

TRANSCRIPT OF
NATIONAL CONFERENCE ON PREVENTING
THE CONVICTION OF INNOCENT PERSONS

JANUARY 17 -19, 2003

APPENDIX TO CONFERENCE REPORT

CONVENED BY:
AMERICAN JUDICATURE SOCIETY

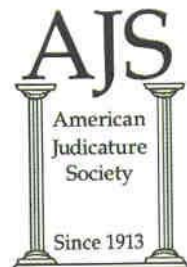


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* This transcript has been edited for consistency and clarity and does not necessarily reflect the exact words of the speakers. However, the editing has been done while trying to maintain as closely as possible the words and meaning expressed at the conference.

PROCEEDINGS

January 17, 2003
MORNING SESSION

(8:35 a.m.)

MR. SOBEL (Presiding): Good morning. I'm Allan Sobel, the Executive Director of the American Judicature Society. Welcome to the American Judicature Society Conference on Preventing the Conviction of Innocent Persons. We are thrilled to hold this conference, thankful that the Open Society Institute has provided the necessary funds to make this conference possible, and honored and privileged to have you here with us.

When I look out into this gathering, I see the diversity that is so important to the work of AJS and the success of this conference. I see the faces of prosecutors, law enforcement officials, judges, defense attorneys, crime victims' services providers, scientists working in forensic laboratories, and legislators. Preventing the conviction of innocent persons is a tall order. Any success requires, above all, a commitment from people like you, a commitment to work together cooperatively and respectfully with all interested parties in your jurisdiction. There is no place for finger-pointing. AJS will be forever indebted to you. This conference would not be possible without your sense of responsibility, full acceptance of your role as a team member, willingness to go about your job constructively to achieve higher standards for our criminal justice system, and willingness to devote your valuable time and energy to the common good. Even with such a commitment, the task is not easy. The causes of such convictions must be identified. All possible system reforms must be considered. There is no one-size-fits-all solution. Decisions must be made about what reforms are practical and realistic in your jurisdiction, and a strategy developed to secure those reforms. This conference will help you perform those tasks.

This is the first experience that many of you have had with the American Judicature Society. AJS was founded on July 15, 1913, by Herbert Harley, a law-trained, small-town newspaper editor from Michigan. Harley secured support from prominent members of the Bench and Bar, based on his vision of a nationwide court improvement organization that would welcome participation by all members of society. Harley also secured substantial support from Charles Ruggles, a lumberman from Michigan who had just lost a major case and felt inclined to fund an organization that would work to level the playing fields for all litigants in court.

From the outset, AJS was conceived as a reform and educational organization rather than a professional association. In its first five years of existence, the efforts of AJS led to major court reforms, including court unification; merit selection of judges, now commonly referred to as the Missouri Plan; and model rules of civil procedure, which ultimately led to the adoption of the Federal Rules of Civil Procedure. In 1940, Roscoe Pound observed that the American Judicature Society has been behind every significant advance in judicial organization and procedure for a generation. Over the years, AJS has held many national conferences to address emerging issues. On the subject of judicial selection alone, AJS has held more than 175 citizens conferences across the country.

More recently, AJS has held national conferences that examined such topics as sentencing guidelines, the future of our courts, the American jury, responses to the impact of pro

se litigation, and federal judicial selection. 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. In that way, AJS is able to tackle hard issues that others either avoid or cannot address credibly, and AJS is able to act as a catalyst for major judicial reform. This is precisely why AJS is the right organization to hold this conference. 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.

As one AJS founder recently stated, if there was no AJS, an AJS would have to be created. I am confident that – because of our ability to deal with issues such as the wrongful conviction of innocent persons evenhandedly, fairly, and impartially – the founder in this case decided to grant the necessary funds to our organization to convene this conference.

The person I am about to present to you, Larry Hammond, is a great example of how one person in the world of AJS can make a great difference. Larry is an AJS Vice President, a member of our Executive Committee, and the Chair of both the AJS Criminal Justice Reform Committee and the Planning Committee for this conference. He practices law with Osborn Maledon in Phoenix. After earning his JD from the University of Texas, Larry clerked for Justices Hugo Black and Lewis Powell, served in government as an Assistant Special Prosecutor for the Watergate Prosecution Task Force, and later as Deputy Assistant Attorney General, and he has authored numerous articles and lectured widely on criminal justice system issues. Larry's vision ultimately led to this conference. Before I arrived at AJS in April of 2000, Larry was already the Chair of the Criminal Justice Reform Committee. Under Larry's leadership, prior to April of 2000, that Committee recommended to the Executive Committee of our organization that AJS convene a conference such as this one, addressing the issues relating to the wrongful conviction of innocent persons.

When I arrived at AJS on April 1, 2000, there was sitting on my desk a memorandum authored by Larry, on behalf of his Committee, recommending that we obtain the necessary funds to convene a conference such as this and move forward. Larry nurtured his idea with the Executive Committee, and we were fortunately able to obtain the necessary funding from the Open Society Institute so that Larry's vision could become a reality. Larry? (Applause.)

MR. HAMMOND: Good morning to you all. I'm going to take just a moment to give you a little overview of how we got to where we are today. This conference was born of a very simple proposition, a proposition that became undisputable with the advent of DNA exonerations. It became evident to many of us that the debate was changing. No longer were people asking whether innocent people were convicted of crimes they did not commit. Rather, the question had become “what can we do about it?” And out of that very simple observation came the roots of a conference of this type. But it would be terribly misleading to say that the ideas that started us have not matured and developed in an extraordinary way over the last three or four years. The approach that is being utilized for this conference, I must tell you, at least in my experience and the experience of other people who have been involved in this planning, must truly be unique in several ways:

First of all, there was tremendous planning that has gone into this conference, beginning with a series of nationwide interviews conducted by Dr. Barry Mahoney, who you will meet a little bit later this morning, followed up by a series of, as some of you know, intense focus group sessions around the country – in Illinois, in Arizona, San Diego, California – to attempt to look at some of these issues and to see how best to formulate them. Out of those communications came the idea that this conference should be one that, first of all, is kept reasonably small and by invitation only to individuals who would come to us as teams, if you will. We now have teams here in this room from different states. Those teams – and you'll see a list of them in your materials – are remarkable. Each one is composed of individuals who represent all facets of the criminal justice system – judges, defense lawyers, prosecutors, victims advocates, legislators, people with extraordinary scientific knowledge, law enforcement. We think that bringing that diversity is what is essential to make this conference work. And the goal of this conference, unlike so many that all of us have attended, is that it should be the beginning of thought and not the end of it. The idea here, the animating principle, if you will, is that action must come out of a conference of this type. We hope that each of the teams will look hard at the unique situations in their own jurisdictions and will be asking the questions: What can we do in our state; what are our particular circumstances, and how best can we deal with those? You will be hearing and seeing a great deal of information from a variety of sources about things that are being done in other states. You'll hear about things that are being done in other countries but not done in this country yet. And from those, we hope that you will all begin to see, as we are, that there are great things that can be done so that, eventually, we will all be able to say that we have taken a good hard-edged look and have taken action on undertaking things that will reduce the possibility that people can be convicted of crimes that they did not commit.

We also are very fortunate here to have a group of individuals who are not team members, but are representatives of a variety of organizations. There's a list of them on the first page of the materials and the notebook. I won't read the entire list, but I urge you to take a look at it. We have received support and encouragement and great ideas from a wide, wide variety of organizations from around the country, and we have urged them to come and observe this conference and give us their thoughts, as well, as we go along; to serve as a continuing resource for us. So the basic idea of this conference, as you will see it unfold, is that it will have sessions of this type, and then there will be liberal opportunities for the teams to meet and to work on the kinds of particular topics that we hope will provide the foundation for future action. Again, thank you all for joining us. You will find that this is a very busy, action-packed conference, and one that I hope will be profitable for all of us. (Applause.)

MR. SOBEL: In 1996, the National Institute of Justice issued the research report, "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial." The report detailed 28 case studies in which a convicted defendant, serving time in prison, was exonerated by DNA technology. In response to the report, the Attorney General of the United States requested that NIJ establish a national commission to study and recommend steps that should be taken to maximize the value of DNA in the criminal justice system. When the Commission ultimately made its recommendations, they were enthusiastically supported by the Attorney General. When announcing her support, Attorney General Janet Reno stated: "The vigilant search for truth is the hallmark of our criminal justice system. Our methods of investigation, rules of criminal procedure, and appellate process are

designed to ensure that the guilty are apprehended and convicted, while the innocent are protected. But while ours is a system to be cherished, it is not a perfect system, and those of us charged with the administration of justice have a responsibility to seek its continued improvement."

Janet Reno hardly needs an introduction, here or anywhere. Janet graduated from Cornell University with a degree in Chemistry, and then Harvard Law School. Her law career has largely been devoted to public service. Janet was appointed Dade County, Florida's State's Attorney in 1978, elected later that year and overwhelmingly reelected four more times. When President Clinton nominated her to be the 78th Attorney General of the United States in 1993, she became the first woman to hold that position. Janet took office on March 12, 1993, and was the longest-serving Attorney General since before the Civil War. During her term of office, Janet Reno stood for protection of the innocent and following strict principles of due process and fair play in the prosecution and conviction of the guilty. It is my great honor to present to you the former Attorney General of the United States, Janet Reno. (Applause.)

Keynote Speaker

MS. RENO: Thank you all so very much, and thank you for the privilege of being here with you today. I want to congratulate the American Judicature Society, because I think these efforts in these next two days is probably one of the most critically important efforts undertaken in law reform that has happened during my lifetime, or at least during my time in the practice of law. We have seen the facts now. In 30 years, over 100 people have been exonerated because of DNA or other true tests. That is far too many, and yet people say the system protected them. The work that has been done in preparation for this conference makes clear that sometimes it's not been the system; it has been a fortuitous circumstance that borders on being a miracle. And when we see what DNA has done where DNA is available, just think of how many cases of third-degree felonies where people are serving five years in prison, how many misdemeanor cases where people are serving a year in prison, exist but have not the check-and-balance of science. I think this information that we have received over these last years make it absolutely, compellingly and urgently needed that we must proceed to look at how we can prevent the conviction of innocent people. I want to salute those who did the research for so long and were told that risk of error didn't warrant much discussion. You were right, and thank you for leading the way.

But there is something more to inspire us today than just numbers. I do not know how many in this room were at the Warner Theater last night, but the play "Exonerated" was put on for the benefit of the Innocents Project. And, ladies and gentlemen, it is one of the most compelling, powerful pieces of theater that I have seen, again, in my life. It is a story, a true story, of six people who have been exonerated, five men and one woman. What is so powerful is that it is on the words, whenever possible, of the transcripts themselves and of the statements themselves. What is extraordinarily compelling is that you understand how somebody gets confused and then just lets the system overwhelm them. We have got to look at the human terms. And that's why I can tell you so clearly today that it is not just a critical problem, but it is a real problem – a real problem in terms of human beings who were convicted and spent time in jail. After the play, five people – five men, three exonerated from a death penalty from death

row and two other exonerees – were there to tell us what their experience had been. As I walked out of the theater, a man introduced himself, he and his wife – his wife, who had stood with him while he was in prison, convicted and sentenced to death for the death of a nine-year old girl. And standing as I walked with him out the aisle of the theater, I wanted to reach over and just touch him and say, “thank you for surviving, and thank you for coming and making the problem real for us all.”

In some instances, though, it is not exoneration, but it is a spotlight on the problems of the system. The Governor of Florida, when I served as State Attorney, asked me to be a special prosecutor and go reinvestigate the case of a man who had been prosecuted, convicted, and sentenced to death for the poisoning death of his seven children 22 years before. He had spent 22 years in prison with his death penalty having been set aside. He was as close as you are to me for all that day in the court as we presented our findings – that, with the death and incapacity of witnesses, we could not tell exactly what happened, but that he was probably innocent. There had never been sufficient evidence to charge him in the first place, and he should go free. For as long as I can remember anything, I will remember James Joseph Richardson walking out of that courtroom, free for the first time in years. And, ladies and gentlemen, with those men last night, with that theater last night, with James Richardson, it is absolutely imperative that we understand the beauty of the human spirit, the ability to cope, to live through this, to come out of it whole, to come out of it angry but constructive. We owe these people so very much.

I want to salute the teams that are here today. I know so many of you have tremendous caseloads, tremendous issues, tremendous legislative agendas; and to come to a program like this, to participate in the planning, to do all that goes into working to make such a marvelously planned conference a reality, takes an awful lot of time. And I salute your dedication and your commitment to justice and to the truth. You can have a powerful impact by what you do these two days. You can have a powerful impact in the message that goes out in your jurisdiction, in neighboring jurisdictions, in your state. And it can become a domino effect, one to the next, as you communicate what you have learned here, what you have developed here in terms of planning. It is so important, and the reason it is important: If the public's confidence in the results of the criminal justice system erode, then the public will not accept the criminal justice system's findings and results, and that leads to a system, a legal system, that is not the one we have known all of our lives. I think the findings are sufficiently grave in terms of the mistakes the system has made, that we must renew our efforts. This goes not just to the criminal justice system. If the criminal justice system, with its burden of proof, with its concentration of investigative power, makes mistakes like this, think of what the civil legal system does. If the civil legal system makes mistakes on the order of the criminal justice system, think of what problem-solving lawyers, what mistakes they make. I think we have got to renew our efforts to find the truth. And what we do with the criminal justice system, which is the hallmark of the legal system for so many Americans looking in from the outside, will make a profound difference for this century. So I thank you for your undertaking, but there is much more to do, because we've got to convince people.

I just am so proud to see victims advocates here, because so many have got to realize, as they do, that what we need is finality, but accurate finality based on the truth. As much as people are concerned about the conviction of innocent people, they are also concerned about finality in

the system. And unless we do it right, up front, we will never get it right at the end in the long run. State legislators will ask about dollars, but if you look at the monies spent on post-conviction proceedings, we have got to understand that the work that you all will do here in explaining and showing what can happen if we do it right, up front, it can make a difference. And, finally, victims know better than anybody else that they don't want the person who did the crime to be on the street, and if we have made a mistake, somebody else is on the street. We have got to be able to explain it to other legislative committees, to other legislators, to members of the media, to victims groups in our communities. We have got to put it in human terms. But it becomes important that we look in a collegial way, as Allan said, not in a finger-pointing way, but we need to chart a path to a more accurate way to seek justice.

I love to walk around Washington. Not on nights like last night, but in the evenings, particularly, and walk, for example, into the Jefferson Memorial. One of the writings that I love in the memorial is, "I am not an advocate for frequent changes in laws and institutions, but laws and institutions must go hand-in-hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change with the change of circumstances, institutions must also advance to keep pace with the times." What Thomas Jefferson said so long ago should remind us now of where we must go. But we must remember that it is not just technology; it is not just science; it is human beings that will make the difference. The fingerprint, so-called, "expert" who makes a mistake can be checked by humans who have a system of checks and balances. Nothing will ever, ever, ever substitute for the person, for the people, for the human decision involved in this, the most awesome exercise of governmental power. And so you will have many issues to deal with – eyewitness identification and its weaknesses; lineups and how we can improve them; discovery and depositions; dollars for indigent defense; training, training, and more training; and how we learn from our mistakes. It is a difficult task, because much of it focuses on dollars, and state budgets now are in a crisis, probably unparalleled in the history of our federal system. I urge you not to let dollars stand in your way. I urge you to be innovative and creative and show and be prepared to show people how an investment of some dollars up front can save dollars down the road; and that is not just a matter of pouring money into the system, it is putting money into the system in carefully thought-out, effective, common sense ways.

I urge you – as I was looking through the latest material that I received this morning, the results of polls – I urge you not to let polls govern you. I always enjoyed going to Congress and being told that this poll said this and this poll said that. And my point was that polls shouldn't dictate who gets prosecuted. The right evidence and the law should dictate that. Polls shouldn't indicate where we go, because one innocent person convicted is one innocent person too much. But we have got to be prepared to have solid data, data that is concise, that can be quickly amended as new information comes in. We have got to have solid data to take to editorial boards and to others to make the system work. And we've got to understand the politics of it. I think one of the problems we see is that we're all used to the newspaper reporting on one sensational case in which exoneration has occurred, or one sensational case where police misconduct has been proved. And people sometimes tend to take it as an isolated incident. It is far better if we look at all the data. I would urge, as a follow-up to this wonderful conference, a forum that undertakes to point out for prosecutorial training, for defense counsel training, for editorial boards, for community groups that are concerned about where we're going, just how this can

happen – how an eyewitness can make a mistake; how a jailhouse confession can cause the problem, unlimited by a prosecutor who really follows through. We can make a difference if we put it out in human terms and show people that it's happening on a more regular basis than people give credit for. But still, it will be difficult.

But last night, Kirk Bloodsworth talked. Kirk Bloodsworth is a big, burly man from the Eastern Shore of Maryland. He's an ex-Marine. He spent most of his life as a commercial fisherman on the water. He's the man that spent the time on death row for the murder of a little girl. He is a man who was innocent of that crime. And he talked about how he walked out and came back to the community. When he walked into a store, a woman would take her child and say, "don't go near that man, don't go near that man." And he said, "but I'm innocent." And at first, he thought he would just pull away. But he decided to go out talking – and to talk and talk and talk – to law students, to others, to people who listened. And I have the sense, though he didn't say so, that he was talking to people who originally didn't listen. But because he was so compelling and so human – and because he pointed out that this could happen to you, this can happen to your son, this can happen you as a taxpayer, as a person who has never been in any major trouble, this can happen. And so I think it is going to be important for us all to leave this conference talking – talking with solid facts, talking with solid proposals, talking, talking, talking – so that we do our part to restore confidence in the system and to ensure the system works.

But I think we must do more than that. I think we have got to come to grips with the fact that we've got to change the culture. We shouldn't be sending people to the electric chair or to death based on gamesmanship. We should be doing it based on the process of how we get to the truth – and the truth, not the conviction, must be at the forefront of everything we do in the criminal justice system. I think we've got to begin in our law schools and make sure that people who have the thought of being a prosecutor or a defense counsel have the opportunity to see, firsthand and in clear terms, just what happens in each of these cases in which exoneration has occurred and what could have been done to prevent it. But Allan said this is the beginning; it is not the end. I think the ultimate problem lies with America's search for the truth. We've each gone down our little pig trails – the lawyers with the adversarial system; the doctors with evidence-based medicine or something like that, whatever their latest term is; the media in its own way; memory experts in their own way; communication experts in their own way – and never the twain meet, except sometimes in conferences like this. 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. Neuroscience is doing extraordinary things now in terms of memory. We should be there together, informing ourselves as lawyers about what's happening. We should be experts, not in trial practice, per se, or just in trial practice, but in the substance of what is necessary to achieve the truth. We can do so much if we organize our law schools, our universities, to bring the disciplines together to seek the truth in an effective manner. Until we do that, we are going to be a nation that is lesser for it.

As I prepared these remarks, I came to the conclusion that we need to be doing it at every level. How we work together to find the truth in community disputes, how we work together to learn, is so important. What we have is a nation that is so often governed by television. And what is seen on television the first morning after a tragedy, the first morning after a riot, the first

morning after a calamity, will often shape the law enforcement response, will clearly shape the media response, and so all of us are in this together. 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. I salute you and thank you for the wonderful effort you have undertaken. (Applause.)

MR. SOBEL: Thank you, Janet, for those wonderful remarks. A number of jurisdictions around the country have developed targeted responses to identify causes of wrongful convictions, including false eyewitness identification, false confessions, mishandling of evidence, and inadequate training and resources for law enforcement, prosecutors, and defense counsel. In our first plenary session, Barry Mahoney will moderate a panel discussion among representatives from those jurisdictions. As you listen to the discussion, consider whether these responses might be implemented in your jurisdiction; and also consider why and how reform efforts got started in these jurisdictions and the path that the efforts took in search of reform.

Dr. Barry Mahoney is President Emeritus of the Justice Management Institute, a Denver-based nonprofit organization engaged in court-related education, research and technical assistance, which he helped found in 1993. He earned a law degree at Harvard Law School and a Ph.D. in Political Science from Columbia University. Barry has led over 20 national research and technical assistance projects on court and justice system problems. Before this conference was even planned, AJS hired Barry to conduct a national study to determine whether a conference aimed at preventing the conviction of innocent persons would be well received by judges, prosecutors, defense attorneys, law enforcement officials, and crime victims services providers. Barry conducted dozens of interviews around the country and came back with a “thumbs up.” The knowledge he gained through those interviews, his work in conducting focus group meetings to help shape the conference agenda, and his input as a member of the Conference Advisory Committee, have been enormously valuable. It is now my privilege to present to you Barry Mahoney, the moderator of the first plenary session. (Applause.)

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

MR. MAHONEY: Let's get our panel up here. You don't want to hear from me; you want to hear from these folks that are going to be up here speaking with you. They are the ones that have been on the ground, in the field, doing the work. (Pause.)

As Larry Hammond and Allan had mentioned, back about a year and a half ago, over about a three- or four-month period, I conducted quite a number of interviews with folks around the country who are involved in one way or another with the justice system in this country – prosecutors, defense counsel, victims services providers. I didn't talk as much as I should have with forensic scientists. I spoke a lot with both trial and appellate judges and a number of other people. There was near universal agreement that this was a very important topic and that it needed attention. There was a good bit less than universal agreement about what should be done, but there was, I think, a general sense that there were some constructive things going on, and that bringing people together could make a difference and we could learn what was going on in jurisdictions that had begun to take a serious look at things at this point.

In the course of the year and a half or so since I began working on this, an awful lot has happened. This topic area is much more in the public consciousness now than it was when I first began, for a number of reasons with which you are all familiar. It's clear as you look at the kinds of flaws that we find in cases where persons have been wrongly convicted. They have been mentioned – mistaken eyewitness identification; reliance on flawed scientific evidence; police work that isn't what it should be; restrictive policies concerning practices, concerning discovery and disclosure; defense counsel that are overworked, under-resourced, under-compensated, and sometimes not as competent as they should be; testimony by self-interested witnesses; false confessions; false inculpatory statements; lack of really effective use of modern scientific evidence. These are just some of the systemic flaws that need to be addressed. But there really are things that can be done – and are being done – that would markedly improve the process, lead to greater accuracy and to greater confidence, ultimately, in the system that we want to see, reducing the possibility of the conviction of innocent persons. So we're going to focus on some of those things this morning.

Let me introduce our panel. I'll go from your left towards me. On the far left is Sue Narveson, who is the Administrator for Crime Lab in the Police Department in Phoenix, Arizona. She's the past President of the American Society of Crime Laboratory Directors, and she has been very much involved in the development of DNA analysis capabilities, both in Arizona and around the country. Next to Sue is Gil Kerlikowske, who is the Chief of Police in Seattle, Washington. He's been in law enforcement for over 30 years. He's a past President of PERF, the Police Executive Research Forum. Next to him is Justice Robert Orr, who is a Justice of the North Carolina Supreme Court. He's been on the Supreme Court for eight years, and he's a member of the new North Carolina Commission, convened by the Chief Justice, that will review how innocent persons are sometimes convicted and what improvements can be made in the system to reduce the likelihood that that can happen. And, finally, closest to me is Gary Wells, who is a Professor of Psychology at Iowa State University. He's worked extensively on studies of eyewitness memory and has co-chaired the NIJ panel that developed the guidelines and a training manual for law enforcement on the subject of eyewitness evidence. He's also worked with the State of New Jersey on actually implementing some of the guidelines that that panel developed, which is on the ground now, in place in New Jersey.

I want to begin with Sue Narveson. Sue, there are lots of cases where someone was wrongly convicted and it turns out there's been reliance on what had been thought to be, quote, "expert scientific testimony," that later turned out simply to be wrong. I think of things like bite marks ostensibly linked to a defendant, analysis of hair samples that turns out to have been very badly off. What was happening here? What's now being done to address this problem? I just throw that out to open this up. And tell us a little bit about working with forensic scientists and what's going on in this area.

MS. NARVESON: I'll do my very best. I think one thing that needs to be understood is the fact that there are multiple discipline areas within the area of forensic science, which is the application of science to legal matters. And some of these disciplines involve identification technologies such as DNA, drug analysis, firearms examination, et cetera, and they are based on objective information that can be obtained from instrumental analysis. Others are more

subjective, meaning that we rely more heavily on the experience and training and education of the staff to be able to make comparisons and make a statement in regard to the significance of the association that's being made between an evidentiary item and an individual that's involved with criminal activity. Obviously, anytime we move into a more and more subjective area, there can be varying degrees of opinion on the weight that should be applied to the evidence, and, indeed, the testimony or the reports that are provided after the time that the examination is concluded is very important to how the juries hear this information, how the investigators take the information, and how the prosecutors and the defense counsel use the information.

A case in point would be perhaps hair analysis, where hairs can vary dramatically from person to person. You have to look at a wide range of samples, and there can be a limitation on what kinds of conclusions can be drawn. Hair technology and a lot of the subjective areas are not areas where we can declare a match between an item that's associated with the criminal activity and an individual to the exclusion of all others. On the opposite end of the spectrum, obviously, is going to be technology such as DNA, where we have arrived at virtual identity of the individuals, as long as you eliminate the possibility of an identical twin. So I think what we've seen over the past few years is that the technology has advanced in some areas, becoming more objective in the information that we can use for coming to conclusions, and in other areas, we still have subjective comparisons that have to be made and opinion testimony that has to be rendered. I would say that, in order to ensure the credibility and the reliability of the expert testimony – especially in those areas where we are more subjective and have to state opinions – there are a number of standards that have been implemented: Number one, we do have accreditation and certification programs now that establish a certain set of standards that must be followed in order to actually double-check, do a technical and administrative review on any and all analysis and reports that are issued. We also have standards that require the monitoring of court testimony, the proficiency testing of examiners. I think all of those factors that have come into the arena in the last 20 years have really improved the reliability and the accuracy and the credibility of the forensic evidence that's currently available.

MR. MAHONEY: Are those standards in place in every jurisdiction, or only in a few?

MS. NARVESON: At this point in time, over half of the public crime laboratories in the country are accredited.

MR. MAHONEY: And who does the accreditation?

MS. NARVESON: The American Society of Crime Laboratory Directors Laboratory Accreditation Board.

MR. MAHONEY: With a set of objective standards that you look at?

MS. NARVESON: Yes.

MR. MAHONEY: You've made some progress. Technology is evolving; we're getting more objective in some places. What are the next steps? What needs to be done?

MS. NARVESON: I think Ms. Reno mentioned training, training, and training. I think education is a critical component. Communication is another critical component. I think 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 and make sure that we don't wrongfully convict someone that is innocent. And I think, along those lines, 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; that CSI is not reality. I mean, a lot of the things that they do in 60 minutes would be nice to be able to do, but it's not reality. It does give you a look at some of the things that we could do if we had additional staffing. But I think that education is going to be a key and critical component to this, and continual communication.

MR. MAHONEY: I want to come back to this later, but one last question before I move on to Gary Wells: One of the issues that has been raised around this general topic area is the relationship of crime labs to police departments, whether they are law enforcement agencies, state police, or whatever. Do you and does your Association of Laboratory Directors have a view on the issue of being part of a law enforcement agency or being independent?

MS. NARVESON: ASCLAD does not have an official position on that question, and I will tell you that public crime laboratories, not all of them are associated with police organizations. Some are associated with the attorney general's office of the state, et cetera. I do not know of any that are not associated with some part of the criminal justice system, however. Forensic scientists try and remain as objective as possible. Obviously, investigators have their perspective on the case, and they like to interact with the forensic staff, so it's a continual back-and-forth dialogue between the investigators and the courts and the forensic scientists to ensure that 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.

MR. MAHONEY: We'll come back to this, but I want to jump ahead now to Gary Wells. When you look at this general area of conviction of innocent persons, the single most common element that you're likely to find is faulty eyewitness identification, the testimony of someone who was an eyewitness to the crime but who was simply wrong in who he or she fingered. It's an area in which you've done an awful lot of research. You've helped to catalyze some significant changes. I'd like to ask you to help educate this group on why, to start with, are eyewitnesses sometimes simply wrong, and what can be done about it? Gary? I think you've got some slides down here that you're going to use.

PROFESSOR WELLS: I do. (Slide.)

PROFESSOR WELLS: I'm also told that I have, like, seven minutes, so let me see what I can get through with here. I do want to make a number of points here, so I have created some hyperlinks here to embellish, but let me just point out that what we're talking about here, for the most part, is injecting science where it has never been before. Historically, unlike DNA, which is bringing science into the system, this is a situation where eyewitness evidence has existed for

as long as we know. We can't even determine the origins of it, but we have brought science into it. (Slide.)

PROFESSOR WELLS: We know that mistaken eyewitness identification was used in most of these DNA exoneration cases, that is, that was the evidence that was brought against these individuals in about three-quarters of these cases so far. Systematic experimental studies by psychological scientists began in the mid-70s and have flourished since then so that today we have a relatively large peer-reviewed, published literature on eyewitness identification that tells us a lot about why these mistakes occur, and also things that we can do about it. There now exists a 25-year peer-reviewed experimental literature on eyewitness identification. This is one that I will just jump into quickly to give you a sense of how this works. (Slide.)

PROFESSOR WELLS: The scientific method for studying eyewitness identification – we've been doing for 25 years – it works like this: We create events that people witness, and because we created the event, we know exactly what happened. That's absolutely critical in this kind of scientific work. We can do this for large numbers of witnesses. We can replicate it over and over again – have them view a lineup, for example – and since, again, we created the event, we know who, if any of these people in the lineup, is the actual perpetrator. We can then get lineup identification decisions from these people. This work, by the way, has been primarily supported over the years by the National Science Foundation, not by the legal system at all, but by the National Science Foundation; this is the Foundation that primarily funds physics, chemistry, biology. And then we can measure things like the certainty of the identification, then systematically vary things like the nature of the witness event, the characteristics of the witnesses, instructions given to witnesses prior to doing a lineup, the type of lineup that they do, and the behaviors of the lineup administrator, all in an attempt to see how these things affect identification accuracy, certainty of identification, the relation between the two, and so on. So we have a huge literature here, and we know a lot about this problem. What we don't know is how you get the system, for the most part, to adopt the kinds of changes that we know need to be made. (Slide.)

PROFESSOR WELLS: There are two prominent changes that we're talking about here, although it's really a whole host of things. The things that New Jersey did – that's still the only state to have made these changes, although there are some individual departments that have – one is blind testing. One of the things we have learned – and we can see this in the DNA exoneration cases, as well, and we certainly have learned it from our experiments – is that the person who administers the lineup – in most of these states, they're done with photos, as you know – the person who administers these lineups should not know who the suspect is. This is a very interactive process. Detectives are inadvertently, unintentionally influencing witnesses here about their suspicions. It is not the way in which these should be done. The second huge change that could be made was made in New Jersey, and it's working very well for them. That is the sequential presentation, thanks to John Farmer (by the way, who I don't spot yet, but who I know is going to be here), the former Attorney General of New Jersey. Sequential presentation, many of you perhaps are familiar with. The basic idea is that 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 that, if the perpetrator is not there, they still have a tendency to select someone. (Slide.)

PROFESSOR WELLS: So what we have found through repeated experiments is that it's better to present these sequentially. So the witness is told, "We have a number of photos to show you. We'll show them to you one at a time. You have to decide before you go to the next one, is this the guy or not?" This breaks up their tendency to simply compare one to the other. (Slide.)

PROFESSOR WELLS: So what we find with this is that it reduces the rates of mistaken identification. (Slide.)

PROFESSOR WELLS: Let me just give you a summary of what we know about this right now. Steblay, et al, did a meta-analysis in 2001. We first introduced this – myself and one of my Ph.D. students – back in the mid-'80s. It's been tested repeatedly since then. In fact, there are now 23 scientific papers on it, involving 30 comparisons based on over 4,000 witnesses. What we find is that witnesses are almost twice as likely to make a mistake in identification from the standard simultaneous lineup that's in practice in 95 percent of the jurisdictions across this country than they are from a sequential. It's a more conservative procedure. There's a slight loss in accurate IDs, a percent loss of correct IDs, but the net result is – and you have to make this kind of assumption; I'm going here with a figure of two-thirds, assuming that the suspect is the culprit in two-thirds of all lineups, and we have reasons to believe that this figure may be lower than that, by the way – but the odds ratio between mistaken identifications is about 3.7:1 for simultaneous lineups and 7.8:1 for sequential lineups. What it does is that it doubles the diagnosticity of the lineup, approximately, if you use the sequential procedure. You should never use the sequential procedure without double blind testing. (Slide.)

PROFESSOR WELLS: But the point here is that these are reforms; these are changes that can be made. There are a few jurisdictions in the U.S. that have adopted these improved lineup methods, and there are few people who have shown great leadership. There was John Farmer in New Jersey and Tom Sullivan in the work that he did for the Governor's Commission, where he incorporated these as recommendations in the Governor's Commission for change in Illinois, but change hasn't happened yet. Barry Scheck and Peter Neufeld have been really important in terms of helping me get into various jurisdictions to try to facilitate these kinds of changes. But these improvements are largely costless. In New Jersey, it was done inside six months. Every police department in New Jersey now does it this way – double blind testing sequential lineups – and it's working very well for them. There's a whole package of these changes, and with very little cost at all. So these are the kinds of changes that really ought to be a top priority. Look at it this way: As far as we can tell, it is the principal cause of conviction of actually innocent people – not technically innocent, actually innocent. It's virtually costless, we know how to do it, and so it ought to be at the top, in some ways, of our list of things that can be changed. I can go into to detail on any of these things, but I'm guessing my seven minutes is probably up.

MR. MAHONEY: Your guess was right on target, Gary. By the way, you all will notice that there's a microphone in the middle of the room, where, during the period of questions in a couple of minutes – but I first want to give a chance for Gil Kerlikowske and Justice Bob Orr.

But to stay with Gary for one minute; Gary, you mentioned that you've got this start. At the Illinois Commission, there's clearly a recommendation there. Your procedures are underway in New Jersey. By the way, for those of you who are interested in just what's being done in New Jersey, there's this wonderful resource notebook that the AJS staff has put together under Tab 2 on page 45. They cited a memorandum from the then-Attorney General, John Farmer, and the detailed guidelines that are laid out. That's one of the resources you've got here. Gary, as you look into this, what are the obstacles? Who has a problem with this and why?

PROFESSOR WELLS: Well, the biggest obstacle is that there are over 19,000 police departments in this country, and there is no one who is speaking up or having a great deal of influence over multiple police departments. The reason that John Farmer, former Attorney General of New Jersey, was able to do this in New Jersey is because New Jersey is the only state where there is an individual who has authority over all police. In all the other states, the best we can do is try to go in and work on one place at a time. So that's one problem. We don't really know how to change it. I think individuals are going to have to carry the ball within their own jurisdictions to try to get this changed. The other thing is police actually like these changes. Police are actually fairly favorable toward them. Prosecutors seem reluctant. It seems to be because, as far as I can tell, prosecutors are concerned that, if they make these changes, it's an admission that there was some problem with the lineups that they were doing in the past and the convictions that they obtained with those, perhaps afraid that it will open the door for appeals. I think New Jersey has shown that's not the case. You can move forward; you can make changes without having this kind of backward look and second-guessing on prior convictions.

MR. MAHONEY: You've raised some issues for us. This is going to be grist for our teams to be working on. You've raised the leadership issue. This is a good segue to turn to Gil Kerlikowske, and I'd ask you to follow up on some of Gary's points. Is it feasible, from your perspective as the Chief and with 30 years in law enforcement, can these sorts of changes be implemented? And what are the issues in implementing them?

MR. KERLIKOWSKE: Well, everyone knows how easy it is to change police departments. (Laughter.)

MR. KERLIKOWSKE: I think the Attorney General sponsored some research once, and the researcher came back and said changing a police department is like bending granite. (Laughter.)

MR. KERLIKOWSKE: I think bending granite may be easier. But actually, we do sequential lineups in many agencies because this information has been disseminated and published across the country, thanks, in large part, of course, back to the Attorney General and the work that was done. Gary said there are 19,000, but I always thought there were like 17,000 police departments, which is truly the beauty of the American system of policing. The tragedy of the American system of policing is that there are 17,000 law enforcement agencies also, so it becomes an incredibly difficult thing to change all of these organizations. One thing that I would mention to you, that I think is critical, is that the department has to have the leadership and the courage of its leaders to recognize and reward and provide benefits to those people who not just solve high-profile cases or make arrests, but for those, particularly investigators, who have gotten

someone who was arrested out of jail – who worked closely with the prosecutor to see that justice is carried out. And so, when you do those annual rewards in a law enforcement agency, people like that should be recognized. We have a very difficult time with money – and it was mentioned that state budgets are in some of the worst conditions in many, many, many years and, of course, that trickles down to our cities and our counties. But one of the things that we have to look at in the overtime capacity is that, when you have a high profile case, there's almost unlimited overtime to solve that case, and police chiefs' careers often rise and fall on such cases. The same liberal use of overtime for closing, arresting, or solving a high profile case ought to be made available when there is a belief or a concern of even the slightest that the individual that's been arrested or is being focused on, in fact, is the wrong person and is innocent. And it comes back to being able to so clearly articulate to the public and the press, not just the importance of closing a case, but that, if we make a mistake – if we put the wrong person in jail, if the system overpowers that individual – the guilty person is still out on the street, and, therefore, is still a danger to that community.

MR. MAHONEY: Let me ask you, Gil, about some of the specific ideas that have come up. I'll begin with one. The videotaping of two things: One, the lineups; and second – these are different issues, but I'll raise them both – we've got videotaping of lineups and videotaping of police interrogations. Can we get your thoughts on that, on both the desirability and the implementation issues? Let's start with the issue of videotaping lineups. Is that a hard one? Can you do that? Do you do it, and if so, why?

MR. KERLIKOWSKE: It is not a hard one to do, and the videotaping of lineups, I think, is very critical. One of the things that we can also learn is that when mistakes – we've often talked about, one, not finger-pointing, and, two, learning from our mistakes. But I think it's critical that when someone else, an outside individual, reviews those videotapes and – through no purpose other than just the officers that want to see the case closed, not wanting to see an innocent person jailed, but they may give off, as Gary said, the subtle cues during the time that that lineup is going on. And that could cause, of course, a wrongful identification. There's more controversy among policing about videotaping the confession or interrogation or interview. That 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 interplay that occurs during interviews and interrogations is pretty critical, and I think we find that there's probably more objections raised in the videotaping of confessions than anywhere else.

MR. MAHONEY: To be concrete, what do you do in Seattle?

MR. KERLIKOWSKE: We videotape; we videotape at the end of the –

MR. MAHONEY: You tape the statement, but you don't tape the entire interrogation?

MR. KERLIKOWSKE: But the camera is not on during the entire time.

MR. MAHONEY: Okay. Another issue I wanted to ask you about – the scope of an investigation in a serious crime case. One of the concerns raised by people who have looked at

this process is that there is a tendency in many departments and in many investigations, to focus in rapidly on a single suspect, especially in a high profile case when you've got a lot of pressure for rapid solution to the investigation. Now, what are sound – in your view, what are sound police practices with respect to keeping the investigation open? Alternative approaches vis a vis focusing in on a single suspect?

MR. KERLIKOWSKE: I think the changes in the practice have been most helpful in a couple of ways. One is that, during these high profile cases with a lot of people dedicated to solving it, there has to be a supervisor within that investigation that is set aside and asked to kind of stand outside and watch what is going on, for a couple of different reasons: One is that the detectives involved in those cases will work countless numbers of hours, and we know that the more hours that they work, the more prone they are to making mistakes. And so you actually have to have someone that is a little bit objective, a supervisor that's going to be able to pull people off the case, to mandate a certain amount of rest for the investigators that are involved. And the other part is that that person can be that objective kind of gatekeeper within the organization. I'm sure, from the defense bar, they won't say that this person is objective and is a gatekeeper on those things, but that person is going to be able to stop the investigation at a point where maybe they're losing perspective, or maybe the focus is too great on one particular individual.

MR. MAHONEY: So, somebody involved in this who has some distance from it?

MR. KERLIKOWSKE: That's exactly right.

MR. MAHONEY: And some objectivity about it. I've talked particularly with prosecutors around the country and, in some of these cases where you've got issues of evidence turning up long after a trial, concerns of prosecutors feeling they're getting hung, in a sense, for non-disclosure of relevant evidence that, in fact, they didn't know at the time. And this can go back and forth, but one of the issues – the underlying issue here is the relationship between a police department and a prosecutor's office in the course of a criminal investigation and prosecution. You have some thoughts, I think, on those issues of communication and the turning over of evidence, both evidence that will point towards a specific individual and perhaps evidence that might tend to exculpate or point in a different direction. What are your thoughts on that?

MR. KERLIKOWSKE: I think the relationship between that law enforcement executive and the chief prosecutor of that jurisdiction is particularly critical, and the relationship and the open communication has to be built long in advance of a crisis or a critical incident. Also, investigators – especially with the advent of cold case squads over the last few years – come across pieces of information in these areas. There needs to be that non-finger-pointing, non-retribution that, when this information is provided to a prosecutor, that those things are not going to occur and, in fact, that open exchange of information and the seeking of the truth and the seeking of justice are of paramount importance rather than trying to find someone within the organization that, in fact, made a mistake or did something wrong.

MR. MAHONEY: Finally, one question before I turn to Justice Orr. Standards for forensic labs and forensic testing, and the relationship of the labs to law enforcement – the issue is, should the labs be closely linked; should they be more independent with some kind of independent oversight? What are your thoughts on that?

MR. KERLIKOWSKE: I think there's a strong push to move the laboratories to be separate from the law enforcement agency itself. I think being a part of, perhaps, the criminal justice system overall is probably a good idea. There needs to be, as Sue said, the communication and the discussion, but I think there needs to be that certain distance and separateness. I don't want to see the crime laboratory's budget a part of the police department budget, and we start trying to perhaps short-change the forensic investigation because we need a few more police cars or something like that.

MR. MAHONEY: We get more objectivity and better scientific evidence with a little more distance and independence?

MR. KERLIKOWSKE: I think that could be helpful.

MR. MAHONEY: Okay. Justice Orr, let me turn to you for a few minutes here. There have been some highly publicized cases in North Carolina in which the persons initially convicted have subsequently been exonerated. Recently, the Chief Justice formed a special commission or committee to study these problems. You're a member. Can you tell us a little bit about the background to the formation of the Commission and about, kind of, its mission and its current status?

JUSTICE ORR: Well, we're very much in the formative stages of the Chief Justice's Commission in North Carolina. We have had a grand total of one meeting, and part of my role and responsibility in being here for this conference is to hopefully take back a lot of beneficial information for the Commission. It is unprecedented, I think, to a certain extent, to have the Chief Justice of the State's highest court and the head of the judicial system unilaterally create and form a Commission to address the question of actual innocence. This was a direct result, I think, of the high profile cases that have been reported in North Carolina, but also because of some of the private involvement and interest of the North Carolina Center for Actual Innocence and, of course, the national attention given to this issue, particularly in the realm of capital cases, and particularly in Illinois. The Commission is comprised of a broad cross-section of folks involved in the criminal justice system and, although, as I indicated, because we are new, we are attempting to add some members to the Commission. The Chief Justice actually chairs the Commission. At the inception, the Chief indicated that the three immediate goals were to avoid convicting the innocent; to more efficiently convict and punish the guilty; and to increase public confidence in the criminal justice system. But those goals, I think, do not limit us in what we are going to try and achieve. Our next meeting is January 24th, and we're tentatively scheduled to begin studying and discussing eyewitness identification, its impact on the conviction of the innocent, and the feasibility of potential procedural changes in North Carolina. I would have to say that, already, we've seen some small benefit from the formation of the Commission as a result of the attendant publicity. I might add that we have Matthew Eisley from the Raleigh News and Observer, who has been assigned to cover this conference. Matthew is the Court

Reporter for the News and Observer. At our first meeting, the Attorney General, who is a member of the Commission, reported about the huge backlog of rape kits, which were untested because of the lack of funding and the lack of staff at the State Bureau of Investigations Lab. Shortly after the media reported this, permission from the legislature was approved to move certain appropriated funds around to pay for new lab people, at least for the next six months. Now, while there's a far greater long-range need for permanent positions and increased funding, at least one small positive step has taken place.

One of the questions that was raised in our telephone conference among our panel members and AJS staff was about special training for judges. We have not had any specialized training for our judges in North Carolina, although I would note, with Judge Davis here, that a couple of years ago, North Carolina hosted the Southeastern Conference for Genetics in the Courtroom. An effort that brought about a hundred judges, primarily state court judges from around the Southeast, to North Carolina for a conference to try and educate and comfort all of those liberal-arts-leaning judges who stayed as far away from the chemistry lab and the biology courses as they could in the course of their education. The sponsoring organization – Einstein Institute for Science, Health, and the Courts – is based in this area and has conducted seminars around the country. I would note that, from our initial conference meeting, it's pretty obvious that we all share the same goal of making sure that innocent people aren't convicted. What also became apparent is that, while we may all agree on that, how we get there and how we go about doing it can present a number of challenging and difficult issues. For example, one of the participants at the meeting said to me, “Well, I'm all for this, but let's make sure that we don't do anything that makes it tougher on law enforcement.” We had a brief discussion about DNA banks. Obviously, the more extensive the DNA banks that we have, the greater likelihood that perhaps innocent people will not be convicted. But efforts to have a broad, expansive use of DNA banks has met with certain resistance in the realm of civil liberties. And one other issue that I might add that we discussed briefly was where you have multiple defendants and multiple defense attorneys in sort of a race to the prosecutor to see who can work the best deal and then turn and point the fingers at the ones that didn't get there quickly enough. Where does the attorney/client privilege play into this if you know that an innocent person, if you're a defense attorney and you know an innocent person is about to be convicted or charged? So there are lots of issues, lots of challenges for us.

I will relate one quick story: We had a very interesting Frontline piece, a PBS documentary, about a young man named Terrence Garner who was convicted in North Carolina for assault with a deadly weapon and inflicting serious injury, kidnapping, and robbery. He was sentenced to about 30 years. My wife and I sat watching this program very quietly, and at the conclusion, it was pretty evident – at least from the television program – that Terrence Garner had been wrongfully convicted, and the process by which it had taken place was one that made those of us in the criminal justice system cringe. And at the conclusion, my wife turned to me and very pointedly said, “Well, you're on the Supreme Court. What are you going to do about it?” (Laughter.)

JUSTICE ORR: I'm not sure my answer satisfied her, and I'm not sure that any of us, individually, can make great changes, but I think that, collectively, the efforts of organizations

like AJS and this conference, the efforts by our Commission, perhaps will go a long way in allowing us, collectively, to actually do something about it.

MR. MAHONEY: It seems to me that your wife had the right question. (Laughter.)

MR. MAHONEY: What are you – what are we going to do about it? I have plenty more questions for the panel, but I have a hunch that some of you in the audience will have some questions, too. How about – what would you like to ask some of our panelists? And as you come to a microphone, please identify yourself. You'll note that we have a reporter here, and there will be a transcript of the conference, so we'd like to know who's asking.

MR. CROPSEY: I'm Allen Cropsey. I'm in the State Senate in Michigan. Professor Wells, do you have a list of the jurisdictions, besides New Jersey, that have actually implemented the lineup changes?

PROFESSOR WELLS: Not really. For example, this is the first that I had heard that Seattle was doing sequential, so these things are happening, and we don't always know where they are happening. We do know that – and they're happening in different ways. I mean, some places – for example, Brooklyn just announced, because of their ... it was their District Attorney who said we're going to do double-blind from now on, the blind testing from now on, with our lineups, but not sequential. So there is some picking and choosing. There are – I mean, I can tell you, you know, some of the places. Some of the places are sort of peculiar, you know – a Clinton, Iowa, here or there – but basically, I would say that approximately, that no more than five percent of jurisdictions in this country have actually made these changes.

MR. MAHONEY: Let's take a quick poll. Anyone in the audience here from a jurisdiction that's using the sequential identification or double-blind? (No response.)

MR. MAHONEY: Well, we have something to think about here, don't we?

PROFESSOR WELLS: We sure do.

MR. MAHONEY: Did we have another question here?

MR. CROPSEY: Also, perhaps, to the lady from Arizona – on the degradation of evidence, especially as a legislator, we don't get into a whole lot of this. Could you explain, especially when it comes to DNA and some of these other things that you're dealing with, bodily substances? How is the degradation being kept to a minimum so that there isn't any degradation, especially if it's been a long time – like 15, 20, 25 years – after a conviction?

MS. NARVESON: Well, first of all, the beauty of DNA is the fact that it's relatively stable, as long as when it was originally collected, the body fluid was dried and has been kept in a dry condition. DNA is stable under normal room temperatures for very, very long periods of time. I think those agencies that have stored their evidence for long periods of time now are seeing the benefits of hanging on to that evidence. Technology years ago might not have been able to get you the answers that you can get today. And I think that's why we're seeing some of

these cases being revisited and are finding more information in order to exonerate individuals, or, in some cases, it simply supports the original conviction. But DNA is very stable, and it can be stored at cool room temperature, ensuring that it's not exposed to, you know, the light, et cetera.

MR. MAHONEY: Let me come back to you. Audience folks, let's think about other questions. I have one observation, though. I want to pick up on something that Justice Orr pointed out, which was the big backlog of untested rape kits in North Carolina. As I did these focus groups around the country, one of the striking things that emerged was the concern of criminal justice practitioners about the big backlogs in DNA testing, the impact on the process and on the capacity to get to the right person early as a major issue in terms of resources. Is this true in labs around the country?

MS. NARVESON: Most definitely. There is no real good number on what the true backlog is. There are some efforts underway, sponsored by the Attorney General's Initiative on the DNA backlog, to try and capture information on that from law enforcement agencies and forensic labs across the country. We should see something, I would expect, by perhaps mid-summer, as far as the survey results that they have been able to obtain. But there are backlogs in laboratories – forensic laboratories – across the country. They are not only in DNA; they're also in other disciplines of forensic laboratories.

MR. MAHONEY: Question?

MR. BENNETT: Bill Bennett. I'm a prosecutor from Springfield, Massachusetts. Regarding the DNA databases, I'd like to get the panel's view on expanding DNA databases – including a universal DNA database – so that all, not just convicted offenders, but all individuals be included.

MR. MAHONEY: All right, there's an easy one. Do you want to start on that, Sue?
(Laughter.)

MS. NARVESON: I think that that's going to be an issue for the legal minds to wrestle with. Certainly, the databases that exist right now that are focused on convicted offenders have been very, very successful. There is an initiative in certain parts of the country to provide an opportunity to individuals to volunteer samples, and it's amazing how many of those volunteers that are then tested against the database turn out to be linked to a case that hasn't been solved.
(Laughter.)

MS. NARVESON: So that's one effort that's going on. We also have a continual expansion of the statutes, such that we started with convicted felons and now are moving out into all convicted felons. Initially, it was primarily focused on sexual assaults. In Virginia, they have moved to all arrestees. So, gradually, the legislation is being expanded and, as the success stories accumulate, and as other states watch to see – you know, the civil libertarians, will they attack it – and if they don't, if it's successful, then you'll see that expand. But it's not for the forensic laboratories to make that happen, but certainly for victims advocate groups or for the legal individuals and also legislators to decide what best meets the needs of society.

MR. MAHONEY: From a police perspective, Gil, any perspective on this subject?

MR. KERLIKOWSKE: From a police perspective, I think everybody should give a DNA sample and be tested. (Laughter.)

MR. KERLIKOWSKE: I think it will be as common for every arrestee as taking fingerprints now, when there is a custodial arrest, to have the DNA, regardless of the crime. There's a body of research that tells us that the modus operandi kind of theories that we have criminals that commit a vast array of different crimes. We just solved a '93 murder case in Seattle with an arrestee out of Florida – out of Marathon, Florida – that was ten years old. His DNA was just entered because of an arrest in Florida, and I think it was possession of burglary tools, which is completely different from the rape and homicide that occurred in Seattle ten years earlier.

MR. MAHONEY: Justice Orr, not that we'll have to put you on the spot, specifically – you're welcome to respond to this on your own – but I suspect you've got a sense of varying views when this topic came up after the Commission meeting.

JUSTICE ORR: It was a very brief discussion, and I had a subsequent discussion with the Attorney General about it. I certainly won't speak for our Attorney General, but I think that, in North Carolina, we only collect samples from felons convicted of a violent crime, and that the interest is to at least expand it to those convicted of all felonies. I do know that there was a bill introduced in the legislature to expand it. It was opposed, I'm almost sure, by the American Civil Liberties Union, and I don't think it passed. I'm talking a little bit off the top right now, but, clearly, from the conversations that we had, the ability to expand the base resolves a lot of the concerns about convicting the right person as opposed to the wrong person. In Virginia, it was used or mentioned as an example of how successful their program had been versus how relatively unsuccessful our program had been in North Carolina.

MR. MAHONEY: This is a topic that will be a recurring one, I suspect, through this conference and long after. We've got another question. Yes?

JUDGE DAVIS: A couple of observations. I'm Andre Davis. I'm a Federal District Judge in Baltimore. First, on the question of sequential identification, I think Gary's work is really leaking out among the law enforcement communities. I can report that at least several FBI offices – I don't know if this is a national policy – that several FBI offices have gone to sequential identification procedures. I would add – since now all states have fairly sophisticated photo identification apparatus available through motor vehicle departments – the FBI is using, in lieu of the traditional mug shots, photographs taken from the motor vehicle administrations, which clearly lessens the suggestiveness of photographic identifications. On the question of data bank backlogs and rape kits, that's a problem that, I think, is universal all over the country. In Baltimore, somewhat controversial among some, one of our preeminent private foundations – with the strong support, I think, of victims rights groups – which the foundation, having an interest in criminal justice issues in general, gave a very significant grant to the Baltimore City Police Department, in excess of \$200,000, to devote to cutting into the backlog. And there have been three or four hits and one exoneration as a result of that grant. So people may well want to

think about going into the private foundation arena. That's counterintuitive, I think, and, as I say, it's controversial. People think, well, better use, perhaps, can be made of that money. But so far, it's been very beneficial in Baltimore.

MR. MAHONEY: We've got another question here.

MR. SCHECK: Barry Scheck from the Innocence Project in New York. I want to just make some observations on this DNA data-banking question. It may be an easier problem than you think. My friend, Mr. Bennett, raises a good question. We had a national commission on the future of DNA evidence that the former Attorney General, Janet Reno, put together, and many of those people are here. The Honorable Ronald Weinstein from Arizona was on this commission. We came to the conclusion that, when you start looking at this, it is going to be increasingly a problem on a state-by-state basis; but when you start looking at these issues, you will see, number one, there is a huge problem in turnaround time. That is to say that the labs are starved for resources, so from the time that a sample in a new crime goes to the crime lab to the time that they can test it for law enforcement – I was just talking with Carl Selavaka from Massachusetts – and that's a year. They can be six to 12 months in Massachusetts. That is by no means atypical. When you're talking about resources, first you want to get that turnaround time on new crimes solved. That is a certain amount of money. Obviously, the whole issue of untested rape kits was one that I personally brought to the attention of the authorities in New York City. I'll say for Giuliani that he began taking care of it, but this was three or four years ago and we're still trying to get through our backlog of 16,000, so that is a significant expenditure of money. Then when you start talking about most statutes in states that would authorize the taking of DNA from people who are on supervised release, parole and probation, I would submit to you, and those in law enforcement, that these are the first samples that you really want to get to put into a databank because they are, after all, people on the street, and it's more important to have their DNA profiles in the databank than people that are still in prison. That backlog is sometimes estimated to be – what is the latest number, Carl? – 600,000 or 700,000? And then when you start looking at whatever your state says in terms of what samples you can put in a databank from a convicted offender, whether it's a violent felon or it's all felonies – which I think is now 22 or 23 states that are all felons – there are backlogs there. So it was the conclusion of our commission – and this was one where everyone could agree, the civil libertarians and the law enforcement people – before you reach the question of “let's take DNA from everybody at birth” or “let's take DNA from everybody arrested for a misdemeanor” or “let's take DNA at arrest”, the first issue is why don't you fund these backlogs where we can all agree, for efficient law enforcement, you want to do the job. These are the kinds of things, I think, that the North Carolina commission and others can come to terms with. So, in some ways, the most difficult questions are in front of us in terms of civil liberties, but I think that there's a whole agenda that a lot of us have thought about where there's actually tremendous consensus.

MR. MAHONEY: We've got a list of priorities, and certainly at every level of government, an issue of legislative appropriations – national, state, and local – zeroing in on where you want to get first, from simply a public safety and accuracy perspective.

MR. SCHECK: The problem, too, I think, for everyone in this room, is that it looks like the Innocence Protection Act may not get out of the United States Congress. I hope it does,

thank you, Peter, but if it doesn't, it's going to turn to the states to start passing these post-conviction DNA bills – there's a lot of them – or also do something about counsel, if Congress doesn't act. Equally, there's the Debbie Smith Act, a bill that's pending in Congress to provide money for testing those untested rape kits. I hope I'm wrong, but I have a feeling that the states are going to have to step up in a very big way very soon on these sorts of issues.

MR. MAHONEY: Another question here from the audience? Yes? This is a small enough room, and we want, really, over these two and a half days, to be a conversation, not just folks talking one after another. I think we're getting that here.

MR. SMITH: Virgil Smith, Wayne County Prosecutor's Office, Michigan. Professor Wells, I missed something. I understood blind testing, but I've heard the term mentioned a couple of times, “double blind testing”. I was just wondering what that was in reference to.

PROFESSOR WELLS: That's referring basically to the same thing. In science, among scientists, it's very well known what blind testing is, and double blind testing. Scientists are taught this right from the outset. That is, the idea of blind testing is that the person being tested is not given clues about the answer. For example, in tests of a new medicine, a new drug, single blind would be that the person receiving the new drug doesn't know whether they got the drug or the placebo. Double blind is that the person who – not only that, but the person who medically examines them to see how well they're doing on the drug versus the placebo does not know whether they got the drug or the placebo. So, technically, what I'm talking about is double blind. Clearly, lineups have to be blind – single blind. Single blind means you don't tell the witness, “Mr. Jones, we want you to try to identify Number 3.” (Laughter.)

PROFESSOR WELLS: Double-blind is that you couldn't tell the witness that anyway, because you don't know if the suspect is Number 3 or Number 6 – or Number 2 or Number 1. We use the term “blind” and we really, technically, mean “double blind.”

MR. SMITH: Thank you.

MR. ALLISON: Bill Allison from Austin, Texas. The question was asked, “Are there any other jurisdictions that are implementing these sequential double blind identification procedures?” Certainly not in Texas that I know of; however, from the other end, what we're talking about is commissions that would formulate policy. We would then try to sell it to government organizations, police departments. We had an opportunity, myself and other defense lawyers, last August where the police department in Austin desperately wanted a lineup. We dictated the New Jersey rules and they did it. It was easy. Witnesses from the District Attorney's Office came – there were lots and lots of higher-level police officers within the Austin Police Department who wanted to see this thing done – and it came off without a hitch. It was as easy to do as the comparatives. And so one of the things that I want to say is that many of us are in a position to negotiate a single one as a demonstration to see. And if that is done, and if the people who are doing this see that it can be done – and it's not that difficult – then when we talk about policies, people have already seen it done, and I think it's an easier sell. Thanks.

MR. WANGER: My name is Eugene Wanger from Michigan. I'd like to ask Professor Wells, based on the evidence, what error rate would he expect to see in a well-conducted double blind sequential lineup?

PROFESSOR WELLS: It turns out that's a difficult question. Let me just quickly explain why that's difficult. Error rates vary as a function of – is it within rates, is it cross-rates; how much time passed; how good a view did the witness get of the perpetrator; what were the lighting conditions like – all kinds of things like that. What's important about things like double blind and sequential is that we know that, whatever the error rate is under the particular conditions – witnessing conditions and so on – that it will cut it down. So, for instance, in our state crimes, if we create a witness event where we're finding a rate of, let's say, of mistaken identifications of a percent, this will cut it in half or less to do the sequential. So whatever that rate is, we're roughly cutting it in half. The problem is that there's no single rate out there; it varies all over the place, as a function of all of these other variables. All we can do, as a system, to try to minimize this is to take control over the things that we can control. We can control how the lineup is done. Keep in mind, though; to emphasize the sequential too much is a mistake. You should never do sequential without also doing double blind. There are also critical instructions that should be given to the witness ahead of time and so on. In other words, it's a whole package. The New Jersey package is a good version of that, and it's in the book here. You can download it off the Internet.

MR. STONE: Chris Stone of the Vera Institute in New York. I have a question for Gail – or for anybody – but it's a question about how practical, in the real world of law enforcement detective work, the kinds of policies we're talking about here are. I don't know how many photographs I have shown to victims each day in the United States, but my guess is it's absolutely enormous. I was the victim of a gun robbery – a gunpoint robbery – a few months ago and was injured in the course of that robbery. And a detective came. It was in a jurisdiction where they were doing sequential. So I was sequentially shown these photographs, and it was immediately apparent to me, exactly as Gary said, what a huge benefit it is. It works just the way Gary says. If you start looking for the most likely, you're really looking for that person. And when I couldn't find anybody, the detective then showed me a photograph of the guy they thought it was, who they arrested up the block and stopped with a gun, who fit the description, they said. They couldn't put the charge on him, just based on what they had, but they knew it was the guy, and it was really too bad that I hadn't picked him out. And then the next day they wanted me to go and do a ride-around in the neighborhood to see if I saw the guy who had done the crime. (Laughter.)

MR. STONE: I just tell that story because I don't think that's actually all that surprising. I think we have a lot of very hardworking law enforcement detectives out there, and we don't have the division of labor in a lot of police departments that lets someone who doesn't know who the suspect is spend all the time with the victim in the course of the investigation. So having lived through that experience, I came to really respect the detective who was working on that case, though no charge was ever brought in that case, just to end the story. I was just wondering how practical, Gil, you think this really is.

MR. KERLIKOWSKA: I think the sequential is easily practicable. I think the double blind is much more difficult, given the size of police forces and the number of people, et cetera. I think there's much less fishing because of a couple of reasons: One is – and I think the kind of watershed was the O.J. Simpson trial – a police department is just not going to be effective unless there's some level of trust and cooperation from the community, and people that are going to call and give us information and report crimes, et cetera. We do have a trust factor and a credibility problem, so I think that a lot of law enforcement agencies are really making that as much the mantra as trying to catch that perpetrator at any and all costs, because the any and all costs seem to be a problem. I would think that, if we talk later with Gary and try to figure it out, there are some ways. But looking at the size of police forces, double blind is difficult. Lineups aren't done that frequently, but there is a lot of the other information that's given out. So it's a tough issue.

MR. MAHONEY: Gary, any thoughts on Chris's question about the practicality on a day-to-day, ongoing basis?

PROFESSOR WELLS: It's very practical. Talk to New Jersey, they do it every day – big department, small department – no difficulty at all. They got creative at times. The best way to do these things, quite frankly, is, you don't – there's not even an investigator in the room. They sit down to a laptop and you do the identification and the pictures come up on the laptop. There's no one there to influence you, and at the laptop, you know, you make your response on that. There are lots of ways to effectively keep the detective out of that process. That's what you're trying to do. That's called objective testing. It's done all the time in other domains – before we approve a drug, before studies and experiments can be published, you know – scientists want to know, was it double blind or not? I think it's easy to do. The fact is, jurisdictions that haven't gotten into trying to solve that problem may be able to imagine it being difficult, but it's not difficult. New Jersey has had no difficulties whatsoever, and they have been doing it for months or so – every lineup, every photo spread, every time, every jurisdiction, every detective. It's not difficult.

MR. MAHONEY: Question?

MR. LEVEY: My name is Dan Levey from Arizona, from the Attorney General's Office. I work as a victim advocate there. My question is for Professor Wells. On the scientific study for eyewitnesses, without the factor of the real-life emotions from victims after being victimized or from an eyewitness, would that not weigh heavily or have a factor, such as, you know, they're in the worst time of their life; they're in a crisis? In a controlled study like that, where you knew the outcome, how does that play into things with the study?

PROFESSOR WELLS: As far as we are able to tell, stress and fear do not improve eyewitness accuracy. If anything, it harms eyewitness accuracy. The DNA exoneration cases, I think, are beautiful examples. Almost all of them were victim witnesses. You know, these were important events for them. They are almost all sexual assault cases. They had good views, but they still mistakenly identified the person. We have no reason to think that the principles, which are based on what we know about how human memory works and does not work, would not apply to real witnesses.

MR. MAHONEY: Let's take one more question, and then I have a kind of a final wrap-up question for our panel before I turn it over to Allan.

MS. MAPLES: My name is Cheri Maples, Captain and Personnel Attorney for the Madison, Wisconsin, Police Department. One thing I just wanted to put to people from law enforcement here that I found is very, very important – and it's really important when you're running your pre-service academies, your in-service training – to talk very explicitly about integrity, truth, honesty, values. What I've found is that the new officers that come into the pre-service academy, we train; we do a session of ethics which is not just a separate section, but it's integrated with all of our investigations and everything else. Within two years, police officers coming back, probably the most common comment is that it's bullshit with everything that you want to do. Everyone that deals with police officers knows that. So I think it's very, very important in in-service training, when you're talking about evidence or whatever you're talking about, to bring the unconscious agreements that are out there into the conversation – into explicit conversations – whether you're dealing with evidence, whether you're dealing with eyewitness lineups. We have found that that is probably the most effective thing, whether you're dealing with taking a free cup of coffee and what it means. What I found is that once you start dealing with those unconscious agreements that exist amongst police officers and make it explicit conversations, that things change immensely. Thank you.

MR. MAHONEY: Let me ask the panel for some concluding thoughts, but to share them with us. Perhaps you can also let us know what do you think – in your particular field of endeavor or expertise – what are the most positive, most significant, and most promising things you see happening? What do you want to leave everyone in the audience with, in terms of ideas, as the “go forward” to start working in their teams? I'll begin with you, Sue.

MS. NARVESON: I think one of the most positive things I've seen over the last year has been an increased awareness by all components of the law enforcement community and the legal community about this idea of having a balanced approach that includes the integration of all of our efforts, such that we all are working on this together, as opposed to working at cross purposes. I also think I see an increased interest in funding, in finding out how much, how many resources, we need to tackle this problem, as Barry Scheck so aptly presented. It has to be resource-driven because there are many, many victims out there, each of whom deserves their measure of justice. We have to have a database of convicted offenders that is large enough. We also have to remember that we have to be able to have the resources to do those cases that are non-suspect cases that are sitting in our evidence storage facilities at this point in time. The Federal Government has stepped forward. A lot of it is due to the heightened awareness of the public and our federal legislators as to the importance of this, the power of DNA technology. That commission single-handedly has been the driving force behind the National Institute of Justice putting millions of dollars into the system to get the analysis of convicted offender samples and non-suspect case samples moving forward very, very rapidly. I think that you will see a continued support in Congress. That's the message I'm getting; that finally, we're realizing that we're all in this together. But having said that, local agencies need to realize that that's only a stopgap measure. We have to take this opportunity to increase our infrastructure, such that we can handle all incoming cases. We don't have that capacity at this point in time. So, I guess, in

light of the fact that I work for a police agency, other law enforcement agencies have crime laboratories and we're also competing with each other. I think we compete with the blue suits for every dollar that's on the table when I work for the same agency. I think we need to get a better handle on what the cost effectiveness of having good technology is. My goal in my laboratory and in working with investigators and law enforcement officials and the criminal justice community is to be able to apply the best science to the best evidence in every case. That's a goal that I will probably work toward for the rest of my career and never attain, but I think working together, we can get a lot further down the road than we are right now.

MR. MAHONEY: Thank you, Sue. Gary, and then Gil – sound bite for CNN: What do you want to leave folks with?

PROFESSOR WELLS: What do I want to leave folks with? I think this issue of reaffirming how lineups are done – it's inexpensive; it's important; it's a change that is well within our grasp. And I am encouraged, although the word is still greatly misunderstood, that people are starting to get and realize that it's not just the case that eyewitnesses are inherently unreliable. Yes, some of the unreliability of eyewitnesses comes from that; some of it comes from the fact that we simply haven't improved these procedures. We need to make sure that the instructions – the way of selecting the fillers, the method of presentation and who is presenting them, and pulling out expectations and so on from the equation – that we know how to do these things. The next step is to figure out how to get jurisdictions to adopt them.

MR. MAHONEY: To do it as leadership. Gil?

MR. KERLIKOWSKE: Police departments want to be and should be expected to be the first line of defense in preventing wrongful arrests and convictions.

MR. MAHONEY: Justice Orr?

JUSTICE ORR: There's no way I can be that brief. (Laughter.)

JUSTICE ORR: To work towards political consensus. I think the funding issues are enormous, the competition for dollars in the states – whether it's for education, healthcare, the criminal justice system or whatever. There needs to be a building of political consensus to move these positive changes forward. The other point that I would make, from my own particular perspective as a member of the court of last resort, is to say that it's interesting and academic to sit on the outside in the context, particularly, of capital cases, but for those of us who, in those last hours before someone is executed, have to make decisions as to whether to grant the stay or not – and you're being bombarded with a range of claims at the last minute – this is a very real issue, particularly in the realm of capital punishment for those states that have it.

MR. MAHONEY: Thank you. Over the last hour and a quarter, we've heard some really thoughtful ideas, plenty of grist for your work in teams, some ideas that not only help prevent conviction of the innocent, but make our system work better and fairer. Let me ask you to join me in thanking our panel. (Applause.)

MR. SOBEL: Good afternoon. I hope everyone enjoyed lunch. We're now ready for the second plenary session. Larry Marshall, who was scheduled to be on this panel, is involved in some legal matters back in Chicago and is unable to join us here today. John Stookey from Arizona will be replacing Larry Marshall. The foundation for any successful reform effort is support from interested groups – law enforcement, prosecutors, defense counsel, judges, legislators, and victims services providers. The concerns of these interest groups must be heard and addressed before they can be expected to jump onboard any reform effort. Our next plenary session will help you find common ground in your jurisdiction. The panelists cover the waterfront. Pay particular attention to the views and concerns expressed by those who come at the problem of wrongful convictions from a different perspective than you do. These are concerns that will need to be satisfactorily addressed before any desired reform takes place in your state. Christopher Stone will moderate this discussion. Since 1994, Mr. Stone has been President and Director of the Vera Institute of Justice. Under his direction, Vera has been actively addressing many criminal justice system issues. Mr. Stone is a graduate of Harvard College and Yale Law School. Before joining Vera, Mr. Stone served as a Public Defender in Washington, D.C. It's now my pleasure to present Mr. Christopher Stone. (Applause.)

Plenary Session II: Panel Discussion – Finding Common Ground

MR. STONE: Good afternoon. My job is to stay out of the way, because you have one of the greatest panels that I have ever been privileged to participate with here. You have before you John Stookey, who is a defense lawyer and tells me he knows Larry Marshall. He's a defense lawyer in Phoenix.

MR. STOOKEY: I also added that I knew Larry Marshall and I'm no Larry Marshall. (Laughter.)

MR. STONE: He's a defense lawyer in Phoenix, Arizona, and a political scientist and former professor of political science at Arizona State University. Next to him you have Gerald Richard, who is the Director of the Legal Support Division of the Phoenix Police Department. He also – and how relevant can this be – he chairs the Rules and Revisions Committee of the Arizona Peace Officers Standards and Training Board, and he also chairs the Arizona Supreme Court's Commission on Minorities. He is a former prosecutor and a former public defender, although I think that last one was measured in weeks. (Laughter.)

MR. STONE: Ann Seymour is probably known to almost all of you as one of the premier victims advocates – expert on victims' rights, victim assistance, victims services – and is a principal of Justice Solutions here in D.C. Bill Ritter is an elected District Attorney since 1993 in Denver and probably one of the best respected District Attorneys in the country. He is Chair of the American Prosecutors Research Institute. He is Vice President of the National District Attorneys Association, and he is a former United States Attorney. Mike Lawlor, fittingly, is probably one of the premier legislators in our field in the country. He is a member of the Connecticut House of Representatives. He's in his tenth year as Chairman of its Judiciary Committee, and he is a professor and a former prosecutor from New Haven. And Andre Davis is

a U.S. District Court Judge in Maryland. He is a former state trial judge, a former prosecutor and Assistant United States Attorney, and formerly a lawyer with the Justice Department's Civil Rights Division here in D.C. He is Chair-Elect of the ABA's National Conference of Federal Trial Judges, Co-Chair of the International Committee of the Einstein Institute for Science, Health and the Courts, which we heard about a little in the earlier plenary. It is, I think you will agree, an extraordinary panel. And almost all of them are former prosecutors. We're going to take advantage of the fact that we all know each other now and have had a good morning session, and we're going to try to keep this session a fairly informal and, I hope, lively one. I'm going to pose some general questions to the group and anybody can answer who wants to. I hope that more than one person will take me up on most of these questions, and when the answers stop coming, I will pose another question. We'll do that probably for about 30 minutes or so, and then I will invite all of you to join in the discussion with comments, questions, to one or more members of the panel for your own responses to earlier questions. Our focus is not, as we did earlier today, it's not on the views of this group about what the answers to the problems are. We're really focused here on the challenge of working together to find answers and implement solutions. We are going to be exploring not just the need to do that and the opportunities to do it, but also some of the obstacles to working together, as the panel sees them.

When I joined the Vera Institute of Justice in the late '80s, my first job was to work in the United Kingdom during the exoneration or the reversal of the convictions of the Birmingham Six and the Guilford Four. And that resulted in the appointment of a Royal Commission to reexamine the entire basis of criminal procedure in England and Wales – should there be jury trials, what should the rules of evidence be; what should be the rules governing police investigations – and eventually, that resulted in the appointment of the Royal Commission that inquired into that. It made a series of recommendations, one of which was the setting up of the English Criminal Cases Review Board that you will hear more about in the next session. But in preparing for today's panel, I asked a friend of mine who sat on that Commission on Criminal Procedure – the Royal Commission in England back in the early '90s – I asked him, you know, with all that and the whole Royal Commission, the appointment of all of that, did the police accept that there had been a miscarriage of Justice in the Birmingham Six or the Guilford Four? And the answer was, absolutely not; never did. They thought they had the right people all along. And I was reminded of that when, just a few weeks ago in New York City, the case of some young men who were prosecuted and convicted for a brutal attack on a jogger in Central Park, when their convictions were reversed by a court and, again, the police – my colleagues in the Police Department there, those that I've talked with – were absolutely convinced they had the right people and that there was no miscarriage of justice there, until a few weeks ago. So we start with the very real question – 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? You will notice from the materials in your package that criminal defense lawyers are the only groups in the survey that was done – and the results are there – the only groups who describe wrongful conviction as a serious problem in their jurisdictions. And probably more importantly, more than half of the respondents across all parts of the criminal justice system in that survey, more than half, said that they thought this was either not a problem or very, very rarely happened, if at all. So what do you think, gang? Do we have a problem here? Do we have agreement that we have a problem?

MR. LAWLOR: Can I take that? We had a little warm-up to this session before. There was a lot of discussion in the same way many of you are sitting out there, potentially listening to some of these concepts for the first time. As a legislator – as someone who has to sort of take the pulse of my colleagues in Connecticut – it seemed to me that, even though there are many experts out there who are giving us chapter and verse about potential ways of police and prosecutors doing their job more effectively, I think most of my colleagues would simply hear this as a proposal to put more obstacles in the way of police and prosecutors doing their jobs. I think that, to the extent there is a problem – actually, there is one, right? – I think there has to be a way to somehow take the temperature of citizens at large, in particular, policymakers, to see if they understand the significance of these incidents that have begun to come to the surface. So I'd have to say, in talking to my colleagues, I don't think that they realize there's a problem. I think they think there's a problem in other states; they don't think there's a problem in our state. But I would be very skeptical – and, by the way, I think this group consists of people who didn't actually apply to come here. (Laughter.)

MR. LAWLOR: There's a conference in Washington about inappropriate or unlawful or wrongful convictions of innocent persons, and I'd like to go there. I think people are here because of their expertise in their state, their leadership role in their state in these different areas. And I think many of the people in the audience were probably sitting here this morning saying, you know, this is sort of logical to me, but I don't really buy the fact that this is such a huge problem that needs to be addressed in the upcoming session of the legislature, for example. Let me clarify: There is a problem, but I'm not so sure that the public at large, or even the people in this room, necessarily agrees with that.

MR. STOOKEY: I agree with that. Certainly, our experience in Arizona would suggest that there are many segments of our population who don't see this as a problem. One of the issues, I think, that helps to explain that – and maybe is one that we, as a group, need to think about – is what I call the paradox of DNA. What that means is that I think that the DNA evidence has demonstrated to people that there are some individuals who have been wrongfully convicted, but it is the belief that those are a relatively small number, and if there is not DNA evidence to exonerate somebody, that somebody is not innocent, and that, therefore, we have this double blind with regard to the DNA evidence. It opens the door for us to meet and talk about this issue, but in some ways, it's used to slam the door, to say that the problem is very substantial.

MR. RITTER: I think there is a feeling about this, like you have a feeling about a minor heart attack. A minor heart attack is something that someone else has, and, as long as it's somebody, you might be able to describe it as minor. But when it happens to you, it doesn't feel very minor. (Laughter.)

MR. RITTER: I think the big debate about the nature and the extent of that first question that we received in our packets here for the working group, I think prosecutors around the country would acknowledge that there have been people who were factually innocent, who have been convicted of crimes and have been convicted of serious crimes. I think Attorney General Reno addressed a pretty important question. What we know now about people who are on death row is what we know because of the attention that has been paid to those cases. But, you know, in my office, we have 5,600 felony cases a year that we process through seven courtrooms.

That's a lot of cases through a very few courtrooms, and huge volumes of cases. So I don't know that anybody is paying attention to – or knows the nature and extent of – the problems that lie beneath, sort of, the capital punishment cases or the death penalty cases, or even serious felony cases. I suspect that's a place where there is not common ground presently among prosecutors and police and other practitioners. But the nature and extent of it is in that third tier down from the most significant cases.

JUDGE DAVIS: I think there is a natural human resistance that we all can appreciate to the suggestion that our work, often our life's work, has resulted in grave injustice. So there is, I think, a natural resistance to the idea that this is a real problem, a broad-based occurrence. But I think that fair-minded people of good will, examining the evidence, simply cannot conclude other than that we have a serious problem. I agree fully with the Attorney General that even one is too many, but I think what we've seen in the exonerations – the DNA exonerations – is significantly the tip of a large iceberg. I don't know how large the iceberg is, but I know it's an iceberg and I know that we who participate in the system need to devote significant resources, energy, and time and attention to further identifying the problem and correcting it.

MR. RICHARD: That's one of the things that we said in the Arizona group. We could identify two DNA cases, and we said those two are too many. That being the case, what we wanted to do is go ahead and move forward as far as coming up with a way that is going to be supported by the legislature, as well as by all the entities that are going to be involved, as far as attempting to address future cases; trying to make sure we set up a role model, as we have been able to do in some other areas, and to be able to go to other states and help other jurisdictions as far as what to do and what to look for and how to overcome that. But one of the things – and I know that I had a chance to talk with Chris about this before – sometimes, a lot of this is not just the prosecutors, but it starts with the police. As was said earlier by our Chief from Seattle, this starts with the police. It starts with training. It starts with ethics, as Captain Maples mentioned. It starts with attitude, and it starts with commitment. Unless you have that at the top level and you see that it is definitely funneling down through the entire organization – that what you have to do if this was a community, as I usually do community law enforcement seminars – there are other ways in order to make sure that that individual who is, as we call him, in the corner pocket – the chief – is working with us in order to make sure that we have collaboration. And we are addressing the issue with regard to justice. If you don't have that, you have to go to those outside, external forces in order to make sure that this does happen.

MR. RITTER: Can I respond to Judge Davis? He says it's a serious problem. I think that the question that needs to be asked for the purposes of this discussion is, what's “serious”? Is “serious” something we can get at numerically? Is “serious” something that we only get at by saying, well, qualitatively, there's a very small number, but they were really important cases? And what is our idea? One of our members in our small group said, if the ideal is to have no wrongful convictions, then the only way to arrive at that is to not convict people at all, because we're a criminal justice system and people are human beings and decision-making oftentimes is subjective. The science can be very helpful, but it's not always going to be the thing that decides. I think that, in order for the criminal justice system to operate, you have to assume not just the possibility, but also the likelihood that there will be some number of wrongful convictions. That's a very difficult thing to accept and to assume, but I think that it may be the premise upon

which we have to operate, and if people disagree, at least I put it out there for discussion. 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.

MS. SEYMOUR: I think we have a problem, too. I think one wrongful conviction is one too many, but I also believe that one guilty person who goes free is one too many. I think it's defining the scope of the problem, and also what this conference is doing is looking at who the problem affects and who has it has impact on.

MR. STONE: I think that the question I want to put back is, 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? If the doubts are the way you've actually just described them, and the differences of opinion might be there, do we need to create that common ground? And what is it? Is it helpful in one state to point to a slew of wrongful convictions from another, or even in one county to point to wrongful convictions in another county? Or is that a false road to go down in building a consensus, and should one work about trying to understand the system better in one's own place? What counts as a basis for common work on this problem?

MR. RICHARD: This takes me back to when I was prosecuting street gangs. Arizona was in a state of denial. We said we didn't have a street gang problem. Actually, we have a street gang problem – not only in our urban areas, but in rural areas and suburbs, but also on the reservations. Once we accepted the fact that we had the problem, we came up with a definition and we started to address it. I believe the same thing is here. This is exactly what I'm hearing again when I was asked to attend, and that was, if the problem exists, instead of pointing fingers and throwing rocks, knowing you live in a glass house, too. Look inside of your own community and identify those issues, whether they are at the level of DNA and individuals that are being wrongfully convicted and sentenced to death, or they are of lesser offenses. Once we do that, then we're able to turn to this tort community and say, yes, we're giving you the best product we can possibly give you. How many times, especially in law enforcement, have we heard you have to serve your customers, and your customers are the community? So we need to educate not only those internally, those individuals in this room, but also those within our respective agencies and the community. Because if we don't have the community understanding exactly what it is we're trying to do, then everything we're doing is for naught, because they are going to constantly say we don't trust them.

JUDGE DAVIS: 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. I think leadership, among other things – some of which have been mentioned already – leadership such as the Chief Justice of North Carolina, as Justice Orr said, unilaterally saying we have a problem; we're not sure of the parameters of that problem, but I'm going to take affirmative steps to begin an examination of our system to see how big the problem is, and what, if anything, we might be able to do about it. I think those kinds of models are very important to get to the attention of leaders in all the states, all the jurisdictions. So the bottom line is, you don't even have to believe that you have a serious problem, however you choose to define that, to be persuaded, I think, that there is a problem and

that it's at least worth the devotion of some resources and collaboration across jurisdictional lines.

MR. STONE: Let me ask, then, if we can get a group of people together across agencies, across interests, and we can do, as Andre suggests, agree that we're going to do something about the process and the potential flaws in the process, even if we disagree about the extent or the numbers of the quantity of the issue. Before we start working on joint solutions, are there particular issues in particular agencies that we ought to be aware of? Are there problems, not with the outcomes here, but with the processes in some of the agencies and the police and prosecution? I was struck, again looking at the material in the binder, that prosecutors rated the contributions of prosecutorial misconduct to wrongful convictions as a higher factor than any of the other groups surveyed. In fact, victims' advocates didn't rate it at all as contributing. They were the only group that didn't think prosecutorial misconduct played into it – prosecutorial mistakes, sometimes, but not prosecutorial misconduct. Prosecutors, of all the groups, rated it as the highest problem. The same kind of thing happened with the police. The police rated police misconduct as a bigger problem than judges or prosecutors did, so it's an interesting picture. What are some of the inside issues? Are there particular routines, are there polices, are there processes and agencies that need to be addressed, in particular? Or are there issues in what researchers call the legal or the courthouse culture – that while we may all operate in the same system, are there some courthouse cultures, office cultures, that can contribute to this problem? John?

MR. STOOKEY: Let me start with my friend's admonition here to talk about your own house first. In Arizona, there was a group appointed by the Attorney General, called the Capital Case Commission, that studied death penalty cases in Arizona since '75 and looked at which cases were reversed, which individuals were eventually found not guilty of the underlying offense, and so on. We don't need to go into those numbers except to say that the number one reason explaining reversals in capital cases, including those where the individual was eventually found not guilty, was ineffective assistance of counsel. I think this is something that shows up throughout the system in the United States. I think it is a result of a lack of training in some regards, I think it is primarily a result of lack of funding – and I know we all feel that way – and I think that isn't something that unites our communities, is our recognition of a lack of funding. But 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. I think that's a uniting issue for us, because I believe the prosecutors, the defense attorneys, all the victims rights advocates, would all agree that there are fundamental problems at that level of the system. I think, going back to your earlier question, how much of a problem is too much – well, I think any problem that has a potential solution to it is too much, and there are potential solutions to the kinds of problems that we're talking about.

MR. RITTER: I definitely think there are cultures in prosecutors' offices and in police agencies, and I'd say even in public defenders' offices, although I know far less about that. But an ethic develops over time, or the lack of an ethic develops over time. It has to do very much with – people talk about training. It has to do with the step before training – with recruitment,

with how you speak to people as you're interviewing them for a position, and then how you train them. And so much about ethics is the core that they bring to you, so your training may be just at the margins, but you have to very much reinforce what you say in the recruitment process, and then how you act upon it. It's very difficult to undo a first-degree murder case when you lose confidence in your evidence. It's very difficult for a prosecutor to do that if they don't have the backing of the head of the office. If they can't sit with you and explain it, they're going to feel like they are being timid about evidence that other people might go forward on. So the ethic of the office has to reinforce the decision to do that. You combine that with the fact that we are in an adversarial system, and that compounds the problems where acting on a lack of confidence in evidence is concerned, because you rate people upon their ability to be good adversaries, so your prosecutors may feel very much like they will be rated a certain way if they are trying to undo it. Finally, I would say that, if you take something like the identification issue – the sequential identification issue – most of what has been done in prosecutors' offices or in police departments having to do with identification issues was done as a result of the adversarial process of going in and battling and litigating things. Again, one member of our group pointed out that we fastened upon something that was right because it was tested in the courts. Maybe it won by a 4:3 decision, it was barely right, but, by God, somebody said it's right, so now we're going to do it. And we don't look for other new and better things to do because nobody yet has told us they're right. You again have the adversarial system, and your results are later interpreted by seven Justices of the Supreme Court. All these things kind of compound the difficulty of doing new and different things and doing them in a system that's conflictual.

MS. SEYMOUR: I listened to Bill talking, and I am really reminded about how everything that we're talking about here in terms of wrongful or rightful conviction is about procedure and processes. I don't know if victims are a culture or not, but in the culture of criminal victimization and victim advocates, we're all about people. There is a little bit of a disconnect. We need to really consider the human element of everything that we're talking about and the fact that people really do get hurt by crimes, whether there's a wrongful or rightful conviction. I think that needs to be considered, and I think the fact that victims and advocates have been involved in this process – I really want to thank you all for that because we're kind of not used to it, we're more of an afterthought. Also, I'd comment that I know of no crime victim or advocate who wants an innocent person to be punished for something that he or she didn't do. That's common ground right there. I will tell you that, in my line of work, there are often times where I'm not allowed to be seen in public with public defenders or defense attorneys on issues. And this is one where I feel we really do have common ground on that point alone.

MR. STONE: Anybody else on individual issues or cultures or organizations?

MR. LAWLOR: I think that it should be said through all of this – and I don't know that anyone has actually alleged that there's some pervasive corruption in the criminal justice system; in other words, that these wrongful convictions are deliberate. I don't think anyone is suggesting that. I think it's important, if that is the case, to say at the outset, you know, I don't know if there is a suspicion there. If you believe there are a lot – or more than there needs to be – of wrongful convictions, do you believe that people are deliberately doing this, knowing that they have an innocent person, maybe believing that they did some other crime, but just trying to convict them?

If you don't believe that, then I think it's important to say that, because it seems to me that the process of analyzing it will be less accusatory, which I think is important in this process.

MR. STONE: It's a really important point. Let me, though, just put it back to you in a slightly different way: You were a prosecutor in New Haven. All over the country, you know how these systems work. There is probably no jurisdiction like New York City, but when I first walked into a criminal court in New York City, after I was a lawyer, the very first case I saw was a guy who had been arrested for burglary. It became clear in the arraignment, when the case was first presented the very first day, that he had been arrested with burglary in his own apartment, and the case began to get really sort of weak. So everybody quickly huddled, and they said, well, just plead guilty to disorderly conduct. There was no allegation in the case of disorderly conduct, but he would let the case go away; he'd be convicted, he wouldn't be – because, in New York, the category of the offense “disorderly conduct” isn't technically a crime, so he could walk out saying he didn't have a criminal record. The prosecutor would walk out with a conviction in the file, and we'd be done. The fact that there was no allegation of disorderly conduct didn't bother anybody, and that was the disposition and it was done in about seven minutes. Now, you just said that nobody believes that we're deliberately convicting people of things they didn't do, just because he's guilty of something. But that's exactly what I think we're doing in lower courts across the country every day because, unlike what the former Attorney General said this morning – it's the truth, not the conviction, that must be at the forefront of everything we do in the system, those were her words. In fact, in lower criminal courts, dispute resolution; dealing with the case; moving the business – as long as everybody is happy – is actually what's in front of the system. What do we do about that? Do we just say, okay, we're concerned about wrongful convictions of felonies and up, or of felonies where someone goes to prison? Do we explain to the public that we're not going to bother about it in minor cases, but we are going to bother about it in major cases? Or are we facing a bigger problem than this discussion so far suggests? Can I put that back to you, Mike? (Laughter.)

MR. RITTER: He agrees that there is no place like New York City. (Laughter.)

MR. LAWLOR: You know, I think I can remember doing the same thing when I was a prosecutor. You knew you had a problem, and then you immediately switched gears to try and figure out a way the police wouldn't be sued for wrongful arrest. It seems to me that that was accomplished in the way you just pointed out. Although I do think there is a distinction between deliberately setting out to set up an innocent person versus this kind of byproduct of courts that have become overwhelmed and a plea-bargaining process that gives a lot of leverage to prosecutors. After all, as my brother – who is also a prosecutor – says all the time, you pick any little old lady on the street and follow her around for 24 hours, and I'll charge her with something. (Laughter.)

MR. LAWLOR: You probably have that option at your disposal, but I do think there's a distinction between deliberate, corrupt decisions and this sort of default protect-your-rear-end, protect-the-criminal-justice-system attitude. But I think it needs to be highlighted, and I think people need to come to grips with it. One other thing that comes to mind for me is that we've also had these discussions in our state about race in the criminal justice system, and the question is, is the system a racist system? When you ask that question, I think it's slightly different than

asking are all the prosecutors and cops racists, as individuals, versus is the outcome racist in its content? I can remember that, when I was a prosecutor, in retrospect, looking at some of the decisions I made, I can see that they were influenced by race for reason that are a little bit too complicated to go into now – but, nonetheless, if someone was saying, “Mike, you're a racist because you did that,” I think I would have been very defensive. Like, look at the way you're making these decisions, look at the factors you're using. Don't you see how that can have the effect that is really objectionable? And to the extent one discusses the topic we have today, that may be an appropriate approach, especially if you're trying to get consensus in order to make an appropriate response.

MR. STONE: Andre?

MR. RICHARD: Chris, I think you've really cut to the core with your observation and question. The question was put, are victims a culture? I don't know, but I suppose it's correct to say that certainly victims form a community, and just as victims form a community, the truth of the matter is, recidivist offenders form a community. And how many of us are unfamiliar with the kinds of black humor that we all recall, quote, "well, he did something." That's exactly what you're cutting to. I began my judicial career at the Court of Limited Jurisdiction in Maryland – traffic offenses, misdemeanors – and part of the culture there was exactly what you described. And I suggest to you that it's not just that the lower courts have limited jurisdiction, and it's certainly not just in Maryland, but it's an endemic problem. We have in Maryland this concept, as many of you have in your own states, called a PBJ – probation before judgment – which is a way to dispose of the case without a conviction on a guilty plea. There must be a guilty plea. The truth of the matter is, regrettably, many judges lost the capacity to say “not guilty” in traffic cases, in small misdemeanor cases, in what we would describe today as sort of community dispute type cases. And, uniquely in Maryland, you know, you don't need a law enforcement office – let alone a lawyer – to actually file charges against somebody. We have a wide open system where A, who lives down the street, can march into a court commissioner and state an oath that he or she was assaulted and battered by B, living up the street. The Commissioner can issue an arrest warrant without any intervention by any law enforcement officer. So the system has some endemic, some inherent problems. But my point is that there is a cynicism that arises out of an understandable frustration with crime, with recidivist, with the burden crime – even petty crimes – impose on the community and on the individuals. I think that one of the things that we've got to do as leaders, judges, prosecutors, legislators – as people concerned about the problem of wrongful conviction – is to fight against what I refer to as the black humor "he did something" and so, somehow, it's okay for a person to plead guilty to time served. In the real world, of course, as we on the federal side well know, what's happening now in the second decade of the Sentencing Guidelines, a lot of those seemingly insignificant guilty pleas in state court are coming back to haunt offenders in major ways in Federal Court, because in Federal Court, a PBJ is a conviction. It may not be a conviction under state law, but it's a conviction. Similarly, lots of state misdemeanors are counted as felonies for purposes of the Federal Sentencing Guidelines. So, while I understand the frustration and I understand the cynicism that naturally arises – and I enjoy black humor as much as anybody, usually – we've got to move beyond the humor; we've got to move beyond the cynicism. As the Attorney said, being convicted of a third-degree felony when you shouldn't be convicted of a third-degree felony needs to be addressed, just as much as any other wrongful conviction.

One of the things that you mentioned a little bit earlier – you said that prosecutors, when asked, said prosecutorial misconduct and police said police misconduct – everyone within their own community does not want to believe they still have someone in there that is bringing down their name and bringing down their reputation and bringing down their image. When I think back, as I'm listening to everyone speak about when I was a prosecutor, I built a relationship with my officers. Why? Because I had older prosecutors who were telling me you can't trust the cops, all they're trying to do is clear their cases. Then when I was in the Police Department, they said, well, you can't trust the county attorneys because all they are going to do is just get cases and charge those cases they can win. When I was in the Public Defender's Office for six weeks, you couldn't trust anybody. (Laughter.)

MR. RICHARD: The whole purpose was, once you get that relationship, that positive relationship with those officers – and some of them that I know today have risen through the ranks to commander – what I found is that they would come to you and they would tell you, “Don't prosecute this case; we stopped this individual and here's the police report, but don't move forward because we know your ethics.” When I had those individuals that still wanted to move forward, I would have others that had a relationship to that case who would say, “Gerald, don't do that; this case is not a good case.” And when I would walk into a courtroom and dismiss it with prejudice and see the entire criminal defense bar on the other side say, oh, my God, what in the heck did they do – because they knew how strong I was when it came to prosecuting cases – they said something had to be wrong because I wasn't going to place the county attorney's office in jeopardy as far as their image. Today, we aren't even close to being interested in placing the police as far as their particular position. But 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.

MS. SEYMOUR: Yes. (Applause.)

MR. STONE: Let's take that as a given, and let's think about how we actually build some of these partnerships to work together on these problems. Let's just start with who is at the table. Are there people who don't usually get pulled into these partnerships, who we need to pay attention to, whom we need to have at the table? Are there voices, concerns, interests that you would suggest need to be part of the common work of dealing with these problems? Ann, you have to start; you were looking at me.

MS. SEYMOUR: Yes, obviously, I'm here representing victims. I think victims are at the table. Very often, we sometimes feel like we're at the kid's table at Thanksgiving. On this issue, I think we need to be at the big table. Joe and Ellen, some of the victim survivors and advocates here today were saying that it's not our radar screen as it needs to be, so we have an obligation to go back to our culture or community, and, I think, bring up the issues. But I will also let you know that I think our issues may be distinct. In addition to the fact that none of us wants an innocent person to be wrongfully convicted, we also need to recognize that, when there's a wrongful conviction, that means the rightful one didn't happen, which means someone

bad, who does bad things to people, is still out there, which raises a whole range of issues for crime victims – primarily safety and primarily mental health issues. So I offer that to you.

I also think that, as we go through the conference here and into the future, we look at what role victims have, not just as an obligation to them, but to really see victim involvement as an opportunity to make a really big difference. I think the most important thing is to really recognize that they need to have information about what's going on in the case. I listened to other people talk about this issue, and it's like it's a foreign language to a lot of victims. I know that a lot of times, we talk about notification, but in cases like this – and I have been working with folks in Illinois in the past couple of weeks – notification by Federal Express letter that may or may not arrive in time to notify the victim prior to a national press conference that tells the world that the person convicted of the crime in their case now gets a far different fate from what the court decided – that's not notification. Consider, as I started out saying today, the human element in these cases, from the victims' perspective and from the recidivist community perspective, as well, and recognize that I do think there is a lot of common ground. I can't speak for all victims, but I'm sure willing to come to the big table.

MR. STONE: John?

MR. STOOKEY: I think something that Attorney General Reno talked about this morning is important. One group that may be at the table, as well, is the education community. This is, in many instances, about lawyers, certainly with regard to prosecutors, judges, and defense attorneys. And legal education, traditionally – and Attorney General Reno has talked about this eloquently – has not focused upon this problem or this issue of wrongful conviction or a process that is flawed. Maybe we can build it, in the ways that she's talked about, into the legal education process, such that we're not only trying to remedy past problems, but also moving forward in a more unified fashion with regard to these ethical issues. So I think we should take her up on that recommendation, as well.

MR. RICHARD: I agree with that, John, but I'd provide just a comment from the prosecutor's perspective: These innocence projects that are attached to universities or law schools, they are largely out there investigating whether or not there have been wrongful convictions. And so you can imagine that the prosecutor community would be a bit nervous about that. It might even skew the type of discussion or dialogue you would have in the law school about what this picture looks like, if those are the people – the people who are part of the innocence projects – are the only people who are having the discussion. They are the professors -- they are the ones teaching the criminal process and procedure classes – so it should be, even in the law school context, the broader dialogue. So have some healthy discussion about the nature and the extent of the problem and whether or not there's malice involved. But if it's just left to the innocence projects, then I suspect prosecutors will even be nervous about it being a topic of discussion in law schools.

MR. STONE: John, do you want to come back?

MR. STOOKEY: I think it's an excellent caveat, and that is, indeed, not what I had in mind. What I had in mind, and what I think Attorney General Reno is talking about, is that as

part of the first year curriculum, you would have prosecutors, victims rights advocates, defenders, and judges talking about the significance of this issue. So I agree wholeheartedly.

MR. RICHARD: What I was suggesting was that maybe prosecutors are not invited to be on innocence projects for good reason.

MS. RENO: What I'm thinking of is just a seminar on truth. It didn't have anything to do with the specific cases or an innocence project, but a line of discipline in how we seek the truth – communication, legal, medical, psychological, physiological points of view. That would be a good way for common ground because it would take it out of the criminal justice system as in who caused that automobile accident, what happened at that intersection, and all the issues would come up in terms of what people recollect. And we do so little of that, and so much is known, and we never get together because we're each going down our little pig trail.

MR. RITTER: I'd like to say something about that, and I know I'm talking a lot, but I think there are a lot of prosecutors and even police officers who don't feel like the system is really about truth-seeking, and that it may be, in part, somewhat responsible for this issue before us – the innocent people being convicted wrongfully. There has been some gamesmanship, as you said this morning, Attorney General Reno, and it kind of gets to be game playing. We're getting evidence suppressed – we're getting things we think should be a part of the record not a part of the record – and so the jury is maybe dealing with less than the truth, and so maybe it gives people the idea that they can cut corners. That's not the right thing to do at all, but I'm just wondering how much, for instance, the exclusionary rule has to do with prosecutorial misconduct or police misconduct, in trying to get at, you know, a result in a system where they have lost confidence in its truth-seeking ability – again, a very proactive thing to put on the table. But I think it's not a bad thing to have out there in a conference like this, where we're talking about it.

MR. STONE: Just use the microphone, tell us who you are, and let's open it up.

MS. LEVENSON: My name is Laurie Levenson, and I have a question for the panelists. Do you think this has become so hung up in procedure and cut back so much on procedural rights that we're having a harder time than we should have finding out who's been wrongfully convicted? In particular, I'm thinking about the limitations, time-wise, and successful petitions for habeas corpus.

JUDGE DAVIS: Yes. (Laughter.)

JUDGE DAVIS: The tension alluded to by one of the earlier presenters, between our desire for finality, on the one hand, and the constitutionally-rooted interest in process values is a part of the system, day/in and day/out, that we've got to work through. Frankly, there are many of us – not all of us, but many of us – who believe that, over time, the interest in finality has trumped our deeply rooted constitutional values and individual liberty. So what I say to my criminal procedure students, somewhat glibly – but I think there's more than a kernel of truth to this – is we've gone from the point of view that it is better that ten guilty people be acquitted than that one innocent be convicted to the point now where some believe we are willing to accept the

conviction of a few innocents in order to ensure that the guilty be convicted. That's a tension in the system, and I think, again, the leadership in the criminal justice system has to work continuously in our respective domains to try to strike the balance. True, I absolutely agree that it is a tragedy for a guilty person to go free, it is a tragedy for an innocent person to be convicted, but our constitutional values have already struck the scales in favor of what I refer to, admirably, as exaggerated due process. That's our system. In a culturally diverse system, a system where economic wherewithal drives so much of legal outcomes – and for other factors that could mention, but I won't – we made the decision. Our founding fathers made the decision in 1791 that we're going to make it hard to convict people of crimes because we value liberty and we value those process interests, so we must not ever, I believe, so denigrate the importance of those process values that we get to the point that the end justifies the means. So it's a constant battle, it seems to me.

MR. GORDON: Ken Gordon. I'm a Senator from Colorado. When I run for office, we have elections and one person wins and one person loses. That's the language of the game. Obviously, in the United States, in very many different forums, the conversation is, did you enter? Did you lose? I think that's probably the conversation that goes on in most discussions about this topic between public defenders and district attorneys in cases. And I would say that a district attorney in most jurisdictions, if a person were acquitted because of evidence that comes out during the trial, that the person was probably innocent, would feel that he lost the case. And when he went back to the office, he'd say, "I lost the case" even though he may have been convinced himself during the trial – or she – that the person was acquitted because they were innocent, or at least there was a strong and reasonable doubt of their guilt. If you had to talk about changing culture, I think – I was a public defender before I was in the legislature, and I worked in Denver, and I think the District Attorneys in Denver were pretty good. But even there, I know that the conversation was about what the jury said and that was whether you won or lost, and I think that if you're talking about cultures, we need to think about what's a win? If an innocent person is not convicted, nobody should think that they lost anything. And I think it probably goes to the elected DA in the jurisdiction. What are they saying? Are they rewarding their deputies that have a win/loss ratio, or are they rewarding deputies who investigate a case and say, "I don't want to prosecute this because I think there's a reasonable doubt"?

MS. SEYMOUR: I don't think it's just the DA, though. I think your comment is wonderful, but I think there's a public expectation that you want more checks in the win column. I think that drives a lot. It goes beyond everyone sitting in this room and whatever role we have in the criminal justice system. There is a public expectation that expects that.

MR. RITTER: There is. Mike and Chris and I were all on this Harvard Symposium on Indigent Defense Systems, and there were people from all around the country who described different things happening and their view of certain prosecution offices. It was, well, you didn't really get to leave and go to a nice firm until you had won a death case. Do you remember that one conversation we had about that? That's a problem. If that's how prosecutors view their work, and sort of their moving up the ladder – that they are winning and they are winning death cases, particularly – you can get into some trouble. They're talking about an office that's been in some trouble. So there are things you can do as the head of the office to try again to get a message to your troops that you're not counting the wins/losses and that you really do care about

the cases they decide to try and whether they are prepared, and, ultimately, that they did everything that they could to eke out justice at the end.

MR. MALENG: Norm Maleng, the prosecuting attorney for Seattle, Washington. I want to come back to this question. I think it was Representative Lawlor that was the one that first addressed it. That is, the question, “do we have a problem?” And I want to suggest that that question may be at the very heart of whether this conference is going to be successful. I just wanted to throw out the idea that I think it is the inappropriate approach to the issue that's before us, because everybody is going to have a different frame of reference. For example, if you ask me, in the current environment across the country, do you have a problem? The frame of reference to some of the issues that are associated with the state of Illinois, most people would respond, no, we don't have a problem. Somebody else's frame of reference could be, you know, if we convict one innocent person, we have a problem. I don't think we're going to go “we shouldn't be going down that road”. What will happen is, because people have a different frame of reference, you're going to get 95 percent of the people falling off the wagon. The appropriate question is the historic one that's always been before the criminal justice system. And that is, how do we improve our justice system? And when I look around the room – and particularly, I'm knowledgeable about people such as Bill Ritter from Denver and Attorney General Reno in her work, both as a prosecutor and as the Attorney General – most of us are committed to the improvement of the system. For example, in the prosecutor's office, it could be special units for domestic violence or child physical and sexual abuse. It could also be associated with particular practices. For example, I think one of the issues that was discussed today was this whole issue of sequential eyewitness identification, and I really think that we can give the credit for that to Attorney General Reno, who, I believe, was the Justice Department that really identified some of the research that had been done – raised it as an issue, formed a work group, and from that work group, came out a best practices, which a criminal deputy in my office, Mark Larson, was a part of. He brings it back, and now it's started in the City of Seattle Department. But what it is, is that you identify an issue and get people working on it, and the way to do it, I think – what can come out of these sorts of conferences like we have here – is that you go back and get energized by some of the ideas that you have heard, rather than going back and arguing on whether we've got a problem or not. So I think we need to go back to the idea of ways of improving the system. And there is a lot of work that has been done – whether it's on eyewitness or videotaped confessions – that we can get a greater knowledge and go back and then do something about it. So I think, coming back to what Representative Lawlor said, if you're talking about it in the legislative context, somebody would respond to you, oh, we don't have a problem, because they're thinking of maybe what happened in that case in New York City or some of the issues surrounding capital punishment in Illinois. I think we need to be sensitive to those things, but I think that we need to kind of go back to our historic thing about improving the justice system.

MR. LAWLOR: I want to make one comment on that. I agree 100 percent that it's the more positive approach that will pay dividends here, I think. But also, one potential problem that really hasn't been mentioned yet that I think is a real problem is – given the advent of these new techniques like sequential identification and new technologies like DNA, et cetera – I think it's more likely that, when there is a wrongful conviction, that we'll find out about it when people find out about it in your jurisdiction. And I think it runs the risk of really eroding the confidence that jurors, for example, would have in the criminal justice system, and I think that is a problem

that everybody can identify with; that if we make a mistake and we get caught, then we might lose our credibility for the foreseeable future. And you can see these things playing out in some parts of New York City, Los Angeles, et cetera. People lose confidence in the ability of the system to do a state-of-the-art investigation. It runs the risk of people not believing testimony in trials in the future. So, to me, that's what I would look at. I'd look at the horror story, the potential problem. When those crop up, it seems to me the kinds of solutions that have been discussed here today are ready-made to solve those problems when they occur. So maybe you'd like to be proactive, right, and put it out there before people realize there's a problem; but inevitably, in every jurisdiction, these things are going to happen, and I think, maybe through the work that we've all participated in here, we can say, well, here, actually, I've got a notebook full of solutions that can ensure that this doesn't happen again, and restore our credibility.

MR. STONE: Barry?

MR. SCHECK: I really want to follow up on that point, because you took the words right out of my mouth. There is a problem, but, most importantly, it's an opportunity, and the way to define the problem is not just these high profile exonerations, which are kind of cognitive dissonance to people; they have a lot of trouble accepting, as Chris mentioned, which frankly gets in the way. We're a lot closer in some ways to videotaping custodial interrogations in New York, because it was a best practice and a good solution. And then the Central Park Jogger case, which is maybe the most spectacular example, created resentments within the police departments and made it a little harder to get on with that. But if you want to look at data, think of this: It's not just that there are three post-conviction DNA exonerations – that's post-conviction – there are tens of thousands of people just with DNA testing over the last ten years who were arrested and then, when they finally got around to doing the testing because of this turnaround time, they were exonerated and they were released. So this is an unprecedented database. We are not, frankly, keeping track of these cases as carefully as we should so that we could learn more about the best practices and where the problems are. So this is a great opportunity. And the other part of it is what Ms. Seymour is talking about, because there's no question that, when you look at the post-conviction exonerations and you look at the pre-conviction, post-arrest exclusions, just with DNA, look at all the crimes that were committed by the individuals who were eventually apprehended with the DNA testing. They are almost invariably, in these cases, serial offenders. We're talking about serial rapists and serial murderers that were out on the streets because the wrong people were in prison. And this, to me, all the ideas that we're looking at here – whether it be reforms for false convictions, reforms for reducing the number of incorrect identifications for substantially reducing the right ones, whether it's cleaning up crime labs so you have reliable data – it's just good law enforcement. It's hard for me to see how we could fail to come together on that. I should say, Bill, there are innocence projects in law schools that look at wrongful convictions, but there are also 50 courses now in law schools that are entitled “Wrongful Convictions: Causes and Remedies” with a website that contains much of the data that is in your books, and more that have prosecutors involved in teaching them. And they are all just directed at the research angle. That's where I think we can make the most progress.

MR. STONE: Let's keep going.

MR. WALLACE: Scott Wallace with the National Legal Aide and Defender Association. We've talked a little about counsel issues. I know we don't have any public defenders, specifically, on any of the panels. Let me try to inject some specific issues here that relate to how we can all work together on these cultural issues. There is a question that is listed in our questionnaire – is one of the problems incompetent or ineffective counsel? Well, we talked in our group earlier about the subsets of that issue being funding and independence. Why is it that you have ineffective assistance? Well, there's not enough money; people have a thousand cases open at any time; and there is no set of standards that guides the selection, the appointment of counsel, often, so you have a judge selecting someone with unguided discretion – who is just in the courtroom – and they are taking a death penalty case. I have been in courtrooms where there is no public defender. You have 70 misdemeanor defendants lined up; the judge says, “Does anybody here want a lawyer?” They have already been in detention for a week. “If you do want a lawyer, I'll hold you over and I'll get you lawyer, and we can get to your case in five days; or you can take the deal I'm going to offer you, and you can go home today.” If they do ask for a lawyer, then they're given a lawyer who has a thousand cases. All they do – and I have seen this time and again – is read the police report and say, “Here's the standard deal.” So what this gets to about us all working together is, there's a judge in that courtroom who is allowing that to happen. There are legislators who say, “A thousand cases? That's not too bad; at least we're keeping things moving.” A lot of people are complicit in this, so it's an invitation to the judiciary to think about what might happen if they had some standards for selecting qualified, experienced, trained lawyers; an invitation for legislators to think about why it's important to get caseloads down to the national standards, why it's important to have standards; and, finally, a little invitation to Ms. Seymour and the victims' groups that there is a set of victims that we're not talking about quite yet – and I hope you might consider including in the victims community – and that's the victims of wrongful convictions. One way you could reach out to them is to have that part of your agenda – compensation for wrongful convictions or doing something to help them – because they are victims of the criminal justice system. And sometimes, as we heard at the show last night at the Warner Theater, “The Exonerated”, the consequences are horrible – years of your life gone, your family destroyed. So I invite you to broaden your perspective there.

MR. STONE: Thanks, Scott. Do you want to respond to either of those two comments? Anything else?

MS. SEYMOUR: I'm on record as agreeing with two defense attorneys ... oh.
(Laughter.)

MS. SEYMOUR: I agree about broadening the agenda. At some point, I would love to talk to you about your culture also broadening the agenda a little bit, too. (Laughter.)

MS. SEYMOUR: There is some group-broadening that can occur under the umbrella of this. I think it's a great opportunity.

MR. RICHARD: It was mentioned a little bit earlier about moving forward in the context of improving the justice system, improving the system as a whole. I know that, in Phoenix, when the issue of racial profiling was coming down the pike and we had a community that was

saying “collect data”, our chief said, “I’m going to accept that racial profiling has occurred in Phoenix, and what are we going to do in order to change it?” That’s when we started training our officers with regard to racial profiling – as far as assisting other agencies with regard to curriculum development within the state; assisting the Police Executive Research Forum, for those of you who are familiar with it; assisting those other agencies in order to address it. And at the same time, though, we took a look at the consent decrees and what the Justice Department was saying with regard to what agencies needed to do with regard to hiring, and with regard to training, and with regard to making sure that you do a better background check; with regard to instilling ethics and integrity in each one of the officers that we brought in. So, consequently, we did take that attitude with regard to improving, rather than just drawing a line in the sand and saying, “it’s here” and “what are we going to do in order to be a better department?” And I believe we can do the same thing here.

MR. STONE: I’m going to pull it to a close with that. It seems to me a wonderful note to end on. Let me just try to pull together a few of the things that have been said in this last hour and a quarter. Mike talked about how his colleagues see this as mostly obstacles to convictions. John talked about the paradox of DNA and maybe too high a standard. Bill talked about the huge volume of cases that nobody knows what’s in them. You did say that you don’t need to come to agreement to decide to do something, a theme we’ve come back to several times. Bill raised the point that there are going to be wrongful convictions as long as we’re human beings running a justice system, and we need to put that on the table and grapple with that. Gerald made a really interesting analogy to the gang problem that he had when he was a prosecutor and the need to look in your own community in order to begin to really deal with the problem right in front of you. John talked about any problem with a potential solution is too big a problem to put up with. Where are the process problems? People have been very open, and, I think, frank. We’ve got a pretty rich array of some real deep process problems in our systems. A public defense lawyer like John talks about ineffective assistance. Bill talked about, I thought quite insightfully, that in some DA’s offices, if you show a lack of confidence in your own evidence, you risk low performance ratings. Mike talked about when there’s a problem, we protect the system from lawsuits. There’s a culture in a lot of our systems where, when things begin to go wrong with the evidence, it’s not an opportunity to look for truth; it’s actually an opportunity where we all start trying to protect the system. And Andre said, if I’ve got this right, that there are lots of judges who lost the ability to say “not guilty.” Gerald summed that discussion up when he talked about the deep distress in the system – in each office, often with other officers – and Andre about the deep cynicism in so much of the system that keeps us from looking at the truth.

There also have been a lot of really powerful suggestions about building partnerships. Ann’s point about victims advocates not only being carrier of a victim perspective and an interest, but actually able to inject the human element into the discussion that we’re all having on jurisdictions. But bringing the education community in – the Attorney General, Bill, and others had a discussion about how the discussion in the law schools, in the education communities, needs to be broad, rich, and actively engaged with the profession. Scott Wallace talked about broadening the agenda to include public defenders, but there are real problems here. Laurie Levenson, in her question, pointed to procedural constraints perhaps too elevated. The Federal Judge agreed that finality has trumped our constitutional values; that’s what he said. Where

economic circumstances often drive outcomes, we protect ourselves by valuing liberty. He's worried that that value is in danger. Ken Gordon, in his question, talked about how, in court, as in elections, one wins and one loses and that acceptance of a win/loss mentality in the system is probably at the root of some of our problems. Ann said, you know, that problem is not just with DAs, and then Bill came back and said that's right, but DA's are a big part of where that culture comes from.

Finally, I'd just like to end with my own response. You know, we may have started with the wrong question – asking whether there is a problem may not be the right way to begin. Instead, we should play and build on the fact that we're all here committed to a constant improvement of the system. Bill talked about the analogy with racial profiling and how the point is to accept what's in front of you and move forward and do something about it. I think that, in the end, that's a pretty good summary of what we mean by justice in the country, anyway. Justice here is essentially a constant search for better ways of resolving disputes, of finding facts, and of keeping our communities together; knowing, with humility, that we are all human, we are going to make mistakes, and that's why justice is the search for better ways, and not some false notion that we will ever actually achieve it. Thanks for a wonderful session. Please join me in thanking the panelists. (Applause.)

THIRD SESSION

(3:15 p.m.)

MR. SOBEL: In a variety of situations, government has chosen to establish a board or commission to monitor and investigate mishaps in search of systemic flaws so that remedial action might be recommended and taken before a similar mishap occurs. The National Transportation Safety Board model is one that comes to mind. Another is the formal review conducted by the military whenever a suspicious incident occurs. Some foreign jurisdictions have taken this step in the criminal justice system. The British Criminal Case Review Commission was established in 1997 and is described as an independent, open, thorough, impartial and accountable body investigating suspected miscarriages of justice in England, Wales, and Northern Ireland. In Canada, public inquiries may be conducted to investigate criminal cases involving alleged wrongful convictions to determine whether systemic practices contributed to or influenced the course of the investigation or prosecution. The work of these commissions of inquiry is aided by subpoena power, evidence adduced at hearings, and assistance from experts. With less formality, most police departments conduct internal affairs investigations whenever there is evidence of questionable police conduct. Our third plenary session will involve a discussion about how best to learn from mistakes in criminal cases, with so-called innocence commissions working a miracle, at least in some states. Professor Laurie Levenson will moderate the session. Professor Levenson teaches criminal law, criminal ethics and procedures in Los Angeles. Before joining the law faculty, Professor Levenson served as an Assistant United States Attorney in Los Angeles for eight years. Currently, in addition to her teaching responsibilities, she serves as a consultant to the media on the Attorney General's new antiterrorism efforts and the white-collar criminal prosecutions of Enron and Arthur Andersen executives. It is my privilege to present Professor Laurie Levenson. (Applause.)

Plenary Session III: Learning From Mistakes – Models of Investigation

PROFESSOR LEVENSON: Thank you so much. Good afternoon. I was really excited when I heard, in the last panel, Norm Maleng say that this was an opportunity to be energized by ideas. And that's the goal of this plenary session. I'm going to call it "thinking outside of the box". And what do I mean by that? 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 for investigation and remedying wrongful convictions. To do that, we have a phenomenal panel from around the world. Next to me, I have – we're honored to have – Justice Michel Proulx. Justice Proulx is a Justice of the Court of Appeals of Quebec, to which he was appointed in 1989. He was a defense counsel prior to that – since 1963 – in fact, named one of Canada's top ten criminal defense lawyers. He has published numerous papers, and he is the author of an award-winning book on Ethics and Canadian Criminal Law. Please welcome him. (Applause.)

PROFESSOR LEVENSON: We welcome, from Manchester, England, David Kyle, who is a member of the UK Criminal Cases Review Commission, also known as the CCRC – a post that he has held since it first became operational in 1997. His responsibilities on that Commission are to advise and mentor the investigation of cases that are being submitted by people or their lawyers who believe that they were wrongfully convicted. He is a, quote, "Criminal justice professional," and he has served in many positions, from the Crown Prosecution Service to his position now. Please welcome him. (Applause.)

PROFESSOR LEVENSON: Next to him is Sam Pailca. She is with the Office of Professional Accountability of the Seattle Police Department. She was appointed to this post back in January of 2001, by the Mayor and the Chief, and she is the only civilian member of that command staff. What they do are the internal affairs investigations, to keep track and to keep an eye on and to remedy problems of police misconduct. Welcome to you. (Applause.)

PROFESSOR LEVENSON: And, finally, we are honored to have Judge Eugene Sullivan, who is a Senior Judge of the United States Court of Appeals for the Armed Forces. He was appointed to that Court by President Reagan in 1986, and President Bush named him Chief Judge in 1990. He attended the Military Academy at West Point, and he has many decorations, including the Bronze Star and the Air Medal. Welcome, Judge Sullivan. (Applause.)

PROFESSOR LEVENSON: Now, this panel is going to be a little different from the last panel because, instead of just throwing out generic questions, I think that we could learn from each panelist how their model for investigation and review works. So I have invited each one of them to give a brief presentation on the genesis of their model – how does it work, what its goals are, and what findings and reforms it has brought about. And we're going to start with Justice Proulx, explaining the Canadian Board of Inquiry.

JUSTICE PROULX: Thank you. I have to say that I feel very honored to be with friends. And by the way, Laurie, I love those expressions you say, like "outside the box", when, in fact, I always thought the justice system was the black box. (Laughter.)

JUSTICE PROULX: A few years ago, the United States requested from Canada the extradition of two fugitives wanted on a triple murder in the State of Washington. The fugitives, if surrendered, could face the death penalty. The Minister of Justice, at the completion of extradition proceedings, ordered the surrender without seeking assurances from the United States that the death penalty would not be imposed. The fugitives fought that order successfully before the Supreme Court of Canada, for reasons that take us to the core of our topic. The extradition treaty between Canada and the United States explicitly provides for a request for assurances. In a unanimous decision, our Court held that many countervailing factors justifies extradition only with the assurance that the death penalty would not be applied. And then the Court stated that the recent and continuing disclosure of wrongful convictions for murder – in Canada, the United States, and in the United Kingdom – provide tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent. This history, the Court added, weighs powerfully in the balance against extradition without assurances when fugitives are sought from Canada.

Now, to take you directly to our discussion – when the Court, in its judgment, relied on recent history of wrongful convictions, it referred substantially to the report of three Commissions of Inquiry which had been convened in Canada in recent years to examine the wrongful convictions of three innocent people: The Marshall Inquiry in 1989; the Moran Inquiry in 1998; and, recently, the Sophanow Inquiry in 2001. To show you how the revelations of the three Commissions were timely for that appeal – in 1991, the Supreme Court of Canada, in *Kindler*, dismissed the same type of application. At that time, the balance tilted in favor of extradition without assurances; and now it is tilted against the constitutionality of such an outcome. The accelerating concern about potential wrongful convictions had sharply increased. For a better understanding of the reasons why the reports of those Commissions had such an impact on that decision, let me give you the following background: Those Commissions of Inquiry were created in the wake of wrongful convictions, as it was done in the Commonwealth – as in England, Australia, and New Zealand. They are not permanent Commissions and should not be confused with our process of review of a claim of miscarriage of justice, which I will underline later. In our tradition, a government – be it the Central or Provisional Government – exercises its discretion to order an inquiry in response to public concerns. In those three cases – Marshall, Moran, Sophanow – they had served lengthy sentences and were eventually acquitted on the basis of new evidence, and not only DNA. Then the Provincial Governments – Nova Scotia, Ontario, Manitoba – not sweeping these concerns under the carpet, established Commissions to investigate the causes; to report, to make recommendations, and sometimes even advise if the person should be entitled to financial compensation. Such Commissions – we can call them *ad hoc* – have become judicial inquests in the sense that the Commissioner or Commissioners are not members of the legislature or Parliament; they were, in fact, presided over by an independent person, either a sitting or retired judge.

The Commissions were held in public. There is a fact-finding stage in order to make findings concerning the relevant events, where subpoenas can be issued and witnesses are heard. In the second stage, a more policy-oriented and informal one, the Commissioner investigates systemic issues to devise recommendations for the future. And at a later stage, it focuses on organizational and social, as opposed to individual accountability, and may include policy studies by academics and practitioners. For instance, in the Sophanow inquiry, there were three

main areas: Eyewitness identification; jailhouse informants; and disclosure examined – and different issues in Marshall and Moran. We can now appreciate the considerable influence of those inquiries on our legal culture, and how they can play a very important role in the very necessary process of education. They also serve as a very important tool of analysis in the review process, which has been recently amended. In fact, last November of 2002, new amendments were brought into the criminal code, as I will now discuss with you.

In our country, aside from the Royal Mercy of a free pardon, which have been exceptionally used to exonerate someone, there always existed a specific remedy to review a claim of wrongful conviction or miscarriage of justice after all rights of appeals with respect to the conviction have been exhausted. That remedy is provided in our criminal code, which applies uniformly throughout Canada. Despite recommendations to confer to an independent body with investigative powers, the jurisdiction to examine miscarriage of justice – as it has been done in England – our Parliament chose to leave it to the Minister of Justice, through what is called an Application for Ministerial Review. In summary, it works the following way: An application is made on the grounds of miscarriage of justice by a person whose rights of appeal have been exhausted. In the review process, the Minister of Justice or a person delegated by the Minister, such as a retired judge or a lawyer – which is, in fact, what happens in practice – is given the power to investigate, to take evidence, issue subpoenas and force attendance of witnesses and compel them to give evidence. Once a report is submitted, the test is that the Minister has to be satisfied, and I quote, "that there is reasonable basis to conclude that the miscarriage of justice likely occurred." The word "likely" lowers the threshold that previously applied with the words, "where it is clear that it had occurred." Then a new trial can be ordered, or the matter can be referred to a Court of Appeal for hearing and determination, as if it were an appeal. When the case is sent back to the Court of Appeals, it is then on account of the new evidence which has been found conclusive.

PROFESSOR LEVENSON: Justice Proulx, if I can just interrupt for one moment, just to sum up what we have then – that when Canada first began its Commissions, the purpose was to review cases that had already been found to be innocent and find out what causes these wrongful convictions. But, from that, you've now led to some reforms in your actual criminal code that allow for an application procedure to the Minister, and if the Minister deems it warranted, to appoint a review committee or review official –

JUSTICE PROULX: Yes.

PROFESSOR LEVENSON: -- who will then review the case and, if they find that it's likely, then they can either have a remedy of going back to the Court of Appeals or ordering a new trial?

JUSTICE PROULX: The point I tried to make so far is that we always had a provision in our criminal code giving to the Minister of Justice jurisdiction of review, but, in fact, it has been not really – it did not really apply, or the culture behind those applications expressed a stronger resistance that has been attenuated by the substantive change in our legal culture, which I tried to express today by a reference to this recent decision of our Supreme Court which goes to the core of the issue. Now, I don't think it would be fair to present to you this outline of the remedies

available in our culture, in our country, without mentioning the appellate process, because in our approach, the Court of Appeal has two functions, which is to prevent, as well as to cure, a miscarriage of justice within the system. The jurisdiction is given to Canadian Courts of Appeal, to admit fresh evidence – evidence not adduced at trial – and to order a new trial, or even acquit the person who has been convicted at trial. It could be, as fresh evidence, the case of a new witness; it could be a witness who recants; or it could be, for instance, as it is and as it has been in the past ten years, an increasing number of claims of ineffective assistance of counsel. The Court of Appeal can also overrule an unreasonable verdict of guilt, a power intended to be an additional safeguard against the conviction of the innocent. Indeed, a substantial number of wrongful conviction cases have been corrected by Courts of Appeal in the traditional process.

PROFESSOR LEVENSON: Okay. What I'd like to do now is to start to contrast that, and come back to you with more details on that, but after we give David Kyle an opportunity to contrast the model you just heard in Canada with what you have, since 1997, in England.

MR. KYLE: Thank you very much, Laurie. Could I start by saying thank you very much, indeed, for asking me to participate in this conference? It's a great pleasure, and, indeed, a privilege for me to have been asked to participate in a matter of such great importance. Of course, I also ought to say – because I'm a Brit, and Brits always have to talk about the weather – whatever else I bring, you'll be glad that I haven't come equipped with a package of the rain and gloom which we always suffer at this time of year, to Alexandria, at any rate. I'm very conscious that the title of this conference is “Preventing the Conviction of Innocent Persons”, and I think that the message that will be at the forefront of our minds, put there from what Attorney General Reno had to say in the course of her opening address, that in all of this, prevention is better than cure. That has to be the case. I might just make a couple of observations on that: First of all, once a case gets past a jury, the damage tends to be done. When a case gets to the appeals stage – especially in my jurisdiction, and, I suspect, in yours, too – there is a very great deference to those people, be they jurors or judges, who have determined the facts. How often have we listened to appeal judges saying, well, we haven't had the benefit of seeing the witnesses and evaluating their evidence? And in order to displace that, something special is needed. Secondly, it seem to me that, because, as a result of that, it can be so difficult to expose miscarriages of justice – and that, in itself, may contribute to obscuring the extent of the problem that was being addressed during the last session. But with that thought in mind, the question which this panel is addressing and which I have been asked to talk about is the question of whether there should be a discrete mechanism for exploring whether there have been wrongful convictions in individual cases, because with the best one in the world, they will occur. Secondly, would putting such a mechanism in place have the potential to benefit the wider interests of the criminal justice system in whatever country it may be established? And with that introduction, I'm going to tell you briefly what has been going on in the United Kingdom and why.

Now, back in the early to mid-'70s, the Republican Army brought its bombing campaign to the mainland UK, and as a result of that, there were a number of well-publicized prosecutions. There's the Birmingham Six, the Guilford Four, the McGuire Seven, and the Judith Ward One. She was never known as the Judith Ward One, but they were all high-profile cases arising out of IRA bombing campaigns in the mainland UK. There was public outrage, a great deal of pressure on the police to catch the perpetrators and get them convicted. By the '90s – late '80s, early '90s

– when all of those cases were dragged back into the Court of Appeal, all the convictions were quashed. And they were all quashed, broadly speaking, because there was found to be fabricated or unreliable confessions and flawed scientific evidence. And so the outcome of that was: 40 people dead and many more injured; 18 people jailed initially, but then 18 people released; and, as a result, the true perpetrators of those offenses not convicted. I recall what Chris Stone was saying in the last session about his discussions with a friend on the Royal Commission who said that the police don't accept that there were wrongful convictions in those cases. I don't think we should go into denial on that front this afternoon. By all accounts, they were innocent of those offenses. I think, again, that I should make the point, just to show that I do have my feet on the ground, that when it comes to exposing miscarriages of justice, being able to demonstrate innocence in the absolute sense is frequently very difficult. And the experience that I have from the five years now that I have been on the CCRC – the Review Commission – is that, when it comes to exposing miscarriages of justice, in reality and in practice, it is far easier to do so by exposing process failure, which can then be said to have an impact on the safety of the conviction, rather than seeking to demonstrate innocence in the absolute sense, although in some cases, that does happen. And DNA has been frequently mentioned this afternoon, and that is a type of situation where that reversal of the position from guilt to innocence in the absolute sense does occur.

PROFESSOR LEVENSON: David, can you give us a sense of how your actual Commission works? How are people appointed? What is your charge? How do you actually get that job done? What happens to your recommendations? And are these people who have already, as in the Canadian system, already been found to be innocent – or is that the question before you?

MR. KYLE: No, the Commission is an independent organization. It is publicly funded. It is there for the purpose of reviewing possible miscarriages of justice, but we are reviewing cases where there have already been convictions and where the convicted person has already exercised his ordinary right of appeal and failed. We are, therefore, a Commission of last resort. But, although the birth of the Commission grew out of those cases I referred to and the recommendation of the Royal Commission that Chris Stone was referring to, our role goes much wider than that. We are given the power to review any criminal conviction and any sentence. We can deal with both conviction and sentence, and we can refer either back to an Appeal Court. Insofar as the offense type is concerned, it simply needs to be a criminal conviction, either before a jury in the Crown Court or before Magistrates who deal with summary cases. The Commission has a number of objectives, but I think for this afternoon's purpose –

JUDGE SULLIVAN: May I interrupt? David, what triggers the Commission acting on a particular case? Is that a petition from one of these defendants whose appeals have all been exhausted? And do you get hundreds or thousands of petitions? Or is the Home Office Secretary – do they refer anything to you, or how does it work?

MR. KYLE: Generally speaking, applications come to us because the person who says he's wrongfully convicted, or she, writes to us. Sometimes it comes via defense lawyers, but the great majority of applications we deal with come direct from the convicted persons themselves. We can go out and look for them if we want to, and they can be referred to us – and sometimes

are – by, for example, the prosecuting authorities. They have reason to think that a conviction may be unsafe. But generally speaking, the applications come to us from the convicted persons themselves.

PROF. LEVENSON: You have some statistics, don't you, on the numbers?

MR. KYLE: Yes. They come to us, and they have done consistently for the five years that we've been in operation, at the rate of about three or four a day. And that amounts in total, up until the end of last month, to just over five-and-a-half thousand applicants. We've dealt with about four-and-a-half thousand of them. But significantly – and this may be something which we want to discuss – of that total, we have been able to refer just approaching 200.

PROF. LEVENSON: And when you say, "refer", who do you refer them to?

MR. KYLE: We refer them to the Court of Appeal or to an appeal court. It's the Court of Appeal in Crown Court cases, to the Crown Court in Magistrate's cases. Let's stick with the court of appeal – when I refer to the “court of appeal”, I mean an appeal court. And what we are required to do is to endeavor to discover new evidence, in the sense of it being evidence which hasn't been previously raised or some new argument which might be mounted; for example, misdirection to the jury or some other argument around the process which went into the trial. If we find new evidence or a new argument which leads us to think there was a real possibility that the court of appeal would not uphold the conviction or would alter the sentence, then we refer the case back to the appropriate appeal court. Once we've done that, it becomes, once again, an ordinary appeal. So, whereas I might say that the commission has been looking at investigating and reviewing a case in an inquisitorial sense, because we're not partisan, we're not representing the applicant. Why we're there is to review the safety of the conviction, and we do that by looking at the case in the widest possible sense. We have a lot of statutory powers that enable us to do that. But having done our bit, if I can put it that way, if it goes back to the court of appeal, then we present quite a lengthy and detailed document with our reasoning why we're doing it, with supporting documents as necessary. So we like to think that we present quite a solid package to the court of appeal.

PROF. LEVENSON: I have a few quick questions. You said there are 5,000 that went to you. From that 5,000, you've done about 4,500. From those, 200 of them you thought met the standard or have a real possibility. What happened to those cases when they got to the court of appeal? How many of them resulted in some type of remedy for the person who you thought might have been wrongfully convicted?

MR. KYLE: The success rate at the moment, if I can put it in those terms, is about two-thirds to one-third. So of the conviction cases we've referred, about two-thirds have been quashed.

PROF. LEVENSON: And who are the people who actually do it? Do you do the work? Do you have a team of workers? Are these paid professionals? Who's paying them?

MR. KYLE: We have quite an interesting profile within the commission. The work is done in two broad blocks. There's the investigation and review, which is the initial phase. That is done by a case review manager, of which we have about 50. They are full-time employed staff, and they come from a variety of backgrounds. We have some lawyers, some former police officers, some former probation officers, others who have been involved in investigative activity, local authority and matters of that nature. So there's a broad base of experience across the case review managers, which we consider to be very valuable, not only in terms of their individual handling of the cases, but also the generic experience which they can bring to bear by talking amongst themselves and bouncing ideas – where should we go, what should we do. In order to help them do that, as I say, we do have a number of statutory powers that they can utilize. We interview many witnesses. That, we tend to do ourselves. But if the problem is either very large in terms of numbers of witnesses who may have to be seen, or if we are investigating allegations of misconduct elsewhere in the system – within the police or the prosecution service or whatever – then we have the power to direct the appointment of an investigating officer, which, when we do it, is usually a senior police officer. But having put the investigation into the hands of an investigating officer, we retain responsibility for controlling and directing that investigation. We also have powers to call without any restriction whatsoever any material which is held by any public body.

PROF. LEVENSON: Including the police, prosecutors?

MR. KYLE: Police, courts, local authorities, social services, security services – anybody who comes within the definition of a public body. Our request for material can't be defeated by any question of confidentiality, secrecy or anything of that nature. So we have the widest access to material, and we use those powers frequently and often. We are very rigorous to make sure that we are acted on and we do get access to the material that we want.

PROF. LEVENSON: David, I'm going to come back to you later with some details, and people may have some questions. But I do want to get Judge Sullivan's reaction to this. Judge Sullivan's assignment is to sort of represent what we have here and to ask you, is anything you've heard from either one of these models something that we have or do you even think we could have. On question before I do that, David, it's correct that you don't have the habeas corpus collateral attack process. So the appeal process, that's it until people get to your commission?

MR. KYLE: Yes it is. Once they get to it, there is no restriction on the number of times they can come to it. But we are the only route back to their appeal court.

PROF. LEVENSON: Judge Sullivan, what do we do here, and should any of this be adopted?

JUDGE SULLIVAN: Let's see. The established federal review process is really, in our country, the three branches. The judicial branch, which has the power to review a conviction and, if there is a systemic process in, say, something's wrong with a videotaped confession, then the person asking for relief gets it, and the courts are restricted at the appeal level to give relief to that person. They can't go out and make law saying, "henceforth, no videotape machine shall ever be stopped" or whatever – the process that led to the violation. We do have the executive

branch – the prosecutors themselves, the Justice Department for the federal government. And I see the Attorney General is here, Attorney General Reno. Good to see you. If they see something wrong in a conviction that's been overturned, it goes to their process. The Attorney General can mandate regulations for prosecutors, to fix the process that's wrong and led to the false conviction. That's one thing.

PROF. LEVENSON: I guess the question is, do you see a need and do you see a fit for the type of commissions that we've heard here, which is sort of outside of the regular criminal justice system? A safety valve type of commission, either one as Justice Proulx described, that makes recommendations for reforms in the criminal justice system and gets referrals from the ministers, or one that David described here, literally, it's a truth seeking and doing investigations.

JUDGE SULLIVAN: It's an interesting thought because, really, you have a habeas process – post-conviction relief available in the District Court level now. But it appears that there's no restriction time wise on this sort of approach. But in our system, there would be expiration of the time to ask for a new trial or to find new evidence, so this is an intriguing idea. I always learn something every day, and I'm very pleased to learn about this. A lot of people don't know it, and I don't think your two governments have it, but we have another court of appeals that's not listed on the books, and it's Congress. Congress has the investigative power to say that a process is broken or wrong and has led to someone being convicted, someone innocent being convicted, and they can investigate the Judiciary Committees of the House and Senate, and perhaps pass a bill through the legislative process to resolve an inherent systemic problem and procedure that led to a false conviction. In a way, it's sort of the last court of resort, the Congress. But this is an intriguing idea. I'd be interested to hear what other people say about it.

As long as I'm here, I'd like to move the goal line for innocence before the process, before the conviction, with an interesting thing that the military does – the United States military does. F. Lee Bailey, a noted trial attorney, has said that if he had an innocent person, he would choose a military jury. If he had a guilty person, he would choose a U.S. District Court jury down the street. To me, our military system, I think, protects the innocent to a great deal. And one of the strong points that it has is, before anyone is convicted or charged with a crime, they have an Article 32 investigation, which means an investigative officer is appointed to investigate whether there's probable cause to refer someone, whether the general should convene a court martial or a trial. This investigative officer can hear evidence – does hear evidence. The person who is suspect of the crime is present at all the proceedings with counsel, hears the witnesses and the evidence against him or her, and has the right to present their own evidence to the investigative officer. There is full discovery, and that whole package is put together in an investigative officer's report and given to the person – usually the general exercising court martial authority – who has the power to charge someone with a crime. And that's a good way, I think, instead of the secret grand juries that we have. I think the military has got a good idea on sifting out the innocent people before they go through the full trial and appeal. So I'll end there.

PROF. LEVENSON: Like you said, I wonder how many of us thought that the solution would be with the military. I'm going to want to start asking questions among the panelists, but before I do, Sam Pailca, you're involved in yet a different type of approach to try to prevent and

deal with issues of wrongful convictions. You're a civilian. What's your approach? How does your mechanism work?

MS. PAILCA: I feel accused. (Laughter.)

MS. PAILCA: This is different. I'm an oddball on this panel. I'm part of an accountability office in Seattle located within the Seattle Police Department. That accountability program that I direct focuses on police misconduct. What we know about wrongful convictions has not, today, identified intentional police misconduct as a big piece of that puzzle. As our chief pointed out earlier today, police departments ought to be the first line of defense in preventing wrongful convictions, and an accountability program can and should assist with that defense, and I think can do so in several ways. I'll outline for you briefly the three primary functions of the position and the office that I hold in Seattle and talk about how each of those functions can come together to create some important protections and reforms that could be helpful. The primary functions that I serve are: One, to oversee and conduct the intake investigation and resolution of complaints. Generally, these are by citizens coming forward to the department – not always; they're also generated internally within the department. The second major function is to review and make recommendations to the chief, to the mayor and to our city council on police practices or standards within the department. Some of those standards and reviews are specific to the complaint investigation process itself, but I'm not limited to those polices – I can, and frequently do, make observations or recommendations about policies or practices that can and should be changed. Finally, I'm charged by the ordinance creating my position with the responsibility to conduct community outreach, to talk about the position and the program in the Seattle Police Department to receive and investigate these kinds of complaints against police officers.

In each of those areas, there are features that can converge to create programs and functions that can protect against wrongful convictions. The first one we're looking at, the investigation function, which takes up the primary focus of my time here. There are two issues within that function that warrant special emphasis today at this conference. The first of those is, I think, that it's important to ensure that a system has some objectivity, specifically with respect to classification and review of complaints. An important feature of Seattle's structure is that, as the director, I have the authority to direct the classification of complaints. So when a citizen complains – when they call, they come into the office, they send a letter (more frequently, we say send an e-mail or use our Web site to make a complaint) – I use those methods to make a complaint using recommendations forwarded from our Internal Investigations Unit about whether that complaint should be investigated or not. Seattle's approach to civilian oversight is unique in that respect, because it gives this authority to a civilian who may, the hope is, have a different and fresh perspective. I think that can be an important feature if you're evaluating what measures a police department might be able to consider.

PROF. LEVENSON: Is there concern that underlying the problems of, perhaps, wrongful convictions or just the way suspects or treated is a cultural issue?

MS. PAILCA: I think so. Just as another check to the tunnel vision that can exist and uniformity in thinking and review of issues – that sometimes gets shaken up a little bit when you

have someone who didn't come from that culture, wasn't trained in the same way, has a different background and perspective. Perhaps one example of how that played out in Seattle after my arrival is we made a change. The classification authority allowed us to reform the way that innocence complaints are considered. Citizens protesting their innocence pose a real challenge for the police internal complaint investigation function. It's just that police practices that have been identified that may contribute to wrongful conviction tend to focus on unintentional, or police practice conduct that isn't intentional or wrong. The same is true, generally, with a claim that a citizen has been wrongfully convicted or they just didn't do what they were cited or arrested for; it is not a complaint about police misconduct. Most of the time that's the case. We get people who want to call and say, "but I didn't run the stop sign" or "if they'd only talked to my friend at the scene, they would have known that I didn't hit my wife" – that kind of thing.

PROF. LEVENSON: Do you have any authority? If the issue is whether someone was wrongfully convicted, you do an investigation and you find out that you have questions about what the police did in the investigation – what can you do about it? Do you feel responsibility to provide that so that the defendant gets access to a new trial? Do you just discipline the officer? What is your role in sort of remedying the problem?

MS. PAILCA: Gratefully, that hasn't happened yet. But certainly I would feel, as I'm sure would the chief of the department and the mayor, our obligation is to immediately inform the prosecutor's office if we were to uncover that in our investigation. I have no doubt that we wouldn't just rest at doing a discipline behind the scenes, but would, of course, if it was material to a conviction, share that information. And we do. Again, the majority of complaints don't rise to that level. Generally, those complainants – because it would so tax the resources of our investigative function to try to second guess and become a trial within a trial of all those kinds of complaints – usually, they are politely but firmly referred back to the court system, which, after all, is designed to hear the other side of the story and to make conclusions about the truth of the fact-setting. But sometimes people do come – it's infrequent, but sometimes they come to our office with a little harder edge to these stories. Sometimes they may allege that a report was falsified or that an officer offered perjurious testimony. One change that we've instituted is that those kinds of complaints are no longer summarily rejected for investigation, as part of the earlier general practice that I described, but usually complainants are referred back to the court. If we have a complaint like that, it still doesn't fit easily into an investigative model that more frequently investigates unnecessary force or just rudeness complaints, but still we ensure that there's no bright line rule that shields those kinds of complaints from investigation – because, of course, short of deadly force, that could be the most serious form of misconduct of all. So we do inquire about the facts and the circumstances. We do make a preliminary review and will ask for the existence of anything that might tend to corroborate that kind of allegation. If we can find that there's some merit or some meat to the allegation, we would conduct a full investigation – and in any event, all of those kinds of claims under our system would be documented. And that leads just to –

PROF. LEVENSON: Who gets that documentation? My question is, does it sort of stay secreted in the police or internal affairs? Does it go to the prosecutor? Does it go to the defense lawyer, or does it get filed directly with the court?

MS. PAILCA: I'll tell you what would happen. This is related to two of the policy review recommendation functions that the office and the department undertake. The first one of those is that we are making efforts through the accountability program to – we're the keeper of information. This information may be important. It may be critical. So we have recommended and are hoping to institute a comprehensive early-intervention system that can include a component for tracking just that kind of information. Complaints of falsification would be the most dramatic example, but it also could track things that may be important, such as a decline rate or an acquittal rate or even no-shows for individual officers. So that's something that a comprehensive early intervention program can track.

PROF. LEVENSON: Could defense lawyers get that information from your group? Let me get a show of hands here – in your jurisdictions, how many of you have a procedure where you suspect there is, quote, "a bad cop", to get the information regarding that officer either lying or using excessive force or the like? (Show of hands.)

PROF. LEVENSON: One or two. Interesting.

MS. PAILCA: There are informal mechanisms now that exist to get at that information. The goal is not to forward information to the defense bar; the goal is to work within the department to correct any behavior that could lead to that sort of event. What we have is we keep information about our investigations, about our discipline. There have been some isolated instances of the defense asking for that kind of information prior to a trial, but that's one of the things that we need to work with our local prosecutor's office in our jurisdiction, to establish clear guidelines and expectations about when and under what circumstances that information is shared, when is it disclosed by the police department, when is it disclosed by the prosecutor's office. So we're working to establish those guidelines.

PROF. LEVENSON: What I'd like to do now is try to find some common ground. We've heard of several different types of models. I'm wondering when you use these models if we're coming to sort of the same causes for wrongful convictions. Justice Proulx, starting with you, when you have these commissions of inquiry and they've looked into why there were wrongful convictions or they've made these referrals, what were the primary causes?

JUSTICE PROULX: Exactly the same as you find in your literature in your own culture, which we heard this morning, which we will always hear about: Eyewitness identification, jailhouse informants, disclosure, forensic experts.

PROF. LEVENSON: What kind of reforms have you done? So you found the problem – what has been done to respond to it?

JUSTICE PROULX: I would say the advantage of the commissions of inquiry is that it then transmits a culture to the courts. When the courts, for instance, had to deal with the issue of jailhouse informants, the courts brought in – and felt that they should bring in – additional safeguards; the awareness, you see, when I said the courts of appeal as well as the Supreme Court has a duty to prevent, in that sense, to set policies which are in accordance to the issues. When you hear that, in '95 through '97, you have a real issue with jailhouse informants, then

how do you deal with this? How do you deal with the issue of forensic experts? Our court, in 2001, in a major landmark decision on the issue of experts, passed a very strong message to the parties as to the way to handle experts in the courtroom.

PROF. LEVENSON: Such as?

JUSTICE PROULX: Such as that the courtroom cannot be a laboratory – the laboratory is before. We have to change our approach. We inherit from a system where experts are partisan forensic experts, and we identified the serious issues in Sophonow. My friend, Richard Wolson, is here today; he was a counsel on the Sophonow Commission, and we even spoke today of the tunnel vision of police officers, the forensic science people who work together. Those things are now identified by the courts.

PROF. LEVENSON: In fact, if I can just share with you, if you go to the Sophonow Report, which you can find online, you will have a series of recommendations that cover each of the following and may be helpful in the work you're doing. It covers issues of how to deal with informants, both jailhouse and street informants; how to deal with the eyewitness ID issue; perjury by police officers or other witnesses; falsification of reports; faulty scientific evidence; coerced confessions – sounding familiar? – alibi evidence; police, prosecutorial and court cultures, like was discussed in the prior panel. And then an issue I want to ask about now, which is the issue of disclosure. Going to you, Sam. The question I've been asking about is who gets this information? We have the Brady standard here in this country – right, Your Honor? – which is somewhat narrow, though. It really goes to whether it proves exculpatory or impeachment. How vigorous have you seen, in your work, Sam, the police officers and the prosecutors being to comply with that standard?

MS. PAILCA: I think that part of that experience is a good news story, because I don't think Seattle has experience, to the same degree, of corruption and scandals that have plagued other cities. But I also see a willingness within the department, in our culture, that would bring that affirmatively to light if we were aware of it. Finally, we have pretty good strong and open public disclosure and discovery laws in the criminal process. And I know that, in the appropriate case, that that information would at a minimum be provided to the judge overseeing the case, who would be permitted to review all of it in camera and make a determination about admissibility based on relevance and prejudice.

JUDGE SULLIVAN: Professor, if we can go back to the Canadian process where the Minister appoints this independent commission that has subpoena power and can find out has there been a wrongful – is there something wrong in the process? Isn't there a political reluctance? Let's say I'm the Minister of Justice in Canada; I'm going to appoint an independent commission because I think, you know, to tell me that my system, my prosecutors, are doing bad things. Is there a sort of a hesitance to do this?

JUSTICE PROULX: Your point is very well taken. As a matter of fact, in 1989, the first commission of inquiry – the Marshall inquiry – recommended very strongly the creation of an independent body, as eventually was adopted in England in '97. And then when, in 1997, the British made their position well known, there was a huge debate in Canada. The Minister of

Justice decided to amend the provisions of the criminal code. And I think it's for financial reasons, they felt that it would be a very expensive situation, so they wanted to make sure that the Minister would become very open and accountable as to the standards and as to the weight due it. Now, history will tell us – maybe ten years from now – if it's a suitable approach, but so far it seems to work better than people expected. So just in the past years, the official screening process, standards are now well known, the threshold is lower. And the Minister does not take it on himself; he gives it to an independent person, either a retired judge or a lawyer, and this person has complete, total independence to investigate and to report. The report is known. So the Minister then has to account for this. To that extent, that mechanism could be more accessible, at the same time valuable and more credible than it was before.

PROF. LEVENSON: I guess going back to you, Judge Sullivan, and the question is raised with regard to our system. You mentioned Congress could play a role like this. Do you think it does, or do you think there are political factors that affect it playing this type of role? And might that be better handled by an independent commission that doesn't have those same political pressures?

JUDGE SULLIVAN: Professor, I agree with you. Although Congress has the potential to delve into that, it's not that often it does. So perhaps we should have an open discussion on if there is a need for that in America. Wouldn't that be an interesting – if the goal is to keep innocent people out of our prisons and to get relief for people who are innocent in our prisons, maybe we should have some sort of commission; maybe a hybrid adapted to our particular process.

PROF. LEVENSON: In fact, Barry Scheck has recommended one that he published in the Adjudicator magazine; having something like the NTSB, which would be a standing commission that would have the power of investigating. And then that information could be used by the courts or otherwise to remedy the situation. We have a question.

MR. WANGER: If you happen to be an American judge or legislator or congressman who has opted for a very restrictive view of habeas corpus, as a practical matter, doesn't it almost automatically follow that they are going to be definitely against having a commission of inquiry set up?

PROF. LEVENSON: That's a great question. I'll go to David and say, David, how did this become the law? What persuaded the government and the public to really make these efforts, and especially when you must have had judges, even along those lines, who said “Why would we do this? Why would we create more bureaucracy, more work, more expense for the situation?”

JUDGE SULLIVAN: You're talking to a country that won't even give law clerks to their judges, they're so cheap, and here they've created this commission, David. (Laughter.)

PROF. LEVENSON: They won't give habeas. Why would they give a commission?

MR. KYLE: It would be very easy to say that the commission resulted from a government that watched television and saw the Birmingham Six doing their triumphant call after they had been acquitted in 1991, but it isn't as simple as that. I'm sure that would have had an impact. As was mentioned earlier, the government's actual response to the quashing of the conviction of the Birmingham Six was to set up a royal commission that looked into the whole of the criminal justice system, as it then existed in England and Wales. And it's worth bearing in mind that, in the intervening years between the convictions of the Birmingham Six in the '70s and the other cases I've referred to and the report of the Royal Commission in 1993, there had been some milestone developments for the better – in my view, in any event, and irrespective of any royal commission. And in particular, I have in mind the passing of the Police and Criminal Evidence Act in 1984, which, for the first time, purported to define and put on a statutory basis police powers and how they should be exercised – and codes of practice attached to that – to ensure their proper operation, and also the creation of an Independent Prosecuting Service in 1986. So those two pieces of major legislation resulted, and had happened long before the Royal Commission reported. The Royal Commission – the Runciman Commission in 1993 – came up with something approaching 300 recommendations covering a huge number of areas within the criminal justice system, of which one was that there should – in order to try and prevent the occurrences which had been witnessed in the terrorist cases – there should be a one-stop organization which could look into miscarriages of justice. But I think a lot of what lay behind it was why does it take years of people being wrongly imprisoned before something is done about it? And quite apart from the philosophical answer to that question, there is the very real practical one that, if you're going to look successfully into a case which may be a miscarriage of justice – which means reviewing evidence, which means getting hold of exhibits for further scientific examination, which means interviewing witnesses – if you wait too long, the process of investigation at that stage becomes all the more ineffective. So those, I think, were the drivers behind the idea that there should be an independent commission.

PROF. LEVENSON: And I want to answer your question, but I want to ask one follow-up to Judge Sullivan. Do you think judges would be opposed, as the prior question asked – even the most hard-line judges – how do you think they would react to the idea of having a commission when they wouldn't be all that inclined, necessarily, to grant habeas?

JUDGE SULLIVAN: I think judges want to see innocent people not be imprisoned and not be convicted, so if there was an independent commission created to examine processes like the British system, I don't see that the judges would be opposed to that – or at least I would not be opposed to that. I can only speak for myself. Let's take a look at that model.

PROF. LEVENSON: In fact, it sounds like the commission gets a lot of the work done before it sends it to the judges. You have a question, sir?

MR. TIEBER: I'm Marty Tieber, an appellate criminal defense attorney from Michigan. For the last decade, I have been basically specializing in federal habeas corpus petitions. I would say this about that: The federal government and the Supreme Court, the lower courts, the courts of appeal across the country, have made it very clear that innocence is not cognizable in federal habeas. That's something that we should all understand. There may be underlying rationales for why an innocent person got convicted, which is cognizable – ineffective assistance or

prosecutorial misconduct – but just proving someone innocent isn't a federal habeas corpus action. And I think that's very important. What I've learned here today about these commissions – it's just amazing to me – they seem to be extremely valuable. I would highly recommend us trying to do something along those lines. In fact, our innocence projects around the country are an attempt to do that on a rather sporadic basis. The main difference is that our innocence projects are staffed by students, not professionals; their resources are very few, and they have no power or authority to pull the kind of information that these commissions have. So I think it's a great idea.

PROF. LEVENSON: Any comment by the panelists?

MR. KYLE: I'd certainly say, in response to that and the comment which Judge Sullivan made a moment ago, in my view, the question is not so much about the response of the judiciary to being presented with a case at a time when all the arguments about the finality of litigation and not wanting to endlessly re-litigate cases are very much in the forefront of their minds. The key to getting a result in these cases, if I can put it that way, which is undoubtedly a matter for the judiciary – I don't suggest for one moment it should be the responsibility of other than the judiciary to determine these cases – but it's about the quality of the information which is given to them, on which you're asking them to make a decision. If there is any value in having the process which we go through, it is our ability, before we send a case back to the court of appeals, to have investigated the case as thoroughly as we can in an inquisitorial way and present quality information to the court, which is then going to be asked to make the decision.

PROF. LEVENSON: Sam, it eventually sounds like you have a unique opportunity, given your model, to get information that might not otherwise be available. One, because you're working within the system of the police, and you have the authority of the police chief, I take it, behind what you're doing as well. Is that right?

MS. PAILCA: That's right.

PROF. LEVENSON: Question?

MR. EISLEY: Matthew Eisley. I'm Matthew Eisley, covering this conference for my newspaper, the News and Observer, in Raleigh, North Carolina. My question is to ask you a little bit more about the public disclosure aspect of this. In each of your respective systems, at what point and to what extent do your findings become public? What's your personal opinion about at what point and to what extent they ought to become public? Many of these complaints arise from public concerns that many people have noted today. Everyone's got an interest in maintaining public confidence in your system.

PROF. LEVENSON: Going down the row, the transparency of your system.

MR. KYLE: So I go first on that? When we start a case, of course, it is an individual case. It is an individual who comes to us. There may, over the fullness of time, come a situation where there appears to be some sort of systemic problem that needs to be opened up. But the time that we're dealing with an individual case, if we decide not to refer a case, then the

reasoning for that decision and any information or evidence that supports our reason for that decision, is made available to the applicant. But it wouldn't be made public. If the applicant chooses to make it public, that would be a matter for them. But we wouldn't make public information on an individual case that we've turned down. If we refer it to the court of appeal, however, it is more likely to get into the public domain, because the reasons for referring the case in the first place and the supporting evidence and information are given to the court and to the parties to the appeal – that is, the prosecution and defense. Once we've made the decision, whatever our reasoning may be, that will come into the public arena.

JUSTICE PROULX: I'd like to answer your question by saying that, historically in our country, media have been responsible for the disclosure of miscarriages of justice. There's no question that, in many ways, people have come to the media to first bring their application public. Second, in reality, the people who really want to achieve something go to the media. Really, nobody wants it – not many applicants want it – to be secret. But assuming that, at the first stage, the matter is really not public, eventually the Minister has to account. Once a report is made to the Minister, the report will become public.

PROF. LEVENSON: What is the media's reaction then, the public reaction? Does it sustain media interest, or do they just take the most sensational cases? Or one thought is that, now that you have a commission, has the public been lulled into thinking that the problem is taken care of and, therefore, they're not particularly interested anymore?

JUSTICE PROULX: Well, I have a firm belief that those matters are well covered in the press and that there is – we're talking about the judicial, the bar, the bench, the police. This is the reason why we're all here today. And I think the public is even as aware as we are. This is a new reality.

PROF. LEVENSON: David, does the public stay on top of what you're doing, or is it sporadic?

MR. KYLE: I think it is sporadic. The public, as in the person in the street, can be remarkably fickle in the way they view things. At one moment, like back in '91, the person in the street was horrified at the thought of a terrible miscarriage of justice occurring. Today, when the Home Secretary is banging on about firearms offenses, street crime, the controversy with the Lord Chief Justice over whether people who commit burglary ought to be sent to prison or not, the person in the street might well say “all I'm interested in is that people who commit offenses get locked up”. But so far as the educational information that is given to the public through the media, I agree with what Michel has just said. I think the media do, and will continue to, play a great part in not only keeping the public informed but also drawing attention to problems that they think arise. At the moment, the press in Britain is relatively comfortable with the commission, the work that the commission does, because there are visible signs that it has made a difference in terms, not only – and I think this is actually quite important because, you remember the figures, that we thoroughly reviewed and investigated a very large number of cases – but out of those cases, some 200 have gone back before an appeal court for another appeal. And so there is value in something like the commission, not only in identifying and putting back into the court cases where there might have been a miscarriage, but also by virtue of

the thoroughness of the review which we undertake. We hope this is the case. It's rather the reverse image. In many cases where we decide not to refer the investigations we have undertaken has, to a point at any rate, confirmed and sometimes enhanced the safety of the conviction that we were out to review. So there is that double feature of it. And as one of our objectives is to enhance public confidence in the criminal justice system, we think that both of those are valuable. What I wouldn't want to happen, and I think this is a danger, is that the existence of something like the commission simply adds another layer of complacency to the fact that all is well. And we need to be challenged to that.

PROF. LEVENSON: I just want to give Sam and Judge Sullivan a chance. Judge Sullivan, I don't know. You described that process of military inquiry, those preliminary inquiries. Are those subject to public disclosure?

JUDGE SULLIVAN: Yes. They can be closed for secret information or restricted, but yes. As a matter of fact, there is one going on right now that's reported in the paper.

PROF. LEVENSON: Sam, that could be a little delicate when you're looking at what may be true or false allegations against police officers. At what point does that become public information?

MS. PAILCA: I'll tell you where we are now. Right now, we provide statistical information about our complaints. We provide a summary – a short redacted summary – of each complaint that attempts to protect the anonymity of both the accused officer and the complainant, and we provide, upon request or public disclosure request, information about complaints that have been sustained where wrongdoing has been proven to have occurred. My boss is here, so I'll be careful. In my opinion, we're only halfway there. I think that we could share more information but still preserve some anonymity in the officers. I think we should do a better job of sharing information about our exonerated, not the same cases which make up the bulk of our caseload. I think it would be very informative and helpful to the public to see that information.

MR. SOBEL: I have a question for Mr. Kyle. It's my understanding that the CCRC has the power to investigate and to make recommendations. If its power to investigate is challenged, must the CCRC go to court to obtain an order requiring compliance?

MR. KYLE: We haven't yet encountered that, and as I mentioned earlier, the single most important statutory power of investigation we have is to require public bodies to give us material. As yet, no public body has declined to do so. Some have argued – and have argued quite extensively – as to whether we ought to have the material. Somewhat surprisingly, the sources of that sort of information, which you might expect to have been concerned and difficult, haven't been. So we have a very good working relationship from the security services, for example, whereas certain public authorities have been very difficult over the provision of material. I think one of the most difficult areas which public bodies have to come to terms with is that, because we have a National Health Service, people's medical records are in the possession of a public body, and it comes as quite a surprise to people to realize that we have power to demand and be given access to people's medical records. So far, we haven't had a situation where we have been refused access, and so we haven't had to go to court. The Scottish Criminal Cases Review

Commission – which by an accident of history and devolution, Scotland has its own commission – they will refuse access to papers by a prosecuting attorney. They did go to court, and they won. A lot of what we do depends on cooperation, because this power does not extend to private individuals and private organizations. So to that extent, we depend on the cooperation. We are, at the moment, putting together a shopping list – or you can call it a wish list – for the home office, which is the body responsible for legislating in criminal justice matters; a wish list with a number of things we would like to have. One of the items on our wish list is that we should be given powers to obtain under compulsion from private bodies, private individuals.

JUDGE SULLIVAN: Could you get an IRA informant in the course of one of your investigations, if you think it worthy to interrogate or question an IRA informant? Could you do that?

MR. KYLE: Yes. We could certainly get the identity and information. We couldn't force that person to talk to us. That would be a matter of he being a private citizen.

JUDGE SULLIVAN: So the army or police wouldn't give that information to you?

MR. KYLE: If we asked for it, unless they could show our request was unreasonable, we would get that information.

JUDGE SULLIVAN: And that information, in the course of a criminal trial, would not be disclosed?

MR. KYLE: No, it wouldn't. One of the things that we have to be very, very conscious of and we have to deal very carefully with is that, just because we can get it doesn't mean to say that everybody else can. And we have referred a case and a defendant's conviction was quashed – and to this day, he doesn't know why because the information on which the referral was based was so sensitive.

JUDGE SULLIVAN: He's probably not going to fight you on that. (Laughter.)

MR. KYLE: But it was a matter of some curiosity to him.

JUDGE P. SULLIVAN: I'm Patricia Sullivan. I'm a judge in a small rural community in the west that has a 3,000-bed prison. There are only two judges in the county. We are absolutely awash in post-conviction and habeas corpus cases. When I get back, there will be a stack, like, this high waiting. I had a couple of questions about those, particularly for Mr. Kyle and Mr. Proulx. One has to do with the role of counsel. One of the big issues in my state is we're having a tremendous budget crisis, and we're looking at going forward on post-conviction cases for a period of time simply because we've run out of dollars for appointed counsel. How do you handle counsel for people who come to the commission? Do you appoint for them? Do they have counsel assigned to them?

MR. LEVENSON: Do they have counsel at all? Justice Proulx?

JUSTICE PROULX: They do have counsel. No application is made without a counsel in reality.

MR. LEVENSON: Who appoints counsel if it goes forward?

JUSTICE PROULX: Each province has a legal aid system, so either the person went to legal aid or through private counsel.

JUDGE P. SULLIVAN: So it is publicly funded if they're indigent?

JUSTICE PROULX: Yes.

MR. LEVENSON: Mr. Kyle?

MR. KYLE: Some of our applicants are legally represented, but by no means all, and it certainly isn't a requirement that they should be. The work that we do is not driven by the applicant or his legal representatives.

JUDGE P. SULLIVAN: They're more like a witness?

MR. KYLE: They may well be. But the expectation on ours is to be innovative and self-motivating about the way in which we go about the investigation that we undertake. We obviously listen carefully to applicants when they apply to us because they – after all, it's happened to them, so they know what's gone wrong. But they're not always able to identify. They may not be able to identify, ultimately, what has gone wrong, which we can demonstrate to have gone wrong. Therefore, there is a big responsibility on the commission to be innovative and to be imaginative in the investigation it undertakes. So we're certainly not dependent on the applicant being legally represented. If they are legally represented and they are well legally represented, then that is a huge advantage. If they're legally represented and they're represented by somebody who can't get out of the adversarial mode – and remember what I said a moment ago about the inquisitorial nature – it can actually be quite time-consuming and potentially damaging to our investigation and review, because our expectation when we're dealing with applicants is we're wanting them to be open and honest with us. Because of the unique position that we hold within the criminal justice system, we are actually the only body who ever looks at the totality of a case. We see everything that the prosecution had, and sometimes more, because we go beyond them and look for material which they should have found if they'd gone out and looked for it. At the same time, we also expect to see exactly what's been going on on the defense side, because it's no good going back to the court of appeals on a position which is not only factually different to that which was raised at trial, because appeal courts are notoriously cynical about changed factual defenses on appeal, but it's even worse if we're going to go back and find the factual change which is now presented to us is in conflict with instructions which were given at trial. And there are huge complexities around this. The main point I think I want to emphasize in response to your question is that we are not reliant on legal representation and, sometimes, legal representation, in our terms, can be more of a hindrance.

JUDGE P. SULLIVAN: I guess that's my second question, because I don't believe the person I'm going to describe only exists in the United States. What do you do with these people that just paper you to death? If you don't have a limit on what people can file, surely you come across these guys that just file over and over again.

MR. KYLE: Yes.

MR. LEVENSON: The vexatious litigant.

MR. KYLE: Yes. And I don't think that I had made the point expressly in my introductory remarks, but there is no limit to the type of offense we can deal with. We deal with the big and the small. Now, if you're looking at a comprehensive package to deal with miscarriage of justice, it's quite right that somebody who has been convicted of a trivial offense, if it matters to them, should be able to have that reviewed. And some of the referrals we've made have been in reference to quite trivial matters. But as you can imagine, the most difficult and the most obsessive correspondents are the people who are convicted of careless driving 30 years ago, fined five dollars or whatever, and for some reason this has been a blot on their lives ever since. (Laughter.)

MR. KYLE: What we try to do is something to be regarded as a measure of our own performance. Although there is, in fact, no limit to the times people can apply to us, we hope that the job we will do first time 'round is sufficiently thorough to avoid leaving avenues for further contact. We make it quite clear to applicants that they can reapply if they're not happy with our decision – they can also take us to court on our rather quaint remedy of judicial review if they don't like our decision – but they can always come back. If they come back, we say you must come back with something new. It's no good just saying the same thing to us over and over again.

MR. LEVENSON: Next question?

MS. HALBERT: Ellen Halbert, Director of the Victim Witness Division of the Travis County District Attorney's Office in Austin, Texas. You heard from Ann earlier about victims' issues. One of them at the top of our list is notification. I'm just curious – in your different programs, and especially in England, for instance, when you take those 200 cases and you sent them to your court of appeals, were victims notified? Were they notified of the one-third that actually were successful in the very end? And any of you who can, speak to how you notify victims about this.

MR. LEVENSON: Let's actually take the full row, including Judge Sullivan and Sam here. In the military system, how much role does the victim play in the process?

JUDGE SULLIVAN: It depends on the crime. Some of them are victimless crimes, but the victim in the appropriate case will testify at the trial level, at the appellate level. To my knowledge, and this is throughout the federal system, there is no notification that, "by the way, the appeal of the person who murdered your daughter is coming up". There's none of that, to my knowledge. It's interesting on notification of people on the appellate thing. In England, I had

noticed that there's a dock in the appeals court, and all people that are having their criminal appeals tried can be there. Actually, they're required to be there in the appeals court, and they hear the arguments for and against them. And in about 95 percent of the cases, they also hear the appeals court deliver the judgment, because, as you probably know or may not know, about 95 percent of all criminal appeals are decided and the opinions are issued within minutes of the end of the appeal. They have a very small backlog.

JUSTICE PROULX: Much smarter than us. (Laughter.)

MR. LEVENSON: Sam, when you're doing the internal investigations for the police – you've had a complaint, perhaps, against the police, either from civilians or from another police officer – do you sort of say “thank you for the complaint, we'll take it from here”? Are they allowed to have a continued role in the process? Do they get notified with what happens to the officer? Do they have a way to appeal if they don't like your findings?

MS. PAILCA: We've worked really hard about trying to achieve better communication with the complainants and with the officers so they are notified about what process we will use to resolve their complaint. They're given a regular status report. At the conclusion of the case, they're given a closing letter that explains the findings and the reasons for the findings. The officer will receive the same information – status reports. They'll be notified. And the complainants, of course, are interviewed – as are the officers – and are allowed to come forward. There is no appeal from the department's decision.

MR. LEVENSON: David, how about you? She asked directly – were those victims in the 200 cases you referred, were they involved in the process? Did they know that you referred them? Did you get a reaction from them?

MR. KYLE: Yes. In the cases where there are identifiable victims, and also bearing in mind that I'm saying that some of the cases we dealt with go back 50 or more years, where there is still a victim or a relative who would be interested in the outcome, they are notified. I'd just like to make the general observation on top of what I was saying a moment ago, that the position of victims and their obvious desire that once a case is over, it's over and they can put the offense behind them, particularly if it's the higher end of the criminal count, they don't want to be revisited. It's a big argument, on top of anything I've already said, for making sure that whatever mechanism you have for dealing with miscarriage of justice, they swing into action quickly. Because I can't think of anything worse, if I'd been a victim of an offense, suddenly to have the whole thing brought back into my mind years after the event. But it's something that we are very conscious of, not only within the commission itself. We have, during our lifetime, done our best to identify and implement and use procedures to make sure that victims are notified sensitively about cases that we may refer. That is done either by our own people – particularly if, in the course of the investigation, there has been any need to involve the victim – or quite often, there will have been a case liaison officer who has had responsibility for dealing with victim welfare, and the case will reactivate that for the purpose of advising the victim of what's going on. But on a wider front, the whole question of victim support and how to deal with victims and witnesses generally is very much at the fore of refinements within the criminal justice system in England and Wales, and we are part of that. Because we are a criminal justice organization, we are one of

the organizations, along with everybody else, which is currently involved in trying to refine the way in which victims are treated within the system.

MR. LEVENSON: Justice Proulx is indicating here that it works pretty much the same, so I'll take the next question.

MR. CASE: Brian Case, Austin, Texas, Prosecutor's Office. I've gotten the impression that the systems in England and in Canada are an outgrowth of the political process, primarily legislative and parliamentary. I'm wondering if the panelists – or anybody else here, for that matter – does anyone have any ideas about commissions that can be effective that do not arise from the legislative process, that somehow are outside of that? Am I correct that they came from parliament and some type of legislative action? Does anyone have any suggestion of anything that would come otherwise?

MR. LEVENSON: Otherwise, like a court?

MR. CASE: Yes, or executive.

MR. LEVENSON: Let me ask Judge Sullivan. Do you think the court would have any power to sort of create a special advisory commission for it, either to suggest reforms in how the court operates – how the people working with the court, prosecutors and police operate – or even to help do fact-finding on cases that the court then reviews?

JUDGE SULLIVAN: I think to establish an independent commission that's going to have some of the powers that we're seeing in Canada and in England, I think that's beyond the realm of judicial authority to create.

MR. CASE: I do, too, although – what I'm wondering is, does anybody have any ideas about the executive branch creating such a thing, and whether or not that's feasible? Obviously, it's political. Has anybody thought –?

MR. LEVENSON: Well, we've had governors, as we know, in at least two states, maybe three – this happens even more – blue ribbon commissions. Nobody has taken the step yet of doing the sort of board that the Board of Inquiry that's around that does the investigation. Any thoughts on that?

JUDGE SULLIVAN: I think the Justice Department – the Attorney General, if he or she so desired – could create a commission to report back to him or her and analyze processes and make it an independent commission. If that were done, however, under the act, it would be subject to Freedom of Information, if it were a true commission created by a department head that would be subject to Freedom of Information requests. But, you know, maybe you want that. Why have an independent commission to get secret information?

MR. CASE: It just seems to me that there's a long way to go in the political process for innocence commissions or anything like that.

JUSTICE PROULX: Can I ask you a question?

MR. CASE: Yes sir.

JUSTICE PROULX: When you listened to David Kyle's presentation, if you listen to the way that the British commission works, is it your perception that it is a political creation, that it has political ties, that it's not independent?

MR. CASE: It's created by statute, was it not?

JUSTICE PROULX: Yes.

MR. CASE: That's political.

JUSTICE PROULX: Then I'm political. I'm a judge – I was appointed by the government – so you're saying I'm political.

JUDGE SULLIVAN: What's so bad about that? (Laughter.)

MR. CASE: I don't mean to imply that Mr. Kyle makes his decisions.

JUSTICE PROULX: I'm not talking about Mr. Kyle as a person. I'm talking about the commission.

MR. CASE: And I'm just wondering, we all kind of have some sense of where the political – where our state is, where the U.S. government is, in the political kind of stream of things and whether or not something like this is possible politically. That's what I meant when I was wondering if it could come from anywhere else.

MR. LEVENSON: Let's get her response and your response to this. Can you stand up, please?

MS. MUMMA: My name is Chris Mumma with the Center on Actual Innocence in North Carolina and part of the commission in North Carolina that the Chief Justice has established. We have not reached the issue of the Innocence Commission yet in detail, but it has been discussed as a possibility in North Carolina. Judges, defense attorneys, prosecutors who attended the first meeting showed interest. All parties showed interest in an independent, non-adversarial commission to look at these cases that came forward where there can be full disclosure. It is an issue that's going to be reached at some point by the commission in North Carolina.

MR. LEVENSON: Thank you.

JUDGE SULLIVAN: That would have to be a statute establishing that commission.

MS. MUMMA: The Chief Justice actually would have the authority to set up such a commission, I believe.

MR. LEVENSON: It depends on what the extent of their authority is. Did you have a response on that point?

MR. WANGER: I do have a response to the question of how are you going to do it, and I'd like to make the suggestion that you consider a state constitutional amendment to do it. When I was delegate to our state's constitutional convention some years ago, I think such a proposal would have passed if there hadn't been as much difficulty or as much notorious difficulty with convicting the innocent as we have today. If your state, like most states, is not in the process of having a constitutional convention now or in the near future, then you have to figure out alternative ways of getting it on the ballot. But I should think it might be very appealing for a number of groups to put it on, and usually it gets on the ballot either through a petition process –

MR. LEVENSON: What about the funding for it?

MR. WANGER: I beg your pardon?

MR. LEVENSON: What about funding for it? You could create the commission. How is it going to eat?

MR. WANGER: It's going to eat by the money that you provide that's going to get in that constitutional amendment you pass. You make it a priority budget item. If you feel that's going to be a problem, it's a way. If you have the power to put it before the voters in your state, there's no question but that you could do something really good. You can short-cut a whole lot of enervation, which almost any bill will receive when it would be so controversial as it goes through the legislature.

MR. LEVENSON: I want to finish up the afternoon with just this final quick question to each panelist. The work of the model that you're working on, what are the best things it has to offer and what are the things that you would tell this audience to watch out for? I'll start with Justice Proulx.

JUSTICE PROULX: I have to say my main concern is how do we get to the truth. And the fascinating discussion we could have one day is to compare systems. We don't have, and I don't pretend that we're right, but you have the grand jury. The British have now abrogated the right to silence. The French compel citizens to testify. They give them the right to lie at that stage of the instruction. It's fascinating how we think of how we get to the truth before the trial starts. So I come back to the question put by the Honorable Reno this morning: How do we get to the truth? And one day, maybe we'll avoid a lot of miscarriages of justice.

MR. LEVENSON: Thank you. David?

MR. KYLE: Just picking up on that last point, we have indeed abandoned part of the right to silence. We are talking about abandoning double jeopardy. We are talking about

relaxing hearsay rules in criminal law. I actually think, I mean, leaving aside the fact that we've also just enacted a Human Rights Act, and for the first time since the early '50s, made the European Convention on Human Rights part of our domestic law – and I happen to think that all this business of things like removing right to silence, it is loading so much in terms of judgment on juries, and then you don't know how they'd exercise it. But I actually think all of this is potentially a problem in Human Rights Act terms. But it also, I think, is an excuse for – or it encourages, if I can put it that way – lazy investigating. I think that is where the objection to it lies, more so, perhaps, than on the principle as to whether it's right or wrong that somebody should have a right to silence or not. But in answer to the specific question, what do I think is good? Well, I don't think I could begin to sit here and say that the model which has been adopted by the creation of our commission is one which I would seek to recommend; and the larger, the discussion which Mr. Case introduced a moment ago about how you go about it or how you might go about it, is one which I would find quite difficult because it brings into play the differences in the political – with both a capital "P" and a small "p" – make-up as against the United Kingdom and the United States. But I think that, by doing what we have done for whatever reason – and yes, of course, it has to be politically inspired because only Parliament, through legislation, can create something to which public money can be devoted, and that's resourcing – whatever is done is an important point. What we have done is to create a mechanism within the United Kingdom, if I include the Scottish Commission for these purposes, which at least seems prepared to demonstrate to the world at large that we are prepared, as a country, publicly to recognize that mistakes do happen and to put public resources into putting them right. And somehow, in order to deal with this – and this is something that came out in the earlier sessions – in order to address miscarriages of justice, there has to be a will somewhere to admit that mistakes do occur, to do something about them and learn from the process of putting them right. I think if I were asked in a sound bite to say what could, I'd try and avoid going for anything that doesn't address those points. Don't go for anything which isn't creating some organization in some form, which doesn't have that will and motivation to look at mistakes and to do something about them.

MR. LEVENSON: Thank you. Sam?

MS. PAILCA: I think the system that we use is a genuine investigative tool and has the capacity to root out conduct that might otherwise go undetected. That's the good thing. I think the bad thing is we have a tendency, when an investigative model is created, that there can be a delinquency that sets in and the investigative model is emphasized over investigative reforms that can have a more pervasive and long-standing effect.

MR. LEVENSON: Judge Sullivan?

JUDGE SULLIVAN: I would like to see this British model analyzed. To me, it's quite significant, if I've gotten my numbers correct, Barrister, that 120 people have had their convictions reversed out of 4,500 – that's a significant establishment that maybe a commission like that should be seriously looked at.

MR. LEVENSON: That's food for thought for all of you. I want to thank our panelists for bringing it to us. (Applause.)

Saturday, January 18, 2003

MORNING SESSION

(8:45 a.m.)

MR. SOBEL (Presiding): Good morning everyone. I hope everyone had a great night's sleep and a good healthy breakfast and is ready for the second day of our conference. The overview will be given by Barry Mahoney and Larry Hammond, who were introduced to you yesterday. I'll turn it over to Larry Hammond and Barry Mahoney.

MR. HAMMOND: Thank you. Let me just spend a minute as we transition here from yesterday afternoon to what we're going to be doing today. Barry Mahoney will be telling you more about that. But as you can tell from the program, we are transitioning now more to looking at the teams and what the teams can and might consider over the next day-and-a-half and thereafter. In that connection, I would urge any of you who haven't had an opportunity to do so to set aside some time to read the entire issue of Judicature Magazine, which you all have been provided with. The magazine has been in existence for a very, very long time, and all of us who are associated with Judicature take considerable and, I think, justifiable pride in the magazine. But this particular issue, I would submit to you, is one of the best produced by this organization. The range of views and the clarity of those articles commend them to all of us. In particular, the article that Barry Scheck and Peter Neufeld wrote about the commission concepts that were talked about yesterday afternoon I find particularly helpful as our teams look at what kinds of things they can be doing.

It seemed to us that what we were talking about yesterday might be best seen as maybe a couple of different models. The English model – the CCRC model -- is really a way of looking for those cases in which there may have been a wrongful conviction, a conviction of an innocent person. That function, as we heard yesterday, performed in England by the Commission, actually in America today is usually performed, if at all, by innocence projects like the one started at Cardozo and like the 20 something other ones around the country, most of them associated with law schools, but not all of them. So one question that I think all of us might ask in our own jurisdictions is do we have a project of that type? If so, how is it doing its job? What kinds of funding stresses do these organizations have? Where are they getting their help and support? What kinds of rules of procedures in our courts affect the work that they do? If they find evidence of actual innocence, can they actually get it into a courthouse? There are reforms in some states that have opened up conviction relief to actual innocence claims, and in some states not. So there's a whole constellation of issues that we heard about yesterday that grow out of that kind of endeavor, and it need not be done by an innocence project; it could be done by some agency established by the state. So there are ranges of things to be considered there. The Canadian model that we heard about is really quite different and serves a different purpose. If you'll read the materials that we have in the white notebook and in the Judicature article, I think it's reasonably clear that that alternative really looks not so much at finding cases in which someone may have been wrongfully convicted but, in fact, looking back after the fact, a retrospective look – a post mortem, if you will – at cases in which someone has been exonerated to see what we can learn. Some people call it the “train wreck” approach. We wouldn't tolerate in this country any longer the idea that there could be a serious calamity that wasn't investigated

after the fact to see what lessons could be learned. I think all of us know that in the 123 DNA cases and the now more than 100 capital cases, it was something else that resulted in release from prison – something other than what it was that got the defendant convicted in the first place. It's true in virtually all of the DNA cases that something other than DNA put them in prison in the first place. Some people say, and I think our groups can consider the question of whether a really hard-edged look – an anatomy, if you will – of a case after it's over might well teach us some things that could help us understand the flaws in our system that could be corrected so that people aren't wrongfully convicted in the future. But those are really two very different models, and I would urge our teams, as we consider going forward, to take a look at both of those kinds of things. When you think about the Canadian model, some of these things can be done, as maybe North Carolina – I heard some very optimistic things yesterday about North Carolina that could be done without legislation, maybe, in some jurisdictions. So we decide that you do need something more than a group or a commission that says we're going to move forward and do it, and there are ranges of other things that follow from that. There are certainly ways that the various components of the criminal justice can, themselves, look at what they have been doing – examine their own experiences, as we heard about with the police review boards yesterday and as we're going to be hearing this morning from Tom Sullivan, the kinds of things done in the State of Illinois. So we have a whole range of options here. But I would urge us, as we go into these team meetings, to keep all of these options in mind and to give thought as to whether they'd be suitable in your jurisdictions. With that, let me turn this over to Barry Mahoney. Thank you.

MR. MAHONEY: I'll be real brief since you all can read an agenda yourselves. Yesterday, we heard a lot of really interesting and good ideas about ways of addressing the flaws that lead to the conviction of innocent persons – from changes in eyewitness identification, more training for police officers, videotaping of lineups and confessions, expanding the DNA base, education for judges and prosecutors, more resources for public defenders, criminal case review commissions, both of the models Larry mentioned, and many others. Your ideas are good. They're worth your consideration. Few of them – even, I suspect, the sequential identification where you're going to need to do some development of guidelines and training – few of them are cost-free. Everybody in this room knows the current state of state and local budgets. It's not a pretty picture. So meaningful changes – there's a lot that can be done without heavy costs, but there are going to be some costs involved, and that issue is bound to come up. But continuing business as usual will also involve costs – really heavy costs. And this morning, our keynote speaker on the panel will address the issue of costs and the benefits of addressing the problem of wrongful convictions. Then in the afternoon, we're going to have a panel right after lunch that will address political issues involved in implementing changes in the area. Today, however, we begin as Larry said – to move from hearing from people in the front of the room toward working in your individual teams. We've got two sessions on the program for asking you to work in your teams, as you started to do yesterday. The instructions are in the blue folder, one session right after lunch and another at the end of the afternoon. The instructions are all in here – there's no need to go over them – but basically, what we're asking you to do is, take a look at where you started yesterday; reexamine your goals; consider who, if anybody else, ought to be brought into this process at this point, what resources you're going to need; and develop an action plan, goals, tasks, next steps, and so forth. There is pretty detailed material in your folder. By the end of the day, we hope you'll have the basic outlines of an action plan because we want to be able to share these among the teams. The first step will be to ask you to bring something written up, in

whatever form, to the AJS Staff at the desk right outside here. They're going to also have for you some overhead transparencies that will cover three areas: Your goals as a jurisdictional team; the next steps you're going to take for the next three-to-six weeks after you get back home; and third, over the period of the next whatever period you pick, six months to a year, what are the key tasks that you want to undertake and accomplish in beginning at least the implementation of the plan you set for yourself today. We understand that this is going to change over time, but kind of what's the direction you'll be leaving here with tomorrow. Laurie Robinson, in case there's anybody in the room who doesn't know you, would you please stand up. Laurie and I will be meeting— at least with a single member of the team, who will make a short presentation tomorrow – but optimally, with all of you to try to get a little sense of where you are. We also have a chance to look at the plan you turn in this evening, but today is really an opportunity to say what you learned here, what you brought with you. There's really an incredible amount of knowledge and experience in the room. Tomorrow, for about two or three minutes each, we'd like each team to make a report, use these transparencies that you've prepared, and we'll have an open discussion about that. What are the ideas, what questions are raised by the presentation? See, what you'd like to be able to do is leave here, with something of a network among the eleven teams that are here, committed to addressing the problem of preventing the conviction of innocent persons. Usually at the end of something like this, getting a sense of where each of you are and what your plans are helps everybody move forward. That's the overall plan from now until some time not later than 11:30 tomorrow morning. With that, I'm going to turn it over to Allan Sobel.

Plenary Session IV: Systemic Costs of Convicting Innocent Persons

MR. SOBEL: Thank you, Barry. As I talk to people from around the country, at the conference here and in other places, it seems like almost everyone talks about how their own state government is in financial crisis. Certainly after the dot-com bust in September 11 of last year, all or most jurisdictions are facing huge budget deficits. Whenever reforms are considered, a cost benefit analysis must be anticipated. There may be reason to believe that reforming the criminal justice system to prevent wrongful convictions is actually a cost saving strategy. Our next speaker, Thomas Sullivan, will address the system at costs of convicting innocent persons, and he'll field whatever questions or comments you have. And then after a break, he'll lead a panel discussion in which the panelists will help us weigh the cost of convicting innocent persons against the cost of implementing criminal justice system reforms. Thomas Sullivan is a partner at the Chicago firm of Jenner & Block. He served as United States Attorney for the Northern District of Illinois from 1977 to 1981. In the past two years, he was co-chair of Governor George Ryan's Commission on Capital Punishment, which concluded its work by issuing a report containing 82 specific recommendations to improve the criminal justice system in Illinois. It's now my pleasure to present to you Thomas Sullivan. (Applause.)

MR. SULLIVAN: Thank you very much. Over 20 years ago, when I was a prosecutor during the Carter Administration, I personally encountered in my office a case of a wrongfully accused and convicted person. This happened to be a civil rather than a criminal case, but it had the same kinds of results. A man named Frank Wallace had come from Poland to the United States. He was the subject of a deportation proceeding because he had failed to admit that he had been a guard at the Nazi prison camp at Czestochowa, Poland. As I came into the office, the

case was then on trial before Judge Julius Hoffman of Conspiracy Seven fame – or infamy. Unfortunately for Mr. Wallace, it was a bench trial. He was found – two of my very fine assistants tried the case – he was found to have been guilty of what he was charged with. He was ordered to be deported. The case went to the Court of Appeals for the Seventh Circuit. The judges there seemed uneasy about the evidence, sent it back for a retrial. The case was then reinvestigated. There was a special department unit at the Department of Justice in Washington that handled these cases, although our local lawyers tried the case. They discovered very quickly, by walking down the street in the town that Mr. Wallace said he was in at the time of the Second World War – he was a young man at that time – that he, indeed, was on a farm, working on a farm; he wasn't at this camp. But the result of a suggestive identification that the Wiesenthal Institute had done, showing only his photograph to these people 25 and 30 years later and suggesting that he was the person that had abused them in the camp, resulted in a lot of people coming to court in Chicago – many of them from Florida, elderly Jewish people – and saying “Yes, that was the man, I remember him, I'll never forget him”. When we finally dismissed the case, I brought him into my office and I personally apologized to him, issued a press release explaining what had happened. But by that time, he had lost his wife, who had divorced him; his children wouldn't speak to him anymore; he'd lost his job. He had no income and he had no assets, and it was not possible to undo the harm that had been done to Mr. Wallace because of that wrongful prosecution. So I have, in Spielberg's terms, “close encounters of the first kind” with wrongful convictions.

In the Governor's Commission in Illinois, we spoke both with the families of victims and we had meetings with these people who were the victim's families who brought the pictures of their loved ones with them – the children, the husbands, the parents – and we talked to the wrongfully convicted, people who'd spent many years in jail for crimes they apparently did not commit or for which they were actually exonerated. In Illinois, approximately two percent of the felony cases result in a death penalty, less than two percent. It necessarily raises the question how many more are there in jail in non-death cases that were not guilty of the crimes for which they were committed. Unlike the 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. They write to lawyers like me. I get letters all the time from prisoners in jail asking me to help them, and I don't do anything about that anymore. I used to, as a young lawyer, but I don't anymore. But the injustice that is visited upon these people is not the penalty, but the fact of the conviction itself that needs to be remedied. No right-thinking person wants to convict somebody for a crime that he didn't commit. And I know that in the audience we have not only defense lawyers and prosecutors but we have policemen. I happen to be a police fan. I know that almost all policemen are dedicated, wonderful people who certainly are not in the business of trying to get somebody convicted for a crime that he didn't commit. But the problem that all of us face in the criminal system – and this includes defense lawyers, judges, prosecutors and police – is what's called “confirmatory bias.” That is to say, 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. It is a very, very difficult thing to overcome, whatever role we are playing in the system. This tunnel vision, this confirmatory bias, is a poison in the system that I think needs to be addressed very clearly, in whatever efforts that are made as a result of this convocation, and that is the subject of training early on for all of

us and it needs to be repeated, despite the fact that we may be very experienced old timers, as we've got a lot of them here in this room.

I'd like to give you an example of the systemic costs of wrongful convictions. One of the cases that resulted in Governor Ryan's granting clemency to all of the people on death row was what we in Illinois know as the Ford Heights Four case. In this case, it involved a brutal murder of a young man and woman out in a southern suburb of Chicago called Ford Heights. Within a few days, four young African American men, who became known as the "Ford Heights Four", were arrested and prosecuted or charged with the crime. An eyewitness identified them as being near the scene at about the time of the crimes. They had engaged in some suspicious activity at the time the police line was made outside the place where this occurred. A young, mentally retarded woman was taken into custody and, after extended questioning without counsel, she made a statement in which she said that she was an accomplice with the men and she had helped them commit this rape and murder – double murder. Soon after that, she recanted her testimony; but the four were prosecuted for rape and murder, and the woman was prosecuted as an accomplice and for perjury in denying that she was involved in it. Eventually, two of the four were sentenced to death. The other two were given extended prison terms, and the cases started up and down in the Illinois court system. After multiple appeals and several reversals and retrials, the convictions and the sentences were affirmed by the reviewing courts, and we were sort of at the end of the process – we're now 15 or 16 years later. At this point, David Protess of Northwestern University's Journalism School enters the picture. He started a program looking into teaching investigative journalism, and he said we're going to look at some of these cases. He assigned a young lady named Kathy Sullivan – no relation – to look into the case of these two men, Jamerson and Williams, of the Ford Heights Four. She went to the files, all of the files, and read through them. And in the file, she discovered a police report of an interview of a witness within one week of the time of the rape and murders, within actually six days afterwards. A man had called his friend on the police department, a man from the police department at Ford Heights, and a state trooper, because state police were involved in this. He named the four actual killers – the names were right in his handwritten report. As far as anyone could tell, nothing was done about that because, by this time, they had already arrested the Ford Heights Four, paraded them in front of television cameras, said “these are the people that did it” And this report of the eyewitness – the man who said that he not only knew it, but they had talked about the fact that they had done this crime – was deep-sixed. The professor and the students eventually obtained confessions from two of the four actual killers. One was dead; another was in jail for murder, for murdering somebody else in the interim. The three surviving perpetrators were tried and convicted, and the four were released; and they settled their civil cases for over \$35 million.

This case, this horrible case, illustrates some of the unnecessary direct costs when innocent persons are convicted. First of all, you have four people who were imprisoned for over four years; and the young woman went to jail, too, for being an accomplice and for perjury. But the guilty people remained free. One of them killed somebody else while he was out during this time. And we don't know what other crimes may have been committed. The civil cases, as I said, were settled for a huge amount of money in these days of tight budgets. The cost of imprisoning these people for 15 years was totally wasted – two of them on death row, with increased costs there. Then they had to go back and reinvestigate the cases 15 years later, retry them; and of course, if the witnesses by then are not available, the criminals go unpunished. And

because of the fact that you have a cross-racial crime – African American criminals, white victims – you get this tension between the races owing to the wrongful conviction of the African American defendants. The direct costs of wrongful convictions illustrated by the Ford Heights Four case can be tremendous. Had the prosecutors or the police, way back at the beginning, done their job properly, it never would have happened – and one other person would have survived, who was killed in the interim. There is also a cost of risk that comes to the prosecutors and the police supervisors when these things happen. When these cases fall apart – as any of the policemen here will know, the police supervisors – when these cases fall apart, then finger-pointing starts, and the finger-pointing starts going up. The police chiefs and elected prosecutors suffer the consequences.

Now in Illinois, in another one of our cases, which we call the Cruz/Hernandez case, they appointed a special prosecutor to look into the police and the prosecutor's conduct in convicting two people who apparently were innocent. There was an indictment brought against the police – six former Assistant State's Attorneys in DuPage County and the police – for wrongfully convicting. I'm not exactly sure what statute they charged them under, but here's what happened. The parents of the little girl that was killed identified the defendants in that case because the police had convinced the parents that the people who were prosecuted, Cruz and Hernandez, were the actual killers. After Cruz and Hernandez were exonerated – quite clearly exonerated – the parents continued to believe they were guilty. The police continued to tell them they were guilty, as the prosecutors did, because of this confirmatory bias. They couldn't get off the idea that they had caused two people to almost lose their lives and gotten the wrong person, when another man in jail was confessing to the crime and admitting he did it alone. It's just a terrible confusion that occurs, and there's severe damage to the victim's families. The victim's families are damaged; reputations are hurt; as well as the potential liability that the prosecutors and police have. As you can see, this is an unusual prosecution, but also liability and tort for wrongful prosecution that can occur. Those are some of the direct costs.

I'd like to talk to you also about some of the indirect costs that can occur. Some of these things have been mentioned before, but I think they are worth talking about again. 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, and tremendous distrust arises among the criminal justice professionals and the public. When the finger-pointing starts, it can involve prosecutors and police from city, county, state – not the federal, so much, in our system. But the victim's families are required to relive, and perhaps testify again, now, against somebody that they had been originally told – in other words, they are now being asked to come in and testify against a wholly different set of defendants, having been convinced by the police and the prosecutors that the first time through they had the right people. I have not been in that position personally, thank goodness. I don't know what it would be like to have to go through this as the parents of little Jeannie McKerrico did out in Wheaton, Illinois – having been convinced that the people that were prosecuted, Cruz and Hernandez, were guilty and later having the lawyers that told you that, and the police, getting prosecuted themselves for obstruction of justice. But you can imagine the guilt that is felt by the prosecutors, in their hearts, and the police and the people who have perhaps made wrongful identifications of the wrong person and then, ten or 15 years later, have to come back and testify against somebody else and realize that this person has done

all that time in jail partially because of what you did unintentionally. But largely as a result, I think, of this confirmatory bias that needs to be talked about – and talked about repeatedly with all of the people in the criminal justice system. When I say repeatedly, I mean not only when you're in the police academy or you're learning how to be a prosecutor, if anybody ever teaches you that, but also as you go through your career. Because all of us, as we get older and more experienced, start to believe in our own judgment and the correctness of our own views and what we've concluded, and there happens to be a natural inclination on the part of all of us to start thinking that we know best and that we have got it figured out. And we tend, as we get older, I think it's quite clear, to reject any suggestion that we have made, God forbid, an improper judgment or a bad call.

In addition to that, in a number of the cases in Illinois that led to these exonerations, there was bad scientific evidence. Hair evidence for example. It's hair-raising to look at the kinds of evidence that is used, and then argued to the juries by prosecutors who should know better, from hair evidence. In a number of states where it's turned out that some so-called professional has testified falsely to the results of scientific experiments, it's required them to go back for years and re-look at all of the other cases in which this has occurred. That's happened, as I understand it, in New Jersey and in Canada and in West Virginia and Oklahoma and Montana, just to name a few. The costs can be tremendous if you have the wrong person in the lab. Of course, if the death penalty is obtained and imposed, the additional cost to litigate that just escalates. The studies show that the cost of imprisoning somebody for life is less than it takes, at least in the jurisdictions in which it's been studied, to execute somebody because of the heavy front-end costs on death cases and the long post-conviction procedures that go on and also the separate facilities they have for these cases. The studies have shown that the extra costs can range anywhere from 15 to 35 percent more. In Illinois, up until the time the Governor placed a moratorium on executions, there was a lapse of about 12 to 15 years from the day the judgment was entered to the day that the execution actually occurred. So there's a tremendous extra cost in the event there's a death penalty. But what we are concerned about here is not specifically death cases, but it's the vast majority of the other cases in which there might be wrongful convictions, and there is no question that, in the long run, apart from the justice of the matter, it is less costly to get it right the first time. And that is the end result to which we're all aiming. Those are the remarks I have. If there's any comment by my panel members? Is Mr. Farmer among us? He's here. Richard, do you want to come up here? Yes, sir.

MR. GORDON: In the Ford Heights Four case, the defense attorneys never saw this memo about the four other people?

MR. SULLIVAN: As I understand the facts, when the case was retried, there's Williams and Jamerson – those are the two who got the death penalty – and in the files of the defense lawyers on the retrial that report was there, the State's Attorneys who tried the case testified that they did not know about this report. The police did, obviously, because they made the report, and in the defense lawyer's files, this report was there but nothing was done about it. You have clearly incompetent defense counsel involved when that occurs if you've got a report like that – nothing done about it whatsoever. Yes, sir?

MR. MARTIN: John Martin, Columbia University. In your experience, does the press bear any responsibility for the pressure we put on police and prosecutors to have a perp walk and immediately tell us who committed these crimes? Is there something the press is doing which should be somehow modified?

MR. SULLIVAN: I think there is no doubt that the pressure is put on by the television cameras and by the reporters to the prosecutors to come up with a solution. It does contribute to this. As far as what should be done about it, I'm not sure anything can be done about it because that's your job. I despair of any idea that you would stop reporters from beating up the prosecutors and the police for today's story, for tonight's 5:00 o'clock news. I think the real effort has to be made not in the journalism schools, but in the police academies and when prosecutors are brought in and taught how to do their jobs; they are taught that they should not give in to the inevitable pressures that they're going to be put under by the media. I do believe, John, one of the things that ought to be looked at is this: With regard to police, we give them all sorts of training when they first come on. I don't know what continued education they get on these subjects, but they certainly get training in the police academies. Whereas a prosecutor, a man gets out of law school, or a woman, goes into practice, applies for the job, is hired. I don't know whether there's any systematic system throughout the country for training prosecutors. I know there are schools that they send them to, but to talk about these kinds of things when you're a prosecutor and moving up into the felony branch, I think it's extremely important. So that's another area that needs to be looked at, and that is to say to require new prosecutors to face the potential of wrongful convictions. Yes?

MS. RENO: I think there is a responsibility on the part of the media because I think the media get tunnel vision as easily as prosecutors or defense attorneys do. I think there should be more training in that regard so they take up the clues that lead to exoneration as easily. Secondly, in many instances, you have a young reporter that needs training as much about the process of the criminal justice system as the prosecutor or the defense attorney need training, and it's come to a time where the pressures are so great – and since newspapers are meant to seek the truth, with the competitive world of newspapering today, I think sometimes it's forgotten.

MR. SOBEL: Tom, could you tell our audience about the Ryan Commission's work? First, how the Commission was formed, what its purpose was, how it went about its business – just sort of a thumbnail sketch of its recommendations. I would be most interested in knowing whether the Commission felt that some of the recommendations should have priority in terms of implementation.

MR. SULLIVAN: This was, I guess, three years ago, after Governor Ryan imposed the moratorium on executions in Illinois. He formed a 14-person commission. Frank McGarr, who is a retired chief judge of the federal court, was the chair. Paul Simon, the former Senator, and I were co-chairs. Of the 14 members, nine of us had been prosecutors. A number of us were also active in defending cases. We had the lawyer for the superintendent of the Chicago Police Department as a member; two city state's attorneys; a number of African Americans and a number of women; and one man who was, along with Paul Simon, the only non-lawyer – Roberto Ramirez, whose father was murdered down in Mexico and whose grandfather then murdered the murderer. So he had a direct relationship to this issue. By the way, he's against

capital punishment. How the Governor selected us, I do not know. He didn't consult me about the selection process. Matt Bentenhause, who was a former assistant U.S. attorney, was deputy governor, and he kind of acted as coordinator of the Commission. We split into three subcommittees. I dealt with police prosecutors. Then there was one on defense lawyers and judges and one on post-conviction matters and other peripheral matters. We had no subpoena power. As subcommittees, we interviewed numerous people. Gary Wells, for example, who spoke here yesterday, came to my subcommittee and explained his theories to us, and we adopted his theories. I think one of the most important recommendations we made is to use the sequential line up procedures with double blind testing. I brought into our subcommittee many police chiefs, as many as I could get, to talk particularly about this videotaping of all suspect statements in homicide cases because, in Illinois, virtually every homicide qualifies for the death penalty. It would be very difficult to figure out how to kill somebody in Illinois and not subject yourself to the death penalty. We had a lot of expertise from all sides of the justice system; police, prosecutors, defense lawyers, and judges came before us and talked to us about their experiences and their recommendations. We read widely. One of the things that we relied on to a great extent were the things Richard will talk about, which is the Canadian recommendations – particularly those found in the Mooring report, which was then available – because there are so many wonderful recommendations in these Canadian reports for reform. And then, as we, in our subcommittees, decided what we were going to recommend to the full committee, we would write those up and then, as the full committee, we would meet and vote on the different recommendations. We had a reporter, Jean Templeton, who did most of the work on the text of the report, the explanations. It was over a two-year process that we went through these recommendations one by one, and we went over and over, as well, the text of the explanations, and a few months ago came out with our final report.

MR. SOBEL: I guess I'd like to know if you could give us a summary of the recommendations and tell us whether there were certain recommendations you felt should take priority.

MR. SULLIVAN: First of all, since I do not have the kind of memory that I used to have, and it seems to be slipping daily, I would like to call your attention to an article that I wrote which was published in three places – the Illinois Bar Journal, the Federal Lawyer, and the National Association of Criminal Defense Lawyers magazine – called "The Champion." It's the same article reprinted three times. It summarizes the major recommendations of the Commission – and if anybody wants it, I can send them a copy of it or the citations to it if you'll just give me your name and address. In addition to that, in this issue that's been passed out of Judicature, I wrote an article about the application of the Commission's recommendations to non-death cases, which I think is very important. One of our recommendations is that consideration should be given to applying these recommendations in non-death cases, the other 98 percent of cases. So you can see in the materials you have in front of you some of the recommendations. The ones that I think were significant were: to reduce the number of qualifying factors, from 20 down to five, to have a statewide review commission that would require – we have 102 counties with elected state's attorneys, who are constitutionally elected officers, to subject their decisions to seek the death penalty to a five-person review commission made up of four state's attorneys and one retired judge, then they could not prosecute a case as a death case without the approval of that commission; to videotape all interrogations of suspects in homicide cases, any potential

death penalty case, which is all of them, not just the confession part of it, which is what they do now in Chicago; to use Gary Wells' procedures for lineups and photo spreads, which he explained yesterday; to require a pretrial hearing whenever the state is going to rely upon the testimony of an in-custody informant, a jail house snitch; to put special instructions to the jury about the testimony of jail house informants and accomplices; to prohibit the imposition of the death penalty based solely on the testimony of an accomplice or a jail house snitch. Those are the pretrial recommendations that were the most important. There are some others that deal with the actual trial of the case. The Supreme Court of Illinois had already adopted rules, while we were doing our work, requiring that all lawyers in death cases, on both sides, be certified as qualified to try these cases. So some of these recommendations that we made, we merely said we agree with what the Supreme Court has already done. My article – thank you, Dawn – is at Illinois Bar Journal, Volume 90, June 2002, page 304. I'll send you a copy of it with my business card, if you'll give me your name. (Laughter.)

MR. SULLIVAN: Those were some of the major recommendations that we made. I'm sure I've missed a few, but a lot of them – oh, the other thing that I want to mention is we recommended training, training for police, prosecutors and defense lawyers and judges. You know, when you talk about training, it sounds like kind of a throwaway recommendation, like “everybody ought to do good and avoid evil”. But I think it's so important to have this training and keep it going during one's career. I could use it myself. I think something that we take out of this into individual states, commissions and so forth; I think that ought to be one of the top-notch priorities for these recommendations. Yes, sir?

MR. SMITH: Virgil Smith from Michigan. The example you gave us had bias as a basis on which these four young men were prosecuted. So I'm wondering, in the review of the death row cases that you made in Illinois, how many did you find were convictions basically started because of the bias on behalf of the officers or the detectives or the district attorneys, and did you make any recommendation to deal with the fact that bias itself leads to unfair convictions?

MR. SULLIVAN: Yes. We did not address the individual cases from the standpoint of racial bias, but what we did was, we had Michael Radelet, who was the man who put together the Judicature Society publication that each of you have, and Glen Pierce – two very knowledgeable professors – to do a statistical study of our cases in Illinois with respect to race and sex and geography and so forth. They rendered a report – it's a technical appendix to the report, very thick – in which they went through these cases very carefully and determined that there were at least two clear evidences of bias. This is statistical now, not on an individual case basis, and the first one was that if the victim was white, there's a much greater chance that there would be a death penalty given for murder. This confirms what has been found in other states, by the way. It's interesting that the race of the defendant did not pop out as a factor, but it was the race of the victim. The other thing that was discovered was that the rural communities, if you commit a murder in a rural community in Illinois, you have a much greater chance of being given the death penalty than if you do it in Chicago or one of the other large cities. I think that's because, in the rural communities, murder is not that common – the people know the victim – whereas, in Illinois, I've listened to some of the statistics about the number of murders per year. We have more on a weekend than some of these states do all year, up in Chicago. So you kind of get used

to it, and it has to be a particularly brutal murder or somebody that is particularly sensitive in the community in order to get a death penalty up in Chicago. So that's what we did.

MR. SMITH: Thank you.

MR. SULLIVAN: You're welcome.

MS. HALBERT: Ellen Halbert, Victim Services, DA's office, Austin, Texas. When the Commission was looking at all the cases in the Illinois system, and you looked at the death row cases, I'm just wondering what kinds of policies and procedures you put in place to notify the victims in all those cases.

MR. SULLIVAN: We did not notify the victims in the 175 cases. There are about 170 people on death row. Our statistical view looked at all murder cases, not just those that resulted in death, because you have to make a comparison. We did invite the victim's families to come before us – and I was not involved in the selection of those people, so I cannot tell you how we chose the people that came before us – but we did spend a day, a very gut-wrenching day, with the families of victims. I can tell you that there wasn't a dry eye in the house at the end of that session, listening to these people explain what they had gone through when their loved ones – their children, their parents, their spouses – were brutally murdered. It was just a horrible experience.

MS. HALBERT: I may have missed it, but I was wondering if, when you put the Commission together – when the Governor did – if there was a victim advocate on the Commission?

MR. SULLIVAN: No, there was not a victim advocate assigned to the Commission. The answer is no.

MS. HALBERT: Thank you.

MR. SULLIVAN: You're welcome. (Pause.)

MR. SULLIVAN: We have with us three very eminent lawyers who are going to talk to us about some of their experiences; and they might, as I understand it, even hit upon the subject matter of this panel – (Laughter.)

Plenary Session V: Cost-Benefit Analysis

MR. SULLIVAN: – the cost benefit analysis. So I would like to introduce each of them to you, then we'll take them in the order in which I introduced them. Richard Wolson, right here on my right, from 1973 to the present has been a criminal defense lawyer in Winnipeg, Canada. He is what's called a "Queen's Counsel", and he practices all throughout Canada in the area of criminal defense. He's been a lecturer and writer on criminal law and advocacy, and he was – and this is of particular importance to this group – counsel to the Sophonow inquiry. As I understand, he ran that inquiry – he'll tell us more about that when he speaks – a very

experienced and eminent Canadian criminal defense practitioner, who was selected to head that important inquiry. John Farmer, over at the end, is the former Attorney General of New Jersey, which has been discussed previously because they have put into place – it's the first state in the union – the identification procedures that Professor Wells talked about yesterday. John clerked for the New Jersey Supreme Court back in the eighties, and then he was in private practice. He was an assistant United States attorney in New Jersey for four years in the early nineties. He was counsel to Governor Whitman for several years. And then, from June of '99 to January of 2002, John served as the New Jersey Attorney General. He currently is a professor of constitutional law at Rutgers Law School in Newark, right John? Then finally, Barry Scheck, who is nationally known because of a number of things. (Laughter.)

MR. SULLIVAN: My wife likes Barry, but she can't forgive him. (Laughter.)

MR. SULLIVAN: But I teach forgiveness. We should give him a pass on that one. (Laughter.)

MR. SULLIVAN: He's 21 years as director of Clinical Education and Trial Advocacy at the Cardozo Law School in New York City. In 1998 – maybe it was '88, I guess, Barry – you began litigating issues in DNA technology. I'm off ten years. He's a member of the New York State Commission on Forensic Science. In 1992, he and Peter Neufeld began the "innocence project", which has resulted in over 100 persons exonerated throughout the United States, and half – or more than half – as a result, wholly or partially, because of the work of the innocence project. He is co-author of the book "Actual Innocence" which I recommend to all of you. It's a wonderful compilation of some of these cases. So Barry Scheck is our third speaker. I'd like to start, John, with you. I'm sorry, Richard. Excuse me. I'm going to ask you these questions and you can give your remarks as you wish. I'd like you to give us an overview of the Sophonow inquiry. I'd like you to tell us a little bit about the Moran and Marshall inquiries – the Moran is the one I studied as a member of our Commission. I would also like you to tell our audience what changes have been made as a result of these inquiries.

MR. WOLSON: There have been, in Canada, a number, unfortunately, of wrongfully convicted accused that have been reported. In three of those cases, there have been called public inquiries, which are rather rare. The inquiries were called to examine the causes of the wrongful conviction in each of those cases, but more importantly, the systemic issues. Because when you examine cases, whether they're cases by the Innocence Commission that Barry knows so well about or the case that the Chairman has talked about this morning, there's a pattern that is recurring in these cases, and we can learn a lot from these patterns that seem to be recurring. The courts, unfortunately, have not always adopted and accepted the recommendations by the judges in the inquiries. The first inquiry was the Marshall inquiry in Newfoundland some years back. The key issue with Marshall was disclosure. Fortunately for the lawyers practicing in Canada, our Supreme Court did adopt and change the law on disclosure largely as a result of that inquiry. The second, Moran sequence, a murder case. Ontario called an inquiry, and issues that were discussed in that case were the scientific issues, particularly hair microscopy, which has changed now in Canada. They're phasing it out, fortunately, and there are no cases in Canada now today where a conviction would lie on hair microscopy alone. Also discussed in Moran was the jailhouse informant, which was later carried in the Sophonow inquiry, the one that I was

involved in. In Sophonow, the inquiry was conducted by a retired Supreme Court of Canada Judge, Peter Corey, one of Canada's most preeminent judges. The inquiry was called in the year 2000 – almost 20 years after Tom Sophonow had been arrested, tried on three occasions, jailed for almost four years, and eventually cleared in 1985, or at least acquitted. Sophonow fought on for about 15 years wanting exoneration – and not by DNA, interestingly enough, but by reinvestigation. The Winnipeg Police Service and the Attorney General's Department in Manitoba exonerated Tom Sophonow of the murder of this young woman involved in the case. December 23, 1981, young Barbara Stoppel – just 16 years of age – was found with a ligature around her neck in the donut shop where she worked. There were four eyewitnesses who saw a man leave the donut shop; one confronted the killer, wrestled with him, but the killer got away. You can imagine that this crime, just two days before Christmas 1981, rocked Winnipeg, a small community of about 500,000. An inquiry or investigation, of course, was started immediately. Sophonow was not arrested until March of '82 in British Columbia, where he was confronted by the authorities. He made a statement – although not an admission, certainly a statement that intended to inculcate him. The statement was not signed, not recorded verbatim, and later denied by Sophonow at his trials. The four eyewitnesses were shown photo packs – not as Professor Wells had noted yesterday, in a sequential manner. Three of the witnesses were part of a live line up, and all four made equivocal identifications – equivocal at the time. But by the time Sophonow's preliminary hearing came a few months after – and all three of his trials, all within the five-year period of his arrest – the identifications became absolute. All four swore that Sophonow was the man they saw leaving the donut shop. One of the four indicated that Sophonow was the man that he wrestled with just a short distance away from the donut shop. There were three jailhouse informants called by the time of the third trial. Nine had lined up to offer their services. (Laughter.)

MR. WOLSON: Nine who lied – we know that today – all of whom said Sophonow confessed to them. All wanted some favor or their day of fame. Sophonow had an alibi, which was not advanced immediately, that he was in a garage having his car repaired and then on his way to a hospital, two hospitals, to deliver Christmas stockings to sick children in the hospitals. This is something that he'd done in other years out in Vancouver. Sophonow was tried – the first trial, a hung jury; second and third trials, convicted – and as I noted earlier, spent almost four years of his life, most of that time in solitary confinement, before the Manitoba Court of Appeals acquitted him in 1986. The inquiry was called in 2001 – the power to subpoena, of course. I called at the inquiry a number of witnesses, including Barry's partner, Peter Neufeld, to talk about his experience in wrongful conviction cases; Dr. Elizabeth Loftus, a well-known psychologist out of Washington State; Dr. Adrian Grounds, a psychiatrist expert in dealing with wrongfully convicted accused, based in the U.K. The issues were the following: Mistaken eyewitness identification, jailhouse informants, false and improperly recorded statements, tunnel vision, failing to disclose by the prosecution, and the conduct of the prosecutors. Unlike many of the cases that you've studied in the United States, Sophonow – and for that matter, Moran and Marshall – all represented by experienced senior defense counsel. So even when you have counsel of that ilk, there can be these horrible mistakes made.

The question posed yesterday: Do we have a problem? And I suggest to you, with 120 post-conviction DNA exoneration cases in this country; with hundreds of post-charge exoneration cases prior to trial; with the Canadian experience; with the experience in the U.K.,

where a royal commission examined numerous cases, exonerating many, two of whom had been hanged years earlier for crimes they hadn't committed – do we have a problem? I suggest that, in this country and in Canada, we have a remarkable system of justice, a model for other countries, but there is no question that we have a problem in my respectful opinion. There is no question, on the issue of costs, that we can make changes that are within our ability and not at great cost. We know from the experience – at least I know from the experience in Sophonow and from study of other cases, from hearing witnesses in Sophonow, from the reports and the book that Barry has co-authored, “Actual Innocence” – that in about 80 percent of cases of wrongful conviction, mistaken eyewitness identification plays a contributing factor, 80 percent. We don't have to look for the cause; we know the cause. Yet why can't a single recommendation – recommended by Justice Corey in the Sophonow report, Professor Wells, Professor Loftus, many other experts, many other lawyers that have practiced in this area – why can't we employ universally, in this country and in mine, the sequential line up, showing the photographs sequentially? It's not a difficult concept; there's no cost involved. If laying out on a table ten photographs, according to the experts, can produce error, mistaken identification, who wants that? There can't be an honest police officer who wants that – or a prosecutor, or any citizen in a just society who wants there to be a mistaken identification. The cost of that is prohibitive, the cost to everyone, because if you pick the wrong one, then the real killer, the real rapist, is out to commit crimes at their will. So why can't we simply develop a policy of how to show the array of photographs? There ought not, in my view, to be objection to that, and it seems to me that every prosecutor can take to their own jurisdiction a request to the police as to how to show the array. I understand that in the double blind testing concept that there can be problems with manpower, particularly in small centers, but we have to make some changes. Eighty percent is just too high.

Jailhouse informants – we know that the jailhouse informant presents a particular problem. They're unsavory. I don't know of a police officer or prosecutor who likes to deal with them. They'll turn on you in a second. Yet we've learned that in about 20 percent of wrongful conviction cases, jailhouse informants are contributing factors. Justice Corey, a most mild-mannered judge, the most decent human being you could ever find, who wouldn't say a negative word about anyone, had this to say in the report: “Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They're smooth and convincing liars, whether they seek favors from the authorities, attention or notoriety; they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.” This is the fellow that hasn't a bad word about anyone. (Laughter.)

MR. WOLSON: It should be noted in Sophonow, as I told you, there were nine jailhouse informants who lined up at the door. One who testified, a fellow by the name of Martin, by the time the inquiry came around – that is about 17 or 18 years after the trial of Sophonow. We learned that Martin had testified on no less than nine occasions as a jailhouse informant. Corey said of him, “He seems to have heard more confessions than many dedicated priests.” (Laughter.)

MR. WOLSON: Now, to eliminate the species of jailhouse informants that we know often lie – a recommendation both in the Sophonow inquiry and the Moran inquiry – seems to be a reasonable thing to do. There's little cost involved. We should never convict on informants' testimony alone. And if that's all you have, why not eliminate the informant? If you have other evidence, then call it and leave the informant aside. In my view, they bring the administration of justice into disrepute. Although the courts haven't adopted the recommendations either in Moran or in Sophonow, prosecutors have at least developed policies which have strengthened, in my view, the chances of there not being error. The test now is, is there some evidence that the informant can bring that he could only have heard from the accused? One of the nine informants who lined up at the door but, fortunately, was not called by the prosecution for other reasons, was a fellow by the name of Terry Arnold. Terry Arnold would have testified about the most intricate details. He would have said Sophonow told him where the body was, which was never disclosed in the media – the nature of the ligature found around her neck, the fact that her sweater was raised – would have testified as to all of these details and would have been accepted, no doubt. Today, Terry Arnold is the number one suspect – the only suspect – in the murder of Barbara Stoppel. He would have known everything. Not only that, Arnold – who is the number one suspect – has gone on to a career in Calgary, Alberta, Vancouver; charged, or at least investigated, for murders in those provinces and investigated in a number of states in the United States for the crime of murder. There's no real cost to eliminating the jailhouse informant, and as I heard one of the prosecutors say yesterday, the only way we'll never have a wrongfully convicted accused is if we don't prosecute. I say prosecute to the hilt. But when we know the pattern that exists, when we know of the problems of jailhouse informants, prosecute to the hilt but don't use them. Use every other method that you have for a true, just verdict.

Tunnel vision was another area we looked at in the Sophonow inquiry. Tunnel vision, Justice Corey noted, is insidious. It can affect an officer or anyone in the criminal justice system with tragic results. Recommendations were discussed by Corey of education – the Honorable Attorney General Janet Reno recommended that yesterday. Education. The cost isn't too high to include in the curriculum for police officers, when they become officers, to include something of tunnel vision – some literature, perhaps a speaker or two – and for there to be updates from time to time.

Lastly, the area of false confessions – we've learned from studies that, in over 20 percent of cases of wrongful conviction, false confessions or improperly recorded confessions are a contributing factor. What's wrong with recording the entire custody of an accused at the police station? One may argue that it takes away from the effectiveness of an interrogation, but who wants the results of an interrogation that can't pass the scrutiny of a videotape analysis? To the contrary, videotape is often a key for the prosecution. A videotaped statement is a powerful weapon for the prosecution, and why not start from the time the accused comes into the police station? You're going to videotape in any event; there's no real cost. So I say that one wrongful conviction is tragic, hundreds are unacceptable to a just society. We have a lot of data, and we can make changes without great cost. Thank you. (Applause.)

MR. SULLIVAN: I'm going to ask the audience to hold on their questions, unless there's something so burning you can't resist, and go to our next speaker. John, I'd like to have you talk,

among other things, about how the lineup procedure and photo strip procedures are working in New Jersey. What's the reaction of the police and prosecutors? Is there a problem with the double blind procedure in the smaller communities and the cost issues?

MR. FARMER: Thank you. Before I answer those specific questions that Tom posed, I wanted to give you a little bit of background on how it is that New Jersey arrived at the point of adopting Professor Wells' and the Justice Department's recommended guidelines for eyewitness identification. The issue of the reliability of convictions really came on my radar screen, personally, first, when I was clerking after law school. I clerked for the New Jersey Supreme Court for a justice named Allan Handler. At the time, the New Jersey death penalty statute was up for review by the court, which sustained its constitutionality with one dissenting vote. That was the vote of the justice for whom I was clerking. Justice Handler and I had, over a two-year period, a lot of lengthy arguments about capital punishment, and his grounds for dissent, which have never wavered – in fact, have only strengthened over the years – were based on his experiences as a trial judge in the City of Newark in Essex County, New Jersey. And his reason for dissenting in capital punishment cases was simply very similar to what Mr. Rooter said yesterday – this is a very human system; mistakes are made. He'd seen them personally, and he was not willing to support a system in which he viewed it as inevitable that an innocent person would someday be executed by the State. I never agreed with him, at the time, on that argument. I thought the system could be made to work perfectly, at least in death cases; but then I became a federal prosecutor a few years later, and I had first-hand experience with one of the first DNA exoneration cases in the country. I was stationed in Trenton at the time. I was the only AUSA in Trenton. There were a few in Camden. New Jersey is very top-heavy in terms of its allocation of federal prosecutors because, frankly, two-thirds of the felonies in the state are committed in Essex County and Hudson County, and so that's where the manpower is located. There was a rape at Fort Dix, which is in South Jersey. I was on duty that night, and a colleague of mine was on duty, so we were involved in the case from the word go. The case involved – and anyone who's tried cases knows that there are vast discrepancies or differences in quality in terms of witnesses – the victim in this case was one of the best witnesses I've ever worked with. She had been employed as a security guard when the rape occurred. She had the presence of mind to retain the bodily fluid in her mouth because she knew that it might have evidentiary value. She was really as composed as you could possibly be. She picked a suspect out of a lineup. The suspect was a man who was known to local police around the Fort Dix area for committing burglaries – he was really a serial burglar. He'd been away a few times, and she picked him out – and, from the first instant she laid eyes on him, he was the person. She testified at trial she was a hundred percent certain that this gentleman was her assailant. I did not try the case, my colleague from Camden did, but I did help prepare the witness. Her testimony – I did cross-examination on her, tried to shake her identification of this gentleman, and she was unwavering. And in fact – I'll get to this in a few minutes – but to this day, she is unwavering that this was the person.

Fast-forward four years. The defendant went away and was doing a ten-year sentence in federal prison. Then there was a story that appeared about a rape and murder in Fort Bragg, North Carolina, in which the defendant in that case ultimately confessed to that murder and mentioned, in passing, that he had also committed a few crimes at other bases, and named Fort Dix as one of them. My colleague learned about this. DNA testing was relatively new at the

time – this was at the end of the eighties, maybe even early nineties – but he, on his own motion, ordered that the sample the woman had retained in her mouth be tested. Sure enough, it was a match to the serial killer in Fort Bragg, North Carolina. I asked him what prompted him – he must have had some residual doubts about her identification which I didn't have, or he wouldn't have ordered that test – and he said that, at the sentencing, the defendant was so adamant that he did not do this, he had never committed a violent crime in his life, he would never do this, and it really stuck with my colleague for a number of years. And when he learned of the confession in North Carolina, he felt compelled to have the testing done. I saw what my colleague went through. It certainly shook my faith in the system. This was a case where there was no hanky panky, there was nothing that was done wrong. There was a simple mistake that was made by a woman who, to this day, believes that, in her mind, that person is the rapist. When we went out and told her the results of the test, needless to say, she was furious that we had the test done and furious that the man that she still believes as guilty was going to be freed. I have not had any contact with her in several years. My colleague told me a few years ago that she has come around, having learned more about DNA, to believing that it probably wasn't him. But in her mind, he will always be the person who raped her because, from the moment she set eyes on him in the lineup, she was fixated on him as the person. Interestingly enough, if you see a photograph of the two – the defendant who was convicted and the one who was ultimately convicted – you see them side by side, there is a certain similarity. The actual guilty party is a lot younger, but in terms of complexion and facial structure, there are similarities there. So, needless to say – it's hard to describe for those who haven't been prosecutors – but what sustains you is a belief in the system and that, while a mistaken conviction is possible, it's something that you view as theoretically possible but it's not going to happen to me. I'm not going to prosecute anybody who's innocent. And this case is an illustration that you can do everything right and get the wrong person. It was an object lesson for me. It's still one that I viewed as my career moved forward as an isolated case, and I didn't have any other cases where I thought there was any possibility. I had no other cases that involved strictly a one-on-one ID, which is what that case involved, so I viewed it as an isolated case.

Fast forward to the end of the nineties, and the Attorney General – I read the report that Attorney General Reno put out in the Justice Department about the wave of exonerations that had begun to occur across the country. When I saw that over 80 percent of those cases involve mistaken eyewitness identification, it seemed to me I could no longer view my own experience as an aberration, necessarily. It may be if we had done the lineup differently, maybe if we had different procedures in place, she wouldn't have been so sure; and maybe that would have led to further investigation of other people. That might have changed the result and led to a just result a lot more quickly, less expensive to the victim and to the system. So I read the report, which was based in part on Professor Wells' work, convened my senior staff, and basically asked them two questions. One, what's in the pipeline in New Jersey; are we facing any of these kinds of situations that might result in exoneration? Two, can we get ahead of this? The context in which I said that was we were dealing, through most of my tenure, with racial profiling issues where we did not get ahead of the issue; we got behind the issue, and the issue landed on our heads. I just didn't want the state to go through another issue like that because I can't describe the pain that that issue has caused the state and its citizens. It's pain that will ripple for years. So Deborah Stone from my office, who was actually very familiar with Professor Wells' work – at her suggestion, we invited Professor Wells out to the annual meeting of the County Prosecutors

Association in September of 2000, where he gave his presentation. And I have to say there was initial reluctance on the part of some of the prosecutors, but the reluctance really didn't have to do with the merits of what Professor Wells was talking about and the validity of the sequential method, the prosecutors' objections had more to do with what's going to happen. Let's say we put something into place and we mandate this is the procedure. What's going to happen to pending cases? What's going to happen to existing convictions? What's going to happen in the future if, for whatever reason, the procedures aren't followed? We took those comments extremely seriously in formulating our guidelines. I met with the chiefs of police associations and informed them that we were considering doing this and I wanted their input. Ultimately, they had fewer concerns than the prosecutors did. The prosecutors naturally are concerned about cross-examinations at trial, motions post-trial, and I think those are legitimate concerns, and we tried in the final draft of our directive to give some flexibility to the guidelines so that an aberrant case could be rehabilitated on cross if it was shown that the procedure that was used did have indicia of reliability. The major concern that the chiefs of police and the local police departments raised had to do with the double blind testing and the costs involved, because you're really doubling the number of officers who have to testify. It's going to be the investigating officer and the officer who administers the test. We have 411, I think, police departments in New Jersey, some of which have two or three officers. One of the things I think needs to happen is we need to consolidate some of our police departments. But as long as there are unions, that's never going to happen. But they raised legitimate concerns, I thought, about how feasible it was to even conduct these when the department is so small; sometimes, there's only one person on duty. So we tried to put into the directives some flexibility for those departments so it doesn't always have to be done that way – but if it isn't, they have to show some indicia of reliability. Naturally, they're going to be cross-examined on it. If this is the stated policy and we're going to follow it, why was that? That's something that's going to have to be litigated.

We were ready to go; we had a proposal ready to go by the end of the year 2000. You'll note that the letter actually went out. The letter didn't go out until the end of April – the reason it didn't go out until the end of April was me. It had a lot to do with the cost/benefit analysis that I was putting myself through. I was hesitant; I hesitated to put it out, probably for the wrong reasons. But what I was dealing with in January of the year 2000 was we had just made public 100,000 pages of documents pertaining to racial profiling. I waived all privileges attached to those documents, and I had done so because there was such a history of dissembling on the issue and the charges of dissembling were continuing. I thought we would never get past it unless we showed people everything we had. And, naturally, that resulted in the dismissal of over 100 cases on suppression motions around the state based on state police stops. There was terrific backlash from law enforcement, which I expected and received – and editorially, also. The New Jersey Law Journal has a "loser of the week" and I set the record. (Laughter.)

MR. FARMER: During my tenure, I think I was loser of the week 36 times. (Laughter.)

MR. FARMER: It's the price you pay for public service. It has infinite rewards. (Laughter.)

MR. FARMER: So I hesitated in January to do it. When the furor had died down somewhat from the racial profiling issue – and I should say that there had been a history. I'm

blurring the issues, but the way that they played out was inseparable in my mind. During the 1990s, over 600 profiling cases had been dismissed involving state police around the state, but they'd been dismissed in the individual counties, so it had never really coalesced. New Jersey has a unique structure the way law enforcement is structured. The attorney general has plenary law enforcement authority – I'm technically the boss of not only the state police and the New Jersey Department of Justice, but also the county prosecutors and the local police. I decided to consolidate all the racial profiling cases and have the state handle them so that, when they were dismissed, they were dismissed by the state and not by the county prosecutors. I'll be candid to tell you that one of the reasons I did that was the thought about these eyewitness identification guidelines and the county prosecutors basically telling me, "look, if you're going to make us dismiss all of these cases, operational profiling and the backlash we're going to receive, don't ask us to support these eyewitness identification guidelines because we will not be able to make it work". So that was an example of how the cost/benefit analysis played into my ultimate decision to go forward. So we consolidated cases, dismissed them, and by April, I felt ready to pursue the reform.

The costs involved in the reform may be less in New Jersey than other states because of the structure of law enforcement. The attorney general's office is responsible, through the police and prosecutor's bureau, for all training that occurs – the training occurs annually, so it's something that's done anyway; we just had to incorporate the training that had already occurred. I mentioned the cost in terms of human resources. We tried to address that. I mentioned the concern about manipulation by defense counsel and potential lost cases. Again, we tried to give departments flexibility, and we put into guidelines language that could be used on redirect in a trial to enhance the viability of whatever deviant procedure is used. The question of how is it working now, how effective has it been, I think the jury is still out on that question. I made a lot of phone calls to various law enforcement people in anticipation of coming here today. There are no hard data, but I can tell you that there's been no wave of suppressed identifications or acquittals or post-conviction relief based on the directive that I issued. I think, and we discussed this yesterday, Barry had a good idea. There's a need for a specific study in one of the counties as to how this is working and the reaction from us. The police I talked to really haven't had a problem with it; the only glitch among the police that I heard was that there's a rumor going around among some of the police officers that the witnesses are tending to pick the second person in the sequence. I don't know if that's true or not. It's just an attempt to sort of game the system, but that's the only negative that I heard. But if that's the case, that's something we need to find out about because maybe we need further reforms. And there's no outrage in the law enforcement community that this is the current state of the law. So on the whole, it's been a positive experience – but again, I think the jury is really still out on the success of this. (Applause.)

MR. SULLIVAN: Thank you very much, John. Barry, you're up to bat now. And I'd like you to talk about your work in this area and also the kinds of projects that have been in place, to your knowledge, and what your recommendations would be for other innocent types of commissions.

MR. SCHECK: In the Judicature article, Peter Neufeld and I tried to anticipate a lot of the presentations here about the Sophonow, Moran, and Marshall commissions and the CCRC

and tried to think hard about what would work in various different states in terms of what one might think of as a capstone reform for all these different measures to reduce the number of wrongful convictions. And when you begin to think about the various commissions that we've already had in the United States, we've had some remarkably successful study commissions, I would call them. Obviously, the most impressive, indeed, is the Ryan Commission Report. Incidentally, every one of these things you can find on our Web site. You can find it at innocenceproject.org – the Sophonow commission, the Moran commission; you can find the complete text of the Ryan commission, the guidelines – all these things. We try to keep on posting new ones as they come along, but obviously, the Ryan Commission recommendations, and particularly the appendix that's associated with the report, have a lot of the hard data that support many of the recommendations that we've heard here today. Obviously, there's room in every state for what one might characterize as a study commission – a public inquiry model – which is a post-mortem of wrongful convictions, such as done in Canada. An observation here is that they picked high profile cases. These were cases that got a lot of press attention. When you begin to look at the costs of these inquiries, they were not cheap. Lots of different people have lawyers. People were flown in for testimony. I would justify it in terms of the product they produced and the influence they had, but it struck us that there had to be a more cost-efficient model. Interestingly enough, the model that we hit upon was the National Transportation Safety Board. There probably isn't a more respected public entity, I think, in this country than the NTSB. We really do trust the NTSB to go in and look at plane crashes, train derailments, and ask the questions of what went wrong and how can we fix it – a real inquiry with real data. The more we began to look at the NTSB, the more interesting it was. It had subpoena power; it would look at each of these transportation catastrophes and would issue recommendations. The recommendations were frequently ignored by the Federal Aviation Administration; obviously, in some ways, you say that's a weakness. I actually think, in some ways, it's a sort of strength because the entity is not burdened with saying, “oh, if we recommend this as a change in policy, look at all the huge costs and problems that are associated with it”. It makes it a comparatively apolitical institution whose only responsibility is to speak truth to power again and again and again, and eventually, after a number of crashes and derailments and a number of recommendations, they have to follow some. But you can always trust this particular institution to be accurate and fair in its recommendations. Also, their recommendations can't be used – or their client base, I should say, can't be used – as a basis for civil liability or even criminal liability. So it turned out to be a study of the NTSB that we talk about in this article, a very interesting model.

The model of the Criminal Case Review Commission is extremely impressive. I was talking with David Kyle yesterday, and if you really start thinking about it – with a prison population of 70,000 – David was estimating that probably, when you put aside their backlog, they look at 800 cases a year. Eight hundred cases are brought to them a year. But remember, the CCRC, as presently constituted, is not just looking at innocence claims; they're sometimes looking at claims of people that are saying, oh, the jury was misinstructed. What we might characterize as a procedural due process claim. He guesstimates that, if you eliminate that, he gets it down to about 600 cases where people are, on the face of it, people are claiming actual innocence. Then if you eliminate the misdemeanors and look at the actual serious felonies, it may be reduced, maybe, to 400. Then all of a sudden you're saying, my gosh, in the prison population of 70,000, they're looking at 400 claims per year. All of a sudden, the cost of that

institution is not as big as if we asked, well, how much does it cost. It's, like, close between – I don't know – maybe eight, nine million dollars per year in American money. That's a little steep, but if you begin to look at it on a state level and you adduce it only to serious felonies and only claims of actual innocence, maybe it's not so out of the ball park. But obviously, the CCRC, when you look at these institutions, is a more mature model. In Canada, after the public inquiries, they would like to get a form of the CCRC, I think. The CCRC came about only after public inquiry, so you can sort of see an evolution here.

It was our thought, when we began to look at these matters, that in going back to your various different state groups, maybe the simplest and best model, initially, for various different states is some form of a public inquiry kind of model on the National Transportation Safety Board, where blue ribbon panels of people from all sides of the criminal justice system, who are very much respected, begin to look at those few cases in the jurisdiction where there are already decided wrongful convictions to see what you can learn from them. In some ways, these kinds of reviews are not really unheard of. Various different state and federal agencies have inspector generals. If you look at the inspector general model, you can see examples of some very impressive audits. Maybe one of the most impressive, when you think about it, was the Bromwich report. Imagine – our federal government, our justice department, instituted an inquiry into problems that arose in the Federal Bureau of Investigation crime laboratory in trace materials – a really hard audit at the very time that the same bureau, and actually, the same agencies, were pursuing the Oklahoma bombing trial. That makes you proud to be an American, that we could have done that inquiry, and, in fact, the product of that inquiry, when you talk to the prosecutors at the trial – and I observed a lot of it, actually – in the final analysis, strengthened the forensic evidence in the case. They can live with all the hits they took for investigating themselves. So these kinds of models, I think, are not outside the scope of what we already do, when you think about it. We heard that in North Carolina, already, the chief justice has begun thinking about, or has formed, an innocence commission and is thinking about various different institutions and the ways it could be done. Many chief justices, or many highest appellate courts in jurisdictions, have a lot of power to institute commissions that can begin looking at these things. Sometimes it would take the state legislature; there may be, sometimes, executive branch involvement.

One of the ways to do this, I think, would also be to look at state university systems. In a time of economic problems, it might be cost efficient and certainly in the interests of state universities if they were empowered, let's say, by legislative enactment, to be a home for a commission that would be studying wrongful convictions and making recommendations for changes in the criminal justice system that would adduce the wrongful convictions and make law enforcement more efficient in catching real assailants, which is really what all these inquiries and all these reforms are about. There could be a group of notables within that university system that could almost be delegated subpoena power, and the university could supply a home and even a staff of researchers. Look at the CCRC model – they actually have the run of the home office and the forensics bureau to do some of their recommendations. The same thing is true with the National Transportation Safety Board. They don't have a big staff of scientists. They sometimes reach out to different federal agencies to do discrete research for them, or they even can contract out to other agencies to do research. I think research and a systematic inquiry is absolutely essential in these areas.

We were talking about the extent of the problem that I was raising yesterday and Richard mentioned again today. You know, it's not just the post-conviction DNA exonerations that are such a wonderful database, but there are, without question, tens of thousands of cases where people were arrested and then exonerated with DNA testing, and we've never really studied or looked at them. One of the proposals that a number of us made years ago, when DNA testing began, was – think about this – in all your crime labs across this country, now they're doing DNA testing. When a case comes into the crime lab, where there's somebody that's been either arrested or is a suspect – but even just take arrests. If there's an exclusion, the people in the laboratory have absolutely no idea whatever happened to that case. Prosecutors and police do not keep accurate or systematic records on what happens to exclusions, nor do they keep track of what happens to inclusions. One would like to believe that the exclusions are going to be cases, ordinarily, where there's going to be a dismissal unless there can be other extenuating reasons. There could be a DNA example that's not really relevant, but if it were going to be a determinant DNA sample, you would feel that this case is out of the system and the research goes on for the real assailant. Or if there's an inclusion, there's a quick guilty plea. You can cost those things out in terms of ultimate savings to the criminal justice system. I know my friends in the forensic laboratory community, one of the things we discussed often on our National DNA Commission – they would love to have that data to be able to say, “is this really cost efficient, one way or another?” – but wouldn't we also like to have that data to see what are the real causes of wrongful arrests? Is there any pattern here? Can we pinpoint it, just as we can also look at what works? How is it that when the DNA, for example, confirms that we got the right person, we can say that there's something good about these particular kinds of investigative methods? Frankly, this is pretty simple. I was quite amazed sitting on a Justice Department committee now that, I think, Sue Narveson referred to – Adjutlab is what we call it – the Ashcroft Justice Department, I think a deputy there who used to work for Bill McCollum in the House, I was explaining, “Gee, we proposed this study years ago and nobody funded it. The only person who did it was Paul Farrar in Virginia.” He looked at me and he said, “That's right, you guys are right. We should have been collecting this data for years.” So I don't think it has anything to do, really, with whether you're conservative or liberal or a prosecutor or a police officer or defense counsel. The collection of data about wrongful arrests – frankly, wrongful convictions – and systematically following it through and trying to learn from it is really critical to building public confidence in our system. There can be these kinds of innocence commissions within a state quite cost effective – there aren't that many wrongful convictions in each state, I don't think, when you really look at the vast run of cases. Yet each of those are extremely significant and really worth studying. That's the kind of thing that I hope, when you begin looking at the stuff in the groups, you might find some way to come up with that.

I just want to very briefly, just two more minutes, discuss two issues we've mentioned but I just want to emphasize a little bit more and give you some data where you might find some good examples. The first issue is videotaping custodial interrogations. One of the things that we have been able to collect – Steve Drizen from Northwestern Law School and one of Ron Huff's colleagues, Richard Leo, at the University of California at Irvine have just come up with a list we posted on our Web site of 130 proven false confessions in the last 15 years. These are not just the post-conviction DNA exonerations where there were false confessions, but these are other cases where people were arrested and then either DNA evidence or law enforcement found the

real perpetrator. They're a pretty careful list of proven false confessions in jurisdictions, which is the kind of thing you can begin to do if you look at data more broadly. When we look at this issue of videotaping interrogations, which I think because of the number of wide profile cases, lies, I think, on the consciousness now of law enforcement, the best place to look is Minnesota. We have some materials in the book by Geller, who had done an NIJ study, and there's some reference here. But Minnesota we have, with the innocence project – Sarah Topf will give you a whole compendium of things – but the prosecutor in Minnesota, Amy Klobachur, has become a big believer in this, as well as a number of law enforcement people throughout the state. They didn't like it at first, when this was imposed by court order, but now they like it a lot. The reasons include: Number one, Amy says she's never lost a suppression hearing; number two, it's very powerful; and number three, I don't think people fully appreciate how they do it. They have a video camera that is surreptitious – that is to say, the suspect does not know that he or she is being videotaped. As the interrogation proceeds, sometimes they've made cases because the police walk out of the room – and I guess there's an infamous one where the suspect started singing, “ding dong the witch is dead, the witch is dead,” not knowing that he was being videotaped. (Laughter.)

MR. SCHECK: Which came out to be kind of a confession there that was pretty damning. (Laughter.)

MR. SCHECK: But they don't know that there's an interrogation and videotaping going on. It does not handcuff law enforcement from using methods that are approved by American law – you have good cop/bad cop; you can deceive a suspect by telling them facts that may lead them to reveal information that, truly, only the assailant could know – all these various different techniques that are used in interrogation and, frankly, do not compare. What police really do does not compare to what Sipowicz does every night on NYPD Blue for the last 12 years, or Homicide: Life in the Street. When you talk to prosecutors, I think at least one group is saying “they do it in San Diego”. It's very powerful with juries and, I think, experienced teachers in these jurisdictions; jurors are not upset when they see police officers come in and one is hard and one is nice, and whatever, because they expect and they know that's going on. On the other hand, what's really good about this procedure from a training point of view is that where mistakes are made; when an officer inadvertently, by leading questions or in some other way, gives information to a suspect, who eventually confesses, that that person didn't know. And in any training in terms of police interrogations, you're always trying to find that data that the suspect produces and that only the suspect could know – it was not suggested, it was not in the newspapers – and it's really good for training law enforcement on how to do interrogations. And there really is a serious cost. When you look at these false confession cases, the Central Park Jogger is a clear example; Mathius Reyes went out and committed a series – he was the person who really raped and assaulted the jogger – he went out and, during a period of time, committed three brutal rape/robberies and a rape/murder in Broward County, Florida, which has had a series of notorious false confession cases. There was Frank Lee Smith, who died on death row awaiting a DNA test, gave a false submission; and a man named Jerry Frank Townsend, who was mentally retarded, pled guilty after falsely confessing to, I think, eight homicides. It turned out that Frank Lee Smith's homicide/rape/murder and all of the Jerry Frank Townsend cases were committed by one man, Eddie Lee Mosely. And Eddie Lee Mosely, who was in and out of mental institutions feigning mental illness, was a one-man crime wave who had committed 62

rapes and murders in the Broward County/Fort Lauderdale area. Tell me that isn't a cost. You find that – in these false confession cases, unfortunately – very, very frequently they are serial offenders.

Finally, on the whole issue of crime labs, which was mentioned by Tom. Yes, you look at Fred Zane in West Virginia and Gilchrist in Oklahoma – those are huge costs. And now in the State of Montana, there's a man named Melnikoff who gave really totally made up scientific testimony about hair comparisons – saying that one hair, the odds of its matching were one in 10,000, and here's another the odds are one in 10,000 – so it's one in 100,000 that the hairs must have come from this individual. DNA testing of the hairs, of course, showed it wasn't his hair; but then the Attorney General of Montana has now realized that, my God, this man Melnikoff ran our crime lab for a decade. He wasn't just doing hair, he was doing toxicology; he was doing arson; he was doing everything – and they are now setting up an audit procedure. It then turned out Mr. Melnikoff went to the State of Washington and was working in the crime lab there, and when informed of this, officials in the State of Washington immediately did an audit of his work, found some problems, and are working, I guess, with Jackie McBurtree's people at the University of Washington trying to set up an audit procedure there. And there's something coming in Maryland, too, in this exoneration of Bernard Webster with DNA. There's a problem with the serologist who did that. You find this in state after state. I'm sure that there are institutions that could be sent up to regulate these crime labs in a way that makes them more independent, which is one of the recommendations of the Ryan Commission report, but again, it's a win/win proposition for law enforcement. (Applause.)

MR. SULLIVAN: Okay, we've heard some very thought-provoking notions here. One thing I have as a question of the panelists, and that is – in these cases of wrongful convictions where there have been jailhouse informants and/or prosecutors who've overstepped the bounds and that sort of thing – do you know of any prosecutions, other than the one out in DuPage County, that resulted in a not guilty of everybody? John, do you know of any prosecutions?

MR. FARMER: No.

MR. SULLIVAN: Barry?

MR. SCHECK: No.

MR. SULLIVAN: Richard?

MR. WOLSON: Not in Canada.

MR. SULLIVAN: That's an interesting thing, too, it seems to me, knowing as we do that there's a major problem, particularly with these jailhouse informants. There simply seems to be no comeback at the end. And I know that, in the Ford Heights Four case, there's an opinion written – in fact, I cite it in one of these articles – by the judge in the state court in Chicago, finding that the prosecutors knowingly used perjured testimony and, of course, the policeman who did not do anything with the report that identified the actual killers. The prosecutors, as far as I know, have not been disciplined and are practicing law in Illinois. The policemen that were

involved were promoted, actually, although this incident didn't come out for about 15 or 16 years afterwards, but as far as I know, there's been no discipline imposed on them for that. And I think that is a very serious problem here, too. That the examples of the horrible conduct that occasionally occur do not result in discipline of the professionals involved. Yes, sir?

MR. WALLACE: Scott Wallace with the National Legal Aid and Defender Association. There was one case that didn't stand up on appeal that was interesting in terms of holding folks accountable. It was the Singleton case out of the Tenth Circuit where, I think, it was a three-judge panel that said the prosecutors who used jailhouse snitch testimony were guilty of obstruction of justice because they had exchanged something of value, that is, a promise of leniency, in return for this testimony. It was reversed en banc after there was a deluge of complaint from the prosecutorial community, but that is an approach that might be considered. Looking at the trade of leniency for the testimony, which is, of course, an indicia of reliability. But then I also had a question about the cost of sequential lineups. There was a wonderful documentary that won an Academy Award for best documentary last year, "Murder On a Sunday Morning." It involved a murder in Ms. Reno's home state. I don't know if any of you saw it, but within a few minutes of this murder in Florida, the police – it was a young black man, that was the description – the police went out and rounded up a young black man a few blocks away and brought him to the husband of the victim who was standing at the scene of the crime. The young black man was in the back seat of the car, handcuffed, the lights on the top turning, and they said, "Is this the man?" He's severely traumatized, and he says yes. The result of that, I mean, there are two things that could have happened – it's a slam dunk case or, in this case, what made it such a compelling drama was that the public defender, this hardened, chain-smoking guy, just said, "I don't think that's right", and he went out. They didn't have an investigator on staff, so he spent his evenings and weekends finding the real culprit. The police had given up. They had their guy, so the cost, I guess it was free for the system, but we can't count on it in every case. So my question is, this seems – I don't know if it's covered by your guidelines or not – what do you do when you've got an on-the-crime-scene nabbing of a suspect like that? How does that incorporate into your sequential procedures at the station house?

MR. FARMER: I think, even before the reform we put in place, there was a general understanding that so-called "show-up IDs" are probably the least reliable. It's certainly not standard. It's discouraged in New Jersey to do it. Are there circumstances where it has to happen? Yes. If the police arrive right after the crime and the person who's there says, "That's the guy who did it," I don't know how you avoid that. But it seems to me that's less unreliable than the so-called – when there have been cases in the past where the police will take the victim to a street corner and they'll drive the person by or walk them by and say, "is that the guy" – I think that's generally understood, even in the absence of sequential lineup reform. That's about the least reliable sort of identification you can have, so it's not something that we permit in New Jersey.

MR. SULLIVAN: We have some experienced policemen here in the audience. Is one of them willing to speak to this issue?

MR. KERLIKOWSKE: Gil Kerlikowske from the Seattle Police Department. I think one of the questions that keeps coming up on this – actually, I think every researcher says we

need more research. To tell you the truth, I don't know if there's much research on this. I've looked in Gary's statement, and this is somewhat of a distinction because yesterday there was a little bit of difference between the double blind and also the sequential lineup issues. In your policy, it says "whenever practical". It says time of day, manpower, personnel considerations in the department, but I'd actually like to see some research. I'd love to see the Department of Justice fund some research on the whole show-up issue. Our procedure is not putting the person in the back seat of the patrol car, etc. Are there some things that can be done? I don't know right now.

MR. SULLIVAN: Sir, with respect to this particular issue of taking the person in the back seat all alone to the victim or the victim's husband, what do you do in Seattle?

MR. KERLIKOWSKA: We would do that if that person were apprehended – stopped within a very short time frame. And I think there are different cases, different states with different sets of case law – the time frame and the proximity or the location. I think we would do that.

MR. SULLIVAN: All right, that's a subject for further inquiry. Yes, ma'am?

MS. KUR: Mary Beth Kur. I'm an elected prosecutor from Michigan. My question goes back to the discipline issue of the attorneys. I just was curious as to whether, when you said they had not been disciplined, if that included whether or not the respective bar associations had taken any disciplinary action against these attorneys.

MR. SULLIVAN: So far as I know, they haven't. Under Illinois law, when a lawyer discovers that another lawyer has committed some fraudulent conduct in the course of the practice, you're duty bound to report that to the Attorney Registration and Disciplinary Commission. And you can be disciplined for not doing that.

MS. KUR: That's the same law we have in Michigan.

MR. SULLIVAN: I have asked the lawyers because this opinion of the judge that I quote from in my article accuses the lawyers of knowing use of perjured testimony, in fact, finds them guilty of knowing use of perjured testimony. I've asked the lawyers in the case whether they've sent that over to the AIDC. They tell me they have not. I have wondered whether I am now, having read the opinion, supposed to do it. So I think when I go back, this will remind me to send that opinion over to the AIDC.

MS. KUR: In our state, too, anyone can file a grievance. It doesn't have to be a member of the bar. I don't know what it's like across the country.

MR. SULLIVAN: These have gotten a lot of publicity, so it makes you wonder about the disciplinary system, at least in our jurisdiction.

MR. SCHECK: I'd like to comment on that. In actual innocence, you know, after each different cause of wrongful conviction chapter, we have a little appendix where we try to come

up with remedies. All we can think about here is, I think, the disciplinary system really may be one way to go. One thing that could be done within state bar disciplinary procedures is that you would have a group of experienced judges, prosecutors, and defense counsel that would look at misconduct in the criminal area. This should include, incidentally, defense lawyers that are totally and completely and unethically deficient in their representation of clients. Because in so many of these cases, I can tell you that the defense – the fellow in Montana, Jimmy Bromgard, the lawyer for him was known as "Jailhouse John" and they had to go get him at the local bar to bring him in for half of the trial. You can find again and again, in so many cases, it's the same people and, in the most serious cases, we all know that has a lot to do with court-appointed lawyers who don't get enough money and who are tolerated and are completely incompetent and unprepared to do representation in serious cases, which undermines the entire system. They should be disciplined equally. When a prosecutor hides exculpatory evidence or commits other acts of misconduct, to be frank, I think it's very hard if you're running a prosecutory office – well, what are you going to do? How far are you going to go to discipline your own prosecutor? It's difficult because it can create political problems, I think for any particular prosecutor, more than if you had a disciplinary system with people who had some expertise in the criminal area. They would actually sanction this kind of conduct on both sides of the aisle. Maybe that would help, because certainly we know there's civil suits, there's absolute immunity for prosecutors and public defenders for things that occur during litigation not in the investigatory stage, and I think maybe disciplinary proceedings, as you suggest, is good.

MS. KUR: Just one other thing. It would apply across the board, to sanction defense attorneys as well?

MR. SCHECK: Absolutely. I'm the first to say that, let me tell you.

MR. SULLIVAN: Thank you, sir.

MR. GORDON: Ken Gordon, State Senator from Colorado. I used to be a public defender, and I had some cases, significant cases, where hair analysis was used against my clients. And at the time, we didn't really have any way to say whether this was good science or not, and it was persuasive, I think, to juries. And I know you mentioned the case where the guy hadn't really even maybe done the analysis and just made up results. But in cases where they do the analysis and they come in and testify, has that been shown to be good science? Or has that been shown in cases to have resulted in evidence that's later found to be false because of DNA? I have one other thought. What I'm thinking about this is have there been any cases where fingerprint testimony has been found to be inaccurate with DNA?

MR. SCHECK: In the area of microscopic hair comparison, a lot of good work has been done. The FBI recently published a paper – Max Hauck, who is now at West Virginia, was a former analyst there, and Bruce Fedele. Is Judge Davis still here? Andre Davis? In Miami about three months ago, Judge Davis chaired a mock trial with Rock Harmon and the hair analysts and people from the FBI. The FBI just published this paper saying what they have done recently over the last five or six years is that they have taken cases where microscopic hair comparison was done by state or local people in a case; they then had their own examiners look at it under the microscope. Hauck reported that, in half the cases, he reported he disagreed with

the results of the hair analysts. If the FBI-experienced analyst also agreed there was an inclusion for the suspect, they then sent it on for mitochondrial DNA testing. In this published paper, they show that in, really, over eleven percent of the cases, the mitochondrial testing showed that the inclusion was an incorrect result. That's a pretty high rate of error. And if you talk to the FBI people themselves – Max Hauck, Carol Dentman, others who have experience – they're really kind of appalled at the level of error that they saw in microscopic hair comparison by state and local people. To have any degree of accuracy there, you have to be pretty experienced. This is a very serious issue. It's been in the Gilchrist cases here, has been at the heart of it in these Melnikoff cases, and that's something that we're going to see in state after state. Now, there is no state in this country where you will not have some kind of a case, what would be a wrongful conviction based on microscopic hair examination, if we can find the hair.

MR. SULLIVAN: Barry or any member of the panel, what about fingerprints?

MR. SCHECK: If you read a book by Simon Cole called "Suspect Identities", which is a very good compendium – there's been some recent articles in the New Yorker, and, of course, the decision by Judge Pollock in the Plaza case, and the Justice Department is also looking into this. There have been some questions where fingerprinting samples will come in and say that the fingerprint testimony in a case was inaccurate. In other words, there are great differences across the country and around the world on what standard should be used to say that a latent print at a crime scene actually matches. There is not agreement on the standards. This is not to say that a fingerprint is necessarily unreliable, but there are differences, and sometimes fingerprint analysts have disagreed; and there are about four well-documented cases where convictions have been thrown out when other analysts have come in that the fingerprints were bad.

MR. GORDON: Thank you.

MS. MUMMA: Chris Mumma from North Carolina. A couple comments, one about you were talking about the volume of cases and the costs associated with the number of cases you look at. One thing we looked at in North Carolina, or talked about, is we have four law schools and journalism schools that are currently working with the Innocence Project. The resource that these students provide is incredible, and the faculty from these schools, in reviewing cases. That's another opportunity to decrease the volume of cases that might go to an ultimate commission looking at innocence claims. Another great resource, there's obvious benefits of sharing of information between states and, hopefully, a year from now there'll be a compilation of all of these great ideas that have come out and the actions that have been taken. But New Jersey, having already implemented these changes and identification procedures, has been a great resource for us already. We've been in contact with them. They miss you very much up there. They've offered training materials, they've offered to be on conference calls with our commission to talk about how they do implementation, so you can't talk enough about the cost savings associated with the experience of other organizations that have already made these changes.

MR. SULLIVAN: Thank you.

MS. MAPLES: Cheri Maples, Captain of Personnel Training for the Madison Police Department. I just want to make sure that the action groups understand the difference between a show-up and a photo array and a lineup. They're very different procedures, and you've got different people in the police department doing them. The people most likely to be doing the photo array lineup and the lineup procedures are detectives. The people who are most likely to be doing show-ups are police officers and first responders. The policies governing these two things vary from police department to police department, but a show-up is something that has to be conducted by the police officer. The legal timing for it is questionable, but most police departments, by policy, will use two to three hours. The victim is usually brought to the suspect's location somewhere; it does not happen at the police department. Whether or not the suspect is going to be handcuffed or in what state is going to be shown is going to be dependent on officer safety considerations and things like that. But the photo arrays and the lineups are very, very different procedures and are taking place after the short window of time. If there's been little research done on the actual show-ups, those are the procedures that are being used. I'd say, talking to the prosecutor from my county, we estimate, having been a detective lieutenant before I got this position, I'd say that the show-ups are done three times as much as the photo arrays or the lineups.

MR. SULLIVAN: Could I ask you a question? Would you redefine the term "show-up" for us?

MS. MAPLES: Show-up is something that occurs when a police officer on the street has investigated a crime and finds a suspect within a very short time of that crime occurring, usually within two hours, and brings the suspect to the victim's location for identification.

MR. SULLIVAN: And that passes muster under Wisconsin law?

MR. SCHECK: That passes muster virtually in every state.

MS. MAPLES: It passes muster under every state law. I can't imagine there's a state where that does not pass muster.

MR. SCHECK: I would be remiss if Gary were here and other people actually at NIJ. They will tell you, maybe not too far in the future, a very interesting solution to this. And that is that, if you are a police officer in a police car and you're equipped with a digital camera, you take a picture of the person that you have found on the street, potentially for a show-up. You could actually, with the use of the device, e-mail that picture to central headquarters – and there are now programs whereby, if you have a photograph, you can automatically tease out from a bank of photos through this digital processing a whole series of maybe five, six, seven or eight other photographs that would be appropriately a likeness, and then you could do a sequential presentation right there within an hour or two. I realize it sounds crazy, but they are actually working on this.

MS. MAPLES: And the point that I want to make is particularly in not your high profile cases, your homicides, etc., you're likely to be dealing with photo arrays and in-person lineups. But in terms of the other crimes that you're talking about, the great majority of those crimes,

you're going to be talking about show-ups. And I've heard very little discussion of those here, so I think that's something that needs a lot more research.

MR. SULLIVAN: I agree with you. I think that's something that ought to be looked at very carefully. Yes, ma'am?

MS. GOLDEN: Megan Golden with the Vera Institute of Justice in New York. I want to go back to the confirmatory bias, or tunnel vision, issue. As I understand it – I talked to a few people about this yesterday – it's a very powerful, psychological phenomenon. I wonder if it's something that training really can address, or is the only thing that will make a difference having some type of a counter balance? And if that's the case, how do you structure that within a police department? Who resolves the conflict? What can work in that way?

MR. SULLIVAN: My solution to federal judges would be, after they've been on the bench ten years, you'd take them out and shoot them. (Laughter.)

MR. SULLIVAN: Perhaps something along that line would help. (Laughter.)

MR. SULLIVAN: But perhaps the panelists have something less drastic.

MR. FARMER: I'm not going near that. (Laughter.)

MR. SULLIVAN: Let me ask the questioner again – what is your name, Miss?

MS. GOLDEN: Megan Golden.

MR. SULLIVAN: Megan, what do you think?

MS. GOLDEN: I don't know the answer. I think it's something worth looking into, whether there might be things to do with the individual that could change the way they think about things. Gary Wells yesterday suggested exercises, but it would be worth looking to see if that can actually be effective. It might not be. If so, if you want to have somebody else in the police department – and I think some places do something like this – who is overseeing or has the role of questioning the prevailing theory? It's an interesting question about how you can structure that within the department to make it work.

MR. SULLIVAN: It's, I think, maybe beyond the expertise of the lawyers, and we need to get into some other disciplines to deal with confirmatory bias. But I don't think there's any doubt that it's a subject that ought to be addressed, and this group would be, I think, ought to put that in their reports and how we're going to deal with this matter of confirmatory bias. Yes, ma'am?

MS. NARVESON: Sue Narveson, the Laboratory Director for the Phoenix Police Department. I have a question for Mr. Scheck. Would you expand on your comment in regard to regulation of crime laboratories for us, please?

MR. SCHECK: Yes. The one model that we have in New York, and we've had it for eight years, we have something called a "forensic science review board". It's the only statute like it in the country. On that review board are judges, defense lawyers, law professors, public defender representatives, and members of a number of crime labs in the state. We have supervisory authority over every crime lab. The first thing that we actually did, we brought in people from the United Kingdom; we formed our own separate DNA subcommittee; and we also made every lab get accredited. Every state laboratory in our state is accredited by ASCLAD; and Howard Said, the Police Commissioner in the New York, and Rudy Giuliani, our former mayor – remember him? – will tell you that it cost him an extra \$33 million when they opened up their new crime lab in Queens because of us. And yet they were very, very thankful because we made them do the things that were necessary to ensure that it would be accredited. One of the things we found is that accreditation is not enough, because even accredited laboratories, we found when we started reviewing their proficiency tests, were screwing up the amounts of drugs that were found in a particular case, which would be critical in determining the level of felony. There were problems with toxicology across the board. So we're pretty cheap – we meet either in Albany or New York; the Division of Criminal Justice Services, which is the state's criminal justice bureaucracy, sort of runs the meetings, but everybody serves for free. And it doesn't cost much for us to come together. So I think we've made some real progress. We've been able to take a lot of steps that I think were pretty progressive, certainly in implementing our DNA data-banking program. We were able to do things that other states couldn't do because we forced them. We were able to get all the things I mentioned yesterday. In New York, the first thing that happened is that we got DNA samples from people on parole or probation; and nobody wanted to do that, but we made them do it. The other good thing about it is that, if you come in as a regulatory body and you say, uh oh, this local crime lab is not up to speed on some particular discipline, they will not get state accreditation. All of a sudden, that county has to come up with the money, and the people in the laboratories themselves really like it because they can say, oh, they have this crazy commission and they're going to – we'll lose our accreditation. We need two more analysts, and you'd better give them to us. So maybe it's confirmatory bias, but we like to think that we've been successful.

MS. NARVESON: Thank you.

MS. RENO: I've thought a lot about the confirmatory bias issue, and I think it does perhaps need further study, but I don't think we can wait. And you have one advantage with lawyers, and that's their CLE requirements. I still think if we could put together a good film depicting actual case histories of that and make it available to prosecutors' offices, we could do a great deal, particularly if it were framed and built by prosecutors who could inspire the prosecutor to think it was something other than just BS. (Laughter.)

MR. SULLIVAN: And I think that would be true of the police, as well; not just the prosecutors, but the people who actually begin the investigations. Is this a rebuttal? (Laughter.)

MR. FLEISCHAUER: Fred Fleischauer. I'm a judge from Wisconsin.

MR. SULLIVAN: State or federal? (Laughter.)

MR. FLEISCHAUER: I've been there for more than ten years, so I'm glad it's a state judge. (Laughter.)

MR. FLEISCHAUER: I've been concerned about the interrelationship of victim/witness coordination systems with the prosecution's offices throughout our state, and apparently, in the country. And I'm wondering if any of you has an opinion about that impact, what impact that might have on confirmatory bias. I've also had the benefit of spending a little time in Latin America looking at the inquisitorial system, the code system of justice, and was impressed by the cooperative attitude they brought to trying to determine truth during that process and trying to determine it early. They have almost no bond system there, and so they make an effort that involves police, prosecutor, judge and public defender to determine who witnesses and what the result ought to be as early as they can after the detention of a suspect. If they cannot do that, the person probably will remain in custody or bond for a long time, perhaps in excess of the sentence.

MR. SULLIVAN: Which country?

MR. FLEISCHAUER: I spent some time in Uruguay. They've also been signatories to an agreement – a treaty, which was a western hemisphere treaty, which I believe most countries signed except ours – concerning the rights of defendants in criminal cases which has required most Latin American countries to develop jury trial systems, access to public defenders, and public proceedings which they've not had in the past. Uruguay had no courtrooms, even, to provide for public proceedings, let alone jury trials, and they're coping with the cost of that. But it seems to me that they may have some examples that we could learn from in terms of working towards the issues of confirmatory bias.

MR. SULLIVAN: Could you stay there for a second? Do any of you want to comment on the first issue? Could you restate the question, the first one?

MR. FLEISCHAUER: Just the interrelationship we've established between victim/witness programs and the prosecution and whether or not you have an opinion as to any impact that may have on the issue of confirmatory bias, where you relate prosecutors with victims as almost their representative. It's hard to separate that issue. And then I think it increases the commitment, in my own opinion, to the process of that victim. I'm wondering if any of you have an opinion about that issue, as well.

MR. RITTER: Bill Ritter, the DA from Denver. I've prosecuted before we really had victim advocates. Now we have an entire system of victim advocacy in our office. Really, I think it's done the opposite, Judge. Prosecutors have this sort of level of interacting between them and the victim. The victim advocate acts almost as a buffer in some cases. In 1981 or '82, when you didn't have that buffer there, was, I think, a greater chance of you developing a commitment and maybe it playing into some sort of bias because you're directly relating with the victim. Now there is a buffer, so we use our victim advocates, often times, to give them bad news, and it might be easier for us to do that. The second thing is I agree with, again, Attorney General Reno that a film for prosecutors by prosecutors would be a good idea. I'm willing to star in that, because it might parlay into something like Law and Order, Fred Thompson. (Laughter.)

MS. MAPLES: I'll do the one for police officers.

MR. SULLIVAN: This, I think, will be our last comment, and then we're going to shut it down for the break. Go ahead.

MR. KAPLAN: My name is David Kaplan, the State Public Defender for Colorado. I'm rebutting what Mr. Ritter's perception is of the last comment about victim advocates. Ann Seymour, I was on a panel with her a couple years ago, and she commented it was the first panel. I don't know if it was the first, but she was surprised to find herself on a panel with the public defender. I think around the courthouse, perhaps, the groups that have the greatest animosity toward one another are not defense attorneys and police officers or defense attorneys and prosecutors, but defense attorneys and victim advocates. They're probably the only two groups that walk around the courthouse and often times don't even make eye contact. So I think that the question, the issue that the question raises, is a legitimate one; and although Mr. Ritter has a perception different than mine, it is at least my perception, and, I think, of many in the defense community, that a lot of that tunnel vision is driven by the position and the power of the victim advocates in a prosecutor's office.

MR. SULLIVAN: What's the problem? How would you identify what's going on here?

MR. KAPLAN: We've heard from, and I've spoken with, victim advocates and had a discussion with Ann Seymour when I was on the panel with her. While there's no question of legitimacy and the increasing importance – and recognition of the increasing importance – of those individuals in the criminal justice system, I think one of the subjects we talked about, which is this tunnel vision, there's a buy-in that occurs and I think probably more so and appropriately so with victim advocates and the plight of the victim. I mean, that's not a surprise. I don't think that's a shocking statement by any means. But when we're trying to address what impact does that have on the system of criminal justice and conviction of the innocent, I think that some of the same problems that have been discussed of identification issues of victims are, perhaps further, either driven or have the advocate also involved in the same problem of perception. As a result of that, you're now not just trying to convince a prosecutor of what their position is and, perhaps, the mistake of their position, but the added pressure – and in many instances, because I want to be clear, appropriate pressure. But what comes with this appropriate pressure is, maybe, an increased concern about that pressure contributing to some mistakes in the system. I think that's something that's perceived, I believe, in Denver, and I think both things can be at play. Through the courts – the last day-and-a-half, what we have are places where the system has gotten better, but along with it come these kind of negative externalities, so to speak, that accompany these problems, and I think this is an area where that's also true. Clearly, the position of victims and victim advocates has improved the system, but that's not to say there aren't dangers that accompanied that improvement.

MR. SULLIVAN: Does the lady want to say something back there? And then we're going to take our break.

MS. HALBERT: He's said so many things that I could be up here the rest of the day trying to tell him that, yes, sometimes he's right. We do support victims through the trial process. We usually think the defendant is guilty because we don't have access to all the information that everyone else does, that's true. But the other truth is that victims need to be at the table. We, us and that offender, are forever connected. You need us to help you, or we want to help you, because the absolute worst thing that can happen is that someone who is innocent is sent to prison. And I can tell my story about going to see a victim who put someone in prison for raping her to tell her that it wasn't true ten years later. We don't any of us want to do that. Our voices are important to helping all of you build the kind of commissions that you need to have. As I say, I could talk the rest of the day about that, but please do not think that we are on the other side of the fence. You'll find victims who are, and they'll always be, but you have a growing number of victims who want to be involved, want to see the right thing happen. They want all those things that everybody looks at. I'm glad he said what he did so I had the chance to say what I did. (Laughter.)

MR. SOBEL: Thank you. Please join me in thanking Tom and the panelists. (Applause.)

MR. SOBEL: This was a most informative and stimulating discussion.

AFTERNOON SESSION

(2:00 p.m.)

MR. SOBEL: Good afternoon, and welcome back. If I can have your attention, please. Professor Dawn Clark Netsch, Vice President of the American Adjudicator Society, serves on its executive committee and is chair of the American Adjudicator Society's Substantive Programming Committee. Since 1966, she has taught at Northwestern University School of law. In 1990, Professor Netsch became the first woman to be elected in Illinois to a state constitutional office when she was elected state comptroller. In 1994, she was the democratic nominee to be Governor of Illinois. I am now proud and honored to present to you Professor Dawn Clark Netsch. (Applause.)

Plenary Session VI: Political Concerns

PROFESSOR NETSCH: Thank you very much, Allan. You might ask what has all that to do with protecting the innocent. It's the money that counts. We will probably get to that. In the plenary sessions that you've had over the last day-and-a-half, and I guess particularly in the team meetings, that is, the meetings where your teams have gotten together to attempt to come up with a long-term plan, you have been assembling both the reasons why we convict innocent persons and the reforms that you believe, or are coming to believe, at least, are necessary to prevent the conviction of innocent persons. And tomorrow, you're going to have an opportunity to present these action plans – to hash over one another's action plans and really begin to identify the steps ahead, the ones that really need to be taken to move plans to reality. Given the quality as well as the diversity of this conference, I have no doubt that those plans are going to be a quality work product. But not everybody out there is as knowledgeable about the issues as you are. Not everyone out there is as concerned about this major defect failure in our criminal justice

system, and certainly not everyone out there is as willing to face the challenge of trying to fix it and to right it. So this panel is going to deal with the politics of reform. Fortuitously, all of the members of the panel, including the moderator, have been or are politicians. There's an old saying in Illinois, "it takes one to know one." So how do we persuade others that our action plans are not only just, but also really sound and cost efficient and designed, really, to lead to correct decisions? I think most of us certainly agree that we want to protect the innocent, but at the same time, we want to make sure that a good system does reach those who are guilty. And the important thing is to keep that line very clearly drawn in between, because, it seems to me, a correct decision, whether it's guilt or innocence, is a major goal of the criminal justice system. I think probably to some extent over the last two days, you've already been reminded that reform can come from a number of different directions. Maybe first and foremost, the state legislatures but also – and, by the way, the state legislatures should include their governors because any of the action that's going to take place at the legislative level, at the state legislative level, is going to have to have, if not the active leadership, at least the acquiescence of the chief executive, so governors are a critical part of that process as well. But reform also can come, as I think we've been hearing from police departments, both state and local, from prosecutors' offices and, indeed, from the courts. All of those agencies really have the power to correct some, if not all, of the defects in the system. And they, indeed, may be encouraged by other constituencies – I call them the “pressure points” – the media; the civic, in some cases, and reform groups, some of which have been referred to legal associations, including bar associations; the religious community, which I've not heard too much about so far; and possibly, even this thing that we call, in capital letters, THE PUBLIC. They're all quite critical, and have, in turn, put pressure on those who may have the actual decision-making power.

What I wanted to do, as our panel proceeds, just to keep in mind a few of the kind of broad-based questions that we might be asking ourselves about the political impact. For example, who are the committed opponents, as well as the dependable sources of support? How do we reach all of those in between those two extremes, if you will? Do public attitudes, as, for example, in public opinion polls or focus groups, differ on different parts of the reform package? And does that make a difference in terms of what is feasible and what is not feasible? Is it better to take reforms one at a time, or try to move with a broad, comprehensive package? Does it make sense to focus primarily on the legislature? Or might it be more productive, actually, long-term, to enlist some of the other players – like chiefs of police, for example, in your state – by getting them to adopt their reforms first with the idea that, perhaps then, you can take that attitude and those reforms to the legislature and say, “okay, they're willing to do something; let's move on our front as well”? And certainly not last, how do we handle the cost of reform issues? We do know that not all are costly, but many are. Are there financial tradeoffs that might be acceptable to the legislature, to the public? For example, reducing the prison population by perhaps reducing mandatory minimums for simple drug violations. Is that something that might literally save some money that could then be pumped into the other side of the equation? So those are just some of the general kinds of questions that might be kept in mind. Now, if I may quickly introduce the members of the panel, each of whom is going to just address one particular reform issue and his experience with it very, very briefly so that we can have lots of discussion. John Farmer, from whom you have heard at least twice, now, I think. John?

MR. FARMER: Just once.

PROFESSOR NETSCH: Particularly on the sequential issue, which he's going to be talking about. You've all been introduced to him a number of times. The main thing is that he was the Attorney General – and I'm going to add this because you understand the importance of it – by appointment, not by election, of New Jersey, and was able to have a major impact from that position. He'd also been a U.S. Attorney in New Jersey before that. Michael Lawlor is now serving his eighth term as a member of the Connecticut House of Representatives, and his tenth year as Chair of the House Judiciary Committee. He's also doing some teaching in the area of criminal justice reforms at New Haven School. In fact, he is an assistant professor of criminal justice at New Haven, and at one point was a member of the National Resource Committee for the Center for Sex Offender Management at the U.S. Department of Justice. He's been very active in this area throughout his legislative career. Virgil Smith is currently Chief of Legislation and Community Relations for the Wayne County, which is Detroit, Michigan, Prosecuting Attorneys' Office. He handles all of that office's legislative matters. He's been very active with respect to the Wayne County legal services. He's going to be talking briefly about that. He also is a former member of the Michigan Senate.

MR. SMITH: Twelve in the Senate, twelve in the House.

PROFESSOR NETSCH: Evenly divided – twelve in the Senate and twelve in the House – so he's had very extensive legislative experience, as well. What each of them is going to do is take a, quote, "reform" with which he has been involved in one way or another, and focus somewhat more, not so much on the content of it as on where were the pockets of opposition, support. How do you get something like this done when you have an agenda that you want to achieve? We will start with, because I read them in that order, the other way around. I'm going to start with you, Virgil. Thank you.

MR. SMITH: The issue I wanted to make reference to is indigent counsel. The biggest appeal in Michigan on criminal cases is ineffective assistance of counsel. That's the top issue raised in the Michigan Courts when prisoners challenge their convictions within the Michigan court system. One of the problems we have consistently faced in the State of Michigan is the amount of money that is dedicated to paying for indigent attorneys. Primarily, that's been an issue that doesn't gain a lot of attention in Michigan. It is generally left to county boards of commissioners and county executives to determine the amount of compensation that will be paid to attorneys paid under the assigned counsel system. On the state level, we do have, on the appellate level, an appellate defenders office that is paid for out of state money. In Wayne County, we have a local defenders association, a defenders office that is also publicly funded. The defenders office, by statute, is required to have 20 percent of assigned counsel cases assigned to them. The other 75 percent of assigned counsel cases are assigned to individual practitioners in the State of Michigan, and they are paid a fee that is determined by their particular county. In my county, in Wayne County, that fee is historically low and has probably been stagnant now for probably the last 20 to 30 years. It has been so low and so stagnant that we now face a federal court action that has been brought forth by the National Association of Public Defenders challenging the way that Michigan pays for indigent attorney fees and trying to get an increase in those fees. So, historically, why are they paid so little? Well, they're paid little because I think there's not a lot of public outcry for paying for attorneys to represent criminal

defendants. There is no constituency to lobby on their behalf. And because they have no constituency, and because politicians normally are least concerned about those that are violating laws and those that have been convicted of a crime, then the issue is generally not raised.

It has gotten so bad in my county and in the State of Michigan that there has been some attention turned to that issue; and the legislative body, including the prosecutor, who's in my county, has tried to work a solution to raise the amount of money that is available for assigned indigent counsel. We began to lobby within the common legislative board to raise the indigent attorney fee. We worked out a funding source to try to gain more money to pay for that particular function. And as we sought legislative support, we were able to obtain a sponsor for that legislation – and just for your knowledge, in order to put an issue before a legislative body, it generally takes one of the members of that body to introduce that legislation in order to have it considered. So when you're lobbying, the first thing you need to do is find a sponsor. Once you obtain that sponsor, then you have to lobby the members of the legislative body and, hopefully, lobby enough of those members, generally a majority, so that you have the potential and the chance to pass that legislation and have it signed into law. In Wayne County, we had gotten support of the county executive at the time; we had gotten the support of the majority of the members of the legislative body; we found a sponsor, and we found the best sponsor that you can have, and that was the chair of the particular legislative committee that legislation would be assigned to for review. So we were rolling. We thought we were in great shape. We thought we were finally, after some 30 years, we would be able to gain these additional dollars and use those dollars for increasing the rates for assigned indigent accounts for attorney fees. Just to give you some example, in my county for capital cases, generally if you cost out the amount of hours that an attorney has to involve himself in preparing a defense for an indigent criminal defendant, if you costed out to the amount of hours they've put in and the amount that we pay, they generally were paid about four to five dollars an hour to represent criminal indigent defendants. So we worked out a solution. We thought that we finally would be able to attack this systemic problem. The executive that was supportive of us, his term ended, and the new county executive was sworn in in January of this year. That threw a little monkey wrench in the process. Once the new county executive came in, even before he came in, during the lame duck session, where the new elected officials have not yet officially taken office, he became aware that we had this legislation on the table. So at the final legislative meeting, where we had this issue passed out of committee unanimously, we had it in front of the full legislative body. The new executive became aware that we had this issue on the table and, because the deficit within the county was an issue that would face him when he took office in January, he had his whole team there to oppose us on that legislation. The legislators got nervous, the support began to wither, the sponsor started asking if we could defer this issue, and finally, my boss decided that he didn't want to get into an active confrontation with the new county executive, so it was pulled from the table at the last minute. That's one of the problems that I think you continually face when you deal with one of the components of the criminal justice system, and that's assigned counsel. That's the story that I wanted to relate to you today as an example of one of the systemic problems that you would have to face in dealing with innocence, and that is making sure that adequate and competent counsel are there to represent those that are accused of crimes.

PROFESSOR NETSCH: Thank you very much. (Applause.)

PROFESSOR NETSCH: Michael Lawlor, Representative in the Legislature of Connecticut.

MR. LAWLOR: We talked about this earlier. Don't ask me to describe briefly the process we used to change some of our minimum mandatory drug law sentences. But I just want to point out, it seems like at the top of my game, I have my sound bites down right now – it's only because Barry Scheck left his notes up here. (Laughter.)

MR. LAWLOR: So I'm all set. So thank you, Barry, I appreciate that. In any event, Connecticut, two years ago, changed a law that I think probably most people have in most states, something along the line of if you sell drugs near a school, you're subject to an enhanced penalty. In Connecticut, it's a three-year minimum mandatory, without going into a lot of boring detail. This problem was first identified, let's say five or six years ago, by people who are best described as drug policy reformers. Pointing at this statute is an extreme example of overkill when it comes to drug sentences, although that point of view is very controversial. It turned out that, over the space of two or three years, people were able to bring other arguments to that same discussion, and it ultimately led to the law being very substantially rewritten – in a positive way, I'd argued, at least. But to describe the process just very briefly, it began with a drug policy reform initiative. Now, that won't get you too much headway in the Connecticut legislature. I don't know what your state is like, but it's probably maybe a third of the legislature will even listen to that if that's where it's coming from. However, this particular problem that had been identified had actually some other aspects, which did bring in some other folks. Just to briefly run through them, for one thing, race turned out to be a major issue on this very point. Obviously, if you have a very special penalty for people selling or possessing drugs near schools – over the course of the last 15 years, we've actually added schools, day care centers and public housing projects and we expanded it from a 1000 foot radius to a 1500 foot radius – basically, you're talking about urban areas, so it turned out that you could basically retrace the steps of some of these prosecutions and, it turns out, the vast majority of people subject to this particular minimum mandatory – in Connecticut, at least – were African American or Latino. So that brought in that whole aspect of discussion. Then the press seemed to take a particular interest in this. For the most part, aside from the reasons I just outlined, we were able to demonstrate very graphically how this specific law had a lot of unintended consequences. For example, we asked the police departments in our urban areas – you know, Connecticut's a small state; we have pockets of urban population, principally in Hartford, Bridgeport and New Haven – we asked the police departments in those towns to draw us a map of their city with the radius around the schools, day care centers and public housing projects. When you see it on paper, it's pretty startling. It turns out, in every urban area in our state, basically, there was no spot in any of those cities that wasn't within one of those circles, except in Hartford. If you wanted to sell drugs, you needed to go to the runway at Brainard Airport, and in New Haven, you needed to go to the Yale Golf Course. Other than that, you were going to get the three-year minimum mandatory. (Laughter.)

MR. LAWLOR: When people saw that, they began to understand how this really didn't make a lot of sense. Whatever you thought about selling drugs, especially about selling drugs to kids, that made a lot of sense. And if you go out to the suburban areas of our state – it's a pretty wealthy state, in general; some of the homes aren't within 1500 feet of one another in the wealthy

suburbs. So people got a sense that it was a little bit unfair since there was just as much drug-selling going on in the rich towns as in the poor towns. So that got some traction, plus adding in the fact that you were subject to this penalty whether you selling drugs right after school or at 4:00 in the morning in the middle of August, when there's no school kids around. Even if there's two 40-year-old junkies selling to each other, you still got charged as if you were selling drugs to a kid getting off the school bus. And so, if you can explain it that way to the media, they started to buy into the argument. Well, we don't like drugs, but on the other hand, this law seems to have unintended consequences. Then it turned out we were actually able to bring in some of the Department of Correction folks who were concerned about prison overcrowding, and they said this law might not be a bad idea. At this point, we were able to reach out to the hardest people involved, from my point of view, which are the Republicans – not that I have any problem with that; I'm Independent. (Laughter.)

MR. LAWLOR: Normally, our legislature is controlled by Democrats with a Republican Governor. Any kind of, sort of, liberal proposal would obviously be criticized by the Republicans. However, it turned out that a few folks on the other side had personal exposure to what this problem was. In fact, they had relatives who had gotten arrested, including a relative of our Governor. I think they began to understand the real world application of some of these laws. To make a long story short, and this was really the key to passage, the ultimate bill that finally passed was proposed by our Governor during his budget speech, where he made the case that one of the things we need to do to control our prison population, one of the ways of doing that, is to identify specific laws that have had unintended consequences and some overkill and are loading up the prisons with non-violent drug offenders. These are his words, not mine. That's the only reason it passed. Then we could bring it out and say “this is the Governor's bill, please vote for it.” It certainly tempered some of the oppositions on the other side. I don't mean to be too cynical, but if you couldn't figure out a way to have a bipartisan proposal – the one group I left off that list were the victims of crime, who were also involved because, as it turns out, they were much more interested in focusing in on persons who commit violent crimes against innocent victims than some of these non-violent drug offenders, who weren't on their list of priorities for precious prison bed space. In any event, that's how it worked out. Maybe the same process could be brought to bear on some of the concepts we're discussing here.

PROFESSOR NETSCH: Thank you. (Applause.)

PROFESSOR NETSCH: Now John Farmer again, with a slightly different focus on the issue.

MR. FARMER: These remarks will really draw more on my experience as chief counsel to Governor Whitman than anything else, and my understanding of the political process that derives from that. I think what Michael did in Connecticut is actually a much heavier lift, politically, than what I did in New Jersey with the identification guidelines because the identification guidelines, I think, you can make a pretty compelling case on the merits for. I could do it unilaterally, so I didn't need to get legislative approval for something like repealing mandatory minimums. That's a tough lift in any legislature. The movement in New Jersey has really just begun. The mandatory minimum kind of crested when there was a bill pending a few years ago that would have expanded the drug free zones to include all public lands and all public

buildings. We did a similar map that would have shown that essentially all of New Jersey would have been the drug-free school zone, essentially. So we were able to beat that one back, but we have not been able to repeal any of the other ones.

Any attempt at reform, whether it's identification guidelines or legislation, has to start from the realization that there is no constituency out there for reforms that are perceived to benefit criminal defendants. That's blunt, but that's true, so you're going to have to build that constituency in order to make the reforms work. In the case of the identification guidelines, we did that by inviting Professor Rauzoff to speak first to the county prosecutors. They have an annual convention, and he took up a whole day of that convention. The morning was a formal presentation of his work, and the afternoon was a very interesting, and sometimes charged, question-and-answer session. At the end of that, though, we had buy-in from virtually every county prosecutor to move forward with the proposal. I described in the last session some of the obstacles we encountered in actually bringing that to bear and presenting it. But I think any reform effort, no matter what the issue, is going to have to take account of legitimate law enforcement concerns. I described some of those in terms of the potential for more unsolved cases, the potential for abuse – or manipulation, I should say – of the guidelines by defense counsel at trial and post-conviction motions. So any reform, you're going to have to listen to law enforcement because I think, you know, this discussion yesterday about do we have a problem – I think we do have a problem, but I think the key to solving the problem is to realize that it's much larger than convicting innocent people. It also has to take into account the scores, the thousands, of unsolved crimes, because when you're talking to law enforcement, that's where they're coming from. It's a very hard job to solve crimes, and there are thousands. I recently looked at some statistics on unsolved homicides – there are thousands of them. I think you have to view both of those statistics together – the scores of exonerations and the scores of unsolved crimes – to realize that we have a major problem with our system. Our system isn't as good as it could be in finding the truth. 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. With respect to specific reforms that are mentioned, like the use of snitches and jailhouse 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 jailhouse snitch was actually the break in the case. There are cases that can only be made with that as your first good evidence. That's something that reformers are going to have to realize as we move forward. My own view is that – and I hear this a lot from law enforcement – that they have so many procedural rules they have to follow that they are hampered in doing their job. If we could find some other non-personal ways, passive surveillance being one that comes to mind, increased use of that, I think coupled with some of these reforms, you might be able to build a constituency on both sides of the issue that you're enhancing the search for truth. I know when the sniper case in this area was going on, I kept thinking to myself, boy, if they just had cameras on those highways, they would have been able to find this person a lot sooner. I don't know if that's true or not. I don't know if passive surveillance is a real answer. But I think any attempt to reform is going to have to take account of the problems law enforcement faces in simply doing its job, if only because law enforcement, police unions and other organizations are extremely adept at using the legislative process, at least in New Jersey, and, I suspect, across the country. The politicians want to be liked by the police, and the police do a very good job of outlining their concerns to politicians as issues arise. Early on, interestingly, as we moved forward with the identification guidelines, I received a lot of calls

from legislatures who were threatening to introduce legislation to prevent it from happening. That completely died out once the training occurred, and I think it's because, as I said earlier, the police really, for the most part, saw it as not such a big deal – a very easy procedure to master. The only abiding objection I've heard to it is the cost of essentially doubling the number of witnesses who are going to have to appear at trial; the person who administered the double blind and the investigating officer. Other than that, there's been significant and substantial buy-in from law enforcement.

I think you're going to have to take into account, as you move forward, the press, which I've always found to be very predictable. Sometimes they can be a great help to you, and sometimes they can absolutely kill you. As I mentioned earlier, being the loser of the week so many times, they can be a thorn in your side. But I think prosecutors, in particular, have to think about the press in a different way when you think about the system as a whole. One of the things I think everyone should think about – what can you do unilaterally? One of the things prosecutors can do, I think, is restrain themselves in terms of the post-indictment press conference, which I think has a deleterious effect on the process, potentially anyway, by publicizing the guilt of someone who's merely been accused. But even in more general terms, you have to take account of the role the press is going to play. We actually did editorial boards on the identification guidelines, explained it to the press so that when they actually came out, for the most part, the press was very supportive. And I think, had we not briefed them in advance and just rolled them out, it might not have had that effect. And I think, finally, in terms of reform, generally, I think it's important in dealing especially with legislatures. You have to think in terms of what measures can be combined with pro-law enforcement measures to broaden the appeal of the reform. In other budgetary times, it would have been if you're going to change the way business is conducted you're going to have to give them the money to train and you're going to have to give them means to accomplish reforms you're seeking to put in place. Only by building constituencies like that, I think, can the real comprehensive reform that I think is necessary occur. (Applause.)

PROFESSOR NETSCH: I think there are lots of potential questions out there. I just want to add a footnote, if I might. You particularly mentioned training, but I think all of you have sort of thought about that in one way or another. This is an example that is not precisely on point, but is perhaps relevant. A few years ago – as a matter of fact, while I was still a member of the state legislature – we passed a sweeping revision of all of the criminal and sexual assault laws, the sexual laws generally, and generically called the rape laws, but it had to do not with just traditional rape, but treatment of children and everything else. We had probably about 17 or 18 of them spread across the criminal code at that time. It was a very well thought-out and very modern code dealing with criminal sexual assault and several interesting gradations. We had a lot of opposition from the state's attorneys and some from the police folks, also, but more from the prosecuting people. But after two sessions – and some compromises, obviously -- it was finally passed. Very quickly thereafter, a group that had been part of the support mechanism managed to get sufficient funding – some private, a little bit government – to start training the prosecutors and the police departments about this new law and what it really meant and how it was really going to make their lives much easier. Over a period of time, I think practically every police department in the State of Illinois got trained, and most of the prosecuting offices. I think by now, and maybe just a couple of years after it was finally in place, there's not a peep about it;

they think it's great, it's fine. If somebody out there is from Illinois and tells me otherwise, I will retract that statement. I haven't heard a peep about it in any event. But the training really was a huge part of that so that they knew what it really did, what it did not do, and how it could help them, which I think is one of the really major factors. So training is, indeed, a critical part of it.

I don't see anyone up at a microphone. Yes, there goes someone right away. While you're on your way, one of the things, I guess, we also have to keep in mind as we go along in this area, is just how the public – because the public does have an impact – in fact, one of the questions that some of us might think about is to what extent does public opinion affect what decisions some of these groups that have the power to make decisions will make? Legislators presumably react to the public, at least their own public, although that's not always entirely clear. Courts may or may not. The police departments, do they care about what the public says? The prosecuting attorneys? Well, I suppose if they're elected, they have some concern about it. But assuming the public really is a player in all of this, how do we get to the public? Just one second, Scott. Here are some of the most recent polling and surveying and all that's been done and research that's been done about public attitudes. The public consistently misjudges trends in crime. That won't come as a great surprise to most of us. The public tends to underestimate the severity of sentencing. Public attitudes are strongly influenced by mistaken beliefs. Public opinion is much more complex than policymakers assume. And policymakers do not accurately perceive public opinion. Sometimes it's a matter of underestimating – for example, almost all of the surveying and polling shows that the public is much more willing to accept alternative sentencing under the right conditions than is generally assumed. Most legislators assume that the public would never accept alternative sentencing, but most polling shows that they would be willing to. So there are a lot of ways in which we don't understand the public, and the public, of course, doesn't understand us. Go ahead.

MR. WALLACE: Just one question about the presentation, the excellent presentation about indigent defense, and one clarification. The group that's suing in Wayne County is not – I think you said the National Association of Public Defenders. I'm with the National Legal Aid and Defender Association. The group that's suing is the National Association of Criminal Defense Lawyers. We often come in and provide technical assistance after a group's been sued to help them fix it up, but we don't do the suing part. But I'm very curious – I think it's wonderful to hear that the DA became proactive in the fight for better-funded indigent defense, and I'm curious to know why he got interested. Was it about the fairness of the system, was it about protecting the innocent, was it concern about cases being overturned? What brought them to feel personally invested in it?

MR. SMITH: It was a political decision. The prosecutor was interested in another political change that he wanted to have the legislative body take up. The chairperson, the chairman of the Public Safety and Judiciary Committee, was interested in indigent defense funding. So, in effect, they married the two proposals, found a funding source and put them both before the legislative body. That's how that issue got started.

MR. LAWLOR: That's shocking, by the way. (Laughter.)

MR. LOGE: Peter Loge of the Justice Project. A question to the panelists and other elected officials here this weekend. What can those of us here in this room do to effect these changes we've all been talking about at the state legislative level? How do we help you do what you need to do?

MR. LAWLOR: To implement these changes, Peter? First of all, I don't know if it's assuming facts not in evidence that everyone is necessarily with that particular program. That's why, yesterday, I pointed out I'm not a hundred percent sure everyone here thinks that these are good ideas. I think you need to take the temperature on that one first. Assuming that's the case, it seems to me you need to find an argument why this is good for the system as a whole, why it's good for victims of crime, for example, why it's good for the integrity of the system, why it would make it more likely that guilty persons would actually be convicted in the end. I think you have to sort of run right if you want to go left on this one a little bit.

MR. SMITH: I think there's also a question of how you attack the problem and what is the problem. This conference has been about laying out particular issues that lead to conviction of innocent people. That's a tough sell in any legislative body because, in order to be an innocent person that's been convicted, you're also a person that has been convicted – and most of the criminal justice system would consider you to be a criminal defendant who is disgruntled and is just trying to get out of jail. So that's not a very strong lobby. You have to change the frame of reference. Don't approach the legislature talking about “we want to free criminal defendants who have been wronged”. You might be able to come in and say, “We want to make sure that we assure the fairness of the criminal justice system”. And I think you also have to be aware of what the trends in the state are. In Michigan, for the last ten years, the Republicans have predominated. One of the issues that they have kept in front of the public and in front of the legislative body is one of victims' rights and putting victims' rights on the table. In effect, they have pushed defendants' rights off the table. So I think you have to be aware of that. You have to blend the reforms, the concerns that you put on the table, with the predominant thought and you need to have a good working group who can decide how to attack the issue, what's the best way to put the issues on the table, and what's the best long-term strategy in terms of how to pass these things within the legislative body.

MR. LAWLOR: Can I add one more thing to that? I think it's very important to listen to the extent that opponents would emerge to any of these things, to listen very carefully to what they're saying, because often times, the criticisms – at least, it's been my experience that the criticism that emerges can be taken into account. You can design a proposal that's flexible enough, which I think is very, very important, flexible enough to allow for exceptions to be made in exceptional circumstances. I think the worst outcome would be sort of a draconian innocence protection proposal, if you know what I mean – not allowing evidence to be admitted in circumstances where it's probably valid evidence but, because of some technical rule, for example, you didn't videotape the interrogation or something like that, where there was a good explanation why it couldn't be done. I don't think you want to have an inflexible rule there. That would be my advice. Listen carefully to the opponents.

PROFESSOR NETSCH: I would underscore that. It seems to me one of the greatest failings that we liberals have – and I think you're one of those too, aren't you? (Laughter.)

PROFESSOR NETSCH: – is that, literally, we have not often listened closely enough to our opponents. We get on our soapboxes, our pedestals or whatever, and we know what's right and we don't really hear. And sometimes what you hear is not quite as difficult to deal with; sometimes it is. Anyone who has had anything to do with trying to pass gun control legislation, for example, has got to understand that. It seems to be absolute extremes, but it isn't always that way if you listen carefully enough and then try really to respond to what people are really concerned about. I think one of the fascinating things about this one compilation of attitudes is, if you put any faith at all in our long-term group republic opinion survey polls, the public in some areas is not as far on the other side as we think they are with respect to some of these forums. That's something else we should listen to and try to work with, the area where we do have some commonality. Sir?

MR. MALENG: Norm Maleng, prosecutor in Seattle. Maybe just a comment to Representative Lawler – it does help also, in our state, to have a Republican prosecutor that brought forth the new drug policy. I was involved in that, but I think it is an important point of trying to reach across the aisle and develop a proposal that people may support for different reasons, but they will support it. But, you know, one of the thoughts I've had over the last couple of days is that we've been talking about a whole series of issues connected with innocence. You know, when you read from afar the story of Illinois, for example – and there could be a whole array of issues that were outlined there – I think that if I had to put one myself at the top of the list, maybe the public defense function, we haven't had a whole lot of discussion about that. Mr. Smith, I just wanted to ask you, could you give me again what the breakdown was between, let's say, public defenders versus appointed counsel – kind of how it works in Michigan or in Wayne County?

MR. SMITH: Right now, it's 75/25 – 25 percent go to the publicly supported Defenders Association and 75 percent to private counsel, who offer themselves up to take assigned indigent cases.

MR. LAWLOR: Can I tell a quick public defender story? Talk about an ironic twist, this actually happened in Connecticut. Like every state, the state is insulated by sovereign immunity so people can't file lawsuits directly against the state. A former suspect wanted to sue the public defender and came before our committee, the judiciary committee, to ask for sovereign immunity to be waived so he could bring an action against the public defender. And this was the basis of it, right? The guy had gotten arrested, accused of a street robbery. The victim, a woman, had picked his photo out of a photo array. From the moment the guy was arrested, he was held on bail. He couldn't post the bail. He was incarcerated for about six months on bail during that process. He had no family in the area; lost his apartment; lost his job. And about six months after he had continually been asking this public defender, as one of the more respected public defenders in the state – a very experienced guy, very savvy, very dedicated – the offender had been asking his public defender repeatedly for a lineup. He said, “I didn't do this. I want the woman to come in and to look at me in flesh and blood and say ‘that's the guy who did it’.” And I guess, understandably, the public defender was saying, you know, I don't think that's such a good idea. “If she points at you and says ‘that is the guy’, then you're kind of screwed.” So he delayed that, and the guy was insistent. It came close to trial. Then he acquiesced and allowed

this lineup to take place. And she said, "I don't see the guy there." They finally said, "is that the guy?" and she said, "that's absolutely not the guy who robbed me." So the guy brought a lawsuit, or wants to bring a lawsuit, against the public defender for now allowing that show-up to take place earlier because, in fact, he was innocent – and they ultimately caught the guy who did it. In our state, this is the example we throw out there to illustrate the problem. It could be a whole variety of explanations why innocent people languish in jail. This is just one example of it, but it just goes to show you how it would be better if we could figure out a way to solve that problem in the future. And I think if smart people put their heads together, we would probably figure out a mechanism for someone who's actually incarcerated who insists on being viewed immediately by the victim, that that can be accomplished. By the way, we gave the guy the right to sue. The case is pending; the public defenders are apoplectic because the prosecutors know they'll be next.

PROFESSOR NETSCH: But the state's judgment groups won't pay the benefits.
(Laughter.)

PROFESSOR NETSCH: You had raised the issue, at least inferentially, about the Illinois thing. You've all heard from Tom Sullivan, who chaired Governor Ryan's commission, which came up with 85 separate recommendations. And just as kind of a footnote, I thought you might be interested in the only ones that even got the attention of the then majority in the state senate, which was a pretty conservative majority. They were willing – they put together, out of the 85 recommendations, only a handful. One, they were willing to consider banning the death penalty for mentally retarded. This, theoretically, of course, had to do with the death penalty because that was what the commission was about, but a lot of it can be carried over to general felony problems. They were willing to ban the death penalty for the mentally retarded, which I guess we don't have to worry about anymore since the Supreme Court, we think, has done that. They were willing to put more support into the whole DNA business. They didn't specify that, I think, but that, they thought, was a perfectly acceptable thing. And as sort of a compromise, one of the main recommendations – probably one of the most critical recommendations of the Sullivan Report – was, as Tom said this morning, to reduce the number of aggravating factors, if you will, from 20 to five. That is the number of circumstances under which the death penalty could be imposed, from 20 to five. They weren't willing to touch that at all, nor to allow a state commission to review every request to seek a death penalty, but they were willing to give the Illinois Supreme Court the right to kind of review. Of course, it automatically reviews all death sentences anyway, but to review and even to rescind or substitute its judgment for the lower courts or juries, judgment about the imposition of the death penalty – really, those are the only reforms that, it was apparently the majority in the senate, it was willing to consider. None of them passed, in any event, so 85 recommendations for reform and not a single one is on the books at the present time. I wanted to make, if I might – I don't see anybody up there. Okay, please. And then I have one other thing I wanted to make.

MS. GRANGE: Lori Grange. The question is in light of the enormous pressure on state lawmakers to make tough budgetary choices; it seems quite difficult to get an item even on the radar screen of state lawmakers. What would be your advise to folks in the field in terms of how to get this issue on lawmakers' radar screens, and then to elevate it to the top of lawmakers' agendas?

MR. SMITH: One of the ways you might be able to approach the problem is, instead of approaching it directly head on, you may be able to build a case for the problem. You could approach one of your county prosecutors and try to convince that prosecutor, talk to that prosecutor, about, say, the eyewitness testimony in terms of getting him to agree to the double blind test or the sequential line up. If you get that prosecutor to agree, you could probably work toward putting that in place in his particular county without having to go and get legislative approval. Then you've got an example to take to the legislature as he builds an experience record. So you can build support throughout the state by putting your case in front of smaller jurisdictions to try to get them to adopt some of the changes that you'd like to have, and then take those changes and the track record from those changes in front of your legislative body to build support for your case. So I think that's one way to approach it, where you're not trying to make a uniform change across the state but you can take it county-by-county or municipality-by-municipality. The one thing I would always advise you is to make sure you do your homework. I'm quite sure one of the first questions that county prosecutors would want to know is why, if you're going to come to me and say you want us to change our lineup procedure, on what basis are you bringing that argument?

PROFESSOR NETSCH: In other words, get the law enforcement community to make the case before you go before the legislature, which is a very good idea.

MR. LAWLOR: Can I chime in just briefly and say that advocacy doesn't really cost anything? None of these kinds of changes can happen overnight, anyway, so I think a lot of time has to be invested in making the case and spreading the word, as was just described. Sooner or later, that dynamic that you described earlier, and how your bill got passed, somebody's going to want something and is going to need somebody else's vote or support for it in the legislature. If you've done your advocacy and eliminated most of the controversy about the proposal, it's always possible to get that stuck into somebody else's initiative. And finally, you know, states are not going to be poor forever, so if you spend the next two or three years making the case for a comprehensive innocence commission, for example, when the budgets turn around, it'll be just a lot easier to deal with it when the money's available. And as I say one more thing, by the way, every state is planning to spend a lot of additional money over the next few years on criminal justice stuff. Almost every state has a prison-overcrowding problem. Almost every state has to figure out how to build more prisons and staff them, etc. So there is new money going in to spend on that criminal justice stuff in the future. You may only be talking about a portion of that being set aside for this kind of thing. That's an argument that can be made, as well.

MR. SCHECK: I think there are creative ways to fund it. I'd direct this to you, Lori, because, for example, on videotaping interrogations, one of the first things a very prominent prosecutor said to us is, it's a great idea, really interested. We videotape all the interrogations. Then we need money to transcribe it. Who's going to fund that? Can we do a pilot project? Or if you take the blind sequential presentation using photos, which is, again, the most common form of eyewitness identification, no photo arrays, you have a program already in place. There are those laptop computers. You can put people in a room, you could get, I would imagine, if there is, out of this meeting, a good dialogue, you have police and prosecutors and judges saying this is a really interesting idea. We want to try a pilot project. You go to a foundation. All

you're really asking for are video cameras for purposes of a pilot project or a series of laptops or something like that. I'm sure that, if the community gets together, the criminal justice community, and reaches out for, maybe, private funding for pilot projects or, depending on the size of your jurisdiction, jurisdiction-wide reform, I think you could get a lot of takers. Some of the most important reforms we've been discussing for the last few days really don't cost that much money, and in fact are going to catch the real criminals without convicting the innocent. It's got to be a good argument to a foundation, right? (Laughter.)

PROFESSOR NETSCH: One sort of, I guess sour note, I would inject, or maybe cautionary note – and for those of us who have been in state legislative bodies, at least, particularly right now where every state is teetering on the brink – to try to talk about long-term, “It will save money, you'll do things to the criminal justice system that will be cost effective down the road”, no, that's not going to work. Almost all the time, if you've got a proposal that has a cash dollar sign on it right now, it will have a dollar sign that will come off right now, not five years from now or whatever. The one great failing of the legislative process in this country is it does not put a premium on long-term vision and planning. You really need to be able to say, “okay, here's a way we can save money right now. Let's transfer that money into this program that is going to help the process.” You may say to yourself long-term they'll save more money, but that's not really a good argument for most state legislators right now. I'm sorry – it really is not.

MR. FARMER: I would echo that. Budgeting right now is very much a zero sum game. If you're going to go to either a governor or a legislature and propose new spending, you're going to have to show them what the money should be taken out of. If you don't have a source, you'd better show them how it's going to help us in the war on terrorism or you're not going to have a prayer.

PROFESSOR NETSCH: Yes, sir?

MR. ALLISON: Bill Allison from Texas. The Texas delegation, we are envious of the rest of you because you're able to discuss substantive problems. We are really more at the stage of focusing on the next two years and the shape of the table. The legislature is in session, it just started; their pastime is to shoot the messenger because they don't like the message. So we have very fundamental problems. Our problems are not to be able to discuss, it's to be able to get past the shooting of the messenger. That is, who do we choose to approach politicians in our state to be able to at least say the message? It can't be me; I'm a defense lawyer. Police are a good idea, but they're not without their baggage, and so we sort of landed on the victim assistant as the best person, because a politician takes great peril shooting that messenger. And secondly, as we discussed the question “do we have a problem” as being, in Texas, the absolute wrong question because we know that the most powerful man in the world has stood before cameras and said we have never executed an innocent person. And we have many politicians who are willing to say, in response to that question “do we have a problem”, no, we do not have a problem. And the public believes it. So we're trying to reformulate our question. And so we need your help – we need your help on better ideas for who carries the message, better ideas for what is the question. We've come up with a question rather than do we have a problem – what is an acceptable loss ratio? How many innocent people are you willing for our criminal justice system to put in

prison? Because we think that's a question that ought to make people very uncomfortable and there is no right or wrong answer to it. So we from Texas are quite envious of all of you. You seem to be light years ahead of us, in that you can actually discuss substantive questions. We need some help on approach.

PROFESSOR NETSCH: Let me ask you something. Have you ever tried to utilize the religious community?

MR. ALLISON: That's a wonderful suggestion, and I wrote it down; and it's something we have not discussed, but we will discuss it. It's a great idea.

PROFESSOR NETSCH: Has anyone out there from any state found that it is a helpful source on some or all of the reforms? Yes?

MS. BLACKWELL: Betty Blackwell with the Texas Criminal Defense Lawyers Association from Austin, Texas. I have lobbied for the Texas Criminal Defense Lawyers, and in absolutely every session are new bills to expand our death penalty; and thank God for the Catholic Church, because they're right there with me opposing that expansion. So yes, they are very powerful, they're very helpful in that particular area.

PROFESSOR NETSCH: Do they help you on any other issue that has to do with reform?

MS. BLACKWELL: No. (Laughter.)

MS. BLACKWELL: I will take that back. Prison conditions – they are very concerned about prison overcrowding, prison conditions, lack of medical care in prisons. They're very concerned about the treatment in prisons. And they have a very large prison fellowship. But as far as the death penalty and that intention to make everything in Texas a death penalty crime, the Catholic Church.

PROFESSOR NETSCH: Why not? You've already executed half the population. (Laughter.)

MR. LEVEY: My name is Dan Levey from Arizona, from the Attorney General's Office. I work as a Special Assistant to the Attorney General for victims of crime. In addition to that, I'm also a survivor in that my brother was murdered, and I'm the National President of Parents of Murdered Children. One suggestion I have for the gentleman from Texas is to endure victims and invite them to the table because this issue, as we've learned over the course of these two days, includes victims. It's not a prosecution/defense issue that we're on the same table. We just want to be invited to the table. And I think – I know – I've run some legislation in Arizona, and typically, when you can get victims, especially survivors, to come and talk, personalize it, it may go a long way in helping the cause and also in not making it a pro-death penalty/anti-death penalty issue. I think when that starts to come up, divisions are made; and certainly, I spoke to members of parents of murdered children on the board, although I'm not in a position right now to say that they support this wholeheartedly, certainly, no one really had any objections and

agreed that, you know, no one wants the wrong person going to prison. So I would say use the victims in a good way.

PROFESSOR NETSCH: You may have raised another point too, which others might have had experience with, moving it just a little bit. And that is, instead of trying to make a case for specific reforms, for example, with statistics, is it better to try to personalize it, to individualize it, which might be even taking the case of someone who has been innocent and convicted rather than just talking about the numbers of innocent people and the reasons, you know, all the surveys and research. Is that a more effective way of at least trying to get people's attention?

MR. LEVEY: I think it is, definitely, to the media. Representative Lawler could probably speak to it. But I typically think humanizing issues and putting real faces on them, including the victim who was wrongly incarcerated as well as the victim of that crime – we're looking at issues of was that person wrongly convicted, but in most cases, typically, there's no doubt who the victim was, especially a homicide or where there's physical evidence that somebody was raped, it's just who did it. So it does go a long way to make those stories real.

PROFESSOR NETSCH: Thank you.

MR. LAWLOR: Let me emphasize that, in some of the stories that have been told here, because the right guy didn't get incarcerated, the actual offender didn't get incarcerated, other people got murdered; and if they'd caught the right guy in the first place, those murders, presumably, would not have taken place. Those are victims that can be pointed to as the real victims of real crimes that could have been avoided had the system worked effectively from the start. So maybe there's some bill that needs to be named after one of those victims that would get a lot of traction because that would be a whole different way of looking at this particular problem.

MR. MALENG: Norm Maleng from Seattle. I want to go back to a comment that I made yesterday. That is, if you just focus in on the issue "do we have a problem" and just, in terms of the innocence issue, it could be very difficult to get a lot of traction, particularly under the present circumstances. But if you look at the specific issues that we have talked about over the last couple of days, and I think this was something that Mr. Farmer might have pointed out; for example, increased use of DNA and what can occur, or these identification issues or videotaped confessions. Look at what the mission of police and prosecutors is when a crime has been committed to arrest the right person, to get him before the court and convict that person. In all of these, the big thrust of them is going to be improving police prosecutor practices. And when you start talking about five innocent or ten innocent, you may have solved 500 crimes. I would turn it around. For example, we have a unit within the Seattle Police Department – the Cold Case Unit – that, with DNA, is solving some very high profile murder cases that occurred ten years ago. So you put that together with some of these others and you start going out and telling the real message, which is that we can improve the justice system and put the bad guys away, and it does have the effect that all of us want, of protecting the innocent. So it's how you're going to come at the issue. And I would suggest in states such as you were talking about, Texas, it's important to engage the police and prosecutors in that state in a non-ideological way,

about how it's to their advantage to do these things. It may take a while, but I think that's the only way that you're going to be able to approach the issue.

MR. FARMER: I agree with that completely. Stealing a page from Barry's book almost literally, I called it the truth project. Under the truth project, we were working together with the state public defender's office, and the offer was any inmate who is claiming to have been unjustly convicted could go to the state public defender's office. They would screen the cases and, if they determined they were viable, they would send them to us. If there were DNA, we would test it. The deal was, of course, then we had the DNA and that was sold to law enforcement with a lot of acceptance because we're trying to expand the database of DNA that we have to begin with. So it is inseparable, the issue of innocence and the issue of unsolved crimes. By linking the two, you're able to create a constituency that might not otherwise exist.

PROFESSOR NETSCH: Thank you, and thank you. On that note, really, which sort of comes back to what all of this is about – it's, yes, making sure that there is a sound case for convicting people who indeed have committed crimes, but also protecting those who have not committed crimes, which is what our conference is all about. On that note, I would very much thank John Farmer, Michael Lawler and Virgil Smith for their participation. (Applause.)

Sunday, January 19, 2003

(9:30 a.m.)

MR. SOBEL (Presiding): Good morning, everyone. We are now officially in the home stretch. In this closing plenary session, we get to hear from you: What plans for post-conference reform efforts were developed by the teams of this conference? What kinds of assistance would help you complete the tasks leading to reform that you have in mind? What needs to be done nationally? What can be done to help states and localities that were not represented at this conference? What was accomplished here in the past three days? Were there any missed opportunities? What can we learn from this experience to make the next conference more meaningful? Barry Mahoney and Laurie Robinson will lead the discussion here this morning. You've probably become well acquainted with both of them by now. Barry was introduced to you on Friday. Now I'd like to tell you a little something about Laurie. At the beginning of this year, she became President of CSR Incorporated, a Washington area firm specializing in survey and policy research, program evaluation, training and technical assistance and management support. CSR's government clients include the White House Office of National Drug Control Policy, the Departments of Health and Human Services, Justice, Education and Labor, and the National Science Foundation. For the past two years, Laurie Robinson has served as a distinguished senior scholar at the University of Pennsylvania's Jerry Lee Center of Criminology and Fels Institute of Government. In her position at Penn, which she has retained, Laurie headed Penn's Forum on Crime and Justice, which sponsors Educational Programs for Washington policymakers about state and local criminal justice system innovations. From 1993 to 2000, Laurie served as Assistant Attorney General in the United States Department of Justice, where she headed the Office of Justice Programs. Prior to joining the Justice Department, Laurie Robinson was Director of the ABA Section of Criminal Justice for 14 years. Laurie is a member of the Advisory Committee that planned this conference, and I must say that we abused the privilege of going to Laurie for counsel and guidance throughout the course of the planning process. We depended so much upon her good judgment that we frequently contacted her and

sought her advice. I now turn this session over to Laurie Robinson and Barry Mahoney. (Applause.)

Closing Penary Session

MS. ROBINSON: Well, we are in the home stretch. It's great to see all of you here today, and Barry and I are going to jump in in a minute. I just want to make one quick observation. During the nearly seven years that I worked at the Department of Justice, I had the opportunity to travel to most every state in the country and meet such an impressive number of frontline practitioners working in criminal justice in this country. And it's so clear that the groups gathered here today really represent that same kind of innovation and vision. And I have long thought, even being a Washington native and living most of my life inside the beltway, that the energy and innovation in this country from criminal justice comes from local communities and the states around this country. And the experience over the last two days, Allan, at this conference, I think really reconfirms that, and it's exciting to see the energy, the diversity and yet the common themes that emerge from these reports. So I congratulate all of you for the work that you're doing, not just on this subject, but more generally in pushing the edge on criminal justice. And I also congratulate you that on Sunday morning we have actually a really good turnout here today. Barry, let me turn to you.

MR. MAHONEY: It's terrific. We've had a chance to look at plans, to meet with not all but almost all of the teams that are here this morning. There are some really interesting ideas. And I think as you see – everybody is going to be asked to take two or three minutes. You've got the transparencies, most of you, in any event. Use the overhead projector and the screen. Give us the highlights of what you're planning to do, what you want to accomplish. Those are the goals. And the key steps that you're going to be taking. We'll try and hold you fairly rigidly to about three minutes, but we won't put you totally in a straitjacket. We're going to ask if you have a particular observation or comment, brief ones, we'll make it quick. We want to make sure everybody gets a chance to be heard. You're likely to learn from each other and take away more ideas than you came into this couple of hours for. So why don't we get started, Laurie. And how about – we've got a list that somebody prepared for us. Travis County, Texas.

MS. ROBINSON: Brian Case, come on down.

MR. CASE: Here we are. (Slide.)

MR. CASE: Well, I guess the first thing that we'd like to say from Travis County is what a great conference this is. And I think all of you are thinking that. So I just want to start off with that positive note. We put a lot of thought into coming up with our goals, you know, like Bill Allison said yesterday, it seems like some of your jurisdictions are pretty far along the process. We thought that in Texas that – and maybe this is probably true for most jurisdictions in reality – that we would start very basic. And the most basic thing we could come up with was to strive for some officially sanctioned study, because in reality, all of the knowledge, this kind of knowledge that we've discussed the past few days here, is anecdotal in Texas. There has been no official study of people who have been exonerated, and we thought about it, and over the past 20 years, we could come up with about 15 cases, some of them going back before the advent of

DNA. What we need, and what I think everybody needs, is to develop a record; and this is the way to develop a record, because you can't get anywhere until you develop a record. That's what this is all about. You see a question mark on that "investigation of current cases". Basically, we thought, well, we probably shouldn't really go into that because that's going to scare a lot of people off, because they're going to look at that as just an unattainable goal. That's something that we talked about, but that's not something that was going to be in mind for a specific recommendation. But the study group is going to make recommendations in these areas. It needs to be presented in a philosophical, structural manner that will be acceptable to social conservatives. And another goal we have to have is to identify official decision-makers who may be receptive to sponsoring this. As far as important next steps, going along with what our primary goal is, identify exoneration cases in the past 20 years. We need to establish a relationship with marketing and grant-writing persons. This needs to be marketed. The language needs to be prepared, how to present this kind of concept to these decision-makers, who may be very skeptical. Obviously, the way it's presented is important. Down here at the bottom, what we thought we would do is contact decision-makers and officials, and we would start just like in building a record, what you want to do is start with the lowest level people – people in your own jurisdictions, chiefs of police, law enforcement chiefs, people in your areas, other DAs, for instance, around the state. You want to work your way up, maybe go through the prison system, and get somebody on board who is in an administrative capacity with the Board of Pardons and Paroles, for instance. Then you work your way up to the Texas Supreme Court and the Texas Court of Criminal Appeals, trying to get a judge to recognize the need for this and possibly be willing to step out and put together the study group. (Slide.)

MR. CASE: These are the two- to twelve-month goals. What we want is a commitment from a decision-maker, one of these people we've identified, and we also need to have in mind some funding sources and resources, and in the resources category was the thought of maybe some law school, social work school, maybe, or journalism. But we've kind of come to the decision that maybe a social work school – and UT does have a good social work school – that we would want to contact about possibly providing some resources. In here somewhere is an examination of other types of projects like this in the state. There is an innocence project, I think, in Harris County, which is Houston. I guess that's about it.

MS. ROBINSON: Good. Any questions or quick comments? (No response.)

MS. ROBINSON: If not, let's move to San Diego County. Lisa Weinreb is coming up for them.

MR. MAHONEY: How about a round of applause for Texas? (Applause.) (Slide.)

MS. WEINREB: Those of us from San Diego feel pretty lucky. We have been blessed with a pretty good budget as of late – not this year, but we've been able to do a lot of things, like a post-conviction analysis of DNA testing and already are doing videotaping of interrogations. But with the current budget crisis, as we're all encountering, we're all going to have to scale back and then take a look and make our goals that which we can actually attain. So what we started out with is, we thought we would try and get a change in some police procedure at our San Diego Police Department. We were going to do a pilot project there where we just use our homicide

detectives from the San Diego Police Department that only deals with homicides in the city proper, not the entire county – there's about 24 detectives – and what we're going to do is, we're going to try the double blind sequential line-ups. We use six-packs. We don't do that, but we're going to try it with those 24 detectives and see how that works before we then try and move on to other agencies and other departments. Also, we're going to make a policy of continuous video and audio recording during interviews and interrogations of suspects. Like I said, we currently videotape all those interrogations from beginning to end, but sometimes they break. If there's going to be a break or they take the suspect to the bathroom or get them something to eat, they turn off the tape. So what we're going to try and do is continuous, not turn it off, and just make that more of a policy. So we'll see how that pilot project goes with the San Diego Police Department. We're going to try and make some changes in our training, incorporate more of the DAs and the public defenders in the Police Academy, at the initial Academy, and then in in-service, have the PDs and the DAs come in and talk to them about what we expect – report writing, things you're going to be challenged on, the importance of searching and following up on additional evidence. Also, the idea of joint public defender and DA ethics training – now, this might get some difficulty on either side. But if we get all of us in a room – we've got 300 deputy DAs in San Diego County and 200 deputy public defenders, so there's a lot of us – so we thought we would get together on our in-service training days and have joint ethics training with someone from, you know, both sides of the – both DAs and public defenders. And then the talk that the former Attorney General Janet Reno was talking about and Norman talked about, the DA training, I think that's absolutely crucial. We're going to try and get some more training within the DA's office, stressing the importance of – we see all these exonerations, we know they happen, and we need to be more sensitive to that. So I think that's very important. Then we want to establish DA policy. We want to do a post-conviction file review, open file review, by the trial and appellate counsel. So post-conviction, come on and take a look at our files if you want, to make sure that there's nothing in there that you didn't have before for any habeas or any appeal process, so, open file policy there. And also establish written policies on forensic retesting. We're pretty open to retesting, but we need to get some written policies. I think that would be more helpful, and everyone would appreciate something like that. (Slide.)

MS. WEINREB: The next three to six weeks, we're going to meet with department heads as a team to discuss recommendations and goals. Texas had the concern that, you know, they always shoot the messenger. But we figure if we go with five of us, they only have one shot and they can't get us all. (Laughter.)

MS. WEINREB: So if we all go together, then I think it will have more of an impact and they can see all the players at the table. So maybe you can try that. I don't know, establish some policies within each department for implementation of some of these goals that we've come up with. So we thought we'd do that. Determine fiscal impacts; everyone's going to have to do that, come up with that for them, and identify alternative funding sources. We've all talked about that throughout the course of this weekend, foundations and the like. (Slide.)

MS. WEINREB: Okay, two to twelve months. We're going to evaluate the San Diego Police Department's pilot project, see how it works, see what the fiscal impacts were, see what the response was, what the results were. Then we're going to refine and develop the programs that we're trying to implement, present the proposals to the regional police executives, our

elected DA and all the different chiefs from the different police agencies. For us, we determined there were 19 different police agencies within San Diego County. But they meet on a monthly basis, all the chiefs do, so we're going to try to present it to that regional team – all five of us together, present it to them – what are, at least, the results of the pilot project and our recommendations. And then later on, we'll try and achieve some type of consensus on any legislative agendas, anything we think we should take to our legislature to implement, if necessary. Thanks. (Applause.)

MS. ROBINSON: Good, Lisa, thank you. (Applause.)

MS. ROBINSON: I'm going to ask Bill Dressel for the National Organizations Group to come forward. While he is, I think a couple of the things in the San Diego presentation on training – on cross-disciplinary training – and on the notion of pilot projects, are some themes you're going to see coming up from a number of the groups. Bill?

MR. DRESSEL: We took a little bit different approach. We don't have the same overheads that you do. And what we did first was try to identify some of the priorities that existed. And in doing this, we recognized there was a need that we had to address what currently was going on in addressing this wrongful conviction area. But we also recognize we're dealing with an adversary system, and we put our focus on that to try to see what we felt could be changed. You can see in your notebook the various national organizations that are here and identify those. Our top priority, as far as key issues is, in listening to what occurred here at the conference, we came up with a number of key issues there. And you'll see them listed. The number one was this idea of counsel. We really felt that that needed a lot of resources because of the inadequate funding, addressing this independence, training to assure. We weren't just picking on them, but it seemed to float to the top. Everyone is saying that there's an issue here as far as having the council. Then we went on and we started identifying the areas of concern that can be addressed, such as what occurs in the eyewitness identification, the false confessions, the interrogation, what we've heard already. Those are areas that can be taken care of and addressed now at the local level. And then the last one under the key issues is the professionalism of all the actors in the system, of really keying in on that aspect. Our key strategy was that there be collaboration and coalition-building in each state and nationally. In other words, as was said when we started out here by Laurie, the resources that exist in this room and in the system are really fantastic. We need to get those people together, all the various players, and bring in the community. This is not something that can be done isolated within the criminal justice system, but the community needs to be involved. The strategy for collaboration and coalition building – we have the three prongs of the strategy first: Develop common principles. Everyone has a shared interest in working together to protect the public. Everything that you are going to be doing needs to be stated in a positive and prudent way. We know there are a lot of concerns and negative issues, but we felt that, by developing these common principles, they are stated in a positive manner that we will get people looking at this issue as being their issue. (Slide.)

MR. DRESSEL: Two is to develop standards, and also accountability. This could be federal legislation, it could be model state legislation, but however it's developed, it needs to be enforceable. And then three is the one that we always come up with, and that's education. And that's education throughout the system, everyone in the criminal justice system, not just the DAs,

the judges, public defenders, but the victims, elected officials. If we can educate on what is occurring, why it is occurring and how it can be changed, that will take the first step. We thought that, from the national perspective, the logical step to take is to make sure that there is some ad hoc committee that is composed of representatives from the groups that were here to continue the work on, and that AJS should take the first step to coordinate that ad hoc group to make sure that this effort continues. Thank you. (Applause.)

MS. ROBINSON: Bill's last suggestion on the ad hoc committee is something Barry and I and Allan have briefly talked about and think is a wonderful idea for moving this forward and having continuity coming out of this session. And our hope would be – I think this is true for AJS – that each team here, before they leave, would designate one person who could serve in that capacity and get that name to the AJS staff. Allan, do you want to add anything to that?

MR. SOBEL: No. I think that's absolutely correct, Laurie, we did talk about that. And it would be wonderful if we could have your input to include in this advisory committee.

MS. ROBINSON: Barry, did you want to add anything?

MR. MAHONEY: No. I just wanted to see if folks from the states and localities have any thoughts on this. Is this an idea that makes sense?

VOICE: Yes. (Laughter.)

MR. SOBEL: Is this is an idea that doesn't make sense? (No response.)

VOICE: What are you planning to do, exactly, with this ad hoc committee?

MS. ROBINSON: Well, I think that that's to be figured out. But the sense is that you don't end the conference and have the energy and the cross-collaboration that occurred here simply end when people catch their planes back home today, Bob. But the hope would be to kind of sort that out. I would hope there would be some leadership from AJS and maybe from the Planning Committee in trying to sort that through. But to listen well as to what the thoughts are – I don't see this as something that would be intensive and time consuming, but as a way to keep a network of shared ideas continuing.

MR. GIBSON: It doesn't seem to be a bad idea – I'm Gary Gibson, San Diego County Public Defender. It doesn't seem to be a bad idea to keep us informed about what's happening everywhere else based on these plans. If we're just going to go back and do our own stuff, what's happening in every other jurisdiction is just going to disappear for us. And you'll be the only point of contact, so I can't imagine that would be a bad idea, that we would get something from you every three to six months to tell us what's going on.

MR. MAHONEY: It's basically a contact. The idea was sort of vague as it came up in the national organization group, but it's at least that you would have a contact person and that there's a continuing interest in, and if you wanted to kind of share ideas, move forward on this in any kind of national way, there would be a person to contact in each of the jurisdictions.

MS. ROBINSON: And, Gary, couldn't the Listserv that you set up help in this regard just as far as information sharing? Good.

MR. MAHONEY: Just to add, we intend to follow up on conference in as many ways as we can. John Stookey and Maria will describe those ways we have in mind later on this morning. But one of the things we intend to do is talk to you at some point after this conference ends and find out how you've progressed in executing your action plans, and that would, I think, help us inform all of the teams of what might be reasonable to expect within a certain period of time.

MS. ROBINSON: Great. Let's turn now to Michigan, Mary Beth Kur.

MS. KUR: Our goals, as you can see from the transparency, are to establish a generic criminal justice system with the intent of reviewing and improving the administration of justice overall and keeping it generic like that so that certain groups maybe aren't turned off. Secondly, we want to address the resource issues that are – what we believe are confronting our criminal justice system in Michigan. And you heard about that from Virgil Smith, the indigent defense issue that's primarily an issue in Wayne County. However, I'm told by Marty Tieber, or we were, that Michigan ranks either last or second-to-the-last in overall compensation in indigent defense. And this is a point that everybody, I think, is probably going to have – the training issue. We have a statute in Michigan on our third point; we have a statute that was arrived at through consensus. Our Prosecuting Attorneys Association and the defense bar and the legislature and the executive branch got together, and we came up with a statute that everybody could live with that only has a five-year window at this point, and very, very few cases have been processed to the point where DNA testing has been done. But all felons in Michigan are required to give a sample now, and, basically, they're just sitting in a refrigerator or wherever they put them and there has been very little done with that. And so one of our priorities is to come up with some kind of a mechanism or money to hire people to process that information so that we've got a better database. (Slide.)

MS. KUR: Our leader is going to be Senator Cropsey, and he's going to take the lead, I think, along with Virgil Smith. They're probably the two most well connected people on our team, and they're going to arrange meetings with different branches of government and also with our chief justice, to obtain their involvement and their cooperation in establishing our commission. All of us are going to address our respective organizations that were a part of our associations regarding collaboration and what issues we discussed and what we learned here. And Senator Cropsey is going to set up a legislative hearing, probably in February, to serve as a forum for addressing these issues that we've discussed here. And we're also going to do a joint press release when we get back. We're from all over Michigan, and so, hopefully, it will get some attention and it will discuss what our plans are and what we learned and where we go from here. (Slide.)

MS. KUR: And lastly, some specific things that we discussed really needed to be done are to reduce the number of fugitive felons walking around in Michigan. We have over 500,000 outstanding warrants that people haven't been arrested on. And Virgil Smith said that there are

40,000 felony warrants just in Wayne County alone. These are people that have been – some have been convicted and some have not been, and we feel that there is a need to round those people up and get them through the system, and it may help even in solving some issues. And the last thing was to investigate additional funding sources for our Innocence Project. The Innocence Project that we have now is done through Cooley Law School, and the bill that set it up only has a five-year sunset provision. And in the two or three years that the law has been on the books, we think, we're not sure, but we think there's only been five cases that have been tested at the very most, and we've already gotten through. It's probably three years old. So we're going to talk about it with, maybe, some universities and foundations, and maybe AJS can help us with some funding issues for our commission and also for, maybe, strengthening the resources that are behind the project and extending it. And that's it from Michigan. (Applause.)

MS. ROBINSON: If we can have Pat Sullivan for Oregon come on forward. I think one of the things that's interesting about the Michigan presentation is this notion of a very broad-based criminal justice commission, a little different from that in its breadth than the other teams.

JUDGE P. SULLIVAN: All right. Our goals – we felt that the political situation in Oregon was such that we weren't going to tackle anything that involved huge political type of activity. So we wanted to focus on things that could be done on the local level. (Slide.)

JUDGE P. SULLIVAN: And what we decided to do is, our first goal is to set up police policies and procedures for legally sound investigations. And the second goal was a pretrial mechanism for review of cases where actual innocence is asserted. And then our third goal was peer review for the following areas. And I guess it will probably be easier if I go to the second one to explain each one of those a little bit better. (Slide.)

JUDGE P. SULLIVAN: We had representatives from Multnomah County, which is our largest jurisdiction – very large, urban jurisdiction – and I'm from Malheur County, which is a very small rural jurisdiction. So we decided what we would do is set up pilot programs in those two jurisdictions, because that would give us a good way of going out into the larger state and showing that it could work in a small place and a big place, and that we'd meet with the agencies, adopt a protocol and then get that going. On the audio taping and video taping, that one's a little harder because we're not sure what equipment is needed, what funding, and we've got some statutory problems. So our first project in that area would be to identify some of those needs and figure out what we need to do. Then Multnomah County is going to set up a process for case review in cases involving claims of actual innocence, and those would occur on the front end for the most part.

MR. MAHONEY: Could you describe a little bit about the notion of looking at the front end about this?

JUDGE P. SULLIVAN: Well, what the idea is, there would be interaction with the defense bar because, it's been our experience, anyway, that they tend to know when they've got a possibly really innocent person, and allow a mechanism for them to come to the DA's office, present that in a way that wouldn't prejudice the case or involve problems and allow for additional independent investigation. Am I stating that right? Okay. And then we wanted to

talk about peer review. And what we mean by that is that we thought we were using a model in Oregon. We were drawing from some of the models that have been used in child sexual abuse cases where there's been quite a bit of emphasis on obtaining independent review of interview techniques and other things like that to avoid mistakes. And what we'd like to do is extend that to all criminal cases in general to improve investigation techniques. And so what we wanted to do with the investigation level was look at putting together some type of a program where cases could be reviewed, similar to what's done now with child abuse interviews, where they can be sent off and somebody can look at the videotaped interview and critique it, or the National Traffic Safety Board that will reviewing accident reconstructions, and they do that regularly with some jurisdictions. So this is an area where the national group would help us to identify a source that might be willing to do peer review. We feel that the police officers would be really receptive to that. And then the next area that we were looking at is cases resulting in dismissal, acquittals or no prosecution. Again, in child abuse cases in Oregon, we have a statutory requirement that child abuse teams have a sensitive case review process that allows for review of cases where there have been acquittals, no prosecutions or dismissals. So this would be after the cases were finished, not on the front end. And what we're going to try to do is expand that program as a pilot in my county and see if that would work as a mechanism for going over cases where there have been those kind of results, and improve the system generally. And then we also would like to look at the defense counsel issue, but we probably have not set up a project on that as much as talking to persons involved with that. Oregon is in the middle of an overhaul of its indigent defense system, and our feeling was that we could look at that process as an opportunity for including in that a better or more coordinated review or process for identifying problem attorneys and doing something about that, as opposed to the present system, where it takes a long time and is very cumbersome and there isn't a lot of information sharing. And what we're probably going to do is refer those ideas along to the people that are involved in that project as something that this might be a good time to look at that. (Slide.)

JUDGE P. SULLIVAN: And I guess this is self-explanatory. This is the things – and what we thought we'd do with these pilot projects at the end of a year is try to take it on the road then and make the presentations to the various interest groups to tell them how it went and see if other people would be interested in adopting it. (Applause.)

MS. ROBINSON: Thank you.

MR. MAHONEY: I think it's a really interesting idea. You've set up pilot projects in the big urban center and a quite rural area in, I think, eastern Oregon. As you undertake these pilot projects, think through the desirability of getting some practical evaluation that focuses on the key questions you want to answer, get that done objectively, and it has that much more impact. Who do we have next, Laurie?

MS. ROBINSON: We have Arizona, Gerald Richard.

MR. RICHARD: Good morning. For those of you who may come from wet and gloomy places like David Kyle talked about in London or places that are very cold, please come to Arizona. (Laughter.)

MR. RICHARD: Over the next two to three, four months, you can come down there, lay by the pool, get all the work done that you need to get done, and we'll be more than happy to meet you out in the golf course. Our first goal is to establish uniformity among law enforcement agencies – sequential line-ups and videotaping interrogations. We believe this is an important area for us. Our second is to establish a review commission. And our third is to establish a broad-based educational program, beginning with a video, which supports this effort. With regards to the review commission, the way that we intend on doing this is first putting together a planning group, a planning group that would go ahead and set for all the different goals objectives, timeline, budget and the like. And we believe that this has worked for us with some other programs that we've done in Arizona. And if we go ahead and we do it that way, we can overcome a lot of the questions that others may have before they actively get involved. (Slide.)

MR. RICHARD: In the next three to six weeks, post-conference, we're going to conduct a meeting of the conference attendees within 60 days, contact the Maricopa County Attorney and attempt to convince him to support this effort. We're going to develop a structured plan for the planning group, which identifies the group's responsibilities; personally recruit planning group members. I'm going to hold a meeting of the planning group to share the information and procure their input. During this time, we can also educate those individuals that aren't truly aware of what it is we're trying to achieve. And by getting their input, we can also learn from them as far as what else we need to do. And we're going to develop a preliminary action plan for that planning group. (Slide.)

MR. RICHARD: In our two to 12-month period, we're going to create advisory groups, both a research group that can do ongoing research to let us know of cases that we need to take a look at, and then also a media advisory group. The media advisory group would, hopefully, help as far as putting a positive spin on the work that we're doing. We're going to develop an action plan for the commission, identifying the agencies and commission members who will support this endeavor. We're going to conduct an informational session for the co-chairs so that, when they go into that first meeting, that they are fully aware of what it is that they need to do and how to get it done, and then we'll hold that commission meeting. Thank you. (Applause.)

MR. MAHONEY: Just quickly, this review commission, am I right that you're going to look at cases in which exonerations have been established?

MR. RICHARD: That's correct. The first two cases are the Crone case as well as the Youngblood case. And that's one of the reasons why we are trying to solicit the support from a Maricopa County attorney, because the Crone case, specifically, was in Maricopa County.

MS. ROBINSON: Good. Thank you. We're turning now to Wisconsin. Keith Findley, if you can come forward. While Keith is coming up here, I think one of the interesting themes that weave throughout is the media and contacting the media, drawing them in. Education, I know that's an issue that came up in the national organization's group I was sitting in with and one we need to keep on our radar screen.

PROF. FINDLEY: I am struck by, as diverse as we all are and the various jurisdictions and whatnot, how much overlap there is in terms of the kinds of ideas that we're coming up with,

and I think you'll see that in our plan. We started off by brainstorming all the various ideas about the types of problems that we see in the criminal justice system and the causes of wrongful convictions that we might address, and then we tried to narrow it down to some things we could do about that. (Slide.)

PROF. FINDLEY: And we started off with a very practical, concrete objective, although a little bit grandiose, I suppose, in saying that we want to improve line-up and photo array procedures in the entire state. And particularly there what we're talking about, is the double blind and sequential line-up procedure. And our strategy there, which I'll get to a little bit more in a second, is to begin, as some of the other jurisdictions have suggested, as well, to create a pilot project – in one jurisdiction, in particular, the Madison, Wisconsin, Police Department – to test this out, see how it works and try to develop a model that we can then sell to other jurisdictions. And that's why we say we want to improve procedures in the state. That's what we're talking about. Our group was struck by some of the discussion that we heard in the plenary sessions about problems with tunnel vision, confirmatory bias, and generally in our own discussions, about a sense that there's a lack of appreciation of these problems among many of the actors in the criminal justice system in our state. And so we thought that education, as others have suggested, is a very important step in this process. And so one of our goals will be to raise consciousness about the issues through training for all of the participants in the criminal justice system, and we're thinking particularly about the need for training for police officers, prosecutors and judges. And our third goal is to support efforts to create a criminal justice study commission. We framed it in this way – that is to say, support efforts – because we already have an ongoing effort in Wisconsin to create such a study commission. The two law schools in the state, along with the state bar, have been working for some months now to try to create a broad-based study commission. Again, it's framed in terms of a criminal justice study commission because we want to achieve buy-in from everyone who has a stake in this process, including victims, prosecutors, judges, the community, defense, whoever it may be. And so we envision this as a commission to study the failings of the criminal justice system, both sides of the coin. That is, the failure to convict the guilty and the other side of that coin, which is the wrongful conviction of the innocent. So those are our goals. (Slide.)

PROF. FINDLEY: The three to six week period, we think our first goal of creating a pilot project for doing line-up and photo array procedures is quite attainable because Captain Cheri Maples of the Madison Police Department is in charge of training and personnel for the Madison Police Department, and she's here and she's committed to it. So in the next three to six weeks, she's going to schedule an in-service to start training detectives on how to do the procedures the correct way, and we've made contact with Dr. Gary Wells, and he's committed to coming to Madison and helping us with this process. (Applause.)

PROF. FINDLEY: The next thing we want to do within the next few weeks is to begin the process of setting up the training programs we were talking about. And so Judy Schwanley, who is a prosecutor from Dane County, will be contacting the state prosecutors training director about creating a prosecutor's training program. Judge Fleischauer from Stevens Point, Wisconsin, will be contacting the director of judicial education to begin talking about creating a judicial education program based on these issues. And the last one relates to our third and broadest goal, that is to create a criminal justice study commission to continue looking at all of

the issues we've been talking about. One of the concerns we identified in the meetings we've had here is that we've got the two law schools and the state bar association behind this idea, but that may not be a broad enough base to get buy-in from everybody we need, because the law schools and the bar association in our state are often viewed, at least in the prosecution and police world, as defense-biased, perhaps. And so we needed to broaden our support here. We know that the Chief Justice is supportive, but she doesn't think it's the right approach for her to appoint a commission at this point. So we have a new Attorney General in the state of Wisconsin; we want to contact the Attorney General and the district attorneys from the two largest counties in the state, who we both believe will be supportive, and get them to lend their support to efforts so that we'll get the kind of broad-based support that we think we need to make this a viable project. (Slide.)

PROF. FINDLEY: And then the two to 12-month program. During this time, we hope to be developing more specifically the programs for training police, prosecutors and judges. We hope to implement the model line-up and photo array procedure in the Madison Police Department. And then, once that is up and running, assuming it's a success, the plan then is to take that on the road and to sell it to other police departments, jurisdiction by jurisdiction throughout the state. And finally, we hope that within that time period we will be able to actually set up our criminal justice study commission and have it functioning.

MS. ROBINSON: Keith, who do you see as the convener of that commission, or do you have a sense of that at this point?

PROF. FINDLEY: The plan right now calls for the deans of the two – we have two law schools in Wisconsin, at the University of Wisconsin and Marquette, which is in Milwaukee. And the plan is for the two deans of the law schools, in conjunction with the criminal law section of the state bar association. And if we can get it, maybe the Attorney General's office, which is our next hope, which is to get them to call for this and to appoint a chairperson of the commission. We have in mind a particular retired and well-respected former justice of the Wisconsin Supreme Court to chair that commission. So that's the plan. Is that responsive?

MS. ROBINSON: Yes. Thank you.

PROF. FINDLEY: Okay. Thank you. (Applause.)

MR. MAHONEY: I'm struck by the way in which so many of your teams are looking both immediate and specific – we're going to start training right away on something we know we can do – and also pretty broad and ambitious and long, far-reaching at the same time. The study commission idea is great. Who do we have next, Laurie?

MS. ROBINSON: Kevin Burke from Minnesota. Are you going to invite everybody here to go to Minnesota for the winter, too, Kevin? (Laughter.)

JUDGE BURKE: Our team has an immediate goal of working very closely with San Diego and Phoenix in the next couple of months. (Laughter.)

JUDGE BURKE: We're going to be traveling – we'll take your offer up – and so we're making some changes in our schedule, and we're willing to do training and whatever else you'd like us to do in the next two to three months. (Laughter.)

JUDGE BURKE: Our six-month goal is to visit you in Canada and London. (Laughter.)

JUDGE BURKE: We hope to finish the year in California and Oregon and make sure that this is a real national effort. And so Minnesota is going to lead that. (Laughter.)

JUDGE BURKE: I want to tell you a little bit about our jurisdiction, because I think that will give you some idea of why we selected the things that we did. Hennepin County represents, at least in major cases, about 40 percent of Minnesota's filings. Our strength is both our weakness. We have 37 police jurisdictions in Hennepin County, so the coordination of that is difficult. On the other hand, we have one district court, one county attorney and one public defender system. We have a strong tradition of cooperating. We have many forums – in fact, it's arguable, too many forums or meetings in which we communicate with each other. As was mentioned, we have a decision of several years ago that requires all interrogations to be audio taped, and many of them are videotaped, so that's not an issue for us. We had a process in the last couple years in which we did a fatality review of domestic violence cases, in which a number of cases were picked. There was a group that was appointed, and they went through to look at what happened, essentially a social autopsy of a fatality review. The Bureau of Criminal Apprehension, which does most of the DNA testing, about 15 percent of the testing they do comes back excluding the primary suspect. One of the team members said that the problem in Hennepin County, or in Minnesota, is we don't know the extent of the problem. That's our goal, is to get a better knowledge of the extent of the problem. Our suspicion is it's much more about near misses. The system got very close to convicting an innocent person, and then the DNA came back and said exclude the primary suspect. So our idea is to use that model of the fatality review, take a representative sample of those cases that excluded the primary suspect, and see why was that a near miss. We wanted to exclude the cases where the officer submitted the DNA suspect and really, basically, wants to confirm, "I don't think this is the guy"; that's exactly what you would want law enforcement to do. But to look at whether or not, in this group of cases, there are near misses. The second thing that we want to do is to look at improving the photographic line-up procedures, and we think that, even with 37 jurisdictions, that's a pretty doable thing within a relatively short period of time. The third thing that we wanted to look at was the other end of the spectrum. Almost all of the discussion for two-and-a-half days has been about death penalty, big cases, and things like that. Our team had some interest in looking at the other end of the spectrum, the low-level misdemeanor, in which budget crunches, time, we don't have enough, can't you plead guilty and get rid of the case may very well have more innocent people in that group than at the other end of the spectrum in which good professionals don't want to convict innocent people, for all the reasons we've talked about. And so they devote time, attention and DNA and all the science and all the training and all that other stuff. When it comes to loitering, "plead guilty and you can get out today" is, at least in our jurisdiction, occasionally a curse. That doesn't mean they were guilty, it just means they got out of jail. And so we wanted to have some discussion and continue with that. And our first step will be San Diego, and our second step is we'll be coming over to meet with you in Arizona. Thank you. (Applause.)

MS. ROBINSON: Let's have Bill Kenerly from North Carolina come forward. While he's coming up, I think it is very interesting that Minnesota, or Hennepin County, chose to focus on that misdemeanor area which we have talked about off and on over the last couple of days. I think they are the only team that has made that one of the central goals, and it will be interesting to learn how that progresses.

MR. KENERLY: Thank you. Before getting started, let me say that, even though we're the same size and about the same age and both of us talk like native North Carolinians, Justice Robert Orr and I, in fact, are two different people. (Laughter.)

MR. KENERLY: I know that's been a source of confusion for a number of you. Let me mention a couple of things. Justice Orr talked about the North Carolina Actual Innocence Commission on Friday, I suppose it was. Let me mention one other thing in our state that affects all of this and affects our goals and procedures. About a year, maybe two years ago, the North Carolina legislature created something called the Office of Indigent Defense Services that has a capital defender branch. It oversees the training and appointment of indigent counsel. In capital cases, attorneys go through a fairly involved application procedure that involves getting recommendations from prosecutors and judges, as well as other people, about their abilities in trial. It also oversees the appointment of counsel on appeal and post-conviction of what we call motions for appropriate relief. And I might add that, as a political matter, and of course I don't think anybody's bold enough to say why things happen in a legislature, but at least one of the issues for our legislature was that the cost of indigent defense services went up year after year. They could never budget for it because they could never quite figure out what it was going to be at the end of the year. And the idea of creating an Office of Indigent Defense Services and giving them a specific budget was something that the legislature could budget each year and could know that the courts were not going to be coming back for additional funding halfway through the year. It's in its earliest stages, but it addresses – or at least we hope that it will address – many of the issues of competency of counsel and funding that some of you have talked about. Let me say a couple of things. People have asked me how the Chief Justice's North Carolina Actual Innocence Commission came to be. Again, it's hard to say exactly how anything happens. But I think there are two or three issues. One is the Chief Justice not only is, of course, committed to doing the right thing, but he has also talked in many different forums about public confidence in the North Carolina court system. I think that, at the same time, we had several cases in North Carolina where actual innocence was the issue. It got a lot of publicity, people exonerated from crimes they'd been convicted of. And probably the third thing, and I hate to – Chris Mumma is not here – he had a law clerk for a couple of years who is very interested in this area and whose sort of personal situation was such that she was able to take this up and push it, and I think my experience has been that most of these types of issues require a spark plug. And we certainly have one in Chris Mumma. So that's what's going on in North Carolina. And it affects what our goals are. As you may recall, Justice Orr mentioned that the Actual Innocence Commission met, I want to say, in November. We actually have a meeting scheduled for this Friday in Cary, which is where the North Carolina Bar Association is headquartered. That Commission doesn't have any funding, but our Chief Justice, in creating it, invited to participate, among others, the Attorney General, the director of the North Carolina State Bureau of Investigations, the Director of the Office of Indigent Defense Services, two prosecutors, myself being one, and a variety of people who, while he does not have a budget – for example, if this

Commission can convince our state Attorney General that a certain procedural approach is appropriate, the Attorney General has the ability to make that happen. With police officer training, the Chief Justice doesn't have any direct influence on that, but through the Attorney General and the director of the State Bureau of Investigation, he could affect the training of police officers in North Carolina. Most of our training is done at one central location in the state, particularly basic police officer training. So those are things that are going on. Now with regard to goals, one of the things that came to our attention was that we didn't have a victim advocate involved in the North Carolina Actual Innocence Commission. We intend to address that and to reexamine the other people that are involved in the dialogue to make sure that we have participation for everybody that's involved in the criminal justice system. We think, and maybe it's just North Carolina and being part of the old South, but if we jump out and try to train somebody two months from now, we're going to run into a stone wall. We think it's important for us to be gradual, to address the different groups through the North Carolina Actual Innocence Commission, through the District Attorneys Association, through the police chiefs and sheriffs associations, on the specific ideas that we have talked about here – double-blind and sequential identification procedures and the possibility of a review commission. So we think that education and, in connection with that, assessing what opportunities we have to pursue these reforms are goals of our team. Over the short haul, as I said, we have a meeting scheduled this coming Friday and we – whoever wrote this thought they were a comedian and made our fourth goal to limit ourselves to three goals. (Laughter.)

MR. KENERLY: The plan at this point is to – this commission has been meeting about every three months – is to probably double the number of meetings and move it up to about six weeks. As I said, we want all the stakeholders there. We think a commitment to a dialogue is important. I have been a private lawyer and have defended people and have been the elected DA in my county for the last 12 years, and if there's any more difficult group to talk to than the 39 elected district attorneys in North Carolina, I don't know who it is. So establishing a dialogue, discussing these issues and what some of the solutions are, are short-term goals of our group. Again, and maybe it's just the water that we swim in in North Carolina, but we thought it's important to be gradual, to deal with things that seem to be reasonably clear-cut – the identification procedures that have been discussed here, go on other issues that we can find some consensus of, identify funding opportunities, which in our state, probably like yours, are almost certainly going to be private, because there just is no state money for basically anything, which by the way, includes out-of-state travel, just as a bye-the-bye. I'm going to Philadelphia in two weeks on a federal gun violence training session. I had to buy my own plane ticket because the state couldn't afford 180 bucks for a round trip plane ticket, so go figure. So we want to finish our study, identify funding opportunities and continue the meetings of the North Carolina Actual Innocence Commission. Thank you. (Applause.)

MR. MAHONEY: A quick question, Bill. Does the Commission have any staff at this point?

MR. KENERLY: Probably the short answer is no, though Chris Mumma, who attended here, this is pretty much a full-time occupation for her, and in the exchange of information, each of us that are members have a staff in our own office, so we're able to do some things without any separate budget.

MR. MAHONEY: Okay. Thanks.

MS. ROBINSON: Thank you. Let's get Ron Kessler from Washington State. One thing that really struck me, not only in this last presentation but a number of them, is just the reinforcement about how each state or locality's political environment is so different, and obviously, that's one big reason why having one set way to approach this for every jurisdiction would make no sense at all and reflects such diversity in the country. Ron?

JUDGE KESSLER: Thank you. In our pre-planning process, we had discussed and planned on expanding our idea to the entire state of Washington. Since we've been here, we've decided that that, perhaps, is a goal that, in the short-run, is perhaps more generous than we can handle for various reasons. In King County, like in Hennepin County, we have a lot of police agencies, a lot of small jurisdictions, in addition to the Seattle Police Department, and this is going to be enough work in our county. So aside from the educational effort, I think what we decided and what we learned is that we need to narrow our focus a little bit. Our goals are to institutionalize our group, our team, so that we continue to exist beyond our meeting here that we created as a working group. We need to expand it a little bit, being careful not to get too large so it's unworkable. We'll recruit and include a victim advocate and a police chief from a smaller jurisdiction in our county because there's the tendency to say, oh, well, this is all a Seattle – a big city problem – and we don't have to worry about it because we do everything right. Number two, we'll inform and educate our own individual organizations and professional organizations and the public and media. We'll be writing a joint op-ag play piece that we're certain that one, if not both, of our newspapers – who operate under a joint operating agreement – will run, and maybe we'll go to local television news, I don't know. I think we have to wait for an atrocity first before they'll pay any attention to us, but that'll happen. And then research and report out on system changes that have occurred. As to the three to six-week goals, again, select a working group and hold an organizational meeting, select subgroups for the individual arms of our working group, submit the op-ag page article, and decide – we have DNA legislation that allows for post-conviction testing upon a demand. It's a strange statute that has a prosecutor veto with an appeal to the attorney general. But in any case, it sunsets in about a year, and we have to remind the legislature to reenact something or other. In addition, with respect to legislation, by legislation, we are a two-party consent tape recording state, and we need to discuss the possibility of changing that. This applies also to suspects in custody. We need to talk about possibly changing that to allow for police effectively mandated tape recording of interrogation. With respect to the two to twelve-month plan – this looks very familiar – we'll be scheduling presentations to each of our professional organizations. We've already been invited to the appellate judges conference in the spring. I expect that we will expand that to attend – our group will be attending and speaking at each of the judges' conferences, the level of the judge's conferences. We'll follow through on these legislative items; again, hold subsequent meetings and develop and implement a plan for sequential line-ups, which we're already doing in Seattle, but the other jurisdictions need to learn about it; and best practices, other best practices. We've also discussed expanding this to misdemeanors; a big problem in the state of Washington outside of our county is not just ineffective assistance to counsel, it's misdemeanor courts that don't assign counsel in misdemeanor cases. It happens in a huge number of cases outside of our county, and we need to press them to follow the constitutional mandate. Judges in Washington

have just shrugged their shoulders and said, “Well, sure, we'll take the guilty plea unrepresented. But if they come back later and ask to withdraw it with a lawyer, we'll probably let them do that.” We need to do some education to explain that that's not the way it's supposed to work because the Constitution doesn't allow it. Thanks. (Applause.)

MR. MAHONEY: Thanks, Ron. There's a recent Supreme Court case, Shelton against Alabama, that heightens the bar on taking pleas, even if you're not going to – the person is not going to jail.

JUDGE KESSLER: Sure.

MS. ROBINSON: Colorado, Bill Ritter. Let me just mention, by the way, we have one other team after this. Start thinking if you have any broader comments, questions for any of the team presenters. Just put it in your head.

MR. RITTER: The first thing we're going to do is study why prosecutors are overrepresented as presenters up here. (Laughter.)

MR. RITTER: Out of the, I think, 11 groups, five or six of us who have been prosecutors, we think there's some kind of victimization going on that involves selectivity on your part. (Laughter.)

MR. RITTER: You're going to see in ours a theme, I think, also of gradualism. As it relates to the first goal, that's not something that's all that gradual. We have with us State Senator Ken Gordon, and he has got a bill that he is ready to file. We have worked on it; the DAs and the public defenders together are working on it. We have some areas of disagreement still, but we're going to try and get it to the point where it will go through its post-conviction DNA testing. The statute will set forth standards where it's required. We had an effort last year, and we asked them to pull it because we thought it wasn't something we would get to a place where prosecutors would agree on it, so now we're back this year and we think by the end of the legislative session, which is in May of this year, we will have a post-conviction DNA testing bill. We do have a post-conviction rule that is fairly broad, and so we don't think it will pick up huge number of cases, but it is important, we think, to have this on the books and have the ability for people to come in outside of the rules of criminal procedure with a post-conviction DNA testing mandate. And this is where you'll see the gradualism creep in. Investigate and research other jurisdictions' experience with sequential ID and double blind testing. Part of that just is, I think, the political reality that both the chief and I, at least, recognize. My lawyers always cringe when I get off the plane from Washington, D.C., for about the first three days. They hide from me because I come back with ideas and things that I'd like to see done and I task them to do those things. And particularly, I think, in the police department as well, they do things easier; it's easier to get them to do things if peers suggest it rather than sort of this top down thing. So for my purposes and, I think, for our chief of police purposes in Denver, we think that talking to the people in New Jersey about their experiences, about the benefits of doing it, about, you know, what it's cost them in terms of the kinds of identifications that aren't being made that might have otherwise been made, but do those kinds of things and get our troops to a place where they understand our peers in other places, maybe even Seattle Police Department and district

attorney's office, understand that this is a good thing and this is a positive thing and begin that way. We really didn't call it a pilot project, but I suppose if we impact just Denver first, it would be viewed to some extent as a pilot project. And then the third goal is education and training, and I think you've seen that. That's a broad-based goal involving police, prosecutors, and I think we're the first group that have included defenders in our sort of education and training where these issues are concerned. But our state public defender is here, and I think there's a notion that defenders should understand many of the things that have been talked about at this conference, the training and education part shouldn't be limited to just police and prosecutors. Because – and in part, it has to do with the numbers of people going through courtrooms and the number of people that our public defenders represent – things can get sort of overwhelming in terms of your caseload, but you still have to be aware of that case coming along that has the potential to actually be a wrongful conviction if the public defender doesn't pay special attention to it, as well. And finally – this wasn't talked about much at this conference – we think it's maybe one of the biggest reasons in Colorado that we don't have the problem that some other jurisdictions have – not getting into the debate about the seriousness or the extent, the nature, of the problem. We have a statewide-funded public defender's office. And really, that, we think, has helped a lot with respect to limiting this problem. So we think continued funding is important, and one of the reasons it's important is because we have an \$850 million deficit – doesn't sound like a lot to those people from California, but it's the third worst deficit in the country and in proportion to your total budget. And so, since it is statewide-funded, it's important that we be careful not to let the funding go away. Three to six weeks post-conference, we're going to contact our counterparts: Police, prosecutors, defenders in other places where they're doing sequential identification and blind testing. Second, (a), we're going to contact training committees for Colorado prosecutors, fall training on sequential ID. We have a statewide annual conference in the fall, and this is one of the things that I can do very quickly is say to our training committee “put this on the list of things that we're going to train on in the fall”. And then (b) is training for police regarding sequential ID, the same kind of thing where we try and broaden the group out. It may be just training the chiefs in the first instance, it may be doing some training in academies, but it's going to be sort of this gradual approach as opposed to just saying, “let's do it”. And third, lobby for the DNA legislation bill after the bill is filed. And then these are our key tasks, and we have them there as two to twelve-months. We put five in red here, because we have a mayoral election, so we want to make sure our chief is still with us while we accomplish some of these tasks. (Laughter.)

MR. RITTER: We don't know what's going to happen to him. He's a very gifted guy, and it strikes me that gifted people in law enforcement don't last as long as some other people. Number one, pass legislation regarding the statute; two, statewide training, prosecutor training for prosecutors – looks a lot like our other key tasks, but training committee, and then really talking to the state counterparts. Three, this is the implementation part. After research, begin talking about how we implement the double blind sequential identification in Denver and perhaps in other places. And two other issues – public defender funding, and we do have an innocence project. So I just kind of tacked this in down there. We have an innocence project that's actually in cooperation with both of our law schools. There's a private attorney who is really heading it up with prior, I think, experience in academia. The public defenders, as well as other criminal defense attorneys, are participating in it. They have not come to the prosecutors yet with the cases, but I expect that they will do that. And I just put it down there, in part, to

explain why we didn't have anything about the innocence project in terms of our goals. It's happening, and we're waiting to see what happens when the cases come to the prosecutors and we begin looking at the ones that they have screened through. (Applause.)

MS. ROBINSON: If Judge Cordy from Massachusetts can come up. And I also want to comment that Bill Ritter has really been a national leader, as well, in the National District Attorneys Association, a very key group for any of these ideas moving forward. And, Bill, really delighted that you've been involved in all of this.

JUDGE CORDY: Thank you. I don't have a clue about how to use this thing here, but I suppose I'll learn in the next minute or two. A couple of caveats: Massachusetts is a bit smaller, a little more compact, and our criminal justice system is perhaps a little better integrated than some of what I've heard in the few days I've been here. We have 11 DAs and one attorney general, all elected; that's not a lot. We only have two crime labs; they've both been certified. That's good. We have a well-run single statewide public defender's office, which Colorado does, as well. That's also very good because there's a great training mechanism there and a great constituency. We have a state police department that reports to the governor and which provides investigative services for about 50 percent of our communities on serious criminal matters, so that's a pretty good range. We don't have a death penalty. We have a very organized victim rights establishment with a board reporting to the attorney general, so it's a group that's readily available to participate in these kinds of discussions. And we have certainly, I think the DAs would say, very liberal post-conviction appeals processes, which enable lawyers or counselor-defendants to bring motions for new trial years and years after convictions and appeals are over, based on actual innocence. So with those things in mind, we have, at least as we see it, fewer people who would need to be convinced about the improvements we've discussed, and perhaps fewer dramatic things that would need to be done in order to move those improvements along. So with that, let me fumble with this machine. Perfect. (Slide.)

JUDGE CORDY: Our goals: Increased training for investigators and other actors in the criminal justice system regarding best investigative practices, and then implementing the same. We also have, fortunately, very good training institutes for judges – they're statewide – for judges, for police officers, for public defenders, and the ability to draw those training institutes together to put together programs that can service all of them, I think, will be very helpful. Increased funding for DNA testing and other forensic services. And we have current legislation pending to expand the database. That's really almost a separate and distinct, discrete goal. And then, even though we have good post-conviction processes, there's a lot of inconsistency about what judges ought to be doing and what lawyers ought to be doing with regard to claims of actual innocence when they come up years afterwards. Judges have the authority to hold hearings and take evidence and actually permit the spending of state resources to conduct investigations, but the criteria are uncertain, and judges have their own views of these things, and there's no uniformity. So we really need to work on that. And that's, in part, getting judges and lawyers to better identify those cases in which the possibility of wrongful conviction is present so that resources get properly focused. In the short term, our view is that we need to communicate with our colleagues regarding what we've learned at this conference and the issues raised here, gain their support for the stated goals that I've just described, and also for a statewide conference of criminal justice stakeholders. What happened here needs to be duplicated in our

state, as far as I'm concerned, and can be readily duplicated because we don't have hundreds and hundreds of actors that need to be engaged in this. And begin planning such a conference by identifying necessary participants and recruiting the leaders of these training institutes to sort of work together to design the conference and get it off the ground. (Slide.)

JUDGE CORDY: With respect to a little further out, very simply, we'd certainly like to hold the conference and then, through that process, identify an appropriate institution to press the implementation of the goals and recommendations that come out of it; and there are several candidates, but I think it's not for us to decide presently. And then, lobby for additional budgetary support for the state crime lab, particularly with respect to DNA testing, in the next budgetary cycle. And the good news is we have the chairman of the House Criminal Justice Committee as part of our group, and the state crime lab chair or director, and the two of them have agreed that this would be a good thing. So at least, in spite of our fiscal crisis, we may get some of that. That's it. Thanks. (Applause.)

MS. ROBINSON: I'm sure all of you have seen that there are a number of key themes that keep coming up over and over, and Barry Mahoney, who may be the most rigorous note-taker I've ever known in my career, has already compiled kind of a synthesis of that. And I think that would be very helpful for everyone. Barry?

MR. MAHONEY: I had the opportunity, mostly last night and a little bit this morning, to take a look at the different plans. And you've all heard this, but as I looked at it, a couple of things struck me. One, so many of you were looking, quite sensibly, it seems to me, at short-term – what can we do now – some specific changes that could be made that would probably improve the way we do investigations, in particular, and generally improve the system. These are the main kind of themes and issues I picked out: One, improving front-end police procedures, looking both at double blind sequential line-ups and at the audio taping or videotaping of interrogations. But hitting that eyewitness identification and false confessions, or inculpatory statements, is something you can reduce the error rate in there, and they're things that we know enough to do something about that right now. It's already being done in some places. A lot of you, I've got six or seven of the jurisdictions at least, doing that. Second, expanding the DNA database and improving the DNA analysis capabilities. Clearly, very important – it goes directly to identifying the guilty and preventing the conviction, and even the prosecution, of the innocent. And we know that's a resource issue, and some of you are making that a high priority for legislation. As I gave focus groups around the country before this conference, that also emerged. Big issue, one in which I think we really need to develop a national kind of movement to recognize. This is very important from a public safety and protection of the innocent perspective. Third, the set of issues related to counsel – defense counsel – the need for strong, competent, politically independent defense counsel. Colorado, Michigan, Oregon, -- all pointed, in one way or another, to the need to strengthen defense services, make sure that they get adequate funding. You moved towards adequate standing and adequate funding, standards, compensation and resources. The national organization group also picked this out as its kind of top priority issue nationally. The fourth thing, almost all of the teams in one way or another hit education and training, particularly for police, prosecutors, defense attorneys and judges. Some of you also brought out the importance of education and training for victims groups, bringing the victims groups into this process, and for the education

of sort of a larger community – legislators, the media and others – so that we get an understanding of the system improvement efforts that we're trying to undertake here. I was struck by the two different kinds of things about larger commissions. Several jurisdictions have picked up the idea of review commissions. So in one way or another, Arizona, Oregon, Travis County in North Carolina, which is already doing it, looking at the review of cases in which there is assertion of actual innocence, whether they're current cases or cases involving persons who've already been exonerated. But that commission idea, particularly the learning from what went wrong. I was struck by Kevin Burke's looking at the 15 percent of near misses in Minnesota, looking at cases, making the record, as Travis County talked about. Where do you have the actual case when somebody has been proven innocent? And as you look across a number of those, what can you learn about patterns that will lead you to making systemic improvements? And then, finally, the interest of several – Michigan, Wisconsin, Washington, and perhaps North Carolina – all looking beyond the immediate and the specific towards some kind of overall examination of what's going on. This comes to Norm Maleng's point about the importance of developing an effort that's really focused on criminal justice system improvement. And to do that, you need an understanding of some of the specific problems. You need to bring a lot of stakeholders into the process. You need to engage the community outside. You need leadership within the justice system, and you need some involvement from folks outside. And I get a sense that you're headed, several of you, headed in that direction. So those were the kind of principal themes that I saw coming out of this – lots of commonality here. Beyond that, a recognition from just about every group in one way or another of the need, the recognition that this needs to be – If you're going to make changes, if you're going to make a difference here, it needs to be a broad and inclusive approach; and also a need for leadership, leadership within the justice system, the leading and respective prosecutors, defense attorneys, judges, victims groups and so forth, police for sure, and institutional leadership. Several of you mentioned that. Where do you get the sponsors that are going to have the credibility in the legislature, the executive branch and the larger community? Those are, as I was listening here, great ideas, terrific energy and enthusiasm and hard work over these past few days. I thought it was great.

MS. ROBINSON: Let me just add to the last one on the buy-in, the notion of the broad-based approaches. I want to go back to a theme that Allan struck in the very beginning of the conference. This issue has obviously been fraught with a lot of ideology and finger-pointing; of bad feelings, of blaming other people. Peter Loge, in our national organizations group, said why don't we all get beyond that? Which, of course, everybody, in theory, would agree with. But I was very struck in the jurisdiction reports by the fact of how concrete and problem-solving these approaches are; that it's not about finger-pointing, it's about drawing the system people in, hearing what they have to say, doing a lot of listening, engaging them, having the peer-to-peer training and education. And I think those themes are essential as we move ahead.

MR. MAHONEY: One other thought. Laurie and I have been to lots of conferences. Sunday morning, people's minds are in the airport and they're headed there. And you all have stayed and worked and maintained attention, and that's one indicator of the likelihood of this conference having a real impact when you go back to your jurisdictions. And the kind of stone that's thrown into the pond here is going to have ripples in your own jurisdictions, in your states, and, I think, nationally. Observations and comments – we've got several over here. David Kyle is in the back.

MR. KYLE: Yes. Good morning, all. I thought I'd take the opportunity to give a view from across the pond of what I've heard this morning and also in the last two days. Before I do that, could I say the team from Minnesota and, indeed, any other state is very welcome to visit England. (Laughter.)

MR. KYLE: If anybody wants to come across and talk to the commission, you've got to come to Birmingham. Now, Birmingham has more length of canals than Venice, but anybody who's ever been to Birmingham will know that the comparison stops there. (Laughter.)

MR. KYLE: What I wanted to put across from my perspective was that, in particular, how encouraging it is that people with influence from across the states seem to be so committed with the great ideas of how you can all do something now, up at the front end of all of this, with a view to doing things which begin to cut down the risk of miscarriage of justice occurring. The model which I represent, the CCRC, I think it will become apparent, was we were kicked into doing it because there was such a breakdown in confidence in the criminal justice system in the United Kingdom that it was politically uncomfortable. And we all know that, if there is to be a political kick-start to anything, it is unlikely to come from the politicians. I haven't picked up a great deal in the last few days that the politicians from the states here seem uncomfortable about how the criminal justice is operating. Those of you who have this commitment to do things on your own initiative, up at the front end, it's very encouraging. I picked two things specifically out of what I heard this morning, and they, perhaps, didn't get into Barry's list of key issues. But one of them was the idea that was mentioned by the Minnesota presentation, that it's not only the big cases that result in miscarriage of justice, it's the little things as well. It's something that I'm very conscious of, because my commission deals with everything from motoring offenses through to horrendous murder and sex offenses. But the little offenses are just as likely to be victims of miscarriage, and to some people, that matters. A minor conviction can affect your life and career for a long time. We actually have quite a few of our applicants whose careers, if they want to come to the States, they can't because they've got a previous conviction, but they'd like to get rid of their conviction so they can come here. And the other thing is, this again is because it's where the model which I represent is coming from, we are actually looking at individual states to determine whether there has been a miscarriage of justice, which is, perhaps, an indulgence of public funding where the messages that are coming out here are very much about taking cases where it has already been demonstrated and then putting them under the microscope versus to think along the line of can people within this room do anything to assist the process of establishing whether there has been a miscarriage of justice in the first place. That's something that was mentioned before in the California presentation where there was reference to open file policy post-conviction. I heard a sharp intake of breath about that. But in those terms, it is very much the police and the prosecutors who have access to the material. Are there things that can be done to – in a recognition that mistakes do occur – are there things that can be done to assist in the process of helping those who do assert that they have been the victim of a miscarriage of justice?

MR. MAHONEY: Good thoughts, David. Thanks. I want to give Scott Wallace here, he had an observation, and then I'll go over to Larry Hammond.

MR. WALLACE: I just wanted to raise what may be a gap between the great presentations we've heard from all these jurisdictions and a national issue, and see if maybe it extends more broadly. These teams all represent jurisdictions with great public defenders, well-established public defense systems, reasonably well funded. And what we hear nationally is that the biggest problems with wrongful convictions happen where there's no system at all. Half the jurisdictions in the country don't have a public defender. It's all ad hoc assigned counsel. The judge picks the lawyer, the judge pays the lawyer, or they write the contract and get some bottom dweller who is willing to take these cases and do a lousy job. (Laughter.)

MR. WALLACE: So my concern is that, in this room, we're not reaching the worst jurisdictions where the worst abuses occur. And I think that's one reason the national organizations featured this a little more highly, because, nationally speaking, that is an enormous problem that is not reflected elsewhere here. I'm wondering whether that is perhaps an issue in other disciplines, whether it's prosecution or policing, that maybe some of the worst sort of backwaters where you just rush through cases and you have sloppy judging, sloppy policing, you know, prosecution without any standards or ethics, is it a problem, more broadly, that we need to think of nationally?

MS. ROBINSON: Scott, I think that one of the things that a number of us have considered, the people who come on teams to spend a weekend when it's 10 degrees in Washington, D.C., are not people, by and large, who are skeptical about whether there is a problem and who are not devoted to the notion of increased professionalism. So I think one of our charges out of this conference is to think about who wasn't in the room over the weekend, what groups haven't been represented, what jurisdictions haven't been, and how do we reach those people. And I think the threshold question there is how do we, in the non-finger-pointing way, communicate with them about the fact that there is a problem. Because it seems to me that's the threshold, to get them interested at all.

MR. MAHONEY: If you're going to get started, you have to get started with people who know that the system can be better than it's been, and we couldn't ask for better jurisdictions than we've got here to get it started. We've got to create some models so people have something to look at, and you all can do that.

MR. WALLACE: It's also one of the reasons we came up with the idea of the collaboration. We at the national defense organization level don't know these lousy public defenders. They don't join or come to our conferences. But judges around the country, for example, see them every day. So we need to collaborate with other groups and help us identify and reach out to the people in the system who need help, so collaboration for us is very key.

MS. ROBINSON: Good point. Larry?

MR. HAMMOND: Laurie and Scott have touched on something that has been right at the heart of our thinking from the time that we started this project. I'd like to address it very quickly, and then I have two other quick points. I will leave the end-of-conference comments to my friend, Allan. But I just wanted to touch on a couple of these things. The issue of outreach to other jurisdictions is critically important to the success of this program. All of us know that.

When we went through the grappling process to decide how to put on this conference, we came to the conclusion that we needed to have a relatively few jurisdictions for exactly the reasons that you all have seen, so that we could bring some intensity and focus to these issues. But from our perspective, we will regard ourselves as having failed in at least one dimension if we don't transmit what we have learned here to our friends elsewhere. And frankly, I'm particularly concerned about that in the South. We have lots of southern states that are not here. North Carolina and Texas are really our only Southern representatives. But all of us know that our friends in the South suffer from under-funding of indigent defense and from large death row populations that are staggering compared to some of the experiences that we have. So thinking, all of us, about how we can communicate with our friends elsewhere is, I think, a critically important function of this conference, and I hope we all can keep that in mind. Secondly, I want to pick up on a point that David Kyle made when he said that there were people gasping – Lisa, I was one of them. I think that was like warm water washing over me; the idea that you could go into a prosecutor's office and have an open file for a post-conviction examination of a case, to me, is just stunning news. If that were done in these jurisdictions around the country, if nothing else came out of this conference but that, we would have done an enormous thing. The idea that you can sit down in a prosecutor's office and look at a file post-conviction, I can guarantee you, for many of the states I've just mentioned, that idea would be so foreign as to be beyond imagination. So I would urge all of us to think about what we can do in our states to replicate what they've done successfully and are doing successfully in San Diego. Finally, and I'm really sorry to say this, I have some bad news for Bill Ritter. Bill, I know, wanted to be the star in the video that was done, and I really appreciated the understated way in which he approached that. (Laughter.)

MR. HAMMOND: But Allan and I had really a lovely conversation yesterday evening with Janet Reno, who very sincerely expressed the desire to participate with us and help on any kind of a visual presentation that we were going to do out of this conference, and the Arizona team is very much interested in doing some kind of a video or visual presentation that will look at a couple of these cases and do so with the thought in mind of having something that we can transmit to others. Bill, we may be able to find some lesser role for you. (Laughter.)

MR. RITTER: Start small anyway.

MR. HAMMOND: But I want to communicate to you and Allan, I think this is consistent with what Ms. Reno said to us yesterday, her level of enthusiasm for this is really very sincere and very high. I think anyone in this room could pick up a phone and call her and ask her to help on any of these issues, and I would be amazed if she didn't do it. So there is a great resource and one that we ought to use. Thanks to all of you.

MS. ROBINSON: Bill, did you want to comment? (Laughter.)

MR. RITTER: It has to do a little bit with, there's an ad hoc committee, I think, at the National District Attorneys Association that should, at some level, be involved in that and be part of the conversation, but more broadly. Laurie and I have talked a lot about this because we're both on the Planning Committee – how do you get prosecutors to sit down and talk about this? Because there are a lot of prosecutors, their back gets bowed pretty quickly, particularly if you're

talking about an individual case. It's often more difficult to talk about the broader topic if they've had an individual case where everyone disagreed with an innocence group and whether or not a person was actually innocent or deserves even a look. But secondly, you know, to the broader public, it can appear like you are admitting mistakes. And because so many prosecutors are political individuals, that can be difficult for them politically. I would just encourage people in the room – there are prosecutor representatives in each of the groups, and I think that's great – Wisconsin talked about approaching the district attorneys from the two largest jurisdictions, but for people who are approaching other prosecutors to find a way to do it, that, I think, does it in a fashion that Norm Maleng talked about, to talk about improving the justice system and to look at ways to do a better job. We may have more success, certainly, with the National District Attorneys Association – Norm and I are both on the board of that – and the American Prosecutors Research Institute. So we have some ability to connect with them, but it's not an easy task, because our conversations when we're at a board meeting of the National District Attorneys Association, our conversations about these things are largely about prosecutors from jurisdictions where there is a fairly serious fight going on in the state or in that city; the prosecutor feels very defensive about those things, and you just need to find a way to, maybe, if possible, lower the temperature in the room, make it less confrontational and make it about improving the system, and do as much as you can to loop prosecutors into that conversation. I think, with prosecutors and with police officers, you have better success if you find a way to do that, and will in the end get quicker results as it relates to these kinds of improvements we talked about. Thank you.

MR. MAHONEY: Other observations or questions? Yes? Senator Cropsey.

MR. CROPSEY: First of all, I just want to say thank you for the invitation to be here. I have learned a tremendous amount. Some folks will think I'm kind of an abnormality here because I am a religious conservative and I'm sharing a Senate Judiciary Committee in Michigan, but you know, justice is a key issue and should be a key issue with every person here, and certainly every informed citizen. I think one of the holes, and we kind of talked about this, is how do we get the religious community involved? Especially the conservative religious community. Folks from Texas, that's all you have in Texas, I think, is conservative religious community. (Laughter.)

MR. CROPSEY: There are some significant resources out there, and I think if they realize that there's a problem that they'd be willing to take a look at it; and they need to be approached, very frankly. And I'm just going to throw out a few names. Chuck Colson with the prison fellowship has a tremendous standing in that community, lives in the area, and I think if he's approached properly – it needs to be done right -- but I wouldn't be surprised if he wouldn't be on a forum with Janet Reno at some point in the future if he was approached properly, and he definitely has connections with several of the other groups, with James Dobson, who is one of the largest newscasters in the United States – not newscasters, but he's got his program and he goes into a lot of different issues dealing with family issues. I know every Christmas he gets an angel tree project. He gives Chuck Colson's group a lot of support there. But I think on the national level, those at the national level need to take a serious look at that and say how do we approach these people? How do we bring them on board? Because I think if they are approached, that they would come on board. But then on the state level, speaking as a politician

and speaking for Michigan, where we've never had the death penalty, not since 1835 – first in the English-speaking world to outlaw the death penalty, which I think is wrong, okay? I prefer the death penalty. I'm probably a minority here, but that's the majority in my state. But at the same time, because we don't have the death penalty, we don't have those key cases. Somebody's facing the electric chair and is going to be there and, hey, the DNA evidence came back and said this person was innocent. We just warehouse them now to the end of their life is what we do. And that just kind of gets shoved to the back burner. But at the same time, we have the lowest level of indigent defense expenditure of any state, except for maybe Alabama, and that just surprised me when that was brought out by one of the people here in the group. Okay, how do we begin to work on that? Well, it's going to be hard to raise that, especially with the budget cuts that we have, unless there's people out there that say, you know, this is a serious problem. And you've got to start to generate that, and that can be done through some of these different organizations and stuff, too, but the pressure has got to be put on the legislature to help with the funding. Because, frankly, funding for criminal defense attorneys, that's not on a high priority with any legislator anywhere, okay. But it needs to be brought out and say, hey, as a matter of justice, this needs to be done. Now, how do we go about doing it?

MS. ROBINSON: Barry had suggested that we turn to our two representatives from journalism who are here, John Martin from Columbia and Ted Gast, who is my colleague at the University of Pennsylvania for many, many years a reporter with U.S. News. If we could put both of you on the spot for some reaction from the standpoint of the media, can they be part of the solution here? Ted, I'm going to really put you on the spot.

MR. GAST: Okay. Maybe John should go first, because I haven't been able to be at the whole conference here. But a lot of these issues, of course, are perennial issues. We in the media have a problem – well, we've got many problems – but one of them is we have lots of turnover in the media. I head a national group, as Laurie said, Criminal Justice Journalists. We have about 400 journalists who cover crime and justice in various ways. Unfortunately, this is often viewed as an entry-level occupation. People come in and cover it for a year or two and then go on to something else. So our group is trying, and it's going to be a long effort to try to educate journalists on these important issues that we're talking about here through Listservs, conferences, publications and so on. We have a Listserv, like you. Listservs in your own professions have about 450 people, and often, reporters are asking some very basic questions and they'll suddenly come up with a potential innocence case and will put out a message that will say, basically, hey, is there anyone out there? People all over the country know some good sources to talk to, so of course, based on conferences like this, I and others refer people to the right sources. But one of the problems, as someone just alluded to in the case of state legislators; this is also, right now, not a huge issue in journalism as a whole. There are certain hotbeds of journalism; let's say, for example, the Chicago Tribune, which has done a very excellent job of exposing some of the problems in Illinois that, of course, led partially to what is happening out there now. But that's the exception to the rule. Many journalism organizations, I think properly, are concerned with a lot of, right now, national defense issues, state and local budget issues, that kind of thing. And crime is a little bit off the radar screen because the perception is, oh, crime is down, crime issues are not a big issue, and that relates to all of this that we're discussing today. So all I can say is there are certain pockets of journalism, our group included, that are trying to improve coverage, but it's going to be sort of a long haul. But I'm interested in keeping in touch

with all of you and spreading the word when questions come up about this. So, John? John and I haven't discussed that. Let's see what perceptions he has.

MR. MARTIN: The best idea I've heard here is coming from San Diego, which is where I'm from. But it's the open file – you can't let journalists see it in most states. But to facilitate the process by which defense lawyers and others can get at the cases to get these people out, to find some way to save these lives that have been so badly damaged – a case in Oregon, talking with Judge Sullivan, in this prison, all the money to pay for post-conviction proceedings is gone, so the people are just sitting out there. From a journalist's standpoint – many of you I've talked to, I'm teaching a class in national reporting this year – one of the subjects we're taking up is wrongful convictions. Journalists do see this as an area where the public needs to know more, wants to know more. Northwestern has led the way, the Journalism Project. I can only just say I would encourage you to go back to all your jurisdictions and do the best you can to implement what you've come up with here. One thing I heard mentioned a minute ago, I hear that there's going to be a lot of meetings when you get back. I'm not so sure things are going to come out of that, but I know you've got the energy to do it; you've got the intelligence and the expertise to do it, and I just encourage you to go ahead and include journalists wherever you can. You can't reveal information which you can't reveal, but at any point, where journalists contact you or you touch upon the journalistic community, make them aware that you're really interested in this and that you hope they'll look at it, as well, and I think the public will come along, too, because that's where they get their information. Thank you very much for letting me attend.

MR. MAHONEY: Thanks, John. Journalists are interested in the exposing story and the wrongful convictions. Most of the people in this room are either concerned about the innocent people in jail or that needs attention. I think most of the folks here recognize what you have here is something like an opportunity to go beyond that and really make significant system improvements. I was going to ask before I turn it back to Laurie, ask Andy Sonner, who has been a prosecutor and is now an appellate judge, and who has been involved in this for quite a while. I think you've got some thoughts on this, Andy.

JUDGE SONNER: I asked you what you wanted me to say and he said you're the oldest rat in the barn. (Laughter.)

JUDGE SONNER: I'd like to have some perspective on what is occurring here. Yesterday, I did think that this is a great opportunity. We look back to the halcyon days of LEAA, when they were pumping all kinds of money into criminal justice, and what we were able to accomplish in those years. I think the police are the ones who really went with the ball and took advantage of the federal government's interest in local law enforcement and greatly improved the administration of justice. I look upon the exonerations as another great opportunity to go beyond what we've been able to accomplish in years before. There's a tendency to be very smug about the administration of justice in the United States. I heard some commentator say one time that, really, the great contribution of the United States to democracy has been the creation of due process. I think that what the Innocence Project has been able to do, what the exonerations have showed, is that this isn't working as well as we thought it was working. So I think that we can now go beyond not just the exoneration of some innocent people to improve the system so that we don't see a breakdown, as we've seen a breakdown in some ways in the past. We needed

some catalyst. And I think the catalyst is the exonerations, and then this group taking advantage of that catalyst in going far beyond. Maryland isn't represented here, but I keep thinking as I hear all of these things that people are going to do as they go back to their individual states, what can I do in Maryland? I'd like to be able to synthesize everything that you're talking about doing and go back to Maryland, and maybe we can catch up with you. Thank you.

MS. ROBINSON: Thank you, Andy. Just to wrap up, I would offer this one thought as I turn the microphone back over to Allan Sobel. That is, Allan, to whatever extent AJS can, to synthesize the kind of lessons learned that have come out of this conference, not in a lengthy transcript, though, obviously that's useful as backdrop, but in a form that can be disseminated over the Web and in hard copy very broadly within the justice system to people who are interested. It's an issue on people's minds. They're grasping to see what steps can be taken, and I think there were so many rich ideas that came out of the presentations here this morning. Barry and I both commented at the kind of wealth of ideas emerging, that some synthesis of that that can be broadly gotten out there is critical to building momentum from this conference, and I think all of us here thank you and AJS for the opportunity to be here. (Applause.)

MR. SOBEL: Thank you, Laurie. That's a great segue into what I want to do next, and that's call upon the Director of Research at AJS, Malia Reddick, and John Stookey to come up and tell you briefly what our post-conference plans are. John and Maria?

MR. STOOKEY: Malia asked me to pass along one message. Unfortunately, this deals with one of the teams in particular. She has a PhD from Michigan State University. (Laughter.)

MR. STOOKEY: Therefore, we will not be communicating with the Michigan team in any manner, shape or form because of their relationship with the University down the road. (Laughter.)

MR. STOOKEY: Seriously, two of the things we've been thinking about is how to keep the momentum going and what form that process should take. What I want to do very briefly is summarize for you the steps that the Planning Committee, which we're both part of, have been thinking about in this regard. If others have ideas as to how we might do that, we would very much like to hear from you. The first step, very consistent with what you were just saying, is we will have out to all of you within the next week a brief summary of what happened here over the last couple of days. We're going to try to synthesize things. We're going to try to do it in a fashion that, when people who work with you say "what were you doing", you can give this, if you would like, if you're interested in trying to develop press releases and so on from that or trying to communicate within your own communities – the defense community, the prosecution community, the law enforcement community – you will have a ready source of the description of what happened. That will be coming out. It will also be placed within the next week on the AJS Web site. That's our first issue and our first product. There will be coming out, after we're finished with the transcripts, a more in-depth conference report, if you will, that we again are going to try to do somewhat of a different kind of conference report. Conference reports tend to be these long, drawn-out documents – this person said this, and this person said that – and no one ever reads them. But we're going to try to use it as a synthetic document. And in this particular instance, we're going to try to take all the action plans that people have put together so diligently

here and pull out the common themes, talk about the first tasks and so on, and present it in an organized fashion that may be useful to you all to know what happened and what is likely to happen into the future. Related to the future part is that we also will be communicating with you, probably at maybe three-month intervals, where we will send out e-mails to all of you asking for follow-ups on what's going on within your particular jurisdictions. We will then again compile that information and send it back to all of you so that you know what's going on in the other states. We think that's a very, very important process. Finally, as part of the educational process, there will be an article in *Judicature* about this conference and the implications of it, and also using some of the excerpts from the transcripts of some of the important comments that were made during this time period. We're excited about this. We're excited about trying to keep the momentum going. We're particularly excited about all of your contributions. Thank you very much. (Applause.)

MR. SOBEL: We're almost there. I want to give some well deserved thanks to some special people and finally call upon our former Chairman of the Board, Justice Henry Frye. But let me ask those who are still in attendance who served on the Advisory Committee to please stand. It was really their counsel and guidance that helped us create a conference that I think has been most beneficial. If you served on the Conference Committee, please stand and let's all thank them. (Applause.)

MR. SOBEL: I also wish to thank again the Open Society Institute for its vision for funding this conference and making it all possible. Jackie, thank you so much. (Applause.)

MR. SOBEL: Really, the entire staff of AJS, in many ways, made this all possible. I want to thank some special people. Kerri Hill – Kerri, are you in the room? (Applause.)

MR. SOBEL: Kerri directed this project. Many of you have spoken with Kerri directly. She's helped you get ready for the conference. Kate Sampson, who is everybody's right-hand person. (Applause.)

MR. SOBEL: Malia Reddick, our Director of Research, who designed the survey that went out in connection with this, wrote up the survey report and will be working on the post-conference report with John Stookey. (Applause.)

MR. SOBEL: And Clara Wells – Clara is the person who took care of all the hotel arrangements. We're very satisfied with how the arrangements worked out. I hope all of you are, as well. Then Mark Wagner. I don't know if Mark is in the room, but Mark tracked the registration and helped people with various arrangements that needed to be made. Now I would like to call upon Justice Henry Frye, who served as Chairman of the Board of the American Judicature Society.

JUSTICE FRYE: Two minutes. I was on the Planning Committee. It took us two years planning this, but it was really worthwhile, and I just wanted to say that. I made a few notes this morning that I thought you might be interested in. On the 16th of January in the year 2003 – now I can't read my own notes. Let me start again. (Laughter.)

JUSTICE FRYE: On the 16th of January in the year 2003, a conference on the innocents to try to keep them free; free from incarceration for any and all crime, free from indictment and conviction at any time. Our purpose for convening, we believe, is very sound, so we gathered in Alexandria at the Hilton, Old Town. We were welcomed by Larry Hammond; we think he is the best, along with Allan Sobel, Executive Director, AJS. (Laughter.)

JUSTICE FRYE: Everything was well planned, no frills and no casino; and our keynote speaker was the Honorable Janet Reno. (Laughter.)

JUSTICE FRYE: She told us about Exonerated, a very moving play, and some of the innocent people exonerated by DNA. Her presentation set the pace, other speakers carried through, telling us what is being done and things that we can do. This morning, we had the highlights, as teams made it clear that the work will continue when we go away from here. Eleven jurisdictional teams to the mission remained true, as they laid out the plans of the things they will do. They will continue the dialogue, meeting and visiting together; going to San Diego and Phoenix, lured by the weather. (Laughter.)

JUSTICE FRYE: We won't solve all the problems, but we're finding the way. When we stop convicting the innocent, remember, we started here today. Thank you. (Applause.)

MR. SOBEL: Finally, let me thank each and every one of you. It's really your commitment to higher standards, your commitment to give of your own valuable time and energy, that makes this conference a success and, I'm sure, will make the reform efforts you undertake in your own jurisdictions a success. Thank you. (Applause.)