the Group also expressed concern that compared with European countries, very little happens to prosecutors in the United States for knowingly allowing a wrongful conviction to occur.

Some participants noted that the United States lacks working quality assurance systems when it comes to lawyers, both defense and prosecution. EWG discussions highlighted that the system should not just rely on court determinations of misconduct or ineffective assistance. Some participants found it important that the U.S. build up its quality assurance systems and increased oversight for lawyers. It was mentioned that bar associations, like the American Bar Association (ABA), should take more of a leadership role in policing lawyers.

It was also expressed by participants that sanctions against officials and attorneys could create a lack of participation from these individuals to uncover wrongful convictions because of concerns about sanctions and public censures. Other participants felt that courts and prosecutors *are* taking this very seriously, and there is already enough public pressure so that offices do not want to be perceived as committing this kind of misconduct. This alone is enough to prevent officials from allowing wrongful convictions. Participants with these views felt that there were more important things to focus on in the area of wrongful convictions than the policing of lawyers and public officials.

Another point of discussions concerning prosecutors and international practices concerned the case study of Denmark. Participants were interested in its system where the prosecutors conduct the trial, but the trial is not a game where the end result is that the better player wins. There was interest in creating a legal culture which supports trials where the end game is the truth. Some participants found that this is an area where the U.S. could learn from other cultures because the U.S. culture is based firmly in the adversarial system. The EWG found that the whole attitude of win and lose should be considered when looking at research and alternative models.

Quality Assurance

Participants discussed quality assurance in the UK, specifically, that all the main elements — police, prosecution, and prison service — are subject to independent inspections.[113] Inspectors look both at performance of the individual and at cross-cutting teamwork. Parts of the U.S. system, e.g., prisons, could serve as a model. Prisons inspectors look at how good a job prisons are doing, and evaluate the end-to-end process.

Participants acknowledged that in talking about accreditation and quality assurance, they might mean different things. Participants suggested that while everything may look fine in an accreditation, one must consider the composition of an oversight council. If it is only comprised of police officers and prosecutors this is problematic; there has to be balance on the council. For example, one participant mentioned that the U.K.'s CCRC was established as a form of quality control; however there was a lot of disagreement about whether the CCRC could maintain this quality control because of its composition.

[113] See http://www.cps.gov.uk/publications/docs/cjs_inspection_reform.pdf. For more information on police independent inspections, see http://www.ipcc.gov.uk/en/Pages/default.aspx, and for prison inspections, see http://www.justice.gov.uk/inspectorates/hmi-prisons/.

Participants also discussed the case study of New Zealand with regards to concern about the quality of criminal defense lawyers. New Zealand is currently instituting a new quality assurance framework where in order to provide legal aid services to indigent defendants, attorneys have to be accredited through a process.[114] Accreditation is for a fixed period, and attorneys need to apply for re-approval once their period of approval expires. If the attorney does not meet the accreditation standards, then the attorney will be removed as a provider of legal aid services and cannot work on legal aid cases.[115] New Zealand decided to institute an accreditation process for legal aid attorneys after experiencing several issues with attorneys, including not showing up prepared to defend their indigent clients.[116] The EWG suggested a model like this may free up funds to allow the state to hire better qualified defense attorneys to represent indigent defendants that may be more at risk for wrongful convictions because of a lack of appropriate legal counsel.

Participants discussed that some defense attorneys lack quality. Discussants mentioned that there are programs aiming at resolving these problems such as state progressive programs where the state will pay the tuition for law school in return for a few years of legal aid. However, even in this area the resources are limited. Participants found that programs like this were important to get more defense attorneys in the field and that resources should be improved in this area.

Participants also raised ineffective assistance of counsel in the sentencing stage. The EWG briefly discussed issues in Texas in the sentencing stage. The system channels juries into the death sentence through questions they must answer. There used to be two questions, but this was ruled unconstitutional. Now there are three questions: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[117] Many participants said that the legislature has to address the jury information problem. They found that it may be useful to look to other countries and their use of juries and jury instructions to determine new methods.

U.S. participants were curious about whether there was a better balance in other parts of the world regarding the resources available to the prosecution and defense. International respondents stated that in terms of adversarial and inquisitorial systems, within each system many countries have variations. It was acknowledged that research should study the benefits and weaknesses of each model, which would allow the U.S. to think about selectively borrowing some ideas and bringing them into the U.S. system.

It was also discussed that progress is being made. U.S. defense lawyers are tracking the mitigation issues. Death cases are being addressed. However, one issue that is still a problem is death penalty cases. Many attorneys representing death penalty clients do not have the file from

[114] "Legal Aid Lawyers May Face Competency Tests," *The National Business Review*, February 11, 2010, http://www.nbr.co.nz/article/legal-aid-lawyers-may-face-competency-tests-118399.
[115] *ibid.*
[116] *ibid.*
[117] Tex. Cr. Code. § 37.0711.3(b).

the trial and get involved in the case at the end, rather than in the beginning stages of the initial trial.

Transparency

Participants highlighted that ineffective assistance of counsel is a downstream problem in the system because if police and prosecutors conduct reviews of the case properly, the person would not have needed counsel later. Experts highlighted the case of Anthony Porter as an example of this scenario. Anthony Porter was convicted of two murders in Illinois and sentenced to death. In 1988, just 50 hours before his scheduled execution, he received a reprieve from the Illinois Supreme Court. However, his reprieve was not granted because the Court feared Porter might be innocent, but because the Court was concerned that Porter could not comprehend what was about to happen and why (he had tested extremely low on an IQ test). Porter had been convicted in the wake of poor representation, an insufficient investigation by the police department, and a complete lack of physical evidence connecting him with the murders. Over ten years later, a witness in the Porter case admitted that he committed the murder to students from Northwestern University who were investigating the case. Porter was released from prison on bond and the murder charges against him were dropped.[118]

Experts also highlighted the case of Alejandro Dominguez that portrays the issue with eyewitness identification and forensics. In 1990, Alejandro Dominguez was convicted of raping a woman in Illinois when he was 16 years old. Dominguez was tried as an adult in a bench trial. The only evidence "linking" Dominguez to the crime was an uncertain identification by the victim and forensic evidence that did not exclude him as a match. Six years after his release in 1994, INS threatened to deport Dominguez for failing to register as a sex offender. Dominguez sought DNA testing of the semen recovered from the victim, and in 2002 DNA testing proved that Dominguez was innocent. Dominguez was officially exonerated that same year.

The EWG stated that no matter what reforms governments institute for eyewitness identification, they will still have a high error rate. Participants suggested instituting policies like those in the Netherlands, where you cannot use eyewitness evidence unless it is corroborated. In the Netherlands, the Dutch rules of evidence also require that any weak aspects of a case, like uncorroborated testimony, be fully tested against other possible versions. There must always be corroborating evidence; however, it is still possible to convict on two independent corroborating pieces of false evidence and the procedure is not completely free from confirmation bias.[119]

Participants also found it important that governments institute open-file policies. Participants stated that there were a lot of good examples of this in the U.S. and overseas. The EWG found that it does not seem to matter whether evidence is Brady or not, it should all be turned over to the defense. The Group suggested that researchers could be very powerful in recommending reforms in these areas.

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[118] See http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilPorterSummary.html.

[119] Brants, Chrisje, "The Vulnerability of Dutch Criminal Procedure," *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, ed. Ronald C. Huff and Martin Killias (2008): 173.

Participants discussed concern over restrictions on public records requests, especially during the appellate process. The EWG discussed that a problem associated with the public records requests is that if the attorney needs the public records to make the case at the appellate level, he/she cannot get them until after the appellate level is over. Participants suggested that the U.S. should look to models with more transparent record keeping, especially during the trial process.

One participant raised issues that have evolved with the U.K. Freedom of Information Act. The Freedom of Information Act 2000 creates a general right of access to information held by public authorities in the U.K. The Act provides for 24 exemptions from disclosure, including both absolute and qualified exemptions. For qualified exemptions, the public official must decide whether the public interest in disclosure outweighs the public interest in invoking the exemption.[120] Participants raised the concern that while it seemingly allows one to access information, there is a clause which allows authorities to withhold sensitive information. This is often subjective, so attorneys cannot access the records when necessary. It is important to consider these types of clauses when looking at public records requests.

Participants also mentioned the benefits of exploring the inquisitorial system and that NIJ could at least reduce to empirical questions the claimed detriments of those practices. The EWG found that there are many objections to inquisitorial processes that are not empirically supported. There may be justifiable workarounds to these detriments. Participants mentioned that the double blind is an example of an area where there are justifiable workarounds to the detriments. Participants stated that if we are not using inquisitorial models in parts of our justice system that we should have empirical evidence to base the choice not to use inquisitorial practices.

U.S. participants discussed the critical need for checks and balances, regardless of the type of criminal system. Participants asked the following questions with regards to these checks and balances: (1) What are the rules for getting post-conviction relief under the different systems?; and (2) What impediments are there for getting review?

Evidence

Participants discussed other countries where certain evidence must be corroborated. For example in Scotland, you cannot have a confession stand alone as evidence, it must be corroborated.[121] The EWG found that one area of useful research would be to look at how often individuals are convicted on eyewitness evidence or what percentage of the case is made up by an eyewitness identification.

Participants also raised the point that even if an eyewitness identification or confession is "improved" or corroborated by another piece of evidence, that corroborating evidence may also be unreliable. For example, the investigators may have five pieces of evidence which corroborate each other, but all are unreliable.

[120] For more information about the UK's Freedom of Information Act, see http://www.legislation.gov.uk/ukpga/2000/36/contents.
[121] Per Lord Justice-Clerk Thomson, *Sinclair v. Clark*, 1962 J.C. 57 at 62.

Participants discussed that the U.S. is not necessarily safer than other countries, yet its criminal justice system touches exponentially more people and acts than other countries. The Group wondered what the U.S. could learn from other countries about their approaches to criminality which could enable the U.S. to maintain public safety yet minimize wrongful convictions. The EWG found that investment should focus on quality rather than quantity.

Death Penalty

Participants discussed the effects of the death penalty on wrongful convictions. Participants raised issues regarding capital punishment in Illinois. In 2000, 13 people were released from death row, out of a total of 289 people on death row, an error rate of 4.4%.[122] Illinois' governor at the time, George H. Ryan, then declared a moratorium on executions, and the legislature set up a capital punishment litigation trust fund that provides money for defense.[123] That fund has since expended $70 million on 20 death sentences.[124] Participants expressed that this is a lot of money that could be spent in other areas, such as DNA testing. Participants claimed that while the error rate improved and mitigation at trial improved, there are still issues that cannot be controlled. One of these issues is that the system cannot control the disparity in death sentencing from judges and juries. The EWG expressed concern over the issue of proportionality with death sentencing. Some participants expressed that the only remedy is to abolish the death penalty. Other participants suggested that the U.S. could look to countries without the death penalty to explore the differences.

Racial Issues

The EWG discussed the difficulties with race because of the disproportionality of minorities moving through the justice system. Race is an issue in wrongful convictions because of these statistics; minorities may be more impacted by wrongful convictions, but the figures are not clear. Participants wondered if there was something the U.S. could learn from other countries' procedures to minimize the impact of racism on decisions.

Participants also discussed this issue as an inherent underlying issue in the U.S. justice system. The potential for racial biases begins in each stage of the criminal justice process, including: arrest, access to counsel, higher proportion of indigent suspects, arbitrary sentences, and other biases in the system. These inherent biases, whether intentional or not, throughout the criminal justice system result in a greater proportion of incarcerated minorities.

Research Ideas

The Group expressed that the rate of wrongful convictions must be publicized. The EWG discussed fundamental questions for the research community. They discussed the following questions in terms of exploring further research on wrongful convictions.

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[122] Warden, Rob, "Illinois Death Penalty Reform: How it Happened, What it Promises. Northwestern University School of Law," *The Journal of Criminal Law & Criminology* 95 (2), http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/deathPenaltyReform.pdf.
[123] *ibid.*
[124] *ibid.*

1. **Rate and Proportion of Wrongful Convictions.** What is the rate of wrongful convictions? The EWG found this critical. What is the proportion of wrongful convictions that are malfeasance vs. error? Is it possible that there are going to be random mistakes? Is it an issue that happens only once in a while when people fall through the cracks, or does it have to be an organizational accident? Does the rate of wrongful convictions vary by crime? At what rate does wrongful conviction have a social cost that warrants a larger intervention than we have today? How many wrongful convictions need to occur to trigger a widespread public response?

2. **Hot Spots**. Are there hot spots of wrongful conviction? If this is true, are there observable indicators showing a higher risk of wrongful convictions in some locations?

3. **Plea Bargaining**. Do pleas cause wrongful convictions?

4. **Risk Factors**. Are particular individuals more at risk for unnoticed wrongful convictions? What does the past tell us about current problems?

5. **Case Studies**. What can we learn from individual cases? How can we generalize from the enormous body of literature about individual cases?

6. **Forensic Consulting**. What would be the detriment to a public lab providing consultative services to defense lawyers?

7. **Open-File Discovery**. Is it true that witnesses are in more jeopardy if you have open-file discovery than if you do not?

8. **Value of Evidence**. The EWG expressed that two statements made at the workshop led to an important research question. The statements were: (1) "Better that 10 guilty men go free than one innocent man is convicted." (2) "Getting a convicted criminal is more important than avoiding a wrongful conviction." The related research question is: What is the value of getting inculpatory evidence that convicts someone who is guilty compared with the value of exculpatory evidence that keeps someone who is innocent from being incarcerated?

The Wrongful Convictions Rate

EWG acknowledged that there needs to be some type of way to determine how many wrongful convictions exist, but the problem is that this is very difficult to determine. The EWG noted that there is a lot of information that exists about the 250 death penalty and DNA cases. They also stated that most researchers are comfortable with a 1-percent to 3.3-percent or even a 5-percent error in murder and death penalty cases. However, they expressed that there is no direct way to measure the number of wrongful convictions in robberies and burglaries. The EWG felt that estimates could be done. Participants mentioned the study of prison conditions conducted by Rand. Researchers surveyed inmates on many topics including whether they were wrongfully

convicted. An average of 15 percent said they were wrongfully convicted.[125] The EWG discussed that most prisoners do not claim they are innocent. Therefore they found that with a well-done prison survey asking both inmates and people who work in prisons which individuals are innocent, it would be possible to derive information on which estimates could be generated. The Group also expressed that researchers could also address looking at the issue of wrongful convictions by studying issues with parole boards.

The Group mentioned the perennial discussion in criminal justice about the Blackstone principle ("Better that 10 guilty men go free than one innocent man is convicted.") and a lot of misunderstanding about the statement. The EWG expressed that it is important to get a sense of the real scale of the wrongful convictions problem. Participants expressed concern that if there is only a small rate of error, people will try to minimize the importance of the problem. Experts felt that in order to provide the true statistics of wrongful convictions, researchers need to know how often errors are being made at the mundane level, not just at the high-profile level. For example, looking at cases overturned by CCRC, the number is .0001%. Participants found that this figure may not be persuasive in urging policy makers to initiate and follow through on reforms; therefore studies must go further in looking at wrongful conviction rates.

Judicial Processes

The EWG discussed checks at the judicial stage of the criminal justice process because jurors are known to give tremendous credence to what has been put on the record. The EWG noted that very little research had been conducted on the role of the court process on wrongful convictions. Participants expressed the difficulty in receiving money or a sponsor for research on the judicial process. The EWG posed five questions in this area:

1. **Level of Certainty**. What level of certainty of the evidence does a prosecutor need to bring a case to grand jury? This is one of the first checks in the process. Where are prosecutors making that decision?

2. ***Voir Dire***. Are innovations in *voir dire* effective in practice?

3. **Jury Instructions**. How do researchers effectively evaluate the impact of reforming jury instructions? There's been innovation in the last 20 years, however researchers and practitioners know that jurors often have no idea what the instructions mean.

4. **Expert Witnesses**. What are the effects when judges allow experts at trial to talk about the frailties of particular kinds of evidence (e.g., eyewitness, police interrogation techniques)?

5. **Caseloads**. What is an acceptable caseload for defense attorneys? Participants expressed horrific underfunding for indigent defense as a concern in the area of wrongful convictions.

[125] Peterson, Mark, Jan Chaiken, Patricia Ebener, and Paul Honig, "Survey of Prison and Jail Inmates: Background and Method," Final Report for National Institute of Justice, grant number N-1635-NIJ, Washington, DC: National Institute of Justice, 1982, http://www.rand.org/content/dam/rand/pubs/notes/2005/N1635.pdf.

False Confessions

The Group discussed the gap in research in the area of the effect of false confession expert testimony. Some found that studies in this area would be helpful to fill the gap. The EWG discussed appellate bias, because the only cases reported are those in which the judge would not let the expert in, the defense appealed, and then the appellate judge held that this was in the judge's discretion. Participants felt that it would be fairly easy to do a project on false confession expert testimony. The feeling was that researchers could find a significant effect of false confession expert testimony, and no significant effect of eyewitness expert testimony.

Prosecution

The EWG also found that research would be useful to determine how prosecution units get high rates of conviction and if the cases are approved by felony review. The following question arose in this discussion: How many cases are plea bargains, how many go to trial, and how many cases are lost? The EWG felt that researchers need to study what led to the initial error during felony review in approving these charges. Researchers should explore why prosecutors did not pursue these specific cases.

Participants raised the issue that if researchers want prosecutors to participate in research endeavors, language is important (e.g., "mandates" vs. "guidelines"). Us-versus-them language is not helpful. Specifically, unhelpful or contentious issues include stories about bravado prosecutors or misconceptions that acquittal means the person is innocent.

Law Enforcement

The EWG expressed the need for descriptive data from police agencies because many of the research questions researchers ought to address would have an impact on policies and practices in police departments. Participants raised questions in this area:

1. **Ideas into Practice**. How do new ideas spread in the field (diffusion of innovation)? Where have police departments that have adopted new practices gotten their scientific information? How did the science get out there?

Participants also discussed wrongful police stops and front-door errors. The EWG expressed the need to look at why the stops happened on a clinical level. Participants asked the following questions in this discussion:

1. **Training.** Could there be more effective training?

2. **Cost**. What about the cost of police stops?

3. **Racial Bias**. Do we tolerate a higher rate of error for our minority citizens? Participants raised concerns about the causes underlying the disparities. It is concerning when there is a potential for bias at each level of the criminal justice system, whether intentional or not.

Partnerships

Lastly, the EWG expressed that the criminal justice system has blind faith in each of its actors, which is problematic if each operates independently without supervision. Participants found that the discussions at the workshop revealed significant distrust between different actors in the criminal justice system.

The Group expressed the importance of different actors in the criminal justice system working together and talking to each other. This is especially important because practitioners are put on opposite sides of the adversarial process. Participants discussed that these conversations may not occur naturally without prodding and encouragement. Participants found that finding common ground between these different elements of the criminal justice system is an important focus area.

Appendix A: Agenda

INTERNATIONAL PERSPECTIVES ON WRONGFUL CONVICTIONS WORKSHOP: PRACTICES AND RESEARCH

Monday, September 13, 2010

8:00–9:00 a.m. **Registration and Networking**

9:00–9:05 a.m. **Greetings and Welcome**
John Laub, Director, National Institute of Justice

9:05–9:15 a.m. **Opening Remarks**
Edwin Zedlewski, Division Director, International Center, National Institute of Justice

9:15–9:30 a.m. **Goals and Outcomes for the Group**
Edward Connor, Workshop Facilitator, President, Institute for Law and Justice

The goal of the workshop is to learn about preventing and correcting wrongful convictions by listening to colleagues from around the globe. If we can determine alternative practices, we can devise a research agenda around these best practices to determine their transferability and effectiveness in the United States. The participants shall address needs for research, research gaps, and new potential research areas in the field of wrongful convictions in light of international and domestic practices. The group should also address what action is a priority and what the federal government can do to make these changes happen.

9:30–10:30 a.m. **LEGAL SYSTEMS**

An Integrated Justice Model
Marvin Zalman, Professor**,** Wayne State University

Discussion

- Do particular legal systems invite wrongful convictions? Are there inherent issues with certain legal systems; i.e., adversarial vs. inquisitorial, which allow for wrongful convictions?
- Do political elections in the judiciary cause wrongful convictions? What can we learn from other countries

10:45–11:50 a.m. **POST-EXONERATION**

New Zealand Compensation
Jeff Orr, Chief Legal Counsel**,** Ministry of Justice, New Zealand

Canadian Inquiries

Stephen Bindman, Special Advisor on Wrongful Convictions, Department of Justice, Canada

Discussion

- What do other countries do post-exoneration? What methods of compensation do they incorporate and what types of services are offered? In this session we will discuss practices, including New Zealand's system of compensation for wrongful conviction and imprisonment.
- Should a formal inquiry be conducted in each case? How do these inquiries help our understanding of wrongful convictions? In this part of the session we will discuss the inquiries Canada has conducted after exonerating those wrongfully convicted.

11:50 a.m.–1:10 p.m. **WORKING LUNCH AND PRESENTATION**

Laurie Robinson, Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice

C. Ronald Huff, Co-editor: Wrongful Conviction: International Perspectives on Miscarriages of Justice, Professor of Criminology, Law, and Society and Sociology University of California, Irvine

1:10–2:20 p.m. **APPEALS AND INNOCENCE COMMISSIONS**

The Criminal Cases Review Commission
Richard Foster, Chair, Criminal Cases Review Commission, England, Wales and Northern Ireland

North Carolina Innocence Inquiry
Kendra Montgomery-Blinn, Executive Director, North Carolina Innocence Inquiry Commission

Discussion

- How can a separate appeals process for wrongful convictions help in discovering wrongful convictions? In this panel we will discuss alternative appeals practices, including Great Britain's Criminal Cases Review Commission (CCRC) and the Scottish Criminal Conviction Review Commission (SCCRC), Canada's Criminal Conviction Review Group, and New Zealand's post appeals process.
- We will also discuss the North Carolina Innocence Inquiry Commission.

2:20–4:00 p.m. **ROLE OF ATTORNEYS, TRIALS, AND EVIDENCE**

The Role of Lawyers in the U.S.
Brandon Garrett, Professor of Law, University of Virginia School of Law

The Role of Lawyers in Denmark
Hans Fogtdal, Assistant Deputy Director**,** Office of the Danish Director of Public Prosecutions

Dallas Conviction Integrity Unit
Michael Ware, Special Fields Bureau Chief**,** Dallas County District Attorney's Office

Terri Moore, First Assistant**,** Dallas County District Attorney's Office

Discussion

- What is the role of the prosecutor? What about truth vs. conviction? How do legal ethics and culture change the dynamic of the case? What are prosecutors doing in the U.S. and abroad to prevent and correct wrongful convictions?
- What is the state of criminal defense attorneys abroad and in the U.S.? Is there a different legal culture when it comes to taking indigent cases abroad?
- What is the role of expert witnesses in trials in the U.S. and abroad? Are there alternative models? What is the harm in opinion evidence vs. fact evidence?
- How can the use of juries contribute to wrongful convictions? Are juries too inexperienced with the rules of evidence? Can and do non-jury trials protect a defendant?
- Examples on this topic will be presented and discussed, such as the Dallas Conviction Integrity Unit, and the New York Conviction Integrity Group.

4:15–5:30 p.m. **ARRESTS AND CONVICTIONS**

False Convictions and Guilty Pleas in the U.S.
Sam Gross, Professor of Law**,** University of Michigan Law School

Plea Bargaining in Europe
Gwladys Gillieron, Visiting Research Scholar**,** Institute on Crime and Public Policy University of Minneapolis Law School

International Perspectives on the Death Penalty
Carolyn Hoyle, Reader in Criminology and Fellow of Green Templeton College, Centre for Criminology**,** University of Oxford

Discussion

- How do plea bargains lead to wrongful convictions and what about alternative models of plea bargains, or sometimes the absence of plea bargains, such as in France? Does the death penalty lead to faulty plea bargains? What are ways to minimize it?
- How can we prevent wrongful convictions in highly charged and politicized environments brought on by high-profile cases?

5:30 p.m. **WRAP-UP AND ADJOURN**

Tuesday, September 14, 2010

8:30–10:00 a.m. **FORENSICS**

Forensics and Wrongful Convictions in Scotland
Brian Caddy, Lay Member Scottish Criminal Cases Review Commission

Forensics and Wrongful Convictions in Canada
Stephanie Reilander, Deputy Director**,** Center of Forensic Sciences

Preventing and Correcting Wrongful Convictions Using Forensic Science in Arizona
Ron Reinstein, Judge (retired), Judicial Consultant Arizona Supreme Court
Carrie Sperling, Executive Director Arizona Justice Project, Sandra Day O'Connor College of Law
Kent Cattani, Chief Counsel, Capital Litigation and Criminal Appeals Arizona Attorney General's Office

Forensic Challenges in the U.S.
Gerald LaPorte, Forensic Policy Program Manager Office of Investigative and Forensic Sciences, National Institute of Justice

Discussion
- How can forensics lead to wrongful convictions and what ways can this be prevented? What are alternative methods of involving forensics to prevent wrongful convictions? What can we learn from European investigations methods which teams forensics investigators and detectives to determine the hypothesis of a case?
- How does the interpretation of forensic evidence lead to wrongful convictions and how can this be prevented? Do judges, attorneys, and jurors understand forensic evidence and how can this be rectified to prevent wrongful convictions?
- How do psychological factors impact forensic examiners?

10:15–11:40 a.m. **POLICE AND INVESTIGATIONS**

Investigations in the Netherlands
H.P. Schreinemachers, Counselor for Justice and Police Affairs, Embassy of the Netherlands

Investigations in the U.S.
James Markey, Sergeant, Phoenix Police Department

Eyewitness Identifications
James Doyle, Director of the Center for Modern Forensic Practice, John Jay College of Criminal Justice

Discussion
- What is the role of police in investigations? What are different roles of the police in investigations around the world? What are the European investigative methods? What are alternative models of investigations?
- How does constabulary independence (little involvement from the prosecutor) differ from the American tradition where the prosecutor is more involved in investigation

- What is the role of context bias and "tunnel vision"? How do psychological factors impact investigators?
- How can eyewitness identifications be improved to prevent wrongful convictions? Are there practices in line-ups which have proved effective in protecting against

wrongful convictions? Should eyewitness identifications be corroborated like in other countries, like the Netherlands?

- What about false confessions and snitches? What are alternative practices to prevent mistakes in these areas?

12:00–1:30 p.m. **LESSONS LEARNED AND FUTURE RESEARCH AGENDA**
Edward Connor, Workshop Facilitator

In this session we will discuss the possibility and feasibility of transferring international programs and models into the U.S. We will then discuss a future research agenda to look at the real feasibility of such knowledge and practice transfers.

1:30 p.m. **WRAP-UP AND ADJOURN**

Appendix B: Participant List

Karen Amendola
Chief Operating Officer
Police Foundation

Bethany Backes
Social Science Analyst
Office of Research and Evaluation
National Institute of Justice
U.S. Department of Justice

Jim Bethke
Director
Texas Task Force on Indigent Defense

Stephen Bindman
Special Advisor on Wrongful Convictions
Department of Justice
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Alison Brooks
Research Assistant
National Institute of Justice
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Katharine Browning
Senior Social Science Analyst
Office of Research and Evaluation
National Institute of Justice
U.S. Department of Justice

Brian Caddy
Lay Member
Scottish Criminal Cases Review Commission
United Kingdom

Kent Cattani
Chief Counsel
Capital Litigation and Criminal Appeals
Arizona Attorney General's Office

Edward Connors *(Workshop Facilitator)*
President
Institute for Law and Justice

James Doyle
Director of the Center for Modern
Forensic Practice
John Jay College of Criminal Justice

Hans Fogtdal
Assistant Deputy Director
Office of the Danish Director of
Public Prosecutions
Denmark

Richard Foster
Chair
Criminal Cases Review Commission
United Kingdom

Susan Gaertner
Ramsey County Attorney
Ramsey County Government Center West

Brandon L. Garrett
Professor of Law
University of Virginia School of Law

Gwladys Gillieron
Visiting Research Scholar
Institute on Crime and Public Policy
University of Minnesota Law School
Switzerland

Stephen Goudge
Judge
Court of Appeals for Ontario
Canada

Jon Gould
Director
Center for Justice, Law and Society
George Mason University

Samuel Gross
Thomas and Mabel Long Professor of Law
University of Michigan Law School

Barbara Hervey
Judge
Texas Court of Criminal Appeals

Carolyn Hoyle
Reader in Criminology and Fellow of
Green Templeton College
Centre for Criminology
University of Oxford
United Kingdom

C. Ronald Huff
Professor
Dept. of Criminology, Law, and Society
University of California, Irvine

Miranda Jolicoeur
International Liaison and Research Analyst
MetaMetrics, Inc. Contractor
International Center
National Institute of Justice
U.S. Department of Justice

Maha Jweied
Senior Counsel
Access to Justice Initiative
U.S. Department of Justice

Gerald LaPorte
Forensic Policy Program Manager
Office of Investigative and Forensic Sciences
National Institute of Justice
U.S. Department of Justice

Jim Markey
Sergeant
Phoenix Police Department

John Laub
Director
National Institute of Justice
U.S. Department of Justice

Kendra Montgomery-Blinn
Executive Director
North Carolina Innocence Inquiry Commission

Terri Moore
First Assistant
Dallas County District Attorney's Office

Angela Moore-Parmley
Acting Division Director
Office of Research and Evaluation
National Institute of Justice
U.S. Department of Justice

Christine Mumma
Executive Director
North Carolina Center on Actual Innocence

Michael Naughton
Senior Lecturer in Law/Sociology
Founder and Director,
Innocence Network UK (INUK)
School of Law
University of Bristol
United Kingdom

Michele Nethercott
Lawyer
Office of the Public Defender, Baltimore, MD

Jeff Orr
Chief Legal Counsel
Ministry of Justice
New Zealand

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Appendix C: Participant Provided Case Studies

This appendix contains case studies written by workshop participants to illustrate some of the points made in workshop discussions. These case studies are provided to give context to the discussions. They are in no way a reflection of views at the Department of Justice.

Legal Systems: An Integrated Justice Model

By: **C. Ronald Huff**, University of California, Irvine and **Marvin Zalman**, Wayne State University

In recent decades, studies about miscarriages of justice have raised concerns about the accuracy of police investigation, prosecution, and criminal convictions, both in common law and Roman law countries. These issues appear to be more prevalent in common law countries where a large number of innocence projects have been established.

If so, common law systems might look to continental/inquisitorial systems for guidance. Any conclusion about prevalence, however, is premature since (1) no nation keeps systematic records of exonerations and (2) policies vary regarding the retention of forensic evidence for post-conviction testing. Further, the often fortuitous discovery of wrongful convictions and the controversy or doubt that surrounds miscarriage claims makes such recording unlikely.
It is nevertheless useful to speculate about the structures of various criminal justice systems to consider whether certain characteristics might logically suppress error. This task is aided by analyzing justice systems through an integrated justice model that divides the whole into relevant domains, and within each domain examines the institutions, functions, personnel, regulating concepts, ideologies, and ideals that contribute to case outcomes.

In conceptualizing an integrated justice model that would seek to minimize wrongful convictions, four domains are critical: (1) the adjudication (or adversary) domain of lawyers, courts, and jurors; (2) the law enforcement domain of police investigations; (3) the psychology domain, which has been critical to uncovering errors in eyewitness identification, false confessions, juror error, and tunnel vision; and (4) the forensic science domain, where DNA profiling has been the most important element in discovering justice errors. We comment briefly on these domains below to illustrate some key features that might characterize such a model.

The Adjudication Domain: An integrated justice model would seek to place greater emphasis on "balanced fact finding" rather than a traditional adversarial approach to adjudication, which rests on the assumption that both the prosecution and the defense have the resources and the ability to perform their roles. This model would require expanded disclosure of the prosecution's evidence prior to adjudication.

The Law Enforcement Domain: An integrated justice model would envision investigations that are more even-handed (again, "balanced fact-finding"), pursuing inculpatory and exculpatory evidence that is designed solely to discover truth, rather than to pursue convictions. Defense counsel would have direct input into investigations, as do prosecutors in the adversarial model.

The Psychology and Forensic Science Domains: Both of these domains would be envisioned as the scientific ("evidence-based") foundation of fact-finding in the pursuit of evidence to be considered by jurors and judges. Greater emphasis would be placed on such scientific expertise than on eyewitness testimony, for example, which has been the single leading correlate of wrongful convictions. Toward that end, forensic laboratories would be independent entities, rather than part of law enforcement or prosecutorial agencies; forensic evidence, including DNA, would be retained until post-conviction testing could be performed or, in case of acquittal, until it could be utilized in attempting to determine the identity of the actual offender; and the testimony of qualified psychologists and forensic scientists would routinely be permitted to assist the court in fact-finding.

Ideally, all justice personnel would adopt the ideals of each domain—justice, public safety, human insight, and truth—to seek to assure accuracy in the investigation, prosecution and adjudication processes.

Preventing Wrongful Convictions Though Education

By: **Judge Barbara Hervey and Megan M. Molleur,** Texas Court of Criminal Appeals

Most criminal practitioners still have no clue what the term "actual innocence" really means. Does it indicate that bad lawyering (ineffective assistance of counsel) deprived the defendant of his rights? Does it indicate that "bad science" was used to convict the wrong person? And what do we really mean by "bad science"? Does it indicate the State concealed, lost, or otherwise was responsible for keeping evidence material to the defense from discovery? Does it mean the defendant committed some other offense but not the one actually charged? Or does it mean the accused just isn't the actual perpetrator? And if the defendant is actually innocent, what do we do about it? What lessons can we learn from the tragic injustice that occurs with every wrongful conviction and unjust incarceration?

Endless debates and conversation on the topic of actual innocence/wrongful conviction must give way to meaningful reform and education, through instructions and training—these things are key to reform.

All the participants in the criminal system have a stake in the correct administration of justice. Likewise, all the participants share the responsibility of understanding the basics: law, science, procedure, and the respective roles of the other participants and the overall structure of the criminal justice system. Everyone must learn to accept responsibility when flaws in the system are found, without pointing fingers. And everyone must be able to accept that mistakes are made and admit that he or she has something to learn, whether it is as a result of a mistake or a basic concept they never fully grasped in the first place. It is always acceptable to admit you don't know something, and it is wise to seek instruction when this occurs.

So, it should be that we go back to basics, that we hammer the basics, and that we also keep full and open minds to disciplines we don't understand.

Judges should understand their roles as gatekeepers. They should have more instruction on forensic science and standards for the admissibility of scientific evidence. Attorneys must

understand their ethical obligations and their responsibilities to their clients and community, and they must be held accountable for mistakes without shifting blame or refusing to learn from those errors. Law enforcement should encourage the use of best practices in the performance of their duties. Crime labs must be reliable. Standards for collection, preservation, and storage of evidence must be addressed by our legislatures. And all of us must strive to educate each other as to how all these pieces of the puzzle can fit together in a never ending effort to bring about meaningful reform to rectify the causes of wrongful convictions.

A Miscarriage of Justice Based Upon False Scientific Evidence: "The Birmingham 6"

By: **Brian Caddy,** Lay Member Scottish Criminal Cases Review Commission

In 1974 a series of explosions killed and maimed a large number of people spending an evening in two different public houses in the centre of Birmingham, England. These explosions were associated with Irish dissidents. At this time a number of Irish residents were journeying to Northern Ireland to attend the funeral of an Irish dissident who had blown himself up in a previous incident. They were stopped boarding a ferry and transferred to the local police station where they were tested by a scientist from the local forensic science laboratory for the presence of trace explosive on their hands. The test he employed was the so-called Griess test which is basically a colour (pink) test for nitrite ion which can be liberated from such material as the explosive nitroglycerine using caustic soda. Such a test is usually referred to as a presumptive or screening test. This means that while nitroglycerine will respond to the test, it does not exclude other materials also producing the pink colour to the test, especially something as common as nitrocellulose used as a covering to many shiny surfaces. This means that any positive test should be confirmed by a more independent specific and sensitive test.

Subsequent evaluation of the processes used demonstrated that the laboratory had at least three different "recipes" for the Griess reagents. These showed variations in the strengths of the caustic soda, the use or not of a solublising agent such as alcohol or ether, the temperature of the system, and the time required for the appearance of the colour. Details of the method supposedly used by the scientist were not written down at the time of use, but it would appear that he had tried to refine the test to increase its specificity but at the same time this would have reduced its sensitivity thereby vitiating the whole purpose of the test. (Many years later in a collapsed civil action, the recipe claimed to have been used by the scientist was demonstrated not to be viable because of the very low concentration of caustic soda employed). Subsequent testing demonstrated that the positive responses could have arisen from contamination of the testing basins with nitrite ion present in the soap used to clean the basins. Additionally, it was known that the detainees had played cards on the train to the ferry; the surfaces of these cards were likely to have been covered with nitrocellulose. These cards were heavily abraded and would have transferred surface particles to the hands of the players, which could have produced a positive reaction to the Griess test. Further testing with new cards showed that the retention time of surface particles was limited, but abraded cards would have transferred more material and persistence may well have been longer. This means that the cards could not be entirely excluded as the possible source of the positive Griess test. All attempts at trying to confirm the results of the Griess tests using thin layer chromatography failed. A single test of one swab using mass

spectrometry linked to gas chromatography (GC-MS) suggested the presence of nitroglycerine, but this test could not be repeated. Later testing of swabs taken from the hands of smokers demonstrated that there was an unknown compound that demonstrated all the same properties of nitroglycerine on this analytical system. In spite of the results from the defective state of the tests employed, the 6 accused were all convicted and spent 18 years in prison.

What are the lessons to be learned? First, scientists must be properly trained and regularly evaluated for their manipulative and interpretive skills. Second, all tests employed must be properly evaluated with details of their sensitivity, specificity and repeatability recorded. Scientists should be able to demonstrate what should be considered presumptive/screening and what specific tests should be ordered; a single test cannot be considered adequate for an identification. Details of all tests need to be recorded at the time of their use and any variations in the standard process recorded with reasons for the deviation.[126]

This case brought an enormous impetus to the UK forensic science laboratories for the implementation of quality assurance and quality control systems that were externally verified and ultimately lead to the establishment of the Criminal Cases Review Commission (CCRC) for England, Wales and Northern Ireland in 1997. Scotland has its own Commission.

The Key Limitations of the CCRC

By: **Dr. Michael Naughton**, University of Bristol, UK

The Criminal Cases Review Commission (CCRC) is the statutory independent public body that reviews alleged miscarriages of justice in England, Wales and Northern Ireland. It is an outgrowth of the main recommendation of the Royal Commission on Criminal Justice that was established in response to the public crisis of confidence in the entire criminal justice system from start to end caused by notorious cases such as the Guildford Four and the Birmingham Six.[127] However, after a decade in operation it is increasingly clear that the help that the CCRC can provide for innocent victims of wrongful conviction is severely limited.

Not independent

The CCRC is supposed to be an independent public body. However, its operations are governed by s.13(1)(a) of the Criminal Appeal Act 1995 which requires that it cannot refer applications to the appeals courts unless:

'...there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.'

The 'real possibility' test means that the CCRC is not independent, despite such claims. On the contrary, it is always in the realm of trying to second-guess how the appeal courts may view

[126] See Mullin, Chris, *Error of Judgement: The Truth about the Birmingham Bombings*, Dublin: Poolbeg Press, 1997.
[127] See Royal Commission on Criminal Justice, *Report* (Cm. 2263), London HMSO, 1993.

referred cases. This is because the CCRC has to bear in mind the decisions of the appeals courts in first appeals and cannot send cases back on the same grounds. As such, the CCRC is best described as a filter for the appeals courts, with CCRC reviews mere safety checks on the lawfulness or otherwise of criminal convictions, as opposed to in-depth inquisitorial investigations that seek the truth of claims of innocence by alleged victims of wrongful convictions.

Most crucially, cases may not be referred by the CCRC, even if it turns up compelling evidence that indicates an applicant's claim of innocence is valid, if it does not satisfy the 'real possibility' test in the eyes of the CCRC (for example, if the evidence was available or could have been made available at the original trial).

Not interested in innocence

In fact, the CCRC is not concerned with whether applicants are innocent or guilty, as it clearly states on its website:

'We do not consider innocence or guilt, but whether there is new evidence or argument that may cast doubt on the safety of an original decision'.[128]

In this light, it is crucial to note that the CCRC is NOT a state-sponsored innocence project. It was not designed to investigate cases with the view of assisting those who might be innocent to overturn their convictions. It operates entirely within the parameters of the criminal appeals process in the role of a 'legal watchdog' to ensure that its decisions meet with its rules and procedures; it seeks to determine whether convictions are lawful.

In the U.S., the efforts of innocence projects have forced the issue of a possible federal-level solution to the apparent problem of the wrongful conviction of the innocent onto the agenda, with a CCRC-style body seen as a potential model.

However, in response to the CCRC's apparent failures in dealing with applicants who may be innocent, it is facing increasing attacks from practitioners, legal scholars, the media politicians and third sector groups.[129]

The emergence of the innocence projects movement in the U.K. in a post-CCRC era is equally telling. Although innocence projects did not exist in the U.K. prior to the CCRC, the Innocence Network U.K. (INUK) has actively supported the creation of over 30 innocence projects in U.K. universities since 2004 in direct response to the limits of the CCRC in handling claims of innocence.[130]

[128] Criminal Case Review Commission. UK. www.ccrc.gov.uk.
[129] See Naughton, Michael, *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave Macmillan, 2009.
[130] See www.innocencenetwork.org.uk.

Prosecutors and Penal Orders in the Swiss System

A Penal Order is the most common form of summary criminal procedure in the Swiss system. It is also popular in other European countries; it is commonly referred to as the "continental plea bargain."[131] It is similar to plea bargaining, but differs from the American system because if a defendant does not agree with the Penal Order they do not run the risk of having a larger sentence because they chose to go to trial rather than take the deal. [132] In the Swiss system a Penal Order is only available in cases where the punishment is either a fine or a term of imprisonment that is less than 6 months. [133] Either a judge or a prosecutor provides both the charges and the sentence to the defendant in the form of a document. [134] If the defendant does not agree with any part of the terms, charges, or the facts surrounding the charge, then the defendant has the right to a full trial. [135] The defendant simply declines on the form to proceed to a trial. [136]

The examples below show how a Penal Order operates in the Swiss justice system.

Case studies (Swiss penal order procedure)

By: **Dr. Gwladys Gillieron,** University of Zurich

Traffic violation

B is caught on radar driving 45 km p/h in excess of the speed limit on main roads. The public prosecutor issues a decision ("penal order") in which B is sentenced to a fine of 750 Swiss francs (which is approx. 750 $). If B doesn't agree with the decision, he has ten days to make opposition.

Example of wrongful conviction

X is caught driving above the speed limit on motorways and sentenced by penal order to a fine of 120 Swiss francs. X doesn't make opposition, so the decision becomes final. The penal order has been issued by the public prosecutor, although the vehicle registration plate wasn't clearly readable. It was assumed that the car was from the canton of Bern (BE), but it could also be from the canton of Geneva (GE).[137] In addition, the person that could be identified on the photo taken

[131] Killias, Martin, and Stefan Trechsel, "Law of Criminal Procedure," *Introduction to Swiss Law* (3rd ed.), ed. Dessemontet, François and Tuğrul Ansay, The Hague: Kluwer Law International, 283.
[132] *ibid.*
[133] *ibid.*
[134] *ibid.*
[135] *ibid.* According to the unified Swiss Code of Criminal Procedure that came into force on January 1 2011 and replaced the 26 cantonal criminal procedure codes, it is the public prosecutor that is responsible for issuing penal orders.
[136] Killias, Martin and Stefan Trechsel, "Law of Criminal Procedure."
[137] The Swiss car number plates consist of a two-letter code for the canton followed by up to 6 numerical digits.

by the speed camera was a woman and not X (who is male). Therefore, the petition of revision[138] filed by X is admitted.

Petty theft

X steals a pair of trousers worth 100 Swiss francs (which is approx. 100 $). The shop owner calls the police. A police officer writes a report about the incident. Based on this report, the public prosecutor issues a penal order in which X is sentenced to a fine of about 250 Swiss francs.

The prosecutor can decide to pronounce either a fine or a short prison sentence (until 6 months) if the stolen goods are worth more than 300 Swiss francs.

Drugs

A is caught selling drugs on the street. After the interrogation of the suspect at the police station, the police report is transferred to the public prosecutor. On the base of the police report, the public prosecutor convicts A by penal order to a fine of 1000 Swiss francs.

Depending on the amount sold, the public prosecutor can decide to pronounce either a fine or a short prison sentence (until 6 months) or both.

The Pious Plea

By: **Lindsay Herf,** Arizona Justice Project

Close to 95 percent of criminal cases end with convictions obtained through plea bargaining.[139] Most would believe that the plea bargaining system would never produce a wrongful conviction. After all, who would plead guilty to a crime she/he did not commit? John Watkins did.

In 2004, at age 20, John Watkins was charged with two unrelated crimes: (1) possessing child pornography[140] and (2) sexual assault.[141] He was threatened with 120 years in prison on the pornography charges.[142] Then, Watkins was offered a plea: if he pled guilty to both cases, he would receive no prison time for the pornography charges and be sentenced to 7-14 years in prison for rape.

With no DNA evidence to prove his innocence for the rape, he pled guilty to the two crimes. Seven and one half years later, advanced DNA testing techniques proved Watkins was not the

[138] The petition of revision is the only legal remedy once a judgment has become final. New evidence not available before must be shown.
[139] See Bureau of Justice Statistics: Criminal Cases in State Trial Courts (Report based on felony offenses charged in 2006 throughout the United States) at http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=221.
[140] Under Arizona law, child pornography, or images of people under 15 years engaged in sexual activity, is punishable by 10 to 24 years in prison *per* image.
[141] Under Arizona law, sexual assault, a violent crime against a person, is punishable by 7 to 14 years in prison.
[142] Arizona's sentence for this crime is "by far the longest in the nation and is more severe than sentences imposed in Arizona for arguably more serious and violent crimes." See *State v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006).

person who committed the rape. This means the true assailant has never been caught and has possibly gone on to commit other violent attacks.

Watkins is not alone. At least 19 other individuals have pled guilty to violent crimes they did not commit and were later proven innocent through DNA testing.[143]

Why this is happening in our innocent until proven guilty system of criminal justice?
Part of the answer is that innocent people are being produced for prosecution based on flawed evidence: poor investigation, eye witness misidentification, and tunnel vision by some law enforcement agents. In the case against Watkins, each of these aspects came into play.
The rape victim was a 48-year-old woman who was intoxicated at the time of the assault. Two hours after the assault, she told the detective she could not help in making a composite sketch of her attacker, but could only give a general description: young, white male, white t-shirt and basketball shorts, medium build, blondish-brownish hair. Police continued to press her for an identification and showed her a video where she identified a young man as the possible attacker. The man she identified was not John Watkins. However, police became fixated on Watkins. The victim was called in again and this time presented with a photo line-up which showed 6 similar looking young white males, 5 in black t-shirts and 1 in a white t-shirt. She chose the one in the white t-shirt — that was John Watkins. The suggestive photo line-up and pressure to identify the attacker created a false eyewitness identification.

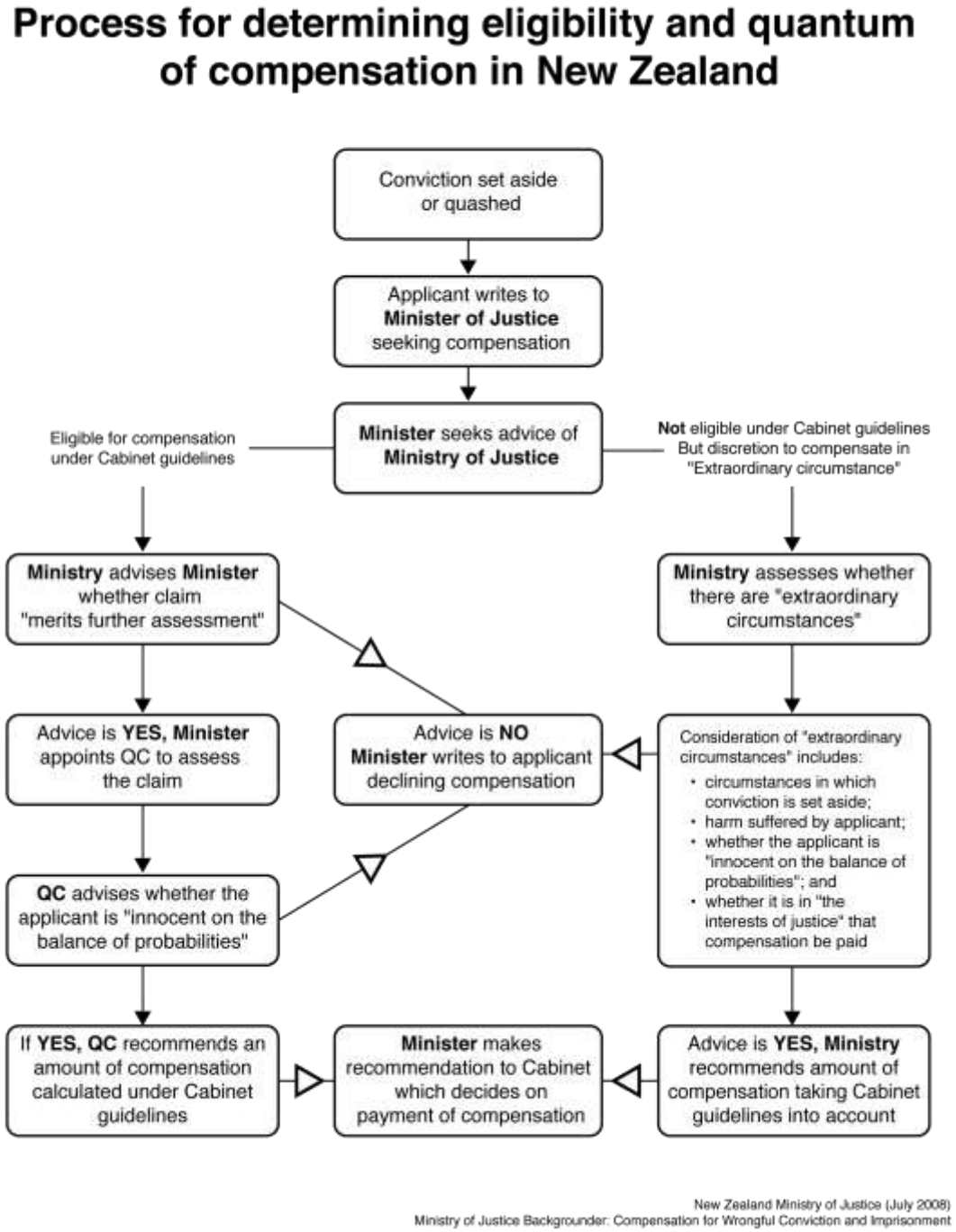
The interrogation of Watkins also proved to be a problem. Police are trained that in a reliable confession, the suspect will produce information about the crime that is not known to the public and only the true assailant would know. In this case, Watkins denied involvement in the rape at least 68 different times during the interrogation. But after 4 ½ hours of interrogation in which Watkins was told he failed a voice stress test and that meant he was lying and the interrogators lied to Watkins by telling him his fingerprints were found at the crime scene *and* multiple witnesses had already identified him, Watkins finally broke down and admitted to the rape. However, his "confession" contained incorrect details about the crime, and the accurate details he gave had all been fed to Watkins by the interrogator during the first 4 hours and 20 minutes of the interrogation.

No matter what Watkins said about his innocence for the rape, the detectives thought they had their man.

Without DNA evidence, Watkins's exoneration for the rape would have been impossible. The DNA and non-DNA exonerations remind us that there are cracks in the system and sometimes the unimaginable occurs: an innocent person pleads guilty to a crime she/he did not commit

[143] See "When the Innocent Plead Guilty," www.innocenceproject.org.

New Zealand's Compensation for Wrongful Conviction and Imprisonment



New Zealand Ministry of Justice (July 2008)
Ministry of Justice Backgrounder: Compensation for Wrongful Conviction and Imprisonment

Statutory Compensation for Victims of Miscarriages of Justice in England and Wales

By: **Dr. Michael Naughton**, University of Bristol, U.K.

England and Wales has a statutory compensation scheme for victims of miscarriages of justice under the terms of s.133 of the Criminal Justice Act 1988 as follows:

'(1) When a person has been convicted of a criminal offence and when subsequently his conviction has been reversed [quashed] or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted?(5) In this section "reversed" shall be construed as referring to a conviction having been quashed — (a) on an appeal out of time. (b) on a reference — under the Criminal Appeal Act 1995…'

This immediately denies statutory compensation to all successful appellants who overturn a criminal conviction within the normal criminal appeals system. It effectively limits eligibility to less than 1 percent of successful appeals that are overturned on fresh evidence in an out of time appeal or upon a referral back to the appeals courts by the Criminal Cases Review Commission, established by the Criminal Appeals Act 1995.

In the leading authority on the eligibility for compensation for a miscarriage of justice, Lord Justice Dyson distinguished four categories of successful appeal in the Court of Appeals (Criminal Division) at the post-appeal stage, with only the first category, relating to factual innocence, eligible for compensation:

'…A category 1 case is where the court is sure that the defendant is innocent of the crime of which he has been convicted. An obvious example is where DNA evidence, not obtainable at the time of trial, shows beyond doubt that the defendant was not guilty of the offence. A category 2 case is where the fresh evidence shows that he [sic] was wrongly convicted in the sense that, had the fresh evidence been available at the trial, no reasonable jury could properly have convicted...It does not follow in a category 2 case that the defendant was innocent. A category 3 case is where the fresh evidence is such that the conviction cannot be regarded as safe, but the court cannot say that no fair-minded jury could properly convict if there were to be a trial which included the fresh evidence...There is a fourth category of case to which Lord Bingham referred in Mullen. This is where a conviction is quashed because something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted [but is likely to be guilty]".[144]

As such, statutory compensation in England and Wales is only awardable to those highly rare occasions when fresh evidence emerges at the post appeal stage that completely exonerates a

[144] *R (Adams) v. Secretary of State for Justice* [2009] EWCA Civ 129, para. 30.

person who was convicted of a criminal offence, for instance by new DNA evidence that was not available at the time of the original trial or previous appeal.

However, there has only ever been one case that has been overturned post-appeal following a referral by the Criminal Cases Review Commission that entirely exonerated the appellant in the England and Wales — the case of Sean Hodgson who overturned his conviction for rape and murder after 27 years in prison when DNA evidence proved that he was innocent.[145]

The AEDPA: A Barrier to Justice?: A Case Study of Carlton Gary

By: **Dr. Carolyn Hoyle**, co-author of Hood, R. and Hoyle, C. *The Death Penalty: A Worldwide Perspective* (Oxford University Press, 2008)

In a due process model, evidence should be gathered honestly and cases handled with integrity. If prosecutors encounter evidence that weakens their case, they are obliged to disclose it, while if they find flaws in the work done by investigators they must demand further safe evidence or drop the charges. They must, in other words, be prepared to abandon their conviction that they've got their man when evidence arises to the contrary — an obligation which is especially strong in capital cases.

Non-disclosure of exculpatory evidence (as defined by the 1963 case of *Brady vs Maryland*) features in many wrongful convictions, but since the introduction of the *Antiterrorism and Effective Death Penalty Act* of 1996 (AEDPA) U.S. appellate courts have failed to uphold due process values.

The AEDPA aimed to curb federal death penalty appeals and to increase the speed and number of executions. It has succeeded, but at considerable cost. Evidence of misconduct, including exculpatory evidence hidden from the trial, is no longer enough to reverse a conviction. To get a new trial, a defendant has to prove that if the jury had known about it, it would have acquitted him. The only way to get a federal court to consider new evidence is if it amounts to overwhelming proof of innocence. The burden of proof in appeals has effectively been reversed.

The case of Carlton Gary illustrates these difficulties.[146] Convicted in 1986 of killing and raping three women in Columbus, Georgia, he remains on death row despite compelling evidence that critical elements of the state's case at his trial were fabricated or unreliable. Brady violations include the non-disclosure of a bite cast from a victim's wound which does not match Gary's teeth. Denied relief by the District and 11th Circuit courts because he did not meet the required AEDPA standard, he was refused cert by the U.S. Supreme Court in June 2009. That fall, the

[145] See *R v. Hodgson* [2009] EWCA Crim 490.
[146] For more information about the case of Carlton Gary, see Rose, David, *The Big Eddy Club: The Stocking Stranglings and Southern Justice*, New York: The New Press, 2007.

defense revealed that the forensic samples that the state had said had been destroyed had come to light in the police evidence store, but their motion for a stay pending DNA testing was denied. Gary came within 4 hours of execution when the Georgia Supreme Court finally granted a stay to permit the tests. The final rounds in this legal battle are expected in 2011.

Politicians, prosecutors and appellate courts, sometimes argue that Brady violations are 'technicalities' that, if used to reverse convictions, will lead to the exoneration of factually guilty people. There is no evidence of this. In fact, since the AEDPA, it isn't hard to have someone executed on a technicality, despite compelling fresh evidence pointing to innocence.