

Wisconsin Criminal Justice Study Commission

Summary of Meeting held on 8/31/05 at State Bar Center, Madison, WI

Present: Mike Malmstadt, Kelli Thompson, Gerry Mowris, Enrique Figueroa, Ken Hammond, Keith Findley, Noble Wray, Nanette Hegerty, Steve Glynn, Dan Bach, Floyd Peters, Jerry Buting, Penny Beerntsen, Bob Donohoo, Fred Fleishauer, Suzanne O'Neill, Steve Bablitch, John Charewicz, Michael Smith, Walter Dickey (afternoon only), Dan Blinka (afternoon only),

Not Present: Scott Horne, Emily Mueller, Cheri Maples (or her designee, Bill Grosshans), Tom Hammer, Gerard Randall

Staffed by: Byron Lichstein (UW Law School), Lisa Roys (State Bar)

Transcribed by: Gwen McCutcheon (Premium Business Services)

Introduction

The meeting began with an introduction by Keith Findley. (1-6). Findley first noted that there have been at least 340 exonerations between 1989 and 2003. Findley then said that this Commission is designed to carry forward other efforts in Wisconsin that have addressed the problem of wrongful convictions. Those other efforts include the American Judicature Society's conferences, the Avery Task Force, the Attorney General's work on eyewitness identification, and recent Wisconsin Supreme Court cases.

Findley said that the Commission's agenda will be up to the Commission members. Issues that the Commission might be interested in include some of the leading causes of wrongful convictions: eyewitness identification, false confessions, jailhouse snitch testimony, training and funding of defense counsel, the role of prosecutors, the availability of post-conviction relief, forensic science, and tunnel vision.

Findley then said that the Commission's co-sponsors agreed as a group to nominate Judge Mike Malmstadt as Chairman and wanted to ask the rest of the group if there are any objections to Malmstadt's nomination.

No one objected to the nomination and Findley therefore turned the meeting over to Malmstadt.

The Commission members then all briefly introduced themselves. (6-16)

Discussion of Avery Task Force Legislation

Gerry Mowris distributed copies of the newly introduced Avery Task Force legislation. Malmstadt asked Keith Findley to briefly describe the legislation.

Findley began with the provision dealing with electronic recording of interrogations. (18). The Commission members discussed how much money will be made available under the grant program for purchasing recording equipment (19-20), whether the legislation covers non-custodial interrogations (21-23), when during an interview the recording requirement will attach (24-25).

Findley then described the provision on eyewitness identification (25).

Findley next described the provision on DNA testing (27). The Commission members discussed the number of cases the provision will affect (27-28), whether District Attorney's Offices typically oppose motions for DNA testing (29-30), and what material police and prosecutorial agencies send for testing (31-32). Floyd Peters suggested that, for the next meeting, we have someone from the Crime Lab speak to the Commission about how it prioritizes different requests for testing.

Findley then discussed the provisions on retention of biological evidence and extending the statute of limitations for charges involving DNA profiles (33-34).

Brainstorming of Potential Issues for Commission's Consideration

This portion of the meeting consisted of a discussion of potential issues for the Commission to consider.

The Commission first discussed whether it should try to recommend changes or additions to the legislation recently introduced by the Avery Task Force. Although some Commission members initially suggested that the Commission should address the Avery Task Force legislation by immediately working with the legislature or making recommendations on the legislation, it was ultimately decided that the legislation will pass very soon and that the Commission should not focus attention on changing or adding to it. (35-43).

Enrique Figueroa suggested that the Commission consider the issue of whether particular racial or ethnic groups represent a disproportionate number of wrongful convictions. Second, Figueroa also suggested that the Commission consider what role language plays in wrongful convictions, and particularly how monolingual individuals are processed through the system. Third, Figueroa suggested that the Commission address whether faith in the justice system is increasing or decreasing along racial or ethnic lines. (37-38).

Malmstadt suggested that the Commission address the role of the prosecutor, and specifically the manner in which charging decisions are made. (40)

Donohoo read a list of issues raised by the Avery Task Force during their brainstorming session. The list included the following: training/knowledge of prosecutors, training/knowledge/pay of defense attorneys, appellate standards of review, jailhouse snitch testimony, co-defendant testimony, false confessions, law enforcement training, tunnel vision, law enforcement conflict of interest, discovery rules, eyewitness identification, training on DNA evidence, prosecutors' handling of post-conviction motions. (41).

Mowris suggested that the Commission consider how to divert some cases out of the criminal justice system—for example, sending some drug cases to treatment rather than to prison. (43)

Fleishauer suggested that the Commission consider methods of counting cases, prosecutorial discretion (with a focus on the number of charges versus the number of dismissals), and how the tunnel vision caused by the adversary process sometimes inhibits the pursuit of justice. Other Commission members then discussed tunnel vision and how the current criminal justice system encourages it. (44-47)

Malmstadt suggested that the Commission consider whether the discovery rules from *Brady v. Maryland* inhibit the truth-seeking process by discouraging law enforcement from following alternate suspects. (48)

Floyd Peters suggested that the Commission address the dwindling resources for training and equipping law enforcement officers. (48)

Kelli Thompson suggested that the Commission consider access to and compensation for defense counsel, both in terms of changing the standard for qualifying for a public defender and in raising the compensation rate for assigned counsel. (48)

Enrique Figueroa suggested that we consider the use of deadly force by police officers. (49-50)

Steve Glynn and Gerry Mowris suggested that the Commission consider ways to allow people to re-integrate into society after a criminal conviction, specifically through expungement. (51)

Fred Fleishauer suggested that the Commission consider revisions to simplify and clarify the Criminal Code. Gerry Mowris and Michael Smith suggested that this ties into the problem of overcharging because a single course of conduct can give rise to so many different charges. (52-54)

Penny Beerntsen suggested that the Commission consider ways to educate the public, and therefore the potential jury pool, about relevant criminal justice issues such as eyewitness identification. (54). Nanette Hegerty and Gerry Mowris suggested this idea is related to countering the CSI effect and educating jurors about the reality of what law enforcement authorities are actually able to do. (54-55)

Keith Findley suggested the Commission consider the use of jailhouse snitch testimony.

Findley also raised the issue of forensic science, which includes resources, access, and oversight of crime labs, as well as the use of questionable scientific techniques. (55-56). Mike Malmstadt suggested this might include the use of questionable opinion evidence that a person's behavior is consistent with having been the victim of a certain crime.

[NOTE: The following potential issues were raised after the Commission's brainstorming session—Fleishauer's was raised at the end of the meeting, Beerntsen's were raised after the meeting via e-mail—but I have included them here among the other issues raised for brainstorming.]

Fleishauer suggested the Commission should consider whether Wisconsin should develop some mechanism or body for review of old cases with claims of innocence. (108). Findley added that this suggestion is related to attempting to take claims of innocence out of the adversary process.

Beerntsen suggested that the Commission should consider whether the state's efforts to help exonerated people (like Steven Avery) are adequate. She specifically suggested we consider the issues of compensation for the exonerated and what the state can do to help exonerated people re-integrate into society.

Beerntsen also suggested the Commission consider whether different law enforcement agencies are cooperating to share information. (In the Avery case, one department was investigating the real perpetrator (Greg Allen), but the department that investigated Avery did not investigate Allen. This perhaps could have been avoided with better cooperation.

Beerntsen also suggested we consider making the system less adversarial by holding pre-trial conferences between defense attorneys and prosecutors so that the two sides can come together to discuss alternate suspects and determine if anything has been overlooked

Discussion of Logistics: Decision-making Process and Work Product

The Commission members discussed possible ways the Commission could reach decisions and possible work products. (57-63)

It was agreed that the decision-making process would be by consensus and that the work product would depend on what the Commission members deemed appropriate for the issue at hand. (63)

Ken Hammond's Presentation on Attorney General's Eyewitness ID Project

Ken Hammond discussed the new Model Policy and Procedure for Eyewitness Identification recently implemented by the WI DOJ. (64-67). The Commission members then discussed issues related to the eyewitness guidelines. (67-91).

Discussion of First Issue for Commission's Consideration

Dan Blinka proposed that the Commission consider interrogation practices. (91). Ken Hammond then described his research on electronic recording practices in Wisconsin. Hammond said that most law enforcement agencies have resigned themselves to the fact that electronic recording has arrived in Wisconsin. However, these same agencies are looking for guidance on implementing recording, and for that reason the AG may come up with guidelines similar to the eyewitness guidelines and may want to seek feedback from the commission members. (93-94).

Nanette Hegerty said that if recording is becoming a requirement, the Commission may want to address funding to help agencies comply with the requirement. (94).

Ken Hammond and Walter Dickey raised the issue of whether electronic recording should lead to a re-examination of interrogation practices. (96).

Ken Hammond and Keith Findley discussed some of the practical considerations of recording, such as transcription. (96-97).

Dan Blinka suggested the Commission consider the use of trickery and deceit in interrogation practices and the issue of what questioning occurs pre-interrogation. (98-99). Jerry Buting suggested that the Commission could bring in some experts to talk about the psychology of false confessions. (99).

Commission members discussed whether suspects should be advised that recording is taking place. (100-101).

Gerry Mowris suggested that the Commission could start the process of compiling data on whether electronic recording saves money by reducing court costs. (105).

Walter Dickey suggested that the Commission members should focus on what the most reliable methods are for conducting interrogations. (105).

Discussion of Agenda for Next Meeting

Mike Malmstadt asked all the Commission members to look at the Avery Task Force legislation and see if there are any changes that warrant our immediate attention. Malmstadt also asked Dan Blinka to prepare a short memo on police interrogations, including a discussion of what kind of techniques are used and what techniques are legally permissible. (105-106).

Malmstadt also asked Byron to find out the agenda for the November 18th law review symposium and report back to the Commission members so that we can decide how much of the symposium the Commission members should attend and whether we should meet as a group at some point during the symposium. (107).

Malmstadt also asked Byron to prepare a list of issues that were suggested during brainstorming and to distribute it to the Commission members so that they can prioritize which issues they think the Commission should consider first. (108).

Figuroa asked whether the Commission's meetings are public and whether information from the meetings can be disclosed to people in the media. (108). It was generally assumed by the Commission members that the meetings aren't subject to the open meetings law. However, Malmstadt said he didn't have a problem with Commission members talking generally to people in the media about the Commission's activities.

Ken Hammond asked if the Commission would be available to give feedback on electronic recording guidelines, if the Attorney General were to develop such guidelines. The Commission members agreed that they could be available to give feedback, perhaps through e-mail and perhaps before the November 18th meeting. (109).

Donohoo asked if the Commission has funding to bring in experts to testify. Walter Dickey said there is money available from the 4 sponsoring organizations. (110-11).