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**Access Denied: A Socio-Legal Exploration of Access to Justice in Nigerian Wrongful
Conviction Cases**

By

Chinyere E. Obinna

A Thesis

Submitted to the Faculty of Graduate Studies

through the Faculty of Law

in Partial Fulfillment of the Requirements for

the Degree of Master of Laws

at the University of Windsor

Windsor, Ontario, Canada

2021

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**Access Denied: A Socio-Legal Exploration of Access to Justice in Nigerian
Wrongful Conviction Cases**

by

Chinyere E. Obinna

APPROVED BY:

S. McMurphy

Department of Sociology, Anthropology, and Criminology

P. Ocheje

Faculty of Law

R. Bahdi, Advisor

Faculty of Law

August 25, 2021

DECLARATION OF ORIGINALITY

I hereby certify that I am the sole author of this thesis and that no part of this thesis has been published or submitted for publication.

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ABSTRACT

Research has shown that notwithstanding the substantive and procedural laws that protect the rights of criminal defendants in Nigeria, the criminal justice system has often failed to uphold its commitment of justice to these individuals, resulting in wrongful convictions. Wrongful convictions undermine the integrity and effectiveness of the criminal justice system and result in devastating consequences on wrongfully convicted individuals. Though the reality of wrongful conviction is established in Nigeria, research on the problem is scarce. Besides, much of the available literature focuses on the legal causes of wrongful convictions without considering the broader social context. This thesis seeks to address the gap in knowledge through a socio-legal study of the barriers that wrongfully convicted individuals experience in the Nigerian criminal justice system and how they experience these barriers. Five wrongfully convicted individuals were interviewed for the study and the interview transcripts were analyzed using thematic analysis. The findings show that wrongfully convicted persons in Nigeria experience multiple barriers to justice that devalue their humanity, prevent them from participating meaningfully in their cases, and deny their fundamental and procedural rights. These experiences cause the wrongfully convicted persons to lose faith in the criminal justice system, question the legitimacy of its institutions, and distrust the officials that work within it. It is hoped that the recommendations made for further research and reforms would inspire changes to address the problem of wrongful conviction in Nigeria, remedy the harms done to wrongfully convicted persons, and help bolster the integrity of the Nigerian legal system.

DEDICATION

To my Father in heaven, thank You for Your presence that never left me, for Your grace that was sufficient, for Your power that accomplished it all! My hands are raised, my heart is bowed! Chimmeri!

To my children, Chinazom, David, Tochi, and Akunna, this is for you. Anything is possible if you believe and work at it!

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My deepest gratitude goes to my supervisor, Professor Reem Bahdi, for her excellent supervision of this thesis. I truly appreciate your guidance, assistance, and patience as I navigated this challenging journey. I also wish to thank Dr. Paul Ocheje, my internal department reader, and Dr. Suzanne McMurphy, my external department reader. Thank you for accepting to join my thesis committee and for your support of this project.

My appreciation goes to Windsor Law for providing me with a platform to explore a topic that is very dear to my heart. I am grateful to my course instructors at Windsor Law: Dr. Laverne Jacobs, Dr. Anneke Smit, Dr. Bill Conklin, Professor Myra Tawfik, and Professor Vasanthi Venkatesh for the invaluable knowledge and insights I gained from your classes. To Annette Demers, many thanks for cheering me on. To my cohort, thanks for the exchange of ideas and for the journey. Anna, we did it!

My profound thanks to my tight circle: Aunty Alice, Azuka, Busola, Edith, Mercy, Abigail, Gert, Claudette, Keva, and Andrea. I am truly grateful for your friendship and prayers. To my parents and siblings, you have been there from the beginning! I am forever grateful for your love and encouragement. To my pastors and first ladies at ANFGC Windsor, I appreciate your counsel and prayers. God bless you richly.

Finally, I wish to thank the study participants for sharing their stories. Your voices have been heard beyond Nigeria and will hopefully illuminate the issue of

wrongful conviction in the country. Many thanks to Pastor Hezekiah Ogunjobi and the Center for Justice, Mercy, and Reconciliation (CJMR) for providing access to the participants and for their incredible work with the wrongfully convicted in Nigeria.

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LIST OF ABBREVIATIONS

1999 CONSTITUTION	Constitution of the Federal Republic of Nigeria 1999
AFRICAN CHARTER	The African Charter on Human and Peoples' Rights 1986
CID	Criminal Investigation Department
CJ	Chief Justice
CJMR	Centre for Justice, Mercy, and Reconciliation
CPA	Criminal Procedure Act
IAC	Ineffective Assistance of Counsel
LEDAP	Legal Defence and Assistance Project
NMAP	New Media Advocacy Project
NPF	Nigeria Police Force
OAU	Organization of African Unity
REB	Research Ethics Board

PROLOGUE: POSITIONALITY AND MOTIVATION FOR STUDYING WRONGFUL CONVICTIONS IN NIGERIA

Several years ago, I graduated with a law degree from my home country, Nigeria. Afterwards, I proceeded to the Nigerian Law School for vocational legal training, after which I was called to the Nigerian Bar. As a fresh graduate from Law School, one of the first briefs I handled was the case of a criminal defendant who had been arrested and charged with a misdemeanour. The young man's relatives brought the matter to our law firm following their concerns about his prolonged detention in prison custody. The initial consultation with the family revealed that the total period the defendant had spent in both police and prison custody surpassed the maximum sentence for the alleged crime. When I took up the case as defence counsel, the case could still not proceed as the police prosecutor failed several times to appear in court to prosecute the case. After several adjournments, I applied to the court to strike out the case for want of diligent prosecution. The court granted the request and struck out the case against our client.

As I continued with legal practice, I moved away from litigation practice to corporate law practice for personal and family reasons. Thus, a few years ago, when I relocated to North America for graduate studies, I earned my first master's degree in Law and Governance from Montclair State University. I had enrolled in the program to prepare for a productive engagement with the burgeoning governance and compliance field in Nigeria. In Montclair State, the Faculty of Arts and Social Sciences housed the Law and Governance program, which provided me with a unique opportunity to take non-legal courses. Mediation theory and practice was one of those courses, and it ignited my interest in alternative dispute resolution mechanisms.

Coincidentally, during my enrolment in the mediation course, I became involved in a friend's family conflict that the religious organization they belonged to was attempting to resolve. As the dispute became intractable, I decided to apply some of the principles I learned in my mediation class to the conflict. I noticed a positive change in my friend's conflict behaviour. This surprising and pleasant development got me thinking about the differences between my conflict intervention approach and the organization's process. I learned that the difference was that I provided them with an opportunity to tell their story from their perspective and validated their feelings and emotions about the conflict. Though my intervention did not ultimately resolve the conflict, the transformation in my friend's conflict behaviour and my interest in seeking alternative ways to resolve conflict led me on the path to pursuing a doctorate in Conflict Analysis and Resolution at Nova Southeastern University.

Continuing my studies in the new field, I became more interested in the treatment of specific individuals experiencing conflicts in particular contexts. Reflecting on my friend's case, I came to believe that the lack of a formal dispute resolution mechanism in the organization may have led them to diminish their voice and invalidate their emotional experiences in the conflict. Beyond the immediate circumstances of my friend's case, the broader issue of social justice, especially the topics of marginalized people and communities, engaged my attention. To this end, most of my class papers and projects covered underrepresented or oppressed groups or populations in organizations and societies. For example, I explored the cases of Aboriginal communities in Australia, the forgotten war in Yemen, and the impact of therapeutic jurisprudence on marginalized youth in drug courts in the United States.

As I began to consider the topics for my dissertation, I gravitated towards a subject that would give voice to an oppressed or marginalized population and validate their experiences in

their inhabited spaces. From my previous class research projects and my friend's case, I had noted the significance of providing a platform for marginalized or oppressed people to tell their stories and validate their experiences. For example, Australia's National Sorry Day provided a platform for the Aboriginal community to recount the past and ongoing experiences of trauma and suffering by the removed children, initiate a process of acknowledgement, repentance, and forgiveness, and validate the need for reparations. For my research on drug courts in the United States, I found that the judges slowed the revolving doors of recidivism for youths from marginalized communities when applying the principles of giving voice, showing respect and promoting neutrality during the judicial process. Giving voice to marginalized populations enables them to tell their stories that would otherwise remain concealed or overshadowed by stories of majority groups. It also allows them to participate in shaping policies and practices that impact them and their communities.

With this understanding, I decided to undertake my doctoral dissertation on the government's role in addressing post-conviction issues of wrongfully convicted individuals in Nigeria. Several cases of exonerations in the United States, where I then resided, got me thinking about the fate of the exonerees after their release. I often thought about the young man that I represented in my early years of legal practice. Although the court did not convict him of any crime, he was wrongfully detained. When the court struck out his case, he was let go without any form of restitution from the government for the harms he suffered from his prolonged detention in police and prison custody. Through my doctoral study, I wanted these individuals to lend their voices to how the government can make them whole after their wrongful conviction. My doctoral thesis thus focused on the post-wrongful conviction experiences and needs of exonerated individuals.

However, beyond studying the post-release experiences of wrongfully convicted individuals in Nigeria, I realized the importance of gaining a holistic understanding of the problem of wrongful conviction in the country. I also needed to explore how wrongful convictions occur in the Nigerian criminal justice system through the experiences of wrongfully convicted persons in the country. The thesis topic, my perspectives on the phenomenon under study, the methodologies adopted in this study thus grew out of my particular standpoint as a researcher and my motivation for this study. They are also grounded in the theoretical and doctrinal literature about wrongful convictions, procedural justice, criminal justice, human rights, and other lines of legal and socio-legal literature. My commitment to giving voice to those who have suffered a wrong or faced a traumatic experience is equally inspired by the understanding that, as feminist and critical race scholars in law have long argued, giving voice to individual experiences can help us understand collective experiences.¹ I have incorporated the voices of those wrongfully convicted into the thesis. There is a dearth of research on wrongful convictions in Nigeria, and I hope that this study will fill the gap in the literature on the subject in the country. More importantly, the stories of the wrongfully convicted individuals in Nigeria are essential to affirm the reality of wrongful convictions in Nigeria and to understand better the contributory factors to wrongful conviction in the Nigerian context. This understanding can inspire changes to address the problem for the sake of preventing wrongful convictions, helping to remedy the harms already done, and help bolster the integrity of the Nigerian legal system.

¹ See e.g. Reem Bahdi, “Narrating Dignity: Islamophobia, Racial Profiling, and National Security Before the Supreme Court of Canada” (2018) 55:2 Osgoode Hall LJ 557.

CHAPTER 1: INTRODUCTION

The criminal defendants' experiences with the Nigerian criminal justice system involve interactions with various officials and institutions tasked with maintaining law and order and the administration of justice.² During these interactions, the expectation is that the criminal justice system will provide these individuals with a fair criminal process that protects their rights and guarantees just outcomes for their cases. This expectation rests on the fundamental and procedural rights for criminal defendants enshrined in the Constitution of the Federal Republic of Nigeria ("1999 Constitution"),³ the African Charter on Human and Peoples' Rights ("African Charter"),⁴ and the Criminal Procedure Act ("CPA").⁵ However, notwithstanding the guaranteed rights and means to effectuate those rights in these laws, the Nigerian criminal justice system has often failed to uphold its commitment of justice for these individuals, resulting in miscarriages of justice, including wrongful convictions.⁶

Scholars and commentators have explored the issue of wrongful conviction in the Nigerian criminal justice system.⁷ The various aspects they have considered include the contributory factors to wrongful conviction, its impact on the affected individuals, and ways to prevent the problem in the criminal justice system. Nevertheless, scholarly literature on wrongful

² In Nigeria, the officials include police officers, prosecutors, defence counsels, and magistrates/judges, while the institutions comprise of the police force and the courts.

³ Constitution of the Federal Republic of Nigeria 1999, (as amended), entered into force on 29th day of May 1999. [1999 Constitution] § 34 (1) (a); § 35 (1), (2), (3), (4), (5) (6); § 36 (4), (5), (6), (8).

⁴ African Charter on Human and Peoples' Rights (Banjul Charter), OAU, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [African Charter]. Art. 3 (1), (2); Art. 5; Art. 6; Art. 7.

⁵ Criminal Procedure Act [Nigeria], Cap C41 LFN 2004, 2 September 1990, Pt.2; Pt. 11; Pt. 12; Pt. 14; Pt. 18; Pt. 20; Pt. 28. (The domestic laws and international instrument will be discussed further in the thesis).

⁶ V O Aigbokhaevbo & E A Iyamu-Ojo, "Criminal Justice in Nigeria: Forensic Science as a Panacea" (2015) 20 U Botswana LJ 25; Leonard Opara, "The Law and Policy in Criminal Justice System and Sentencing in Nigeria" (2014) 4:7, Intl J Asian Soc Science 886.

⁷ See e.g. Daniel Ehigialua, "Nigerian Issues in Wrongful Convictions" (2013) 80:4 U Cin L Rev 1131;

convictions in Nigeria is scarce. The literature on the subject is mainly found in newspaper reports, advocacy group publications, and blog posts.⁸

Wrongful conviction has a contested definition in the literature. Most scholars and researchers have articulated a restrictive definition of wrongful conviction based on factual innocence, which involves “convicting those who are innocent either because no crime was committed or, more commonly, because a crime was in fact committed, but by someone else”⁹ However, some adopt a broader understanding of wrongful convictions which also includes “convictions marred by serious constitutional or other procedural or due process errors, which are foundations of our civilized legal system and are not “legal technicalities.”¹⁰In other words, those who adopt a broader view of wrongful convictions include cases where the individual may be factually guilty of the crime.

This study will adopt the broader definition of wrongful convictions for the following reasons. Research confirms that the most prevalent cases of wrongful conviction in Nigeria fall within the broader definition, which involves procedural or due process errors rather than those that involve factual innocence.¹¹Also, it is challenging to establish factual innocence in Nigeria because there are few means or no mechanisms to do so. In some countries like the United States

⁸ See New Media Advocacy Project, “Innocent and Sentenced to Die: Wrongful Incarceration on Nigeria’s Death Row” (12 August 2020) online (video): New Media Advocacy Project < <https://www.nmap.co/project/faces-of-death-row-innocent-men-sentenced-to-die-in-nigeria/>; Adejumo Kabir, “Nigerians Jailed for Over 20 Years Say They Were Wrongfully Detained, Convicted”, *Premium Times* (1 November 2019) <www.premiumtimesng.com/news/headlines/360516-nigerians-jailed-for-over-20-years-say-they-were-wrongfully-detained-convicted.html>

⁹ See e.g. Michael Risinger, “Innocents Convicted: An Empirically Justified Factual Wrongful Conviction” Rate, (2007) 97 J. Crim. L. & Criminology 761, at 762; Hugo Adam Bedau & Michael L. Radelet, “Miscarriages of Justice in Potentially Capital Cases” (1987) 40 Stan. L. Rev. 21.

¹⁰Marvin Zalman, "An Integrated Justice Model of Wrongful Convictions" (2010) 74:3 Alb L Rev 1465 at 1470. See also Daniel S Medwed, "Innocentrism" (2008) 5 U Ill L Rev 1549 at 1560 for legal innocence as “cases where the evidence simply fails to clear the threshold of guilt beyond a reasonable doubt.”

¹¹ Ehigialua, *supra* note 7 at 1133; Fasilat Abimbola Olalere, “Case Study Account of Causes and Legal Implication of Wrongful Conviction” (2020) 11:2 Nnamdi Azikiwe University J Intl L Jurisprudence 122.

and Canada, mechanisms such as DNA testing and post-conviction review have been used to establish factual innocence.¹² These resources, however, are not available in Nigeria. Besides, the broader definition better aligns with the theoretical framework of the study. The more restrictive definition of wrongful conviction, which links wrongful conviction to factual innocence, focuses on determining the outcome of the case. This study is not concerned with the outcome but instead aims to illuminate aspects of the procedural and due process considerations that have led to the undesirable outcomes.

Problem Statement & Research Questions

Research has shown that the failure of the Nigerian criminal justice system to protect the rights of criminal defendants has led to wrongful convictions.¹³ An examination of wrongful convictions in the criminal justice system has also shown their detrimental effects on the affected individuals.¹⁴ Wrongful convictions highlight the reality of human rights and procedural violations in the criminal justice system.¹⁵ Moreover, wrongful conviction undermines the integrity of the criminal justice system, erodes public trust, and raises questions about the legitimacy of the justice system and the officials that work within it.¹⁶ This thesis explored the barriers to justice that wrongfully convicted persons experienced in the Nigerian criminal justice system and how they experienced the barriers.

¹² Charles I Lugosi, "Punishing the Factually Innocent: DNA, Habeas Corpus and Justice" (2002) 12:2 Geo Mason U CR LJ 233; Andrea S Anderson, "Wrongful Convictions and the Avenues of Redress: The Post-Conviction Review Process in Canada" (2015) 20 Appeal: Rev Current L & L Reform 5.

¹³ Ehighalua, *supra* note 7 at 1133; Olalere, *supra* note 11 at 122.

¹⁴ Joy Ugba, "Remedies for Wrongful Convictions in Nigeria" (last visited 25 March 2021), online (pdf): *Academia*< https://www.academia.edu/45189217/Remedies_for_Wrongful_Convictions_in_Nigeria>

¹⁵ Udo Jude Ilo, "Nigeria Country Report on Death Penalty Application" (last visited 12 June 2021), online (pdf): *British Institute of International & Comparative Law*< www.biicl.org/files/2300_country_report_nigeria_ilo.pdf>

¹⁶ Marvin Zalman, Matthew J Larson & Brad Smith, "Citizens' Attitudes toward Wrongful Convictions" (2012) 37:1 Crim Justice Rev 51.

In exploring the barriers to justice that wrongfully convicted persons experienced in the Nigerian criminal justice system and how they experienced the barriers in the system, this thesis focused on two related but distinct research questions. These research questions are:

1. what are the barriers to justice that wrongfully convicted persons experience in the Nigerian criminal justice system prior to their convictions? and
2. how do wrongfully convicted persons experience these barriers to justice?

Significance of Study

First, this thesis contributes to the knowledge and analysis of wrongful convictions in Nigeria. There is insufficient research about wrongful convictions in the country. The problem of wrongful conviction requires further exploration for various reasons. Wrongful convictions reveal the wide disconnect or gap between law on the books and people's lived realities. The problem also highlights human rights violations in the criminal justice system and their detrimental effects on the affected individuals. This study, drawing on original qualitative research, explains how the barriers to justice combined to produce the wrongful convictions of five participants. The cases elucidate the dynamics of their individual stories and the dynamics of the interaction between individual circumstances and shortcomings in the Nigerian criminal justice system. This thesis is the first scholarly study to examine wrongful convictions in Nigeria based on qualitative research and the first scholarly study to present the voices of those wrongfully convicted as the basis of its findings and analysis.

Second, this study contributes to the theoretical and methodological understanding of wrongful conviction. Much of the literature on wrongful convictions follow the "familiar plot of

wrongful conviction scholarship,”¹⁷ which employs case-based narratives to catalogue wrongful conviction cases, identify the legal causes of wrongful convictions in those cases, and propose reforms to prevent future cases of wrongful convictions.¹⁸ Scholars have expressed dissatisfaction with the current situation. They have urged a rethinking and re-orientation of wrongful conviction scholarship that incorporates criminological and social science theoretical approaches and methods to advance understanding of the problem.¹⁹ Using Procedural Justice Theory and Due Process Model to explore wrongful convictions in Nigeria, this study sought to understand how various actors in the criminal justice system made decisions at various stages of the criminal process that resulted in wrongful convictions of the study participants. The Procedural Justice Theory and the Due Process Model also enabled a holistic assessment of the Nigerian criminal justice system, including the socio-economic, cultural, and political contexts that inspire wrongful conviction cases.

Further, the qualitative research approach adopted by this study transcended the case-study narrative legal methodology to offer a systematic study of wrongful conviction. This approach provided a deeper analysis of the experiences of the study participants which begins to illuminate the contributory factors of wrongful convictions in Nigeria. Of course, the perspectives of the wrongfully convicted persons are only part of the analysis of the causes and significance of wrongful convictions in Nigeria. Different methodologies and fuller analysis,

¹⁷ Richard A Leo, "Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction" (2005) 21:3 J Contemp Crim Just 201 at 207.

¹⁸ See Chapter 2 of thesis.

¹⁹ See e.g. Leo, *supra* note 17 at 215. (Leo notes that “in every miscarriage of justice, the whole is far greater than the sum of its parts” and “that individual causes cannot tell us much about the interaction effects between different sources of error or across multiple stages of the criminal process from arrest to prosecution to conviction.”). See also Eric Colvin, “Convicting the Innocent: A Critique of Theories of Wrongful Convictions” (2009) 20:2-3 Crim L Forum 173.

including, for example, interviews of other actors such as Nigerian officials, would be needed in order to further understand the causes and broader contexts of wrongful convictions. However, this study gives a glimpse into these structural factors based on the experiences of the wrongfully convicted themselves.

Third, this study offers an example of how the voices of those most affected by the legal system can be brought to bear in theorizing about wrongful convictions in particular and access to justice more broadly. Access to justice scholarship tends to be written from the perspectives of lawyers, judges, and legal professionals. A few community-based access to justice scholars aim to shift the centre of analysis by exploring and presenting voices from within affected communities.²⁰ Nevertheless, this approach remains the exception rather than the rule. There is a dearth of studies about barriers to justice from the perspectives of wrongfully convicted persons. This thesis aimed to fill the gap in the literature by examining the barriers to justice in wrongful conviction cases in Nigeria from the standpoint of wrongfully convicted individuals in the country. Like the larger access to justice literature, the literature on wrongful conviction is written mainly by legal scholars and experts from an ‘outsider’ point of view. Hearing the stories from the study participants provided firsthand accounts of their experiences during the criminal process and helps advance knowledge about “what really happens when access is denied”²¹ The information generated from the study highlight the barriers these individuals faced in the Nigerian criminal justice process. Understanding wrongful convictions from those who have

²⁰ See e.g. Reem Bahdi, "Arabs, Muslims, Human Rights, Access to Justice and Institutional Trustworthiness: Insights from Thirteen Legal Narratives" (2018) 96:1 Can B Rev 72; Janet E Mosher, "Grounding Access to Justice Theory and Practice in the Experience of Women Abused by their Intimate Partners" (2015) 32:2 Windsor Yearbook of Access to Justice 149.

²¹ Amanda Dodge, "Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations" (March 2013), online: Canadian Bar Association < http://www.cba.org/CBA/cle/PDF/JUST13_Paper_Dodge.pdf > at 1.

been wronged increases awareness about the reality of wrongful convictions in Nigeria and provides a fuller understanding of the impacts on the wrongfully convicted.

Finally, this study furthers access to justice theorizing beyond discussions of the wrongfully convicted. Rodrick MacDonald's foundational paper entitled "Access to Justice in Canada Today: Scale, Scope, Ambitions" helped lay the foundations for studying access to justice.²² The paper was adopted, for example, by Professors at the University of Windsor in helping to frame a mandatory course in access to justice.²³ McDonald proposed a three-part framework for thinking about access to justice: substantive, which prioritized an understanding of law on the books; procedural, which emphasized the fairness of procedural rules, especially from the perspective of users; and, symbolic which focuses attention on how law structures social hierarchies. Since then, other access to justice scholars have adopted MacDonald's framework in making empirical, policy, and theoretical contributions to a rapidly growing access to justice literature.²⁴ This thesis, building on this tradition, drew on MacDonald's access to justice framework and linked access to justice to the Due Process Model and Procedural Justice Theory, which helped identify and explain the barriers to justice experienced by those wrongfully convicted.

²² Roderick A MacDonald, "Access to Justice in Canada Today: Scope, Scale, Ambitions" in Julia Bass, W A Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Ontario: Law Society of Upper Canada, 2005)

²³ See e.g. Reem Bahdi, *Access to Justice Course Guides*, 2005, University of Windsor, Faculty of Law (on file with the author).

²⁴ See e. g. Emily Bates, Jennifer Bond & David Wiseman, "Troubling Signs: Mapping Access to Justice in Canada's Refugee System Reform" (2016) 47:1 *Ottawa L Rev* 1; Bahdi, *supra* note 20.

Organization of Thesis and Relationship of Chapters

This thesis is organized into eight chapters. Following the present introductory chapter, the second chapter reviews the literature related to wrongful convictions in both the Nigerian and transnational contexts. Specifically, the chapter discusses the contributory factors to wrongful convictions and the impact on the wrongfully convicted in the United States and Canada. The literature review from Canadian and American sources is rather extensive for the simple reason that this is an area of established scholarship. Considering my experiences as a transnational lawyer and scholar and my understanding of the dangers of “legal transplants,” I was careful not to presume that the contributory factors of wrongful conviction in Nigeria were the same as those presented in the scholarly literature from North America. Nonetheless, the literature review from American and Canadian sources informed this study because the review helped define the study’s research questions. In particular, the literature review reinforced the importance of asking questions that addressed the role of a broad range of actors within the criminal justice system.

Chapter three turns to the access to justice framework that helped ground this study of wrongful convictions in Nigeria. This chapter surveys the Nigerian criminal justice system and outlines laws that protect criminal defendants’ constitutional and procedural rights during the criminal process. Surveying the laws helped highlight the legal and procedural rights of criminal defendants that were violated in the criminal process. Identifying the substantive legal framework also helped in the analysis and interpretation of participants’ narratives by allowing a comparison of “laws on the books” versus “law in action.” It further reinforced that access to justice, whether studied in schools or taken up by policymakers and legal reformers, must always move beyond an analysis of the letter of the law.

Chapter four focuses on the main theoretical framework that helped define the research: the Due Process Model and Procedural Justice Theory. The chapter begins by explaining how each contributes to understandings of the procedural element of access to justice as articulated by MacDonald before setting out the theories in more detail. The theoretical framework informed the interview protocol, which is set out in Appendix I.

Chapter five details the research methodology. It describes the research method, data collection method involving interviews with the wrongfully convicted persons and the thematic analysis method adopted and applied to data analysis. This thesis was proposed before the outbreak of the international pandemic. The main goal had been to meet with those wrongfully convicted in person. This methodology had been conceptualized before Covid-19 made international travel impossible. Nonetheless, I made adjustments to ensure that the study centred the voices of the wrongfully convicted.

Chapter six presents the study's qualitative findings based on semi-structured interviews with five wrongfully convicted individuals. These interviews highlight the main contributory factors of wrongful conviction in Nigeria as identified by those who experienced wrongful convictions: unlawful detention; falsified statements and wrongful charging by police; the use of torture to extract evidence; corruption and offers to free individuals in return for money or other benefits. The chapter also laid out the participants' discussion of the impacts of wrongful conviction on their lives.

Chapter seven provides the analysis and interpretation of the contributory factors presented in the previous chapter. The themes that emerged from the interviews reinforced some of the main findings of the existing literature about wrongful convictions in Nigeria and added

significantly to the existing literature. The chapter highlights how officials fail to act within the Nigerian law and identifies the profound ways in which, not surprisingly, individuals who have faced wrongful convictions have been impacted by the experience.

Chapter eight concludes the thesis and furnishes recommendations for further exploration of wrongful convictions in Nigeria. It underscores the need to address the main causes of wrongful convictions as identified by the interviewees. These recommendations are intended to encourage further study and reforms for the sake of the individuals who are wrongfully convicted and Nigerian society. In the end, a legal system helps to regulate people's relationships with each other. Through the law, a state provides its citizens and residents with safety and security. This chapter reinforces that we can understand wrongful conviction as an indicator of the health of the legal system as a whole rather than an isolated failure of that system.

CHAPTER 2: LITERATURE REVIEW, CONTRIBUTORY FACTORS TO WRONGFUL CONVICTION IN TRANSNATIONAL CONTEXT

Introduction

In recent decades, wrongful convictions in criminal justice systems gained global attention.²⁵ Public acknowledgement and the need for a better understanding of the problem led to increased exploration of the issue. Thus, scholars and researchers, primarily from the United States and Canada, focused their attention on identifying the causes of wrongful conviction and its impact on wrongfully convicted individuals. Though it is certain that wrongful convictions occur in the Nigerian criminal justice system, less is known about the contributory factors and the impact on the wrongfully convicted. There is little or no empirical research on wrongful conviction in the country as most literature on the problem is contained in case studies, newspaper reports, agency publications, and blog posts. Also, there is no publicly available database that systematically collects and retains information on wrongful convictions.

This chapter contributes to the larger study in several ways. First, the literature review helped situate the study within the domain of existing literature and present the rationale for conducting the study. In particular, the literature review pointed to the lack of scholarly analysis about wrongful convictions in Nigeria and reinforced the need to develop empirical data in the Nigerian context. Second, the review examined the individual and institutional contributory factors to wrongful convictions and the impact of wrongful convictions on the affected

²⁵ Ronald C Huff, “Wrongful Convictions: The American Experience” (2004) 46:2 Can J Corr 107; Lynne Weathered, “The Growing acknowledgement of Wrongful Conviction, The Australian Response within an International Context” (2013) 3 Victoria U L & Just J 79; Kent Roach, “Wrongful convictions in Canada” (2013) 80:4 U Cin L Rev 1465; Erin Shapiro, “Wrongful Convictions: Not Just an American Phenomenon?: An Investigations Into the Wrongful Convictions in the United States, Germany, Italy, & Japan” (2020) 34:3 Emory Intl L Rev 897.

individuals. These factors and impacts helped inform the development of research questions for the study. Third, the literature review was harnessed in analyzing the data for this study (Chapter Seven) and in identifying areas for further research (Chapter Eight).

Most of the scholarly literature focuses on the legal causes of wrongful convictions in the criminal justice system without putting these in a larger social context. This state of legal scholarship follows the development of the wrongful conviction literature in the United States and Canada written mainly by legal scholars. The scholarship privileges the case-study narrative methodology and primarily involves the identification of wrongful conviction cases and their contributory factors. The situation presumes that wrongful convictions represent an aberration or a failure of the criminal justice system rather than a representation of or window into the larger legal system. This study, however, suggests that wrongful convictions are not departures from the larger legal system but rather symptoms of the legal system's more general failings. Accordingly, a broader understanding of wrongful conviction, one that puts these failures in a larger context, is needed if we are to address its root causes.²⁶

Wrongful Convictions in Nigeria

Across jurisdictions, it is difficult to determine the full scope of wrongful convictions.²⁷ The nature of the problem itself makes it difficult to define the scope: convictions are wrongful only after they have been identified. But there are those who remain within the system and have yet to be identified. Accordingly, it is impossible to define the numbers or scope of wrongful

²⁶See Chapter Seven. Going through the analysis, one can see that the causative factors must be understood in larger context. For example, this thesis points out that police corruption is not simply a problem within the criminal justice system but is part of a larger societal problem. Bribes and torture, for example, are evident in other parts of the legal system and, indeed, in society more broadly. See also Paul Ocheje, "Norms, Law and Social Change: Nigeria's Anti-Corruption Struggle, 1999-2017" (2018) 70:3 Crime L Soc Change, 363. (The article notes the importance of going beyond the law to the broader institutional and social contexts in addressing with the problem of corruption in Nigeria).

²⁷ Marvin Zalman, Brad Smith & Angie Kiger, "Officials' Estimates of the Incident of Actual Innocence Convictions" (2008) 25:1 Just Q 72; Kent Roach, "Wrongful convictions in Canada" (2013) 80:4 U Cin L Rev 1465.

convictions in Nigeria. However, scholars and commentators have considered the issue of wrongful conviction in Nigeria.²⁸ They have discussed various aspects of the problem including the contributory factors to wrongful conviction, its impact on the affected individuals, and means of forestalling the problem in the criminal justice system.

Scholarly Sources

Daniel Ehighalua's article on the issues involved in wrongful convictions in Nigeria provides a broad overview of the problem in the Nigerian context.²⁹ In his paper, the author discusses the contributory factors to wrongful convictions, the application of international human rights law in combating wrongful convictions in Nigeria, and the role of lawyers and non-governmental organizations in preventing wrongful convictions in the country. The author notes that wrongful convictions in Nigeria do not occur because of problems with the human rights laws in Nigeria but arise from the actions of individual actors in the criminal justice system.

The article identifies six contributory factors to wrongful convictions in Nigeria: policing strategy, police brutality and torture, the paucity of legal representation, the skewed bail system, rights awareness, and poor investigative skills. In essence, these contributory factors underscore the main role of the police and judicial officers in wrongful convictions in the criminal justice system. In the case of police officers, the paper details the unfair strategies the police employ in the arrest and detention of criminal suspects such as prolonged detention, use of torture to obtain confessions, and denial of police bail. In addition, the police often lack the resources to conduct investigations especially in cases that require forensic analysis. The role of judiciary is

²⁸ Ehighalua, *supra* note 7; Fasilat Abimbola Olalere, "Case Study Account of Causes and Legal Implication of Wrongful Conviction" (2020) 11:2 Nnamdi Azikiwe University J Intl L Jurisprudence 122; Fasilat Abimbola Olalere, "Case Study Account of Causes and Legal Implication of Wrongful Conviction" (2020) 11:2 Nnamdi Azikiwe University J Intl L Jurisprudence 122.

²⁹ Ehighalua, *supra* note 28.

highlighted in the unfair court bail system which disadvantages poor criminal defendants, the underfunding of the judiciary, and the corruption that exists in its ranks. Further, criminal defendants' ignorance of their rights and lack of legal representation in their cases play a critical role in their wrongful convictions.

In addition to the contributory factors of wrongful convictions, the author points out the impact of the problem on the wrongfully convicted persons and their families. He notes that wrongfully convicted individuals suffer the scorn and humiliation of being dragged through the criminal justice system as well as the deprivation of their right to liberty. Their family members also experience emotional, social, and economic consequences from the wrongfully convicted persons' prolonged trials and incarceration.

Fasilat Olalere's paper provides a case study account of the causes and legal implications of wrongful convictions in Nigeria.³⁰ She reviews wrongful conviction cases from Nigeria and other jurisdictions to show the causes of wrongful convictions in those contexts. She contends that wrongful convictions contravene the justice objectives of the criminal justice system which to provide a fair trial to criminal defendants. Like Ehigalua, Olalere identified five contributory factors to wrongful convictions. Nonetheless, not all the factors were associated with wrongful convictions in the Nigerian criminal justice system. The factors she discussed include faulty eyewitness identification, false confession, police misconduct, forensic error, and incompetent legal representation.

The paper notes faulty witness identification as a major contributory factor in wrongful convictions in the US and describes how faulty witness misidentification leads to wrongful

³⁰ Olalere, *supra* note 28.

convictions in the country. However, it does not identify any cases of wrongful convictions in Nigeria that was caused by faulty witness misidentification and bemoans the lack of legislative framework to regulate police identification parades in Nigeria. The paper provides three Nigerian wrongful conviction cases that involved police misconduct and false confessions. In these cases, the criminal defendants were arrested and tortured by the police to extract confessional statements regarding the alleged crimes. The defendants were exonerated on appeal as the court held that their coerced confessional statements could not be admitted in evidence. It is noteworthy that the defendants had competent legal representation on appeal which enabled their release from incarceration. The paper further discusses the role of forensic error and incompetent representation of counsel as contributory factors in wrongful convictions in the United States but does not provide cases where these factors led to wrongful convictions in Nigeria.

The Global Study on Wrongful Death Row Convictions presents a comparative study on wrongful convictions in Nigeria and five additional jurisdictions around the world.³¹ Like Olalere's paper, the study used the case study approach to examine the problem of wrongful convictions in the jurisdictions. The authors acknowledge the challenges of understanding the prevalence of wrongful convictions in the Nigerian criminal justice system and hopes that the provision of adequate investigative and reporting resources will mitigate this challenge.

In the Nigerian case under review, the study identified the factors that led to the wrongful conviction of the criminal defendant as arrest and false confession obtained by torture, lack of access to effective legal representation, violations of fair trial rights and judicial misconduct.

³¹ Delphine Lourtou, Sandra Babcock & Katie Campbell, K. "Justice Denied: A Global Study of Wrongful Death Row Convictions" (last visited 12 August 2020) online (pdf): *The Cornell Centre on the Death Penalty Worldwide* <files.deathpenaltyinfo.org/legacy/files/pdf/innocence_clinic_report_2018_R4_final.pdf>

It showed how the factors coalesced to result in the wrongful conviction of the criminal defendant. Beyond the case under review, the study also offers four risk factors they consider as prevalent in the Nigerian criminal justice system. The factors include ineffective assistance of legal counsel, lengthy pre-trial detention, torture and coercion leading to forced confessions, and official misconduct. The issues that constitute official misconduct include police raids, arbitrary arrest, corruption, and misuse of prosecutorial powers.

Non-scholarly Sources

Aside from scholarly sources, there are a few non-scholarly sources that have addressed wrongful convictions in Nigeria. These sources tend to be brief and infrequent. In their blog post to draw attention to wrongful convictions in Nigeria, Legal Defence and Assistance Project (LEDAP), a leading criminal justice advocacy organization, partnered with New Media Advocacy Project (NMAP) to publicize cases of wrongful convictions in Nigeria using the medium of video recordings.³² They displayed three video recordings where the wrongfully convicted persons detailed their stories of arrests, trials, and convictions for capital crimes in the Nigerian criminal justice system. In furtherance of their goal of showing the reality of the problem in the country, the organizations screened the recordings for local and international human rights organizations. They also indicated their interest in sharing the recordings with allies and stakeholders in the criminal justice advocacy community to put pressure on policy makers to address wrongful convictions in Nigeria.

Also, in his newspaper article on the post-incarceration experience of an exoneree in Nigeria, Chika Oduah presented the story of the journey of the exoneree in the Nigeria criminal

³² See New Media Advocacy Project, “Innocent and Sentenced to Die: Wrongful Incarceration on Nigeria’s Death Row” (12 August 2020) online (video): New Media Advocacy Project < <https://www.nmap.co/project/faces-of-death-row-innocent-men-sentenced-to-die-in-nigeria/>>

justice system.³³ According to his report, the exoneree was arrested and convicted for killing a relative during a family dispute and was sentenced to death at the conclusion of his trial. He was discharged and acquitted on appeal for want of diligent prosecution.

The report also documents the impact of the experience of wrongful conviction on the exoneree. During his time in incarceration, the exoneree suffered from emotional and physical problems such as stress, depression, diabetes, and high blood pressure. He also attempted to take his life following his suffering and misery from his wrongful conviction and incarceration. In addition, he lost his mother and missed family gatherings and celebrations. Nonetheless, the report noted that exoneree found faith in prison and was ordained a faith minister during his incarceration. He also resolved to further his education and left the prison with two doctorate degrees.

Finally, Adeola Adeyemo's article on the case of wrongful conviction in Nigeria details the story of a man who was arrested and wrongfully convicted for murder. He was discharged and acquitted on appeal when his case was taken up by a leading criminal advocacy group in Nigeria. According to the report, the contributory factors in the exoneree's case include wrongful arrest, torture to extract confessional statement, and unfair trial process. The article also notes that the exoneree suffered the loss of his eye and his marriage during his incarceration. In addition, the exoneree reported that he did not trust the judges to deliver justice and that all persons should have access to justice regardless of their economic status.

³³Chika Oduah, "Life After Death Row: The Pastor Praying for Nigeria's Prisoners" *Aljazeera* (1 April 2020), online: <<https://www.aljazeera.com/features/2020/4/1/life-after-death-row-the-pastor-praying-for-nigerias-prisoners>>

Contributory Factors to Wrongful Convictions, Lessons from Canada and United States

Most of the literature about wrongful convictions comes from the United States and some has emerged from Canada. Scholars in both jurisdictions, like their Nigerian counterparts, stress that wrongful convictions do not usually result from one single factor. Instead, both individual and institutional elements may work together, resulting in a wrongful conviction.³⁴ The most common contributory factors identified in the literature include eyewitness misidentification,³⁵ professional misconduct,³⁶ false confessions,³⁷ and inadequate representation of counsel³⁸

Eyewitness Misidentification

Eyewitness misidentification has been cited as the leading factor in wrongful convictions in the United States and Canada.³⁹ In their study, Huff, Rattner, Sagarin, and MacNamara show that 60% of the wrongful convictions in their database of about 500 (and growing) cases involved eyewitness misidentification.⁴⁰ Innocence Project supports this position when it notes that eyewitness misidentification was implicated in nearly 69% of over 375 wrongful conviction cases overturned by DNA in the United States.⁴¹ Although eyewitness testimony is crucial to the

³⁴ Huff, *supra* note 25; Myriam S Denov & Kathryn M Campbell, "Criminal Injustice: Understanding the Causes, Effects, and Responses to Wrongful Conviction in Canada" (2005) 21:3 J of Contemporary Crim Justice 224.

³⁵ Douglas Balko, "Justice Delayed Is Justice Denied: Wrongful Convictions, Eyewitness-Expert Testimony, and Recent Developments" (2013) 46:4 Suffolk UL Rev 1087.

³⁶ Kathryn Campbell & Myriam Denov, "The Burden of Innocence: Coping with a Wrongful Imprisonment" (2004) 46:2 Can J Corr 139.

³⁷ Rachel Dioso-Villa, "A Repository of Wrongful Convictions in Australia: First Steps toward Estimating Prevalence and Causal Contributing Factors" (2015) 17:2 Flinders LJ 163 at 166.

³⁸ Ellen Yaroshefsky & Laura Schaefer, "Defense Lawyering and Wrongful Convictions. Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/906

³⁹ Ronald C Huff et al, "Guilty Until Proved Innocent: Wrongful Conviction and Public Policy" (1986) 32:4 Crime & Delinquency 518; Bruce MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31:3 Man LJ 403.

⁴⁰ Huff, *supra* note 39 at 524.

⁴¹ "Eyewitness Identification Reform" (last visited 16 April 2021), online: *Innocence Project* <innocence project.org>

proper functioning of the criminal justice system, social scientists, legal scholars, and even the courts have long questioned its reliability.⁴²

Multiple factors impact the reliability and fairness of eyewitness testimony during the criminal process. These elements are broadly categorized into system variables and estimator variables.⁴³ System variables are eyewitness factors that can be controlled by the criminal justice system, such as identification procedures and the conduct of police interviews.⁴⁴ Estimator variables are outside the control of the system, like the attributes of the witnesses and the environmental conditions of the crime scene.⁴⁵ The distinction between these two classifications of variables has significant implications in the criminal justice system. According to Yarmey, "[t]he differentiation between estimator and system variables allows for a more conclusive understanding of the probability of accuracy, errors of commission and omission, and completeness of reports in eyewitness memory about criminal incidents at different points in time."⁴⁶ Moreover, because system variables can be controlled, their study can inform changes in

⁴² George Vallas, "A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses" (2011) 39:1 Am J Crim L 97; John T. Wixted, Laura Mickes, & Ronald P. Fisher, "Rethinking the Reliability of Eyewitness Memory" (2018) 13(3): Perspectives on Psychological Science 324. (For instance, Münsterberg observes that "in a thousand courts at a thousand places all over the world, witnesses every day affirm by oath...mixtures of truth and untruth, combinations of memory and of illusion, of knowledge and of suggestion, of experience and wrong conclusions). Hugo Münsterberg, *On the Witness Stand: Essays on Psychology and Crime* (New York: Doubleday Page, 1909) at 43; *United States v. Wade*, 388 U.S. 218, 228 (1967). (Justice Frankfurter also remarked that "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.")

⁴³ Gary Wells, "Applied Eyewitness Testimony Research: System Variables and Estimator Variables" (1978) 36 J Personality and Soc Psychology 1546; Dana Walsh, "The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness" (2013) 54:3 BC L Rev 1415.

⁴⁴ Wixted et al., *supra* note 42 at 324-325.

⁴⁵ Daniel A Yarmey, "Eyewitness Identification: Guidelines and Recommendations for Identification Procedures in the United States and in Canada" (2003) 44:3 Canadian Psychology = Psychologie Canadienne 181.

⁴⁶ *Ibid* at 182.

the criminal justice system, which could mitigate eyewitness misidentification and enhance the accuracy of eyewitness evidence.⁴⁷

As indicated earlier, the system variables in eyewitness evidence include police identification procedures and police interviews. The police employ two pretrial identification procedures to obtain eyewitness testimony: lineups and show-ups.⁴⁸ Show-up procedures typically take place soon after a crime is committed and involve presenting a single individual to an eyewitness to identify the perpetrator of a crime.⁴⁹ While show-ups may assist police investigations in proceeding promptly, scholars have chronicled many issues associated with the identification procedure.⁵⁰ A major criticism has been the procedure's suggestive nature, whereby a single suspect shown to an eyewitness could be implicated in a crime.⁵¹ Suggestive actions that can contribute to inferences of guilt include providing the witness with the opportunity to view the suspect in handcuffs, at the police station, or while seated in a squad car.⁵² Additionally, since show-ups do not avail the benefit of showing multiple suspects to an eyewitness, the procedure does not assure the reliability of the eyewitness' memory and could result in "the possible reduction in [the] protection of the innocent suspect."⁵³

⁴⁷ J Don Read, "Features of Eyewitness Testimony Evidence Implicated in Wrongful Convictions" (2006) 31:3 Man LJ 523.

⁴⁸ David A Sonenshein & Robin Nilon, "Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance" (2010) 89:1 Or L Rev 263.

⁴⁹ Steven E Clark & Ryan D Godfrey, "Eyewitness identification evidence and innocence risk" (2009) 16:1 Psychonomic Bulletin & Review 22.

⁵⁰ Nancy K Mehrkens Steblay, "Reforming Eyewitness Identification: Cautionary Lineup Instructions; Weighing the Advantages and Disadvantages of Show-Ups versus Lineups" (2006) 4:2 Cardozo Pub L Pol'y & Ethics J 341.

⁵¹ P Christian Milde, "Bare Necessity: Simplifying the Standard for Admitting Showup Identifications" (2019) 60:6 BC L Rev 1771. (Courts in the United States have also held that showups are "inherently suggestive" and that they should be used in exceptional circumstances) See e.g. *United States v. Hadley*, 671 F.2d 1112, 1115 (8th Cir. 1982); *United States v. Newman*, 144 F.3d 531, 535 (7th Cir. 1998).

⁵² Benjamin E Rosenberg, "Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal" (1990) 79:2 Ky LJ 259.

⁵³ Steblay, *supra* note 50 at 249.

Contrary to show-ups, lineups are conducted later and typically comprise a suspect and several other individuals known as foils or fillers.⁵⁴ During show-ups, the police allow the eyewitness to view all the individuals in the lineup to identify the suspect.⁵⁵ The identification process can take the form of a simultaneous lineup where the witness views all individuals in the lineup at once or a sequential lineup that allows the witness to view the individuals consecutively.⁵⁶ In cases where the lineup administrator and witness are unaware of the suspect's identity, the lineup is designated as "double-blind."⁵⁷ When only the administrator knows the suspect's identity, the lineup is known as a "non-double-blind" lineup.⁵⁸

Eyewitness misidentification can also occur during police interviews.⁵⁹ The errors arise from police interview techniques which can distort the eyewitness memory and lead to an incorrect description of events.⁶⁰ In their article about eyewitness identification reforms, Wise et al.⁶¹ detail the interview techniques that lead to erroneous eyewitness testimony. These include strategies that foster incomplete recollection from the eyewitnesses, contaminate the witnesses' memories of crimes, and succumb to systemic pressure to gather biased evidence.⁶²

Police officers are sometimes unable to collect complete information from eyewitnesses for several reasons. First, they ask an abundance of closed questions rather than open-ended

⁵⁴ Sonenshein, *supra* note 48 at 270.

⁵⁵ *Ibid* at 271.

⁵⁶ *Ibid*.

⁵⁷ Kovera, Margaret Bull, and Andrew J. Evelo. "The Case for Double-Blind Lineup Administration." (2017) 23:4 *Psychology, Public Policy, and Law* 421.

⁵⁸ Sonenshein, *supra* note 48 at 271.

⁵⁹ Michael P. Toglia, J Don Read, David F Ross, & R C L Lindsay, eds, *The Handbook of Eyewitness Psychology: Volume 1: Memory for Events*, 1st ed (London, UK: Taylor & Frances, 2012).

⁶⁰ Wixted et al., *supra* note 42 at 329.

⁶¹ Richard A Wise, Kirsten A Dauphinais & Martin A Safer, "Tripartite Solution to Eyewitness Error, A " (2007) 97:3 *J Crim L & Criminology* 807.

⁶² *Ibid* at 843.

ones.⁶³ Closed questions take away control from the eyewitnesses and hinder them from fully communicating the pertinent details of the crime. Second, frequent interruptions of the eyewitness accounts of crimes impact memory recall and discourage witnesses from providing relevant information. Finally, officers ask witnesses a standard set of questions rather than questions consistent with each witness's unique mental representation of the crime.⁶⁴

Furthermore, officers contaminate the eyewitness memories of crimes by advancing alternative information during interrogations. They provide the witnesses with information about the crime from other sources rather than furnishing information from the witnesses' recollection of the crimes. This information known, as post-event information, comes from other eyewitnesses, the media, and police officers and can be communicated through leading questions, enticing witnesses to guess answers, and affirming their feedback.⁶⁵ Unfortunately, witnesses can incorporate the post-event information with their recollections, which could impact their memory of the crime and identification of the actual suspect.⁶⁶

Additionally, there are institutional issues that result in biased eyewitness testimony during police interviews. For instance, police officers may feel constrained by their organizations to manipulate the eyewitness recall of the crime. The pressure could be motivated by the law enforcement organization's primary focus on convicting offenders and collecting corroborating evidence from the witnesses to secure the conviction.⁶⁷ Moreover, using inexperienced novice

⁶³ Wixted et al., *supra* note 42 at 329.

⁶⁴ Wise et al., *supra* note 61.

⁶⁵ Elizabeth F Loftus, "Planting Misinformation in the Human Mind: A 30-year Investigation of the Malleability of Memory" (2005) 12 *Learning and Memory* 361.

⁶⁶ Elizabeth F Loftus, David G. Miller, & Helen J Burns, "Semantic Integration of Verbal Information into a Visual Memory" (1978) 4:1 *J Experimental Psychology* 19.

⁶⁷ Ronald P Fisher, "Interviewing Victims and Witnesses of Crime" (1995) 1:4 *Psychology, Public Policy, & Law* 732.

police officers to conduct interviews with eyewitnesses under poor conditions can result in ineffective interviews with biased and flawed results.⁶⁸

As noted earlier, estimator variables are factors of eyewitness misidentification that the justice system cannot control. Researchers have identified these factors and how they result in eyewitness misidentification.⁶⁹For example, in their article on the accuracy of eyewitness testimony in criminal cases, Wise, Fishman and Safer⁷⁰examined how human memory contributes to eyewitness error. The authors noted the constraints to the accuracy of human memory that impact an eyewitness's detailed testimony of a crime. They contend that human memory "does not work like a video camera" that can reproduce an exact record of the crime, but eyewitnesses unconsciously reconstruct their memory of the crime.⁷¹The reconstruction process happens when factors such as their expectations, beliefs, and understanding of similar events impact the witnesses' factual recollection of the crime.⁷²Misidentification could then arise when the witnesses combine these multiple sources of information to create a narrative of the crime.⁷³

Human memory can also be limited by other factors such as time delay and stress. Research has shown that longer delays between observation and the retrieval of eyewitness evidence can lead to difficulty in retrieving the information.⁷⁴In their study on the effects of

⁶⁸ *Ibid* at 756.

⁶⁹ See e.g. Brian L Cutler, Steven D. Penrod & Todd K. Martens, "The reliability of eyewitness identification: The role of system and estimator variables" (1987) 11:3 L Human Behavior 233. See also Carolyn Semmler et al., "Role of Estimator Variables in Eyewitness Identification" (2018) 24:3 J Experimental Psychology: Applied 400.

⁷⁰ Richard A Wise, Clifford S Fishman & Martin A Safer, "How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case" (2009) 42 Conn L Rev 435.

⁷¹ *Ibid* at 455.

⁷² *Ibid*.

⁷³ *Ibid* at 456.

⁷⁴ See e.g Wenbo Lin, Michael J Strube & Henry L Roediger, "The Effects of Repeated Lineups and Delay on Eyewitness Identification. (2019) 4 Cognitive. Research 16 .

delay on memory accuracy and confidence, Wheatcroft et al.⁷⁵ interviewed twenty-one witnesses about a crime they observed. The participants were interviewed again on the same subject after six months. The study found that the passage of time between the two interviews significantly reduced memory accuracy.⁷⁶ Naka, Itsukushima and Itoh's⁷⁷ article presents the study findings of long-term memory accuracy in everyday life in natural settings. They asked eighty-six salesclerks to recall a customer that had made a purchase in their store three months prior. The results indicate that though two-thirds of the clerks identified the customer from a photograph, only 13% were accurate.⁷⁸

Regarding stress and memory recall, although it is assumed that heightened emotional levels facilitate memory, research suggests stress has more of a negative than positive effect on the memory of an eyewitness.⁷⁹ Besides, an eyewitness's recall memory is significantly impacted when violence is involved.⁸⁰ As Aharonian and Bornstein assert, "[e]yewitnesses in high-stress situations are less likely to be able to correctly identify a perpetrator from a lineup, and recall of details associated with the witnessed crime is less likely to be accurate."⁸¹ In addition, the involvement of a weapon during a crime is likely to aggravate the negative impact of stress on an eyewitness's memory.⁸² The stress levels increase in these cases as the eyewitness's attention is

⁷⁵ Jacqueline M Wheatcroft, Graham F Wagstaf & Brian Manarin, "The influence of Delay and Item Difficulty on Eyewitness Confidence and Accuracy" (2015) 1 Intl J Humanities and Soc Science Research 1.

⁷⁶ *Ibid* at 4.

⁷⁷ Makiko Naka, Yukio Itsukushima, & Yuji Itoh, "Eyewitness Testimony After Three Months: A Field Study on Memory for an Incident in Everyday Life" (1996) 38:1 Japanese Psychological Research 14.

⁷⁸ *Ibid* at 22.

⁷⁹ Ani A Aharonian & Brian H Bornstein, "Stress and Eyewitness Memory" (2008). Faculty Publications, Department of Psychology 485.

⁸⁰ See Lauren O'Neill Shermer, Karen C Rose & Ashley Hoffman, "Perceptions and Credibility: Understanding the Nuances of Eyewitness Testimony" (2011) 27:2 J Contemporary Crim Justice 183.

⁸¹ Aharonian & Bornstein, *supra* note 79 at 485.

⁸² Shermer et al., *supra* note 80 at 186.

drawn to the weapon rather than other details such as the perpetrator's features or the environment.⁸³

Official Misconduct

Official misconduct has emerged as one of the most common factors in wrongful convictions.⁸⁴ For instance, the National Registry of Exonerations in the United States indicates that 1530 out of 2,775 cases (55%) listed in the Registry are related to official misconduct.⁸⁵ Also, in Huff et al.'s database, the second and third most common official errors were police and prosecutorial errors, respectively.⁸⁶ Gross et al.⁸⁷ define official misconduct as when "a prosecutor, police officer, or less frequently, forensic analyst or child welfare worker violate[s] an official duty in the investigation or prosecution of a criminal case, and that violation contributed to the conviction of a defendant."⁸⁸ Official misconduct can take many forms depending on the government official involved in the case.⁸⁹ Though the police and prosecutors are the most commonly discussed officials in the literature, the roles of the judiciary and forensic scientists in wrongful convictions have also been highlighted.⁹⁰

⁸³ *Ibid.*

⁸⁴ See e.g. Clayton B Drummond & Mai Naito Mills, "Addressing Official Misconduct: Increasing Accountability in Reducing Wrongful Convictions" (2020) 1:3 Wrongful Conv L Rev 270.

⁸⁵ "% Exonerations by Contributory Factor" (last visited 03 May 2021), online: National Registry of Exonerations <www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>

⁸⁶ Huff et al., *supra* note 39 at 528.

⁸⁷ Samuel R. Gross et al., "Convicting the Innocent: The Role of Prosecutors, Police, and Other Law Enforcement" (last visited 05 May 2021), online: National Registry of Exonerations <www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf>

⁸⁸ *Ibid* at 8.

⁸⁹ Denov & Campbell, *supra* note 25 at 227.

⁹⁰ Drummond & Naito Mills, *supra* note 84; Samuel R. Gross et al, *supra* note 87 at ix. (The report focuses mainly on misconduct by the police, prosecutors and forensic experts. The authors cite the death of data for not including criminal defence lawyers and judicial officers in their study). See also Spencer S Hsu, "FBI Admits Flaws in Hair Analysis Over Decades", Washington Post (18 April 2015), online: www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcabc310_story.html>

Scholars have examined the nature of official misconduct and the reasons for its occurrence in the criminal justice system. In their report on government misconduct and wrongful convictions, Gross et al.⁹¹ provide a detailed discussion of the role of prosecutors, police, and other law enforcement in the wrongful convictions of the first 2,400 exonerees in the National Registry of Exonerations by February 2019. The report identifies five categories of official misconduct, including witness tampering, misconduct in interrogations, fabricating evidence, concealing exculpatory evidence, and misconduct at trial.⁹²

Drummond and Mills⁹³ conducted a study on the forms of misconduct committed by officials in murder exonerations. The study findings mirror the police and prosecutorial misconduct identified in Gross et al.'s report while further highlighting other forms of misconduct committed by judicial and forensic officials.⁹⁴ The judicial misconduct they found include erroneous findings or procedure, improper intervention, bribery, and conflict of interest.⁹⁵ The misconduct by forensic officials comprised false testimony and misstated or invalid evidence.⁹⁶

Police Misconduct: The police play a crucial role in the criminal justice process. Police officers make decisions about making arrests, filing charges, and securing evidence to support the charges.⁹⁷ Thus, the police and their actions during the criminal process remain the focus of

⁹¹ Gross et al, *supra* note 87.

⁹² *Ibid* at 29.

⁹³ Drummond, *supra* note 84.

⁹⁴ *Ibid* at 283-284.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*.

⁹⁷ Denov & Campbell, *supra* note 25 at 227.

attention in wrongful convictions.⁹⁸ As mentioned above, police misconduct takes many forms and can occur during any stage of the criminal process.

The forms of misconduct that take place during the initial stages of the criminal process encompass improper arrests,⁹⁹ witness tampering, tainted identifications, and flawed interrogation practices.¹⁰⁰ Witness tampering involves the police deliberately and improperly persuading witnesses to furnish false evidence or withhold correct information during investigations.¹⁰¹ This form of misconduct is actualized through threats or intimidation.¹⁰² For instance, police officers can threaten to bring criminal charges or secure imprisonment or death sentences against witnesses and their relatives to provide the required information.¹⁰³ In the absence of threats, the officers also obtain testimony from witnesses through bribery or trickery.¹⁰⁴

The use of suggestive procedures by the police during identifications can lead to misidentifying innocent individuals, which has been implicated in wrongful convictions.

Innocence Project details such suggestive procedures to include:

using lineups in which the suspect stands out or is the only person who truly fits the description provided by the witness; putting the same suspect in repeated identification procedures, making that suspect seem more and more familiar to the eyewitness; or unnecessarily using a show-up, where only a single suspect is presented to the eyewitness.¹⁰⁵

Grosso et al. also present the suggestive identification procedures employed by the police in the cases they studied. They describe identification processes where the police inform the witnesses,

⁹⁸ *Ibid.*

⁹⁹ Russell Covey, "Police Misconduct as a Cause of Wrongful Convictions" (2013) 90:4 Wash U L Rev 1133.

¹⁰⁰ Gross et al, *supra* note 87 at 29.

¹⁰¹ Gross et al, *supra* note 87 at 56.

¹⁰² Drummond, *supra* note 84 at 289.

¹⁰³ Gross et al, *supra* note 87 at 30.

¹⁰⁴ *Ibid.*, at 31.

¹⁰⁵ Innocence Staff, "How Eyewitness Identification Can Send Innocent People to Prison" (15 April 2020), online: *Innocence Project* < <https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/>>

either directly or indirectly, which suspect to identify in a lineup.¹⁰⁶ While these suggestive identification practices steer the eyewitnesses towards police suspects and invariably lead to wrongful convictions, Grosso et al. caution that not all such cases can be classified as misconduct. They submit that suggestive identification practices only constitute misconduct when the police deliberately structure the identification process to influence the witness to identify the police suspect.¹⁰⁷

The police interview and interrogation form the core of police investigations. Yet, even though most police officers diligently perform their investigative duties, they sometimes commit errors or engage in outright misconduct during the interrogative process.¹⁰⁸ Significantly, these errors and misconduct have been implicated in false confessions, a critical factor in wrongful convictions.¹⁰⁹

Researchers have documented the use of physical violence or threats of imminent violence by the police during the interrogation of suspects.¹¹⁰ Police officers have also used torture and inhuman treatment as means of obtaining confessions from suspects.¹¹¹ Further, officers extract information from suspects on the pretence that they have the legal authority to guarantee certain benefits such as lenient sentences or reduction of charges. Using deception as an interrogative tactic is particularly consequential. The suspects consider the police as

¹⁰⁶ Gross et al, *supra* note 87 at 71. In one case, a member of a street gang was misidentified as the suspect in the murder of a rival gang member. The suspect was the only person in the lineup with his short sleeve top showing his gang's tattoo on his forearm. In another case, the police were more direct when they told the witness to choose a particular picture.

¹⁰⁷ *Ibid* at 70.

¹⁰⁸ Denov & Campbell, *supra* note 25 at 227.

¹⁰⁹ Grosso et al, *supra* note 87 at 77.

¹¹⁰ Covey, *supra* note 99 at 1138.

¹¹¹ Saul M. Kassin et al, "Police-Induced Confessions: Risk Factors and Recommendations" (2010) 34 L Human Behavior 3.

authorities on the law and would likely believe their misinformation about their authority which can then lead them to confess to crimes they did not commit.¹¹²

As the criminal process advances from the investigative phase to trial, police officers may find themselves serving as witnesses to the alleged crimes or facts about them. During this time, the officers don't need to coerce witnesses or suspects to furnish false evidence against the criminal defendants; they present the evidence directly as witnesses. Covey's study of two mass exonerations resulting from high-profile police scandals in Los Angeles and Texas detail the forms of police misconduct that occurred as the innocent defendants were charged and tried in the criminal justice system.¹¹³ According to Covey,

Police officers filed false police reports detailing observations of criminal conduct the defendants never engaged in or describing circumstances that if true would have established criminal conduct. In most of the cases, police either physically planted drugs or weapons on the defendants and then lied about how they found the contraband, or simply misstated that they had found drugs or weapons when they had not. Police officers then testified to these same false facts at preliminary hearings and at trial in those rare cases that did not end in guilty pleas.¹¹⁴

In other instances, the officers falsely reported incriminating statements made by other suspects or witnesses or falsely accused the defendants of confessing to the alleged crimes.¹¹⁵ Covey was unequivocal in his assessment of the causative factor of the wrongful convictions of hundreds of innocent criminal defendants in his study. He asserts thus:

In short, then, the primary "cause" of false convictions in the [two] scandals was police perjury, some form of which was present in 100% of the cases. Innocent defendants who won exonerations primarily had been convicted in the first instance on the basis of the false reports and false testimony of corrupt police officers. That same police misconduct,

¹¹² Grosso et al, *supra* note 87 at 64. See also Laurie Magid, "Deceptive police interrogation practices: how far is too far?" (2001) 99: 5 Michigan L Rev 1168.

¹¹³ Covey, *supra* note 99 at 1138. These two major cases (Rampart and Tulia) account for nearly two hundred cases of wrongful conviction and represent two large sets of exonerations stemming from police corruption scandals in the US.

¹¹⁴ *Ibid* at 1156.

¹¹⁵ *Ibid* at 1158-1159.

however, was also responsible for the generation of other types of false evidence, including false witness statements and false confessions that supported the police officers' false reports and perjurious testimony in court.¹¹⁶

In addition to fabricating evidence against criminal defendants, police misconduct during the trial phase includes concealing or withholding exculpatory evidence.¹¹⁷ Grosso et al. highlight two categories of exculpatory evidence concealed by police officers: substantive evidence of innocence and impeachment evidence.¹¹⁸ The substantive evidence of innocence corroborates a defendant's assertions of innocence and include "alibi evidence for the defendant, evidence about alternative suspects (some of whom were later proven to be the real criminals), and forensic evidence that showed that the defendant was not the source of semen or blood or fingerprints left at the scene of the crime."¹¹⁹ Impeachment evidence is evidence that would have undermined witnesses' testimony of defendants' guilt. In these cases, the police:

hid statements in which prosecution witnesses said the opposite of what they testified to in court, attempts by those witnesses to retract their accusations or testify that the defendants were innocent, known histories of deception and crime by prosecution witnesses, money or favours received by the witnesses or deals that saved them years in prison in return for nailing the defendants.¹²⁰

Though the instances of concealment of evidence cited above are clear cases of misconduct, it is essential to note that not all concealment is deliberate. Instead, some misconduct occurs because of neglect or misunderstanding of evidence by police officers. Nevertheless, these cases of misconduct have a potentially devastating impact on individuals and

¹¹⁶ *Ibid* at 1160.

¹¹⁷ Drummond, *supra* note 84 at 289.

¹¹⁸ Grosso et al, *supra* note 87 at 32.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*.

the justice system. Thus, officers are expected to follow procedures to ensure that they don't conceal or withhold relevant evidence.¹²¹

Prosecutorial Misconduct: The literature articulates the powerful and unique role of the prosecutor in the criminal justice system.¹²² Prosecutors decide who to charge, what charges to bring, when to bring charges, and whether to offer a plea bargain.¹²³ In countries with jury trials, such as the United States, prosecutors are enormously influential in grand jury proceedings where decisions are made about indictments of criminal suspects.¹²⁴ Aside from their influential role in the criminal justice system, prosecutors are uniquely positioned to fulfill a twofold obligation of "zealous advocate[s]" and "neutral ministers of justice" in the criminal process.¹²⁵ This responsibility is unlike defence lawyers who are solely committed to defending their clients' interests. The United States Supreme Court eloquently explained the dual duty of the prosecutor:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt should not escape or innocence suffer. He may prosecute with earnestness and vigour - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹²⁶

¹²¹ Denov & Campbell, *supra* note 25 at 228.

¹²² See e.g. Robert L Misner, "Recasting Prosecutorial Discretion" (1996) 86:3 J Crim L & Criminology 717 at 718. ("Developments in the areas of charging, plea bargaining, and sentencing have made the prosecutor the preeminent actor in the system."); See also Jeffrey Bellin, "The Power of Prosecutors" (2019) 94:2 NYU L Rev 171 at 172. ("prosecutors-not judges, legislatures, or police, and not facts, laws, or crime-as the key explanatory variable for criminal justice outcomes.")

¹²³ See Peter J Henning, "Prosecutorial Misconduct and Constitutional Remedies" (1999) 77:3 Wash U L Q 713.

¹²⁴ See Bennett L Gershman, *Prosecutorial Misconduct* 2nd ed (Eagan, MN: Thomson Reuters, 2003).

¹²⁵ Daniel S Medwed, *Prosecution Complex: America's Race to Convict and Its Impact on the Innocent* (New York, NY: New York University Press, 2012) at 2.

¹²⁶ *Berger v. United States*, 295 U.S. 78 (1935) at 88.

Thus, in this peculiar position, prosecutors should not act as partisan advocates seeking only to convict but should ensure the court decides the defendant's guilt based on sufficient evidence and that he is afforded procedural justice.¹²⁷

Various reasons exist for the dual responsibility required of prosecutors. First, since prosecutors wield enormous power in the criminal justice system, their obligation as ministers of justice limits the abuse of this power and offsets the imbalance of resources that disadvantages the defence in the criminal process.¹²⁸ Besides, the more significant burden of responsibility on prosecutors inspires trust in the accuracy and legitimacy of the criminal justice system.¹²⁹ In essence, conferring prosecutors with the title of ministers of justice engenders the belief that justice will prevail in criminal proceedings.¹³⁰

However, despite the expectations of the fulfillment of these obligations from prosecutors, the literature has shown that prosecutorial misconduct contributes to wrongful conviction cases. For instance, a study found prosecutorial misconduct in about one-quarter of the first two hundred fifty-five persons exonerated by DNA evidence in the United States. Also, scholarship on wrongful convictions in Canada identified prosecutorial misconduct as a contributory factor in key wrongful conviction cases.¹³¹ Aside from the study of the role of prosecutorial misconduct in wrongful convictions, scholars and researchers have also examined

¹²⁷ Peter A Joy, "Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System" (2006) 2006:2 Wis L Rev 399. *See also* R. v. Boucher, [1955] S.C.R. 16 (Can.) (The court held that "the right of the accused to have his guilt or innocence decided upon the sworn evidence alone uninfluenced by statements of fact by the Crown prosecutor, is one of the most deeply rooted and jealously guarded principles of our law.").

¹²⁸ Medwed, *supra* note 125 at 2.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Helena Katz, *Justice Miscarried: Inside Wrongful Convictions in Canada*, (Toronto: Dundurn, 2011); *see also* Roach, *supra* note 27.

the underlying conditions that promote prosecutorial misconduct in the criminal justice system.¹³²

Like police misconduct, the potential for prosecutorial misconduct exists at various stages of the criminal justice process. Prosecutors may engage in misconduct in executing their charging function.¹³³ Bad faith prosecution epitomizes the abuse of this obligation and often exposes "an actual animus, malice, or evil intent on the part on the prosecutor's part."¹³⁴ Forms of bad faith prosecution include bringing charges which are not supported by probable cause,¹³⁵ prosecuting individuals solely based on race and other prohibited classification,¹³⁶ or a prosecution driven by personal or political benefit.¹³⁷

Prosecutorial misconduct at the charging stage also extends to the grand jury process.¹³⁸ In fact, the nature of grand jury proceedings provides a fertile ground for abuse of prosecutorial duty. The secretive nature of the grand jury means that only the grand jurors, witnesses and the prosecutor are privy to its proceedings. In addition, the prosecutors preside over grand jury proceedings as both judge and advocate and decide which evidence will be introduced or withheld from the proceedings.

Prosecutorial misconduct may also take place during plea bargaining. Plea bargains between prosecutors and defence counsels account for most criminal convictions in the United

¹³² Joy, *supra* note 109; see also Keith A Findley & Michael S Scott, "Multiple Dimensions of Tunnel Vision in Criminal. Cases, The " (2006) 2006:2 Wis L Rev 291.

¹³³ See Bennett L Gershman, *Prosecutorial Misconduct*, 2nd ed (Eagan, MN: Clark Boardman Callaghan, 1986).

¹³⁴ *Ibid* at § 4.4 at 4-30.

¹³⁵ Medwed, *supra* note 103 at 14.

¹³⁶ Gershman, *supra* note 115 at § 4.4, at 4-28 to 4-29. (Gershman notes other problematic prosecutions such as selective and vindictive prosecutions. However, he notes that these types of prosecutions differ from bad faith prosecution since they are based on legitimate and sufficient evidence and the prosecutor's improper motive is inferred).

¹³⁷ *Ibid*.

¹³⁸ John S Edwards, "Prosecutorial Misconduct, by Bennett L. Gershman" (1987) 7 Pace L. Rev. 463.

States and other jurisdictions.¹³⁹ The frequency of plea deals in the criminal justice system and the nature of the deals have led to serious concerns about the administration of justice and the presumption of innocence.¹⁴⁰ Specifically, critics contend that hurriedly negotiated plea deals without much oversight from swamped judges could commodify justice and threaten judicial integrity.¹⁴¹ Moreover, misconduct such as enticing defendants with lesser charges in exchange for plea deals increases the likelihood of guilty pleas by innocent persons.¹⁴² Prosecutor misconduct in plea bargaining may also arise in cases where prosecutors withhold exculpatory evidence from defendants or reach a plea deal without the participation of defence counsel.¹⁴³

Concealment of exculpatory evidence is a form of prosecutorial misconduct that occurs during the trial stage. Prosecutors are obligated by rules of professional conduct to disclose all pertinent evidence in a case to the defence.¹⁴⁴ The courts have also weighed in on the prosecutor's duty to disclose. The United States Supreme Court in *Brady v. Maryland*¹⁴⁵ held that "the suppression by the prosecution of evidence favourable to the accused upon request violated due process where the evidence is material either to guilt or to punishment."¹⁴⁶ The Supreme court revisited its decision in *Brady* to clarify the definition of "materiality" of suppressed evidence. The court held in *United States v. Bagley*¹⁴⁷ that exculpatory evidence is material only if there is a

¹³⁹ Medwed, *supra* note 125 at 53. (Plea deals make up 95% of criminal convictions and continues to rise in the United States); see also Zina Lu Burke Scott, "An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada" (2018) 81:1 Sask L Rev 53 (Majority of criminal cases are settled by plea bargains in Canada).

¹⁴⁰ Scott, *supra* note 119 at 54.

¹⁴¹ *Ibid* at 53. See also Covey, *supra* note 99. In the Tulia police scandal, thirty-one of the thirty-nine convictions came from plea bargains).

¹⁴² Medwed, *supra* note 125 at 53-54.

¹⁴³ Gershman, *supra* note 114 at § 7.6 & §7.20.

¹⁴⁴ See e.g. Rules of Professional Conduct for Legal Practitioners (Amendment) Rules 2020. Model Rule 3.8 (d) of the American Bar Association Model Rule governs disclosure of exculpatory evidence in the United States.

¹⁴⁵ *Ibid* at 87.

¹⁴⁶ 473 U.S. 667 (1985).

¹⁴⁷ *Ibid* at 682.

reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different."¹⁴⁸

In Canada, the seminal case on the prosecutor's disclosure obligation is *R v. Stinchcombe*.¹⁴⁹ The Supreme Court set out the commitment thus: "The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done."¹⁵⁰ However, the Court further held that the duty to disclose is subject to the Crown's discretion concerning the timing and manner of disclosure and the withholding of information regarding the rules of privilege and to protect the identity of informers.¹⁵¹

The literature provides categories of concealment of exculpatory evidence by prosecutors. According to Gershman, suppressing mistaken eyewitness identification is one of the most dramatic examples of this form of misconduct. It involves concealing evidence "showing that the witness may have been mistaken ranges from evidence that the police initially suspected another person committed the crime, to an eyewitness's failure to identify the defendant, to an eyewitness's identification of someone else as the perpetrator."¹⁵² Prosecutors have also concealed fraudulent and erroneous forensic evidence that they knew would exonerate defendants but still allowed their conviction all the same.¹⁵³ In addition, prosecutors have

¹⁴⁸ *Ibid* at 682.

¹⁴⁹ 1991 CanLII 45 (SCC), [1991] 3 SCR 326.

¹⁵⁰ *Ibid* 326-327.

¹⁵¹ *Ibid* 327.

¹⁵² Bennett L. Gershman, "The Prosecutor's Contribution to Wrongful Convictions" in Allison D. Redlich et al., eds, *Examining Wrongful Convictions: Stepping Back, Moving Forward* (Boston: West Group, 2014) at 112-113.

¹⁵³ Grosso et al., *supra* note 87 at 91.

suppressed evidence that could impeach prosecution witnesses.¹⁵⁴ Finally, prosecutors engage in this form of misconduct in instances where they conceal statements of witnesses that contradict the testimony of the witnesses at trial or evidence eliciting false testimony from witnesses in exchange for incentives.¹⁵⁵

Other forms of prosecutorial misconduct that occur during trial comprise presenting false testimony and making improper statements. The prosecutors may lie about the facts of the offence or the investigation and prosecution of the case.¹⁵⁶ Also, during closing arguments, the prosecutor may affirm the lies witnesses told during the trial or make inaccurate statements of facts with no basis in the evidence on record.¹⁵⁷ Beyond engaging in perjury themselves, prosecutors also permit state witnesses to lie during the trial.¹⁵⁸ Prosecutors have an obligation not to mislead the court.¹⁵⁹ Presenting or allowing perjured testimony in court can violate defendants' due process rights and lead to an unfair trial. It could result in wrongful convictions of innocent persons, hence the requirement for prosecutors to disclose perjured evidence.¹⁶⁰

False Confessions

A confession is one often regarded as the most compelling and incriminating piece of evidence that the prosecution can bring against a criminal suspect.¹⁶¹ As Richard Leo observes, "a suspect's confession initiates a seemingly irrefutable presumption of guilt among justice officials,

¹⁵⁴ Brandon L Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge, MA: Harvard University Press, 2011) at 122.

¹⁵⁵ Grosso et al., *supra* note 87 at 89. (The incentives prosecutors offer include cash payments, reduced sentences or dismissal of charges, threats, and promises or deals).

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ Medwed, *supra* note 125 at 80.

¹⁵⁹ Gershman, *supra* note 114; Medwed, *supra* note 125 at 416-417.

¹⁶⁰ *Ibid* at 116.

¹⁶¹ See Richard A Leo & Richard J Ofshe, "Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88:2 J Crim L & Criminology 429.

the media, the public, and lay jurors."¹⁶² The assumption of guilt prejudices the perceptions and judgement of actors in the criminal justice system since they believe that confessions are inherently correct.¹⁶³ Thus, the suspect's confession tends to determine his case, notwithstanding the presence of exculpatory evidence.¹⁶⁴

A false confession is defined as "an admission ("I did it") plus a postadmission narrative (a detailed description of how and why the crime occurred) of a crime that the confessor did not commit."¹⁶⁵ Although the frequency of occurrence is unknown, researchers and scholars have affirmed false confession as an important contributor to wrongful conviction.¹⁶⁶ In the United States, Innocence Project reveals that false confessions are present in about 25% of all DNA exonerations in the United States.¹⁶⁷ According to Kassin et al., the sample represents a fraction of false confessions in wrongful conviction cases since it excludes false confessions that result in guilty pleas, given where DNA evidence is unavailable, provided in cases without post-conviction testing, and was refuted before trial.¹⁶⁸ In addition, official commissions of inquiry into wrongful convictions in Canada has noted false confessions as a contributory factor in the

¹⁶² Richard A Leo, "False Confessions: Causes, Consequences, and Implications" (2009) 37 J Am Acad Psychiatry Law 332 at 340.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Leo, *supra* note 162 at 133.

¹⁶⁶ See Dwyer, Jim, Peter Neufeld & Scheck Barry, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongfully Convicted* (New York, NY: Doubleday, 2000); Ronald C Huff, Arye Rattner & Edward Sagarin, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, California: Sage Publications, 1996); Michael L Radelet, Hugo A Bedau & Constance E Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (Boston: Northeastern University Press, 1992).

¹⁶⁷ "False Confessions Happen More Than We Think" (last visited 03 June 2021), online Innocence Project, < <https://innocenceproject.org/false-confessions-happen-more-than-we-think/> >

¹⁶⁸ Kassin et al, *supra* note 111.

cases reviewed.¹⁶⁹ Moreover, studies indicate that false confessions led to wrongful convictions when presented as evidence at trial.¹⁷⁰

A critical issue that scholars and researchers have explored is the "mystery" of false confessions.¹⁷¹ Why would an individual confess to a crime they did not commit? In North America, the question dates back to the 1692 Salem Witch trials, where the authorities extracted false confessions from the suspects through torture and threats.¹⁷² Interestingly, the question continues to date, especially as most people believe that they will not confess to crimes for which they are innocent.¹⁷³

Saul Kassin and Lawrence Wrightsman provide insights into the issue by furnishing three main forms of false confessions.¹⁷⁴ First, suspects may volunteer false confessions to protect another person, attract attention to themselves or because they are delusional and believe they committed the crime.¹⁷⁵ Second, suspects confess falsely to escape the consequences of harsh police interrogation or take advantage of a perceived benefit offered by the police during the interrogation.¹⁷⁶ This form of confession is the most common, and suspects make the confessions

¹⁶⁹ See The Inquiry Regarding Thomas Sophonow-The Investigation, Prosecution and Consideration of Entitlement to Compensation (Winnipeg: Attorney General, 2001), online: Government of Manitoba <<http://www.gov.mb.ca/justice/sophonow/toc.html>> (Commissioner Peter deCory) [Sophonow Inquiry].

¹⁷⁰ See e.g. Steven A Drizin & Richard A Leo, "The Problem of False Confessions in the Post-DNA World" (2004) 82:3 NC L Rev 891 at 996; Richard A Leo & Richard J Ofshe, "Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88:2 J Crim L & Criminology 429 at 482. (Two studies found that innocent defendants who falsely confessed were convicted 73- 81% of the time).

¹⁷¹ See e.g. Douglas L Keene & Rita R Handrich, "Only the Guilty Would Confess to Crimes: Understanding the Mystery of False Confessions" (2012) 24:6 Jury Expert 4.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Saul M Kassin & Lawrence S Wrightsman, "Confession evidence", in Saul M Kassin & Lawrence S Wrightsman, eds, *The Psychology of Evidence and Trial Procedure* (Beverly Hills: Sage Publications, 1985) at 67–94. (They classify the three forms of false confessions as: voluntary, coerced-compliant and coerced-internalized).

¹⁷⁵ Keene, *supra* note 171 at 5.

¹⁷⁶ Leo, *supra* note 162 at 338.

with the understanding that they are innocent and their statements are false.¹⁷⁷ Third, innocent suspects under police interrogation are persuaded to confess to an offence that they objectively understand did not occur.¹⁷⁸ This form of false confessions typically occurs when individuals distrust their memory and become malleable to external influence.¹⁷⁹ Voluntary false confessions rarely lead to wrongful convictions as police officers are successful in spotting them.¹⁸⁰ However, the other forms of false confessions are more likely to result in the wrongful conviction of innocent defendants.¹⁸¹

Aside from the forms of false confessions mentioned above, scholars have documented three errors made by police when obtaining false confessions, which can lead to wrongful convictions.¹⁸² The errors occur sequentially during the multiple stages of the police interrogation process and involve psychological coercion.¹⁸³ They are classified as misclassification error, coercion error, and contamination error.¹⁸⁴

Misclassification is the first error in false confessions and occurs when police officers wrongfully focus on innocent individuals as suspects.¹⁸⁵ Davis and Leo explain that "once specific suspects are targeted, police interviews and interrogations are thereafter guided by the presumption of guilt."¹⁸⁶ Police officers misclassify innocent persons as guilty persons for a variety of reasons. For example, the officers may lack correct and adequate investigative skills to

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Kassin et al, *supra* note 111 at 15.

¹⁸⁰ Gisli H Gudjonsson, "The Psychology of False Confessions" (1989) 57:2 *Medico-Legal J* 93 at 101.

¹⁸¹ Keene, *supra* note 171 at 5.

¹⁸² See e.g. Leo, *supra* note 162; see also Jon Gould & Richard A Leo, "One Hundred Years Later: Wrongful Convictions after a Century of Research" (2010) 100:3 *J Crim L & Criminology* 825.

¹⁸³ Leo, *supra* note 162 at 333.

¹⁸⁴ *Ibid.*

¹⁸⁵ Keene, *supra* note 171 at 6.

¹⁸⁶ Deborah Davis & Richard Leo, "Strategies for Preventing False Confessions and Their Consequences" in Mark Kebell & Graham Davies, eds., *Practical Psychology for Forensic Investigations and Prosecutions* (New York: John Wiley & Sons, 2006) 121–49 at 124.

distinguish between truth and deception or accurately decipher suspects' deceptive behaviours.¹⁸⁷ Also, the presence of bias and closed-minded attitudes during police interviews can lead to misclassification errors.¹⁸⁸ In addition, flawed forensic evidence has led police officers to misclassify innocent persons as guilty suspects.¹⁸⁹

Once the police misclassify a suspect, they move to the next stage to interrogate and coerce a confession from the individual. During the interrogation, police officers employ various psychologically coercive techniques to extract false testimony from the suspect.¹⁹⁰ The coercive methods used include threats of harm, promises of leniency, accusations, and deprivation of necessities such as food, water, and bathroom breaks.¹⁹¹ Besides, psychological coercion involves getting the suspect to believe that they have no choice but to falsely confess to the crime.¹⁹² In addition, sustained physical confinement and interrogation techniques are designed to isolate and wear down the suspect.¹⁹³ Ultimately, the suspect fearing no alternative escape route or a detrimental outcome, succumbs to the wishes of the interrogator.¹⁹⁴

The third error of contamination occurs when the suspect provides a subsequent narrative" to his false admission.¹⁹⁵ The post-admission narrative "contextualizes and attempts to explain the "I did it" statement and transforms the fledgling admission into a fully formed confession."¹⁹⁶ This phase of the interrogation aims to obtain a compelling and incriminating narrative that will lead to the suspect's conviction. Interrogators can contaminate the suspect's

¹⁸⁷Lourtau et al, *supra* note 31 at 8.

¹⁸⁸ Gisli H Gudjonsson, "The Science-Based Pathways to Understanding False Confessions and Wrongful Convictions" (2021) 12 *Frontiers in Psychology* 1.

¹⁸⁹ *Ibid* at 4.

¹⁹⁰ See Gould & Leo, *supra* note 173 at 846; see also Lourtau et al, *supra* note 31 at 8.

¹⁹¹ Leo, *supra* note 153 at 335.

¹⁹² *Ibid*.

¹⁹³ Gould & Leo, *supra* note 173 at 846.

¹⁹⁴ *Ibid* at 846-847.

¹⁹⁵ Leo, *supra* note 162 at 337.

¹⁹⁶ *Ibid*.

subsequent story by providing private information that seems to confirm the suspect's guilt, generating a narrative that indicates the suspect's motive or encouraging the suspect to show remorse for committing the crime. Also, interrogators can present false evidence or tell lies to convince the suspect that they committed the crime.¹⁹⁷ When the suspect incorporates these details in his postadmission narrative, it is more likely to strengthen the confession and make it difficult to disprove when introduced at trial.¹⁹⁸

Ineffective Assistance of Counsel

Defence counsels are expected to provide effective legal representation to their clients to protect their due process rights. As Adele Bernhard asserts, "it [is] the defence counsel's responsibility to protect [the innocent] from the mistakes of others: from witnesses' misidentifications, police officers' rush to judgment, and prosecution's reluctance to reveal potentially exculpatory material."¹⁹⁹ Without competent legal assistance, it would be challenging for criminal defendants to mount an adequate defence in their cases and navigate the criminal justice system.²⁰⁰ Effective assistance of counsel can also help address other factors that could jeopardize just outcomes for the defendants.

Courts in Canada and the United States have upheld the right to effective assistance of counsel.²⁰¹ For example, in *R. v. GDB*,²⁰² the Supreme Court of Canada held that the right to effective counsel is considered a principle of fundamental justice protected under ss. 7 and 11(d)

¹⁹⁷ See Aviva Orenstein, "Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence" (2011) 48:1 San Diego L Rev 401.

¹⁹⁸ Leo, *supra* note 162 at 337.

¹⁹⁹ Adele Bernhard, "Effective assistance of counsel" in Sandra D Westervelt & John A Humphrey, eds, *Wrongly Convicted: Perspectives on Failed Justice* (New Brunswick, Rutgers University Press, 2001) at 227-228.

²⁰⁰ As Justice George Sutherland put it: Even the intelligent and educated layman lacks both skill and knowledge adequately to prepare his defence even though he had a perfect one. He acquires the guiding hand of a counsel at every step in the proceedings against him. Without it, though he be not guilty he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama* 287 U.S. 45 (1932) at 69.

²⁰¹ The right to effective assistance of counsel is absent countries such as the UK and Nigeria.

²⁰² 2000 SCC 22.

of the Canadian Charter of Rights and Freedoms. Similarly, In *McMann v. Richardson*,²⁰³ the United States Supreme Court upheld the right to effective counsel as part of the constitutional guarantee of the right to counsel and noted that "it has long been recognized that the right to counsel is the right to effective assistance of counsel."²⁰⁴ In subsequent cases, the Supreme Court defined effective assistance of counsel to include: requiring that the appointment of counsel for indigent defendants be made on time that affords "effective aid in the preparation and trial of the case,"²⁰⁵ ensuring that the defence participates fully and fairly in a criminal trial,²⁰⁶ accurately advising defendant on the prospect of conviction at trial and the extent of punishment that might be imposed,²⁰⁷ and providing legal representation on legal issues beyond those directly before the court.²⁰⁸

Aside from the courts' position on effective assistance of counsel, professional bar associations have set standards requiring defence counsels to provide competent representation to their clients.²⁰⁹ The regulations cover the defence counsel's representation from the initiation to the conclusion of cases and extend to such issues as the counsels' preparedness, abilities, training, as well as building rapport and trust with the clients. While these standards and guidelines are considered influential, compliance with the standards is voluntary, and sanctions are not imposed in the event of violations. Nonetheless, the American Bar Association notes that

²⁰³ 397 U.S. 759 (1970).

²⁰⁴ *Ibid* at 771 n. 14. (The Sixth Amendment of the United States Constitution provides for the right to assistance of counsel for individuals accused of crimes).

²⁰⁵ Powell, *supra* note 22.

²⁰⁶ Herring v. New York, 555 U.S. 135 (2009).

²⁰⁷ Lafler v. Cooper, 566 U.S. 156 (2012).

²⁰⁸ Padilla v. Commonwealth of Kentucky, 559 U.S. 356 (2010).

²⁰⁹ See American Bar Association, Model Rules of Professional Conduct, ABA, 2007, Rule 1.

their standards "may be relevant in the judicial evaluation of constitutional claims regarding the right to counsel."²¹⁰

Ineffective assistance of counsel (IAC) "refers to a failure with respect to competent legal representation and occurs when a defence attorney's conduct has undermined the adversarial process to the point that the trial cannot be relied on as having produced a just result."²¹¹ Research indicates that IAC plays a significant role in wrongful convictions. For example, a Columbia University study found that IAC was the major contributory factor noted in capital appeals cases over twenty years.²¹² Another study found that IAC was the most common claim in almost 50% of state appeals.²¹³ Further, IAC was also a factor in the most prominent wrongful conviction cases in Canada.²¹⁴

Scholars and commentators have examined the issues that contribute to ineffective assistance of counsel. The factors they identified include lack of motivation,²¹⁵ inadequate funding,²¹⁶ overwhelming caseloads,²¹⁷ and excessive use of plea deals.²¹⁸ Defence counsels may lack the

²¹⁰ "Criminal Justice Standards for the Defense Function" (last visited 20 March 2020), online: American Bar Association <www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/> Standard 4-1.1 (b).

²¹¹ Craig M. Cooley, Brent E. Turvey, *Miscarriages of Justice: Actual Innocence, Forensic Evidence and the Law* (San Diego, Elsevier, 2014).

²¹² Gould & Leo, *supra* note 173 at 855.

²¹³ Brandon Garrett, "Judging Innocence" (2008) 108 *Columbia L Rev* 107.

²¹⁴ See Royal Commission on the Donald Marshall, Jr. Prosecution (Province of Nova Scotia, 1989) [Marshall Inquiry]. The commission noted that ineffective assistance of counsel was a significant cause of the wrongful conviction of Donald Marshall, Jr.; see also the commission on the proceedings involving Guy Paul Morin (Toronto: Ontario Ministry of the Attorney General, 1998) at 1049. (The Honourable Fred Kaufman stated that in many cases, ineffective assistance of counsel was a contributory factor in many cases of wrongful convictions).

²¹⁵ See Lissa Griffin, "The Correction of Wrongful Convictions: A Comparative Perspective" (2001) 16:5 *Am U Int'l L Rev* 1241.

²¹⁶ Medwed, *supra* note 10.

²¹⁷ See Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (Chicago, IL: American Bar Association, 2011).

²¹⁸ Peter A Joy & Kevin C McMunigal, "Inadequate Representation and Wrongful Conviction" (2003) 18:1 *Crim Just* 57.

motivation to represent their clients because of personal or professional biases.²¹⁹ For instance, after years of representing criminal defendants, some defence counsels may develop a pessimistic attitude about their role and begin to doubt their clients' claims of innocence. Besides, some defence counsels neglect to build connections with their clients and may no longer be concerned about their fate or the outcome of their cases.²²⁰ As a result, such defence counsels become the "antithesis of a zealous advocate" which increases the chances of conviction of innocent defendants.²²¹

Further, insufficient financial resources make it challenging for defence counsels to represent their clients effectively. Inadequate funding of the public defence programs and legal aid has been a significant concern in ensuring effective legal representation for criminal defendants who cannot afford to hire a lawyer.²²² Although governments have funded these programs, it is still the case that the resources are incredibly inadequate, considering the requirements of adequate and effective representation.²²³ The reasons proffered for insufficient funding for the programs include budgetary shortfall and cutbacks, resource inequities in funding for prosecutors and public defence, increases in the number of crimes, and the extension of the right to counsel to more classes of criminal defendants by the courts.²²⁴ Regardless of the above mentioned, the consequences of the paucity of funding for criminal defence are dire. For instance, inadequate funding has led to fewer defence lawyers and the ability of the lawyers to

²¹⁹ Yaroshefsky & Schaefer, *supra* note 38 at 128.

²²⁰ *Ibid* at 128.

²²¹ *Ibid*.

²²² See Ehigialua, *supra* note 7 at 4; See also "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel" (April 2009), online (pdf): Open Society Foundations www.opensocietyfoundations.org/publications/justice-denied-americas-continuing-neglect-our-constitutional-right-counsel>

²²³ Medwed, *supra* note 10.

²²⁴ See Donald A Dripps, "Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice" (2013) 70:2 Wash & Lee L Rev 883; see also Adeyemi I Adewumi, "The Legal Aid Council in Nigeria: Challenges and Possible Solutions" (August 1, 2017), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3547025>

investigate and defend their cases properly.²²⁵ This situation may ultimately put criminal defendants at the risk of receiving an incompetent representation of counsel and experiencing wrongful conviction.

A major fallout of insufficient funding of criminal defence is the burden of excessive caseloads for defence counsels. The overwhelming caseloads force these lawyers to choose between the needs of their clients and handling other official or personal matters. Consequently, defence lawyers, even the best-intentioned ones, are often unable to carry out their professional responsibilities such as properly interviewing their clients, conducting requisite investigations, filing appropriate motions, and negotiating responsibly with the prosecutor.²²⁶

The pervasive use of plea bargains in criminal adjudications has been noted as one of the biggest obstacles to effective assistance of counsel and has remained an issue of concern to critical stakeholders in the criminal justice system.²²⁷ The problem is mainly premised on the fact that the bargains are often made quickly without adequate consultation or investigation. Moreover, in such cases, the accused persons forfeit their rights to a trial once they secure the plea deal.²²⁸

Multiple reasons exist for the overwhelming dependence on plea deals in criminal prosecutions. First, the excessive caseloads and shortage of resources for public defence make it nearly impossible for public defenders to settle most of their cases without plea bargains, even in the face of abdicating their duty to inform their clients of the options of accepting the deal or

²²⁵ Yaroshefsky & Schaefer, *supra* note 38 at 129.

²²⁶ Lefstein, *supra* note 217.

²²⁷ Molly J Walker Wilson, "Defense Attorney Bias and the Rush to the Plea" (2016) 65:2 U Kan L Rev 271.

²²⁸ Sheila M Berry, "Bad Lawyering - How Defense Attorneys Help Convict the Innocent" (2003) 30:4 N Ky L Rev 487.

proceeding to trial.²²⁹ Besides, most accused persons choose pleas deals to quickly settle their cases and avoid the high cost of court trials. Finally, though the public counts on prosecutorial discretion and judicial impartiality to safeguard criminal defendants, the incentives to go for plea bargains are so immense that innocent defendants are often pressured to confess to crimes they did not commit.²³⁰

Instances of IAC in wrongful convictions are well-documented in the literature. For example, a study by Innocence Project on post-conviction appeal claims in exoneration cases found that the most common claims of IAC 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. Other examples of less frequently reported claims included failure to investigate, failure to object to an ID, and failure to present expert testimony.²³¹

Other conditions of IAC identified by research studies include defence counsels that do not request disclosure from the prosecution,²³² frequently fail to meet their clients in advance of trial or appear at scheduled hearings.²³³ According to Griffin, "the lack of adequate discussion denied defense counsel the opportunity of delving into the defendant's background or his prior record,

²²⁹Peter A Joy & Kevin C McMunigal, "Inadequate Representation and Wrongful Conviction" (2003) 18:1 Crim Just 57.

²³⁰ Lindsey Devers, "Plea and Charge Bargaining," (24 January 2011), online (pdf): *Bureau of Justice Assistance, U.S. Department of Justice* <<https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf>>

²³¹ Emily M West, "Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases." (2010) at 4, online (pdf): *The Innocence Project, New York* <https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf>; see also Berry, *supra* note 227 at 489. (The author details similar examples of ineffective assistance of counsel in cases outlined in her article).

²³² Roach, *supra* note 27 at 48.

²³³ Lourtau, *supra* note 31 at 8.

hindered the defense's development of a coherent theory of the case, and gave the defendant virtually no role in the... process.²³⁴

Impact of Wrongful Convictions

Wrongful convictions result in serious negative consequences on the affected individuals. Though research shows that the effects of wrongful conviction are similar to those of long-term imprisonment, study findings suggest that wrongfully convicted persons experience these effects differently.²³⁵ For these individuals, the deleterious consequences are aggravated by the injustice of being imprisoned for crimes they did not commit.²³⁶ The impact of wrongful convictions reported in the literature comprise psychological, physical, social, emotional, and financial effects.

Psychological Impact

Several studies have documented the various psychological effects experienced by wrongfully convicted persons. For example, in his psychiatric assessment of eighteen wrongfully convicted men, Adrian Grounds²³⁷ found that the men experienced psychiatric disorders akin to those experienced by war veterans. Specifically, some men suffered from depression and post-traumatic stress disorder while imprisoned and even after their exoneration. In addition, study findings by Burnett et al. and Campbell and Denov²³⁸ and show that many of their study

²³⁴ Griffin, *supra* note 215 at 1263.

²³⁵ See Denov & Campbell, *supra* note 34 at 233; see also Simon A Cole, "Cultural consequences of miscarriages of justice" (2009) 27:3 Behavioral Sciences & L 431 at 432.

²³⁶ See Zieva Dauber Konvisser, "Psychological Consequences of Wrongful Conviction in Women and the Possibility of Positive Change" (2012) 5:2 DePaul J Soc Justice 221.

²³⁷ Adrian Grounds, "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46:2 Canadian J Criminology & Crim Just 165.

²³⁸ Ros Burnett, Carolyn Hoyle & Naomi-Ellen Speechley, "The Context and Impact of Being Wrongly Accused of Abuse in Occupations of Trust" (2017) 56:2 How J Crime & Just 176; Campbell & Denov, *supra* note 36 at 139.

participants contemplated or attempted suicide during their imprisonment. Wrongfully convicted persons also struggled with anxiety, panic disorders and sleep problems.²³⁹

Wrongfully convicted persons also reported experiencing loss and stigma. For example, Denov and Campbell's study found that their participants experienced various losses related to identity, credibility, hope, and future purpose.²⁴⁰ However, the most devastating loss for all the participants was the separation from their families during their incarceration. Interestingly, participants in another study recounted that they experienced positive personality changes during their wrongful convictions.²⁴¹ The stigma experienced by wrongfully convicted persons includes damage to their reputation and self-stigma. While some of these individuals struggled to manage suspicion from their community, others suffered the shame and humiliation of being labelled criminals while in the criminal justice system and even after their release.²⁴² In addition, most of the participants in one study reported that they were avoided by their friends and suffered harassment from strangers.²⁴³

Physical Impact

The physical problems that wrongfully convicted persons experience include threats, assaults, and sleep deprivation in police custody.²⁴⁴ Study findings also report experiences of intimidation, bullying, and physical abuse during police interrogations.²⁴⁵ These degrading acts

²³⁹ Grounds, *supra* note 237 at 169; Burnett et al, *supra* note 238 at 190.

²⁴⁰ Denov & Campbell, *supra* note 25 at 234-235.

²⁴¹ See Zieva D Konvisser & Ashley Werry, "Exoneree Engagement in Policy Reform Work: An Exploratory Study of the Innocence Movement Policy Reform Process" (2017) 33:1 J Contemporary Crim Justice 43. (Participants noted that they reflected and grew from their experiences including a positive attitude and not taking things for granted).

²⁴² Saundra D Westervelt & Kimberly J Cook, "Coping with Innocence After Death Row" (2008) Contexts 7:4 32 at 35; Ehighalua, *supra* note 7 at 1133.

²⁴³ Westervelt & Cook, *supra*, note 242 at 35.

²⁴⁴ Grounds, *supra* note 237 at 169.

²⁴⁵ Sion Jenkins, "Families at War? Relationships Between 'Survivors' of Wrongful Conviction and 'Survivors' of Serious Crime. (2014) 20 Intl Rev Victimology 243.

left most participants feeling traumatized and dehumanized. In addition, participants described the prison environment as violent and hostile and recounted the intimidation, harassment, and violent attacks they experienced from other inmates while incarcerated.²⁴⁶ Another study also reported experiences of fainting, stomach troubles, eating disorders, and muscle weakness.²⁴⁷

Social Impact

Research also indicates the struggles that wrongfully convicted persons experience with their personal relationships and connections in society. In some cases, these individuals experience challenges adapting to life after their release from incarceration and avoid maintaining close relationships with others.²⁴⁸ In addition, the burden of being retargeted by the criminal justice system also made some exonerees change their appearance or take other measures to avoid being recognized in public.²⁴⁹

Wrongfully convicted persons also report fractured or lost relationships with partners, children, parents, and friends.²⁵⁰ The spousal relationships were particularly affected as the spouses experienced psychological distress and felt that they could not care for their children alone.²⁵¹ According to Grounds, some "experienced a profound estrangement, the loss of a closeness that never returned."²⁵² In some cases, the loss of family relationships happened when their family members abandoned them or refused to accept their innocence.²⁵³

²⁴⁶Zieva Dauber Konvisser, "What Happened to Me Can Happen to Anybody - Women Exonorees Speak out" (2015) 3:2 Tex A&M L Rev 303.

²⁴⁷Seri Irazola et al, "Study of Victim Experiences of Wrongful Conviction" (November 2013) at 1, online (pdf): *Office of Justice Programs* < <https://www.ojp.gov/pdffiles1/nij/grants/244084.pdf>>

²⁴⁸ Grounds, *supra* note 237 at 171.

²⁴⁹ Denov & Campbell, *supra* note 25 at 236.

²⁵⁰ Konvisser, *supra* note 246 at 329-330.

²⁵¹ *Ibid* at 173-174.

²⁵² Grounds, *supra* note 237 at 173.

²⁵³ Denov & Campbell, *supra* note 25 at 235.

Emotional Impact

The experiences of wrongfully convicted persons with the criminal justice system provoked feelings of resentment for the justice system and anger and aggression towards society.²⁵⁴ They felt particularly hateful towards a society that condones injustice and an unfair administration of justice.²⁵⁵ For some, their experiences "seem to have instilled in them a profound cynicism and mistrust regarding the fairness and legitimacy of authority figures."²⁵⁶

The feelings of resentment and bitterness also extended to the state and state actors. One study found that the wrongfully convicted persons felt that the lack of acknowledgement and apology from the state and prosecutors failed to assuage their guilt and bring them closure.²⁵⁷ Further, the losses suffered by wrongfully convicted persons fueled an intense intolerance for injustice. They were especially affected when they witnessed people's rights being disrespected or when they considered certain outcomes unfair.²⁵⁸

Economic Impact

The economic consequences of wrongful conviction and imprisonment are devastating. Wrongfully convicted persons experience severe financial burdens as they lose earnings and assets to pay legal bills and other expenses. For instance, some borrow money or sell their assets to raise funds to secure bail. In some cases, some became financially destitute and had to rely on families, friends, and communities for financial support.

The post-incarceration situation of wrongfully convicted persons is equally dire as they experience great difficulty in finding jobs. According to Santos, the stigma associated with their

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ Campbell & Denov, *supra* note 36.

²⁵⁷ Konvisser, *supra* note 246 at 355.

²⁵⁸ *Ibid.*

criminal conviction and their lack of job training while imprisoned make it particularly challenging to secure employment.²⁵⁹ Moreover, most exonerees cannot secure financial compensation for their wrongful conviction or have their name expunged from the records despite their release from prison.²⁶⁰ These difficulties lead to financial struggles and compound the challenges of re-entry into society for these individuals.²⁶¹

Conclusion

A review of the literature about the factors that contribute to wrongful convictions revealed that the main contributory factors in the Nigerian context are wrongful arrest, official misconduct, false confession obtained by torture, and inadequate legal representation. The literature also showed that wrongfully convicted persons experience physical, emotional, financial, and social consequences from their wrongful convictions and incarceration. Much of the Nigerian literature relied on scholarship from the United States and Canada. This is important since wrongful conviction scholarship is well established in these jurisdictions and forms the basis for wrongful conviction research for other countries. However, most of the literature from Nigeria and North America focused mainly on the contributory factors in the criminal justice system without addressing the broader social context. Particularly, the review of the literature from Nigeria demonstrated the need for empirical analysis of wrongful conviction in Nigeria to better understand the causes and address its impact on the wrongfully convicted.

²⁵⁹ Fernanda Santos, "Vindicated by DNA, but a Lost Man on the Outside," *New York Times* (25 November 2007) <https://www.nytimes.com/2007/11/25/us/25jeffrey.html>

²⁶⁰ Cole, *supra* note 235 at 239.

²⁶¹ *Ibid.*

CHAPTER 3: SUBSTANTIVE ACCESS TO JUSTICE & THE NIGERIAN LEGAL LANDSCAPE

No access to justice analysis would be complete without an identification of the laws governing the area of inquiry under consideration. Roderick MacDonald highlighted the identification and analysis of substantive laws as an element of access to justice because, as he put it, “[i]t is not solace to anyone to have access to easily accessible judicial remedies if the substance of the law giving rise to these remedies is unjust.”²⁶² Legal scholars and reformers have long been concerned with examining legal rules in any given jurisdiction to determine their relationship to justice and to identify the extent to which the laws on the books differ from the law in action.²⁶³ This chapter offers a relatively brief overview of the legal landscape in Nigeria for the purposes of demonstrating that the laws on the books differ from the law in action. Put simply, Nigeria’s substantive legal system includes a sufficient set of guarantees of individual and procedural rights to guard against wrongful convictions.

Indeed, a robust set of national and international laws promote the rights of criminal defendants and their implementation in Nigeria. The survey of the laws will cover the 1999 Constitution,²⁶⁴ the African Charter,²⁶⁵ and the Criminal Procedure Act.²⁶⁶ All these laws provide the full range of rights that should mitigate against wrongful convictions, including recognition of the principles of freedom, equality, and justice which are enshrined in the 1999 Constitution

²⁶² MacDonald, *supra* note 22 at 105.

²⁶³ Christine Rothmayr Allison, “*Law in Books Versus Law in Action: A Review of the Socio-Legal Literature*” in Louis M Imbeau & Steve Jacob, eds, *Behind a Veil of Ignorance? Power and Uncertainty in Constitutional Design* (Heidelberg: Springer, 2015) 35; Michael Lynk, “Chapter 5: Human Rights in the Canadian Workplace” in Geoffrey England, Peter Barnacle & Innis M Christie, revising authors, *Employment Law in Canada*, 4th ed (Toronto: LexisNexis, 2005) (loose-leaf revision 2018).

²⁶⁴ *The 1999 Constitution*, *supra* note 2.

²⁶⁵ *The African Charter*, *supra* note 3.

²⁶⁶ *The CPA*, *supra* note 5.

and reinforced in both domestic statutes and regional human rights instruments that pertain to Nigeria.²⁶⁷

Despite these robust protections, wrongful convictions persist in Nigeria leading to the conclusion that substantive laws may be necessary, but they are not sufficient to guard against wrongful convictions. Thus, Nigeria is no different from a jurisdiction like Canada: gaps exist between the law on the books and the law in action.

The Nigerian Criminal Justice System

The criminal justice system refers to “the collective institutions which an accused offender passes until the accusations have been disposed of or the assessed punishment is concluded.”²⁶⁸ According to Olonisakin et al, the criminal justice system “is an essential part of any civilized nation to ensure justice, fairness, the practice of the rule of law and the institutionalization of a democratic system.”²⁶⁹ The Nigerian criminal justice system is adversarial, a result of its common law legacy.²⁷⁰ In the adversarial system, the prosecution and the defence argue their positions before an impartial judge who seeks to determine the truth. The prosecution, after accusing the defendant, must prove its case beyond reasonable doubt.²⁷¹ The defendant is deemed innocent until the prosecution meets the burden of proof. The responsibility of the judge is to ensure that the trial proceeds according to the procedural rules or due process of law and the rules of evidence.²⁷² In Nigeria, the principal components of the criminal justice

²⁶⁷ *The 1999 Constitution*, *supra* note 2 at s 17 (1).

²⁶⁸ Brian A Garner & Henry Campbell Black, eds, *Black’s Law Dictionary*, 9th ed, (St. Paul, MN: West, 2009) sub verbo “criminal justice system.”

²⁶⁹ Tosin T Olonisakin et al, “The Nigeria Criminal Justice System and Its Effectiveness in Criminal Behaviour Control: A Social-Psychological Analysis” (2017) 22:2 IOSR J Humanities & Soc Science, 33.

²⁷⁰ Matthew Eze, “Plea Bargaining in Nigeria: Legal Safeguards Against Abuse” (20 December 2018), online: Social Science Research Network < papers.ssrn.com/sol3/papers.cfm?abstract_id=3469724 >

²⁷¹ *Ibid* at 1.

²⁷² Ikenga K.E. Oraegbunam, “The Jurisprudence of Adversarial Justice” (2019) 15 *Ogirisi: A New J African Studies* 27.

system include law enforcement (the police), judicial process (courts, prosecutors, defence lawyers) and corrections (prison officials).²⁷³

The Nigeria Police Force

Section 214(1) of the 1999 Constitution established the Nigeria Police Force (NPF). The constitution stipulates that no other police force shall be established for the Federation or any part thereof, thereby abolishing local and individual state police forces. The federal government has exclusive jurisdiction over police affairs since it is an item on the Exclusive Legislative list of the Constitution.²⁷⁴ The force is organised and administered in accordance with such provisions as may be prescribed by an act of the National Assembly.²⁷⁵ One of such laws passed by the Nigerian legislature is the Police Act which deals with the organization, discipline, duties, and powers of the police force.²⁷⁶

The NPF is tasked with the maintenance and securing of public safety and public order in the country.²⁷⁷ The force also plays a major role in the administration of criminal justice in the country. The police are the first point of contact for a criminal defendant in the criminal justice system. Thus, the defendant's path to justice may be significantly impacted by the manner the police carry out their duties or exercise their powers.²⁷⁸ Section 4 of the Police Act outlines the general duties of the police:

[T]he police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of the law and order, the protection of

²⁷³ Tosin T Olonisakin et al, *supra* note 269 at 34. (The thesis only considered the police and the courts)

²⁷⁴ 1999 Constitution, *supra* note 2 at pt. I, sch. II.

²⁷⁵ *Ibid* at s 214(2).

²⁷⁶ Police Act [Nigeria], Cap P19 LFN 2004.

²⁷⁷ 1999 Constitution, *supra* note 2 at s 215(3).

²⁷⁸ Onwuchekwe, Stanley Ikenna, "The Police & the Administration of Criminal Justice System in Nigeria" (25 March 2015), online:

<www.academia.edu/19792244/THE_POLICE_AND_ADMINISTRATION_OF_CRIMINAL_JUSTICE_SYSTEM_IN_NIGERIA>

property and the enforcement of all laws and regulations with which they are directly charged and shall perform such military duties within or without Nigeria as may be requested of them by or under the authority of this or under any Act.²⁷⁹

The Police Act also provides the police with powers to carry out the duties noted above.

These include the powers to arrest without warrant²⁸⁰serve summons lawfully issued by a court,²⁸¹grant bail to persons arrested without warrant,²⁸²search premises and seize and secure stolen property²⁸³search and detain suspects,²⁸⁴and take measurements, photographs and fingerprint impressions from suspects.²⁸⁵In addition, the police officers are empowered to conduct criminal proceedings before any court whether or not the information or complaint is laid in their name.²⁸⁶More specifically, section 23 of the Police Act highlights the duties of the police in criminal proceedings. It provides that:

Subject to the provisions of Section 174 and Section 211 of the Constitution of the Federal Republic of Nigeria (which relates to the power of the Attorney General of the Federation and of the State to institute and undertake, takeover and continue or discontinue criminal proceedings against any person before any court of law in Nigeria) any police officer may conduct in person all prosecutions before any court whether or not the information or complaint is laid in his name.²⁸⁷

The Judicial System

The judicial system of Nigeria consists of four layers: The Supreme Court of Nigeria, the Court of Appeal, the Federal and State High Courts, and the Magistrate Courts (Southern States) and Area Courts (Northern States).²⁸⁸The Supreme Court of Nigeria sits at the apex of the

²⁷⁹ *Police Act*, *supra* note 339.

²⁸⁰ *Ibid* at s 24 & 25.

²⁸¹ *Ibid* at s 26.

²⁸² *Ibid* at s 27.

²⁸³ *Ibid* at s 28.

²⁸⁴ *Ibid* at s 29.

²⁸⁵ *Ibid* at s 30

²⁸⁶ *Ibid* at s 23

²⁸⁷ *Ibid* at s 251 (1) (2) & (3).

²⁸⁸ Jadesola Akande, "The Legal Order and the Administration of Federal and State Courts" (1991) 21:4, *Oxford University Press* 61.

judicial structure. The 1999 Constitution established and set the composition of the court.²⁸⁹The court comprises of the Chief Justice of Nigeria and such number of Justices of the Supreme Court, not exceeding twenty-one, as may be prescribed by an Act of the National Assembly.²⁹⁰The Supreme Court exists only at the federal level and is the final court of appeal. The court has both appellate and original jurisdiction. Its original jurisdiction is limited to disputes between the federation and a state or between states when such disputes involve any question on which the existence or extent of a legal right depends.²⁹¹

The Court of Appeal sits below the Supreme Court. Like the Supreme Court, the Court of Appeal is a federal court and possesses exclusive jurisdiction over all inferior courts in Nigeria with the exception of magistrate and customary courts.²⁹²The court is composed of the President of the Court of Appeal and such number of Justices of the Court of Appeal, not less than forty-nine of which not less than three shall be learned in Islamic personal law, and not less than three shall be learned in customary law, as may be prescribed by an Act of the National Assembly.²⁹³

Following the Court of Appeal are the Federal High Court and state high courts. The Federal High Court has exclusive jurisdiction over federal revenue related matters.²⁹⁴The court consists of the Chief Judge of the Federal High Court and such number of Judges of the Federal High Court as may be prescribed by an Act of the National Assembly.²⁹⁵ To this end, the Federal High Court is duly constituted if it consists of at least one Judge of that Court.²⁹⁶

²⁸⁹ *1999 Constitution, supra* note 2 at s 230 (1) & (2).

²⁹⁰ *Ibid* at s 230 (2) (a) & (b).

²⁹¹ *Ibid* at s 232 (1)

²⁹² *Ibid* at s 240.

²⁹³ *Ibid* at s 237 (2) (a) & (b).

²⁹⁴ *Ibid* at s 251 (1).

²⁹⁵ *Ibid* at s 253.

²⁹⁶ *Ibid* at s 253.

The state high courts are the highest courts of record in the states in Nigeria. Each state high court has original and appellate jurisdiction in civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue.²⁹⁷ The courts also possess such jurisdiction in criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.²⁹⁸ The state high courts consists of the Chief Judge of the State and such number of Judges of the High Court as may be prescribed by a Law of the House of Assembly of the State.²⁹⁹ The constitution also gives the chief judge of each state the power to make rules for regulating the practice and procedure of the high court of the state.³⁰⁰

The constitution also provides for Customary and Sharia Courts of Appeal.³⁰¹ The customary court of appeal has appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.³⁰² The customary court of appeal is created by any state that requires it. The President of the customary court of appeal of each state makes rules for regulating the practice and procedure of the customary court of appeal of the state. The Sharia court of appeal exercises appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law.³⁰³ The jurisdiction of the Sharia court of appeal is limited by both subject matter and parties. With respect to subject matter, the court can decide only questions of Islamic personal law concerning marriage and succession. Regarding parties, the court has jurisdiction on questions of marriage and succession where all parties or deceased are

²⁹⁷ *Ibid* at s 272 (1).

²⁹⁸ *Ibid*.

²⁹⁹ *Ibid* at s 270 (2) (a) & (b).

³⁰⁰ *Ibid* at s 274.

³⁰¹ *Ibid* at s 275 (1) & 280 (1).

³⁰² *Ibid* at s 282.

³⁰³ *Ibid* at s 271 (1).

Muslims or where the parties, being Muslims, request that the court hears the case in the first instance to determine that case in accordance with Islamic personal law.

The Constitution of the Federal Republic of Nigeria

The 1999 Constitution is the supreme law of the land, and its provisions are binding on the authorities and individuals throughout the country.³⁰⁴The constitution asserts that the nation's social order is grounded on the principles of freedom, equality, and justice.³⁰⁵Promoting the social order requires that every citizen shall have equality of rights, obligations and opportunities before the law;³⁰⁶the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced,³⁰⁷governmental actions shall be humane,³⁰⁸and the independence, impartiality, and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.³⁰⁹

Rights of Criminal Defendants under the 1999 Constitution

The 1999 Constitution provides for fundamental rights applicable generally to all citizens and rights that are specifically for accused persons or criminal defendants. The fundamental rights include:

- a. the right to the dignity of the human person (right against torture, inhuman or degrading treatment),³¹⁰
- b. right to personal liberty,³¹¹
- c. right to silence,³¹²

³⁰⁴ *Ibid* at s 1.

³⁰⁵ *Ibid* at s 17 (1).

³⁰⁶ *Ibid* at s 17 (2) (a).

³⁰⁷ *Ibid* at s 17 (2) (b).

³⁰⁸ *Ibid* at s 17 (2) (c).

³⁰⁹ *Ibid* at s 17 (2) (e).

³¹⁰ *Ibid* at s 34 (a).

³¹¹ *Ibid* at s 35 (1).

- d. right to be informed of the facts and grounds of arrest,³¹³
- e. right to be brought to court within a reasonable time,³¹⁴
- f. right to be released on bail,³¹⁵
- g. right to fair hearing,³¹⁶
- h. right to presumption of innocence,³¹⁷
- i. right to be promptly informed of offence,³¹⁸
- j. right to adequate time and facilities to prepare his case,³¹⁹
- k. right to employ counsel of his choice,³²⁰
- l. right to examination of witness,³²¹
- m. right to have an interpreter,³²²
- n. right to obtain a copy of his judgement.³²³

African Charter on Human and People's Rights

The African Charter affirms that member states of the Organization of African Unity (“OAU”) acknowledge the human and people’s rights enshrined in the charter and undertake to adopt legislative or other measures to give effect to them.³²⁴ The member states declare that individuals are guaranteed the enjoyment of the rights and freedoms in the charter without

³¹² *Ibid* at s 35 (2).

³¹³ *Ibid* at s 35 (3).

³¹⁴ *Ibid* at s 35 (4).

³¹⁵ *Ibid*.

³¹⁶ *Ibid* at s 36 (4).

³¹⁷ *Ibid* at s 36 (5).

³¹⁸ *Ibid* at s 36 (6) (a).

³¹⁹ *Ibid* at s 36 (6) (b).

³²⁰ *Ibid* at s 36 (6) (c).

³²¹ *Ibid* at s 36 (6) (d).

³²² *Ibid* at s 36 (6) (e).

³²³ *Ibid* at s 36 (7).

³²⁴ *African Charter*, *supra* note 3 at art 1.

discrimination of any kind³²⁵They also recognize that every individual is equal before the law and is entitled to equal protection of the law.³²⁶

The rights pertinent to criminal defendants include:

- a. right to the respect of the dignity inherent in every human being (prohibition of all forms of exploitation and degradation including slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment).³²⁷
- b. right to liberty and to the security of his person. (prohibition of arbitrary arrest and detention).³²⁸
- c. right to have his cause heard, including the right to an appeal to competent national organs, right to be presumed innocent until proved guilty by a competent court or tribunal, the right to defense, including by counsel of his choice, and right to be tried within a reasonable time by an impartial court or tribunal.³²⁹

The Criminal Procedure Act

The CPA governs criminal procedure in high courts and magistrate courts in southern states in Nigeria.³³⁰The law regulates all facets of the criminal process including modes of arresting, charging and trying accused persons and criminal defendants. The law also governs sentencing of convicted persons and challenging the legality of the trial outcomes. In addition, the CPA protects the rights of criminal defendants. Some of the parts of the CPA that are relevant to the criminal process and protection of defendants' rights include the provisions on

³²⁵ *African Charter, supra* note 3 at art 2.

³²⁶ *African Charter, supra* note 3 at art 3 (1) (2).

³²⁷ *African Charter, supra* note 3 at art 5.

³²⁸ *African Charter, supra* note 3 at art 6.

³²⁹ *African Charter, supra* note 3 at art 7 (1).

³³⁰ Southern states include Abia, Akwa Ibom, Ebonyi, Delta, Edo, Ekiti, Ondo, Oyo, Ogun, Osun, Enugu, Rivers, Imo and Bayelsa.

arrests,³³¹ institution of proceedings,³³² bail and recognisances,³³³ the charging process,³³⁴ witnesses,³³⁵ and conclusion of trial.³³⁶

Conclusion

If Nigeria has relatively strong laws to protect against wrongful convictions but these laws prove insufficient, how might the contributory factors that are implicated in wrongful convictions be analyzed? This chapter has suggested that simply understanding the laws or the formalities of the legal system and how institutions are intended to operate may be necessary but insufficient to explain the occurrence of wrongful convictions and the gaps between law on the books and law in action. How can we understand the reasons why these wrongful convictions still occur in the criminal justice system? The next chapter offers two standards to help explain both the contributory factors leading to wrongful convictions and the significance of those factors: the Due Process Model and Procedural Justice Theory.

³³¹ *CPA, supra* note 5 pt. 2.

³³² *CPA, supra* note 5 pt. 11.

³³³ *CPA, supra* note 5 pt. 14.

³³⁴ *CPA, supra* note 5 pt. 18.

³³⁵ *CPA, supra* note 5 pt. 20.

³³⁶ *CPA, supra* note 5 pt. 28.

CHAPTER 4: PROCEDURAL AND SYMBOLIC ACCESS TO JUSTICE, TOWARDS A NEW THEORETICAL FRAMEWORK

The literature review in Chapter Two revealed that most scholars who study wrongful convictions, whether in Nigeria, Canada or the United States, seek to extract the factors that contribute to these convictions by examining failings within the legal system. Indeed, the Nigeria literature is inspired by Canadian and American studies. While such an approach has its benefits, it is unduly narrow, especially when considering wrongful conviction in the Nigerian context. The prevailing literature produces what might be called a “laundry list” approach to understanding wrongful convictions. This approach delineates and catalogues the legal causative factors, from witness identification errors to police misconduct, while recognizing their interdependence and complexities but without putting these factors into larger social and political context or examining why they are allowed to exist within the criminal justice system in the first place. Similarly, the previous chapter, Chapter Three, emphasized that a robust set of substantive and procedural rights that should be available to protect against wrongful convictions can be found within the Nigerian criminal justice system. Yet, wrongful convictions persist.

This chapter suggests a theoretical framework that puts the contributory factors that help produce wrongful convictions in their larger social, political and legal contexts. This theoretical framework consists of the Due Process Model and Procedural Justice Theory, both of which play an important analytical role in this study. First, the Due Process Model assisted in evaluating the actions of the actors in the Nigerian criminal justice system in light of the values that ought to influence the criminal process. The Due Process Model made a case for a criminal justice system in Nigeria that protects the rights of accused persons and guards against wrongful convictions. Procedural Justice Theory, for its part, helped to assess the fairness of the procedures used by

decision-makers in the Nigerian criminal justice system. Also, the theory was useful in understanding how the wrongfully convicted persons perceived the fairness of the procedures and their treatment by the authorities. Further, it justified the need for procedural fairness in facilitating substantive rights and the fair treatment of the criminal defendants in the criminal justice system. Before delving into the main features of the Due Process Model and Procedural Justice Theory, this chapter briefly explains their connections to access to justice theorizing as presented by Roderick MacDonald.

Access to Justice, the Due Process Model and Procedural Justice Theory

The Due Process Model provides as a measure against which to assess and explain wrongful convictions in Nigeria because of the model's relevance to the data analysis (Chapter Seven) and the model's significance for access to justice theorizing. As noted in the previous chapter, scholars and researchers have long emphasized that access to justice involves more than studying the legal terrain or law on the books and it requires more than finding ways to giving people access to the legal system. Access is necessary but so is procedural fairness. As MacDonald avers, "even if the outcome reached in a legal proceeding is substantively just, the credibility of the outcome depends on minimum respect for fair procedure."³³⁷The fairness of legal procedures cannot be examined simply with reference to existing laws or practices as these may themselves be unfair. Procedural Justice Theory therefore provides a standard against which processes can be measured.

Moreover, MacDonald, among other access to justice scholars, emphasize that legal processes must be studied in their larger socio-legal contexts and the impact of law must also be examined to determine how law and legal institutions empower some individuals and groups

³³⁷ MacDonald, *supra* note 22 at 105.

while disempowering others.³³⁸ MacDonald calls this larger socio-legal study “symbolic access to justice” and reiterates that a system of law is not a true justice system until there is symbolic access.³³⁹ It is important that people feel a connection to the system and scholars must examine why and not simply how these relationships are formed or, alternatively, broken. Such an analysis has been largely missing from the literature about the factors that contribute to wrongful convictions. As noted in Chapter two, much of the analysis has focused on legal causative factors. But, the significance of wrongful convictions for broader society and understanding how the contributory factors are reflected in and reinforced in the broader society has not been sufficiently studied.³⁴⁰ The Due Process Model makes the link between the criminal justice system and broader society and Procedural Justice Theory further explains the need to consider the relationship between procedural fairness and social contexts of the legal system.

Due Process Model

Developed by H. L. Parker, the Due Process Model is one of two models that explains the competing underlying values and intricate workings of the criminal process.³⁴¹ Parker defines the criminal process as “all the complexes of activity that operate to bring the substantive law of crime to bear (or to avoid bringing it to bear) on persons who are suspected of having committed crimes.”³⁴² The Due Process Model can be contrasted with Parker’s counter model, the Crime Control Model, which is primarily concerned with maintaining law and social order.³⁴³ The Due Process Model privileges individual protection from injustices. The values that underlie the Due Process Model rest on the premise that the criminal justice system functions to

³³⁸ Bahdi, *supra* note 20; Bates et al, *supra* note 24.

³³⁹ MacDonald, *supra* note 22 at 106.

³⁴⁰ That is why my second question is so important to this research. I want to go beyond contributory factors to understand the broader context by asking those who are most affected by it.

³⁴¹ Herbert L Parker, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968).

³⁴² *Ibid* at 2.

³⁴³ *Ibid* at 10.

provide maximum protections to accused persons at each stage of the criminal process.³⁴⁴Parker argues that these values promote a criminal process that protects individuals from state power and ensures a fair process.³⁴⁵

The Due Process Model also identifies the desired features of a criminal justice system. It favours a fact-finding process that determines guilt through a formal adjudicative process rather than informal investigative and prosecutorial processes. The model acknowledges the possibility of errors during fact finding process and argues for the determination of an accused person's guilt through a hearing before an impartial tribunal rather than the informal factfinding processes. The formal adjudicative process aims to prevent and eliminate the errors of the factfinding process and protect innocent defendants.

In addition, the Due Process Model seeks to limit the exercise of state power over individuals during the criminal process.³⁴⁶Since the coercive and restraining use of official power over individuals can result in the deprivation of their rights, the Due Process Model calls for controls and safeguards in the criminal process through the instrumentality of legal guilt.³⁴⁷The doctrine of legal guilt provides that an accused person cannot be held guilty "merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done."³⁴⁸ Instead, the guilt of an accused person is affirmed when the factual determination is made "in procedurally regular fashion and by authorities acting within competences duly allocated to them."³⁴⁹Also, a guilty verdict can only be upheld if procedural rules that safeguard

³⁴⁴ Herbert L Parker, "Two Models of the Criminal Process" (1964) 113:1 U Pa L Rev 1.

³⁴⁵ *Ibid* at 13-23.

³⁴⁶ *Ibid* at 16.

³⁴⁷ *Ibid*.

³⁴⁸ *Ibid*.

³⁴⁹ *Ibid*.

the criminal process are effectuated.³⁵⁰The model therefore emphasizes, as the name implies, that the process leading to an outcome is just as important as the outcome itself. It is not sufficient to arrive at a factual determination of guilt or innocence; attention must be paid to the procedures that lead to the determination. In short, a just system cannot be built on improper procedures regardless of the outcomes.

Furthermore, the Due Process Model supports equality of persons in the criminal process.³⁵¹The US Supreme Court aptly captures the essence of the notion of equality in the criminal process when, commenting on the possibility that justice might be linked to socio-economic status, it opined that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has"³⁵²The basis for this assertion rests on the fact that the unequal means available to criminal defendants makes it challenging for the majority who are indigent to defend their cases in an adversarial system of criminal justice.³⁵³

However, the Due Process Model does not demand a state obligation to grant equal opportunity for criminal defendants to defend their cases.³⁵⁴ Rather, the model contends that the criminal process, which is initiated by the state, and which can potentially lead to the deprivation of individual rights, imposes some public responsibility to ensure that financial incapacity does not prevent criminal defendants from mounting an effective defense.³⁵⁵

³⁵⁰ *Ibid.*

³⁵¹ Parker, *supra* note 341 at 168.

³⁵² Griffin v. Illinois, 351 U.S. 12, 19 (1956).

³⁵³ Parker, *supra* note 341 at 168.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid* at 168-169.

The Due Process Model also supports imposing restraints on the police and prosecutors in the discharge of their duties during the criminal process³⁵⁶ These restraints, especially during the arrest and pre-detention periods, ensure that the police officers do not violate the defendants' rights. Protecting the defendants' rights during the trial is also of equal significance. The focus here is ensuring that violations of the defendants' rights by the police are addressed at the trial stage since police abuses are rarely prosecuted. Additionally, pretrial detentions and plea bargains should be employed sparingly, and the defendants' bail conditions should not be too stringent. Finally, the defendants should be given broad rights of appeals out of concern about wrongful convictions; since "the reversal of a criminal conviction is a small price to pay for an affirmation of proper values and a deterrent example of what will happen when those values are slighted."³⁵⁷ In sum, the Due Process Model emphasizes the essence of fairness through all stages of the criminal justice system.

Procedural Justice Theory

Similar to the Due Process Model, procedural justice refers to the fairness of decision-making procedures by authority figures and the fair treatment of individuals during the process.³⁵⁸ Procedural Justice Theory evolved from the experimental research by John Thibault and Laurens Walker about the impact of procedural justice in third party conflict resolution processes.³⁵⁹ Their research findings demonstrate a significant association between assessment of

³⁵⁶ Richard A Leo, "Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction" (2005) 21:3 J Contemporary Crim Justice 201 at 214.

³⁵⁷ Parker, *supra* note 341 at 231-232.

³⁵⁸ Sarah Bennett, Lorelei Hine, Lorraine Mazerolle, "Procedural Justice" (last modified 26 April 2018), online: Oxford Bibliographies < <https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0241.xml> >; Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in Handbook of Justice Research in Law 65, (Joseph Sanders & Lee Hamilton eds, 2000).

³⁵⁹ John Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1975).

procedural fairness and satisfaction with outcomes of processes.³⁶⁰ They found that disputants who perceived the procedures used in the resolution processes as fair expressed satisfaction with the outcomes, even when those outcomes were unfavorable.³⁶¹ Procedural Justice Theory thus places greater emphasis on the link between legal procedures and society more broadly than does the Due Process Model. In my study, Procedural Justice Theory thus reinforces the need, as suggested by symbolic access to justice, to think about the relationship between criminal justice processes and larger social relationships. Criminal justice processes can tell us something about how people perceive power relations in society and the regard with which societies hold their citizens.

Following their ground-breaking research, subsequent studies confirmed the connection between the assessments of procedural justice, process outcomes, individual satisfaction and perceptions of institutional integrity in legal contexts and quasi-legal contexts. For instance, in his influential work on procedural justice, Tom Tyler, reported the results of one of his studies that involved interviews with residents of Chicago about their experiences with the police and the courts.³⁶² The results demonstrated that the citizens' perception of procedural justice was the strongest factor in determining outcome satisfaction.³⁶³ In another study of convicted felony defendants in three cities, Casper, Tyler and Fisher found that the defendants' judgement about procedural fairness during their case processing made a significant contribution to their satisfaction in the outcome of their cases.³⁶⁴ The findings in the above mentioned research were

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² Tom R Tyler, *Why People Obey the Law* (New Haven, CT: Yale Printing Press, 1990)

³⁶³ *Ibid.* See also Tom R Tyler, "The Role of Perceived Injustice in Defendants' Evaluation of Their Courtroom Experience" (1984) 18:1 L Society Rev 51. (The study also found "that among the defendants studied the major determinant of satisfaction with legal authorities is perceived fairness").

³⁶⁴ Jonathan D Casper, Tom Tyler & Bonnie Fisher, "Procedural Justice in Felony Cases" (1988) 22:3 L Society Rev 483 at 494.

corroborated in a study that examined litigants in a court-ordered arbitration in Pittsburg.³⁶⁵ The research further found that even litigants who lost their cases expressed satisfaction with the outcomes because they deemed the hearing to be fair.³⁶⁶

Research also establishes a relationship between the perception of procedural fairness and the appraisal of legal institutions and officials. Tyler's survey of defendants in traffic and misdemeanor courts examined the defendants' evaluation of their judge and the court system.³⁶⁷ The study findings indicated a strong relationship between the defendants' judgements about procedural fairness and their attitudes towards the judge and the courts.³⁶⁸ Similarly, the findings from Tyler's earlier mentioned study with Chicago residents, showed that procedural fairness had direct effects on the evaluation of the authorities involved.³⁶⁹ A more recent survey of a random sample of California residents was commissioned by the Administrative Office of the Courts in the state. The residents were asked to evaluate their trust and confidence in the state courts. The report stated that "[h]aving a sense that court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence in the California courts." The researchers contend that that "[p]olicies that promote procedural fairness offer the vehicle with the greatest potential for changing how the public views the state courts." The report's assertion is consistent with Lind and Tyler's position that

³⁶⁵ Jane W Adler, Deborah R Hensler & Charles E Nelson, "How Litigants Fare in the Pittsburgh Court Arbitration Program" (Santa Monica, CA: Rand Corporation, 1987).

³⁶⁶ *Ibid* at xiv.

³⁶⁷ Tom R. Tyler, "The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience" (1984) 18:1 L Society Rev 51.

³⁶⁸ *Ibid* at 63.

³⁶⁹ Tyler, *supra* note 367.

high levels of procedural fairness result in more favourable assessments of legal officials and institutions.³⁷⁰

A related issue in the assessment of procedural justice in legal settings is the relationship between procedural justice and the legitimacy accorded legal institutions.³⁷¹ According to Tyler, procedural justice has a significant effect in the perception of legitimacy of institutions³⁷² Tyler's claim finds support in recent studies. In Akinlabi's study of adolescent school children in Nigeria, his analysis revealed that procedural justice had a major impact on the adolescents' judgment about police legitimacy.³⁷³ Boateng and Darko's research on citizen's assessment of procedural justice and legitimacy of local police confirm the "significant effects of procedural fairness and police-initiated contacts on citizens' propensity to consider the police as legitimate."³⁷⁴ Thus, individuals who perceive that they have been treated in a procedurally fair manner by legal institutions or officials will likely perceive them as legitimate and trustworthy.³⁷⁵ Moreover, the perception that the institutions and officials are legitimate enhances the sense that they should be obeyed.³⁷⁶

The literature describes four critical elements for assessing procedural fairness: voice, neutrality, respect, and trustworthiness.³⁷⁷ Voice means that people are provided with a meaningful opportunity to participate in proceedings. For example, in third party neutral

³⁷⁰ E. Allan Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988) at 66.

³⁷¹ *Ibid* at 76.

³⁷² Tom R Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law" (2003) 30 *Crime Justice* 283.

³⁷³ Oluwagbenga M Akinlabi, "Young People, Procedural Justice and Police Legitimacy in Nigeria" (2015) *Policing Society* 1

³⁷⁴ Francis D Boateng & Isaac N Darko, "Perceived Police Legitimacy in Nigeria: The Role of Procedural Fairness and Contacts with the Police (2021) 65 *Intl J L Crime Justice* at 1.

³⁷⁵ Akinlabi, *supra* note 373 at 31; Tyler & Lind, *supra* note 43 at 66-68.

³⁷⁶ Tom R. Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law" (2003), 30 *Crime Justice* 283 at 286.

³⁷⁷ See e.g. Tom R Tyler, "Social Justice: Outcome and Procedure (2000) 35:2 *Intl J Psychology* 117; see also Michael M. O'Hear "Plea Bargaining and Procedural Justice" (2008) 42 *Ga. L. Rev.* 407

proceedings, participation takes place when parties or their legal counsels present evidence to the decision maker.³⁷⁸ Further, voice signifies that people perceive and experience that their input was considered in decision making and that it influenced outcomes.³⁷⁹ People feel more fairly treated when they are given the opportunity to present their own side of the story and when the opportunity is provided early in the process.³⁸⁰

Neutrality involves transparency, objectivity, and impartiality of the authorities that people are dealing with.³⁸¹ People make a favorable assessment of procedural justice when they believe that the authorities are open about their decisions and the processes involved in reaching the decisions. Also, people infer that the procedures are fairer when they perceive that the authorities make decisions based on rules and facts rather than allow personal beliefs or biases to influence the decisions.³⁸² Generally, people seek to engage with authorities that will apply the rules in a consistent and impartial manner.³⁸³

Judgements about respect relate to how the authorities show individuals common courtesy and recognition for their legal rights. Tyler notes that, people “are very concerned that, in the process of dealing with authorities, their dignity as people and as members of society is recognized and acknowledged.” In fact, findings from one study indicated a favorable perception of procedural fairness with the respectfulness of the treatment the participants received from the police.³⁸⁴ Beyond treating people with courtesy and dignity, people perceive that the authorities

³⁷⁸ Tyler, *supra* note 377 at 121.

³⁷⁹ O'Hear, *supra* note 377 at 426.

³⁸⁰ *Ibid.*

³⁸¹ Tyler, *supra* note 377 at 122.

³⁸² *Ibid.*

³⁸³ Ogadimma Arisukwu, Tunde Adebisi, Chisaa Igbolekwu & Festus Asamu, “Police Treatment of the Public in Police Stations: Evidence from Zaria, Nigeria” (2021) *Policing*, 1 at 10.

³⁸⁴ Casper, Jonathan D, Tom Tyler & Bonnie Fisher, “Procedural Justice in Felony Cases” (1988) 22:3 *L Society Rev* 483.

are fair when they acknowledge and respect their legal rights. For example, authorities can do this by recognizing people's right to bring cases before them and treating their cases diligently.³⁸⁵

Trustworthiness is associated with the motives of authority figures and their concern for the welfare of the individuals they are dealing with. People perceive whether or not the authority figure is trustworthy by their actions during their interaction. Hollander-Blumoff and Tyler explain the relationship between trust and trustworthiness in the context of the legal system:

Trust is the least overt aspect of fairness because it involves inferences on the part of the parties that the authority was sincerely trying to do what was right and was motivated to do what was good for the people involved. Because trust is an inference, it is shaped by how the authorities act.³⁸⁶

Thus, people will judge authorities as trustworthy when the authorities demonstrate that they have acknowledged the information brought forth by the parties and considered them in their decision-making process.³⁸⁷

Conclusion

The theoretical framework provided the basis for examining the workings of the Nigerian criminal justice system and individual perspectives in Nigerian wrongful conviction cases. The four elements of procedural justice (voice, neutrality, respect, and trustworthiness) were helpful in the analysis of the fairness of processes and the fair treatment of the wrongfully convicted persons in the Nigerian criminal justice system. The perspectives of wrongfully convicted persons concerning procedural fairness yielded a more detailed and nuanced understanding of the

³⁸⁵ Rebecca Hollander-Blumoff & Tom R Tyler, "Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution" (2011) 1:2 J Dispute Resolution 1

³⁸⁶ *Ibid* at 5.

³⁸⁷ O'Hear, *supra* note 377 at 429.

barriers to justice than often presented in wrongful conviction literature written by legal professionals as set out in Chapter Two.

CHAPTER 5: METHODOLOGY, SOCIO-LEGAL RESEARCH

Introduction

The literature review on wrongful convictions revealed a dearth of research on wrongful convictions in Nigeria and the experiences of barriers to justice by wrongfully convicted persons in the country. The review also showed that research studies on the contributory factors to wrongful conviction have focused on the individual and institutional factors in criminal justice systems. The individual and institutional factors, though necessary to the study of wrongful convictions, ultimately prove too narrow to fully understand why these wrongs take place. Such an approach treats wrongful convictions as aberrations and fails to question whether wrongful convictions are actually symptoms of larger societal trends. This study addresses this gap and conceptual flaw in the existing literature by exploring the barriers to justice in Nigerian wrongful conviction cases through the lenses of Procedural Justice Theory and the Due Process Model, both of which expand the scope of analysis and provide alternative frameworks for situating wrongful convictions in their larger social and political contexts.

This study aimed to examine the barriers to justice that wrongfully convicted persons experience in the Nigerian criminal justice system and how they themselves experience and understand the barriers. In other words, to move beyond the assessments provided by legal actors and scholars. Accordingly, socio-legal methodology was selected for the study. This chapter briefly outlines the parameters of this methodology before setting out in more detail how socio-legal methodology was employed to generate data and listen to the voices of the wrongfully convicted.

Socio-Legal Approach

Socio-legal research is one of the methodological approaches to legal studies.³⁸⁸ The approach has been defined as "an interdisciplinary perspective to legal research that employs a variety of other methods from the humanities and social sciences for the analysis of the law, legal phenomena, and their connections to the broader society"³⁸⁹ Thus, in socio-legal research, methods and theories from the humanities and social sciences can be used for data collection and analysis.³⁹⁰ Using social theories or concepts expands legal discourse. Situating itself within socio-legal research, Procedural Justice Theory was used to assess the fairness of the procedures used by decision makers and their treatment of wrongfully convicted persons in the Nigerian criminal justice system. Also, the Due Process Model was employed to highlight the unfair procedural experiences of the wrongfully convicted persons during the criminal process. Within the socio-legal paradigm also, this study used narrative research to yield empirical data that responded to the research questions.³⁹¹ As Leo & Gould maintain, "narratives are powerful and compelling vehicles for communicating injustices."³⁹²

³⁸⁸ See Dawn Watkins & Mandy Burton, eds, *Research Methods in Law*, (London, UK: Routledge, 2013) (For a full discussion on various methodologies in legal research, In addition to socio-legal studies, the analysis covers doctrinal research, empirical research, legal history, comparative legal research & critical legal studies). For further exposition of 'legal research styles,' see also Paul Chynoweth, "Legal Research" in Andrew Knight & Les Ruddock, eds, *Advanced Research Methods in the Built Environment* (West Sussex, UK: Blackwell Publishing Ltd, 2008) 28.

³⁸⁹ Robert W Gordon, "Lawyers, Scholars, and the Middle Ground" (1993) 91:8 Mich L Rev 2075; Mike McConville & Wing Hong Chui, eds, *Research Methods for Law* (Edinburgh, UK: Edinburgh University Press Ltd, 2007).

³⁹⁰ Reza Banakar & Max Travers, eds, *Introduction to Theory and Method of Socio-Legal Research*, in *Theory and Method in Socio-Legal Research* (2005). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511112

³⁹¹ McConville, *supra* note 389 at 5.

³⁹² Richard A Leo & Jon Gould, "Studying Wrongful Convictions: Learning from Social Science" (2009) 7:1 Ohio St J Crim L 7 at 14.

The empirical feature of socio-legal research represents its focus on law in action.³⁹³ Socio-legal scholars justify studying law in action because of the gap between law in the books and law in action. Such studies have examined the law "as it is actually selectively applied and experienced by different groups in society,"³⁹⁴ "the workings of the law and behaviour of legal actors,"³⁹⁵ and the "social effects of the law, legal processes, institutions and services."³⁹⁶ Thus, socio-legal research aims to address the discrepancy and its adverse effects by moving beyond exclusive doctrinal analysis of law in the books to a careful study of the law in society.³⁹⁷ Exploring the experiences of the barriers to justice in the Nigerian criminal justice system revealed how legal rules and their procedural application by legal actors impacted the ~~wrongfully convicted persons~~ participants during the criminal process.

Further, the socio-legal approach emphasizes a commitment to the contextual study of law.³⁹⁸ According to Selznick, "'law in context' points to the many ways legal norms and institutions are conditioned by culture and social organization. We see...how much the authority and self-confidence of legal institutions depend on underlying realities of class and power; how legal rules fit into broader contexts of custom and morality."³⁹⁹ Harris confirms the inextricable connection between law and the "wider social and political culture" and adds that law "can therefore only be properly understood if studied in that context"⁴⁰⁰ Examples of this relationship include decision making about legal rules by specialized actors within the broader social context.

³⁹³Simon Jolly, "Family Law" in Philip A Thomas, ed, *Socio-Legal Studies*, (Brookfield: Dartmouth, 1997). Empirical means "evidence about the world based on observation or experience." See also Felicity Bell, "Empirical research in law" (2016) 25:2 Griffith Law Rev 262 at 264.

³⁹⁴ Michael Salter & Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Harlow, Pearson Longman, 2007) at 155.

³⁹⁵Keith Hawkins, ed, *The Human Face of Law: Essays in Honour of Donald Harris*, (Oxford: Oxford University Press, 1997)

³⁹⁶ Socio-Legal Studies Association, 1995, (last visited 3 March 3, 2021), online:< <http://www.slsa.ac.uk/>>

³⁹⁷ Salter, *supra* note 394.

³⁹⁸ See e.g. Dermot Feenan, "Foreword: Socio-Legal Studies and the Humanities" (2009) 5:3 Int'l J L Context 235.

³⁹⁹ Philip Selznick "Law in Context Revisited" (2003) 30:2 JL & Soc'y 177.

⁴⁰⁰ Phil Harris, "Curriculum development in Legal Studies" (1986) 20:2 L Teacher 110 at 112.

Such decisions could depend on and be understood from these contextual factors.⁴⁰¹ Thus, utilizing socio-legal methodology enabled an appreciation of the contextual factors that condition the execution of the substantive and procedural laws by the institutions and officials in the Nigerian criminal justice system.⁴⁰²

Research Method Adopted for This Study

An exploration of barriers to justice in the Nigerian criminal justice system from the wrongfully convicted persons' standpoint called for a qualitative research method. Qualitative research is one of the research traditions used in socio-legal inquiry. The research approach represents the "study of people and phenomena in their natural setting and reflects an emphasis on the meaning people find in their natural social life"⁴⁰³Qualitative research contrasts with quantitative research, which is an objective and systematic approach that employs numerical data to gain knowledge about the world.⁴⁰⁴Qualitative inquiry is suitable for promoting a "deep understanding about what a subject matter is, in all its real-world complexity, and an ability to describe, explain, and communicate that understanding."⁴⁰⁵Thus, this research approach helped explore the experiences of the barriers to justice for wrongfully convicted persons in the Nigerian

⁴⁰¹ See Mandy Burton, "Doing Empirical Research: Exploring the Decision-making of Magistrates and Juries" in Dawn Watkins & Mandy Burton, eds, *Research Methods in Law* (New York, Routledge, 2013) at 55. Author highlights "extra-legal" the factors that impact jury decision making in practice. See also John Griffiths, "The Social Working of Legal Rules" (2003) 35:48 *J Leg Pluralism & Unofficial Law* 1.

⁴⁰² Darren O'Donovan, "Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls" in Laura Cahillane & Jennifer Schweppe, eds, *Legal Research Methods: Principles & Practicalities* (Dublin, Clarus Press, 2016) at 31.

⁴⁰³ Robin Cooper & Laura Finley, eds, *Peace & Conflict Studies Research: A Qualitative Perspective* (Charlotte, Information Age Publishing, 2014) at 2.

⁴⁰⁴ Uwe Flick, *Designing Qualitative Research* (London, Sage, 2008).

⁴⁰⁵ Linda D Bloomberg & Marie Volpe, *Completing Your Qualitative Dissertation: A Roadmap from beginning to End* (Thousand Oaks, Sage, 2016) at 38.

criminal justice system by allowing the researcher to enter the world of these individuals to achieve a holistic understanding of the subject matter⁴⁰⁶

Qualitative research methods vary depending on the purpose of the study, which influences the data collection and analytical methods.⁴⁰⁷ Creswell identifies five main qualitative research methods: case study, ethnography, phenomenology, grounded theory, and narrative research.⁴⁰⁸ Case study research involves the exploration of "a real-life contemporary bounded system (a case) or multiple bounded systems (cases) over time, through detailed, in-depth data collection involving multiple sources of information"⁴⁰⁹In ethnography research, the researcher is committed to gaining first-hand knowledge about an issue in cultural and social settings often through participant observations.⁴¹⁰ Finally, grounded theory research is a method whereby the researcher moves beyond descriptions to develop theories for an action or a process based on interviews of many participants.⁴¹¹ I discounted the research methods mentioned above as they did not meet the objective of the study, which employed interviews to examine the experiences of the barriers to justice for wrongfully convicted individuals in Nigeria.

While I considered phenomenological research, this method's features seemed suitable since it examines individuals' lived experiences. However, phenomenological studies focus on a common essence that several individuals ascribe to their lived experience of a phenomenon.⁴¹²

⁴⁰⁶ John W Creswell, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (Los Angeles, Sage, (2013).

⁴⁰⁷ *Ibid.* Other research methods are discussed extensively in the qualitative research literature, See Jerry W Willis, *Foundations of Qualitative Research: Interpretive & Critical Approaches* (Thousand Oaks, Sage, 2007); see also Bloomberg, *supra* note 405.

⁴⁰⁸ Creswell, *supra* note 406.

⁴⁰⁹ *Ibid* at 97.

⁴¹⁰ Paul Atkinson, Amanda Coffey, Sarah Delamont, John Lofland & Lyn Lofland, eds, *Handbook of Ethnography* (Thousand Oaks, Sage, 2007).

⁴¹¹ Juliet Corbin & Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Theory* 4th ed (Los Angeles, Sage, 2015).

⁴¹² Creswell, *supra* note 406.

However, this study aimed to explore the experiences of barriers to justice for wrongfully convicted persons in Nigeria to identify the common ideas and patterns in the participants' experiences and perspectives. Thus, I selected the narrative research method for the study.

Narrative Research

Narrative research has been defined thus:

Narrative inquiry is a way of understanding experience. It is a collaboration between researcher and participants, over time, in a place or series of places, and in social interaction with milieus. An inquirer enters this matrix in the midst and progresses in this same spirit, concluding the inquiry still in the midst of living and telling, reliving and retelling, the stories of the experiences that make up people's lives, both individual and social. Simply stated,...narrative inquiry is stories lived and told.⁴¹³

People undergo experiences as they navigate through life and interact with others. One way that they can structure these experiences is through stories. The stories help them to create order out of these complex experiences.⁴¹⁴ Narrative research is best suited for this study as it enabled me to collect, analyze, and interpret the stories the wrongfully convicted persons told about their experiences in the Nigerian criminal justice system⁴¹⁵ As Denzin states, "experience if it is to be remembered and represented, must be contained in a story to be narrated. We have no direct

⁴¹³ D Jean Clandinin & F. Michael Connelly, *Narrative Inquiry: Experience and Story in Qualitative Research* (San Francisco, Jossey-Bass, 2000) at 20. "Narrative," often used interchangeably with "story" has been defined as "the spoken or written text giving an account of an event/action or series of actions/events, chronologically connected" See Barbara Czarniawska, *Narratives in Social Science Research* (London, Sage, 2004) at 17.

⁴¹⁴ Catherine Kohler Riessman, *Narrative Methods for the Human Sciences* (Los Angeles, Sage, 2008).

⁴¹⁵ Patrick T Hiller & Julia Chaitin, "Their Lives, Our Peace: Narrative Inquiry in Peace & Conflict Studies" in Robin Cooper & Laura Finley, eds, *Peace and Conflict Studies Research: A Qualitative Perspective* (Charlotte, Information Age Publishing, 2014).

access to experience as such. We can only study experience through its representation, through the stories we are told."⁴¹⁶

The most used approaches in narrative research include biographical study, autoethnography, life history, and oral history.⁴¹⁷ A biographical study is a written account by a researcher about an individual's life. In these types of studies, the researcher studies historical documents and written records for a deceased subject and extensive interviews and documents for a living participant⁴¹⁸ In autoethnography, individuals who are subjects of the study write and record their experiences themselves. Their personal experiences are then analyzed within the broader socio-cultural context.⁴¹⁹ The life history approach refers to the study of a person's entire life.⁴²⁰ Finally, in oral history studies, the researcher collects stories and reflections from individuals with first-hand knowledge about particular experiences.⁴²¹ These experiences can also be situated within historical, social, or political contexts.⁴²²

In considering these approaches to narrative research, I opted for the oral history approach since I collected narratives from multiple individuals about events that they had personally experienced. Though significant, these experiences do not span the entire lives of the wrongfully convicted persons; they only provide paths to snapshots of their lives. Further, the narratives from the wrongfully convicted persons about the barriers to justice experienced in the

⁴¹⁶ Norman K Denzin, "Foreword" in Molly Andrews, Shelley Day Sclater, Corrine Squire & Amal Treacher, eds, *The Uses of Narrative: Explorations in Sociology, Psychology & Cultural Studies* (New Brunswick, Transaction Publishers, 2009) at xi.

⁴¹⁷ Creswell, *supra* note 406.

⁴¹⁸ Valerie J Janesick, "Oral History, Life History, & Biography" in Audrey A Trainor & Elizabeth Graue, eds, *Reviewing Qualitative Research in the Social Sciences* (New York, Routledge, 2013).

⁴¹⁹ Carolyn Ellis, Tony E Adams, & Arthur P Bochner, "Autoethnography: An Overview" (2011) 12:1 Forum Qualitative Soc Research 1.

⁴²⁰ Janesick, *supra* note 418.

⁴²¹ Creswell, *supra* note 406.

⁴²² Janesick, *supra* note 418

Nigerian criminal justice system unveiled these experiences both at the personal and the broader contextual levels.

The Research Sample

I used a purposive sampling method to select the study's sample. Purposive sampling is helpful in choosing participants who are most likely to yield valuable and appropriate information, considering the purpose of the study.⁴²³ Thus, I selected individuals who provided information about the barriers to justice they experienced during the criminal process and how they experienced them. The sample consisted of five individuals who met the following criteria: (a) were 18 years and older, (b) had been convicted of a criminal offence or offences, (c) had been convicted in Southwest Nigeria, (d) had been sentenced to a term of imprisonment or death, (e) had been exonerated in the past ten years. All the participants were tried and convicted for capital offences by state high courts. One participant was discharged and acquitted by the Supreme Court of Nigeria. The remaining four participants were granted state pardons by their respective state governments.

I contacted the study participants through the Centre for Justice, Mercy, and Reconciliation (CJMR), a non-governmental organization dedicated to the human rights and prison reforms advocacy based in Ibadan, Oyo State, Nigeria. I had negotiated access to the participants through emails and phone calls to the Chief Executive Officer of CJMR. I explained my intentions and the purpose of the research, after which he agreed to act as the gatekeeper in the study. To this end, CJMR provided a site approval letter to the Review and Ethics Board at the University of Windsor for the study. (See Appendix II).

⁴²³ Creswell, *supra* note 406.

Recruitment

I recruited the study participants from the pool of exonerated persons from CJMR. After I secured clearance for the study from the Research Ethics Board (REB) at the University of Windsor, I emailed letters of participation to CJMR to deliver to the pool of participants (see Appendix III). The letters of participation required the participants to contact me by phone or email within a week if they were interested in participating in the research.

Within two days of emailing the letters to CJMR, I received text messages from six of ten individuals who showed interest in participating in the study. I contacted each individual who had reached out to me to select those that met the inclusion criteria. I used a recruitment questionnaire for this purpose (see Appendix IV). I selected five individuals that met the criteria and scheduled interviews with them at a date and time of their convenience. The sixth individual was not selected because he failed to meet one of the inclusion criteria; he had been exonerated for more than ten years. I advised the selected participants to secure a private and safe place for the interviews in compliance with the University of Windsor REB's privacy requirements.

Data Collection

I selected semi-structured interviews as the data collection method for this study. Qualitative interviewing was useful in eliciting thick descriptions and allowed me to ask additional questions and clarify the participants' answers.⁴²⁴ Each participant took part in a single and separate phone interview which was conducted in English. I had intended to travel to Nigeria to conduct face-to-face interviews with the participants. However, the COVID-19 pandemic travel restrictions prevented travel to Nigeria, hence the use of phone interviews for the study.

⁴²⁴ Creswell, *supra* note 406.

Before the commencement of each interview, I explained the consent process to the participants. I informed them about the nature of the study, its goals, potential risks and ways to mitigate the risks. I also explained their withdrawal rights, the confidentiality of their participation and the privacy of their information. Then, I provided the participants with the opportunity to ask questions about the process or study. Since the interviews took place over the phone, I obtained verbal consent from the participants to confirm their willingness to proceed with the interviews. The participants also granted permission to audio tape the interviews. I recorded the interviews with my digital recorder and backed up the recordings to my password-protected computer. Upon completing all interviews, the interview recordings were transcribed verbatim in preparation for analysis of the transcripts. The transcribed interview data was analyzed manually using the thematic analysis method.⁴²⁵The analysis involved six phases: (1) Familiarization with the data, (2) Generating initial codes, (3) Searching for themes, (4) Reviewing themes, (5) Defining and naming themes, and (6) Producing the report.

Data Analysis

I started the analysis by immersing myself in the data through repeated readings of the interview transcripts. In addition to initial notes and ideas that I brought to the analysis from the transcription process, I took further notes and marked ideas for coding the transcripts. Following from this initial stage and building on the notes and ideas created from the phase, I proceeded to the second phase where I generated initial codes from the data. The codes represented features of the data that I assessed as relevant to the research questions. The codes were noted on the transcripts with a different font colour and matched with data extracts that denoted each code. I

⁴²⁵ Virginia Braun & Victoria Clarke, "Using Thematic Analysis in Psychology" (2006) 3:2 *Qualitative Research in Psychology* 77.

worked through the whole data set, giving full attention to each data item to identify repeated patterns or meaning within the data. I generated one hundred and nineteen codes from this phase.

The third phase involved searching for themes from the long list of different codes identified across the data set. The themes describe larger units of the data through the combination of different codes that are similar or relate to the same feature within the data. I used tables to sort the different codes into potential themes. The table helped me to visualize the codes and appraise the connections between the codes and between the themes that emerged from the search process. I generated seventeen themes at the end of this phase.

The fourth phase began with a review of the themes that emerged from the last phase. During the process, themes that had inadequate data to support them were discarded. Several others were collapsed into each other. This phase also involves the refinement of the new themes to ensure that the data supporting them cohered in a meaningful way and they are clearly distinct from each other. Afterwards, I read through the data set to ensure that the selected themes correctly reflect what was in the data. After it became evident that I had six clear and distinct themes that could tell a coherent story about the data, I proceeded to the phase five.

During this phase, I provided a clear definition for the themes followed with a detailed analysis for each theme. The definition of the themes involves the organization of the data extracts into a coherent and consistent narrative account. In writing the analysis for the theme, I determined the narrative that each theme revealed and how each theme is positioned in the broader story that I am telling about the data. The final part of this phase involved assigning names to the themes. I assigned names that would convey the essence of each theme to the

reader. The write-up of the thematic analysis completes the data analysis, and the report is reproduced in Chapter 6 and Chapter 7.

Ethical Considerations

Conducting research with human participants requires researchers to follow specific ethical guidelines.⁴²⁶ Researchers are tasked with obtaining informed consent from the participants and protecting them from harm.⁴²⁷ I followed the ethical guidelines established by the REB at the University of Windsor. I ensured that the participants provided verbal consent before participating in their interviews. I assigned alphabets to participants for the interviews and transcripts to maintain their anonymity and confidentiality.

I secured all research documents with participants' identifiable information in a locked safe in my office. I also secured the digital recorder in the locked safe. I stored the interview recordings and transcripts in my password-protected computer. The documents and recordings will be kept until after the completion of data analysis. Then, the documents will be shredded with my shredder, and the recordings and interview transcripts deleted from my digital and electronic devices.

⁴²⁶ Catherine Marshall & Gretchen B Rossman, *Designing Qualitative Research*, 6th ed (Los Angeles, Sage, 2015).

⁴²⁷ See Rosalind Edwards & Melanie Mauthner, "Ethics and Feminist Research: Theory and Practice" in Melanie Mauthner, Maxine Birch, Julie Jessop & Tina Miller, eds, *Ethics in Qualitative Research* (London, Sage, 2002) at 14.

CHAPTER 6: FINDINGS, LISTENING TO THEIR VOICES

This chapter presents the findings obtained from semi-structured interviews conducted with five participants from the study sample, all of whom were wrongfully convicted. As set out in Chapter One, the two research questions that shaped this study are:

1. what are the barriers to justice that wrongfully convicted persons experience in the Nigerian criminal justice system prior to their convictions? and
2. how do wrongfully convicted persons experience these barriers?

Thematic analysis method was used to analyze the responses of the study participants.

Six themes emerged from the interviews and point to the contributory factors in wrongful convictions in Nigeria and that examine the main impacts of wrongful convictions on the wronged individuals. The main contributory factors discussed by the wrongfully convicted participants to explain their wrongful convictions include unlawful detention; police undermining the investigation primarily by eliciting falsified statements or imposing wrongful charging processes; the use of torture as a tool to extract evidence; and, corrupt practices, notably offering freedom for sale. The participants also discussed the impact of their experiences and emphasized that they simultaneously lost faith in the system and gained faith in God. Throughout this chapter, the participants' voices are amplified using illustrative quotations from the interview transcripts to capture the multiple perspectives of the participants' realities. Analysis of the themes that emerged from the interviews is presented in the next chapter. This chapter focuses on the narratives presented by the men themselves so that their narratives emerge more clearly and forcefully. I refer to individual participants by alphabets to protect their identities.

Contributory Factors, Wrongful Conviction from The Perspective of Research Participants

Unlawful Detention

All five of the wrongfully convicted men interviewed stated that they were detained in police custody for several weeks after their arrests. Significantly, the police moved most participants to multiple police detention centers before charging them in court. According to BN,⁴²⁸ “I was in the police station for 3 days. So, they now transferred me to CID [Criminal Investigation Department]. After a month they now took me to prison.”

Other participants reported similar experiences. One of the participants described how he spent over a month in police detention before appearing in court:

There was one policeman that entered when my father was asking those questions. He just spoke and I recognized the voice. I said this voice, this voice was amongst the police people that tortured me, shot gun. I just told my father, my father just started fighting those policemen. They locked my father up inside the cell. so that's how... after maybe after just four hours, they release my father. After they release my father, [they]didn't release me too. I was there, I was there. I spent more than a month in the station before the now took me to court. (PP)⁴²⁹

Another explained that he spent a week in police study before appearing in court:

I spent one week in that station then after spending one week, they now transferred my case to the state CID... So that is how he now removed the mask from my face, he said I should go. then when we climb back to the office, they said they should take me to the cell. Then, when we got to the cell, they leave me there, I spend one week at the state CID, then they took me to court. (BC)⁴³⁰

A third participant spent over two months:

I told him that I did not do anything, that he should help me. He took me to the station. I reached the police station I was there, they locked me inside the cell. no food, nothing, nothing my brother was coming. Later, I spent two weeks there... It's two months and 11 days [at the second police detention facility]. (TU)⁴³¹

⁴²⁸ Interview with BN (08 December 2020) in Windsor, Ontario (notes on file with researcher).

⁴²⁹ Interview with PP (07 December 2020) in Windsor, Ontario (notes on file with researcher).

⁴³⁰ Interview with BC (05 December 2020) in Windsor, Ontario (notes on file with researcher).

⁴³¹ Interview with TU (06 December 2020) in Windsor, Ontario (notes on file with researcher).

The detention periods for all participants are represented in Table 1 below:

Detention Period in Police Custody

Participant	Detention Period in Police Custody
PP	4 weeks
NC	8 weeks
BN	6 weeks, 1 day
TU	10 weeks
BC	2 weeks

Table 1

All participants also reported lengthy pretrial detention periods. The participants recalled that they were initially charged at Magistrate courts although they were alleged to have committed capital offences. According to PP, “Yes, at the Magistrate Court, I spent more than two years and 4 months...Yes, only at the magistrate before my paper now came out for the high court.”⁴³² BC affirmed that “in awaiting trial, that is ATM, they call it awaiting trial, that is for the lower court. So, I spent...in the Magistrate Court, I spent three years and a half before my DPP

⁴³² PP, *supra* note 429.

advice came out.”⁴³³ Similarly, BN recounted that “they took me to the Magistrate Court, so after one year six months, the case now went to the high court.”⁴³⁴

The pre-trial detention periods for all participants are represented in Table 2 below:

Pre-Trial Detention Period

Participant	Pre-Trial Detention Period
PP	28 months
NC	8 months
BN	18 months
TU	7 months
BC	42 months

Table 2

Undermining the Investigation: Falsified Statements and Wrongful Charging

Processes

Study participants also depicted how police officers undermined the investigation process in their cases. Some participants reported that they did not write the statements the prosecutors tendered as evidence in court. The participants revealed how police investigators wrote the statements and passed them off as written by the participants. As a participant explained,

⁴³³ BC, *supra* note 430.
⁴³⁴ BN, *supra* note 428.

[T]hose policemen wrote in my statement, ‘drugging pure water’ and armed robbery or whatever they wrote... I’m not the one that wrote my statement. After they wrote it, they asked me to... because I remember, they gave me pen, that I should sign in so, so, so, so place. I didn’t understand because that day, they have already tortured me.⁴³⁵

Another participant recalled the moment that he found out about the contents of the false statement attributed to him:

From the initial stage, I never wrote any statement before the counsel...I mean the IPO. The first IPO that died, it was the first IPO that wrote all the statement by himself. I did not write anything so it was the statement of the first IPO that the judge used because I told him, I told the judge that the incident that occurred, it was by discharge, it was by charging that the gun explode, discharge and shot one of those criminal but the judge now did not take it in, Meanwhile I don’t know that the first IPO wrote that I shot, I was the one that shot the person that died which is not, which is not. I did not say anything, I did not write anything by myself.⁴³⁶

In addition, some participants noted irregularities in the manner they were charged. BN reported that “they now joined me with some criminals which I do not know them, almost four people they joined the case together. So, they joined me with some people together. So, when we go to the court, they read the case together”.⁴³⁷ According to NC,

they brought like 20 people outside and said the people that they robbed, that they know the person that they said they should look at. Those people, they pointed at me, they pointed at four persons police told them, say it, that day. It's me that they pointed at, they pointed at, is it only one person that robs? they said, out of the three persons, that I am the leader. where did I see this people? The people that they pulled [charged] us together, I don't know them in the sight of God that created us.⁴³⁸

Their accounts detailed how such irregularities undermined the criminal process in their cases.

Torture as Tools of Extraction of Evidence

Participants narrated how police officers tortured them to obtain confessional evidence them. The participants revealed the severe physical violence that the police inflicted on them. As BN recalled:

⁴³⁵ PP, *supra* note 429.

⁴³⁶ BC, *supra* note 430.

⁴³⁷ BN, *supra* note 428.

⁴³⁸ Interview with NC (06 December 2020) in Windsor, Ontario (notes on file with researcher).

They beat me. They tortured me very well oh, they even break my...the... my right hand. They told me to confess, and I told them I don't know anything about... they used iron, they hung me, they turned me upside down for two days, they asked me to confess I said there's nothing I did, I did not commit any crime. And they used iron, they brought iron, they used iron to press all my legs; as I am talking to you now, even all my legs the marks are there. They asked me to confess I said I did not know anything about the case.⁴³⁹

NC also narrated a similar experience:

Even at the time that I was there, they beat me (voice rises), they beat me (voice rises), they beat me (voice rises). Where's my gun? Where's my gun? They tied me, they hung me up, they hung me up, they were... as they tied me, they were beating me, where's my gun? They know, they already know... I fainted. I could not shout because I had been shouting, shouting, shouting, shouting until I became tired until I want to die, and I said it...and you know what? They dropped me. As they dropped me, they dropped me; they beat me. I suffered... They wounded me; they wounded me (shouts). They took out my teeth...as I am now, I use artificial teeth.⁴⁴⁰

TU described the torture that led to his false confession:

I was there... They said I was the robber, I said to them, ah, impossible, which person? one person went and robbed, he said why am I asking him such a foolish question. He slapped me; blood started coming out of my ear...before they covered my ear. They beat me; they hung me up for the offence that I didn't commit. When they hung me...all my finger was fold, my hands were swollen. I told them; I did not do anything. They shot me in the leg. That man, Sergeant P, if he puts a bullet in somebody's fingers and in their legs and he would hang them up. He hung me one day, two days, three days. I told them I did not commit the offence. He said it's a lie. He said it's me. I told them to please drop me. It's me; it's me, then he dropped me.⁴⁴¹

Corruption: Freedom for Sale

Participants pointed to a connection between corrupt practices of police officers and the participant's continued detention in police custody. Some participants described bribery requests from the officers while they were in custody. Based on the participant's narratives, there appeared to be a nexus between the failure to meet the officers' demands and their continued detention in police custody. According to BN,

⁴³⁹ BN, *supra* note 428.

⁴⁴⁰ NC, *supra* note 438.

⁴⁴¹ TU, *supra* note 431.

the police asked my mommy that if they can release me, she's going to pay 300,000 [naira]. Are you hearing me now? If they can release me, before they release me to her, she's going to pay 300,000 [naira]. Are you getting my point now? She now said that she did not have the money. They now ask her that if she did not have the money go and look for a lawyer by herself to defend me for the case.⁴⁴²

TU reported a similar experience:

They told my brother to bring 30,000 naira. They said he should bring 30,000 [naira]... They said they will leave me. He said they would settle everything; he said he knows that I am not the one that committed the offence... He said if he sees 30,000 [naira], he will free me. After my brother struggled, he came up with 7,000 [naira]. They told him to go with his 7000 [naira], that it will not be useful for them. Because of that, they charged me to court. When they charged me to court, I was there at the Magistrate Court to the High Court...⁴⁴³

Feeling the Impact

Participants spoke of the impact of the experiences of the barriers to justice on them.

They reported that they suffered losses from the processes in the criminal justice system and from the treatment they received from state actors in the system. BN recalled that "I lost my family through the problem. My mommy died, my daddy died, my two sisters died."⁴⁴⁴In TU's case, he said that "I was not sleeping, I was not sleeping at all" and lamented that "all my mates, everybody has given birth. Everybody has a wife; I don't have anything. I don't have money to rent house. Nigeria has spoiled my life."⁴⁴⁵ He also described the indignity he experienced in police custody and how this indignity impacted his perception of himself and the world around him:

In fact, I cannot talk again because I am very small, tiny somebody who is detained inside the cell with no food, nothing, nothing. I was at the station for two months. I had a bath for only a day; only one day I took my bath. You will see your body rot. You will not see anything good; you wear only one cloth.⁴⁴⁶

⁴⁴² BN, *supra* note 428.

⁴⁴³ TU, *supra* note 431.

⁴⁴⁴ BN, *supra* note 428.

⁴⁴⁵ TU, *supra* note 431.

⁴⁴⁶ *Ibid.*

NC narrated his experience thus:

As I am talking to you now, I don't have money. If somebody sees me... if somebody says... because as I came from prison madam, one day... this thing that I'm telling you I cannot even tell P.O. I hung myself, I hung myself up. I hung myself up in the night, in the midnight, I hang myself. Because in the night, like 2 o'clock, I hung myself. I didn't know, as the thing cut. as it cut, I was on the ground, and I said (screams). I realized that the thing has cut... They destroyed me. If I think as I am now, it will be as if life will not pay me.⁴⁴⁷

Some participants recounted the financial losses they incurred during the criminal process. One participant described how his family lost significant amounts to a defence counsel:

After collecting the money 80000 naira from my mommy, that my mommy should bring 80000 first that he's going to continue after bail, he's going to work for charge and bail so that I'll be paying the money small, small. So it is that very day that they took me to court that I was expecting him to appear in the court we did not see the lawyer.⁴⁴⁸

Another participant also explained how his family was asked for significant sums:

Then my sister brought out 100,000 [naira]. Then we gave it to the lawyer and the lawyer now said, okay my sister should wait. he went to High Court to go and bring bail bond so am...I, I read through the bail bond, he said I should fill it. and then I signed, hoping that the man is going to file, is going to work for my bail within that week. he said I should go, he, they should take me back to the prison, then waiting, waiting, waiting for about six months, I did not see even the lawyer, I did not see him. I didn't see him so that is how he left.⁴⁴⁹

Losing Trust, Gaining Faith

All participants reported that they had lost trust in judicial authorities and the criminal justice system and gained faith in God as a just and fair actor in the system. The participants attributed their unfavorable perception of the authorities and the justice system to the unfair treatment and unfair processes they experienced in the system. Only one participant had had a previous interaction with the police and the courts. In articulating his negative view of police officers in Nigeria, BN stated that “whenever I see the police, I always feel bad because I count

⁴⁴⁷ NC, *supra* note 438.

⁴⁴⁸ BN, *supra* note 428.

⁴⁴⁹ BC, *supra* note 430.

police like they're the worst corruption in Nigeria. They are the worst, number one corruption because they do not follow the truth. I always disrespect them. I do not trust police."⁴⁵⁰ From TU's perspective, "police are thieves. If policemen see armed robbers, they will take money from them. If anybody ... If anybody says that they said they are corrupt, it's true, it is not a lie."⁴⁵¹ BC shares that "they have to caution them. The way they do their work, they do it wrongly, it's not the way they train them, they do the work."⁴⁵² It is noteworthy that all participants endorsed the END SARS police protests that had taken place in Nigeria before the interviews. They considered the protests necessary to hold the Nigerian police officers accountable for their misconduct and corrupt practices.

In addition to their views about the police, the following participants' comments illustrate the negative view of judicial officers:

I have told you that... judge, judge, if somebody does something, if they see money and go and give judge, [they] will collect money o! They are corrupt. They are corrupt... Magistrates, High Court. Me, I cannot trust them me, I cannot trust them... this thing that I'm telling you, you supposed to understand me. There's no place that I cannot say it, that a judge does not collect money. This thing that I'm telling you, I know the judge. Me myself, I'm a sinner but what I'm telling you is that judge in Nigeria, I did not go, I did not go to another country. Nigeria, this Nigeria, from Magistrates to High Court, Madam let me not lie to you, it's what I saw.⁴⁵³

I never trust, because to my own case, I put it as a case study, aha, because the judge did not do my case very well before he gave me judgement. Before he gives the judgement, he did not view my case very well. He did not verify it before he gave me a sentence so I never, I never trust judge. Even why I was in away, I was in prison; I do advise some people, don't say you don't have complainant. I use my own case to do case study for them, say look at my case, this is how it happened. Don't say you'll be prayerful. I don't have complainant; I don't have witnesses, know this that, forget about it. if judge wants

⁴⁵⁰ BN, *supra* note 428.

⁴⁵¹ TU, *supra* note 431.

⁴⁵² BC, *supra* note 430.

⁴⁵³ NC, *supra* note 438.

to sentence you, they will do their talk, they will not follow the law, they will not investigate at all what happened, so that is it.⁴⁵⁴

Yes, because when money is... I experienced... you know when I was facing the court, there were some cases which we're tougher than me, for my own case. Before you know it, L has been released, L has been released. there is a case that I want to give you example. the guy was a notorious criminal. We were in the same cell. but when we go to the next court, they said the guy had died in a car accident. But the judges did not ask, the judge didn't ask that where is the report of the accident? Which hospital the accused went to? They took the person to the hospital... I don't know whether you're getting what I'm saying? It's the same judge and he dismissed the case. Yes, he dismissed the case and for your surprise, when I got out of prison, I met this same person. yes, I met the same person. so, I am very sorry for this statement, I count some judges in Nigeria as useless judges.⁴⁵⁵

The participants also expressed unfavourable views about the courts and the justice system in Nigeria. Acknowledging his loss of confidence in the courts, PP declared that the court “is no good at all. Even I do not pray to go to that place again, Auntie, I don’t pray that I should have case again.”⁴⁵⁶ All participants spoke about a system of justice characterized by injustice, inequalities, and corruption. According to one participant,

The system of justice in Nigeria...Nigeria law is injustice because they don’t say the truth. They don’t tell the truth. If police arrested you unlawfully, getting to court, the judge will now support the police. They will now take, I mean um...the policeman will be prosecuting the accused person for a case, I mean, for what did not happen. They collect money from people, bribe, so we [have] injustice. If you are a poor man, you don’t have much to say, you don’t have power, but if you’re a rich man, everything is money. It’s money they need...Corruption.⁴⁵⁷

For another participant, the system of justice in Nigeria is emblematic of the country’s condition. He concluded that “for me if I want to come back in another life, it will not be to come in Nigeria or in Africa. The corruption is too much.”⁴⁵⁸

⁴⁵⁴ BC, *supra* note 430.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ PP, *supra* note 429.

⁴⁵⁷ BN, *supra* note 428.

⁴⁵⁸ TU, *supra* note 431.

All participants indicated that they have lost the belief that criminal justice officials will be held accountable for their unfair conduct and treatment of participants in the criminal process. The participants blame government inaction for this situation. As TU aptly inquired: “Is it me that will arrest him? Or if I tell the government, what would the government do?”⁴⁵⁹ Another participant noted that “even some of them will be promoted because for them, the government thinks that they are doing a good job.”⁴⁶⁰ In addition, PP stated police officers are not held responsible for misconduct because of the protections offered by their superior officers: “That's their superior officers, they're the ones that give them all these powers, so that's why they have the power to do evil.”⁴⁶¹ For BC, the only remedy for a victim of police misconduct is “if you have a lawyer that can come to you and [rise] up, stand by you and I mean, take your matter up, it is then they will be afraid but you if don't have anybody, they will only abandon the person, that's all. they will only abandon the person.”⁴⁶²

As the participants lost faith in the criminal justice system's commitment to deliver a fair and equitable process in their cases, they articulated a firm belief in God to do same for them. All participants expressed a favorable perception of God as an important actor in the criminal justice system. They described God as playing the role of protector, advocate, and judge. PP stated:

All I know is that if it's not for God, if not for God, I would have just died there. but I thank God that their plan, their plan on me for evil did not work, it did not come to pass.

A guy like me, even the time I was in prison, I used to say that thing. Every morning, every time that I used to pray, that God, but if I know anything concerning this issue, that God, but I will not, I will die there. but if I did not know anything, I will not die there.⁴⁶³

⁴⁵⁹ *Ibid.*

⁴⁶⁰ BN, *supra* note 428.

⁴⁶¹ PP, *supra* note 429.

⁴⁶² BC, *supra* note 430.

⁴⁶³ PP, *supra* note 429.

Auntie, before I was thinking like...I was thinking, to do more than that. But as God has already revenge for me, that's no... Even, it's not my part, but when I was in prison, people that died there, I cannot count them. I can't count, so I thank God that as I go there, even though for one day I was not sick, so all these things I just said, so God is with me. So, there's no need for me to revenge.⁴⁶⁴

BC reported:

I feel bitterly in my mind but I was praying to God and I said God, if really I committed this offence, I should die in prison but if I did not committed the offence, take me outside, no matter how long but take me outside, so... yes because I was praying, doing fasting and prayer because I believe that is only God that can set me free from the condition I was facing... where I was in awaiting trial, many people who knows me there, they were telling me how there's nothing in your case why, why are they delaying you, I said I don't know. they say God will set you free, you don't have problem, why delaying you.⁴⁶⁵

The participants' views about the role of God in the criminal justice system appears to be driven by their perception of their standing in the society. Most participants blamed their poor background for their unfair treatment by the police and judicial authorities, hence their abiding trust in God to vindicate them in the criminal process. The participants expressed their positions thus:

Because the power is in their hands [judicial authorities], nothing, there's nothing that will happen with them, nothing will happen to them except only this God, ah, ah, if you're fully serving God, it's only God that intervene, that's all. if you are fully serving God, it's only God that intervene for all these people but to say you have any other power, nothing...no power.⁴⁶⁶

I just said okay, as God has already fought for me, because I feel bad. number one, I don't feel happy. I'm not...you know... because my people are very poor, that's cheating. that's all I know, because if my people... all I know is that they cheated on me because my parents were very poor, so they just used power, that's all I know.⁴⁶⁷

The court is made for big man, big man. If you have money, they will not jail you; if you don't have money, they will jail you. Ah, the children of big men commit now, if you have money, they will go settle them with the money and release them.⁴⁶⁸

⁴⁶⁴ *Ibid.*

⁴⁶⁵ BC, *supra* note 430.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ PP, *supra* note 429.

⁴⁶⁸ NC, *supra* note 438.

Conclusion

Semi-structured interviews with five wrongfully convicted men in Nigeria revealed six themes that enhance our understanding of the contributory factors and impacts of wrongful convictions. The men identified how unlawful detention, police undermining the investigation primarily by eliciting falsified statements or using wrongful charging processes, the use of torture as a tool to extract evidence, and, corrupt practices, notably offering freedom for sale, contributed to their wrongful convictions. They also discussed the impact of their experiences and emphasized that they simultaneously lost faith in the system and gained faith in God. The next chapter, Chapter Seven, of this study offers more detailed analysis of these themes in light of the literature review and theoretical frameworks adopted for this study, specifically Due Process Model and Procedural Justice Theory. Chapter Eight then offers recommendations for reform and further research that critically examines the existing literature considering the observations made by the participants in this study and the theoretical frameworks adopted.

CHAPTER 7: ANALYSIS OF THEMES, CONTRIBUTORY FACTORS & WRONGFUL CONVICTIONS IN NIGERIA

This chapter presents an analysis of the themes that emerged from interviews with five wrongfully convicted Nigerian men about the barriers to justice that wrongfully convicted individuals experienced in the Nigerian criminal justice system and how they experienced the barriers. The chapter is organized according to the same contributory factors that emerged from the interviews as set out in the previous chapter. The analysis presented draws on previous chapters throughout. Where the themes that emerged from the interviews reinforced or contradicted the conclusions found in the existing literature (Chapter Two) or the existing Nigerian legal framework (Chapter Three), these discrepancies are highlighted. Similarly, the principles of the Due Process Model and Procedural Justice Theory presented in Chapter Four are deployed, where applicable, to explain the significance of the themes presented.

Consistent with the existing literature, this chapter reinforces that multiple errors and procedural wrongs combine to produce wrongful convictions in Nigeria. However, this chapter also emphasizes the need to go beyond the existing literature and situate wrongful convictions within a larger socio-legal context. The legal errors and wrongs evident in wrongful convictions impact the criminal justice system itself but they also have larger significance for Nigerian society. The literature detailing Nigerian wrongful convictions has yet to fully offer or develop such a holistic framework. This literature also does not offer sufficient detail about the how legal errors or procedural wrongs are committed. This chapter aims to help fill these gaps.

Unlawful Detention

The participants consistently noted lengthy periods of detention in police and prison custody. After their arrests, the police moved most participants from the initial police detention cells to other police detention facilities where they were kept for harsh interrogations and torture. The detention periods also served as opportunity for police officers to extort money from the participants to release them from custody. After the participants were charged to court, they still spent significant periods of time in prison custody as they waited for their trials to commence in the High Court.

The lengthy police and prison detention periods for the participants is unlawful as it is contrary to the provisions of Section 35 (4) of the 1999 Constitution which requires the police to bring an arrested or detained before a competent court of jurisdiction within a reasonable time. A reasonable time is defined as twenty-four hours where there is a court of competent jurisdiction within a radius of forty kilometers or forty-eight hours or such longer period as in the circumstances may be considered by the court to be reasonable where there is no court within forty kilometers.⁴⁶⁹

The connection between the unlawful pretrial detention of the participants and their wrongful convictions is consistent with previous research on wrongful convictions in Nigeria. For instance, Ehighalua's research details how the police subvert the fundamental rights of criminal defendants when they arrest and detain them beyond the constitutionally mandated period "in the expectation that a case will be built around such arrest that is, working towards the answer, rather than via any scientific approach towards

⁴⁶⁹ 1999 Constitution, *supra* note 2 at s 35 (5).

investigation of crime.”⁴⁷⁰ In addition, the police circumvent the accused person’s right through the practice of “holden charge” which allows magistrates with no jurisdiction in mostly capital cases to detain accused persons in prison custody while the police conduct their investigations. NC allude to this experience when he stated that “magistrate is to show, collect, adjourn, adjourn, adjourn, go and come, go and come, go and come, before I could come out.”⁴⁷¹

Also, The Cornell Law School's global study found that lengthy pretrial detention periods increases the risk of wrongful convictions as the long detention periods and the associated harsh interrogation and abuse may lead to false confessions from the detainees.⁴⁷² They also found that the risk is heightened when the detainees are held incommunicado and especially without access to counsel.⁴⁷³ This latter finding characterized the cases of BC and TU who were held in police custody without access to their relatives and a defence counsel respectively.

Holding accused persons incommunicado or depriving them of access to their counsels after their arrests is unfair as it deprives them of the chance to participate early in the criminal process.⁴⁷⁴ Procedural Justice Theory argues that individuals are deprived of their voice in proceedings when they are not provided with meaningful opportunity to participate in them.⁴⁷⁵ The unfairness of the police arrests is exemplified in TU and BC cases. TU was held in pretrial detention for 42 and a half months before he was assigned a counsel to handle his defence. In BC’s case, the police prevented visits from his

⁴⁷⁰ Ehighalua, *supra* note 7 at 1136.

⁴⁷¹ BC, *supra* note 430.

⁴⁷² Lourtau et al, *supra* note 31 at 10.

⁴⁷³ *Ibid.*

⁴⁷⁴ O'Hear, *supra* note 377 at 426.

⁴⁷⁵ Tyler, *supra* note 283 at 121.

relatives who could have assisted him in defending himself against the charges laid against him by the police.

Lengthy pretrial detention also aggravates the power imbalance between the prosecution and the defence during the criminal process. This situation is contrary to the Due Process Model which argues for maximum protection of accused persons at each stage of the criminal process and advocates for equality of persons in the criminal justice system. In cases involving lengthy pretrial detentions such as TU's case where he did not get legal representation until his trial at the high court, there is the likelihood that evidence to support his case may be lost or destroyed while the state builds its case on evidence taken from him after his arrest.

Undermining the Investigation: Falsified Statements and Wrongful Charging Processes

Participants identified two ways that police officers impaired the investigation of their cases. In the first instance, the police wrote the confessional statements for the participants which was presented in court as evidence against them. In the cases where the police wrote the statements, the statements were admitted in evidence by the courts. Secondly, the police joined the participants with persons that are unknown to them in their charge sheets.

The actions of the police officers in writing the confessional statements and the admission of the statements in evidence by the court contravene the provisions of the Evidence Act.⁴⁷⁶ The Evidence Act defines a confession as “an admission made at any

⁴⁷⁶ *Evidence Act* [Nigeria] Cap E14, LFN 2004.

time by a person charged with a crime, stating, or suggesting the inference that he committed that crime.”⁴⁷⁷It further states that “confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only.”⁴⁷⁸Since a confessional statement is the most compelling and incriminating evidence that the prosecution can bring against a criminal suspect, it is essential that the confession meets the evidentiary burden of proof. Thus, the confessional statements the police officers wrote on behalf of PP and BC could not be deemed as their statements. More significantly, in BC’s case, he assumed that the judge would have acceded to his counsel’s application to strike out his case. He recalled:

I mean, [I] was wondering, say no witnesses, no complainants, then where is a doctor's report, then he said nothing was given to him, to her. Then the judge now, he take everything so I was thinking that all her requests was not, I mean, does not meet [the burden of proof]. So, I thought you would use that to struck out the case.⁴⁷⁹

The rules of evidence governing admission of confessional evidence serve as deterrent to abuse of the defendant’s procedural rights and to prevent wrongful convictions. This position mirrors the procedural justice theory’s stance that providing a fair procedure to a criminal defendant entail giving the defendant the opportunity to participate in the proceedings. By attributing police written statements to the participants, the police deprived the participants of the chance to tell their own side of the story which is a critical component of the adversarial system of justice.

The police action in charging the participants together with unknown persons contravenes the provisions of the Criminal Procedure Act which states that individuals

⁴⁷⁷ *Evidence Act*, s. 27 (1).

⁴⁷⁸ *Evidence Act*, s. 27 (2).

⁴⁷⁹ Tajudeen Ojo Ibraheem, “The Relevance of Confessions in Criminal Proceedings” (2013) 3: 21Intl J Humanities and Soc Science 291.

can only be charged jointly when they are accused of the same offence or different offences committed in the same transaction.⁴⁸⁰The police brought initial charges against these participants in the Magistrate courts by way of charge sheets which would specify, among other particulars, the time and place where the offence is alleged to have been committed.⁴⁸¹Since the participants indicate that they do not know the persons that they were charged with, charging them together with unknown persons constitutes a procedural error by the police.

The unfairness of the charging procedure can be assessed by the trustworthiness of the actions of the police officers in their interactions with the participants. The key question is whether “the [police] was sincerely trying to do what was right and was motivated to do what was good for the people involved”⁴⁸²As O’Hear maintains, the standard to judge whether the police officers were trustworthy in their dealings with the participants is to “demonstrate that they have acknowledged the information brought forth by the parties and considered them in their decision-making process.”⁴⁸³

Torture as a Tool for Extracting Evidence

The police used threats and torture on the participants during the interrogation process. The participants described the horrific physical abuse they endured during the interrogations including broken bones, detached teeth, and gunshot wounds. Some participants also revealed that they still bear the visible signs of the physical abuse they

⁴⁸⁰ *CPA, supra* note 5 s. 155.

⁴⁸¹ *CPA, supra* note 5 s. 78 (b).

⁴⁸² Hollander-Blumoff, *supra* note 385 at 5.

⁴⁸³ O’Hear, *supra* note 377 at 429.

experienced. Ultimately, the pain from the torture by the police officers resulted in false confessions from some participants.

The treatment of the participants by police officers contravenes the provisions of section 34 (a) of the 1999 Constitution which enshrines the right to respect for the dignity of the human person and prohibits torture or inhuman or degrading treatment.⁴⁸⁴The African Charter contains a similar provision.⁴⁸⁵In addition, the Evidence Act provides that

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature.⁴⁸⁶

The implication of the above legal provisions is that persons in authority are prohibited from obtaining evidence from criminal defendants through physical or mental abuse, and evidence procured in such manner should not be admitted in court. Thus, in cases where the criminal defendant alleges that their confessional statements was procured by such means, it is the responsibility of the judge to investigate the allegations and ensure that the statements are not accepted as evidence in the proceedings if they were obtained through torture.

The participants' experiences find support in research that show that the use of torture by police officers often lead to false confessions by criminal defendants. Olalere's

⁴⁸⁴ *1999 Constitution, supra* note 2 at s 34.

⁴⁸⁵ *African Charter, supra* note 3 at art 5.

⁴⁸⁶ *Evidence Act, s. 28.*

research revealed that criminal defendants were wrongfully convicted when the court admitted their confessional statements obtained through police torture in evidence during their criminal proceedings.⁴⁸⁷ The author also characterized the actions of the police officers who procured the evidence and testified against the defendants in court as police misconduct. The reasons for the participants' confessions under torture are also supported in literature. Aborishade notes that criminal defendants often confess to avoid further pain. In some other cases, the defendants falsely confess when they see no way out of the situation.⁴⁸⁸

Beyond the constitutional implications of the treatment of the participants by the police, their treatment can be deemed unfair when appraised through the procedural justice lens. Tyler affirms the importance of authorities treating people with courtesy and dignity as well as acknowledging their legal rights in their interactions with those individuals. He maintains that people care that their dignity as individuals and members of society are recognized and acknowledged in their dealings with authorities. Employing the severest form of physical abuse to obtain a confession from the participants showed flagrant disrespect for their individual identities and gross disregard for their fundamental rights as Nigerian citizens.

Authorities sometimes view torture as an indispensable mechanism for interrogations, although research has shown its deleterious impact on individuals and ineffectiveness in gathering reliable information during interrogations. In Nigeria, it is common practice for the police to employ torture on individuals during arrests and

⁴⁸⁷ Olalere, *supra* note 28 at 126.

⁴⁸⁸ Gould & Leo, *supra* note 173 at 846-847.

detention in police custody.⁴⁸⁹ This dependence on torture is due in part to the dearth of investigatory resources available to the police.⁴⁹⁰ Though it can be argued that Nigerian police officers work under difficult and hostile conditions, these circumstances do not justify inflicting the severest form of torture on criminal defendants to procure confessional statements. Considering the unequal power dynamics between state actors and the individuals during the criminal process, it is essential that these actors uphold the constitutional and procedural protections for these individuals.

Corruption: Freedom for Sale

Participants discussed requests for bribes from police officers while in police custody. Their narratives reveal that the requests were made after they were tortured during police interrogations. According to the participants, the police officers offered to release them from custody if their families met their monetary demands. When they failed to make the payments, the participants remained in police detention and were eventually charged for the crimes.

The participants' experiences of police corruption in police custody reflect the police misconduct noted in Lourtau et al's study which found that criminal suspects who could not make bribe payments to the police were tortured, denied bail or detained longer in police custody.⁴⁹¹ Also, the participants accounts which highlight the connection between their inability to pay the bribes and their continued detention and eventual trial is

⁴⁸⁹ Richard A Aborisade, "Unsolved Murders and the Investigative Failures of the Nigerian Police Force: Security and Sociopolitical Implications" (2018) 27:2 African Security Rev 177.

⁴⁹⁰ *Ibid* at 182.

⁴⁹¹ Lourtau et al, *supra* note 31 at 46.

consistent with research which posits that police extortion disproportionately affects the poor who are not able to pay their way out of police custody.⁴⁹²

As noted earlier, the Nigerian police is charged with securing public safety and public order in the country. They also play a significant role in the proper functioning of the criminal justice system. They make decisions about arrests, charges, and securing evidence for prosecution. Consequently, their action during the criminal process clearly impacts the defendant's path to justice. In cases where police engage in conduct that are contrary to the purpose for which they were established or violates their official duties, this has serious consequences for an effective criminal justice administration and national security.

Such an ineffective system of justice would be characterized as a system where justice is available to the highest bidder. The Due Process model's advocacy for equality in the criminal justice system envisages a criminal process where every person enjoys equal treatment regardless of their financial status. Police misconduct arising from corrupt practices threatens this goal and could lead to wrongful convictions of innocent poor persons in Nigeria.

Feeling the Impact

The narratives of the participants covered the impact of their experiences in the criminal justice system. They described how they experienced the processes and their

⁴⁹² Human Rights Watch, "Everyone's in on the Game: Corruption and Human Rights Abuse by the Nigerian Police Force" (last visited 30 July 2021) online: *refworld* <www.refworld.org/docid/4c6b9ade2.html>

treatment from state actors during the criminal process. They reported financial losses and recounted the personal and social impact of these experiences on them.

The multiple effects the participants reported align with existing research on the effects of wrongful convictions on individuals who experience the problem. For instance, Ugba's research reports that wrongfully convicted persons miss out on memorable events such as births and deaths during their incarceration.⁴⁹³ Denov and Campbell's study findings about the loss of hope, identity, and future opportunities are consistent with the participants' narratives about losses related to hope and time.⁴⁹⁴ As one participant recounted, the losses he experienced ultimately resulted in a suicide attempt.⁴⁹⁵ Further, the narratives of exonerees about the traumatic and dehumanizing effects of their treatment by police investigators in Jenkin's study reflect the lack of respect and dignity the participants experienced during their time in police custody.⁴⁹⁶

The participants' discussions about the impact of their experiences in the criminal justice system emphasize the unfairness of their treatment during the criminal process. According to Casper et al, individuals assess the fairness of their treatment by authorities by how respectful the authorities treated them.⁴⁹⁷ In addition to respectful treatment, the element of respect in procedural justice also considers whether the authorities acknowledged the rights and identities of the individuals during their interactions. The participants alluded to various aspects of the dimension of respect in describing their treatment by authorities:

⁴⁹³ Ugba, *supra* note 14 at 2.

⁴⁹⁴ Denov & Campbell, *supra* note 25 at 234.

⁴⁹⁵ NC, *supra* note 438.

⁴⁹⁶ Jenkins, *supra* note 245 at 247.

⁴⁹⁷ Casper et al, *supra* note 384 at 498.

they suffered me, they [were] wrong, something that I did not know about it, and then how I lost my family. my poor family. So, it's a part of that thing that I know that it's unfair. That they wasted my time, they wasted my time for what I did not know anything about it. The crime that I did not commit, I did not commit it, even some people who commit a crime they release them which I can't mention their names.⁴⁹⁸

Because the way they maltreat me, I was not feeling okay. Yes, that is why I...because I did not committed the offence, I did not committed the offence so that is why I feel bitterly in my mind, in my heart. I feel bitterly in my mind.⁴⁹⁹

They will beat you every day. If they just, if police come out like this in the night around 1:00 o'clock, they would say, hey listen to your name now, listen to your name. If they call anybody, maybe around 12 or 1 or 3, around 4, that person will be killed. You will pray that they do not call your name, let them not remember your name. That's what remains, that is the only prayer one would be praying there inside the cell.⁵⁰⁰

Losing Trust, Gaining Faith

The participants stories show an unfavorable perception of officials in the justice system and in the criminal justice system that is rooted in the unfair processes and treatment they experienced during the criminal process. Though all but one of the participants had no experience with the criminal justice system prior to their wrongful convictions, all participants indicated that they trusted the authorities and the justice system before their wrongful convictions. Their trust in the system was revealed in the confidence they expressed about their release from police custody after their arrests and acquittal from the charges laid against them. Ultimately, their negative experiences in the criminal justice system led to a positive view of God's position as a trusted figure in the justice system.

The participants' unfavourable view of the officials and the system is grounded in their assessment of the neutrality and trustworthiness of the officials they interacted with

⁴⁹⁸ BN, *supra* note 428.

⁴⁹⁹ BC, *supra* note 430.

⁵⁰⁰ TU, *supra* note 431.

during the criminal process. Neutrality involves transparency, objectivity, and impartiality of the authorities while trustworthiness is associated with the motives of authority figures and their concern for the welfare of the individuals they interact with.⁵⁰¹ This relationship between participants' assessment and their perception of authorities finds support in Tyler's study of defendants in traffic and misdemeanor courts which found the existence of a strong connection between the defendants' assessment of procedural justice and their attitudes towards the judge and the courts.⁵⁰² Another study with Chicago residents also show that procedural fairness had direct effects on their evaluation of the authorities involved.

Reflecting on their interactions with the judges, participants questioned the motives of the judges and believed that the judges were not open about their decisions and the processes involved in reaching their decisions. For instance, TU believed that the judge convicted him because "she wants to be, because she wants to be CJ [Chief Justice] of [the] state... to sentence, send people to death."⁵⁰³ In BN's view:

Some of the judges they don't follow the right way. They see the right and they cover it. For example, my judge at the high court, he saw the right and he covered it. He knows that... he knows that I did not commit the crime, but he convicted me. Because even the appeal court, what's the name? the Supreme Court was saying that...which Mr. J can stand in witness, the case is not supposed to be convicted. That the high court and the appeal court they didn't follow the right, they didn't even follow the right statement to judge the case.⁵⁰⁴

Participants also believed the police officers were partial and untrustworthy during their interactions with them. They indicated that police actions during their arrests showed they were unconcerned about their welfare. In the participants' view, the police

⁵⁰¹ Tyler, *supra* note 283 at 122; Hollander-Blumoff & Tyler, *supra* note 385 at 5.

⁵⁰² *Ibid* at 63.

⁵⁰³ TU, *supra* note 431.

⁵⁰⁴ BN, *supra* note 428.

treated them unfairly because of their poor backgrounds. They recalled instances of other individuals who were released on account of their backgrounds or connections in the society. Their stories reflect that “if somebody has people, if he does something he will be released...somebody with money, it’s on the phone that they will [mention their] child.”⁵⁰⁵ “If the poor man is right, they will give him wrong. but if the big man is wrong, they will give him right, because of money.”⁵⁰⁶

The unfavorable assessment of the authorities by participants has serious implications for the criminal justice system. The participants stories confirm how their assessment of the authorities and the criminal justice system affect the perception of legitimacy of the authorities and the system. According to Tyler, people’s assessment of procedural justice has a major effect on their perception of legitimacy of institutions. Boateng and Darko’s research findings on citizen’s assessment of procedural justice and legitimacy of local police confirm that “significant effects of procedural fairness and police-initiated contacts on citizens’ propensity to consider the police as legitimate.”⁵⁰⁷ Thus, individuals who perceive that they have been treated in a procedurally fair manner by legal institutions or officials will likely perceive them as legitimate.⁵⁰⁸ A further implication of this connection is that the perception that institutions and officials are legitimate enhances the sense that they should be obeyed.⁵⁰⁹

Furthermore, participants’ negative assessment of their experiences in the criminal justice system had an impact on their perspective of accountability for

⁵⁰⁵ NC, *supra* note 438.

⁵⁰⁶ BC, *supra* note 430.

⁵⁰⁷ Boateng, *supra* note 374 at 9.

⁵⁰⁸ Akinlabi, *supra* note 375 at 31; Tyler & Lind, *supra* note 43 at 66-68.

⁵⁰⁹ Tom R. Tyler, “Procedural Justice, Legitimacy, and the Effective Rule of Law” (2003), 30 *Crime Justice* 283 at 286.

authorities. Participants believed that the authorities will not be held accountable for their misconduct during the criminal process. The reasons they proffer for this outcome are the superior power of the authorities and the protections they enjoy for the government and their bosses.

The need for accountability for misconduct in the criminal justice system is one of the values espoused by the Due Process Model. The model emphasizes ‘quality control’ at critical parts of the criminal process aimed at protecting defendants’ rights and addressing errors of criminal justice actors.⁵¹⁰The trial phase serves as the forum to address violations of defendants’ rights carried out by police officers during the arrest and pretrial periods.⁵¹¹Holding the police officers accountable at this stage is critical since the state rarely prosecutes officers for cases of misconduct against criminal defendants.⁵¹² In like manner, the appellate phase provides the opportunity to deal with violations of defendant’s rights that occurred during the trial phase.⁵¹³ While there is a need to hold police officers and judicial officials accountable for their actions during the criminal process, the focus of such accountability should be on intentional misconduct and not conduct that arises when the officers are acting in good faith.

Faith in God

In contrast to their unfavorable perspective of authorities in the criminal justice system, participants expressed an overwhelming positive view of God’s role in the justice system. They believed that God protected them during their incarceration and aided their release from prison custody. On the issue of unequal treatment they experienced,

⁵¹⁰ Parker, *supra* note 344 at 15.

⁵¹¹ Huff et al., *supra* note 39 at 96.

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

participants trust that God can equalize the uneven power dynamics in the criminal process and address the violations of their rights by the authorities.

Participants' perspectives of God's role in the criminal justice system raised in this study is not explored in the current literature. There were no questions in the interview protocol about their religious beliefs or the role of the divine in criminal justice. Participants expressed these views as they answered questions in the interview protocol or follow up questions. The relationship between criminal defendants' religious beliefs and their perspectives of judicial authorities and the criminal justice system is worthy of exploration in future research.

Conclusion

This chapter offered an analysis of the themes that emerged from semi-structured interviews with five wrongfully convicted Nigerian men as presented in Chapter Seven. The analysis presented reinforces the importance of understanding wrongful convictions in Nigeria through a holistic framework that moves beyond simply identifying contributory factors, as is usually the case in the existing literature. As explained in Chapter Four of this study the Due Process Model and Procedural Justice Theory offer a framework for linking the experience of participants in the criminal justice system to the larger social and political contexts in which the system operates. This chapter has offered insights into how this model and theory might help us better understand the contributory factors of wrongful conviction and how those who are wrongfully convicted understand their experiences. Time and space have limited the analysis, but I hope to have at least demonstrated the need for a new approach to understanding wrongful convictions, an approach that puts these wrongs in their larger socio-legal contexts. The next and final

chapter of this study offers some suggestions for reform and details where further research might be pursued.

CHAPTER 8: CONCLUSION & RECOMMENDATIONS

This study explored the barriers to justice that wrongfully convicted individuals experienced in the Nigerian criminal justice system and how they experienced the barriers. The title of the study expressed my desire to understand the gap between the law in the books and the law in action with respect to wrongfully convicted persons in the Nigerian context. Through the analysis of the themes, this study clearly shows a huge gap between the legal and procedural rights enshrined in the Nigerian constitution and other laws and the application of these laws in the criminal justice system. The multiple barriers to justice that the study participants experienced in the criminal process align with the literature and demonstrates that the Nigerian justice system often fails to fulfill its commitment to justice for criminal defendants, leading to wrongful convictions. Interestingly, this failure seems to be an abiding characteristic of the Nigerian justice system. Some of the wrongful convictions in this study occurred several years prior to this study, yet the failure of the justice system remains evident in more recent literature.

The unfairness of the processes and the treatment that the authorities extended to the study participants revealed that that they had a complete disregard for the individual and procedural rights of the participants and due process of law. For instance, the severity of some of the torture tactics they employed in their interrogations show how they failed in their duty to protect the rights of the individuals in their custody. Also, their corrupt practices in the criminal process not only contributed to the wrongful convictions of the participants, but it undermined national security as potentially guilty individuals could have been set free by paying huge bribes to the police. The complete disregard for the rights of the participants is reflected more broadly in the criminal justice system through

the lack of accountability for authorities who engage in violations of criminal defendants' rights. This conclusion aligns with current literature and reports which indicate ongoing violations by these authorities. Though there had been a few cases where officials have been disciplined, most of the violators have faced no consequences for their actions.⁵¹⁴A related conclusion is the enduring nature of some of the violations that the wrongfully convicted persons suffered. The participants experienced the criminal process at different periods, yet each participant experienced almost the same violations as others during their experiences. These conclusions imply that the violations of criminal defendants' rights would likely continue if the authorities perceived that they would escape the consequences of these violations. Ultimately, this situation could result in more cases of wrongful convictions in the country.

Furthermore, the narratives of the participants demonstrate the ongoing nature of the impact of their experiences in the criminal justice system. Several years after their exonerations, the participants continue to suffer from the consequences of their experiences. The effects of these violations reveal the difficulty of recovery from a wrongful conviction. Though they reported that some of their physical scars remain, the most enduring are the psychological scars that seem to symbolize their personal and social identities. Through the participants' personal narratives, we can understand how they perceive themselves as individuals and Nigerian citizens.

Finally, the stories of the participants show that wrongful conviction is a highly transformative experience. Though this conclusion may seem simple on its face, the

⁵¹⁴ Sahara Reporters, "Justice Yunusa, Two Other Judges Sacked for Judicial Malpractice" *Sahara Reporters* (16 July 2016), online: < saharareporters.com/2016/07/16/justice-yunusa-two-other-judges-sacked-judicial-malpractice>

narratives of the participants show fundamental changes in their viewpoints about their relationships with authorities. For instance, many participants who trusted the authorities before their experiences had no faith in the same authorities several years after their experiences. This, of course, has implications about their inclination to engage productively with the authorities or obey them. In one's participant's case, it was only his religious beliefs that mediated a planned destructive conduct against the authorities several years after his wrongful conviction.

A key question raised by this study is how to close the gap to ensure that the Nigerian criminal justice system fulfills its commitment to justice to criminal defendants and prevents wrongful convictions. A follow up question relates to ways to address the impact of wrongful conviction on the affected individuals. In the sections that follow, I propose recommendations to close the gap and address the effects of the experiences. I also provide suggestions for further research.

Recommendations

The violation of the rights of criminal defendants by officials in the criminal justice system constitutes a serious breach of the officials' ethical, professional, and legal duties. While some of the actions of the officials may not rise to the level of misconduct, officials must respect and protect the rights of criminal defendants during the criminal process.

Education and Training

Police and judicial organizations should provide specialized and continuing education and training on topics related to wrongful convictions for the officials. The

education and training should cover both substantive and procedural aspects of the law including the fundamental principles of criminal law and the role of different actors in wrongful convictions in the criminal justice system. Training on wrongful convictions should also be incorporated in the curriculum of the Police Training Academy and National Judicial Institute. Given that wrongful convictions involve various actors in the criminal justice system, the organizations can organize joint conferences that engage all the officers working together to further understanding of wrongful convictions and find holistic solutions to the problem.

Since wrongful convictions in Nigeria reveal that the state has failed to protect the fundamental dignity of individuals, an education scheme that focuses on the roles and responsibilities of state officials, especially the police and judges, in protecting human dignity should be fashioned. A model for such education was introduced in Palestine.⁵¹⁵ This model focuses on an examination of the professional identity of the judiciary rather than simply training about legal principles. The education model also creates space for those who have been wronged by the legal system to speak directly to state officials.

Enhanced Resources

The federal governments should also provide adequate resources for police officers to execute their assignments. As indicated earlier, the police claim to use torture as the main investigative tool because of the dearth of investigative resources.⁵¹⁶ Also, it is shocking that Nigeria with a population of about two hundred million people has only three forensic laboratories for crime investigations. Access to adequate resources for

⁵¹⁵ Reem Bahdi & Mudar Kassis, "Decolonisation, Dignity and Development Aid: A Judicial Education Experience in Palestine" (2016) 37:11 Third World Q 2010.

⁵¹⁶ Aborisade, *supra* note 489 at 182.

officers will enhance their capacity to discharge their duties and could reduce their dependence on unlawful means to perform their duties in the criminal process.

Prosecutions and Accountability

Besides, the officials who engage in misconduct should be held accountable for their actions. Police officers and judicial officers should be charged for acts of criminal misconduct committed during the criminal process. For instance, the Anti-Torture Act criminalizes torture in Nigeria and prescribes punishment for individuals who commit such acts.⁵¹⁷ The Anti-Torture Act also allows for personal civil claims in damages and compensation for victims of torture.⁵¹⁸ Victims can seek assistance of the Human Rights Commission or non-governmental organizations to file complaints against perpetrators.⁵¹⁹ It is hoped that the Attorney General will employ his powers under the Anti-Torture Act to ensure effective implementation of its provisions to hold accountable those who engage in torture.⁵²⁰ Holding officials who engage in misconduct accountable, whether during public trials or in internal investigations, will hopefully deter others from involvement in such conduct.

Compensation & Apologies

Further, there is need to address the harmful effects of the experiences of the participants in the criminal justice system. The 1999 Constitution provides for compensation and public apology from an appropriate state official to any person who has been unlawfully arrested or detained.⁵²¹ A wrongfully convicted individual can also

⁵¹⁷ *Anti-Torture Act* [Nigeria] 2017, s. 9 (1) (2).

⁵¹⁸ *Ibid*, s. 9 (3).

⁵¹⁹ *Ibid*, s. 5.

⁵²⁰ *Ibid*, s. 10, s. 11, s. 12.

⁵²¹ *1999 Constitution*, *supra* note 2 at s 35 (6).

bring an action for false imprisonment in civil court. Nonetheless, it can be quite challenging for wrongfully convicted persons to access these remedies because of financial and logistical challenges. The government can help in this regard by providing legal services through legal aid organizations to assist them in filing their claims and accessing other benefits. Beyond the financial compensation, the government can help them secure psychological and counselling services to deal with the psychological and emotional harms from their experiences. In addition, they may need assistance with workforce skills, housing, and education after their release from incarceration. The government can provide these services through local welfare offices that can be accessed easily by the wrongfully convicted persons.

Suggestions for Future Research

Data

I collected the study data from interviews with wrongfully convicted persons in Nigeria. Thus, the information obtained about the research problem is limited to the stories of their experiences. More research needs to be done from the perspectives of the various actors that interact with criminal defendants in the criminal process. Such research will enable a comprehensive understanding of wrongful convictions in the Nigerian criminal justice system. In addition, additional research projects could furnish a database of exonerees in Nigeria which will house samples for future studies. Moreover, the study sample comprised of all male exonerees who had been charged with capital offences. This sample size of five male participants may not be representative of the general population of wrongfully convicted persons in Nigeria. The general population of wrongfully convicted persons in Nigeria will be diverse with regard to gender, class of

offences, and types of sentences. Further research should incorporate female exonerees and individuals charged with non-capital offences to understand their unique experiences of wrongful convictions in the Nigerian justice system.

Theory & Methodology

Using Procedural Justice theory and the Due Process Model in this study enabled me to expand legal discourse on the role of actors in the Nigerian criminal justice system and to analyze the broader contexts that underlie wrongful convictions in Nigeria. The narrative qualitative approach adopted for the study also provided a systematic and deeper analysis of contributory factors of wrongful convictions in the country. While the research method gave voice to the wrongfully convicted persons to tell their stories, it only provided partial insight into the roles of some actors in the criminal justice system. More empirical studies using other data collection methods such as observations, surveys, and documentary evidence, are needed to provide a more holistic understanding of the problem of wrongful convictions in Nigeria.

Access to Justice and Wrongful Convictions

In this study, I sketched out a framework for thinking about the relationship between access to justice and wrongful convictions. I adopted Rodrick MacDonald's access to justice schema which sets out three elements of access to justice: substantive, procedural and symbolic. Adopting these elements helped stress the gap between laws on the books and laws in action and the need to understand wrongful convictions in their larger social context. But, I was limited by time and space in my assessment of access to justice theorizing and its application to wrongful convictions in Nigeria and beyond. More research and analysis is needed to explore the facets of access to justice and how

access to justice scholarship might further our understanding of the contributory causes of wrongful convictions and its impact on the wrongfully convicted.

Final Reflections

This study explored the issue of wrongful conviction through the experiences of wrongfully convicted persons in the Nigerian criminal justice system. The study elevated the voices of the wrongfully convicted and privileged their experiences. The findings showed multiple barriers to justice that these individual experienced during the criminal process. They also revealed the losses they suffered from these experiences.

Scholarship on wrongful convictions in Nigeria is scarce. Hopefully, the study will be the beginning of further examination of this important subject in the country. While it may not be possible to prevent wrongful convictions, it is hoped that a deeper understanding of its contributory factors alongside diligent implementation of these recommendations by relevant authorities will reduce its occurrence in the Nigerian justice system.

The significance of studying and understanding wrongful convictions in the Nigerian criminal justice system cannot be overemphasized. Wrongful conviction threatens the integrity of the criminal justice system, undermines public trust, and raises doubt about the legitimacy of the justice system and the officials that work within it. Besides, wrongful conviction has devastating consequences on the wrongfully convicted and incarcerated. The participants in this study recounted horrific stories of torture and utter disregard for their fundamental rights by officials in the criminal justice system. Their experiences resulted in a complete loss of trust in the justice system and the

government officials that work in the system. The Nigerian criminal justice system can only fulfill its promise of access to justice when it provides fair processes, equal treatment, and just outcomes for all defendants regardless of economic status or social standing.

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APPENDIX I: INTERVIEW PROTOCOL

Thank you for agreeing to talk with me today. I am looking forward to the interview. As you know from the participation letter, I am researching access to justice in Nigerian wrongful conviction cases. I have found that individuals in Nigeria face many obstacles when they go through the criminal justice system. These obstacles deprive them of their rights under the law and prevent them from obtaining justice for their cases.

I will be interviewing wrongfully convicted and exonerated people about their experiences in the Nigerian criminal justice system. I would like to find out about your personal experiences with your arrest and trial. I would also like to understand your views regarding your treatment by the police and judge/magistrate during your encounters with them in the justice system.

Interview Questions:

1. Please tell me about your arrest by the police.
2. What happened to you in police/prison custody?
3. How do you feel about your treatment by the police officer(s) when they arrested and detained you?
4. How long did you spend in detention before you were charged you to court?
5. Please tell me about your participation in the bail process during your detention. when they charged you to court?
6. How long did your trial in the court last?

7. Please tell me how you defended your case in court?
8. How do you feel about the way you were treated by the court during your trial?
9. How long were you imprisoned after your wrongful conviction?
10. How were you declared innocent of the charges against you?
10. What does fairness mean to you?
11. With your understanding of fairness, please tell me in what ways you consider arrest or detention to be fair or unfair?
12. With your understanding of fairness, please tell me in what ways you consider your treatment by the police fair or unfair?
13. How do you see the police after your wrongful conviction and imprisonment?
14. What is your view of judges/magistrates now?
15. How do you now see the court as an institution?
16. How did you think your encounter with the police was going to end?
17. How did you think your trial was going to end?
18. What do you think will happen to the police officer(s) who arrested and detained you? The judge/magistrate who sent you to prison?
19. How do you feel about the system of justice in Nigeria?
20. Please tell me your highest level of education.

21. Do you have anything else to add about your experience of wrongful conviction and your views about the officials in the criminal justice system?

Closing:

Thank you for your time. I appreciate your decision to share your experiences and thoughts with me today.

APPENDIX II: SITE APPROVAL LETTER



Centre for Justice, Mercy and Reconciliation

Box 22671, U.I., Ibadan, Oyo State, Nigeria
Mobile Phone: 08025782527, 08030488093, 08050945037 Tel: 02-7513187
E-mail: info@cjmr-ng.com; Web site: www.cjmr-ng.com

RC 3287

CJMR Secretariat, 2nd floor beside Cowbell, Adabale Shopping Complex,
Opp Butol Petrol Station, Iyana Bodija,
Ojoo Express way, Akinyele LG
Ibadan, Oyo State, Nigeria. Or P.O Box 22671, U.I Ibadan, Oyo State, Nigeria

Motto: Never blind the TRUTH no matter what the consequences

September 14, 2020

University of Windsor
401 Sunset Avenue
Windsor, ON N9B 3P4
(Canada)

Subject: Site Approval Letter

To whom it may concern:

This letter acknowledges that I have received and reviewed a request by *Chinyere Obinna* to conduct a research project entitled "*Access Denied: An Exploration of Access to Justice in Nigerian Wrongful Conviction Cases*" and I approve of this research to be conducted at our facility.

When the researcher receives approval for her research project from the University of Windsor's Research Ethics Board, I agree to provide access for the approved research project.

Sincerely,

p **Oeboboye O/ujobi**
Executive Director for CJMR
+2348025782527/ +2348030488093
hezekiaholujobi@yahoo.com

TRUSTEES

Director: Pastor Hezekiah Olujobi; **Chairman:** Brig-Gen. Rev Akin Baiyeroju; **Secretary:** Elder S.A. Adeosun
Members: Rev. Olukunle Samson, Pastor Samuel Ajayi, Mrs. V.M. Olujobi, **Treasurer:** Deaconess Olabisi Olaiifa

Legal Adviser: Oladipo Olasope Esq., Barrister Babatunde Ojehomoh

APPENDIX III: LETTER OF PARTICIPATION



Invitation to Participate in a Research Study titled *Access Denied: An Exploration of Access to Justice in Nigerian Wrongful Conviction Cases*

Dear Sir/Madam,

My name is Chinyere Obinna. I am a graduate student in the Faculty of Law at the University of Windsor. I am currently completing my thesis to satisfy the requirement for an LLM degree. I want to invite you to take part in my study.

The purpose of the study is to examine the obstacles to justice in wrongful conviction cases in Nigeria and how these obstacles can be addressed to prevent wrongful convictions in the Nigerian criminal justice system. The study will contribute to a better understanding of wrongful convictions in Nigeria and how to address the obstacles that prevent wrongfully convicted persons from achieving justice. The study will also give you the chance to speak about your wrongful conviction and imprisonment and your treatment by the police and the judge/magistrate.

I am using this medium to solicit for your assistance in participating in this study. To participate in this study, participants must meet the following requirements: a) be 18 years old or older, b) convicted of a criminal offence or offences, c) have convicted in Southwest Nigeria, d) sentenced to a term of imprisonment or death, and e) exonerated within the last ten years. Participants who meet the criteria and decide to participate in the research will be asked to give verbal consent to show that they have agreed to participate in the study.

The participants will be interviewed by the researcher about their arrest, trial, and imprisonment in Nigeria. They will also be asked about their views concerning their treatment by the police and the judge/magistrate. The interviews will last between 60-90 minutes and will be conducted at a location and time chosen by the participants. The researcher encourages individuals who will choose to participate in the study to find a safe, confidential, and private place to participate in the interviews.

The Centre for Justice, Mercy and Reconciliation does not endorse or encourage participation in this study.

If you decide to participate in this study, please contact me at your earliest convenience, preferably within one week of the receipt of this letter. You can reach me through the telephone number or e-mail addresses provided below for further discussions about the study.

APPENDIX IV: RECRUITMENT QUESTIONNAIRE

Recruitment Questionnaire

Name:.....

Phone number:.....

Email address:.....

City and State of Residence:.....

Highest Level of Education:.....

Age bracket:

- a) 18-30 b) 31-40 c) 41 and above

Were you wrongfully convicted of a criminal offence or offences in Southwest Nigeria?

Were you sentenced to a term of imprisonment or death following your conviction?

Were you exonerated in the past ten years?

APPENDIX V: CONSENT FORM



CONSENT TO PARTICIPATE IN RESEARCH

Title of Study: *Access Denied: An Exploration of Access to Justice in Nigerian Wrongful Conviction Cases*

You are asked to participate in a research study conducted by **Chinyere Obinna**, from the **Faculty of Law** at the University of Windsor. The results of the study will contribute to the LLM thesis of the student.

If you have any questions or concerns about the research, please feel free to contact **Chinyere Obinna** at obinnac@uwindsor.ca or her supervisor **Professor Reem Bahdi** at rbahdi@uwindsor.ca or 519-253-3000 (Ext. 2941).

PURPOSE OF THE STUDY

The study will examine the obstacles to justice in wrongful conviction cases in Nigeria and how these obstacles can be addressed to prevent wrongful convictions in the criminal justice system in Nigeria.

PROCEDURES

If you volunteer to participate in this study, you will be asked to:

Take part in a single phone interview that will take place in a place and time that is convenient for you. The interview will last between 60-90 minutes and will be conducted and recorded by the researcher. During the interview, you will be asked questions about your arrest and trial in Nigeria. You will also be asked about your views concerning your treatment by the police and the magistrate/judge.

POTENTIAL RISKS AND DISCOMFORTS

This study may involve some potential risks to you:

You may find feel uncomfortable or embarrassed discussing your wrongful conviction and imprisonment. You may also feel upset when you will talk about how you were treated by the police and magistrate/judge. Also, you may be anxious about being interviewed for this study.. To help you deal with these potential risks, you will not be forced to answer any question about your experiences that makes you feel uncomfortable. Also, if you experience serious negative feelings during the interview, I will stop the interview and ask you to seek support from your family, friend or your religious leaders. If acceptable to you, I can also refer you to a professional who may be able to help you with these feelings. .

Also, you may believe that you may lose your privacy during the interview. To protect your privacy, you will be given you a fictitious name for the interview and you will not be asked your real name during the interview.

In addition, you may feel that your participation in the study may lead you to forfeit any financial help you may be receiving because of your wrongful conviction. To help you deal with these potential risk, I will make sure that your privacy will be protected during the research process and information that you provide during the research will be kept confidential.

Furthermore, you may believe that your information may be revealed to others during the research process. To protect your information during the process, I will keep your information private and confidential. I will secure all the documents and recordings with information that identifies you in my home office.

POTENTIAL BENEFITS TO PARTICIPANTS AND/OR TO SOCIETY

This study will contribute to a better understanding of wrongful convictions in Nigeria and how to address the obstacles that prevent wrongfully convicted persons from achieving justice.

APPENDIX VI: CONSENT FOR AUDIO TAPING



CONSENT FOR AUDIO TAPING

Research Participant Name:

Title of the Project: *Access Denied: An Exploration of Access to Justice in Nigerian Wrongful Conviction Cases*

I consent to the audio recording of interview.

I understand this is a voluntary procedure and that I am free to withdraw at any time by requesting that the recording be stopped. I also understand that my name or will not be revealed to anyone and that recordings will be kept confidential. The audio recording in the computer will be protected by a password and the recording in the digital recorder will be stored in a locked safe.

The destruction of the recordings will be completed after transcription and verification.

I understand that confidentiality will be respected and that the recordings will be for professional use only.

This research has been cleared by the University of Windsor Research Ethics Board.

(Research Participant)

(Date)

VITA AUCTORIS

NAME: Chinyere Obinna

PLACE OF BIRTH: Uli, Anambra State, Nigeria

YEAR OF BIRTH: 1970

EDUCATION: University of Nigeria Secondary School, Nsukka,
Enugu State, 1988
University of Nigeria, LL.B., Enugu, Enugu
State, 1992
Montclair State University, M.A., Montclair,
New Jersey, 2015
Nova Southeastern University, M.S., Fort-
Lauderdale, Florida, 2018

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