ERRORS IN MISDEMEANOR ADJUDICATION

SAMUEL R. GROSS

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Abstract

Millions of defendants are convicted of misdemeanors in the United States each year but almost none obtain exonerations, primarily because ordinarily exoneration is far too costly and time consuming to pursue for anything less than years of imprisonment. The National Registry of Exonerations lists all known exonerations in the United States since 1989—2,145 cases, as of the end of 2017; only 85 are misdemeanors, 4%. In all but one of these misdemeanor exonerations the defendants were convicted of crimes that never happened; by comparison, more than three-quarters of felony exonerees were convicted of actual crimes that other people committed. In almost 80% of the misdemeanor exonerations we know about, the defendants pled guilty, compared to 16% of felony exonerations. In fact, two thirds involved defendants who pled guilty to misdemeanor drug possession in a single jurisdiction—Harris County (Houston), Texas. They were exonerated because the local forensic crime lab tests seized "drugs" even after criminal cases are closed by guilty pleas, and it found that these defendants were carrying no illegal drugs. Routine post-plea testing of alleged drugs may be unique to Harris County. Judging from these cases, however, guilty pleas by innocent misdemeanor defendants are common. Of the minority of misdemeanor exonerations that did not involve guilty pleas to drug possession, most were assaults, usually on police officers. Most of the defendants were exonerated either because videos that proved their innocence came to light after conviction, or because the police officers who testified that they had been assaulted were themselves charged with perjury, violence or other misconduct. Nearly all the few misdemeanor exonerations we know about depended on fortuitous events that made the process cheap and simple—usually forensic tests that police conducted for their own purposes; sometimes previously unknown videos, or criminal investigations of police officers. Otherwise, it seems, innocent defendants convicted of misdemeanors are just out of luck.

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SAMUEL R. GROSS*

INTRODUCTION

There's every reason to worry that many defendants who are convicted of misdemeanors, usually by guilty pleas, are innocent—but there are hardly any data that speak to that issue.

I work with the National Registry of Exonerations, which investigates and publishes information on every known exoneration in the United States since 1989—2145 cases, as of the end of 2017.[1] We sometimes say that we do two tasks at the Registry: tell stories and count things. On this topic, the accuracy of misdemeanor adjudications, meaningful counting is simply impossible. We don't have a solid estimate of the *number* of misdemeanor convictions in the country—the usual guess is several times as many as felony convictions—let alone anything like decent data on what happens in those cases. Megan

* Thomas and Mabel Long Professor of Law, University of Michigan Law School; Co-Founder and Senior Editor, National Registry of Exonerations. I would like to thank Gerry Leonard and David Rossman for organizing the *Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System* conference held at Boston University School of Law in November 2017, for which this Article was prepared; the participants in that excellent conference; the editors of the Boston University Law Review; and Maurice Possley and Klara Stephens who helped me greatly on this Article and so many other efforts.

[1] *Summary View*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/5J6V-VJCW] (last visited Apr. 16, 2018). All references to cases in the National Registry of Exonerations are as of December 31, 2017.

Stevenson and Sandra Mayson estimate that, at present, about 13.2 million misdemeanor cases are filed in the United States each year,[2] producing millions of convictions. Almost none ever produce exonerations that we have been able to find and list in the Registry.

Almost none, however, is not quite zero. Four percent of the exonerations we know about involve misdemeanors (85/2145), and these rare specimens provide hints at what goes on in the uncharted depths of lower criminal courts. Plus, they include dozens of interesting stories.

I. THE CASES

A. *Two Misdemeanor DNA Exonerations*

I'll start with two stories.

In December 2015, someone drove a stolen SUV into a tree in Anaheim, California, and fled on foot.[3] Jose Arteaga was arrested that night because a young man told the police that the driver was named Edgar—Arteaga's middle name—and was a member of a local street gang, and an officer who saw the SUV drive away picked Arteaga from a collection of pictures of gang members who had "Edgar" somewhere in their names.

Arteaga was charged with vehicle theft, hit and run with property damage, and two gang-crime enhancements. Bail was set at $100,000. In April 2016, at a bail reduction hearing, the prosecution revealed that three male DNA profiles were found on the SUV's owner's manual, none of which came from Arteaga. Bail was reduced to $50,000, which Arteaga could not post, but the prosecution offered him a deal: plead guilty to misdemeanor vehicle theft, get a sentence of four months in jail, and go home immediately because he had already served four months in pre-trial detention. Arteaga took the deal, pled guilty, and was released.

Several months later, the DNA from one of the profiles was matched to a DNA profile in the FBI's national database that came from another member of the same gang whose *first* name was Edgar. Arteaga was exonerated in September 2016; the gang member whose DNA was found in the SUV was never charged.

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On March 26, 1997, in Queens, New York, Fancy Figueroa came home from high school on her sixteenth birthday and was raped by a man who followed her

[2] Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018).

[3] Maurice Possley, *Jose Arteaga*, NAT'L REGISTRY EXONERATIONS (Feb. 17, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5093 [https://perma.cc/56SJ-82Q6].

and forced his way into her family home.[4] She called the police and they took her to a hospital. When a medical exam revealed that she was pregnant, the officers concluded that she concocted the rape to cover up the pregnancy, and they tricked and bullied her into signing a statement saying that no rape had occurred.

Figueroa pled guilty to filing a false report, a misdemeanor. She picked up trash as community service for three days and was on probation for six months. In 2003, Vincent Elias—who had been convicted of two other rapes in Queens in 1999—was required to submit a DNA sample to the New York State database. It matched the DNA profile from the rape kit taken from Figueroa in 1997, which had also been added to that database.

After she was exonerated in 2004, Figueroa said she forgave the detectives who pressured her to recant the rape claim, but added, "I felt they hurt me more than the rapist hurt me. He just came and left, but for six years, nobody believed me. I lost my family. I lost my freedom. I lost a little of my sanity."

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These may be the two *least typical* of the eighty-five misdemeanor exonerations in the Registry. They are the only ones that involve DNA, and the only two in which a real crime was actually committed; in all the others the defendants were convicted in cases in which, in fact, no crime occurred.[5] More important, neither of these cases originated as a misdemeanor.

Jose Arteaga's case is of a type that's familiar to all criminal trial lawyers in America: a felony case that falls apart and is dumped by a prosecutor who offers the defendant a no-time misdemeanor plea bargain.

When I was a criminal defense attorney in San Francisco in the 1970s, I believed (as most defense attorneys did) that false convictions were extremely rare. But I knew that at least three of my clients had taken no-time misdemeanor deals like that in felony cases they were highly likely to win at trial. As one judge described it, "He just bought an insurance policy." I believe all three were

[4] Maurice Possley, *Fancy Figueroa*, NAT'L REGISTRY EXONERATIONS (July 26, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4474 [https://perma.cc/LP7X-Z6HV].

[5] The case of Yareli Sanchez is a quasi-exception. She was convicted of prostitution in Houston in 2011 and exonerated in 2015 by evidence that she was coerced into prostitution by a dangerous, violent, and abusive pimp. *See* Maurice Possley, *Yareli Sanchez*, NAT'L REGISTRY EXONERATIONS (July 8, 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4935 [https://perma.cc/N8RF-5JXD]. Coercion is a form of "duress" which is a complete defense to the charge—but because duress is an "excuse" rather than a "justification" (such as self-defense), technically she did commit acts of prostitution but is excused from punishment. *See, e.g.*, Rodriguez v. State, 368 S.W.3d 821, 824 (Tex. App. Ct. 2012). For the purposes of this discussion, I treat her case as a "no crime" exoneration.

probably innocent, and two of them almost certainly so, but their cases did not register as likely wrongful convictions—perhaps because they pled to trash and did no time in custody. They were just part of the messy detritus of processing felonies.

Misdemeanor pleas by felony defendants are not rare. They account for ten percent or more of all felony case dispositions in the seventy-five most populous counties in the United States.[6] If that rate applies to all counties, it would translate into tens of thousands of cases. I expect that those cases include more than their share of innocent defendants. One common reason prosecutors offer bargain basement deals is that the evidence of guilt is weak and unconvincing, which means it will be hard to get a conviction—and also that the defendant might actually be innocent. Of course, the defendants do not have to accept the offers, but many innocent defendants will take deals that are sweet enough, especially if they're in pre-trial detention and will be released immediately if they plead.

For all we know, false misdemeanor pleas by felony defendants outnumber false felony convictions—but Arteaga's is the only exoneration in that category that we have found.

Fancy Figueroa's case is less common and, in some ways, even more troubling. Like almost all misdemeanor exonerations (but unlike Arteaga's case) it's a "no-crime" exoneration.[7] She was convicted of a crime that never happened, as opposed to one that someone else committed. But the investigation that led to her conviction concerned a serious crime of violence that did happen, a rape—of which she was the victim. What happened to her is a disturbing example of how, under the wrong circumstances, anybody involved in a felony investigation—a witness, a bystander, a family member, even a victim—can get caught in the machinery and blamed for things they didn't do.

Perhaps the most startling fact about these two cases is that both were cleared by post-conviction DNA database hits. Neither defendant sought exoneration. What happened instead is that the police placed the crime-scene DNA profiles for these cases in government databases even though the cases had been closed by arrest and conviction, *and* the real criminals' DNA profiles ended up in the same databases because they were convicted of other crimes, *and* the crime-scene profiles were matched by database software to the real criminals' profiles, *and* the police were notified *and*, in turn, notified the prosecutors who contacted

[6] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009-STATISTICAL TABLES 24 tbl. 21 (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/G4YD-JNS5].

[7] A "no-crime" exoneration is defined as one in which "[t]he exoneree was convicted of a crime that did not occur, either because an accident or a suicide was mistaken for a crime, or because the exoneree was accused of a fabricated crime that never happened." *Glossary*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx [https://perma.cc/3GRY-DYJG] (last visited Apr. 16, 2018).

the defendants and secured exonerations. That's a pretty improbable *deus ex machina*.

B. *Fifty-Eight Misdemeanor Drug Possession Guilty-Plea Exonerations*[8]

Fifty-eight of the eighty-five misdemeanor exonerations we know about, more than three-quarters of the total, have the same basic plot. A substance said to be an illegal drug was found in a search of a car the exoneree was driving or riding in, and the exoneree was arrested. While the exoneree was still in jail, the prosecution offered a plea bargain, usually at the first court appearance, and the exoneree accepted.[9] About forty percent were released the same day; the rest within days, occasionally weeks, or, in a few cases, months. Sometime later, the local crime lab tested the material seized from the exoneree and found no controlled substances. The prosecutor's office was notified, contacted the exoneree's defense attorney, and they secured an exoneration.

All but one of these exonerations took place in Harris County, Texas (home to Houston)—which has also had ninety similar drug possession guilty-plea exonerations with felony convictions. The reason for this concentration of cases in Harris County is simple: apparently, no other jurisdiction in the country has a crime lab that regularly tests substances that are believed to be illegal drugs *after* the suspects who were carrying them have been charged and pled guilty.[10]

Why did these innocent defendants plead guilty? Some may have believed they were guilty when, in fact, the powders and pills they were carrying contained no illegal substances. Most, however, pled guilty in order to go home.

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[8] This Section expands upon prior work, including my recent piece *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 776 (2017).

[9] In one of the fifty-eight cases, the defendant pled guilty to a misdemeanor charge of unlawful carrying of a weapon, which is only illegal in Texas if the defendant committed a crime while carrying the weapon. In this case the crime that made carrying a gun illegal was drug possession. He was exonerated when the lab determined that he had not possessed illegal drugs. *See* Maurice Possley, *Chris Truong*, NAT'L REGISTRY EXONERATIONS (Apr. 10, 2017), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5115 [https://perma.cc/266L-HPVB]. The other fifty-seven exonerations all involved pleas to misdemeanor drug possession.

[10] *See* NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014, at 8-9 (2015), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf [https://perma.cc/94TB-6YTS]. The remaining misdemeanor drug testing case is from Multnomah County, Oregon (Portland), where the District Attorney asked the police lab in 2016 to test the "drugs" some defendants had pled guilty to possessing in earlier years and found five who were innocent, one of whom had pled to a misdemeanor. *See* Maurice Possley, *Andre Mazur*, NAT'L REGISTRY EXONERATIONS (Dec. 9, 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5042 [https://perma.cc/B5XB-WH88].

In the usual case, the defendant had a criminal record. As a result, bail was too high for him to make. If he pled not guilty, he'd wait months for trial, in jail—and then might be sentenced to years in prison if convicted. It's no surprise that given the choice, many pled guilty and went home within days or weeks, or immediately.

There's a cost, of course—another conviction on the defendant's record—but for defendants who already have one or more convictions, another misdemeanor drug possession case may not be a big deal.

As I mentioned, routine post-guilty plea testing of suspected drugs seems to be unique to Harris County. That means that, in some counties, tests are rarely performed in any drug possession cases, almost all of which are based on guilty pleas. Instead, many drug arrests—like most of those in the Harris County exonerations—are based on cheap and notoriously error-prone, on-the-spot "presumptive" field tests for drugs, and nothing more is done before the all-but-inevitable guilty plea.[11]

Even in Harris County itself, post-plea drug testing had little impact for years. Some tests were not done until long after the defendants had completed their terms. In many cases, the paperwork was lost or misdirected. In 2014, when the District Attorney's Office realized the scope of the issue, they found hundreds of innocent defendants who pled guilty to drug possession. They're still clearing the backlog.

If similar testing were conducted in all counties, there would be thousands of additional exonerations of innocent drug defendants. But even that would leave most of the problem untouched.

Hundreds of thousands of defendants plead guilty every year to avoid pre-trial detention for non-drug misdemeanors. Why wouldn't they? They may face months in jail waiting for trial, but get weeks or days—or no time at all—if they plead guilty.

How many of these defendants are innocent? We have no idea and no easy way to find out. No simple lab test will answer the question, and nobody reinvestigates everyday shoplifting, assault, or disorderly conduct cases. Judging from drug possession pleas in Harris County, it might be many thousands.

Plea bargaining is the great American method of sweeping problems in criminal cases under the rug. The defendant's constitutional rights were violated? No problem; offer him a good enough deal, he'll plead guilty, and

[11] Gross, *supra* note 8, at 776; *see, e.g.*, Ryan Gabrielson & Topher Sanders, *How a $2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES MAG. (July 7, 2016), http://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html?_r=0 [https://perma.cc/CYB6-HXEP]. Field drug tests were much less common among the misdemeanor drug exonerations in Harris County (25%, 14/57) than among the felonies (93%, 84/90), possibly because the drugs that are typically identified (or misidentified) by field tests (e.g., heroin, cocaine, methamphetamine) are considered worse than those typically identified by other means (marijuana, prescription pills).

that'll be the end of it. The evidence of guilt stinks? If you reduce the charges enough he'll probably go for it, and we'll never have to present any evidence.

Innocence can be swept under that same rug. Even in felony cases, innocent defendants who are convicted at trial are far more likely to be exonerated than those who plead guilty. If you pled guilty, it's harder to convince people that you're innocent than if you never admitted guilt, and there are fewer procedural avenues for review. In addition, and more important, defendants take plea bargains in order to get short sentences—typically, much shorter than what they'd get if convicted at trial—and the scarce resources that are required to achieve an exoneration are generally allocated to innocent defendants with harsher punishments.

Guilty pleas account for some ninety-five percent of felony convictions, but—excluding drug cases—only eleven percent of known felony exonerations (197/1832). That means that among felonies, the exoneration rate for guilty pleas is more than one hundred fifty times lower than for convictions at trial. If you believe this reflects the actual rate of errors in the ninety-five percent of felony convictions that are based on plea bargains, it's very reassuring. Thus, for example, a distinguished Colorado judge wrote, "I can't imagine the 'innocent-but-pleading' rate is anywhere near 1 out of 100,"[12] and concluded that "[w]rongful convictions . . . are . . . exceedingly rare."[13] Applying this logic to misdemeanors, where the guilty pleas may approach ninety-nine percent of all convictions, one might happily conclude that false misdemeanor convictions are nearly non-existent.

In fact, we have no idea how many innocent defendants plead guilty because we almost never try to find out—not for felonies and certainly not for misdemeanors. In Harris County, for drug possession cases, no one had to try. The police lab just ran the tests and eventually the lawyers and the courts took notice. It was serendipitous—unexpected, cheap, definitive—and the proven cases of innocent people who pled guilty are anything but rare.

C. *Twenty-Five Misdemeanor Exonerations Without DNA or Drug Testing*

This is the residual category, misdemeanor exonerations that were obtained without DNA or drug testing.

i. Three of these cases, like the two misdemeanor guilty-plea DNA exonerations, began as felony investigations. In these cases, however, the defendants went to trial for felonies.

[12] Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 672 n.44 (2007).

[13] *Id.* at 671 n.38.

James Strughold was tried on sixteen felony counts of first-degree sexual misconduct with a child in Saint Louis in 1997,[14] in one of the last known prosecutions in a national wave of "child sex abuse hysteria" cases that began in the mid-1980s.[15] As usual in such cases, the children (after extensive and suggestive questioning by teachers, police, and child welfare workers) testified to bizarre and often physically impossible events and conduct by the defendant. In dozens of similar cases, defendants were convicted of serious felonies based on such testimony and sentenced to decades in prison. By 1997, however, the hysteria was fading. The jury acquitted Strughold of all felonies but convicted him of several misdemeanors. He was sentenced to probation and thirty days in jail; two years later, at a retrial, he was acquitted on all counts.

Seneca and Tari Adams, brothers, were severely beaten by several Chicago police officers in 2004, and, as often happens after such beatings, charged with multiple felonious assaults on the officers.[16] The judge at their bench trial acquitted them of all felonies—clearly, he did not believe the officers—but convicted them of misdemeanor battery nonetheless and sentenced them to probation. They were exonerated seven months later.

ii. Eleven of the twenty-five cases involved physical altercations between the exonerees and police officers: five resisting arrest convictions, four assault convictions (including Seneca and Tari Adams), and one each for harassment and obstruction of justice. What stands out most about these cases is the evidence of innocence that was the basis for the exonerations.

In six of these eleven cases, the officer "victims" were themselves the subjects of criminal investigations or convictions. Not long after the trial of Tari and Seneca Adams, the officers who testified against them were indicted by a federal grand jury for planting evidence on suspects, falsely accusing suspects of having guns, and "breaking into homes and robbing residents of guns, money and drugs and . . . filing false reports."[17] In four other exonerations in Contra Costa

[14] Maurice Possley, *James Strughold*, NAT'L REGISTRY EXONERATIONS (Sept. 22, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4752 [https://perma.cc/57NX-G76P].

[15] *See* SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989-2012, at 75-78 (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf [https://perma.cc/GBV6-37V8].

[16] *See* Maurice Possley, *Seneca Adams*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4563 [https://perma.cc/3K7W-47KC] (last updated Aug. 1, 2017).

[17] Maurice Possley, *Tari Adams*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4562 [https://perma.cc/JW7Y-2M4J] (last updated Aug. 1, 2017).

County, California, in 2015 and 2016, charges were dismissed because of pending criminal investigations of the arresting officers by local authorities.[18]

In the remaining five cases in this category, the defendants were exonerated because, after conviction, their defense attorneys obtained videos that showed that the officers lied when they testified that the exonerees attacked them: one cell phone video, two surveillance videos, and two body camera videos.

For example, in July 2014, Wassillie Gregory was charged with "harassment" of a police officer in Bethel, Alaska.[19] The officer wrote in his report that Gregory was "clearly intoxicated" and "I kindly tried to assist Gregory into my cruiser for protective custody when he pulled away and clawed at me with his hand."

Gregory pled guilty, without the benefit of a defense lawyer. Normally, that would be the end of the story. But this arrest was witnessed by Linda Green, an associate professor of anthropology at the University of Arizona who was doing seasonal research on the Yukon-Kuskokwim Delta, and she filed a complaint with the police department. Gregory was exonerated a year later because a surveillance video showed the officer handcuffing him and then repeatedly slamming him onto the pavement.

iii. In two additional cases in which police officers were critical witnesses but not the supposed victims, the exonerations were also based on videos that contradicted the officers' testimony—one from a surveillance camera and one from a body camera.

iv. Seven of the misdemeanor exonerations involved convictions for assaults on civilian victims, four strangers and three family members of the exonerees.

v. Four exonerees were convicted of miscellaneous misdemeanors: one each for threatening (to bomb an abortion clinic), prostitution, and stalking, and one drug possession case in which real drugs were planted on the innocent defendant.

In sum, nearly three quarters of misdemeanor exonerations without drug or DNA tests were for assaults or related crimes, such as resisting arrest (18/25). Like the much larger group of drug-possession exonerations, all twenty-five of these exonerations were based on evidence that the crimes never happened. Unlike the drug cases and the two misdemeanor DNA exonerations—all of which were for convictions based on guilty pleas—seventy-two percent of the convictions in this set were obtained at trials, eight by juries and ten by judges.

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[18] For a list of these cases, see Search: Detailed View, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Apr. 16, 2018) (filter field "County of Crime" to "Contra Costa" and filter field "Tags" to "M, NC") (listing cases of Ray Valentine, Chuong Nguyen, Warren Stingley, and Braden Wenger).

[19] Maurice Possley, *Wassillie Gregory*, NAT'L REGISTRY EXONERATIONS (May 26, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4696 [https://perma.cc/6NBF-F67U].

II. GENERAL PATTERNS IN MISDEMEANOR EXONERATIONS

The misdemeanor exonerations we know about are very different from the much larger set of felony exonerations.

With one exception, all eighty-five misdemeanor exonerations are no-crime cases: the defendants were convicted of possessing drugs when they had none, committing assaults when they themselves had been assaulted, or doing other things that never happened.[20] In contrast, thirty-two percent of felony exonerations are no-crime cases.

As a result, there is only one eyewitness misidentification among these eighty-five exonerations, in the case of Jose Arteaga—the only misdemeanor exoneree who was convicted of an actual crime that someone else committed.

There is also only one false confession among these eighty-five exonerations. This is not surprising. False confessions usually follow prolonged interrogations, which are reserved for the most serious crimes.[21] Seventy-five percentof the false confessions we know of in felony exonerations were in homicide cases (194/259), and another seventeen percent were in sexual assault and child sex abuse cases (44/259). It's no coincidence the only false confession among the misdemeanors was by Fancy Figueroa, in a rape investigation.

If there was any *official misconduct* in the cases of the fifty-eight misdemeanor exonerees who were cleared by post-conviction drug tests, we don't know about it. This is not surprising; we know little about the facts of most of those cases, except how they unraveled. On the other hand, there was misconduct by police officers in two-thirds of the misdemeanor exonerations that did not turn on post-conviction forensic testing (18/27), including three cases that also included misconduct by prosecutors.

Nearly eighty percent of misdemeanor exonerations were for convictions based on guilty pleas (67/85)—all but one of the fifty-nine drug-possession cases and thirty-one percent of the remainder (8/26). Only sixteen percent of felony exonerations involved guilty pleas.

Misdemeanor exonerations occurred much more quickly than felony exonerations. The mean time from conviction to exoneration for a misdemeanor was 1.7 years and the median was 0.9 years. For felonies, the average time gap was 10.9 years and the median was 8.3 years.

The vast majority of these eighty-five misdemeanor defendants were exonerated by powerful evidence of innocence that was obtained by law enforcement agencies for their own purposes:

- fifty-eight were exonerated by drug tests conducted by police labs;
- seven were exonerated by evidence from official sources that the officers who testified against them were corrupt;

[20] *See Glossary*, *supra* note 7 (defining no-crime cases).

[21] GROSS & SHAFFER, *supra* note 15, at 57-58.

- four were exonerated by police videos, three from body cameras and one from a surveillance camera (and an additional three were exonerated by privately recorded videos—two by videos from commercial surveillance cameras, and one by a cell-phone video); and
- two were exonerated by database DNA hits.[22]

III. DISCUSSION

A. *Misdemeanor Defendants Who Plead Guilty*

Almost eighty percent of the misdemeanor exonerations we know about are from convictions based on guilty pleas (67/85), and eighty-five percent of those guilty pleas were by innocent misdemeanor drug defendants in Harris County, Texas. These Harris County cases were found in a post-guilty plea drug testing program that the crime labs conducted on their own. They seem to be a reasonably representative sample of errors in cases in which defendants in that county pled guilty to drug misdemeanors without lab tests to confirm their guilt.[23]

The Harris County exonerations confirm that substantial numbers of innocent defendants plead guilty to avoid pretrial detention. They also show that the defendants who entered those pleas were overwhelmingly male (eighty-two percent), and disproportionately black—forty-six percent in a county with twenty percent African Americans[24]—which may simply mean that men and African Americans are more likely to be stopped and searched for drugs in Harris County than women and those of other races.[25]

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[22] The remaining eleven misdemeanor exonerations include James Strughold's child sex abuse conviction, Yareli Sanchez's prostitution conviction, and nine convictions for threats or assaults on civilians. *See* Possley, *supra* note 5; Possley, *supra* note 14.

[23] The Harris County testing program found a comparable number of other errors that do not appear in the Registry. The Harris County District Attorney's Office also dismissed cases in which post-plea testing found the drug that was charged but in an amount that was too small to support the charge the defendant pled to, and cases in which the tests found an illegal drug but not the one the defendant pled to possessing. The Registry does not count either type of case as an exoneration. *See* EXONERATIONS IN 2014, *supra* note 10, at 9 n.11.

[24] *QuickFacts Harris County, Texas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/harriscountytexas/PST045216 [https://perma.cc/5VX4-8LC6] (last visited Apr. 16, 2018).

[25] The difference in the proportion of exonerations by race means that African Americans in Harris County are about four times as likely as other residents to be included among these drug possession guilty plea exonerations. A recent study by Sandra Mayson and Megan Stevenson includes data on misdemeanor charging and conviction rates by race in eight jurisdictions. They report that the per-capita rate of misdemeanor drug arrests in Houston in 2013 was about 3.3 times higher for black residents than for white residents. Sandra Mayson & Megan Stevenson, Misdemeanors by the Numbers (2017) (unpublished manuscript at 20 fig.6) (on file with author).

These exonerations cannot, on their own, be used to estimate the proportion of innocent defendants among those who plead guilty to drug misdemeanors. It might be possible, however, to calculate that rate if the crime labs kept records on all the cases that received post-guilty plea drug testing and made the records available to researchers.

A high proportion of all misdemeanor arrests are based on conduct that is observed by police officers. Inevitably, police arrest people by mistake, as they did in these drug cases—but also in many other contexts and in every jurisdiction in the country. If those who are charged cannot make bail, they face the same Hobson's choice that led these fifty-six innocent misdemeanor drug defendants (and an additional ninety innocent felony drug defendants) to plead guilty in Harris County. There's no doubt that other innocent defendants plead guilty to misdemeanors on a regular basis in order to avoid pre-trial detention in other counties, and in non-drug cases, but without a chemical test for innocence, we don't know how many or who they are.

B. *Felony Defendants Who Plead Guilty to Misdemeanors*

We know of only one exoneration of a felony defendant who pled guilty to a misdemeanor, Jose Arteaga. One reason might be that innocent felony defendants who are allowed to plead to misdemeanors are rarely interested in prolonging a fight they have mostly won by avoiding the catastrophe they were facing. Arteaga's case fits that pattern: his exoneration, like those of the drug-possession guilty-plea defendants in Harris County, was a surprise gift from the police.

C. *Catching Cops Who Lie*

Much, perhaps most, of the evidence in misdemeanor cases comes from police officers—who sometimes lie. We know of ten misdemeanor exonerations that turned on discrediting *civilian* witnesses, mostly in assault cases. A variety of items of evidence that were unavailable or had been excluded at trial did the trick: a statement by the alleged victim that was inconsistent with her testimony, other impeaching evidence, a recantation by a prosecution witness, a new eyewitness to the altercation. However, in the thirteen cases where the defendants successfully discredited the testimony of *police officers*, only two types of evidence were used: video recordings that showed that the officer lied and evidence that the officer himself had been (or might soon be) charged with serious crimes committed while on duty.

D. *Trials and Guilty Pleas*

More than seventy percent of misdemeanor exonerations were based on forensic testing (60/85)—the Harris County drug-possession exonerations, a similar exoneration in another county, and two DNA exonerations. All were for convictions based on guilty pleas. By contrast, nearly three-quarters of the misdemeanor exonerations that weren't based on forensic testing (18/25)—primarily assaults and similar cases—were from convictions after trial.

There are many ways that going to trial may help a defendant who is wrongfully convicted secure an exoneration. The most common is probably simply that it's easier to persuade people that you're innocent if you've never admitted to being guilty. In addition, misdemeanor exonerations usually happen within a year of conviction, which provides another major advantage: Cases of defendants who plead guilty are closed as soon as judgment is pronounced, but those with defendants who are convicted at trial remain open for post-trial motions and appeals for months or years after conviction.

The advantage of having a pending case is immediately apparent for fifteen of the eighteen exonerations of misdemeanor defendants who went to trial. In eleven of those cases the conviction was reversed on appeal—and in two others, a motion for a new trial was granted by the trial court—after which the defendant was acquitted or the charges were dismissed. In two additional cases that were tried together, critical exculpatory evidence was given to the prosecutor on the day of trial; he reviewed it right after conviction and moved to dismiss the charges the next day.

If these fifteen defendants had not had open cases, they would have had to file some type of petition for extraordinary relief. That works well enough when a prosecutor does it on the basis of exculpatory DNA or drug tests, but in most other contexts, prosecutors and lower courts have no interest in reopening closed criminal convictions, especially not misdemeanors. That was even true for the Harris County drug possession guilty-plea cases. Until the spring of 2014, many, if not most, of the exculpatory drug tests were lost or ignored; it took a special program by the District Attorney's Office to find and act on them.[26]

We've run into this pattern in another context. In several jurisdictions, prosecutors across the years have learned that particular police officers are systematically corrupt: they file false reports, steal money from suspects, solicit bribes, or plant drugs on innocent defendants.[27] When that happens, a common response is to dismiss all charges based on testimony by those officers in cases that are still pending—before trial, at trial, or on appeal—but to do nothing to reopen similar convictions in closed cases.[28]

The rate of guilty pleas by innocent defendants is probably higher for misdemeanors than for felonies—especially for misdemeanor defendants in pretrial detention, who are certain to spend significant time in custody if they don't plead guilty. The exonerations we know about suggest that virtually none of them are ever exonerated—unless exculpatory forensic evidence appears unbidden, as if by magic.

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[26] *See* EXONERATIONS IN 2014, *supra* note 10, at 8-9.

[27] *See* Samuel Gross, Michael Shaffer & Maurice Possley, *VI. Group Exonerations*, *in* GROSS & SHAFFER, *supra* note 15, at 80-90; SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, NAT'L REGISTRY EXONERATIONS, RACE AND WRONGFUL CONVICTIONS 20-26 (2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/NSD8-UCS3].

[28] *See* GROSS, POSSLEY & STEPHENS, *supra* note 27, at 24 n.53.