literatures" (p. 208), inadequate counsel is not so amenable to experimental research and does not lend itself to relatively simple protocols for curtailing it, such as implementing double blind line-up procedures and videotaping of interrogations. As Garrett (2011) notes, IAC has been difficult to study in wrongful conviction cases: "Precisely due to [the] lawyer's ineffectiveness, one cannot tell from the trial records what

[12] "Sleeping Lawyers" (Scheck, Neufeld & Dwyer, 2003, pp. 237-249); "The Court Jesters" (Yant, 1991, pp. 159-176); and "Ineffective Counsel" (Christianson, 2004, pp. 93-99), for example.

powerful arguments and evidence an effective lawyer would have presented to the jury" (p. 166). It is only when records surrounding the exoneration are compiled that it becomes remotely possible to make such an inquiry. The demanding nature of the *Strickland* standard for relief, requiring IAC claimants to prove what an effective lawyer could have accomplished at trial, means that in many cases such a record will have been created—even if relief was not forthcoming on those grounds. The study below is a preliminary attempt to outline the contours of inadequate counsel in known wrongful conviction cases, drawing on a large, publicly available data set and its corresponding non-public archive, to further describe the nature of the investigative failures therein, and to the extent possible, what underlying conditions may be implicated.

Chapter 1

Current Study:

"Inadequate Legal Defense" as a contributor to wrongful convictions

The National Registry of Exonerations (NRE)[13] documents cases in which people were convicted and later exonerated in the United States from 1989 to the present. Each individual case entry includes demographic and regional information; dates of offense, conviction and exoneration; crimes of conviction and sentence; a list of contributing causes to the conviction (false confession, mistaken eyewitness identification, false or misleading forensic evidence, perjury/false accusation, official misconduct, and inadequate legal defense); whether DNA evidence played a role in the exoneration; and a factual summary of the circumstances of conviction and exoneration.

The NRE tracks exonerations, not wrongful convictions. It is not representative of undiscovered wrongful convictions and the cases it includes are undoubtedly skewed in ways both obvious and obscure. More serious crimes and convictions carry longer sentences that provide both greater time and motivation to undo. The availability of appellate relief varies greatly among regional court systems. The level of activity of the press, innocence projects and clinics, and other interested parties in securing exonerations is not evenly distributed. Beyond that, case summaries are drawn from the available documentation held in the non-public NRE archive, which varies widely among cases in volume, level of detail, and source type.

This analysis concerns the NRE's first 1,635 cases, of which 381 (23.4%) include inadequate legal defense (ILD) as a contributor to the wrongful conviction, as determined by NRE researchers. Thirty-six cases[14] list ILD as the sole contributor. It is important to note that, unlike the cases in Benner's (2009) sample of successful IAC claims, many of these convictions

[13] The NRE is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law.

[14] L. Acero, B. F. Allen, M. Belcher, D. Bivens Jr., D. Contee, N. J. Croy, M. Earle, C. Eason, Y. Eldridge, A. Golden, R. Greer, A. Hebrard, B. Henly, M. Hernandez, E. Hughes, T. Jasin, L. D. Jones, T. L. Jones, K. F. Lee, P. P. Magnan, G. McKenzie, M. Mikes, J. Miller Jr., N. Moreno, B. Neirynck, G. Nobles, L. Pettit, N. Rhoades, S. Rigel, S. A. Rivera, Tammy Smith, C. Stonehouse, L. Swanagan, L. Thain, M. Thorn, H. Wells.

were not overturned on the basis of a judicial determination that trial counsel's performance was deficient and prejudicial but on other grounds or through other processes.

I conducted qualitative analysis of these 381 ILD cases to address the following research questions:

1) How many of the ILD cases involved failures to conduct proper fact investigation versus other types of legal failures?
2) What patterns emerge when the investigative failures described therein are systematically analyzed?
3) How many of these wrongful convictions might have been prevented if an effective fact investigation had been conducted at the pre-trial stage?

This was an iterative process in which only the first question was clearly formulated at the outset. The specific categories of attorney failure and patterns of investigative failure emerged only as I worked through the data and created codes.

On my first reading of the NRE summaries, which ranged from about 200 words on the short end to more than 2,000 words for the longest summaries, I simply noted whether an investigative failure was implicated, or if the failure was another type of lawyer misstep. It soon became clear that many cases had both types of failures. I then went back and coded each case as investigative or other legal failure or both, and if an investigator played a role in the case at trial or in postconviction I noted that as well, although most summaries did not include that information. My codes at first were very specific (such as: a) "failed to object to in-court identification"; b) "represented alternate suspect"; c) "failed to review exculpatory serology report"; d) "failed to request fingerprint analysis") and then as larger patterns of failure began to emerge, my codes evolved into more general categories (the examples listed above evolved as follows: a) "trial error(s)"; b) "ethical violation(s)"; c) "failure to investigate discovery"; d) "failure to investigate physical evidence"). Drawing from the summaries, I created the bullets below (and those additionally found in Appendix A., pp. 48-59) to succinctly exemplify and quantify each type of investigative failure in the selected cases after completing this iterative coding and categorization process.

In the second stage of analysis, I reviewed and indexed all available source documents in the non-public archive from which the NRE summaries were written for all cases in which a failure to investigate was indicated or suggested, and also reviewed numerous source documents for ILD cases in which failure to investigate was not indicated in the summaries as a cross-check. Source documents varied in type and volume for each case, but generally consisted of media reports, appellate and postconviction briefs and petitions, and reviewing courts' opinions and orders[15]. The sample was reduced to 366 cases after removal of 15 cases in which either the specific attorney failure could not be discerned from either the summary or the source documents, or the apparent failure occurred at the appellate stage[16]. As a result of this second-stage review, I re-classified some cases and found additional types of error in others.

Investigative or legal missteps?

Inadequate legal defense can be divided into some general categories, in which failure to investigate is a distinct area. Other areas of counsel failure relate more directly to the lawyer's unique role as holder of a Juris Doctorate, member of the bar and officer of the court. Along with "Failure to Investigate", Benner's (2009) "IAC Classification" (p. 356) schema includes other categories of lawyer ineffectiveness that relate to those functions solely within the province of licensed attorneys. Drawn from opinions resolving successful IAC claims, these include: "Lack of Trial Skills"; "Failure to Raise Mental Health Issue"; "Failure to File Notice of Appeal"; "Lack of Knowledge of Law"; "Guilty Plea Advice"; "Failure to Suppress Inadmissible Evidence"; "Failure to Object"; "Failure to Call Witness", etc. (Benner, 2009, pp. 356-372). Much of the literature on wrongful convictions and ineffective assistance of counsel does not make such a clear distinction between 1) counsel's mandate to investigate and 2) the duty to be

[15] In a fair number of cases, there was no written opinion and relief was granted from the bench, or an order was issued without any substantive discussion. Working with an undergraduate research assistant, I collected approximately 50 opinions granting relief that were not previously held in the NRE archive, but some could not be obtained despite our efforts.

[16] Four cases involved only appellate counsel error (D. Bolstad, K. Boyd, Jr, W. Lomax, D. Patrick.); 11 cases could not be classified as any specific type of trial attorney failure, even after review of NRE source documents (M. Belcher, R. Cole, N. Croy, G. Drinkard, B. Ellis, N. Fields, L. Gardner, C. McCollum, M. McCormick, M. Miller, P. Phillips).

ethical, knowledgeable in the law and to make reasonable strategic decisions in the course of trial or plea negotiation. Where the distinction is made, failure to investigate is sometimes included in a list of counsel errors that is dominated by failures that fall squarely into the second category. For example, in describing IAC claims pursued in the first 255 DNA exonerations, West (2010) reports that:

> "…the most common types of claims included defense lawyers who: failed to present defense witnesses (often to establish/confirm an alibi); failed to seek DNA testing or have serology testing done to try to exclude the client; failed to object to prosecutor arguments or to evidence introduced by the state; and failed to interview witnesses in preparation for trial or to cross examine state witnesses… *less frequently reported claims included failure to investigate* [emphasis added], failure to object to an ID, and failure to present expert testimony" (p. 4).

Parsing this list carefully, many of these examples, such as failure to interview witnesses and failure to seek DNA testing, actually indicate a failure to investigate. Fact investigation, legal research and writing, negotiation and litigation are distinct areas of practice that draw on different skill sets and abilities; it makes sense to examine them separately.

To answer my first question, I first read the summary and then reviewed the source material for the ILD cases, and coded the failures of counsel as either failure to investigate (FTI); or a type of legal failure: trial errors (TE), ethical violations (EV), mistakes of law (ML), and pre-trial errors (PTE); or some combination of these. The different types of defense failure, and their frequency in terms of absolute number and percentage of the 366 cases are detailed below in Table 1.

Table 1. *Types of defense failure.*

Type of defense failure	Number of cases	Percentage of cases
Failure to investigate	295	80.6
Trial errors	186	50.8
Ethical violations	45	12.3
Pre-trial errors	34	9.3
Mistakes of law	33	9.0

- 33 cases (9.0%) hinged at least partially on pure mistakes of law, such as an attorney being unaware that witnesses could be subpoenaed from out of state to testify.
- 34 cases (9.3%) included pre-trial legal errors, such as not timely listing witnesses or failing to follow proper pre-trial procedures for entering evidence, resulting in the exclusion of exculpatory witnesses or evidence.
- 45 cases (12.3%) involved gross ethical violations or misconduct, such as attorneys operating under actual conflicts of interest, or, in one case, without proper licensing.
- 186 cases (50.8%) involved trial errors, such as introducing damaging evidence or failing to impeach inculpatory witnesses with evidence in the lawyer's possession. 142 (38.8%) cases involved trial errors along with other types of legal errors and/or failures to investigate; in 44 cases (12.0%), trial errors constituted the sole attorney failure.
- 295 cases (80.6%) involved failure to investigate. In 168 cases (45.9%) FTI was present along with one or more other types of legal failures; FTI was the sole failure in 127 cases (34.7%).
- Of the 36 cases in which ILD was listed as the sole contributor by NRE researchers, 26 (72.2%) involved FTI. Of the 29 ILD cases in which the exoneree had been sentenced to death, 22 (75.9%) involved FTI.

Common fact investigation failures

FTI took a number of common forms in the study sample of 295 cases. The categories were not mutually exclusive, and many cases involved more than one of these. The

different categories of investigative failure, and their frequency in terms of absolute number and percentage of the 295 cases are detailed below in Table 2.

Table 2. *Types of investigation failure.*

Failure to investigate:	Number of cases	Percentage of cases
Inculpatory witnesses	113	38.3
Exculpatory witnesses	87	29.5
Physical evidence	70	23.7
Alibi evidence	66	22.4
Alternate suspects	59	20.0
Medical evidence	53	18.0
Discovery material	48	16.3
Crime scene	16	5.4
DNA evidence	14	4.7
Client's mental status and/or psychological background	12	4.1
Client's criminal history	9	3.1
Client's physical condition	5	1.7
Client's cultural and linguistic background	2	.7

Below I describe these common forms and provide examples adapted from the NRE summaries (The National Registry of Exonerations, 2015). In some of the examples, the form of investigative failure described was the critical lapse and in others it was not. A few are from cases where the impact of the investigative failure was either unclear or where the legal failures in the case appeared to be more critical based on the unique circumstances of the case; I include those because they are illustrative of important patterns of investigative failure regardless.

Inculpatory witnesses

Failure to investigate inculpatory witnesses was seen in 113 (38.3%) of the FTI cases[17], making it the most common type of investigative failure across the FTI sample. John Henry Wigmore (1940) declared that cross-examination is "the greatest legal engine ever invented for the discovery of truth" (p. 5) and courts have generally accepted this pronouncement[18] (Epstein, 2008; Simon, 2012; Underwood, 1997). However, some scholars regard it as more shibboleth than valid legal principle. According to Epstein (2008): "The mythic status of cross-examination… actually impedes accurate fact-finding because leading questions are not always an appropriate or sufficient tool for truth finding…" (p. 437). The effectiveness of cross-examination as a means of dismantling an accusation perhaps depends less on eloquence in the courtroom than on prior knowledge brought to bear; the skill of an archer cannot overcome an empty quiver: its value "is questionable if defense counsel is not armed with background material derived from pretrial investigations of the surrounding circumstances and expert consultation on the technical facets of these circumstances" (Bowman, 1970, p. 643). Underwood (1997) says this about the limits cross-examination: "By the time a trial begins, any searching (for facts, witnesses, documents, etc.) had better be over" (p. 121). This is an especially pertinent observation in light of the fact that most criminal cases are resolved by dismissal or plea; cross-examinations are nearly as rare as trials themselves.

[17] L. Adams, R. Addison, R. Alowonle, J. Amrine, O. Anthony, M. Austin, E. Baker, J.L. Baker, B. Baran, J. Bass, J. Becerra, W. Berry, J. Blackshire, Ty Bradford, M. Bravo, G. Bright, R. Britton, R. Buchli II, M. Caldwell, V. Caminata, M. Catalan, C. Chatman, K. Y. Cheung, D. Clay Sr., E. Coker, R. Connor, M. Conteh, R. Cridelle, W. Cservak, R. Cullipher, Y. Eldridge, Ernesto Flores, Jr., J. Garcia, T. W. Gassman, G. Gathers, R. Gondor, G. Gross**,** M. Hash, B. P. Herrera, J. Herrera, M. Hill, J. Jackson, E. Jackson-Knight, Andrew Johnson, Terrell Johnson, Jerry Jamaal Jones, Levon Jones, D. Kelly, J. Kluppelberg, R. Knupp, L. Lamb, R. E. Larson, D. M. Lawrence, W. Lopez, A. Luster, E. Lynn, F. Macias, T. Mason, B. McLaughlin, S. Mellen, Roberto Miranda, K. Mitchell, A. Morris, B. Neirynck, J. Palazollo, C. Parish, K. Pavel, V. Persad, J. C. Pichardo, C. Potts, J. Ramirez, J. Ramos, G. Randolph, E. Reasonover, K. Register, R. Resh, W. Robles, J. Rodriguez, C. Roesser, L. K. Rojas, R. Rose, R. Ross, R. Sanders, A. Sifuentes, T. Simmons III, L. Sinegal, Timothy Smith, P. E. Statler, G. Steidl, K. Stewart, W. Swift, J. Talamantez, D. Talley, D. Taylor, J. Tears, C. Thomas, P. Thompson, C. Tomlin, J. Trakhtenberg, J. Trulove, E. Truvia, D. Tucker, A. Vargas, J. Vaughn III, M. Verkullen, E. Wagstaffe, Joseph Walker, G. Walls, M. Weiner, J. Wheeler-Whichard, H. Whitlock, Antonio Williams, Emmaline Williams

[18] See *California v. Green* (1970); *Dixon v. United States* (2006); *Lilly v. Virginia* (1999); *Watkins v. Sowders* (1981).

Within this category, a number of distinct types of valuable impeachment evidence were not investigated.

Criminal history:

- A man who accused Magilie Conteh of robbing him could have been impeached with a prior conviction for a crime of dishonesty, but the trial attorney took the prosecutor's word for it when told that the victim had no record (Jouvenal, 2013).

Reputation for dishonesty or mental disturbance:

- Victor Caminata was convicted of an arson in which his girlfriend had incriminated him. His postconviction defense team discovered that five years before the fire, the girlfriend had filed a false police report against a previous boyfriend (Possley, 2014a).

Evidence of dishonesty or confusion in discovery materials:

- Terrence Mason's attorney failed to use a helpful police report when he cross-examined the only eyewitness to a robbery who effectively implicated Mason. Under questioning by Mason's appellate counsel at a post-conviction proceeding, the lawyer said that he "must not have noticed" the report but later claimed, in response to a professional grievance, that he "had chosen not to make an issue" of the police report "lest it backfire" (*Mason v. Scully*, 1994, pp. 27-28).

Statements in direct conflict with other credible evidence:

- George Lindstadt was accused of a sexual assault by a complainant who contradicted her own statement, and the court that granted relief found that a "lawyer who conducted an adequate investigation could have elicited testimony by Lindstadt that he did not live with his daughter at the time of the alleged abuse, and in that way (and others) shaken the credibility of both key prosecution witnesses" (*Lindstadt v. Keane*, 2001, p. 193).

Personal grudge:

- Roberto Miranda provided his first attorney with the names of six people who could help prove his innocence, but the attorney did not interview any of them. One of those people was the ex-girlfriend of a man who claimed to have been present when Miranda stabbed the victim to death. When she was finally interviewed by Miranda's habeas attorney, she told of a romantic rivalry that had existed between Miranda and the witness, who had made threats against Miranda. The judge who granted Miranda's writ held that "the lack of pretrial investigation and preparation by trial counsel cannot be justified" (qtd. in Gross, c. 2012a).

Financial incentive:

- Carl Chatman was accused of sexual assault in a Cook County courtroom by an aide in 2002. Many years earlier, the woman had received a settlement after claiming to have been raped in an office building. She filed suit against Cook County just days after accusing Chatman and was eventually awarded over $400,000 (Possley, 2015a).

Exculpatory witnesses

In an adversarial system there is a clear requirement that defense counsel test the state's case, but in theory it is not necessary to produce witnesses to establish reasonable doubt. In some jurisdictions there may be procedural advantages to presenting no evidence at all. Unlike static exculpatory documents, witnesses are unpredictable and are more easily impeached. Practically speaking, these may be valid reasons for not listing and presenting witnesses whose testimony is potentially exonerating. However, there is no sound strategic basis for failing to investigate and discover such witnesses in the first place. No decision can be made about whether calling witnesses is worth the risk if the witnesses are never located and evaluated. Yet in 87 cases[19]

[19] J. Adams, R. Addison, R. Alowonle, R. Anderson, O. Anthony, M. Austin, B. Blake, L. Boyd, R. Bragg, M. Bravo, D. Brown, R. Buchli, S. Burgess, M. Caldwell, X. Catron, O. Cesar (1), O. Cesar (2), A. Chaparro, G.

(29.5%), such witnesses[20] existed and were not pursued.

- Darron Goods' lawyer never interviewed the shooting victim in his 2005 Baltimore case, who was not called at the trial but later testified at a post-conviction hearing that Goods was not the assailant. The trial lawyer later explained that the omission was due to his inability to locate the victim, who was later discovered to have been in juvenile detention at the relevant time, telling a journalist that "it is the state's obligation to bring in the victim anyway… I had no way to find him…"; the judge who granted Goods relief said the trial attorney "could have or should have" interviewed him pre-trial (Bykowicz, 2005).

- Kelvin Wiley was convicted of beating his girlfriend after his lawyer failed to locate helpful witnesses-- neighbors who saw another man enter the victim's San Diego home before she was attacked inside. The judge who vacated Wiley's conviction cited his lawyer's failure to discover those witnesses through a competent investigation as grounds for relief (Alvord, 1992). Wiley's appellate attorney blamed the prosecutor as well: "My own feeling is that the district attorney has an obligation to make sure a proper investigation is done.. They had a white girlfriend who said her black boyfriend did it, and they didn't feel they had to investigate any further" (qtd. in Alvord, 1992).

Physical evidence

Criminal defense lawyers have been criticized for their lack of facility with scientific

Chapman, T. E. Chumley, E. Coker, R. Connor, R. Cullipher, H. Cunningham, A. L. Day, Y. Eldridge, O. Engesser, J. Fritz, W. Goodman, D. Goods, C. Greene, P. Hampton, N. Harris, W. Harris, D. Helmig, M. Hernandez, B. P. Herrera, J. Herrera, S. Hogan, D. Howard, E. Hughes, J. Jackson (WA), T. Jasin, Juan Johnson, J. Kluppelberg, R. Knupp, D. Larsen, D. M. Lawrence, C. Livingston, G. Lopez, W. Lopez, F. Macias, P. P. Magnan, M. McCormick, T. Merrill, Roberto Miranda, C. Mitchell, W. Nieves, M. Nnodimele, S. Ortiz, J. Palazollo, D. Paradis, M. Pardue, C. Parish, J. C. Pichardo, D. Polonia, D. Provience, J. Ramirez, W. Robles, M. Rocha, C. Roesser, L. K. Rojas, J. P. Rollin, A. Sifuentes, L. D. Sims, K. Stewart, J. Talamantez, P. Thompson, S. Thompson, J. Trulove, G. Valdez, E. Wagstaffe, V. Washington, H. Wells, J. Wheeler-Whichard, K. Wiley.

[20] Excluding alibi witnesses, which will be discussed in a separate section.

evidence. Jonakait (1991) famously posited that perhaps "attorneys are reasonably bright people who became lawyers partly because they were afraid of science and math… If so, lawyers will not examine the scientific evidence with as much skepticism as they would other information." (p. 349). In 70 cases[21] (23.7%), physical evidence was not fully investigated and either went unchallenged or unpresented.

- After Jerry Jamaal Jones was accused of assaulting a cellmate, his trial attorney was provided with a handwritten journal of the accuser in which he described how he was falsely implicating Jones (Stingl, 2011). The attorney explained his decision to disregard the journal and investigate no further: "I was suspicious of it from the beginning. No one in my experience keeps a diary in the jail and admits crimes in it" (qtd. in Stingl, 2011). A much less experienced post-conviction attorney had the journal examined by a handwriting expert who confirmed its authenticity, and Jones' conviction was vacated (Stingl, 2011).

Alibi evidence

Alibi evidence was not properly investigated in 66 cases[22] (22.4%). Alibi evidence can be incredibly powerful, but it can also backfire badly if it is uncorroborated or appears tainted in some way: "…disbelieved alibis are typically deemed to be deceitful, and thus are readily taken

[21] O. Anthony, R. Appling, H. Baltrip, M. Bravo, J. R. Bromgard, S. Burgess, V. Caminata, L. Canen, E. Carter, O. Cesar (1), G. Chapman, D. Contee, C. R. Dexter, Jr., P. Dombrowski, G. Drennen, E. Esse, G. Ford, D. L. Gavitt, A. Golden, R. Gondor, Jennifer Hall, D. Hamilton, B. Harris, M. Hash, J. Hebshie, E. Hughes, E. Jackson-Knight, H. James, Juan Johnson, Jerry Jamaal Jones, D. Kelly, J. Kluppelberg, D. Larsen, K. F. Lee, C. Livingston, K. Martin, S. Mellen, J. Miller Jr., L. Montoya, S. V. Morales N. Ventura, N. Moreno, C. Munoz, L. Murray, G. Nelson, M. Nnodimele; C. Parish, L. Pettit, K. Register, R. Resh, J. Rodriguez, C. Roesser, P. Rose, J. Savory, L. Sinegal, G. Steidl, R. L. Stinson, W. Swift, J. Tomaino, S. Toney, J. Trulove, E. Truvia, G. Vann, Carl Veltmann, Christopher Veltmann, E. Washington, H. Whitlock, G. Wilhoit, James Williams, C. Wilson, R. D. Wyatt.

[22] R. Alvarez, J. Amrine, J. S. Anderson, M. Austin, C. Avery, E. Baker, J. Bass. A. Carmona, E. Carter, O. Cesar (1), M. Conteh, D. Corner, L. A. Day, P. Dombrowski, Ernesto Flores, Jr., D. Foster, J. Garcia, T. W. Gassman, R. Gondor, D. Hamilton, C. Harding, W. Harris, D. Helmig, J. Herrera, M. Hill, D. Hurt, Timothy Johnson, E. E. Larson, G. Lindstadt, W. Lopez, A. Luster, R. Madrigal, L. McGee, H. Miller, C. Montgomery, L. Montgomery, J. Moore, G. Nelson, A. Ortiz, L. Palmer, C. Parish, Pavel, D. Polonia, C. Potts, E. Raby, Jr., S. Radillo, Jr., J. Ramirez, R. Resh, R. Ross, D. Ruby, J. Savory, A. Sifuentes, T. Simmons III, J. E. Smith, P. E. Statler, K. Stewart, D. Taylor, R. D. Thomas, E. Wagstaffe, J. Walker, W. Walker, B. Ward, V. Washington, M. Weiner, J. Wheeler-Whichard.

to imply guilt" (Simon, 2012, p. 163) (see also Garrett, 2011, pp. 156-158). Some alibi witnesses appear to be more effective than others for imputing actual innocence. Absent physical corroboration of the alibi (e.g., video footage, time cards), motivated familiars (relatives, friends and domestic partners) are the least convincing, while strangers and non-motivated familiars (such as personnel at a business one frequents) are most readily believed (Culhane & Hosch, 2004; Hosch et al., 2011; Olson & Wells, 2004). Jurors may assume that a defendant's family members and friends would fabricate to spare a loved one from being convicted. In some of the NRE ILD cases, weak alibi evidence was presented without the supporting material that would have made it much more convincing. In other cases, strong alibi evidence was never fully investigated in the first place. In one case, a patently false alibi was presented, undermining all credibility the defense may have otherwise enjoyed.

Institutional alibis:

- Jose Garcia was sentenced to 25 years to life for murder despite the fact that he was incarcerated in the Dominican Republic when the victim was killed in the Bronx. Although the victim's sister testified for the defense that she had spoken to Garcia by telephone on the night of the murder, when she believed he was in the Matanzas jail, she was forced to acknowledge that she had not dialed the phone herself (*Garcia v. Portuondo*, 2006). The trial attorney cross-examined an eyewitness who had identified Garcia but presented no other witnesses or documents to corroborate the alibi (*Garcia v. Portuondo*, 2006). A United States Magistrate found that the failure to have an investigator seek police records and travel documents and to interview potential witnesses constituted ineffective assistance and the reviewing appellate court agreed: "His duty was to investigate, not to make do with whatever evidence fell into his lap.[fn omitted] …In failing to conduct any investigation at all, [his] performance at trial fell well below objective standards of reasonable representation" (*Garcia v. Portuondo*, 2006, p. 284).

Employment alibis:

- Joshua Moore was working at a golf shop in Huntington Beach, California when a video store was robbed, but his attorney failed to develop the evidence that could prove his alibi, including two receipts—one of which bore Moore's fingerprints (Possley 2012a). The lawyer acknowledged that he failed to contact two of Moore's co-workers who could also verify his alibi, despite being aware of their potential testimony (Schou, 2011). Cynthia Moore, Joshua's mother, said that, "When we hired him, he told me he knew how to handle the case--that he was an ex-DA and was confident he could get Josh off" (qtd. in Schou, 2011).

Consumer alibis:

- Carl Montgomery was purchasing a bicycle at Sears at the time of the crime he was accused of committing and had a receipt, but his lawyer failed to present the clerk's disinterested and potentially highly persuasive testimony in court. Rather, he presented twelve close friends and relatives of Montgomery as his alibi witnesses, who were not believed by the jury. The appellate court, granting relief, court noted that the lawyer "testified that his failure was due to 'inadvertence' as well as the fact that he 'simply didn't believe' [Montgomery]" (*Montgomery v. Petersen*, 1988, p. 412) and disapproved of the notion "that defense counsel's conclusory statement that he did not believe his client was an adequate basis for ignoring such an important lead. Indeed, if counsel had taken the few steps necessary to identify and interview the Sears clerk, he may well have formed a more favorable view of his client's veracity" (*Montgomery v. Petersen*, 1988, p. 414).

Backfiring alibis:

- Ronald Ross testified that he had been watching an NBA basketball playoffs game when a shooting occurred, but was contradicted by prosecutors who entered evidence that the

shooting occurred before the game. This could have been rebutted with the fact that a different playoffs game was being televised at the time in question, but his attorney failed to marshal that evidence in his defense and he was convicted (Possley, 2013a).

Even worse, Donald Ruby's lawyer presented an alibi witness who was flatly contradicted by documentary evidence showing that she was actually at work at the relevant time (Miller, 1993); it was only at his second trial that irrefutable evidence, based on blowfly eggs, was introduced to show that the murder occurred at a time when Ruby was 90 miles away (Possley, 2014b). An innocent defendant who lacks a strong alibi may be especially desperate to produce one. It is incumbent on defense attorneys not only to locate sound alibi evidence and any corroboration where it exists, but to vigorously test any proffered alibi evidence, as the prosecution likely will, and be certain it is above reproach before presenting it in court[23]. In the absence of full investigation, counsel may err by opening the door to damaging evidence against his own client. When that evidence is "so damaging to his client's case that it may fatally taint the trial," introducing it becomes a substantive violation of counsel's duty to provide effective representation (Gershman, 1997, p. 268).

Alternate suspects

The SODDI (Some Other Dude Did It) defense, a term credited to Steven Lubet (1992), involves arguing or implying that the actual perpetrator is someone other than the defendant on trial. McCord (1995) refers to this as the "aaltperp" (alleged alternate perpetrator) strategy, and notes the hurdles that must be overcome to adduce such supporting evidence in court even where it exists[24]. When deployed without supporting evidence it tends to fail, and worse, subjects the theory of defense to mockery and derision by the prosecution in closing argument. Nonetheless,

[23] See *Henry v. Poole*, 409 F.3d 48 (2d Cir., 2005): "…it is 'axiomatic'…that the presentation of false exculpatory evidence in general, and false alibi evidence in particular, is likely to be viewed by the jury as evincing consciousness of guilt" (p. 72).

[24] Some of the more onerous restrictions on introducing such evidence were invalidated in *Holmes v. South Carolina* (2006).

if sufficiently reliable, such evidence can be among the most persuasive in creating reasonable doubt and thus lead to acquittal or outright dismissal. The defense is never required to prove who actually committed a crime, but it is certainly helpful when possible. In 59 (20.0%) of the FTI cases[25], credible evidence of alternate suspects was not fully investigated by defense attorneys before trial or plea.

- Gilbert Amezquita was sentenced to fifteen years in prison for an aggravated assault in which a cell phone was stolen. Had his trial attorney contacted the people who were called from or used the phone after it was taken from the victim, at least one of whom was listed in a police report provided to the defense before trial, he would have discovered Gilbert Guerrero, the actual attacker. The trial attorney admitted that he had done nothing more than read a file on the case and did no independent investigation. Paid $2500 by Amezquita's family, the trial attorney later told the press: "He was going to have a hard enough time (just) paying my fees. He did not have money for an investigator" (qtd. in McVicker & Khanna, 2003).

In several cases, the failure to investigate an alternate suspect apparently stemmed from an ethical violation—lawyers operating under a conflict of interest in which they also represented or were retained by the alternate suspect[26].

Medical evidence

Related to failures to properly investigate physical evidence, a common pattern seen in 53 (18.0%) of the FTI cases[27] was a failure to investigate the medical evidence that was used to

[25] B. F. Allen, R. Alvarez, G. Amezquita, J. Amrine, O. Anthony, J. Bass, J. Bell, Jr., Debra Brown, R. Buchli II, M. Caldwell, A. Chaparro, G. Chapman, D. Clay, Sr., E. Daniels, R. Dudley, R. Gondor, K. Harris, W. Harris, M. Hash, D. Helmig, L. D. Jones, T. L. Jones, J. Kluppelberg, L. Lamb, D. Larsen, D. M. Lawrence, R. Leverett, G. Lopez, E. Lynn, R. Madrigal, P. P. Magnan, B. Miller, Roberto Miranda, L. Montoya, N. Moreno, L. Murray, C. Parish, R. Perez, D. Polonia, C. Potts, S. Radillo, Jr., J. Ramirez, R. Resh, L. Roberts, R. Ross, S. Schulz, A. Sifuentes, L. Sinegal, K. Stewart, R. D. Thomas, A. Tiscareno, S. Toney, D. Tucker, E. Vamvakas, V. Washington, R. Williamson, S. Wilson, Yarbough.

[26] A. Chaparro, E. Daniels, L. D. Jones, N. Moreno.

[27] A. Baba-Ali, B. Baran, J. Baumer, R. Baylor, D. Bell, L. Boyd, B. Briggs, G. Chapman, D. Christoph, R. Coney, R. Cullipher, Y. Eldridge, L. Eze, J. Fritz, R. Greer, W. Hales, D. Hamilton, R. Hays, G. Lindstadt, D. Loveless, J.

inculpate defendants, or failure to develop such medical evidence when it was exculpatory in nature.

- Debbie Loveless and her common law husband John Miller were convicted after her 4-year-old daughter was killed in a brutal attack. The child had actually been bitten by a dog, as the pair claimed, but their attorneys failed to discover medical records indicating that wounds which appeared to have been caused by a knife were actually caused by a surgeon's scalpel; in attempting to save the child's life, tissue damaged by the dog's teeth had been cleanly excised. As well, autopsy photographs showed a paw print on the child's back (Possley, 2015b; Possley, 2015c). Among the findings of fact of the trial court which ultimately granted relief were that Miller's trial attorney "did not pursue the dog defense theory because the State's attorney told him the dogs were only 'puppies'" and that neither of the privately retained attorneys for Loveless and Miller shared autopsy photos with a qualified expert (qtd. in FitzGerald, 1994).

A number of defendants were convicted after their attorneys failed to develop medical evidence to dispute diagnoses of Shaken Baby Syndrome[28]. Another group of defendants was convicted of child sex abuse even though medical evidence suggested no assaults had occurred[29] Robert Coney and Leroy Orange (see also Bogira, 2005) were convicted based on their false confessions, despite available medical evidence demonstrating that they had been physically brutalized while in custody of police interrogators.

Discovery material

Requesting and closely examining discovery material from the prosecution is the most

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Miller, S. V. Morales, N. Moreno, L. Murray, D. Okongwu, L. Orange, H. Overton, D. Paradis, M. Parker, K. Pavel, S. Ralston, J. Ramos, N. Rhoades, J. P. Rollin, D. Ruby, P. Stallings, G. Steidl, A. Tiscareno, D. Tucker, G. Vann, Carl Veltmann, Christopher Veltmann, M. Verkullen, M. Ware, M. Weiner, H. Whitlock, J. Willett, Emmaline Williams, S. Wilson, J. Wosu, A. Yarbough, E. Zimmerman.

[28] J. Baumer, W. Hales, S. Ralston, A. Tiscareno, M. Ware.

[29] L. Eze, R. Hays, G. Lindstadt, D. Okongwu, M. Parker, K. Pavel, J. Ramos, Emmaline Williams, James Williams, J. Wosu.

basic element of investigating the state's evidence, but that was not done in 48 (16.3%) of the FTI cases[30].

- David Tucker's trial lawyer testified in postconviction that his lack of knowledge that the victim had identified another person as the man who beat him was the result of his failure to ask for police reports; he "had trusted the prosecution to provide him with relevant documents and he had not requested police investigation reports" (*Tucker v. Prelesnik*, 1999, p. 751).

- Rafael Madrigal's trial attorney did not transcribe audiotapes he received from the prosecution despite having been granted a continuance to examine them, so he never learned that they contained valuable exculpatory evidence. Additionally, he ignored reports of interviews conducted by a public defender investigator, contained in the file he received from that office when he took over the case, that could have led to testimony from his supervisor establishing that Madrigal was at work at the time of the offense (*Madrigal v. Yates*, 2009).

Crime scene

In 16 (5.4%) of the FTI cases[31], a visit to the crime scene would have revealed that the state's theory of the defendant's guilt was impossible or highly unlikely, but that was not done by a member of the defense team until postconviction. All of these cases involved inculpatory eyewitnesses who could have been effectively discredited—they simply could not have seen

[30] R. Alowonle, A. Baba-Ali, B. Baran, R. Baylor, J. Becerra, J. Bell, Jr., R. Buchli II, E. Carter, G. Chapman, E. Coker, R. Connor, R. Cullipher, O. Engesser, R. Gondor, C. Greene, C. Harding, D. Helmig, H. James, D. Larsen, R. Leverett, E. J. Lloyd, W. Lopez, R. Madrigal, K. Martin, T. Mason, B. McLaughlin, A. Morris, M. Nnodimele, J. C. Pichardo, C. Potts, R. Resh, S. Rigel, C. Roesser, P. Rose, W. Swift, D. Talley, D. Terens, C. Thomas, D. Tice, D. Tucker, E. Wagstaffe, E. Washington, V. Washington, H. Wells, Antonio Williams, Emmaline Williams, S. Wilson, A. Yarbough.

[31] R. Addison, O. Anthony, G. Bright, M. Caldwell, J. Garcia, G. Gathers, D. Howard, John Jackson, Terrell Johnson, J. Kluppelberg, F. Macias, K. Mitchell, K. Register, J. Talamantez, E. Truvia, Emmaline Williams.

what they claimed to see from their stated vantage point.

John Jackson was represented by a private attorney who received a flat fee for all his work on public defense cases. When answering allegations of neglect by a different client, the attorney argued that the client "believes my role is to find proof that he's innocent of this particular charge. I've explained to him the role, or my role, is to see his constitutional rights are protected" and yet conceptualized that role as that of a referee rather than that of an advocate (qtd. in Armstrong, Davila, and Mayo, 2004). The judge that granted Jackson's writ of habeas corpus said the attorney's failure to visit the crime scene amounted to the omission of a "fundamental task" and, combined with his other failures to challenge the state's inculpatory facts, constituted ineffective assistance (Armstrong, Davila, and Mayo, 2004). The judge admonished that the attorney: "those are the facts that you begin with, not the facts you end with" (qtd. in Armstrong, Davila, and Mayo, 2004).

DNA evidence

DNA evidence has been heralded as a "truth machine" (Kreimer, 2005)[32], but it was not properly investigated in 14 (4.7%) cases[33] of exonerees convicted in the DNA era (1990 or later). In eight cases, defense attorneys did not request that biological evidence be tested for DNA. Cheydrick Britt was convicted in Florida in 2004 but the DNA testing that exonerated him was not done until 2013 (Possley, 2013b). In another case, that of Lafonso Rollins in Illinois, exculpatory DNA test results sat in the state's crime lab but were never requested by his lawyer (Center on Wrongful Convictions, c. 2102a). In two other cases, DNA testing was done incorrectly or results were described deceptively by the state's analysts. The testing done in Randall Mills' 1999 sexual assault case actually excluded him, but his attorney failed to discover this (Possley, 2014c). In Florida, Jesse Miller Jr. was convicted at his first two trials in large part

[32] The assertion that DNA evidence constitutes a "truth machine" is highly problematic (Aronson & Cole, 2009), but it is nonetheless quite convincing to juries.
[33] G. Amezquita, D. Boyce, M. Bravo, C. Britt, W. Cservak, R. Gondor, A. Hicks, Richard Johnson, J. Miller, Jr., R. Mills, L. Montoya, C. Parish, R. Resh, L. Rollins.

on the basis of DNA evidence that state experts claimed incontrovertibly placed Miller at the crime scene, but was acquitted at his third trial after his new attorney hired an independent expert to challenge the flawed DNA examination done by the state's analyst (Duret, 2014; Freeman, 2014).

Client's mental status and psychological background

Most of the 12 (4.1%) FTI cases in this category[34] involve defendants who made incriminating statements as a result of their mental illness or intellectual disability.

- Dayna Christoph, a juvenile, confessed to sexually abusing her younger sister and was convicted; the Washington Court of Appeals found that "a minimally adequate investigation would have discovered Ms. Christoph's documented long-term mental and emotional difficulties and sufficient exculpatory evidence to warrant dismissal of the charge of the information, or at the very least, to support a plea bargain for reduced charges"; Christoph's lawyer devoted less than two hours to her case (*State v. Christoph*, p. 4, 2000).

Client's criminal history

In nine cases[35] (3.1%), trial attorneys failed to investigate their clients' criminal records, thus crippling their defenses.

- Alexander Hebrard pleaded guilty to illegal possession of a firearm, despite the fact that the underlying felony charge which would have made him ineligible to possess such a weapon had actually been dismissed prior to his plea (Possley, 2013c).

[34] A. Carmona, B. Chen, D. Christoph, E. Coker, R. Cullipher, H. Cunningham, B. Harris, E. J. Lloyd, L. Montoya, S. Ortiz, C. Stonehouse, R. Williamson.
[35] L. Acero, J. S. Anderson, C. Eason, G. Ford, J. Garcia, A. Hebrard, B. Henly, L. Montgomery, S. A. Rivera,

Client's physical condition

In five cases[36] (1.7%), the physical condition of the defendants was inconsistent with their guilt, but their attorneys failed to develop the evidence that might have exonerated them on those grounds. Anselmo Aviles was suffering injuries from a motor vehicle accident and was on crutches on the day of a 1988 home invasion he was charged with, but his attorney failed to obtain and present the medical records and testimony of his doctors that proved this (Possley, 2012b). Harry Miller was recovering from a recent stroke in December 2000 when a woman was robbed by an assailant wielding a knife, *in another state*, but none of his caregivers were called to testify and he was convicted (Denzel, c. 2012a). Cherice Thomas was legally blind and would have had great difficulty executing the shooting that she was convicted of without her glasses, not worn by the perpetrator, but her lawyer did not pursue that evidence in her defense (Possley, 2013d).

Client's cultural and linguistic background

In two cases[37] (0.7%), attorneys failed to investigate the ways in which their clients' particular cultural backgrounds might have manifested a false appearance of guilt and failed to obtain effective translators. Anthropologists could have been called to explain how the cultures and languages of Boping Chen (Chinese) and Santiago Morales (Mixtec) might have influenced their respective demeanors and occluded their understandings of critical court proceedings (Possley, 2012c; Possley, c. 2012a).

Conclusion: The power of comprehensive pre-trial defense investigation

In trying to discern some greater meaning from these categories of investigative failure, what I find most notable is that the largest incidence occur in arenas that fall most clearly outside the trial lawyer's traditional skill set: interviewing witnesses and recognizing issues surrounding

[36] A. Aviles, N. Brown, H. Miller, S. Rigel, C. Thomas.
[37] B. Chen, S. V. Morales.

scientific evidence. In contrast to the relatively small number of investigative failures that might be described as a complete abdication (such as failing to request discovery materials), the investigative failures in my sample were mostly of the type that might be expected to result when lawyers operate without the necessary assistance.

In addition, though the vast majority of cases described here were not death penalty cases, the categories of investigative failure track closely with the specific tasks that ABA (2003) guidelines require for capital guilt phase investigation: obtaining discovery, interviewing potential witnesses, examining physical evidence, viewing the crime scene, and exploring the client's background as it relates to culpability. Investigations that comport with this high standard were necessary in these cases, but did not occur.

The power of comprehensive fact investigation

Attempting to apply facts learned later to a particular moment in time and place when a defendant was being tried is inherently problematic. Although I tried to be conservative about categorizing cases as ones in which the evidence that helped free a defendant in postconviction would have done so at the trial level, I imagined a counterfactual in which reasonable and impartial jurors heard and weighed the evidence and were not unduly influenced by extralegal factors. It may be that the jurists who granted relief in these cases were more amenable to evidence of innocence than lay persons drawn from communities affected by crimes that were frequently shocking in nature. On the other hand, the burden of proof shifts from the state to the defendant at the appellate level, so it may be that these factors tend to balance each other out. And many of the defendants were retried by juries that acquitted them when the previously undiscovered evidence was finally presented, though perhaps by more gifted trial attorneys than those they initially received.

In order to address the final research question, it was necessary to make a subjective judgment about whether a proper investigation would likely have prevented those wrongful convictions where an investigative failure had been present. Here I tried to be conservative, erring on the side of answering in the negative. For instance, where alibi evidence was first

presented in postconviction proceedings along with other newly discovered evidence of innocence, I did not assume that the alibi evidence presented at trial alone would have been sufficient to prevent conviction unless it was strongly corroborated (e.g., the individual was indisputably incarcerated at the time of the crime or had other unassailable proof). If an exoneration came about because of a long-delayed recantation, confession by an alternate suspect, DNA testing that was unavailable at the time of trial, or some other extraordinary event, I did not deem the failure to investigate a relatively inconsequential piece of exculpatory evidence as a case where having done so would likely have prevented the conviction.

In 16 cases the unexplored evidence probably would not have made a difference in light of other circumstances of the case. For example, while Daniel Taylor's lawyer failed to discover that one of the police officers whose testimony was critical in rebutting his alibi had been accused by a judge of lying in court four months earlier, along with other evidence supporting the alibi, a local newspaper was able to do just that (Possley, 2014d). But in light of the fact that Taylor had confessed, along with a number of other youths who implicated him as well as themselves (Possley, 2014d), it seems unlikely that such evidence would have prevented his conviction. His exoneration came only after the Illinois Attorney General's Office found that the state's attorney had withheld evidence that seven police officers had actually confirmed Taylor's alibi (including two who had testified otherwise at his trial) (Possley, 2014d); no amount of diligent defense investigation was likely to have dislodged that evidence in the absence of the Attorney General's review.

In 53 cases I was not confident to make a determination, either because it did not seem clear based on the available information or because I believed the case was simply too close to call. Joy Wosu's case is an example of one involving circumstances in which I felt no definitive judgment could be made. Wosu was convicted of sexually abusing two twin seven-year old girls, who claimed she had assaulted them at their birthday party (Possley, 2015d). Her attorney failed to investigate medical evidence that scarring in the girls' genital regions pre-dated the accusation or to introduce available testimony that hymenal scarring was not a valid indicator of abuse

(Possley, 2015d). Sixteen years later her conviction was overturned on precisely those grounds (Possley, 2015d), yet at the time of Wosu's 1993 trial, the mantra of the day was "we believe the children" (see Coleman & Clancy, 1990; Moston, 1990). In 1993, the jury might well have agreed with that sentiment, even with the medical evidence in Wosu's favor.

On the other end of the spectrum, it seems reasonably clear that some types of evidence—evidence that in all probability would have been uncovered by a comprehensive pre-trial investigation--would have been quite convincingly exculpatory if not fully dispositive in many of these cases. Police officers claimed that Jeanie Becerra and Arthur Morris obstructed and assaulted them when the officers were summoned to the couple's home in Topeka, Kansas in 2014 (Possley, 2015e; Possley, 2015f). Video of the incident was provided to defense attorneys just before trial but was not viewed at the time (Possley, 2015e; Possley, 2015f). After the trial, a prosecutor discovered that the video showed no illegal behavior on the part of Becerra and Morris (Possley, 2015e; Possley, 2015f). Had the attorney viewed the evidence prior to trial, it seems likely the case would have been dismissed outright. In another case, the names of two witnesses to a fatal accident were listed in a police report, but the substance of their exculpatory statements were not included in the report (Possley, 2015g). They were never interviewed by Oakley Engesser's defense team before his trial for manslaughter and were not called to testify (Possley, 2015g). It seems reasonable to conclude that if they had been, he would probably not have been convicted.

Of the 295 cases where FTI was present, 226 met my criteria for those in which a comprehensive defense investigation might well have prevented the conviction (See Appendix B., pp. 60-65). This is a subjective evaluation in a preliminary study. Nonetheless, based on my analysis, 13.8 percent of the first 1,635 wrongful convictions documented in the NRE might plausibly have been avoided if the core defense function of fact investigation had been carried out in a more robust fashion.

Chapter 2: Discussion

Losing our (clients') innocence

In most of the cases examined here, we can learn the basic details of a breakdown that occurred but not necessarily why it occurred. Whether the result of inexperience, willfully insufficient diligence, lack of resources or some less tangible process in which the presumption of innocence was abandoned by an advocate at the outset, these data offer incomplete answers. It is simply not possible to attribute a cause of the failure to investigate in the majority of cases, although some case materials do provide an explanation. Insufficient funding is a well-known fundamental and perennial problem. In Texas, Federico Macias' attorneys were compensated with a flat fee that amounted $11.84 per hour and $500 total was allotted to his investigator (*Martinez-Macias v. Collins*, 1991). As the judge who granted him a new trial wrote: "The errors that occurred in this case are inherent in a system which paid attorneys such a meager amount… investigators fared no better" (*Martinez-Macias v. Collins*, 1991, pp. 789-790). In 1985, Eddie Joe Lloyd's appointed attorney in Detroit was given a mere $150 for preparation and investigation (Innocence Project, Inc., c. 2012). Some of the failures to initiate proper investigations were at least partially the result of inexperience: Kia Stewart was represented by a group of Tulane Law School students and a professor who had never conducted a murder defense (Possley, 2015h). Caseload or other systemic pressures were apparent in the defense of Robert Lee Stinson, whose lawyer had only been on his case for two weeks before he was tried (Innocence Project, Inc., 2014). In a few cases, such as that of Kenneth Pavel (*Pavel v. Hollins*, 2001), lawyers incorrectly believed that the state's evidence was so weak that there was no need to mount a zealous defense. And in some, there is indication of the belief that a guilty client was not worth the investment required for of a full investigation. Carl Montgomery's lawyer made little effort to investigate disinterested alibi evidence, later saying, he "simply didn't believe" his client (qtd. in *Montgomery v. Petersen*, 1988, p. 412).

Much has been written about the resource constraints that hobble the provision of indigent defense, but there may be more nebulous cultural and psychological processes at work

as well. There is a large body of research describing how tunnel vision and cognitive biases on the part of police and prosecutors may lead those actors to develop a theory of guilt and discard any evidence that does not conform. Martin (2001) defines tunnel vision in the criminal justice system as "a set of preconceptions and heuristics that causes police investigators to select evidence to build a case for the conviction of their chosen suspect while suppressing or ignoring information and interpretations that point away from guilt" (p. 848). Confirmation bias, defined most simply as the tendency to seek and favor confirmation of a pre-existing belief or hypothesis (Nickerson, 1998), easily leads to tunnel vision and may be responsible for this tendency toward inculpation. In addition to the general human tendency toward confirmation bias, police investigators experience specific institutional pressures that steer that bias forcefully in the direction of clearing cases and assisting prosecutors to obtain convictions (Simon, 2012). Defenders, particularly those who represent the indigent, also face institutional pressures to clear cases and resolve docket backlogs and may be similarly susceptible (Findley & Scott, 2006), if to a lesser degree. Adele Bernhard (2001) contends that, "Another reason for the poor quality of criminal defense services is the unacknowledged but pervasive belief of all participants in the criminal justice system—even criminal defense attorneys—that anyone who has been arrested is guilty" (p. 232).

An interesting finding from Gould and colleagues (2014) was that any prior criminal history increased the risk of an erroneous conviction, even when the past conviction or arrest was incongruous with the instant charge. This suggests something other than a rational reliance on specific and idiosyncratic past behavior as a possible indicator of more recent behavior but, rather, that criminal legal system practitioners may be using mental shortcuts to make guesses about potential guilt or innocence and that these determinations may have a perverse effect on outcomes: "If the defendant has no criminal record, the police are more likely to view inculpatory evidence with skepticism, arguing that this is not the type of person who is likely to commit a crime. They are more likely to investigate whether a mistake has been made" (Gould et al., 2014, p. 498). Defense attorneys may make similar calculations, and this could have an

especially detrimental effect on the poor and people of color. Selection bias resulting from police discretion about whom to arrest, especially for minor crimes, may be amplified at later stages of the process and accumulate along the way to case disposition. Rationing of investigative resources by indigent defenders based on prior record is yet another potential point where disadvantage may manifest in criminal case processing.

Gould et al.'s (2014) study is interesting in another way as well. The authors compared 260 erroneous convictions with 200 "near misses" in which a person was charged but either had his case dismissed (91%) or was acquitted at trial (9%). By using these "near misses" as a matched control sample, they were able to identify statistically significant factors that predicted erroneous conviction (Gould et al., 2014). Gould and colleagues (2014) found that "weak defense" (involving "defense attorneys who had serious conflicts of interest, who did not bother to prepare opening and closing statements, or who did not have the education or funds to enlist the help of an expert" [Gould et al., 2014, p. 502]) was indeed a predictor of erroneous conviction. Examining the underlying data from this study, in order to determine what defense investigation efforts were undertaken, and by which personnel, in the "near misses" as compared to the erroneous convictions, could provide valuable information. As well, it could be useful to compare conviction rates in public defender offices with staff investigators carrying reasonable caseloads to those without, although it might be very difficult to isolate the investigator effect amid the confounding factor of highly punitive legal culture (which likely accompanies extremely constrained defense resources) resulting in high multicollinearity, and few offices likely have truly sufficient investigative support. Another approach is to conduct ethnographic research at carefully selected public defense provider sites. Significant resources would be required to successfully carry out such a project, but the potential for gaining fine-grained insights about the cultural and psychological barriers to effective defense investigation, beyond the well-known resource constraint problems, could conceivably justify such an investment.

Changing prevailing professional norms

According to Benner (2009), criminal justice systems "have forgotten their primary

mission and increasingly operate under a presumption of guilt… where processing the 'presumed guilty' as cheaply as possible has been made a higher priority than investigating the possibility of innocence" (p. 267). Forty years ago, Judge David Bazelon (1973) wrote that the reluctance to reverse convictions stemmed from judges' belief that most defendants are guilty—what he called "'guilty anyway' syndrome" (p. 26). The belief that everyone is guilty means that judges accept pleas without worrying about their factual basis or whether any defense investigation has been done, and some defense attorneys also suffer from the presumption that their clients are generally guilty (Guggenheim, 2012). The impact of *Wiggins* may have been less than some observers had hoped, but it was certainly remarkable in one way: it explicitly relied on ABA standards as governing the analysis of the reasonableness of counsel's performance[38] (Rigg, 2007). Those standards make clear that investigation must be done even if there is evidence suggestive of guilt, even in non-capital cases. Defense attorneys need to fully internalize this principle: "[i]f defense attorneys presume their client is guilty based on little more than a police report, and do not conduct an independent investigation," (Benner, 2009, p. 332) then law enforcement investigators become the arbiters of guilt. In comparison to the work on police and prosecutors' inculpation biases (see Simon, 2012), there is relatively scant literature examining the ways in which members of the defense bar may also be propelled toward the belief that the most of their clients are probably guilty, causing them to overlook innocence as a result, and how unconscious race and class biases may be implicated in such processes (see Richardson & Goff, 2013).

"[W]ithout facts at their disposal, defense counsel have to make their determinations on impressions made by the defendants. These impressions may well be influenced by misunderstandings that are a function of the social distance that separates middle-class professionals from the lower strata of society" (Scheingold, 2010, p. 312). Legal education that stresses the importance of fact investigation along with teaching culturally competent approaches

[38] In contrast with *Strickland*, where the Court held that ABA guidelines "are guides to determining what is reasonable, but they are only guides" (1984, p. 688).

to representing indigent clients (see Archer, 2013; Holdman & Seeds, 2008; Lopez, 2008) could potentially help mitigate the "everyone's guilty" attitude that may afflict some defenders. Recently, the Michigan State Appellate Defender Office (2014) specifically sought to hire a lawyer who possessed a "'streetwise' instinct beyond the law for the facts surrounding a conviction." Relying on investigators, who occupy a considerably less privileged social and professional position than those who hold law degrees, is perhaps an even more direct way to bridge the chasm between indigent clients and most of their defenders. According to one public defense investigator in North Carolina: "Investigators can bridge the gap with clients. It's not that attorneys can't communicate … but sometimes the title gets in the way. As an investigator, I can go in with a different approach and relate on different level" (qtd. in Lee, Hamblin, & Via, 2019, p. 17). Not only are investigators paid at lower rates than attorneys[39], but a little investigation can go a very long way. Many of the convictions described above could likely have been prevented with even a minor investment of investigative resources. It would not have taken much effort to learn that LaDondrell Montgomery was in jail on an unrelated arrest when his crime of conviction occurred (Possley, c. 2012b), or that Longino Acero was not required to register as a sex offender (Possley, 2014e).

Who needs an investigator?

Lack of zealous and effective representation is a huge systemic problem for indigent defense; it is a crisis that has been apparent for decades. The consequences to defendants who have been falsely accused, it might be asserted, stem as much from anemic fact-finding processes as from limited or unexercised legal expertise. My findings are consistent with such an assertion, with the caveats and limitations noted above. Investigative failures were by far the most frequent type of failure in the NRE ILD cases-- appearing in 80.6% of cases-- and in 43% of those cases,

[39] The highest paid line investigator in the San Francisco Public Defender's Office earns nearly $6,000 less per annum than the salary paid to a starting Deputy Public Defender ($92,928 and $98,514 respectively) (San Francisco Public Defender, 2015). In Los Angeles, the highest paid line investigator earns $112,548 annually, while a Deputy Public Defender with four years' experience earns $167,388 (Los Angeles County Department of Human Resources, 2015). In Florida, investigators hired through the Capital Case Registry receive $40.00 per hour in comparison with $100.00 per hour for appointed attorneys (Commission on Capital Cases, 2015).

the failures were solely investigative. A competent defense investigation can forestall overcharging and excessive punishment as well as lay groundwork for dismissals and acquittals. Yet the defense investigator remains largely invisible to the public, and occupies a relatively marginalized role within the criminal defense profession. Uphoff (2006) describes what happens when investigators are scarce within public defender offices: "I worked at the public defender office in Milwaukee, Wisconsin in the early 1980s. We had six investigators for about forty lawyers. That means each lawyer could use an investigator only on selected cases—those that were most serious and most likely to be tried" (fn 298, pp. 781-782).

Likewise, the lack of investigators is often not mentioned in conversations about the crises in indigent defense. Despite Peng's (2015) description of the severe threat to liberty posed by overburdened investigators, and despite the fact that her boss Derwyn Del Bunton (2016) specifically cited the inability of his office to develop exculpatory evidence when he began refusing new cases, a recent workload study of public defenders in Louisiana did not address the issue of investigators at all (Postlethwaite & Netterville, APAC, 2017). The Louisiana study, using the Delphi method[40], concluded that the state required 1,769 full-time public defenders to adequately represent its public defender-eligible defendants, yet it had only 363—clearly a critical shortage (Postlethwaite & Netterville, APAC, 2017). The respondents, in making their estimates of time required for different types of cases, were told to "presume adequate investigative, secretarial and other support services" (Postlethwaite & Netterville, APAC, 2017, p. 17). How would these estimates of the number of lawyers and lawyer hours that were needed have changed if the assumption was that investigative resources in Louisiana were not adequate, as they almost certainly are not? Staffing 1,769 lawyers based on the recommended ratio of one investigator to every three lawyers would require that there be 590 investigators to work with them. But we do not know from this report if there are even the 121 investigators that would be needed to presume adequate support for the 363 public defenders Louisiana currently employs.

[40] The Delphi method involves iterative surveying of subject experts to achieve consensus regarding the item of inquiry; Postlethwaite & Netterville (2017) surveyed 65 private defense practitioners and 60 public defenders in Louisiana.

We only learn that there are 168 total support staff in the state, because investigators did not comprise a separate category and were collapsed along with support staff (legal secretaries, paralegals, etc.) (Postlethwaite & Netterville, APAC, 2017). In an encouraging development, a more recent workload study employing a similar methodology did look specifically at the level of investigator staffing in the North Carolina public defense system (Lee, Hamblin & Via, 2019). The study concluded that adequate staffing of investigators would require an additional 139 investigators be hired, an increase of 223 percent, compared with a need for 73 percent more lawyers (Lee, Hamblin & Via, 2019). Investigators who were interviewed by Lee and colleagues said that "they can often explain the evidence to clients more effectively than an attorney" (Lee, Hamblin, & Via, 2019, p. 16), and the authors concluded that, "In many cases, the mere fact that they are represented by a defense team that includes an investigator, rather than a solitary attorney, helps to bolster the client's confidence in the representation, leading to better communication" (Lee, Hamblin & Via, 2019, p. 16)

As Bowman (1970) notes, "Not only is an attorney unskilled in investigative methods, but he lacks the time to expend in thorough investigation" (p. 634, fn14). The skills and temperament required of a successful investigator may not be present in all attorneys, yet it is considered acceptable and even expected by the courts[41] (and some lawyers) for defense attorneys to conduct their own fact investigations unless there is some exceptional need for investigative assistance, such as in a capital case. The ABA (2003) guidelines for death penalty cases insist that the defense team include a "professional investigator" (p. 925) (along with a mitigation specialist), but the ABA's (1993) Defense Function Standards imply that use of

[41] Ake v. Oklahoma (1985) held that indigent defendants were entitled to the "raw materials" and "basic tools" of an effective defense (p. 77). But as Blume and Johnson (2013) note, "…since *Ake*, most courts have interpreted 'basic tools' to mean an investigative or expert service that is absolutely necessary to the defense. This is a showing that is frequently impossible to make without access to [those] very services…" (p. 2144). See also Groendyke (2007).

investigators is optional[42]. In contrast, prosecutors have a vast array of investigative assistance at their command, including police and in-house investigators, crime laboratory analysts, and medical examiners (Blume & Johnson, 2013). In denying the appeal of Sabrina Butler, who was later exonerated from Mississippi's death row, the state Supreme Court held that she had "failed to show 'substantial need' for an investigator… Why should an investigator be necessary to perform tasks an attorney ordinarily performs?" (*Butler v. State of Mississippi*, 1992, p. 9). Conflating the roles of lawyer and investigator, as a legal norm, ensures that requests for funds earmarked for investigators will continue to encounter such resistance.

Learning to think like a lawyer is not necessarily good practice for acting as an investigator. Legal thinking trains focus on legally relevant factors, but effective investigators navigate a less ordered sphere, pursuing tangents and conversations that may meander but that serve to establish rapport and sometimes lead to revelation. Many of the people who need to be interviewed in criminal cases have had unpleasant experiences with the legal system and distrust or even despise lawyers; an investigator can serve as a buffer between witnesses and the formal legal process. There are structural reasons to use investigators as well. As Miller (2003) points out, attorneys generally cannot testify and Steiner (1981) notes that "tremendous problems result when the lawyer is the only available possible impeaching witness" (p. 543) (see also fn42). Yet of those attorneys surveyed by Lowenthal (1981) who did conduct witness interviews, only 54.4 percent had a third party present (Steiner, 1981). A prosecutor who conducts his own pre-indictment investigation rather than relying on the police puts his absolute immunity in jeopardy

[42] "Standard 4- 4.3 Relations With Prospective Witnesses**: …**(c) It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel... (e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person." ©1993 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association. See also fn4.

should he misstep[43] (see *Buckley v. Fitzsimmons*, 1993; *Imbler v. Pachtman,* 1976; *Fields v. Wharrie*, 2014). It is worth noting here that, despite the problems with generalizing from the NRE cases, a large number of the 295 FTI cases featured failures to interview lay witnesses, the task that most requires an investigator. Lyon & Smith (2014) assert that most criminal cases "demand the involvement of [defense] investigators" (p. 22).

As late as 2017, a newspaper's investigation found that many court-appointed defense lawyers in Wisconsin rarely worked with investigators, even in the most serious cases (Carpenter, 2017). The paper found that about 100 attorneys had accepted at least 50 felony case appointments without requesting funds for an investigator, and some lawyers had worked as many as 300 cases without investigator assistance. Past-president of the Wisconsin Association of Criminal Defense Lawyers Bill Mansell told the paper: "A minor felony is not a minor thing… I don't know what sort of felony cases you could have that wouldn't require some sort of investigative work,' Mansell said. 'That's unimaginable to me.'" (qtd. in Carpenter, 2017). Ellen Henak, an appellate lawyer and officer of the Wisconsin Association of Criminal Defense Lawyers, shared her opinion as well: "…any case that has any real complexity is going to require an investigator for something" (qtd. in Carpenter, 2017).

Evolving standards

The right to state-paid counsel created by *Powell* once applied only to capital cases but has been elaborated through subsequent holdings to apply to any case in which imprisonment is a possible penalty; in order to prevent wrongful convictions in many more kinds of cases it would be wise to follow the path laid out by the standards for death penalty guilt phase investigation in non-capital cases as well. Ten years after *Strickland*, Stephen Bright (1994) remarked that, "Providing better representation today than the [*Powell*] defendants had in Scottsboro in 1931 requires money, a structure for providing indigent defense that is independent of the judiciary and

[43] The principle is that when acting as an investigator before a finding of probable cause has been made, a prosecutor should only enjoy the qualified immunity endowed upon police; it does not mean prosecutors should never conduct investigations. It does include a logic of distinguishing the investigative and advocatory functions.

prosecution, and skilled and dedicated lawyers" (p. 1836). I would submit that, to an extent perhaps not fully appreciated, it also requires skilled and dedicated investigators, and that one way to optimize indigent defense resources is to rely more on them; they should not be seen as luxuries to be reserved for serious felonies. The capital defense bar appears to have made great strides in elevating its prevailing professional norms[44]. As Bowman (1970) argued long ago, "Although the defendant accused of a capital crime presents the most serious case due to the possible punishment, there is no logic in withholding [expert and investigational] aid from persons facing lesser degrees of official sanctions. The same rationale that led to granting counsel in a broad range of cases is applicable to additional assistance" (p. 636, fn29).

[44] As one example, between 1989 and 1997, attorneys spent an average of 1,889 hours per federal death penalty trial; for the period covering 1998 through 2004, the figure had climbed to 3,557 hours (Gould & Greenman, 2010).

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Appendix A.

Examples of forms of investigative failures

Inculpatory witnesses

Criminal history:

- A man who accused Magilie Conteh of robbing him could have been impeached with a prior conviction for a crime of dishonesty, but the trial attorney took the prosecutor's word for it when told the victim had no record (Jouvenal, 2013).

- Kash Register was implicated by a neighbor whose criminal record included, among other crimes of dishonesty, an arrest for forgery less than a week before the murder for which Register was convicted (Possley, 2013e).

Reputation for dishonesty or mental disturbance:

- After Ty Bradford's girlfriend claimed he had threatened her with a knife, he received a letter from a person who wrote that the girlfriend had admitted the accusation was false, but his lawyer did not investigate the issue and he was convicted (Possley, 2013f).

- William Lopez was convicted of a 1990 murder in Brooklyn, but before he was sentenced, prosecutors turned over a letter from a woman who said that a witness against Lopez had admitted she had lied at his trial. Unfortunately, Lopez' first attorney had a medical emergency and was replaced by another attorney who failed to investigate the letter or call it to the attention of the court at sentencing (Possley, 2014f).

- Richard Cridelle's first trial attorney was provided with a redacted copy of the accusing witness' medical records by the prosecution and did not argue for an unedited version to be disclosed. When Cridelle was tried a second time with new defense counsel, that attorney demanded and received an un-redacted copy; the complete records revealed a mental health history of psychoses (Possley, 2014g).

- Emmaline Williams' adopted 14-year-old daughter accused her of sexually abusing her in 1985, but her attorney did not investigate the accuser's background and failed to discover school records stating that she had "a problem telling the truth" and was "an inveterate liar" (qtd. in Possley, 2014h).

- Victor Caminata was convicted of an arson in which his girlfriend had incriminated him. His postconviction defense team discovered that five years before the fire, the girlfriend had filed a false police report against a previous boyfriend (Possley, 2014a).

- The only witness against Susan Mellen at her 1998 Los Angeles murder trial not only told a story at odds with the autopsy findings, but had a history of filing false reports of criminal behavior against various individuals in the county, "but had been discredited in every instance" (Possley, 2015i).

- Yvonne Eldridge was accused of mistreating profoundly ill children for whom she was a professional caregiver. Her attorney failed to discover that the doctor who leveled the allegations had made unwanted sexual advances toward Eldridge and others in the hospital where he was employed, and had accused other women of Munchausen syndrome by proxy as well (Gross, 2012a).

- Patrick Thompson was convicted of sexual assault despite the existence of many witnesses, found by his new attorneys in postconviction, who could have testified that the alleged victim was known for making such false accusations (Possley, 2012d).

- Alfredo Vargas' postconviction defense team located a doctor who was acquainted with the parents of his accuser and their propensity to make false claims that their daughter had been sexually abused (Possley, 2013g).

Evidence of dishonesty or confusion in discovery materials:

- Police officers claimed that Jeanie Becerra and Arthur Morris obstructed and assaulted them when the officers were summoned to the couple's home in Topeka, Kansas in 2014. Video of the incident was provided to defense attorneys immediately before trial but was not viewed at the time. After the trial, a prosecutor discovered that the video showed no illegal behavior on the part of Becerra and Morris (Possley, 2015e; Possley, 2015f).

- Terrence Mason's attorney failed to use a helpful police report when he cross-examined the only eyewitness to a robbery who effectively implicated Mason. Under questioning by Mason's appellate counsel at a post-conviction proceeding, the lawyer said that he "must not have noticed" the report but later claimed, in response to a professional grievance, that he "had chosen not to make an issue" of the police report "lest it backfire" (Mason v. Scully, [1994], pp. 27-28).

- During his trial, Dell Talley's attorney received a coded police report that indicated that the victim in the case had given a description of an attacker who did not resemble Talley in any way. Because the attorney had not requested the report as part of a pre-trial investigation, he was unable to decode it and use it for impeachment purposes (Possley, 2014i).

- Antonio Williams' lawyer did not review the original statement of the alleged victim, which contained no accusations against Williams (Gross, 2012b).

Statements in direct conflict with other credible evidence:

- Donald Kelly's trial lawyer failed to investigate evidence from the crime that cast doubt on the chief state witness, Kelly's ex-girlfriend, who claimed she had been lying in bed with the victim when Kelly burst in and shot him. At a retrial, his new attorney developed evidence showing the ex-girlfriend's clothing had no trace of blood, calling her account into question (Possley, 2013h).

- George Lindstadt was accused of a sexual assault by a young girl who contradicted her own statement (Possley, 2013c), and the court that granted relief found that a "lawyer who conducted an adequate investigation could have elicited testimony by Lindstadt that he did not live with his daughter at the time of the alleged abuse, and in that way (and others) shaken the credibility of both key prosecution witnesses" (Lindstadt v. Keane, [2001], p. 193).

- Evidence indicated that the man who claimed Christopher Parish shot him inside an apartment was not truthful, but this was not investigated until his second trial, where a crime scene technician testified that no blood was found at the purported crime scene (Possley, 2015j).

- A woman who claimed to have seen Jamal Trulove shoot a man from her second story window was discredited by the findings of a ballistics expert who concluded that the victim had been shot from a different direction than the witness claimed, but the expert was not enlisted until Trulove's second trial, at which he was acquitted in 2015 (Possley, 2015k).

- Earl Truvia was convicted based on the testimony of a woman who claimed to see a shooting. If his attorney had properly investigated the case, he would have discovered two strong pieces of evidence that served to impeach her: the time of death found by the coroner did not match her statement and it was not possible to see the shooting from her stated vantage point (Armbrust, c. 2012).

- Mark Weiner's attorney failed to investigate cell phone records indicating that a woman was actually close to her mother's home at the time she claimed Weiner was holding her captive in a different location (Possley, 2015l).

Personal grudge:

- Roberto Miranda provided his first attorney with the names of six people who could help prove his innocence, but the attorney did not interview any of them. One of those people was the ex-girlfriend of a man who claimed to have been present when Miranda stabbed the victim to death. When she was finally interviewed by Miranda's habeas attorney, she told of a romantic rivalry that had existed between Miranda and the witness, who had made threats against Miranda. The Clark County District Court judge who granted

Miranda's writ held that "the lack of pretrial investigation and preparation by trial counsel cannot be justified" (Gross, c. 2012a).

- John Palazzolo told his lawyer that the woman who had accused him of holding her prisoner and raping her had devised an elaborate plan to have him falsely convicted and provided the name of a man who could corroborate his story. The attorney did not locate the witness, and gave several explanations for this failure in postconviction. First the attorney claimed he had made a strategic decision not to pursue that line of defense, electing to argue instead that the sex was consensual and "keep it simple" for the judge. He also said that he had been unable to locate the witness through a process server. A postconviction investigator testified that he had found the witness within a month by contacting his mother (Possley, 2015m).

- Jacob Trakhtenberg's ex-wife claimed he had molested their daughter and then filed a civil lawsuit against him. His criminal lawyer failed to develop the evidence found later by his civil attorney: a deeply hostile relationship between the couple which included assaults by the ex-wife on Trakhtenberg and a bitter custody dispute. In addition, the ex-wife, Trakhtenberg's second wife, had previously accused his first wife of child sex abuse in an unrelated case (Possley, 2014j).

Financial incentive:

- Carl Chatman was accused of sexual assault in a Cook County courtroom by an aide in 2002. Many years earlier, the woman had received a settlement after claiming to have been raped in an office building. She filed suit against Cook County just days after accusing Chatman and was awarded over $400,000 (Possley, 2015a).

- In 2001 in Palm Beach County, Florida a couple on a motorcycle was shot from a vehicle and the husband was struck in the hip. No leads materialized until a private investigator assembled a photographic line-up that included Vishnu Persad and he was identified by the victims and three of their friends who had witnessed the shooting. The private investigator brought the identification to law enforcement and Persad was charged. His lawyer, who had never tried a felony case, failed to develop evidence of a $10,000 reward the investigator would collect for his efforts, or that the eyewitnesses had all been drinking (Possley, 2012e).

Exculpatory witnesses

Witnesses listed by the state but never called to testify or interviewed by defense:

- Debra Brown's attorneys failed to interview a man listed as a witness by the state before her murder trial. The man, who had seen the victim alive at a time which would have

established Brown's innocence in her subsequent death, was never approached by the defense until postconviction (Possley, 2013i).

- The names of two witnesses who said Oakley Engesser was not the driver of a car involved in a fatal accident were listed in a police report, but without the substance of their exculpatory statements; they were never interviewed by the defense team before his trial for manslaughter and were not called to testify (Possley, 2015g).

- A witness listed by the state in the assault trial of Ricky Cullipher did not appear for trial. His attorney had not interviewed the woman and was thus unaware that she would have testified that the victim, whose own memory of the event was impaired, had actually shot himself in a game of Russian roulette (Possley, c. 2012c).

- Darron Goods' lawyer never interviewed the shooting victim in his 2005 Baltimore case, who was not called at the trial but later testified at a post-conviction hearing that Goods was not the assailant. The trial lawyer later explained that the omission was due to his inability to locate the victim, who was later discovered to have been in juvenile detention at the relevant time, telling a journalist that "it is the state's obligation to bring in the victim anyway.. I had no way to find him…"; the judge who granted Goods relief said the trial attorney "could have or should have" interviewed him pre-trial (Bykowicz, 2005).

No door-knocking:

- Kelvin Wiley was convicted of beating his girlfriend after his lawyer failed to locate witnesses-- neighbors who saw another man enter the victim's San Diego home before she was attacked inside. The judge who vacated Wiley's conviction cited his lawyer's failure to discover those witnesses through a competent investigation as grounds for relief (Alvord, 1992). Wiley's appellate attorney blamed the prosecutor as well: "My own feeling is that the district attorney has an obligation to make sure a proper investigation is done.. They had a white girlfriend who said her black boyfriend did it, and they didn't feel they had to investigate any further" (qtd. in Alvord, 1992).

Physical Evidence

- Clarence Dexter, Jr. was convicted of killing his wife in 1991, based in part of faulty blood analysis. Prior to a scheduled retrial, his new defense team located an expert who cast doubt on the blood evidence, and also discovered a bloody shoe print that was inconsistent with Dexter. The charges were then dismissed by the prosecution (Gross, c. 2012b).

- In Iowa, Eric Esse's trial attorney never sought the testimony of a firearms expert who could have excluded a pistol linked to Esse that prosecutors incorrectly claimed was the murder weapon (Possley, 2013n).

- After her conviction, Jennifer Hall's family hired a new attorney who did what her trial attorney had failed to do. An expert hired by the new attorney ruled out arson as the cause of the fire for which Hall had been found criminally liable (Denzel, c. 2012b).

- After Jerry Jamaal Jones was accused of assaulting a cellmate, his trial attorney was provided with a handwritten journal of the accuser in which he described how he was falsely implicating Jones (Stingl, 2011). The attorney explains his decision to disregard the journal and investigate no further: "I was suspicious of it from the beginning. No one in my experience keeps a diary in the jail and admits crimes in it" (qtd. in Stingl, 2011). A much less experienced post-conviction attorney had the journal examined by a handwriting expert who confirmed its authenticity, and Jones' conviction was vacated (Stingl, 2011).

- Carol Jean Wilson's lawyer failed to fully investigate whether her handwriting linked her to an allegedly forged document, as the prosecution claimed, apparently because he feared the result would implicate her; a thorough analysis done in postconviction effectively excluded her (Possley, 2013j).

Medical evidence

- Judith Fritz in Pennsylvania (Possley, 2013k) and Noe Moreno in North Carolina (Possley, 2012f) were both convicted of vehicular manslaughter though the medical evidence of the automobile occupants' injuries, never independently investigated by their trial lawyers, showed that they were not driving.

- Rashawn Greer was convicted of first degree murder in the death of his infant child, but evidence developed at a re-trial indicated the child had been injured during a time period when Greer was not caring for her (Possley, 2013l).

  Debbie Loveless and her common law husband John Miller were convicted after her 4-year-old daughter was killed in a brutal attack. The child had actually been bitten by a dog, as the pair claimed, but their attorneys failed to discover medical records indicating that wounds which appeared to have been caused by a knife were actually caused by a surgeon's scalpel; in attempting to save the child's life, tissue damaged by the dog's teeth had been cleanly excised. As well, autopsy photographs showed a paw print on the child's back (Possley, 2015b; Possley, 2015c). Among the findings of fact of the trial court which ultimately granted relief were that Miller's trial attorney "did not pursue the dog defense theory because the State's attorney told him the dogs were only 'puppies'" and that neither of the privately retained attorneys for Loveless and Miller shared autopsy photos with a qualified expert (qtd. in FitzGerald, 1994).

- Nick Rhoades was convicted of criminal transmission of HIV after his attorney failed to discover that his viral load was undetectable and transmission would be highly unlikely (Possley, 2014k).

- Gordon "Randy" Steidl (Center on Wrongful Convictions, c. 2012b) and Herbert Whitlock (Center on Wrongful Convictions, c. 2012c) were convicted even though the knife that a woman claimed was the murder weapon could have not inflicted the victims' wounds.

- Gregory Wilhoit's family located an expert who could contest bite-mark evidence that the prosecution planned to use against him, but his attorney never even spoke with the expert (Gross, c. 2012c).

Alibi evidence

Institutional alibis:

- William Walker expected to be exonerated by a videotape of an armed robbery he was tried for, but the videotape was never produced in court. Perhaps his attorney also relied on this, but he failed to investigate evidence that Walker was seeking substance abuse treatment at the local county Crisis Intervention Center at the relevant time, as was later attested to by a witness and further documented with Center records (Possley, 2015n).

- James S. Anderson's defense in a robbery case was that he had been in Los Angeles seeing his probation officer at a time that would have made it impossible for him to commit the crime, which occurred in Tacoma. He was representing himself along with standby counsel, who failed to subpoena the records that would have proven his alibi (Possley, 2014l). His girlfriend had also testified that he was in Los Angeles, but lacking corroboration, was not believed (In re Pers. Restraint of James S. Anderson, No. 37073-5-h, WA Ct of Appeals 12-11-08).

- Jose Garcia was sentenced to 25 years to life for murder despite the fact that he was incarcerated in the Dominican Republic when the victim was killed in the Bronx. Although the victim's sister testified for the defense that she had spoken to Garcia by telephone on the night of the murder, when she believed he was in the Matanzas jail, she was forced to acknowledge that she had not dialed the phone herself (Garcia v. Portuondo, [2006]). The trial attorney cross-examined an eyewitness who had identified Garcia but presented no other witnesses or documents to corroborate the alibi (Garcia v. Portuondo, [2006]). A United States Magistrate found that the failure to have an investigator seek police records and travel documents and to interview potential witnesses constituted ineffective assistance and the reviewing appellate court agreed:

"His duty was to investigate, not to make do with whatever evidence fell into his lap.[fn omitted] …In failing to conduct any investigation at all, [his] performance at trial fell well below objective standards of reasonable representation" (Garcia v. Portuondo, [2006], p. 284).

- After LaDondrell Montgomery was convicted of a violent robbery at a T-Mobile store, his father realized that he had been in a local jail at the time of the crime. None of the lawyers involved had discovered this ironclad alibi, and the judge who vacated the conviction said that, "Both sides in this case were spectacularly incompetent" (qtd. in Possley, c. 2012b).

Employment alibis:

- Ernesto Flores, Jr. pleaded guilty to a burglary after his attorney failed to obtain payroll records establishing he was at work at the time of the crime (Possley, 2015o).

- Joshua Moore was working at a golf shop in Huntington Beach, California when a video store was robbed, but his attorney failed to develop the evidence that could prove his alibi, including two receipts—one of which bore Moore's fingerprints (Possley 2012a). The lawyer acknowledged that he failed to contact two of Moore's co-workers who could also verify his alibi, despite being aware of their potential testimony (Schou, 2011). Cynthia Moore, Joshua's mother, said that, "When we hired him, he told me he knew how to handle the case--that he was an ex-DA and was confident he could get Josh off" (qtd. in Schou, 2011).

Retail and consumer alibis:

- Chamar Avery told his attorney he had been at an auto repair shop with several other young men at the time of a murder in which he had been charged. His attorney sent an investigator, who left a business card, but made no further attempt to verify Avery's story. His lawyer would later claim that he made a "strategic decision" not to call these young men, whom he had never met, at Avery's trial because he did not know what they "would say or how they would present" (qtd. in Possley, c. 2012d).

- Magilie Conteh was posting on his Facebook account at the time of a robbery he was convicted of, but his attorney did not seek the records that would later be used to corroborate his whereabouts (Possley, 2013m).

- After Lamar Palmer was convicted of an assault in Queens in 1998, his brother, a police officer, discovered records that proved he was on his cell phone at the time (Possley, 2013n).

- Juan Herrera's trial lawyer called his family to testify that he was with them at a tax preparer's office during the shooting for which he was convicted, but failed to obtain the computer records from the office that corroborated their claim (Possley, 2012g).

- David Hurt's girlfriend testified that he was on the telephone with her when a gas station employee was murdered, but his attorney did not produce the records confirming that or call her parents, who would likely have been far more convincing that his romantic partner, as witnesses to corroborate her testimony (Possley, 2014m).

- Carl Montgomery was purchasing a bicycle at Sears at the time of the crime he was accused of committing and had a receipt, but his lawyer failed to present the clerk's disinterested and potentially highly persuasive testimony in court. Rather, he presented twelve close friends and relatives of Montgomery as his alibi witnesses, who were not believed by the jury. The appellate, granting relief, court noted that the lawyer "testified that his failure was due to 'inadvertence' as well as the fact that he 'simply didn't believe' [Montgomery]" (Montgomery v. Petersen, [1988], p. 412) and disapproved of the notion "that defense counsel's conclusory statement that he did not believe his client was an adequate basis for ignoring such an important lead. Indeed, if counsel had taken the few steps necessary to identify and interview the Sears clerk, he may well have formed a more favorable view of his client's veracity" (Montgomery v. Petersen, [1988], p. 414).

- Tommy Simmons III was buying items at a gas station about fifteen minutes from the scene during a Palmdale, California killing for which he was convicted. He provided his trial attorney with receipts of those purchases, but the lawyer mistakenly believed that they did not contain time information and never presented them in his defense (Possley, 2014n).

- Mark Weiner's cell phone records indicated he was almost 20 miles away from a purported crime scene at the time a woman claimed he was holding her captive in 2012, but his attorney did not investigate those records (Possley, 2015l).

Backfiring alibis:

- Ronald Ross testified that he had been watching an NBA basketball playoffs game when a shooting occurred, but was contradicted by prosecutors who entered evidence that the shooting occurred before the game. This could have been rebutted with the fact that a different playoffs game was being televised at the time in question, but his attorney failed to marshal that evidence in his defense and he was convicted (Possley, 2013a)

- Rickey Dale Thomas' attorney presented computerized payroll records that indicated it would have been just possible, if a very tight timeline, for him to commit a 1989 robbery in Hopkins County, Texas, but the portrait they painted was incorrect. Handwritten records, which were more accurate, showed conclusively that he could not have committed the robbery, but those records were not obtained until after he was convicted (Possley, 2012h).

- Michael Hill's trial attorney attempted to establish his alibi for a 1994 murder in Springfield, Massachusetts with testimony from a woman who was checking into a motel with him very close to the time the killing occurred. Unfortunately, the records did not include the specific check-in time and gave the appearance that the pair had checked in much earlier. Without further explanation of the discrepancy from the defense, which had to do with the motel's computer system and would have corroborated the alibi, the erroneous records were used to impeach Hill's witness (Possley, 2012i).

- Donald Ruby's lawyer presented an alibi witness who was flatly contradicted by documentary evidence showing that she was actually at work at the relevant time; it was only at his second trial that irrefutable evidence, based on blowfly eggs, was introduced to show that the murder occurred at a time when Ruby was 90 miles away (Possley, 2014b).

Alternate suspects

- While awaiting sentencing on an armed robbery conviction, Roy Alvarez discovered that another man had been investigated for crimes that were very similar and had happened in the same area in the same time frame. On his own, Alvarez contacted the owner of the store where the robbery had occurred, and the owner then went to police. After being shown a photograph of the other individual, the store owner identified him as the actual perpetrator and Alvarez' conviction was vacated (Possley, 2014o).

- Gilbert Amezquita was sentenced to fifteen years in prison for an aggravated assault in which a cell phone was stolen. Had his trial attorney contacted the people who were called from or used the phone after it was taken from the victim, at least one of whom was listed in a police report provided to the defense before trial, he would have discovered Gilbert Guerrero, the actual attacker. The trial attorney admitted that he had done nothing more than read a file on the case and did no independent investigation. Paid $2500 by Amezquita's family, the trial attorney later told the press: "He was going to have a hard enough time (just) paying my fees. He did not have money for an investigator" (qtd. in McVicker & Khanna, 2003).

- Daniel Larsen was convicted of carrying a concealed weapon and sentenced to 28 years to life under California's Three Strikes provision. His trial attorney failed to interview witnesses, including a retired police chief, who had seen another man throw the knife that Larsen was accused of hiding after a fight in a parking lot (Possley, 2014p).

- Benjamin Miller was charged with the murders of five African American sex workers in 1972. Several weeks later, Miller's father read in the newspaper that another man had been arrested for attempting to strangle a black prostitute in the same area and informed Miller's lawyer. Citing Miller's confession, the lawyer declined to investigate further and

Miller was convicted (Possley, 2012j). In a case that happened nearly thirty years later, Richard Perez was accused of robbing a woman of her jewelry at knifepoint in Santa Ana, California. Before he went to trial, his mother learned of the arrest of a man who was similar in appearance to Perez and charged with similar crimes. Her unsupported suspicion that this man was the actual perpetrator of the crime her son was charged with was insufficient to ward off his conviction, but before Perez was sentenced she hired a new lawyer. Larry Magdaleno, the new lawyer's investigator, located a former girlfriend of the other man who was in possession of the victim's stolen jewelry; Perez' conviction was set aside and shortly thereafter his charges were dismissed (Possley, 2012k).

Discovery material

- Edward Carter in Michigan (Possley, c. 2012e), Henry James in Louisiana (Possley, 2014q) and Richard Johnson in Illinois (Center on Wrongful Convictions, c. 2012d) were all convicted of sexual assault, even though state serology reports that excluded them had been turned over to their lawyers.

- Bruce McLaughlin's attorney accepted inaccurate transcripts of the complaining witnesses' statements without listening to the accompanying audiotapes (Possley, 2015p). Similarly, trial attorneys for both Sierra Rigel (Possley, 2014r) and Daniel Terens (Possley, 2013o) failed to examine the audiotapes of their statements to police, which differed markedly from the transcripts in which they appeared to incriminate themselves.

- Cherice Thomas' first attorney failed to notice a witness quoted in a police report as saying the perpetrator was male (Possley, 2013d).

- The officer who obtained a false confession from Derek Tice noted in a report that he had invoked his Miranda rights, but Tice's lawyer did not use the information to argue for suppression (Shaffer, c. 2012).

- Peter Dombrowski's attorney never even made the standard request for discovery, which would have yielded exculpatory fingerprint evidence (Possley, 2014s).

- Rafael Madrigal's trial attorney did not transcribe audiotapes he received from the prosecution despite having been granted a continuance to examine them, so he never learned that they contained valuable exculpatory evidence. Additionally, he ignored reports of interviews conducted by a public defender investigator, contained in the file he received from that office when he took over the case, that could have led to testimony from his supervisor establishing that Madrigal was at work at the time of the offense (Madrigal v. Yates, 2009).

- Terrence Mason's attorney failed to use a helpful police report when he cross-examined the only eyewitness to a robbery who effectively implicated Mason. Under questioning

by Mason's appellate counsel at a post-conviction proceeding, the lawyer said that he "must not have noticed" the report but later claimed, in response to a professional grievance, that he "had chosen not to make an issue" of the police report "lest it backfire" (*Mason v. Scully*, 1994, pp. 27-28).

- David Tucker's trial lawyer testified in postconviction that his lack of knowledge that the victim had identified another person as the man who beat him was the result of his failure to ask for police reports; he "had trusted the prosecution to provide him with relevant documents and he had not requested police investigation reports" (Tucker v. Prelesnik, [1999], p. 751).

Crime scene

- John Jackson was represented by a private attorney who received a flat fee for all his work on public defense cases. When answering allegations of neglect by a different client, the attorney argued that the client "believes my role is to find proof that he's innocent of this particular charge. I've explained to him the role, or my role, is to see his constitutional rights are protected" and yet conceptualized that role as that of a referee rather than that of an advocate (qtd. in Armstrong, Davila, and Mayo, 2004). The judge that granted Jackson's writ of habeas corpus said the attorney's failure to visit the crime scene amounted to the omission of a "fundamental task" and, combined with his other failures to challenge the state's inculpatory facts, constituted ineffective assistance (Armstrong, Davila, and Mayo, 2004). The judge admonished that the attorney: "those are the facts that you begin with, not the facts you end with" (qtd. in Armstrong, Davila, and Mayo, 2004).

DNA evidence

- In Florida, Jesse Miller Jr. was convicted at his first two trials in large part on the basis of DNA evidence that state experts claimed incontrovertibly placed Miller at the crime scene, but was acquitted at his third trial after his new attorney hired an independent expert to challenge the flawed DNA examination done by the state's analyst (Duret, 2014; Freeman, 2014).

Client's mental status and psychological background

- Dayna Christoph, a juvenile, confessed to sexually abusing her younger sister and was convicted; the Washington Court of Appeals found that "a minimally adequate investigation would have discovered Ms. Christoph's documented long-term mental and emotional difficulties and sufficient exculpatory evidence to warrant dismissal of the charge of the information, or at the very least, to support a plea bargain for reduced charges"; Christoph's lawyer devoted less than two hours to her case (State v. Christoph, 2000).

- Detectives claimed that Carl Chatman confessed to a 2002 sexual assault that occurred in a Chicago courtroom. His attorney failed to uncover his extensive mental health history, including a diagnosis of schizophrenia and repeated hospitalization, and never requested a competency hearing (Possley, 2015a).

- Ronald Keith Williamson in Oklahoma had a significant mental health history and made incriminating statements that on their face suggested mental disturbance, but his trial attorney failed to even request a competency hearing before he was tried for sexual assault homicide and, later, sentenced to death (Possley, 2014t; see also Grisham, 2006).

- 14-year-old Lorenzo Montoya's school records showed that his IQ had been measured at 69 and he was in a special education placement, but this information was not developed until an investigator working for his postconviction counsel uncovered it years later. By then, he had spent 14 years incarcerated in a 2000 murder for which he had implicated himself and two other youths (Possley, 2014u).

- Boping Chen's lawyer did not develop psychiatric testimony indicating that he was not a pedophile (Possley, 2012c), and Henry Cunningham's attorney did not investigate his sexual dysfunction as a defense to a child sex abuse charge (Possley, c. 2012f).

- Sandra Ortiz (Possley, 2013p) and Carol Stonehouse (Possley, 2013q) were convicted of killing abusive romantic partners when a comprehensive investigation would have revealed facts supporting a battered woman syndrome defense.

Client's criminal history

- Longino Acero had a previous conviction that did not require registration as a sex offender, but his attorneys never checked his court file and advised him to plead guilty to a charge of failing to register. Corey Eason was also convicted of failing to register as a sex offender, though it was clear from his record that he had never been convicted of any offense that would require him to do so. Simon Rivera also was required to register in error because his criminal history was not fully investigated (Possley, 2014e).

- Alexander Hebrard was convicted of illegal possession of a firearm, despite the fact that the underlying felony charge which would have made him ineligible to possess such a weapon had actually been dismissed (Possley, 2013c).

- Jeffery Rodriguez' first armed robbery trial ended in a hung jury but his attorney failed to order the transcripts of that proceeding, hobbling the cross-examination of the complaining witness at the 2003 re-trial where he was convicted (Denzel, c. 2012c).

Appendix B.

Cases in which a comprehensive defense investigation could have prevented the conviction

1. Acero, Longino
2. Adams, Jarrett
3. Addison, Ronald
4. Allen, Billy Frederick
5. Alowonle, Rilwan
6. Amezquita, Gilbert
7. Anderson, James S.
8. Anderson, Roland
9. Appling, Riolordo
10. Austin, Michael
11. Avery, Chamar
12. Aviles, Anselmo
13. Baba-Ali, Amine
14. Baker, Jimmy Lee
15. Baltrip, Henry
16. Baran, Bernard
17. Bass, Jimmie
18. Baumer, Julie
19. Baylor, Ronnie
20. Becerra, Jeanie
21. Bell, Derrick
22. Bell, Jr., James
23. Berry, Wilder
24. Blackshire, James
25. Blake, Bryan
26. Boyd, Latherial
27. Bradford, Ty
28. Bragg, Rodney L.
29. Bravo, Mark
30. Bright, Gregory
31. Britt, Cheydrick
32. Britton, Robert
33. Bromgard, Jimmy Ray
34. Buchli II, Richard

35. Caldwell, Maurice
36. Caminata, Victor
37. Canen, Lana
38. Carter, Edward
39. Catron, Xavier
40. Cesar (1), Owen
41. Cesar (2), Owen
42. Chatman, Carl
43. Cheung, Kum Yet
44. Chumley, Tom Edwin
45. Clay, Sr., David
46. Coker, Edgar
47. Connor, Reginald
48. Contee, Darian
49. Conteh, Maligie
50. Cridelle, Richard
51. Cservak, Wayne
52. Cullipher, Ricky
53. Cunningham, Henry
54. Day, Lee Antione
55. Dexter, Jr., Clarence Richard
56. Dombrowski, Peter
57. Earle, Margaret
58. Eason, Corey
59. Eldridge, Yvonne
60. Engesser, Oakley
61. Esse, Eric
62. Flores, Ernesto Jr.
63. Ford, Glenn
64. Fritz, Judith
65. Garcia, Jose
66. Gassman, Tyler W.
67. Gathers, Gary
68. Golden, Andrew
69. Gondor, Robert
70. Goods, Darron
71. Greene, Cy
72. Greer, Rashawn

73. Gross, George
74. Hales, Warren
75. Hall, Jennifer
76. Hamilton, Derrick
77. Hampton, Patrick
78. Harris, Keith
79. Harris, Nicole
80. Harris, Warren
81. Hash, Michael
82. Hays, Robert
83. Hebrard, Alexander
84. Hebshie, James
85. Helmig, Dale
86. Henly, Brock
87. Hernandez, Maria
88. Herrera, Juan
89. Herrera, Bobby Paiste
90. Hicks, Anthony
91. Hill, Michael
92. Howard, DeAndre
93. Hughes, Elicia
94. Hurt, David
95. Jackson, John
96. James, Henry
97. Jasin, Thomas
98. Johnson, Juan
99. Johnson, Richard
100. Johnson, Terrell
101. Jones, Jerry Jamaal
102. Jones, Levon Junior
103. Jones, Lydia Diane
104. Kelly, Donald
105. Kluppelberg, James
106. Knupp, Richard
107. Lamb, Larry
108. Larsen, Daniel
109. Larson, Robert E.
110. Lawrence, Darrian Mark

111. Lee, Kuoa Fong
112. Leverett, Ron
113. Lindstadt, George
114. Livingston, Christopher
115. Lopez, George
116. Lopez, William
117. Loveless, Debbie
118. Lynn, Eric
119. Madrigal, Rafael
120. Magnan, Paul Philip
121. Martin, Kevin
122. Mason, Terrence
123. McGee, Leroy
124. McLaughlin, Bruce
125. Mellen, Susan
126. Merrill, Thomas
127. Miller, Benjamin
128. Miller, Harry
129. Miller, John
130. Mills, Randall
131. Miranda, Roberto
132. Mitchell, Charlie
133. Mitchell, Keith
134. Montgomery, Carl
135. Montgomery, LaDondrell
136. Montoya, Lorenzo
137. Moore, Joshua
138. Morales, Santiago Ventura
139. Moreno, Noe
140. Morris, Arthur
141. Munoz, Cesar
142. Murray, Lacresha
143. Neirynck, Brian
144. Nelson, Gary
145. Nieves, William
146. Nnodimele, Martin
147. Ortiz, Sandra
148. Padilla, Fidel

149. Palazollo, John
150. Paradis, Donald
151. Parish, Christopher
152. Perez, Richard
153. Persad, Vishnu
154. Pettit, Leona
155. Pichardo, Juan Carlos
156. Potts, Clinton
157. Raby, Jr., Earl
158. Ralston, Sean
159. Ramirez, Jesus
160. Ramos, Jesse
161. Randolph, Guy
162. Register, Kash
163. Resh, Randy
164. Rhoades, Nick
165. Rigel, Sierra
166. Rivera, Simon Angel
167. Roberts, Lisa
168. Robles, Willie
169. Rocha, Mario
170. Roesser, Christopher
171. Rojas, Luis Kevin
172. Rollin, Joseph Pierre
173. Rollins, Lafonso
174. Rose, Peter
175. Ross, Ronald
176. Ruby, Donald
177. Schulz, Stephen
178. Sifuentes, Alberto
179. Simmons III, Tommy
180. Sims, Lennie Darrold
181. Sinegal, Layo
182. Smith, John Edward
183. Smith, Timothy
184. Statler, Paul E.
185. Steidl, Gordon
186. Stewart, Kia

187. Stonehouse, Carol
188. Talamantez, Jesse
189. Talley, Dell
190. Terens, Daniel
191. Thain, Leeann
192. Thomas, Cherice
193. Thomas, Rickey Dale
194. Thompson, Patrick
195. Tiscareno, Abigail
196. Tomlin, Charles
197. Toney, Steven
198. Trakhtenberg, Jacob
199. Trulove, Jamal
200. Truvia, Earl
201. Tucker, David
202. Valdez, Gilbert
203. Vamvakas, Evangelo
204. Vann, Gussie
205. Vargas, Alfredo
206. Vaughn III, James
207. Veltmann, Carl
208. Veltmann, Christopher
209. Verkullen, Maxwell
210. Wagstaffe, Everton
211. Walker, Joseph
212. Walker, William
213. Washington, Vonaire
214. Weiner, Mark
215. Wells, Harold
216. Wheeler-Whichard, Jonathan
217. Wiley, Kelvin
218. Wilhoit, Gregory
219. Willett, Jeffery
220. Williams, Antonio
221. Williams, Emmaline
222. Williams, James
223. Wilson, Carol Jean
224. Wilson, Sharrif

225. Wyatt, Rickey Dale
226. Yarbough, Anthony