

A15-1637

STATE OF MINNESOTA
IN THE SUPREME COURT

Danna Rochelle Back,

Respondent,

vs.

State of Minnesota,

Appellant.

BRIEF OF *AMICUS CURIAE*
THE CENTER ON WRONGFUL CONVICTIONS WOMEN'S PROJECT

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INTEREST OF AMICUS¹

The Women’s Project is a project of the Center on Wrongful Convictions (“CWC”) at Northwestern Pritzker School of Law’s Bluhm Legal Clinic. Dedicated to identifying and rectifying wrongful convictions, the CWC represents clients with claims of actual innocence. The CWC also researches systemic problems in the criminal justice system, advocates for legal reform, and works to raise public awareness of the prevalence, causes, and social costs of wrongful convictions.

The Women’s Project is the only innocence initiative in the country focusing solely on wrongful convictions of women. Through advocacy, research, and outreach, the Women’s Project’s mission is to represent innocent women, raise awareness of the wrongful convictions of women, and promote initiatives to reduce the frequency of the causes and consequences of those wrongful convictions.

The Women’s Project, as an innocence initiative supporting wrongfully-convicted women, disagrees with the position of the State of Minnesota that Ms. Back is ineligible for compensation under Minn. Stat. § 590.11, notwithstanding the reversal of her conviction based on this Court’s explicit finding that she committed no crime. The Women’s Project submits this brief to provide information about the unique challenges faced by wrongfully convicted women, and to emphasize that an excessively narrow interpretation of the statute—to include only cases in which the prosecutor

¹ *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

dismissed the charges, even after an outright reversal, and in which “new evidence” establishes innocence—would disproportionately preclude innocent women from receiving remuneration for time spent in prison for crimes they did not commit.

ARGUMENT

I. Wrongfully convicted women not only are punished for crimes they did not commit, but also are vilified in the court of public opinion for violating societal expectations based on their gender, and are deserving of compensation as any other innocent convicted person.

A. Society unfairly deems female suspects guilty regardless of whether they committed any unlawful acts.

Consciously or unconsciously, people tend to immediately condemn women charged with violent crimes. Historically, society has judged female offenders against the “ideal woman” standard, under which women are expected to be “docile,” “maternal,” and “obedient.” Laureen Snider, *Female Punishment: From Patriarchy to Backlash*, in *THE BLACKWELL COMPANION TO CRIMINOLOGY*, 235 (Colin Sumner ed., 2004). Women offenders are considered “doubly deviant,” having both broken the law and violated rules of womanhood. Chimène I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 *COLUM. J. GENDER & L.* 38, 39 (2002). As mentioned by one scholar, “[t]he perceived exceptionality of violence by women . . . amplifies and exacerbates the societal condemnation and demonization of violent offenders who are women.” *Id.* at 83. This is particularly true where a woman is accused of killing a loved one.

Even today, while female criminals are seen as “more needy than evil,” women accused of committing crimes are deemed to have violated gender norms and failed as a “wife/partner, mother, daughter, and employee.” Snider, *Female Punishment*, at 236. This continued view that women suspects are “guilty” of violating both the law and social norms may account for the disparity in media coverage of female crime suspects. Women accused of violent crimes are more likely than their male counterparts to (1) appear on the front page or main section of a newspaper, (2) be featured as a lead story in the publication, (3) be the subject of larger headlines, (4) receive more days of coverage, and (5) have their photographs in the media. Maria Grabe et al., *Gender in Crime News: A Case Study Test of the Chivalry Hypothesis*, 9 MASS COMM. & SOC’Y 137, 149 (2006).

Societal condemnation of female defendants, including by the media, is so pronounced that it bleeds into the courtroom. Prosecutors can and do comment on women defendants’ failure to behave according to societal expectations, rather than just focusing on the elements of the alleged crime. *See* Katherine Van Wormer, *WORKING WITH FEMALE OFFENDERS: A GENDER-SENSITIVE APPROACH* 94 (2010) (discussing how prosecutors use stereotypes of women to appeal to juries). Similarly, judges have considered women’s failures to live up to societally-imposed standards when deciding sentences. *See, e.g.*, Record of Proceedings at 1381–83, *Bunch v. State*, No. 16S00-9607-CR-00486 (Ind. Sept. 13, 1999) (trial judge accused a later-exonerated woman of getting pregnant in order to receive leniency, stating: “I

understand that you have arranged to have yourself impregnated . . . prior to the . . . trial. . . . [Y]ou thought it would work to your advantage somehow in this process. It will not. . . . You will not raise that child.”).

Women suffer tangible negative consequences from this in-court treatment. Women perceived as exhibiting gender-inappropriate behavior receive harsher sentences than women who appear more feminine in court. Joanne Belknap, *THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE* 166 (3d ed. 2007); Van Wormer, *WORKING WITH FEMALE OFFENDERS*, at 94–95. Additionally, women are more likely to be sentenced to death when portrayed as “man-hating” before or during trial. Kathryn Ann Farr, *Defeminizing and Dehumanizing Female Murderers: Depictions of Lesbians on Death Row*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN: OFFENDERS, PRISONERS, VICTIMS, AND WORKERS* 249 (Barbara Raffel Price & Natalie J. Sokoloff eds., 2d ed. 2004).

In contrast, men accused of violent crimes, particularly murder, do not face the same stigmatization as women under the same circumstances. For example, when a man commits a “crime of passion” and kills an intimate partner during a relationship dissolution, society is more likely to forgive him. Miglena Sternadori, *The Witch and the Warrior: Archetypal & framing analyses of the news coverage of two mass shootings*, 14 *FEMINIST MEDIA STUD.* 301, 304 (2014). In this situation, the blame for the partner’s death is often placed on the murdered woman. *Id.* A woman suspected of killing an intimate partner, on the other hand, is immediately condemned. *See* Marvin

D. Free & Mitch Ruesink, *WRONGFUL CONVICTIONS OF WOMEN: WHEN INNOCENCE ISN'T ENOUGH* 112-13 (2016) (discussing how a woman was convicted of capital murder against her husband, despite the acquittal of the man she had supposedly hired to do the killing, after being portrayed at trial as “an undesirable woman who was greedy and promiscuous.”) The only plausible explanation for these differences in treatment between male and female suspects is that women face added criminal penalties for exhibiting non-criminal behavior.

B. The automatic condemnation of women suspected of committing violent crimes can lead to increased risk of wrongful conviction, which should be rectifiable with the same opportunity for compensation as for any other innocent person convicted of a crime.

Advancing criminal charges against a woman while publicly condemning her demeanor or behavior risks blurring the line between lawful and unlawful behavior, raising the likelihood of wrongful conviction. Indeed, many wrongful convictions have occurred following damning statements in court about the defendants’ traits as women. For instance, in wrongfully prosecuting Nicole Harris for the murder of her child, the prosecutor stated, “[s]he doesn’t stand up for her family . . . She’s not the mother the defense wants to present to you.” Jeff Coen, *Mom Convicted of Strangling Son*, CHI. TRIB., Oct. 27, 2005, at 10 (internal quotation marks omitted). Tabitha Pollock was likewise wrongfully convicted of murdering her child—a crime her boyfriend actually committed—because she “should have known” he was a threat. *People v. Pollock*, 202 Ill. 2d 189, 216-18 (Ill. 2002). Penalizing a person for lawful

conduct in addition to unlawful action is reprehensible; twice penalizing a person who committed no unlawful action at all is even worse and warrants recompense.

Here, Back was doubly condemned. At trial, both the prosecutor and the judge criticized Back for not behaving as they expect a woman to behave. In closing arguments, the prosecutor made unfounded comments such as, “in [Back’s] mind they were fighting over her, ‘cause that was the drama that she so enjoyed.” (R. 352), “[s]he loved that drama” (R. 349), and “she enjoyed that drama.” (R. 351.) These statements could only have been intended to persuade the jury that Back, merely by being a “dramatic” woman, assumed a duty to prevent Nicholas Super from killing Daniel Holliday. The prosecutor further stated, “[s]he knew he had shot at Danny Holliday’s garage over the summer, and that it was over her and the fact that she was over there with Danny. She knew he had been in love with her.” (R. 348.) The suggestion that Back was responsible for Super’s desires, in addition to his actions, was both sexist and irrelevant. Equally irrelevant and inflammatory was the prosecutor’s note that Back was having sex with both Holliday and Super at the same time (R. 348).

The prosecutor drove home the idea that Back somehow had control over Super’s behavior by insisting that Back “made” Super take her to Holliday’s house, and “took” Super to the party where he subsequently shot Holliday because of Back. (R. 368-69.) This manner of thinking is more reminiscent of the story of the sirens in Greek mythology than it is relevant to the case at hand. *See* Keitner, 11 COLUM. J.

GENDER & L.at p. 83 (discussing the figure of the *femme fatale* as a recurring theme in art and popular culture, and its role in condemning female offenders). The jury took the bait and, without any legal justification, convicted Back of second-degree manslaughter. The condemnation of Back’s not-unlawful behavior continued during her sentencing when the judge announced, “I think this was a situation where, in truth, Ms. Back, you enjoyed and got some satisfaction out of having the young men involved here respond to you and react to you” (R. 421.)

The purpose of § 590.11 is to right wrongs suffered by those who erroneously served prison sentences for crimes they did not commit. S.F. 2480, 88th Leg., 1st Engrossment (Minn. 2014) (Letter from Kathleen Pontius, Senate Counsel, Research and Fiscal Analysis). Few have suffered such wrongs as Back, who lost not only her freedom, but her reputation and her respectability as a woman. To preclude her, and women like her, from even *applying* for compensation is to condone the sexist behavior that led to her erroneous incarceration in the first place.

II. The proposed construction of § 590.11 would unfairly exclude innocent deserving individuals, particularly women, simply because their innocence cannot be proven by new scientific evidence.

A. New scientific evidence is often not present in women’s wrongful conviction cases, but those women are no less innocent.

Requiring new scientific evidence of innocence in order to receive a *hearing* on compensation, when the plain language of the statute creates no such standard, would be arbitrary and irrational. Distinct differences exist between men and women as to

the typical causes of wrongful convictions. Andrea L. Lewis & Sara L. Sommervold, *Death, but Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 ALB. L. REV. 1035 (2015). Those differences extend to the types of evidence most readily available to prove innocence—in particular, DNA evidence, which has been central to only 3% of women’s exonerations to date. *Exoneration Detail List for Kathy Gonzalez, Paula Gray, Debra Shelden, Ada JoAnn Taylor, Cathy Woods*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx>.² In fact, the National Registry of Exonerations includes 1,614 exonerations that did not rely on any new scientific advancements. *See generally id.*

It is unreasonable to suggest that exonerees are less innocent because the proof of their innocence was not scientific. By that logic, many cases involving commonly understood causes of wrongful conviction would be excluded from consideration for compensation, such as false confessions, official misconduct, child sex abuse hysteria, perjury, and false accusations. *See, e.g., Exoneration Detail List for Cheryl Adams* (one of 183 false confession cases in which neither DNA nor forensic science was used to prove innocence); *Nissa Baillie* (one of 789 official misconduct cases in which neither DNA nor forensic science was used to prove innocence); *Violet Amirault* (one

² Because nearly half of wrongfully convicted women are convicted of crimes involving a loved one or someone in their care, DNA evidence is often out of reach because their DNA is present on and around the victim as a matter of course. *See id.*

of 42 child sex abuse hysteria cases in which neither DNA nor forensic science was used to prove innocence); *Paula Hall* (one of 877 perjury and false accusation cases in which neither DNA nor forensic science was used to prove innocence). *Id.* Requiring new scientific evidence for compensation eligibility would exclude individuals who were wrongfully convicted *despite* non-scientific evidence of innocence. The crux of the matter should be innocence—regardless of the type of evidence establishing innocence or when it was produced.

B. Innocent women already face an evidentiary disadvantage because of the typical nature of the crimes for which women are wrongfully convicted.

In more than sixty percent of women's exoneration cases, no crime took place at all. In contrast, no crime took place in less than a quarter of men's exoneration cases. *See generally*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx>. Coupled with the fact that nearly half of exonerated women were convicted of harming a loved one, it is plain that simply being a woman has a profound impact on wrongful conviction and the evidence available to prove innocence. *Id.*

Too often, when a woman is wrongfully convicted of a crime that did not occur, she is in the difficult position of trying to prove a negative. In a variety of contexts, federal and state courts have taken steps to relieve a party's inherently difficult burden of proving nonexistence. *See State v. Paige*, 256 N.W.2d 298, 304 (Minn. 1977) (discussing shifting the burden of proof to the defense to establish a

prima facie case that a gun permit existed and then shifting the burden back to the state to disprove the defense, thereby alleviating the “state’s difficulty in proving a negative”) (internal quotation marks omitted); *State v. Charlton*, 338 N.W.2d 26, 31 (Minn. 1983) (discussing the defendant’s initial burden of production of sufficient evidence of duress so as to alleviate “the state’s difficulty in proving a negative”) (internal quotation marks omitted); *Ray v. Clements*, 700 F.3d 993, 1010 (7th Cir. 2012) (discussing whether the state was unfairly burdened with proving a negative when required to show the defendant did not timely file a post-conviction petition). Even so, in the post-conviction context, a majority of wrongfully convicted women still bear the burden of proving a negative. Thus, it is imperative that courts, armed with the knowledge that women are disproportionately convicted of crimes that did not occur, carefully consider women’s claims of innocence.

Here, while it is evident that Nicholas Super committed the crime of murder, this Court found that Back’s actions did not constitute a crime. Her claim for compensation should not be dismissed without further consideration simply because her claim of innocence depends on proving a negative.

As previously noted, nearly half of wrongfully convicted women are convicted of harming or killing a loved one or child in their care. The difficulty of proving their innocence is thus further compounded by the emotional toll of losing a loved one. These women simultaneously experience extreme personal grief and the trauma of wrongful accusation.

Research establishes that the experience of being wrongfully convicted is a “sustained-catastrophe” that can permanently change lives. See Zieva Konvisser, *Psychological Consequences of Wrongful Convictions in Women and the Possibility of Positive Change*, 5 DEPAUL J. FOR SOC. JUST. 221, at 238 (2012). “Once an individual is isolated, interrogated, wrongfully convicted, imprisoned and released, his or her mental health symptoms upon reentry are like those of torture survivors – anxiety, depression, and post-traumatic stress disorder [PTSD].” *Id.* at 239. On the other hand, individuals who suddenly lose a loved one, particularly a family member or child, can experience traumatic bereavement resulting in complex physical and psychological responses. Kari Dyrgron, Dag Nordanger, & Atle Dyregren, *Predictors of Psychological Distress After Suicide, SIDS, and Accidents*, J. DEATH STUDIES 27 143, 143 (2003). These responses to grief are heightened when a woman is wrongfully convicted. Incarcerated women are highly susceptible to delayed or complicated grief while incarcerated. Holly M. Harner, Patricia M. Hentz, & Maria Carmela Evangelista, *Grief Interrupted: The Experience of Loss Among Incarcerated Women*, 21 QUAL. HEALTH RES. 4, 454 (2011).

Given the above, it is of utmost importance that the totality of the experience wrongfully convicted women endure be considered in determining eligibility for redress. Often, the events leading up to an arrest happen in quick succession; wrongfully convicted women go from having a healthy child or other loved one to being incarcerated for their loved one’s death within a matter of days. *E.g.*, *Bunch v.*

State, 964 N.E.2d 274 (Ind. Ct. App. 2012); *People v. Pollock*, 202 Ill.2d 189 (2002); *Butler v. State*, 608 So.2d 314 (Miss. 1992); *Harris v. Thompson*, 698 F.3d 609 (7th Cir. 2012). The combination of wrongful conviction and grief compounds the suffering of these innocent women and prolongs the harm caused by the State. They, like all other innocent persons sent to prison, should be eligible for compensation for these harms.

CONCLUSION

The unique evidentiary issues and circumstances that challenge so many wrongfully convicted women should not be ignored; rather, they should be considered in evaluating wrongfully convicted women's cases, such as Back's. For the reasons above, as well as those advanced by Back in her filings, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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