

## UNMAKING A “MURDERER”: LESSONS FROM A STRUGGLE TO RESTORE ONE WOMAN’S HUMANITY

DAVID A. SINGLETON\*

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\* Associate Professor of Law, Northern Kentucky University Chase College of Law; Executive Director, Ohio Justice & Policy Center; A.B., Duke University; J.D., Harvard Law School. I am very appreciative of everyone who has worked so hard to help me free Tyra Patterson, including Angelina Jackson, Steven Drizin, Peggy Lehner, Jim Petro, Nancy Petro, Bill Beagle, Shannon Jones, Jean Schmidt, Michele Young, Chinonye Chukwu, Dorianne Mason, Erik Crew, Donna Harati, Kris Burgess, Shakyra Diaz, Pam Geist, and Alesha Hamilton. I am especially appreciative of Colin P. Pool’s assistance with this Article. Finally, I dedicate this Article to my client and dear friend Tyra Patterson.

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## INTRODUCTION

In 1999, an Ohio jury convicted Clarence Elkins of the rape and murder of his elderly mother-in-law and the rape of his six-year-old niece.<sup>1</sup> In an opinion that left no question about Elkins’s guilt, the court of appeals affirmed his conviction.<sup>2</sup> Three years later, the same court of appeals upheld the trial court’s denial of his petition for post-conviction relief and his motion for a new trial.<sup>3</sup> In so holding, the appellate court concluded that the trial court properly denied relief even though his niece had recanted her testimony and had subsequently identified a “look-alike” as the perpetrator.<sup>4</sup> The court was especially critical of the recantation, cataloguing the various reasons why the trial court did not abuse its discretion in finding it unreliable.<sup>5</sup>

But Elkins would eventually be exonerated.<sup>6</sup> Years later, DNA evidence excluded him as the culprit and a subsequent DNA test indicated that another man, who had lived next door to the victims,

<sup>1</sup> *Clarence Elkins*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment/clarence-elkins> (last visited Mar. 13, 2016).

<sup>2</sup> *State v. Elkins*, No. 19684, 2000 WL 1420285, at \*1 (Ohio Ct. App. Sept. 27, 2000).

<sup>3</sup> *State v. Elkins*, No. 21380, 2003 WL 22015409, at \*4 (Ohio Ct. App. Aug. 27, 2003).

<sup>4</sup> *Id.* at \*3–5 (concluding that the trial judge did not abuse discretion in rejecting recantation as unreliable).

<sup>5</sup> *Id.*

<sup>6</sup> *Clarence Elkins*, *supra* note 1.

had committed the offense.<sup>7</sup> In 2005, the state finally dropped the charges and Elkins walked out of prison a free man.<sup>8</sup>

Elkins was fortunate to be one of the 337 people exonerated by DNA evidence since 1989.<sup>9</sup> DNA evidence is considered the gold standard for establishing innocence.<sup>10</sup> But DNA evidence is not available in every case involving the conviction and imprisonment of an innocent person. And where no DNA evidence exists, proving innocence is especially difficult.<sup>11</sup> Indeed, not only is a prisoner claiming actual innocence no longer entitled to the benefit of the doubt,<sup>12</sup> but in addition, various cognitive biases—including confirmation, selective information processing, belief perseverance, avoidance of cognitive dissonance, egocentric, and status quo biases—affect how prosecutors, courts, parole boards, and even governors considering clemency view the prisoner’s innocence claim.<sup>13</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *DNA Exonerations Nationwide*, THE INNOCENCE PROJECT (Mar. 7, 2016, 11:46 AM), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>.

<sup>10</sup> See Jay D. Aronson & Simon A. Cole, *Science and the Death Penalty: DNA, Innocence, and the Debate over Capital Punishment in the United States*, 34 LAW & SOC. INQUIRY 603, 613 (2009) (quoting Peter Neufeld as describing DNA evidence as the “gold standard” in proving innocence); Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 721 (2006) (describing DNA as the “gold standard” in establishing a miscarriage of justice).

<sup>11</sup> Nic Caine, *Factually Innocent Without DNA? An Analysis of Utah’s Factual Innocence Statute*, UTAH L. REV. ONLAW 258, 260 (2013) (“Innocence claims in non-DNA cases are inherently more difficult to prove as they rely upon recantations, unreliable forensic science evidence, ineffective assistance of counsel, and prosecutorial conduct—none of which conclusively prove that the defendant is innocent.”); Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1161 (2011) (“Claims of innocence in non-DNA cases can be even more tinged with gray tones, in part because of the inherent difficulty and ambiguity in trying to prove a negative. Claims of innocence based upon challenges to convictions resting upon recantations, or resting upon inherently unreliable forensic ‘science’ evidence, are especially complicated and increasingly common examples of such gray-shaded innocence cases.”); Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another’s Innocence: A Systemic Approach*, 17 TEX. WESLEYAN L. REV. 499, 500 n.4 (2011).

<sup>12</sup> See Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 354 (1994).

<sup>13</sup> See, e.g., Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593–1602 (2006) (discussing four cognitive biases that affect prosecutorial decision making); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006) (examining how tunnel vision affects prosecutors); Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, The Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847 (2002) (same); Daniel D. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 701–03 (2005) [hereinafter Medwed,

This Article, however, will focus on the effect of another factor which makes it hard for prisoners in non-DNA cases to prove their innocence: their status as “Other.” I argue that society’s disdain for and dehumanization of prisoners makes criminal justice institutions predisposed to view innocence claims skeptically, and the people raising them as undeserving of fair consideration. The vehicle I will use to explore this phenomenon is a case study: *In re Tyra Patterson*.

But before turning to the case study, Part I proposes a Rawlsian thought experiment where the reader is asked to select the values and principles of the criminal justice system not knowing what his or her social status will be. The reader is asked to assume that he or she could one day be incarcerated for a crime the reader did not commit and posits that he or she would create a justice system that would prioritize fairness over finality in evaluating post-conviction actual innocence claims. Part I theorizes that although other cognitive biases may skew how criminal justice system actors analyze innocence claims, prisoners’ status as the Other plays a significant part in the difficulty prisoners face in pursuing actual innocence claims, an idea Part III will explore in more depth.

Part II presents the case study. Tyra Patterson, its subject, has served almost twenty-two years behind bars for aggravated murder and aggravated robbery, crimes she insists she did not commit. As the reader will learn, this innocence claim is supported by credible evidence. Tyra<sup>14</sup> has no remaining court remedies and has asked Governor John Kasich to grant her clemency. I have served as Tyra’s lead attorney since the fall of 2012. The first half of the case study discusses the evidence supporting her conviction and the evidence pointing to her innocence. The second half documents how we used Tyra’s own humanity to galvanize support from conservative politicians, many of whom have met her and have become her fiercest advocates.

Part III explores the lessons to be learned from the case study as well as some questions the study raises. One of the most important lessons the case study offers is the power of using a prisoner’s humanity

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*Up the River*] (discussing positive self-image bias, egocentric bias, and status quo bias); Kristy L. Fields, *Toward a Bayesian Analysis of Recanted Eyewitness Identification Testimony*, 88 N.Y.U. L. REV. 1769, 1779–80 (2013) (describing egocentric and status quo biases).

<sup>14</sup> I refer to Tyra by her first name because she is my friend. I wrote about our friendship in *To Love or Not to Love: The Possibility, Promise and Peril of Mutually Transformative Attorney-Client Friendships*, 46 SETON HALL L. REV. 743 (2016). Additionally, mindful of my ethical duty of confidentiality, I have consulted with Tyra for her permission and her feedback. As she did with *To Love or Not to Love*, Tyra enthusiastically supports the publication of this Article.

as an advocacy tool to change hearts and minds that might otherwise be apathetic, if not unsympathetic, to the prisoner’s plight. Although Tyra still awaits Governor Kasich’s decision on her clemency application, the only reason her application is still pending is because we found a way to deploy Tyra as her own best advocate. One of the questions Part III tries to answer is whether the strategy we used in Tyra’s case—“de-otherizing” her through face-to-face meetings with influential community members—can be applied on a broader scale to achieve criminal justice reform.

The Article concludes with an epiphany: though we have worked hard to prove Tyra’s innocence, what has mattered most to her is that we have restored her humanity by allowing those who have met her to see it. Thus, the recognition of her humanity by others, not the evidence of innocence we have gathered, is what has unmade Tyra’s status as a murderer.

#### I. A RAWLSIAN THOUGHT EXPERIMENT

Imagine you are asked to redesign the criminal justice system and specify its core values, but you have not yet been born and do not know what station in life you will occupy. From behind Rawls’s veil of ignorance,<sup>15</sup> you do not know whether you will be rich or poor, white or a member of a racial minority, privileged or marginalized, powerful or powerless. Accordingly, you assume that you could be among the least advantaged in society. But assume something else: you might one day be charged, convicted, and imprisoned for a crime that you did not commit and for which there is no definitive scientific evidence to exonerate you. Such a fate could also await a loved one, close friend, or someone else you know well and respect.

Knowing these possibilities, what values and protections do you identify as necessary for the criminal justice system? If protecting against the continued imprisonment of an innocent person is important, then how do you do so where there is no conclusive proof

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<sup>15</sup> See JOHN RAWLS, A THEORY OF JUSTICE 17, 136 (1971). In this book, Rawls explores the principles of justice by engaging in a number of thought experiments including what he termed the “original position.” Rawls asks readers to imagine they are part of a group of individuals tasked with designing the political and economic structures of a society they will build. But they are situated behind what Rawls calls, a “veil of ignorance,” which prevents each member of the group from knowing his or her race, gender, wealth, education, and other markers of social status. Because members of the group could be among the most disadvantaged in society, they would not propose laws that would be unjust as applied to the least advantaged. For a more in depth analysis of Rawls’ theory, see Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 443 (2004); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307 (2004).

of innocence? In such cases, should post-conviction courts, parole boards, or governors considering clemency assume that the innocence claim is bogus, or should they be open to the possibility that the claim is legitimate? Should these institutions assume that witness recantations are inherently unreliable, or acknowledge that sometimes witnesses testify falsely at trial? Additionally, should these system players skeptically analyze non-DNA evidence of innocence in piecemeal fashion emphasizing why each component does not necessarily prove innocence and could be consistent with guilt, or instead examine all of the evidence holistically in order to see whether the big picture is one of innocence? Finally, would you want society to define you by your crime of conviction, or to see you as the human being that you are?

I suspect that most people, assuming that they at some point in their lives could be wrongfully imprisoned, would want those who evaluate their innocence claims to do so carefully, not dismissively. Most people, motivated by their own self-interest, would value fairness in the post-conviction process over finality. Closing the courthouse doors and other mechanisms of release to an innocent person wrongfully convicted would be something most people would find abhorrent.

But if we would design a criminal justice system that would make it easier for us, if we were wrongfully incarcerated, to prevail on an actual innocence claim, then why do we tolerate a system that makes it so difficult for prisoners to prove innocence in non-DNA cases?

Numerous scholars have written about the cognitive biases that influence prosecutorial and judicial (or perhaps quasi-judicial) evaluations of innocence claims.<sup>16</sup> The biases that influence prosecutorial decision-making include: confirmation bias, which describes the tendency of people to “favor information that confirms their theory over disconfirming information;”<sup>17</sup> selective information processing, which describes the inability of people to “evaluat[e] the strength of evidence independent of their prior beliefs;”<sup>18</sup> belief perseverance, which describes “the tendency to adhere to theories even when new information wholly discredits the theory’s evidentiary basis;”<sup>19</sup> and avoidance of cognitive dissonance, which describes “the desire to find consistency between one’s behavior and beliefs.”<sup>20</sup> These

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<sup>16</sup> See *supra* note 13.

<sup>17</sup> Burke, *supra* note 13, at 1594.

<sup>18</sup> *Id.* at 1596.

<sup>19</sup> *Id.* at 1599.

<sup>20</sup> *Id.* at 1601.

biases, individually and in combination with one or more of the others, can cause prosecutors to develop “tunnel vision.”<sup>21</sup> Biases that affect judicial (or perhaps quasi-judicial) decision-making include: egocentric bias, which describes “the proclivity of individuals to develop a positive—and perhaps over-inflated—vision of their own abilities;”<sup>22</sup> and status quo bias, which describes the phenomenon of a person, when given the opportunity to reconsider a decision, being “predisposed toward the outcome of the earlier decision in the matter regardless of whether she was responsible for that decision in the first instance, a concept that has been referred to as ‘conformity effects.’”<sup>23</sup> But I propose that there is another bias at play: our tendency to dehumanize prisoners and consider them unworthy of the fair consideration we would demand for ourselves if we were ever in their shoes. I will explore this bias in Part III after discussing the Tyra Patterson case study.

## II. *IN RE TYRA PATTERSON*: A CASE STUDY

I first met Tyra Patterson in the fall of 2012. At the time, Tyra was a thirty-seven-year-old woman who had spent eighteen years in prison for crimes she claimed she did not commit.<sup>24</sup> Her crimes of conviction were serious: one count of aggravated murder and four counts of aggravated robbery.<sup>25</sup> The trial judge sentenced Tyra to forty-three years to life,<sup>26</sup> thirteen more years than the shooter, who pled guilty, received.<sup>27</sup>

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<sup>21</sup> See Findley & Scott, *supra* note 13, at 292 (defining “tunnel vision” as “that ‘compendium of common heuristics and logical fallacies,’ to which we are all susceptible, that lead actors in the criminal justice system to ‘focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt’” (quoting Martin, *supra* note 13, at 848)); Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 *How. L.J.* 475, 481 (2006) (describing the concept of tunnel vision as shaped by “psychological mechanisms”).

<sup>22</sup> Medwed, *Up the River*, *supra* note 13, at 701.

<sup>23</sup> *Id.* at 702.

<sup>24</sup> See *Offender Search*, OHIO DEP’T OF REHAB. & CORR., <http://odrc.drc.ohio.gov/OffenderSearch/Search.aspx> (enter “Patterson” in “last name” field and “Tyra” in “first name” field; click “search”) (listing Tyra’s birthday as May 20, 1975) (last visited Dec. 16, 2016).

<sup>25</sup> *Id.*

<sup>26</sup> *State v. Patterson*, No. 15699, 1997 WL 216576, at \*9 (Ohio Ct. App. May 2, 1997).

<sup>27</sup> *Offender Search*, OHIO DEP’T OF REHAB. & CORR., <http://odrc.drc.ohio.gov/OffenderSearch/Search.aspx> (enter “Keeney” in “last name” field and “LaShawna” in “first name” field; click “search”) (last visited Dec. 16, 2016).

In January 2011, Governor Ted Strickland reduced Tyra's sentence to sixteen years to life, finding that her sentence was "highly disproportionate when compared to other similarly situated offenders."<sup>28</sup> Following the commutation, Tyra became parole-eligible and had her first hearing on March 1, 2011.<sup>29</sup> Although the Ohio Parole Board ("Parole Board") concluded that Tyra had "adjusted well to the institution and completed relevant programming," it found that "a release at this time would demean the overall seriousness" of her crimes.<sup>30</sup> Making clear just how seriously it viewed the offense, the Board added that "[a] young teenager lost her life when shot by the co-defendant in this case," calling this "a senseless killing that could have been prevented."<sup>31</sup> The Board denied release and scheduled Tyra's next hearing date for April 1, 2018.<sup>32</sup>

When I first met with Tyra, her prospects for release were grim. Without DNA evidence that conclusively established her innocence, it was unlikely that a court would reopen her case.<sup>33</sup> And as long as Tyra maintained her innocence, it was unlikely that the Parole Board would release her in 2018.<sup>34</sup> For this very reason, the attorney who assisted Tyra with her earlier successful clemency application refrained from explicitly claiming that she was innocent even though he was convinced that she was.<sup>35</sup> In his professional opinion, "it is very risky to make actual innocence claims" because if the governor denies clemency, the Parole Board "may be less inclined to let the applicant out later."<sup>36</sup> So instead, he sought a substantial reduction of Tyra's original sentence but framed the petition "in such a way as to point out facts which undermined [her] convictions without explicitly claiming actual innocence."<sup>37</sup>

Tyra and I eventually concluded that filing another clemency application would be our best option for securing her release before

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<sup>28</sup> Tyra Patterson, Warrant of Commutation, Jan. 7, 2011 (on file with author).

<sup>29</sup> Ohio Parole Board Decision, Mar. 1, 2011 (on file with author).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Sue Russell, *Seeking Second Chances Without DNA*, PAC. STANDARD (Oct. 11, 2012), <http://www.psmag.com/politics-and-law/seeking-second-chances-without-dna-48082>.

<sup>34</sup> This concern was echoed by Daniel S. Medwed in his article *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 523–28 (2008).

<sup>35</sup> Affidavit of Madry L. Ellis, *In re* Clemency Application of Tyra Patterson, ¶ 8 (Jan. 17, 2015) (on file with author).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ¶¶ 9–10.



2018. And we decided to say explicitly what Tyra’s previous lawyer had only hinted: that Tyra had been wrongfully convicted. But the odds of receiving clemency a second time seemed especially long, particularly since we would be asking a different governor, John Kasich, who has granted the fewest clemency requests of any Governor since the 1980s.<sup>38</sup>

Tyra’s status as a convicted robber and murderer further reduced our chances of walking her out of prison. Tyra is, of course, a human being, but to the criminal justice system she is merely Inmate Number 37737, a felon lacking humanity, voice, and power. If we are to win Tyra’s freedom, we must find a way to convince Governor Kasich to see Tyra as more than a number.

I begin this case study with the court of appeals’ statement of facts in Tyra’s case. As is typical in opinions affirming criminal convictions, the court treats her guilt as beyond dispute and paints her in the worst possible light. To the court of appeals, Tyra is Other; her otherness makes it difficult to conceive that she might actually be innocent.

I then offer Tyra’s version of events and the evidence supporting it, information that has led many—including a former Ohio Attorney General—to believe that Tyra is very likely innocent. What becomes apparent is that no single piece of evidence exonerates Tyra; instead, the evidence of her innocence must be viewed holistically. But that is precisely why proving innocence in non-DNA cases is so hard: skeptics find reasons to discount individual pieces of evidence that point to innocence and either fail to see, or deliberately ignore, the big picture. Tyra’s status as Other only encourages those inclined to such skepticism to dismiss her claim.

The remainder of this Part chronicles how the prosecutor and the Parole Board have dehumanized Tyra and how we have fought to reclaim her humanity. Although Governor Kasich has not yet decided Tyra’s clemency application, I believe that our efforts to humanize Inmate Number 37737 have provided invaluable assistance to our cause.

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<sup>38</sup> See Alan Johnson, *Kasich uses clemency powers sparingly in 2015*, THE COLUMBUS DISPATCH (Jan. 1, 2016, 6:08 AM), <http://www.dispatch.com/content/stories/local/2015/12/31/kasich-clemency.html> (discussing how Governor Kasich approved only two of the 244 requests he considered); Alan Johnson, *Kasich rarely uses clemency to pardon, commute sentences*, THE COLUMBUS DISPATCH, (Mar. 16, 2015, 8:23 AM), <http://www.dispatch.com/content/stories/local/2015/03/16/kasich-rarely-uses-clemency.html>; Alan Johnson, *Pardon from Kasich is rare*, THE COLUMBUS DISPATCH (May 19, 2012, 8:14 AM), <http://www.dispatch.com/content/stories/local/2012/05/19/pardon-from-kasich-is-rare.html>.

*A. The Court of Appeals' Version of the Facts*

The decision affirming Tyra's conviction begins by describing how the victims ended up in the neighborhood where Tyra lived. "In the early morning hours of September 20, 1994, Holly Lai was driving around Dayton with four other teenage girls in her Chevrolet Chevette."<sup>39</sup> The four teenagers with Holly were Holly's sister Michelle, sisters Amy and Candice Brogan, and Danielle Jones.<sup>40</sup> Holly parked her car at what would become the scene of Michelle's murder and left with Amy to steal a radio.<sup>41</sup> After arriving back at the car, a "[Chevrolet] Caprice pulled ahead of Holly's car and blocked the girls' exit."<sup>42</sup> "Then, [Angela] Thuman[, an occupant of the Caprice,] approached Holly's window and said 'what would you do if I put a gun to your head and said check that body' and asked the girls if they had any crack."<sup>43</sup> Thuman and Kellie Johnson, who was nearby, then tried to grab Holly's car keys after which Johnson hit Holly.<sup>44</sup> LaShawna Keeney, who was with Johnson, "asked the girls if they had any jewelry, crack, or money and told the girls to 'check it in,'" slang for "this is a robbery."<sup>45</sup> Joseph Letts, who was with Johnson and Keeney, placed a pit bull on victim Amy Brogan's lap.<sup>46</sup> As the robbery unfolded, Tyra, who was at the scene, punched Candice Brogan in the eye. According to the court of appeals, all of the co-defendants surrounded the car and rocked it, laughing as they chanted, "we checked in your stuff."<sup>47</sup>

The court then recounted the shooting:

Keeney pointed [a gun] at Holly's head and said "somebody is going to get killed tonight." Patterson, who was standing by Keeney, said "shoot it shoot it." After Keeney took the gun away from Holly's head, Holly ducked and turned to the right and saw Keeney shoot Michelle. Patterson was still standing by Keeney when Keeney shot Michelle and never tried to stop Keeney. Everyone scattered after Michelle was shot. No one tried to help.<sup>48</sup>

Detective Tom Lawson interrogated Tyra. He told the jury that

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<sup>39</sup> State v. Patterson, No. 15699, 1997 WL 216576, at \*1 (Ohio Ct. App. May 2, 1997).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Patterson*, 1997 WL 216576, at \*1.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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Tyra initially told him that she and Rebecca Stidham had been riding in a car driven by Aaron Moten looking for Joe Letts, and that they found Letts with Keeney and Thuman.<sup>49</sup> Keeney, Letts, and Thuman got into the car, after which “Keeney showed everyone a .22 caliber gun and announced that she was ‘not taking shit from anybody.’”<sup>50</sup> They then drove to the apartment complex where Tyra lived and Letts and Keeney got out of the car when they saw Johnson walking Letts’s pit bull.<sup>51</sup> Moten then parked his car in front of the victims’ Chevette, and Keeney and Thuman approached the victims and began threatening them.<sup>52</sup> The detective testified that Tyra told him that she walked away and soon after heard a gunshot.<sup>53</sup> Detective Lawson also testified that Tyra claimed that she picked up a necklace from the ground that Keeney had thrown there, which she flushed down the toilet when she got back to her apartment.<sup>54</sup>

Detective Lawson told the jury that as he was preparing to book Tyra, she said “that she had not been truthful during the [initial] interview and that she wanted to talk with him again.”<sup>55</sup> According to Detective Lawson, Tyra admitted during the second interview that she grabbed a necklace from the girl sitting behind the driver and was at the car when Keeney shot Michelle.<sup>56</sup>

Detective Lawson then videotaped Tyra’s statement, during which she admitted grabbing a necklace from one of the victims.<sup>57</sup> Tyra also admitted during the videotaped statement that she had seen LaShawna Keeney with a gun shortly before the robbery.<sup>58</sup> During her videotaped statement, Tyra said that she had “grabbed



<sup>49</sup> *Id.* at \*2.

<sup>50</sup> *Id.*

<sup>51</sup> *Patterson*, 1997 WL 216576, at \*2.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at \*3.

<sup>56</sup> *Id.*

<sup>57</sup> Screenshot, Videotape: Statement of Tyra Patterson to Detective Tom Lawson (Sept. 20, 1994) (on file with author).

<sup>58</sup> *State v. Patterson*, No. 15699, 1997 WL 216576, at \*3 (Ohio Ct. App. May 2, 1997).

Keeney and told her to ‘chill out,’” and that she and her friend Rebecca Stidham, who was at the scene with her, “had not been near the car when Keeney shot Michelle.”<sup>59</sup>

Tyra did not testify at her trial.<sup>60</sup> The only witness the defense called was a woman named Angela Briscoe. Briscoe, who lived with Keeney, Letts, Thuman, Johnson, and Moten, testified that after the shooting, her roommates entered the apartment they shared with her, and all of them, including Briscoe, fled to a hotel.<sup>61</sup> Tyra was not with them and did not go to the hotel.<sup>62</sup>

This statement of facts not only paints Tyra in a very negative light but also treats her guilt as fixed and beyond dispute. Reading the opinion brings to mind the difficulty of challenging factual determinations courts treat as final. But the facts relied upon in affirming convictions are not always accurate or complete. Indeed, as in the *Elkins* case, every exoneration tells the story of how the facts found at trial were inaccurate and incomplete.

#### B. Tyra’s Innocence Claim and the Evidence Supporting It

Tyra’s account of what happened the night of the incident differs from the court of appeals’ version in several respects. The jury never heard Tyra’s side of the story because her lawyers told her that “the prosecution would ‘tear [her] up because [she] didn’t ‘talk right’ and sounded like [she] was from the streets.”<sup>63</sup> But her co-defendants and two other witnesses corroborate Tyra’s version.

Tyra, who was nineteen in September 1994, insists that she did not know three of her four co-defendants (Keeney, Thuman, and Johnson),<sup>64</sup> and only knew Letts from smoking marijuana with him a few times before the incident.<sup>65</sup> Tyra did meet Keeney briefly for the first time a few hours before the crimes, when Keeney showed up at Tyra’s apartment looking for her boyfriend Letts.<sup>66</sup>

Tyra wound up at the scene of the crimes after leaving her apartment with her friend Rebecca Stidham to search for Stidham’s

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Aff. of Tyra Patterson, *In re* Clemency Application of Tyra Patterson, ¶ 98 (June 30, 2013), <https://justice4tyra.files.wordpress.com/2013/07/tyra-newaffidavit.pdf> [hereinafter Patterson Aff.].

<sup>64</sup> *Id.* ¶ 34 (Tyra did not know Keeney); *id.* ¶ 42 (Tyra did not know Johnson); *id.* ¶ 44 (Tyra did not know Thuman).

<sup>65</sup> *Id.* ¶ 32.

<sup>66</sup> *Id.* ¶¶ 34–35.

lost car keys.<sup>67</sup> They left with Aaron Moten, who had been smoking marijuana with Stidham and Tyra earlier in the evening.<sup>68</sup> When Stidham decided to ride with Moten to search for her keys, Tyra went along in hopes of smoking more marijuana.<sup>69</sup> Stidham did not recover her lost keys.<sup>70</sup>

As Moten drove the three back to Tyra’s, he stopped the car beside someone Tyra had never seen before: Kellie Johnson, who was walking a pit bull.<sup>71</sup> Johnson and Moten argued, with her accusing him of trying to hook up with “those bitches” in the car.<sup>72</sup> While they argued, Keeney, Letts, and Thuman walked up to Moten’s car and climbed in.<sup>73</sup> As she told Detective Lawson during her interrogation, Tyra recalls seeing Keeney pull a gun from her waistband, waving it around and “acting crazy.”<sup>74</sup> Because Tyra thought Keeney was “just running her mouth,” she “didn’t take her seriously.”<sup>75</sup>

According to Tyra, Keeney, Letts, and Thuman were only in Moten’s car “a short time.”<sup>76</sup> The three left Moten’s car to make room for Johnson to get in the car with Moten, Tyra, and Stidham.<sup>77</sup> Keeney, Thuman, and Letts left on foot with the pit bull, heading towards the alley behind the complex where Tyra lived.<sup>78</sup> Heeding Tyra’s request to take her and Stidham home, Moten eventually pulled his car alongside a Chevette, at which time Johnson jumped out of the car and ran over to the Chevette, where Keeney and Thuman were talking to the driver.<sup>79</sup> Tyra and Stidham then got out of Moten’s car, intending to walk back to Tyra’s apartment,<sup>80</sup> and Moten then pulled in front of the Chevette and parked.<sup>81</sup>

Tyra remembers “a lot happening at the Chevette” and admits she and Stidham “were curious to see what was going on.”<sup>82</sup> However, they

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<sup>67</sup> *Id.* ¶ 38.

<sup>68</sup> *Id.* ¶ 32.

<sup>69</sup> Patterson Aff., *supra* note 63, ¶ 38.

<sup>70</sup> *Id.* ¶¶ 40–41.

<sup>71</sup> *Id.* ¶ 42.

<sup>72</sup> *Id.* ¶ 43.

<sup>73</sup> *Id.* ¶¶ 44–45.

<sup>74</sup> *Id.* ¶ 46.

<sup>75</sup> Patterson Aff., *supra* note 63, ¶ 46.

<sup>76</sup> *Id.* ¶ 47.

<sup>77</sup> *Id.* ¶ 48.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* ¶ 50.

<sup>80</sup> *Id.*

<sup>81</sup> Patterson Aff., *supra* note 63, ¶ 51.

<sup>82</sup> *Id.* ¶ 52.

“hung back and did not walk right up to the car.”<sup>83</sup> As they stood and watched, Tyra saw Keeney, Johnson, and Thuman robbing the victims, pulling items out of the car and throwing them to the ground.<sup>84</sup>

At some point the driver of the Chevette looked at Tyra and said, “Please make them stop. Please tell them that we don’t have anything.”<sup>85</sup> Tyra then walked over to Keeney and told her to leave the victims alone, at which point Keeney cursed at Tyra.<sup>86</sup> Tyra and Stidham then started to walk away from the scene towards Tyra’s apartment.<sup>87</sup> As they left, Tyra noticed a shiny object lying in the grass. She picked it up and noticed it was a necklace. She kept it and continued walking towards her apartment.<sup>88</sup> As Tyra and Stidham continued on their way, a gunshot rang out behind them. They then ran the rest of the way to Tyra’s apartment.<sup>89</sup>

Soon after arriving in her apartment, Tyra heard a “panicky voice yelling, ‘Please help! My sister has been shot!’” Because hearing that voice “deeply affected” Tyra, she decided to call 911.<sup>90</sup> Tyra recalled telling the dispatcher that there had been a robbery and that the police needed to come.<sup>91</sup> As Tyra was about to hang up, the dispatcher asked for her name, and Tyra answered “Tiara.”<sup>92</sup> Tyra also “started rambling about how [she] had heard about the robbery from [her] girlfriend.”<sup>93</sup> Tyra lied about her name and how she knew about the robbery because she worried she might get in trouble for picking up the necklace from the ground.<sup>94</sup> Motivated also by the fear that she might be implicated in the robberies and the shooting, Tyra then flushed the necklace down the toilet.<sup>95</sup>

Hours later, Tyra and Stidham went down to the police station to be questioned separately.<sup>96</sup> Tyra tells a very different story about what happened when Detective Lawson entered the room to interrogate her. She remembers him stating that the fifteen-year-old girl who had

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* ¶ 54.

<sup>85</sup> *Id.* ¶ 55 (internal quotations omitted).

<sup>86</sup> *Id.*

<sup>87</sup> Patterson Aff., *supra* note 63, ¶ 58.

<sup>88</sup> *Id.* ¶ 59.

<sup>89</sup> *Id.* ¶ 61.

<sup>90</sup> *Id.* ¶¶ 62–63.

<sup>91</sup> *Id.* ¶ 63.

<sup>92</sup> *Id.* ¶ 64.

<sup>93</sup> Patterson Aff., *supra* note 63, ¶ 64.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* ¶ 67.

<sup>96</sup> *Id.* ¶¶ 69–70.

been shot was dead and that he knew Tyra had been at the scene.<sup>97</sup> After he asked her what happened, she told him how she and Stidham got to the scene, that she had briefly seen Keeney with a gun shortly before the incident, that she tried to stop the robbery by telling Keeney to leave the victims alone, that she and Stidham then left to go back to Tyra’s apartment, that she heard a gunshot, and then called 911 to get help for the shooting victim.<sup>98</sup> Tyra did not tell him about picking up the necklace from the ground at that point because she was afraid she would get in trouble for it.<sup>99</sup>

After Tyra finished, Detective Lawson began yelling at her, telling her she was a “fucking liar,” and that she was going to spend the rest of her life in prison for murdering a fifteen-year-old girl.<sup>100</sup> Tyra kept insisting that she had not hurt anyone, and Detective Lawson continued screaming at her.<sup>101</sup> None of this portion of the interrogation was recorded.<sup>102</sup>

According to Tyra, Detective Lawson then told her he was booking her for murder and escorted her from the room.<sup>103</sup> As they walked, they came to an area where a detective’s car was parked; inside was Stidham.<sup>104</sup> Detective Lawson then pointed to Stidham and said, “Look. There’s your friend. She’s going home.”<sup>105</sup> Tyra then asked, “Why is she going home and I’m not?”<sup>106</sup> Detective Lawson answered, “Because she helped us. She gave us a videotaped statement.”<sup>107</sup> Tyra then exclaimed, “I’ll give you a videotaped statement.”<sup>108</sup> But Detective Lawson responded, “You don’t have anything to tell me. You denied doing anything wrong.”<sup>109</sup> Tyra shot back, “I had a necklace.”<sup>110</sup> Tyra, who had no prior criminal record,<sup>111</sup> believed naïvely that Detective Lawson would let her go home if she gave a videotaped statement

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<sup>97</sup> *Id.* ¶ 71.

<sup>98</sup> *Id.* ¶¶ 73–74.

<sup>99</sup> Patterson Aff., *supra* note 63, ¶ 76.

<sup>100</sup> *Id.* ¶ 77.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* ¶ 78.

<sup>103</sup> *Id.* ¶ 79.

<sup>104</sup> *Id.* ¶ 80.

<sup>105</sup> Patterson Aff., *supra* note 63, ¶ 80.

<sup>106</sup> *Id.* ¶ 81.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* ¶ 82.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Montgomery Cty. Adult Prob. Dep’t Social History Questionnaire for Tyra Patterson 3 (undated) (on file with author).

about the necklace.<sup>112</sup>

Detective Lawson then took Tyra back into the interrogation room.<sup>113</sup> He did not turn on the video recorder initially but instead asked Tyra to tell him about the necklace.<sup>114</sup> Tyra then stated that she picked up the necklace from the ground as she and Stidham walked back to Tyra's apartment.<sup>115</sup> When Tyra finished, Detective Lawson yelled, "We know you snatched that necklace from one of the girls in the car!"<sup>116</sup> Tyra insisted that she was telling the truth about the necklace but Lawson refused to believe her.<sup>117</sup> Detective Lawson then told Tyra that she would spend the rest of her life in prison if she was convicted of murder, and that "it would be better to admit to ripping the necklace from one of the victims . . . rather than going down for murder."<sup>118</sup> Although Tyra says she did not want to admit to something she did not do, she also did not want to spend the rest of her life in prison and wanted to go home.<sup>119</sup> She decided to tell Detective Lawson that she grabbed the necklace from one of the victims even though she still maintains she picked the necklace up from the ground.<sup>120</sup>

Detective Lawson and Tyra then practiced off-camera what she would say about the necklace, with Detective Lawson instructing her at one point to use her hands to show how she ripped the necklace from the victim.<sup>121</sup> Detective Lawson then took Tyra to another room to give her videotaped statement confessing to robbery.<sup>122</sup> Tyra noticed that once the recording started, Detective Lawson became "a very different man."<sup>123</sup> He no longer yelled or screamed as he had off-camera but was "polite, calm, and kind" during the recording.<sup>124</sup>

Although I believe her, there is no way to prove that Tyra is telling the truth about how Detective Lawson pressured her to falsely confess. Unfortunately, Detective Lawson chose to record only fifteen minutes of an approximately two-hour interrogation.<sup>125</sup> Only Detective Lawson

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<sup>112</sup> See Patterson Aff., *supra* note 63, ¶ 82.

<sup>113</sup> *Id.* ¶ 83.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* ¶ 84.

<sup>116</sup> *Id.* ¶ 85.

<sup>117</sup> *Id.*

<sup>118</sup> Patterson Aff., *supra* note 63, ¶ 86.

<sup>119</sup> *Id.* ¶ 87.

<sup>120</sup> *Id.* ¶¶ 87–88.

<sup>121</sup> *Id.* ¶ 88.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* ¶ 89.

<sup>124</sup> Patterson Aff., *supra* note 63, ¶ 89.

<sup>125</sup> Offense Supp. Report of T.G. Lawson, Sept. 22, 1994, at 000138 [hereinafter



and Tyra know what transpired during the questioning.

But through investigation, we were able to corroborate other aspects of Tyra’s innocence claim. The corroborating evidence includes the 911 call Tyra made, which the jury never got to hear, victim Holly Lai’s testimony from Kellie Johnson’s trial that it was Johnson who committed the robbery that Tyra confessed to doing, and statements from three of Tyra’s four co-defendants exonerating her.

#### 1. Tyra’s 911 Call

At our first meeting, Tyra told me that she had called 911 to get help for the victims shortly after the shooting but that her defense counsel did not introduce the call at trial because she gave a false name. Although the defense file had long been destroyed, I obtained a copy of the 911 recording from the prosecution’s file. Upon hearing the call, I believed it would be helpful.

Tyra is heard on the tape asking for the dispatcher to “hurry up” and send help because “I think they got robbed. It was some girls in a car.”<sup>126</sup> There were, however, troublesome aspects of the recording. Tyra told the dispatcher her name was “Tiara” and claimed that she had heard about the robbery from a girlfriend.<sup>127</sup> Still, I found it odd that the defense chose not to introduce a recording of the call at her trial.<sup>128</sup>

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Offense Supp. Report of T.G. Lawson] (indicating that interrogation began at 17:14 hours and ended at 18:57 hours).

<sup>126</sup> *Tyra’s 911 Call*, YOUTUBE (July 10, 2013), <https://www.youtube.com/watch?v=WTb5hcWUcwE>.

<sup>127</sup> *Id.*

<sup>128</sup> Citing Ohio Rule of Evidence 801(D)(2), the state claims that Tyra “may have had to take the stand,” because in Ohio, “a party may not introduce their own out of court statement.” Letter from Leon Daidone, Assistant Prosecutor, to John R. Kasich, Governor of Ohio 6 (July 3, 2014) (on file with author). Whether Tyra would have had to testify in order to get her 911 call into evidence is beside the point, for this was a case that required Tyra to take the stand and tell the jurors what happened in the interrogation room. The most powerful evidence against Tyra was her confession. *See* Aff. of Sharon Wilson, *In re* Clemency Application of Tyra Patterson, ¶ 4 (June 20, 2013), [https://justice4tyra.files.wordpress.com/2013/07/aff-\\_wilson.pdf](https://justice4tyra.files.wordpress.com/2013/07/aff-_wilson.pdf) [hereinafter Wilson Aff.] (“The most damning evidence the prosecution presented against Tyra was her videotaped statement.”); Aff. of June Ackerman, *In re* Clemency Application of Tyra Patterson, ¶ 5 (June 17, 2013), [https://justice4tyra.files.wordpress.com/2013/07/aff-\\_ackerman.pdf](https://justice4tyra.files.wordpress.com/2013/07/aff-_ackerman.pdf) [hereinafter Ackerman Aff.] (“The most powerful evidence against Tyra was her videotaped confession.”). The defense, however, provided no reason for the jury to believe that Tyra’s confession was false. *See* Aff. of Robert Reed, *In re* Clemency Application of Tyra Patterson, ¶ 6 (June 22, 2013), [https://justice4tyra.files.wordpress.com/2013/07/aff-\\_reed.pdf](https://justice4tyra.files.wordpress.com/2013/07/aff-_reed.pdf) [hereinafter Reed Aff.] (“[T]he defense did not discuss the confession and did not give us any reason to believe a person would falsely confess to a crime she did not commit.”). Without

Ira Mickenberg, an expert in ineffective assistance of counsel and best practices of trial attorneys in criminal cases, opined that Tyra's call "was powerful evidence . . . that Tyra was not acting in concert with the criminals, but was trying to get police help for the victims."<sup>129</sup> According to Mickenberg, the call "also corroborated [Tyra's] contention that the criminals fled together after the shooting, and that [Tyra,] who was not involved with them, called the police from her home."<sup>130</sup>

But what about Tyra's false statements to the 911 dispatcher? Did those efforts to shade the truth justify her lawyers' decision not to introduce the call? Mickenberg believed that there were innocent explanations for why Tyra mispronounced her name and lied about how she learned of the crimes, specifically that she may have worried about police questioning and may have even feared reprisals from the actual perpetrators.<sup>131</sup> Mickenberg characterized defense counsel's failure to introduce the recording as "inexplicable" because it went "directly to their client's innocence[,] . . . directly refuted the State's claim about Ms. Patterson's intent[,] and cast Ms. Patterson's role in the case in a very favorable light."<sup>132</sup>

The value of the 911 call to Tyra's defense became even clearer after we interviewed six of Tyra's trial jurors, who eventually submitted affidavits in support of Tyra's 2013 clemency application. Each of the six jurors, who heard the call for the first time nearly twenty years after the trial, indicated that had they heard the recording at trial, they likely would not have voted to convict Tyra, even though she lied about some things during the call.<sup>133</sup> Addressing Tyra's giving a false name, Juror Steve Guy said: "I can understand why [Tyra] may have hesitated to identify herself correctly."<sup>134</sup> Regarding Tyra's statement that she heard about the robbery from her friend, Juror Nancy Day stated: "I can understand that Tyra must have been extremely scared while making that 911 call. She was trying to do the right thing, but . . . was

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testimony from Tyra that she falsely confessed, her defense was doomed to fail.

<sup>129</sup> Aff. of Ira Mickenberg, *In re* Clemency Application of Tyra Patterson, ¶ 14 (July 1, 2013), <https://justice4tyra.files.wordpress.com/2013/07/mickenberg.pdf> [hereinafter Mickenberg Aff.].

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* ¶ 15.

<sup>132</sup> *Id.* ¶ 17.

<sup>133</sup> See Ackerman Aff., *supra* note 128, ¶ 13; Reed Aff., *supra* note 128, ¶¶ 11, 13; Wilson Aff., *supra* note 128, ¶ 19; Aff. of Clarence New, *In re* Clemency Application of Tyra Patterson, ¶ 14 (June 14, 2013), [https://justice4tyra.files.wordpress.com/2013/07/aff\\_new.pdf](https://justice4tyra.files.wordpress.com/2013/07/aff_new.pdf) [hereinafter New Aff.].

<sup>134</sup> Aff. of Steve Guy, *In re* Clemency Application of Tyra Patterson, ¶ 7 (June 25, 2013), [https://justice4tyra.files.wordpress.com/2013/07/aff\\_guy.pdf](https://justice4tyra.files.wordpress.com/2013/07/aff_guy.pdf).

scared of being charged with a serious crime.”<sup>135</sup>

Finally, it seemed implausible that Tyra was calling 911 to set up an alibi. If that was her motivation, then it made no sense for her to give a false name. If Tyra were trying to construct an alibi, then she would have given her correct name at the beginning of the call, instead of a false name at the end of the call. Juror Clarence New addressed this very point in his affidavit: “The fact that Tyra initially mispronounced her name to the dispatcher only furthers my belief that she was motivated to call 911 out of sincere concern, not to create an alibi for herself.”<sup>136</sup>

## 2. Holly Lai’s Testimony at Kellie Johnson’s Trial

During our investigation we obtained the transcript of Holly Lai’s testimony at Kellie Johnson’s trial. Johnson went to trial in December 1994,<sup>137</sup> nearly one year before Tyra’s trial.<sup>138</sup> During Johnson’s trial, Holly testified that she saw Johnson “trying to get [the necklace] off of [Candice Brogan] when she was fighting her.”<sup>139</sup> When asked a short time later if Holly saw Johnson take the necklace from Candice, Holly answered, “Yes.”<sup>140</sup> Holly’s testimony at Johnson’s trial, if believed, means that Tyra’s admission to robbing the necklace was false.<sup>141</sup>

## 3. The Victims’ Initial Statements to the Police

Police Officer T.M. Olmstead, the first officer to arrive at the scene, interviewed victims Holly Lai, Amy and Candice Brogan, and Danielle Jones shortly after the shooting.<sup>142</sup> Olmstead’s report

<sup>135</sup> Aff. of Nancy Day, *In re* Clemency Application of Tyra Patterson, ¶ 13 (June 13, 2013), [https://justice4tyra.files.wordpress.com/2013/07/aff\\_day.pdf](https://justice4tyra.files.wordpress.com/2013/07/aff_day.pdf).

<sup>136</sup> New Aff., *supra* note 133, ¶ 12.

<sup>137</sup> Partial Transcript of Record, *In re* Kellie Johnson, Montgomery Cnty. C.P. Ct., Juv. Div. (1994) (Nos. JC-94-6650, JC-94-6651, JC-94-8025) [hereinafter Partial Transcript of Record, *In re* Kellie Johnson].

<sup>138</sup> Tyra’s trial began on November 27, 1995. *See* Partial Transcript of Record at 58, *State v. Patterson*, Montgomery Cnty. C.P. Ct. (1995) (No. 94-CR-2753) [hereinafter Partial Transcript of Record].

<sup>139</sup> Partial Transcript of Record, *In re* Kellie Johnson, *supra* note 137, at 35.

<sup>140</sup> *Id.* at 36.

<sup>141</sup> Holly testified at Johnson’s trial that Tyra was “[t]rying to steal things out of the car,” but admitted that she “couldn’t really see everything [Tyra] did.” Partial Transcript of Record, *In re* Kellie Johnson, *supra* note 137, at 146. As will be discussed below, during their initial interviews with the police in the hours after the incident, neither Holly nor any of the victims described the person later identified as Tyra Patterson as committing any criminal acts. Only later, after Tyra confessed, did Holly and the other victims incriminate Tyra.

<sup>142</sup> Offense Supp. Report of T.M. Olmstead, Sep. 21, 1994, 03:00 hrs, 000102–103 [hereinafter Offense Supp. Report of T.M. Olmstead] (on file with author).

describes six suspects. The victims described “Suspect #1” as a black female, approximately nineteen or twenty years old, “light skinned with a frizzy afro haircut, wearing a flowered tank top and no bra.”<sup>143</sup> According to the victims, this person “later produced a small black handgun, possibly a 22 caliber” and shot and killed Michelle Lai.<sup>144</sup> The victims subsequently identified twenty-two-year-old LaShawna Keeney as the shooter.<sup>145</sup>

The victims described “Suspect #2” as an “ugly” white female, with “dark hair, very short, similar to the way a male would cut his hair,” with a tattoo of a cross on her arm.<sup>146</sup> During subsequent interviews, the victims told the police that this suspect flirted with Holly.<sup>147</sup> This suspect also asked if the girls in the Chevette were on crack and told them to “check it in.”<sup>148</sup> The victims eventually identified Angie Thuman as the second suspect.<sup>149</sup>

Based on his interview with the victims, Officer Olmstead described “Suspect #3” as a “black girl, with braids.”<sup>150</sup> In a separate interview, Danielle Jones further described the black girl with braids as “dark complected.” This description fit Kellie Johnson, who was fourteen at the time of her arrest,<sup>151</sup> and who has a dark complexion relative to her four co-defendants.<sup>152</sup>

Officer Olmstead’s report lists “Suspect #4” as a “white girl, wearing a green tank top” and sporting “a small cross tattooed on her right bicep.”<sup>153</sup> But later descriptions by the victims indicate that Suspect #2 and #4 are the same individual: Angela Thuman.<sup>154</sup>

<sup>143</sup> *Id.* at 000102.

<sup>144</sup> *Id.*

<sup>145</sup> Partial Transcript of Record, *supra* note 138, at 463, 476–77, 481 (Nov. 28, 1995) (testimony of Amy Brogan); *id.* at 605, 607 (Nov. 29, 1995) (testimony of Danielle Jones); *id.* at 729–30 (Nov. 30 1995) (testimony of Holly Lai).

<sup>146</sup> Offense Supp. Report of T.M. Olmstead, *supra* note 142, at 000102.

<sup>147</sup> Offense Supp. Report of G.L. Engel, Sep. 21, 1994, 18:11 hrs, at 000116 [hereinafter Offense Supp. Report of G.L. Engel] (on file with author) (Danielle Jones interview); *id.* at 000117 (Candice Brogan interview); *id.* at 000119 (Holly Lai interview).

<sup>148</sup> *Id.* at 000119.

<sup>149</sup> Partial Transcript of Record, *supra* note 138, at 475 (testimony of Amy Brogan); *id.* at 598–600 (testimony of Danielle Jones); *id.* at 700 (testimony of Holly Lai).

<sup>150</sup> Offense Supp. Report of T.M. Olmstead, *supra* note 142, at 000102.

<sup>151</sup> Offense Supp. Report of T.G. Lawson, Sep. 22, 1994, 21:20 hrs, at 000140 (on file with author).

<sup>152</sup> See Video Statements of Kellie Johnson, LaShawna Keeney, Angela Thuman and Tyra Patterson (on file with author).

<sup>153</sup> Offense Supp. Report of T.M. Olmstead, *supra* note 142, at 000102.

<sup>154</sup> Offense Supp. Report of G.L. Engel, *supra* note 147, at 000116 (Danielle’s Jones’s description); *id.* at 000117 (Candice Brogan’s description); *id.* at 000119 (Holly

The victims described “Suspect #5” as a “skinny black male, wearing no shirt, white sweatpants” with “a large afro type haircut.”<sup>155</sup> In separate interviews, each of the victims stated that the shirtless man was walking a pit bull.<sup>156</sup> Three of the four victims reported this man saying “sic ‘em Angie” or “get ‘em Angie.”<sup>157</sup> A fourth, Amy Brogan, reported that the shirtless man put the dog in the Chevette and tried to get it to attack her.<sup>158</sup> At trial, victims Danielle Jones and Holly Lai identified Joe Letts as the skinny, tall shirtless man with the pit bull.<sup>159</sup>

Officer Olmstead’s report describes a sixth suspect: “an older white female, wearing a pink bathrobe.”<sup>160</sup> This individual was Rebecca Stidham, Tyra’s friend.<sup>161</sup> The police did not charge Stidham with any crimes.<sup>162</sup>

None of the victims gave a description of any person matching Tyra’s when they first spoke to Officer Olmstead at the scene. Hours later, Holly Lai gave a detective the only description of a person who could be Tyra: a black female with a “medium complexion and a medusa type wild hair.”<sup>163</sup> Holly did not describe what the woman with the “medusa type wild hair” did during the events leading up to Michelle’s murder. Additionally, none of the other victims described this person to the police during their separate interviews with

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Lai’s description); Offense Supp. Report of T.G. Lawson, *supra* note 125, at 000134 (Amy Brogan’s description).

<sup>155</sup> Offense Supp. Report of T.M. Olmstead, *supra* note 142, at 000103.

<sup>156</sup> Offense Supp. Report of G.L. Engel, *supra* note 147, at 000116 (Danielle’s Jones’s description); *id.* at 000117 (Candice Brogan’s description); *id.* at 000119 (Holly Lai’s description); Offense Supp. Report of T.G. Lawson, *supra* note 125, at 000134 (Amy Brogan’s description).

<sup>157</sup> Offense Supp. Report of G.L. Engel, *supra* note 147, at 000116 (Danielle’s Jones’s description); *id.* at 000117 (Candice Brogan’s description); *id.* at 000119 (Holly Lai’s description).

<sup>158</sup> Offense Supp. Report of T.G. Lawson, *supra* note 125, at 000134 (Amy Brogan’s description).

<sup>159</sup> Partial Transcript of Record, *supra* note 138, at 612 (testimony of Danielle Jones); *id.* at 698 (testimony of Holly Lai).

<sup>160</sup> Offense Supp. Report of T.M. Olmstead, *supra* note 142, at 000102.

<sup>161</sup> Patterson Aff., *supra* note 63, ¶ 39 (describing Rebecca as wearing a robe). Additionally, as evidenced by a recent video statement, Rebecca is a white female. Ed Pilkington & Laurence Mathieu, *The Injustice System: A Tale of Two Tyras*, THE GUARDIAN (Jan. 14, 2016), <http://www.theguardian.com/us-news/ng-interactive/2016/jan/14/the-injustice-system-us-prisons-tyra-patterson-michelle-lai-dayton-ohio-montgomery-county> [hereinafter Pilkington & Mathieu, *Part One*].

<sup>162</sup> Wes Hills, *Girl Too Young to Be Tried as Adult*, DAYTON DAILY NEWS, Dec. 7, 1994 (listing Kellie Johnson, Joseph Letts, Angela Thuman, LaShawna Keeney, and Tyra Patterson as the five people charged with aggravated murder and aggravated robbery in connection with the incident on September 20, 1994).

<sup>163</sup> Offense Supp. Report of G.L. Engel, *supra* note 147, at 000119.

detectives. Although three of the four victims did select Tyra's photo as a person who had been at the scene,<sup>164</sup> there are no statements in any of the police reports or detective notes describing specifically what Tyra did during the incident.<sup>165</sup>

In sum, the fact that the victims did not attribute any criminal wrongdoing to Tyra in their initial statements to the police conflicts with their subsequent testimony at trial that Tyra actively participated in the robberies and urged Keeney to shoot Michelle Lai.<sup>166</sup> The absence of any mention of the role played by the black female with a "medium complexion and a medusa type wild hair," if indeed that person was Tyra, bolsters Tyra's assertion that she did not rob the victims and had left the crime scene by the time of the shooting.

#### 4. The Statements of Tyra's Co-defendants and Witnesses

During our investigation, I interviewed each of Tyra's co-defendants. Three of them—Keeney, Johnson, and Letts—gave sworn affidavits supporting Tyra's innocence claim. Thuman declined to give an affidavit, citing her concern that doing so might jeopardize her opportunity to obtain parole.<sup>167</sup> All four took polygraphs, which corroborated the key components of Tyra's version of events. We also interviewed Tyra's friend, Rebecca Stidham, who was also polygraphed, and witness, Aaron Moten, who was not polygraphed. I also reviewed the prior statements these individuals gave to the police when questioned shortly after Michelle was killed to determine to what extent they were inconsistent with their more recent statements.

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<sup>164</sup> Partial Transcript of Record, *supra* note 138, at 484 (testimony of Amy Brogan) (discussing out-of-court identification of Tyra Patterson); *id.* at 602–03 (testimony of Danielle Jones); *id.* at 710 (testimony of Holly Lai).

<sup>165</sup> When she identified Tyra from a photo spread, Amy Brogan said nothing about what role Tyra played in the events. Offense Supp. Report of T.G. Lawson, *supra* note 125. The police records indicate that when Danielle Jones and Holly Lai selected Tyra's photograph from a photo array on the evening of September 20, 1994, they each identified her as "one of the individuals at the vehicle." Undated Portion of Offense. Supp. Report, Bates No. 000121 (on file with author). Both Holly and Danielle also selected Rebecca Stidham's photograph from a photo array as one of the people "at the vehicle." *Id.* However, as discussed earlier, Stidham was never charged.

<sup>166</sup> See notes 145–161, 163–165 and accompanying text. *But see* State v. Patterson, No. 15699, 1997 WL 216576, at \*1 (Ohio Ct. App. May 2, 1997).

<sup>167</sup> I met with Thuman to have her sign an affidavit based on our previous conversations. That's when she declined to sign based on her fear that the Parole Board would not release her if she did. The draft affidavit is on file with the author.

## a. LaShawna Keeney’s Statements

In her affidavit, Keeney acknowledged shooting and killing Michelle Lai.<sup>168</sup> At the time of the incident, Keeney, Letts and Thuman lived together at Thuman’s apartment, where Johnson and Moten “sometimes stayed.”<sup>169</sup> Keeney was not friends with Tyra and did not socialize with her.<sup>170</sup> She actually admitted being jealous of Tyra after hearing that Letts had been spending time at Tyra’s smoking marijuana.<sup>171</sup> As evidence of her jealousy and dislike of Tyra, Keeney, armed with a gun, arrived at Tyra’s apartment a few hours before the robbery to confront her.<sup>172</sup> Keeney left with Letts and later argued with him.<sup>173</sup>

According to Keeney, “Tyra and her friend did not reach into the car to take anything and did not participate in the robbery in any way.”<sup>174</sup> Rather than participating in the robbery, “Tyra actually tried to stop [it]. She walked up to me and told me to leave the victims alone.”<sup>175</sup> However, Keeney ignored Tyra’s plea to stop and “kept doing what [she] was doing” as Tyra and Rebecca walked away.<sup>176</sup> After shooting Michelle Lai, Keeney fled with Johnson, Thuman, Letts, and Moten to a motel.<sup>177</sup>

During her polygraph examination, Keeney answered “yes” when asked whether Tyra tried to stop the robbery; “no” when asked if Tyra snatched a necklace from any of the victims; “no” when asked if Tyra participated in the robbery; and “no” when asked if Tyra assaulted any of the victims.<sup>178</sup> The two polygraph examiners who conducted Keeney’s examination concluded that she told the truth in answering those four questions.<sup>179</sup>

When interviewed by the police after her arrest, however, Keeney

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<sup>168</sup> Aff. of LaShawna Keeney, *In re* Clemency Application of Tyra Patterson, ¶ 3 (June 26, 2013) (on file with author) [hereinafter Keeney Aff.].

<sup>169</sup> *Id.* ¶ 6.

<sup>170</sup> *Id.* ¶ 7.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* ¶ 8.

<sup>173</sup> *Id.*

<sup>174</sup> Keeney Aff., *supra* note 168, ¶ 13.

<sup>175</sup> *Id.* ¶ 14.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* ¶ 16.

<sup>178</sup> Report from Frank Smith & Donald Clark, Ohio Polygraph & Assocs. and Clark-Dye & Assocs., on Polygraph Examination Report of LaShawna Keeney to author (Dec. 21, 2012), [https://justice4tyra.files.wordpress.com/2013/07/polygraph\\_lashawna.pdf](https://justice4tyra.files.wordpress.com/2013/07/polygraph_lashawna.pdf).

<sup>179</sup> *Id.* at 2.

made statements arguably implicating Tyra in the crimes. One report notes:

[Keeney] stated she had questions about her coat, money and her two friends Tyra and Moe. She stated she was curious why Moe had not been charged, since Moe had given her the gun and I asked her when he had given her the gun and she stated right after he had shot himself two days before. She stated that Tyra's friend, that being Rebecca [Stidham] had just as much to do with it as Tyra. I asked what if anything Rebecca [Stidham] had stolen. She stated nothing that she [k]new of but she was up at the car.<sup>180</sup>

Another report states that "Keeney was shown the photo spread of Patterson and at 1358 hrs identified Patterson as the bi-racial female she had described as being involved as well."<sup>181</sup>

The meaning of Keeney's alleged statement that Stidham "had just as much to do with it as Tyra" is unclear. One interpretation is that Keeney was saying that both Tyra and Stidham were involved in the robbery. Perhaps a more plausible interpretation, however, is that Keeney believed it unfair to charge Tyra and not Stidham since they both played the same role—i.e., that they were both up at the car but did not participate in the robbery. The latter interpretation is consistent with the fact that Stidham was not charged.

Additionally, Keeney's identification of Tyra as being "involved" as indicated in the police report is ambiguous. First, given Keeney's statement that Stidham should have been charged, it is unclear whether Keeney would consider anyone who was up at the car as "involved" even if that person did not participate in the robbery. Second, it is not even clear that Keeney used the word "involved," since the word was not included within quotation marks in the police report. This leaves open the possibility that "involved" is the detective's word, not Keeney's. In fact, the notes contain one very clear example of a detective using words Keeney likely did not speak. Specifically, a portion of a police report reads: "[Keeney] stated she had questions about her coat, money and her two friends Tyra and Moe."<sup>182</sup> Although Keeney was friends with Johnson, Thuman, Letts, and Moten,<sup>183</sup> she was not friends with Tyra.<sup>184</sup> Rather than Keeney using the word "friends"

<sup>180</sup> Offense Supp. Report of T.G. Lawson, *supra* note 125, at 000112.

<sup>181</sup> Undated Portion of Offense Supp. Report, *supra* note 165.

<sup>182</sup> Offense Supp. Report of T.G. Lawson, *supra* note 125.

<sup>183</sup> Keeney was Letts's girlfriend. They lived together with Thuman, Johnson and Moten. Kenney Aff., *supra* note 168, ¶ 6.

<sup>184</sup> *Id.* ¶ 7; Aff. of Kellie Johnson, *In re* Clemency Application of Tyra Patterson, ¶¶ 5–6 (June 23, 2013) [hereinafter Johnson Aff.] (on file with author); Aff. of Joe Letts,



to describe her relationship with Tyra, it is more likely that the police simply assumed that Tyra and Keeney were friends.

b. Kellie Johnson’s Statements

Kellie Johnson had not met Tyra before the night of the shooting.<sup>185</sup> Johnson is “positive” that Tyra “did not take anything from the car and did not punch or fight with any of the victims.”<sup>186</sup> In her affidavit, Johnson states that Tyra “did not participate in the robberies, tried to stop what was happening, and was walking away when the shot was fired.”<sup>187</sup> Explaining why she was able to remember that Tyra was not involved, Johnson said: “The reason I am able to remember after all these years what Tyra did or didn’t do the night Michelle got murdered is because it is hard to forget when someone is convicted and locked up for something she didn’t do.”<sup>188</sup>

During her polygraph, Johnson answered “yes” when asked if Tyra and Stidham had left the scene when Michelle was shot; “no” when asked if Tyra grabbed a necklace from anyone in the Chevette; “no” to the question, “Did Tyra participate in the robbery of the victims in the Chevette”; and “yes” when asked whether Tyra tried to stop the robbery “by telling the shooter to leave the girls alone.”<sup>189</sup> The examiner concluded “no deception indicated” on Johnson’s answers to the questions.<sup>190</sup>

During her police interrogation, however, Johnson accused Tyra of participating in the robbery. Specifically, during her videotaped statement, she told the detective that Tyra approached the car with Keeney and asked the girls if they had money.<sup>191</sup> But no one else involved in the case, neither the surviving victims nor any of the other co-defendants, described Tyra walking up to the car with Keeney. Instead, all of the witnesses who gave information to police about how the incident started say that it was Thuman, Johnson, and Keeney who

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*In re* Clemency Application of Tyra Patterson, ¶ 8 (June 2013) [hereinafter Letts Aff.] (on file with author); Aff. of Aaron Moten, *In re* Clemency Application of Tyra Patterson, ¶ 7 (June 27, 2013) [hereinafter Moten Aff.] (on file with author).

<sup>185</sup> Johnson Aff., *supra* note 184, ¶ 6.

<sup>186</sup> *Id.* ¶ 17.

<sup>187</sup> *Id.* ¶ 23.

<sup>188</sup> *Id.*

<sup>189</sup> Report from Robert L. Patterson, Tri-State Polygraph Assocs., Inc., on Polygraph Examination Report of Kellie N. Johnson to author (Dec. 20, 2012), [https://justice4tyra.files.wordpress.com/2013/07/polygraph\\_kellie.pdf](https://justice4tyra.files.wordpress.com/2013/07/polygraph_kellie.pdf).

<sup>190</sup> *Id.* at 2.

<sup>191</sup> Videotaped Statement of Kellie Johnson (Sept. 22, 1994) (on file with author).

were the first three to approach the Chevette.<sup>192</sup>

In her affidavit, Johnson admitted lying to the police about Tyra's role.<sup>193</sup> Johnson explained: "I . . . lied when I told the police that Tyra approached the car with LaShawna and asked the girls in the Chevette if they had any money or anything. I lied about Tyra because I wanted to shift responsibility and blame away from myself."<sup>194</sup>

### c. Joe Letts's Statements

In his affidavit, Joe Letts described how Keeney, Johnson, and Thuman instigated the robbery and "started fighting and punching the girls in the car."<sup>195</sup> What Letts did not see is Tyra participating in the robbery: "At no point did I see Tyra touch the Chevette or take anything out of the car. I never saw her act aggressively toward the girls."<sup>196</sup> To the contrary, Letts remembered "seeing Tyra and Becca start walking away. Not too long after that, I heard the gun go off after hearing Kellie say 'she hit me, she hit me' and LaShawna say, 'you hit my friend!'"<sup>197</sup> Letts, who had not spoken with Tyra since the incident,<sup>198</sup> concluded his affidavit by saying, "I don't think that it's fair that Tyra's in prison. She never hung out with Kellie, Angie or LaShawna, and she was in no way involved in the shooting death of Michelle Lai."<sup>199</sup>

During his polygraph examination, Letts answered "no" to the following questions: "Did you personally see Tyra participate in the robbery of the occupants of the Chevette?"; "Did Tyra plan the robbery of the occupants of the Chevette?"; "Did you witness Tyra take a necklace or any other items from anyone in the Chevette?"; "Did Tyra leave the shooting in Aarons [sic] car?"<sup>200</sup> The examiner concluded

<sup>192</sup> Partial Transcript of Record, *supra* note 138, at 459–63, 474–75 (testimony of Amy Brogan) (identifying Thuman and Keeney as the first two people at the Chevette); *id.* at 598–601 (testimony of Danielle Jones) (identifying Thuman and Keeney as the first two people at the Chevette); *id.* at 700–01 (testimony of Holly Lai) (identifying Thuman and Johnson as the first two people at the Chevette); Offense Supp. Report of G.L. Engel, *supra* note 147, at 000131 (documenting Thuman's statement that she approached the Chevette with Johnson). *See also* Partial Offense Supp. Report, Bates No. 000142 (Sept. 22, 1994) (on file with author) (documenting Letts's statement that Keeney and Thuman committed the robbery).

<sup>193</sup> Johnson Aff., *supra* note 184, ¶ 21.

<sup>194</sup> *Id.* ¶ 21; *see also* Offense Supp. Report of T.G. Lawson, *supra* note 125, at 000112 (documenting Keeney's statement that "Kelly was doing most of the beating").

<sup>195</sup> Letts Aff., *supra* note 184, ¶¶ 17–18.

<sup>196</sup> *Id.* ¶ 19.

<sup>197</sup> *Id.* ¶ 18.

<sup>198</sup> *Id.* ¶ 22.

<sup>199</sup> *Id.* ¶ 23.

<sup>200</sup> Report from James L. Hammes, James L. Hammes Polygraph Inc., on Polygraph

that Letts’s answers to the questions were truthful.<sup>201</sup>

Letts made no statements incriminating Tyra. After making a brief oral statement denying that he put the pit bull in the Chevette and claiming that Keeney and Thuman had robbed the victims, Letts refused to answer any additional questions without a lawyer.<sup>202</sup>

#### d. Angela Thuman’s Statements

Angela Thuman declined to submit an affidavit supporting clemency for Tyra. But Thuman did agree to be polygraphed. During her examination, Thuman answered “yes” when asked whether Tyra tried to pull her away from the victims’ car during the robbery; “no” when asked whether Tyra left the scene of the shooting with Keeney, Johnson, Letts, and Moten; and “no” when asked whether Tyra was friends with Thuman, Keeney, and Johnson.<sup>203</sup> The examiner concluded that Thuman’s responses to those questions were truthful.<sup>204</sup>

In 1994, during her police interviews, Thuman allegedly made oral statements incriminating Tyra. Specifically, the police reports stated that Thuman told the police, “I don’t know who took what from the white girls,” but then stated, “I think Tyra took some jewelry. I think Tyra had a ring from the driver, but Shawna had a ring too. I know Tyra reached in the car. I don’t know if she was hitting on somebody or taking something. Everybody was just throwing blows.”<sup>205</sup>

Thuman’s statements to the police are questionable for three reasons. First, Thuman’s statement that Tyra took a ring from the driver, Holly Lai, is flatly contradicted by Lai’s testimony that nothing was taken from her.<sup>206</sup> This undermines Thuman’s accusations about Tyra, including that she saw Tyra reach into the car. Second, Thuman’s credibility is further undercut by her admission, on video, that she had smoked crack just before the incident.<sup>207</sup> Third, when she gave her videotaped statement to the police, Thuman did not allege

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Examination Report of Joseph Letts to author (Feb. 26, 2013), [https://justice4tyra.files.wordpress.com/2013/07/polygraph\\_joes.pdf](https://justice4tyra.files.wordpress.com/2013/07/polygraph_joes.pdf).

<sup>201</sup> *Id.*

<sup>202</sup> Partial Offense Supp. Report, *supra* note 192.

<sup>203</sup> Report from Frank Smith & Donald Clark, Ohio Polygraph & Assocs. and Clark-Dye & Assocs., on Polygraph Examination Report for Angela Thuman to author (Jan. 17, 2013), [https://justice4tyra.files.wordpress.com/2013/07/polygraph\\_angie.pdf](https://justice4tyra.files.wordpress.com/2013/07/polygraph_angie.pdf).

<sup>204</sup> *Id.* at 2.

<sup>205</sup> Offense Supp. Report of G.L. Engel, *supra* note 147, at 000131–32.

<sup>206</sup> Partial Transcript of Record, *supra* note 138, at 126 (testimony of Holly Lai) (describing taking off her rings and throwing them in her car seat to prevent the robbers from stealing them; the police recovered and photographed the rings where she threw them in her car).

<sup>207</sup> Videotaped Statement of Angela Thuman (Sept. 20, 1994) (on file with author).

that Tyra was involved in the crimes.<sup>208</sup>

e. Rebecca Stidham's Statements and Polygraph Results

In her affidavit, Rebecca Stidham remembered that Tyra acted as a "peace-keeper" in "tr[ying] to tell [Keeney] to stop."<sup>209</sup> Stidham also stated that she and Tyra stood "away from all the action going on in the Chevette" at the time of the robbery.<sup>210</sup> She recalled Tyra picking up something from the ground as they walked away from the robbery before the shooting, later seeing it was a necklace.<sup>211</sup> Finally, Stidham expressed sadness because she wanted to testify for Tyra at trial but Tyra's lawyers did not call her.<sup>212</sup>

During her polygraph examination, Stidham answered "yes" when asked whether Tyra told Keeney to leave the victims alone; "no" when asked if Tyra snatched a necklace from any of the victims; "yes" when asked whether Tyra called 911 to get help for the victims; and "yes" when asked if Tyra picked up a necklace from the ground.<sup>213</sup> The examiner concluded that Stidham was truthful in her responses.<sup>214</sup>

f. Aaron Moten's Statements

In his affidavit, Moten described what little he recalled of the robbery. Specifically he "remember[ed] seeing LaShawna, Angie and Kellie hit the girls in the Chevette" and "saw things being taken out of the car."<sup>215</sup> He "never saw Tyra take anything from any of the girls in the Chevette," and "never heard Tyra say anything to any of the girls in the Chevette."<sup>216</sup> Moten also stated that Tyra "did not rob any of the girls in the Chevette and did not help Keeney, Johnson and Thuman rob them."<sup>217</sup> The reason Moten could recall Tyra's lack of involvement in the crimes is because he "thought it was wrong that she got convicted and has spent so many years in prison."<sup>218</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> Aff. of Rebecca Stidham, *In re* Clemency Application of Tyra Patterson, ¶ 11 (June 22, 2013) (on file with author).

<sup>210</sup> *Id.* ¶ 10.

<sup>211</sup> *Id.* ¶ 13.

<sup>212</sup> *Id.* ¶ 18.

<sup>213</sup> Report from Robert L. Patterson, Tri-State Polygraph Assocs., on Polygraph Examination Report of Rebecca Stidham to author (Dec. 19, 2012), [https://justice4tyra.files.wordpress.com/2013/07/polygraph\\_becca.pdf](https://justice4tyra.files.wordpress.com/2013/07/polygraph_becca.pdf).

<sup>214</sup> *Id.* at 2.

<sup>215</sup> Moten Aff., *supra* note 184, ¶ 12.

<sup>216</sup> *Id.* ¶¶ 14–15.

<sup>217</sup> *Id.* ¶ 16.

<sup>218</sup> *Id.* ¶ 19.

### 5. A Muddled Picture of Innocence

I believe that Tyra Patterson did not commit aggravated murder or aggravated robbery. I am not alone in this belief. Among those who have studied Tyra’s case and believe that she is innocent is former Ohio Attorney General Jim Petro.<sup>219</sup> Although I cannot prove it, I also believe that the victims gave incriminating testimony against Tyra at trial—in contrast to their early statements to the police that barely mention her—because by the time of trial they had learned of Tyra’s confession. If they knew of Tyra’s confession, such knowledge could have tainted their recollections.

However, proving Tyra’s innocence is hard. As the discussion in the subsections above shows, there is no single piece of evidence that exonerates Tyra. Her innocence claim rests on multiple facts which must be viewed collectively in order for a picture of innocence to emerge. But each fact that supports Tyra’s innocence claim is vulnerable to attack. For instance, a skeptic could argue that Tyra called 911 to construct an alibi for herself. The skeptic could also contend that the victims’ failure to describe any actions by Tyra in their initial reports is understandable because they were in shock when they first spoke to the police. The skeptic could dismiss the recent statements of Tyra’s co-defendants and witnesses reasoning that they are simply trying to help their friend. And, of course, the skeptic could argue that the polygraphs should not be considered at all in a clemency proceeding because they would not be admissible in a court proceeding.<sup>220</sup>

There are answers—compelling ones—to each of the skeptic’s points. For example, if Tyra called 911 to develop an alibi, then it makes no sense that she mispronounced her name in an attempt to hide her identity. Additionally, the victims’ failure to attribute specific wrongdoing to Tyra when they first spoke to the police stands in stark contrast to their attribution of specific criminal acts to most of Tyra’s co-defendants. Moreover, regardless of whether one believes the co-defendants’ statements that Tyra was not friends with Keeney, Johnson, and Thuman,<sup>221</sup> and did not know Letts well,<sup>222</sup> what motive does

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<sup>219</sup> As will be discussed below, Petro has urged Governor Kasich’s office to commute Tyra’s sentence based on his belief that Tyra is innocent. Petro can be seen proclaiming his belief in Tyra’s innocence in a public service announcement about Tyra’s case that is available on the internet. *I Am Tyra Patterson*, YOUTUBE (Jan. 26, 2016), [https://www.youtube.com/watch?v=1w\\_CNoqv4IA](https://www.youtube.com/watch?v=1w_CNoqv4IA).

<sup>220</sup> See *State v. Crouse*, 528 N.E.2d 1283, 1286 (Ohio Ct. App. 1987).

<sup>221</sup> Keeney Aff., *supra* note 168, ¶ 7; Johnson Aff., *supra* note 184, ¶ 6; Letts Aff., *supra* note 184, ¶ 8 (stating that Tyra was not friends with Keeney).

<sup>222</sup> Letts Aff., *supra* note 184, ¶ 5; Patterson Aff., *supra* note 63, ¶ 32.

Keeney, who is still in prison, have to lie for Tyra?

Although there are good responses to the skeptic's arguments, focusing on these weaknesses diminishes the overall power of Tyra's innocence claim. This is the problem we faced as we filed Tyra's clemency application and began advocating for her release.

C. Deploying Tyra as "Her Own Best Advocate"<sup>223</sup>



In July 2013, we filed Tyra's clemency application with the Ohio Parole Board.<sup>224</sup> In deciding whether to grant a clemency application, the governor of Ohio ("the Governor") receives a recommendation from the Parole Board.<sup>225</sup> The Parole Board has the discretion to decide whether to hold a hearing on the clemency application. If it holds a hearing, then it must issue a report setting forth the facts adduced at the hearing and a recommendation for whether the Governor should grant or deny clemency.<sup>226</sup> If the

Board decides not to hold a hearing, then it must recommend that the Governor deny clemency.<sup>227</sup>

We included the following materials with Tyra's application and our letter explaining why the Parole Board should recommend clemency: (1) a copy of the recording of Tyra's 911 call; (2) Holly Lai's testimony that Kellie Johnson was the one who grabbed the necklace from Candace Brogan; (3) Tyra's affidavit and polygraph results; (4) the affidavits of six trial jurors who heard Tyra's 911 call for the first time when we played it for them, and who indicated that they would

<sup>223</sup> Undated photo of Tyra (on file with author).

<sup>224</sup> Tyra Patterson Clemency Application and Supporting Materials (July 2, 2013) (on file with author).

<sup>225</sup> OHIO REV. CODE ANN. § 2967.07 (West) (effective Mar. 18, 1965).

<sup>226</sup> *Clemency Procedures: Non-Death Penalty Cases*, ODRC Policy No. 105-PBD-05(VI)(G)(3) to (VI)(G)(5), OHIO DEP'T OF REHAB. & CORR. (June 17, 2015), [http://www.drc.state.oh.us/web/drc\\_policies/documents/105-PBD-05.pdf](http://www.drc.state.oh.us/web/drc_policies/documents/105-PBD-05.pdf).

Although this version of the policy was not in effect at the time of Tyra's hearing, the portions relating to the requirement of the Board to issue a report if it holds a hearing, and what happens if the Board does not hold a hearing, have not changed.

<sup>227</sup> *Id.* at (VI)(C)(8).

not have voted to convict Tyra had they heard the call at trial; (5) witness Rebecca Stidham’s affidavit and polygraph results; (6) the affidavits and polygraph results of co-defendants LaShawna Keeney, Kellie Johnson, and Joe Letts; (7) co-defendant Angela Thuman’s polygraph results; (8) witness Aaron Moten’s affidavit; (9) the affidavits and/or curriculum vitae of the four polygraph examiners who conducted polygraphs for Tyra’s clemency application; (10) the expert report of Professor Steve Drizin—a nationally and internationally recognized expert on false confessions—who opined that Tyra’s confession had the hallmarks of being coerced; (11) the expert report of Ira Mickenberg, a nationally recognized expert on ineffective assistance of trial counsel, who discussed the various ways Tyra’s lawyers failed her; and (12) the affidavit of Carl Goraleski, one of Tyra’s trial attorneys, who acknowledged that the defense was ineffective.<sup>228</sup> We were hopeful that the Board would give Tyra a hearing. We were wrong.

Four months after we filed Tyra’s petition, the Parole Board notified us that it had decided to deny Tyra a hearing.<sup>229</sup> Addressing Tyra’s innocence claim, the Board concluded that “the Judicial Branch is the appropriate forum to address and resolve[] any issues relative to the conviction.”<sup>230</sup> With no realistic hope of reopening Tyra’s case in court, and with the Parole Board’s decision not to hold a hearing on her clemency application, the prospects of getting Tyra released from prison were more remote than when we started.

A few weeks later, however, Tyra’s prospects brightened when I visited her with Professor Drizin, who had not previously met Tyra. During the visit, Drizin spent time getting to know Tyra as a person, talking with her about her past, her day-to-day life in prison, and her hopes and ambitions for the future. He saw what I had seen in Tyra during the year I had gotten to know her: a remarkable woman whom you would want to have as your neighbor and friend. Indeed, toward the end of the visit, Drizin told Tyra how impressed he was with her and said, “You’re your own best advocate,” a sentiment he continues to express.

Drizin also made a suggestion that would prove helpful: find a way to get former Ohio Attorney General Jim Petro and his wife Nancy, both Republicans, involved in Tyra’s case. Jim, who wrote *False Justice*:

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<sup>228</sup> Clemency Application, *supra* note 224. Most of these materials are available at Tyra’s website, <http://justice4tyra.com/key-materials>.

<sup>229</sup> *Minutes of the Special Meeting of the Adult Parole Authority*, OHIO ADULT PAROLE AUTHORITY (Oct. 31, 2013) (on file with author)

<sup>230</sup> *Id.*

*Eight Myths that Convict the Innocent* with Nancy,<sup>231</sup> had worked on several cases with the Ohio Innocence Project since retiring as Attorney General. In fact, as Ohio Attorney General, Jim became the first attorney general in the nation to collaborate with an innocence project to free a wrongfully convicted man.<sup>232</sup> Better yet, Drizin suggested, we should try to get both Jim and Nancy to meet Tyra, in person if possible, and he offered to reach out to them. In his email to Nancy, Drizin described Tyra as “a remarkable woman,” whom he hoped she and her husband would meet.<sup>233</sup> Drizin concluded his email describing the impact Tyra had on him: “I left the prison thinking I had to do everything in my power to help Tyra get out of prison now . . . . My first thoughts were to contact you and Jim.”<sup>234</sup> In a separate email to me, Drizin reiterated why he believed it so important for the Petros to meet Tyra: “I just think that if Nancy meets Tyra, her heart will melt. Mine did.”<sup>235</sup>

Three days later, Drizin and I spoke with Jim about Tyra’s case.<sup>236</sup> During the call, Jim indicated that he had read the materials about Tyra’s case and said that he was prepared to begin advocating for her with the Governor’s office. Jim said that while he hoped to one day meet Tyra, he and Nancy were unable to do so at that time because they spent their winters in Florida and would not be back in Ohio until spring.

Drizin’s belief that Tyra is “her own best advocate” and that it was important for people to meet her persuaded us that it was important to convince as many influential people as possible to meet with Tyra in hopes they would agree to advocate for her release. Although we had taken one of Tyra’s jurors to meet her,<sup>237</sup> we had not thought of using

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<sup>231</sup> JIM PETRO & NANCY PETRO, *FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT* (2011).

<sup>232</sup> T.C. Brown, *Jim Petro’s Crusade*, COLUMBUS MONTHLY (Oct. 2010), <http://www.columbusmonthly.com/content/stories/2010/10/jim-petro039s-crusade.html>.

<sup>233</sup> E-mail from Steven Drizin, Expert on False Confessions, to Nancy Petro, Co-Author of *FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT* (Dec. 16, 2013, 4:56 PM) (on file with author).

<sup>234</sup> *Id.*

<sup>235</sup> E-mail from Steven Drizin, Expert on False Confessions, to author (Dec. 16, 2013, 5:40 PM) (on file with author).

<sup>236</sup> E-mail from Steven Drizin, Expert on False Confessions, to Jim Petro, former Ohio Attorney Gen. (Dec. 19, 2013, 11:13 AM) (on file with author).

<sup>237</sup> Juror Nancy Day met with Tyra in early August 2013. Describing Tyra, Ms. Day said: “She is such a wonderful person and deserves her freedom and much more.” E-mail from Nancy Day, to author (Aug. 5, 2013, 7:58 AM) (on file with author).



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face-to-face meetings with Tyra to galvanize conservative Republicans who might have influence with the Governor’s office. Based on Drizin’s insight, we began developing this new strategy.

State Senator Peggy Lehner, a Republican from Montgomery County, Ohio, where Dayton is located, accepted my invitation to meet to discuss Tyra’s case.<sup>238</sup> During our meeting, I told Senator Lehner that not only did I believe Tyra was innocent and had been wrongfully convicted, but also that Tyra had a compelling story of transformation. Specifically, I mentioned that despite dropping out of school in the sixth grade, Tyra had managed to educate herself in prison, a point I hoped would resonate with Senator Lehner, who still chairs the Senate Education Committee. As I handed Senator Lehner the packet of materials that failed to persuade the Parole Board to grant a hearing in the case, I asked her to come to the prison to meet Tyra. She agreed.<sup>239</sup>

Senator Lehner met with Tyra and left the prison promising to help in any way she could, including trying to convince other legislators to meet Tyra.<sup>240</sup> Specifically, Senator Lehner offered to reach out to fellow Republican state senators Bill Beagle, whose district included the prison where Tyra is incarcerated, and Shannon Jones.<sup>241</sup> Both Senators Beagle and Jones eventually met with Tyra and agreed to help. And because of Senator Lehner’s involvement, two other Republican state senators, John Eklund and Bill Seitz, who at the time served, respectively, as the chair and vice-chair of the Senate Criminal

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When they met, Day (left) took the following picture with Tyra.



<sup>238</sup> E-mail from author, to Peggy Lehner, Ohio State Senator (June 15, 2014, 11:24 PM) (on file with author).

<sup>239</sup> *Id.*

<sup>240</sup> E-mail from Peggy Lehner, Ohio State Senator, to author (June 19, 2014, 7:11 AM) (on file with author).

<sup>241</sup> *Id.*

Justice Committee, agreed to help Tyra without meeting her.<sup>242</sup>

As part of their pledge to help Tyra, Senators Lehner and Beagle wrote a letter to Governor Kasich urging him to grant her clemency.<sup>243</sup> To humanize Tyra, they included in their letter the picture juror Nancy Day took with Tyra.<sup>244</sup> In their letter, they asked Governor Kasich to release Tyra “not only because she may be innocent but also because of the woman she has become.”<sup>245</sup> They stated that after meeting Tyra they realized that “regardless of what took place the night of the crime, Tyra does not belong in prison at this time.”<sup>246</sup> They then discussed how Tyra took advantage of “the opportunity to turn her life around” “[r]ather than being bitter about the turn her life has taken.”<sup>247</sup> They recounted how Tyra—a sixth grade dropout who was functionally illiterate when she entered prison—obtained her GED, earned her boiler engineer’s license, and completed over 200 self-improvement programs.<sup>248</sup> Clearly affected by meeting Tyra, the senators described her “as a lovely, gentle, well-educated and well-spoken woman” who “has a deep personal faith in God and tries to help others in need.”<sup>249</sup> They ended the letter by expressing their hope that the Governor would “come to see that Tyra Patterson is an extraordinary woman who deserves clemency” and “who will make [the Governor] proud should [he] decide to release her.”<sup>250</sup>

Senators Eklund and Seitz also wrote the Governor urging him to release Tyra. In their letter, they remarked that Tyra’s case “is a compelling case for clemency and an equally compelling example of rehabilitation over the twenty years she has been in prison for [crimes] that circumstances now indicate she may well have not committed.”<sup>251</sup>

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<sup>242</sup> E-mail from author, to Peggy Lehner, Ohio State Senator (June 26, 2014, 9:41 AM) (discussing Senator Seitz’s willingness to help Tyra) (on file with author); E-mail from Amanda Connell, to author (July 29, 2014, 2:05 PM) (confirming Senator Eklund’s desire to assist Tyra with her clemency campaign) (on file with author).

<sup>243</sup> Letter from Peggy Lehner & Bill Beagle, Ohio State Senators, to John R. Kasich, Ohio Governor (undated) (on file with author). Although undated, the author’s notes indicate that this letter was sent to the Governor’s Office in early September 2014.

<sup>244</sup> *Id.* at 1.

<sup>245</sup> *Id.* at 2.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Letter from Peggy Lehner & Bill Beagle, Ohio State Senators, to John R. Kasich, Ohio Governor 2 (undated) (on file with author).

<sup>250</sup> *Id.* at 3.

<sup>251</sup> Letter from John Eklund & William Seitz, Ohio State Senators, to John R. Kasich, Ohio Governor 1 (Sept. 3, 2014) (on file with author).

Acknowledging that our criminal justice system tries “to achieve justice in each case,” Senators Eklund and Seitz noted that “occasionally the system makes mistakes and convicts innocent people” and that “it would be unfair to limit clemency to people who can prove their innocence with indisputable evidence like DNA.”<sup>252</sup> The Senators then discussed the “compelling evidence” they believed indicated that Tyra “very likely did not commit the crimes” for which she was convicted: the six jurors who said the 911 call would have changed their votes had they heard it at trial; and the polygraph results for Tyra, her co-defendants, and a witness, which supported Tyra’s “claim that she did not participate in the robbery that preceded the murder, and actually tried to stop the robbery before she left the scene with her friend.”<sup>253</sup> The Senators stressed the importance of granting clemency in cases like Tyra’s, “where there is no other meaningful remedy to gain her release.”<sup>254</sup> Lastly, Senators Eklund and Seitz closed by addressing the likelihood that the Parole Board would refuse to release Tyra at her next hearing in 2018: “Based on what we know, the Parole Board looks unfavorably upon prisoners who assert their innocence.”<sup>255</sup>

In addition to the state Senators Peggy Lehner recruited, we convinced Jean Schmidt, a former Republican Congresswoman from Ohio, to meet with Tyra. Like others who have met Tyra, Schmidt was impressed with her. Indeed, Schmidt would later describe Tyra as having “one of the most beautiful spirits I have ever encountered.”<sup>256</sup> Based on her meeting with Tyra, Schmidt agreed to contact the Governor’s Office to lobby for Tyra’s release. As will be discussed *infra* in subsection F, additional influential people would eventually meet Tyra and agree to advocate for her release.

#### D. *Our Advocacy with the Prosecutor*

Although we doubted he would agree to do so, we asked Leon Daidone, the prosecutor responsible for Tyra’s case, to meet with her. He declined, claiming that if he did so he would have to meet with every prisoner who wrote him claiming he or she was innocent. Daidone also refused our invitation to meet with LaShawna Keeney and the other co-defendants so that he could assess for himself the

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 2.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Letter from Jean Schmidt, former Congresswoman, to John R. Kasich, Ohio Governor 2 (undated) [hereinafter Schmidt Letter] (on file with author). Although this letter is undated, the author scanned and emailed it to the Governor’s counsel in December 2015.

credibility of their statements that Tyra was not involved in the crimes.

Perhaps the reason Daidone refused to meet with Tyra is that he had written her off. In response to my criticism of him for not taking the time to meet with Tyra, he would later yell, “I’m not going to meet with a murderer!”<sup>257</sup> And in discussing Tyra’s case in the media, he compared her and her co-defendants to “a bunch of wolves attacking.”<sup>258</sup>

#### E. Tyra’s 2015 Clemency Hearing

The support Tyra received from current and former elected officials who met her caused the Parole Board to reverse course and grant Tyra a hearing on her clemency application. In a letter notifying us of its change, the Board wrote that it “has been made aware of additional information and interest in the application. It appears that all the interests would best be served by the Board conducting a hearing on the application[.]”<sup>259</sup> The Board scheduled the hearing for late January 2015.

However, as the hearing approached, it became clear to us that a majority of the Board continued to be hostile to Tyra’s application. For example, although Tyra had the right to testify at the hearing through video conference,<sup>260</sup> the Board refused to allow her to do so.<sup>261</sup> Additionally, while the rules required the Board to interview Tyra

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<sup>257</sup> As will be discussed below, we managed to convince the Parole Board to hold a clemency hearing for Tyra, which occurred on January 26, 2015, the date when Daidone exclaimed, “I’m not going to meet with a murderer!” In case the reader is wondering, the Parole Board does not allow transcripts to be made of its proceedings.

<sup>258</sup> Pilkington & Mathieu, *Part One, supra* note 161 (quote appears in a video embedded in the article under the heading “Montgomery County’s Story”).

<sup>259</sup> Letter from Cynthia Mausser, Chair of the Ohio Parole Bd., to author (Oct. 28, 2014) (on file with author).

<sup>260</sup> *Clemency Procedures: Non-Death Penalty Cases*, 105-PBD-05(VI)(E)(1)(a), OHIO DEP’T OF REHAB. & CORR. (effective June 6, 2014) [hereinafter 105-PBD-05(VI)(E)(1)(a) (2014)] (on file with author). The revised policy, which became effective on June 17, 2015, and has since been revised on July 11, 2016, eliminated the ability of a prisoner to participate in a clemency hearing via teleconference. See *Clemency Procedure: Non-Death Penalty Cases*, 105-PBD-05(VI)(E)(1)(a), OHIO DEP’T OF REHAB. & CORR. (July 11, 2016), <http://www.drc.ohio.gov/Portals/0/Policies/DRC%20Policies/105-PBD-05.pdf?ver=2016-09-01-142058-020>.

<sup>261</sup> E-mail from Jamie O’Toole, Parole Bd. Emp., to Angelina Jackson (Jan. 13, 2015, 10:59 AM) (on file with author) (“The Board will not receive any testimony from Ms. Patterson during the hearing.”). Video conferencing capability was not the issue. Earlier we informed O’Toole that we planned to call both Tyra and LaShawna Keeney to testify at the hearing. E-mail from Angelina Jackson, to Jamie O’Toole, Parole Bd. Emp. (Jan. 13, 2015, 9:02 AM) (on file with author). When O’Toole responded in her 10:59 AM email, she indicated that only Tyra would not be able to testify.

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before the hearing if for some reason videoconferencing was unavailable,<sup>262</sup> the Board refused to interview her.<sup>263</sup>

The hearing did not go well. In my opinion, the Board treated our witnesses, which included Senators Lehner and Jones and former Congresswoman Schmidt, dismissively. In response to testimony from one of the Senators about Tyra’s good character, one of the members asked, “Aren’t you aware that prisoners are always on their best behavior when meeting with people like you?” Additionally, when a high-ranking former correctional officer testified that he would have no problem leaving his children in Tyra’s care, a Parole Board member implied, through her questioning, that the witness had had an inappropriate relationship with Tyra.

The Board members who actively participated in the hearing made clear that they believed Tyra was guilty and that the 911 call and other evidence we submitted was worthless. With respect to the 911 call, one of the Board members indicated that she believed the call was an attempt to construct an alibi. When I tried to explain that if the call were an alibi, Tyra would have given her correct name, my argument seemed to fall on deaf ears. Finally, one Board member falsely claimed that the reason Tyra was not released in 2011 was because she had a poor conduct record, even though at the time the Board denied release in 2011 the Board indicated that Tyra had adjusted well and completed numerous relevant programs.<sup>264</sup>

The Board’s hostile tone was apparent to several of Tyra’s supporters who attended the hearing. In her email to me the day following the hearing, one supporter, an attorney, remarked:

I was personally appalled by the treatment of you and justice by not permitting a full closing [argument] or testimony by Tyra. But this kind of shocking lack of concern for justice will work for you. I know that I thought of the old south and how it must have felt to work so hard, present a powerful and compelling case and be silenced one way or another. I suspect at least one other parole board member must be outraged!<sup>265</sup>

The Board changed its tone when surviving victims Danielle Jones and Candice Brogan spoke, treating them deferentially and

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<sup>262</sup> 105-PBD-05(E)(1)(a) (2014), *supra* note 260.

<sup>263</sup> E-mail from Angelina Jackson, to Jamie O’Toole, Parole Bd. Emp. (Jan. 13, 2015, 4:10 PM) (on file with author) (documenting earlier telephone conversation between Jackson and O’Toole during which O’Toole said the Board would not interview Tyra).

<sup>264</sup> Ohio Parole Board Decision, *supra* note 29.

<sup>265</sup> E-mail from Michele Young, to author (Jan. 27, 2015, 6:02 PM) (on file with author).

respectfully. At one point during Candice's presentation, she claimed for the first time, contrary to her trial testimony, that Tyra punched her in the face and grabbed her necklace, and that therefore she knew Tyra was guilty. When Candice finished, I stood up to read from the transcript of Candice's trial testimony, where in response to the prosecutor's questions she stated that she did not see who punched her and snatched her necklace.<sup>266</sup> As I read from the transcripts, I noticed many Board members looking down and not paying attention.

Two months later we got the bad news. By an eight-to-two vote, the Parole Board recommended to Governor Kasich that he deny Tyra clemency.<sup>267</sup> Although we were not surprised, we were nonetheless disappointed by the lengths the Parole Board went to make it hard for the Governor to grant relief. For example, the Board mentioned in its report Candice's unsworn statement at the hearing that she witnessed Tyra rob and assault her, but made no mention that in so stating, Candice completely contradicted her sworn testimony at trial.<sup>268</sup>

#### F. *Post-Hearing Advocacy*

Governor Kasich, not the Parole Board, will have the final say on whether Tyra receives clemency. To that end, we have continued to arrange for influential people to meet Tyra, so that they may advocate for her release with the Governor's Office. These advocates have included numerous religious leaders who have sent letters of support on her behalf.<sup>269</sup> However, one of the most powerful people to meet Tyra was Hamilton County Prosecutor Joe Deters, considered by many to be one of the toughest prosecutors in Ohio. Meeting Tyra in person impressed Deters. In the first of two letters he wrote to Governor Kasich urging her release, Deters started by saying that in seventeen years as elected prosecutor, "I have opposed parole for thousands of prisoners serving sentences for violent crimes. Until now, I have never urged the release of a prisoner serving such a sentence."<sup>270</sup>

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<sup>266</sup> Testimony of Candice Brogan, *supra* note 147, at 519 ("Q. . . . Now, were you able to see who hit you in your eye? A. No.").

<sup>267</sup> Minutes of Special Meeting, Ohio Parole Board, March 27, 2015 (on file with author).

<sup>268</sup> *Id.* at 19.

<sup>269</sup> Letter from Pastor Ebenezer Yebuah, to John R. Kasich, Ohio Governor (Dec. 22, 2015) [hereinafter Yebuah Letter] (on file with author); Letter from Rev. Hart Edmonds, to John R. Kasich, Ohio Governor (Dec. 22, 2015) (on file with author); Letter from Rabbi Abie Ingber, to John R. Kasich, Ohio Governor (Dec. 19, 2015) [hereinafter Ingber Letter] (on file with author).

<sup>270</sup> Letter from Joseph T. Deters, Hamilton Cty. Prosecutor, to John R. Kasich, Ohio Governor (Dec. 1, 2015) (on file with author).

Acknowledging that “there are reasons to believe Tyra did not commit the offenses for which she is incarcerated,” Deters said that Tyra’s possible innocence was not the reason he supported her release.<sup>271</sup> He then described meeting Tyra and finding her to be “an intelligent, kind and thoughtful woman who will make a meaningful contribution to the community when she is released” by “work[ing] to educate children about the dangers of dropping out of school and using drugs.”<sup>272</sup> In a second letter, Deters offered to help “marshal the funding—including funds potentially available through [his] office—that would be necessary for Tyra to have a position in which she could set that example for, and deliver her message to, young people.”<sup>273</sup>

Tyra has also received significant media coverage since the hearing. Although a handful of media outlets did stories about Tyra’s most recent clemency campaign before her January 2015 hearing,<sup>274</sup> The Guardian published a three-part series online about Tyra’s case in January 2016.<sup>275</sup> And shortly after the Guardian series, Tyra’s team released a PSA campaign called “I Am Tyra Patterson,” featuring a number of celebrities, former elected officials, and two of Tyra’s jurors,<sup>276</sup> which garnered additional media coverage.<sup>277</sup> Hopefully

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Letter from Joseph T. Deters, Hamilton Cty. Prosecutor, to John R. Kasich, Ohio Governor 2 (Dec. 28, 2015) (on file with author).

<sup>274</sup> See, e.g., Diane Dimond, *Jurors Urge Another Look at Their Verdict in Tyra Patterson Case*, NOOZHAWK (Nov. 9, 2013, 5:15 PM), [http://www.noozhawk.com/article/diane\\_dimond\\_tyra\\_patterson\\_jury\\_verdict\\_20131109](http://www.noozhawk.com/article/diane_dimond_tyra_patterson_jury_verdict_20131109); Tom Beyerlein, *Convict Seeks Clemency, Says She Was Pressured into False Confession*, DAYTON DAILY NEWS (Sep. 22, 2013, 12:05 AM), <http://www.mydaytondailynews.com/news/news/crime-law/convict-seeks-clemency-says-she-was-pressured-into/nZ3B3>.

<sup>275</sup> Pilkington & Mathieu, *Part One*, *supra* note 161; Ed Pilkington & Laurence Mathieu, *The Injustice System: Part Two—This Could Have Cleared Her*, THE GUARDIAN (Jan. 15, 2016) [hereinafter Pilkington & Mathieu, *Part Two*], <http://www.theguardian.com/us-news/ng-interactive/2016/jan/15/the-injustice-system-part-two-tyra-patterson-trial-michelle-lai-dayton-ohio-us-prisons>; Ed Pilkington & Laurence Mathieu, *The Injustice System: Part Three—Time to Come Home*, THE GUARDIAN (Jan. 16, 2016), <http://www.theguardian.com/us-news/ng-interactive/2016/jan/16/the-injustice-system-part-three-tyra-patterson-michelle-lai-dayton-ohio>.

<sup>276</sup> *I Am Tyra Patterson*, *supra* note 219 (featuring actors Alfre Woodard, Colman Domingo, and Hill Harper; *Mad Men* creator Matthew Weiner; attorney/authors Michelle Alexander and Bryan Stevenson; former Ohio Attorney General Jim Petro; former United States Congresswoman Jean Schmidt; Yusef Salaam of the Central Park Five; and trial jurors Steve Guy and Sharon Wilson).

<sup>277</sup> Jamiles Lartey, *I am Tyra Patterson: Celebrities and Activists Call for Release of Ohio Woman*, THE GUARDIAN (Jan. 27, 2016, 2:34 PM), <http://www.theguardian.com/us-news/2016/jan/27/i-am-tyra-patterson-video-matthew-weiner-alfre-woodard-ohio-murder>.

additional media will follow that will help humanize Tyra.

### G. *The Waiting Game*

Through a surrogate, we have asked Governor Kasich to meet Tyra.<sup>278</sup> I do not expect him to do so and I am not even sure it was appropriate to ask, an issue I will wrestle with in Part III. But if Governor Kasich were to meet Tyra, I believe he would see in her what so many others see; I believe he would be moved to release her. However, as I write, Tyra remains in prison. Her clemency petition remains pending.

## III. INSIGHTS AND QUESTIONS

This case study offers several lessons, most notably that: (1) the dehumanization of prisoners generally makes it harder for specific prisoners with non-DNA actual innocence claims to be believed; and (2) “de-otherizing” prisoners through personal contact with power brokers is a valuable advocacy tool not only in individual cases like Tyra’s but also, potentially, in systemic criminal justice reform work. The case study also raises important questions, including whether it is appropriate for governors to meet with prisoners whose sentences they might commute—the very thing we have asked Governor Kasich to do in Tyra’s case—and then release the prisoner based in part on what they learn about the person they have met. And beyond individual cases like Tyra’s, is it possible for society as a whole to be more open to the humanity of incarcerated persons, regardless of their guilt or innocence? To these lessons and questions I now turn.

### A. *Insights*

#### 1. The dehumanization of prisoners and its impact on non-DNA actual innocence claims.

There is no question that both the Parole Board and the prosecutor disbelieve Tyra’s innocence claim. Rather than take a holistic view of the evidence that points to Tyra’s innocence, both the Parole Board and the prosecutor have instead focused on each individual component of her claim and then argued why each fails to prove her innocence. For example, referring to Tyra’s 911 call during his interview with *The Guardian*, Prosecutor Daidone dramatically proclaimed: “Oh my God, an innocent person would never call the

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<sup>278</sup> Letter from Peggy Lehner, Ohio State Senator, to John R. Kasich, Ohio Governor 2 (Dec. 13, 2015) [hereinafter Dec. 13 Lehner Letter] (on file with author).



police. I hate to burst people’s bubbles but that’s absolute nonsense.”<sup>279</sup> He then went on to discuss how Tyra lied about her name, about not being at the scene and how she found out about the incident.<sup>280</sup> One Parole Board member expressed similar concerns at Tyra’s clemency hearing. But this argument ignores why it made no sense for Tyra to give a false name if she were attempting to construct an alibi.

The prosecutor’s resistance to Tyra’s claim is also evident in how he addressed the statements from the Tyra’s co-defendants and witnesses Rebecca Stidham and Aaron Moten, dismissing their affidavits because they were “signed in 2013, nineteen (19) years after the crime” and because “[n]one were subjected to cross examination to test their veracity.”<sup>281</sup> While it is true that their statements were not subjected to cross-examination at trial, I offered the prosecutor the opportunity to meet with several of these witnesses, including Keeney, but he chose not to do so.

With respect to the polygraphs, the prosecutor predictably dismissed those as “not admissible to prove the guilt or innocence of the accused because such tests have not been recognized by the scientific community as being a reliable method of determining the veracity of the examinee.”<sup>282</sup> Interestingly, as we pointed out in response, Daidone’s “repudiation of polygraph evidence is a startling contradiction to the decades-long practice of [his] own office, which has an established history of using polygraphs to determine guilt or innocence.”<sup>283</sup> Additionally, a retired polygraph examiner who used to work for Mr. Daidone’s office disputed Daidone’s assertion that polygraphs are unreliable, explaining that “polygraphs conducted by well-trained polygraphists are very accurate and reliable in determining whether a subject is telling the truth or engaging in deception.”<sup>284</sup> In sum, if Daidone’s office considers it appropriate to consider polygraphs in evaluating the guilt or innocence of the accused, then it is disingenuous of him to dismiss such evidence in determining whether Tyra, all four of her co-defendants, and Rebecca Stidham are telling the truth when they assert that Tyra did not participate in the robbery and in fact tried to stop it.

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<sup>279</sup> Pilkington & Mathieu, *Part Two*, *supra* note 275.

<sup>280</sup> *Id.*

<sup>281</sup> Letter from Leon Daidone, Prosecutor, to John R. Kasich, Ohio Governor 2 (on file with author).

<sup>282</sup> *Id.* at 9.

<sup>283</sup> Letter from author, to Samuel H. Porter III, Assistant Chief Counsel in the Office of Governor John Kasich 3 (Aug. 18, 2014) (on file with author).

<sup>284</sup> *Id.* at Ex. 1.

The prosecutor and the Parole Board could have considered Tyra's evidence of innocence as a whole rather than parsing the evidence and then finding reasons to reject each individual piece. Only by taking a holistic view of the evidence in Tyra's case does a picture of innocence emerge.<sup>285</sup>

So why have the Parole Board and the prosecutor resisted Tyra's innocence claim? Perhaps one or more of the cognitive biases discussed in Part I—confirmation bias, selective information processing, the avoidance of cognitive dissonance, ego-centric bias, and status quo bias—combined with institutional concerns such as the pressure to uphold the finality of Tyra's conviction,<sup>286</sup> influenced the prosecutor's and Parole Board's response to Tyra's innocence claim. But I suspect something else is at play: Tyra's status as Other, a woman unworthy of the compassion and fair consideration we would want extended to the people we care about most in our lives. It is the system's dehumanization of Tyra that has proved to be our greatest challenge.

A comprehensive discussion of the social psychology of the dehumanization of others is beyond the scope of this Article. But a few salient points may help one understand the resistance to Tyra's innocence claim specifically, and hostility to prisoner innocence claims more generally. First, dehumanization is "the most important precursor to moral exclusion, the process by which stigmatized groups are placed 'outside the boundary in which moral values, rules and considerations of fairness apply.'"<sup>287</sup> People "who are morally excluded, do not count in a moral sense. Consequently, anything that is done to someone who is morally excluded is permissible, no matter

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<sup>285</sup> For a helpful discussion of the problem of considering evidence of innocence in isolation, see Stephanie Robert Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J. C.R. & C.L. 55 (2014).

<sup>286</sup> For a discussion of the priority courts place on safeguarding the finality of convictions, see Hartung, *supra* note 285; Joshua Lott, *The End of Innocence? Federal Habeas Corpus Law After In re Davis*, 27 GA. ST. U. L. REV. 443, 457 (2011); Bryan Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Convictions*, 41 HARV. C.R.-C.L. L. REV. 339, 345 (2006). See also William S. Sessions, *Finality Over Fairness: The Troy Davis Case*, ACS BLOG (Oct. 2, 2008), <http://www.acslaw.org/acsblog/node/12672> (last visited Dec. 17, 2016).

<sup>287</sup> Phillip Atiba Goff, Jennifer Eberhardt, Melissa J. Williams & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERS. SOC. PSYCHOL. 292, 293 (2008) (quoting Susan Opatow, *Moral Exclusion and Injustice: An Introduction*, 46 J. SOC. ISSUES 1 (1990)).

how heinous the action.”<sup>288</sup> Put simply, we do not treat members of dehumanized groups as we would our loved ones and friends. To us, those we dehumanize are Other.

Second, people tend to associate those they dehumanize with animals.<sup>289</sup> For example, the Nazis depicted Jews as vermin during the Holocaust;<sup>290</sup> some opponents of illegal immigration compare Latinos to insects;<sup>291</sup> and some racists equate black people to nonhuman primates.<sup>292</sup> Additionally, the media has labeled minority youth accused of violent crime as “super predators.”<sup>293</sup> Such labeling makes it easier to justify prosecuting young people of color in adult, rather than juvenile, court and sentencing them to lengthy periods of incarceration, or even death.<sup>294</sup>

Third, numerous scholars recognize that prisoners are members of a dehumanized class.<sup>295</sup> My experience representing prisoners

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<sup>288</sup> *Id.* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERS. SOC. PSYCHOL. 526, 527 (2014) [hereinafter, Goff et al., *The Essence of Innocence*] (noting research that shows that “members of dehumanized groups can receive fewer basic social considerations”) (citing Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 847–53 (2006)).

<sup>289</sup> Goff et al., *The Essence of Innocence*, *supra* note 288, at 528.

<sup>290</sup> *Id.* (citing GUSTAV JAHODA, *IMAGES OF SAVAGES: ANCIENT ROOTS OF MODERN PREJUDICE IN WESTERN CULTURE* (1999)).

<sup>291</sup> *Id.* (citing OTTO SANTA ANA, *BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY AMERICAN PUBLIC DISCOURSE* (2002)).

<sup>292</sup> *Id.* (citing TOMMY L. LOTT, *THE INVENTION OF RACE: BLACK CULTURE AND THE POLITICS OF REPRESENTATION* (1999); Robyn L. Jones, *The Black Experience Within English Semiprofessional Soccer*, 26 J. SPORT & SOC. ISSUES 47 (2002); Dora Apel, *Just Joking? Chimps, Obama and Racial Stereotype*, 8 J. OF VISUAL CULTURE 134 (2009); Wright Thompson, *When the Beautiful Game Turns Ugly*, ESPN (June 5, 2013), [http://espn.go.com/espn/feature/story/\\_/id/9338962/when-beautiful-game-turns-ugly](http://espn.go.com/espn/feature/story/_/id/9338962/when-beautiful-game-turns-ugly)).

<sup>293</sup> Jane Rutherford, *Juvenile Justice Caught Between the Exorcist and a Clockwork Orange*, 51 DEPAUL L. REV. 715, 721 (2002); Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J. CIV. RTS. & ECON. DEV. 765, 775–56 (2015) (discussing the depiction of young African American and Latino males who commit violent crimes as “super predators”); Robin Walker Sterling, *“Children Are Different”: Implicit Bias, Rehabilitation and the “New” Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1057–58 (2013) (describing how the fear of young black super predators “spread like a fever”).

<sup>294</sup> Rutherford, *supra* note 293, at 721; Southerland, *supra* note 293, at 778; Sterling, *supra* note 293, at 1058–60.

<sup>295</sup> *See, e.g.*, Deborah Ahrens, *Incarcerated Childbirth and Broader “Birth Control”: Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 49 (2015) (recognizing that “the problems of incarcerated childbirth are but a symptom of our broader dehumanization of prisoners”); Aviva Orenstein, *Once We Were Slaves, Now We Are Free: Legal, Administrative, and Social Issues Raised by Passover Celebrations in Prison*, 41 PEPP. L. REV. 61, 86 n.137 (2013) (“Another aspect of the dehumanization of prisoners stems from their

confirms this. My clients experience a range of inhumane conditions, including physical and sexual abuse by staff and other prisoners, constitutionally deficient medical care, inadequate food, frequent strip searches, and occasional exposure to extreme cold and heat in their cells. Numerous clients, including Tyra, have told me that prison degrades their human dignity.<sup>296</sup>

From my perspective, both the prosecutor and the Parole Board perceive Tyra as less than human. The prosecutor's reference to Tyra and her co-defendants "as a bunch of wolves,"<sup>297</sup> conjures the trope of young black people as predators. I am also convinced that the primary reason the prosecutor played the video of Tyra's confession at her clemency hearing was to dehumanize her. The video shows Tyra as an inarticulate nineteen-year-old with gold teeth in her mouth talking and cursing like a street kid. Other than to drive home Tyra's otherness, there was no reason for the prosecutor to play the video given that we had freely acknowledged the substance of what the video showed. Additionally, although the prosecutor claimed that he did not want to meet with Tyra because it would set a bad precedent requiring him to meet with other prisoners who claimed their innocence, perhaps the real reason for his refusal was that he had written Tyra off as someone undeserving of an opportunity to be heard.

The Parole Board never compared Tyra to an animal. But its failure to treat her fairly in accordance with its rules—specifically its refusal to allow her to testify at her clemency hearing and its decision not to interview her—suggests that the Board viewed her as a member of a marginalized group "outside the boundary in which moral values, rules and considerations of fairness apply."<sup>298</sup> Another indication of

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portrayal as whiners with trivial problems, too much free time on their hands, and easy access to courts."); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 275 n.47 (2011) (contending that "the public gaze contains no recognition of the shared humanity or the equal moral status of the people in prison" but instead systematically dehumanizes prisoners). See generally Craig Haney, *Demonizing the "Enemy": The Role of "Science" in Declaring the "War on Prisoners"*, 9 CONN. PUB. INT. L.J. 185 (2010) (arguing that society dehumanizes prisoners in order to wage war on crime); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007) (discussing inhumane conditions of incarceration as a form of dehumanization).

<sup>296</sup> Their claims of being dehumanized is consistent with the scholarly literature. See, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1173 (2015) (describing prisons as "places of intense brutality, violence, and dehumanization") (citing COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 52 (2006)).

<sup>297</sup> Pilkington & Mathieu, *Part One*, *supra* note 161.

<sup>298</sup> Opatow, *supra* note 287, at 1.

the board’s belief that Tyra was a member of an outgroup not entitled to fairness was its decision to include in its report Candice Brogan’s statement that she saw Tyra punch her and grab her necklace without also indicating that during Candice’s sworn testimony at trial she said she could not see the person who hit her and took her necklace. Candice got the benefit of the Board’s doubt; Tyra did not. Moreover, the hostile manner in which the Parole Board treated some of our witnesses, particularly those who tried to vouch for Tyra’s character, suggested incredulity that reputable people would dare speak up for a prisoner convicted of violent crimes.

However, the Parole Board and the prosecutors were not the only criminal justice system actors to dehumanize Tyra. To a certain extent Tyra’s lawyers, who decided not to put her on the stand because she “didn’t ‘talk right’ and sounded like [she] was from the streets,”<sup>299</sup> saw her as Other. They could have worked with Tyra to improve her ability to communicate effectively to the jury, but did not.<sup>300</sup> And they made no effort to challenge Tyra’s confession as false, introduce her 911 call, or give the jury a cohesive narrative of her innocence.<sup>301</sup> Would Tyra’s lawyers have made these same decisions if they were representing the white, middle class daughter of a close friend who found herself in the same situation as Tyra the night of the murder? Of course, we will never know the answer to that question. However, I suspect that Tyra’s race, class and perhaps even gender may have played a role in the ineffective assistance of counsel she received.<sup>302</sup>

Additionally, the trial judge’s sentencing of Tyra to forty-three-years-to-life, thirteen more years than she gave the shooter, was unconscionable. While it may be common practice for judges to cut criminal defendants who plead guilty a break, Tyra’s sentence raises questions of fundamental fairness. Did Tyra’s social status affect the judge’s sentencing decision? Perhaps it did.

If the Board and prosecutor view Tyra as not fully human, then perhaps that has skewed their evaluation of Tyra’s innocence claim, making them more skeptical of it than they should be. What proved

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<sup>299</sup> Patterson Aff., *supra* note 63, ¶ 98.

<sup>300</sup> *Id.*

<sup>301</sup> Mickenberg Aff., *supra* note 129, ¶¶ 9–11.

<sup>302</sup> I do not believe that Tyra’s two trial lawyers bore ill will towards her. I have met them both and believe they are well meaning, good men. One of the lawyers who tried Tyra’s case cared enough about her to submit an affidavit acknowledging that the defense’s “inability to devise a strategy to attack [Tyra’s] confession crippled the defense to Tyra’s detriment.” Aff. of Carl G. Goraleski, *In re* Clemency Application of Tyra Patterson, ¶ 13 (June 27, 2013), <https://justice4tyra.files.wordpress.com/2013/07/201307120949.pdf>.

difficult was getting the prosecutor and Parole Board to focus on the forest instead of the trees. I suspect that Tyra's status as "Other" prevented them from fairly evaluating Tyra's innocence claim.

2. The value of "de-otherizing" prisoners through face-to-face meetings with influential people.

The most compelling lesson of this case study is the power of Tyra's humanity to change hearts and minds and the importance of getting people to meet her so that they can become advocates for her cause. Every visitor I have taken to meet Tyra has encountered a woman with a beautiful soul, a person with whom they have formed an almost instant connection.<sup>303</sup> Meeting Tyra in person has allowed them to see beyond the "murderer" label that has dehumanized her for nearly twenty-two years.

Many of Tyra's visitors believe very strongly in her innocence. Maybe seeing her humanity has opened them up to the possibility that

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<sup>303</sup> See, e.g., Dec. 13 Lehner Letter, *supra* note 278, at 1 ("Each time I come away [after meeting Tyra] feeling deeply humbled by the beautiful and positive spirit of this remarkable woman."); Edmonds Letter, *supra* note 269 ("I was deeply moved by the raw honesty of Tyra's sharing [the day I met her]."); Schmidt Letter, *supra* note 256, at 1 ("[Tyra] has one of the most beautiful spirits I have ever encountered. She is a kind, loving and gentle woman."); Ingber Letter, *supra* note 269 ("I was touched and frankly moved by her sincerity, thoughtfulness and pure goodness. . . . I would be honored to introduce Tyra to my daughters in person and would trust her with the most precious lives in my family.").

Some staff and volunteers at the prison where Tyra is incarcerated have made similar comments about her character. One of them was retired lieutenant correctional officer Gilbert Scroggy. Describing Tyra, he wrote:

Ms. Patterson is one of the most remarkable individuals, let alone prisoners, I have ever met. I am confident that if released, Ms. Patterson will be a productive, contributing member of society. I also believe that if you release Ms. Patterson, she will amass a record of community achievement that will make you proud. . . . Over the course of my [twenty-five-and-one-half year] career in corrections, I've supervised thousands of prisoners, only a handful of whom I would trust with the people I care most about, my family. Ms. Patterson is one of the few I would trust. She is one of the kindest, most peaceful, and most gentle human beings I've ever met.

Letter from Gilbert Scroggy, Retired Lieutenant Corr. Officer, to John R. Kasich, Ohio Governor 1 (Dec. 7, 2015) [hereinafter Scroggy Letter] (on file with author).

Clearly Mr. Scroggy's comments about Tyra indicate that not every prison employee who has come into contact with Tyra has treated her in a dehumanizing way. During my work with Tyra, and throughout my career representing prisoners, I have encountered many prison employees that recognize my clients' humanity, though I have also met many more who do not. In my opinion, the prison system as a whole, not necessarily all of the individual staff who comprise it, is what dehumanizes the men and women I serve.

she did not commit the crimes the jury found that she did. Perhaps they are engaging in their own selective processing by starting from the premise that she could be innocent and then analyzing her evidence of innocence in that light. This could be what allows them to see in Tyra and her innocence claim what the Parole Board and prosecutor either cannot (or refuse to) see.

Maybe it is inappropriate to try to draw broader lessons from how we turned Tyra’s visitors into her advocates. Tyra is one of the most engaging people I have ever met. Many of the people who have met her agree.<sup>304</sup> Additionally, as many of her visitors have noted, Tyra is also a physically beautiful woman.<sup>305</sup> Plus, she has a credible innocence claim. Perhaps the takeaway here is a narrow one: that an especially charismatic and attractive prisoner can win over supporters through the sheer force of her personality. While I agree that there is something very special about Tyra which draws people to her, I believe that our use of Tyra’s humanity as an advocacy tool has implications beyond her case. This was driven home to me during one of the most powerful moments I experienced representing Tyra.

During the fall of 2014, I took Senators Peggy Lehner and Shannon Jones to meet Tyra. Although Senator Lehner had met Tyra previously, Senator Jones had not. Senator Jones, as expected, found Tyra impressive, so much so that she agreed to speak at Tyra’s clemency hearing a few months later. But the most compelling moment of the day happened when Tyra left the room and LaShawna Keeney came in to share what she remembered about the night she shot Michelle Lai. After Keeney told the senators that Tyra did not participate in the robbery, tried to get her and her co-defendants to stop, and then left before Keeney shot Michelle, the conversation turned to Keeney’s life story. As it turned out, Senator Jones and Keeney attended the same high school just a few years apart. Tearfully, Senator Jones asked Keeney, “How could we have attended the same good school and I’m in the legislature and you are here?” Keeney then told the sad story of her childhood, of how she suffered severe abuse, which pushed her into illegal drug use as an elementary school student. It was her eventual addiction to drugs, Keeney told Senators

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<sup>304</sup> See, e.g., Yebuah Letter, *supra* note 269 (describing that meeting Tyra “deeply affected” him); Scroggy Letter, *supra* note 303 (describing Tyra as “one of the most remarkable people, let alone prisoners, I have ever met”).

<sup>305</sup> See, e.g., Letter from Jerry Goodman, M.D. & Mrs. Goodman, to John R. Kasich, Ohio Governor (Dec. 22, 2015) (on file with author) (“Tyra’s positive spirit overwhelmed us, and touched us emotionally. Not only is Tyra a beautiful woman, she is also exceptionally articulate, caring, intelligent and sensitive.”).

Jones and Lehner, that played a significant role in her shooting Michelle Lai. As I watched Senator Jones's face, I could tell that Keeney deeply affected her. Later, Senator Lehner reported that Senator Jones cried all the way home.

Keeney's interaction with Senator Jones demonstrates, perhaps better than the myriad conversations Tyra has had with the people we have brought to visit her, the power of a person's humanity. Keeney may have entered the interview room a convicted murderer, but by the time she left, both senators also saw her as a human being. The opportunity to find common ground with people we perceive as different is what allows us to see the humanity in others. That, I believe, is the broader lesson to draw from this case study.

### B. *Questions*

Fully addressing the questions this case study raises is beyond the scope of this Article. However, I will briefly address two issues I have pondered, the first one narrow, the second broad.

#### 1. Is it Appropriate for Governors to Meet with Prisoners Whose Sentences They Might Commute?

As I mentioned earlier, we have asked Governor Kasich to meet with Tyra. I am convinced that if he does, he will see in her what those who have met her do. He will realize that releasing Tyra poses no Willie Horton risk,<sup>306</sup> and that she would be a productive, contributing member of society. I believe that if Governor Kasich sees Tyra's humanity for himself, he would be more inclined to accept her innocence claim and agree that her continued incarceration is an injustice that needs to be remedied immediately.

At least one scholar has proposed that governors considering whether to grant clemency in death penalty cases meet with the lawyers

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<sup>306</sup> Willie Horton may have single-handedly doomed Massachusetts Governor Michael Dukakis's 1988 bid to become president of the United States. In 1986, the Massachusetts Department of Corrections released Horton as part of its weekend furlough program but he did not return. Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited#.DPKH2dhYk>. Nearly a year later he raped a woman in Maryland after binding and knifing her fiancé. *Id.* George H.W. Bush's campaign devastated Governor Dukakis's campaign with an ad featuring Willie Horton. *See Willie Horton 1988 Attack Ad*, YOUTUBE (Nov. 3, 2008), <https://www.youtube.com/watch?v=Io9KMSSEZ0Y>.



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representing the condemned.<sup>307</sup> But I would go further and propose that governors contemplate personally meeting prisoners seeking pardons or commutations of their sentences. As Tyra’s case shows, she is her own best advocate. There is simply no adequate substitute for meeting her in person. One has to be in her presence to fully see and appreciate her humanity.

I concede that my proposal raises practical problems. How would a governor decide which applicants are worthy of a meeting? Where should such a meeting occur? Is there a risk that a prisoner would, as the Ohio Parole Board suggested with respect to Tyra, be on her best behavior and try to deceive the governor? Would it be fair for a governor to meet with some prisoners seeking clemency and not others? And if a governor felt obliged to meet with prisoners before granting clemency, would that not discourage governors from using their clemency powers?

I will not answer all of these questions but will address a few. First, I do not propose that governors meet with every prisoner seeking clemency. Perhaps in certain cases, based on recommendations from the governor’s pardon attorney or other staff, a meeting between a governor and a prisoner seeking mercy would be appropriate and helpful. The governor’s staff could develop a protocol for deciding when and under what circumstances to meet with prisoners seeking clemency. My point is that governors should be open to meeting with prisoners who have applied for clemency.

Second, because of the nature of clemency, it is not wrong for a governor to meet with one prisoner but not another. As Professor Stephen Garvey notes, “mercy is a gift. As such, mercy is thought to be free from the demands of equality or equal treatment.”<sup>308</sup> The *sui generis* nature of clemency does not require a governor to meet with every prisoner seeking mercy just because the governor meets with one.

Third, to the extent we would question the wisdom of a governor taking time from her busy schedule to meet with a prisoner, we would probably do so because we have internalized the dehumanization of prisoners. Indeed, many of us would not think twice of governors meeting regularly with business leaders. If so, why should governors not meet with prisoners? Do we recoil at this suggestion because we believe that a prisoner is not worthy of an audience with the state’s

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<sup>307</sup> Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. C.L. & C.R. 191, 205 (2003).

<sup>308</sup> Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1324–25 (2004).

chief executive?

Fourth, what better way for a governor to understand the impact that prison has on the lives of those behind bars than to meet occasionally with prisoners, sending an important message to the community about the humanity of the people we incarcerate. President Obama's July 2015 meeting with federal prisoners in Oklahoma, the first time a sitting president has ever held such a meeting,<sup>309</sup> was a powerful moment. Pope Francis's September 2015 visit to a Philadelphia prison, where he met with 100 prisoners and their families, was similarly moving.<sup>310</sup> If a pope and a sitting president can meet with prisoners, then so too can governors.

Perhaps a meeting between Tyra and Governor Kasich will prove unnecessary for her release. Maybe the politicians, religious leaders, and others we have taken to meet Tyra will help persuade Governor Kasich to commute her sentence to time served. Still, I would love to see the Governor meet Tyra. Not only would such a meeting profoundly affect the Governor, but it would also convey the importance of not writing off people merely because they are imprisoned.

## 2. What implications does Tyra's case study have for criminal justice system reform?

If this case study proves anything, it shows there is value in bringing elected representatives into prisons to meet with the men and women incarcerated there. Regardless of whether Governor Kasich releases Tyra, the elected officials who have met her were all profoundly affected by the experience. They each saw in Tyra a person who, despite difficult challenges, had taken advantage of every opportunity prison life offered to improve herself. They encountered a woman who was more than just a label. They met and got to know someone they could envision as their daughter, neighbor, or friend. And similarly, the two state senators who met LaShawna Keeney, especially Senator Shannon Jones, were able to see Keeney as more than the person who shot and killed Michelle Lai.

If we are to make substantial progress in seeing prisoners as the

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<sup>309</sup> Peter Baker, *Obama, in Oklahoma, Takes Reform Message to the Cell Block*, N.Y. TIMES (Jul. 16, 2015), <http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html>.

<sup>310</sup> Karen Heller, *Inside a Philadelphia Prison, the Pope Offers Inmates Hope and Redemption*, WASH. POST (Sep. 27, 2015), [https://www.washingtonpost.com/lifestyle/style/inside-the-philadelphia-prison-that-will-host-pope-francis-on-sunday/2015/09/26/25024fae-5bca-11e5-9757-e49273f05f65\\_story.html](https://www.washingtonpost.com/lifestyle/style/inside-the-philadelphia-prison-that-will-host-pope-francis-on-sunday/2015/09/26/25024fae-5bca-11e5-9757-e49273f05f65_story.html).

human beings they are, then we must create more opportunities for politicians and community members to interact in a meaningful way with prisoners. One idea is to expand the number of prisons offering TEDx talks.<sup>311</sup> These talks bring community members and prisoners together to share their stories.<sup>312</sup> Based on the success of these talks, other prison systems have begun to embrace the concept.<sup>313</sup>

I am also exploring ways to get legislative committees in Ohio to periodically hold hearings in prisons about criminal justice reform. In addition to allowing incarcerated men and women the opportunity to see legislators in action, convening committee meetings in prison would give lawmakers an opportunity to hear the concerns of prisoners and to see their humanity.

My experience bringing legislators into the prison to meet with Tyra makes me hopeful that exposing legislators to incarcerated men and women could lead to meaningful reform. Some of the politicians who have met Tyra have already begun to discuss ways to reform the Ohio Parole Board. I have no doubt that exposing them to Tyra’s humanity is one of the reasons for their interest in such reform.

#### CONCLUSION

When I began representing Tyra, I hoped to find the evidence that would prove her innocence and secure her release from prison. While I believe that Tyra is innocent, I acknowledge that I will never be able to prove so definitively. Unfortunately for Tyra, there is no conclusive evidence to exonerate her. And because clemency is a political process, I accept that we may not persuade Governor Kasich, a former presidential candidate, to release Tyra, although I remain hopeful that we will.

But regardless of whether we obtain Tyra’s freedom during Governor Kasich’s administration, my journey with Tyra these past

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<sup>311</sup> Two prisons that offer TEDx talks are the Ironwood State Prison in Blythe, California, see *TEDx Ironwood State Prison*, TED.COM (May 10, 2014), <https://www.ted.com/tedx/events/11879>; and the Marion Correctional Institution in Marion, Ohio, see Kate Torgovnick May, *TEDx in Prison: 3 Great Talks from TEDxMarionCorrectional*, TEDBLOG (Nov. 7, 2012, 11:33 AM), <http://blog.ted.com/tedx-in-prison-3-great-talks-from-tedxmarioncorrectional>.

<sup>312</sup> Michael Mechanic, *TEDx Goes to Prison*, MOTHER JONES (June 23, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/06/ironwood-state-prison-tedx-richard-branson-scott-budnick-sean-stephenson> (describing the TEDx program at Ironwood State Prison).

<sup>313</sup> See, e.g., Donald Gilliland, *SCI Pittsburgh Staff Get High-Energy Motivation via TEDx*, TRIBLIVE (June 17, 2015, 11:33 PM), <http://triblive.com/news/alleggheny/8577401-74/prison-wetzel-tedx> (describing TEDx programs in Pennsylvania prisons).

four years has taught me something very important. Though I have sought to restore Tyra's humanity by proving her innocence, the evidence of her innocence is not what makes her human. The recognition of Tyra's humanity by the dozens of people I have brought to meet her is what has unmade her status as a murderer, not the evidence of innocence we have gathered in our attempt to gain her release. Tyra draws comfort from the fact that elected officials and religious leaders she has met see her as someone's daughter and sister, not merely as Prisoner No. 37737. On this point, Tyra writes: "Thank you for believing in me and bringing others to meet me [because] it made me believe in me again. I too am somebody special and I am too God['s] child."<sup>314</sup>

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<sup>314</sup> E-mail from Tyra Patterson, to author (Mar. 4, 2016, 7:36 PM) (on file with author).

## EPILOGUE

On March 16, 2016, around 11:00 a.m., I sat in my car at the Woodland Cemetery in Dayton, Ohio. Two weeks earlier, Holly Lai's husband, Brian Holbrook, reached out to let me know that Holly wanted to meet me at Michelle Lai's grave. Brian explained that March 16th was Michelle's birthday. Brian told me to park near the cemetery's pond and that they would meet me there and then drive the short distance to Michelle's grave.

During the almost four years I had represented Tyra at that point, I wanted to meet Holly to see if she would confirm Tyra's version of events the night Michelle was killed. Tyra always told me that one day Holly would reach out and would support her release. I always nodded encouragingly as Tyra talked about Holly coming forward, hoping that day would soon come. But over time, I began to doubt that I would ever meet Holly.

My doubts grew as I waited for Brian and Holly to arrive. They were half an hour late. I was now sure they would not come. But then I saw a white van approaching. It was Brian and Holly. Tyra was right after all. I was finally going to meet Holly.

For two hours I sat in their van and talked – mostly about Michelle and how much Holly missed her. Holly told me that she suffered from mental illness as a result of Michelle's murder, and often struggled to have a good day. But Holly wanted me to know one thing: she wanted to see Tyra released, and no longer believed Tyra participated in the robbery that led to Michelle's murder. Holly told me she wanted to write a letter to Governor Kasich supporting Tyra's release, so long as her family would never know. Holly told me that her family would disown her if they ever knew that she sought Tyra's release. Holly then asked if I could find out if the governor's office could keep confidential any letter she would write. I told her I would ask and let her know, though I told her I suspected that her letter would be a public record. I hugged both Holly and Brian as I left.

Five weeks later I sat in Holly's living room, explaining to her and Brian that any letter she sent the governor would in fact be a public record. Holly told me she wanted to write the letter anyway, explaining that her relationship with her family was already beyond repair and that it was time to do what she knew was right.

Holly wrote a powerful letter that I sent to Governor Kasich's office. In the letter, Holly remembered "calling out to a biracial woman in [a] coat who was standing next to a white woman in a

robe.”<sup>315</sup> Holly wrote that she asked the biracial woman, whom Holly identified in the letter as Tyra, “to tell the people who were robbing us to stop and I remember seeing that woman saying something in the direction of LaShawna Keeney, the shooter.”<sup>316</sup>

Holly then said something in her letter that Tyra had told me, but which I had not disclosed to anyone else. Holly wrote: “After the shooting, I remember talking to a police officer at the scene when the biracial woman in the coat (Tyra) walked by. I recall telling the officer that the biracial woman in the coat was not involved in the robbery.”<sup>317</sup> Similarly, Tyra told me at our first meeting that after she called 911 she left her apartment and walked past the surviving victims talking with the police. Tyra stressed that if she participated in the robbery, the victims would have said so and the police would have arrested her on the spot. Holly’s recollection of seeing Tyra a second time that night and telling the police Tyra was not involved in the crimes corroborated Tyra’s actual innocence claim.

Holly then said something in her letter I had long suspected: that the police had tainted the victims’ recollection of events. Specifically, Holly explained that while she believed that the police “did their best to solve Michelle’s murder . . . they also told us things as trial approached that may have influenced how we remembered things. For example, before Tyra’s trial, one of the detectives told me that Tyra had confessed to grabbing a necklace from Candy [Brogan].”<sup>318</sup> Holly explained that even though she knew that it was Kellie Johnson who had robbed Candy of a necklace, “[k]nowing Tyra confessed is probably one of the reasons I said at trial that Tyra fully participated in the robberies.”<sup>319</sup>

Additionally, Holly described how she felt upon learning that Tyra had called 911 after the shooting, something she did not know at the time of Tyra’s trial: “I wish that I had known at trial that Tyra had called 911. For all of these years I believed that no one at the scene cared about us. I also wondered whether anyone heard me going door to door begging for someone to call 911. . . . After hearing Tyra’s 911 call recently, I now believe that she cared.”<sup>320</sup>

Finally, Holly described how she felt writing her letter urging

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<sup>315</sup> Letter from Holly Lai Holbrook, to John R. Kasich, Ohio Governor (Apr. 26, 2016) (on file with author).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

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Tyra's release: "I . . . realize that supporting Tyra has helped to free me from the pain I have held in all these years. Writing this letter also has helped me see that I actually have a voice that deserves to be heard."<sup>321</sup> Holly closed her letter, saying: "I hope that you will release Tyra now because the sooner you do so, the quicker I can begin to fully heal."<sup>322</sup>

As this article goes to print, Tyra is still incarcerated. Her clemency application is still pending. I do not expect Governor Kasich will ever meet Tyra. But if he does, I believe he would set her free.

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<sup>321</sup> Letter from Holly Lai Holbrook, to John R. Kasich, Ohio Governor (Apr. 26, 2016) (on file with author).

<sup>322</sup> *Id.*