

Power and accountability

Life after death row in the United States

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Central to critical criminology is the examination of the unequal distribution and application of power in modern society (DeKeseredy, 2011). In this chapter, we examine applications of power and accountability as experienced by exonerated death row survivors in the United States. Since 2003, we have conducted 18 life history interviews with exonerated death row survivors in the United States. Our participants include 17 men and one woman who were wrongfully convicted of capital crimes, sentenced to death, and later exonerated and released from prison (see Table 22.1; Westervelt & Cook, 2007, 2008, 2010, 2012a, 2012b, 2013, forthcoming; Baumgartner, Westervelt & Cook, 2014; Cook, Westervelt & Maruna, 2014). Through this work, we have documented the devastating toll that wrongful capital convictions have on the social, psychological, and physical health of exonerated death row survivors and their families. We examine the extensive challenges to re-entry faced by exonerees: finding employment; searching for a place to live; rebuilding family and friend relationships; on-going conflict with the state over financial compensation; expungement of their wrongful convictions; and learning to cope with the social and psychological impact of life on death row (Westervelt & Cook, forthcoming). In addition to this academic work and in the spirit of public sociology (Buroway, 2004), we currently volunteer with non-profit organizations that provide peer-support to people directly impacted by wrongful convictions.¹ This work enhances our opportunities to learn more from exonerees and shape supportive remedies for those whose lives have been shattered by wrongful convictions.

Here, we take a step back to examine how power is exercised by the state, how accountability is pursued in cases where innocent people are sentenced to death for murders they did not commit, and to offer some ideas for remedy and redress. In previous publications, we have explicitly used critical and feminist criminological frameworks for analyzing these events (Westervelt & Cook, 2007, 2010, 2012a). We argue that wrongful convictions establish a relationship to the state that is potentially lethal and perpetual; once an exoneration occurs, the battle against the state is not over. Exonerees continue to fight the state for the wrongful conviction to be expunged and for compensation to be awarded. In this paper, we document some of the consequences of wrongful capital convictions, through the voices of our research participants.

Stolen lives

The state exercises power in such a way that wrongly convicted and condemned people feel abandoned and rejected by society. Exonerated death row survivors first felt the power of the state during the investigatory and trial stages of their cases when their voices were mostly unheard and their innocence overlooked (if not actively disregarded). “Prosecutors are relatively well-funded and have broad discretionary authority to bring charges against defendants. The average defendant in capital cases is poor and relies on an under-funded attorney, often court-appointed, with a heavy caseload and limited time, resources, and knowledge to adequately represent his/her client. . . . It is not a level playing field” (Westervelt & Cook, 2010, p. 261). After exoneration, the playing field remains uneven as exonerees face ongoing conflict with the state to regain their reputations, expunge their records, and gain access to limited resources to aid their reintegration (Westervelt & Cook, 2012a). Many are not successful because they lack the resources to wage these fights or to pay for others to fight for them. Still, the state continues to have relatively unlimited resources to inhibit their reintegration by limiting which, if any, exonerees have access to compensation or reparations. The state also has a more powerful voice in the court of public opinion often by continuing to question an exoneree’s actual innocence (Westervelt & Cook, 2012a).

Christie (1977, p. 4) argues that the state steals conflicts away from stakeholders and that “[c]onflicts become the property of lawyers.” Lawyers represent the state and act on behalf of the state; they engage police to carry out the will of the state in order to “protect and serve” the public. As such, conflicts are “immensely more valuable” (p. 7) than the supposed property that might have been lost in the conflict, because doing so provides a platform for the state to reinforce its own power. Christie’s concept can be extended to those who are wrongly convicted as they are themselves “stolen” by the state without resources to defend themselves against the powerful prosecution and death sentence imposed on them. In a recent gathering of exonerated death row survivors, for instance, one exonerated death row survivor referred to his 22 years of wrongful incarceration as being “held hostage” by the state. He was, in essence, “stolen” from his family, friends, community, and lost his independence and capacity to live his life.² He saw his life as “irreparably disrupted” (Westervelt & Cook, 2012a, p. 54) due to the state’s accusations against him.

Upon sentence of death, and thus being “expelled from humanity” (Westervelt & Cook, 2012a, p. 171), our exonerees’ lives were stolen from them by the state. A vivid and terrifying example is Greg Wilhoit’s experience when the judge made it clear that he was to be executed: “[We’ll kill you by] lethal injection, but if that fails, we’ll kill you by electrocution. If the power goes out, we’ll hang you. If the rope breaks, we’ll take you out back and shoot you And I just about shit! It was just me and the prosecutor, and the judge in this big giant courtroom . . . I’ve realized this was the most sobering moment in my life” (Westervelt & Cook, 2012a, p. 108). Perry Cobb tries to convey that moment in this way: “It’s a little hard to describe. . . . I guess it’s like a mother giving birth and the child dies at birth. I don’t know. I really don’t know. But I do know that it’s a pain that no artist can draw if a person’s able to give it to him in words. I don’t believe that they can put it on a, a canvas . . . you talking about self. . . . It’s like a, a dry, rotten weed in the wind. It’s gone. It’s a dusting, and you’ll never see ’em again. . . . It’s really hard to give you that. I can’t give it to you. . . . That moment was my whole life. That was my life” (Westervelt & Cook, 2012a, p. 171).

In some cases, facing their actual execution date cemented their despair. Sabrina Butler believed she was to be executed in 1990, but did not understand that the execution had been stayed pending appeal. When the day arrived, she was “the scariest person in the world. . . . This is a

feeling I wouldn't wish on my worst enemy. . . . That is the most humiliating, scary thing that any person could ever go through. I was scared to death because I thought that they was gonna kill me for something that I didn't do, and I couldn't tell nobody to help me. Wasn't nobody there" (Westervelt & Cook, 2012a, p. 116). Shabaka Brown came within 15 hours of his execution in Florida. While being measured for his burial suit, he lashed out at the guards and lost some teeth in the brawl.

Adding to the pain of having one's life being stolen is witnessing the extermination of stolen lives of others who are condemned to death alongside them. Greg Wilhoit's close friend on death row in Oklahoma, Chuck Coleman, was executed during Greg's confinement. "Eleven minutes after midnight, [they] announced that Charles Troy Coleman had been pronounced dead. And, like I said, I really didn't think it'd bother me. So nobody could have been more surprised than I was when instead of indifference I was overwhelmed with grief" (Westervelt & Cook, 2012a, p. 115). The grim reality that everyone confined on death row has been snatched up by the state and housed for extermination is sobering.

Victims of state harm

We have argued elsewhere (Westervelt & Cook, 2010) that exonerated death row survivors are, in fact, victims of state harm. According to Kauzlarich, Matthews and Miller (2001, p. 176), victims of state crime have "experienced economic, cultural, or physical harm, exclusion, or exploitation because of tacit or explicit state actions or policies which violate the law or generally defined human rights." We argue that exonerated death row survivors share the following characteristics with other victims of state crime:

- 1 They are among the least socially powerful actors.
- 2 The state fails to recognize how harmful its institutional policies are. Any acknowledgment of harm by the state is neutralized by a sense of state entitlement.
- 3 Victims of state harm are blamed for their own suffering.
- 4 Victims of state harm must rely on the victimizer (the state) for redress.
- 5 Victims of state harm are easy targets for repeat victimization.
- 6 Illegal state policies and practices are an attempt to achieve organizational or institutional goals.³ (Westervelt & Cook, 2010)

As the most powerful actor in wrongful convictions, the state creates and recreates harm to exonerated death row survivors in many ways – by refusing to acknowledge an exoneree's actual innocence, by ignoring exonerees' needs post-release, and by exculpating the state and its officials of responsibility for the wrongful conviction.

The catalogue of harms suffered by death row survivors is lengthy and includes being released from prison, often quite suddenly, without assistance finding a place to live, difficulty finding employment because the wrongful conviction is not expunged or because of significant gaps in their work record or obsolete job skills, on-going health problems rooted in poor prison conditions and inadequate health care, and difficulty repairing family bonds ruptured by their wrongful incarceration. The battles against the state continue as they fight for record expungement, compensation, and official recognition of innocence through certificates of innocence or gubernatorial pardon. These battles further exacerbate the trauma of the wrongful conviction and contribute to the many reintegration obstacles they encounter. Exonerated death row survivors also struggle with the social stigma of being on death row, attempting to regain their

reputations as respectable citizens. They face compound grieving processes over loved ones lost while incarcerated and myriad losses of time with family, children they could have had or known better, grandchildren they could have loved, work opportunities they could have pursued to build security for the future, to name only a few (Westervelt & Cook, 2012a). While some consider the trauma of the wrongful conviction to end at exoneration and release, we argue that exonerated death row survivors experience *continuing traumatic stress* as they work through the process of reintegration (Westervelt & Cook, forthcoming).

Post-exoneration remedies

While wrongfully condemned to death and incarcerated, most exonerated death row survivors who participated in our research imagined that once they proved their innocence and were released, the legal nightmare would end. For instance, Alan Gell said, “I just made all kinds of plans on how wonderful it would be once I was released. What I didn’t realize is I had forgotten what it was like to be free. I forgot what reality was to be in a society. You know? A lot of the things that I said I was gonna do took money to do” (Westervelt & Cook, 2012a, p. 58). But as noted above, their expectations are often shattered as they confront the reality of life after exoneration. Researchers and advocates have recommended changes to several practices that could reduce the obstacles exonerees face as they attempt to reintegrate.

An automatic expungement of the wrongful conviction from their record would provide the exonerated death row survivor with a cleared background, smoothing their reentry into society after prison. Given the widespread use of criminal background checks for everything from employment to public housing to college admission, expungement of the wrongful conviction may help to remove some barriers to resources needed for reintegration.

Research documents that expunging the wrongful conviction varies widely from state to state (Shlosberg, Mandery, & West, 2012, 2014). For instance, while “New York law permits the sealing of cases where charges have been dismissed, vacated, set aside, not filed, or otherwise terminated” (Shlosberg et al., 2012, p. 1232), most states do not provide an automatic expungement in such cases. For example, they found that two thirds of Florida exonerees whose cases were studied did not receive an expungement of their wrongful convictions. “Generally speaking, expungement laws are restrictive” (Shlosberg et al., 2014, p. 354). In many states, procuring an expungement is nearly impossible if the innocent person pled guilty. A guilty plea by an innocent person is not uncommon but extremely difficult to overcome. It often is a consequence of intense pressure from police and prosecutors in a bargain to reduce charges and avoid court. Therefore, Shlosberg et al. (2012, p. 1232) write that “this data suggests that expungement after exoneration is often more myth than reality.”

In addition to the many barriers that must be overcome if their record is not expunged, failure to expunge a wrongful conviction has been shown to increase the likelihood of post-exoneration criminal offenses committed by exonerated individuals (Shlosberg et al., 2014). Thus, denying an exonerated person an expungement of the wrongful conviction creates a greater risk to public safety. The state that restricts access to expungement may be culpable, at least in part, for additional harms. Overall, Shlosberg and her colleagues found that 61.9 percent of exonerees had no record of post-exoneration offending, but that 38.1 percent did (Shlosberg et al., 2014, p. 373). Furthermore, “[e]xpungement is significantly associated with post-exoneration offending” where those who had received expungements were significantly less likely to criminally offend post-exoneration (Shlosberg et al., 2014, p. 375).

Griffiths and Owens argue that “society owes a civic debt to exonerees for unjustly taking their freedom (and sometimes labor), be it intentionally or accidentally” (2014, p. 267). That debt,

we argue, should include a financial compensation plan/package to assist exonerees with their needs after release. Scholars have developed an extensive body of research on financial compensation for the wrongly convicted (see Baumgartner et al., 2014; Bernhard, 1999, 2004, 2009; Kahn, 2010; Mandery et al., 2013; Mostaghel, 2011; Norris, 2012; Owens & Griffiths, 2012). Baumgartner et al. (2014, p. 260) point out that “a common misperception is that compensation is provided automatically by the state;” however, only 31 states have compensation laws in place, and statutes that exist are riddled with obstacles rather than avenues to compensation (Norris, 2012).

The majority of the exonerated death row survivors we interviewed received no compensation (see Table 22.1). In fact, the most common answer we received when asked what they got after exoneration is summed up by Alan Gell: “No state help. No federal help. No nothing. I had to pay out of pocket every step of the way” (Westervelt & Cook, 2012a, p. 201). Some pursued compensation without success. For instance, Greg Wilhoit pursued compensation from Oklahoma after his release from death row and shared this with us, “you ought to see this application for compensation! And, the first hoop you gotta jump through to be eligible for this money . . . is you gotta be pardoned by the governor, get an official pardon. So [my attorney Mark Barrett] went in front of this board and all this stuff. And they said that they don’t have the authority to pardon somebody who hasn’t been convicted of anything. See I got acquitted in [my retrial]; I got a directed verdict. I’m not eligible for a pardon because I’m not guilty of anything. Now what kind of shit is that? See fortunately, I got a good sense of humor, otherwise I’d go crazy. It’s a catch-22, you know. I’m convinced they did it on purpose; they knew what they were doing” (Westervelt & Cook, 2012a, pp. 225–226).

Exonerated people can pursue three avenues for compensation: a state compensation statute, civil litigation, and specific state legislation (often called a private bill) (Baumgartner et al., 2014; Norris, 2012; Westervelt & Cook, 2012a). In most cases, the exoneration is not enough on its own to warrant compensation; the exonerated person needs to prove his/her innocence over and above the exoneration and release from prison. Proving a negative, as this requires, often results in exonerated former inmates being denied relief. When pursuing reparations through litigation, courts often require exonerated plaintiffs to prove that the state acted with intent to knowingly wrongly convict them, establishing fault for the purposes of calculating recompense. In our adversarial system, this puts the state in a position to defend itself vigorously against claims by exonerated plaintiffs in order to minimize damages and cost to the state. Finally, winning financial redress through specific state legislation creates an imposing challenge for an exoneree with limited resources and political clout, and is the least frequently pursued and successful mechanism for getting compensation (Innocence Project, 2009). Each avenue to financial assistance from the state comes with its own set of obstacles and difficulties and on average takes many years to complete, making compensation for exonerees far from automatic.

Three of our research participants were awarded compensation through state statutes: Kirk Bloodworth in Maryland, Perry Cobb in Illinois, and Sabrina Butler in Mississippi. Bloodworth received his compensation about six months after his exoneration in 1993 while Cobb and Butler’s took much longer. Cobb’s compensation came more than 14 years after his exoneration and Butler’s almost 20 years later (Westervelt & Cook, 2012a, p. 202). Six of our research participants were awarded financial settlements after suing the states, counties, and/or municipalities where they were wrongly convicted. The awards from such litigation produced much higher amounts than those compensated via state statute, though again the cases took many years to wind through the courts and inflicted additional damage (stress and frustration) on the exonerees in the process. Nine of our participants received no assistance from the state post-exoneration.

These findings from our small sample of death row survivors mirror recent findings from a study of all 156 death row exonerees listed by the Death Penalty Information Center.⁴ According

to Merritt (2017), only 37 percent of death row exonerees have received any form of financial redress via the avenues open to them. Other studies have shown that, for those few who receive it, this redress can take many years on average to be awarded, leaving the exoneree with nothing in the immediate aftermath of their exoneration (Innocence Project, 2009). And while compensation can provide options for a comfortable life, it also can generate unexpected problems, such as managing money with little to no financial planning experience and the arrival of “friends” who try to take advantage of the exonerees (Westervelt & Cook, 2012a, pp. 201–206).

Accountability

Doyle (2014) employs a medical metaphor of “iatrogenic injuries” (p. 57) to outline how wrongful convictions occur in the criminal justice system. The errors that occur in the criminal justice system are, from a critical criminology perspective, more than merely unfortunate mistakes; they are a consequence of choices to review (or not), to charge (or not), to use specific evidence (or not), at every step in the criminal justice process. When decisions are made, the potential for errors are present. He argues that these errors are not merely a result of “bad apples” as much as they are holes (like “swiss cheese”) in the organizational structures in which these events occur. Doyle writes that “[e]ven in those situations where a ‘bad apple’ can be identified – the cases of a corrupt forensic scientist who writes a report without testing the sample, for example, or a prosecutor who buries plainly exculpatory evidence – the bad apple approach is radically incomplete. Standing to the left and the right of the bad apple are the raft of officials and practitioners who hired the bad apple, and failed to catch his or her mistakes” (Doyle, 2014, p. 60). In other words, bad apples are essentially ratified by the system, and the system becomes what Westervelt and Cook (2010, p. 274) call a “contaminated orchard.” We contend that the contaminated orchard encompasses both the individual and system failures that lead to the wrongful conviction, as well as the reluctance and/or refusal of system officials to acknowledge and be accountable for the trauma caused to those harmed by the wrongful conviction. System officials who continue to publicly assert an exoneree’s guilt after exoneration, who become obstacles to an exoneree receiving reparations to assist with reintegration, and who are unwilling to examine their role in the wrongful conviction are also rooted in a contaminated orchard.

Rarely have prosecutors been held accountable for misconduct that leads to wrongful convictions. Among our 18 participants, we know of only one case in which a prosecutor received any repercussions for his/her official recognized misconduct. In the case of Alan Gell, the prosecutors who had withheld exculpatory evidence received a letter of reprimand in their bar file. Many in the community were outraged by how light the “punishment” was, especially as compared to Gell’s ten years in prison (4.5 of it spent on death row) (Neff, 2004). Another such example can be found in the case of Michael Morton,⁵ wrongfully convicted of killing his wife Christine in Texas. His wrongful conviction was based in large part on prosecutorial misconduct. Morton spent more than two decades incarcerated, and later was exonerated based on DNA evidence. The prosecutor, Ken Anderson, went on to become a judge in Texas.⁶ But in an interesting and unusual twist after Morton’s exoneration, Anderson was disbarred and spent three days (of a ten-day sentence) in jail for suppressing the exculpatory evidence that led to Morton’s decades of wrongful incarceration. This made national headlines because of the rarity of this final outcome.

Our exonerated death row survivors had a lot to say about holding *the system* accountable for the harms they have suffered. They argue that a first step towards repairing the harms of wrongful capital convictions is for the state to acknowledge the terrible mistake that was made. Juan Melendez told us, “You talking about men that know I was innocent before going to trial and *still* wanted to kill me. Why?! . . . If he say, ‘Hey, I was wrong’ then . . . I would embrace him, shake

his hand, . . . because it take a man to do that. It's that simple. But these people, they don't admit it when they do wrong. They cannot afford to admit that they do wrong. How the hell are they gonna say that, 'We almost killed an innocent man in there,' and they for the death penalty. It's political!" (Westervelt & Cook, 2012a, p. 207). Our participants also want to hold specific officials accountable in their cases. As Scott Taylor said, "We should be able to hold corrupt cops, judges, and state's attorneys accountable when we find out they framed me or planted false evidence and knew and intentionally tried to kill me" (Westervelt & Cook, 2012a, p. 226).

Some might argue that exonerations and the limited repercussions some system officials incur are evidence that the system works to prevent and correct wrongful convictions. But, the most angry responses from the exonerated death row survivors we interviewed came when we asked if their exonerations were proof that the system works. Greg Wilhoit succinctly replied, "Baloney!" while Kirk Bloodsworth insisted, "No sir! No ma'am! No way! No how! The system didn't work! *I* worked. I got myself out" (Westervelt & Cook, 2012a, p. 208). Several of our participants also recognized how original crime victims were betrayed by the system when the crimes they experienced resulted in the wrong person being convicted. Alan Gell received a letter of apology from the surviving son of Mr. Jenkins, whom he had been accused of killing. "He apologized for hating me all them years and told me that he was sorry I went through all the things that I did because of them motherfuckers, talking about the police and prosecutors. And he just seemed real bitter and hateful toward them . . . It felt real good because I was, all that time, [thinking] the victim's family [was] hating me and wanting me dead. I wanted somehow to let them know that I didn't do it and they got the wrong person and that you might want to pursue it because they got me and not the right person. That means you're not getting justice" (Westervelt & Cook, 2012a, p. 164).

As is likely not surprising, most of our participants argue that the final expression of accountability for their wrongful capital convictions would be the abolition of the death penalty. As Kirk Bloodsworth has often said, "I want to kill the thing that tried to kill me." Having survived these harrowing ordeals, many have transformed their experiences into object lessons for the broader debates around crime and punishment in the United States. In fact, research shows that raising awareness about wrongful convictions in death penalty cases has resulted in a reduction in public support for the death penalty (Baumgartner, De Boef, & Boydston, 2008).

Conclusion

We agree with other scholars who argue that the system is "broken" (Liebman, Fagan, & West, 2000). The system has failed to protect the human rights of the accused, resulting in thousands of people wrongfully convicted and hundreds condemned to death. To think that no innocent person has been executed in the United States is misguided (Harmon & Lofquist, 2005; Radelet & Bedau, 1998; Radelet, Bedau, & Putnam, 1994). Critical criminologists have been right to examine state power in order to expose its abuses and the impacts on those who are the targets of that power. In the cases of exonerated death row survivors, those abuses of power have led to years lost to wrongful incarceration and ongoing struggles with the state to acknowledge its mistakes and responsibilities to those harmed.

Notes

- 1 Sandra Westervelt serves on the Board of Directors for Witness to Innocence (www.witnesstoinnocence.org) which serves the needs and interests of those impacted by wrongful capital convictions. Kim Cook serves on the Board of Directors for Healing Justice (www.healingjusticeproject.org) which

provides restorative justice peer-support for exonerated individuals and original crime victims/survivors in cases that resulted in exonerations.

- 2 Personal communication with an exonerated death row survivor who participated in a gathering sponsored by Witness to Innocence in Cleveland, Ohio, October 2015.
- 3 Stratton (2015) uses the state crime framework to examine the many causes of wrongful convictions, providing a fruitful typology for critical criminologists to pursue in future research.
- 4 www.deathpenaltyinfo.org/innocence-and-death-penalty (last visited on January 3, 2017).
- 5 www.slate.com/articles/news_and_politics/jurisprudence/2012/12/michael_morton_s_wrongful_conviction_why_do_police_and_prosecutors_continue.html.

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Appendix

Table 22.1 Biographical details of participants

Name	Sex	Race	Age at conviction	State where tried	Yrs in prison ⁱ	Yrs on death row ^j	Yr of exoneration	DNA?	Actual offender[s] identified? ⁱⁱⁱ	Compensation received? ^{iv}
Beeman	M	W	23	OH	3	2.5	1979	No	Yes	No
Bloodsworth	M	W	24	MD	8	1.5	1993	Yes	Yes	Yes
Brown	M	B	24	FL	13	13	1987	No	No	No
Butler	F	B	19	MS	5.5	2.5	1995	No	No	Yes
Cobb	M	B	37	IL	7	4	1987	No	Yes	Yes
Fain	M	W	35	ID	18	17.5	2001	Yes	No	No
Gauger	M	W	41	IL	3	0	1996	No	Yes	No
Gell	M	W	23	NC	6	4.5	2004	No	Yes	Yes
Howard	M	B	23	OH	26	1	2003	No	No	Yes
James	M	B	23	OH	26	1	2003	No	No	Yes
Keaton	M	B	19	FL	2	1	1973	No	Yes	No
Krone	M	W	35	AZ	9.5	2.5	2002	Yes	Yes	Yes
McMillian	M	B	47	AL	5	5	1993	No	No	Yes
Melendez	M	L	33	FL	17.5	17.5	2002	No	Yes	No
Rivera	M	L	25	NC	2	1.5	1999	No	Yes	No
Taylor**	M	B	29	IL	13	10	2003	No	No	Yes
Tibbs	M	B	35	FL	2	1.5	1982	No	No	No
Wilhoit	M	W	32	OK	4	4	1993	No	No	No

Notes: i This category includes only the years in prison for this wrongful conviction and does not include any prior years of incarceration on other charges. In addition, several participants were not released from prison immediately after exoneration as they completed sentences on other, unrelated charges. That time is not included here. This category also does not include any time they spent in jail or prison awaiting trial, which in some instances was two to three additional years. Numbers (for years in prison and years on death row) are not exact and may have been rounded slightly up or down by one to three months.

ii The number of years spent on death row may not equal the years spent in prison. Several exonerees received retrials after appellate review, were reconvicted on the same charges, but were sentenced to life in prison rather than death. At that point, they were moved from death row into the general population of prison until their eventual exonerations.

iii This category includes cases in which the actual perpetrator of the crime for which the exoneree was wrongfully convicted either has been tried and convicted for that crime or has been publicly acknowledged in some way as the actual offender, even if not convicted.

iv Of those receiving compensation, only three—Bloodsworth, Butler, and Cobb—were provided compensation via compensation statutes in their states. The others were compensated as a result of litigation pursued against local, county, and/or state officials and agencies.

** This exoneree prefers to remain anonymous. We have assigned this pseudonym to him.