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## A Dime for Your Time: A Case for Compensating the Wrongfully Convicted in South Carolina

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**A DIME FOR YOUR TIME:  
A CASE FOR COMPENSATING THE WRONGFULLY CONVICTED  
IN SOUTH CAROLINA**

Chelsea N. Evans\*

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\* 2018 J.D. Candidate at the University of South Carolina School of Law. The author would like to thank Dean Colin Miller at the University of South Carolina School of Law for his guidance and insight on this Note. The author would further like to thank Diana Holt and Eddie Lee Elmore for allowing the author to share Mr. Elmore's story.

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I. INTRODUCTION	

Edward Lee Elmore was twenty-three years old in 1982 when he was wrongfully convicted for the rape and murder of an elderly widow in rural Greenwood, South Carolina.<sup>1</sup> His case is one of the most well-known and egregious wrongful conviction cases in South Carolina's history.<sup>2</sup>

Elmore's ordeal started when police found the body of Dorothy Edwards in her bedroom closet.<sup>3</sup> A neighbor pointed to Elmore, whom Edwards occasionally employed to perform odd jobs around her home.<sup>4</sup> The sole evidence of Elmore's presence in Edwards' home was a single fingerprint on her back door.<sup>5</sup> The fingerprint was not unusual given that Elmore had recently performed some work on Edwards' home.<sup>6</sup> Police arrested Elmore despite lacking probable cause,<sup>7</sup> and his trial commenced

1. See Emanuella Grinberg, *Death Row Lawyer: 'If I Throw in the Towel, a Client Dies'*, CNN (Mar. 7, 2014), <http://www.cnn.com/2014/03/07/us/death-row-stories-elmore/> (discussing the Elmore case).

2. Elmore's case has been the subject of local and national media attention, a book, and a CNN television series. See RAYMOND BONNER, *ANATOMY OF INJUSTICE: A MURDER CASE GONE WRONG* (2012) (profiling Elmore's case) [hereinafter BONNER, *ANATOMY OF INJUSTICE*]; Christina Elmore, *Matter of Life and Death*, POST & COURIER (Oct. 16, 2015), [http://www.postandcourier.com/archives/matter-of-life-and-death/article\\_9f887fee-9f8f-53f5-8bf3-6cbe4cf8af34.html](http://www.postandcourier.com/archives/matter-of-life-and-death/article_9f887fee-9f8f-53f5-8bf3-6cbe4cf8af34.html); Jeffrey Collins & Meg Kinnard, *Ex-Death Row Inmate Walks Out a Free Man*, STATE (Mar. 3, 2012), <http://www.thestate.com/news/article/14399954.html>; Raymond Bonner, *Still on Death Row, Despite Mounting Doubts*, N.Y. TIMES (July 8, 2002), <http://www.nytimes.com/2002/07/08/us/still-on-death-row-despite-mounting-doubts.html>; *Death Row Stories: Innocence and the Intern* (CNN television broadcast Mar. 9, 2014); *Death Row Stories S01E01*, YOUTUBE (July 24, 2016), <https://www.youtube.com/watch?v=RCbIFVTQGp4>.

3. See BONNER, *ANATOMY OF INJUSTICE*, *supra* note 2, at 14.

4. See *Elmore v. Ozmint*, 661 F.3d 783, 787 (4th Cir. 2011). In Elmore's federal habeas corpus relief proceedings, his defense team presented evidence that Edwards' neighbor, Jimmy Holloway, was likely the murderer. See *Elmore*, 661 F.3d at 804-07 and BONNER, *ANATOMY OF INJUSTICE*, *supra* note 2, at 132-40, for an overview of the evidence tending to suggest Holloway's guilt.

5. BONNER, *ANATOMY OF INJUSTICE*, *supra* note 2, at 18.

6. *Id.*

7. *Id.* at 19.

less than three months later.<sup>8</sup> A jury ultimately found Elmore guilty, and he was sentenced to death.<sup>9</sup>

Elmore would stand trial two more times and juries in both trials again sentenced him to death.<sup>10</sup> During the next three decades, Elmore's lawyers initiated appeal after appeal challenging the sufficiency of the evidence. The case involved a number of factors that often contribute to wrongful convictions, including perjured testimony by a "jailhouse snitch,"<sup>11</sup> police and prosecutorial misconduct,<sup>12</sup> faulty forensic evidence,<sup>13</sup> and ineffective assistance of counsel.<sup>14</sup>

After decades of numerous state and federal appeals, the United States Court of Appeals for the Fourth Circuit awarded Elmore habeas corpus relief, holding that his original lawyers in his first trial provided ineffective assistance of counsel in violation of Elmore's Sixth Amendment rights.<sup>15</sup> The majority opinion noted, "[h]aving scrutinized volumes of records of Elmore's three trials and his state [post-conviction relief] proceedings, we

8. *Id.* at 43.

9. *Id.* at 94.

10. *See id.* at 109 ("After three trials, three juries, and three appeals, Elmore was back on death row.")

11. James Gilliam, a fellow inmate, testified at three separate state trials that Elmore approached him and confessed to murdering Edwards. *See Elmore v. Ozmint*, 661 F.3d 783, 820 (4th Cir. 2011); BONNER, ANATOMY OF INJUSTICE, *supra* note 2, at 162. Gilliam later recanted his testimony during state post-conviction relief proceedings alleging that a prison administrator asked for "help" with the Elmore case. *Elmore*, 661 F.3d at 820 (citing J.A. 1910); BONNER, ANATOMY OF INJUSTICE, *supra* note 2, at 166–67.

12. *See Elmore*, 661 F.3d at 841–42 (citing J.A. 3540) (discussing Elmore's motion for a new trial based on a claim of state misconduct in concealing "material exculpatory evidence and perjured testimony by law enforcement officers," which the court denied under the belief that any misconduct did not have an impact on the 1984 verdict). *See generally* BONNER, ANATOMY OF INJUSTICE, *supra* note 2 (discussing many instances of police and prosecutorial misconduct in the Elmore investigation and trial).

13. *See id.* at 851 ("Simply put, the gross failure of Elmore's 1984 trial lawyers to investigate the State's forensic evidence—including the medical examiner's time-of-death opinion, the pubic hairs allegedly recovered from Mrs. Edwards's bed, the nature of the "Item T" materials removed from Mrs. Edwards's bloody abdomen, and the fingerprint lifted from the blood-smear toilet in Mrs. Edwards's en suite bathroom—had a palpably adverse effect on the defense.")

14. *See id.*; *Elmore*, 661 F.3d at 869–70 ("[T]here is a reasonable probability—that is, a substantial likelihood—that, but for his lawyers' failure to investigate the State's forensic evidence, Elmore would have been acquitted in the 1984 trial.")

15. *See id.* *Elmore*, 661 F.3d at 871–72 ("Because the only fair conclusion is that Elmore has shown deficient performance and resulting prejudice, he is entitled to relief on his Sixth Amendment ineffective assistance of counsel claim.")

recognize that there are grave questions about whether it really was Elmore who murdered Mrs. Edwards.”<sup>16</sup>

The 195-page Fourth Circuit opinion vacating Elmore’s conviction was a welcomed victory, but the court’s ruling was not an automatic grant of freedom. As a result of the Fourth Circuit’s ruling, Elmore could face a new state trial in which he could be reconvicted and resentenced. However, Elmore agreed to enter an Alford plea, a form of guilty plea in which he maintained his innocence while admitting the State had enough evidence to convince a jury of his guilt.<sup>17</sup> The Alford plea deprived Elmore of the chance to be legally exonerated in a new trial but provided him with credit for time served and the opportunity to immediately leave prison.

In 2012, Elmore regained his freedom after spending thirty years behind bars for a crime he did not commit.<sup>18</sup> Elmore spent twenty-eight of those years on death row.<sup>19</sup> When Elmore was released, he moved back to Abbeville to live with his sister.<sup>20</sup> However, not everyone in Elmore’s hometown was convinced of his innocence and stigma followed him.<sup>21</sup> His lawyers feared for his safety and ultimately decided that a move to Columbia would be in Elmore’s best interest.<sup>22</sup>

Through meager Social Security and disability checks and the assistance of his legal team, Elmore was able to obtain modest housing and a vehicle.<sup>23</sup> Elmore spent most of his twenties—when many people learn how to budget and manage money—in prison. Elmore sought to live independently but struggled to make good financial decisions. Although he was eventually able to resolve the debt, Elmore temporarily fell victim to a payday loan trap.<sup>24</sup>

Additionally, caused in part or in whole from his period of incarceration, Elmore struggles with emphysema, chronic obstructive pulmonary disease, and congenital heart failure.<sup>25</sup> He keeps an inhaler on his person at all times

16. *Id.* at 786.

17. *See* Grinberg, *supra* note 1; Transcript of Record at 3, *South Carolina v. Elmore*, No. 1984-GS-24-314 (Greenwood Cty. Ct. Gen. Sess. Mar. 2, 2012).

18. *See* Grinberg, *supra* note 1.

19. In 2010, a state court concluded that Elmore was intellectually disabled and declared him ineligible for execution under *Atkins v. Virginia*. *See Elmore*, 661 F.3d at 786 (“Nearly two years later, on February 1, 2010, the state PCR court granted Elmore relief on [the *Atkins*] claim, vacating his death sentence and ordering that a life sentence be imposed instead.”).

20. *See* Elmore Dep. 16:2–8.

21. Telephone Interview with Diana Holt, Attorney, Diana Holt, LLC (Jan. 3, 2017).

22. *See* Elmore Dep. 107:10–18; Telephone Interview with Diana Holt, *supra* note 21.

23. Telephone Interview with Diana Holt, *supra* note 21.

24. *Id.*

25. *Id.*

and uses an oxygen machine at night to help him breathe.<sup>26</sup> During much of Elmore's incarceration, prison rules allowed inmates to smoke, and non-smokers could not escape secondhand exposure.<sup>27</sup> Although Elmore is a former smoker, prison conditions likely exacerbated the severe loss of his lung capacity.<sup>28</sup> Elmore's lung condition precludes any opportunity for employment.<sup>29</sup> Furthermore, while incarcerated, Elmore underwent a botched dental procedure in which a prison dentist chose to pull over twenty of Elmore's teeth rather than design a partial plate.<sup>30</sup> The procedure caused Elmore extreme pain and left him without most of his teeth.<sup>31</sup>

In addition to his medical issues, Elmore experiences symptoms associated with post-traumatic stress disorder.<sup>32</sup> Adjusting to life outside prison bars has been difficult for Elmore, and he regularly experiences nightmares.<sup>33</sup> Elmore cannot escape the memories of what he witnessed in prison, including violent assaults<sup>34</sup> and notably seeing the remains of a fellow inmate who was murdered by an explosive device.<sup>35</sup> During his time spent on death row, Elmore witnessed dozens of friends leave their cells to never return.<sup>36</sup> After each friend was put to death, Elmore's lawyer had to reassure a panicked Elmore that he would not be next.<sup>37</sup>

On one occasion, Elmore got unnervingly close to execution.<sup>38</sup> The warden read Elmore his death warrant, and Elmore was placed in isolation to await execution.<sup>39</sup> Elmore was so certain of his death that he made "peace

26. Elmore Dep. 11:2–5.

27. See Elmore Dep. 12:23–13:12; Telephone Interview with Diana Holt, *supra* note 21.

28. See Elmore Dep. 46:18–25; Telephone Interview with Diana Holt, *supra* note 21.

29. Telephone Interview with Diana Holt, *supra* note 21. See Elmore Dep. 12:6–20 (transcribing Elmore in a deposition where he stated that he could not work and that he "can't hardly walk up two steps without gasping for air").

30. Elmore Dep. 124:6–19.

31. Elmore Dep. 124:20–25, 125:1–17.

32. Telephone Interview with Diana Holt, *supra* note 21.

33. *Id.*

34. Elmore Dep. 133:4–8.

35. See Elmore Dep. 127:23–128:9. Elmore was incarcerated at the same time as Donald "Pee Wee" Gaskins, the infamous South Carolina serial killer. In 1982, Gaskins murdered another inmate using a homemade explosive device. Elmore saw the murdered inmate's blood and dismembered body parts the morning after the murder. See Clif LeBlanc, *South Carolina's Infamous Serial Killer, "Pee Wee" Gaskins*, STATE (Nov. 10, 2015), <http://www.thestate.com/news/special-reports/state-125/article44056854.html>, for a brief overview of Gaskins.

36. Telephone Interview with Diana Holt, *supra* note 21.

37. *Id.*

38. Elmore Dep. 129:12–25, 130:1–20.

39. See *id.*

with God.”<sup>40</sup> Elmore described the experience of confronting his death as the following:

Couldn't eat, couldn't sleep, you know, just—just bad thing. Just a bad thing. Like I say, it's something you don't—you know—you know, people on the outside don't really know how it is, right, but if you're put in that situation . . . it's a terrible thing.<sup>41</sup>

At his lowest, Elmore contemplated suicide to escape the psychological trauma of prison and serving on death row.<sup>42</sup> When asked in a deposition about some of the things he missed while incarcerated, Elmore became visibly upset about missing the death and burial of his mother.<sup>43</sup> Elmore has also expressed dismay about not having an opportunity to have a wife and children since he was incarcerated at such a young age.<sup>44</sup>

When Edward Lee Elmore emerged from prison after thirty years behind bars for a crime he did not commit, he had nothing but the clothes on his back.<sup>45</sup> Elmore entered a world that was wholly unfamiliar to him given the rapid technological advances of the last three decades. At the time of Elmore's release, the State of South Carolina provided no form of support to aid him in re-entering society. Without the help of his family and legal team, Elmore would have been left on his own to meet immediate basic needs, such as food and shelter.

The State of South Carolina is one of just eighteen states that do not have a wrongful conviction compensation statute.<sup>46</sup> The South Carolina Legislature should enact a statute to compensate individuals who have been wrongfully convicted and incarcerated. This Note serves to advocate for the enactment of such a law, which would provide adequate redress for the State's role in wrongful convictions.

Part II of this Note provides a brief overview of wrongful convictions, including the prevalence of wrongful convictions and the stories of several individuals who were wrongfully convicted in South Carolina. Part III explains how a wrongful conviction affects the innocent. Part IV details the current monetary remedies generally available to the wrongfully convicted

40. Elmore Dep. 131:15–24.

41. Elmore Dep. 130:22–25, 131:1–3.

42. Elmore Dep. 141:16–25.

43. Elmore Dep. 135:11–22, 136:3–7.

44. Elmore Dep. 140:2–21.

45. Telephone Interview with Diana Holt, *supra* note 21.

46. *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <http://www.innocenceproject.org/compensating-wrongly-convicted/> (last visited Mar. 13, 2017).

upon release. Part IV further details the various ways wrongful conviction compensation statutes vary from state to state. Finally, Part V provides a series of recommendations intended to help the South Carolina Legislature in drafting a wrongful conviction compensation bill.

## II. THE STATE OF WRONGFUL CONVICTIONS

### A. Current Landscape

The revered Judge Learned Hand wrote in a 1923 opinion that “[o]ur procedure has always been haunted by the ghost of the innocent man convicted,” but declared that “[i]t is an unreal dream.”<sup>47</sup> Judge Learned Hand’s dismissal of wrongful convictions as “an unreal dream” reflects a traditional belief in the infallibility of the American criminal justice system.

Indeed, prior to the publication of Edwin Borchard’s groundbreaking 1932 novel, *Convicting the Innocent*, the formal study of wrongful convictions in the United States was practically non-existent.<sup>48</sup> In *Convicting the Innocent*, Borchard profiled sixty-two cases of wrongful convictions in the United States.<sup>49</sup> Borchard identified many of the underlying causes and advocated for reforms, including compensation for exonerees.<sup>50</sup> Borchard argued, “But a mistake has been made, whether in good faith or bad, and the question arises, who should bear the loss, the hapless victim alone or the

47. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

48. See Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 827 (2010) [hereinafter Gould & Leo, *One Hundred Years Later*] (detailing Borchard’s early work); C. Ronald Huff, *Wrongful Convictions in the United States*, in WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 72 (C. Ronald Huff & Martin Killias eds., 2010) (describing the methods Borchard used to obtain his results in *Convicting the Innocent*); Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 11 (2009) [hereinafter *Studying Wrongful Convictions*] (pointing to *Convicting the Innocent* as the breakthrough historical work on the subject); Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 203 (2005) (crediting *Convicting the Innocent* as the beginning of wrongful conviction study); EDWIN M. BORCHARD, *CONVICTING THE INNOCENT*, at xiii (Yale University Press, 1932). In *Convicting the Innocent*, Borchard notes that there was some federal legislative activity in 1913 to indemnify those who were wrongfully convicted. See BORCHARD, *supra* note 48, at 387.

49. Borchard profiled sixty-five cases of wrongful convictions in *Convicting the Innocent*, but three cases were based in England. See generally BORCHARD, *supra* note 48.

50. See BORCHARD, *supra* note 48, at xv (identifying various causes of wrongful convictions). *Id.* at 407 (“It may be hoped that within measurable time remedial legislation may recognize the social obligation to compensate the innocent victims of an unjust conviction.”).



community. Under any economic or legal system, there would seem to be but one answer to that question.”<sup>51</sup>

When *Convicting the Innocent* was published, just three states provided statutory compensation for wrongfully convicted individuals.<sup>52</sup> Despite Borchard’s research and advocacy in the early twentieth century, academic literature on wrongful convictions and systemic reform efforts remained paltry.<sup>53</sup>

The advent and use of deoxyribonucleic acid (DNA) testing in the 1990s led to an increase in exonerations.<sup>54</sup> The increase led to a heightened awareness of wrongful convictions and, more generally, systemic flaws in the criminal justice system.<sup>55</sup> In the last two decades, wrongful convictions have emerged as a major criminal justice issue. There is no shortage of academic literature detailing the causes of wrongful convictions and proposing reforms.<sup>56</sup>

Moreover, zealous journalists and broadcast media have further increased public awareness of wrongful convictions through countless news articles and programming like the wildly successful *Serial* podcast and Netflix’s *Making a Murderer* documentary.<sup>57</sup> Furthermore, activists have

51. See BORCHARD, *supra* note 48, at 376–77.

52. See BORCHARD, *supra* note 48, at xxiv.

53. See Gould & Leo, *One Hundred Years Later*, *supra* note 48, at 828 (“Yet, for the next fifty years [after Borchard’s *Convicting the Innocent*], research on wrongful convictions was sporadic.”); Gould & Leo, *One Hundred Years Later*, *supra* note 48, at 204 (“Until the late 1980s, the subject of the wrongful conviction of the innocent had been largely and somewhat curiously ignored by criminologists and most other social scientists.”).

54. See Gould & Leo, *One Hundred Years Later*, *supra* note 48, at 829–30 (explaining the impact of DNA testing on wrongful convictions).

55. See Leo & Gould, *Studying Wrongful Convictions*, *supra* note 48, at 13 (demonstrating the role DNA has played in exonerating the wrongly convicted); Leo, *supra* note 48, at 205 (“The advent of DNA testing and the window it opens onto the errors of the legal system have altered the nature and study of miscarriages of justice in America.”).

56. It is now generally accepted that wrongful convictions are often caused by the following factors: prosecutorial misconduct, police misconduct, eyewitness misidentification, faulty forensic evidence, perjured testimony, ineffective assistance of counsel, and false confessions. See JIM PETRO & NANCY PETRO, *FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT* xii (rev. ed. 2015); BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 124 (2011); C. RONALD HUFF ET AL., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* 71–72 (1996).

57. See Sam Adams, ‘*Making a Murderer*’ and *True Crime in the Binge-Viewing Era*, *ROLLING STONE* (Jan. 13, 2016), <http://www.rollingstone.com/tv/news/making-a-murderer-and-true-crime-in-the-binge-viewing-era-20160113>; Ellen Gamerman, ‘*Serial*’ Podcast Catches Fire, *WALL ST. J.* (Nov. 13, 2014), <http://www.wsj.com/articles/serial-podcast-catches-fire-1415921853>. *Serial*, at one point, was the fastest podcast to reach five million downloads and streams in iTunes history. *Id.*

formed dozens of organizations across the country to advocate for both the wrongfully convicted and larger reform efforts.

Perhaps most importantly, state legislatures have increasingly begun considering and adopting wrongful conviction reforms and remedies, including statutory compensation laws.<sup>58</sup> Despite this national trend and ever-growing body of scholarly research, South Carolina has failed to enact a wrongful conviction compensation statute.

### *B. Prevalence of Wrongful Convictions*

Concrete data on the rate of wrongful convictions is sparse, difficult to measure, and “likely unknowable.”<sup>59</sup> According to Jon B. Gould, a leading scholar on wrongful convictions, existing data and research posits a three percent rate of error in the criminal justice system.<sup>60</sup> This estimate translates to the incarceration of thousands of innocent individuals each year, but the data is admittedly uncertain.<sup>61</sup>

Exoneration data is more quantifiable and is therefore a good indicator to estimate the prevalence of wrongful convictions.<sup>62</sup> In 1989, the National Registry of Exonerations (“the Registry”) began tracking exonerations in the United States.<sup>63</sup> As of February 2017, the Registry has recorded 1992

58. See Michael Leo Owens & Elizabeth Griffiths, *Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Legislation*, 75 ALBANY L. REV. 1283, 1286–87 (2012) (Then, beginning in the early 1980s, states began to enact statutory compensation, and since then we have witnessed a spate of enactments . . . of wrongful compensation statutes . . .”).

59. Jon B. Gould, *Wrongful Convictions in the United States: An Overview*, OXFORD HANDBOOKS ONLINE (2014), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-006?print=pdf> [hereinafter Gould, *Overview*]; Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U.L. REV. 1133, 1143 (2013) (“When it comes to wrongful convictions, very little hard data exists.”). See Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173 (2008) for a detailed discussion of the myriad reasons it is difficult to estimate the occurrence of wrongful convictions.

60. Gould, *Overview*, *supra* note 59, at 3.

61. See *id.* But see Covey, *supra* note 59, at 1135 (“The data we currently have is simply too limited to permit any accurate generalizations about how frequently wrongful convictions occur . . .”).

62. See Covey, *supra* note 59, at 1144 (“[F]ormal exoneration is the best that our legal system is usually capable of doing, and thus provides the best indicator we have of instances in which an actually innocent person has been wrongfully convicted.”).

63. See *Our Mission*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/mission.aspx> (last visited Nov. 1, 2016).

exonerations.<sup>64</sup> The exonerees tracked by the Registry spent an average of 8.7 years imprisoned and, cumulatively, have lost a total of 17,314 years behind bars.<sup>65</sup> While this figure provides a general estimate, it likely understates the number of people who have been wrongfully convicted for the following reasons: (1) not every individual released from prison for a wrongful conviction is legally exonerated; and (2) not every individual who is wrongfully imprisoned receives an opportunity to have their conviction overturned.

According to the Registry, seven people have been legally exonerated in South Carolina since 1989.<sup>66</sup> Again, for the aforementioned reasons, this number likely understates the number of people the State of South Carolina has wrongfully convicted. This figure notably excludes individuals like Edward Lee Elmore. Although it is arguably impossible to know for certain how many people have been wrongfully convicted in South Carolina, past and present incidents demonstrate a need to address wrongful convictions in the State's administration of justice and provide financial restitution to the aggrieved.

The following five cases underscore the need for South Carolina to revisit its position on wrongful conviction compensation. As the cases illustrate, a variety of different factors contribute to wrongful convictions. Irrespective of the causes, the State of South Carolina has an obligation to remedy such gross miscarriages of justice.

### 1. *James McClurkin and Ray Degraffenreid*

James McClurkin and Ray Charles Degraffenreid were convicted in 1973 for the slaying of an elderly man in Chester, South Carolina.<sup>67</sup> Both men have spent the last forty years in prison.<sup>68</sup> Despite a lack of evidence and both men having alibis that placed them miles away from the crime

64. *Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> (last visited Feb. 5, 2017).

65. *Interactive Data Display*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Feb. 5, 2017).

66. *See Number of Exonerations in South Carolina Since 1989*, NAT'L REGISTRY OF EXONERATIONS, [www.law.umich.edu/special/exoneration/Pages/about.aspx](http://www.law.umich.edu/special/exoneration/Pages/about.aspx) (follow "Using the Registry" hyperlink, then follow "Browse Cases" hyperlink, then search "South Carolina").

67. *See Andrew Dys, A Pledge to Make It Right for Wrongfully Convicted Chester Men Jailed 40 Years for Murder*, HERALD (Oct. 15, 2016), <http://www.heraldonline.com/news/local/news-columns-blogs/andrew-dys/article108499402.html>.

68. *Id.*

scene, the two defendants were convicted based on the testimony of a criminal who later confessed to committing the murder.<sup>69</sup> Degraffenreid falsely confessed to the murder after being locked in “solitary confinement for five days [with] almost no water or food, no heat, and suffering from bleeding hemorrhoids.”<sup>70</sup>

After years of maintaining McClurkin’s innocence, his family was finally able to convince the Sheriff of Chester County to re-open the case for examination.<sup>71</sup> The sheriff determined that there was no evidence connecting McClurkin and Degraffenreid to the murder and spoke in favor of parole before the South Carolina Board of Pardons and Paroles.<sup>72</sup> The parole board agreed to parole and release McClurkin in October 2016.<sup>73</sup> Degraffenreid was unable to appear before the parole board in the October hearing due to significant mental deterioration, but he got another opportunity in November 2016.<sup>74</sup> The board released Degraffenreid in January 2017 after he spent a few weeks in a treatment facility for his mental deterioration.<sup>75</sup> At the time of this writing, neither McClurkin nor Degraffenreid have been formally exonerated.<sup>76</sup>

## 2. Robert Palmer

Robert Palmer was incarcerated for nearly four years for homicide by child abuse in the death of a seventeen-month old baby.<sup>77</sup> At the time of the incident, Palmer was dating the co-defendant, the victim’s grandmother, who was temporarily keeping the child while the child’s mother was out of town.<sup>78</sup> The co-defendant “admitted to mistreating the victim by shaking, spanking, and overdosing him [with antihistamine medication],” but Palmer

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. See Andrew Dys, *A Pledge to Make It Right for Wrongfully Convicted Chester Men Jailed 40 Years for Murder*, HERALD (Oct. 15, 2016), <http://www.heraldonline.com/news/local/news-columns-blogs/andrew-dys/article108499402.html>.

74. *See id.*

75. See Andrew Dys, *SC Man Freed After 40 Years for Murder He, Police Say He Did Not Commit*, STATE (Columbia, S.C.) (Jan. 25, 2017), <http://www.thestate.com/news/state/south-carolina/article128621774.html>.

76. *See id.*

77. See Charles D. Perry, *Conway Man Cleared in Child’s Murder Now Suing Horry County, Investigator Who Sent Him to Prison*, STATE (Columbia, S.C.) (Mar. 12, 2016), [www.thestate.com/news/state/south-carolina/article65763887.html](http://www.thestate.com/news/state/south-carolina/article65763887.html).

78. *See id.*

maintained his innocence.<sup>79</sup> Palmer claimed that he had no knowledge of what caused the child's injuries and denied any involvement.<sup>80</sup> In 2015, the South Carolina Supreme Court determined that there was insufficient evidence to support a finding "that Palmer either harmed the victim or was aware [the co-defendant] was harming him."<sup>81</sup> The court overturned Palmer's conviction, and he was released from prison.<sup>82</sup>

In March 2016, Palmer filed a lawsuit against the State of South Carolina, Horry County, and the police investigator for false imprisonment, negligence, malicious prosecution, and deprivation of Palmer's civil rights.<sup>83</sup> Palmer's complaint alleges that his "ordeal cost him his job, kept him away from his family and left him with nightmares about what he endured in prison."<sup>84</sup> Palmer's assertions in his complaint reflect the post-incarceration experience of many wrongfully convicted individuals.

### 3. *Richard Gagnon*

In 2008, Richard Gagnon was convicted for a double homicide that left him behind bars for nearly eight years.<sup>85</sup> Despite denying any involvement with the crime and scant physical evidence, Gagnon's fate was sealed by Robert Lee Mullins, a jailhouse informant who testified that Gagnon confessed to the murders while both men were in jail.<sup>86</sup> When new DNA evidence later linked a different person to the crime, prosecutors still maintained that Gagnon and the second individual committed the crime together.<sup>87</sup> In 2013, Gagnon was released from prison after a jailhouse informant stepped forward and testified that Mullins admitted to fabricating Gagnon's confession.<sup>88</sup> Gagnon was exonerated in 2015 when prosecutors dismissed all charges against him.<sup>89</sup>

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79. *State v. Palmer*, 413 S.C. 410, 420, 776 S.E.2d 558, 563 (2015); *see Perry, supra* note 77.

80. *See State v. Palmer*, 408 S.C. 218, 224, 758 S.E.2d 195, 198 (Ct. App. 2014), *rev'd* 413 S.C. 410, 776 S.E.2d 558 (2015).

81. *See Palmer*, 408 S.C. at 421, 776 S.E.2d at 564.

82. *See Perry, supra* note 77.

83. *See id.*

84. *Id.*

85. *See* Maurice Possley, *Richard Gagnon*, NAT'L REGISTRY OF EXONERATIONS (June 2, 2015), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4698>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

#### 4. *Joseph Walker*

In 2002, Joseph Walker was arrested and charged for the kidnapping and rape of a woman in Denmark, South Carolina.<sup>90</sup> The woman alleged that she was at a gas station when a man assisted her in getting her car to crank.<sup>91</sup> She invited the man to “follow her . . . to her home so she could get money to pay him” for assisting her.<sup>92</sup> Once the two arrived at her home, the man blindfolded and kidnapped the woman, drove her to another location, and later sexually assaulted her.<sup>93</sup> The victim identified Walker as the assailant when police presented her with security footage from the gas station.<sup>94</sup>

Although Walker told investigators that he visited the gas station on the day of the incident, he “denied any knowledge of the crime or the victim” and provided an alibi.<sup>95</sup> During Walker’s trial, the victim again identified Walker as the perpetrator.<sup>96</sup> Despite a complete lack of tangible evidence connecting Walker to the crime or the victim, Walker was convicted and sentenced to twenty-four years in prison.<sup>97</sup> Walker was exonerated in 2014 after spending twelve years incarcerated.<sup>98</sup>

#### 5. *Jepheth Barnes*

In 1995, a bank foreclosed on Jepheth Barnes’ home due to his wife’s secret gambling problems and resulting nonpayment of their mortgage.<sup>99</sup> Consequently, Barnes “separated . . . from his wife and her two children from a previous marriage . . . .”<sup>100</sup> Two days later, his wife’s eleven-year-old daughter alleged—and later testified—that Barnes raped her.<sup>101</sup>

The examining doctor that prepared the rape kit testified that although sperm was present, its lack of motility indicated that the rape had not occurred within the last two days as the girl claimed.<sup>102</sup> A South Carolina

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90. See Maurice Possley, *Joseph Walker*, NAT’L REGISTRY OF EXONERATIONS (Nov. 25, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4552>.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. See *id.*

98. See *id.*

99. See *id.*

100. *Id.*

101. *Id.*

102. *Id.*

Law Enforcement (SLED) analyst—relying on an incomplete DNA profile—testified that there was enough evidence to suggest that Barnes could have been the perpetrator, though she “could not estimate the statistical probability that the sperm came from Barnes.”<sup>103</sup>

Despite maintaining his innocence and the examining doctor’s testimony, a “jury convicted [Barnes] of criminal sexual conduct with a minor and . . . sentenced [him] to [sixteen] years in prison.”<sup>104</sup> In 2002, a new DNA analysis of the rape kit revealed that the sperm belonged to the victim’s brother and not Barnes.<sup>105</sup> Barnes was subsequently exonerated when the prosecution dismissed the case in 2003.<sup>106</sup>

### III. WRONGFUL CONVICTIONS HAVE A DETRIMENTAL IMPACT ON THE INNOCENT

There is minimal scholarly research dedicated to analyzing how a wrongful conviction specifically affects a wrongfully convicted person after release, and the majority of research concerning post-incarceration experiences focuses on ex-offenders.<sup>107</sup> However, available research shows that, upon release, wrongfully convicted individuals ordinarily struggle to obtain housing, healthcare, employment and training, access to financial resources, and assistance with pursuing a lawsuit, compensation claim, pardon, or expungement.<sup>108</sup> Additional research has concluded that “90% of exonerees lost all of their assets, such as savings, vehicles and houses” during their ordeals.<sup>109</sup> Wrongful convictions also take an economic toll on families and friends of the accused who devote limited resources to fighting the conviction.<sup>110</sup>

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. See Amy Shlosberg, *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 354 (2014) (“[V]ery little attention has been paid to the factors that allow exonerees to successfully reenter society . . .”); Sandra D. Westervelt & Kimberly J. Cook, *Coping with Innocence After Death Row*, 7 CONTEXTS 32, 33 (2008) (noting that there is little scholarly literature examining the consequences exonerees face after release).

108. Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), [www.nytimes.com/2007/11/25/us/25dna.html](http://www.nytimes.com/2007/11/25/us/25dna.html).

109. KARIN D. MARTIN, A MODEL STATE POLICY FOR THE TREATMENT OF THE WRONGFULLY CONVICTED: A STUDY CONDUCTED FOR THE LIFE AFTER EXONERATION PROGRAM 6 (2006).

110. Meggan Smith, *Have We Abandoned the Innocent? Society’s Debt to the Wrongly Convicted*, 2 AM. U. CRIM. L. BRIEF 3, 6 (2007) (citing Jennifer Friedlin, *New Project Aims to*

Lacking or having exhausted any financial resources, exonerees are forced to rely on family and friends to meet their basic needs after leaving prison.<sup>111</sup> This desperate reliance on others is often a humiliating experience for exonerees.<sup>112</sup> Some exonerees have no family and friends to rely upon and are left on their own.<sup>113</sup> Unlike former prisoners who are paroled or released after completing their sentences, exonerees often have no access to state resources designed to help newly-released inmates transition back into society.<sup>114</sup> Consequently, exonerees receive very little, if any, support to overcome barriers to successful re-entry.

### A. Employment

Exonerees encounter significant hurdles in obtaining gainful employment after their release. Many states do not provide for automatic expungement when a person is exonerated.<sup>115</sup> Therefore, despite their

*Assist Exonerated Prisoners*, AP NEWS (May 8, 2003), <http://www.truthinjustice.org/LAEP.htm>.

111. See Jennifer Wildeman et al., *Experiencing Wrongful and Unlawful Conviction*, 50 J. OFFENDER REHAB. 411, 414 (2011) (citing Stephanie Armour, *Wrongly Convicted Walk Away with Scars*, USA TODAY (Oct. 19, 2004), [http://usatoday30.usatoday.com/money/workplace/2004-10-13-dna-exonerated-jobs\\_x.htm](http://usatoday30.usatoday.com/money/workplace/2004-10-13-dna-exonerated-jobs_x.htm)) (“Without government assistance in finding either employment or safe housing, many exonerees are forced to depend on family members and friends in order to survive.”); MARTIN, *supra* note 109, at 6 (citing Stephanie Armour, *Wrongly Convicted Walk Away with Scars*, USA TODAY (Oct. 19, 2004), [http://usatoday30.usatoday.com/money/workplace/2004-10-13-dna-exonerated-jobs\\_x.htm](http://usatoday30.usatoday.com/money/workplace/2004-10-13-dna-exonerated-jobs_x.htm)). (“[A]pproximately one-third of exonerated people depend on friends and family for financial means.”).

112. See Mark Pogrebin et al., *Employment Isn't Enough: Financial Obstacles Experienced by Ex-Prisoners During the Reentry Process*, 39 CRIM. JUST. REV. 394, 404 (2014) (noting that [p]arolees' reliance on “family members for help . . . can be humiliating”).

113. Donna Mckneelen, “*Oh Lord Won't You Buy Me a Mercedes Benz?*”: *A Comparison of State Wrongful Conviction Compensation Statutes*, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 185, 188 (2013) (citing INNOCENCE PROJECT, BENJAMIN N. CARDOZO SCH. OF LAW, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 3 (2009)) [hereinafter MAKING UP FOR LOST TIME].

114. Wildeman, *supra* note 111, at 413 (citing Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 176 (2004)) (“When released, many exonerees are not provided with the same reentry opportunities that are made available to parolees.”); MAKING UP FOR LOST TIME, *supra* note 113 (“Services available to parolees in many states, including job placement and temporary housing, are not available to exonerees.”).

115. Kimberly J. Cook et al., *The Problem of Fit: Parolees, Exonerees, and Prison Reentry*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 237, 244 (Allison D. Redlich et al. eds., 2014) [hereinafter *The Problem of Fit*]; Jack Healy, *Wrongfully Convicted Often Find Their Record, Unexpunged, Haunts Them*, N.Y. TIMES (May



innocence, many exonerees still suffer the consequences of having a criminal record. Expungement usually requires an attorney's expertise, and most exonerees do not have the financial resources to engage an attorney.<sup>116</sup> Moreover, the expungement process can take years to complete.<sup>117</sup> Without an expungement, exonerees are required to disclose the conviction and imprisonment on job applications, and employers are ordinarily able to find a record of the exoneree's criminal history through a standard background check.<sup>118</sup>

Because employers are often unwilling to hire people with any type of criminal record, exonerated individuals struggle to find employment.<sup>119</sup> Many exonerees produce legal documentation to prove their innocence to potential employers, but evidence of an exoneration is often futile due to the tremendous amount of stigma associated with incarceration.<sup>120</sup> The stigma is ordinarily an insurmountable barrier as employers and neighbors oftentimes believe that an exoneree is truly guilty of the crime.<sup>121</sup> Accordingly, "many exonerees find that employers are wary of hiring them and coworkers are reluctant to work with them" despite having knowledge of the person's exoneration.<sup>122</sup>

Exonerees are further disadvantaged by a lack of skills and training and large gaps in employment due to their incarceration.<sup>123</sup> Because the prison system fails to provide inmates with adequate opportunities for education and skills development, exonerees emerge from prison ill-equipped to re-enter the workforce.<sup>124</sup> Furthermore, technological advances render many previously marketable skills obsolete.<sup>125</sup> Additionally, exonerees are unable to provide a legitimate reason for the large gap in employment without disclosing their conviction.<sup>126</sup>

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5, 2013), <http://www.nytimes.com/2013/05/06/us/wrongfully-convicted-find-their-record-haunts-them.html>.

116. *The Problem of Fit*, *supra* note 115, at 244.

117. MAKING UP FOR LOST TIME, *supra* note 113, at 10.

118. *The Problem of Fit*, *supra* note 115, at 240; MAKING UP FOR LOST TIME, *supra* note 113, at 10.

119. Smith, *supra* note 110, at 6 (citing SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED 432 (David Eggers & Lola Vollen eds., 2016)).

120. *Id.*; *The Problem of Fit*, *supra* note 115, at 240; Healy, *supra* note 115.

121. See Westervelt & Cook, *supra* note 107, at 35 ("Frequently, community members still see them as guilty criminals who 'beat the system.'").

122. Smith, *supra* note 110, at 6.

123. *Id.*

124. *Id.*

125. *Id.*

126. *The Problem of Fit*, *supra* note 115, at 241.

Exonerees that are able to find employment often find it difficult to remain employed for various reasons. For example, some exonerees experience hostile work environments due to the stigma surrounding their incarceration, and employers sometimes terminate exonerees after learning of their conviction or receiving complaints from customers.<sup>127</sup> Additionally, exonerees are often forced to accept low-paying, menial jobs.<sup>128</sup> Furthermore, the psychological effect of an exoneree's false conviction, imprisonment, and post-release experiences can interfere with the person's ability to effectively function in a work environment.<sup>129</sup>

State governments ordinarily provide ex-offenders with free rehabilitation and job placement services.<sup>130</sup> Exonerees are often ineligible to participate in these programs due to their false convictions and are essentially "released into an employment no-man's land."<sup>131</sup> The inability to secure and maintain meaningful employment exacerbates additional issues exonerees face, such as obtaining housing and medical care.

### B. Housing

Exonerees regularly struggle to find housing after being released from prison, and one study found that "forty percent of exonerees lack adequate housing."<sup>132</sup> Exonerees are often unable to utilize temporary shelters established for ex-offenders who have been paroled or released after completing their sentences.<sup>133</sup> Some exonerees are able to rely on family and friends for shelter; however, a false conviction and the resulting stigma can

127. Smith, *supra* note 110, at 6.

128. *Id.* (citing Sharon Cohen & Deborah Hastings, *For 110 Inmates Freed by DNA Tests, True Freedom Remains Elusive*, AP NEWS (May 28, 2002), <http://truthinjustice.org/truefreedom.htm>).

129. *See* Wildeman, *supra* note 111, at 428 ("Furthermore, complications stemming from mental health disorders such as PTSD and depression can undermine attempts to become employed.").

130. *The Problem of Fit*, *supra* note 115, at 241.

131. Stephanie Armour, *Wrongfully Convicted Walk Away with Scars*, USA TODAY (Oct. 13, 2004), [http://usatoday30.usatoday.com/money/workplace/2004-10-13-dna-exonerated-jobs\\_x.htm](http://usatoday30.usatoday.com/money/workplace/2004-10-13-dna-exonerated-jobs_x.htm).

132. Smith, *supra* note 110, at 5 (citing *Bad Things Happen to Good People*, in SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED, 395–432 (Lola Vollen & Dave Eggers eds., 2005)).

133. *Id.* at 5–6 (citing *Bad Things Happen to Good People*, in SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED, 395–432 (Lola Vollen & Dave Eggers eds., 2005)).

strain relationships, and some exonerees are left to find housing on their own.<sup>134</sup>

Absent expungement, private landlords and public housing authorities often deny housing to exonerees on the basis of a criminal record.<sup>135</sup> Furthermore, an exoneree's lack of credit history and inability to secure steady employment also impedes efforts to obtain housing.<sup>136</sup> Moreover, newly-released exonerees are normally unable to produce enough money to cover initial housing costs, such as deposits and application fees.<sup>137</sup> Consequently, it is common for exonerees to experience homelessness.

### C. Healthcare

Ex-inmates, irrespective of innocence, leave prison with a host of physical, psychological, and emotional issues due to their experiences while incarcerated.<sup>138</sup> Ex-inmates have been found to have "higher rates of chronic and infectious disease (in particular, asthma, hypertension, tuberculosis, diabetes, hepatitis and HIV/AIDS) . . . ."<sup>139</sup> Furthermore, "inmates are also three times more likely than the general population to suffer from a serious mental illness and four times more likely to have a substance abuse problem."<sup>140</sup> Numerous exonerees develop debilitating mental health conditions such as extreme paranoia, depression, anxiety, and post-traumatic stress disorder (PTSD).<sup>141</sup> The effects of these mental conditions are magnified due to the difficulty exonerees have in emotionally processing a wrongful conviction and the myriad struggles exonerees encounter as they try to adjust to their new freedom.<sup>142</sup>

134. *Id.* at 6.

135. Smith, *supra* note 110, at 6 (citing *Bad Things Happen to Good People*, in SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED, 395–432 (Lola Vollen & Dave Eggers eds., 2005)).

136. *Id.* (citing *Bad Things Happen to Good People*, in SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED 395–432 (Lola Vollen & Dave Eggers eds., 2005)).

137. *Id.*

138. *Id.* at 6–7.

139. Michael Ollove, *Ex-Felons Are About to Get Health Coverage*, PEW CHARITABLE TRUSTS (Apr. 5, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/04/05/exfelons-are-about-to-get-health-coverage>.

140. Jacque Wilson, *Obamacare: A 'Stay Out of Jail Free' Card?*, CNN (Dec. 12, 2013), <http://www.cnn.com/2013/12/12/health/obamacare-medicaid-prison-jail/>.

141. Wildeman, *supra* note 111, at 412 (citing Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 165–83 (2004)).

142. *Id.* at 412–13.

Oftentimes, exonerees do not have access to treatment for their physical or psychological conditions. Exonerees are often unable to obtain private health insurance, due to its cost and common link to employment.<sup>143</sup> Moreover, some exonerees do not qualify for government health insurance, such as Medicaid or Medicare.<sup>144</sup> Furthermore, “even exonerees that are eligible for government supported health coverage may find that the bureaucracy and paperwork involved is enough to effectively prevent them from receiving it.”<sup>145</sup>

#### IV. MONETARY REMEDIES AVAILABLE TO THE WRONGFULLY CONVICTED

Upon release, the wrongly convicted generally have three options to seek recourse from the state: civil litigation, special legislation, or statutory compensation. The availability and adequacy of each option varies among states, and exonerees that live in states without a compensation statute are unlikely to recover any type of financial restitution.

##### A. *Civil Litigation*

An exoneree can seek restitution for a wrongful conviction by filing a civil rights claim against a state actor under 42 U.S.C. § 1983 for deprivation of constitutional rights. However, it is difficult to prevail on a § 1983 claim due to the significant legal barriers claimants must overcome. Section 1983 provides a “method for vindicating federal rights elsewhere conferred” by the United States Constitution or a federal statute, but the section itself does not create substantive rights.<sup>146</sup> Accordingly, wrongfully convicted individuals may pursue a § 1983 claim only if § 1983 covers a right at issue in the individual’s case.

If a wrongfully convicted individual is able to state a claim for a right covered under § 1983, the individual must then prove government misconduct.<sup>147</sup> Claims under § 1983 ordinarily involve malicious prosecution; ineffective assistance of counsel; suppression of exculpatory evidence; a coerced confession; fabricated evidence; or the use of suggestive

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143. See MAKING UP FOR LOST TIME, *supra* note 113, at 8. Mckneelen, *supra* note 113, at 188.

144. *Id.*

145. *Id.*

146. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

147. Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J. L. REFORM 123, 132 (2010) (citing Davison v. Cannon, 474 U.S. 344, 347 (1986)).

eyewitness identification techniques.<sup>148</sup> The claimant must show culpability on the part of the state actor, and it is insufficient to allege misconduct on the basis of “coincidence, mistake, or negligence” alone.<sup>149</sup> Culpable conduct is exceedingly burdensome to prove, and absent a showing of intentional misconduct, a claimant will not be able to successfully assert a claim under § 1983.<sup>150</sup>

Wrongfully convicted individuals are further hindered by various immunity protections that can bar a § 1983 action entirely.<sup>151</sup> Perhaps more importantly, wrongful convictions are often attributed to causes wholly unrelated to official misconduct, and are therefore not actionable under § 1983.<sup>152</sup> Because civil litigation presents such onerous obstacles to successful adjudication, it is ordinarily not a feasible option for exonerees seeking restitution. Moreover, litigation is an expensive and protracted process that imposes additional financial and emotional hardships on the wrongfully convicted individual as the person awaits a judgment.<sup>153</sup>

### B. *Special Legislation (Private Bill)*

Exonerees can also pursue special legislation, or a private bill, to obtain compensation.<sup>154</sup> This method requires the assistance of a sympathetic state legislator who agrees to introduce and lobby for the passage of a private bill to compensate that particular individual. It is considerably difficult for an exoneree to gain compensation through special legislation because “[p]ositive publicity surrounding the exoneration, the political connections of the exoneree, and budgetary concerns all are much more likely to determine the fate of the bill than the merits of the claim for compensation.”<sup>155</sup>

Generally, wrongfully convicted individuals do not have the political connections necessary to successfully pursue special legislation.<sup>156</sup>

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148. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 35 WISC. L. REV. 35, 54 (2005).

149. *Id.* at 53.

150. Kahn, *supra* note 147, at 132.

151. *Id.* at 133.

152. Armbrust, *supra* note 114, at 162–63.

153. *Id.* at 134.

154. *Id.*

155. *Id.* (citing Albert B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 699–700 (2002)).

156. MAKING UP FOR LOST TIME, *supra* note 113, at 13. In *Convicting the Innocent*, Borghard acknowledged problems inherent in private legislation and noted, “[b]ut such relief

Furthermore, the variable nature of political environments make the legislative process unpredictable, and the ultimate passage of a private compensation bill is not guaranteed.<sup>157</sup> Some legislators are reluctant to support compensating a former inmate, despite the individual's innocence.<sup>158</sup> Moreover, the legislative process is ordinarily lengthy, and exonerees are often in need of financial relief sooner rather than later.

Even if a wrongfully convicted individual is successful in getting a private bill passed, some private bills provide significant monetary awards, while others fail to adequately compensate the individual.<sup>159</sup> In addition, special legislation only addresses wrongful convictions on a case-by-case basis. Wrongful conviction compensation must be provided on a larger scale to achieve meaningful reform and ensure adequate redress for those who have been falsely convicted.

### C. *Statutory Compensation*

Generally, the phrase "statutory compensation" describes state laws that provide some form of restitution for those who have been wrongfully convicted.<sup>160</sup> According to the Innocence Project at Benjamin N. Cardozo School of Law, "[i]n states that provide adequate assistance, compensation statutes are the most equitable, comprehensive and compassionate form of compensation available."<sup>161</sup>

Unlike civil litigation and special legislation, statutory compensation is available to anyone who meets specific eligibility criteria, and it does not require a showing of intentional government misconduct.<sup>162</sup> Further, "statutes generally treat each qualified applicant equally, so the level of support cannot vary depending on personality issues, race, educational background, political connections or other considerations."<sup>163</sup> Additionally, if structured appropriately, statutory compensation is generally the most expeditious option.<sup>164</sup>

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is spasmodic only and few victims of wrongful conviction have the necessary friends or influence to bring about a special legislative act." BORCHARD, *supra* note 48, at 375.

157. MAKING UP FOR LOST TIME, *supra* note 113, at 13.

158. *Id.*

159. *See id.* for a comparison of how personal legislation can sometimes lead to inadequate compensation for exonerees.

160. *See id.*

161. MAKING UP FOR LOST TIME, *supra* note 113, at 13.

162. Kahn, *supra* note 147, at 135.

163. MAKING UP FOR LOST TIME, *supra* note 113, at 14.

164. *Id.* at 13–14.

The federal government, the District of Columbia, and thirty-two states have implemented statutory schemes to compensate the wrongfully convicted.<sup>165</sup> There is wide variation in compensation statutes among jurisdictions, and some statutes are more comprehensive than others.<sup>166</sup> Compensation statutes generally vary in the size of the award, eligibility requirements, and filing requirements.<sup>167</sup> This Note does not seek to provide a comprehensive fifty-state survey on wrongful conviction compensation statutes, but it hopes to provide the reader with a basic understanding of the various components that these statutes encompass.

### 1. *Size of the Award*

Compensation statutes vary greatly in the size of the monetary award. The majority of states with compensation statutes provide a fixed dollar amount for each day or year the claimant was incarcerated.<sup>168</sup> Awards in states providing a fixed dollar amount can range from \$5000 per year of incarceration in Wisconsin<sup>169</sup> to \$80,000 per year of incarceration in Texas.<sup>170</sup> The federal government and several states award \$50,000 per year of incarceration.<sup>171</sup> Montana's wrongful conviction statute does not provide any financial assistance at all but rather opts to provide only "educational aid."<sup>172</sup> A handful of jurisdictions award an additional fixed amount for

165. *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <http://www.innocenceproject.org/compensating-wrongly-convicted/> (last visited Jan. 22, 2017).

166. *See generally* McKneelan, *supra* note 113 (providing a comprehensive survey of state compensation statutes).

167. *Id.*

168. *See, e.g.*, ALA. CODE § 29-2-150 (2001); FLA. STAT. § 961.01 (2008); 705 ILL. COMP. STAT. § 505/1 (1987); N.C. GEN. STAT. § 148-84 (2010). *See also* McKneelan, *supra* note 113, at 205–06.

169. WIS. STAT. ANN. § 775.05(4) (2017).

170. TEX. CODE ANN. § 103.052(a)(1) (2009).

171. *See, e.g.*, 28 U.S.C. § 2513(e) (1982); ALA. CODE § 29-2-159(a) (2001); FLA. STAT. § 961.06(1)(a) (2015); N.C. GEN. STAT. § 148-84 (2010); MISS. CODE § 11-44-7(2)(a) (2009); WASH. REV. CODE § 4.100.060(5)(a) (2013) (providing fixed dollar damages for each day or year of wrongful incarceration). Michigan's governor is expected to sign a wrongful conviction compensation bill in early 2017 authorizing \$50,000 per year of incarceration. *See* Jonathan Oosting, *Mich. Plans \$50K Compensation for Wrongfully Convicted*, DETROIT NEWS (Dec. 7, 2016), <http://www.detroitnews.com/story/news/local/michigan/2016/12/07/wrong-conviction/95108412/>.

172. MONT. CODE ANN. § 53-1-214 (2003).

every year the claimant was on death row, parole, or listed on a sex offender registry.<sup>173</sup>

Conversely, several states determine awards on a case-by-case basis. In some states, judges determine how much a claimant will receive.<sup>174</sup> In Maryland, the Board of Public Works, which consists of the state's governor, comptroller, and treasurer, decides how much to award a claimant.<sup>175</sup> Connecticut's statute vests authority in an appointed claims commissioner who has sole discretion over whether to grant compensation and the amount of the award.<sup>176</sup> Notably, "most states provide little guidance as to the amount of compensation or as to how to calculate the amount the state may award a claimant."<sup>177</sup>

Furthermore, many states cap the total award regardless of the length of time spent in prison. Statutory provisions establishing caps on monetary awards range from \$20,000 in New Hampshire, to \$750,000 in North Carolina, and \$2 million in Florida.<sup>178</sup> Illinois law provides a graduated compensation structure that sets different caps based on the length of time incarcerated.<sup>179</sup> Some states, do not impose an upper limit on wrongful conviction compensation. For example, Connecticut recently awarded \$6 million to an exoneree who spent twenty-one years in prison.<sup>180</sup>

Moreover, in addition to a monetary award, some compensation statutes provide for various forms of non-financial assistance.<sup>181</sup> Non-financial assistance seeks to alleviate some of the difficulties exonerees face while attempting to transition back to society.<sup>182</sup> For example, Colorado awards

173. *See, e.g.*, 28 U.S.C. § 2513(e); TEX. CODE ANN. § 103.052(b); WASH. REV. CODE 4.100.060(b) (awarding fixed amounts on a per-year basis in which an exoneree sat on death row, parole, or the sex offender registry).

174. *See, e.g.*, D.C. CODE § 2-421 (1981); W. VA. CODE § 14-2-13a(d) (2014) (providing judges such discretion). *See also* Mckneelen, *supra* note 113, at 207 (noting that some states "leave the decision of the amount to the presiding judge or fact finder").

175. MD. CODE ANN., STATE FIN. & PROCUREMENT, § 10-501 (2003).

176. *See* CONN. GEN. STAT. § 54-102uu(d)(1) (2016); Mckneelen, *supra* note 113, at 207 ("Connecticut mentions no specific amount or limit on the compensation amount and leaves it to the Claims Commissioner to consider relevant factors and determine an amount.").

177. Mckneelen, *supra* note 113, at 206.

178. N.H. REV. STAT. ANN. § 541-B:14(II) (2007); N.C. GEN. STAT. § 148-84(a); FLA. STAT. § 961.06(e).

179. 705 ILL. COMP. STAT. ANN. 505/8(c) (2009).

180. Mckneelen, *supra* note 113, at 207 ("Connecticut mentions no specific amount or limit on the compensation amount and leaves it to the Claims Commissioner to consider relevant factors and determine an amount."); Richard Weizel, *Wrongfully Convicted Connecticut Man Awarded \$6 Million Compensation*, REUTERS (Jan. 29, 2015), <http://www.reuters.com/article/us-usa-connecticut-conviction-idUSKBN0L301R20150130>.

181. Mckneelen, *supra* note 113, at 207.

182. *Id.*



monetary compensation; tuition waivers at state universities for both the exonerated person and his or her children; back child support; attorney fees associated with bringing the compensation claim; and any costs or penalties a person had to pay due to the wrongful conviction.<sup>183</sup> Non-financial assistance may also encompass employment and job skills training and “health insurance coverage for medical and counseling services.”<sup>184</sup> Furthermore, upon approving compensation, at least one state statute specifies that a court must automatically issue an expungement order.<sup>185</sup>

## 2. *Taxation*

Federal and state taxation laws present an additional challenge for exonerees who are able to obtain compensation through a statutory provision. In 2015, Congress amended the Internal Revenue Code to exempt wrongful conviction compensation.<sup>186</sup> However, at the state level, the law is often silent on how to treat wrongful conviction compensation for tax purposes.<sup>187</sup> A mere four states address the tax treatment of wrongful conviction compensation.<sup>188</sup> Under California law, compensation may not be “treated as gross income.”<sup>189</sup> Similarly, Utah exempts awards from state taxes.<sup>190</sup> The remaining two states generally exempt wrongful conviction compensation, except for any funds used to pay attorney fees.<sup>191</sup>

## 3. *Eligibility Requirements*

State compensation statutes impose a variety of eligibility requirements on those seeking compensation for a wrongful conviction. One of the primary eligibility requirements is a determination of innocence, and compensation statutes vary on what constitutes innocence. Several states condition eligibility on a claimant’s receipt of a pardon.<sup>192</sup> A pardon requirement presents a significant hurdle to obtaining compensation because

183. COLO. REV. STAT. ANN. § 13-65-103 (2013).

184. McKneelan, *supra* note 113, at 207.

185. COLO. REV. STAT. ANN. § 13-65-103.

186. Gillian B. White, *Taxing the Wrongfully Convicted*, ATLANTIC (Feb. 22, 2016), <http://www.theatlantic.com/business/archive/2016/02/taxing-the-wrongfully-convicted/470397/>.

187. McKneelan, *supra* note 113, at 205.

188. *Id.*

189. CAL. PENAL CODE § 4904 (2016).

190. UTAH CODE ANN. § 78B-9-405(5)(a) (2012).

191. *See* MASS. GEN. LAWS ch. 258D § 5 (2004); VT. STAT. ANN. tit. 13, § 5574 (2015); McKneelan, *supra* note 113, at 205.

192. McKneelan, *supra* note 113, at 198.

pardons are rare, discretionary, and subject to the whims of the then-existing political environment.<sup>193</sup>

Alternatively, some states opt to require a showing that DNA evidence proves the claimant's innocence.<sup>194</sup> Conditioning eligibility on a DNA exoneration is problematic because some individuals are exonerated based on other forms of evidence, such as a witness recantation.<sup>195</sup> Stringent requirements like a pardon or DNA exoneration tend to ensure that a state compensates only those individuals who are truly innocent and not those individuals released on a legal technicality. However, these requirements are extremely difficult to meet, and many exonerees may have to forego an opportunity to pursue a claim if a state does not provide any alternative ways to qualify for compensation.

In other states, a court or administrative body determines a claimant's innocence. Some states condition eligibility on a reversal, vacation, or dismissal of a conviction based on innocence. Other states take it a step further and require a subsequent hearing before a court, committee, or administrative body to determine innocence.

For example, Florida requires a hearing before an administrative law judge to determine a claimant's innocence if a prosecutorial authority objects to the claimant's eligibility for compensation.<sup>196</sup> Additionally, Illinois allows those who have secured a "certificate of innocence from the circuit court" to initiate a compensation claim.<sup>197</sup> Furthermore, under North Carolina law, the state's Innocence Inquiry Commission can submit its finding of a claimant's innocence to a three-judge panel that determines whether to exonerate the claimant.<sup>198</sup>

Colorado defines "actual innocence" as "a finding by clear and convincing evidence by a district court that a person is actually innocent."<sup>199</sup> Colorado's statute sets forth specific criteria and forbids a judge from concluding actual innocence on the basis of evidence that is "legally insufficient to support the . . . conviction," or where the "court reversed or vacated [a] conviction because of a legal error unrelated to . . . actual innocence or because of uncorroborated witness recantation alone."<sup>200</sup> The

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193. Justin Brooks & Alexander Simpson, *Find the Cost of Freedom: The State of Wrongful Conviction Compensation Statutes Across the Country and the Strange Legal Odyssey of Timothy Atkins*, 49 SAN DIEGO L. REV. 627, 640 (2012).

194. *Id.* at 644.

195. *Id.* at 640.

196. FLA. STAT. ANN. § 961.03 (2011).

197. 705 ILL. COMP. STAT. ANN. 505/8.

198. N.C. GEN. STAT. ANN. § 15A-1469 (2016).

199. COLO. REV. STAT. ANN. § 13-65-101 (2013).

200. *Id.*

statute further prohibits a finding of actual innocence “on the basis of uncorroborated witness recantation alone.”<sup>201</sup>

Many states afford claimants some latitude in pursuing a wrongful conviction compensation claim by allowing claimants to satisfy at least one of several options to bring a claim. However, some states severely limit a claimant’s ability to pursue compensation by conditioning eligibility solely on the satisfaction of a single stringent requirement, such as a gubernatorial pardon or DNA exoneration.<sup>202</sup>

In addition, some eligibility requirements limit compensation claims based on the classification of the crime. Some states provide compensation only for wrongful felony convictions, precluding those convicted of misdemeanors from recovering.<sup>203</sup> However, many states allow exonerees to pursue compensation despite the classification of the crime.<sup>204</sup>

Another eligibility issue relates to whether an individual entered a guilty plea or falsely confessed. Under some state laws, only an exoneree who “did not by his own conduct cause or bring about his conviction” is deemed eligible for wrongful conviction compensation.<sup>205</sup> This statutory language essentially operates to bar recovery by individuals who gave false confessions or entered guilty pleas.<sup>206</sup> In these states, a subsequent determination of actual innocence is immaterial.<sup>207</sup> These provisions ignore the many reasons innocent individuals plead guilty or give false confessions. For example, the District of Columbia bars claimants who entered a guilty plea; however, the statute excepts those who entered an Alford plea.<sup>208</sup>

Relatedly, under Florida’s “clean hands” provision, individuals with prior felony convictions are barred from pursuing compensation claims.<sup>209</sup> The clean hands provision is problematic because it does not differentiate between the type and nature of the felony. Therefore, the provision can operate to prohibit a deserving claimant from pursuing compensation based on a one-time nonviolent offense.<sup>210</sup>

201. *Id.*

202. McKneelan, *supra* note 113, at 198.

203. *Id.* at 196–97.

204. *Id.* at 197.

205. *See, e.g.*, N.J. STAT. ANN. § 52:4C-3 (2013); N.Y. CT. CL. ACT § 8-b (McKinney 2007).

206. MAKING UP FOR LOST TIME, *supra* note 113.

207. McKneelan, *supra* note 113, at 198.

208. D.C. CODE ANN. § 2-425 (2012); McKneelan, *supra* note 113, at 198.

209. FLA. STAT. ANN. § 961.04 (2012).

210. *See* David M. Reutter, *Provision in Florida Law Prohibits Compensation to Wrongfully Convicted*, PRISON LEGAL NEWS (Aug. 15, 2011), <https://www.prisonlegalnews.org/news/2011/aug/15/provision-in-florida-law-prohibits-compensation-to-wrongfully-convicted/>.

#### 4. *Filing Requirements*

Compensation statutes also differ in various filing requirements. Although several compensation statutes are silent on the amount of time a claimant has to file a claim, the majority of statutes specify a two-year limitation period.<sup>211</sup> Under Tennessee law, a claimant has just one year to file a claim.<sup>212</sup> Conversely, in New Hampshire, Texas, and Vermont, a claimant has three years to file a claim.<sup>213</sup>

Further, wrongful conviction statutes vary widely in the procedure for filing a compensation claim. Some compensation statutes provide that a claimant must file with a state agency, like the Division of Risk Management in Alabama,<sup>214</sup> the Industrial Commission in North Carolina,<sup>215</sup> or California's Victim Compensation Board.<sup>216</sup> Connecticut requires claimants to file with an appointed Claims Commissioner.<sup>217</sup>

In other states, claimants must initiate a civil action in a state court.<sup>218</sup> For example, in Colorado, a claimant must bring a lawsuit in a state district court and name the state as the respondent.<sup>219</sup> If the court sides with the claimant, it will direct the state court administrator to compensate the exoneratee.<sup>220</sup>

#### V. SOUTH CAROLINA SHOULD ENACT A WRONGFUL CONVICTION COMPENSATION STATUTE

South Carolina should enact a wrongful conviction compensation statute to adequately redress the pecuniary and non-pecuniary harms exoneratees suffer as a result of their incarceration. South Carolina should pursue statutory compensation as the means by which to compensate exoneratees because it is foreseeable, timely, and equitable. Out of the available remedies, statutory compensation is the best method so long as the law is structured in an efficient and equitable manner. A survey of the jurisdictions that currently provide wrongful conviction compensation is instructive.

211. McKneelan, *supra* note 113, at 201.

212. *See* TENN. CODE ANN. § 9-8-108(a)(7)(F) (2012); McKneelan, *supra* note 113, at 201.

213. McKneelan, *supra* note 113, at 201.

214. ALA. CODE § 29-2-158(a) (2003).

215. N.C. GEN. STAT. ANN. § 148-83 (2015).

216. CAL. PENAL CODE § 4900 (2016).

217. CONN. GEN. STAT. ANN. § 54-102uu (2009).

218. McKneelan, *supra* note 113, at 201.

219. COLO. REV. STAT. ANN. § 13-65-102(5) (2014).

220. *Id.* § 13-65-103(1).

Instead of following any single state's statutory scheme, South Carolina should adopt the best aspects from a variety of compensation statutes.

*A. Size of the Award*

South Carolina should follow the majority of states and enact a statute that provides a fixed base amount for each year the claimant was incarcerated. A fixed amount is better than a case-by-case determination of compensation because a case-by-case determination is more likely to be influenced by politics and controversies surrounding the amount of the compensation package. Moreover, a fixed amount removes the uncertainty associated with a case-by-case determination. Additionally, a fixed amount encourages efficiency because state officials do not have to waste time calculating what a claimant is owed.

South Carolina should set the base compensation rate at \$70,000 per year of incarceration. The statute should also provide an additional \$20,000 for every year the claimant was on death row. Furthermore, the statute should provide an additional \$15,000 for every year the claimant was on parole, probation, or registered as a sex offender. A claimant should receive an award of \$1,000,000 or less as a lump sum. If the total amount exceeds \$1,000,000, the claimant should receive the initial \$1,000,000 as a lump sum with the remainder to be paid as an annual annuity payment. Furthermore, the statute should limit an award to a total no greater than \$4,000,000.

A base rate of \$70,000 is hardly enough to compensate one who has been deprived of their liberty and subjected to so much trauma through their incarceration. Indeed, it is arguably impossible to quantify the loss associated with a wrongful conviction and imprisonment. However, the proposed base rate will enable those who have been wrongfully convicted to begin to rebuild their lives. The proposed amount will enable the claimant to meet basic needs such as food, housing, transportation, and healthcare. The \$70,000 base rate would place the Palmetto State ahead of all but one state in the amount of compensation. Furthermore, the base rate would exceed The Innocence Project's recommendation of \$63,000.<sup>221</sup> Additionally, the base rate would exceed South Carolina's median household income of \$45,483.<sup>222</sup> By exceeding the median household income, the proposed base rate offers some additional restitution to account for the intangible effects of a wrongful conviction.

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221. *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <http://www.innocenceproject.org/compensating-wrongly-convicted/> (last visited Mar. 13, 2017).

222. *QuickFacts South Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/45> (last visited Mar. 13, 2017).

The State should further provide tuition waivers at any state college, university, or technical school; back child support; and, any attorney fees associated with bringing the compensation claim. Moreover, the State should provide job skills training and courses on personal finance.

### *B. Taxation*

Wrongful conviction compensation awards are not subject to federal taxes. Like the federal government and the State of California, South Carolina's compensation statute should exempt from state taxes any money awarded as restitution for a wrongful conviction. The labyrinth of state tax laws can impose a heavy burden on exonerees who are unfamiliar with how the laws apply to a compensation award.<sup>223</sup> This unfamiliarity can lead to additional legal troubles in the future for the exoneree. Furthermore, the State should not award compensation to an exoneree as restitution, and then ask for some of the compensation back in the form of taxes. Exonerees have already paid a heavy price by serving years in prison for a crime they did not commit; the State should not impose additional burdens through taxation.

### *C. Filing and Eligibility Requirements*

South Carolina's compensation statute should provide for a two-year filing requirement to give claimants adequate time to bring a claim. Furthermore, the State should consider adopting an administrative process for the filing of compensation claims. Unlike states that require the filing of a civil suit, an administrative process is more timely and cost-effective.<sup>224</sup> Because exonerees are often cash-strapped and desperate for assistance upon release, states should place a high priority on distributing compensation as soon as possible. Therefore, the statute should also impose reasonable but prompt time limitations on any required state action or response to ensure an expeditious process.

The stringency of eligibility requirements is often the determining factor when it comes to granting a compensation award. South Carolina should adopt standards that adequately balance an exoneree's interest in obtaining compensation and the State's interest in compensating only those who are truly innocent. Any exoneree, regardless of the type of crime (i.e. felony or

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223. White, *supra* note 186.

224. See Brooks & Simpson, *supra* note 193, at 637 (“[S]ystems . . . which favor an administrative process instead of a civil suit, tend to be less onerous and are more fit to achieve the general purpose of compensation: to quickly and fairly alleviate the wrong caused by the exoneree's wrongful conviction and incarceration.”).

misdemeanor) should be eligible to apply for compensation. Further, the State should qualify as eligible anyone who has been pardoned by the governor or State Board of Pardons and Paroles based on a finding of innocence, or exonerated by DNA evidence. However, these conditions should not be the only means by which to qualify for compensation. The reversal, vacation, or dismissal of a conviction for any reason should also constitute sufficient grounds to qualify for compensation.<sup>225</sup>

*D. A Proposal for Adjudicating Compensation Claims and Notes on Filing Requirements*

South Carolina should consider adopting a process that is both administrative and judicial to adjudicate wrongful conviction compensation claims. The State should designate an administrative agency to receive all claims for wrongful conviction compensation and cooperate with other relevant agencies to disburse claims. Any claimant that is pardoned by the governor or State Board of Pardons and Paroles should be given a certificate of innocence to present to the designated administrative agency. In this situation, the administrative agency should automatically grant the claimant compensation.

Furthermore, any claimant that had a court reverse, vacate, or dismiss the claimant's conviction should be able to petition that court for a certificate of innocence. If the court determines by a preponderance of the evidence that the claimant is innocent of the alleged crime, the court must issue a certificate of innocence. The claimant can then present the certificate of innocence to the designated administrative agency which will automatically grant compensation.

In the event that the court that reversed, vacated, or dismissed the claimant's conviction refuses to issue the claimant a certificate of innocence, the claimant can still apply for compensation with the designated administrative agency. However, instead of automatically granting compensation, the designated administrative agency will schedule a hearing before a five-judge panel. In addition, the designated administrative agency will notify the prosecuting authority and the court that declined to issue a certificate of innocence.

The panel of judges will hear arguments from both the claimant and the prosecuting authority to determine whether the claimant should be granted

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225. This provision will allow individuals who had a conviction reversed, vacated, or dismissed, due to reasons such as ineffective assistance of counsel, recanted witness testimony, Brady violations, or other reasons, to pursue statutory compensation.

compensation. In determining whether to award compensation, the panel of judges should consider and rely on the record developed in the claimant's trial court and post-conviction relief proceedings.<sup>226</sup> If the five-judge panel determines by a preponderance of the evidence<sup>227</sup> that the claimant is innocent, the panel should direct the administrative agency to award the claimant compensation.<sup>228</sup>

#### *E. A Note About Costs*

As with any piece of legislation that requires funding, some legislators may express opposition to a wrongful conviction compensation statute due to the cost. However, it is important to note that a statutory compensation award is predictable and likely to be much smaller than a jury award in a wrongful conviction lawsuit. A statutory compensation scheme would provide the State with the ability to estimate any potential liabilities the State will incur as a result of a wrongful conviction. As the rate of wrongful convictions and exonerations increase, the State would be wise to provide a method of compensation that could potentially result in cost savings.

### VI. CONCLUSION

Wrongful convictions are an unjust byproduct of the criminal justice system. Absent access to compensation, the wrongfully convicted are often unable to resume a normal life upon release. One who has been wrongfully convicted can never be made entirely whole, and there is no amount of money that can replace what the wrongfully convicted lost as a result of their incarceration.

By its failure to enact a wrongful conviction compensation statute, the State of South Carolina has chosen to abandon its obligation to bear the burden of failings within the State's criminal justice system. The State has ignored the plight of the wrongfully convicted for far too long. The State of South Carolina should follow the example of thirty-two other states and enact a compensation statute to provide the wrongfully convicted with an equitable opportunity to pursue a second chance at life.

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226. See Brooks & Simpson, *supra* note 193, at 648–49 (discussing why a wrongful conviction administrative process should give deference to prior court proceedings).

227. Although not discussed in this Note, many states impose a higher clear and convincing evidence standard. See Brooks & Simpson, *supra* note 193, at 642.

228. These types of “minitrials” in California have not “open[ed] the floodgates” to excessive numbers of wrongful conviction compensation claims. See Brooks & Simpson, *supra* note 193, at 636.



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