

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 4-½ 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

Joseph White Dies In Accident 2-1/2 Years After Murder Exoneration

Joseph White, 48, was crushed to death on March 27, 2011 in an industrial accident at the factory where he worked in Tarrant, Alabama. White's funeral was on March 30 in Holly Pond, Alabama.

White was one of six people convicted in 1989 and 1990 of charges related to the February 1985 rape and murder of 68-year-old Helen Wilson in Beatrice, Nebraska. The media dubbed them the 'Beatrice Six.'

White was the only one of the six who did not confess after intense interrogations. While the other five made plea deals in exchange for reduced charges and sentences, White went to trial with the prosecution intending to seek the death penalty if he was convicted. Three of White's co-defendants testified against him and he was convicted of rape and first-degree murder. The jury recommended a sentence of life in prison instead of a death sentence.

After losing his direct and post-conviction appeals, White pursued DNA testing of the crime scene biological evidence. For years the State of Nebraska opposed his efforts to test the evidence, but in 2007 the Nebraska Supreme Court ordered the DNA testing. The testing was finally conducted on some of the evidence in the summer of 2008 and



Joseph White
in October 2010

additional testing followed. The testing proved that neither White nor any of his five co-defendants -- who confessed and pled guilty -- had anything to do with Ms. Wilson's rape and murder.

White's motion for a new trial based on the new exculpatory DNA evidence was granted on October 15, 2008, and he was released on a personal recognizance bond later that day. He had been incarcerated for more than 19-1/2 years since his arrest. The charges against him were subsequently dismissed. The two members of the Beatrice Six still incarcerated were paroled several weeks after White's release. The six defendants were wrongly imprisoned for a total of more than 76 years.

In November 2008 Nebraska Attorney General Jon Bruning held a press conference and disclosed that the DNA evidence conclusively linked Bruce Allen Smith to Ms. Wilson's rape and murder. However, Smith died in 1992 of AIDS.

Nebraska's State Board of Pardons unanimously voted on January 26, 2009, to pardon the five defendants who confessed based on their actual innocence of Helen Wilson's rape and murder. AG Bruning said, "They are 100 percent innocent."

Nebraska did not have a wrongful conviction

compensation statute, but the publicity about the exoneration of the Beatrice Six resulted in the passage of a law in 2009 that provides for the payment of up to \$500,000 to a wrongly convicted person.

White filed a claim, and on October 1, 2010 he became the first person to be awarded compensation under Nebraska's compensation law when he settled his claim for the \$500,000 maximum. He was paid \$25,000, with payment of the \$475,000 balance scheduled to be voted on by the Nebraska legislature on March 29, 2011 as part of the annual state claims bill. White's lawyer issued a statement on March 29 that when the legislature authorizes payment of the \$475,000 it will go to White's estate.

White also filed a federal civil rights lawsuit against Gage County and several officials. That lawsuit is pending.

After White's release he returned to Alabama and lived with his family in Cullman. He was engaged to a former school sweetheart and their wedding was scheduled for May 7.

White was the first person exonerated by DNA evidence in Nebraska, and the Beatrice Six are the largest number of defendants exonerated by DNA evidence in one case in the United States.

Read Justice Denied's article in Issue 41 about the Beatrice Six
www.justicedenied.org/issue/issue_41/beatrice_six_jd_issue_41.pdf

Patricia Wright Seeks Compassionate Medical Parole

Patricia Wright's story of being convicted in 1998 of her ex-husband's 1981 murder in Los Angeles was in *Justice Denied* Issue 38. There is no physical or

forensic evidence or eyewitness tying her to the crime, she adamantly denies any involvement, and crime scene fingerprints exclude her.

Patricia has been diagnosed with terminal fourth stage breast cancer and would like to spend her limited days at home with her family. The Board of Parole Hearings, the

Dept. of Corrections, and the Los Angeles District Attorney have stated they are not opposed to Patricia's release on medical Parole.

The only obstacle is Patricia's life without parole sentence (LWOP).

The sentencing Judge, Curtis Rappe, has stated that he will consider reducing Patricia Wright's LWOP sentence if he receives a recommendation from one or all of the following: The Board of Parole Hearings, Governor Jerry Brown, or Matthew Cate-Secretary of Department of Corrections and Rehabilitation. Governor Brown is now considering whether to recommend Patricia's compassionate release, or he could also issue a conditional pardon based on her medical condition.

Patricia's story can be read online at, www.justicedenied.org/issue/issue_38/patricia_wright_jd_issue_38.pdf.

Dougherty cont. from p. 20

Instead, "the prosecutor's errors were part of a protracted series of improper arguments." Indeed, we conclude that the prosecutor's statements were a pervasive pattern of misconduct that permeated and affected the entire proceedings. (¶98)

...
In this case, we are unable to conclude that it is "clear beyond a reasonable doubt" the jury would have convicted appellant of the offenses as charged, as the evidence was not so overwhelming so as to proscribe this finding. More-

over, the cumulative effect of the prosecutor's improper remarks clearly deprived appellant of his constitutional right to a fair trial. (¶100)

We do not reach this decision lightly ... However, given the facts, circumstances, and evidence in this case in light of the prosecution's misconduct, we have decided that a fair trial was impossible. (¶101)
State v. Dougherty, 2011-Ohio-788 (OH Ct of Appeals 12th Dist, 2-22-2011)

Sources:
State v. Dougherty, 2011-Ohio-788 (OH Ct of Appeals 12th Dist, 2-22-2011)