

EXECUTIVE SUMMARY

“[T]he most fundamental principle of American jurisprudence” is “that an innocent man not be punished for the crimes of another.”¹ The source of public confidence in our criminal justice system resides in its ability to separate those who are guilty from those who are not. The criminal justice system in Pennsylvania is finely tuned and balanced and almost always delivers reliable results. However, no such system, much less our own, will achieve perfection in its exercise. Due process does not require that every conceivable step at whatever cost be taken to eliminate the possibility of convicting an innocent person. Even so, the system cannot routinely accept the conviction of an innocent person without being challenged to consider measures to reduce the likelihood of error and grant redress to victims of these errors. Accepting this challenge as fully and as reasonably as we can further strengthens public confidence in the integrity of our criminal investigations and convictions.

Since 1989, 34 states and District of Columbia have been witness to 273 postconviction DNA exonerations. These exonerations represent cases in which the conviction has been indisputably determined to be wrong by continuing advances in the use of DNA science and evidence. They represent tragedy not only for the person whose life is irreparably damaged by incarceration for a crime he did not commit, but also for the victim since each *wrongful* conviction also represents the *failure to convict* the true perpetrator. These cases require us to take measures to sustain both the integrity of our convictions and the moral force of our burden of proof. If experience is the name we give our mistakes, these exonerations provide a remarkable opportunity to examine our practices and policies, and correct them to the best of our ability. Pennsylvania is not alone in the matter of tending to conviction integrity. As the narrative and appendices to this report make clear, we are the beneficiaries of work being done before us by a wide variety of legislative, judicial and executive initiatives undertaken to minimize the risk of conviction error.

These exonerations challenge long-accepted assumptions in the soundness of certain practices of the criminal justice system both nationwide and in Pennsylvania. They cast a disturbing doubt on the reliability of eyewitness identifications, confessions, and overly aggressive practices within the adversarial legal system. Victims can often be mistaken in their identifications of perpetrators, especially when influenced, often unintentionally, by subtly suggestive procedures for lineups, photo arrays, and showups. Interrogation techniques applied to suspects are calculated to obtain a confession and recurrently “work” against innocent suspects, especially those who are inexperienced, suggestible, unintelligent, mentally defective or anxious to end the interrogation. Many defendants cannot afford a private attorney and therefore receive less thorough representation by overworked public defenders and appointed counsel. In many places,

¹ *Commonwealth v. Conway*, 14 A.3d 101, 114 (Pa. Super. Ct. 2011).

this lack of adequate representation is due to underfunding of public defender offices and substantial underpayment of appointed counsel representing indigent defendants. Although untested for the trial or tested by outdated methods, inmates seeking post trial testing of DNA biological evidence often encounter unreasonable obstruction and opposition to its testing or learn that their petition is jurisdictionally barred.

Under this institutional structure, defendants have been punished for crimes they did not commit. Compounding these concerns, biological evidence is available in only a small number of cases involving violent crimes. There is every reason to believe that mistaken identifications, false confessions, inadequate legal representation, and other factors underlying wrongful convictions occur with comparable regularity in criminal cases where DNA is absent. While it is impossible to say with confidence how many innocent people are now, have been or will be imprisoned, it would be indefensible to say that every conviction or acquittal is factually correct. To this end, we must pay close attention to the lessons contained in these DNA cases. To the best of our ability, we must respond by creating practical and workable measures that serve to advance conviction integrity by minimizing the risk of error.

Senate Resolution No. 381² directs the commission “to study the underlying causes of wrongful convictions.” This charge calls for an inquiry that in other contexts is characterized as a failure analysis, much like a professional inquiry into a routine surgical procedure that unexpectedly results in a bad outcome or into a chain of events that causes a plane crash. In a failure analysis, the focus is on determining what went wrong in order to prevent recurrence of the problem. We can rightly celebrate the presumption that a great majority of criminal cases reach a just outcome. But the focus in this report is necessarily on the reasons why justice miscarries in a minority of cases. Many scholars, practitioners, law enforcement agencies, and the courts, among others, have examined these cases and advocate for a variety of responses and remedies to the problems revealed by the wrongful convictions. This report attempts to bring the General Assembly’s attention to policies for Pennsylvania that may reduce the likelihood that innocent people will suffer imprisonment for crimes they did not commit while further ensuring that the actual perpetrator of the crime is brought to justice.

The resolution directed “the Joint State Government Commission to establish an advisory committee to study the underlying causes of wrongful convictions so that the advisory committee may develop a consensus on recommendations intended to reduce the possibility that in the future innocent persons will be wrongfully convicted in this Commonwealth.” This resolution directed the advisory committee to:

- 1) review cases in which an innocent person was wrongfully convicted and subsequently exonerated;

² Sess of 2006, appendix A, *infra* p. 229.

- 2) review any other relevant materials;
- 3) identify the most common causes of wrongful convictions;
- 4) identify current laws, rules and procedures implicated in each type of causation;
- 5) identify potential solutions in the form of legislative, rule or procedural changes or educational opportunities for elimination of each type of causation; and
- 6) consider implementation plans, cost implications and the impact of potential solutions on the criminal justice system.

Several cases from our Commonwealth that are related in the law review article, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform From the Pennsylvania Eight*,³ were informally reviewed. A number of the advisors were personally familiar with some of these cases, and there was a limited discussion of these and other cases.

The advisory committee divided into subcommittees on legal representation, investigation, redress and science. The advisory committee was to have reported its findings and recommendations near the end of 2008, but all the subcommittees had not completed their deliberations by that date. Rather than partially report its findings and recommendations, the advisory committee waited until all the subcommittees were able to share their recommendations with the full committee before reporting to the Senate.

Materials relevant to wrongful convictions and subsequent exonerations are widely available. The advisory committee had special access to an electronic library of material posted on Duquesne University's computerized blackboard. Among other items, postings included research reports, law review articles and other messages. Duquesne University graciously made this available to the advisory committee, and each subcommittee had its own page.

Causes of wrongful convictions are commonly determined to be "mistaken eyewitness identifications; false confessions; perjurious informant testimony; inaccurate scientific evidence; prosecutorial and defense lawyer misconduct; and inadequate funding for defense services."⁴ Some of these causes are sometimes described by varying terminology, but "at this juncture, the primary causes of wrongful convictions are well understood."⁵

³ 12 Widener L. Rev. 359 (2006); its author is John T. Rago, the chairman of the advisory comm.

⁴ Cal. Comm'n on the Fair Admin. of Just., Final Rep., Letter from the Executive Dir. (2008).

⁵ Boston Bar Ass'n, Getting it Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts 3 (Dec. 2009).

The subcommittees primarily deliberated on recommendations that have been and continue to be considered throughout other states. As some of these recommendations receive consideration, they have been adopted in some fashion by more and more jurisdictions. After all the subcommittees completed their deliberations, their recommendations were shared with the full advisory committee. The full advisory committee was afforded an opportunity to comment on all the proposals regardless of which subcommittee generated the specific proposal. Comments of advisors criticizing the proposals appear in appendix J.⁶

While there was some consensus on these recommendations, members remain sharply divided on the advisability of adopting or implementing some or all of these recommendations. Some advisors question whether a foundation has been established to recommend any of these proposals and fear that their implementation could create more injustice. Conversely, those advisors who endorse these recommendations are persuaded that well-considered and well-researched initiatives to prevent miscarriages of justice should be adopted when they are sensible and relatively easy to implement as demonstrated by law enforcement and prosecutors in a wide variety of jurisdictions.

Despite these differences, the advisory committee shares a number of interests central to maintaining public confidence in conviction integrity. Members agree that no innocent person should be punished for a crime he did not commit. Members want to promote the highest interests of public safety by making the guilty accountable for the crimes they commit. Members want our policies and practices to justify our confidence in the testimony of eyewitnesses and confessions made by the accused and used at trial. Members share a keen sensitivity to the victims of crimes and the need to minimize the risk that a victim would be called upon to endure a second trial, much less suffer the anguish that accompanies any uncertainty that comes from a DNA exoneration postconviction. Members do not want to artificially add challenges to the difficult tasks our police and prosecutors encounter every day in dealing with crimes and victims. Members seek to have the full and robust use of valid science throughout the course of our criminal investigations, prosecutions and postconviction review. And all members expect conduct from every individual and office to be of the highest ethical and professional standards of conduct that we expect from every participant in the criminal justice system.

In full consideration of all of the viewpoints and passions stirred by the subject of this report, the recommendations contained herein are tested, timely, reasonable, practical and affordable. Through careful comparisons with similar efforts undertaken around the country, none of the recommendations in this report present an outlier position. These recommended policies and practices are proven to be good for the accused, good for law enforcement, good for victims and good for our Commonwealth.

⁶ *Infra* p. 309.

Summary of Key Proposals Generated by the Subcommittees⁷

Eyewitness Identification

A rule of criminal procedure should be amended to require defense counsel in capital cases to be educated on evidence relating to eyewitness identification.

A statute should require the administration of lineups and photo arrays to be conducted by a person who does not know either which one is suspected by investigators or which one is being viewed by the witness.

Confessions

A rule of criminal procedure should be amended to require defense counsel in capital cases to be educated on evidence relating to confessions.

A statute should require custodial interrogations to be electronically recorded with a coextensive wiretap exception for law enforcement.

Indigent Defense Services⁸

Defense services for indigency should be standardized throughout our Commonwealth.

Rather than the counties, our Commonwealth should fund defense services for indigency and compensation for these attorneys should be adequate and substantially uniform.

Informant Testimony

Judges should caution a jury when testimony from a jailhouse informant is presented.

Law enforcement should electronically record the informant's statement and try to electronically record the incriminating statement made to a jailhouse informant.

⁷ The proposals appear *infra* pp. 167-207. These proposals were developed by the subcomms.; comments of advisors criticizing the proposals appear in appendix J, *infra* p. 309.

⁸ These recommendations originated from Final Rep. of the Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys. 163-97 (2003). These recommendations were intentionally underdeveloped by this advisory comm. because S. Res. No. 42 (Sess. of 2007) established a task force with an advisory comm. to "study the existing system for providing services to indigent criminal defendants." The rep. for this other res. will be published in the near future and is exclusively on this topic.

A statute should:

- 1) mandate timely disclosure of certain information to the defense when the prosecution seeks to introduce testimony from an informant that the accused incriminated himself and the evidence from the informant was obtained while investigating a felony; and
- 2) require a hearing in any capital case before admitting testimony from an informant that the accused incriminated himself.

Prosecutorial Practice

Prosecutorial offices should:

- 1) implement internal policies that encourage ethical conduct;
- 2) implement and enforce internal discipline when ethical standards are violated;
- 3) develop other mechanisms to provide internal oversight to ensure, to the fullest possible extent, the integrity of investigations, evidence development, and trial and postconviction practices; and,
- 4) adopt clear guidelines and appropriate sanctions in instances where purposeful or otherwise egregious prosecutorial misconduct is discovered or revealed.

Pennsylvania Supreme Court should adopt proposed amendments to Pa. Rules of Prof'l Conduct R. 3.8, relating to evidence of wrongful conviction.⁹

Postconviction Relief¹⁰

The time to petition for relief based upon a statutorily specified exception to the regular time should be extended from 60 days to one year.

The statute should be amended to eliminate:

- 1) a time-based requirement to obtain postconviction relief based upon a DNA test if the test could exonerate the petitioner; and
- 2) imprisonment as a prerequisite to petition for DNA testing postconviction.

The statute should be amended to clarify:

- 1) the right to petition for DNA testing postconviction; and
- 2) that DNA test results can be compared to profiles in the State DNA Data Base pre- and postconviction.

⁹ These amendments were endorsed by Pa. Bar Ass'n.

¹⁰ Some of these will update the statute to reflect recent appellate rulings by Pa. courts and assure that interests of justice will appropriately allow postconviction testing.

The statute should be amended to allow courts to summarily dismiss frivolous and repetitive, successive petitions while authorizing them to adjudicate any petition to test DNA postconviction if required in the interests of justice.

Redress

A statute should:

- 1) allow a claim for damages to be paid by the Commonwealth to those who have been wrongfully convicted and imprisoned if their actual innocence is established; and
- 2) enable automatic expungement of the criminal history record for those found eligible by Commonwealth Court.

A statutorily created commission should convene to periodically review:

- 1) reforms adopted by other jurisdictions to ensure the integrity of their convictions; and
- 2) any additional wrongful convictions in Pennsylvania based upon actual innocence after the exoneration to determine their causes and how to avoid their recurrence.

Transitional services similar to those provided to correctly convicted individuals upon their release should be extended to individuals who have been wrongly convicted but are no longer under correctional supervision.

Science

A statute should:

- 1) require accreditation of forensic laboratories operated by the Commonwealth and its municipalities;
- 2) generally require the preservation of biological evidence relating to a criminal offense; and
- 3) criminalize the intentional destruction of biological evidence that is statutorily required to be preserved.

A statutorily created forensic advisory board should be established to:

- 1) advise the Commonwealth on the configuration of forensic laboratories and the delivery of their services to state and local government;
- 2) offer continuing education relating to forensic science to investigators, attorneys, scientists and others involved in criminal justice; and
- 3) timely investigate allegations of professional negligence and misconduct affecting the integrity of forensic analyses.