

Wisconsin Criminal Justice Study Commission

Summary of 1) Commission meeting held on 11/18/05 at Monona Terrace Convention Center in Madison, WI, and 2) Wisconsin Law Review Symposium held on 11/18/05 and 11/19/05.

Present for Commission meeting: Walter Dickey, Gerard Randall, Penny Beerntsen, Keith Findley, Michael Smith, Fred Fleishauer, Bob Donohoo, Gerry Mowris, Nanette Hegerty, Ken Hammond, Scott Horne, Jerry Buting, Emily Mueller, Suzanne O'Neill

Not Present: Kelli Thompson, Dan Blinka, Tom Hammer, Mike Malmstadt, John Charewicz, Floyd Peters, Dan Bach, Enrique Figueroa, Cheri Maples, Bill Grosshans, Noble Wray, Steve Glynn

Chaired by: Fred Fleishauer (filling in for Mike Malmstadt)

Staffed by: Byron Lichstein

Also present: Stephen Grohmann, Office of Justice Assistance

I. Introduction

This meeting of the Commission coincided with the Wisconsin Law Review's symposium: "Preventing Wrongful Convictions: Re-examining Fundamental Principles of Criminal Law to Protect the Innocent." The Commission members attended the symposium during the morning of 11/18/05, met over lunch from 12-1:30, and then attended the remainder of the symposium until 5:00. Some of the Commission members then attended the symposium on 11/19/05.

II. Symposium: Day 1, morning

[Although we had arranged in advance for the symposium to be videotaped for the benefit of commission members who could not attend, technical problems resulted in a failure to videotape Day 1. However, the presentations from Day 1 are summarized here in detail.]

A. Introduction

The symposium began with an introduction by its organizers from the Wisconsin Law Review, law students Tricia Schulz and Bonnie Cosgrove.

B. Presentation Introducing Symposium: Larry Marshall

The first presenter was Larry Marshall, a law professor at Stanford University and one of the co-founders of the Center on Wrongful Convictions at Northwestern

University Law School. Marshall's role was to provide an introduction to the symposium.

Marshall said that the recent revelation of wrongful convictions should teach criminal justice professionals to have humility about the accuracy of the criminal justice system. He suggested that those seeking to implement reforms should base those reforms on an overall attitude of humility (for all criminal justice professionals) rather than on the humiliation and finger-pointing (directed at those who have made mistakes) that can occur after a wrongful conviction is exposed. Marshall said that reforms based on humility are deeper and more likely to last and have the potential to lead to cooperation and partnership on other reforms that go beyond issues of innocence. In contrast, he criticized reforms based on blame and humiliation because those reforms tend to be superficial and fleeting and tend to foster a climate of non-cooperation. Marshall suggested that people in the criminal justice system should not assume bad faith on the part of their adversaries and should instead assume that adversaries' errors are the product of mistake.

Marshall noted a number of ways in which a 'humble' criminal justice system would differ from an 'arrogant' criminal justice system: a humble system would recognize the possibility of conviction of the innocent and would not punish convicted defendants more for refusing to accept responsibility or for lacking remorse; a humble system would not withhold parole for failure to complete treatment programs that require an admission of guilt; and a humble system would restrict or ban the death penalty.

C. Presentation on Tunnel Vision: Keith Findley and Michael Scott

The next presentation was from two UW Law Professors, Keith Findley and Michael Scott. Findley is Co-Director of the Wisconsin Innocence Project; Scott is a former police officer and professor on police methods. Findley and Scott addressed the topic of tunnel vision, which they defined as "flawed decisional processes that lead those in the criminal justice system to focus on a suspect and select and filter evidence of that suspect's guilt while ignoring or suppressing evidence that points away from guilt." Findley noted that tunnel vision affects everyone in the system (including police, prosecutors, judges, and defense attorneys) and has consequences for all stages of a criminal case.

Findley described a hypothetical case that begins with a mistaken eyewitness identification. Police, with a good faith belief in the accuracy of the ID, might then interrogate the suspect with an eye towards eliciting a confession. The interrogation tactics might produce behaviors in the innocent suspect that are perceived as incriminating, or worse, might elicit a false confession. In an effort to bolster the evidence against the suspect, police or prosecutors might seek out jailhouse snitch testimony that, unbeknownst to them, is false. Or forensic scientists, seeking to confirm a pre-existing belief that the suspect is guilty, might render biased interpretations of forensic data, or worse, might fabricate forensic evidence. Finally, once the suspect is charged, defense attorneys and judges might fail to question the evidence against the suspect, thereby resulting in a half-hearted defense or an unfair trial.

Findley and Scott described three causes of tunnel vision. First, Findley described cognitive tendencies present in all people, such as confirmation bias (the tendency to seek

or interpret evidence in ways that support existing beliefs, expectations, or hypotheses), belief perseverance (the difficulty people have in dislodging initial beliefs, even when the basis for those beliefs is proven wrong), and hindsight bias (the tendency to think that an eventual outcome was inevitable, or more likely or predictable than originally expected).

Second, Findley and Scott described systemic pressures that induce tunnel vision. Scott discussed systemic pressures on police, first noting that police are pressured and rewarded for making arrests, not for exonerating innocent people. He then said that it can be easy for police to become emotionally invested in a particular view of a case, which can shift the focus from determining the truth to defending the pre-existing view. Findley then discussed some systemic pressures on prosecutors, noting first the fact that success is measured by conviction rates. He also said that, for ethical prosecutors who only prosecute those persons whom they personally believe are guilty, it can be very difficult to consider the possibility of innocence once a belief in guilt has been formed and a prosecution has begun. Findley noted that most outcomes in the criminal justice system (guilty pleas, guilty verdicts after trials, appeals denied) reinforce the view that all defendants are guilty, thereby making it more difficult for prosecutors to consider the possibility of innocence.

Third, Findley described prescriptive causes of tunnel vision—meaning established rules and procedures within the criminal justice system that encourage tunnel vision. He discussed the Reid technique, a police interrogation technique that teaches police officers to make judgments of guilt or innocence and, if a judgment of guilt is made, focus on eliciting a confession rather than objectively gathering information. Findley also described the stringent rule for admissibility of third party perpetrator evidence (meaning the defendant’s right to present evidence that some third party—and not the defendant—was actually the perpetrator). He explained that, for such evidence to be admissible, defendants are required to prove that the third party perpetrator had a direct connection to the crime. According to Findley, this rule encourages tunnel vision in the fact-finder by prohibiting access to exculpatory evidence and also provides police with a disincentive to thoroughly investigate alternate suspects (because thorough investigation of an alternate suspect could lead to admissible third-party perpetrator evidence, whereas a more cursory investigation of an alternate suspect might prevent third-party perpetrator evidence from being admissible). Finally, Findley discussed how the stringent standards for proving ineffective assistance of counsel and for receiving a new trial based on newly discovered evidence are examples of tunnel vision because they rely on the view that the original outcome must have been correct and should ordinarily not be subject to question.

Findley and Scott then proposed some solutions to tunnel vision. Scott suggested that investigators and supervisors should be selected and trained with an eye towards minimizing tunnel vision. Scott also suggested varying investigators’ assignments and case responsibilities (to discourage entrenched ways of approaching cases), holding ‘case challenge’ sessions in which investigators are encouraged to challenge the prevailing case theory, having someone other than the lead investigator present the case to the prosecutor, maintaining a complete investigative log of all activities, and encouraging an open and thorough search for all potential physical evidence. Scott also suggested instilling a culture of well-intentioned fallibility in police departments.

Findley noted that education and training could be important remedies, but he suggested they may not be enough. He said that, if education and training alone are inadequate, one key remedy is creating enough transparency to allow people who do not share the guilt hypothesis to have access to evidence. This means, primarily, changing the discovery process to allow defense attorneys greater access to evidence. Findley also suggested that changes to post-conviction and appellate standards could help alleviate the effects of tunnel vision.

D. Presentation on Criminal Discovery: Mary Prosser

The next speaker was UW law professor Mary Prosser, who spoke about discovery. Prosser began by describing a case involving two related armed robberies in which the two victims identified the same suspect even though the two victims' descriptions did not match each other and the suspect did not match either description. The suspect was arrested. Soon afterward, a high school student told her guidance counselor that she had witnessed the robberies and knew the robbers. (The suspect arrested by police was not one of the people the student accused.) School authorities passed the information on to the police, but the police did not write the information in any report and did not conduct any further investigation into the student's statement. As the case progressed through court, defense counsel received vague information (during informal conversation with the investigators) about alternate suspects. Defense counsel's early attempts to follow up on the information (both through informal requests to the prosecutor and through formal discovery requests) were unsuccessful. Later on, when a different prosecutor was assigned to the case, defense counsel succeeded in finding out the name of the school and the guidance counselor, but, by that time, no one could remember the name of the witness. Lacking the ability to present the witness or her statement, the original suspect was convicted.

Prosser argued that the outcome of the case was unreliable because the defense had been prevented from having timely access to relevant facts. If the defense had been given timely access to those facts, it could have investigated the alternate suspect and perhaps developed enough evidence to exonerate the defendant and inculpate the alternate suspect.

Prosser said that the current system provides few opportunities for the defense to have access to relevant facts. She said that the preliminary hearing, one possible proceeding at which the defense could discover information, typically allows for only limited questioning of the state's witnesses by the defense. (This is because the purpose of a preliminary hearing is only to determine whether the state has enough evidence to meet the low threshold of proof required to continue the prosecution—once the state meets that low threshold, defense attorneys are typically prohibited from questioning the state's witnesses in further detail.) In addition, any discovery that could occur at a preliminary hearing often does not take place because defendants often waive preliminary hearings in exchange for receiving some benefit from the prosecution (such as earlier discovery or reduced bail).

Prosser also noted that facts are often never developed because the vast majority of cases are resolved by guilty pleas based on facts described in a police report. Prosecutors and defense attorneys, overburdened with heavy case loads, often reach

settlements without ever thoroughly investigating the facts. Defendants, told by their attorneys that turning down a plea agreement and demanding a trial could result in a much stiffer penalty, often acquiesce in early guilty pleas despite the lack of factual development. Prosser noted that the United States Supreme Court has encouraged the practice of pleading guilty on less than a full set of facts by holding that prosecutors are not required to turn over impeachment evidence before a guilty plea. (Impeachment evidence, as opposed to evidence of actual innocence, is evidence that could be used to discredit one of the state's witnesses.) Prosser said that we should not necessarily have confidence that defendants who plead guilty are actually guilty—the exoneration cases have proven that even innocent defendants sometimes plead guilty.

Prosser then described U.S. Supreme Court cases dealing with discovery and argued that the Court has given prosecutors little incentive to turn over information to the defense. She said that the Court has repeatedly emphasized that the prosecutor has no obligation to turn over the entire prosecution file to the defense. Rather, the state is only required to turn over evidence favorable to the accused that is material to guilt or punishment. ('Material' means that there is a reasonable probability that the evidence would result in a different outcome.)

Prosser criticized the U.S. Supreme Court's standard. She said that it has failed to ensure fair trials. She said that the standard vests too much discretion in the prosecutor to determine what evidence must be disclosed and that the standard does not encourage prosecutors to err on the side of disclosure. She said that the standard does not clearly explain what must be disclosed and does not impose an effective sanction for non-disclosure.

Prosser argued that police and prosecutors often fail to meet even the narrow discovery standard. She said that many of the exoneration cases have been characterized by unlawful withholding of exculpatory evidence. She said that non-disclosure occurs for a variety of reasons, ranging from bad faith to simply failing to recognize the exculpatory value of a particular piece of evidence.

Prosser then said that our legal system, contrary to the practice in criminal cases, has endorsed broad discovery in civil cases. Lawyers in civil cases have the opportunity, before trial, to ask detailed questions of the other side and to take live testimony from the other sides' witnesses.

Prosser then suggested reforms to the criminal discovery system. She began by citing 3 guiding principles:

- 1) we should bring healthy skepticism to the evidence that initiates a prosecution, rather than turning discovery into a guilt-assumptive process,

- 2) we should keep in mind the obligation of the prosecutor to do justice, which includes protecting the innocent as well as convicting the guilty, and the duty of defense counsel to investigate as part of providing effective representation,

- 3) we should start with the presumption that all relevant evidence known to the police and prosecution should be discoverable. Rather than requiring the defense to meet a burden of persuasion that the information should be disclosed, the prosecution should have the burden of showing why certain information should not be disclosed – for example, because of statutory privilege, or because disclosure could place a witness at risk of harm.

Prosser then suggested the following specific reforms:

- 1) Train prosecutors and defense attorneys in the discovery rules.
- 2) Implement a mandatory open file policy, meaning that the prosecutor's entire file would be available to the defense. (Prosser noted that this would not be a panacea, because it would only provide access to information that has been reduced to writing and placed in the prosecution's file. It would not account for exculpatory evidence that, for example, was never reduced to writing by the police.)
- 3) Provide more detailed definitions of what evidence must be disclosed, thereby reducing the likelihood of non-disclosure based on ignorance that the rules require disclosure of a particular piece of evidence.
- 4) Implement deadlines ensuring that discovery is given early in a case and is not contingent on waiving rights, such as the right to a preliminary hearing.
- 5) Develop additional mechanisms, such as depositions, to provide the defense access to prosecution witnesses before a trial. Several states—Iowa, Missouri, New Hampshire, Florida, North Dakota, Vermont, and Texas—already allow such depositions, and Prosser said that Florida's 40 years of experience are a successful example.

E. Presentation on Eyewitness Identification: Gary Wells

The next speaker was Gary Wells, a psychology professor from Iowa State University who has spent his career researching eyewitness identification. Wells first summarized research findings and reforms in the field of eyewitness identification, including a brief discussion of double-blind, sequential photo arrays and live lineups.

He then described a new idea, which he called the "Probable Cause Proposition." Wells explained that, even in the most carefully constructed lineup, an innocent suspect will be at risk for misidentification. The frequency of mistaken identifications depends on how often innocent suspects are put in lineups and photo arrays. (The more often innocent suspects are placed in lineups and photo arrays, the more often they will be misidentified). Thus, police could reduce the frequency of misidentifications by reducing the frequency of placing innocent suspects in lineups and photo arrays; this could be done by ensuring that suspects are placed in lineups and photo arrays only when there is other independent evidence of guilt. However, he said many police departments do not have criteria for when a suspect will be put in a lineup or photo array—sometimes nothing more than a hunch is required. Wells argued that, in order to reduce the risk of mistaken identification, police should only conduct lineups or photo arrays when they have other significant evidence pointing to a suspect. This will reduce the rate at which innocent suspects are put in lineups, thereby reducing the rate of mistaken identifications.

Wells also said that, once a witness has made a mistaken identification, that witness's memory is ruined for any future identification procedures that might contain the real perpetrator. Therefore, Wells said that his approach, in addition to protecting the innocent, would also preserve the integrity of eyewitnesses' memories by reducing the chance that an eyewitness will make a mistaken identification and thereby contaminate his/her memory.

III. Commission Meeting

The Commission members then met as a group over lunch. Fred Fleishauer presided over the meeting because the Chairman, Mike Malmstadt, was absent.

Fleishauer began by summarizing the Commission members' priorities (as collected by Byron after the last meeting) about what issues the Commission should consider first. He noted that not everyone had replied with their priorities; however, of those that had replied, the rankings were as follows: 1) False confessions/ interrogation techniques, 2) Funding for technology to videotape, store, catalog, retrieve, and transcribe police interrogations, 3) Tunnel vision. Fleishauer also noted that there was a tie for fourth priority between 'access to, training, and pay of defense attorneys' and 'role and training of prosecutors.'

After describing the priorities, Fleishauer opened the meeting up to discussion of the priorities and to whether those priorities had changed given the symposium presentations so far. Michael Smith and Fleishauer said that they had been impressed by some of the remedies suggested for tunnel vision and that it might be worth brainstorming about further remedies. Gerry Mowris said that, after Professor Prosser's presentation, he would put discovery as a high priority. Jerry Buting agreed, noting that he believed the idea of criminal depositions might be worthwhile. Bob Donohoo said that he had participated in a committee that looked at the effectiveness of criminal depositions in Florida and that the committee had found the Florida experience was negative. Buting suggested that the Commission should look at the Florida Supreme Court's review of the issue. Donohoo said that he does not think criminal depositions can be brought to Wisconsin.

Keith Findley suggested that the Commission could look at other possible remedies for the discovery issue. Michael Smith and others identified the problem as being the lack of timely access to relevant facts, in part because police reports often describe only part of the story. Fleishauer described his experience in Uruguay, where both sides are provided with much more open access to evidence. He said that, although it is not a perfect system, it seemed to work well.

The Commission members then discussed the fact that charging decisions are typically based on an incomplete set of facts, usually taken from a police report that only summarizes the story of the case and does not include all the relevant details. The members discussed the 'charging conferences' that used to occur in Milwaukee County. (During the 'charging conferences,' prosecutors would confer with defense attorneys, police officers, and other sources of information before making a charging decision. Today, charging decisions in Milwaukee County are typically based only on written police reports.) Both Walter Dickey and Donohoo agreed that the charging conferences had been a good thing, because they resulted in better-informed, more accurate charging decisions. However, Donohoo said that the charging conferences had been abandoned because of time and resource constraints and that there isn't money to bring them back now. Smith said that it may have been abandoned in Milwaukee County, but that doesn't mean the Commission can't consider it for other places. Other members noted that, in smaller counties, charging decisions are made based on more expansive fact investigation.

Donohoo noted that, in Milwaukee County, defense attorneys are given access to the prosecutor's entire file. The problem, however, is that often the file doesn't contain the complete story of the case because the investigation conducted by the police did not document the complete story. Dickey then said that the issue becomes how the system can encourage early fact-development. Donohoo also noted that the revisions to the Code of Criminal Procedure will now require that all police reports be turned over at the initial appearance. Many members lauded this change but also noted that it still does not address the issue of early fact development. Nanette Hegerty noted that one issue is hiring and training officers who have the writing skills to convey the full description of the case in a police report.

The Commission members then discussed what their work product would be. Emily Mueller asked whether the members should determine the product before taking up specific issues. The members discussed this question and then agreed that the best procedure is to pick an issue, study it, and then determine what, if any, work product could contribute to improving the system with respect to that issue.

Fleishauer then returned to the question of what issue should be taken up at the next meeting. He noted that, even though the presentation on discovery had stimulated discussion, discovery had not been a high priority before the presentation. The members agreed that, consistent with their written priorities, the Commission should take up false confessions first. Donohoo suggested that one question the Commission should consider is whether videotaping cures false confessions.

Buting said that he had not returned his list of priorities because he wanted to see the symposium presentations first. He noted that he was particularly intrigued by the idea of a post-conviction commission (the topic of one of the afternoon's presentations). He suggested that he'd like to see the remainder of the presentations and then perhaps discuss people's priorities again at that point. Scott Horne said that, in La Crosse, they have a commission that convenes every time there's a child death. He said that most jurisdictions have that kind of a commission after certain events. Findley said that, as far as 'innocence commissions' are concerned, there are two kinds: one kind is for resolving whether claims of innocence are valid and the other is for post-exoneration autopsies. As to Commissions that determine the validity of claims of innocence, Horne wondered whether the number of request is overwhelming. Findley said that there are many requests, but not an overwhelming number.

Dickey said that the idea of post-exoneration autopsies seems fitting; the Department of Corrections used to conduct similar autopsies in the aftermath of noteworthy events. Smith said that such autopsies could be useful not only in cases where things go wrong, but also in cases where things go right.

Donohoo said that, in the 3 clear wrongful convictions cases out of Milwaukee County, it took very little time to determine what went wrong. The cases consisted of 1) eyewitness misidentifications and 2) police failure to follow a different investigative lead. Donohoo also said that the Milwaukee County DA's Office gets a very large amount of letters from inmates claiming innocence. Findley said that the Wisconsin Innocence Project gets a large, but manageable, number of requests.

Fleishauer suggested that, for the next meeting, the Commission should take up the issue of false confessions in detail. He suggested that Byron should work with the Chairman and the Commission members before the next meeting to come up with

reading materials or presentations to inform the discussion. The other members agreed that this would be an appropriate plan. Keith Findley added that the false confession issue is timely because he believes the Wisconsin Department of Justice is preparing to conduct training on electronic recording and on how to conduct interrogations that will be recorded and played for juries. Findley suggested that the Commission's work on false confessions could complement and amplify the efforts already begun by the Wisconsin DOJ. Byron said that, in preparation for the next meeting, he and Ken Hammond could discuss how the WI DOJ's efforts and the Commission's work could fit together.

Fleishauer said that, if time permits, the discussion of false confessions at the next meeting will be followed by a more in-depth discussion of what other issue to take up, particularly in light of the symposium presentations.

IV. Symposium, Day 1, afternoon

A. Presentation on Inadequacy of Defense Counsel: Rod Uphoff

After the Commission's meeting over lunch, the symposium resumed with a presentation by Rod Uphoff, a law professor from the University of Missouri. Uphoff described a number of myths about the criminal justice system that inhibit reform and contribute to wrongful convictions. First, he noted the myth that all defendants receive effective assistance of counsel. Uphoff said that adequate defense counsel is among the most important safeguards in ensuring the accuracy of the criminal justice system. Without adequate counsel, defendants are unable to exercise other rights designed to protect the innocent. Furthermore, Uphoff argued that, despite the ideal of equal representation for the rich and poor alike, the reality is that the poor receive vastly inferior representation.

Uphoff said that approximately 80% of people accused of felonies are indigent and qualify for a publicly-funded attorney. However, Uphoff said that publicly-funded attorneys are too often overworked and underfunded, lacking the time and resources to conduct thorough factual investigation or retain expert testimony to challenge the prosecution's case. High case loads and inadequate pay lead to a need to process a high volume of cases, primarily through guilty pleas.

In addition to problems with publicly-funded attorneys, Uphoff said that some very poor people do not even qualify for a publicly-funded attorney. Indigency criteria vary from jurisdiction-to-jurisdiction, and often the indigency bar is set so low that it excludes a large number of people who do not have enough money to afford an attorney.

Uphoff next discussed the myth that police will properly collect, handle, store, and analyze forensic evidence. He said that the U.S. Supreme Court has declined to provide an effective remedy in cases in which the police mishandle or lose potentially exculpatory evidence. He also said that defendants often lack the resources to hire an expert to challenge or review the prosecution's forensic analysis.

Uphoff then discussed the myth that cross examination will expose the truth. He said that cross-examination is too often conducted by unskilled, unprepared defense attorneys. Furthermore, he said that even skilled cross-examination can sometimes be insufficient to counter the testimony of a convincing witness, such as a compelling eyewitness.

Uphoff then discussed the myth that innocent people don't confess and plead guilty to crimes they didn't commit. He said that many people in the criminal justice system, including Supreme Court Justices, have been slow to acknowledge the reality that innocent people sometimes confess to crimes they didn't commit (in the belief that confessing is the only way to lessen their ultimate penalty) and then plead guilty to those crimes (often because their defense attorneys lack the time and resources to challenge the prosecution's case).

Uphoff's next myth was that guilty defendants escape on technicalities because they are protected by too many rights. Uphoff said that high profile cases such as the O.J. Simpson and Kobe Bryant cases have fostered an inaccurate perception that the criminal justice system has too many potential loopholes that allow the guilty to go free. According to Uphoff, the most commonly discussed defendants' rights (such as Miranda rights and search and seizure rights) very rarely result in the prosecution losing the use of evidence and even more rarely lead to a guilty person escaping conviction.

Uphoff recommended a number of reforms to the system, including some discussed in other presentations, such as videotaping of interrogations and eyewitness identification reform. Most prominently, however, Uphoff called for the system to recognize the inadequacy of defense counsel for the indigent and to provide adequate funding for representation of indigent defendants. In addition, Uphoff emphasized increased training in the collection, storage, and analysis of forensic evidence and increased defense access to crime labs and forensic experts. He noted that forensic evidence is often the most accurate evidence and, if collected properly, can reduce reliance on less reliable kinds of evidence.

B. Presentation on Interrogations of Juveniles: Ken King

The next speaker was Ken King, a law professor from Suffolk University. King's presentation focused on the admissibility of evidence obtained during interrogations of juveniles. Specifically, King analyzed the standard courts use to evaluate whether a juvenile validly waived his/her *Miranda* rights. (For the non-lawyers: recall that, under the U.S. Supreme Court case *Miranda v. Arizona*, statements made to police during an interrogation are not admissible in court unless the suspect was first advised of his/her rights—to remain silent and to have access to a lawyer—and validly waived those rights. If the suspect did not validly waive his/her rights, the suspect's statements are inadmissible. Courts often evaluate waivers by asking if they were 'knowing, voluntary, and intelligent.')

King's major point was that the current standards for evaluating juveniles' *Miranda* waivers do not sufficiently protect children from unintelligently waiving constitutional rights.

King began by saying that children generally lack the cognitive capacity and emotional maturity to understand and intelligently waive *Miranda* rights. He said that recent studies of the brain show major physiological differences between adults and juveniles and that brain development continues throughout late adolescence. He cited studies showing that children have very low comprehension of what the *Miranda* rights mean (much lower comprehension than adults). Furthermore, he said that the decision to waive *Miranda* rights is a complicated cognitive task, requiring the ability to retain

information in memory while recognizing future possibilities and speculating on the likelihood of those possibilities. In making this kind of decision, King said that adolescents are much more “present focused” (meaning they tend to overlook the long range consequences of their choices and instead behave in a manner that satisfies their immediate needs) and impulsive than adults and are more susceptible to peer pressure. He described research suggesting that juveniles making the decision whether to waive *Miranda* rights are hard-wired to ‘react rather than think.’ King said that these general characteristics of juveniles are compounded by the fact that most juveniles in the delinquency system are at the lower range of cognitive and emotional functioning relative to other juveniles.

King said that, early on, the U.S. Supreme Court recognized the substantial differences between children and adults and called for “special caution” in evaluating the admissibility of statements made by juveniles during interrogation. Furthermore, in determining admissibility, the Court gave great weight to whether an adult was present with the juvenile during the interrogation. However, King said that later decisions watered down the special consideration given to juveniles and imported the *Miranda* standards from adult cases. According to King, the result is that the current system treats juvenile waivers of *Miranda* rights similar to adult waivers, thereby failing to give effect to the substantial differences between children and adults.

King said that, currently, 35 states apply a ‘totality of circumstances’ test to determine whether a juvenile validly waived *Miranda* rights. (‘Totality of the circumstances’ means that judges consider a list of factors and decide, under all the factors, whether a waiver of *Miranda* rights was knowing and voluntary. Under a ‘totality of the circumstances’ test, no single factor is determinative. As described below, King disagrees with the ‘totality of circumstances’ approach and instead believes that courts should adopt a test in which a single factor—the presence of a lawyer—is determinative.) ‘Totality of the circumstances’ tests for juvenile *Miranda* waivers typically direct judges to consider factors such as: age, intelligence, education, maturity, presence or absence of a parent, prior experience with the courts and police, and the nature of the interrogation, including how the *Miranda* rights were administered or explained to the child.

King said that, although in theory courts are supposed to consider youth and low intelligence, in practice very young children and/or children of low intelligence are often found by courts to have validly waived *Miranda* rights. Therefore, including such factors in a ‘totality of the circumstances’ test does little to protect young children or children of low intelligence.

King then said that, if a parent was present during a purported waiver of *Miranda* rights by a juvenile, courts almost always conclude that the waiver was valid (even though no single factor is determinative under a ‘totality of the circumstances’ approach). King argued that this should not necessarily be the case, because: parents will most often lack the experience and understanding necessary to advise a child about the child’s legal rights; sometimes, it is the parent who turned the child in to police or provided information leading the police to interview the child; parents will often feel a sense of urgency or public duty to solve the crime and, believing that the child was not involved, join with the police in encouraging the child to tell the truth and answer questions. King argued that, while this may be good, developmentally sound parenting, it is not a sound

strategy for protecting a child's constitutional rights and may lead the child to a lengthy period of incarceration. King said that courts should not force parents to choose between legally sound advice and good parenting

King argued that courts should adopt a new test for whether a juvenile has validly waived his/her *Miranda* rights. He said that courts should conclude that a juvenile cannot make a knowing and intelligent waiver of *Miranda* unless represented by counsel who is present during interrogation and has adequate time to counsel the child before questioning commences. King said that this new rule would account for the cognitive and emotional differences between children and adults and would also recognize that only an attorney (not a parent) is capable of adequately protecting a juvenile's constitutional rights.

C. Presentation on Post-Conviction Innocence Commission: Christine Mumma

The next speaker was Christine Mumma, an attorney with the University of North Carolina's Center on Actual Innocence and the staff attorney for the North Carolina Chief Justice's Commission on Actual Innocence. Mumma talked about proposed legislation in North Carolina that would create a state commission to review prisoners' post-conviction claims of innocence.

Mumma first explained the difference between the various commissions (and proposed commissions) in North Carolina. She said that, in 2002, after a series of high profile exonerations in North Carolina, the Chief Justice of the North Carolina Supreme Court established a commission (the Chief Justice's Commission on Actual Innocence) to examine problems in the criminal justice system that can lead to wrongful convictions. That commission exists today and has 32 members. In order to achieve maximum credibility, the membership is heavily weighted towards law enforcement representatives. The commission first addressed eyewitness identification reform and taping of interrogations.

Next, the Commission decided to address the quality of post-conviction relief for claims of innocence. The Commission concluded that North Carolina's current system for processing claims of innocence was not working, in part because of the large number of claims. Furthermore, the Commission concluded that the legal system's emphasis on finality tended to result in frequent findings of procedural default (meaning that inmates who had unsuccessfully appealed, or who had passed up their initial chance to appeal, were not allowed to present new claims of innocence to the courts). The Commission conducted research about Great Britain's Criminal Cases Review Commission (a governmental body that reviews post-conviction claims of innocence in Great Britain), finding that the CCRC has 70 employees, a budget of \$16 million, and reverses convictions in 2.4% of the cases it reviews. Mumma said that North Carolina's Commission knew it couldn't have the budget of the CCRC but that it found the CCRC's example instructive.

In order to address North Carolina's problems in reviewing post-conviction claims of innocence, the Chief Justice's Commission on Actual Innocence proposed legislation that would create a state commission to review innocence claims. Mumma said that the legislation first defines what claims of innocence will be eligible for review (only living persons; only felony convictions; anyone can assert a claim of innocence on

behalf of an inmate; the claim must assert complete innocence to the crime charged; there must be ‘some credible new evidence of innocence.’)

The proposed commission would have a staff of attorneys and investigators. The staff, with the assistance of the law schools, would screen claims of innocence. The staff would present claims to an 8 member commission made up of 1 judge, 1 district attorney, 1 victim’s advocate, 1 defense attorney, 1 layperson, 1 sheriff, and 2 discretionary appointees (appointed by the Chief Justice of the North Carolina Supreme Court and the Chief Judge of the North Carolina Court of Appeals). If 5 of the 8 members agree that a claim of innocence has “sufficient evidence to merit judicial review,” then the claim is reviewed by a 3 judge panel. If all 3 members of the panel agree that there is “clear and convincing evidence of factual innocence,” then the conviction is reversed. If 2 of the 3 panel members agree, then the case is reviewed by the North Carolina Supreme Court. There is no right to appeal the decision of the panel.

In order to have his/her case investigated, the defendant must waive all procedural safeguards, such as the right to self-incrimination. However, a defendant is not required to have exhausted all other available remedies, and a claim to the commission does not foreclose other avenues of judicial relief.

If the commission decides to investigate a claim, the prosecuting attorney must make his/her file available to the commission’s investigators. The commission’s proceedings are not open to the public. However, victims must be notified of claims of innocence and are allowed to attend the commission’s proceedings.

The legislation establishing the commission passed the North Carolina house in August, 2005, and is expected to be considered by the Senate in May, 2006.

D. Roundtable Discussion: Larry Marshall, Gary Wells, Keith Findley, Rod Uphoff, Richard Leo, Ken King; moderated by: Rich Rosen

The final event of Day 1 was a roundtable discussion between some of the presenters. The panel was moderated by Rich Rosen, a law professor from the University of North Carolina.

The panelists first discussed how reforms to protect the innocent can be most effectively advanced. Larry Marshall said that progress is most easily achieved when people from different parts of the criminal justice system work together to implement reforms. He advocated for creating a climate of cooperation in which the adversaries assume good faith and accept that mistakes happen without bad faith. Gary Wells said that, in his experience, reform is possible only when law enforcement representatives are a prominent part of the push for reform. Wells said that changes cannot occur only through the efforts of defense attorneys. Wells and other panelists added that defense attorneys need to be prepared to help prosecutors and police officers advance reasonable pro-law enforcement reforms as well.

Rosen raised the question of to what extent innocence-related reforms force us to consider how to balance the need for effective law enforcement with protection of the innocent. Rosen noted the example of the *Youngblood* case, in which the U.S. Supreme Court held that inadvertent destruction of evidence by police typically will not in itself require the dismissal of charges against a defendant.

That question led to a discussion of the situation in New Orleans, in which Hurricane Katrina led to the destruction of evidence. The panelists agreed that effective law enforcement should not be automatically sacrificed when evidence is lost due to circumstances beyond human control.

Rosen then asked the panelists to discuss whether we have a ‘good’ criminal justice system. Uphoff pointed out that the question of whether the system is ‘good’ or ‘bad’ depends on the standard of comparison. Findley said that, whether we believe the system is good or bad, we all recognize room for improvement. Leo said that he believes it is important to have a system for counting and categorizing mistakes made by the criminal justice system, because this data is essential to identifying problems and devising reforms.

Finally, the panelists discussed whether new technologies will ultimately result in a foolproof criminal justice system. The panelists agreed that the potential for error will always exist, primarily because no amount of technological advancement will remove the human factor from the system.

V. Symposium, Day 2

A. Presentation on Prosecutorial Discretion: Peter Joy

The first presentation on the symposium’s second day was by Peter Joy, a law professor at Washington University in St. Louis. Joy began by citing statistics showing that prosecutorial misconduct has been present in many of the exoneration cases. He said that a major theme of his talk would be that prosecutors have too much discretion, too little guidance, and too few mechanisms to enforce what rules do exist.

Joy said that existing ethics rules for prosecutors are not significantly different than ethics rules for other lawyers. He said this does not make sense given that prosecutors are generally expected to be ‘ministers of justice,’ therefore playing a somewhat less adversarial role than other kinds of lawyers.

Joy recommended a number of reforms aimed at improving prosecutorial practices.

1) Limit compensation to witnesses. Joy noted that prosecution witnesses often receive benefits for testifying that go beyond the benefits defense witnesses can receive. Joy argued that compensating prosecution witnesses can undermine the integrity of the truth-seeking process.

2) Require District Attorneys to present exculpatory evidence to grand juries. (Wisconsin, unlike some other states, does not have a grand jury system. The role of a grand jury is to determine whether a prosecutor has enough evidence to go forward with criminal charges against a suspect. Obviously, the amount of evidence necessary to move past the grand jury stage is less than the amount of evidence necessary to convict.) Currently, Supreme Court cases do not require prosecutors to present exculpatory evidence when asking a grand jury to allow charges against a suspect. Joy suggested that requiring prosecutors to do so could weed out some instances of wrongful prosecution at an earlier stage of court proceedings.

3) Limit charges to those that can be proven beyond a reasonable doubt. Joy noted that prosecutors often charge a suspect with many counts—sometimes including

counts that could not be proven beyond a reasonable doubt—in order to create leverage for the suspect to plead guilty. Joy suggested that ending this practice could reduce the incidence of innocent defendants pleading guilty in order to avoid stiff penalties.

4) Require prosecutors to pursue all relevant exculpatory evidence. Joy suggested that prosecutors—perhaps affected by tunnel vision—sometimes choose not to pursue evidence pointing away from defendants. He suggested that a rule requiring prosecutors to pursue such evidence could help prevent wrongful convictions.

5) Prohibit prosecutors from using cross-examination to discredit truthful witnesses. Joy suggested that discrediting a truthful witness inhibits the truth-seeking process because it encourages the fact-finder to disregard the truth. He said that prosecutors sometimes nevertheless engage in such cross-examination in order to increase the chances of a guilty verdict.

6) Require prosecutors to elicit information from witnesses only if the prosecutor has reason to believe the information is true. Joy suggested that eliciting potentially false information from witnesses inhibits the truth-seeking process because it may lead the fact-finder to base a verdict on false information. He said that prosecutors sometimes nevertheless elicit such information in order to increase the chances of a guilty verdict.

7) Prohibit appeals to emotion. Joy suggested that prosecutors should not be allowed to appeal to emotion because such appeals can lead the fact-finder to reach a verdict not based on the evidence, a possibility that can inhibit the truth-seeking process.

8) Improve discipline for Brady violations. Joy argued that the current sanction for Brady violations (meaning the prosecution's failure to provide the defense with exculpatory evidence) is not sufficiently strict to discourage such violations. He argued that the system should tighten the sanctions.

B. Presentation on Defense Attorneys for the Indigent: Steve Bright

The next presenter was Steve Bright, a law professor and Director of the Southern Center for Human Rights. Bright said that most defendants represented by publicly-funded defense attorneys are poor minorities. He said that the criminal justice system is underfunded and overwhelmed and that indigent defense suffers more than any other facet of the system.

Bright said that many poor people do not even qualify for publicly-funded attorneys. He noted that, similar to many other states, Wisconsin's definition of indigency is 33% of the federal poverty line. With these low indigency bars, many defendants are processed through the system without attorneys. Many of these unrepresented defendants meet with the District Attorney for a very brief period of time and then plead guilty without any significant understanding of the charges against them or the potential penalties.

Bright then related a number of stories describing the low quality of representation in many capital cases. He noted that two disbarred Houston defense attorneys had represented 24 men currently on death row.

Bright noted 3 recommendations that he believes could improve the quality of indigent defense: 1) create and support independent public defender offices (like those in Wisconsin), 2) provide resources to lower the case loads of defense attorneys

representing indigent defendants, and 3) ensure that defense attorneys are held accountable for their representation of indigent clients.

Finally, Bright said that courts and legislatures have been slow to implement reforms that might improve the quality of defense for the indigent, and he therefore said that lawyers should take responsibility for raising the quality of indigent defense.

C. Presentation on False Confessions: Steve Drizin and Richard Leo

The next presentation was by Steve Drizin, a law professor and Director of the Center on Wrongful Convictions at Northwestern University, and Richard Leo, a professor of criminology, law, and psychology at the University of California-Irvine.

Drizin began by describing the notorious Central Park jogger case, in which a number of juveniles were convicted of rape and murder based on confessions later proven to be false by DNA evidence. After DNA evidence exonerated the defendants, the following problems with the confessions were discovered: 1) the juveniles' accounts differed on nearly "every major aspect of the crime, who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault and when in the sequence of events the attack took place," 2) the confessions were not "corroborated by, consistent with, or explanatory of objective independent evidence," 3) the confessions were filled with significant errors about information that the true perpetrators would have known, and 4) the confessions did not lead police to any information they did not already know.

Drizin then described the two existing legal rules designed to prevent unreliable confession evidence from being presented to a jury: 1) the corroboration rule, and 2) the rule that confessions are inadmissible if they are not obtained voluntarily.

He first explained that the corroboration rule is broken down into two sub-parts. One of the sub-parts, the *corpus delecti* rule, holds that confession evidence can only lead to conviction if the confession is corroborated by evidence that a crime was actually committed (such as evidence of some death, injury, or loss). Drizin argued that the *corpus delecti* rule is not a sufficient remedy for false confessions because it only requires proof that a crime was committed; the rule does not protect against false confessions when a crime has been committed but the innocent confessor was not the perpetrator. Drizin said that the vast majority of false confessions occur in cases in which a crime actually occurs and that therefore the *corpus delecti* rule does not provide substantial protection against false confession evidence.

The other sub-part of the corroboration rule requires that the confession itself (rather than merely the existence of a crime) be corroborated by other independent evidence. Drizin said that this requirement is superior to the *corpus delecti* rule but that it still does not provide substantial protection against false confessions because the amount of corroboration required is very small, thereby not preventing convictions based on false confessions. Drizin also noted that this version of the corroboration rule has not been widely adopted.

Drizin then discussed the other traditional legal safeguard against unreliable confession evidence, the voluntariness test, which holds that confession evidence is inadmissible if the confession was obtained against the suspect's 'free will.' The focus of the voluntariness test is not on whether the confession conveys accurate, reliable

information, but on whether it was obtained against the suspect's will. Drizin argued that the voluntariness test is inadequate because, as the false confession/DNA exoneration cases show, the test does not screen out false confessions.

Leo then discussed psychological research on false confessions over the last 20 years. He said that the research has: 1) documented the existence of false confessions, 2) analyzed the psychology of the interrogation process that leads to false confessions, 3) analyzed situational and individual risk factors that can lead to false confessions, and 4) analyzed the impact of confession evidence on juries (he said that false confession evidence is very powerful to a jury, as evidenced by the fact that a false confessor stands a 73-81% chance of conviction if his/her case goes to trial).

Leo then described a system for evaluating the reliability of confession evidence. He suggested that criminal justice professionals should analyze the fit between the suspect's post-admission narrative (the suspect's account of how and why he/she committed the crime) and the known details of the crime. Leo suggested that, for true confessions, the suspect will: 1) possess non-public knowledge about dramatic and mundane crime facts not likely guessed by chance, 2) be able to lead police to new, missing or derivative crime evidence, 3) be able to explain crime scene anomalies, and 4) provide a description consistent with physical and independent case evidence.

Leo and Drizin then proposed a new test for the admissibility of confession evidence. The touchstone of the test is that confession evidence is admissible only if it is reliable. The proposed test would divide confessions into two categories: those that are electronically recorded and those that are not. For recorded confessions, admissibility would depend on a 3 factor totality of the circumstances test (meaning that a judge would consider the following three factors and determine if the confession is sufficiently reliable to reach the jury): 1) does the confession provide information about the crime not known to the public?, 2) does the confession lead law enforcement to evidence not already known?, 3) does the confession provide details that "fit" with objectively knowable facts of the crime?

For unrecorded confessions, judges would first determine whether the state has proven by clear and convincing evidence that recording was infeasible. If the state proves infeasibility, judges would then determine if the confession led law enforcement to evidence unknown to them. If the confession did not lead law enforcement to unknown evidence, it would be inadmissible. If it did lead law enforcement to unknown evidence, the judge would allow the confession to reach the jury if it satisfied a totality of the circumstances test (considering the same factors mentioned earlier: whether it produced facts unknown to the public and whether it fit objectively known facts).

D. Presentation on the Future of Innocence-related Reforms: Rich Rosen

The next speaker was Rich Rosen, a law professor from the University of North Carolina. Rosen said that, until the mid 1990's, people in the criminal justice system believed the system was absolutely infallible. To illustrate this point, Rosen discussed a U.S. Supreme Court case called *Herrera v. Collins* in which Justice Sandra Day O'Connor suggested that our system does not convict innocent people because of the many Constitutional rights that protect criminal defendants. Rosen said that, after the case came out, no one challenged O'Connor's suggestion. Furthermore, Rosen said that,

based on his own experience as a criminal defense attorney, the belief in the system's infallibility extended to defense attorneys as well.

Rosen then discussed Justice O'Connor's assumption that the criminal law decisions of the Warren era (referring to the former U.S. Supreme Court Justice, Earl Warren, who was on the Court from 1953-1969) were innocence-protecting decisions. Rosen argued that the *Miranda* decision (explained above), for instance, was not an innocence-protecting decision because it did little to prevent police from eliciting false confessions. Rosen said that the Court rejected interrogation-related remedies, such as requiring a lawyer to be present during interrogation or requiring interrogations to be conducted in public, that would have been more protective of innocence. He made a similar argument about the U.S. Supreme Court decisions dealing with eyewitness identification, stating that they did little to implement reforms that would reduce the likelihood of misidentification. Finally, Rosen stated that the rules for criminal discovery created in *Brady* (explained above) were also not substantially protective of innocence.

This discussion of the Warren-era cases led Rosen to conclude that we should not rely on the U.S. Supreme Court to implement reforms that prevent wrongful convictions. He characterized the U.S. Supreme Court as a group of 9 people without experience in criminal justice and without power to enforce their decisions. Rosen said that, even if the U.S. Supreme Court were to dictate legal rules that would protect the innocent, these rules would often not be enforced because of political realities (for instance, most elected trial judges will be very hesitant to suppress an eyewitness identification, no matter how flawed the procedure used to elicit the identification).

Rosen then said that, unlike the Warren-era reforms, the current innocence-related reforms have been practical and effective because they have been addressed to the specific, immediate causes of wrongful convictions rather than to a 'grand scheme of constitutional interpretation.'

Rosen discussed the future of innocence-related reforms. He said he has doubts that the current reform movement will continue, but he believes the best strategy for prolonging the reform movement is to make it non-adversarial and emphasize that innocence is an issue in which we all have a stake. He said that he believes reforms aimed at protecting the innocent will often be harmful to the guilty (for example, he pointed to videotaping of interrogations, which he believes will substantially increase the chances of convicting the guilty).

Finally, Rosen discussed two areas of the criminal justice system that he believes should be most impacted by the recent acknowledgment of the criminal justice system's fallibility. First, he said that the DNA exoneration cases should change the conversation about the death penalty. Second, he said that, although he applauds efforts to prevent wrongful convictions, he believes many parts of the country have inadequate systems for remedying wrongful convictions after they've already occurred. He said the interest in finality leads to an almost insurmountable assumption of guilt that closes avenues of post-conviction relief, and he said we should work toward developing more accessible avenues of post-conviction relief.

E. Presentation on a New Model for Criminal Justice Reform: Kate Kruse

The next presenter was Kate Kruse, a law professor from the University of Nevada-Las Vegas. Kruse first summarized the eyewitness identification reforms in Wisconsin, including the Wisconsin Attorney General's Model Policy, the Wisconsin Supreme Court's decision in *State v. Dubose* and the State Legislature's new law requiring law enforcement authorities to have written policies on eyewitness identification.

Kruse then said that the Wisconsin eyewitness identification reforms are consistent with a new paradigm for governmental reforms. The new paradigm, known as 'experimentalist governance,' adopts a 'bottom-up' approach in which state governmental entities, rather than telling local entities what to do, give local entities guidance and implement laws that encourage experimentation. Kruse described 4 key concepts of experimentalist governance: 1) empowering local entities with authority and encouraging experimentation, 2) provisional rule-making, in which state regulatory entities give local entities discretion but also ensure that local entities will be held accountable for the manner in which discretion is exercised, 3) benchmarking, in which local entities are encouraged to measure outcomes using common metrics, and 4) transparency and information-pooling, in which state entities provide information to local entities to inform local decision-making. Kruse said that, in experimentalist governance, top-down institutions (such as state legislatures, state regulatory agencies, and state supreme courts) take background roles that emphasize providing guidance and information.

Kruse then discussed experimentalist governance in the context of the Wisconsin eyewitness identification reforms. She said that the top-down institutions have created an infrastructure for reform because the state legislation requires law enforcement to articulate their practices and consider benchmarks, the Attorney General guidelines provide a source of data and information for development of policies, and the Supreme Court decision in *Dubose* motivates compliance with the reforms.

Kruse then addressed how Wisconsin's reformers were able to succeed. She said the formula for success included 1) rhetoric of a shared systemic problem rather than blame, 2) patient, face-to-face encounters to win converts, 3) the use of pooled information about mistakes and effective practices through the National Innocence Network, and 4) local partnerships between practitioners, policy-makers, and academics.

Kruse concluded by noting some potential problems and unanswered questions about the Wisconsin eyewitness reforms. She noted that the *Dubose* case implements a difficult tradeoff, in that the new rule for the admissibility of show-up evidence somewhat ironically allows show-ups to be conducted in situations when the police have little evidence that the suspect is the perpetrator. (The irony is that the protection against misidentification is at its lowest when the evidence against the suspect is weak.) Kruse further noted that she is skeptical that the *Dubose* case will bring about long-term compliance with the eyewitness identification reforms. She suggested that the challenge for the future (and for the Wisconsin Criminal Justice Study Commission) is how to build-in long-term compliance with the eyewitness identification reforms.