



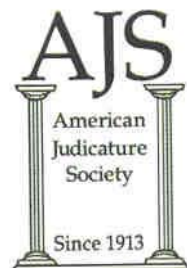
**A NATIONAL CONFERENCE ON PREVENTING
THE CONVICTION OF INNOCENT PERSONS—
A CONFERENCE REPORT
JANUARY 17-19, 2003**

CONVENED BY:
AMERICAN JUDICATURE SOCIETY

IN COOPERATION WITH THE FOLLOWING ORGANIZATIONS:

ABA CRIMINAL JUSTICE SECTION
THE CONSTITUTION PROJECT
EQUAL JUSTICE USA/QUIXOTE CENTER
THE JUSTICE MANAGEMENT INSTITUTE
THE JUSTICE PROJECT
MURDER VICTIMS FAMILIES FOR RECONCILIATION
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A NATIONAL CONFERENCE ON PREVENTING THE CONVICTION OF INNOCENT PERSONS—A CONFERENCE REPORT*

I. Introduction

A unique and significant Conference on *Preventing the Conviction of Innocent Persons* was held in Alexandria, Virginia on January 17-19, 2003. Convened by the American Judicature Society (AJS) and sponsored by the Open Society Institute, the Conference brought together teams from eleven states to discuss the causes of and efforts to avoid wrongful convictions. Present were teams representing: Arizona; San Diego County, California; Colorado; Massachusetts; Michigan; Minnesota; North Carolina; Oregon; Texas; King County, Washington; and Wisconsin. The Conference was structured to facilitate the development of action plans by each of the teams to address the unique issues of wrongful conviction in each jurisdiction. Diverse teams were selected within each state to facilitate this goal, with representation from the judiciary, law enforcement, prosecution, defense attorneys, victim services providers, and legislative members. An equally diverse group of fifteen national organizations interested in criminal law matters (whose names appear on the cover page of this Report) also participated.

With this Conference report, AJS intends to offer Conference attendees, members of criminal justice system-related national organizations, and criminal justice system professionals a resource in their attempts to respond responsibly to issues surrounding the conviction of innocent persons. The report will detail the planning process for the Conference, provide a summary of Conference events, profile

* Points of view expressed in conference materials or by conference speakers do not necessarily represent the official positions or policies of the American Judicature Society, the Open Society Institute, or any of the cooperating organizations.

Conference teams' reform-oriented action plans, and offer suggestions for how interested jurisdictions may pursue criminal justice system change.

II. Background of Conference

AJS is a national, nonpartisan, not-for-profit organization whose mission is improving the administration of justice. The organization's neutrality offered a unique opportunity to address the issues surrounding convictions of innocent persons in a way that had not been visited before. As Allan Sobel, AJS Executive Director and Vice President, noted in his opening remarks at the Conference: "AJS has always been an objective, independent, broad-based organization, and its conferences have been successful because they bring together, such as here, people of diverse backgrounds, all interested parties in the justice system – judges, lawyers, and other concerned citizens." Sobel observed: "The important and difficult task of finding responses to the problem of convicting the innocent must begin with an objective, fair and open-minded examination of the problem."

Conference planning began with inviting a professionally diverse conference planning committee to serve as advisors to AJS staff in developing the Conference. Committee members included legislators, law enforcement professionals, prosecutors, criminal defense attorneys, victims' services providers, and judges. This group worked to ensure the *National Conference on Preventing the Convictions of Innocent Persons* evolved into an opportunity for various criminal justice system representatives to join in learning about and developing plans to respond to convictions of innocents. At the same time that it was considering the advice of the planning committee, AJS hosted three focus group sessions with criminal justice

representatives in San Diego, California, Chicago, Illinois, and Phoenix, Arizona. Together these sessions helped provide much of the structure for the conference.

III. Purpose and Structure of the Conference

The essence of the approach taken at the Conference was to step outside and above the confines of the American adversary system and explore a cooperative approach to preventing wrongful convictions.

Wrongful convictions are failures of the American adversary system of criminal justice. Retired Attorney General Janet Reno, who gave the keynote address at the AJS Wrongful Conviction Conference, articulated the heart of a cooperative approach to preventing wrongful convictions — bring system participants together in the pursuit of truth. While the adversary model is motivated by the goal of victory, the cooperative model is premised on the belief that substantial and productive reform to address the wrongful conviction problem must be motivated by all participants setting aside that goal for the moment and asking what steps can be taken cooperatively to ensure that the system achieves truth.

The Wrongful Conviction Conference was an operationalization of this approach. Teams from eleven jurisdictions around the country gathered to discuss how to address the wrongful conviction problem. The unique character of the Conference, however, was not the geographic diversity of the teams; rather it was the diversity within the teams. Teams were composed of police officers, defense attorneys, prosecutors, judges, victims rights advocates, forensic and crime lab investigators, and legislators. Each team was designed to explore reform in a cooperative fashion, setting aside the traditional barriers imposed by the adversary process.

The jurisdictional teams, along with invited experts and a team composed of members from the media and interested public groups, discussed the scope and causes of wrongful convictions and possible solutions to those causes. Each jurisdiction also met in individual team meetings to develop a cooperative strategic plan for steps that could be taken in their jurisdiction to prevent wrongful convictions.

The Conference was divided into a series of Plenary Sessions dealing with the issues associated with wrongful convictions. The sessions included:

Keynote Speaker: Former Attorney General Janet Reno – *Wrongful Convictions: A National Problem*

Plenary Session I: Potential Targeted Responses to Identified Causes of Wrongful Convictions.

Moderator: Barry Mahoney, *President Emeritus, Justice Management Institute*

Panelists:

Hon. Robert F. Orr, *Associate justice of the North Carolina Supreme Court*
Gil Kerlikowske, *Seattle Chief of Police*
Sue Narveson, *Supervising Criminalist, Arizona Department of Public Safety Crime Laboratory*
Gary Wells, *Professor of Psychology, Iowa State University*

- Increased training and resources for law enforcement, prosecution and indigent defense.
- Sequential eyewitness identification procedures;
- Videotaping interrogations;
- Crime lab and scientific evidence issues.

Plenary Session II: Panel Discussion – Finding Common Ground

Moderator: Chris Stone, *Director, Vera Institute of Justice*

Panelists:

Hon. Mike Lawlor, *Connecticut State Representative*
Anne Seymour, *National Victims' Services Provider*
John A. Stookey, *Attorney – Osborn Maledon, P.A.*
Hon. Andre Davis, *United States District Court, Maryland*
Bill Ritter, Jr., *Denver District Attorney*
Gerald Richard, *Phoenix Police Department*

Moderated panel with a law enforcement officer, prosecutor, judge, victims rights advocate, legislator, and criminal defense attorney respond to the

keynote address and discuss the wrongful convictions generally and their concerns about review commissions and potential targeted systemic reforms.

Plenary Session III: Learning From Mistakes – Models of Investigation

Moderator: Laurie Levenson, *Professor of Law, William M. Rains Fellow, Director, Loyola Law School Center for Ethical Advocacy*

Panelists:

Hon. Eugene R. Sullivan, *United States Court of Appeals for the Armed Forces*

Justice Michel Proulx, *Quebec Court of Appeals*

David Kyle, *United Kingdom Criminal Cases Review Commission*

Sam Pailca, *Seattle Police Department*

- General background and definition of an innocence commission;
- The United Kingdom’s Criminal Case Review Commission experience;
- Canada’s Commissions of Inquiry;
- Analogous commissions such as police internal affairs investigations, military incident reviews.

Plenary Session IV: Systemic Costs of Convicting Innocent Persons

Keynote Speaker: Thomas P. Sullivan, *Jenner & Block, Co-Chair, Governor’s Commission on Capital Punishment*

Plenary Session V: Cost-Benefit Analysis

Moderator: Thomas P. Sullivan, *Jenner & Block, Co-Chair, Governor’s Commission on Capital Punishment*

Panelists:

Richard Wolson, *Sophonow Inquiry Commission Counsel*

John Farmer, *former New Jersey Attorney General*

Barry Scheck, *Cardozo Law School*

Panel presentation addressing how jurisdictions may weigh the costs of convicting innocent persons against the costs of implementing criminal justice system reforms.

Plenary Session VI: Political Concerns

Moderator: Dawn Clark Netsch, *Northwestern University School of Law*

Panelists:

Hon. Mike Lawlor, *Connecticut State Representative*

John Farmer, *former New Jersey Attorney General*

Mr. Virgil Smith, Jr., *Wayne County Prosecutor’s Office*

Panel of representatives of review bodies/approaches (e.g., CCRC, Canadian inquiry) and targeted reform efforts (e.g., John Farmer, NJ) discussing the political hurdles to establishing their systemic reviews and reforms, including:

overcoming opposition, marshalling support, answering detractors, creating teamwork, amassing and organizing resources.

Closing Plenary Session:

Barry Mahoney, *President Emeritus, Justice Management Institute*

Laurie O. Robinson, *Senior Fellow, Jerry Lee Center of Criminology, University of Pennsylvania*

- Brief reports by team designees on key features of action plans to be undertaken by the jurisdiction.

Interspersed with these plenary sessions, were working groups where the teams from each state formulated action plans to prevent wrongful convictions in their jurisdictions. Sessions were also held where conferees with similar professional positions met to discuss relevant issues. For example, all prosecutors met as a group, as did defense attorneys.

IV. Overview of conference events/sessions

This section of the report offers an overview of the plenary sessions and summarizes the action plans formulated by the individual jurisdictions. The Appendix of the Report contains a complete transcript of the Conference for those interested in reviewing the explicit content of the discussions held at the Conference. The following summary is also cross-referenced to the Appendix to permit readers to review the exact content of various statements made at the conference.

A. Keynote Speaker: Wrongful Convictions -- A National Problem¹

The *National Conference on Preventing the Conviction of Innocent Persons* began in earnest with a motivating keynote speech from former U.S. Attorney General Janet Reno. Gen. Reno addressed the need for emphasis on truth seeking in the criminal justice system. Gen. Reno stated: “the truth, not the conviction, must be at

¹ See Appendix, pp. 4-8.

the forefront of everything we do in the criminal justice system.” Addressing the idea that preventing convictions of innocent persons is a task that has its roots in the way we teach criminal justice system professionals, Gen. Reno noted: “I think the American university system must begin to focus on truth as an ultimate, ultimate goal, truth with disciplines coming together to learn together about how they use the different disciplines of law and medicine and science and communication and service to achieve the truth. We can do so much if we organize our law schools, our universities, to bring [us] together to seek the truth in an effective manner.”

Team members and representatives of national organizations were encouraged to work together both during the Conference and to continue the dialogue with their colleagues post-Conference in order that important changes can continue to be made. Gen. Reno concluded: “It is the future of our criminal justice system; it is the future of our legal system; it is the future of our nation that is at stake, and your work here in these two and a half days will make a profound difference.”

B. Plenary Session I: Potential Targeted Responses to Identified Causes of Wrongful Convictions²

Numerous jurisdictions, both American and foreign, have recognized a need for targeted responses to the causes of wrongful convictions. A panel moderated by Barry Mahoney of the Justice Management Institute addressed role-specific and system-wide issues regarding particular responses including sequential identification procedures, increased training and resources for law enforcement, prosecution, indigent defense, and crime laboratories, and videotaping interrogations.

² See Appendix, pp. 8-28.

Susan Narveson, Administrator, Laboratory Services Bureau of the Phoenix Police Department, responded to questions regarding the role forensic evidence has played in both contributing to convictions of innocents and to preventing such convictions. She noted the importance of presenting forensic evidence in a technically correct, but clear, fashion so that it is understood by juries and judges. As a means of maximizing the potential that scientific evidence will be clearly and correctly understood by decision-makers and that they will be most likely to draw reasonable inferences from such information, Narveson noted that The American Society of Crime Laboratory Directors Laboratory Accreditation Board has accredited “over half of the crime laboratories in the country” and that accreditation includes adoption of standards for the education and experience of personnel qualified to testify in courts. Narveson echoed Ms. Reno’s remarks concerning the importance of training, stating: “we need to recognize that we’re all part of an integrated effort to ensure that we identify the individual who is guilty of a crime – we need to educate investigators, the legal community and the judicial community, and the victims advocates groups on what the current technology is capable of, and also what its limitations are. I think we all need to have a very realistic perspective on exactly what can and cannot be done.”

Regarding the independence of crime labs and challenges to retaining objectivity when crime labs are tied to or fall under the umbrella of another criminal justice agency such as the state police or an attorney general’s office, Narveson noted that crime lab personnel strive for impartiality but that the reality is that they interact with other parties in the system. “It’s a continual back-and-forth or dialogue between the investigators and the courts and the forensic scientists to ensure that we remain –

we retain our objectivity, and yet provide them with the information that they are going to need to further the investigation and to file a case on an individual and hopefully be able to prosecute and successfully convict the right person as opposed to the wrong person.”

Having studied eyewitness identification using scientific principles for the last 25 years, Professor Gary Wells of Iowa State University advocated a very specific method of “collecting” eyewitness evidence in order to maximize such evidence’s reliability. Wells presented a case for using sequential identification procedures with blind testing as a means of preventing eyewitness identification mistakes. Blind testing indicates that the officer administering a line-up should not know who the suspect is. This safeguard removes the possibility that the officer may unconsciously give clues regarding which member of the line-up he or she believes to be the perpetrator. Wells observed: “This is a very interactive process. Detectives are inadvertently, unintentionally influencing witnesses here about their suspicions.”

Wells promoted use of sequential line-up procedures as well. He explained: “the standard lineup procedure is a simultaneous one. What we have learned is that when witnesses view a lineup like this, whether it’s a live lineup or photos, all at once, they tend to simply compare one to the other, decide who looks most like the perpetrator. The problem is, if the perpetrator is not there, they still have a tendency to select someone.” The benefit of viewing suspects’ photos sequentially is that an eyewitness’ tendency to compare suspects decreases, and the likelihood that the witness will only choose the person he or she actually saw increases. Addressing the idea that eyewitness identification procedures are a change that has only been made in

a very few jurisdictions, Wells noted: “these improvements, notice, are largely costless.”

Gil Kerlikowske, Chief of the Seattle Police Department, responded to questions regarding videotaping interrogations and confessions and narrowing an investigation. Chief Kerlikowske noted that the central question for law enforcement regarding use of videotapes is: “does the machine turn on from the moment that the people enter the doorway and begin to discuss this case, or is, in fact, the videotape only done at the time that a person wishes to make or does make a statement about that [the case]?”

Mahoney noted that much has been observed about police investigations that tend “to focus in rapidly on a single suspect.” He sought Kerlikowske’s insight on how law enforcement officials can guard against ruling out viable suspects. Kerlikowske recommended using an independent supervisor who is responsible for determining when investigators need a rest and requiring that investigators pursue all reasonable leads. Such a precaution allows cases to be investigated responsibly and provides protection against what is commonly termed “tunnel vision.”

Hon. Robert Orr, Associate Justice on the North Carolina Supreme Court, detailed the recent formation of an Actual Innocence Commission (Commission) in North Carolina. The Chief Justice of the North Carolina Supreme Court unilaterally formed the commission in response to several cases of exoneration in the state. At the Commission’s first meeting, the group’s immediate goals were articulated: “to avoid convicting the innocent, to more efficiently convict and punish the guilty, and to

increase public confidence in the criminal justice system.” Orr noted: “those goals, I think, do not limit us in what we are going to try and achieve.”

C. Plenary Session II: Finding Common Ground³

The Conference’s second panel discussion intended to get to the heart of the Conference’s focus – teamwork. A panel of criminal justice system participants responded to questions centering on how the groups they represent can work together to understand, address, and change the issues contributing to convictions of innocent persons in a productive way. A legislator, judge, victims’ services representative, prosecutor, criminal defense representative, and law enforcement official focused on how to avoid finger pointing and seek to understand the roles their colleagues play in the system they work in. Moderator Chris Stone of the Vera Institute of Justice opened by asking panelists: “do we have an agreement, even that there’s a problem? And if we don’t, do we need agreement in order to move forward?” Hon. Michael Lawlor, Connecticut State Representative and Chair of the Judiciary Committee, remarked that the way different parties perceive information on convictions of innocents frames the way those parties understand the problem. For example, Lawlor explained that to certain legislators, proposed increased training and standards for law enforcement and prosecutors might be interpreted as a: “proposal to put more obstacles in the way of police and prosecutors doing their jobs.” Lawlor’s comments led to discussion amongst the panelists regarding their recognition that not all criminal justice system professionals agree on the extent and nature of the problem of convictions of innocent persons. Bill Ritter, Jr., Denver District Attorney, remarked that the only sure way to guarantee the absence of wrongful convictions is to have no

³ See Appendix, pp. 28-45.

convictions at all. “I think that in order for the criminal justice system to operate, you have to assume, not just the possibility, but the likelihood that there will be some number of wrongful convictions. But I think it’s an important thing, at least an important concept to think about as we talk about reforms and as we talk about where our common ground can be in deciding how big the problem is.”

As the discussion unfolded, Stone reframed the discussion to focus on whether consensus on the parameters of the problem was necessary to moving forward with systemic improvements and change. Stone asked: “how much common ground or common definition of the problem do you need to create, if you’re going to start working together in a jurisdiction to deal with these things?” Hon. Andre Davis, United States District Court, Maryland, responded: “One of the beneficial aspects of this endeavor is that you really don’t have to decide or come to agreement on how big the problem is before you are absolutely convinced that something needs to be done about it.

Stone asked the panel to consider whether there were specific courthouse cultures or office cultures that may contribute to wrongful convictions – cultures that may need to be addressed. John Stookey, a criminal defense attorney, noted that in a study of capital cases in Arizona since 1975, ineffective assistance of counsel was found to be a factor in reversals in every case. He noted: “certainly an aspect of the wrongful conviction problem is not simply what goes on with regard to the police in the investigation stage, but it is what goes on once somebody has been charged with an offense and goes to trial and whether this system is adequately prepared to be able to give that person the kind of justice that we all believe is appropriate.” Ritter noted

that one way to guard against problematic office cultures is to set the tone or ethic of the office beginning with the interviewing process, so that new hires understand the level of professionalism that is expected of them.

Gerald P. Richard, II, Director of Legal Support, Phoenix Police Department, remarked on the importance of forming and maintaining relationships across professional boundaries in the criminal justice system. He commented: “by us all coming here together today, what it says is that none of us want to do that to one another. If someone is going to take the heat for a wrongful conviction, then we all sit at the table together, and we say that it broke down somewhere along the system, but no one agency, one political figure, one chief, one victim, one judge, will take the heat for all of it, because somewhere in the system, there was a problem.

D. Plenary Session III: Learning From Mistakes—Models of Investigation⁴

Professor Laurie Levenson chaired the third plenary session and described its purpose as “thinking outside the box...” “We’re thinking and proposing models outside of the traditional American criminal justice system of appeals and collateral attacks, although we will make comparisons with those. Rather we are looking at other models of investigation and remedying wrongful convictions.” Specifically the panel explored the investigation of wrongful convictions by Canadian Commissions of Inquiry, the British Criminal Case Review Commission, and the Office of Professional Accountability of the Seattle Police Department.

Justice Michel Proulx of the Court of Appeals of Quebec, discussed the Canadian Commissions of Inquiry. Such commissions are appointed by the relevant

⁴ See Appendix, pp. 46-73.

provincial governments to investigate the causes of specific examples of wrongful convictions. The investigations are then used to make recommendations about how such occurrences might be prevented in the future. The commissions also sometimes consider whether the person wrongfully convicted should be entitled to financial compensation.

Commissions of Inquiry are not appointed to determine if a wrongful conviction has occurred. Rather they are appointed only after a determination has already been made that such a conviction has occurred. Commissioners are not members of the legislature or Parliament; they are presided over by an independent person, either a sitting or retired judge.

The commission hearings are public and divided into two stages. The first is a fact-finding stage, where subpoenas can be issued and witnesses are heard. In the second stage the commission investigates systemic issues to devise recommendations for the future and focuses on organizational and social, as opposed to individual accountability, and may include policy studies by academics and practitioners.

David Kyle, who is a member of the United Kingdom Criminal Cases Review Commission (“CCRC”), next discussed his agency’s role in remedying and preventing wrongful convictions. The Commission reviews cases where there have already been convictions and where the convicted person has already exercised his ordinary right of appeal and failed. Unlike the Canadian Commissions of Inquiry which only investigate cases where a wrongful conviction has already been demonstrated, the CCRC is empowered to review cases of potential miscarriages of justice. If the CCRC

concludes based on new evidence that there may have been a miscarriage it can then refer it back into the legal system for further proceedings.

Discussion of the CCRC included commentary by various participants that this model appeared similar in some ways to post conviction relief in the United States, but with significantly less of the procedural barriers that characterize the American alternative.

The panel discussion also included consideration of other types of models for review of wrongful convictions. For example, mention was made of the model proffered by Barry Scheck and his colleagues, which is patterned after the National Transportation Safety Board. Under this approach, a wrongful conviction would be considered a significant public policy event, much like a plane or train crash. Investigators would be immediately sent in to understand why the “accident” occurred and what could be done to prevent similar occurrences in the future.

The Conference then heard from Sam Pailca of the Seattle Police Department, who spoke about a more focused attempt to investigate and prevent wrongful convictions. The Accountability Office of Seattle P.D. was described as “the first line of defense in preventing wrongful convictions.” That first line consists of an internal procedure within the police department that calls for an investigation of police practices and procedures when there is a citizen complaint of wrongdoing. Such complaints include those that an innocent person has been arrested or investigated.

The Seattle model was used to demonstrate that investigations of wrongful convictions can be done either at a system level, like those in Canada and England, or by the individual agencies that are involved in the investigation. Indeed there is

nothing mutually inconsistent about the approaches, and jurisdictions might consider either or both as an option to evaluating non-traditional means of preventing wrongful convictions.

E. Plenary Sessions IV and V: Systemic Costs of Convicting Innocent Persons and Cost-Benefit Analysis⁵

Thomas Sullivan, Co-Chair of the Illinois Governor’s Commission on Capital Punishment, delivered a keynote address focusing on the systemic costs of convicting innocent persons. Sullivan noted that wrongful convictions in death penalty cases are more likely to be found than any such convictions in non-death cases. “These other cases don’t get the kind of post-conviction scrutiny that death cases do. They are not publicized. People go to jail and they do their time.”

Sullivan discussed the damage that confirmatory bias does during investigations and prosecutions. Defining the problem, Sullivan called for conferees to address the issue: “once we conclude that a particular person is the culprit, we seek evidence to support that conclusion. And we tend to try to explain away evidence that leads away from that conclusion.” Sullivan moved on to detail Illinois’ Ford Heights Four cases involving the wrongful conviction of four men for rape and murder. The men were exonerated largely as a result of the investigative efforts of journalism students from Northwestern University. Sullivan noted the role confirmatory bias played in these convictions, highlighting an interview taken within six days of the crime that revealed the identities of the actual perpetrators. Despite the ultimate revelation of the interview’s accuracy, confirmatory bias contributed to the conviction of the Ford Heights Four as those involved in the case quickly became convinced that

⁵ See Appendix, pp. 73-104.

the correct perpetrators were in custody. Ultimately, the Ford Heights Four received a settlement of over \$35 million to compensate for their wrongful conviction.

Sullivan also used the Ford Heights Four cases to highlight some of the systemic costs of wrongful convictions. He noted that there were costs involved in the loss of liberty of the exonerees; the freedom of the unpunished actual perpetrators, one of whom committed another murder before the erroneous convictions were revealed; the monetary losses incurred for imprisoning the wrong men; and the large settlement to the exonerees. Sullivan moved on to address the damage done to victims and their families when the wrong person is convicted. He remarked that sometimes victims and their families are unable to accept the fact that the wrong person was convicted and feel betrayed by an exoneration. Conversely, victims and their families who are able to accept an exoneration still suffer from the knowledge that an innocent person was punished for the crime they suffered and that the perpetrator continued to enjoy freedom and potentially commit further crimes against other victims and their families.

Sullivan also discussed some more intangible costs of such convictions, for example, the resulting tension that can damage community and racial relations and working relationships among criminal justice system professionals. “There is a tremendous loss of public confidence in the system when it is demonstrated that there have been wrongful convictions of innocent people. Police, prosecutors, defense lawyers, the courts all end up diminished in the public eye as a result of these exonerations...”

Following Sullivan’s keynote remarks, a panel convened to highlight specific actions taken in response to convictions of innocents and proposed actions. Richard Wolson, Sophonow Inquiry Commission Counsel, described the inquiry into the wrongful conviction of Thomas Sophonow in Winnipeg, Manitoba, Canada. Wolson explained that in Canada, three inquiries have been conducted to examine three separate cases of wrongful conviction. “The inquiries were called to examine the causes of the wrongful conviction in each of those cases, but more importantly the systemic issues.” Wolson noted that the inquiry had subpoena power and that as commission counsel, he called and examined many witnesses. Wolson concluded by summarizing some of the recommendations in the Sophonow Inquiry report, including discontinuing use of jail house informant testimony and the initiation of sequential identification procedures.

John Farmer, former New Jersey Attorney General, detailed his experience deciding to mandate sequential identification procedures for all of New Jersey and implementing that decision. Farmer described how his peripheral involvement in a case of wrongful conviction coupled with his review years later of the National Institute of Justice report “Convicted by Juries, Exonerated by Science,” prompted him to investigate using sequential identification procedures in New Jersey as a way of proactively responding to the potential for wrongful convictions that mistaken eyewitness identifications hold. Farmer highlighted prosecutors’ concerns about the effect of a blanket move to sequential identification procedures on existing convictions and pending cases as well as police concerns over sufficient manpower to cover the blind testing. New Jersey’s policy of giving the Attorney General plenary law

enforcement authority allowed Farmer to require all police departments to implement sequential identification procedures.

Barry Scheck presented the idea that each state institute an inquiry commission modeled after the National Transportation Safety Board (NTSB) that would investigate cases of actual innocence. As with the NTSB, such a body would be independent, and would make non-mandatory recommendations for systemic change based on its findings in each case. Scheck also likened the anticipated work of such a body to that of inspector generals. In the interest of proposing cost efficient ways to pursue such commissions, Scheck suggested universities as locations for those bodies.

F. Plenary Session VI: Political Concerns⁶

Northwestern University Law School Professor Dawn Clark Netsch, who is also Chair of the Board of the American Judicature Society, chaired the session on the politics of reform. She described the political problems associated with trying to prevent wrongful convictions, while ensuring that the guilty are convicted, in a way that is cost-effective. The panel members each talked about reforms that they had been involved with in their states and the politics of that reform and morals that could be learned from them.

Mr. Virgil Smith, Chief of Legislative and Community Relations for the Wayne County, Michigan Prosecuting Attorneys Office, discussed the significant problem of inadequately funded indigent defense and the difficulty of getting political support for such expenditures. Mr. Smith reaffirmed what has been found nationally; that ineffective assistance of counsel, often borne of inadequate resources, is one of the primary causes of wrongful convictions. He also pointed out, however, that

⁶ See Appendix, pp. 104-121.

adequate funding for indigent defense is a cause without a constituency and, therefore, is difficult to achieve politically.

Michael Lawlor, a representative in the Connecticut Legislature, talked about changes in laws that lead to unintended consequences, particularly a mandatory sentencing law for drug offenses near a school. Mr. Lawlor's point was that legislation that appears to be tough on crime and politically popular, often has unintended consequences that increase injustice in the system and increase the chances of wrongful convictions. He discussed how such initiatives may be opposed successfully even in light of their political appeal.

John Farmer, former Attorney General of New Jersey, re-emphasized that there is no natural constituency for reforms that are perceived to benefit criminal defendants. He discussed the reform of identification procedures in New Jersey. His key strategic advice based on his experiences was that "I think the key to bringing reform to bear is to make law enforcement see that it will help them in that process of trying to discover the truth." Mr. Farmer indicated that this realization would help facilitate some reforms, but would be extremely detrimental to others. "With respect to specific reforms that are mentioned like the use of snitches and jail house informants, I think it would be impossible to get law enforcement to go along with anything on those lines, when they can point to cases like the Manson case where the jail house snitch was actually the break in the case."

A lively discussion of the politics of wrongful conviction reform was interspersed with and followed the presentations.

G. Closing Plenary Session: Action Plans⁷

Based on the problems unique to their jurisdictions, the team members' personal professional experience and the information presented at the Conference, each team formulated a strategic plan to implement the cooperative model in their location. These plans were presented at the closing plenary session.

The goals for the various jurisdictions were diverse but primarily fell into five categories:

1. Improving Police Procedures

Seven of the eleven jurisdictions indicated in some form that one of their goals was to improve police investigation techniques that would decrease the chances of error and wrongful convictions. These goals primarily focused on discussions at the Conference, including sequential line-up, double blind procedures for show-ups; and audio and/or video taping of interrogations.

2. Improving DNA Database and Analysis Capabilities

Many of the jurisdictions also set as a goal legislative attempts to improve DNA capability. The general consensus was that expanding DNA capabilities would decrease the chances of wrongful convictions, while increasing the conviction of the truly guilty.

Recommendations included increases in the size of the DNA data base by ensuring that all those convicted of felonies are included in the data. Some jurisdictions were concerned about the backlog in analysis of DNA and the need for additional resources and staff to reduce that backlog and stay current.

⁷ See Appendix, pp. 121-149.

3. Enhanced Defense Counsel Funding and Training

Various jurisdictions established as one of their goals increased funding and training of indigent defense counsel. These recommendations reflect the growing consensus that inadequate funding and burdensome workloads by defense counsel is one of the major causes of wrongful convictions.

4. Expand Education

Every jurisdiction in some form set as a goal increased education for police, prosecutors, defense attorneys and judges. Several jurisdictions proposed expanding the educational efforts to legislators, the public and the media, as well. The general idea was that wrongful convictions will only be reduced if relevant decision-makers and groups understand the problem and potential ways to address them. Similarly, education is a necessary part of having sufficient political support to take meaningful steps.

5. Increased Understanding of the Problem and Its Solutions

Several states proposed that they needed a study of the level of wrongful convictions in their jurisdiction in order to understand the magnitude of the problem and to convince local decision-makers that this is not simply a problem that “others” have.

These proposal were two types. First, were recommendations for study commissions like that in North Carolina or Illinois to identify the extent of the problem. Second, others suggested review commissions patterned after the National Transportation Safety Board, Canadian Commission of Inquiry or the United

Kingdom's Criminal Cases Review Commission to identify the causes of wrongful convictions and suggest remedies.

6. Specific Proposals

Some of the specific team goals were as follows:

- Address compensation issues for all involved in the criminal justice system, but in particular indigent criminal defense attorneys. (Michigan Team)
- Improve photographic line-up process and take steps to improve the show up procedure. (Hennepin County, Minnesota)
- Change in Police Procedure (Pilot Project)—Double Blind Sequential line-ups; continuous video audio recording (San Diego)
- Establish an on-going dialogue within the law enforcement community to discuss videotaping, identification process and other procedures that might improve the process. (Massachusetts)
- Create a Criminal Justice Study Commission (Wisconsin)
- Create a pilot project for eyewitnesses ID reform in the Madison Police Department (Wisconsin)
- Establish an Innocence Review Commission (Arizona)
- Education and training for Police, Prosecution, Public Defenders, and Judges concerning wrongful convictions (Colorado Team)

- Study commission to look at causes of wrongful convictions
(Texas Team)

V. Going Forward

The purpose of the Conference was both to motivate the teams present to take significant steps to address the problem of wrongful convictions, but also to provide a blueprint of how other states might address the problem. This section of the report attempts to take the issues raised and the discussions had at the Conference and formulate them into a series of recommendations for jurisdictions wishing to reduce wrongful convictions.

A. Some Starting Principles for Any Attempt to Address the Wrongful Conviction Issue

1. Wrongful convictions are a local problem

Former Speaker of the House, Tip O’Neil, always reminded us that “All politics is local.” The Conference heard repeatedly in differing ways that the issue of wrongful convictions is also always local. National studies about the level and significance of the problem, do not convince decision-makers and citizens that there is a problem in their own area.

Recognizing this, many state teams at the Conference said that one of the first steps to addressing this problem must be some type of proof that the problem does in fact exist in their area. This might be a study commission, as suggested by some states, or possibly some coverage of the problem by the media. In either case, however, there must be evidence that the problem is more extensive than one or two “aberrations” in order to motivate concern and action.

2. The need for a team

Every jurisdiction at the Conference recognized that the problem of wrongful convictions can only be addressed through a team of all stakeholders. This means police, prosecutors, defense attorneys, judges, legislators, media, and victims rights groups must be brought together to have a chance to deal with this issue. Each of the teams provided a resounding endorsement of the cooperative approach upon which the Conference was founded.

3. Start small

All of the teams discussed the need to take small steps and build the momentum. Trying to accomplish too much at one time will only be destructive of the team harmony and political support necessary to make meaningful policy changes.

4. Money, money, money

The teams repeatedly discussed the importance of money to any attempt to prevent wrongful convictions. First, it was continually noted that any proposal that is going to cost large sums of money is likely to fail in the current money strapped states. Conversely, one of the most effective ways to advance a proposal is to demonstrate that it will lead to reduced costs or at least be cost neutral.

5. There is no constituency for this type of change

Related to all of the issues above, many conference speakers reminded participants that preventing wrongful convictions is not going to have a natural constituency. Any success requires broad based support from across the spectrums of stakeholders and politics.

B. Education as a Prerequisite to Reform

All of the Conference teams emphasized that the key to reform is education. At least three different types of education were emphasized as necessary in any community seeking to prevent wrongful convictions: (1) there are wrongful convictions in your area; (2) there are identifiable causes for the wrongful convictions; and (3) at least some of these causes can be eliminated or at least reduced by focused reforms. The Conference discussion provided at least the outline of how each of these educational steps might be accomplished.

1. There are wrongful convictions in your area

Participants at the conference heard about and discussed a variety of ways to educate criminal justice system participants and the public about the problem of wrongful convictions in their area. Particular attention was given to studies of this issue in various states, such as North Carolina, Illinois, and Arizona. Only with an adequate knowledge base about the scope of the problem in a particular community, can education about particular reforms begin.

2. The Causes of wrongful convictions

The Conference participants also discussed the importance of education which identifies how and why wrongful convictions occur. One way of providing such education, that is implied by the conference presentations and that seems particularly useful, is to educate people about why the adversary system that we have all been taught to believe ensures the finding of the truth, does not always do that. This education might be structured in terms of prevalent myths of the American adversary system.

a. The myth of equal combatants

The adversary system assumes that vigorous and equal combat between the prosecution and the defense will ensure fair and appropriate outcomes and, therefore, prevent wrongful convictions. The participants at the Conference repeatedly heard about and reported instances where such equality did not exist. Particularly significant according to the discussion is the underfunding and overwork of the defense community in nearly every jurisdiction in the country. For example, several jurisdictions noted that the most common reason for cases to be overturned in their states was ineffective assistance of counsel. Although there are certainly stories of sleeping lawyers, the real story told was not the lack of ability or commitment by the defense community, but the lack of time and resources.

b. The myth that a full and fair investigation of crimes informs the adversarial process

The second myth is that the adversary system resolves disputes based upon all of the evidence that is relevant to the crime. This issue was particularly discussed in the context of what has been dubbed “confirmatory bias.” Confirmatory bias occurs when an individual forms an assumption or hypothesis about what has happened and then begins to only focus on evidence that supports that assumption; ignoring any fact that does not. Examples were given that showed totally incomplete and inadequate police investigations that resulted from the investigating officer’s early conclusion that a particular person was the likely offender and the subsequent disregard for any facts that might be inconsistent with that conclusion.

c. The myth that the adversary system will test witness credibility and, therefore ensure that the jury obtains a correct picture of what evidence is relevant and valid

When working as portrayed in idealistic descriptions, the adversary system trusts the judgment of witness credibility to a jury of peers. However, the Conference participants repeatedly heard that the jury is often not effective in determining whether testimony is truthful and valid.

The first example of this problem is really not an indictment of the jury system, but a reflection of human frailty. One of the most powerful forms of witness testimony in a criminal case is the account of the eyewitness. However research presented at the Conference demonstrates the prevalent fallibility of eyewitness testimony. Eyewitnesses are often convinced they have identified the correct person and convey to the jury that degree of certitude, even though in reality they are mistaken.

Other witnesses that are often given great credibility by a jury, when in fact the information provided is flawed, are “experts.” So called “junk science” has infected the legal system in many regards and the cross examination process has not been effective in preventing jurors from relying upon it, the Conference attendees heard.

Informant and co-defendant testimony was also highlighted as a source of wrongful conviction. Although these witnesses, who have a motive to provide any story necessary to advance their own case, may be cross-examined, the reported research shows that prosecutors and juries continue to rely upon their conclusions in many cases, thereby contributing to the wrongful conviction problem.

d. The myth that only the guilty confess

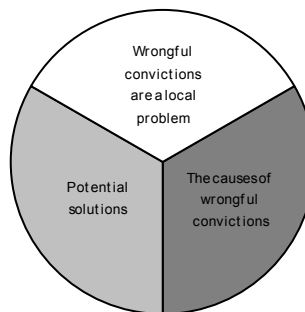
Perhaps most surprising to the lay observer is the consistent finding, discussed at the Conference, that one leading cause of wrongful convictions is false confession. The causes of such confessions range from psychological issues associated with the suspect to coercion, both physical and mental, by investigators.

3. Reforms

Education about potential reforms seems best structured around the experiences of other jurisdictions, or indeed other countries. This premise informed the wrongful conviction conference – cross-fertilization of ideas and experiences with what works and what does not work is crucial to the education process.

In thinking about potential reforms, the Conference discussion suggests a continuum from very specific reforms to system reforms. For example, at the specific end of the continuum were reforms such as sequential lineups and taping of interrogation. At the systemic end of the continuum were commissions such as those used in Canada, England or the National Transportation Safety Board.

Putting these aspects together, the conference suggests an education agenda for any interested jurisdiction that includes the following:



C. A Continuing Role for the American Judicature Society.

Participants were uniform in their praise for the Conference. They were also uniform in their support for a continuing role for AJS in attempts to prevent wrongful convictions. The exact shape and contours of that involvement will evolve over time. However, two interrelated continuing roles for AJS seem particularly evident from the proceedings.

1. Facilitating the State Planning Process.

As this report reflects, the consensus is that the major steps toward criminal justice reform to prevent wrongful convictions are local. However, as the conference demonstrated, a coordinated national effort to facilitate and encourage such efforts appears necessary. Resulting from such a national initiative would be the sharing of knowledge and encouragement of continuing local efforts.

This role could be played by further conferences, but other approaches are worth exploring as well. The AJS listserv established during the planning phase of this project should continue to serve this need. In addition, a website designed to provide useful information to states and decision-makers seeking to address this issue would be useful. While there are very good websites on wrongful convictions, there do not appear to be any that focus specifically upon seeking to facilitate and inform local efforts to explore policy reform in that area. Another aspects of such a website might be ongoing updates about what individual states or locations are doing in this regard. This would provide other states with insights into not only what appears to be working and not working, but also the political, economic, and social hurdles that are being encountered by other states.

2. The Need to Continue to Focus on Seeking Truth in the Justice System.

General Reno's keynote address included an impassioned call to the universities of the United States to join in the effort to reduce wrongful convictions. Specifically, she said that "We can do so much if we organize our law schools, our universities, to bring together to seek the truth [in the criminal justice system] in an effective manner." General Reno's vision is a university setting where ideas are exchanged, research conducted, and education provided about how to shift the American legal system away from a system motivated by "the win" toward one motivated by achievement of "the truth." This idea caught the attention of many at the Conference because it was so clearly needed and because it conceptualized the problem in a way that united, rather than divided, the stakeholders. The accomplishment of truth is a shared goal of prosecutors, defense attorneys, victims, legislators, law enforcement, judges, and the general public.

CONCLUSION

The National Conference on Preventing the Conviction of Innocent Persons allowed for teams from all over the country to engage in an exciting and productive interchange of ideas about how to prevent wrongful convictions. More importantly, however, the conference laid the groundwork for experimentation with a series of significant reforms across the country. Indeed, the ultimate success of the Conference will turn on the extent to which such reforms are tried and are successful.

Although each reform effort is necessarily local, the National Conference has shown the utility and importance of coordinated efforts and cooperation. The

American Judicature Society remains committed to fostering that cooperation and facilitating the implementation of meaningful reform. In that regard, it seems appropriate to end this overview of the Conference, where it began. Although participants came from diverse points of view and did not necessarily agree on all aspects about the level, causes, and solutions to wrongful convictions, there was a consensus in support of General Reno's call to action:

“The truth, not the conviction, must be at the forefront of everything we do in the criminal justice system.”