

The Seven (at least) Lessons of the Myon Burrell Case

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I. INTRODUCTION

For much of the world, 2020 was a troubling year, but few places saw as much uproar as Minnesota. The police killing of George Floyd set off protests in Minnesota and around the world,¹ even as a pandemic and economic downturn hit minority communities with particular force.²

But, somehow, the year ended with an event that provided hope, promise, and a path to healing. On December 15, 2020, the Minnesota Board of Pardons granted a commutation of sentence to Myon Burrell, who had been convicted of murder and attempted murder and sentenced to life in prison.³ The Burrell case, closely examined, is a Pandora's box containing many of the most pressing issues in criminal justice: racial disparities, the troubling treatment of juveniles, mandatory minimums, the power (and, too often, lack) of advocacy, the potential for conviction and sentencing review units, clemency, and the need for multiple avenues of second-look sentencing. The purpose of this essay is to briefly explore each of these in the context of this one remarkable case, and to use this example to make a

¹ Damien Cave, Livia Albeck-Ripka & Iliana Magra, *Huge Crowds Around the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES, (June 6, 2020), <https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html>.

² Heather Long, Andrew Van Dam, Alyssa Fowers & Leslie Shapiro, *The COVID-19 Recession is the Most Unequal in Modern U.S. History*, WASH. POST (Sept. 30, 2020), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality/>; Joel Neel, *Forum: Pandemic's Disproportionate Impact on Minority Communities in U.S. Cities*, NPR.ORG (Sept. 30, 2020), <https://www.npr.org/sections/health-shots/2020/09/30/917857018/forum-pandemics-disproportionate-impacts-on-minority-communities-in-u-s-cities>; William F. Marshall III, M.D., *Coronavirus Infections by Race: What's Behind the Health Disparities?*, MAYO CLINIC (Aug. 13, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/coronavirus-infection-by-race/faq-20488802>.

³ Leah Asmalash, *He Was Sentenced to Life in Prison While a Teenager. 18 Years Later, Myon Burrell Walks Free*, CNN (Dec. 18, 2020), <https://www.cnn.com/2020/12/16/us/myon-burrell-release-trnd/index.html>.

crucial point about criminal justice reform: To really make change, many fixes must be pursued at once, through a variety of methods. Just as it took many converging issues to create deep injustice in the Burrell case, there must be many converging paths to reform.

II. THE MYON BURRELL CASE

Shortly before Thanksgiving in 2002, an eleven-year-old girl named Tyesha Edwards was shot to death while doing homework in the dining room of her home at 3431 Chicago Avenue South in Minneapolis. The intended victim was Timothy Oliver, a seventeen-year-old who was standing outside in front of the house next door.⁴

Oliver named Isaiah (“Ike”) Tyson, Hans Williams, and Burrell (whom he knew as “Skits”) as those involved in the shooting, and all three were arrested and charged with the murder.⁵ Burrell was charged as an adult. Williams pled guilty to second-degree murder for the benefit of a gang, and Tyson pled guilty to second-degree murder and attempted first-degree murder for the benefit of a gang.⁶

Burrell, who denied involvement in the shooting from the time of his arrest, proceeded to trial before a jury and was convicted of first-degree murder and other charges. Oliver was the only eyewitness to testify that Burrell was the shooter.⁷ Myon Burrell was sentenced to life in prison plus 12 months on the first-degree murder for the benefit of a gang charge and a consecutive term of 186 months for the attempted murder for the benefit of a gang of Timothy Oliver.⁸

The conviction was overturned by the Minnesota Supreme Court in May of 2005 because of mistreatment of Myon Burrell during interrogation, among other issues.⁹ At re-trial, Burrell elected to forego a jury and have Hennepin County District Judge Charles A. Porter, Jr. serve as the trier of fact. In April of 2008, he was again convicted of murder in the first degree and attempted murder. He was sentenced to life in prison plus 60 months for the murder and a consecutive term of 186 months for the attempted murder

⁴ State v. Burrell, 697 N.W.2d 579, 584–80 (Minn. 2005).

⁵ *Id.* at 585.

⁶ *Id.* at 588.

⁷ *Id.* at 589.

⁸ *Id.* at 590–91.

⁹ *Id.* at 598–99.

of Timothy Oliver.¹⁰ The Minnesota Supreme Court overturned this sentence while affirming the conviction, and at his third and final sentencing Burrell received a life sentence (with parole eligibility after 30 years) plus 12 months for the murder of Tyesha Edwards and a consecutive 180-month term for the attempted murder of Timothy Oliver.¹¹

Since Burrell's 2002 arrest, underlying allegations and evidence have shifted markedly. Isaiah ("Ike") Tyson, who testified in his own plea hearing that Burrell was the shooter, testified at the second trial (and has repeated since that time) that he was, in fact, the shooter and that Burrell was not present. Timothy Oliver, who identified Myon Burrell as the shooter at the first trial, died between the first and second trials.¹² Some witnesses presented by the government at the trials later retracted their claims.

In the spring of 2020, both activists in the community (including co-author Leslie Redmond) and United States Senator Amy Klobuchar called for an investigation into the conviction and sentence of Myon Burrell.¹³ Senator Klobuchar served as the County Attorney for Hennepin County at the time of the first trial.

In response to this call, Laura Nirider, Clinical Professor of Law and Co-Director of the Center on Wrongful Convictions at the Northwestern Pritzker School of Law, and Barry Scheck, Co-Founder of the Innocence Project and Professor of Law at the Benjamin N. Cardozo School of Law at Yeshiva University, convened a panel of national legal experts. Co-author Mark Osler served as the chair of that panel.¹⁴ The 59-page Report produced by that independent panel was publicly released on December 8, 2020. It recommended that Burrell be released because "no purpose is served by Burrell's continuing incarceration, and no negative fact overwhelms the

¹⁰ Burrell v. State, 858 N.W.2d 779, 782 (Minn. 2015).

¹¹ *Id.*

¹² *Id.*

¹³ Stephen Montemayor, *Amy Klobuchar Urges Hennepin County Attorney to Investigate Myon Burrell Case*, MINNEAPOLIS STAR-TRIB. (Mar. 5, 2020), <https://www.startribune.com/amy-klobuchar-urges-hennepin-county-attorney-to-investigate-myon-burrell-case/568533312/>.

¹⁴ MARK OSLER ET AL., REPORT OF THE INDEPENDENT PANEL TO EXAMINE THE CONVICTION AND SENTENCE OF MYON BURRELL (Dec. 8, 2020), <https://news.stthomas.edu/wp-content/uploads/2020/12/2020-12-Burrell-Report-Master.pdf> [hereinafter Burrell Report].

imperative of freedom.”¹⁵ One week later, Burrell’s commutation was granted and he was released the same day.¹⁶

III. THE SEVEN LESSONS OF THE MYON BURRELL CASE

A. Race Matters

America is a nation built on the exploitation and criminalization of Black people.¹⁷ Thus every institution, policy, law, and practice must be viewed in a historical context. The American criminal justice system is no exception.¹⁸ The modern criminal justice system reveals the continuation of the criminalization of Black people. In *The Souls of Black Folk*, W.E.B. Du Bois asked, “How does it feel to be a problem?”¹⁹ This becomes the question to Myon Burrell and other Black youth who are disproportionately impacted by the juvenile justice system.²⁰

In the United States, it is impossible to talk about Myon Burrell’s case without acknowledging the critical role racial disparities play in the criminal justice system.²¹ The criminal justice system was designed in an effort to control and discipline the population.²² Ironically, this same criminal justice system was rooted in efforts to achieve rehabilitation rather than punishment.²³

¹⁵ *Id.* at 5.

¹⁶ Will Wright, *Minnesota Releases Myon Burrell, Man Given Life Sentence After a Murder*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/us/myon-burrell-released-commuted.html>.

¹⁷ JOE FEAGIN, *HOW BLACKS BUILT AMERICA: LABOR, CULTURE, FREEDOM, AND DEMOCRACY* (2015).

¹⁸ Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOCIO. REV. 151, 162 (2004).

¹⁹ W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK*, (Henry Louis Gates ed., Oxford University Press 2007) (1903).

²⁰ Artika Tyner, *The Emergence of the School-to-Prison Pipeline*, A.B.A. (Jun. 1, 2014), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/june_2014/the_emergence_of_the_school-to-prison_pipeline/ (“children of color are more likely to be referred out of the classroom and receive harsher punishment for their actions”).

²¹ Pettit, *supra* note 18, at 162.

²² Pedro Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. EDUC. REV. 189 (1995).

²³ RACHEL ELISE BARKOW, *PRISONERS OF POLITICS* 56 (2019).

The criminal justice system has been used as a vehicle to force Black people into second-class citizenship, a concept Michelle Alexander addresses in her book *The New Jim Crow*.²⁴ Until his recent release, Myon Burrell was dehumanized and his image was used as a symbol for what is wrong with the Black community by the media and prosecutors. In 2002, after the murder of Tyesha Edwards, Burrell was never viewed as a sixteen-year-old teenager or even a human being whose life mattered. Myon was limited to the labels of “criminal” and “murderer.”

Within the four corners of the Burrell case, there was a hidden but striking example of the way race matters, particularly in the way Black men are viewed. The public properly was made well aware of the tragic loss of eleven-year-old Tyesha Edwards in the shooting for which Burrell was convicted. However, the intended target of the bullet—Timothy Oliver, who had a round go through the leg of his pants—was not accorded the status of “victim” at the trial or in the public eye.²⁵ There was no allegation that Oliver was involved in doing anything other than standing there at the time of the shooting. He was reputed to have instigated the conflict merely by making faces (“mean mugged”) at people associated with Burrell.²⁶

When Oliver was shot dead in the street a year later, a story on the case focused almost exclusively on gang membership and Oliver’s relationship to the Burrell case.²⁷ The article was titled “*Bullets Find Teen Who Had Cheated Death*.”²⁸

The failure to recognize Oliver as a victim of the crime, or even as a juvenile like Edwards and Burrell, is telling. While Tyesha Edwards was viewed accurately as an “innocent” victim, Oliver was seen as a non-victim who “cheated death,” despite the fact that he was a seventeen-year-old who was shot at while talking to someone in front of a house, allegedly for making mean faces at them. Does race matter in the way this Black child was viewed?

²⁴ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

²⁵ *The Murder of 11-Year-Old Tyesha Edwards by Myon Burrell*, HENNEPIN CNTY. ATT’Y., <https://www.hennepinattorney.org/news/news/2020/February/myon-burrell-statement> (Sentencing Transcript, 2003, on file with the authors. As recently as 2020, the prosecutors in the case publicly described Oliver only as a “rival gang member”).

²⁶ *State v. Burrell*, 772 N.W.2d 459, 462 (Minn. 2009).

²⁷ David Chanan & Howie Padilla, *Bullets Find Teen Who Had Cheated Death*, MINNEAPOLIS STAR TRIB. (Jan. 29, 2004), <https://www.startribune.com/jan-29-2004-bullets-find-teen-who-had-cheated-death/196779051/>.

²⁸ *Id.*

The answer to that question is clearly laid out in 400 years of American history.

B. Juvenile Offenses Are Different

Recently, there has been serious national and local attention on the importance of criminal justice reform and the call to action to end mass incarceration. However, there is a need to focus on the juvenile justice system within that larger framework.

The juvenile justice system is intended to recognize the youthfulness and potential futures of children.²⁹ Unfortunately, this consideration was not given to Myon Burrell and is still not given to many other young Black youth. Myon's case reminds us of the purpose of the juvenile justice system and that we cannot afford to throw away our youth.

In 1899, the first juvenile court system was established in Chicago, Illinois.³⁰ The court desired to rehabilitate rather than punish juvenile offenders.³¹ Juvenile courts were based on the legal doctrine of *parens patriae*, which means "parent of the country."³² This doctrine gave the state the power to serve as guardian over juveniles.

In 1940, researcher Mary Huff Diggs surveyed juvenile courts across the country.³³ Diggs found what we now call "disproportionate minority contact."³⁴ She found that Black children were coming into contact with courts at a younger age, were less likely to have cases dismissed, and were committed to an institution, referred to an agency or individual much more

²⁹ *Youth in the Justice System: An Overview*, JUVENILE LAW CENTER, <https://jlc.org/youth-justice-system-overview>.

³⁰ Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 294 (2008).

³¹ *Id.* at 286.

³² *Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

³³ Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 401 (2017).

³⁴ Alex R. Piquero, *Disproportionate Minority Contact*, 18 FUTURE CHILD. 59, 59–79 (2008) (noting that Black youth are overrepresented at almost every stage of the juvenile justice system).

frequently than White youth were.³⁵ Historically, these disparities can be attributed to intentional and blatantly race-based policies.³⁶

Pursuant to Minnesota statutes, the juvenile justice system is “a civil proceeding designed to protect the child from the consequences of his or her own conduct, develop individual responsibility for unlawful behavior, rehabilitate him or her, and, at the same time, promote public safety.”³⁷ The juvenile court has jurisdiction over individuals under the age of 18 who engage in unlawful conduct.³⁸

The purpose of the laws relating to children alleged or adjudicated to be delinquent is to “promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior.”³⁹ Juvenile court systems should pursue this purpose by means that are “fair and just, that recognize the unique characteristics and needs of children, and that give children access to opportunities for personal and social growth.”⁴⁰

The state struggles with a disproportionate amount of youth of color involved in the juvenile justice system. In fact, Minnesota disparities are both “higher than national levels and more severe in magnitude than those of many comparable states.”⁴¹ This means that the adverse effects of having a juvenile delinquency record disproportionately impact youth of color.⁴² In Minnesota, Black youth are four times more likely to be arrested, two times more likely to be referred to adult court, and 50% less likely to be sentenced directly to probation.⁴³ Many factors contribute to overrepresentation of youth of color

³⁵ Mary Huff Diggs, *The Problems and Needs of Negro Youth as Revealed by Delinquency and Crime Statistics*, 9 J. NEGRO EDUC., 311, 313–316 (1940).

³⁶ NATIONAL RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (Richard J. Bonnie et al. eds., 2013), <https://www.nap.edu/read/14685/chapter/10>.

³⁷ MINN. STAT. § 260B.001, subd. 2 (2020).

³⁸ *Id.* (There is a difference between unlawful conduct and misbehavior. Laws such as “disturbing the peace” have made it hard to tell the difference).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ U.S. DEP’T OF JUSTICE, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL (2009), <https://www.sedgwickcounty.org/media/24941/ojdp-dmc-technical-assistance-manual-july-2009.pdf>.

in system involvement, including inequitable distribution of resources in communities, bias within policies and practices of juvenile justice agencies, and underlying social conditions of communities, especially poverty.⁴⁴

C. *The Problem of Mandatory Minimums*

Myon Burrell, a juvenile who either was not involved in the shooting of Tyesha Edwards or (at worst) was goaded into it by adults,⁴⁵ received a life sentence plus a term of years because of the operation of mandatory minimums.

First, even though no one alleges that anyone was shooting at Tyesha Edwards (Timothy Oliver was clearly the target), Burrell was convicted of first-degree murder under a theory of premeditation and transferred intent.⁴⁶ The first-degree murder statute allows for only one, mandatory, sentence: life in prison.⁴⁷

Two other mandatory sentences applied to Burrell as well: he was ultimately sentenced to 12 months concurrent to the life term on the murder charge because the crime was allegedly for the benefit of a gang, and 6 months on the attempted murder charge for the same reason.⁴⁸

A life sentence plus a term of years—even with the possibility of parole after three decades—is a remarkably harsh mandatory sentence in these circumstances, which included a sixteen-year-old defendant,⁴⁹ unstable

⁴⁴ *Id.*

⁴⁵ Burrell Report, *supra* note 14, at 14.

⁴⁶ Under Minnesota law, premeditation is transferrable; MN 609.185(a)(1) allows that first degree murder exists if the defendant “causes the death of a human being with premeditation and with intent to effect the death of the person *or another*.” [emphasis added] MINN. STAT. § 609.185(a)(1) (2020).

⁴⁷ MINN. STAT. § 609.185 (2020). Currently, a conviction for premeditated first-degree murder is life without the possibility of parole. However, at the time Burrell was sentenced, parole after 30 years was possible, and this was contemplated at his sentencing. Burrell Sentencing Transcript, May 1, 2008, p. 1812.

⁴⁸ These add-ons went through several permutations in the course of appeals in this case, and ultimately were determined by the Minnesota Supreme Court. *Burrell v. State*, 858 N.W. 2d 779, 781-782 (Minn. 2015).

⁴⁹ Because youth are especially prone to change as they mature, mandatory minimums are particularly problematic when applied to them. Suzanne S. La Pierre & James Dold, *The Evolution of Decency: Why Mandatory Minimum and Presumptive Sentencing Schemes Violate the Eighth Amendment for Child Offenders*, 27 VA. J. SOC. POL'Y & L. 165, 168-75 (2020).

testimony, and two judgments that were overturned by the state's Supreme Court. But in the end, this was a sentence required by the statute.

In short, mandatory sentences flatten narratives; the things that make a case and the people involved distinctive are lost, and everything is reduced to simply the label applied to the crime. Not all first-degree murders or the people convicted are the same, but the law demands the same sentence for all. Distinctions between different people and situations are lost, and with it goes human dignity.

One troubling aspect of mandatory minimums is that they shift discretion from judges to prosecutors—because mandatory minimum sentences are tied to the charge of conviction, it is the prosecutor's power to choose the charge that determines the sentence. Unlike judges, who rule on sentencing in a public way that is made accountable through appeals, prosecutors are largely unaccountable for charging decisions and make them in the opaque setting of their office. Professor Stuntz critiqued this with a sharply honed edge: “harsh sentencing statutes give prosecutors the ability to define their own sentencing rules.”⁵⁰

And so it was for Myon Burrell. Why was he charged with first-degree murder? Because that is what the prosecutors chose, knowing the potential sentence. He could have been charged with second-degree murder,⁵¹ under a theory of transferred intent, or of third-degree murder⁵² as reckless. There is a lazy assumption that prosecutors always bring forth the most serious charge, but that simply isn't true. In fact, in the majority of cases in the United States, a less serious charge is brought as part of a plea agreement—and the only difference is that the person in that case chooses not to exercise their constitutional right to a trial. Even within the four squares of the Burrell case, this is true: the two adults involved with the crime, the ones who would have had sway over the child, Burrell, both pled guilty to second-degree murder and avoided the mandatory sentence of life in prison.⁵³

The Burrell case brings to the surface the cruel advantage that mandatory minimums give to prosecutors: It allows them both to jack up sentences (as with Burrell) and to lower them (as with the adults involved)

⁵⁰ William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 595 (2001).

⁵¹ MINN. STAT. § 609.19 (2020).

⁵² MINN. STAT. § 609.195 (2020).

⁵³ *State v. Burrell*, 697 N.W.2d 579, 588 (Minn. 2005).

as political motivations or personal instincts—rather than justice—demand, all while under no requirement to divulge their reasons for doing so.

D. The Power of Advocacy Outside the Courtroom

The Preamble to the United States Constitution begins with “We the People of the United States...”⁵⁴ This sets the tone for the Constitution and lays the foundation for our country. Myon Burrell’s case provides a modern-day example of the true power of the People. When the justice system closed its doors to Burrell, the People opened them back up. In a conversation with co-author Leslie Redmond, Burrell states that he believes “everything that came out of the situation was because of community advocacy.”⁵⁵

Long before Burrell’s case received national news, his family fought tirelessly on his behalf. However, it was not until they gained the attention of Robin McDowell, an investigative reporter at the Associated Press, that Burrell’s case would reach a major breakthrough. On January 28, 2020, McDowell published an article provocatively titled *Amy Klobuchar Helped Jail Teen for Life, But Case Was Flawed*.⁵⁶ The following day, a community-led press conference was held at the Minneapolis Government Center.⁵⁷ Former presidents of the Minneapolis NAACP Nekima Levy Armstrong and Leslie E. Redmond were two of the many organizers that called on Senator Klobuchar and Hennepin County Attorney Mike Freeman to right their wrongs by reviewing Burrell’s case.⁵⁸ This press conference garnered local and national news but did not receive a response from Senator Klobuchar and

⁵⁴ U.S. CONST. pmb1.

⁵⁵ Myon Burrell, Personal Communication, Jan. 30, 2021.

⁵⁶ Robin McDowell, *Amy Klobuchar Helped Jail Teen for Life, but Case was Flawed*, ASSOCIATED PRESS (Jan. 28, 2020), <https://apnews.com/article/115076e2bd194cfa7560cb4642ab8038/gallery/d3783e60c23e4457b657e510358cdccf>.

⁵⁷ RAW: *Minneapolis NAACP President Responds to AP Investigation into Myon Burrell Case*, KARE 11 (Jan. 29, 2020), <https://www.kare11.com/video/news/local/raw-minneapolis-naacp-president-responds-to-ap-investigation-into-myon-burrell-case/89-51f0fbe7-ce3d-418c-94fe-07814ef1ec00>.

⁵⁸ *Id.*

pushed Attorney Freeman to double down on his conviction.⁵⁹ However, the community did not relent from its fight for Burrell's freedom.

By February 2020, media attention gained support from many Minnesotans, including Joe McLean who was the jury foreman when sixteen-year-old Myon Burrell was sentenced to life in prison.⁶⁰ McLean came forward in local and national news outlets urging Attorney Freeman to reopen the case and explaining how he regrets convicting Burrell.⁶¹ The NAACP even issued a statement on the injustice and lack of evidence in the Burrell case.⁶²

On March 1, 2020, protestors shut down Senator Klobuchar's presidential campaign rally in Minnesota.⁶³ Senator Klobuchar dropped out of the 2020 presidential race the following day.⁶⁴ Her team reached out to the then president of the Minneapolis NAACP, Leslie E. Redmond, to arrange a meeting with Burrell's family and Nekima Levy Armstrong. The meeting was the first opportunity Senator Klobuchar had to meet Burrell's family and hear from them directly. During the meeting, Armstrong urged Senator Klobuchar to release a statement pushing for an independent investigation of Burrell's case and reiterated her support for Conviction Integrity Units. On March 5, 2020, Senator Klobuchar joined the fight by releasing a statement

⁵⁹ Matt Sepic, *Freeman Says He's Still Waiting for New Evidence to Reconsider Myon Burrell Case*, MPR NEWS (Feb. 25, 2020), <https://www.mprnews.org/story/2020/02/24/freeman-says-hes-still-waiting-for-new-evidence-to-reconsider-myon-burrell-case>.

⁶⁰ *Jury Foreman Regrets Convicting Teen in Girl's 2002 Death*, CBS MINN. (Feb. 1, 2020), <https://minnesota.cbslocal.com/2020/02/01/jury-foreman-regrets-convicting-teen-in-girls-2002-death/>.

⁶¹ *Id.*

⁶² *NAACP Issues Statement on the Injustice and Lack of Evidence in the Myon Burrell Case*, NAACP (Feb. 1, 2020), <https://www.naacp.org/latest/naacp-issues-statement-injustice-lack-evidence-myon-burrell-case/>.

⁶³ Brianna Pfannenstiel, *Amy Klobuchar Cancels Rally After Black Lives Matter Protesters Seize Stage at Minnesota Event*, USA TODAY (Mar. 1, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/03/01/myon-burrell-protestors-shut-down-amy-klobuchar-event-before-super-tuesday/4926779002/>.

⁶⁴ Nick Corasaniti, *Amy Klobuchar Drops Out of Presidential Race and Endorses Biden*, N.Y. TIMES (Mar. 2, 2020), <https://www.nytimes.com/2020/03/02/us/politics/amy-klobuchar-drops-out.html>.

which included both of Armstrong's requests.⁶⁵ The National NAACP and Minneapolis NAACP both publicly applauded Senator Klobuchar's letter.⁶⁶

Once Senator Klobuchar was on board, it opened up the door for the expert legal panel, pardon hearing, and the formation of Minnesota's first Conviction Review Unit. The people pushed Senator Klobuchar, and she used her influence and power to push down the pathway toward Burrell's freedom.

Lawyers often have more power and influence than they would like to acknowledge. Charles Hamilton Houston reminded us that "a lawyer's either a social engineer or a parasite to society."⁶⁷ Thankfully, in this situation, Senator Klobuchar ultimately chose to be a social engineer. Burrell's case revealed that there is a pathway to redemption for all of us, not just those who have criminal records. It is time for prosecutors to assume their roles as "ministers of justice"⁶⁸ which requires them to seek out truth rather than convictions.

E. The Potential of Conviction & Sentencing Review Units

Emerging out of the innocence movement, the United States has seen significant growth in the development of what are variously known as "Conviction Integrity Units" or "Conviction Review Units." A recent survey of units in the United States revealed over 75 existing entities that are charged with taking a second look at troubling convictions.⁶⁹ Many new units are the products of progressive prosecutors who have been elected across the country.⁷⁰

⁶⁵ Robin McDowell & Michael Rezendes, *Klobuchar Calls for Independent Review of Black Man's Case*, ASSOCIATED PRESS (Mar. 5, 2020), <https://apnews.com/article/ca6a1a5b1770506d96e659b8a2c5050f>.

⁶⁶ NAACP Commends Senator Amy Klobuchar's Call for Independent Investigation and Review into the Case Involving Myon Burrell, NAACP (Mar. 5, 2020), <https://www.naacp.org/latest/naacp-commends-senator-amy-klobuchars-call-independent-investigation-review-case-involving-myon-burrell/>.

⁶⁷ Steven D. Jamar, *Biographical Sketches: Charles Hamilton Houston*, HOWARD U. SCH. L. (2004), <http://law.howard.edu/brownat50/BrownBios/BioCharlesHHouston.html>.

⁶⁸ MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. (A.B.A. 1983).

⁶⁹ Mark Osler & Leslie Redmond, Survey of Conviction Integrity/Review Units, (Jan. 2020) (unpublished survey) (on file with the authors).

⁷⁰ Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989, 990 (2020).

There is a broad consensus among experts about the primary causes of wrongful convictions: misconduct by police and prosecutors, ineffective defense counsel, junk science, bad identification procedures, faulty eyewitness identifications, coercive interrogations, and unreliable informants.⁷¹ Several of these factors were at play in the Burrell case. Specifically, the role of unreliable informants played a major role in the panel's analysis.⁷² The Burrell Panel was fortunate to have the involvement of many of the leaders in the innocence and wrongful conviction movement, including Innocence Project co-founder Barry Scheck and Northwestern University's Laura Nirider.⁷³

Even with all of that experience in wrongful convictions, the Burrell panel went beyond the normal charge of conviction integrity reviews and examined the integrity of the *sentence* as well.⁷⁴ Combining conviction and sentencing review proved to provide two extraordinary benefits. First, it encouraged the analytical frame of wrongful conviction review—the *integrity* of the conviction—to be applied to sentencing. Second, it ultimately opened an otherwise unavailable avenue to freedom - clemency. The first of these will be discussed here, while clemency will be addressed in the next section.

Traditionally, sentences are subjected to scrutiny in three ways. First, the sentencing scheme is sometimes re-evaluated in whole or in part, separate from a discrete case. For example, intense focus on over-sentencing of crack cases led to a reform of those laws and guidelines at the federal level and (sometimes) with a retroactive effect which led to the release of some of those over-sentenced for their crimes.⁷⁵ Second, sentences can be reviewed on direct appeal or through a habeas petition. Finally, sentences are sometimes

⁷¹ Carrie Leonetti, *The Innocence Checklist*, 58 AM. CRIM. L. REV. 97, 100–101 (2021).

⁷² Burrell Report, *supra* note 14 at 16–30.

⁷³ *Id.* at 45–48. Other experts involved included Mike Ware of Texas (who previously headed up one of the first conviction integrity units, in Dallas), David Singleton of Ohio (who serves as the Executive Director of the Ohio Justice & Policy Center), Maria Hawilo (a Distinguished Professor in Residence at Loyola Law School in Chicago), and former Ohio Attorney General James Petro. *Id.*

⁷⁴ *Id.* at 4–7.

⁷⁵ Nicholas Bogel-Burroughs, *For Inmates Released Under New Criminal Justice Reforms, 'Every Day Counts,'* N.Y. TIMES (July 21, 2019), <https://www.nytimes.com/2019/07/20/us/first-step-act-criminal-justice.html?searchResultPosition=1>.

re-considered through second-look provisions including parole, compassionate release, and clemency.

However, second-look provisions too rarely invite a hard look at the continuing integrity of a sentence in the context of a particular case. Part of the problem is that petitioners in second-look processes usually are not provided with counsel, and (being incarcerated) they don't have the ability to do much investigation or research. One exception was the Obama clemency initiative. That project focused on whether a petitioner would be subjected to the same sentence under current law, along with individualized considerations such as violence while incarcerated. In that project, pro bono counsel was obtained for many petitioners.⁷⁶ In the end, over 1700 commutations of sentence were granted as part of that initiative.⁷⁷

By merging sentence and conviction integrity, we were able to leverage the resources and techniques used for conviction review with our normal tools for sentence review. For example, the very notion of “integrity”—whether something holds up under scrutiny—is not often used in clemency work in analyzing sentences.⁷⁸ But the concept works. In the Burrell panel report, the sentence was held up against the four traditional goals of sentencing—retribution, deterrence, incapacitation, and rehabilitation—and found to lack integrity at this point in time.⁷⁹

No conviction integrity/review unit is known to now combine examination of both conviction and sentence, but there is great potential in this idea. Hopefully, conviction integrity and review units will look to this example as a means to expand both their work and true justice.

F. Clemency

Myon Burrell did not receive an exoneration or a new trial. Rather, he was released after his sentence was commuted by the Minnesota Board of

⁷⁶ *Obama Administration Clemency Initiative*, U.S. DEP'T. JUST., <https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative> (last updated Jan. 12, 2021).

⁷⁷ Gregory Korte, *Obama Grants 330 More Commutations, Bringing Total to a Record 1,715*, USA TODAY (Jan. 19, 2017), <https://www.usatoday.com/story/news/politics/2017/01/19/obama-grants-330-more-commutations-bringing-total-record-1715/96791186/>.

⁷⁸ This construct has been powerfully used in other contexts, such as the review of capital sentences. *See Furman v. Georgia*, 408 U.S. 238 (1972) (Opinions of Marshall, J. & Brennan, J.).

⁷⁹ Burrell Report, *supra* note 14 at 14–15.

Pardons,⁸⁰ which consists of the Governor, the Attorney General, and the Chief Justice of the Supreme Court.⁸¹ Clemency is a process that has frequently been in the news since President Trump closed out his presidency with controversial grants.⁸² Even with all of the attention surrounding clemency, President Biden was still left with a pile of 14,000 undecided petitions to deal with.⁸³ Within Minnesota, the Burrell case broke new ground in the use of clemency and offers a window into the opportunities and hurdles advocates see now.

Minnesota's clemency process, like those of too many other American jurisdictions (including the federal government),⁸⁴ has been unproductive and sometimes unfair.⁸⁵ The Minnesota process is unusual. Petitioners for pardon⁸⁶ or commutation⁸⁷ submit their cases to the Department of Corrections and appear personally before a Pardon Board that consists of the Governor, the Attorney General, and the Chief Justice of the Minnesota Supreme Court.⁸⁸ State law requires that the vote among the Board be unanimous.⁸⁹ The statute also creates three primary types of clemency: pardon, commutation, and "pardon extraordinary," which (somewhat

⁸⁰ Chao Xiong & Liz Sawyer, *Board of Pardons Commutes Myon Burrell's Sentence*, MINNEAPOLIS STAR TRIB.: LOCAL (Dec. 16, 2020, 4:52 AM), <https://www.startribune.com/board-of-pardons-commutes-myon-burrell-sentence-calls-for-immediate-release-from-prison/573399171/>.

⁸¹ *Id.* (the Chief Justice, Lori Gildea, was recused from this decision due to a conflict).

⁸² Rosalind S. Helderman, Josh Dawsey & Beth Reinhard, *Trump Grants Clemency to 143 People in Late-Night Pardon Blast*, WASH. POST (Jan. 20, 2021, 12:42 PM), https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/7653bd12-59a2-11eb-8bcf-3877871c819d_story.html.

⁸³ Anita Kumar, *Trump Left Behind a Clemency Mess. The Clock's Ticking for Biden to Solve It.*, POLITICO (Feb. 11, 2021, 4:30 AM), <https://www.politico.com/news/2021/02/11/biden-clemency-criminal-justice-468539>.

⁸⁴ Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465, 477–485 (2017).

⁸⁵ *Id.* 491–493.

⁸⁶ A pardon affects the underlying conviction, and usually (but not always) is granted to those who have completed their sentence.

⁸⁷ Unlike a pardon, a commutation leaves the conviction and its other effects intact but shortens the sentence.

⁸⁸ MINN. CONST., art. V, § 7.

⁸⁹ MINN. STAT. § 638.02(1) (2020).

ironically) is a pardon whose availability is restricted to those whose sentence has been completely served for at least five years, or ten years for a violent offense.⁹⁰

Over the past 30 years, clemency had atrophied in Minnesota. Typically, after 1990 only 7 to 25 pardon extraordinaries were granted per year.⁹¹ The Board granted its first commutation of sentence in 28 years (Burrell's was the second) earlier in 2020,⁹² and its first full pardon (as opposed to a pardon extraordinary) in over 35 years was granted to a woman whose initial hearing was held only minutes before Burrell's.⁹³ The reasons for this drop-off were legion: political disinterest, the requirement of unanimity, recalcitrance by the Department of Corrections, and other factors all played a role.⁹⁴

In the unusual year of 2020, this disfunction mattered more than usual. At the time of Burrell's clemency hearing on December 15, 2020, Minnesota prisons were in crisis. Despite plenty of warning that COVID-19 would hit prisons hard,⁹⁵ by the time of the hearing nearly half of Minnesota's prison population had contracted the disease and six incarcerated people had died.⁹⁶ It was an abject failure. In other states clemency was used on an

⁹⁰ MINN. STAT. § 638.02(2) (2020).

⁹¹ Andy Mannix & Briana Birschbach, *Far From Grace: How Minnesota Radically Changed the Way it Forgives Criminals*, MINNPOST: NEWS, POLITICS & POLICY (July 30, 2015), <https://www.minnpost.com/politics-policy/2015/07/far-grace-how-minnesota-radically-changed-way-it-forgives-criminals/>.

⁹² Kevin Featherly, *Woman Receives Rare Commutation of Sentence*, MINN. LAWYER (June 18, 2020), <https://minnlawyer.com/2020/06/18/woman-receives-rare-commutation-of-sentence/>.

⁹³ Charmaine Nero, *Board of Pardons Votes to Grant Minnesota's 'First and Absolute' Pardon in Over 35 Years*, KARE 11 (Jan. 26, 2021, 7:05 PM), <https://www.kare11.com/article/news/local/board-of-pardons-votes-to-grant-minnesotas-first-and-absolute-pardon-in-over-35-years/89-313922a7-7a73-425d-9f3d-3ad87840961e>.

⁹⁴ Mannix & Birschbach, *supra* note 91.

⁹⁵ Mark Osler, *We Must Thin the Prison Population Before Pandemic Hits Them*, MINNEAPOLIS STAR TRIB. (Mar. 27, 2020, 5:43 PM), <https://www.startribune.com/we-must-thin-the-prison-populations-before-pandemic-hits-them/569174562/>.

⁹⁶ Randy Furst, *Judge Rips Minnesota Corrections Department for Failing to Stem the Surge in COVID-19 Cases*, MINNEAPOLIS STAR TRIB. (Dec. 11, 2020, 8:32 PM), <https://www.startribune.com/judge-rips-minnesota-corrections-department-for-failing-to-stem-the-surge-in-covid-19-cases/573374361/>.

emergency basis to reduce prison populations,⁹⁷ but Minnesota's process was too unwieldy to handle such a task.

With Myon Burrell's case, clemency had a breakthrough in Minnesota—a high-profile, challenging case that broadcast the possibilities of this institution. The Governor and Attorney General were public in heralding the breakthrough, with Governor Tim Walz saying, "It shows what this board can do; it can bring justice and mercy."⁹⁸

And so it has. The trick now will be to leverage this breakthrough to further advance mercy and justice. Three avenues offer the possibility of lasting change. First, there seems to be a new will—evidenced by the breakthroughs in 2020—for the members of the Board itself to use the clemency power more vigorously. Second, a court challenge to the unanimity rule is now making its way through the Minnesota courts and may result in that limiting factor being struck down as unconstitutional. And finally, legislation has been advanced, with the support of the governor, that would thoroughly restructure of the clemency process.⁹⁹

Myon Burrell forged a path to freedom through clemency. Hopefully, that path will remain open for others in Minnesota. Governor Walz properly described the potential of clemency; the challenge now will be living that out.

G. *The Necessity of Multiple Second-Look Mechanisms*

⁹⁷ Kenny Lo, Betsy Pearl & Akua Amaning, *Clemency 101*, CTR. FOR AM. PROGRESS: CRIM. JUST. (May 1, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/05/01/484300/clemency-101/> (Oklahoma, for example, released 450 prisoners through clemency, Washington State released about 1100, and Kentucky released over 500 through clemency to avoid the effects of COVID-19); Christy Gutowski, *Gov. J.B. Pritzker Quietly Grants Clemency Requests to Illinois Prisoners Amid Coronavirus Pandemic, Including One Released Thursday Who Had Been Serving Life*, CHI. TRIB. (Apr. 9, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-pritzker-inmate-commutations-20200409-ql323nt4azfitagdeon5gswn2q-story.html> (other states used clemency in less publicized but still significant ways during the crisis).

⁹⁸ Xiong & Sawyer, *supra* note 80.

⁹⁹ Stephen Montemayor, *Gov. Tim Walz Weighs Changes to State Pardon System*, MINNEAPOLIS STAR TRIB. POLITICS (Mar. 31, 2020, 9:52 PM), <https://www.startribune.com/gov-tim-walz-weighs-changes-to-state-pardon-system/569270562/>.

It is the tendency of government to use the tools of oppression robustly and the tools of freedom and equity with great reluctance. In criminal law, that means mechanisms like mandatory minimums, aggressive charging, and treating kids like adults come easy, but opening avenues to mitigating harsh sentences is hard. Yet the fight is worth it. Because there are so many avenues to over-sentencing, there needs to be multiple second-look mechanisms that offer a real chance for mitigating harshness.

Consider, as an example, the changes to federal law in just the mid-1980's (which, as we will see, impacted the options available to Myon Burrell). A series of provisions, supported by a bipartisan coalition, jacked up sentences. 1984 saw Congress create a commission to draft mandatory sentencing guidelines,¹⁰⁰ bolster and extend the federal death penalty,¹⁰¹ and amend the bail laws by creating broad presumptions of detention in drug trafficking and other cases.¹⁰² In 1986, Congress passed the Anti-Drug Abuse Act (which included punitive mandatory minimums)¹⁰³ and 1987 saw the arrival of the new, and remarkably harsh, mandatory sentencing guidelines. Finally, Congress kept it up by passing *another* Anti-Drug Abuse Act, which (among other provisions) applied the mandatory minimums in drug cases to co-conspirators.¹⁰⁴

While piling all of these provisions on the backs of criminal defendants, Congress simultaneously hobbled the second-chance provisions that might mitigate all of this retributive legislation. In 1987, Congress completely eliminated parole from the federal system,¹⁰⁵ thus taking away the primary mechanism for the review and amendment of lengthy sentences. A decade later, in 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act (AEDPA).¹⁰⁶ The AEDPA codified and

¹⁰⁰ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

¹⁰¹ *Id.*

¹⁰² See Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150 (1986); *United States v. Salerno*, 481 U.S. 739 (1987) (deeming the statute constitutional—despite the plain threat to the presumption of innocence).

¹⁰³ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 (1986).

¹⁰⁴ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (1988).

¹⁰⁵ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (that legislation tied the end of parole with the forthcoming institution of mandatory guidelines on Nov. 1, 1987).

¹⁰⁶ Act of Apr. 24, 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in part at 28 U.S.C. §§ 2244–2267).

extended restrictions on habeas corpus already imposed by the judiciary.¹⁰⁷ Because of the AEDPA, federal habeas relief is available to both federal and state petitioners, and state inmates like Burrell are able to file habeas petitions rooted in the United States Constitution or federal law—for example, challenging a sentence that violates the Eighth Amendment’s ban on cruel and unusual punishment. However, the AEDPA restricts state prisoners such that they can only file a federal habeas petition if they have exhausted all remedies in the state.¹⁰⁸ Simultaneously, the AEDPA also bars habeas claims which *have* been adjudicated by the state,¹⁰⁹ with key exceptions.¹¹⁰ People held in state prisons have only one year from completion of appeals to file federal habeas¹¹¹ and late or subsequent petitions are accepted only in extraordinary circumstances.¹¹²

Myon Burrell did file unsuccessful appeals and an equally unsuccessful post-conviction petition for a new trial in state court.¹¹³ He would not have been eligible for parole consideration for another two decades. It was not until the interventions described above, which are nearly unique to this case, that a comprehensive review took place.

Certainly, each second-look mechanism has drawbacks. Clemency is subject to the political whims of the moment and is dependent on the philosophies of those in power. Allowing judges to review cases and amend sentences can be broadly productive (as it was with the federal First Step Act),¹¹⁴ but creates disparities between those judges willing to adjust

¹⁰⁷ Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 448 (2007).

¹⁰⁸ 28 U.S.C. § 2254(b)(1)(A); 28 U.S.C. § 2254(b)(1)(B) (Exceptions exist if there is no state corrective process or circumstances exist that render such process ineffective.).

¹⁰⁹ 28 U.S.C. § 2254(d).

¹¹⁰ 28 U.S.C. § 2254(d)(1) (Those exceptions are cases where the state court has issued a decision that is “contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States”, 28 U.S.C. § 2254(d)(1), or was based on “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2).)

¹¹¹ 28 U.S.C. § 2244(d).

¹¹² See 28 U.S.C. § 2244(b); 28 U.S.C. § 2244(d)(1)(C); 28 U.S.C. § 2244(d)(1)(D).

¹¹³ *Burrell v. State*, 858 N.W.2d 779 (Minn. 2015).

¹¹⁴ *The First Step Act of 2018: One Year of Implementation*, U.S. SENT’G. COMM’N. (Aug. 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

sentences and those who refuse. Parole is sadly opaque and suffers from both political sway and uneven application.

In other words, each of the second-look mechanisms creates a gap. That means that to allow worthwhile cases to receive second-look reviews, we need multiple and overlapping processes. That, after all, would be nothing more than what legislatures have done to create over-sentencing in the first place: enable overlapping processes that move towards a common goal. If we are to have several in the service of retribution, we will need several in the service of justice and mercy as well.

IV. CONCLUSION

Rev. Dr. Martin Luther King Jr. reminded us that “the arc of the moral universe is long, but it bends toward justice.”¹¹⁵ That arc, however, must be co-created by those of us who care about justice. Myon Burrell’s case reveals the critical role lawyers, politicians, and community activists play in ensuring justice is truly served and accessible to all. Our legal system is not blind and has negatively impacted Black and Brown communities.

The death of George Floyd in 2020 inspired a broad and worthy discussion of race, justice, and the relationship between the state and the people. Sadly, that focus faded within a few months among White Americans.¹¹⁶ We drop the subject at our own peril; the toxic swamp of injustice will result in more tragedy unless drained. The carceral state and its disparate impact on Black Americans built up through intentional actions over decades. The dismantling of that structure will take even more sustained focus over time. The Myon Burrell case shows us some of the outlines of that project, and what needs to be done has become increasingly clear. The key question remains: Are we a nation of sufficient humility to truly pursue justice and mercy?

¹¹⁵ This famous truism was used by King in an address at the National Cathedral on March 31, 1968. SMITHSONIAN INSTITUTION, “Martin Luther King, Jr.” Some argue that it represents a spiritual value more than a political one. Matt Lewis, *Obama Loves Martin Luther King’s Great Quote—But He Uses it Incorrectly*, DAILY BEAST, (Apr. 11, 2017), <https://www.thedailybeast.com/obama-loves-martin-luther-kings-great-quote-but-he-uses-it-incorrectly>

¹¹⁶ Michael Tesler, *Support for Black Lives Matter Surged During Protests, but is Waning Among White Americans*, FIVETHIRTYEIGHT, (Aug. 19, 2020), <https://fivethirtyeight.com/features/support-for-black-lives-matter-surged-during-protests-but-is-waning-among-white-americans/>.