

INNOCENCE PROJECT

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President Joseph R. Biden
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20050

Dear President Biden:

In 2019, as the Trump Administration began its unprecedented 13 person execution spree, you offered a powerful call to end capital punishment. Recognizing that over 180 individuals who were sentenced to death since 1973 had been exonerated, you stated, “Because we can’t ensure that we get these cases right every time, we must eliminate the death penalty.”¹ In the five years since you made that powerful statement, 20 additional individuals who were sentenced to death in this country were exonerated.² Others who were innocent, including our client, Marcellus Williams,³ were executed. Because we, at the Innocence Project, know from hard experience that the risk of executing the innocent is both intolerable and all too real, we write to urge you to commute the death sentence of every person on federal death row.

About the Innocence Project

The Innocence Project works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for all. Our work is guided by science and grounded in anti-racism. Since our inception in 1992, we have relied on DNA and other scientific advancements to help free or exonerate more than 250 people who, collectively, spent more than 3,600 years behind bars. Twenty-three of our freed or exonerated clients faced the death penalty.⁴

Sixty-three percent of our exoneration cases involved eyewitness misidentification (including, in some cases, as many as five erroneous identifications); more than half were driven by unreliable and invalidated forensic science; almost one-third relied on false confessions; and nineteen

¹ [@JoeBiden](#), X (July 25, 2019, 5:14 PM).

² [Innocence Database](#), Death Penalty Info. Ctr. (last visited Oct. 31, 2024).

³ See [Who is Marcellus Williams](#), Innocence Project (Aug. 15, 2023) (Missouri case where there was no reliable evidence proving that Williams committed the crime and the prosecutor had moved to vacate the conviction and death sentence).

⁴ [Explore the Numbers: Innocence Project’s Impact](#), Innocence Project (last visited July 24, 2024).

percent were driven by jailhouse informant testimony.⁵ These trends are consistent with exonerations across the country.⁶ Notably, 60% of wrongful convictions nationwide involve official misconduct.

For example, Ron Williamson was convicted of murder and condemned to death by an Oklahoma jury in 1988. The key evidence against him was seventeen hairs recovered from the crime scene. An expert in the now-debunked field of “hair microscopy” testified that the hairs “matched” Mr. Williamson’s. Mr. Williamson came within five days of execution but he was exonerated after the Innocence Project used DNA testing to establish that *none* of the hairs belonged to Mr. Williamson.⁷

Because these leading causes of wrongful conviction remain pervasive in our state and federal criminal and capital punishment systems, the Innocence Project works alongside policymakers, supporters, and partner organizations and has spearheaded the passage of more than 200 transformative state laws and federal reforms. Still, the risk of executing an innocent person remains.

There is little doubt that the factors driving wrongful convictions in the state system are also at play in the federal death penalty system. While there have been no documented federal capital exonerations to date, the same risks are clearly visible. Take, for instance, reliance on “junk science.” The case of Daniel Lee, the first individual executed under the Trump administration, exemplifies this. His conviction and death sentence rested in part on a single hair found in a cap worn by one of the perpetrators. The government told the jury that the hair matched Mr. Lee’s but post-conviction DNA testing established that it was *not* Mr. Lee’s hair.⁸ The federal court vacated neither his conviction nor his death sentence when they learned of this new evidence.⁹

Mr. Lee’s case is not an anomaly. Dustin Higgs’s conviction and death sentence also rested on “junk science”—specifically, comparative bullet analysis,¹⁰ a forensic technique that the FBI publicly

⁵ [Eyewitness Misidentification](#), Innocence Project (last visited Oct. 30, 2024); [Misapplication of Forensic Science](#), Innocence Project (last visited Oct. 30, 2024); [Informing Injustice: The Disturbing Use of Jailhouse Informants](#), Innocence Project (last visited Oct. 30, 2024).

⁶ [% Exonerations by Contributing Factor](#), Nat’l Registry of Exonerations (last visited Nov. 24, 2024).

⁷ [Ron Williamson](#), PBS Frontline (last visited Oct. 30, 2024); [Ron Williamson](#), Innocence Project (last visited Oct. 30, 2024).

⁸ Movant’s Supplemental Memorandum, *United States v. Lee*, No. 4:97-CR-00243-(02) (E.D. Ark. July 18, 2007), ECF No. 1139.

⁹ *United States v. Lee*, 2008 WL 4079315 (E.D. Ark. Aug. 28, 2008). Lee’s death sentence was also tainted by false evidence. *Lee v. Warden*, No. 2:19-cv-00468, 2019 WL 6608724, at *6–9 (S.D. Ind. Dec. 5, 2019) (requiring hearing and stay of execution where prosecution claimed a teenaged Lee was responsible for a murder and “got away with it” with a plea bargain, but neither was true), *stay of execution vacated*, 2019 WL 6718924 (7th Cir. Dec. 6, 2019).

¹⁰ *Higgs v. United States*, 711 F. Supp. 2d 479 (D. Md. 2010).

renounced and ceased using in 2005.¹¹ He was the 13th and final person rushed to execution by the Trump Administration in 2021, just days before your inauguration as President.

The Federal Capital System Risks Executing the Innocent

The pathway to post-conviction exoneration is limited and difficult to navigate for innocent people convicted of crimes at both the state and federal level. The Innocence Project's exonerations – which arise, predominantly, from state court convictions across the country – overwhelmingly occur decades after conviction and after the appellate process has been completed. This is because some of the leading causes of wrongful conviction are, by their nature, unlikely to be uncovered quickly or easily — for instance, official misconduct and perjured testimony are intentionally obscured and advances in science emerge years or even decades after a conviction. Just this year, we helped to overturn the conviction of Sandra Hemme in Missouri, who pleaded guilty 43 years ago to a murder she did not commit.¹² Last year, we secured the exonerations of Leonard Mack 47 years after his 1976 wrongful rape conviction in New York¹³ and Perry Lott 35 years after his 1988 conviction for rape, burglary, and other charges in Oklahoma.¹⁴

To date there have been 143 federal exonerations since 1989.¹⁵ That there has not been a documented exoneration of a federal death row prisoner is not surprising. For federal death row prisoners, pathways to post-conviction relief are not only limited, they can also be dangerously truncated. While state prisoners are afforded post-conviction review first through the state courts and then through the federal courts, federal prisoners have a single opportunity in federal court. Furthermore, exonerations occur almost exclusively during the post-conviction process where discovery and other factfinding tools become available. When access to these tools or the ability to present evidence in court is denied, the likelihood of establishing a wrongful conviction sharply diminishes.¹⁶

The federal system also makes little to no allowance for scientific advancements that occur after the post-conviction process or even discoveries of long-suppressed evidence central to a conviction or sentence. Where some states have enacted “newly discovered” post-conviction

¹¹ [FBI Laboratory Announces Discontinuation of Bullet Lead Examinations](#), FBI Nat'l Press Off. (Sept. 1, 2005).

¹² [Missouri Circuit Court Overturns Sandra Hemme's Murder Conviction After 43 Years](#), Innocence Project (June 17, 2024).

¹³ [Hit in DNA Database Proves Leonard Mack's Innocence After 47 Years of Wrongful Conviction](#), Innocence Project (Sept. 5, 2023).

¹⁴ [Perry Lott](#), Nat'l Registry of Exonerations (last visited Oct. 30, 2024).

¹⁵ [Exonerations in the United States Map](#) (sorted by "Federal"), Nat'l Registry of Exonerations (last visited Nov. 19, 2024).

¹⁶ Many federal prisoners never get an evidentiary hearing in their one chance at post-conviction review. This has implications for the reliability of both their convictions and sentences. *See, e.g., Jackson v. United States*, 638 F. Supp. 2d 514 (W.D. N.C. 2009) (federal death row prisoner denied expert funding, discovery, an evidentiary hearing and any appeal in case asserting that key sentencing evidence about stun-gun use against victim was junk science).

statutory schemes that accommodate claims based on developments in forensic science,¹⁷ federal law has no analog. If occurring “too late,” the federal courthouse doors will remain closed to claims based on new scientific evidence or changes in the law that undermine a conviction or a death sentence.¹⁸ The Supreme Court recently interpreted the federal “savings clause” to shut the door on nearly all such claims.¹⁹ As Justice Jackson observed: “Apparently, legally innocent or not, [an individual] must just carry on in prison regardless, since . . . no path exists for him to ask a federal judge to consider his innocence assertion.”²⁰

Because they are subject to less scrutiny of their cases, people convicted of crimes in federal court face a higher risk of wrongful conviction. That translates to a higher risk of being executed by the government for a crime they did not commit.

The Pernicious Role of the Death Penalty in Pressuring the Innocent to Plead Guilty

State and federal prosecutors often use the threat of the death penalty in plea bargaining: pressuring people charged with crimes to plead guilty in order to avoid the prospect of an execution. They also leverage the threat of the death penalty to secure the testimony of alleged co-conspirators.²¹ Since 1989, 872 innocent people pled guilty to a crime for which they were later exonerated, and 20 of these people had federal convictions.²² Our cases demonstrate that such conduct also compels innocent people to falsely confess to crimes they did not commit and/or to

¹⁷ See, e.g., Tex. Code Crim. Proc. Ann. art. 11.073.

¹⁸ Norris Holder, a federal death row prisoner who completed § 2255 proceedings, the federal post-conviction process, has sought to test the ballistics evidence in his case now for over a decade. At trial, Mr. Holder admitted his involvement in the bank robbery, but denied he ever fired his weapon in the bank or intended that anyone be shot much less killed. In contrast, the Government’s ballistics expert—despite “inconclusive” findings—testified that certain shots fired at the victim could be attributed to Mr. Holder. His trial counsel never retained a ballistics expert to independently examine the ballistics evidence. *Holder v. United States*, No. 4:03CV00923, 2008 WL 2909648, at *5–6, *36–37 (E.D. Mo. July 22, 2008). Attempting to prove that their client did not fire, current counsel sought to examine and test the ballistics evidence in his case. The district court ruled that it lacked jurisdiction to consider the request, deeming it a “successive” motion—i.e., one filed after Mr. Holder’s § 2255 proceedings had been completed. *Holder v. United States*, 2016 WL 10706271 (E.D. Mo. May 19, 2016). In 2024, he provided an expert report that cast doubt on the Government’s ballistics testimony as not being supported by the examiner’s own data or by accepted scientific standards, but the Government has continued to refuse Mr. Holder’s requests to conduct independent testing of the evidence. He thus remains unable to establish whether his death sentence is predicated on junk science.

¹⁹ See *Jones v. Hendrix*, 599 U.S. 465 (2023) (rejecting ability of federal applicant who had completed post-conviction proceedings to rely on 28 U.S.C. § 2241 to establish innocence).

²⁰ *Id.* at 495 (Jackson, J., dissenting) (“[T]he majority generally claims that the saving clause only authorizes the filing of a habeas petition if filing a §2255 motion would be ‘impossible or impracticable.’ . . . say, if the courthouse . . . has burned to the ground or been carried away by a mudslide.”).

²¹ Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 Just. Sys. J. 313, 314 (2008); see also Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence From New York’s 1995 Reinstatement of Capital Punishment*, 8 Am. L. & Econ. Rev. 116 (2006); Sherod Thaxton, *Leveraging Death*, 103 J. Crim. L. & Criminology 475 (2013).

²² [Exonerations in the United States Map \(sorted by "Guilty Plea" and "Federal"\)](#), Nat’l Registry of Exonerations (last visited Nov. 19, 2024).

falsely implicate others. Earlier this month, a southern Illinois court vacated the conviction of Danny Davis based on new DNA evidence after he spent 32 years in prison. Mr. Davis pleaded guilty to avoid a death sentence and stated, at the time of his plea, “I just want to live.”²³ Additionally, when Christopher Ochoa was 22 years old, he falsely implicated himself and a friend in a rape/murder and agreed to plead guilty in exchange for a life sentence after he was threatened with lethal injection. It took 12 years for Mr. Ochoa to be exonerated.²⁴

Innocent people who plead guilty face significant hurdles to achieving an exoneration. They relinquish their right to appeal and the chance of an acquittal. They forgo the fact-finding process inherent at trial which dims the chances that their wrongful conviction will later be uncovered. Avoiding the death penalty is a “substantial incentive” to make this otherwise impossible decision—regardless of their actual innocence or guilt. In this way, the credible threat of federal execution contributes to wrongful convictions of individuals not only on death row but also elsewhere in the U.S. criminal legal system.

The Role of Racial Bias in Wrongful Conviction

The imperfections of the criminal legal system are most pronounced in cases involving people of color who face overwhelmingly worse outcomes than similarly-situated white people. The wrongful conviction data is stark:

- Black people are seven times more likely than white people to be falsely convicted of serious crimes.
- Even accounting for crime rates, Black people convicted of murder are almost 80% more likely to be innocent than other people convicted of murder.
- The exonerations of innocent Black people convicted of murder were almost 50% more likely to include misconduct by police officers than the exonerations of white people convicted of murder.²⁵

The racial disparities reflected in the federal death penalty system are similar. As of June 3, 2024, 49% of the 541 people whose cases the government authorized for federal capital prosecution since 1988 were Black; 73% were people of color.²⁶ Over half of the prisoners currently on federal

²³ [Police Coerced a False Confession from 20-Year-Old Danny Davis – 32 Years Later. His Murder Conviction is Finally Vacated. Innocence Project](#) (Nov. 14, 2024).

²⁴ [Christopher Ochoa](#), Innocence Project (last visited Oct. 30, 2024).

²⁵ [Exonerations by Race/Ethnicity and Crime](#), Nat’l Registry of Exonerations (last visited Oct. 31, 2024); Samuel R. Gross et al., [Race and Wrongful Convictions in the United States](#), Nat’l Registry of Exonerations, 4 (2022).

²⁶ [Decl. of Matthew Rubenstein Regarding the Geographic Location of Federal Cases, the Frequency of Authorizations, Death Sentences and Executions, and the Race and Gender of Defendants and Victims](#) (hereinafter Rubenstein Declaration), Fed. Death Penalty Res. Counsel ¶ 8 (June 3, 2024).

death row are people of color. Black men alone account for nearly 40% of the row, even though they comprise far less than 10% of this country's population.²⁷

Furthermore, 26% of those who were exonerated from death rows across the country were wrongfully convicted of killing a white person even though only 13% of murders by Black people involve white victims.²⁸ And 60% percent of prisoners currently on federal death row were sentenced to death for the murder of a white person,²⁹ even though white people comprise 50% of homicide victims.³⁰

And it is not just racial disproportionality. All the key issues leading to wrongful conviction are exacerbated when the accused is a person of color. Eyewitness identification is considerably less reliable when the witness seeks to identify someone of a different race.³¹ Indeed, research indicates that this bias is strongest when white witnesses attempt to identify Black subjects, and weaker in the inverse.³² People of color are also the subject of biased policing which can lead to wrongful convictions, even in capital cases.³³

For example, Walter McMillian was exonerated in 1993 after spending six years on Alabama's death row. Mr. McMillian, a Black man who was condemned to death for the murder of a young white woman, recalled the Sheriff telling him: "I don't give a damn what you say or what you do. I don't give a damn what your people say either. I'm going to put twelve people on a jury who are going to find your goddamn black ass guilty."³⁴ The dozens of Black men and women who could attest to his whereabouts at the time of the murder were disregarded.³⁵

²⁷ See [Race for the Population 18 Years and Over, 2020](#), U.S. Census Bureau (last visited Jan. 11, 2024); [Race, 2020](#), U.S. Census Bureau, (last visited Jan. 11, 2024). Only those 18 years old and over are punishable by death. And while both adult men and women are equally eligible for the death penalty, in practice, men overwhelmingly populate our nation's death rows: Federal death row is currently all male.

²⁸ Gross et al., *supra*, at 3.

²⁹ Rubenstein Decl. Ex. A. (sorted by status "Death Sentence" and race of victim "white").

³⁰ See, [United States Dep't of Justice, Federal Bureau of Investigation \(2019\), Crime in the United States](#).

³¹ Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psych. Pub. Pol'y & L. 3, 15 (2001).

³² John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 Am. J. Crim. L. 207, 211 (2001).

³³ Gross et al., *supra*, at 16.

³⁴ Colman McCarthy, [A Matter of Death and Life](#), Wash. Post (Oct. 9, 1995).

³⁵ [Walter McMillan](#), Equal Just. Initiative (last visited Oct. 30, 2024). Anthony Ray Hinton, who spent 30 years on death row for a crime he did not commit, was exonerated after bullets that purportedly came from his gun were properly tested. [Anthony Ray Hinton](#), Equal Just. Initiative (last visited Oct. 31, 2024). He describes the role race played in his arrest, trial, and sentencing in his memoir, *The Sun Does Shine*.

No action has been taken to address the racial inequities in the capital federal system or to provide redress to those individuals so harmed by them.

Conclusion

Mr. President, the execution of an innocent person is a morally and constitutionally intolerable event. But scores of innocent people have been wrongly convicted of murder and sentenced to death and the factors that drive such wrongful convictions persist within the federal death penalty system. Under these circumstances, we urge you to commute the sentences of the 40 men currently on federal death row. It is the one act in your power that guarantees that this country will not kill an innocent person.

Respectfully,

A handwritten signature in blue ink, appearing to read 'Christina Swarns', with a stylized, cursive script.

Christina Swarns
Executive Director