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2015 Symposium: Wrongful Convictions: Science, Experience & the Law Keynote Panel Discussion

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2015 SYMPOSIUM: WRONGFUL CONVICTIONS: SCIENCE,
EXPERIENCE & THE LAW:
KEYNOTE PANEL DISCUSSION*

Moderator:

Professor Mary Kelly Tate, Director, Richmond Institute for Actual Innocence

Panelists:

Shawn Armbrust, Executive Director, Mid-Atlantic Innocence Project

Michael N. Herring, Commonwealth's Attorney, City of Richmond

Douglas A. Ramseur, Capital Defender for Central Virginia

*Note from the Editor and Disclaimer:

The following is a minimally-edited transcript of the panel speakers from the 2015 *Richmond Journal of Law and the Public Interest* Symposium, Wrongful Convictions: Science, Experience and the Law held on October 29, 2015. Biographies of the speakers are included in the Introductory Remarks.

None of the opinions of these persons are necessarily the opinion of their respective agencies or employers. They are not to be used nor will they be able to be used for any legally binding purpose regarding the speaker or any agency.

INTRODUCTORY REMARKS:

Caitlin Kear:

Doug Ramseur will be starting us off. He is the capital defender for central Virginia. He is a graduate of James Madison University and right here at T.C. Williams School of Law. He practiced for seven years with Bowen, Bryant, Champlin & Carr in Richmond before being named the Deputy Capital Defender for Central Virginia in 2003. He then became a Senior Staff Attorney with the Office of the Georgia Capital defender and became the Capital Defender for Central Virginia this year.

We also have Mike Herring, Commonwealth Attorney for the City of Richmond. He was sworn in in 2006 and prior to that was a partner in the law firm of Bricker & Herring where he practiced criminal law and medical malpractice law. He is the first African American president of the Richmond Bar Association and also actively involved in the law school here as well.

We also have Shawn Armbrust who is the Executive Director of the Mid-Atlantic Innocence Project. She is a graduate of Georgetown University Law Center and Northwestern University.

And, moderating today we have Professor Mary Tate, Director of the Actual Innocence program, here at Richmond. She graduated from the University of Virginia School of Law in 1991 and clerked for Judge Merhige in the Eastern District of Virginia. We are very thankful for all of her help putting on a symposium and her moderating purposes today will be to kind of keep us on track and keep us on time. So Professor Tate if you would like to start us off.

PANEL DISCUSSION:

Tate:

Yes, well thank you everyone for, making time in your busy schedules to be here. JOLPI has done a

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wonderful job and special thanks to all of our guests who are extraordinarily busy folks and it is very generous for you to come. I am going to pass the baton to Doug Ramseur, he is going to be speaking for about 12-15 minutes, each panelist will have that same allotted time and then around 1:30-1:35 I am going to be the bouncer and make the Question & Answers session open up if they go a little long, but I don't anticipate that.

Tate: Ok, thank you Doug.

Ramseur: Yeah, thank you. I want to say that it's really an honor to come back and speak at the law school that I was able to attend and on such a distinguished panel here

You know when I got the call to come and speak for on this this panel for talking about sort of innocence issues and wrongful convictions, I'll be frank with you, I kind of deferred at first. I think Caitlin will tell you, that I kind of deferred at first because I did not think I was the right person for it, because I am just going to be upfront and say I hate innocent clients, okay.

I absolutely hate having them, they are the worst possible kind of client you can have. And you know I was surprised when I, when I first started doing criminal defense, I've done criminal defense for my entire career, and I was kind of shocked when I started doing it, how often I had clients that I felt like were either (a) not guilty of what they were charged with, or (b) not guilty of as severe an offense of what they were charged with, and it was really kind of surprising to me how often that happened.

And originally you go into this, and you think, you want to help people who are innocent, and that's a great calling. I've actually learned to realize what I really like doing is helping guilty people, because

there is no way to win with an innocent client. Unfortunately, when they come to you and they are factually innocent, they are going through an awful process. A criminal justice system that does not believe they are innocent. As much as we talk about the presumption of innocence that people are presumed innocent until proven guilty without a reasonable doubt, that is not how our system, and our society looks at this.

I don't think anyone when they hear about a horrific crime and the next day on the news they hear they arrested someone for it - everyone sort of goes, oh, thank god, they've caught the person who did it, because that is our assumption and what we think of people in that situation. So when you have someone who is innocent they are going to go through what is a really difficult situation that they should not have been put through. And then, if that person gets convicted of the crime you feel awful, you feel like you as a lawyer have failed in your obligation to them, and that you have not done the things that you should have done, and that responsibility weighs on you.

And if you're successful for that person and you're able to get their charges dismissed or get a resolution for them, that gets them back to their family and their lives, they have still gone through this traumatic experience, and all you did was kind of what you were supposed to do, right? There isn't much joy in freeing an innocent person often times before trial because it's just what was supposed to have happened, and it was a break down in the system, regardless. It gets, it gets tough to represent them throughout, one of the problems you have with innocent clients is, they have a complete inability to share remorse for a crime they didn't commit? And so they come across, in the system, as remorseless criminals, because they will not take responsibility for what's happened, and it can be

difficult with a system that wants them to be bent in a different way, and so you find it very difficult as a lawyer to please a client like that. They are unhappy in the jail. They're unhappy separated from their family. They're unhappy with every part of the process that is working wrongfully against them, and it's hard, as a lawyer, because one of the things we're taught as lawyers is how to get resolutions in cases, how do we figure out a way to make all sides get what they need out of it, and that can be very, very difficult with innocent clients... because they're often unwilling to compromise. Our criminal justice system is certainly set up to encourage plea agreements and resolutions in cases, more than it is trials.

And there's benefit to plea agreements and resolutions, and when you have a client who is innocent and who you believe is innocent sometimes, you have to have very difficult conversations with them about what the reality is, of their chances of success. I go in and when I approach cases, very much from the beginning, I do not come in and ask a client from the get go, you know, what happened, tell me what you did, are you guilty, are you not guilty, because I've just decided it doesn't matter to me as much anymore. What matters to me is, can they prove the case against you. And if I have a client that insists to me that they are actually innocent, I'll say that, that's great, but if they can prove that you're guilty of this, and I believe they're going to find you guilty of it, then we need to find a way to lessen your exposure of this. And that is really difficult and painful. It's not as idealistic as I like to be, it is pragmatic and practical, and it's not why I came to do this, but I want to help people through it, and I have, unfortunately, had more situations than I would care for, where I feel like I have convinced someone who may have been acquitted at trial, might be innocent, that they should take a

resolution that is not that they're found not guilty, but sometimes it might be a plea agreement, and that's really hard, but it's a reality that we face when the rubber actually hits the road in our system.

And, so what I tell people is innocent clients are the kind that turn defense attorneys into alcoholics, because you end up stressed out all the time, worried that you're not going to do enough, that you haven't done enough, to get this client what they need. And you're worried that that client is in prison, for something that they didn't do, when you could have done something better, and it's hard to quiet those demons in your head. So that's why I love guilty clients, and it's what I wish they all were because they're normally just people who are good people who have made a bad decision, that has put them in a bad place, and they're willing to take some responsibility for that most of the time, and they're happy with any benefit they get, and any little thing you do for them they really appreciate, and if you lost, then they were kind of guilty anyway, so, it's ok, you don't have to end sucking down Xanax for a whole night to get over it.

That being said, there is no doubt that the work that's being done, to try to prevent those wrongful convictions from happening, is so important. We're never going to finish that work, and there's always going to be people who need to do it, and, we have to think about how do we, my focus is completely trial oriented, I don't do post conviction work, I know Ms. [Armbrust] does that, and everything I do is how do I keep people, to get them the best resolution that I can pending trial. And, there, what we've seen in is and other people have taught this better than I, is the shortcoming that we have in our trial system. It is not perfect, it is never going to be perfect, there are a lot of problems that we have in it, some of those may be inherent in the

system, you may never be able to fix those problems, but we've had them illuminated in a way that I hope would open people's eyes more, to the grand problems, I know there was talk earlier about forensic science, and I know that we'll have some talk here about DNA and exonerations, and people will be discussing that. And the DNA exonerations have been great in that they have illuminated a problem, but there are some people who I think worry that that shows our systems working because we now have these DNA exonerations and forensic science that can solve our problems. When what I see, the reality is, how few cases that I'm involved in on a daily basis that have DNA that is dispositive of the case. That is DNA evidence, that means, if you did it, this is your DNA right? And only the person who did its DNA is right here. The vast majority of cases, there is never any DNA or forensic science evidence that is dispositive of whether or not a person is innocent or guilty. And what we know is in those cases where DNA, there's a large number of people that turn out to be factually innocent. They weren't the ones who did it. And we have to extrapolate that out to the remainder of those 98% of cases where there isn't ever going to be DNA. There is rarely ever going to be DNA evidence in a drug case, in larceny cases. Most times, they're not even trying to collect that kind of evidence in those cases. But we see people being convicted on the basis of things that we know are problematic from DNA exonerations. We know that the leading causes for wrongful convictions at trials are eyewitness misidentification, We know that through the DNA exonerations. Well, we're relying on those eyewitness identifications in most of those other 98% of cases, often times, when we know how misleading they are, and we're not challenging those as well as we need to.

We know through those DNA exonerations that many of these are involving informant testimony. But we have these jailhouse informants who have become an epidemic of people who are trying to get their own sentences reduced or getting some benefit because while they testify against someone else and they're leading to an enormous amount of wrongful convictions. I have been, doing this work for almost twenty years now, and I have been shocked more recently how often I have seen cases that had zero forensic evidence in them and were almost completely based on the back of jailhouse informants. People who said my client told them that he committed this murder while they were in jail together and there is no other corroboration of this. And I have done a great deal of research into this in Virginia and discovered and uncovered a specific network of informants who were lying and concocting evidence so that they could get their own sentences reduced. If they testify against someone else it will get their sentence reduced and the other person will go to jail for it. It is happening and it is dangerous. And it's not just in Virginia. California's recently had a huge scandal on the use of undercover, of jailhouse informants in particular. And how it has become rampant as a way to say, "I'll get someone else to do my time for me." And these existing cases were frankly, the police and the prosecutors know they don't have the strongest case sometimes, because there isn't DNA evidence. It's the weakest cases that end up, sometimes, leading to wrongful convictions because they turn to the least reliable evidence.

But unfortunately juries believe this kind of evidence. You know studies have shown that jurors believe jailhouse informants. They believe that people talk in the jail. And it is extremely hard to disprove that you had a conversation with someone in a jail, or you said something. And so that leads

us, and we should realize that we need to be much more critical when we do that. There's great work being done, by certainly the Virginia Department of Forensic Science, I'm not going to bad mouth them here, they do great work independently. But we have seen unreliable junk science coming in in cases throughout the country. Massachusetts has recently had a problem where they have—they had their analysts who were falsifying drug reports, in the analysis drug reports. One analyst who was using the drugs that came in herself and then falsifying the reports from that. The way we uncover those things, and sometimes we uncover it through great audits and great government, things that are there, but I believe my role in the system is to be a check on that power. To be the one who goes back and looks to see where those problems are.

I have a controversial job where I defend people the state's trying to execute, and some people might not appreciate the work I do all the time. And I have those uncomfortable situations where I'm at a cocktail party or maybe I've just buckled in on that four-hour cross-country flight. Where the person next to me asks what do I do for a living, and the last thing I want to do is start this discussion that I can't get away from for four hours. And so what I tell people is I'm quality control for the government because it sounds pretty boring. And it doesn't really go past that. But that really is a lot of what I do. My job is to make sure that the government does its job correctly—that they dot their "I"s and cross their "T"s. That they abide by the constitution, they abide by the rules and the laws, and they don't cut corners. It's really my favorite part of my job is to be able to shine a light on those things. And many of the problems that we've seen, you know this lab in Massachusetts that had a problem, that's come to light because defense attorneys were allowed to investigate those things. Because we did

our job and we went back in and reinvestigated what happened there.

And I have concerns that in Virginia in particular, we're not allowing defense attorneys to do this well enough. And the biggest way and, what I want to talk about a little bit is that Virginia has an utter lack of discovery in the criminal justice system here. And Mike and I were on recently on a committee from the Supreme Court looking at reform, in the criminal discovery process, along with Professor John Douglass, who's at this University. I don't know how many of you know this about Virginia, some of you practice know, in Virginia a defendant is only entitled to receive from the prosecution any statements that they have already made to a law enforcement officer. They are entitled to get a copy of their own criminal record, and they are entitled to lab certificates, so certificates of analysis from the lab. So if you were a criminal defendant in Virginia, charged with a crime, charged with murder, charged with capital murder, you are not entitled to have a list of the witnesses who are going to testify against you. You're not entitled to have the statements that those witnesses have given the police. You are not allowed to have the police reports about what the police think. Now there are some jurisdictions, like Mr. Herring's in Richmond, at their discretion because they realize the importance of having an informed defense on both sides, but it's not required. And there are plenty of jurisdictions in Virginia that say you will only get the bare minimum and nothing else.

So that means in a criminal case in Virginia, a capital murder case, I may have had no idea who the witnesses are even going to be, before they are called. And so, Mike and I were on a committee along with Professor Douglas and a number of other people from around the state, who have called for expansion of those rules. To allow for

reciprocity, if it were a civil case we would be able to have depositions and interrogatories. We would know everything that happened if we were arguing about money. But when argue about people's lives, we don't get that.

There are lots of other problems about the low rates of compensation that we have for attorneys, doing court appointed work. Again, the vast majority of defendants who come into our criminal justice system, and I would probably say the vast majority of people that the "Innocence Project" and other people are working for, were indigent, they were represented by court appointed lawyers. And some court appointed lawyers do great work and do a great job. Some of them unfortunately, don't. And the defendant doesn't get to choose which one he gets. He gets the person who is assigned to him to do that work.

In Virginia, I looked this up recently because I wanted to double check, if you are charged with a class two felony, that is first degree murder in Virginia, the statutory rate for the lawyer who defends you, is \$1,235. Now you can apply for a waiver, that can get you an additional \$850, if it was a special needs kind of case, where it required extra, and if it really required extra you can ask for more than that. But what that says is that in Virginia, we have decided that the run of the mill ordinary first degree murder case, that should be able to be defended by a defense attorney for \$1,200. That it is shameful and ludicrous to think that that's how we value the job of people in murder cases for the defense that way. And we need to, and the other thing that happens is, you get that \$1,235, any waiver above that you can get approved for, with approval of a judge, sometimes the Chief Justice of the Supreme Court has to approve it. But it's also only until they run out of the money, and every year they seem to run out of money at the end of

the fiscal year. Come April or May, some of the lawyers are hearing no more waiver money is going to be allowed for you. So if you were a defense attorney whose defending that person, you're just out of luck, on getting paid any additional money. You are only ever going to get that \$1,235, no matter how much time you put in it. It means that we don't give incentives for the defense attorney to go that extra effort. So I'm going to wrap up, those are my main thoughts and concerns that I wanted to share about things we can do to help prevent wrongful convictions because I would much rather prefer we be in a position where I don't have to represent innocent people anymore and have some real reforms that will make that better and make our system work better. So thank you. I look forward to hearing what you have to say.

Tate: Thank you Doug.

Herring: So I'm going to defer to my good friend, Mary, to allow time for me to comment on something that I'm going loosely call an eeyore. The eloquence of Ramsey. I'm always, whether I agree with Doug or not, I'm always captivated by what he says and I tend to think more about it after the fact, than I like. And I'm sure I'll do that today. I really am going to share with you, my personal experience from innocence cases. I've done lots of work in lots of different settings, and in many different capacities. And I'll defer again to Mary, on the extent to which she wants to touch on that throughout the course of our panel. But for the course of these ten minutes, it's going to be fairly narrow.

When Caitlin invited me to participate in your panel and she shared with me the topic of our discussion, it made me pause, because I didn't really know what that meant. "The human experience." So she and I corresponded a bit and she asked me if I was going to be able to frame my impression of it.

And I did, I did my best and I told her that my experience with these cases cause me to feel a sense of panicked anxiety, right? And I don't mean that jokingly. I'm dead serious about it. And I'll give you examples of three scenarios in which I had this sense of panicked anxiety. The first, oddly enough, was when I was defense attorney, twelve, thirteen years ago, and I was representing John Otis Lincoln, the fellow who did the crimes that Marvin Anderson was wrongfully convicted of. And what was odd about my representation of Lincoln was that I was working with this wonderful lawyer in Hanover, Michael Clower, and Mike and I would go out and see Lincoln, and John, you know, was a hulk of a man who had lost one of his fingers because he had tried to, anybody remember MASH? Remember Klinger? Klinger wanted a Section 8. Well, John had convinced himself that he could get the equivalent of a Section 8 by cutting off the circulation to his finger. So he put a rubber band on it and it went necrotic and died, but he didn't get out, he just lost half his finger.

So I'm sitting in the room with this guy who's a self induced amputee, and he was a perfectly cordial, rational, well-behaved client, who, several years before this trial had come back through one of Brant's cold hits, had come to court and confessed to the crimes Marvin was convicted for. Except that in the process of confessing, he also called the judge and everybody there "Klansman," so he lost his credibility. True story. You know, he railed them as all being horrible Hanover racists, and so they all thought he was a raving idiot. Well, we then have to cross-examine Marvin Anderson, who we know to be innocent, in our efforts to represent, zealously represent, John Otis Lincoln. And so I felt panicked and anxious because I really was at a loss of what to do to ethically, and adequately, and zealously, represent Lincoln. Consider, I have

to cross examine a man in such a way to suggest that he may have in fact been guilty of something that I now know and that the science tells me he didn't do. It felt horrible.

Fast forward. I met Shawn [Armbrust] several years ago, but got to know her better in the context of our last two cases, the first of which was Thomas Haynesworth and the more recent was Michael McAlister. Many of you folks, many of the younger folks probably don't know Law and Order, but those of us who are my generation remember it from its earlier versions. And in every Law and Order moment, in every Law and Order episode there was this scene or scenario where the prosecutor is sitting in the room with the client and the defense lawyer. And all the defense lawyers in the audience, in the room, will be going, "That never happens. It never happens." And it's true, it never happens, except two times in my life. I've had two Law and Order moments. And they've both been Armbrust clients, and it's not because Armbrust is a bad lawyer, quite the contrary. Alright? In Haynesworth's case, I go out to, was it Greenville? Greenville, and, we don't have time, we may later, but in essence Haynesworth had been wrongfully convicted for sexually assaulting a few women that it turned out Leon Davis had actually offended against.

Well, I go in and I meet Haynesworth, and about five minutes into the encounter, I'm sitting in the room with this guy, and the hair starts to go up, and I'm not a hairy guy, but I feel what I think to be hair going up on my arms. And I've had this feeling before when I've been in the room with predators, especially when I was doing capital work, and I'm trying to defend guys, who I know did it, but I've got to defend the guys, right? Well this is a strange feeling, but this time it was a little bit of a

sweat, and the tingle, because I knew I was sitting in the room with an innocent guy.

And it's probably hubris, on my part, to think I know when I'm in the presence of someone who is telling the truth. But I swear, I knew it. And then he takes his polygraph and I think he passes his polygraph and at that moment I thought: "uh oh, now what?" Really. Because all we had at that point was my personal sense that he was innocent, Shawn's insistence that he was innocent, and this inadmissible polygraph evidence. And as Shawn will tell you later, just by twist of fate, things work out. But she tells that part a bit better than I.

And then more recently with McAlister - I'm looking at my clock - McAlister and Haynesworth couldn't be more different. Haynesworth, I still run into in the courthouse. I mean he's this handsome, almost country but he's not, just an unassuming guy. He walks around, I swear it looks like he's got a Sony Walkman, because they're big headphones - they are not little earphones. And it would make sense because when Haynesworth went away, this little earphones and smartphone technology didn't exist. Well so he walks around with this thing, and he comes in and out of the courthouse working over at the AG's office and he has this beautiful demeanor about him. And I don't get it, I'd be bitter as Hell! I'm telling you I'd be bitter as Hell if the system put me away wrongfully for eighteen years. This guy is such a big man, and such a beautiful person, that he tried to give me a Christmas gift, years ago. He tried to give several people in the courthouse \$50 bills for Christmas, right?

McAlister —not a bad man, but a bit of a broken man. You know, his life had been marked by alcoholism. He'd had some run-ins with the law, so I didn't have the warm and fuzzy feeling in the room with McAlister. Until there was this tense standoff

almost because I needed to talk to him and I needed to do it and not pay attention to her [Shawn] or our co-counsel, Jim Bensfield, at all. And so they were kind enough to literally stand off to the side while McAlister and I just sat there and talked, right? And he got to a point where he was on the verge of tears, and he eventually said, you know, “look...” - the equivalent of it was: “I’ve done some F’d up things in my life, truly. But this wasn’t one of ‘em.” And that point, the panicked anxiety came back. Because I knew—I knew, we had the wrong guy, we didn’t have polygraph evidence and he was a broken man. So he was an unsympathetic, wrongfully convicted person. But, lest we all feel really good about this—let me reduce this to the reality of the real world for you. Shawn and I can have an exchange over one of our cases, almost in isolation, in a vacuum. The dynamic that Doug shares with you, though, about the routine, run-of-the-mill case, that Zerkin has or some of the other lawyers had, poses a different challenge. And here it is: we are charged, he is charged with representing his clients zealously. He can’t come into my office, though, and claim actual innocence for every defendant, because if he does, eventually he becomes the boy who is crying wolf. Well, how does he choose which client to advocate actual innocence for? And so if he isn’t advocating for the actual innocence of every defendant, is he committing malpractice? Is he underrepresenting the people that he just comes in and engages in great discovery and plea negotiations for? Is he coming in and saying, “I’m advocating for innocence-light?” Conviction integrity units within offices is probably the way to do it. But it is not conviction integrity units, in the way that that term has come to be known today. And as time allows, we’ll talk about that.

Tate: Wonderful. Beautiful remarks. Thank you. Shawn?

Armbrust:

Hi there. Thank you so much for having me today. As the non-trial lawyer on the panel today, I have notes. But I have been the executive director of the Mid-Atlantic Innocence Project for ten years. And prior to law school did wrongful convictions work at the Center on Wrongful Convictions at Northwestern and as a college student. So I've seen these cases for a long time and they're all wildly different. But if I'm going to pull apart a common thread in all these cases and an overarching lesson that I've seen in these cases, it is that the system really isn't equipped to deal with wrongful convictions. I'm sort of the depressing corollary to Doug's commentary about how the system isn't prepared to deal with innocent people before trial. It's also not equipped to deal with them very well after trial. We've seen 330 DNA exonerations, more than 150 death row exonerations, and people have made incredible efforts at preventing wrongful convictions and at trying to make them easier to correct. But, at the end of the day, it hasn't gone as far as it needs to go. We're still operating in the system in which it's virtually impossible to overturn convictions, and in which the human costs of that are often overlooked as people focus on finality and on process.

We prize finality, we typically assume that juries of gotten it right at trial, and we don't favor re-litigating facts. The system would break if we had to re-litigate facts in every case. And so what we've leaned toward is re-litigating facts in virtually no cases. We also have a byzantine post trial process. And we don't have enough time today to talk about the post-trial process; I think Brandon Garrett will get into it. But, it's not set up to litigate guilt or innocence very well. It's set up with procedural hurdles in place that make it incredibly difficult for claims of innocence to be heard on the merits in court. And so what this means, practically, in

my cases is that I have to have both overwhelming proof of innocence, and I also have to have either an extraordinary confluence of lucky events or an extraordinary confluence of people. So you need Mike Herring, you need Alice Armstrong, who's back there, you need people who are really willing to go the extra mile, and do things that most people on their positions aren't willing to do. And I would say to you that's not a system. It's great that I've been exposed to so many wonderful people doing this work, and I love that aspect of my work, but that's not a system we can rely on to correct wrongful convictions.

I tell people who ask what I actually do on a day-to-day basis that I'm more of a political campaign manager than a lawyer much of the time. I spend a lot of my time strategizing about relationships. I strategize about media. I strategize about how to convince political actors to do what I need them to do for my clients and make it look like it's in their interest. Very little of that requires spending time on Westlaw, reading cases. That has to be done, but at the end of the day what tends to get the clients out of prison is having those extraordinary people who are willing to say the legal standard is maybe a little lower than it is or turn away when there's a procedural issue they could raise.

I don't want to spend a lot of my time telling war stories. I hate doing that, but that's what I'm about to do. Because I do want to illustrate that point through a few case examples. The first example is the case of Thomas Haynesworth, which Mike talked about. In Thomas' case we had an extraordinary group of people who believed in his innocence. We had Mike, we had Wade Kizer, the Commonwealth's Attorney of Henrico County, because Thomas's case spanned two jurisdictions. We had Alice Armstrong in the Attorney General's office. We had Ken Cuccinelli in the Attorney Gen-

eral's office. And yet, once we had filed our writ of actual innocence there was one oral argument – in which Alice argued on our side. After that argument the court *sua sponte* decided that it wanted to go en banc. And so we went en banc. I argued, along with General Cuccinelli himself, and we still only won by one vote. Even after everyone had agreed that Thomas was innocent, there was actually no way to get him out of prison in Virginia.

So, we were lucky we were able to finagle a way of doing it. But, from the point where everyone agreed he was innocent to the point where he was exonerated, it was ten months. If we hadn't been able to actually get him out through backdoor channels, he would have sat in prison for another ten months while the case was being litigated – even though no one thought he had committed the crime. And so that is one example of an instance where the system ultimately looked like it did the right thing because the right result was achieved, but it's hard to say that that's a system we want to have in place...that you have to operate through backdoor channels and political pressure and hope that a majority of the Court of Appeals will eventually see your way even if it's arguable that you actually do meet the legal standard in the case.

The second case is the case of Jonathan Montgomery. Jonathan Montgomery was convicted of a sexual assault in which the victim didn't come—I guess the complaining witness—didn't come forward until five months—five years after the crime. So when the case went to trial it was a “he said she said” case –bench trial, judge convicts, and he goes to prison. Several years later, the complaining witness was actually working as a civilian in the police department. She is racked with guilt. She confesses to a friend, who happens to be a police officer. He says, “I'm a police officer, I have an obligation to do something about this,” so he does.

She's charged with perjury. The Commonwealth's Attorney in Hampton does the right thing—takes the information to the trial lawyer who represented Mr. Montgomery.

Unfortunately, they then went to the circuit court and got the conviction vacated. The reason I say “unfortunately,” is because in Virginia, the circuit court loses jurisdiction over the case after twenty-one days. And so the order is taken to the Department of Corrections and the Department of Corrections says, “that’s weird, we don’t really see these.” They hand it to the attorney at the Attorney General’s Office who works with the Department of Corrections, who doesn’t know what the order is, and looks at the order and says, “well that’s an illegal order, you shouldn’t enforce that because it was an illegal order.” At this point there is a media firestorm. When I get involved in the case, the family on one hand was very happy to have me but on the other hand was going, “wait a minute, why are you working with this Attorney General’s Office that is now trying to keep me in prison?” I’m trying to explain to the client and his family that look, I understand that everybody thinks you’re innocent and that someone tried to order you to be released but that actually was illegal, so you’re going to have to sit in prison for a little while longer while we try to get you out. Trying to explain this to this client and explain why it’s rational is pretty tough because it isn’t all that rational. And again, luckily there were wonderful people involved in this case—Marla Decker, now Judge Decker, was in the Governor’s Office. She took the case to me. She made sure we got him out as quickly as possible. Once again, Alice Armstrong in the Attorney General’s Office worked with us on the case, argued on our side. We won, but again, is that a system you really want in your state?

And the last example is the McAlister case. The McAlister case is one that has been hard, because of course by the time I got involved in the case in 2014, both the person who had arrested Mr. McAlister for attempted rape in 1986 and the person who prosecuted him had believed that he was innocent for more than 20 years. But Mr. McAlister still remained convicted of that offense and Virginia was moving forward to civilly commit him as a sexual violent predator, which likely would have kept him in prison for the rest of his life. And when I started looking at the case I took it both to Mike and to Alice and I said, “well, I really think this guy’s innocent. So let’s talk about the facts first...I really think he’s innocent but it’s not really newly discovered because people started hearing about this evidence before trial ended. It’s not really ineffective assistance because his lawyer did kind of ask about it at trial, and it’s not *Brady* because it sort of was disclosed at the time of trial.” So there actually was no viable legal remedy to get Mr. McAlister out of prison, even though no one involved in the conviction believed that he was guilty. And once again we were lucky. We were able to secure a pardon, and that was great. And we were able to get him out of prison. But again, I don’t think you want to rely on a system in which you can’t actually use the criminal justice system to get an innocent person out of prison and instead have to rely on a political process to get someone out of prison.

So, sorry to be a downer. I’m usually not a downer. I think there are things we can do to make the system better, and I love to talk about them in the questions. I think some of them could involve, I was just talking to Mike about potentially changing the Writ of Actual Innocence to allow for some kind of bail or bond if everybody involved agrees that the person is innocent. So I think there are things that we can do to make the system better.

But I think that when we see exonerations, we often look at them and say they are proof that the system works, but often times they are proof that although we manage to get the right result, there are still things we need to do to make the system better so you don't need this confluence of unusually great people to make sure that the right result occurs.

Tate: Wonderful. Thank you. Wonderful. These comments were just fantastic. And I am going to give the panel one minute to make any essential comments that are a riff or an advance on what one of your co-panelists have said before we open it to questions. Are there any loose ends that you'd like to? —and we are going to keep it brief because our audience—I know we have a hot bench of an audience.

Ramseur: Yes. I was struck a little bit by how much of the sort of talk about here is based on kind of a person's personal belief in innocence sometimes. And Mike Herring is one of the best, most amazing lawyers I know and I am so glad he is a prosecutor because we need more in the world like him. But when you think in some ways about how you come into a situation, and part of your sense of whether or not this person is worthy of relief, is your own personal belief as you talk to that person.

And the idea that I think a lot of people have in our system, that we have the ability to be human polygraphs. First off, I don't believe the electronic ones are worth anything, but that's me. But I certainly—I get lied to all the time. Everybody lies to me, okay. I mean everyday people lie to me. And one thing I have—we all think we are pretty good at spotting that and I've learned sometimes I just don't know, all the time. You going to lie to me? That's fine, lie to me. I mean, I'm going to do what I'm going to do. But we have a lot of times were

wrongful convictions happen in our system because someone has said, “I absolutely believe this person is guilty, the evidence isn’t there, but I 100 percent believe they are, and so it’s okay for me to cut this corner that then leads to the conviction.” And I don’t want us to be in a situation where we have to rely on that same sense to unconvict people sometimes. And another prosecutor I have a tremendous amount of respect for in another jurisdiction recently had a case that ended up blowing up. And it was a wrongful conviction. And one of the things that came out was this prosecutor said, “You know I was initially skeptical of the veracity of this complaining witness when I read the police reports. I was skeptical. But then I met the person and I spoke to them in person. And I just really believed at that point in time that this crime had happened to them.” And then the prosecution went forward. The person got convicted. And it ultimately blew up months and months later. So we need to be careful. I want to believe my sense in it, but I also worry that we base this on our own ability to tell.

Tate: Post conviction lawyers can commit the same sins that we decry in law enforcement in terms of tunnel vision, or confirmation bias, or all those things.

Ramseur: And I’ve had plenty times were I thought someone was innocent and they absolutely were not, come to find out.

Armbrust: My first DNA case.

Tate: So, unless Mike or Shawn have anything additional, time to open it to the audience.

Herring: You know I will say this. I think that’s a fair, it’s not so much a criticism, it’s a fair point. But I don’t know that we can, and I don’t know that we ought to, cleanse the justice system of the human component. I tell you, because Shawn has highlighted the

system of coincidences. Right? That's what—that's your point? At the risk of oversimplifying.

Armbrust: Yeah.

Herring: Because of the system of coincidences, if I don't have a personal investment in her client's position I don't know that I can be an effective advocate with Shawn. If it's a purely technical position, Shawn and I probably stay on parallel adverse paths. Polite, collegial, but adversarial paths.

Tate: We are going to open it to the audience. So if anyone—we have two microphones on either side of the Moot Courtroom and please wave a hand and we will . . .

Armbrust: There is one in the balcony.

Herring: The first one's open.

Tate: Oh we can't get the microphone up there. Project loudly please.

Participant: I was wondering if anybody on the panel can comment on the role of disability in wrongful convictions. Particularly, the impact of...disability of defendants during initial police encounters and during interrogations.

Ramseur: Yeah, so I mean, we've seen a lot more recognition...and the question for anyone who didn't hear was about disability and basically vulnerable defendants that way. We've seen in my work, in capital work, because they've said you can no longer execute people who are intellectually disabled. Right? We used to call them mentally retarded, we now call them intellectually disabled. And, you can't seek the execution of juveniles for the same reason: which is, they are vulnerable people. We can still put them in prison for the rest of their lives though. Right? And they are still vulnerable to wrongful convictions for exactly the same reason

and some people would argue they actually get less relief sometimes when you're only doing life in prison as opposed to a death penalty. There are less people to come in to try and find out that you were wrongfully convicted. You know, there's a reason why, you know, we look at the number of exonerations and there have been 150 exonerations from people who are on death row, but only 330 DNA exonerations of everybody, completely here, because we give more scrutiny to that.

It is certainly true that I think we need to make everyone more aware of mental health issues and the vulnerability that is there. And people get involved in it more that way. We're seeing movement, I think, to recognizing, that, but it hasn't stopped that unfortunately the breakdown in our mental health systems has led us to push those people to the criminal justice system instead, and led for more of that to happen. And I think there's trying to be greater awareness, and openness to it, but it happened, it's an enormous risk. And it's hard again when someone can't communicate with you, they can't defend themselves well, they can't explain something to you. I have had a number of clients who are intellectually disabled, and I was often struck when I first met them, that I absolutely did not think they were intellectually disabled when I first met them. In fact, I walked out of those meetings going "That's a really nice guy, he's a client, he just agreed with everything I said. He's so smart." That was just their way of masking that they weren't following anything I was saying. And as [a] lawyer, I'm used to talking to them and telling them what they should do. And as a person who's vulnerable they're used to doing sometimes what they're told. And it leads to a lot of injustice, and so it needs to be more awareness. It was only after meeting those people several times that I realized...and really getting their records...that they

were extremely vulnerable people. And so, it just takes a lot more awareness to get there, and it's tough.

Tate: Shawn?

Armbrust: I think I see it come into play in a couple of different ways. The first very concrete way is in false confessions. False confessions have been a factor in nearly a quarter of all post-conviction DNA exonerations. And although people with normal IQs can falsely confess, and do in many cases, if you are intellectually disabled or mentally ill, or a juvenile, you are much more likely to falsely confess. For exactly the reason you just talked about, which is that you are used to masking your disability or vulnerability by being extra compliant with authority. So it is much easier for police techniques that are designed to convince people that it's rational to confess. Those work in tandem with false confessions more often when there is an intellectual disability or another vulnerability.

Tate: Or work for the poor.

Armbrust: Yeah, exactly. And then the second way I think it can come into place is that, you know, once you are convicted, once your direct appeal is concluded, you no longer have the right to counsel. So, if you are a prisoner, you are making it through in Virginia state habeas, and federal habeas on your own. So if you are intellectually disabled, you may be able to get a jailhouse lawyer, and some of them actually aren't bad. They're not the same as having a really good post-conviction lawyer. You're forced to litigate that on your own, and there are people who have clerked on the Supreme Court who have a hard time figuring out federal habeas. It's not exactly intuitive. So if you're intellectually disabled it's particularly hard. And even when you're trying to get a lawyer, it can be challenging. People write to our office. We get six hundred re-

quests per year from people who want our help. We have a staff of four full-time and three part-time employees, so we cannot talk to all six hundred of those people. We ask them to fill out a questionnaire. And we try really hard, to look at those questionnaires, and say, okay clearly there's something, this guy had a hard time filling it out, let's send someone to talk to this person. But as you said, you can't always tell, and so the intellectual disability makes them less strong communicators and less able to advocate for themselves to get lawyers. And so it can lead to wrongful convictions, but it can also make them more difficult to correct because you don't have the means to actually do what you need to do to correct them.

Tate: The cases getting in the pipeline, that's another system that's just *ad hoc* because at the University of Richmond we have resources but not extensive resources, so what you're doing is you're triaging and you're trying to, you know, make reasonable decisions about resources, and it's very difficult but sometimes you can see markers even in a twenty six page questionnaire.

Participant: Good afternoon. One of the comments, I have and one of the things I see is that when you go to plea deals, a lot of times a defendant faces a multitude of charges and the plea deal sort of whittles it down to one or two charges and the plead guilty to it, and they miss that whole idea of a trial. What are your comments and I guess I really am focusing more towards Mike in terms of how that sort of causes problems in terms of how those people who plead guilty to things they might not necessarily want to plead guilty to.

Herring: I think the term that's begun to be applied to this is "stacking charges." I think I lean left of most of my peers as prosecutors, but even leaning left, I am a lawyer and I come to work every day to be an ad-

vocate. And I try to make decisions and litigate strategically and I look for leverage the same way Doug does. If there's probable cause for the charge, and if there is in fact an injury, it becomes tough for me to decide which charges I'm going to throw away and which I am going to litigate or use for leverage. What's left out of the discussion on stacking charges, I think, is often, at least in the state system, offers, plea offers, that are much lower than the statutory plea range. So third offense distribution, mandatory minimum ten years, the offer, if you're in a jurisdiction that is sympathetic to the argument that ten years is a draconian sentence, the offer is going to be less. It might be six. Well, when that person rejects the six years, the case goes to trial and he's convicted and gets the ten or more. We look through the lens, you look in the rearview mirror of what happened to that case and you assume that he was a victim of stacked or leveraged charges that we took advantage of his status as a third time dealer even though he only sold a twenty dollar rock. And it's a very sympathetic case, very sympathetic fact pattern the twenty-dollar sale, but I don't know how much you all expect me to negotiate against myself. I put a good offer on the table and he rejects it, do I put a better offer on the table? How much do I induce him to save himself? I do think though, in fairness, that we are going to, at least some jurisdictions are going to be more willing to look at charging decisions just because of the impact of it. You see it in gun cases. Violent crimes involving guns, you can rack up much more mandatory gun time than you get on the actual substantive offense. And I don't know that that was the intent of the legislature and we certainly don't want to bear the cost of it.

Tate: May I tie this into your, I do think it's related, your reference in your remarks, a little bit of a tickler on prosecutorial conviction integrity units. And you

said that there is this certain image and you might want to educate the audience of what that construct is but you seem to have a slightly different view or a variation on it, is that correct?

Herring: Yes.

Tate: Would you amplify?

Herring: In most discussions about conviction integrity units, the term sort of refers to this review of older cases. And so you're going back and looking at your files going through this sort of quality control analysis. Well, one of my co-panelists made the earlier point that, Shawn did, I'd rather avoid a near miss than have to correct a wrong. Conviction integrity looking through the rearview mirror tries to right a wrong. I think if we're going to avoid near misses you've got to set processes up in offices that allow for some sort of critique, scrutiny, scrutinizing of the cases it's moving through the system. Easy to say, hard to implement though because that means if Shawn and I are colleagues, Shawn's looking over my shoulder to some degree at my work. And she might be looking over my shoulder and concluding that I'm not discharging my discovery obligation as she thinks the law requires me to. And you can imagine how easy in theory it is to say "yeah you should do that" but the office, the dynamic in the office really becomes caustic. But I think that's the only way that it works. There are jurisdictions that will speed up in California that have begun to do it.

Tate: Good, thank you.

Participant: Good afternoon, my name is [name omitted] and I'm a third year law student here at Richmond. It seems like one of the dangers of widely publicized actual innocence cases is that it can erode the public trust in our criminal justice system, that we can get things right. Is there a way to design a system

that will allow those convicted to have more effective access to actual innocence claims without that erosion of public trust?

Ramseur

Well, I agree with what Mike said earlier that there is still a human element to this and we have to recognize that because it's a human institution, it makes mistakes. And the problem that we have is when we try to make a system, if we had a system that said "look, it is unfortunate that it makes mistakes and we will do our best to try to correct them," then we would have at least some belief that while the system isn't perfect, we work hard to fix it and we have processes that are in place to do that. What Shawn discussed then is how hard it is to get it fixed because our system values finality. It values the conviction. Don't upset a conviction after it's happened because everyone will want to, because defense attorneys like me will continue to try to fight for some client and never give up. And that was the problem and now there may have been some overcorrection. So, I agree it causes public confidence, what we need is to then talk about what are the processes like a conviction integrity unit or allowing for us to know there is some open avenue to vent those mistakes that happen and not make it like you've got to move the world to make it happen. Ensure that there's a willingness to do that, which sometimes is tough to do.

Armbrust:

I think one way of sort of avoiding the erosion of public trust, is if we are able to really show that we're trying to learn lessons from wrongful convictions. I think a lot of time when we talk about wrongful convictions we end up talking about blame, you know, who screwed up, who did something wrong. I don't think that's a super productive conversation if we're trying to make the system better so that the system isn't allowing for wrongful convictions as often. I think it's possible that if there were...when there are wrongful convictions,

if we do what some people are talking as a root cause analysis, a sentinel events review, there are all sorts of different terms that mean essentially the same thing. But what they are is taking what the field of medicine has used to look at error and do a review in a non-blaming way. To figure out what were the places in the process where the system failed. And taking those lessons and really trying to apply them. And I think if you can do that and show that you're doing that, then the public could say "okay well the system makes mistakes, every system makes mistakes, it's run by people, that happens. But at least this system is learning from them and trying to become better." And so that's where I think you could take something that could erode public trust, and turn it into a way that could improve public trust in the system.

Tate: And I wanted to add with Bryan Stevenson's book *Just Mercy*, I think there's an element with regard to legitimacy and problems on the public trust that he's getting at and mass incarceration and policing videos, and what not. But I agree with Shawn that to frame it as structural problem solving is absolutely essential and not to go in a blaming direction, but even if we take that tact, we as a democracy have to admit that we are producing wrongful convictions that afflict the poor and racial minorities at a higher rate. So that seems to me that it gets lost sometimes in discussions about the frontal pre-trial problems.

Herring: I think that one problem that plagues the state system, and I say this because of my limited experience in the federal system, but I have watched people who work in the federal system, is that there is such an emphasis, if not premium, on the state system on moving the case through. My great uncle used to say, "take your time." Just the coolest dude in the world, "take your time." But we just don't in the state system. The federal system, on the other

hand, allows for good substantive tractive lawyering. Now again, it's easy for me to sit here and criticize the system, but we've got swollen dockets and speedy trial statutes. The casualty of that scenario though is, perhaps, the integrity of some of the outcomes. Pleadings. Wrongful convictions. So I don't know that in the current framework, unless we agree to slow the entire state system down significantly, you're going to see an improvement in the quality of the outcomes.

Participant: I know the panel knows me, but for the people in the audience that don't, I'm [name omitted]. And I thought I heard Shawn say something that I do want to comment on. We do have a bail statute now for actual innocence, for both writs.

Armbrust: Did it pass last year?

Participant: Yes.

Armbrust: I thought it didn't. That's great.

Participant: We have a bail statute for when the Attorney General is agreeing to relief. And, if I could, I would like to comment on sort of the public trust and integrity of the system. I think one of the things that helps enhance or restore the public trust is when we all as the government actors say: "we have identified a mistake. We have to fix it. We're going to do it now." One of the things that we do as the Office of the Attorney General when we agree that someone is entitled to relief, we ask the court to expedite review. We waive certain things, so we are fully participating in getting those cases fully resolved as quickly as possible.

Participant: Shawn gave us some examples where maybe in spite of the system, some innocent people were able to get justice. Do you have any study, any stories, where that didn't work out? Where there are innocent people that you have not been able to get the justice they deserve?

Armbrust:

Yes. And in a wise political move, I am going to choose cases from Maryland to talk about because that's just a better choice. There's a case pending right now in Maryland Court of Appeals, which is their highest court, in which the prosecutor has chosen to focus purely on process. So the individual, the defendant, was convicted on a rape in the 1980s, and there is no DNA left to test because the rape kit has been destroyed. And, this is a guy who was about 17 or 18 at the time he got arrested. And when he got arrested several months after the crime, he said to his lawyer, "Hey, at the time of the crime, I was working as a part-time dog washer. I was paid per dog, under the table. I don't know if I was working that day, but maybe they've got records." The defense attorney goes to this dog washing business, which is a husband and wife. The husband is dying. The wife says, "I don't think I have records, my husband is dying. I can't really look for them." The police, the state's attorney go to her. She says, "I don't have records." She's subpoenaed to testify at trial. She says, "I don't have records." The court says, "I order to you to go look. If you find them, come back to us." She doesn't come back. Years later, husband is deceased. Post-conviction attorney goes, "Sure enough, there are records. He was at work that day." At the time, there was no way in Maryland to move for a new trial based on newly discovered evidence, so they filed an ineffective assistance of counsel claim. State said, "The lawyer was diligent. He looked for the records; that's not ineffectiveness." He loses.

In 2009, I think it was, Maryland passed its version of a writ of actual innocence and the lawyer this time said, "Okay, it wasn't ineffective assistance because the lawyer was diligent, I'm going to file a newly discovered evidence claim." The State said, "Well, the lawyer wasn't diligent in seeking the records." And there actually is a slight gap in the law

between diligence for purposes of ineffective assistance of counsel and diligence for purposes of newly discovered evidence, we tried to say there wasn't but there is. I wish there weren't. He won in the trial court. That win was appealed by the State. He lost in the intermediary appellate court, and it's now up at the state highest court, but we don't know what's going to happen. The State has admitted that the evidence is material, so it would change the outcome of trial. But it all hinges on this definition of "diligence for purposes of newly discovered evidence." So that's one of those instances. I have another instance in Maryland right now where two years ago, we had asked for a comparison of a palm print. There were six palm prints at the point of entry that had originally been the main focus of the investigation. We asked for a comparison, the State got a hit, we said, "Who is it?" they said, "We're not going to tell you, but it is not one of the original suspects." We litigate for a year, we finally get the name; within five minutes, we determine that it was in fact one of the original suspects. And it actually was an oversight, I'm not defending the prosecutor, but that was an oversight. He didn't get the connection. And I think we finally have a hearing coming up in April of 2016 on the innocence claim, which will be I think two and a half years after we got the palm print hit. It's someone who doesn't know the defendant, who says he's never been in the home, there was no other robbery at the home, so it's a case where I think if we were working with a different prosecutor, maybe we wouldn't have won by now, but I think it would be a very different process. Instead we're probably going to be litigating this case for the next three to five years. So, I think there really are big distinctions in the cases where you do have extraordinary people on board.

Participant: Good afternoon, my name is [name omitted], I'm a third year law student. Mr. Ramseur, my question is for you sir. You mentioned how you don't enjoy defending innocent persons, that they're the biggest challenge. We were also mentioning how often plea agreements take place, but an innocent person who may be convicted that pleads guilty is prohibited from a writ of actual innocence in the future. So, in spirit of the human nature of when you think that somebody may be innocent, how do you proceed in advising a client who you believe to be innocent but perhaps a plea is going to give them a better situation than the odds are looking for them?

Ramseur: Sure, it's a great question. You just have to sign a, frankly I acknowledge the reality of the system, that it makes a lot of mistakes and that most people get convicted. You have to spend a lot of time and unfortunately, part of a lot of the job I do right now is spend a lot of time convincing people that they ought to agree to spend the rest of their lives in prison? Which is not easy to do for people who've never been good decision makers in their life. And, because the alternative is the death penalty you spend time explaining to them kind of the reality of what our system is, that it has shortcomings, that it has failures, and here is the pragmaticness [sic] of how do they, of what the chances of success are for them with any of these things. It's extremely rare and unlikely for people to get writs of actual innocence granted for them, and the idea sometimes is, it is a kick in the teeth, the entire system is kind of meant to bear down on you and to make you bend to its will and the question is, what do you want to get out of this in the long run? What's the result that you're trying to get to here? Do you want to have an opportunity to be free and be back to your family or do you, are you going to stand up and say, "No there's no way I'll ever admit that I did this." And they're extremely hard

discussions and different people have to make different decisions for their own lives as to what is the right choice for them in those situations, and all I can do is advise them for it. One of the things I say to clients, and Shawn and I have talked about this before, is I can't guarantee any result for a client, because I don't get to make the decision. I don't have a vote on the jury. I'm not the judge. I'm not the prosecutor. All I can do is say, "I will work as hard for you as I can to try to get you the best result we can, but there are times when the best result possible is probably a very very bad one for you." And so, we have to try to find a way around that and that's the reality of it and that it is ultimately going to be their decision as to what happens, we are trying to make them make that decision. I hate having those discussions with people, it makes me feel very sad about our system and my role in it sometimes.

And as much as I believe in our system in some ways—I believe in the ideology of our system. Ideologically, I believe there is a great way for our system to be. The practical element is I know our system has biases, it has prejudices, and it doesn't work perfectly because it is made up of humans who are there. So it can be a little bit soul crushing sometimes, to be that way with people. I say that I don't like the innocent clients that way because you have to crush their souls a little bit about what the reality of their chances of success are in our system. It's not often that people are found not guilty at trial—it's rare, that way. We hope they get it right we hope that's because people are rarely charged in those ways but it is just not always the case.

Tate: And once you are under a life sentence instead of under death sentence. Professor Gross out of Michigan recently did a peer-reviewed analysis and found a 4.1 % error rate. He was using statistical

regressions and one of the cruel ironies of his analysis was that if you were, for some reason, no longer under the threat of the death sentence, you were getting fewer resources and less scrutiny was going to be invested in your case.

And so, we are looking at possibly a 4.1 percent error rate and that error rate question is meticulously argued. But we are probably in the zone of having to accept at a minimum you know based on the Urban Institute and whatnot, close to 5 percent, so it's tough.

Herring: As counterintuitive as this is, though, I think the incidents of wrongful conviction in capital cases are significantly lower—perhaps because there are fewer capital cases—than routine felony cases. But I think you stand a better chance of having someone proving your actual innocence in capital litigation than in run-of-the-mill felony litigation because of the resources, the lawyering, and the time afforded to your case. It is very counterintuitive. Right? But it's the truth.

Ramseur: No it's absolutely the truth. And what I worry about is the ordinary injustice that happens. The ordinary cases that happen every day that injustice happens this way. I am fortunate I get to put a lot of time and effort into my cases to try to prevent it from being injustice in a lot of my cases.

Armbrust: If you look at misdemeanors, we don't take them. If they are not still in prison, we've got 600 requests per year to get through before that. I don't know if anyone read the New York Times article on racial profiling this weekend. In Greensboro, North Carolina, a couple of the misdemeanor cases that they mentioned are cases that easily could have ended in convictions, but the misdemeanor system is not at all set up to test the factual accuracy of the claims. People plead and they go home, and I think those cases get virtually no scrutiny. Capital cases

get significantly more, so people are more likely to catch mistakes when they happen.

Ramseur: One of the ways people are most encouraged to take plea agreements is because they are not home. They are locked up, pretrial, and they cannot afford a bond or a bail. And then you tell them, “If you plead guilty today, then you will go home today to your family, with time served.” Then they will say, “But I didn’t do it.” And you say, “Well, that’s great—trial is set for another month.” Then people will go, “Okay, I will plead today because I need to go home today to take care of my family and that is more important to me.”

That is an ordinary injustice that happens every single day and it is just because it makes the trains run on time, in some ways and it is practical for some people. It is unfortunate so we have to work to get those resources a little bit so maybe we can prevent that from happening. It’s really hard.

Tate: It is very fitting that [name omitted] will be our last question, a man with a mighty background in criminal defense.

Participant: [Name omitted] and I uh, have defended a few capital cases, and had a few innocent clients including capital ones, but what I really want to do is comment on Mike’s suggestion that there would be less wrongful convictions in capital cases, than in other cases. And, on the one hand, it is correct that there are more resources available, but I think there are some countervailing factors. One of those is that it is my belief that the burden of proof switches more and more to the defendant the worse the crime is, and so that when you reach, when you reach capital cases, then truly the burden is on the defendant to prove innocence. Juries are happy to give people charged with breaking and entering all the constitutional rights to which they are entitled, and about which they are instructed. But you could

instruct them from now until next month about the burden of proof and the presumption of innocence in a nasty capital case, and I don't think it means anything. So, I think the burden of proof issue means that you have a greater possibility. The other thing that you have is the wrongful convictions based on pleas, is amplified in capital cases because people choose to eliminate the death penalty in order to avoid that consequence—far more so than agreeing to a plea to avoid an additional ten years. And so if we include in the mix the people who plead guilty, even though they may not be, then I think that we really skew the results, because I think an awful lot of those people are saying, "I will do anything as long as you don't kill me."

Tate: The ultimate cost benefit question for a client.

Armbrust: And I think the jury. One of the things Sam Gross, an academic at the University of Michigan, has written very powerfully about is how little we actually know about wrongful convictions. That is one of the questions: "Is the rate higher in capital cases?" Because we can talk about what the rate is in capital cases, but we cannot talk about it anywhere else. The National Science Foundation got a group of people together a few weeks ago to talk about wrongful conviction research in some of those areas where we do not know. I think those are some good arguments about capital cases having a higher rate of wrongful convictions, and they may well be right. One of the things that I think people are going to be trying to do is test whether or not they are right so that we can learn about wrongful convictions because we really do know so little.

Tate: Absolutely, thank you, this was terrific paneling, I am going to hand it back to Caitlin.

Kear: Thank you all so much, just a round of applause for our panelists. Thank you. We really all very much

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appreciate you coming here today, and sharing such valuable opinions and insights, and experiences, so, truly, thank you so much.