

## Editorial continued from page 22

- The CCRC, and the Court of Appeal's review of a case referred by the CCRC, does not alter the prosecution's burden of proof beyond a reasonable doubt.
- The CCRC reviews applications that a sentence is a miscarriage of justice, even if the applicant doesn't claim the underlying conviction is erroneous.

3) The assertion that the NCIIC provides a viable mechanism for a person claiming innocence to successfully challenge his or her conviction is based on rhetoric, and not the reality of the review and judicial process the legislation creates. The byzantine rules under which the NCIIC and the three-judge panel appointed to review a case referred by the commission operates, raises the question: Who will be successful in having erroneous charges dismissed against him or her?

4) North Carolina has 38,000 adult prisoners (Dec 2006), so if perchance several of them a year overcome the NCIIC's procedures and succeed in having their charge(s) dismissed, they will likely be used as examples of the legal system's effectiveness, and how rarely it errors by convicting the wrong person.

The perceived need for the NCIIC (or any sort of extra-judicial review of criminal convictions) is a backlash to procedural impediments in habeas proceedings, such as 'time limit' and 'due diligence' rules that must be satisfied before "new" exculpatory evidence will be considered. In the absence of compelling scientific evidence, discovery of evidence sufficient to undermine a conviction can be a cumulative and non-linear process that can take an extended period of time to complete. Present day artificial federal and state time limits for filing a challenge to a conviction after discovery of new evidence is inconsistent with how non-scientific evidence is gathered in the real world.

Consequently, if all revisions to habeas rules in the federal Anti-Terrorism and Effective Death Penalty Act (1996) were repealed, and all states repealed procedural impediments to the introduction of new evidence in habeas proceedings – an inquiry commission (such as the NCIIC) would be somewhat redundant. Consistent with that observation is that state and federal post-conviction habeas proceedings following exhaustion of a defendant's direct appeal don't have a parallel in the United Kingdom (England) – and the CCRC process was created to fill that void.

The current enshrinement in federal and state habeas laws of procedure over substance means that untold numbers of defendant's are being deprived of a judge considering the merits of the person's claim of being illegally convicted. Repealing the federal and state procedural bars prohibiting those people from having access to judicial review could be expected to result in hundreds of overturned convictions each year – that today are going uncorrected.

The gulf is wider than the Grand Canyon between the hopes raised by the talk of a body in North Carolina to review claims of wrongful conviction, and the reality of what was crafted under the influence and watchful eye of judicial, prosecution, and so-called "victims" rights advocates and lobbyists. The NCIIC adds additional layers of complexity to the legal process, when reducing layers is what is needed to aid the wrongly convicted.

The NCIIC is worse than nothing. It can only be hoped that no other state relies on it as a model to establish a comparable statutory scheme, and that the deadline for submitting a claim to the NCIIC is not extended beyond its sunset date of December 31, 2010.

## Man Convicted Of Murder After DNA Cleared Him, Awarded \$706,000

In June 2000, 10-year-old Nienke Kleiss was raped and murdered in Schiedam, Netherlands. Her 11-year-old male friend, Maikel, survived by pretending to be dead after being severely beaten.

Schiedam is a suburb of Rotterdam, Netherlands second largest city.

A 28-year-man, Cees B., was seen near the scene of the crime. He was arrested because he fit the police profile of a potential pedophile. After some hours of intense interrogation, Cees confessed to Nienke's murder and rape, and the assault of her friend. Immediately afterward he retracted his confession, claiming it was coerced by the police.

Cees' protestations of innocence during his trial fell on deaf ears. The prosecution relied on his confession to obtain his conviction of murder, rape and assault. He was sentenced to 18 years in prison with mandatory TBS (behavioral modification) psychiatric treatment. His conviction was affirmed on appeal.

Then, in the summer of 2004, a man, Wik H.,

was arrested for attempted sexual assault. During his questioning he admitted committing a very violent rape in The Hague in 2002, and killing Nienke and assaulting her friend in 2000. Wik's confession was confirmed when a DNA test of sperm found on Nienke did not exclude him as her assailant.

Cees began proceedings to overturn his conviction based on the new evidence of his innocence. The Court of Appeals ordered his release in January 2005, after 4-1/2 years of wrongful imprisonment. He subsequently filed a damage claim against the police and prosecutors for their mishandling of his case.

After Wik was convicted of the same crimes Cees' had previously been convicted of committing, he was sentenced to 20 years in prison with mandatory TBS psychiatric treatment. Wik's sentence was reduced to 18 years in November 2005, when the Court of Appeals ruled the prosecution had not presented evidence that Wik assaulted Maikel to prevent being identified.

In September 2005, a memo was leaked to the Dutch news media revealing that prior to Cees' trial, Netherlands' National Forensic Service (NFI) had notified the prosecution that DNA tests excluded him as the source of evidence left at the crime scene by Nienke and Maikel's assailant. The prosecution did

not disclose the exculpatory DNA test results to Cees' lawyer prior to his trial, nor to the Appeals Court that freed him in January 2005. The leaked memo stated in part, "The NFI let it be known during a discussion with the officer in charge of this case that there were doubts about [Cees] B's guilt."

Although the prosecutors responded by vigorously denying they had concealed evidence of Cees' innocence at the same time they were prosecuting him, 70 percent of the Dutch people polled said they believed that was exactly what the prosecutors did. One newspaper wrote, "To the majority of the Dutch public this equates to a murderer caught standing over a dead body with a knife in his hand."

Cees' claim for damages was greatly strengthened by the surfacing of the exclusionary DNA report, since it supported his claim that police interrogators had coerced him into falsely confessing. In November 2005, Cees was awarded \$706,000 by Netherlands' government to settle his false imprisonment damages claim.

### Sources:

Appeal Court Cuts Sentence On Nienke's Killer, *Expatica News* (Netherlands), November 22, 2005.  
Mugging The Messenger, *Expatica News* (Netherlands), November 24, 2005.  
Dutch Pay For Wrongful Conviction, *Science Daily*, November 28, 2005.