

# THE WRONGFUL CONVICTION OF INDIGENOUS PEOPLE IN AUSTRALIA AND CANADA

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Drawing on Rachel Dioso-Villa's repository of wrongful convictions published in this issue, this article examines known cases of wrongful convictions of Indigenous persons in Australia and Canada. It finds that Indigenous people are over-represented among the wrongfully convicted in relation to their representation in the population in both Australia and Canada. At the same time, there are likely many undiscovered wrongful convictions of Indigenous persons especially when the over-representation of Indigenous men and women in prison is considered. A factor in this likely under-representation of Indigenous people among remedied wrongful convictions may be the incentives that accused, especially Indigenous women, face to plead guilty even if they are not guilty. This finding underlines some of the dangers of limiting wrongful convictions to cases of proven factual innocence and not including among the wrongfully convicted those who may have valid defences such as self-defence.

The immediate causes of the wrongful convictions of Indigenous people examined in this article include false confessions, mistaken eyewitness identification, lying witnesses, lack of disclosure and forensic error. Underlying and deeper causes include disadvantages that Indigenous people suffer in the criminal justice system including language and translation difficulties, inadequate and insensitive defence representation, pressures to plead guilty and racist stereotypes that associate Aboriginal people with crime. This last factor may help explain why police and prosecutors have prosecuted weak cases later revealed to be wrongful convictions. Such stereotypes may also affect determinations of credibility by juries and judges. That said, Indigenous victims of wrongful convictions have at times benefited from creative remedies. For example, the High Court finessed its restrictions on

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hearing fresh evidence in both the Kelvin Condren and Terry Irving cases and prosecutors made concessions in the Jeanie Angel and Vincent Narkle cases. In Canada, courts have granted a number of Indigenous persons bail pending appeals or even decisions by the executive to grant a petition to re-open the case.

## I INTRODUCTION

Focusing on the experience of disadvantaged groups can reveal new insights about wrongful convictions. As Professors Debra Parkes and Emma Cunliffe have recently suggested, such an approach provides an excellent vehicle to explore the deeper causes of wrongful convictions and critically examine definitions of wrongful convictions restricted to proven factual innocence.<sup>1</sup> Professors Parkes and Cunliffe have focused on the experience of women including Aboriginal women who have been subject to wrongful convictions. Another disadvantaged group that should be studied in relation to wrongful convictions are those who suffer mental disabilities and disorders. The focus in this article will be on the wrongful conviction of Indigenous people.

In both Australia and Canada, Indigenous people are grossly over-represented among prisoners. In Australia, 27 percent of prisoners are Indigenous while Indigenous people constitute less than 3 percent of all Australians.<sup>2</sup> In Canada, Indigenous people constitute 28 percent of sentenced admissions to custody and about 4.3 percent of the Canadian population.<sup>3</sup>

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<sup>1</sup> Debra Parkes and Emma Cunliffe, 'Women and Wrongful Convictions: Concepts and Challenges' (2015) 11 *International Journal of Law in Context* 219.

<sup>2</sup> Australian Bureau of Statistics, *Prisoners in Australia* (2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

<sup>3</sup> Government of Canada, *Admissions to adult correctional services, by characteristic of persons admitted, type of supervision and jurisdiction, 2013/2014* <<http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14163/tbl/tbl04-eng.htm>>.

The Indigenous experience of wrongful convictions cannot be easily separated from broader and pervasive issues of colonialism, racism and systemic discrimination that contribute to gross overrepresentation of Indigenous people in Australian and Canadian prisons as well as disproportionate rates of Indigenous crime victimisation. The close connection between Indigenous wrongful convictions and these larger socio-economic and systemic factors allows wrongful convictions to be approached through a broader lens.

This article will start by examining two historical studies of wrongful convictions of Indigenous people, the Rupert Maxwell Stuart case from Australia and the Lawrence Brosseau case from Canada. These case studies reveal causes of wrongful convictions that have often been neglected. They include language issues that make accused persons dependent on translation to communicate with their lawyers and the court and a lack of cultural competence by justice system actors including defence lawyers. The Brosseau case is also significant because it stems from a guilty plea to avoid a sentence of capital murder.

Wrongful convictions stemming from guilty pleas will be examined in the next part of the article. An increasing number of wrongful convictions in Canada are being discovered from guilty pleas. Indigenous women in both Australia and Canada who are charged with murder frequently plea guilty even though they may have a valid defence such as self-defence. It will be argued that such cases suggest that wrongful convictions should not be defined restrictively to include only factual innocence and should include those who were convicted but may have a valid defence.<sup>4</sup>

The next part of this article will examine the available data on wrongful convictions of Indigenous people in both Australia and Canada. This data, though incomplete, suggests that Indigenous people have suffered wrongful convictions disproportionately. For

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<sup>4</sup> Parkes and Cunliffe, above n 1.

example Indigenous people account for 14 percent of the 71 wrongfully convicted people in Rachel Dioso-Villa's important repository published in this volume even though they account for less than 3 percent of the Australian population.<sup>5</sup> Yet it will be suggested that there are likely many more undiscovered wrongful convictions when the gross over-representation of Aboriginal people among convicted prisoners are considered. The discrepancy between Indigenous people being only 14 percent of recognised and remedied Australian wrongful convictions but 27 percent of current prisoners will be explored. It will be suggested that the most likely explanation is that Indigenous people face particular challenges in having their wrongful convictions recognised and remedied.

The next two parts of the article will examine known wrongful convictions of Indigenous persons in Australia and then Canada. The focus will be on identifying both the immediate cause of these wrongful convictions such as mistaken eyewitness identifications and false confessions and deeper structural causes. Racist stereotypes that associate Aboriginal people with crime may help explain why police and prosecutors have demonstrated tunnel vision in prosecuting weak cases against Indigenous persons later revealed as wrongful convictions.

The case studies also reveal that Indigenous victims of wrongful convictions have at times benefited from creative remedies. For example, the High Court finessed its self-imposed restriction on hearing fresh evidence to assist in the overturning of both Kelvin Condren's and Terry Irving's wrongful convictions. Canadian courts granted bail in a number of cases of Indigenous people pending their appeals or even pending the Minister's petition decisions. Such decisions soften but do not remove the barriers that Indigenous persons face in overturning wrongful convictions.

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<sup>5</sup> See Rachel Dioso-Villa, 'A Repository of Wrongful Convictions in Australia' in this issue.

## II EARLY AUSTRALIAN AND CANADIAN CASE STUDIES OF INDIGENOUS MEN WRONGFULLY CONVICTED OF CAPITAL MURDER

In order to gain some historical perspective, it is useful to compare two early Australian and Canadian cases that both involved Aboriginal men charged with capital murder. In both cases, the accused appealed to the highest courts in the land only to have their claims rejected. In both cases, the accused had difficulties conversing with the police and their lawyers in their non-Indigenous language.

### A *Rupert Maxwell Stuart*

The Australian case involved a 27 year old Aboriginal man Rupert Maxwell Stuart charged in 1959 with the rape and murder of a nine year old girl in South Australia. The trial was conducted in English even though Mr Stuart was only fluent in the Aranda Aboriginal language. At the start of the trial, Stuart attempted to challenge an elaborate confession that the prosecution claimed he had given to the police. Without success, he tried in a brief but poignant statement to explain to the court:

I cannot read or write. Never been to school. I did not see the little girl. I did not kill her. Police hit me. Choked me. Make me say these words. They say I killed her. That is what I want to say.<sup>6</sup>

In the end, Stuart's incriminating statements were not excluded. He was subsequently convicted by an all-white jury and given an execution date.

The High Court rejected fresh evidence that Stuart did not understand English enough to have made the detailed confession

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<sup>6</sup> As quoted in South Australia, Royal Commission in regard to Rupert Max Stuart, *Report* (1959), 7.

introduced at trial.<sup>7</sup> As will be seen, the High Court continues to hold that it cannot consider fresh evidence. The High Court also held that any error of law made when the prosecutor told the jury that Stuart could have testified was replicated by the trial judge and did not cause a miscarriage of justice.

Stuart's case was championed in the press by a young Rupert Murdoch and became a cause célèbre. His counsel sought but was refused leave to appeal to the Privy Council. Mr Stuart's death penalty was commuted, but three judges in a subsequent Royal Commission concluded: 'we see no valid reason for apprehending any miscarriage of justice'. The Commission stated it would have reached the same verdict as the jury and indeed two of the three judges had already sat in the courts below that found Mr Stuart guilty.<sup>8</sup> It is not surprising that Stuart's lawyers boycotted the Royal Commission. As will be seen, there was a similar blatant conflict of interest in a Canadian case where a judge who had been Attorney-General at the time of an Indigenous man's conviction sat on the man's subsequent appeal. The court in that case overturned the wrongful conviction, but unfairly dismissed the miscarriage of justice 'as more apparent than real'.<sup>9</sup> Both of these cases suggest that Indigenous people may face disadvantages not faced by others in having their wrongful convictions recognised and remedied.

The Stuart case raises questions about how many wrongful convictions may have been caused because Indigenous people (and others) were not able fully to understand the language of the trial or had their testimony misunderstood because of the way they spoke. It is noteworthy that such linguistic differences are not generally described among the common immediate causes of wrongful convictions. This suggests that many such lists of causes may be under inclusive because not enough attention has been paid to

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<sup>7</sup> *Stuart v The King* [1959] HCA 27. The two page written confession is contained in *Ibid* 31-2. See also Justice Michael Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23 *Adelaide Law Review* 195.

<sup>8</sup> South Australia, Royal Commission in regard to Rupert Max Stuart, *Report* (1959), 21 [160].

<sup>9</sup> *R v Marshall* (1983) 57 NSR (2d) 286 (CA).

wrongful convictions involving Indigenous peoples and perhaps other marginalised or racialised groups.

### B *Lawrence Brosseau*

The Stuart case has some similarity to a Canadian case decided a decade later. The Canadian case involved Lawrence Brosseau, a 22 year old Aboriginal man, who had some knowledge of English but preferred to testify through a Cree interpreter. When charged with capital murder, he pled guilty to non-capital murder. He unsuccessfully tried to appeal stating:

I wish to appeal my conviction and sentence on the grounds that 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. When he told me this I was scared and pleaded guilty.<sup>10</sup>

As in Stuart's case, there is evidence that Mr Brosseau had trouble communicating with his own lawyer. Indeed when pleading Brosseau guilty, his own lawyer told the trial judge that his client: '... is describable only in terms of an absolute primitive. I don't pretend to have any particular understanding of his mind or of his intent'.<sup>11</sup> This underlines how defence lawyers who lack the necessary linguistic and cultural competence can contribute to the wrongful conviction of Indigenous accused.

Brosseau's lawyer subsequently filed an affidavit with the court that his client may have been unable to understand the nature and consequences of the plea. Nevertheless, the Supreme Court of Canada upheld Brosseau's guilty plea on the basis that the trial judge had no duty to inquire into whether Mr Brosseau himself was aware of the nature and consequences of his plea. This case demonstrates how defence lawyers through lack of understanding and perhaps lack of effort may contribute to wrongful convictions. This may be

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<sup>10</sup> *R v Brosseau* [1969] SCR 181, 186.

<sup>11</sup> *Ibid* 185.

especially so if lawyers do not have basic cultural and linguistic competences when representing Indigenous clients.

The Brosseau case also reveals that judicial failures to inquire into guilty pleas and to make findings whether they have a proper factual basis may be contributing causes to wrongful convictions. Mr Brosseau's decision to plead guilty to avoid a death sentence is an extreme example, but the next section will examine how guilty plea discounts in both Australia and Canada continue to penalise accused people for exercising their trial rights.

### III BEYOND FACTUAL INNOCENCE? INDIGENOUS PEOPLE AND GUILTY PLEAS

#### A *Wrongful Convictions and Guilty Pleas*

In Canada and the United States, there is mounting evidence that even in non-capital cases, innocent people are making rational and irrational decisions to plead guilty to crimes that they did not commit.

One particularly poignant Canadian case involved a mentally disabled adult, Simon Marshall, who pled guilty to a series of sexual assaults that were later disproved by DNA testing. Mr Marshall had his convictions overturned in 2005, but by that time he had already been victimised in a prison environment.<sup>12</sup> In 2008, the Ontario Court of Appeal accepted that Anthony Hannemayer made a rational decision to plead guilty to receive a lesser sentence after a mistaken eyewitness identification. Like increasing numbers of accused and many Indigenous accused, Mr Hannemayer was already in prison because he had been denied bail.<sup>13</sup> In such circumstances, accused persons may well conclude that they have little to lose and a sentence

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<sup>12</sup> *R v Marshall* [2005] QCCA 852.

<sup>13</sup> *R v Hannemayer* [2008] ONCA 580.



reduction to gain by pleading guilty. The criminal justice system offers adversarial trials as a means of testing the state's evidence and discovering the truth, but through charge and sentencing plea bargaining effectively penalises an accused for exercising their right to a trial.

There have been a series of wrongful convictions in Canada that all stemmed from faulty forensic pathology evidence given by Dr Charles Smith. In at least five of these cases, vulnerable persons (young mothers, an Indigenous father and a father who recently immigrated to Canada) pled guilty.<sup>14</sup> In three of the cases, the accused faced murder charges that in Canada carry a mandatory life imprisonment sentence. In all of the cases, they accepted guilty pleas that resulted in short sentences of imprisonment or even non-custodial sentences.

### B *Guilty Pleas and Indigenous People*

At least three of the people wrongfully convicted because of Dr Smith were Indigenous. This is perhaps not surprising given that Dr Smith later admitted that he thought his role was to act as an advocate for the Crown and to make the prosecution's case "look good". Dr Smith was prepared to make moral judgments about mothers and fathers based on their lifestyles. For example, he thought that women in troubled relationships or custody battles were

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<sup>14</sup> *R v Sheratt-Robinson* [2009] ONCA 886 (mother with another child seized by child welfare charged with first degree murder punishable by life imprisonment pleads guilty to infanticide and but received a one year sentence); *R v CF* [2010] ONCA 691 (18 year old mother pleads guilty to infanticide and received a non-custodial sentence); *R v C.M.* [2010] ONCA 690 (21 year old mother charged with second degree murder accepts plea to manslaughter and received a non-custodial sentence); *R v Kumar* [2011] ONCA 120 (recent immigrant father with other children charged with second degree murder but accepts manslaughter plea with 90 day intermittent sentence); *R v Brant* [2011] ONCA 362 (19 year old Indigenous father charged with manslaughter in relation to death of his son accepts aggravated assault conviction with a 6 month sentence of imprisonment).

more likely to kill their children.<sup>15</sup> There is no specific evidence about Dr Smith's attitudes towards Indigenous people, but he might have been suspicious of Indigenous people if he disagreed with their parenting practices and associated them with stereotypes about the abuse or neglect of children.<sup>16</sup>

Richard Brant, a Mohawk man, originally charged with manslaughter pled guilty to aggravated assault of his son and received a sentence of six months imprisonment in 1995. His conviction was overturned with the consent of the Crown in 2011 on the basis of new pathology evidence that 'cast considerable doubt'<sup>17</sup> on Dr Smith's evidence that the death was non-accidental. Mr Brant believed he could not effectively challenge Dr Smith's testimony that his child had died as a result of shaken baby syndrome.<sup>18</sup>

In an affidavit filed with the Court of Appeal, Mr Brant explained that his lawyer had urged him to accept the guilty plea because he:

... would have to take the stand, and that my credibility would be a big problem because of my criminal record. In the end, it came down to a contest between me with my criminal record, and Dr Smith with his credentials.<sup>19</sup>

This statement reveals how Aboriginal people may experience problems contesting their innocence. It also reveals that persons may

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<sup>15</sup> Ontario, Inquiry into Pediatric Forensic Pathology in Ontario, *Report* (2008), vol 2, 177.

<sup>16</sup> Kristen Kramar, 'Coroners' Interested Advocacy: Understanding Wrongful Accusations and Convictions' (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 803. On the gross over-representation of Indigenous children among children in care in Canada: see Truth and Reconciliation Commission, *Canadian Residential Schools: The Legacy* (2015) vol 5, ch 1.

<sup>17</sup> *R v Brant* [2011] ONCA 362, [2].

<sup>18</sup> *Ibid* [3] concluding that '[t]he fresh evidence establishes that a miscarriage of justice has occurred. It is in the interest of justice that the fresh evidence be admitted, the guilty plea set aside, the appeal from conviction allowed and an acquittal entered'.

<sup>19</sup> Affidavit of Richard Brant, undated, [17] <<http://smithforensic.blogspot.ca/2011/05/richard-brant-charles-smith-case-his.html>>.

be more inclined to plea guilty to a crime that they did not commit if they already have the stigma of a criminal record. In addition, provisions that allow judges to mitigate the sentence that an Indigenous person receives may also have the unintended effect of making a guilty plea more attractive.<sup>20</sup>

Mr Brant was placed in an agonising dilemma. If he testified that he was innocent, he would likely be cross-examined on his criminal record. The jury would be warned that his prior convictions were only relevant to his credibility, but there would be no guarantee that they would follow such judicial instructions. It would not have been clear in 1995 whether Mr Brant could question prospective jurors about whether they would be biased against him because he was Aboriginal. Under a precedent established in 1998, he would be able to ask potential jurors a simple question of whether they would be biased and unable to decide on the evidence because the accused was Aboriginal.<sup>21</sup> Such a question, however, would alert prospective jurors to the fact that he was Aboriginal. Moreover, prospective and actual jurors might not be able to identify subconscious racism that might guide their decision-making. Another factor making a jury trial less attractive for Mr Brant and other Indigenous accused is that Aboriginal people would likely be under-represented on the panel of prospective jurors and the Supreme Court has recently confirmed that there is no right to a representative panel of prospective or actual jurors.<sup>22</sup>

In the wake of his wrongful conviction being overturned, Mr Brant stated that Dr Smith ‘needs to go to jail for a little while to see what he put a lot of people through’.<sup>23</sup> Dr Smith was never prosecuted and a public inquiry was limited to examining systemic

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<sup>20</sup> *Criminal Code*, RSC 1985, c C-34, s 718.2(e).

<sup>21</sup> *R v Williams* [1998] 1 SCR 1128. The author represented the Aboriginal Legal Services of Toronto that intervened in favour of such questions being asked in this case.

<sup>22</sup> *R v Kokopenace* [2015] SCC 28.

<sup>23</sup> ‘Father in disgraced pathologist case acquitted’, *CBC News* (online), 4 May 2011 <<http://www.cbc.ca/news/canada/toronto/father-in-disgraced-pathologist-case-acquitted-1.1010766>>.

issues arising from his faulty testimony. The focus on systemic accountability, at the expense of individual accountability, is typical of the Canadian approach to wrongful convictions.<sup>24</sup>

Richard Brant's case fits into a pattern of Indigenous people being wrongly convicted on the basis of a weak prosecution case that was not effectively challenged by defence lawyers. Mr Brant's lawyer did not challenge Dr Smith's testimony despite the fact that an initial autopsy (not conducted by Dr Smith) found that the cause of the child's death was pneumonia not shaking. Because of the guilty plea, Dr Smith's testimony was not tested at trial and no competing expert evidence was called.

One of the recommendations of the public inquiry appointed in the wake of the Smith cases was increased legal aid funding designed to allow those who could not privately retain counsel to call competing expert witnesses.<sup>25</sup> One early Dr Smith case is also striking in this regard. A middle class family mortgaged their home to pay the expenses of a number of expert witnesses from the United States. The result was that the daughter of the middle class family was discharged at a preliminary inquiry and never faced trial when the judge accepted the testimony of the defence expert witnesses over that of Dr Smith.<sup>26</sup> The advantages of the adversarial system are not equally distributed. The economically disadvantaged, including Indigenous people, face greater risks of wrongful convictions stemming from difficulties of challenging the prosecution's case.

Another factor in guilty plea cases was the steep discount given for a guilty plea. Mr Brant was charged with manslaughter which has a maximum sentence of life imprisonment but received a sentence of six months imprisonment when he pled guilty to aggravated assault. Others in similar positions in the Dr Smith cases even received non-

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<sup>24</sup> See Kent Roach, 'Comparative Reflections on Miscarriages of Justice in Australia and Canada' in this issue.

<sup>25</sup> Ontario, Inquiry into Pediatric Forensic Pathology in Ontario, *Report* (1998), 460-3.

<sup>26</sup> *R v M(S)* [1991] OJ 1383.

custodial sentences when they pled guilty. In such cases, the pressures placed on even the innocent to accept responsibility and get on with their lives may be irresistible.

Like Canada, Australia has guilty plea discounts. Some Australian commentators have suggested that an accused should be allowed to argue innocence as a mitigating factor in sentencing.<sup>27</sup> There is a certain logic to this proposal given the harsh reality of cases where accused face long sentences and are offered deep discounts for a guilty plea that may force even the innocent to plea guilty. Such an approach is accepted in the United States.<sup>28</sup> Nevertheless such a “guilty but innocent” approach makes a mockery out of the idea that the criminal justice system is committed to the discovery of the truth and is repelled by the conviction of the innocent.

The guilty plea discount may especially work to the disadvantage of Indigenous persons. For example, while half of Australian prisoners have criminal records, over three quarters of Indigenous prisoners have such records.<sup>29</sup> Because so many Indigenous accused already suffer the stigma and disadvantages of a criminal record, they may be more inclined to plead guilty even if they are innocent or have a valid defence.

Indigenous people are also more likely to be denied bail than non-Indigenous accused. Pre-trial imprisonment may make it more difficult to contest guilt and give the accused an incentive to plead

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<sup>27</sup> Mirko Bagaric and Julie Brebner, ‘The Solution to the Guilty Plea Discount: The Qualified Guilty Plea’ (2002-3) 30 *International Journal of Sociology and the Law* 51.

<sup>28</sup> *North Carolina v Alford*, 400 US 25 (1970). The case concerned an African American accused who pled guilty to avoid capital punishment, but maintained his innocence. The United States Supreme Court accepted his ‘guilty but innocent plea’. The Court held, however, that the trial judge should determine whether there was a factual basis for the guilty plea.

<sup>29</sup> Australian Bureau of Statistics, *Aboriginal and Torres Strait Islanders Prisoners* <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Aboriginal%20&%20Torres%20Strait%20Islander%20prisoner%20characteristics~10007>>.

guilty if innocent. Although awareness that wrongful convictions arising from guilty pleas is relatively novel, Canada's *Royal Commission on Aboriginal Peoples* observed as early as 1996 that 'most Indian people enter guilty pleas because they do not really understand the concept of legal guilt or innocence, or because they are fearful of exercising their rights'.<sup>30</sup>

### C *Indigenous Women and Guilty Pleas*

Indigenous women face particular pressures to plea guilty especially when charged with crimes related to the high levels of domestic and family violence that they experience.

#### 1 *Australian Studies*

One Australian study found that 8 out of 10 Aboriginal women charged with killing their male partners pled guilty to manslaughter, one pled guilty to murder and the remaining woman was found guilty of manslaughter. In contrast, guilty pleas were only entered in 67 percent of 25 cases of non-Aboriginal women. There were also acquittals in 20 percent of those cases. Professors Stubbs and Tolmie relate the higher guilty plea rate of Indigenous women to a variety of factors including lack of access to lawyers, difficulties of communications and some Indigenous traditions of not speaking ill of the deceased.<sup>31</sup> Aboriginal women, particularly those who have may have a criminal record and/or are traumatised by violence, may be reluctant to testify. This may make it impossible for them to assert valid defences. A follow-up study found that 17 out of 19 cases of Indigenous women charged with murdering their partners were resolved by guilty pleas.<sup>32</sup> These important studies suggest that

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<sup>30</sup> Ottawa, Royal Commission on Aboriginal Peoples, *Gathering Strength* (1996), 167.

<sup>31</sup> Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women' (2008) 41 *Australian and New Zealand Journal of Criminology* 138, 148-9, 150.

<sup>32</sup> Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand? How Do They Fare?' (2014) 45 *Australian and New Zealand Journal of Criminology* 383, 386-7.

Indigenous women charged with killing their male partners in Australia are very likely to plead guilty and are at risk of doing so even when they are innocent or have a valid defence.

One case where the above phenomenon was recognised, albeit only on appeal, is the case of Robyn Kina an Indigenous woman who was convicted in 1988 of murdering her abusive male partner. In a sense the case was exceptional because there was a trial. Alas the trial lasted less than a day, no evidence was called on behalf of the defence and the jury deliberated for 50 minutes before finding Ms Kina guilty. Somewhat like the cases of Mr Stuart and Mr Brosseau, Ms Kina subsequently stated: ‘The lawyers and solicitors used a lot of big words and a lot of Aboriginal people can’t understand what they are talking about. I didn’t have a clue’.<sup>33</sup>

The Queensland Court of Appeal denied her appeal in 1988. It noted that ‘when the deceased was drunk he was occasionally aggressive toward the appellant and occasioned her injury in the past’,<sup>34</sup> but nevertheless ruled that there was no evidence of provocation. Self- defence was apparently not even argued at trial and no attempt was made to introduce fresh evidence at the first appeal.

A new appeal was ordered in 1993 by the Attorney-General after a petition by Ms Kina. The Queensland Court of Appeal considered fresh evidence not adduced at trial about the sexual and physical abuse that Ms Kina had suffered at the hands of the deceased; the deceased’s threats to rape Ms Kina’s niece; Ms Kina’s extremely difficult background and the linguistic difficulties that she had with her defence barrister. The Queensland Court of Appeal allowed the

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<sup>33</sup> Hedley Thomas, ‘Failure of justice system that feels all too familiar’, *The Australian* (online), 16 December 2006 <<http://www.theaustralian.com.au/news/nation/failure-of-justice-system-that-feels-all-too-familiar/story-e6frg6nf-111112697062>>.

<sup>34</sup> *R v Kina* (Unreported, Supreme Court of Queensland, 23 November 1988) as quoted in *R v Kina* (Unreported, Supreme Court of Queensland, 29 November 1993).

appeal from conviction and ordered a new trial. It stressed that ‘the concept of miscarriage of justice is broad and flexible and should not be curtailed by judicial exegesis’.<sup>35</sup> The majority of the Court of Appeal stressed the problems that Ms Kina had communicating with her lawyers. It concluded that it need not decide issues relating to a battered woman’s claim of self-defence or other possible defences that would reduce murder to manslaughter. One judge, however, expressed concerns that even though there was evidence of self-defence and provocation, the evidence was not raised at trial.<sup>36</sup> The prosecutor did not pursue a new trial in part because Ms Kina had already spent five years in prison.

The Robyn Kina case is an important miscarriage of justice case in Australia. It has fortunately attracted attention. It has been used as a basis for social context education and is the subject of a recent book.<sup>37</sup> As will be discussed below, it provides good evidence that wrongful convictions should not be restrictively defined and limited to cases of factual innocence. Ms Kina stabbed and killed her abusive partner, but it is difficult to maintain that her murder conviction and subsequent imprisonment was not wrongful and a miscarriage of justice.

## 2 *Canadian Studies*

Professor Sheehy’s important recent Canadian study of 91 cases of women who killed their spouses found that 37 of the women could be identified as Aboriginal. In 25 of these cases, the Indigenous women pled guilty to manslaughter. Ten of the Indigenous women went to trial and in seven of those cases, the women were acquitted.<sup>38</sup> This is a higher rate of acquittal than that found in Australian studies.

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<sup>35</sup> *R v Kina* (Unreported, Supreme Court of Queensland, 29 November 1993), 39.

<sup>36</sup> *Ibid* 51.

<sup>37</sup> Elizabeth Mackinlay, Kristy Thatcher and Camille Seldon, ‘Aboriginal and Torres Strait Islander Study Unit’ (2004) 33 *Australian Journal of Indigenous Education* 23; Dave Berry, *Robin Kina: Strong Aboriginal Woman: A Lifer Redeemed* (Dave Berry, 2014).

<sup>38</sup> Elizabeth A Sheehy, *Defending Battered Women on Trial* (University of British Columbia Press, 2014) 126, 189, 198, 320-36.



Nevertheless, the Canadian study documented some disturbing differences in the results of cases that went to trial. For example, one Indigenous woman, a residential school survivor, was convicted of manslaughter and received a three year sentence after the defence called a social worker to testify about the reactions of battered women while another Aboriginal woman who was able to present more qualified expert testimony was acquitted.<sup>39</sup>

Unfortunately less information is available about the 25 out of 37 cases where the Aboriginal women pled guilty because of the absence of trial transcripts. There is more information about one of these guilty plea cases because the case was litigated all the way to the Supreme Court of Canada on sentencing issues.<sup>40</sup> This case involved Jamie Gladue who stabbed and killed her partner Reuben Beaver on her 19<sup>th</sup> birthday. At the time, Ms Gladue was pregnant with her third child. She was charged with second degree murder which has a mandatory sentence of life imprisonment and ineligibility for parole for 10 years. However, she pled guilty to manslaughter and received a three year sentence. The case was officially presented as one based on the intoxication and provocation defences (both of which can reduce murder to manslaughter) based on the facts that Ms Gladue had just discovered that Mr Beaver had had sexual intercourse with her sister and that he had told her she was “fat and ugly”. In addition, Ms Gladue had a blood alcohol reading almost twice the legal limit.

Professor Sheehy suggests that there was also evidence that might have supported a self-defence claim. Reuben Beaver had been convicted of assaulting Jamie Gladue when she was pregnant with their first child. Ms Gladue had bruising from her fatal encounter with Mr Beaver.<sup>41</sup> Gladue’s new lawyers on the first appeal to the British Columbia Court of Appeal tried to introduce as fresh evidence a psychologist’s report describing the abuse and its impact

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<sup>39</sup> Ibid 152-60, 179-80.

<sup>40</sup> *R v Gladue* [1999]1 SCR 688. The author represented the Aboriginal Legal Services of Toronto which intervened in this case and argued that a distinct approach was necessary for the sentencing of all Aboriginal offenders.

<sup>41</sup> Sheehy, above n 38, 191.

of Ms Gladue. Nevertheless, the Court of Appeal refused to admit this fresh evidence on the basis that the report was inconsistent with the agreed facts and the guilty plea. It also indicated that the trial judge had adequately considered Mr Beaver's earlier conviction and concluded that Ms Gladue was not a "battered woman".<sup>42</sup> This arguably is based on a misreading of Canadian self-defence law which hinges not on whether an accused has the status or diagnosis of being a battered woman, but rather whether the woman acted reasonably given her past experiences and her reasonable perception of a threat.

The *Gladue* case is well known in Canada because it established an important precedent about the need for a distinct approach to the sentencing of all Aboriginal offenders. It is disturbing, however, that the case may also be a possible wrongful conviction in the sense that Ms Gladue might have had a valid self-defence claim even though she pled guilty at trial.

#### D *The Limits of Factual Innocence Requirements in Light of the Experience of Indigenous People*

Some define wrongful convictions restrictively as the conviction of those who are factually innocent.<sup>43</sup> This raises difficult issues of fit in legal systems such as Australia and Canada that do not recognise factual innocence. Both countries use broader definitions of miscarriages of justice which include various forms of procedural unfairness including cases where the accused was prejudiced in advancing what might be a valid defence. This means that there are a number of cases where convictions could be viewed as wrongful

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<sup>42</sup> *R v Gladue* [1997] CanLII 3015 (BC CA), [35]-[42]. But see *R v Lavallee* [1990] 1 SCR 852 at 890: 'The focus is not on who the woman is, but on what she did'.

<sup>43</sup> Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence* (Signet, 2001). North Carolina has recognised a second appeal right but restricted it to claims of factual innocence: NC Gen Stat §§ 15A-14, 60-75. For a review of its work see Kent Roach, 'An Independent Commission to Review Claims for Wrongful Convictions: Lessons from North Carolina?' (2012) 58 *Criminal Law Quarterly* 284, 299.

even though there may not be conclusive evidence of innocence or even continuing doubt over whether any crime has even been committed.<sup>44</sup> Cases such as the Robyn Kina case have rightly been recognised in Australia as a miscarriage of justice even though she stabbed and killed her abusive partner and was not factually innocent.

A case can also be made that the guilty pleas that Mr Brosseau and Ms Gladue entered in Canada may also be wrongful convictions. As Professors Parks and Cunliffe have suggested, definitions of wrongful convictions that are limited to factual innocence may ignore the disadvantages that marginalised groups may face in the justice system.<sup>45</sup> There is a particular danger that a focus on factual innocence will require the wrongly convicted to live up to an ideal of victimhood. As Professor Sheehy has outlined in her important study of battered women on trial in Canada, a number of Aboriginal women were reluctant to testify about abuse from their partners. They frequently described such abuse by the term “fighting” which downplays the seriousness of the abuse.<sup>46</sup> Another reason why Aboriginal women may downplay such abuse is a desire to protect surviving partners from imprisonment and an understanding that some abuse from Indigenous partners may stem from the harms of colonialism including the residential schools/Stolen Generations experience. Indigenous persons may have difficulties living up to implicit social and political ideals embraced in terms such as “factual innocence” and “exoneration” in part because such ideals themselves reflect cultural and political assumptions of the dominant society. In addition, Indigenous people may often find themselves in violent

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<sup>44</sup> Some might argue that every conviction overturned on appeal is wrongful: Michael Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (Palgrave, 2008). Such an approach would produce a very high number of wrongful convictions. See, eg, a study of 614 successful Australian appeals from convictions from 1 June 2005 to 31 December 2012: Judge Sydney Tilmouth, *The Wrong Direction: A Case Study and Anatomy of Successful Australian Criminal Appeals* <<http://clant.org.au/images/images/the-bali-conference/2013/Tilmouth.pdf>>.

<sup>45</sup> Parkes and Cunliffe, above n 1, 228.

<sup>46</sup> Sheehy, above n 38, 195.

situations where claims of factual innocence are not valid or particularly relevant.

There are other principled and normative arguments for broader definitions of wrongful convictions that would not be limited to proven factual innocence.<sup>47</sup> In some cases, a wrongful conviction should include a conviction under an unjust law. In Canada, for example, Aboriginal people were prohibited from engaging in some non-harmful cultural activities. Aboriginal people have also been prosecuted in Canada for exercising Aboriginal and Treaty rights. The conviction of Aboriginal people for such activities may be seen as wrongful. Aboriginal people are also disproportionately convicted of system based offences such as breach of bail, peace bond and probation conditions. There are concerns that the imposition of such conditions may in part be driven by stereotypes associating Aboriginal people with crime. All of these factors support a broader definition of wrongful convictions than one limited to factual innocence.

A factual innocence requirement is based on an incomplete understanding of the rules of criminal liability. It focuses simply on whether the prohibited act occurred. It is not generally attentive to whether the accused had the required mens rea or had a valid defence. One of the concerns in Lawrence Brosseau's case is that his own lawyer said he had no idea about his client's intent. This may have reflected linguistic issues and a lack of cross-cultural competence. The lawyers representing Robyn Kina and Jamie Gladue did not raise self-defence claims at trial even though an accused are entitled to acquittals if there is a reasonable doubt that they acted in self-defence. Ineffective assistance by defence counsel has played a role in a number of wrongful convictions, but it may be

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<sup>47</sup> Kent Roach and Gary Trotter, 'Miscarriages of Justice in the War Against Terror' (2005) 109 *University of Pennsylvania Law Review* 967; Susan Bandes, 'Framing Wrongful Conviction' [2008] *Utah Law Review* 1; Carol Steiker and Jordan Steiker, 'The Seduction of Innocence' (2005) 95 *Journal of Criminal Law and Criminology* 587. For a defence of a focus on innocence see Daniel Medwed, 'Innocentrism' [2008] *University of Illinois Law Review* 1549.

particularly important with respect to Indigenous accused and other marginalised groups.

The focus on factual innocence emerged from a particular American political environment that produced imprisonment rates significantly higher than any other democracy. Factual innocence may have been the only progressive move in the United States. It has been particularly important in resisting the death penalty. Nevertheless, it is far from clear that other democracies, including Australia and Canada, do not provide more fertile ground for a broader concern about justice that goes beyond concerns about the conviction of those who can prove that they are factually innocent.

#### IV WRONGFUL CONVICTIONS AND INDIGENOUS PEOPLE: OVER AND UNDER REPRESENTATION

Even accepting for the sake of argument restrictive definitions of wrongful convictions that are limited to the factually innocent, it is clear that Indigenous people are over-represented among the wrongfully convicted in respect to their percentage in the population.

##### A *Over-Representation Compared to the Indigenous Population in Society*

Rachel Dioso-Villa's important repository of 71 wrongful convictions in Australia contains 9 wrongful convictions of Indigenous people including two women.<sup>48</sup> This accounts for 14 percent of the wrongful convictions. At the same time, Aboriginal people being less than 3 percent of the total Australian population.

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<sup>48</sup> See Rachel Dioso-Villa, 'A Repository of Wrongful Convictions in Australia' in this issue.

Professor Dioso-Villa's list reveals new cases of Indigenous people who have been wrongfully convicted, but it may still understate the over-representation of Indigenous people given the difficulties of identifying people as Indigenous and her approach of limiting wrongful convictions to cases of factual innocence or cases where crimes did not occur. For example, her list does not contain Robyn Kina whose case was overturned as a miscarriage of justice, but does not satisfy the definition of factual innocence.

Unfortunately, a similarly comprehensive Canadian list of wrongful convictions has yet to be produced. Nevertheless it is relatively certain that on any Canadian list, Aboriginal people would be over-represented compared to their 4.3 percent representation of the population.

Canada's leading Innocence Project, the Association in Defence of the Wrongfully Convicted, has an admittedly partial and incomplete list of 20 wrongful convictions which include four people or 20 percent who are Indigenous including one woman.<sup>49</sup>

The conclusion that Indigenous people are over-represented among the wrongfully convicted in Australia and Canada is important. It is yet another indication of repeated findings that the criminal justice system fails Indigenous people. Nevertheless findings of Indigenous over-representation among the wrongfully convicted should not be surprising. To some extent they simply reflect the gross over-representation of Indigenous people among prisoners in both countries. It also likely reflects the role of conscious or unconscious stereotypes that associate Indigenous people with crime as well as cultural and economic difficulties and challenges that Indigenous people face in obtaining access to justice.

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<sup>49</sup> The cases of Donald Marshall, William Mullins-Johnson, Richard Brant and Tammy Marquardt are listed at <<http://www.aidwyc.org/cases/wrongful-convictions-timeline/>>.

*B Under-Representation Compared to Indigenous Populations in Prison*

Recognising that Indigenous people are over-represented among the wrongfully convicted in relation to their small percentage of Australia's or Canada's population should not end the analysis. There are many wrongful convictions that go undetected especially in jurisdictions such as Australia and Canada that rely on the pro bono work of volunteers in Innocence Projects and do not have a publicly funded institution such as the Criminal Cases Review Commission of England and Wales that has the potential to investigate claims of wrongful convictions.

Any analysis of Indigenous people and wrongful convictions should factor in the massive over-representation of Indigenous people in prison. The imprisoned are those most immediately at risk of having been wrongfully convicted. For example, Innocence Projects typically prioritise investigations on behalf of serving prisoners.

Indigenous people constitute 28 percent of the current Australian prison population.<sup>50</sup> When this number is considered, the fact that Indigenous people constitute 14 percent of those on Rachel Dioso Villa's list of discovered wrongful conviction actually starts to look like possible under-representation of Indigenous people among those people who have received remedies for wrongful convictions. Similarly even the fact that 20 percent of those on an incomplete Canadian list of the wrongfully convicted are Indigenous slightly under-represents their representation in the prison population that is at the most immediate risk for having been wrongly convicted.<sup>51</sup>

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<sup>50</sup> Australian Bureau of Statistics, above n 2. Over three quarters of Aboriginal prisoners had prior records compared with just over half of non-Indigenous prisoners, a factor that may be relevant to false guilty pleas.

<sup>51</sup> Indigenous prisoners constitute between 23 to 26 percent of Canadian prisoners: see Office of the Correctional Investigator, *Aboriginal Offenders: A Critical Situation* <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>>; Government of Canada, above n 3.

The under-representation of Indigenous persons among recognised and remedied wrongful convictions is even more dramatic for Indigenous women. Indigenous women constitute about 30 percent of all female prisoners in Australia<sup>52</sup> and 36 percent of admissions to sentenced custody in Canada.<sup>53</sup> At the same time, Indigenous women constitute only two of the 71 wrongfully convicted persons on the Australian list and only one on the incomplete Canadian list. As suggested above, Indigenous women may be more likely to plea guilty even if they are innocent or have a valid defence. They also face other barriers in having their wrongful convictions recognised and remedied.

*C Possible Explanations of Under-Representation Among  
Recognised and Remedied Wrongful Convictions*

Any list of wrongful convictions will be partial and incomplete, but something can be learned from the lists that are available. It is clear from the Australian and Canadian lists that Indigenous people are grossly over-represented among the wrongfully convicted in relation to their small percentage in the Australian and Canadian populations.

What is more surprising is that Indigenous people are under-represented in the Australian and Canadian lists of the wrongfully convicted in relation to the high percentages in which they are found in prison populations. This is quite different from the United States where African Americans constitute over 60 percent of DNA and 46 percent of exonerations not limited to DNA while constituting about 37 percent of the American prison population.<sup>54</sup> The American

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<sup>52</sup> Creative Spirits, *Aboriginal Prison Rates* <<http://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates#axzz3rZPj8PJ5>>.

<sup>53</sup> Government of Canada, *Adult correctional statistics in Canada, 2013/2014* <<http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14163-eng.htm#a8>>.

<sup>54</sup> The Innocence Project lists 206 African Americans among 333 exonerations: Innocence Project, *DNA exonerations nationwide* (26 October 2015) <<http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>>. The National Registry of Exonerations lists 797 African-Americans among its 1702 exonerations. African-Americans are thus included on these lists of wrongful convictions at a higher percentage than their 37 percent representation in state and federal prison populations in 2013: see



figures suggest that African-American people may not face the same type of barriers as Indigenous people in Canada and Australia face in having their wrongful convictions recognised and remedied.

How can the apparent under-representation of Indigenous people among those who have obtained remedies for their wrongful convictions in relation to their overrepresentation in the prison population be explained?

One hypothesis is that Indigenous people are less likely to be wrongfully convicted than others who are imprisoned for crime. This hypothesis, however, seems highly implausible given all the other disadvantages that Indigenous people face in the criminal justice system.

A more plausible hypothesis would be that there is a time lag between the representation of Indigenous people among current prison populations and the discovery of wrongful convictions. Many wrongful convictions take decades to be remedied. Indigenous overrepresentation in Australian and Canadian prisons has been increasing over time. In 1995, for example, Aboriginal people constituted 14 percent of Australia's prison population. This is the exact same percentage of Indigenous people found on the list of 71 historical wrongful convictions.<sup>55</sup> This might suggest that Indigenous people do not face particular barriers in having their wrongful convictions remedied in relation to their prison population given the

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National Registry of Exonerations, *Exonerations by Race and Crime* <<http://www.law.umich.edu/special/exoneration/Pages/ExonerationsRaceByCrime.aspx>>; US Department of Justice, *Prisoners in 2013* <<http://www.bjs.gov/content/pub/pdf/p13.pdf>>. Brandon Garrett has engaged in more fine grained analysis of the first 250 DNA exonerations based on the percentage of those convicted of the most relevant crimes, murder and rape, but still finds African Americans to be over-represented among the exonerees compared to the percentages of African Americans convicted of those crimes: Brandon Garrett, *Convicting the Innocent* (Harvard University Press, 2011).

<sup>55</sup> John Walker and David McDonald, 'The Over-representation of Indigenous People in Custody in Australia', *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, No 47, 1995).

time it typically takes to have any wrongful conviction remedied. This is an area that deserves further research.

A final hypothesis is that Indigenous people may experience particular barriers to having their wrongful convictions recognised and remedied that are not faced by non-Indigenous victims of wrongful convictions. This is an intuitively plausible hypothesis. The same disadvantages in the criminal justice system that contribute to their wrongful convictions may make Indigenous people less likely to obtain remedies for their wrongful convictions. In addition, many Indigenous people who have been wrongfully convicted may simply give up hope and not seek a remedy, especially after they have been released from prison. The conditions of colonialism that contribute to the frequent interaction between Indigenous people and the justice system may also lead to less frequent remedies for wrongful convictions. This may help explain why Indigenous people in Australia and Canada (unlike African-Americans) seem to obtain remedies for wrongful convictions at a lower rate compared to their percentage in the prison population. This hypothesis that Indigenous peoples face particular barriers in having wrongful convictions remedied should be tested by additional research. In short, more work is needed to understand the immediate and more structural causes of the wrongful conviction of Indigenous people and to devise strategies better to prevent and remedy such wrongful convictions.

## V AUSTRALIAN WRONGFUL CONVICTIONS INVOLVING INDIGENOUS PERSONS

Australia has had a number of recognised wrongful convictions involving Aboriginal people. The data set is small and the exact numbers must be viewed with extreme caution given both large numbers of unexposed and unremedied wrongful convictions and particular difficulties that Indigenous peoples may experience in gaining access to post-conviction legal assistance.

Nevertheless, a review of the recognised cases will outline some of the immediate and more structural causes of wrongful convictions as they affect Indigenous people. It will also suggest some remedies that may be particularly effective in preventing and remedying such wrongful convictions. It will be seen that those few Indigenous people in Australia who have had their wrongful convictions recognised have often been assisted by both courts and prosecutors in various ways.

#### A *Kelvin Condren*

An Aboriginal man Kelvin Condren was convicted in 1984 for murder. He was charged and prosecuted even though another non-Aboriginal man had confessed (though subsequently recanted) to the murder and Mr Condren had been arrested for public drunkenness on the night of the murder and some witnesses had seen the murder victim alive after the time that Mr Condren had been arrested and imprisoned. The circumstances of the case are suggestive of police tunnel vision which may also be influenced by stereotypes associating Aboriginal people with crime.

Another more immediate cause of the wrongful conviction may be somewhat similar linguistic issues as seen above in relation to the Stuart case. In 1987, the Queensland Court of Appeal dismissed an attempt to lead additional expert evidence that Condren's confession may have been related to Aboriginal speech patterns including the phenomenon of gratuitous concurrence. There were also attempts to introduce fresh evidence suggesting that the victim was seen alive after Mr Condren had been arrested on the night in question. The Court of Appeal refused to admit the new evidence on the basis that it was not fresh and could with due diligence have been introduced at trial.<sup>56</sup> Due diligence tests should be applied in a manner that is sensitive to the difficulties that all accused but particularly

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<sup>56</sup> *R v Condren* (1987) 28 A Crim R 261 at 297. For an account by the expert offered by the accused who did much work on the subject see Diana Eades, 'The case for Condren: Aboriginal English, pragmatics and the law' (1993) 20 *Journal of Pragmatics* 141.

Aboriginal accused may have in preparing evidence for trial. The accused may have to discover alibi evidence if the police investigation has been influenced by tunnel vision which assumes that the accused is guilty. It may also be difficult for lawyers to find appropriate expert witnesses to testify about issues that are specific to Indigenous people.

Mr Condren petitioned the Attorney-General with new evidence that if accepted would have suggested that the victim was still alive after Condren was arrested and imprisoned on the night of her death. The petition was denied. The type of unstructured and unreviewable petition procedure used in Australia creates a danger that the executive may deny the petitions of unpopular applicants. In general, the giving of reasons can help to counter the role that implicit or explicit prejudice may play.

Leave to appeal from the Queensland Court of Appeal was sought in the High Court. On this application, Condren's counsel seemed to concede that as a result of the then recent decision in *Mickelberg*<sup>57</sup> that the High Court could not admit new evidence even though new evidence relating to the timing of the murder would seem to exonerate Condren. Instead Condren's lawyer asked the High Court to either refer the new evidence to the Queensland Court of Criminal Appeal or to offer an opinion to the Attorney-General that a new petition should be allowed.

Chief Justice Mason at the start of the hearing appeared skeptical that the High Court could intervene noting 'it is not a step that this Court has ever taken before and it would require the Court to express an opinion as to what was desirable on the part of the Attorney-General divorced from any operative order or declaration that the Court might make'.<sup>58</sup>

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<sup>57</sup> [1989] HCA 35.

<sup>58</sup> Transcript of Proceedings, *Kevin Condren v The Queen* [1989] HCATrans (16 November 1989) 14.

As the hearing went on, however, a number of Justices appeared to accept that the new evidence relating to the timing of the killing after Condren's arrest was "very powerful evidence" of Condren's innocence. For example, Justice McHugh asked counsel for the Attorney-General that 'if it is accepted, it must lead to acquittal, must it not?'<sup>59</sup> Chief Justice Mason also raised concerns that 'the Court cannot turn a blind eye' to evidence that might, if accepted, lead to 'a significant possibility' that the verdict would be different. The Chief Justice then suggested that counsel for the DPP seek instructions 'in light of strong opinions'<sup>60</sup> expressed by the judges.

Over the lunch break, counsel for the DPP sought instructions and advised the Court that the DPP would instruct the Attorney-General on any new petition application about the views expressed by the Justices during oral argument. Counsel for the DPP then told the High Court that the Attorney-General had been advised in the previous denial of Condren's petition by the Solicitor-General. The implication seemed to be that the DPP as a prosecutor with quasi-judicial responsibilities would be more impartial and respectful of the concerns about the conviction voiced by the High Court than the Solicitor-General who acts as the government's lawyer.

In the end, Mr Condren's lawyer agreed to the hearing being adjourned *sine die* noting that 'it is not completely satisfactory, however, it is probably the best we could have hoped for ...'.<sup>61</sup> Mr Condren's subsequent petition was granted by the Attorney-General, albeit after a change to a Labor government.<sup>62</sup> One virtue of petitioning the executive is that applicants can make successive applications. One vice of the petition process is its lack of transparency. In this case, it is possible that Condren's petition to reopen his wrongful conviction might have continued to be denied without the Court's and the DPP's informal intervention and the

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<sup>59</sup> Ibid 69, 71 (McHugh J).

<sup>60</sup> Ibid 71.

<sup>61</sup> Ibid 75.

<sup>62</sup> Brown and Wilson, *Justice and Nightmares: Successes and Failures of Forensic Science in Australia and New Zealand* (New South Wales University Press, 1992) 173.

change of government. Given the secrecy of the petition procedure, we may simply never know.

A new Attorney-General referred Condren's case to the Queensland Court of Criminal Appeal for a second appeal. On the subsequent appeal, the Court of Appeal admitted new evidence both relating to the victim being seen alive after Condren had been arrested and jailed and on the issue of "Aboriginal English". The Court of Appeal quashed the conviction, but a majority ordered a new trial. One judge in dissent would have entered an acquittal on the basis that any subsequent conviction in the face of much contradictory evidence would be unsafe.<sup>63</sup> Australian courts generally order new trials even in cases of suspected wrongful convictions whereas Canadian courts are somewhat more inclined to enter acquittals which protect persons from subsequent prosecutions.<sup>64</sup> In any event, after hearing submissions from Condren's lawyers, the Queensland authorities decided not to prosecute Condren. He was released 7 years after his wrongful conviction.

The Queensland Crime Commission subsequently examined and dismissed allegations that Mr Condren and witnesses in the case had been assaulted in custody and that Condren's confession had been fabricated. The Commission applied a criminal standard of proof because such allegations amounted to allegations of crime. It decided that the high standard had not been satisfied in large part because of inconsistencies in Mr Condren's statements over time. It did not recommend any criminal or disciplinary charges against the police involved in the case, but noted that a more thorough original investigation might have prevented Condren from being charged.<sup>65</sup>

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<sup>63</sup> *R v Condren* [1991] 1 Qd R 578, 591 (Dowsett J)

<sup>64</sup> Kent Roach, 'Comparative Reflections on Miscarriages of Justice in Australia and Canada' in this issue.

<sup>65</sup> Queensland Criminal Justice Commission, *Report on the Investigation of the Complaints of Kelvin Ronald Condren and others* (1992) 41-2.

The fact that the Queensland police and prosecutors proceeded with such a weak case against Kelvin Condren suggests that they were influenced by tunnel vision. In other words, they may have prematurely fixed on Mr Condren as the suspect in part because he was romantically involved with the victim and known to the police. The police interrogated Condren until he confessed. The police were reluctant to consider another non-Indigenous suspect even when that other person confessed to the crime and witnesses indicated that they had seen the victim alive after Mr Condren had been arrested on unrelated charges on the night in question. The police and prosecutors persisted with an appallingly weak case in the face of mounting evidence that Condren did not and could not have committed the murder. As will be seen, some Canadian wrongful convictions of Aboriginal people involve similar forms of police tunnel vision in which weak cases were converted into wrongful convictions.

The Queensland Commission focused on specific allegations of fault, but was not blind to some of the systemic issues. It noted that ‘miscarriages of justice may occur in any criminal justice system’ but that when Indigenous people are involved ‘the odds of injustice increase dramatically because they have little or no stake in the system and it has little relevance to their lives’.<sup>66</sup> It recommended special procedures for interviewing Indigenous suspects under disability including the presence of counsel or an “interview friend” and the recording of police interviews. The Commission reasoned:

... it seems somehow grotesque to expect people who have been living at the edge of society in every way to fit into the rigid structure of the criminal justice system. Even the formal safeguards put in place in the system seem to provide little real protection.<sup>67</sup>

Many Australian states have adopted special procedures for interviewing Indigenous suspects and they provide some protections against false confessions and intimidation.

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<sup>66</sup> Ibid 69.

<sup>67</sup> Ibid 64.

### B *Terry Irving*

Terry Irving, an Indigenous man, was convicted by a jury of a bank robbery in Cairns in 1993 and sentenced to 8 years imprisonment. The suspect was originally described by a number of witnesses including a police officer as almost 6 feet in height and in his twenties. Mr Irving was charged even though he was only 5 feet 7 inches in height and in his late thirties. His trial originally scheduled for three days lasted less than a day when his barrister did not show up. He was convicted after being positively identified by the bank tellers.<sup>68</sup> As will be seen, mistaken eyewitness identification has played a role in several wrongful convictions of Indigenous people in both Australia and Canada. In some cases, difficulties of cross-racial identifications may be a factor.

Mr Irving was denied legal aid for his appeal and represented himself. The Queensland Court of Appeal denied his appeal in 1994 without written reasons. As in the Condren and Stuart cases, first appeals failed to correct wrongful convictions.

Again representing himself, Mr Irving sought to appeal to the High Court. The High Court adjourned the application for leave to appeal noting that the case revolved around identification evidence. The court indicated that it expected the prosecutor to 'have provided the applicant and the Court with a full transcript of the trial and a written explanation by reference to that transcript as to why' a police detective involved in the case had not been called as a witness in Irving's trial. The High Court also indicated that legal aid authorities should reconsider the matter.<sup>69</sup> As in the Condren case, the High Court did not hesitate to use its informal powers to assist a disadvantaged litigant.

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<sup>68</sup> Hans Sherrer, 'Court ok's compensation suit for Terry Irving for 4 and half years wrongful imprisonment for bank robbery', *Justice Denied* <<http://justicedenied.org/wordpress/archives/1452>>.

<sup>69</sup> Transcript of Proceedings, *Irving v The Queen* [1997] HCATrans 251 (15 August 1997).



Mr Irving was subsequently represented by a lawyer in the High Court. Chief Justice Brennan stated during the leave to appeal proceedings that:

... this Court is a court of appeal only. How do we cope with problems of the inadequacy of representation or error in the conduct of the prosecution when that evidence emerges only after the Court of Appeal has dealt with it?<sup>70</sup>

The DPP in some sense rescued the High Court from this dilemma by conceding: 'We have a lot of difficulty, with respect, contending that what occurred in Cairns was a fair trial'.<sup>71</sup> The Chief Justice then concluded:

In the circumstances, the admissibility of which may be in doubt - and I am referring to the affidavit evidence - gives the gravest misgiving about the circumstances of this case: a serious crime; counsel brought in at the last moment; material which is relevant to cross-examination of identification not in counsel's hands at the time that the trial starts; evidence in relation to the bank video not adduced; and then there follows problems in relation to the calling of Detective Pflingst who evidently broadcast or authorised the broadcast of a description of the alleged offender which, at least in terms of age and perhaps in terms of height, does not suit the accused. It is a very disturbing situation. And in all of this, the accused has been denied legal aid for his appeal.<sup>72</sup>

And:

... In the light of the concession which counsel for the Crown has properly made, the order of the Court is that special leave be granted to appeal to this Court; that the appeal be heard *instanter*; that the appeal be allowed; that the order of the Court of Appeal be set aside; that in lieu thereof the appeal to that court be allowed, that the conviction be quashed and that a new trial be ordered.<sup>73</sup>

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<sup>70</sup> Transcript of Proceedings, *Irving v The Queen* [1997] HCATrans 405 (8 December 1997).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

Mr Irving was released from jail three days later. The Crown subsequently entered a *nolle prosequi*. As Sangha and Moles have suggested the result was ‘sensible and pragmatic, but arguably inconsistent with the rule in *Mickelberg*,<sup>74</sup> which prevents the High Court from considering fresh evidence.

Mr Irving has subsequently sought additional remedies in a number of different venues but so far without success. The Queensland Criminal Justice Commission found no official misconduct in his case and the Queensland Attorney-General has denied a request for compensation. Mr Irving is also suing the responsible officials. Some of the same barriers that Indigenous people face in having wrongful convictions remedied may also be relevant when they attempt to obtain compensation. Mr Irving has even tried to go beyond the Australian justice system and made a complaint to the United Nations Human Rights Committee. It, however, ruled the complaint inadmissible on the basis that Mr Irving had not exhausted his domestic remedies.<sup>75</sup>

### C *Vincent Narkle*

In 1992, a complainant told police that she was sexually assaulted by two young Aboriginal males at a house in Western Australia. Vincent Narkle lived in the house in question. The complainant identified Mr Narkle from a photo line-up. Mr Narkle was arrested and interrogated. He confessed to the sexual assault, though he subsequently said that he made the confession because he was hit in the ribs and intimidated by the detectives. A jury convicted him in 1993 of unlawful detention and unlawful sexual penetration. He was sentenced to 5 years imprisonment. His appeal to the Court of Appeal was dismissed the same year, as was an application to the High Court for special leave to appeal. This is another demonstration that first appeals often fail to prevent wrongful convictions.

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<sup>74</sup> Bibi Sangha and Robert Moles, *Miscarriages of Justice and the Rule of Law in Australia* (LexisNexis, 2015) 78.

<sup>75</sup> Human Rights Committee, *Views: Communication No 880/1999*, UN Doc CCPR/C/74/D/880/1999 (2002) (*Mr Terry Irving v Australia*).

In 2006, Mr Narkle's conviction was quashed and an acquittal entered on the basis that the police officers who conducted the photo-line up with the complainant had not disclosed that they had on several previous occasions shown her photos of Mr Narkle. The Court of Appeal overturned the conviction in light of the prosecution's concessions 'that the non-disclosure has led to a miscarriage of justice, in that the appellant has, as a result of it, lost a fair chance of acquittal'.<sup>76</sup> Because Mr Narkle had already served his five year sentence, the Court of Appeal:

... ordered that the convictions be set aside and that, in lieu, there be a judgment of acquittal in respect of each charge. There should be no re-trial.<sup>77</sup>

In this way, Mr Narkle received the tangible remedy of an acquittal and not simply an order for a new trial. He also subsequently received \$163,000 in compensation for the 18 months he spent in jail.<sup>78</sup>

#### D *Frank Button's DNA Exoneration*

An Aboriginal man, Frank Button was wrongfully convicted in 2000 of raping a 13 year old girl. Like Vincent Narkle, he lived in the same house as the victim. Button's nephew provided evidence against his uncle, but retracted the evidence at trial saying he was intimidated by the police. Mr Button was convicted by an all-white jury. Although there was biological material on the girl's bed sheets, no DNA testing was done, apparently because of a belief that it was not necessary because the perpetrator had been identified and because of resource constraints.

The biological material was, however, eventually tested and found not to come from Mr Button. This was admitted as fresh evidence on

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<sup>76</sup> *Narkle v The State of Western Australia* [2006] WASCA 113, [13].

<sup>77</sup> *Ibid.*

<sup>78</sup> '163,000 for 18 months in jail', *Western Australia Sunday Times* (online), 4 July 2007 <<http://netk.net.au/Tort/Tort1.asp>>.

the appeal. The Queensland Court of Appeal stated that the conviction was ‘entirely false’<sup>79</sup> and that it was a ‘black day in the history of the administration of justice in Queensland’.<sup>80</sup> It quashed the conviction, but ordered a re-trial.<sup>81</sup> A subsequent media investigation suggests that while the victim had told the police Frank Button was in the house and inebriated at the time of the rape, that she had described a perpetrator who was younger and had shorter hair than Mr Button. As in the Irving case, this suggests a willingness to continue to prosecute a case despite evidence that is inconsistent with the accused’s guilt.

Mr Button subsequently explained his trial as follows:

Once I sat in the dock there, listening to all these people give their statements and all that, I just picked -- I just picked a spot up on the wall above the judge’s head, and just kept looking at that. You know, tried to block it all out. Thought about something else. Tried to think about other things.<sup>82</sup>

These comments reveal the alienation that some Indigenous people experience from the justice system even in cases where linguistic comprehension does not appear to be an issue. This also raises questions about the quality of representation that Indigenous people may receive in some criminal trials.

A subsequent inquiry by the Queensland Crime and Misconduct Commission concluded that there was no individual misconduct by the investigating officer and forensic scientist in the case. The Commission did not investigate whether the fact that Mr Button and the victim were Indigenous had played a role in the case.<sup>83</sup> This 2002 report demonstrated less concern with systemic issues than the 1992

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<sup>79</sup> *R v Button* [2001] QCA 133, 4.

<sup>80</sup> *Ibid* 2.

<sup>81</sup> *Ibid* 5.

<sup>82</sup> Australian Broadcasting Corporation, ‘A Black Day for Justice’, *Four Corners* <<http://www.abc.net.au/4corners/stories/s507423.htm>>.

<sup>83</sup> Queensland Crime and Misconduct Commission, *Forensics under the Microscope*, October 2002.

report on the Kelvin Condren case. This is unfortunate because inquiries provide an opportunity to identify some of the systemic and structural causes of wrongful convictions. For example, one Canadian inquiry into a wrongful conviction has focused on issues of systemic discrimination faced by Indigenous people in the criminal justice system.<sup>84</sup>

### E *Derek Bromley*

Derek Bromley was known to police and had been released from prison shortly before he was arrested for murder. A person with a mental illness implicated Bromley in the death of a man whose decomposed body was found in the Torrens River. Another witness, a taxi driver, identified Mr Bromley as one of three Aboriginal persons that he drove to the river along with the victim who was not Indigenous. The taxi driver described Mr Bromley as a person dressed in a white suit, something that other witnesses denied.

Bromley was convicted of murder in 1984 and his first appeal was denied. In 1986, the Australia High Court denied leave to appeal. It was satisfied that the trial judge's warning to the jury about the witness who suffered from a mental illness was sufficient. It was also satisfied that there were sufficient warnings to the jury about discrepancies between a taxi driver's description and identification of Mr Bromley as one of three Aboriginal men seen with the deceased on the night of his death and descriptions of Mr Bromley by other witnesses.<sup>85</sup> Difficulties of cross-racial identification have played an important role in many of the American DNA exonerations.<sup>86</sup>

Mr Bromley has been imprisoned since 1984. He has been denied parole because he maintains his innocence. He has failed in two

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<sup>84</sup> Nova Scotia, Royal Commission on the Donald Marshall Jr. Prosecution, *Report* (1989).

<sup>85</sup> *Bromley v The Queen* [1986] HCA 49.

<sup>86</sup> Of the first 250 DNA exonerations in the US, 71 involved white women who misidentified an African American as the perpetrator of a sexual offence: see Garrett, above n 54, 73.

petitions in 2006 and 2011 to the Attorney-General to re-open his case. In both cases, much of the new evidence related to concerns about testimony that Dr Colin Manock, a forensic pathologist, gave at trial relating to the victim's cause of death and the timing and method of bruising on a decomposed body that had spent considerable time in the water. Mr Bromley is expected to file an appeal under new South Australian provisions enacted in 2013 that allow second appeals by accused if there is fresh and compelling evidence. Unlike some cases in Canada, no attempt has been made to obtain bail pending appeal in this case even though bail would arguably be available pending a second or subsequent appeal.<sup>87</sup>

The new evidence to be offered as fresh and compelling evidence will likely relate to pathology evidence and the key witness who had a mental disorder. It remains to be seen whether the original problems with identification and unreliable witnesses will be considered under the South Australian provisions for subsequent appeals based on fresh and compelling evidence. A recent South Australian decision suggests that courts may take a broad view of what evidence is fresh especially if there has been disclosure violations or misleading evidence.<sup>88</sup>

#### F *The Campbell and Rotumah Five*

This relatively recent Sydney case stemmed from an incident in which five young Indigenous people, Gary, Ian and Vivian Campbell and Brett and Steven Rotumah, were convicted of an affray offence arising out of an altercation with white youth who had used racial slurs but were not charged. The police obtained confessions from four of the accused, but their convictions were overturned in part

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<sup>87</sup> Section 4(c) of South Australia's *Bail Act 1985* (SA) provides that a person who has been convicted and sentenced can still be eligible for bail if he or she 'has not exhausted all rights of appeal against the conviction or sentence, or to have it reviewed'. Although enacted before the 2013 second appeal provisions, this bail provision would seem to apply to a person seeking a second or subsequent appeal against a conviction.

<sup>88</sup> *R v Drummond (No 2)* [2015] SASFC 82.

because of a failure to follow special rules requiring Aboriginal Legal Services to be informed of their interrogations.

Vivian Campbell did not make a statement but the court concluded that it was:

... left with a sense of real unease about this conviction. In all the circumstances, I am satisfied that his Honour ought to have had a reasonable doubt about this charge.<sup>89</sup>

This approach suggests the continued importance of not limiting wrongful convictions to cases of proven factual innocence. This case also indicates how excessive police behavior can contribute to the wrongful conviction of Indigenous persons.

#### G *Jeanie Angel*

Indigenous women account for more than a third of the female prison population in both Australia and Canada. Given this over-representation, it is somewhat shocking that the Jeanie Angel case is generally seen as the only recognised case of a wrongful conviction of an Indigenous woman in Australia. One possible explanation may be particular difficulties that Indigenous women experience accessing legal services that would be necessary to overturn wrongful convictions. Another factor, as discussed above, is that Indigenous women may face great pressures to plead guilty and this may make it more difficult for them to have a wrongful conviction recognised and remedied.

Jeanie Angel was convicted by an all-white jury of murdering another Indigenous woman in 1989. The prosecution introduced a confession from her, but Ms Angel retracted the confession claiming that the police had threatened and assaulted her during an interrogation where counsel was not present. She also claimed that

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<sup>89</sup> *Campbell and 4 Ors v Director of Public Prosecutions (NSW)* [2008] NSWSC 1284, [49].

the police had tricked her into signing a confession even though she could not read or write.<sup>90</sup> Her conviction underlines the importance of credibility determinations at trial and the danger that Aboriginal people, perhaps especially women, will not be believed.

In 1991, however, the Crown consented to overturning Angel's conviction. As in the Vincent Narkle case discussed above, the Western Australian Court of Appeal took the relatively rare step of entering an acquittal rather than ordering a new trial.<sup>91</sup> Crown concessions played an important role in both the Narkle and Angel cases. Combined with the High Court's actions in both the Condren and Irving cases, they demonstrate that judges and prosecutors have exercised their discretion to the benefit of some Indigenous people who are victims of wrongful convictions. This is admirable and produced effective remedies in the individual cases. Nevertheless, it does not change the structural factors that led to the wrongful convictions in the first place. It also suggests that all of these wrongful convictions might have gone unremedied had prosecutors and judges not lent a helping hand. This is relevant to the previous discussion which suggested that Indigenous people may be under-represented among those who have had their wrongful convictions recognised in relation to their presence in the prison population. One hypothesis that could explain such under-representation is that Indigenous people may face particular barriers in obtaining remedies for wrongful convictions. The High Court addressed some of these barriers by finessing the restrictions on fresh evidence in the Condren and Irving cases and prosecutors eventually assisted in the Angel and Narkle cases. Many other Indigenous victims of wrongful convictions may not be so lucky.

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<sup>90</sup> 'Murder suspect 'forced to confess'', *news.com.au* (online), 6 December 2007 <<http://www.news.com.au/news/suspect-forced-to-confess/story-fna7dq6e-1111115043959>>. On continued problems in Western Australia in interviewing Aboriginal suspects and witnesses and providing proper interpretation see *State of Western Australia v Gibson* [2014] WASC 240; Corruption and Crime Commission *Report on Operation Aviemore* 5 November 2015.

<sup>91</sup> *R v Angel* (Unreported, Western Australia Court of Appeal, 8 October 1991).



There are limits to the state's benevolence to Indigenous victims of wrongful convictions. The Western Australia government refused to compensate Ms Angel, even though she suffered the hardship of her four year old son dying during the two years in which she was imprisoned.<sup>92</sup> No one was ever charged in relation to the victim's death though three other women reportedly received tribal punishments for it.<sup>93</sup> This case also illustrates how wrongful convictions can also harm Indigenous people in the many cases where the victim of the crime is also Indigenous.

#### H *Summary*

The recognised Australian cases suggest that false confessions and mistaken identifications are particularly prevalent as immediate causes in these wrongful convictions of Indigenous persons. Jeanie Angel, Kelvin Condren, and the Campbell/Rotumah five, as well as the historical Stuart case, all involved false confessions. A number of jurisdictions have responded with rules that require recording of police interviews and special accommodation of Aboriginal interviewees. This may respond to the immediate cause of false confessions, but a deeper problem may be that false confessions can reflect police tunnel vision fueled in part by stereotypes associating Aboriginal people with crime. They may also reflect a willingness of the police to use or threaten violence towards Indigenous suspects and a despair that some Indigenous suspects may have about their ability to prove their innocence. As the Queensland Crime Commission noted in its examination of the Condren case, false confessions may also be a product of the alienation that many Aboriginal people feel towards the justice system.<sup>94</sup>

The Terry Irving, and Vincent Narkle cases involve mistaken identifications with some police misconduct in the form of

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<sup>92</sup> Tony Barrass, 'No cash for Aboriginal woman Jeanie Angel wrongly jailed', *The Australian* (online), 3 June 2008 <<http://www.theaustralian.com.au/news/nation/no-cash-for-woman-wrongly-jailed/story-e6frg6pf-1111116520126>>. See also *The Australian*, 6 December 2007.

<sup>93</sup> news.com.au, above n 90.

<sup>94</sup> Queensland Criminal Justice Commission, above n 65, 69.

suggestions in the Narkle case. Misidentification may also be an issue in the Derek Bromley case. The Frank Button case is also reflective of a form of tunnel vision which concluded that it was not necessary to test a DNA sample until after a conviction had been recorded. The recognised cases of wrongful convictions of Indigenous people and especially Indigenous women may well be the tip of the iceberg given the large number of Indigenous people that come into conflict with the Australian criminal justice system.

## VI CANADIAN WRONGFUL CONVICTIONS INVOLVING INDIGENOUS PERSONS

### A *Donald Marshall Jr.*

The most notorious Canadian wrongful conviction involving an Indigenous person remains the 1971 murder conviction of Donald Marshall Jr. Mr Marshall always claimed he was innocent. Unfortunately he was repeatedly disbelieved by all justice system actors.

The police disbelieved Marshall when he told them that a third party had stabbed both him and the victim even though Marshall called the police and was indeed stabbed. Marshall's own lawyers appear not to have believed in Marshall's innocence. They conducted no independent investigations and made no disclosure requests to the prosecutor. Finally, the jury of 12 white men that convicted him did not believe Marshall's testimony that he did not stab the victim.<sup>95</sup>

The federal Minister of Justice in 1983 referred Marshall's case for a second appeal to the Nova Scotia Court of Appeal. The Crown prosecutor consented to overturning the appeal, but the Court of Appeal (which included a judge who had been Attorney-General at

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<sup>95</sup> Nova Scotia, Royal Commission on the Donald Marshall Jr. Prosecution, *Report* (1989).

the time of Marshall's original conviction) blamed Marshall for his wrongful conviction. It concluded that 'any miscarriage of justice is, however, more apparent than real'.<sup>96</sup> It suggested that Marshall could still be prosecuted for perjury for not admitting that he and the victim were attempting to rob the man who killed the victim. The Marshall case revealed at each stage of the process how Indigenous people are at increased danger of losing credibility battles that can be a determining factor in many wrongful convictions.

A subsequent Royal Commission heard testimony from Marshall in the Mikmaq language though Marshall had testified in his original trial in English.<sup>97</sup> It was the first justice system actor who believed Marshall. The Commission accepted that Marshall was not attempting to rob the perpetrator when the perpetrator stabbed both him and the homicide victim. It is noteworthy that the perpetrator who was white was eventually convicted of manslaughter even though Marshall was wrongfully convicted of murder.<sup>98</sup> It will be seen below that two Indigenous people were wrongly convicted of murder as a result of flawed pathology testimony from Dr Charles Smith even though many others were convicted of lesser crimes of manslaughter and infanticide.<sup>99</sup> Wrongful convictions cannot and should not be studied apart from pervasive inequalities in the justice system.

The Royal Commission severely criticised all justice system actors for their handling of the case. The only exception was the all-white jury who convicted Marshall. It remains a crime in Canada to inquire into jury deliberations.<sup>100</sup> It is unfortunate that the commission did not examine a press report at the start of its mandate that one of the jurors at Marshall's 1971 trial even when confronted

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<sup>96</sup> *R v Marshall* (1983) 57 NSR (2d) 286.

<sup>97</sup> Nova Scotia, Royal Commission on the Donald Marshall Jr. Prosecution, *Report* (1989), 171.

<sup>98</sup> *R v Ebsary* (1984) 15 CCC (3d) 38 (NSCA); *R v Marshall* (1972) 8 CCC (2d) 329 (NSCA).

<sup>99</sup> See Kent Roach, 'Comparative Reflections on Miscarriages of Justice in Australia and Canada' in this issue.

<sup>100</sup> *Criminal Code*, RSC 1985, c C-34, s 649.

with evidence of Marshall's innocence explained the conviction in the following racist terms:

With one redskin and one Negro involved, it was like two dogs in a field - you knew one would kill the other. I would expect more from a white person. We are more civilised.<sup>101</sup>

The Royal Commission found that Marshall's status as an Aboriginal person affected the handling of his case. The police virtually framed Marshall. They kept interviewing young and vulnerable witnesses until those witnesses were prepared to lie in court by testifying that they saw Marshall commit the crime. When the witnesses tried to recant, their attempts to do so were thwarted by the trial judge who seemed to assume that any recantation by the witness must be related to threats from Marshall, even though Marshall had been detained and denied bail since his arrest.

Both the prosecutor and the defence lawyers essentially accepted the police's case and neither asked for all of the police notes with the witnesses which would have revealed inconsistencies. The case has resulted in some positive reforms, most notably the Supreme Court's recognition of a broad constitutional right of disclosure,<sup>102</sup> but such a right would not apply in Marshall's case because the defence did not ask for disclosure. The Royal Commission made some recommendations about creating Indigenous justice systems, but it is doubtful that such systems would apply in cases of serious crimes. In any event, such reforms have not been implemented.<sup>103</sup>

### B *William Mullins-Johnson*

The Richard Brant case has been described above, but Mr Brant was not the only Aboriginal person wrongly convicted in the Dr Charles

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<sup>101</sup> Alan Story, 'The tangled tale of Donald Marshall: Racial prejudice and perjury helped put him behind bars', *Toronto Star*, 9 June 1986, A8.

<sup>102</sup> *R v Stinchcombe* [1991] 3 SCR 326.

<sup>103</sup> Jane MacMillan, 'Still Seeking Justice: The Marshall Inquiry Narratives' (2014) 47 *University of British Columbia Law Review* 927.

Smith cases. William Mullins-Johnson served 11 years in jail after being convicted for sexually assaulting and murdering his young niece. Like Marshall, Mullins-Johnson always claimed he was innocent, but he was convicted by a jury. In a 2:1 decision, the Ontario Court of Appeal upheld the conviction, but with one judge dissenting on the basis that the trial judge had erred by not sufficiently instructing the jury about evidence consistent with the accused's defence.<sup>104</sup> Under Canada's Criminal Code, this dissent gave the accused an appeal as of right to the Supreme Court. A five judge panel of the Supreme Court dismissed the appeal with a single line judgment stating agreement with the majority of the Court of Appeal.<sup>105</sup> The case is a dramatic illustration of the limitations of appeals as a means of correcting miscarriages of justice.

Mr Mullins-Johnson was first released from custody in September 2005 on \$125,000 bail pending the result of his application to the federal Minister of Justice for a second appeal.<sup>106</sup> The granting of bail pending a petition is an act of judicial creativity which has no known parallel in Australia. The federal Minister of Justice granted the petition and ordered a new appeal. In 2007, the Ontario Court of Appeal, with the consent of the prosecutor, overturned Mr Mullins-Johnson's murder conviction on the basis of new pathology evidence indicating that the cause of the niece's death was accidental and that evidence that the niece had been sexually assaulted was a post-mortem artefact.

Mr Mullins-Johnson asked the Court of Appeal for a formal declaration of his innocence, but the Court of Appeal concluded that 'just as the criminal trial is not a vehicle for declarations of factual innocence, so an appeal court ... has no jurisdiction to make a formal legal declaration of factual innocence'.<sup>107</sup> At the same time, the Court of Appeal apologised for Mr Mullins-Johnson being 'wrongly

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<sup>104</sup> *R v Mullins-Johnson* (1996) 112 CCC (3d) 117 (Ont CA).

<sup>105</sup> *R v Mullins-Johnson* [1998] 1 SCR 977.

<sup>106</sup> Colin Perkel, 'Mullins-Johnson free after 12 years', *National Post*, 21 September 2005 <<http://truthinjustice.org/mullins-johnson.htm>>.

<sup>107</sup> *R v Mullins-Johnson* [2007] ONCA 720, [24].

convicted' and entered an acquittal.<sup>108</sup> Three years later, Mullins-Johnson received \$4.25 million in compensation. His lawyer noted that money could not repair the stigma and danger that he had suffered during 11 years in jail or the damage to him and his family.<sup>109</sup>

### C *Tammy Marquardt*

Tammy Marquardt is another Dr Smith case. She is not widely known as Indigenous but is described on the Association in Defence of the Wrongfully Convicted's website as having an Anishinabe father.<sup>110</sup> She served almost 14 years in prison.

As a 21 year old single mother, Ms Marquardt was charged with murdering her 2½ year old son. Her son had previously been placed in child welfare care and also had pre-existing health problems including epilepsy.<sup>111</sup> Involvement with child welfare officials is a constant in the lives of many Aboriginal parents in Canada and Indigenous children constitute almost 40 percent of all children in child welfare care.<sup>112</sup> This makes many Aboriginal parents subject to increased state surveillance and more vulnerable to charges and prosecutions for the injury or death of their children.

Before trial, Ms Marquardt unsuccessfully sought to question prospective jurors about whether they would be prejudiced against her because of the allegations of child killing. She did not seek to ask a question about prejudice on the basis of her Indigenous status

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<sup>108</sup> Ibid [26].

<sup>109</sup> Theresa Boyle, 'Man wrongfully convicted in Smith case gets 4.25 million', *Toronto Star*, 22 October 2010.

<sup>110</sup> See <<http://www.aidwyc.org/cases/historical/tammy-marquardt/>>.

<sup>111</sup> *R v Marquardt* [2011] ONCA 281, [4].

<sup>112</sup> National Collaborating Centre for Aboriginal Health, *Aboriginal and Non-Aboriginal Children in Child Protection Services* <[http://www.nccah-ccnsa.ca/docs/fact%20sheets/child%20and%20youth/NCCAH\\_fs\\_childhealth\\_EN.pdf](http://www.nccah-ccnsa.ca/docs/fact%20sheets/child%20and%20youth/NCCAH_fs_childhealth_EN.pdf)>.

perhaps because such questions would alert jurors to it.<sup>113</sup> In any event, the jury did hear prejudicial evidence about Ms Marquardt even though it had minimal probative value. Specifically, it heard evidence that two weeks after her son's death, Ms Marquardt, after drinking, had told people she had killed her son, in part because she had forgotten how to perform CPR.<sup>114</sup>

Dr Smith testified at the trial that the child's cause of death was asphyxia "consistent with" a pillow being used to smother him. He ruled out epilepsy as a cause of death. If the jury accepted his expert testimony, it virtually guaranteed Ms Marquardt's conviction given that she was the only person with access to her child at the time in question. An inquiry examining these cases would later find that Dr Smith made inappropriate reference to her family life and also did not understand his role as an expert witness to be impartial.<sup>115</sup>

In 1998, the Ontario Court of Appeal dismissed Ms Marquardt's appeal from her murder conviction. Her lawyer argued that the trial judge had failed to relate the evidence to a possible manslaughter verdict. The Court of Appeal noted that Ms Marquardt had testified and denied that she was angry, had a black out or any other type of mental state that would support a manslaughter verdict.<sup>116</sup> Donald Marshall's lawyers similarly argued in his 1972 appeal that the trial judge had erred in not leaving a manslaughter verdict for the jury to consider.<sup>117</sup> Such arguments are problematic because they are in tension with both Marshall's and Marquardt's consistent claims of innocence. At the best, the defence lawyers' arguments in these appeals demonstrated a lack of sensitivity to their client's story. At worst, they may have presumed and hinted at guilt.

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<sup>113</sup> *R v Marquardt* (1994) 44 CR (4<sup>th</sup>) 353 (Ont Gen Div).

<sup>114</sup> *R v Marquardt* [2011] ONCA 281, [12].

<sup>115</sup> Ontario, Commission of Inquiry into Pediatric Forensic Pathology, *Report* (1988), 183, 188.

<sup>116</sup> *R v Marquardt* (1998) 124 CCC (3d) 375 (Ont CA).

<sup>117</sup> *R v Marshall* (1972) CCC (2d).

In any event, Ms Marquardt's appeal was denied in 1998 and she did not seek to appeal to the Supreme Court. In 2009, as evidence of Dr Smith's incompetence mounted, Ms Marquardt appealed to the Supreme Court out of time. The court in a short summary judgment granted the leave to appeal and remanded the case to the Ontario Court of Appeal to hear fresh evidence.<sup>118</sup> She was subsequently granted bail pending the appeal, thus releasing her from 13 years imprisonment. Both the Supreme Court of Canada's willingness to consider fresh evidence and the granting of bail are examples of judicial creativity in crafting remedies for wrongful convictions.<sup>119</sup>

The Ontario Court of Appeal with the consent of the prosecutor considered fresh evidence that the cause of her son's death was accidental and quashed Ms Marquardt's murder conviction. It ordered a new trial rather than an acquittal, but prosecutors subsequently withdrew charges.<sup>120</sup> This case and Mr Mullins-Johnson's case raises questions about why these two Indigenous people, unlike many other of Dr Smith's victims, were prosecuted and convicted of murder.

#### D *The DNA Exoneration of Herman Kaglik*

There are a number of less known but no less important wrongful convictions of Indigenous people in Canada. Herman Kaglik, an Inuit man, was convicted by a jury in 1992 of raping his adult niece. He was convicted again in 1993 of raping her on other occasions. His niece subsequently retracted the allegations as she was dying of cancer and DNA testing confirmed this retraction. Mr Kaglik was awarded \$1.1 million in compensation. He subsequently told reporters that he had been imprisoned in Alberta, 2500 kilometres from his home in the Northwest Territories and that: '... prison is a violent place. I fought every single day. I was beaten on many

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<sup>118</sup> *Tammy Marie Marquardt v Her Majesty the Queen* [2009] CanLII 21729 (SCC).

<sup>119</sup> See Kent Roach, 'Comparative Reflections on Miscarriages of Justice in Australia and Canada' in this issue.

<sup>120</sup> *R v Marquardt* [2011] ONCA 281.



different occasions. Prisoners tried to rape me'.<sup>121</sup> There was no inquiry into Mr Kaglik's wrongful conviction. Like Frank Button's DNA exoneration, Mr Kaglik's case is not as well-known as it should be.

E *Mistaken Identification: Jason Hill and Allan Miaponoose*

As in the Australian cases of Terry Irving and Vincent Narkle, some wrongful convictions of Aboriginal persons in Canada have arisen from mistaken eyewitness identifications. These cases also demonstrate tunnel vision where the police settled on an Aboriginal suspect despite significant indications that they had the wrong person.

Jason Hill, an Aboriginal person, was convicted of one count of robbery in 1996. He was arrested for a series of 10 robberies that the police were under pressure to solve. In the end, he was only prosecuted for one count because another person was charged and convicted of the other similar "plastic bag" robberies that continued after Mr Hill's arrest and pre-trial detention. The police knew Mr Hill from having arrested him in the past. They suspected him in the robbery and made his picture available in newspapers and on television even before his arrest.

Mr Hill was convicted by a jury in 1996 after a four day trial and nine and a half hours of jury deliberations.<sup>122</sup> His appeal was allowed with the Court of Appeal expressing concern that the two witnesses had been shown a newspaper photo of Mr Hill and that there was:

... no police lineup for any of the witnesses, and there should have been. The only identifications of the appellant directly by all the witnesses were in dock identifications. We are not satisfied that the general instruction by the trial judge as to the frailties of identification evidence

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<sup>121</sup> '\$1.1 million awarded to man wrongly convicted of rape: Herman Kaglik spent nearly 5 years in jail', *Toronto Star*, 20 December 2001, A08.

<sup>122</sup> 'Plastic bag bandit convicted of hold up at credit union', *Hamilton Spectator*, 9 March 1996, B2.

sufficiently highlighted the problems which arose out of the flawed identification procedures of the police. The problem in this case is aggravated by the fact that the police acknowledged by the date of the appellant's trial that he was not the "plastic bag bandit". They had arrested and convicted another man, Francesco Sotomayor, as the so-called plastic bag bandit. He bore a remarkable resemblance to the appellant and had been confused with the appellant by witnesses to other robberies.<sup>123</sup>

The identification procedures used by the police were deeply flawed and the fact that the police and prosecutor persisted with the prosecution even while they charged another (non-Indigenous) man with the string of robberies is suggestive of tunnel vision.

Jason Hill was acquitted at his second trial before a judge alone. Little is known about this trial. For example, it is not known why Mr Hill's second trial was held before a judge alone. His first trial was held before the Supreme Court ruled that the accused could question prospective jurors about whether they could decide the case impartially even though the accused was Aboriginal.<sup>124</sup> The question of possible juror stereotyping and prejudice as occurred in the Marshall case cannot be ruled out.

Mr Hill subsequently sued the police. In this litigation, it was revealed that the police had shown the two tellers a photo line-up of 12 pictures in which Mr Hill was the only Aboriginal person. The photo line-up did not include the other suspect for the robbery. The police had used the same picture of Mr Hill in the line-up that had been previously published in the newspaper and shown on television. They also interviewed the two tellers together. They did not re-investigate Mr Hill's alibi or show the photo of the other suspect to the tellers.<sup>125</sup>

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<sup>123</sup> *R v Hill* [1997] OJ No 3255, [3]-[4].

<sup>124</sup> *R v Williams* [1998] 1 SCR 1128.

<sup>125</sup> The Supreme Court observed that if the police had 'conducted further investigation, it is likely the case against Hill would have collapsed. Had he re-interviewed the eyewitnesses, for example, and shown them Sotomayer's photo, it is probable that matters would have turned out otherwise; when the

Mr Hill's civil case was litigated all the way to the Supreme Court of Canada. The Court recognised that there was '... an unfortunate series of events which resulted in an innocent person being investigated by the police, arrested, tried, wrongfully convicted, and ultimately acquitted after spending more than 20 months in jail for a crime he did not commit'.<sup>126</sup> Nevertheless the Court found that the police were not negligent based on the standards of 1995 when the police investigation was conducted.<sup>127</sup> This case reveals some of the shortcomings of relying on ex post case by case judicial regulation of police and prosecutorial conduct that creates risks of wrongful convictions. Canada often relies on such regulation even though it places a burden on the accused to establish violations. The Australian approach of using ex ante legislative rules to govern identification and other procedures is in many ways preferable.<sup>128</sup>

Jason Hill was not the only Indigenous person wrongly convicted in Canada because of suggestive police identification procedures. In a case from a northern and remote part of Ontario, a 12 year old sexual assault victim told the police her assailant was a 'male adult, heavy set, may have a small goatee, long hair on arms, blue jeans, black t-shirt, no accent'.<sup>129</sup> The police then engaged in an inappropriate show-up procedure where the victim identified the suspect Allan Miaponoose as he sat in a police van. The trial judge subsequently convicted Mr Miaponoose of sexual assault despite recognising the impropriety of the show-up procedure and the fact that he never had facial hair as suggested in the complainant's

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witnesses were eventually shown the photo of Sotomayer, they recanted their identification of Hill as the robber': *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [83].

<sup>126</sup> Ibid [4].

<sup>127</sup> Ibid [4], [88]. The Court did add: 'A reasonable officer today might be expected to avoid lineups using foils of a different race than the suspect, to avoid both the perception of injustice and the real possibility of unfairness to suspects who are members of minority groups — concerns underlined by growing awareness of persisting problems with institutional bias against minorities in the criminal justice system, including aboriginal persons like Mr. Hill' at [80].

<sup>128</sup> For further argument see Kent Roach, 'Comparative Reflections on Miscarriages of Justice in Australia and Canada' in this issue.

<sup>129</sup> *R v Miaponoose* [1996] CanLII 1268 (ON CA), 10-11.

original description of the suspect. The Ontario Court of Appeal subsequently reversed the conviction and entered an acquittal stressing Miaponoose's absence of facial hair.<sup>130</sup> These two cases raise issues of mistaken eyewitness identification though it is not known the degree to which difficulties of cross-racial identification were at play in the two cases.

#### F *Wilson Nepoose*

Wilson Nepoose was wrongfully convicted of the murder of an Indigenous woman by a jury in 1987. He was convicted largely on the basis of the testimony of two witnesses who, like the witnesses in the Donald Marshall case, made many inconsistent statements to the police and subsequently retracted some of them. The Court of Appeal that eventually overturned the conviction noted that the testimony of the key Crown witness: '... at trial was replete with inconsistencies and indeed admissions of outright lying. Nonetheless the jury chose to find guilt'.<sup>131</sup>

As in the Donald Marshall case, the police did not pursue alternative suspects despite the inconsistent stories told by their key witnesses. The police investigation was affected by tunnel vision, likely compounded by stereotypes if not animus against Mr Nepoose. His sister in law suggested that Mr Nepoose: '... was a local drunk with a prison record. He was a perfect candidate to set up'.<sup>132</sup> Indeed, Mr Nepoose had a substantial criminal record including 19 property offences, four violent offences, four parole violations, four drunk driving convictions, two sex related offences and 15 other criminal convictions.<sup>133</sup>

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<sup>130</sup> *Ibid.*

<sup>131</sup> *R v Nepoose* [1992] ABCA 77, [26].

<sup>132</sup> Reg Curren, 'Nepoose out of jail but not out of spotlight as fight against conviction continues', *Vancouver Sun*, 11 March 1992, A5.

<sup>133</sup> *R v Nepoose* (1988) 46 CCC (3d) 421 (Alta CA).

Mr Nepoose expressed dissatisfaction with his lawyer who advised him not to testify. After the jury convicted him, Mr Nepoose stated in open court:

I am convicted on lies, nothing but lies. The jurors made the mistake of their lives when they convicted me. And when I appeal I will win ... I'll have all those people. There are seven people that were in that room, Rancher's Inn, Room 205, and there was phone calls made that day.<sup>134</sup>

Like Richard Brant, a decision to testify might have resulted in Mr Nepoose's criminal record being admitted into evidence. The prior criminalisation of many Indigenous people provides a barrier to their taking the stand to defend themselves.

Like many other wrongfully convicted Indigenous people examined in this article, Mr Nepoose was not well served by his defence counsel. There are many parallels here with Donald Marshall's wrongful conviction where his lawyers did not attempt to investigate Marshall's alibi and did not ask for disclosure that would have revealed that the prosecution's witnesses made many inconsistent statements. Both Marshall's and Nepoose's lawyers were well paid on private retainers. This suggests that the answer is not simply better legal aid funding, but that defence lawyers require cross-cultural competence and need to struggle with their own racist stereotypes that might deem Aboriginal clients less worthy or more likely to be guilty.

Mr Nepoose's first appeal was dismissed by the Alberta Court of Appeal in 1988. This appeal focused entirely on questions of parole eligibility and did not really address the merits of the conviction.<sup>135</sup> He then started but abandoned a leave to appeal application to the Supreme Court. In 1991, the Minister of Justice with the agreement of prosecutors granted a petition and ordered a new appeal before the

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<sup>134</sup> Tom Barrett, 'The Nepoose Verdict: Does Murder Conviction of Samson Indian mirror the Donald Marshall mistake?', *Edmonton Journal*, 24 February 1991, E1.

<sup>135</sup> *R v Nepoose* (1988) 46 CCC (3d) 421 (Alta CA).

Alberta Court of Appeal. The Court of Appeal ordered another judge to act as a special commissioner under the Criminal Code to inquire into the credibility and weight of new evidence ‘in relation to the question of the guilt or innocence of the Appellant’.<sup>136</sup>

Over four months, the Commissioner heard 22 witnesses and then issued a 253 page report on the case. Although authorised under the Criminal Code,<sup>137</sup> this procedure is rarely used. Nevertheless, it adds inquisitorial elements that have the potential to overcome problems associated with police tunnel vision and lack of independent investigation by the defence.

The Commissioner found that the police had not disclosed evidence that supported Mr Nepoose’s alibi to the prosecutor, let alone to the accused. Some of the undisclosed material included Lily Mackinaw’s statements that Nepoose has stabbed the victim even though there was no evidence of any stab wounds on the deceased. Mackinaw also could not recognise the gravel pit where she testified she saw Nepoose with the victim on the day of the victim’s death. Had the defence known of this material, the Court of Appeal stated the jury ‘would have concluded not only that Lilly Mackinaw was not credible but that she was perhaps delusionary’.<sup>138</sup> The Court of Appeal concluded that this new evidence should be admitted as fresh evidence in part because it ‘was either known by the investigators or in the possession of the investigators, but not made available either to the Crown Prosecutor or to the accused’.<sup>139</sup>

The Alberta Court of Appeal agreed with the Commissioner that ‘the investigators did not bother to follow up any leads which did not point to the appellant’ and that ‘the investigation should have been fully completed’.<sup>140</sup> The case is also noteworthy because the Court of Appeal held that while the non-disclosure caused a miscarriage of

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<sup>136</sup> *R v Nepoose* [1992] ABCA 77 (CanLII), [4].

<sup>137</sup> *Criminal Code*, RSC 1985, c C-34, s 683(1)(e)(ii).

<sup>138</sup> *R v Nepoose* [1992] ABCA 77, [29].

<sup>139</sup> *Ibid* [13].

<sup>140</sup> *Ibid* [30]-[31].

justice, Nepoose's conviction was not unreasonable. It hence ordered a new trial and did not enter an acquittal as has been done in some more recent Canadian wrongful conviction cases. The prosecutor did not prosecute the case and simply stayed proceedings. This meant that Mr Nepoose did not receive the benefit of a not guilty verdict. The province also rejected calls for a public inquiry.

Delma Bull, an Indigenous woman who recanted her testimony in this case explained that the police threatened her with perjury charges and taking custody of her children if she did not testify that she saw Mr Nepoose with the murder victim on the day of the murder.<sup>141</sup> She was subsequently prosecuted for perjury, convicted at her first trial and sentenced to two years less a day imprisonment. This conviction was overturned by an appeal court and Ms Bull was acquitted at her second trial.<sup>142</sup> One of the police officers involved in the case was convicted of perjury for denying he had written that Mr Nepoose was a "slime ball" in his notes relating to some of the undisclosed evidence.<sup>143</sup> This is a very rare example of misconduct that contributed to wrongful convictions being successfully prosecuted in Canada. At the same time, the officer was only sentenced to one day in jail and was allowed to remain employed by the RCMP,<sup>144</sup> thus undermining the individual accountability achieved in this case. Mr Nepoose's family eventually settled a lawsuit against the police. A healing ceremony was held but none of the investigators in the case attended.<sup>145</sup> No other suspects were charged or convicted in the victim's death,<sup>146</sup> again illustrating how wrongful convictions can harm Indigenous victims.

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<sup>141</sup> 'Murder witness admits lying on the stand', *Kitchener Waterloo Record*, 14 August 1991, A10.

<sup>142</sup> 'Queens Bench jury acquits Delma Bull', *Edmonton Journal*, 8 September 1995, B4.

<sup>143</sup> *R v Zazulak* [1993] ABCA 254. One of the surviving witnesses was also charged with perjury but eventually acquitted.

<sup>144</sup> 'Mountie's job safe despite jail time', *Edmonton Journal*, 7 July 1994, B5.

<sup>145</sup> 'Nepoose family lays bitter battle to rest', *Edmonton Journal*, 2 November 2002, A3.

<sup>146</sup> 'Murder victim almost forgotten as 6 year case crumbles', *Hamilton Spectator*, 11 April 1992, A12.

### G *Summary*

As with the Australian cases, the list of Indigenous wrongful convictions in Canada may only represent the tip of the iceberg especially when Aboriginal over-representation in jail is considered. The immediate causes of the Donald Marshall Jr and Wilson Nepoose cases were lying witnesses and the immediate causes of the Jason Hill and Allan Miapoose cases were mistaken identifications. Lack of full prosecutorial disclosure played an important role in both the Marshall and Nepoose cases.

At the same time, there are deeper explanations to these immediate causes that are rooted in police tunnel vision and stereotypes associating Indigenous people with crime that may fuel tunnel vision. The police virtually framed Marshall even though he called the police and was stabbed by the same person who actually killed the victim. The police did not really investigate alternative suspects in the Nepoose case and one police officer described Nepoose as a “slime ball”. The murder of an Indigenous woman in the Nepoose case remains unsolved. Police arrested Jason Hill for a string of similar robberies, but continued to prosecute him even after the robberies continued after Hill was arrested and another person was charged with them.

The Richard Brant and Jamie Gladue cases examined in earlier sections of this article suggests that there is a danger that Indigenous people may plead guilty to crimes when they are innocent or may have a valid defence. They may have reasonable fears that they will lose credibility battles in court especially if they have prior convictions. Wilson Nepoose did not testify about his alibi at his trial in part because his counsel feared that the jury might be adversely influenced when made aware of Mr Nepoose’s extensive criminal record.

Finally, the William Mullins-Johnson, Tammy Marquardt and Richard Brant cases suggest that Indigenous people are not immune from forensic error that can contribute to wrongful convictions.



Unfortunately it is not known whether Dr Charles Smith's forensic error in these cases might be related to stereotypes that associated Aboriginal people with crime, though there is some evidence that Dr Smith was prepared to make moral and unscientific judgments that parents with lifestyles of which he disapproved were more likely to kill their children. It is also significant that Mr Mullins-Johnson and Ms Marquardt, unlike many other of Dr Smith's victims (including Richard Brant), were successfully prosecuted for murder and not for lesser forms of homicide. They served 11 and 13 years respectively before their convictions were overturned on the basis of fresh forensic evidence.

## VII CONCLUSION

Indigenous peoples are over represented among those recognised as wrongfully convicted in Australia and Canada in respect to their small percentage in the population. This provides additional evidence of systemic discrimination against Indigenous people in both justice systems.

At the same time, however, Indigenous people and especially Indigenous women may be under-represented among those recognised as wrongfully convicted in relation to their gross over-representation among imprisoned and convicted offenders who are a group at particular risk of having been wrongly convicted. This finding is less robust than the clear over-representation of Aboriginal people among the wrongly convicted in relation to their percentage in the population. It might be explained in part by lower historical rates of Aboriginal over-representation in prison and the extensive time it often takes for wrongful convictions to be remedied. Nevertheless, it begs questions about how many wrongful convictions of Indigenous people remain undiscovered. Many of the factors that contribute to over-representation in jail may also make post-conviction remedies more difficult for Indigenous people to obtain. It is also notable that African American offenders in the United States do not seem to face the same barriers to having their

wrongful convictions remedied. Unlike Indigenous people in Canada and especially Australia, they are over-represented among the exonerated even compared to their over-representation in the prison population.

As Professors Parkes and Cunliffe have warned, limiting wrongful convictions to those proven to be factual innocent will not capture the situation of women who pled guilty to killing abusive partners even though they may have a valid defence.<sup>147</sup> There is evidence in both Australia and Canada that Indigenous women in such circumstances are more likely to plead guilty than non-Indigenous women. The Richard Brant case also illustrates how Indigenous men may, in some circumstances, be under intense pressure to plead guilty for crimes that they have not committed. High rates of pre-trial detention and lack of access to legal services may help explain why Indigenous accused may plead guilty to crimes for which they are innocent or may have a valid defence.

The experience of Aboriginal people being wrongly convicted is a reminder of the need to examine wrongful convictions in the broader context of social and political justice. There is a danger that the innocence movement in the United States has focused on the factually innocent accused as the mirror image of the crime victim and without adequate attention to how racism and inequality may contribute to wrongful convictions. The wrongful convictions of Indigenous persons in Australia and Canada need to be understood in the context of colonialism and gross over-representation of Indigenous people in prison.

The cases of wrongful convictions of Indigenous people discussed in this article provide some insight into both the immediate and deeper causes of wrongful convictions of Indigenous people. At one level the story is familiar: false confessions, mistaken identifications, lying witnesses, lack of full disclosure and forensic error are familiar

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<sup>147</sup> See Parkes and Cunliffe, above n 1 warning that a factual innocence paradigm will not recognise many of the wrongful convictions of women.

immediate causes of wrongful convictions for Indigenous and non-Indigenous people alike. Recognition of such causes also promotes a familiar reform agenda. Interrogations should be recorded, best practices should be required for identification procedures and forensics and there should be full disclosure by the prosecutor to the defence. All of these reforms are worthy. If implemented, they will benefit Indigenous people if only because of their disproportionate interaction with the criminal justice system. .

At the same time, there is a need to understand and address the deeper causes of the wrongful convictions of Indigenous people. Almost all of the wrongful convictions examined in this article demonstrate signs of police and prosecutorial tunnel vision that allow weak cases to be constructed and successfully prosecuted. A compounding factor to this tunnel vision is racism and stereotypes that associate Aboriginal people with crime. Such views may affect all criminal justice actors, including as the Canadian Donald Marshall case suggests, jurors.

Another underlying factor is the alienation of Indigenous people from the criminal justice system. Many of the cases examined in this article reveal problems of defence lawyers not understanding Indigenous accused for reasons related to language and culture. In some cases, defence lawyers did not seem to believe claims of innocence by their Indigenous clients. Such a lack of understanding likely affects all criminal justice actors and this underlines the need for greater cross-cultural competence in the justice system.

Better training on cross-cultural issues and generic wrongful conviction reform will not be enough to address the wrongful conviction of Indigenous people. They will continue to be disproportionately represented among the wrongfully convicted because of their gross over-representation among prison populations. Broader economic, social and political reforms are needed to address colonial relations that have resulted in such dramatic over-representation of Indigenous people both among prisoners and crime victims in both Australia and Canada.

The analysis conducted here is preliminary, but it suggests that examining how marginalised and disadvantaged groups are affected by wrongful convictions may reveal new insights into what has become a somewhat settled field. Similar analysis has recently been applied to women,<sup>148</sup> but it should be applied to other groups including linguistic minorities, racial minorities and those with mental disabilities and mental health issues. To be sure, the small number of cases of recognised wrongful convictions limits the power of the data, but that is no excuse to ignore the significant and documented cases of wrongful convictions of individuals from disadvantaged groups. It is hoped that such research will facilitate better understanding of how familiar and immediate causes of wrongful convictions interact with deeper structural causes.

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<sup>148</sup> *Ibid.*