

JD Editorial

The Wrong Path: Criminal Case Review Commissions Are Not The Way To Correct The Con- viction Of Innocent Persons

Justice Denied predicted in an editorial in the fall of 2006 that the North Carolina Innocence Inquiry Commission (NCIIC) would fail to contribute to overturning the conviction of an appreciable number of innocent people, and that it was “worse than nothing” as a way to correct the conviction of innocent persons.

The NCIIC’s failure has been more spectacular than JD prophesied: In the 4½ years since it began operating in 2007 it has assisted in the overturning of one conviction, and that is in a state with more than 40,000 prisoners. If only 5% of those prisoners are innocent of their convicted crime(s) there are around 2,000 innocent men and women imprisoned at any given time in North Carolina.

Justice Denied’s 2006 editorial explained the NCIIC was doomed to failure because its design as an extension of the legal system served the political function of covering-up the enormous number of wrongful convic-

tions in North Carolina: since if only a handful of people are identified as innocent by the NCIIC it is evidence “of the legal system’s effectiveness, and how rarely it errors by convicting the wrong person.” (“Worse Than Nothing,” *JD* Issue 34, Fall 2006, 22.)

The performance of the NCIIC has been mirrored in recent years by England and Scotland’s criminal case review commissions. In the six years from 2005 through 2010 England’s CCRC assisted in overturning the conviction in 7 major felony cases — in a country with more than 80,000 prisoners.¹ In 2010 Scotland’s CCRC assisted in overturning two felony convictions.²

Seven years after England’s CCRC began operating in 1997 the Innocence Network UK was founded in response to the CCRC’s failure to effectively aid the innocent. The INUK’s more than 30 member organizations are now doing the heavy lifting in investigating cases of persons claiming innocence in England, Wales and Scotland. As detailed in *The Criminal Cases Review Commission: Hope for the Innocent?* edited by Dr. Michael Naughton, that is reviewed on page 18 of this issue, the CCRC does not typically investigate or champion the cases of people claiming innocence. Instead it preserves the political *status quo* by helping to create the appearance — just as the NCIIC does — that the legal system effectively weeds out the

guilty from the innocent so there aren’t many miscarriages of justice to be corrected.

Criminal case review commissions are a flawed concept for seriously dealing with the conviction of men and women in the U.S. for crimes they didn’t commit, because they reflect the unspoken political agenda behind their enabling legislation that doesn’t want them to succeed.³ CCRC type organizations can accomplish little in the United States while diverting valuable time and energy from helping the enormous numbers of innocent people who are imprisoned.

The NCIIC was a bad idea whose failure to aid significant numbers of innocent people was as predictable as the rising and setting of the sun. The enabling legislation for the NCIIC should be repealed and it should be disbanded. It is for people in England and Scotland to determine if the CCRC and the SCCRC respectively should be disbanded.

Endnotes:

1 The CCRC’s website is at, www.ccr.gov.uk. See also, “The Criminal Cases Review Commission has failed,” by Bob Woffinden, *The Guardian* (London), November 30, 2010.

2 The SCCRC’s website is at, www.sccrc.org.uk.

3 Norway’s CCRC legislation reflects that it has a radically different legal culture than the U.S., because in Norway trying to achieve “justice” is more important than ensuring the finality of an incorrect guilty verdict. The NCCRC can consider both new evidence and new circumstances related to evidence introduced at trial, and to ensure there is no bias against a petitioner a referred case is assigned to a new judge in a judicial district different than the one where the trial took place. The NCCRC’s website is at, www.gjenoptakelse.no/index.php?id=30



Prosecutor Misconduct Causes Overturning Of Ohio Conviction

Russell Lee Dougherty was convicted by a jury in January 2010 of domestic violence and violating a protective order in Hamilton, Ohio related to an alleged incident involving his live-in girlfriend. He was sentenced to 8 years in prison.

Dougherty’s appeal cited several grounds that he claimed warranted a new trial, including that the prosecutor committed misconduct by making numerous prejudicial statements during both the trial and his closing argument to the jury. Dougherty’s prosecutor was Butler County Assistant Prosecuting Attorney Lance Salyers. Ohio’s 12th District Court of Appeals agreed with Dougherty and unanimously overturned his conviction based on a number of Salyers’ comments that prejudiced Dougherty’s right to a fair trial. In its decision, *State v. Dougherty*, 2011-Ohio-788 (OH Ct of Appeals 12th Dist, 2-22-2011), the Court cited five specific instances of Salyers’ miscon-



Russell Lee Dougherty
(OH DOC)

duct that either individually or cumulatively warranted a new trial for Dougherty:

1. Salyers commented during closing arguments about Dougherty’s “failure to testify.” The appeals court stated, “Simply put, there was nothing subtle about the prosecutor’s comment. It was a direct and impermissible reference to (Dougherty’s) constitutional right not to testify, which colored the jury’s view of the trial.” (§40)
2. Salyers commented repeatedly during his closing argument about the “credibility” of Dougherty’s live-in girlfriend’s trial testimony.
3. Salyers made “disparaging comments” about Dougherty’s live-in girlfriend to explain differences between her trial testimony and her preliminary hearing testimony related to the July 2009 incident.
4. Salyers misled the jury when he argued “you enforce the law.” The appeals court stated, “It is well-settled that a jury’s “primary responsibility [is] to

weigh the evidence and assess the credibility of the witnesses.” (§56)

5. Salyers not only commented about a police officer’s testimony that the judge had sustained an objection to, but Salyers “completely misrepresented Officer Robinson’s testimony.” The Court stated, “Because the prosecuting attorney made reference to excluded evidence, and evidence outside the record, we find his remarks regarding Officer Robinson’s testimony were improper.” (§90)

In analyzing Salyers’s numerous improper comments the Court wrote:

[T]he fundamental question that must be asked when engaging in a prosecutorial misconduct analysis is whether the improper conduct deprived appellant of a fair trial. ... Arguably, the prosecution’s statement regarding appellant’s failure to testify could be considered so egregious on its own so as to fundamentally deny appellant a fair trial, and require reversal. (§97)

This is not a case where the misconduct was limited to a single “isolated incident.”

Dougherty cont. on p. 21