

**Canada Has a Guilty Plea Wrongful Conviction Problem: The First Report from The Canadian Registry of Wrongful Convictions**



**[www.wrongfulconvictions.ca](http://www.wrongfulconvictions.ca)**

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## Canada Has a Guilty Plea Wrongful Conviction Problem

### Executive Summary

The Canadian Registry of Wrongful Convictions, like similar registries in the United States and the United Kingdom, was designed to facilitate research on patterns and trends in wrongful convictions.

Launched on 21 February 2023, the Registry records wrongful convictions based on cases where new evidence is admitted that results either in an acquittal by a court or a decision by prosecutors not to prosecute. In this way, the Registry provides a record of miscarriages of justice recognized by courts and prosecutors without requiring proof or making judgments about “factual innocence”.

In an ideal world, such data would be collected by criminal justice actors or Statistics Canada. The Canadian Registry of Wrongful Convictions was founded by teachers and students in a course on wrongful convictions at the University of Toronto’s Faculty of Law. As of its launch in February 2023, it contains 83 wrongful convictions. This does not mean that the Canadian criminal justice system has wrongfully convicted 83 people; it only means that 83 people have received remedies from the criminal justice system. How many are still waiting for remedies is unknown.

This report will deal with one of the striking patterns found in the research that produced the Canadian Registry of Wrongful Convictions. Namely, 15 instances, or 18% of the wrongful convictions in the Registry, were the result of guilty pleas by the accused. Contrary to popular misconception, this means that even the majority of cases that do not go to trial and are settled by a guilty plea (and often through plea bargaining) are at risk of wrongful convictions.

Our figure of 18% of wrongful convictions is identical to the 18% of wrongful convictions on a UK registry that arise from guilty pleas<sup>1</sup> and lower than the just under 27% of wrongful convictions on a US<sup>2</sup> registry.

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<sup>1</sup> University of Essex Evidence-Based Justice Lab, “Miscarriage of Justice Registry,” at: <https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/the-cases/overview-graph/> (accessed 8 Feb 2023) [Essex Registry].

<sup>2</sup> University of California Irvine Newkirk Center for Science & Society, University of Michigan Law School, and Michigan State University College of Law, “National Registry of Exonerations,” at: <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P> (accessed 8 Feb 2023).

## Other key findings:

The majority of Canadian guilty plea wrongful convictions involved “imagined crimes”<sup>3</sup> that never occurred. All of these crimes will be assessed in the Registry’s second report.

Forty percent of the guilty plea wrongful convictions were entered by women. Most of these involved the flawed expert testimony of Charles Smith about the cause of baby deaths.

Almost half (7 of 15) of Canada’s false guilty pleas were taken from racialized people including three Indigenous men, one Black and Indigenous man, another Black man, and a Brown man who had recently immigrated from India.

Two of the fifteen false guilty pleas were taken from accused persons who had diagnosed mental health and cognitive challenges.

13 of the 15 guilty plea wrongful convictions required assistance from state actors such as prosecutors, other experts commissioned by the coroner’s office, and prison officials to be remedied.

The average sentence received by those who made guilty plea wrongful convictions was 10 months. They were deals that were too good to turn down. This is especially true in 5 cases where the person faced a murder charge and a mandatory life sentence if convicted.

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<sup>3</sup> Both false guilty pleas and imagined crimes are also discussed in Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crime and What Canada Must Do To Safeguard Justice*, at: <https://www.simonandschuster.com/books/Wrongfully-Convicted/Kent-Roach/9781668023662> (Parts I and II to be published by Simon and Schuster in April 2023).

## Introduction

Although known to criminologists from at least the 1970's, false guilty pleas reveal deep and intractable flaws in high volume justice systems that encourage plea bargaining and accept guilty pleas as a significant mitigating factor in sentencing. Such approaches effectively punish people for exercising their right to a trial. Neither the courts nor Parliament have been able effectively to remedy this problem.

Part A will set out the key findings from the 15 guilty plea wrongful convictions in the Canadian Registry of Wrongful Convictions.

Part B will provide brief overviews of the 15 cases with further details being available on the Canadian Registry of Wrongful Convictions at [www.wrongfulconvictions.ca](http://www.wrongfulconvictions.ca).

Part C will discuss some possible remedies to better protect and remedy guilty plea wrongful convictions, while maintaining that they are inevitable in any high volume criminal justice system that allows bargaining about which of multiple charges an accused person can plead to and recognizes guilty pleas as a significant mitigating factor when sentencing offenders.

### A. Key Findings from the Registry's 15 Guilty Plea Wrongful Convictions

#### 1) Women are Disproportionately the Victims of False Guilty Pleas

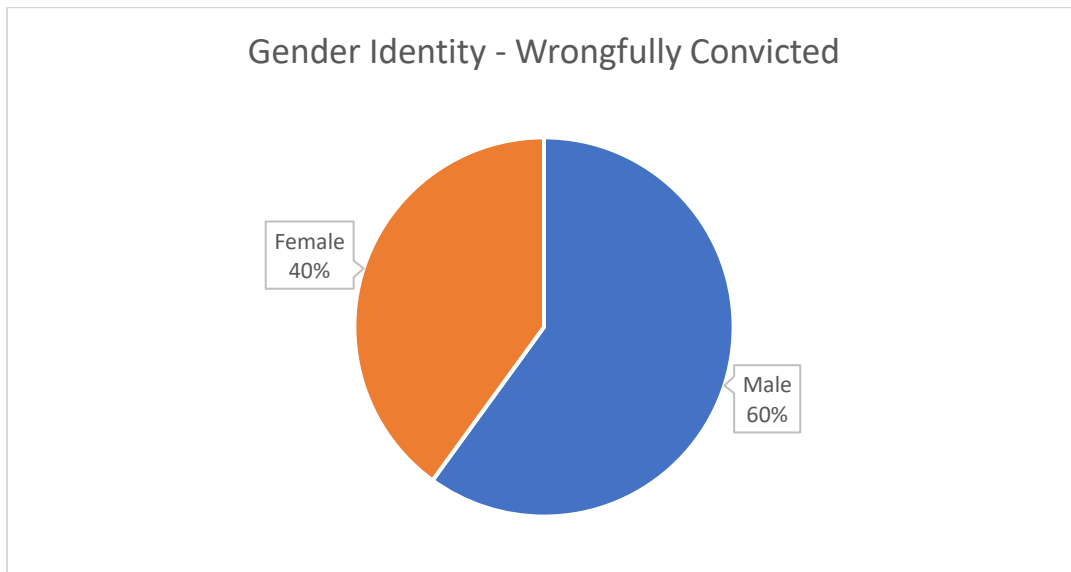
Of the 15 recognized guilty plea wrongful convictions, six involved women (C.F., C.M., Sherry Sherret-Robinson, Maria Shepherd, Brenda Waudby, and Wendy Scott). All but one of these women were charged with murder which has a mandatory sentence of life imprisonment. Five of these were wrongful convictions related to the expert testimony of Charles Smith with the sixth involving a woman, Wendy Scott, who also had cognitive challenges and pled guilty to second degree murder when charged with first degree murder, which carries a mandatory sentence of life imprisonment and parole ineligibility for 25 years.

Although women make up half of the Canadian population, they make up only 6% of the federal prison population of those serving two years or more: the population at most immediate risk of being wrongfully convicted.<sup>4</sup> Women have frequently explained their decision to plead guilty as one designed for their own good and the good of their family.

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<sup>4</sup> Correctional Statistics procured from: Correctional Service Canada, "Statistics and research on women offenders," at: <https://www.csc-scc.gc.ca/women/002002-0008-en.shtml> (accessed 11 Feb 2023).

In her 1997 self-defence review, Justice Ratushny commented that women might plead guilty for a range of “extraneous factors,”<sup>5</sup> including families to care for, regret, and concerns about testifying about the abuse they have endured.



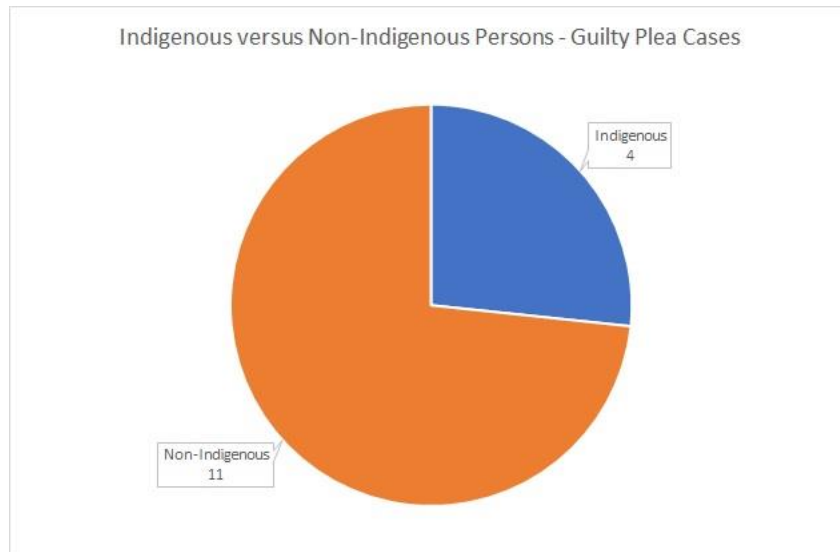
## 2) Indigenous People are Disproportionately the Victims of False Guilty Pleas

Of the 15 recognized false guilty pleas, four (Richard Brant, Clayton Boucher, Gerald Barton, and Richard Catcheway) involved Indigenous men. This is disproportionate to the about 5% of the Canadian population that is Indigenous. It is, however, less than the about 30% of the prison population that is Indigenous. This suggests that Indigenous people, as the population most at risk for wrongful convictions, may face barriers in receiving remedies for guilty plea wrongful convictions.

Strikingly, none of the 15 remedied guilty plea wrongful convictions involve Indigenous women, even though Indigenous women constitute 40% of Canada’s prison population and about 50% of the federal prison population for those serving sentences of two years’ imprisonment or more. This underrepresentation of Indigenous people, and especially Indigenous women, with respect to those who have received remedies for false guilty pleas likely represents access to justice problems including problems with respect to withdrawing guilty pleas (to be examined below).

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<sup>5</sup> Hon. Lynn Ratushny, *The Self Defence Review – Final Report* (Ottawa: Department of Justice, 1997) at 24 [Ratushny].



The Canadian Registry does not include all Indigenous people who have pled guilty but may have been innocent or have had a defence.

In 1968, the Supreme Court of Canada with just one dissent upheld the guilty plea of Lawrence Brosseau even after the Cree man explained: “I only have a grade 2 education and my lawyer told me that if I didn’t plead guilty to the charge that they would sentence me to hang.” To add insult to injury, his own lawyer not only participated in this plea but also told the court that in taking the plea his client was “an absolute primitive. I don’t pretend to have any particular understanding of his mind or intent.”<sup>6</sup>

Unfortunately, the *Brosseau* case remains a valid and relevant legal precedent. Justices Alvin Hamilton and Murray Sinclair in their 1991 Manitoba Aboriginal Justice Inquiry related “inappropriate guilty pleas” and “passivity” and “indifference” to the alienation of Indigenous people from a colonial criminal justice system. They heard testimony in the early 1990’s from inmates who told them, “It was easier to plead guilty because they don’t really believe us.”<sup>7</sup>

In 2011, Justice Frank Iacobucci noted that many Indigenous people in northern Ontario “plead guilty to their offences, rather than electing trial, in order to have their charges resolved quickly but without appreciating the consequences of their decision.” He elaborated that many whom he spoke to “have never known a friend or family member” who when charged ever risked a trial. Many Indigenous people “believe they will not receive a fair trial owing to racist attitudes prevalent in the justice system, including those of jury members.”<sup>8</sup>

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<sup>6</sup> *R. v. Brosseau*, [1969] S.C.R. 181 at 185-186.

<sup>7</sup> Hon. Alvin Hamilton and Hon. Murray Sinclair, *Aboriginal Justice Inquiry* (Toronto: Queens Park, 1991) chs. 6 and 7.

<sup>8</sup> Hon. Frank Iacobucci, *First Nations Representation on Ontario Juries* (Toronto: Ministry of the Attorney General, 2011) at para. 215.

A 2017 Department of Justice study based on 25 interviews with court workers and lawyers from 2016 to 2017 similarly found that many Indigenous people, especially those with criminal records, pled guilty to “get it over with”. One participant concluded that:

Wrongful convictions happen every day in court when people are pleading guilty to things they didn’t do because they’re denied bail or their sense of responsibility is different from criminal responsibility and people are pleading guilty because they feel responsible for something even though they might not in fact be criminally responsible.<sup>9</sup>

Another respondent stated: “discrimination at the police level, Crowns, judges, JPs, even lawyers. They feel like the odds are stacked against them, so what’s the point.”<sup>10</sup> Others cited the costs of repeat court appearances. This study reported that one reason why an Indigenous court worker plan was instituted in the 1960’s was a realization that Indigenous people were pleading guilty when they were not legally guilty.<sup>11</sup> Amanda Carling, a co-founder of the Canadian registry of wrongful convictions, has argued that Indigenous people may suffer from prolonged depression connected with the harms of colonialism and have a lack of faith in the colonial justice system.<sup>12</sup>

Despite Parliament adding in 2019 a factual basis as a factor for judges to consider when deciding whether to accept guilty pleas, matters do not seem to be improving. A failure to consider the factual basis for a plea is not fatal to the validity of a guilty plea.<sup>13</sup>

In 2021, the Ontario Court of Appeal ruled that the circumstances of an Indigenous accused need not always be considered when accepting a guilty plea from an Indigenous person.<sup>14</sup> It upheld a guilty plea made by an Indigenous man who was detained in solitary confinement and who fired his lawyer before he pled guilty. The man sought to reverse his guilty plea a day after it was made. The Court of Appeal was concerned that a more searching inquiry for Indigenous people seeking to plead guilty would both delay guilty pleas and be paternalistic.

In 2022, a five-judge panel of the British Columbia Court of Appeal did not allow an Indigenous man to re-open his guilty plea to assaulting a police officer. The court stressed that he was represented by counsel even though he was in pre-trial detention at the time he pled guilty and had previously suffered trauma while in jail. The Indigenous man had argued that he did not

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<sup>9</sup> Angela Bressan and Kyle Coady, *Guilty Pleas among Indigenous People* (Ottawa: Department of Justice, 2017) at 9.

<sup>10</sup> *Ibid.* at 10.

<sup>11</sup> *Ibid.* at 6. Thanks to Amanda Carling for bringing this report (and many other things) to my attention.

<sup>12</sup> Amanda Carling, “A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions,” 64 *Crim. L.Q.* 415 (2017) at 449.

<sup>13</sup> *Criminal Code*, R.S.C. 1985, c. C-46 at s. 606(1.2).

<sup>14</sup> *R. v. C.K.*, 2021 ONCA 826 [C.K.].

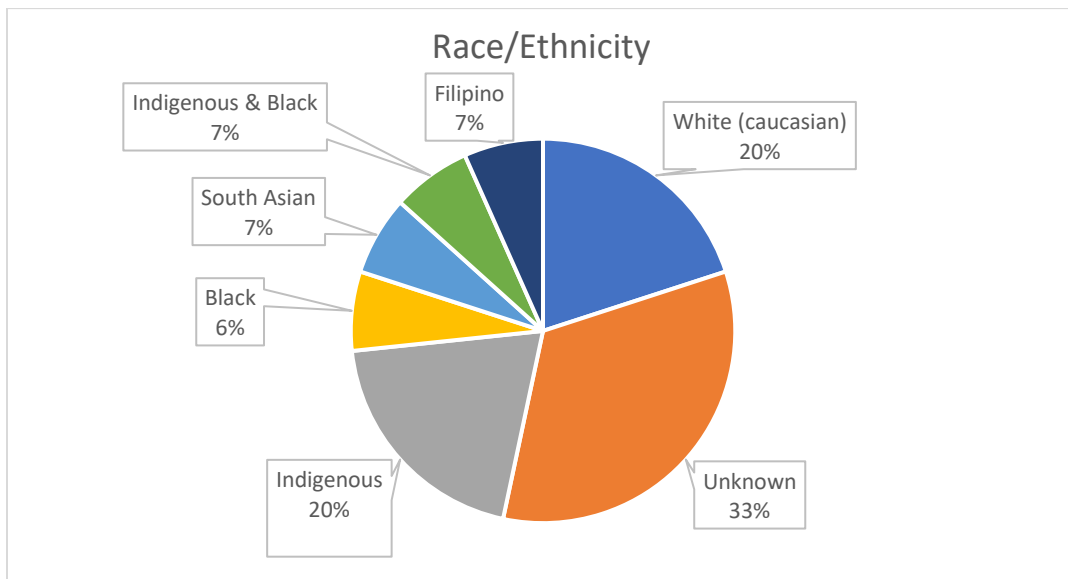
intend to assault a police officer when he threw a hammer while the police officer was in an altercation with the man’s mother, who was concerned that the police would shoot her son.<sup>15</sup>

The British Columbia Court of Appeal also refused to reverse a guilty plea to second degree murder that Philip Tallio made when he was 17 years old, on the basis that he had failed to prove on a balance of probabilities that he lacked the capacity to enter a guilty plea and had not established that another person had killed his 22-month-old cousin.<sup>16</sup>

A guilty plea can be entered and accepted by a criminal court in a matter of minutes. Its effects can be life-long.

### 3) Racialized People are Disproportionately the Victims of False Guilty Pleas

Of the 15 recognized false guilty pleas, two involved Black men (Gerald Barton (who is also Indigenous) and O’Neil Blackett); one involved a Brown man who had recently migrated from India (Dinesh Kumar); and one involved a woman of Filipino birth (Maria Shepherd) married to a Black man.



### 4) Canada’s False Guilty Plea Problem Disproportionately Affects People Living with Cognitive Difficulties

Of the 15 recognized false guilty pleas, two involve people with diagnosed mental health and cognitive challenges.

<sup>15</sup> *R. v. Zaworski*, 2022 BCCA 144 [Zaworski].

<sup>16</sup> *R. v. Tallio*, 2021 BCCA 314 [Tallio]; *Phillip James Tallio v. Her Majesty the Queen*, 2022 CanLII 21676 (SCC) (leave to appeal denied).



Simon Marshall's plea to a series of well-publicized sexual assaults in a suburb of Quebec City was accepted in 1997. He served six years in jail during which he suffered horrible abuse. When released, he pled guilty to two more sexual assaults. These pleas were proven to be false by DNA testing, as were the earlier assaults. The wrong person was arrested and allowed to plead guilty while the true perpetrator went free.

Wendy Scott has been diagnosed with an extremely low IQ. She confessed to a murder when she was presented with false evidence by the police, as is legal in Canada.<sup>17</sup> She was charged with first degree murder and subsequently pled guilty to second degree murder and received the mandatory minimum sentence of life imprisonment with parole ineligibility for ten years. Her guilty plea was overturned in 2015, but without the Alberta Court of Appeal issuing a published judgment.<sup>18</sup> Scott also was the star witness in Connie Oakes' trial for the same murder. Oakes's conviction was overturned based on new evidence of the overturning of Scott's conviction.<sup>19</sup> Oakes is one of 16 Indigenous people out of the present total of 83 people in the Canadian Registry of Wrongful Convictions.

The number of remedied false guilty pleas made by people with cognitive challenges may be undercounted even among the 15 false guilty pleas in the Canadian registry (the Registry is based solely on publicly available material).

One third of over 1,200 accused persons with mental health issues have reported that they pled guilty to an offence that they did not commit at some time during their life.<sup>20</sup> At the same time, Canadian courts, however, generally only require a basic awareness or operating mind for a person to be competent to plead guilty, thereby giving up their right to a trial, often for a reduced sentence.

## **5) In the Majority of Guilty Plea Wrongful Convictions, No Crime Was Committed**

The power of the criminal justice system with respect to the disadvantaged is well demonstrated by its ability to wrongfully convict people for crimes that did not happen.

The guilty plea wrongful convictions related to Charles Smith's flawed expert testimony involved pleas to baby deaths where no crimes occurred and in one case (Brenda Waudby) to child abuse that did not happen. The same is true with respect to the guilty plea wrongful conviction of Clayton Boucher, a Métis man, who pled guilty to possession of illegal drugs and received a sentence of time served, reflecting his four months in pre-trial detention. The RCMP

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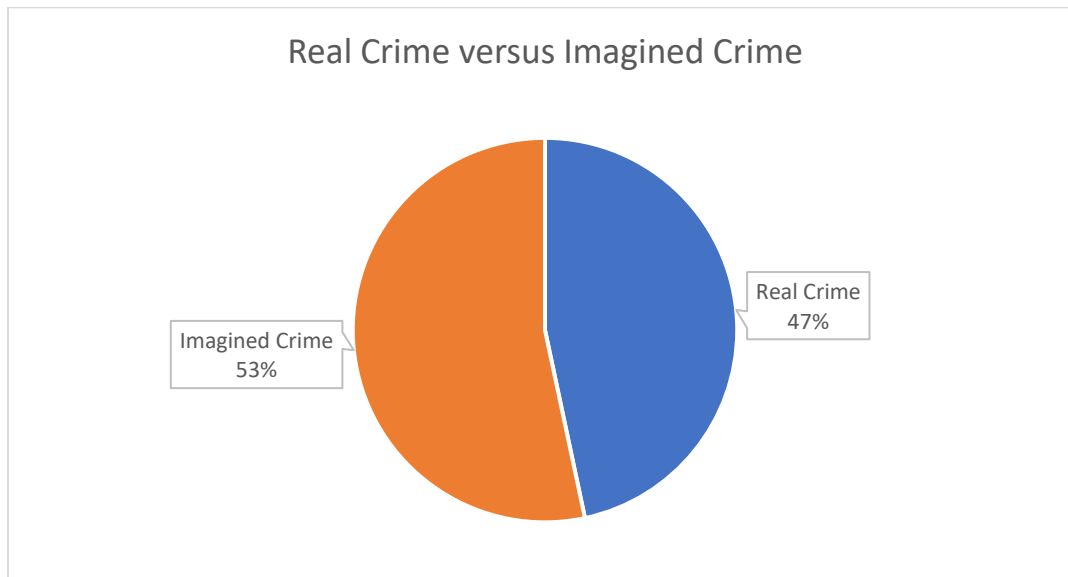
<sup>17</sup> Colin Sheppard, "The Connie Oakes Tragedy," 67 C.L.Q. 523 (2020) at 534-5.

<sup>18</sup> Chris Purdy, "Senator says Alberta murder case 'screams' for an inquiry" (Global News, 2017) at: <https://globalnews.ca/news/3188660/senator-says-alberta-murder-case-screams-for-review-calls-for-public-inquiry> (accessed 23 Jan 2023).

<sup>19</sup> *R. v. Oakes*, 2016 ABCA 90.

<sup>20</sup> Allison D. Redlich et al., "Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness," 34 Law & Hum. Behav. 79 (2010) at 83-4, 88-9.

lab results were that the substance Boucher possessed (in a baking soda container) was not illegal drugs. Boucher pled guilty in the wake of his wife’s accidental death and having had to attend her funeral in shackles.



**6) The Average Sentence Received by the Fifteen who Made False Guilty Pleas Was About 10 Months’ Imprisonment**

Guilty plea wrongful convictions result from sentence and charge bargains that are difficult for many accused persons and even the hypothetical “reasonable person” to decline.

The average 10 month sentence received by 14 victims of guilty plea wrongful convictions excludes the one remedied guilty plea wrongful conviction that involved a sentence of life imprisonment with the minimum period of parole ineligibility of 10 years (Wendy Scott). Even in that case, Scott had been charged with first degree murder, which has a mandatory 25 years of parole ineligibility.

Four of the remaining 14 remedied false guilty plea cases (Brenda Waudby, C.F., C.M., and Chris Bates) received a non-custodial sentence and another received a 90-day sentence to be served on the weekends (Dinesh Kumar). These are examples of what Deborah Tuerkheimer has identified as “lop-sided pleas” that she found in American cases dealing with the controversial shaken baby syndrome.<sup>21</sup>

Two other cases (Richard Catcheway and Clayton Boucher) involved Indigenous men accused of a break and enter and possession of illegal drugs, respectively, who received “time served” sentences of two and four months respectively based on their time in pre-trial detention

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<sup>21</sup> Deborah Tuerkheimer, *Flawed Convictions* (New York: Oxford University Press, 2014) at 159ff.

because they were denied bail after being charged. This provides support for Professor Webster's recent argument that Canada's high rate of pre-trial imprisonment, particularly in the case of long-term pre-trial detention, may contribute to false guilty pleas.<sup>22</sup>

### **7) Guilty Plea Wrongful Convictions Generally Require Proactive Work by More than the Accused Person to Remedy**

In 13 of the 15 cases, the guilty plea wrongful convictions were corrected by actions of the justice system and not simply by the accused person's own actions.

The eight cases related to Charles Smith's erroneous testimony required work by the coroner's office to commission opinions from better qualified experts and eventual agreement by prosecutors that the guilty pleas in light of new evidence constituted a miscarriage of justice. The evidence that Richard Catcheway was in jail in Brandon at the time of the break and enter in Winnipeg to which he pled guilty was originally obtained by a correctional official. The RCMP conducted the analysis that established that Clayton Boucher was innocent of possessing illegal drugs. A Toronto police re-investigation of Paul Bernardo, a serial killer and rapist, was critical in overturning Anthony Hanemaayer's false guilty plea. Gerald Barton's false guilty plea was overturned after the complainant recanted after 38 years and the prosecutor agreed to entering the new evidence and reversing the convictions. An important role of the proposed Miscarriage of Justice Commission will be to reach out to those often disadvantaged people who made false guilty pleas and to educate those in the justice system and the public at large about the dangers of false guilty pleas.

## **B. The Cases**

The 15 false guilty pleas are not just statistics. The Canadian Registry of Wrongful Convictions attempts to tell their stories as fully and fairly as possible from the information provided in publicly available documents.

### **1) C. F.**

An 18-year-old who did not know she was pregnant gave birth to a baby in 1996 who was either still-born or died shortly after birth. Charles Smith, when asked for a second opinion, concluded that the cause of death was asphyxia and "in the absence of an alternative explanation, the death of this baby girl is attributed to infanticide."<sup>23</sup> C.F. was charged and pled guilty to infanticide. She received a 2-month conditional sentence to be served at home, 150 hours community service, and 3 years' probation.

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<sup>22</sup> Cheryl Marie Webster, "Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty" 3:2 Wrongful Conviction Rev. 128 (2022).

<sup>23</sup> *R. v. C. F.*, 2010 ONCA 691 at para. 5.

C.F. received a pardon in 2006, and with the prosecutor's consent her guilty plea was overturned by the Ontario Court of Appeal in 2010, with the prosecutor subsequently withdrawing all charges.

**2) [C. M.](#)**

A 21-year-old who did not know she was pregnant gave birth in November 1992. Charles Smith performed the autopsy and concluded that the cause of death was "asphyxia (infanticide)".

The woman was charged with second degree murder and pled guilty to manslaughter, receiving a suspended sentence, 300 hours of community service, and three years' probation.

With the prosecutor's consent, her guilty plea was overturned by the Ontario Court of Appeal in 2010, with the prosecutor subsequently withdrawing all charges.

**3) [Sherry Sherret-Robinson](#)**

A 20 year-old was charged in 1996 with the first degree murder of her four-month-old baby, on the basis of Charles Smith's conclusion that the baby had injuries to support a finding of intentional killing.

In 1999, she pled guilty to infanticide and received a one-year sentence.

In 2009, with the prosecutor's consent, the Ontario Court of Appeal admitted new evidence that the injuries were not a result of her actions and entered an acquittal.

**4) [Maria Shepherd](#)**

Maria Shepherd, a young and pregnant mother, pled guilty to manslaughter in the death of her three-year-old stepdaughter and received a sentence of two years less a day that she was permitted to serve with contact from her family.

In 2016, with the prosecutor's consent, the Ontario Court of Appeal admitted new evidence discrediting Charles Smith's evidence of an intentional killing and entered an acquittal.

**5) [Brenda Waudby](#)**

Brenda Waudby was charged with murdering her 21-month-old daughter, Jenna, who died of injuries sustained when in the care of a 14-year-old babysitter. Charles Smith maintained that the blunt force injuries could have been inflicted by Waudby because of a "honeymoon period where an infant appears essentially normal."<sup>24</sup>

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<sup>24</sup> Closing Argument of Dr. Charles Smith, "Inquiry into Pediatric Forensic Pathology in Ontario" in the matter of the Order in Council 826/2007 and the Commission issued effective April 25, 2007, appointing the Honourable

In 1993, Waudby pled guilty to child abuse and was given a non-custodial sentence. Her conviction was overturned in 2012 with the prosecutor's consent, on the basis of new evidence including the babysitter's manslaughter conviction.

#### 6) [Richard Brant](#)

Richard Brant was charged with the manslaughter of his infant son on the basis of Charles Smith's diagnosis of shaken baby syndrome, even though an autopsy had concluded that the infant died as a result of complications from pneumonia.

Brant pled guilty to aggravated assault and was sentenced to six months' imprisonment in 1995. In 2011, new evidence was admitted with the prosecutor's consent and Brant was acquitted by the Ontario Court of Appeal, which stated:

Although he had always maintained that he did not harm his son, an important consideration for the appellant choosing to plead guilty was the unequivocal opinion of Dr. Charles Smith that the infant had died from non-accidental head injury. In the fresh evidence Mr. Brant has explained why he pleaded guilty notwithstanding his belief that he was innocent. Moreover, there is some doubt that the facts agreed to at the time of the guilty plea could support the charge of aggravated assault and we note that the trial judge who accepted the plea indicated that it appeared to be the result of a compromise.<sup>25</sup>

#### 7) [Dinesh Kumar](#)

Dinesh Kumar, a recent immigrant from India, was charged with second degree murder in the death of his son in 1991, on the basis of a diagnosis of shaken baby syndrome by Charles Smith and another doctor at the Hospital for Sick Children.

He pled guilty in 1992 to criminal negligence causing death and received a sentence of 90 days' imprisonment to be served on the weekends. Such a sentence also averted the threat of deportation from Canada. Concerns were expressed in the press about the leniency of the sentence.

In 2011, with the consent of the prosecutor, the guilty plea was overturned on the basis of fresh evidence and an acquittal was entered. The Court of Appeal noted that Dinesh Kumar "explained that he was in a new country with its own culture, and he did not speak English very

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Stephen Goudge as Commissioner, at:  
[http://www.archives.gov.on.ca/en/e\\_records/goudge/submissions/pdf/Submission\\_Dr.Charles\\_Smith.pdf](http://www.archives.gov.on.ca/en/e_records/goudge/submissions/pdf/Submission_Dr.Charles_Smith.pdf)  
(accessed 11 Feb 2023) at para. 333.

<sup>25</sup> *R. v. Brant*, 2011 ONCA 362 at para. 1.

well. He was told that he would be deported if convicted of murder or manslaughter but assured that the police would not report his case to immigration if he accepted the plea.”<sup>26</sup>

#### **8) [O'Neil Blackett](#)**

O'Neil Blackett, who is Black, was charged with the second degree murder of 13-month-old Tamara on the basis of Charles Smith's opinion that she had died from strangulation or blunt force trauma.

After 15 months of pre-trial detention, Blackett pled guilty in August 2001 to manslaughter and received a sentence of 3.5 years' imprisonment.

In 2018, with the prosecutor's consent, the Ontario Court of Appeal admitted new evidence that Smith's opinion was unreliable and ordered a new manslaughter trial. The prosecutor subsequently withdrew the charges.

#### **9) [Simon Marshall](#)**

Simon Marshall pled guilty to 13 sexual assaults between 1992 and 1996 in Ste. Foy, Quebec. He was sentenced to 62 months in prison and served his full sentence.

Shortly after his release, Marshall, who had both mental disorders and an intellectual disability, confessed and pled guilty to two subsequent sexual assaults but DNA testing excluded him as the perpetrator. DNA testing then subsequently excluded him for the earlier sexual assaults and they were overturned on the basis of fresh evidence by the Quebec Court of Appeal.

#### **10) [Anthony Hanemaayer](#)**

In October 1989, Anthony Hanemaayer pled guilty to breaking and entering and committing an assault, after he was identified at the first day of his trial by a homeowner who stated he had broken into her home and assaulted her daughter. He was sentenced to two years less a day's imprisonment. Hanemaayer had been told that if convicted after the trial, he might be sentenced to six years' imprisonment.

In 2008, with the consent of the prosecutor, the Ontario Court of Appeal admitted new evidence that Paul Bernardo was the perpetrator and acquitted Hanemaayer. Justice Marc Rosenberg stated that:

[T]he court cannot ignore the terrible dilemma facing the appellant. He had spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if he was convicted. The estimate of six years was not unrealistic given the

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<sup>26</sup> *R. v. Kumar*, 2011 ONCA 120 at para. 13.

seriousness of the offence. The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence.<sup>27</sup>

### 11) [Gerald Barton](#)

Barton, a Black and Indigenous man, pled guilty in 1968 to having sex with a girl between 14 and 16 years of age after having been charged with rape (a more serious offence). He was sentenced to one year of probation.

In 2011, Barton's conviction was overturned on the basis of new DNA evidence excluding him as the perpetrator and a recantation from the complainant. He later unsuccessfully sued for compensation.

### 12) [Chris Bates](#)

Bates' convictions for second degree murder, robbery, and conspiracy to commit robbery were overturned by the Quebec Court of Appeal in 1998 on the basis of evidence that was not disclosed to him at his 1994 trial.

A new trial was ordered but Bates pled guilty to conspiracy to commit robbery, stating that he was "tired of all this". He received a conditional sentence and probation. In 2014, the Quebec Court of Appeal refused to grant Bates an appeal out of time on the basis of new evidence that his plea was the result of post-traumatic stress disorder. The Court emphasized the importance of the finality of verdicts and that Bates was able to avoid prison time by pleading guilty.

### 13) [Clayton Boucher](#)

In 2017, Clayton Boucher, a Métis man, pled guilty to possession of drugs even though he claimed that a white substance found in a baking soda container when police searched his house was, in fact, baking soda. Shortly after his wife was killed in a car accident, Boucher pled guilty and received a sentence of time served for his 4 months in pre-trial detention.

Subsequent analysis revealed that the substance was not illegal drugs. Boucher's conviction was overturned and an acquittal entered by the Alberta Court of Appeal, with the consent of the prosecutor, but without published reasons.

### 14) [Richard Catcheway](#)

In 2017, Richard Catcheway, an Indigenous man with cognitive difficulties, pled guilty to a break and enter and received a sentence of time served for two months in pre-trial detention.

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<sup>27</sup> *R. v. Hanemaayer*, 2008 ONCA 580 at para. 18 [*Hanemaayer*].

A prison administrator subsequently forwarded evidence to Catcheway's lawyer that he had been in prison at the time of the break-in. The Manitoba Court of Appeal admitted this new evidence and acquitted him, stating that "in light of the fresh evidence that conclusively proves the accused's innocence, it would understandably be a miscarriage of justice to uphold his guilty plea."<sup>28</sup>

### 15) [Wendy Scott](#)

Wendy Scott, a woman with cognitive difficulties and an IQ of 50, was charged with the first degree murder of a man in Medicine Hat, but pled guilty in 2012 to second degree murder. Scott had made incriminating but inconsistent statements when interrogated by the police.

In 2015, the Alberta Court of Appeal, with the consent of the prosecutor, quashed her conviction and ordered a new trial without published reasons. The prosecutor subsequently stayed the proceedings in 2017.

### Summary

The 15 wrongfully convicted people—and the families affected by these wrongful conviction guilty pleas—matter. The injustices they suffered should inspire change in criminal justice policies. At the same time, this is likely only the tip of the iceberg of cases where people felt they had no choice but to plead guilty despite being innocent or having a defence for the crime committed.

## C. What Can Be Done About False Guilty Pleas?

### 1) Eliminate Mandatory Sentences, Including for Murder

The majority of the remedied false guilty pleas were cases involving the flawed expert testimony of Charles Smith. In most of these cases, the accused was charged with murder, which carries a mandatory sentence of life imprisonment. All of the accused persons pled guilty to lesser offences that had no mandatory minimum penalty.

In 1997, Justice Lynn Ratushny noted in her Self Defence Review<sup>29</sup> that the threat of mandatory life imprisonment made it very difficult for women with valid self-defence claims to refuse a plea bargain to manslaughter. Unfortunately, Justice Ratushny's 1997 recommendation to allow exemptions from mandatory life imprisonment in murder cases has still not been implemented more than a quarter of a century later even though many democracies do not require mandatory life imprisonment for murder.

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<sup>28</sup> *R v. Catcheway*, 2018 MBCA 54 at para. 8.

<sup>29</sup> Ratushny, *supra* note 5.



## 2) Regulate Sentencing Discounts

The 8 remedied false guilty pleas involving Charles Smith's evidence, as well as the 7 other remedied false guilty pleas in the Registry, involved steeply discounted sentences as represented by the average sentence of 10 months. Canadian law makes no attempt to remedy the sentencing discount that an accused person receives for a guilty plea. Such discounts also constitute *de facto* penalties for going to trial and being convicted. English law has attempted to regulate guilty plea sentencing discounts, though it should be noted that false guilty pleas remain a problem in the United Kingdom. Indeed, they constitute 85 of 466 of the United Kingdom's recorded wrongful convictions.<sup>30</sup>

## 3) Make Review of Guilty Pleas Mandatory

In 2019, as part of Bill C-75, Parliament added a *Criminal Code* provision requiring a factual basis for a guilty plea, further to the existing framework providing for an inquiry into whether a guilty plea is knowing and voluntary. Unfortunately, all of these provisions remain subject to s. 606(1.2) of the *Criminal Code*, which provides that the failure of a judge to make such inquiries does not affect the validity of the accused person's guilty plea.

Even after these 2019 amendments, courts have remained reluctant to overturn guilty pleas in the absence of clear evidence of a miscarriage of justice.<sup>31</sup> The 15 remedied false guilty pleas in the Canadian Registry all had such clear evidence. Furthermore, this evidence was provided by state officials in 13 of these cases, and prosecutors often agreed to reverse the conviction.

## 4) Ensure Culturally and Medically Competent Defence Lawyers with Fewer Financial Incentives to Enter Guilty Pleas

Christopher Sherrin has demonstrated how private lawyers can make more money from their clients' guilty pleas than from going to trial under Ontario's legal aid scheme.<sup>32</sup> When combined with the guilty plea discounts on sentencing, this presents compelling incentives for guilty plea wrongful convictions.

Despite 2018 recommendations by the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions,<sup>33</sup> no ethical codes have been changed to provide defence lawyers with guidance in dealing with what the late Justice Marc

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<sup>30</sup> Essex Registry, *supra* note 1.

<sup>31</sup> C.K., *supra* note 14; Tallio, *supra* note 16; Zaworski, *supra* note 15 (discussed above in Part A).

<sup>32</sup> Christopher Sherrin, "Guilty Pleas from the Innocent," 30 Windsor Rev. of Legal and Social Issues 1 (2011).

<sup>33</sup> Public Prosecution Service of Canada, "Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada," ch. 8, section VI, at: <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/toc-tdm.html> (accessed 23 Jan 2023) [Innocence at Stake].

Rosenberg called the “terrible dilemmas”<sup>34</sup> posed when accused persons who may be innocent or have a valid defence are offered a plea bargain with a heavily reduced sentence. Existing ethical codes in Canada speak of clients being required to voluntarily admit guilt,<sup>35</sup> but this begs the question of whether the clients are actually guilty.

#### **5) Require Prosecutors to Screen Charges and Pre-Trial Detention and to Ensure that Relevant Forensic Tests are Conducted**

The Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions suggested that prosecutors should never accept a guilty plea from someone they know to be “factually innocent”. Unfortunately, this sets a lower standard than guilt beyond a reasonable doubt or even a reasonable prospect of conviction. Prosecutors may often not be in a position to know whether an accused is or is not factually innocent. Given this, they should, when feasible, ensure that forensic tests are conducted as soon as possible. In the Simon Marshall case, prompt DNA testing would have prevented his wrongful conviction and suffering.

The dangers of inducing false guilty pleas should also be considered when laying charges, especially those such as murder that have mandatory minimum sentences. Care should also be taken with respect to pre-trial detention that equals or exceeds a realistic estimate of the sentence should the accused person be convicted, because this may place people in a situation where it is perfectly rational to plead guilty regardless of their guilt. For instance, two Indigenous men, Clayton Boucher and Richard Catcheway, were denied bail despite being charged with less serious offences. They made rational decisions to make false guilty pleas which resulted in their immediate release with a sentence of time served.

#### **6) Create a Proactive and Well-Funded Commission to Review Convictions and Sentences**

A guilty plea wrongful conviction can happen in a matter of minutes. Once the guilty plea is entered, however, it can take decades for the convicted person to correct the miscarriage of justice. As discussed above, in 13 of the 15 remedied cases, the convicted person needed assistance from prosecutors, prison officials or RCMP forensic labs to correct their false guilty pleas.

In their 2021 report, Justices Harry LaForme and Juanita Westmoreland-Traoré stressed the need for an adequately funded proactive commission, comprised of at least nine persons, with enhanced powers to investigate claims that either a conviction or a sentence constitutes a miscarriage of justice.<sup>36</sup> They emphasized that the commission should conduct outreach to

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<sup>34</sup> Hanemaayer, *supra* note 27 at para. 18.

<sup>35</sup> Innocence at Stake, *supra* note 33 at ch. 8, para. 3.

<sup>36</sup> Hon. Harry LaForme and Hon. Juanita Westmoreland-Traoré, “A Miscarriages of Justice Commission,” at: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/index.html> (accessed 11 Feb 2023) [Miscarriages of Justice Commission].

disadvantaged groups and provide support for applicants. The 15 false guilty pleas recorded so far in the Canadian Registry came mainly from disadvantaged persons.

### **7) Those who Plead Guilty to Crimes that They Did Not Commit Should Not Be Precluded from Compensation**

Our search of publicly available information suggests that only 4 of the 15 people who were wrongfully convicted on the basis of false guilty plea received any compensation. Both the federal and Nova Scotia governments opposed Gerald Barton's claims for compensation. They did so through numerous court hearings and even after a judge assessed relevant damages at \$75,000. The Nova Scotia Court of Appeal denied Barton relief, stating: "There is no guarantee in Canada that money will be paid to compensate a person who claims to have been wronged after an acquittal. This case demonstrates that fact."<sup>37</sup>

In their report, Justices LaForme and Westmoreland-Traoré recommended that the federal government should provide no-fault compensation for the wrongfully convicted. They heard from wrongfully convicted persons that having to litigate against governments after their wrongful convictions was a form of re-victimization. They also observed that the United Nations Human Rights Committee had found Canada's approach to compensation to have breached its international law obligations.<sup>38</sup>

### **Conclusion**

In its 2018 report, the Heads of Prosecutions Subcommittee for the first time recognized that Canada has a false guilty plea problem. At the same time, the subcommittee stated that "no Canadian studies to date have quantified, through empirical research, the scope of the phenomenon of accused persons in Canada choosing to plead guilty to crimes they did not commit."<sup>39</sup> That has now changed because of the work of the Canadian Registry of Wrongful Convictions. This work has established clear that false guilty pleas happen in about 18% of known and remedied wrongful convictions in Canada. How many more exist and could be remedied with the help of a proactive and well-resourced Miscarriage of Justice Commission is unknown. What is known, however, is that Canada's remedied false guilty pleas required assistance from the state to correct. Moreover, it is now known that the harms of Canada's remedied guilty plea wrongful convictions have fallen largely on women, Indigenous and other racialized people, and individuals with cognitive challenges.

Canada has, since the 1990's, accepted and encouraged plea bargaining as a way to ensure efficiency and compliance with speedy trial standards under the *Charter*. Too much confidence has been placed in existing legal and ethical standards to ensure that innocent people and

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<sup>37</sup> *Barton v. Nova Scotia (Attorney General)*, 2015 NSCA 34 at para. 1.

<sup>38</sup> Miscarriages of Justice Commission, *supra* note 36 at 187.

<sup>39</sup> Innocence at Stake, *supra* note 33 at ch. 8, section III.

those with a valid defence are not pressured into pleading guilty. The recommendations made by Justice Ratushny in 1997 that mandatory life imprisonment sentences should be abolished because they induce false guilty pleas to crimes like manslaughter and infanticide have been ignored. The problem of disadvantaged people being forced into pleading guilty to crimes that they did not commit, and often did not happen, is a real one that the Canadian criminal justice system must address.