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FALSE POSITIVES IN THE CRIMINAL JUSTICE PROCESS – AN ANALYSIS OF
FACTORS ASSOCIATED WITH WRONGFUL CONVICTION OF THE INNOCENT

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ABSTRACT

During the past several years the issue of wrongful conviction has received increasing attention from state legislators, the legal system, and researchers. Much of this attention has focused on death penalty convictions which have been set aside. As of February, 2003, postconviction DNA testing in the United States had led to the exoneration of 123 wrongfully-convicted individuals. To date, it is unknown how frequently wrongful conviction occurs in the United States. Also unknown is how frequently systemic errors occur which previous research has identified as being associated with the phenomenon wrongful conviction. The present research sought to address this deficiency of knowledge by asking professionals who work in the criminal justice system their perceptions regarding these issues. A 53-item survey questionnaire was administered to four groups of Ohio criminal justice professionals: law enforcement (sheriffs and chiefs of police), prosecutors (chief and assistant), defense attorneys (private and public defenders), and judges (common pleas, appellate, and Supreme Court). The 798 respondents indicate they believe wrongful conviction occurs in 1 to 3 percent of all felony convictions. With more than 2,000,000 individuals incarcerated in the nation's prisons and jails, this error rate would signify that between 20,000 and 60,000 individuals are incarcerated for crimes they did not commit. Significant differences were found in group perceptions. Prosecutors and police perceive the least error (1/2-1%), while defense attorneys perceive the most error (4-5%). Judges perceive the national error rate to be between 1 and 3 percent. When asked their perceptions regarding nine types of system error (police error, prosecutorial error, defense attorney error, judicial error, eyewitness error, forensic error, false confessions, false accusations, and community pressure), respondents, in general, indicate they believed these types of error occur "more than infrequently," but less than "moderately frequent." Again, significant group differences were found. Prosecutors perceive the least system error, while defense attorneys perceive the most error. Police and judges' perceptions generally moderated between the two extremes.

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CHAPTER ONE

WRONGFUL CONVICTION AND THE CRIMINAL JUSTICE PROCESS

Introduction

Justice. The word may be defined as “the constant and perpetual disposition to render every man his due; fairness; conformity to law; merited reward or punishment” (The Law Dictionary 1986). Justice, throughout history, has been viewed in democratic countries as an ideal not only desired but also necessary to pursue. It is in the pursuit of justice, or more specifically, *criminal justice*, that this dissertation is presented.

The criminal justice system in the United States primarily focuses on the concept of justice in regard to two entities: the criminals themselves – and their victims. Justice for criminals usually entails some type of sanction that will punish perpetrators in retribution, and will dissuade them (and others who may be similarly predisposed) from committing future crimes. Sanctions may involve incarceration in order to physically separate the criminal from the rest of society, and/or sanctions may involve rehabilitative efforts aimed at “curing” the malcontent.

By properly sanctioning the offender, justice is also achieved for the victim. The individual victim, after seeing an offender punished for the wrong that was done, gains a sense of retribution and justice. Of course, the ‘victim’ of crime can also be defined as all the participants in society who are adversely affected when another member of that society violates the social contract. Justice, in this case, is accomplished when the criminal is properly sanctioned, the public outrage is quelled, and the social “equilibrium” which was upset by the criminal act is restored.

There is, however, another category of individuals to whom the focus of justice within the criminal justice system is not always tendered. It is a category of individuals who are infrequently, but inexcusably too often, injured and ignored by the system as the process of law grinds ever so slowly but ever so fine. It is a category of individuals who often do not receive justice from the criminal justice system – but instead receive injustice. This category of individuals is the wrongly convicted.

There is increasing evidence that thousands of innocent individuals who have been wrongfully convicted are now incarcerated in U.S. jails and prisons (Bedau and Radelet 1988; Bedau and Radelet 1987; Borchard 1932; Brandon and Davies 1973; Frank and Frank 1957; Gross, 1996; Huff et al. 1996; Huff and Rattner 1988; McCloskey 1989; MacNamara 1969; Radelet, Bedau, and Putnam 1994; Radin 1964; Scheck et al. 2000). Research estimates of the number of individuals wrongfully incarcerated in prisons and jails range from one-half of one percent to as high as twenty percent (Huff and Rattner 1988). The Justice Department reports that there are now in excess of 2,000,000 people behind bars (BJS 2000). According to estimates, therefore, in terms of raw numbers, between 10,000 and 400,000 wrongfully convicted individuals occupy this country's prisons. Even if one accepts an error rate at the low end of the spectrum, say a one-percent, this would translate into 20,000 individuals now incarcerated in prison for crimes that they did not commit.

Wrongfully convicted individuals may experience such ill-fated circumstances as being the victim of false or mistaken identification, fraud, inadequate legal counsel, overzealous prosecution, a lack of financial resources to offset the prosecutorial resources of the state, or racial bias on the part of the police, jury, prosecutor, or judge. Innocent individuals can be wrongfully convicted simply because they lack an ability to articulate their

defense. Numerous articles and books have been published which describe in detail hundreds of these types of cases involving individuals who, after conviction, were able to later prove that they were innocent. (Bedau and Radelet 1988; Bedau and Radelet 1987; Borchard 1932; Brandon and Davies 1973; Connery 1996; Cooper, Cooper, and Reese 1995; Frank and Frank 1957; Frisbie and Garrett 1996; Gross, 1996; Huff et al. 1996; Huff and Rattner 1988; Hirsch 2000; Humes 1999; Linscott 1994; McCloskey 1989; MacNamara 1969; Potter and Bost 1997; Protes and Warden 1998; Walker and Starmer 1999; Radelet, Bedau, and Putnam 1994; Radin 1964; Scheck et al. 2000.)

Researching the phenomenon of wrongful conviction, for a variety of reasons, is a difficult task to undertake. The hidden nature of so many aspects of this problem creates numerous tribulations to the researcher attempting to determine the true extent of the problem. Many wrongful convictions are often the result of professional mistake, incompetence, bias, prejudice, or blatant corruption – attributes most criminal justice professionals do not like to air in the public forum. Other difficult to determine variables such as witness error, community pressure, false accusations, and false confessions are also associated with wrongful conviction and present logistical barriers to any study of the problem. Because of the hidden nature of so many aspects of the phenomenon of wrongful conviction, the harmful actions of criminal justice professionals and non-professionals are often never discovered – and therefore cannot be researched. When wrongful convictions are discovered, it is often only by serendipity. For example, the movie *The Thin Blue Line* (which led to the release of Randall Adams who was falsely convicted of killing Dallas, Texas, police officer Robert Wood in 1976) was filmed only due to unusual circumstances. Film-maker Errol Morris happened to be filming a documentary about the prison psychiatrist

at the prison where Adams was incarcerated and, during the project, Morris became aware of the unusual circumstances surrounding Adam's case. Morris set out to document the facts surrounding Adam's innocence – facts every appellate court that reviewed Adam's case over a ten-year period had refused either to believe or consider. Once Morris provided the necessary financial resources to properly investigate the case, Adam's innocence was substantiated and the Texas Governor pardoned him in 1988. As one reviews the numerous stories of wrongly convicted individuals who were fortunate enough to have their guilty verdicts overturned, it is shocking to see how many of these cases were solved by pure chance, instead of by the mechanisms of a rational criminal justice process

Also impeding research concerning wrongful convictions is an ethos of denial that permeates among professionals in the criminal justice system (Huff, Rattner, and Sagarin 1996; Scheck, Neufield, and Dwyer 2000). When confronted with the possibility that a mistake has been made – that an innocent person may have been convicted of a crime – many of those involved in the process (police, prosecutors, defense attorneys, judges, jurors, eyewitnesses) have a tendency to deny such a thing could happen; they often refuse to accept the fact that they participated in a trial which sent an innocent individual to prison (Scheck et al. 2000). Eyewitnesses who have identified an accused in court will often cling to their story, even after being presented with overwhelming evidence that they had misidentified the accused or after the real perpetrator has been apprehended and has admitted to the crime (see *Commonwealth v. Walter Tyrone Snyder* 1986). Even after convictions are overturned in appeals court, some prosecutors will refuse to admit that they prosecuted the wrong individual and instead will protect their positions by taking bizarre stances or reinventing a case. For example, in rape cases where new evidence is found which proves a convicted

individual's semen was not present in the rape kit, prosecutors will sometimes invent new scenarios to fit the new facts, suggesting that the person who was convicted of the crime must have been involved in a gang-rape – a theory that was never presented at trial because there was no evidence that such an incident had ever taken place. Scheck et al. note:

They [the prosecutors] cling to the original verdict by contriving new theories to explain why the semen of another man, not the convicted party, was discovered in the rape kit. Perhaps, they say, two men participated in the rape, or three, even though the victim only noticed one man. The foreign semen is explained by these new parties to the crime, first mentioned years after the fact: the unindicted co-ejaculator (2000: 248).

Further, in order to prevent wrongful convictions from being overturned, criminal justice officials will sometimes steadfastly hold to technical appellate dates and will not allow new testing to be completed on evidence that may exonerate an individual. The case of Clyde Charles provides a good example. Charles was wrongfully convicted in 1981 of raping a woman in Louisiana. After spending 10 years in prison, Charles learned from other prisoners about new DNA technology that could prove his innocence. He requested that the rape kit evidence in his case be tested to prove that he could not have possibly been the rapist. For seven-years the state courts denied his request to compare his DNA to the semen sample stored in the rape kit. Finally Charles' sister learned of the Innocence Project in New York – a non-profit organization that helps wrongly convicted individuals win their freedom through DNA tests. Barry Scheck, a founder of the Innocence Project, filed a federal civil rights lawsuit on Charles' behalf and was able to get the old evidence tested. The test conclusively proved that Charles could not have been the rapist. Thirty days after the tests proved Charles' innocence, he was released after serving 17 years in prison – 7 of those years

unnecessarily because the state refused to reevaluate the evidence against him using new DNA technology (Clendenning 2000).

Bedau and Radelet, in their study of miscarriage of justice in death-penalty cases note:

No jurisdiction (in the United States) keeps a list of its erroneous convictions, even in murder cases. Moreover, most state officials are apparently not eager to assist investigators in identifying such cases from whatever records they might have available. In no state, for example, were we able to obtain a list of defendants who had been pardoned after conviction or after a sentence of death (1987: 28).

This atmosphere of resistance by responsible officials throughout the criminal justice process is certainly not conducive to the gathering of facts that will lead to a better understanding of the phenomenon of wrongful conviction.

The attitudes of the criminal justice professionals who are on the ‘front-line’ of the war-against-crime are of great importance to the subject of wrongful conviction. These are the individuals (police officers, prosecutors, defense attorneys, judges) who make the day-to-day decisions concerning the administration of justice to the accused. Do these professionals believe that wrongful convictions occur? If so, to what extent? Do they believe wrongful conviction is a small problem or a large problem? Are they aware of the factors research has indicated contribute to wrongful conviction? Almost 20 years ago Rattner (1983) asked these types of questions in a survey of criminal justice professionals. The sample surveyed included Ohio presiding judges of county common pleas courts, county prosecuting attorneys, county public defenders, county sheriffs, and chiefs of police in major Ohio cities; also surveyed were attorney generals from all fifty states, the District of Columbia, American Samoa, Guam, and Puerto Rico. Since Rattner’s survey in 1983 much has occurred that may

have affected the perceptions and attitudes of those he surveyed. Improved forensic science, especially DNA research, has led to the release of numerous wrongfully convicted individuals from prison – many from death row. Some of these exonerations received widespread news coverage that served to sensitize many individuals, both inside and outside the criminal justice system, to the problem and prevalence of wrongful conviction. This dissertation will replicate and expand on Dr. Rattner’s survey in order to determine, in light of the historical events that have occurred in the past 20 years, if perceptions and attitudes among criminal justice professionals have changed regarding wrongful conviction. The results of the survey are discussed in Chapter fourteen. This dissertation, therefore, is intended to accomplish two objectives: (a) examine the separate and combined effects of the various factors associated with the phenomenon of wrongful conviction, and (b) determine current perceptions and attitudes of criminal justice professionals as they relate to the phenomenon of wrongful conviction.

What follows next is a definition of “wrongful conviction” and a short discussion of four categories of wrongful conviction. A brief historical summary of research concerning wrongful conviction is then outlined, and comments are made concerning the effect of the current ‘get-tough’ era on wrongful conviction. Finally, in this introductory chapter, there is a discussion of the extent of the problem of wrongful conviction and why the problem is important to study.

“Wrongful Conviction” Defined

For the purposes of this dissertation, wrongful conviction will be defined as applying to people who have either pleaded guilty to criminal charge(s) or have been tried and found

guilty; and who, notwithstanding plea or verdict, are in fact innocent. This is the same definition that was used by Huff, Rattner, and Sagarin (1996) in their research of “convicted innocents.” This is a narrow definition that does not take into account other cases of injustice that result from various dysfunctions of the criminal justice process that lead to the punishment of a wrongfully accused individual *before* a conviction. For example, the definition of wrongfully convicted could be expanded to include those innocent individuals who are wrongfully *charged* never convicted. Often these individuals spend days, months, and even years incarcerated in a jail before the cases against them are either dropped or a judge or jury acquits them.

Wrongfully convicted innocent individuals can be divided into four categories based on the ultimate disposition of their cases. The first category includes those who are initially found guilty of committing a crime but are fortunate enough to have their innocence later announced by a judge in a court of law. Often these individuals are exonerated due to such circumstances as improved forensic science, the confession of the actual offender, or the discovery of exculpatory evidence that was not available at trial. This type of case is illustrated in *People of State of New York v. Marion Coakley (1983)*. In this case Marion Coakley was wrongfully convicted of rape and sentenced to fifteen years in prison. After being incarcerated for four years, new DNA evidence proved his absolute innocence. Upon his release, Judge Burton Roberts stated, “I was not involved in the original trial But insofar as I am capable of representing the judiciary of the State of New York, I am sorry. And those words are so weak. I am sorry you have suffered this miscarriage of justice.” (Scheck et al. 2000: 33). (See also *Commonwealth v. Snyder 1986*; *State v. Brown 1977*; *State of Georgia v. Calvin Crawford Johnson, Jr. 1983*.) All innocent people, serving time in

prison for crimes they did not commit, hope for the day when evidence will be found that will verify their claims of innocence and they will hear those sweet words like the ones spoken by Judge Roberts.

A second category of the wrongfully convicted includes those individuals who never have their innocence “proven” in a court of law – but instead have their guilty verdicts set aside by an appellate court due to irregularities at the trial level. Often these verdicts are set aside due to police, defense attorney, prosecutorial, or judicial misconduct/ mistake/ incompetence (see *Brown v. Mississippi* 1936; *Miller v. Pate* 1967; *Oklahoma v. Robert Lee Miller* 1987). An example of the type of professional misconduct that leads to this type of wrongful conviction is currently being investigated in Los Angeles, California. What is described by the *Los Angeles Times* as the “Rampart Corruption Scandal” involves police officers operating in the Rampart section of Los Angeles who have either admitted to, or have been accused by fellow officers of, planting false evidence (guns and drugs) on individuals whom they arrested. The January 27, 2000, issue of the LA Times reports the headline “L.A.P.D. Chief Calls for Mass Dismissal of Tainted Cases.” In this article, Los Angeles Police Chief Bernard C. Parks discloses that, “99 people are believed to have been framed by disgraced ex-officer-turned-informant Rafael Perez and his former partners.” Unfortunately, many of these “framed” suspects have already completed their jail or prison sentences; others are still incarcerated in jails and prisons and are waiting for their convictions to be overturned. These types of cases are typically remanded to the trial court for retrial. Professional transgressions, however, often make it impossible for a court to determine the actual guilt or innocence of the accused and the prosecutor will decide not to

retry the case. Because innocence is never legally established, the wrongly convicted individual, although released, often carries the stigma of “getting off on a technicality.”

A third category includes those wrongly convicted innocent individuals who ultimately receive a pardon from a governor (State v. Gray 1987). In these types of cases, evidence is revealed, long after the trial, which casts doubt on the legitimacy of the conviction. Rules of evidence concerning time limits usually estopped a court from reviewing or rehearing the case through the normal appellate process. Again, innocence is never proven in a court of law, and the individual receiving the pardon often continues to carry the stigma of a person who spent many years in prison.

Finally, a fourth category of the wrongly convicted includes those innocent individuals whom are never vindicated. They live out the full nightmare of wrongful conviction. The actual perpetrator is never caught; no scientific breakthrough reveals their innocence, they do not have an appellate court overturn their conviction, nor does a governor step in and issue a pardon. Instead, they unjustly spend many years in prison, often serving out their full sentence or being executed. They simply become lost, and indistinguishable, from the millions of guilty prisoners now incarcerated in U.S. prisons.

Historical and Modern Concerns About Wrongful Conviction

The phenomenon of wrongful conviction, until recently, has received scant attention from the research community. There are, however, notable exceptions. In the 18th Century, Bentham, in *Principles of Penal Law* discussed punishment inflicted on the innocent; Bentham called such a phenomenon “mis-seated punishment” (Browning 1962). In 1923 Supreme Court Judge Learned Hand stated that the criminal justice system’s “unreal dream”

was that of an innocent man convicted. Yale law professor Edwin Borchard, in his pioneering 1932 book *Convicting the Innocent*, discussed 65 cases of wrongful conviction that stretched back to the year 1812. Gardner's *Court of Last Resort* (1953) did a remarkable job investigating capital cases involving the convicted innocent. In the late 1940's and into the 1950's federal judge Jerome Frank and his attorney-daughter Barbara worked essentially alone to bring justice to the convicted innocent – their work resulting in a book titled *Not Guilty* (1955). In 1963 Block wrote *The Vindicators*, and in 1964 Radin *The Innocents*; both books attempted to call to the public's attention the problem of convicting the innocent. In 1983 McCloskey founded Centurion Ministries, an organization dedicated to helping the convicted innocent have their convictions overturned; by 1997 Centurion Ministries had assisted in freeing and vindicating 19 people who had received a death sentence or were imprisoned for life terms but were completely innocent of the crimes for which they had been wrongly convicted.

More recently, Scott and Hirschi argue that wrongful conviction is “a problem that may never go away and is therefore one that should be systematically and regularly addressed” (1988:11). Clear and Cole state, “A serious dilemma for the criminal justice system concerns people who are falsely convicted and sentenced. Whereas much public concern is expressed over those who ‘beat-the-system’ and go free, comparatively little attention is paid to those who are innocent, yet convicted” (2000:79). Finally, Scheck, et al. suggest, “A more commanding view (of the factors prevalent in cases of wrongful conviction) awaits further study by legal scholars and journalists of all innocence cases” (2000: 246).

Getting Tough on Crime – Unintended Consequences

There is a growing concern among researchers studying the phenomenon of wrongful conviction that the current ‘get-tough’ philosophy of crime control in the United States, with its increased focus on identifying, apprehending, and prosecuting criminals, has produced the unintended consequence of increasing the incidence of wrongful conviction (Huff, Rattner, and Sagarin 1996; Huff, Rattner, and Sagarin 1986; Radelet, Bedau, and Putnam 1992; Yant 1991). Huff et al. note, “Not surprisingly, those aspects of our criminal justice system that emphasize crime control objectives may not only help control crime but also contribute to system error and wrongful conviction” (1986: 534).

In today’s ‘Get-Tough Era’ unprecedented sums of tax dollars have been allocated to hire and train more police and correctional personnel, upgrade equipment, and to enter the computer age so that criminal justice agencies could more efficiently collect, maintain and disseminate information (Gordon 1991). The criminal codes have been rewritten to allow judges to impose fixed sentences that increase both the severity and length of time a convicted criminal will spend in prison – especially for those individuals convicted of drug-related crimes (Clear 1994). Prisons and jails have been built and expanded at a record pace in order to accommodate those criminals who are caught by the police and sentenced by judges (Currie 1985). Additionally, the death penalty has been revived and its use dramatically expanded (Clear and Cole 2000). Steps have been taken to make police, court, and corrections agencies larger, more efficient, and more effective. In many states we see increasing incarceration, even as crime rates decline (Blumstein 1998).

As a result of these get-tough policies, many of the intended consequences of the get-tough programs have been realized. Crime rates in the United States have dropped; according to the FBI's Uniform Crime Reports, in 1999 the crime index rate fell for the eighth straight year – reaching the lowest level since 1978. The 1999 National Crime Victimization Survey (NCVS) conducted by the Bureau of Justice Statistics found that the violent crime rate had declined 10 percent since 1973 – reaching the lowest level in NCVS history. According to the same survey property crime declined 9 percent – continuing a more than 20-year decline. At the same time, the United States has experienced a large and expanding prison population; tougher sentencing guidelines have increased the U.S. prison population to over 2,000,000, second only to Russia in the developed world (BJS 2000). The United States now has ten times the population of Canada, but about thirty-five times the prison population (Mauer 1997). The *Bureau of Justice* (1999) reports that if current incarceration rates remain unchanged, 9 percent of men and 28 percent of black men can expect to serve time in prison during their lifetime. The net of law has been expanded; today there are more than 13 million jail admissions per year (BJS 1995). There are in excess of 3.2 million individuals on probation (BJS 1998) and 685,000 on parole (BJS 1998). In sum, during the get-tough era, crime rates have dropped, but there are millions of citizens living under the control of the criminal justice system.

In this dissertation the task of disseminating the information regarding the statistical and holistic successes of 'get-tough' is left to other researchers. The concern here is to call attention to one of the failures, or *unintended* consequences, of the 'get-tough' policy – that is, miscarriages of justice that result in the conviction of certain innocent individuals for crimes they did not commit. There is increasing evidence that criminal justice professionals,

in their zeal to crack down and get-tough on crime, are, in a rush to judgment, dragging into the system increasing numbers of innocent individuals who are being arrested, convicted, and sentenced to prison (sometimes death row) for crimes they did not commit (Huff, Rattner, and Sagarin 1996; Huff, Rattner, and Sagarin 1986; Scheck, Neufeld, and Dwyer 2000). Often these falsely accused individuals are never convicted of a crime but, never the less, spend months in local jails while their cases slowly plod through the machinery of the court process until they are eventually released; those who are wrongfully convicted may languish in prison for many more years.

Extent of the Problem of Wrongful Conviction

How extensive is the problem of wrongful conviction? Many researchers estimate that only a small percentage of those individuals who are convicted and sent to jail or prison are wrongfully convicted. However, it is possible that such research is limited by methodological problems, and has exposed only the metaphoric tip-of-the-iceberg concerning the problems of wrongful conviction.

James McCloskey, founder and director of Centurion Ministries, Inc., a non-profit organization that has freed many wrongly convicted people over a 20-year period states:

It is my perception that at least ten percent of those convicted of serious and violent offenses are completely innocent..... I realize that I am a voice crying in the wilderness, but I believe that the innocent are convicted more frequently than the public dares to believe, and far more frequently than those who operate the system dare to believe. An innocent person in prison, in my view, is about as rare as a pigeon in the park (1989: 54).

Current, educated estimates of wrongful conviction run from less than one percent to as high as twenty percent. Based on data they received from 229 criminal justice professionals, Huff and Rattner (1988) estimated that false positives constituted less than one percent of all felony convictions. These researchers warned that, although the percentage appears small, in terms of the human suffering of wrongfully convicted individuals, one percent of those arrested and charged with index crimes in 1981 would translate into about 12,000 convictions of innocent citizens in that year alone. Clear and Cole (2000) also estimated that about one percent of felony convictions are in error. However, estimates of a one percent error in felony convictions may be low. Radin (1964) quotes a highly respected judge who, using a legalistic definition of wrongful conviction, estimated that each year in the United States there might be a five percent false positive rate (14,000 wrongful convictions at that time). Huff and Rattner's review of the literature concerning false positives, "revealed cases ranging from a very few cases each year up to twenty percent of all convictions" (1988: 134). If the twenty percent false positive estimate were accurate, based on a national prison population of 2,000,000 (BJS 2000), this would translate into 400,000 falsely convicted individuals in the nations prisons.

Much of the attention given to the phenomenon of wrongful conviction by the research community, the press, and the film media, has focused on the wrongful conviction of individuals on death row. (This attention is understandable due to the finality of this form of punishment and the inability of the criminal justice system to correct an error once an innocent person has been executed.) For example, it was recently reported in a major professional publication that in 1999 eight prisoners on death row in the United States were exonerated of the crimes of which they had been

convicted, and that “these eight exonerations show that wrongful convictions, although unusual, occur regularly” (Criminal Justice Weekly 2000: 1.4.24). On January 31, 2000, CNN.com reported the headline Illinois Suspends Death Penalty. The story noted that Illinois Governor George Ryan had “imposed a moratorium on the state’s death penalty.” Governor Ryan is quoted as stating “We have now freed more people than we have put to death under our system – thirteen people have been exonerated and twelve have been put to death. There is a flaw in the system, without question, and it needs to be studied.” Due to the fact that recent state and federal legislation has shortened the length of time inmates have before their execution (The Death Penalty Information Report 1997), there is now an increased danger that wrongfully convicted individuals will be executed. The average time spent on death row before release [because of innocence] is about seven years. Currently, the average time between sentencing and execution is eight years. If that time is cut in half, then the typical innocent defendant on death row will be executed before it is discovered that a fatal mistake has been made

Beyond the hundreds of dramatic cases of wrongly convicted individuals on death-row are the potentially thousands of cases of individuals wrongly convicted of non-capital crimes who are serving long prison sentences (Bedau and Radelet 1987). Tens of thousands of other individuals are likely to be unjustly serving relatively shorter times of incarceration in local jails after being wrongfully convicted of misdemeanors (Huff, Rattner, and Sagarin 1986; McCloskey 1989).

Why The Topic Is Important

Analysis of the problem of wrongful conviction is important for four key reasons: (1) public safety, (2) public confidence in the criminal justice system, (3) individual justice, and (4) an analysis of dysfunctions of the criminal justice system.

Public Safety

When a wrongfully accused individual is convicted of a crime, that person is punished in place of the person who actually committed the offense. Therefore, for every suspect wrongfully convicted, there is a corresponding guilty individual who has not been brought to justice and who may be continuing to commit crimes in the community (see Justice Thurgood Marshall's dissent in *Manson v. Brathwaite* 1977). Radelet, Bedau, and Putnam (1992) give details concerning the case of Melvin Reynolds, a 25 year-old mentally retarded man who was wrongfully convicted of murdering a four-year-old boy and spent four years in prison before the actual killer confessed to the crime. Radelet, et al report:

Melvin Reynolds had shown symptoms of mild mental retardation. Despite that, he was aware that his conviction left a problem hardly anyone else seemed to notice. "What really bothers me", Reynolds stated, "is that whoever did it, they're still out on the streets, laughing about it." Not bad for an I.Q. of 75 (1992: 13).

Public Confidence System In The Criminal Justice

Every year stories reach the media concerning individuals who have languished for years in prison, or who have been executed, and are later found to be wrongfully convicted. Stories of this nature can shake the faith of criminal justice professionals and the citizenry alike in the ability of the criminal justice system to identify criminals and achieve justice.

Wrongful convictions, therefore, can damage the symbolic status of the criminal justice process – a process that symbolizes America’s moral stance against crime and the desire to achieve justice.

The symbolic importance of the criminal justice process to a free society cannot be understated. When an individual is wrongly convicted, and then later that conviction is overturned, a poor image reflects upon and tarnishes the image of the criminal justice process. This damage ultimately places a burden on the integrity, prestige, reputation, credibility, and effectiveness of the entire criminal justice process. Arnold et al. (1965) discuss the importance of maintaining the integrity of our judicial institutions; they argue that the moral level at which the nation’s judicial institutions function is the core element that separates civilized from uncivilized countries:

The center of ideals of every Western government is in its judicial system. Here are the symbols of all of those great principles which give dignity to the individual, which gives independence to the businessman, and which not only make the State a great righteous protector, but at the same time keeps it in its place.... It is in this institution that we find concentrated to a greater extent than any other, the symbols of moral and rational government. (1965: 123)

In a 1996 message to the U.S. Department of Justice, Office of Justice Programs, U.S. Attorney General Janet Reno stated, “our system of criminal justice is best described as a search for the truth” (see Connors, Lundregan, Miller, and McEwen 1996). If that search for the truth becomes perceived as flawed, the public may begin to lose confidence in the criminal justice process. When public confidence regarding the fairness and competency of the system is lost – the ramifications can be serious. In civil matters, once a system appears to have ceased being a credible forum for dispute settlement, citizens may either fail to

pursue their grievances, or worse, seeing no other alternative, begin to take the law into their own hands. In a criminal venue, once a system appears to be incapable of separating the innocent from the guilty, citizens may lose faith in their police officers, prosecutors, and judge's ability to do justice. In a benign political atmosphere it is possible that the system's inability to separate the innocent from the guilty may be looked upon by most citizens as an unavoidable cost of the "war-on-crime." However, in a politically charged atmosphere of racial unrest, affected groups could look upon such systemic failures with suspicion. The political and social ramifications of discriminatory behavior in the United States were demonstrated in the civil unrest of the 1960's – and that scenario need not be relived.

Individual Justice

In 1923, United States Supreme Court Judge Learned Hand wrote, "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream" (*U.S. v. Garsson* 1923). Since that statement by Judge Hand, it is likely that thousands, even tens of thousands of innocent individuals have personally lived that "unreal dream". In the case of the innocent convicted, the experience is not a dream but a very real nightmare.

When an innocent person is wrongly convicted several injustices occur: First, the wrongly convicted individual is unjustly suffering. (S)he is often subjected to the horrors of prison life, is denied freedom (often for several years), and possibly faces execution. "All wrongfully convicted individuals take the lash of punishment for someone else's crime; that is the very definition of their predicament. Far too often, they are surrogates for serial criminals and killers" (Scheck et.al. 2000, 244).

Second, the family of the wrongfully convicted individual also unjustly suffers (e.g. wife without husband, children without father, mother and father without son, brothers, sisters, in-laws.) Take for example the case of 18-year-old Todd Neeley, who was wrongfully convicted of attempted murder and sentenced to fifteen years in prison. For four years his parents “devoted their time, energy, and financial resources to proving Neeley’s innocence Neeley’s wrongful conviction cost his parents nearly \$300,000 in legal expenses and untold emotional trauma and personal anguish” (Huff et al. 1996: 149). The efforts of Neeley’s parents finally paid off. Four years after his wrongful conviction, all charges against Neeley were dropped – primarily because an appellate court determined that key exculpatory evidence had been withheld from the defense attorney.

Third, other participants in the criminal justice process suffer. For example, jury members, prosecutors, and judges are faced with the fact that their actions were instrumental in sending an innocent person to prison, or worse, to death row. Also, imagine the feelings of a rape victim who later discovers that a person she wrongfully identified as the rapist had spent many years in prison because of her testimony, and that the actual perpetrator of the crime is still at large and has gone unpunished. College student Jennifer Thompson wrongly identified Ronald Cotton as the individual who forced his way into her apartment and raped her. DNA evidence eventually exonerated Cotton. When informed by police that Cotton was going to be released, Ms. Thompson stated,

I felt like someone had punched me in the gut. All the air rushed out of my body. I cried for days. It was a hollow, empty feeling We took away years of his life. His bars were made of metal. My bars are emotional. I met alone with Cotton and his wife. I didn’t even want my husband to be with me. I cried, I felt naked. And Ronald said, ‘I am not angry with you, I forgive you.’ It was a remarkable gift. It’s weird, I hated him so much I wanted to watch him die. And now I care

a lot about him. He taught me grace and forgiveness” (Scheck et al. 2000: 234).

Analysis Of Dysfunctions Of The Criminal Justice System

Research on wrongful conviction is important because it is fundamental that those who can fix the problem are made aware that there is a problem. The expert’s ability to better establish justice and improve the fairness of the criminal justice system is enhanced by analysis of the phenomenon of wrongful conviction in order to determine causes and methods for prevention. As tragic as the consequences of wrongful conviction are to innocent victims – a redeeming result of these tragedies is that they allow researchers the opportunity to study system dysfunctions. Each wrongful conviction uncovered can be considered the basis for a “natural experiment.” Babbie explains:

We typically think of experiments as being conducted in laboratories....That need not be the case, however....Social scientists often study what are called *natural experiments*: experiments that occur in the regular course of social events. Sometimes nature designs and executes experiments that we are able to observe and analyze; sometimes social and political decision-makers serve this natural function (1992: 237).

By analyzing each case of wrongful conviction, something may be learned regarding where the criminal justice system has broken down. For example, analysis of a wrongful conviction may reveal flawed procedures used in the handling of eyewitness testimony; evidence of police or prosecutorial overzealousness or even corruption may be exposed; faulty forensic analysis or inadequacy of counsel can be uncovered. This knowledge, if used as a basis for correcting errors, should ultimately reduce the incidences of wrongful conviction and improve our system of justice.

Conclusion

The study of wrongful conviction is important because it impacts issues concerning public confidence in the criminal justice system, individual justice, public safety, and analysis of error. While researchers of the criminal justice process have given a great deal of attention to those individuals *rightfully* convicted, there has been a relative paucity of research that concerns the *wrongfully* convicted. The behavior of those individuals rightfully convicted of crime has been analyzed and reanalyzed in criminological studies. No similar attention is given to the wrongfully convicted; the research community has largely ignored the malfunctions of the system that lead to wrongful conviction. Since the phenomenon of wrongful conviction is rarely studied, much less understood, few policies or procedures are in place to minimize its effects on affected individuals and society as a whole.

Systemic flaws in the U.S. criminal justice process have, over the years, led to the wrongful conviction of thousands of individuals. At a minimum, wrongful convictions typically result in a suspect's financial ruin and loss of reputation. More often, wrongful conviction leads to the incarceration of an individual in one of the nation's jails or prisons. In the worst-case scenario, wrongful conviction leads to death of an individual by lethal injection, electrocution, or in the gas chamber. Those who are wrongfully convicted come from all types of social, ethnic and economic backgrounds. However, as is the case in every other aspect of punishment in the criminal justice process, wrongful conviction weighs most heavily on the young, the poor, and minorities (Currie: 1998 Gordon: 1991; Huff, Rattner, and Sagarin: 1996; Reiman: 2001; Yant: 1991). Regardless of the background of wrongfully convicted individuals, each shares the unpleasant experience of being unwillingly and

unfortunately caught up in the machinery of a criminal justice system that often operates through established rituals that tend to preserve bureaucratic interests at the expense of truth-finding.

In order to implement a process that is better at identifying the wrongfully accused, those people involved in the criminal justice system (police, prosecutor, defense attorney, judge, jury) must be made aware of the various factors that contribute to the incidence of wrongful conviction, and they must be encouraged to consider these factors in the decision making process. A true implementation of this method would require basic changes in the way suspects are viewed and processed by police, prosecutors, and defense attorneys. It will also require that the ‘presumption of guilt’ that is currently (and unconstitutionally) the mind-set of many participants in the criminal justice process (Klockars 1980; McCloskey 1989), be replaced with the constitutionally mandated ‘presumption of innocence’ to which every criminal suspect is entitled. In sum, including consideration of the factors associated with wrongful conviction into the decision making process will require increased professionalism on the part of all actors in the criminal justice system.

Wrongful conviction can probably never be totally eradicated. The inherent fallacies of human organizations will always make them subject to mistake. However, mistakes can be reduced through improved systems based on sound knowledge and research. This dissertation is written with the hope that those involved in the administration of criminal justice decision making process will become better informed concerning the problem of wrongful conviction. After reviewing the information contained in this dissertation the reader should have a better understanding of why and how wrongful convictions occur. It is hoped that this information will be taken into account during the decision-making process and

policies and procedures that will be implemented that will reduce the incidence of wrongful conviction. If one wrongfully convicted individual is spared the horror of sitting in prison for a crime he or she did not commit – this exercise will have been well worth the effort.

Previous research has isolated many factors, both non-systemic and systemic to the criminal justice system, associated with the phenomenon of wrongful conviction. Chapter two provides an overview of these factors. Chapters three through eleven define each factor – eyewitness testimony, police and prosecutorial misconduct or error, inadequacy of counsel, false expert testimony and the use of faulty forensic science, false accusations and confessions, and community pressure for convictions – and discusses the extent of each problem and its ramifications.

CHAPTER TWO

FACTORS ASSOCIATED WITH WRONGFUL CONVICTION

In order to determine which factors are associated with wrongful conviction, one first must identify a wrongfully convicted individual. Identification can be accomplished in several ways; for example, the true offender admits to the crime, a supposed murder victim turns up alive, DNA or other exculpatory evidence becomes acknowledged, or a lying witness confesses. Once a victim of wrongful conviction is identified, the case can then be examined from arrest to conviction in order to determine what went wrong. This formula has been utilized by numerous researchers to determine what factors associated are with wrongful conviction of the innocent. Some previous research investigated information garnered from court records, legal documents, or news-reports that chronicle all types of crimes (usually felonies) where wrongful convictions occurred (Bedau and Radelet 1987; Block 1953; Borchard 1932; Frank and Frank 1957; Garner 1953; Huff, Rattner and Sagarin 1986; Huff, Rattner and Sagarin 1996; McCloskey 1989; Radelet, Bedau, and Putnam 1992; Radin 1964; Rattner 1983; Yant 1991). Other research investigated only capital (or potentially capital) cases (Bedau and Radelet 1987), or explored only recent DNA exonerations (Connors, Lundregan, Miller, and McEwan 1996; Scheck, Neufeld, and Dwyer 2000). Still other research was based on survey research, or reviews of existing literature (Rattner 1983).

Research efforts have produced a list of factors determined to be associated with the phenomenon of wrongful conviction. The major contributing factors are: mistaken eyewitness testimony, false accusations, police misconduct and error, prosecutorial misconduct and error, inadequacy of counsel, faulty expert testimony, false confessions, and community pressure for a

conviction. ‘Other’ important, but less empirically researched factors are: presumption of guilt, existence of a prior criminal record, judicial error, mentally incompetency of the accused, racism, and simple mistake. All of these factors are defined and briefly discussed in this section. Also included in this section is a brief discussion of ‘why’ these same factors are consistently found to be associated with proven cases of wrongful conviction..

Research data suggest that, in most cases of wrongful conviction, more than one factor is likely to have influenced the case. In other words, wrongful convictions are most likely to occur when the criminal justice system breaks down in more than one way (Huff et al. 1986). Huff et al. (1996: 65) note “interaction effects are so important that isolating any one factor misses the point.” Due to the fact that several factors may simultaneously be at work in cases of wrongful conviction, listing cases by “types of error” can be misleading and present an oversimplification of the dynamics of wrongful conviction; caution is therefore advised when considering the independent impact of the individual factors found in each case.

Eight major factors associated with wrongful conviction of the innocent are listed in this chapter. Sheck, Neufeld, and Dwyer (2000), in their study of 62 cases of wrongful conviction, collected and analyzed some of the most current data relating to these factors. Their findings are particularly reliable because data is based on findings harvested from cases of more recent exonerations – where innocence was proven through the use of modern DNA technology. For this reason, the factors in this chapter are listed in the order of prevalence determined by Sheck et al. (2000). It should be noted that their study tended to confirm, rather than dispute, the findings of most previous research related to the topic of wrongful conviction.

Eyewitness Error

Eyewitness error, in the context of wrongful conviction, refers to the mistaken identification of an innocent criminal suspect by a victim or eyewitness to a crime. A large body of research attests to the fact that human memory is inherently flawed – especially when recollections are evoked from a crime-scene setting where an extraordinary experience may impede a witness’s powers of perception (Devenport, Penrod and Cutler 1998; Loftus 1979; Wells 1984; Wells, Small, Penrod, Malpass, Fulero, and Brimacombe 1998). Mistaken identification is particularly harmful to an innocent suspect because judges and jurors tend to believe the veracity of an eyewitness’s claims over an accused’s claims of innocence (Borchard 1932; McCloskey 1989). Without exception, every researcher who has seriously studied wrongful conviction identified eyewitness error as the most prevalent factor associated with the phenomenon (see Brandon and Davies 1973; Frank and Frank 1957; Huff and Rattner 1988; Radelet and Bedau 1992; Yant 1991).

Faulty or Fraudulent Science and “Inexpert” Testimony

‘Faulty science’ refers to erroneous and indicting scientific evidence that is unintentionally offered against an innocent suspect to a crime. ‘Fraudulent science’ refers to erroneous and indicting scientific evidence that is intentionally offered against an innocent suspect to a crime. ‘Inexpert testimony’ refers to the testimony of incompetent forensic ‘experts’ who attest in court to the accuracy of flawed scientific and indicting evidence against an innocent accused. In the same way that judges and jurors give great weight to eyewitness testimony, they also give similar weight to the testimony of laboratory scientists who swear in court as to the accuracy of scientific evidence (e.g. blood, semen, fingerprint, DNA) presented by the

prosecution against an innocent suspect. Often the testimony of a laboratory scientist can mean the difference between conviction or acquittal to a wrongly accused suspect (McCloskey 1989). “Faulty and fraudulent science” and “faulty or fraudulent expert testimony” are included as contributing factors by most other researchers studying wrongful conviction (Bendau and Radelet 1987; Borchard 1932; Huff et al. 1986; McCloskey 1989; Radelet, Bedau, and Putnam 1992; Yant 1991).

Police Error or Misconduct

Police officers or detectives are often the first members of the criminal justice system to intervene in a criminal case. Police officers sometimes personally view a criminal act, or may be close enough to personally hear a gunshot or a scream. More often, police respond to a crime scene after being notified by a citizen that a crime has taken place. The police, therefore, become involved in a criminal case at a very critical time – the beginning. The activities of the police at this juncture, and how well they do their job, may have dramatic implications to an innocent individual who becomes a suspect. Once police error or misconduct contributes to a wrongful arrest, there is an increased likelihood that other criminal justice officials will add momentum to the mistake (Huff et al. 1986). Research confirms that police misconduct and error are major contributors to the wrongful conviction of the innocent (Huff et al. 1986; Huff et al. 1996; McCloskey 1989; Radelet, Bedau, and Putnam 1992; Yant 1991).

Police ‘error’ refers to situations where the police make honest mistakes that may lead to the wrongful arrest of an innocent suspect. Such errors may include mistakenly arresting the wrong person, misreading a search-warrant, or making an unintentional misapplication of the law. Errors can occur when there is inadequate police training, or when inept investigations are

conducted. Police ‘misconduct’ involves intentional actions by police officers and detectives that are designed to increase the odds that a suspect will be arrested and convicted. Such misconduct may include: not giving a Miranda warning, fabricating or planting evidence, suppressing exculpatory evidence, coaching witnesses at lineups and photospreads, or coercing a confession. All of these types of activities increase the probability that innocent individuals will be arrested and convicted of crimes they did not commit (Huff et al. 1996).

Prosecutorial Misconduct or Error

Prosecutorial misconduct is another major problem associated with wrongful conviction (see Buckley v. Fitzsimmons 1993). The prosecutor may be the most powerful individual within the criminal justice process (Gershman 1999). Prosecutors have wide discretion regarding which cases to prosecute and which cases to dismiss. They also enjoy almost an absolute immunity of liability. Due to their position within the criminal justice process, a prosecutor’s errors or misconduct can result in devastating consequences to an innocent suspect (Huff et al. 1996).

Prosecutorial ‘error’ refers to those actions in which a prosecutor makes an honest mistake that may lead to the wrongful prosecution and conviction of an innocent suspect. Prosecutorial errors may occur when prosecutors unknowingly use false or erroneous witness testimony, false or erroneous forensic evidence, or false confessions. Prosecutorial ‘misconduct’ may include activities in which a prosecutor, in order to gain a conviction, intentionally withholds exculpatory evidence, fabricates evidence, coerces witnesses, knowingly uses false testimony, or applies undue plea-bargaining pressure that may force a suspect to plead guilty to crime he did not commit (Scheck et al. 2000). Radin (1964) notes that the willful abuse of power by prosecutors occurs much more often than it should, and that such abuse can result from the

attitudes of prosecutors who view a trial as a kind of game, and who are so busy trying to outsmart and outmaneuver an opponent that they forget that justice is the sole purpose of a criminal trial.

Inadequacy of Counsel

Inadequacy of counsel refers to instances where innocent individuals are wrongfully convicted of a crime they did not commit because, in part, their defense lawyer was incompetent, lazy, or ill-prepared. Huff and Rattner (1988) list “inadequacy of counsel” as an important factor in wrongful conviction. They note that in many of the cases they studied, original defense counsel, due to inexperience, inadequate investigative resources, or other factors, did not adequately represent the interests of the suspect. Yant (1991) suggests that some defense attorneys – without fully investigating their client’s claims of innocence – too often use plea-bargaining as a standard operating procedure to reduce their workload. He also criticizes defense lawyers for seldom taking the time to properly challenge forensic evidence offered by the prosecution.

False Accusation

False accusations are intentional lies made against an innocent suspect who is wrongfully charged with a crime. Unless the false accuser’s lies are exposed, judges and jurors will often give great weight to their testimony, and will convict an innocent person based on this testimony. False accusations can originate from an individual who actually committed the crime – in order to cover-up their own involvement in the incident. False accusations can also come from vengeful spouses, business partners, or acquaintances – anyone who thinks they can profit, either

emotionally or financially, by seeing an innocent person convicted of a crime. Perhaps the most troubling false accusations come from inmates who are locked in jail with an innocent suspect who is awaiting trial. In order to gain the favor of police and prosecutors, these inmates will concoct stories of a “jailhouse confession” that was made by the innocent suspect – and testify in court to the authenticity of their claim (McCloskey 1989). Finally, false accusations have even occurred when no crime ever took place. For example, false accusations of rape against an innocent person have occurred so the feigning ‘victim’ could cover up an unwanted pregnancy; other false accusations have simply resulted from the mental illness of an accuser (Huff et al. 1996)

False Confessions

A false confession is an untruthful statement made by an innocent individual who admits to committing a crime. Huff, Rattner, and Sagarin (1986) note that false confessions are one of the least publicized dynamics of wrongful conviction:

For most people, this may be the most puzzling of all such cases; after all, why would a perfectly innocent person plead guilty? Typically, the innocent defendant protests his innocence to counsel; because many guilty defendants also claim innocence, counsel may regard such claims with cynicism.....Innocent defendants are more likely to accept a plea bargain when they face a number of charges, and the probable severity of punishment is great. For this reason we are particularly concerned about the possible effect of resuming executions in the United States. With so much to lose, who among us would not plead guilty if he thought that by doing so, he could save his own life, and perhaps, eventually go free when the error is discovered? (1986: 529)

Community Pressure

Some types of crimes so outrage the members of a community that pressure will be put on law-enforcement individuals to ‘solve-the-crime’ – and quickly. These types of cases can be exceptionally perilous to an innocent suspect of the crime. Due to pressure to solve the case, criminal justice officials, in order to satisfy the community, may be forced into a rush-to-judgment and arrest the first suspect – often an innocent person. This suspect then may receive the total attention of law-enforcement authorities, and other leads that might be followed are sometimes disregarded. Huff and Rattner describe community pressure for conviction as a time “when hatred replaces reason and due process” (1988: 158). Every major analysis of the phenomenon lists community pressure as a significant factor in the incidence of wrongful conviction (Bedau and Radelet 1988; Borchard 1932; Brandon and Davies 1973; Frank and Frank 1957; Gross, 1996; Huff et al. 1996; Huff and Rattner 1988; Humes 1999; McCloskey 1989; MacNamara 1969; Radelet, Bedau, and Putnam 1994; Radin 1964).

“Why” Do Certain Systemic Dysfunctions Associated with Wrongful Conviction Reoccur ?

In some ways it is relatively easy to itemize *what* factors are associated with the phenomenon of wrongful conviction; more difficult to ascertain is the *why* question – why do certain systemic processes seem to reoccur in cases of wrongful conviction, even though it is known that such processes can lead to miscarriages of justice? For example, for many years it has been known by those in the criminal justice system that eyewitness testimony is very susceptible to error (Loftus 1979), and that the system is increasingly prone to error when there is only a single eyewitness to a crime and no other corroborating physical evidence (Radin 1964; Wells et al. 1998). Yet, such specious eyewitness testimony often continues to be improperly

utilized, relied upon, and even protected by police, prosecutors and judges – often to the peril of an innocent suspect (Scheck 2000). To date, a comprehensive study of the “why” question has not been published. There are, however, bits and pieces of the puzzle that can be examined. Concepts of “noble cause” and “the Dirty Harry problem” have been tendered as partial explanations of *why* criminal justice personnel sometimes take actions that appear to contradict the law and professional ethical standards – actions that can lead to wrongful conviction.

Noble Cause Corruption

One reason “due process” rights are guaranteed U.S. citizens is to protect them from a wrongful conviction. The rights of an innocent person, accused of a crime, are maximized when the law is followed at each step of the criminal process. Often, in cases of wrongful conviction, a criminal justice official has, somewhere along the way, stepped outside the law. Delattre (1996) offers a plausible explanation as to why someone would act outside the law in his discussion of the concept of “noble-cause.” He suggests that a person’s actions ultimately result from perceptions of self-worth and one’s desire to gain the respect of significant others. These perceptions and desires, according to Delattre (1996), are based on whether the causes which one identifies oneself with are admirable or despicable. Crank and Caldero (2000) suggest that this commitment to a noble-cause – the desire to be viewed by oneself and by others as living a noble life – can lead some criminal justice officials to bend, or in some cases, disregard the law when they believe that the process stands in the way of achieving a perceived noble goal. They define this phenomenon as ‘noble-cause corruption’, and note:

Noble-cause corruption is committed in the name of good ends, corruption that happens when police care too much about their work. It is corruption committed in order to get the bad guys off the streets, to protect the innocent and the children from the

predators that inflict pain and suffering on them. It is the corruption of police power, when officers do bad things because they believe the outcomes will be good (2000: 2).

When police officers – or any other criminal justice official – “do bad things” (neglect their sworn duty to uphold the law), in order to get-the-bad-guy-off-the-street, they are circumventing the constitutional and legal process designed to apprehend the guilty and protect the innocent, and replacing that process with a their own private system of justice based on their personal view of what is morally good. The innocent suspect, stripped of constitutional protections by an act of private justice, becomes increasingly susceptible to being a victim of a miscarriage of justice.

The Dirty Harry Problem

A related theory as to why a criminal justice professional might step outside the law is offered by Klockars (1980). He succinctly describes what he defines as “the Dirty Harry problem”:

Policing constantly places its practitioners in situations in which good ends can be achieved by dirty means. When the ends to be achieved are urgent and unquestionably good and only a dirty means will work to achieve them, the policeman faces a genuine moral dilemma. A genuine moral dilemma is a situation from which one cannot emerge innocent no matter what one does – employ a dirty means, employ an insufficiently dirty means, or walk away. In such situations in policing, Dirty Harry problems, the danger lies in not becoming guilty of wrong – that is inevitable – but in thinking one has found the way to escape the dilemma which is inescapable (1980: 33).

The concept of the Dirty Harry problem further complicates the plight of the innocent accused. While the ‘noble-cause’ syndrome suggests that some criminal justice officials may be influenced to “possibly” bend or break the law, the Dirty Harry problem suggests that officials,

in certain situations, are “forced” to choose between one of two ‘un-noble causes’; they must either ‘let-the-bad-guy-stay-on-the-street’ because they have no legitimate legal means available to remove him, or they must disregard the law they are sworn to uphold and make a dubious arrest. This situation is especially dangerous to an innocent suspect. Having done nothing illegal, he should not need to fear the law or the law-enforcer; on the other hand, he may have much to fear from a law-enforcer who is working outside the law. There are numerous stories of wrongful conviction where criminal justice officials used illegal tactics to get-a-bad-guy-off-the-street, only to later discover that they had participated in a charade that sent an innocent man to prison (see *Miller v. Pate* 1967; *Massachusetts v. Cornich* 1989; *Durham v Oklahoma* 1993).

It should be noted that, while Klockars’ focus is on police personnel, the Dirty Harry problem is by no means confined to just police officers – it seems that it would be applicable to all criminal justice officials; prosecutors, for example, are not immune from using dirty means (e.g. withholding exculpatory evidence from the defense attorney) in order to accomplish a perceived noble goal.

Other Reasons “Why”

By no means do the ‘noble-cause’ syndrome and “the Dirty Harry problem” provide an exhaustive explanation of why flawed criminal justice practices associated with wrongful conviction continue to be employed despite their often-unjust consequences. Not all criminal justice officials who bend the rules are “moral entrepreneurs” (Becker 1963: 147). To the contrary, sometimes their reasons for taking illegal or unethical actions are self-serving: to gain an arrest, ‘win’ a case, satisfy the ‘community’, or to otherwise bolster their resume’ and further their own career goals. Also, flawed procedures may be used due to poor training, or simply because of the apathy or laziness of criminal justice officials.

CONCLUSION

The factors most frequently associated with the phenomenon of wrongful conviction include: eyewitness error, faulty or fraudulent use of scientific evidence, police and prosecutorial error or misconduct, inadequate representation by defense counsel, false accusations and false confessions, and community pressure for a conviction. Other contributing factors include : presumption of guilt, existence of a prior criminal record, judicial error, mentally incompetency of the accused, and simple mistake. Typically, two or more of these factors are present in a case of wrongful conviction, and an “interaction effect” between the factors complicates the dynamics of the process.

Also contributing to the incidence of wrongful convictions are the sometime well-meaning and sometime misguided pursuit of a noble-cause by professionals involved in the criminal justice process. This pursuit may lead officials to abandon approved statutory and constitutional processes that are intended to protect the innocent from wrongful arrest or conviction. Biases and prejudices of police officers, prosecutors, defense attorneys, judges, and jurors may also enter into the decision-making process that leads to wrongful conviction, and bureaucratic rituals, which tend to preserve bureaucratic interests, may reinforce these attitudes. Finally, the self-serving career motives of criminal justice personnel may influence decision-making that is harmful to the wrongfully accused individual.

The next several chapters contain a more thorough analysis of the eight most common factors various associated with the phenomenon wrongful conviction. Each analysis will include actual stories of individuals who were wrongly convicted due to a particular phenomenon, and a review of pertinent literature.

CHAPTER THREE

WRONGFUL CONVICTION AND EYEWITNESS ERROR

The vulgarities of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.

Justice William Brennan in *U.S. v. Wade* (1967)

Eyewitness error, in the context of wrongful conviction, refers to the mistaken identification of an innocent criminal suspect by a victim or eyewitness to a crime. Mistaken identification is particularly harmful to an innocent suspect because judges and jurors tend to believe the veracity of an eyewitness's claims over an accused's claims of innocence (Borchard 1932; McCloskey 1989). Few moments are more dramatic or indicting in a criminal trial than when a witness points to a defendant and says, "He's the one!" Every researcher who has seriously studied wrongful conviction has identified eyewitness error as one of the most prevalent factors associated with the phenomenon (Bedau and Radelet 1988; Borchard 1932; Brandon and Davies 1973; Brock 1963; Connors et al. 1996; Frank and Frank 1957; Garner 1952; Gross, 1996; Huff et al. 1996; McCloskey 1989; MacNamara 1969; Radelet, Bedau, and Putnam 1994; Raden 1964; Rattner 1983; Scheck et al. 2000). What follows are brief descriptions of three cases in which innocent individuals were found guilty of a crime they did not commit, due in large part to eyewitness error.

He Was No Doctor - The Case of William Jackson

"They took away part of my life, part of my youth," William Bernard Jackson told reporters as he was released after spending five years in prison for two crimes that he did not commit (Yant 1991; 108). At his trial, a jury found Jackson guilty of committing two rapes in the Columbus, Ohio area. Except for the positive identification of Jackson by the victims, there

was no other evidence to link him to the crimes. At trial the victim's testimonies were rebutted by several of Jackson's family members and friends who swore that he was with them on the nights of the crimes. It was the victim's words against the words of those who knew Jackson and, as is almost always the case in these instances, the jury chose to believe the victims.

After five years in prison, William Jackson got lucky. The Columbus police arrested another man – Edward F. Jackson – who was caught inside a house wearing a ski mask and carrying a wide array of burglary tools. What was particularly unusual about this arrest was that Edward F. Jackson was discovered to be Dr. Edward F. Jackson, perhaps the city's most prominent black internist. When Dr. Jackson's Mercedes-Benz was searched police found a long list of rape victims in his handwriting. The list included the names of several women who were classified as being the victims of the elusive and long sought after "Grandview rapist" who had been terrorizing women in the suburb of Grandview Heights with seeming impunity for several years. The improbable fact that the rapist was a doctor began to make sense as investigators began reviewing the files and discovered that many of the rape victims had said that their assailant had worn rubber gloves and took their pulse after the assault. Fortunately for William Jackson, who was sitting in prison, Dr. Edward Jackson's list of rape victims included the names of the two women that William Jackson had been found guilty of raping.

To the credit of the Columbus police they acted quickly. Only seven hours after Dr. Jackson was indicted on ninety-four counts, including forty-six burglaries and thirty-six rapes, the "wrong" Jackson was released from prison. When the photos of the two Jacksons were compared it was obvious that there was a striking *resemblance*. Both were black, tall, thin, had similar hairstyles, scraggly beards, and mustaches. The prosecutor later admitted, "eyewitness identification is unreliable. But that's what the jury is there for. They have to decide if its

reliable or not” (Yant 1991, 107). It should be noted that the prosecutor did not publicly state that eyewitness identification is unreliable until *after* the conviction.

William Jackson’s case illustrates the type of serious situation an innocent defendant faces when a crime-victim points and identifies him as the perpetrator. The moment in which an eyewitness to a crime identifies a suspect is a significant juncture in the possible prosecution of that person. Once a sympathetic witness identifies a suspect, investigation of other suspects may end for all intents and purposes. U.S. Supreme Court Justice William Brennan, wrote, “The trial which might determine the accused’s fate may well not be in the courtroom, but in the initial pretrial confrontation” (*U.S. v. Wade* 1967: 1162). In most cases, especially rape cases, great weight is placed on eyewitness identification (Huff et al 1996). Further complicating the issues surrounding Jackson’s conviction were racial factors. He was a black man identified by white victims – an indication of the special difficulties that occur during interracial identifications (Huff et al. 1996; Malpass and Kravitz 1969); some of these difficulties are discussed in a section later in this chapter.

Walking in Another Man’s Shoes – The Case of Jeffery Streeter

Accounts of eyewitness error are plentiful, and sometimes bizarre. In one incredible case, due to eyewitness error, a man was convicted of committing a crime without ever being arrested. The man, Jeffrey Streeter, was sitting outside a courtroom waiting for a friend when he was approached by a defense attorney and asked if he would help test the credibility of an eyewitness that was testifying in a case. Streeter agreed to help. Without informing the judge, the defense attorney had Streeter sit next to him at the defense table while the real defendant sat behind them in the seats used by courtroom observers. Despite the fact that the actual defendant was in the courtroom when they testified, three eyewitnesses proceeded to unflinchingly point to

the shocked Streeter as the criminal who had assaulted an elderly man. Streeter was convicted and sentenced to one year in jail. Streeter actually only spent one night in jail and was subsequently released on his own recognizance. Ultimately his conviction was overturned (Court Stand-in Is Convicted," 1980).

Huff et al. report a similar scenario:

Robert Duncan, president of the Missouri Association of Criminal Defense Lawyers, was representing a Mexican-American defendant who had been arrested after being identified by a woman who was raped by an "Italian-looking man." When a second suspect was brought in she identified him, too, as the guilty offender. She reportedly told authorities, I'm getting tired of coming down here to identify this man." According to the defense attorney, "The second guy didn't look anything at all like my client" (1996: 70).

These cases illustrate both the unreliability of eyewitness testimony and the type of systemic momentum that must be overcome by innocent suspects after they have been charged with a crime and their cases mature through the criminal justice system.

EYEWITNESS ERROR RESEARCH

In 1908 Hugo Munsterberg argued that scientific evidence demonstrated eyewitness testimony was just as likely to be wrong as right. Munsterberg premised his contention on an experiment conducted by Berlin university teacher Professor von Liszt. During a lecture before a large class, von Liszt, unbeknownst to the rest of the class, had two students stand up and stage a heated argument over religion; one of the students pulled a gun on the other; they struggled over the gun, a loud blast ensued, but it appeared that no one was hit. The two combatants then backed-off. The other stunned and shaken students were then informed that the event had been staged, and they were then asked to write a detailed account of what they had just observed.

Munsterberg wrote,

Words were put into the mouths of men who had been silent spectators during the whole short episode; actions were attributed to the chief participants of which not the slightest trace existed; and essential parts of the tragic-comedy were completely eliminated from the memory of a number of witnesses (1908, 67).

Almost 100 years after von Liszt's experiment, human nature has not changed. Since Munsterberg wrote on this topic, a sizeable body of research on eyewitness behavior has accumulated which has repeatedly proven the limitations of human memory. Usually imperfect recall only has minor consequences – an embarrassing moment at a social gathering, a forgotten appointment, or a lower test grade for a student. However, in the case of a criminal suspect who becomes the victim of the imperfect recall of an eyewitness to a crime, the consequences can be extremely serious – even life-threatening.

Eyewitness testimony in criminal trials can be, to put it simply, unreliable. As Buckhout notes:

Research and courtroom experience provide ample evidence that an eyewitness to a crime is being asked to be something and do something that a normal human being was not created to be or do. Human perception is sloppy and uneven, albeit remarkably effective in serving our need to create structure out of experience. In an investigation or in court, however, a witness is often asked to play the role of a kind of tape recorder on whose tape the events of a crime have left an impression.... Both sides, and usually the witness, too, succumb to the fallacy that everything was recorded and can be played back without questioning (1974, 23).

Various factors contributing to the unreliability of eyewitness identification have been explored by a number of researchers (see Buckhout, Figueroa, and Hoff, 1975; Clifford and

Scott, 1978; Loftus, 1979; Shapiro and Penrod 1986). Considerable research advancements have been made in the past 25 years concerning such topics as: how jurors evaluate eyewitness testimony (Cutler, Penrod, and Stuve 1988; Wells 1984), the reconstructive aspects of eyewitness memories (Loftus 1979), the development of false autobiographical memories (Lindsay and Read 1995; Loftus and Ketcham 1994), the effectiveness of legal safeguards (Stinson, Devenport, Cutler, and Kravitz 1996), individual differences in eyewitness abilities (Hosch 1994), techniques for interviewing eyewitnesses (Fisher 1995), the abilities of children relative to adults to recall witnessed events (Ceci, Toglia, and Ross 1987), and the extent of agreement among eyewitness experts regarding various findings (Kassin, Ellsworth, and Smith 1989). In general this research has suggested that human memory can be unreliable, and that witnesses to a crime are usually incapable of providing precise accounts of what they have seen. A witness' capacity to reconstruct the events of a crime from memory can depend on many factors: e.g. the age or maturity of a witness, the physical abilities of a witness, the state-of-mind of a witness during the event she is trying to recall, and the length of time that transpired between the event and when it is described. Research also suggests that systemic factors (e.g. how a witness is interviewed by authorities, or how jurors are informed concerning the proper evaluation of eyewitness testimony) can have a profound effect on the possible truth-finding value of eyewitness testimony.

Despite the growing body of research exposing the fallibility of the human mind in regard to memory recall, eyewitness testimony continues to be heavily relied upon in the decision making process in criminal courts (Huff et al. 1996; Lavrakas and Bickman 1975). Rattner (1883) found that although 84.1 percent of prosecutors and 62.5 percent of judges ranked eyewitness misidentification as the most frequent cause of error in a criminal trial, they never-

the-less viewed eyewitness identification as the most critical type of evidence that can be brought to trial. This paradoxical situation is undoubtedly due to the fact that eyewitness identification leads to the conviction of many guilty defendants, and criminal justice officials often need to use this type of evidence if criminals are going to be removed from the street. Eyewitness identification is ‘direct’ evidence that directly links the suspect to the criminal act, as opposed to ‘circumstantial’ evidence, such as fingerprints, that only prove that the suspect had at some point touched a piece of evidence. Officials, convinced of a suspect’s guilt, are not likely to throw out what may be their most persuasive evidence in a case just because they know that, in some cases, innocent suspects have been harmed by erroneous eyewitness testimony. The burden then falls on the defense attorney to make a thorough pre-trial investigation of the claims of eyewitnesses, research the various reasons why a witness may have made a mistaken identification, and to thoroughly examine an eyewitness at trial. Considering the limited resources and expertise available to most defense attorneys, it is unlikely that such tenacity will occur.

FACTORS ASSOCIATED WITH EYEWITNESS ERROR

Huff et al. (1996), in their review of research concerning the various factors associated with eyewitness misidentification, suggest that they can be collapsed into three major categories:

(a) psychological, (b) societal and cultural, and (c) systemic.

Psychological Factors

Psychological factors emanate from the disturbed emotional state of victims or bystanders who are subjected to a criminal act. Trauma or shock can diminish an individual's already imperfect powers of perception (Loftus 1979). For example, the amount of stress involved in an eyewitness situation will affect the recall of details (Christianson 1992; Huff 1996). Studies have established that viewers of violent crime recall fewer details than those who view a less violent crime (Loftus 1979). Individuals caught up in violent crimes can experience a "weapon focus" which allows them to describe the weapon used in a crime in great detail, but inhibits them from adequately describing the individual who was holding the weapon (Yant 1991).

Even in less stressful situations eyewitness identification is fallible. Eyewitnesses can experience the phenomenon of "unconscious transference" in which the mind recalls a vaguely familiar face to play the role of a face that cannot be clearly recalled (Buckhold and Greenwald 1980; Loftus 1979). In these cases, eyewitnesses, desiring to remember the face of a criminal they cannot recall, will conger up a substitute face from their memory of a past encounter.

Societal and Cultural Factors

Flaws in eyewitness identification may result from societal and cultural influences. Societal and cultural expectations are the beliefs held by large numbers of people in a society within a cultural context. Allport and Postman (1974) suggest that most people commonly make perceptual judgments based on stereotypes they possess – that witnesses will more readily identify a suspect who conforms to their predetermined stereotypical notions. For example, if a witness believes that people with numerous tattoos on their body are more likely to be criminals, that witness will most likely identify someone in a line-up who has a large number of tattoos on his body. Racial stereotypes can also effect misidentification. Brigham and Barkowitz (1978)

determined that false identifications are more common when both blacks and whites identified members of the other race, and when individuals have limited experience with persons of the other race. Scheck et al. (2000) also found that the largest percentage of misidentification occurred with cross-racial identification – 35 percent of Caucasians misidentifying African American defendants.

Systemic Factors

System variables were defined over twenty years ago as “variables that are (or potentially can be) under the direct control of the criminal justice system” (Wells 1978: 1548). These variables include procedures that can lead to a wrongful conviction. Eyewitness error leading to erroneous convictions are sometimes created or attenuated due to systemic forces within the criminal justice process. Eyewitness evidence, just like physical evidence, can be damaged or contaminated depending on how evidence is collected. Eyewitness research has demonstrated that certain methods of conducting line-ups are particularly likely to promote false identifications of innocent suspects by eyewitnesses (Wells et al. 1998; see also “Mishandling of Eyewitnesses” below). Systemic errors are perhaps the most important types of errors relating to wrongful conviction because, if these can be corrected, they will mitigate the psychological, societal and cultural influences, which may affect the validity of eyewitness testimony. In order to reduce the incidence of systemic error, criminal justice professionals should be trained to recognize factors associated with eyewitness error in order that identification can be properly gathered, assessed, and utilized.

MISHANDLING OF EYEWITNESSES

Today, there is no national set of legal guidelines or rules of procedures for obtaining eyewitness identification that law enforcement investigators must follow (Wells et al. 1998).

Until 1967 the Court made no definitive statements concerning the garnering of eyewitness testimony. It then handed down three landmark decisions in rapid order that sought to establish effective constitutional guidelines and safeguards governing the admission of this type of testimony. In *U.S. v. Wade* (1967) the Court ruled that suspects are entitled to counsel at post-indictment line-ups. (However, the Court has ruled that there is no right to counsel at pre-indictment photo-identification procedures [*U.S. v. Ash* 1973].) On the same day as the *Wade* decision, the Court, in *Gilbert v. California* (1967), ruled that a suspect had been denied his right to counsel when, 16 days after appointment of counsel, a line-up was held without counsel present. However, the Court later reduced the potential impact of *Wade* and *Gilbert* when it decided, in the case of *Stovall v. Denno* (1967), to uphold a conviction where a witness identified a murder suspect that was brought to bedside at the hospital for identification; although this was a classic “show-up” procedure, the Court decided that, in cases of extenuating circumstances it is an appropriate procedure and due process is not denied. What is most troubling to the cause of reducing mistaken identifications is that the *Wade* and *Gilbert* decisions only apply to ‘post-indictment’ procedures. Pre-indictment photo-line-ups or show-ups are the most common identification method used by police (Stinson, et al 1997); therefore no counsel must be present in the majority of eyewitness identification procedures.

An eyewitness to a crime might be introduced to various identification techniques used by criminal justice officials in attempts to exactly identify the individual(s) who committed the crime, and to further put the witness ‘on the record.’ The witness may participate in a “show-up”, photo-spread, and/or line-up procedure. All three techniques offer potential contamination points for eyewitness’ testimony.

'Show-ups'

In “show-up” procedures, eyewitnesses are shown a single suspect and then asked if that is the individual they saw committing the crime. (This technique differs from a ‘line-up’ procedure where a witness views several people at the same time). During a show-up session a witness may simply view a single photograph of a suspect at the police station, or may view the actual suspect in a public setting or some type of custodial setting such as a jail cell, the back of a police car, or standing handcuffed among a group of police officers.

Show-ups are inherently unreliable (Wall 1965), and are more likely to yield false identifications than properly constructed line-ups (Dekle, Beale, Elliot, and Huneycutt 1996; Wagenaar and Veefkind 1992; Yarmey, Yarmey, and Yarmey 1996). Buckhout (1977) found that one-on-one “show-ups” have a 50 percent potential error rate and are inherently biased. He noted that witnesses are only given the choice of saying yes or no, as opposed to picking one person out of a line-up of five or six. He further suggests that some witnesses feel a pressure to make an identification to avoid disappointing a police officer (see also Loftus 1979; Yant 1991). The Supreme Court in *Stovall v. Denno* (1967) warned that “show-ups” can be dangerously suggestive and prejudicial (see also *People v. Barad* 1936; *People v. Kind* 1934; *State v. Landeros* 1955). The *Stovall* decision pronounced that, except in rare circumstances, “show-ups” should not be used as a identification procedure because “The practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned” (1967: 302); in *Stovall*, in the witness’s hospital room, the defendant was presented alone and handcuffed to a police officer. In *Simmons v. United States* (1968), the majority wrote:

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in

identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. The danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to a witness that one of the person's pictured committed the crime. Regardless of how the initial misidentification come about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification.

Simmons v. United States 1968: 383

Regardless of the language in this opinion, the Court has not ruled out the use of show-up. The Court has stated that eyewitness identification at trial based on pretrial identification procedures can only be set aside “if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification (*Simmons v. United States* 1968: 384). This leaves it to a defense attorney to prove that identification procedures used to identify his client were “impermissibly suggestive”; many defense attorneys do not have the time nor financial resources to investigate the totality of identification procedures used during the processing of their client. Defense attorneys are seldom present at their clients’ line-ups, and when they are, they usually do not understand the factors that affect suggestiveness to witnesses (Stinson et al. 1996); identification procedures, including line-up composition, instructions, and presentation are rarely documented – aggravating the defense attorney’s absence at identification procedures (Scheck et al. 2000; Stinson et al. 1997 Wells et al. 1998). Also, if unethical police officials or prosecutors are blatantly being “impermissibly suggestive”, they will no doubt try to cover-up their unethical actions. Even though the inherent dangers of misidentification during show-ups are well

documented, they are still used in police practice to secure eyewitness identifications leading to arrests and convictions.

'Photo-spreads' and 'Line-ups'

“Photo-spreads” are viewing sessions of photographs, usually conducted at a police station, where witnesses to a crime are asked to look through numerous “mug-shots (photographs of criminal suspects taken by police when a suspect is booked following an arrest), hoping that they will find and identify the perpetrator(s). Most identifications of criminal suspects are from photographs rather than live line-ups (Wells et al. 1998). Instead of staging a line-up after an arrest, police use photo-spread sessions 60 percent to 70 percent of the time (Scheck et al. 2000).

“Line-ups” are procedures where police ask a suspect to submit to being viewed, in a live setting, by the witness to a crime. Many police departments have no standardized line-up instructions, and identification procedures are seldom recorded (Wogalter et al. 1993). Typically the suspect will stand behind a one-way glass with five to nine other individuals. Proper line-ups should include only individuals who resemble the personal characteristics of the suspect as described by the witnesses (Lindsay, Wallbridge and Drennan 1987; Lindsay and Wells 1980; Wells et al. 1998). Improper line-up or photo spread procedures increase the likelihood that there will be a mistaken identification. (Huff et al. 1996; Wells et al. 1998)

Line-up and photo-spread procedures are fraught with pitfalls that can move individuals who are wrongly suspected to the category of wrongly convicted (Huff et al. 1996; Scheck et al. 2000, Wells et al. 1998). For example, research demonstrates that eyewitnesses to crimes might misidentify a suspect due to a psychological phenomenon called “relative judgment process” (Wells et al. 1998). “Relative judgment” suggests that eyewitnesses, when viewing a line-up or photo-spread, will tend to identify the person who *most looks like* the culprit, if the real culprit is

not included among the individuals viewed (Wells 1984). Experiments by Wells (1993) demonstrate that most people who identify an actual culprit in a culprit-present line-up, will simply identify another suspect if the actual culprit is not present. In sum, the relative judgment process becomes most problematic when the actual culprit is not included among the members of a line-up or photo-spread, because the eyewitness identifies an innocent suspect as the guilty party

Experience has shown that line-up and photo-spread procedures can be biased and suggest a specific defendant. For example, at a parole hearing at Angola Prison, an inmate who had served 30 years for rape presented to the parole board a photograph of the line-up in which he was identified as the rapist. There were six men in the line-up – but he was the only one who was handcuffed (Stack and Garbus 1998). Similarly hastily arranged and biased line-ups can be created where only the suspect matches the characteristics identified by the eyewitness, while the other members of the line-up bear no resemblance to those characteristics. When line-ups are conducted in this manner, the prime suspect becomes the only logical choice for the witness. The Supreme Court has long recognized the bias inherent in these types of pretrial confrontations. In *U.S. v. Wade* Justice Brennan noted:

What facts have been disclosed in specific cases about the conduct of pretrial confrontations for identification illustrate both the potential for substantial prejudice to the accused at that stage and the need for revelation at trial. . . . In a case the defendant had been picked out of a line-up of six men, of which he was the only Oriental. In other cases, a black-haired suspect was placed among a group of light-haired persons, tall suspects have been made to stand with short suspects, and, in the case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a line-up with five other persons, all of whom were forty or over (1967:1160).

The danger inherent in flawed show-up, photo-spread, and line-up procedures are clearly demonstrated when one considers the case of *Delaware v. Pagano* (1979). After a series of armed robberies in Delaware, police constructed a composite drawing of the perpetrator and distributed it to local newspapers and television stations. An anonymous caller told police that the man in the drawing looked like a local Catholic priest, Father Vincent Pagano. Ignoring all research on the dangers of using the show-up procedure, police took the witnesses to a club that Father Pagano frequented. When he left the club the police moved the witnesses closer to him so that the witnesses could get a good look at him. After the show-up, police conducted two photo-spread sessions to determine if the witnesses could identify Pagano as the culprit; on both occasions the background of Pagano's photograph differed from that of the other subjects, as did his hairstyle, clothing, and age. To cap off their investigation, police had Pagano submit to a line-up in which all but one of the witnesses (who had now seen him at the club and in two photo-spreads) positively identified him as the armed robber. Father Pagano was indicted on several counts of armed robbery despite his protests of innocence and the lack of any other evidence against him. At his trial every witness who was called positively identified him, in front of a jury, as the culprit accused of the crimes. (This is not surprising since the witnesses had now seen him on numerous occasions over recent months.) Fortunately for Father Pagano, the criminal justice machinery was halted when, during his trial, another person confessed to the crimes. The charges against Father Pagano were dropped and the prosecutor apologized in court (Huff et al. 1996).

The handling of Pagano's case, from investigation to trial, offers a classic picture of how not to handle eyewitness testimony. Show-ups should only be used in extreme circumstances when, for example, a victim is ill or wounded and may be dying. Photo-spreads should only

include photographs of people who all generally match the description given by the eyewitness, and no one photographic background should differ from that of the others (*Simmons v. United States* 1968; *Stovall v. Denno* 1967). Finally line-ups should be conducted so nonverbal cues that might weigh the identification toward one particular suspect are minimized or eliminated.

Judge and Jury Evaluations of Eyewitness Testimony

After an eyewitness identifies a suspect in a show-up, photo-spread, or line-up, the suspect is often brought to trial. This is especially true in the case of the wrongfully accused individual who will often refuse to accept a plea bargain offer. At trial, various safeguards are presumed to be in-place to prevent miscarriages of justice that result from eyewitness error (opportunities to suppress evidence, provide expert testimony, cross-examine hostile witnesses). These safeguards may fail to provide the intended protection because judges, jurors, and defense lawyers are often not particularly adept at evaluating eyewitness procedures (Devenport, Penrod, and Cutler 1998; Stinson, Devenport, Cutler, and Kravitz 1997; Wells et al. 1998). Research has shown that judges may not be capable of properly ruling on erroneous eyewitness testimony garnered from biased eyewitness identification procedures. Stinson et al. (1997) determined that judges are, at times, insensitive to the various nuances of line-up suggestiveness that may bias a witness's testimony; e.g. "foil bias" (the necessarily heterogeneity in a line-up where the other line-up members [foils] match the suspect on features described by the eyewitness but vary on features not mentioned in the witness's description), "instruction bias" (where instructions fail to inform a witness that the actual culprit may not be in the line-up, or imply that the culprit is present) and "presentation bias" (the use of simultaneous line-ups vs. sequential line-ups). Stinson, Devenport, Cutler, and Kravitz (1997) found that some judges do not know that the rate of false identification increases when witnesses, viewing a line-up or photo-spread, are not told

that the culprit may not be present (see also Cutler, Penrod, and Martens 1987; Malpass and Devine 1981) and that fewer false identifications occur with sequential rather than with simultaneous presentations (Cutler and Penrod 1988; Lindsay, Lea, and Fulton, 1991; Lindsay and Wells 1985).

Jurors, likewise, have been found to be unaware of factors that influence line-up suggestiveness and therefore may not be qualified to accurately evaluate the reliability of eyewitness testimony. Cutler et al. (1988) determined that the eight variables that have been empirically shown to affect identification accuracy, (disguise, weapon focus, amount of violence, retention interval, exposure to mug-shots, biased line-up instructions, lineup size, and fairness of the line-up) had “trivial effect” on jurors inferences compared to that of “witness-confidence” which most strongly influenced the jurors perceived likelihood that the identification was correct (see also Wells et al. 1998).

REDUCING EYEWITNESS ERROR IN PRETRIAL AND TRIAL PROCEDURES

Research indicates that certain systemic changes in criminal justice pretrial and trial procedures could reduce the chance of erroneous eyewitness identification leading to a wrongful conviction. Following are some pre-trial and trial recommendations:

Pretrial

Improved pretrial procedure, according to Justice Brennan, “cannot help the guilty avoid conviction, but can only help assure that the right man has been brought to justice” (*U.S. v. Wade* 1967: 1164). Police line-ups and photo spreads can be modified to reduce the effects of the relative judgment process. Research suggests that the six following steps could improve the

authenticity of eyewitness testimony and lessen the chance of error that may lead to a wrongful conviction:

First, witnesses should be warned that the real culprit might not be present (Wells et al. 1998). Empirical data shows that innocent suspects are less likely to be identified if they are warned that the actual culprit might not be present (Malpass and Devine 1981; Parker and Caranza 1989; Parker, Haverfield, and Baker-Thomas 1986). This research has demonstrated that witnesses, if they are not told that the actual culprit might not be present, have a tendency to identify the subject who best resembles the culprit relative to others in the line-up – this phenomenon is known as the “relative judgment process” (Wells et al. 1998).

Second, “blank line-ups”, that is, line-ups in which the real culprit is not present, should be used before the culprit-present line-up. A blank line-up serves as a type of control line-up (or “lure”) to see if the eyewitness is able to resist the temptation of identifying someone if given an opportunity. Experimental research has demonstrated that blank line-ups can be used to identify eyewitnesses who are prone to make mistakes (Wells et al. 1998).

Third, “sequential procedures” should be used to reduce the chance of eyewitness error; a sequential procedure is one where an eyewitness views one suspect at a time, and decides if that person is the culprit before seeing the remaining members of the line-up. Evidence supporting the use of sequential procedures to prevent relative judgment is impressive (Cutler and Penrod 1988; Lindsay et al. 1991; Sporer 1993).

Fourth, in order to avoid influences that might propel an eyewitness in the direction of making a false accusation, a “double-blind” procedure should be used where the individual who conducts the photo-spread or line-up does not know whom is the actual culprit. Even when eyewitnesses are shown proper photo-spreads, and when line-ups contain only similar looking

individuals, police officers and detectives can still improperly influence eyewitnesses. If detectives accompanying the eyewitness during the identification procedure have personal feelings concerning who may be the real culprit, they may unknowingly (or knowingly) give subtle hints to the eyewitness that could lead the eyewitness to make a false identification – what Justice Brennan has described as “the vice of suggestion” (*United States v. Wade* 1967: 1161; see also, Fanselow and Buckhout 1976; Luus and Wells 1994; Wells and Bradfield 1998; Wells and Seelau 1995). Wells et al. (1998) tell an illustrative story:

In *State v. Washington* (1977) a detective secured a photograph of someone he thought was James Washington, his prime suspect in a robbery. Unknown to the detective at the time, however, he had been supplied with the wrong photo and the photo was actually of someone else who was not a suspect. He placed what he thought was a photo of his suspect in position three of a six-person photospread and showed it to the eyewitness. Somehow, the detective managed to obtain an identification of number three, the very person he thought was the suspect. Later, when he learned of the error, he secured a picture of James Washington and created a new photospread with Washington in position number two. The eyewitness then identified Washington. (1998: 628).

Fifth, “confidence statements” should be obtained from eyewitnesses at the time of their initial identification. Confidence statements can also be assessed at various points during the criminal justice process: during crime-scene interviews, after photo-spreads or line-ups, in depositions and pre-trial proceedings, and in court examinations. It has been demonstrated that the confidence that an eyewitness expresses in his or her identification during testimony at trial is the most powerful single determinant as to whether or not a judge or jury will believe that an accurate identification was made (Cutler et. al. 1988). Research has demonstrated that there can be dramatic changes in the confidence eyewitnesses place in their observations as time passes –

confidence that may be based on post-identification events which have nothing to do with memory (Wells et al. 1998). For example, research has demonstrated that witnesses' confidence will be inflated after simply being told that the person they identified was a suspect in the case (Wells and Brasfield 1998). Confidence inflation can also occur after police or prosecutors suggest to the witness that his or her identification matched their assumptions as to who the culprit is, or after a newspaper article suggests that the crime has been solved; these types of events can bolster the confidence of the witness even though the assumptions of police officers, prosecutors, or news-reporters might be wrong. "Confidence malleability" – the tendency for an eyewitness to become more (or less) confident in his or her identification as a function of events that occur after an identification – is particularly important because "actors in the legal system can contaminate the confidence of an eyewitness in ways that can make an eyewitness's in-court expression of confidence a meaningless indicator of the eyewitness's memory" (Wells et al. 1998: 624). Confidence statements, therefore, offer some utility as an index of identification accuracy, and may give a defense attorney notice that extraneous events following the initial identification may have bolstered a witness's confidence. If the confidence of eyewitnesses are noticeably inflated at trial, then the defense attorney should consider the possibility that heightened confidence came from sources other than the acuteness of the witnesses' own memories.

Finally, all line-up and photo-spread sessions should be videotaped (Wells et al 1998). This would allow for an independent record of the entire process (e.g. instructions given to the eyewitness, a record of how the actual line-up or photo-spread looked, a record of the possible verbal or nonverbal suggestions that might have flowed from the line-up agent to the witness, and a record of the witnesses reactions to the line-up) that could then be used at trial by either party. Ultimately, this procedure would allow representatives of wrongfully accused or

convicted individuals a glimpse into the process that may have led to their miscarriage of justice. Also, it might act as a deterrent to criminal justice actors who would purposely participate in biased identification procedures.

Trial

Once a case gets to trial, judges and juries carry the responsibility of properly assessing how eyewitness testimony was obtained, and its value in the justice-seeking process. In *Neil v. Biggers* (1972) and *Manson v. Braithwaite* (1977) the Court stressed five criteria that should be used by judges and jurors to evaluate eyewitness identification evidence: (a) the degree of the witness's attention, (b) the opportunity the witness had to view the offender at the time of the crime, (c) the accuracy of the witness's prior description of the offender, (d) the level of certainty exhibited by the witness at the identification procedure, and (e) the length of time between identification procedure and the crime. Eyewitness researchers have criticized these criteria on several grounds; for example, biased line-up procedures can cause witnesses to become extremely confident of their identification – even though it was erroneous – and accuracy of description is not a good indicator of accuracy of identification (Wells and Murray 1983). Regardless of criticism, these criteria remain the primary guidelines used in today's court trials (Wells et al 1998).

Ultimately, it is the responsibility of a judge and/or jury to accurately assess the value of an eyewitness' testimony. At a minimum, all parties judging a case where eyewitness testimony is presented should have an opportunity to hear testimony from eyewitness experts concerning the strengths and weaknesses of eyewitness evidence. These experts could provide information concerning, for example, how the amount of stress involved in a situation could significantly affect the perception and memory of an eyewitness (Huff 1996). Today, many states prohibit

such expert testimony (Wells et al. 1998) because they believe it will unduly influence a jury, and in the states where such testimony is allowable, skeptical judges often do not permit it. Often, this leaves some judges and jurors with little information with which to make educated judgments as to the value of an eyewitnesses' testimony.

CONCLUSION

Innocent individuals who are wrongly accused by eyewitnesses of committing crimes must confront the simple fact that extensive scientific literature has determined that eyewitness identification is prone to fallibility, and that the criminal justice process can exacerbate the consequences of imprecise memory recall. Eyewitness testimony is usually made in good faith. However, we often know nothing about the conditions under which such testimonies are made. Potentially suggestive and prejudicial show-up procedures continue to be utilized by law enforcement officials. Pre-indictment photo-spread sessions – the most commonly used identification procedure – can be conducted in a biased manner and are often performed without benefit of counsel. Likewise, live line-ups can be conducted in a biased manner that will increase the likelihood of a wrongful identification. Further exacerbating the situation is that defense attorneys may not be knowledgeable enough concerning witness identification procedures to recognize biased procedures that may damage their case. Research has also demonstrated that judges also may lack the knowledge to recognize biased identification procedures and will rule against valid suppression requests. Finally, jurors are often understandably ignorant of proper identification procedures, yet many states prohibit expert testimony concerning these procedures, and in the states where such testimony is allowed,

skeptical judges often do not permit it because they feel the probative value of such testimony is outweighed by its potential prejudicial effect on the jury.

The criminal justice system cannot operate without eyewitness testimony. Eyewitness testimony, therefore, cannot and should not be excluded from the fact-finding process used in the criminal justice system. All parties that are involved in a search for the truth benefit when due process is provided, and when accurate unbiased eyewitness accounts are properly obtained from witnesses. The challenge, therefore, is to refine systemic techniques used to obtain and verify eyewitness testimony so that more guilty defendants, and less innocent defendants, are convicted. Police officials, prosecutors, and judges should be better trained and educated concerning proper methods of obtaining eyewitness testimony.

Most trials are not decided solely on eyewitness testimony – but the ones that are create a greater chance that there will be a miscarriage of justice. The motives of an eyewitness in these cases should always be the subject of great scrutiny, and it is up to defense lawyers to educate themselves so that they can properly cross-examine an eyewitness. Questions should be asked regarding how a photo-spread or line-up session was conducted. Were procedures used that biased the witness's identification? Were any suggestions made to the witness before viewing a line-up? How much trauma did an eyewitness experience during their ordeal? Has there been a change in the witness's confidence in their identification of the suspect? The more valid questions that are asked, the less likely it is that erroneous eyewitness testimony will contribute to a wrongful conviction.

In *United State v. Wade* Justice Brennan suggested that better procedures might reduce the need for a heightened scrutiny of pretrial identification practices by the Court:

Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and

unintentional suggestion at line-up proceedings and impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.' But neither Congress nor the federal authorities have seen fit to provide a solution (1967: 1164).

CHAPTER FOUR

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stage is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized. . .

Frye v. United States (1923)

It would be unreasonable to conclude that the subject of scientific testimony must be “known” to a certainty; arguably, there are no certainties in science.

Daubert v. Merrell Dow Pharmaceuticals, Inc (1993)

WRONGFUL CONVICTION AND FAULTY FORENSIC IDENTIFICATION SCIENCE

Faulty forensic identification science, in the context of wrongful conviction, refers to the presentation to a judge and/or jury, by a forensic ‘expert,’ of mistaken and damning scientific evidence against an innocent accused. Such evidence can include erroneous blood, semen, fingerprint, handwriting, ballistics, or fiber analysis, and can be presented both unintentionally and intentionally by forensic experts. Saks notes, “The testimony some [experts] give is replete with invisible assumptions and guesswork” (1991: 362). Faulty forensic identification is particularly harmful to an innocent suspect because judges and jurors, in the same way that they give great weight to eyewitness testimony, also give great weight to the testimony of laboratory scientists who swear to the accuracy of scientific evidence presented by the prosecution against an innocent suspect. Often the testimony of a laboratory scientist can mean the difference between conviction and acquittal to a wrongly accused suspect (McCloskey 1989). Numerous researchers have recognized the negative impact of faulty forensic science on wrongful conviction (Bedau and Radelet 1987; Block 1963; Borchard 1932; Gardner 1952; Huff et al. 1986; McCloskey 1989; Radelet, Bedau, and Putnam 1992; Radin 1964; Scheck et al. 2000; Yant 1991).

McCloskey suggests, “the work of forensic technicians in police crime laboratories is plagued by uneven training and questionable objectivity” (1989: 58), and that results of laboratory tests are not always what they appear to be. He states, “ we see instance after instance where the prosecutor’s crime laboratory experts cross the line from science to advocacy. They exaggerate the results of their analysis of hairs, fibers, blood, or semen in such a manner that it is absolutely devastating to the defendant” (1989: 58). McCloskey notes that lawyers often make no effort to investigate the validity of the expert’s testimony or challenge the findings – sometimes because they lack the resources to perform needed tests, and sometimes because they are lazy and incompetent.

Yant (1991) shares McCloskey’s fear of faulty forensic science infiltrating the courtroom. He suggests that police often blindly rely on the results of reports from crime labs that have no licensing standards – reports that can contain misleading data resulting from negligence, incompetence, and outright bias (Conners et al. 1996; Scheck et al. 2000). Yant also criticizes police for sometimes relying on the nonscientific results of lie-detector/polygraph tests that have been proven as unreliable. (Lykken [1981], for example, found that innocent suspects fail lie-detector tests about 50 percent of the time.) Finally, Yant suggests that police detectives sometimes use nonscientific “hypnotic interrogation,” even though such methods have been proven to be an unreliable method of obtaining the truth (see Grunbaum 1985; Rock v. Arkansas 1987).

Forensic science is different than most other sciences because it attempts to identify an exact individual and place him or her at the scene of a crime. Saks explains:

Individualization is unique to forensic science. Normal science is concerned with grouping objects and events into meaningful classes, discovering systemic relationships among these classes, and developing and

testing theoretical explanations for those shared attributes and relationships. While normal science looks only between classes, forensic identification science purposefully ignores “class characteristics” and looks within classes. While normal science is concerned with establishing regularities, forensic science is concerned with exploiting irregularities among objects within classes. Its central assumption is that objects possess enough differences that on adequate inspection one object cannot be mistaken from another. (1998: 1074).

What follows are brief descriptions of the case of wrongfully convicted Glen Woodall who was found guilty of a crime he did not commit – due in large part to faulty forensic identification.

The Case of Fred Zain and Glen Dale Woodall

State Trooper Fred Zain, the man in charge of serology for the State of West Virginia, was a forensic superstar. He was capable of finding specks of blood or a spot of semen where his colleagues were unable to find anything. In sum, he was a prosecutor’s dream – a man with remarkable vision, possessing phenomenal lab techniques, and the unique ability to detect genetic markers in crime scene evidence that turned hopeless cases into almost sure winners. Unfortunately for the criminal justice system, Zain’s work was a massive fraud.

The unraveling of Zain’s exploits began in 1992 when the West Virginia State Police Internal Affairs Unit investigated the case of a wrongfully convicted prisoner who had recently been exonerated and released – Glen Dale Woodall. Woodall’s case involved two women who were abducted and raped in early 1987 at a West Virginia shopping mall. The two victims never got a good look at their attacker, who wore a ski mask. Working near the mall was Glen Dale Woodall, the groundskeeper of a cemetery, who had reddish-brown hair and a minor criminal record. Police searched his home but could find no indicting evidence. Woodall protested his

innocence. Detectives took a blood and hair sample from him to compare against the attacker's semen and a single hair found in one of the victim's cars.

The weak case against Woodall was bolstered when, after hypnosis, both witnesses now said they recognized the suspect both by his appearance and a singular scent. The forensic report concerning Woodall's blood and hair sample then arrived. State forensic expert Fred Zain reported he had determined that Woodall was probably the perpetrator of the crimes. Due to the weakness of the two victim's "hypnotic" identification of Woodall, the chief evidence in the case against him was Zain's "scientific evidence." Zain testified in court that, based on his analysis of blood and semen, only six in ten thousand people could have attacked the women and that Woodall was a member of that narrow group. Based on this powerful evidence and testimony, Woodall was found guilty (Scheck et al. 2000: 111).

After five year in prison, Woodall's relatives contacted the Innocence Project and asked for help in getting a DNA reanalysis of the evidence against Woodall. Eventually the evidence was retested and DNA analysis revealed that Woodall was not the source of the semen. Also, the single hair that Zain had testified to as being one of Woodall's pubic hairs was determined to bore no similarity to Woodall's hair. Woodall was released to home confinement, with an electronic bracelet on his ankle to keep track of him. Ten months later the state agreed that he should not be retried and dropped the case against him. Four months after the case was dropped, the state agreed to pay Woodall one million dollars for his wrongful conviction.

An internal affairs investigation was conducted to establish the extent of Zain's activities, and also to determine the state's liability in the Woodall case. The investigation reported that Zain's laboratory could not have performed the tests Zain testified to, and even if he had conducted the tests, his statistics were totally incorrect. In sum, the investigation revealed Zain

had made up a story against Woodall to satisfy the prosecutor and increase his own prestige. And it wasn't the first time. The then-secret internal report noted, "Our investigation has revealed that the trooper who falsely reported the laboratory examination results has done so in other cases on other occasions and may have testified to those false results. . . . (Scheck et al. 2000: 109).

Further investigation into Zain's career revealed that, for least ten years, he had given evidence in hundreds of serious felony cases and had faked data in almost every case (Scheck et al 2000). His pattern was always the same. Zain would first claim to have performed tests that he had not performed. Then he would state that the samples he tested conclusively proved someone's guilt, even though he had never tested the evidence. Finally he would make sweeping conclusions regarding the tests he never performed. Scheck et al. note,

Sham passed for science in criminal cases all over the United States, at times to shocking effect. Zain was a prosecution witness in twelve states. He was responsible for evidence in scores of cases in Texas, where he had taken a position as chief serologist for the county medical examiner in San Antonio. On the word of this dangerous fraud, a jury convicted Jack Davis, a janitor in an apartment complex, of murdering a tenant whose body he discovered. Zain miraculously came up with a DNA test showing blood from Davis on carpet fibers near the body that was otherwise soaked in the victim's blood. As word of Zain's antics in West Virginia reached Texas, a team of lawyers led by Stanley Schneider and Gerry Goldstein exposed Zain's DNA test as phony and exonerated Davis. The same thing happened to Gilbert Alejandro. Zain's contribution to his wrongful conviction in 1990 consisted of testimony that DNA tests showed semen on a rape victim's clothing "could have only originated from [Alejandro]." In fact, these tests were inconclusive. Additional tests showed he was innocent. Four years later, a Texas judge found that Zain knew that Alejandro had been cleared by the tests but failed to report them to anyone (2000: 116).

Brief History of Legal Tests for the Admissibility of Forensic Identification Evidence

The first reported court decision affirming the propriety of using “skilled witnesses” was in the case of *Folkes v. Chadd* (1782). The courts, as far back as the Civil War, used what has been recently termed as the “commercial marketplace test” to determine if an “expert” was qualified to give testimony in court (Saks 1998). Under the marketplace test, a witness was ‘qualified’ as an expert if there was a commercial market for the witness’s knowledge, i.e., if a person could make a living selling his knowledge, then expertise presumably existed. There are two problems with this definition as it applies to wrongful conviction. First, the marketplace test cannot distinguish astrology from astrophysics because the market values both of them. Second, some fields (e.g. forensic science) do not have a real “marketplace” outside of the courtroom. Due to these problems, it became necessary for the courts to invent a new test that would better qualify experts to testify in a courtroom.

In *Frye v. United States* (1923) the emphasis shifted from considering the marketplace value of a witness’s knowledge, to the value of that knowledge as expressed by the opinion of other experts in the field. Judge Van Orsdel in *Frye* stated:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stage is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go along way in admitting expert testimony deduced from well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs (1923: 1014)

Frye, in actuality, is also a marketplace test; the professional and intellectual marketplace was simply added to the commercial marketplace as being a necessary ingredient to qualifying one as an “expert.” The problem remained that the *Frye* test still was incapable of distinguishing astrophysics from astrology. The *Frye* test did, however, separate the expertise from the expert, and created a legal recognition that a body of asserted knowledge existed. Inadvertently, the *Frye* decision transferred control of what was considered ‘valid’ testimony from the commercial marketplace, where buyers were at least making independent decisions as to the value of the purported expertise, to the people who produced the knowledge and offered it (and themselves) to the courts (Saks 1998).

Scheck et al. (2000) suggest that the Supreme Court took steps in *Daubert* to block “junk science” from being offered in courtrooms; federal judges would now serve as gatekeepers for evidence that purported to be scientific. *Daubert* offers the promise that more guilty individuals will be convicted and less innocent individuals will be the subjects of miscarriages of justice. Saks (1998) notes that the shift to *Daubert* clearly is a shift toward judges making scientific evaluations more in the manner that scientists themselves evaluate purported science. He considers this move to represent an increased emphasis on the truth-finding value of trials, but is skeptical of judges’ ability to “think like scientists” and know what questions to ask to properly evaluate data. Saks warns that judicial opinions he has recently examined “seemed to use no rule at all” (1998: 1078), and suggests that judges may ignore rule-guided tests of admissibility.

The Extent of Forensic Identification Error

One might think the case of Fred Zain so peculiar it distorts the real picture of forensic identification scientist. Consider the forensic misidentifications in San Francisco where, according to retired police lieutenant Kenneth Blake, prosecutors “had to dispose of about one-

thousand drug cases because of a bad chemist” (Scheck et al. 2000: 119). Or consider the cases of forensic ‘expert’ Louise Robbins, who specialized in footprint analysis. Her expert testimony helped convict more than twenty people (Yant 1991). A national panel of 135 anthropologists and attorneys concluded that footprint analysis “doesn’t work” because of its impreciseness (Yant 1991: 130); an agent of the FBI crime lab called footprint analysis “totally ridiculous”, and John Marshall Law School professor Melvin B. Lewis called it “snake oil” (Yant 1990: 130). Another case of forensic misidentification involved psychiatrist James “Dr. Death” Grigson who asserted that he could predict, without talking to a patient, how a patient would behave; in *Barefoot v. Estelle* the court ruled that Grigson’s questionable assertion was inadmissible at trial (Yant 1991). The American Psychiatric Association questioned Grigson’s ethical standing in the psychiatric community. However, despite the fact that his dubious findings led to reversals in three Supreme Court decisions, Grigson’s testimony was still instrumental in obtaining death sentences for several Texas defendants (including that of wrongfully convicted Randall Dale Adams – see chapter 6). Another example of forensic misconduct is found in the case of a supervisor of forensic toxicology at the Federal Aviation Administration research laboratory, who plead guilty in federal court to having falsified drug-test results on personnel involved in train crashes (New York Times, 1991). Lastly, consider the case of forensic scientist Ralph Erdmann, medical examiner for forty-eight Texas counties, who claimed to have personally performed four hundred autopsies a year and called himself the “Quincy of the Panhandle.”

Scheck et al. note:

How did Erdman work so fast? By skipping a few formalities. One family read his death report and was surprised to see that the weight of the dead man’s gall bladder and spleen were reported by Erdmann. Years before the man died, both organs had been surgically removed. His body was exhumed and showed that no

incisions had been done. In another case, Erdmann claimed to have examined a woman's brain. Once again the corpse was exhumed – and there was no sign that the head had been touched. He became known as the king of the drive-by autopsy. When a few honest cops and prosecutors started an investigation, they dug up seven bodies and found that none of them had incisions. Erdmann often would want to know the police theory of the death before he wrote up his report on the cause of death, the investigators said, to keep his story straight (2000: 117).

Erdmann was eventually indicted for lying about autopsies he performed. He pleaded no contest and was given a ten-year suspended sentence. Later his probation was revoked and he was sent to prison.

Several respected publications have reported cases of fraudulent forensic identification. Reports concerned: a Texas pathologist who was sentenced for faking autopsies in murder cases (*ABA Journal* March 1993); five New York state troopers plead guilty to repeatedly planting fingerprints in criminal cases (*New York Times* February 4, 1997); a New Jersey medical examiner who was convicted of witness tampering in his trial for faking an autopsy report (*New York Times* October 29, 1997); a footprint expert who faked results in courtrooms over a 10-year period (*ABA Journal* February 1996). Castelle notes, “because it is safe to assume that most of the forensic science fraud that occurs goes undetected, the amount of fraud that has been revealed bears disturbing implications for any estimate of the amount of fraud that passes without notice” (1999: 14).

Fraudulent forensic identification is endemic. McCloskey notes, “the work of forensic technicians in police crime laboratories is plagued by uneven training and questionable objectivity” (1989: 58). Scheck et al., in their study of 62 wrongful convictions, note that ‘rigged’ lab tests often contribute to erroneous convictions (2000: xv). They found that

‘fraudulent science’ (intentional fabrication of evidence by a forensic specialist) contributed to 33 percent of the incidences of wrongful conviction in the cases they analyzed, and misleading “microscopic hair comparison” was present in 29 percent of the cases. A study found that 51 percent of police crime laboratories misidentified paint samples, 28 percent misidentified firearms, and 71 percent erred in conducting blood tests (*New York Times Magazine* December 11, 1983). Castelle suggests, “Although no one can say for certain [the magnitude] of fraud in the criminal justice system, there can be little doubt that bias, exaggeration, and error, if not outright fraud, continues to appear in the work of police labs throughout the country, including the FBI crime lab” (1999:57).

Inadvertent forensic identification error, exaggeration, and biased results are equally pervasive in the criminal justice system. Forensic ‘error’ can take the form of inadvertent mislabeling or switching of samples, mistakenly recording data, mistranscribing results, misreading or misinterpreting results, and loss of evidence. Inadvertent and inaccurate “serology inclusion” occurred in 48 percent of the cases 62 wrongful conviction cases studied by Scheck et al. (2000). Yant notes that a large number of innocent people are wrongfully “convicted or sentenced to death largely due to the testimony of inexpert ‘expert witnesses’ for hire, faulty forensic tests, and inaccurate polygraph exams” (1991: 12). Benjamin Grunbaum, a biochemist at UC Berkley, after studying samples of crime-lab reports, concluded that a surprising number exhibited “negligence, incompetence, and outright bias” (Yant 1991: 66). Castelle (1999) notes that even the Zain investigation, which entrusted only the most respected and independent labs with the reanalysis of Zain’s cases, was haunted with inadvertent errors. Castelle suggests that it is impossible to know the number of inadvertent forensic errors that are never discovered, however, he notes, “it is safe to assume that inadvertent error permeates the

entire system and can have profoundly tragic results” (1999: 14). It is likely that many of the “tragic results” have been the wrongful conviction of innocent people.

Reducing Forensic Identification Error

In order to reduce forensic identification error leading to wrongful conviction it is imperative to understand what type of forensic errors can contaminate a criminal case, and how these errors are able to effect a miscarriage of justice. For many years forensic identification error leading to wrongful conviction could only be identified after, for example, the true offender admitted to a crime, a supposed murder victim turned up alive, or a lying witness confessed. Now, due to modern DNA technology, researchers have been offered yet another way to better determine the factors that contribute forensic identification error and wrongful conviction. What follows is a brief explanation of DNA technology, and how it can be utilized to prevent miscarriages of justice.

DNA Technology

While the difficulties of studying wrongful conviction have been great, there is now a new opportunity – a “window-of-opportunity” – that allows researchers to peer into the ‘black-box’ of wrongful conviction. A new technological phenomenon, DNA (deoxyribonucleic acid) research, has given criminal justice researchers a moment of rare enlightenment. There is now a never before present opportunity to determine, in some cases, who has definitely been wrongfully convicted, and correspondingly, an opportunity to examine those wrongful convictions cases in order to better determine what factors contributed to these miscarriages of justice. Post-conviction DNA exonerations therefore provide an extraordinary opportunity to

reexamine, with greater insight than ever before, the weaknesses of our criminal justice system and how they influence the all-important question of factual innocence.

Evidence resulting from the new DNA technology has been widely accepted by the courts and other agencies within the criminal justice system (Scheck et al. 2000). The new term ‘DNA’ has been linked with a long accepted term ‘fingerprint’, and a new phrase ‘DNA Fingerprinting’ was coined. DNA fingerprinting (known as *restriction fragment length polymorphism*, or RFLP) involves the analysis of blood, skin, or semen evidence that links a suspect to a crime (or exonerates a suspect) similar to fingerprinting. However, DNA fingerprinting is much more precise than is old fashion fingerprinting (Scheck et al. 2000).

Until the early 1990’s the RFLP fingerprinting method could not be widely used because the test required a large amount of DNA for testing. Often, evidence connected to a crime (e.g. bloody clothing, rape kit, saliva, skin under fingernails) would contain small or trace amounts of DNA material – rendering RFLP testing useless. Then in 1993 a way to reproduce, or clone, DNA molecules in the laboratory was invented. A new process *polymerase chain reaction*, or PCR, could be conducted using small amounts of DNA evidence which could be reproduced and made plentiful enough to allow for RFLP testing on all evidence containing DNA materials – no matter how small the original sample. As a result of PCR technology, old evidence, locked away in storage and unable to be tested because of the limitations of science, could now be tested. The results of these tests have often proved that an innocent person was serving time for a crime they did not commit (Connors et al. 1996; Scheck et al. 2000).

Actually ‘DNA fingerprinting’ is somewhat of a misnomer. DNA research technology is better understood when it is compared with the long-accepted “blood-type” technology that has been in use in crime laboratories around the country since the 1930’s. In the past, physical

evidence such as blood or semen was analyzed to see if it was from one of the four known blood-groups: A, B, AB, and O. If the blood-type found at a crime scene matched that of a suspect, it could be used in court as evidence against the accused. However, there were many problems with blood-type technology. It is not a test that makes fine distinctions. Often, there are thousands of individuals other than the suspect who have the same blood-types and live or work near a crime scene. Another problem with blood-type evidence is that blood will quickly deteriorate if not stored properly. Therefore, if blood evidence is not obtained within a short time after a crime has been committed, it may be of little help to investigators. Also, blood samples, even if obtained in a timely manner, must be protected from heat, light, and humidity or bacteria will consume the blood molecules and render the sample useless for blood-typing.

Because DNA molecules are much smaller than the blood antigens that define a person as type A, B, AB, or O – bacteria will not consume them until the larger blood particles are consumed. Also, unlike blood-typing, each person's DNA is unique. Today, DNA can be extracted from crime-scene evidence and matched to a specific individual. Unlike blood-typing evidence that must be tested promptly and stored properly, DNA evidence can be found decades after a crime and still be effectively tested. Scheck, et al. explain the ramifications of this new technology as well as its limitations;

Now the fabric of false guilt is laid bare Snitches tell lies. Confessions are coerced or fabricated. Racism trumps the truth. Lab tests are rigged. Defense lawyers sleep. Prosecutors lie. DNA testing is to justice what the telescope is for the stars: not biochemistry, not a display of the wonders of magnifying optical glass, but a way to see things as they really are. It is a revelation machine. And the evidence says that most likely, thousands of innocent people are in prison, beyond the reach of the revelation machine, just as there are more stars beyond the sight of the most powerful telescope. Most crimes, after all, do not involve biological

evidence – blood, semen, hair, skin, or other tissue – which means there is no genetic material to test (2000, xv).

This ‘window-of-opportunity’ for taking advantage of DNA research as it applies to certain types of wrongful conviction will be brief. Since the early 1990’s the new technology has been widely used. Therefore, in a few years the era of exonerations due to DNA testing will end. There is now a shrinking population of wrongfully convicted prisoners who can be helped by DNA testing, and this population will not be replenished because presently many suspects are now being tested *before* trial. Of the first 18,000 DNA test results verified by the FBI and other crime laboratories (over a seven-year period), at least 5,000 suspects were exonerated before their cases were tried; this means that more than 25% of the prime suspects who were tested could not be implicated because many, if not most, were completely innocent (Scheck et al. 2000). Due to the fact that the 25% rate remained constant for seven years, and that a 1995 National Institute of Justice’s informal survey of private laboratories (Connors, E. T. Lundregan, N. Miller, and T. McEwen. 1996) reveals a strikingly similar 26% exclusion rate, there is a strong implication that the DNA exonerations are tied to some pervasive underlying systemic problem within the criminal justice process that generates wrongful arrests and convictions. In past years, without the new DNA technology, many of these individuals might have been tried and convicted for the crimes they were suspected of committing; only the DNA tests halted the criminal justice system’s forced march from wrongfully suspected to wrongfully convicted.

Lawyers

Castelle (1999) suggests that defense attorneys need to be more diligent in efforts to expose and reduce erroneous forensic evidence that may be used against a wrongfully convicted

suspect. He notes that defense attorneys too often accept at face value the written forensic reports from prosecution expert witnesses and fail to schedule a pre-trial hearing to challenge the admissibility of questionable prosecution science. Defense lawyers should investigate the underlying data contained in the prosecution's forensic reports and submit that data for review by an independent expert in order to obtain independent retesting of any questionable results. Law students should be better trained to recognize forensic error or fraud, and law and medical schools, in order to improve the quality of forensic science, should become active sponsors of first-rate postgraduate forensic science programs. Public defenders offices should have a minimum of one lawyer who acts full time as a forensic science specialist to help other lawyers in their cases.

Other Recommendations

The effects of faulty science may also be mitigated if jurors receive 'innocence training' before deliberations. This training could inform jurors of the dangers of wrongful conviction when expert testimony is accepted as infallible.

Forensic fraud could be reduced if crime laboratories, and their budgets, would be independent from the criminal justice system – and not be beholden to police, prosecutors, or defense lawyers. All medical labs used to offer forensic evidence should be accredited, subject to professional standards, and to regulatory oversight. Forensic scientists should be shielded from non-forensic evidence so as not to contaminate or bias their findings.

Conclusion

It has been well recognized that faulty forensic identification directly contributes to wrongful conviction. Indeed, this has been the very reason numerous studies have been performed to better identify and hopefully reduce forensic error. What was not originally well known, but is now well documented, is the degree to which faulty forensic science can indirectly affect a wrongful conviction by contaminating seemingly independent non-scientific evidence (Castelle 1999). For example, eyewitnesses who have misidentified a criminal suspect may become increasingly confident in their identification once they discover that forensic scientific tests (albeit erroneous) have verified their statement (see *State of West Virginia v. Harris 1987*; Castelle 1999: 14). Due to the fact that “witness confidence” has been demonstrated to be a factor that strongly influences juror’s perceived likelihood that identification testimony is correct (Cutler 1998; Wells et al. 1998), faulty forensic identification science therefore becomes increasingly dangerous because it may influence and encourage other participants in a trial (witnesses, police officers, prosecutors) to more strongly rely on their own erroneous conclusions.

The damage done by faulty forensic science not only adversely affects the trial of wrongfully suspected individuals, but it can continue to plague them when their cases are being appealed. Even when faulty scientific evidence is discovered to have been offered at trial, prosecutors will typically say that the evidence amounts to a *harmless error*, and that the conviction would have occurred even if the faulty evidence had not been presented. Prosecutors will suggest that other evidence in the trial, e.g. eyewitness testimony, overheard confessions by a jail house snitch, the lack of an provable alibi, was enough to legitimize the conviction. What is often unrecognized (and sometime unrecognizable) at the appellate level is the effect the erroneous expert testimony had on the other witnesses in the trial. Scheck et al. note, “For an

innocent person, the two most dangerous words in the language of law are ‘harmless error’ (2000: 172). They suggest that appellate courts use the concept of *harmless error* to absolve police officers and prosecutors of misconduct – and expert witnesses of their responsibility in sending innocent individuals to prison.

Saks (1998) suggests:

The very promise of scientific evidence – that it can commandingly resolve vital and troubling factual uncertainties, such as the identity of the perpetrator of a crime – heightens two competing fears that judicial gatekeepers must harbor. One is the fear of permitting rubbish to infect the trial, mislead the jury, and lead to the wrongful conviction of an innocent person. Counterposing that is the fear of overlooking evidence that would forcefully reveal the guilt of a true perpetrator of a serious crime. Thus, the central dilemma of trials, namely, the countervailing fears of convicting the innocent or acquitting the guilty, is reduced to an evidentiary decision (1998: 1078).

Saks comments appear to take the plight of the wrongfully accused the full circle. From the pre-Civil War courts, through *Frye* and *Daubert*, the fate of the innocent suspect still ultimately rests on an “evidentiary decision” made by a judge who is usually trying to do the right thing – that is, see that the guilty are punished and the innocent are exonerated. However, the experience of history, both ancient and modern, attests to the fact that, in courtrooms, the guilty are still exonerated and the innocent still convicted. Hopefully, the *Daubert* test will reduce the incidence of wrongful conviction, but Saks makes it clear that it will not eliminated it. Expert testimony will therefore continue to be both a redeemer and a curse to the wrongfully accused.

CHAPTER FIVE

WRONGFUL CONVICTION AND POLICE ERROR OR MISCONDUCT

Far too many cases come from the states to the Supreme Court presenting dismal pictures of official lawlessness, of illegal searches and seizures, illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of denial of counsel, and downright brutality.

William J. Brennan, *The Bill of Rights and the States*, 1961

It is because the police are typically the first representatives of the criminal justice system to arrive at the scene of a crime that they figure so prominently in wrongful conviction. Yant (1991) notes that police error and misconduct are a major cause of wrongful conviction. In his words, “That [police error] is where much of the problem lies. If innocent people aren’t charged, they can’t be convicted” (1991: 218). Innocent people who are either “not” suspects, or are only “possible” suspects to a crime, can quickly become “prime” suspects if police initially mishandle the case. The mishandling of criminal cases by police officials can be both unintentional (police error) and intentional (police misconduct). Unintentional police errors known to be associated with wrongful conviction may include: mistaken arrest, failure to read suspects their Miranda rights, misreading a search-warrant, or making an unintentional misapplication of the law. Radin (1964: 17) attributes police error which contributes to wrongful conviction to, “conducting inept investigations, jumping to conclusions rather than letting the facts lead the way, being too lazy to check out all the information thoroughly, or ignoring facts which tend to support the story told by the accused.” Intentional police misconduct involves unethical behavior that may include: failure to read suspects their Miranda rights, illegal detention, using unduly suggestive eyewitness identification procedures (e.g. poor show-up, photo-spread, or line-up procedures),

intimidation of suspects or witnesses, coerced confessions, fabricating and/or planting evidence, and suppression of exculpatory evidence.

What follows is the story of wrongfully convicted Steven Linscott who was imprisoned for a murder he did not commit – due in large part to police misconduct and error.

A Murder and A Dream – The Case of Steven Linscott

Steve Linscott can personally attest to the tragedy that can occur when police officials arrest and charge someone with murder based only on a “dream” and other inconclusive circumstantial evidence. One afternoon two police officers knocked on Linscott’s apartment door and informed him and his wife about the murder of a 24-year-old nursing student in their apartment building. Needing to make an arrest, police asked them for any information that might give them a lead. At that time neither Linscott nor his wife could think of anything that might help the police. As the police left they made a final comment – they asked either of them to call if they could think of anything, no matter how silly it seemed, that could possibly help them. Linscott later stated, “Were it not for that parting phrase, their visit would likely have joined the ranks of the insignificant. But as soon as I heard the words ‘no matter how silly it seems,’ a dream I’d had the night before jumped into my mind” (Linscott and Frame 1994:19). The dream, according to Linscott, was ‘unusually intense and most unpleasant’ and involved a man who was brutally beating another individual.

When Linscott told the police detective about the dream the detective laughed and asked him to make a written account of the dream. Later the police came to his apartment to pick up the written account and told him that they would have experts look at it to see if the dream could help them. The next day police called Linscott and told him they had been in touch with a psychic, and that the psychic thought the dream could be relevant to solving the crime. They

asked him to come to the police station so they could try to get a clearer picture of the killer from the dream. Linscott scheduled an appointment for the following day. When Linscott arrived at the police station he was read his Miranda rights. The police officer told him that anyone who made a statement to police was routinely read his rights. He was questioned for three hours. The next day a detective again called and asked him to come in again to help with a composite sketch of the killer. Linscott asked the detective if he was being considered as a suspect. The detective assured him that he was not a suspect.

Linscott went to the police station the next day. After asking him many questions the police artist came up with a sketch of the killer that – looked like Linscott. According to Linscott, “He would later add sideburns and glasses to make the resemblance even closer” (Linscott and Frame 1994:29). Linscott was then asked to provide blood, saliva, and hair samples – in order to eliminate him as a suspect. Also, to eliminate him as a suspect, they asked to look at his car. Linscott agreed. Linscott was then fingerprinted. The detective finally informed him that he was a suspect – the prime suspect; he stated, “I’d like to think that you are a person who knows that he needs help. My partner and I and everyone else are convinced that you killed the young lady, okay? The evidence you gave us tonight will convict you You are going to get the electric chair” (Linscott and Frame 1994:33). Linscott denied any involvement in the crime.

Based on the “dream” and other circumstantial evidence presented against Linscott, a jury found him ‘not-guilty’ of rape, but ‘guilty’ of murder. Linscott was sentenced to forty years in a maximum-security prison. He spent three and a half years in prison before he was released on bond while awaiting the outcome of his appeal. For the next seven years the prosecutor pursued a retrial. Finally, in 1992, the state agreed to use new DNA technology to conduct an

analysis of the hair and vaginal swap evidence presented against Linscott. As a result of these tests Linscott was exonerated and the State of Illinois dropped all charges.

This case again shows the multiplicity of factors that can lead to a wrongful conviction. The police, needing an arrest for a brutal murder, rushed to judgment against Linscott and arrested him on totally non-conclusive circumstantial evidence. As is typical in cases of wrongful conviction, once police convinced themselves that Linscott was the murderer, they stopped following any other leads that might have led them to the real killer – and the real perpetrator of this brutal crime was left free to continue harming other people. Lies and long interrogations by the police produced the most flimsy of cases against Linscott. A journalist speculated years later that police had a vested interest in arresting a white person, given the social and political tensions associated with integration at that time in the area of the murder (Linscott and Frame 1994). At trial, the state's expert witnesses did not fabricate evidence, but did fail to impress upon the jury the inconclusive nature of the blood and hair evidence presented against Linscott. The prosecutor withheld exculpatory evidence from the defense attorney and unethically twisted the words of the state's forensic expert in his trial summation. Linscott contributed to his arrest due to his naivety. This is often the case in wrongful convictions. Suspects, inexperienced and knowing they have done nothing wrong, can become putty in the hands of experienced criminal justice officials who, convinced of their guilt, will guide them to arrest and conviction.

Police 'Error' and Wrongful Conviction

Unintentional errors by police officers can lead to wrongful arrest. Police, when they come into contact with individuals at a traffic stop, or while investigating some other type of misdemeanor, often rely on information from the FBI's National Crime Information Center

(NCIC). The FBI itself admits that 5 percent of the information in NCIC, (a government databank containing files of millions of fugitives, stolen vehicles, and criminal histories), is either incorrect or incomplete (Yant 1991). Yant (1991) describes a case involving Roberto Hernandez who was pulled over at a traffic stop by California police. When police checked the NCIC file they discovered that Hernandez was wanted in Chicago for attempted burglary. Hernandez spent eleven days in jail before police discovered the computer information had mistaken him with another wanted criminal. He received an apology and was set free; two years later, however, he was again wrongfully arrested for the same Chicago charge.

Police error leading to wrongful conviction can be caused by “overzealousness.” Huff et al. (1996: 64), concerning their study of wrongful conviction, note:

if we had to isolate a single ‘system dynamic’ that pervades a large number of these cases, we would probably describe it as police and prosecutorial overzealousness: the anxiety to solve the case, the ease with which one having such anxiety is willing to believe, on the slightest evidence of the most negligible nature, that the culprit is at hand.

Police ‘Misconduct’ and Wrongful Conviction

Police misconduct involves unethical behavior that “is the result of a conscious decision-making process to abuse one’s authority while in a position of public trust” (Byers 2000: 1). Huff et al, note that wrongful convictions often occur when police are “willing to use improper, unethical, and illegal means to obtain a conviction when one believes that the person at bar is guilty” (1996: 64). Examples of this type of misconduct are numerous. For example, between 1992 and 1995, five New York state troopers were sentenced to prison for repeatedly planting fingerprints in criminal cases they were investigating (Castelle 1999: 13). An officer in Oakland, California, was charged with falsely accusing several men of possessing drugs and weapons

between June 13 and July 3, 2000 (*Four Officers Face Charges*). Regarding the so-called ‘Rampart Corruption Scandal’ in Los Angeles, California, The *Los Angeles Times* reported that L.A. police officer Rafael Perez had admitted to personally participating in unjustified shootings, beatings, witness intimidation, evidence planting, false arrest, and perjury; Perez also named other L.A. police officers that he says were with him during these incidents (*A Second Rampart Officer Tells of Corruption*). Perez was recently sentenced to prison for stealing eight pounds of cocaine from the LAPD evidence room, and has agreed to cooperate with authorities to expose corruption in the LA Police Department. He depicted the Rampart CRASH unit of the LA Police as an “out-of-control group of officers who routinely broke the law to rack up arrests and impress supervisors” (*Four More LAPD Officers Are Suspended*). Perez noted that “some Rampart officers carried stashes of drugs to plant on suspects – usually gang members – who they believed were guilty of crimes but who did not have drugs on them at the time they were stopped” (*A Second Rampart Officer Tells of Corruption*). As a result of Perez’s admissions, numerous wrongful criminal convictions have been overturned (See *Convictions of 9 More Voided in Scandal* and *Ten More Rampart Cases Voided*). Los Angeles Police Chief Bernard C. Parks disclosed that 99 people were believed to have been framed and sent to prison because of disgraced ex-officer-turned-informant Rafael Perez and his former partners (*LAPD Chief Call for Dismissal of All Rampart Cases*). The *Los Angeles Times* reported that more than 3,000 questionable cases would need to be scrutinized due to the Rampart police scandal (*Rampart Probe May Now Affect Over 3,000 Cases*). Between January and April 2000, sixty convictions were overturned by judges in the wake of the scandal (*Thirty L.A. Officers Called to Testify for Grand Jury*).

Scheck et al (2000) found 'police misconduct' to be the third most prevalent factor contributing to wrongful conviction in their study of 62 exonerations, and determined that police misconduct was a factor in 50 percent of the DNA exonerations in their study. Other previous research confirms that police misconduct and error are major contributors to the wrongful conviction of the innocent (Block 1953; Frank and Frank 1957; Gardner 1953; Huff et al. 1986; Huff et al. 1996; McCloskey 1989; Radelet et al. 1992; Radin 1964; Rattner 1983; Yant 1991). Huff and Rattner (1988) suggest that 'unethical' police officers, who bring biases to their jobs, contribute to wrongful convictions by using such practices as: showing a witness a photograph of the suspect prior to a lineup; coaching witnesses, and coercing confessions. The major types of police misconduct found to be associated with wrongful conviction are: suppression of exculpatory evidence, undue suggestiveness in pre-trial procedures, coercion of witnesses, coerced confessions, and evidence fabrication. A short discussion follows concerning each type of misconduct.

Suppression Of Exculpatory Evidence

Suppression of exculpatory evidence refers to the intentional withholding of evidence that would tend to clear a suspect of guilt or blame. Scheck et al. (2000) found this phenomenon in 36 percent of the cases where police misconduct occurred, and determined that the suppression of exculpatory evidence was the largest category of police misconduct leading to wrongful conviction.

An example of evidence suppression leading to wrongful conviction is demonstrated in the case of Thomas H. Broady. He was convicted of first-degree murder during a robbery and sentenced to 10-25 years in prison. After spending five years in prison Broady was released when an appeals court learned that police had withheld, during Broady's trial, the confession of

another man who admitted to the robbery and implicated a third man as his partner and the real killer (Radelet et al. 1992). There is also the case of Robert Kidd who was sentenced to death after being convicted of first-degree murder. The California State Supreme Court overturned his conviction when it was discovered that a police witness had introduced a three-page document at trial that falsely implied that Kidd had a long series of previous arrests. Subsequent investigation also revealed that police had photographic evidence that was never produced at trial that would have exonerated Kidd. At retrial, with all of the evidence properly admitted, Kidd was acquitted.

Undue Suggestiveness In Pre-Trial Procedures

Undue suggestiveness in pre-trial procedures usually involves the improper use of show-up, photo-spread, or line-up identification techniques. Hypnosis of witnesses is also a dangerously suggestive practice that is forbidden in many states (Scheck et al. 2000). Scheck et al. (2000) determined that undue suggestiveness in pre-trial procedures was the second largest category of police misconduct leading to wrongful conviction. They found this phenomenon in 33 percent of the cases where police misconduct occurred. Numerous wrongful convictions have occurred when eyewitnesses, unsure of their ability to identify a suspect, were given improper suggestions by police authorities that led to a misidentification.

Coercion Of Witnesses

Police coercion of witnesses, in the case of wrongful conviction, involves the intimidation of witnesses to force them to falsely testify to facts that the police believe will be instrumental in gaining a conviction. Scheck et al. (2000) determined that police coercion of witnesses occurred in 9 percent of the cases where police misconduct occurred. Crank and

Caldero (2000) suggest that, especially in emotionally charged homicide cases, police officer outrage and concerns over the victims and their families can lead police to coerce witnesses. They describe the case of Anthony Porter who was held 16 years on death row for murder. Porter was scheduled to be executed in February 1998, but his attorney won a stay of execution due to Porter's mental condition. Crank and Caldero state, "Subsequently, the main prosecution witness stated he had been pressured by police to implicate Mr. Porter. Another man since admitted to the murder, and a corroborating witness has been found" (Crank and Caldero 2000: 45). On February 5, 1999, Porter was released from prison.

Coerced Confession

Police officers coerce confessions for the same reasons that they coerce witness testimony; they believe that they have "got the right man", and want to make sure that their efforts result in a conviction. The Wickersham Commission (1931) published 14 volumes, two that were about the police. One of the two volumes focused on police misconduct and identified widespread police abuses to obtain coerced confessions. Huff et al. note,

Among policy makers, police, and prosecutors, use of [coercion] has been justified, although seldom publicly acknowledged, when they have been certain that the person in custody was guilty, and they required a statement from him or her in order to apprehend accomplices and to obtain enough admissible evidence so that a jury would bring in a verdict or guilt against a vicious perpetrator. The motivation here is to 'help the jury out' (1996: 110).

Sheck et al. (2000) determined that police coerced confessions occurred in 9 percent of the cases of police misconduct they studied. Bedau and Radelet (1987), in their study of wrongful conviction found misconduct by the police accounted for nearly 25% of errors identified – usually coerced confessions.

The case of Betty Tyson illustrates the danger of police coercion to an innocent suspect. Tyson was convicted of murdering a well-to-do middle-aged businessman. Although there was no physical evidence linking Tyson to the crime, the case against her was strong; several witnesses placed her at the scene of the crime – and she had confessed to committing the crime. Tyson received a 25-year sentence for the murder. Crank and Caldero note,

A reporter would later find that much of the case was falsified. The ‘confession’ occurred from a severe beating she received at the hands of police. One of the witnesses stated that ‘Detective Mahoney’ had actually put a revolver to his head and forced him to lie on the witness stand.’ In another document, one of the witnesses stated that he had never seen Ms. Tyson at the murder scene, the opposite of what he stated at her trial.” (2000: 46).

In May of 1999, Betty Tyson, who had become New York’s longest serving female inmate, was released from prison. Subsequently the State of New York paid her one-million dollars for false imprisonment.

Evidence Fabrication.

Evidence fabrication also results from the pursuit of the noble-cause, i.e. to-get-the-bad-guys-off-the-streets. Thinking that they have arrested a ‘bad’ individual, some police officials feel that it is necessary to grease the wheels of justice and provide added evidence against the accused to assure a conviction. Scheck et al. (2000) determined that evidence fabrication transpired in nine percent of the cases where police misconduct occurred. James McCloskey, founder and director of Centurion Ministries, Inc., whose efforts have freed numerous innocent individuals from prison in the past twenty years, lists “perjury by police” as a significant contributor to the wrongful conviction of the innocent. McCloskey suggests that “what would

surprise and even shock most jury members is the extent to which police officers lie on the stand to reinforce the prosecution and not jeopardize their own standing within their own particular law enforcement community: (1989:54).

Solutions

Several researchers have concluded that there are steps that can be taken by law enforcement officers to reduce the incidence of wrongful conviction. Huff et al (1996) suggest that training of law enforcement personnel should include consideration of wrongful conviction, including its causes, and methods for prevention. They also suggest law enforcement performance should be routinely evaluated by state attorney general's offices, and that law enforcement personnel who participate in misconduct should be subjected to the most severe professional, civil, and (were applicable) criminal penalties. In order to reduce the number of wrongful convictions, Yant suggests that police departments do several things: obtain, and maintain, a better mix of officers who can look at problems from a variety of perspectives; improve the accuracy of criminal records; emphasize to police officers that previous arrests and/or convictions do not mean automatic guilt; make crime labs independent of police departments (where police detectives cannot influence forensic investigation and where the presumption of guilt is so predominant). Sheck et al. (2000) and Wells et al. (1998) suggest: all line-ups, photo-spreads, and other identification processes should be videotaped; police should be trained about the risks of providing corroborating details that may disguise doubts a witness might hold; information gained by police officials from jail-house snitches should be subjected to heightened scrutiny; crime labs should be separated from police influence and act as an

independent force in the criminal justice system; and federal involvement should be enhanced in prosecuting the misconduct of state police officers.

Conclusion

Police error and misconduct are significant contributors to wrongful conviction. Some police error is unavoidable. Such error can be reduced through better police hiring criteria, training, and education. Police misconduct is avoidable and should not be tolerated by any police official. The police become involved in a criminal case at a very critical time – the beginning. The activities of police officials at this juncture, and how well they do their job, may have dramatic implications to an innocent individual who becomes a suspect. Once police error or misconduct contributes to a wrongful arrest, there is an increased likelihood that other criminal justice officials will add momentum to the mistake. Most of the police misconduct involved in wrongful conviction stems from attempts to gain status by making arrests or closing cases, or due to the noble-cause syndrome. In order to better assure a conviction, unethical police officials are most prone to withhold exculpatory evidence and use biased identification procedures; to a lesser degree they will fabricate evidence or coerce a witness or the suspect. Some systemic changes can reduce wrongful conviction, e.g. videotaping identification procedures and separating crime laboratories from police influence. But it is the police officers themselves that can do the most to reduce wrongful conviction. All police training should include instruction concerning wrongful conviction – its causes and how it can be prevented. Police officers, properly trained, can be educated to understand that preventing wrongful conviction is also a noble-cause.

CHAPTER SIX

WRONGFUL CONVICTION AND PROSECUTORIAL MISCONDUCT

[A district attorney] may prosecute with earnestness and vigor – indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use legitimate means to bring about a just one.

Justice George Sutherland, for the majority
Berger v. United States, 1935

The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right people as expressed in the laws and give those accused of a crime a fair trial.

Justice William O. Douglas
Donnelly v. DeChristoforo, 1974

Research has indicated that prosecutorial error and misconduct are major problems associated with wrongful conviction (Block 1953; Frank and Frank 1957; Gardner 1953; Huff et al. 1986; Huff et al. 1996; McCloskey 1989; Radelet et al. 1992; Radin 1964; Rattner 1983; Scheck et al. 2000; Yant 1991). A comprehensive accounting of all cases in the United States linked to official misconduct and error is not possible because no agency in the country monitors ethical and legal violations by prosecutors. Appellate opinions do not include those cases that are not appealed – such as those that are dismissed or plea-bargained. Newspapers only report the sensational cases. The actual extent of the problem, therefore, is unknown. Humes notes,

There is no reliable or complete source of data on the total number of individuals released from prosecution or prison due to official misconduct. Primarily through press reports and reported appellate decisions, the author has been able to identify more than one hundred major felony cases around the country that were undone by prosecutorial misconduct [between July 1992 and June 1993.] Of course, this represents only a tiny fraction of the nation's felony convictions in this period, most of

which were untainted and fairly won..... still the magnitude of the problem is greater than many in the justice system wish to admit..... These cases represent only a sampling, for they did not include other instances of misconduct litigated solely in state courts, where most appeals die, or those cases in which misconduct may have occurred, but – because they were resolved by guilty pleas – were never appealed at all (1999: 587).

In the past several years there has been significant research that indicates that prosecutorial misconduct leading to wrongful conviction is pervasive (Conners et al. 1996; Scheck et al. 2000). Yant (1991) suggest there are two major causes of prosecutorial misconduct: the adversary nature of the American courts that turn searches for truth into competitive contests between prosecutor and defense counsel, and the elective nature of the office of prosecutor which compels prosecutors, in order to get reelected, to maintain high ratios of convictions to indictments.

The mishandling of criminal cases by prosecutors can be both unintentional (prosecutorial error) and intentional (prosecutorial misconduct). Prosecutorial ‘error’ refers to those actions where a prosecutor makes a honest mistake that may lead to the wrongful prosecution and conviction of an innocent suspect. Prosecutorial errors may occur when prosecutors unknowingly use false or erroneous witness testimony, false or erroneous forensic evidence, or false confessions. Prosecutorial ‘misconduct’ may include activities in which a prosecutor, in order to gain a conviction, intentionally withholds exculpatory evidence, fabricates evidence, coerces witnesses, knowingly uses false testimony, or applies undue plea-bargaining pressure that may force a suspect to plead guilt to crime he did not commit.

What follow is the story of James Richardson who was wrongfully convicted and imprisoned for the murder of his seven children – due in a large part to prosecutorial misconduct.

Poor, Black, and Victimized – The Case of James Richardson

“Free at last, free at last. Thank God almighty, I’m free at last!” were the words tearfully shouted by James Richardson on April 26, 1989, as he was released after wrongfully serving 21 years in a Florida prison (*Man Revels in His Freedom*). A day earlier Richardson had been freed by a Florida judge who had ruled that Richardson’s trial had been tainted by prosecutorial misconduct and perjured testimony (Huff et al. 1996). Twenty-one years earlier James Richardson had stood trial for the poisoning death of his seven children. At trial Richardson was convicted and sentenced to death on evidence presented that he had killed his children in order to collect on an insurance policy. Evidence was also presented that Richardson had confessed to committing the crime to a fellow inmate while in jail awaiting trial.

Prosecutorial misconduct in the case was eventually revealed when crusading attorney and author Mark Lane was able to obtain a file containing exculpatory evidence that had been suppressed during this trial. Lane was able to reveal that the Desoto County prosecutor had framed Richardson for the murder. The suppressed evidence in the file demonstrated that Richardson had not killed his children to collect on an insurance policy – because there was no insurance policy. Evidence also showed that Richardson had not confessed to the crime while he was incarcerated – as a fellow inmate had previously alleged. Suppressed evidence also indicated that another person, Richardson’s mentally-ill babysitter, had confessed to the crime several times to friends and acquaintances. Although the prosecutor had in his hands ample evidence that it was the mentally-ill baby sitter who had actually laced the children’s food with pesticide on the day they died, he chose to withhold this exculpatory evidence from the defense attorney and jury. It was later learned that the prosecutors chose to suppress the evidence because they had already publicly committed themselves to Richardson’s guilt – and because the

woman babysitter was a friend of a Desoto County Sheriff. In order to protect the sheriff's friend, the prosecutor did not call three key witnesses for fear of what they might say, but instead offered perjured testimony from other witnesses (Yant 1991).

Prosecutorial 'Error' and Wrongful Conviction

Prosecutorial error (honest mistake) can result from erroneous information provided to the prosecutor's office by police authorities. For example, prosecutors may unknowingly decide to prosecute a suspect based on evidence that has been unethically or illegally obtained by police; e.g. false eyewitness testimony that resulted from undue suggestion, a coerced false confession, coerced false witness testimony, or fraudulent forensic evidence. Prosecutors may also not be aware that police officials have suppressed exculpatory evidence that would exonerate the accused. This type of prosecutorial error demonstrates the *ratification of error* phenomenon described by Huff et al. (1986) where, once an error is made at the lower levels of the criminal justice system, it tends to be reinforced as a case proceeds through the system.

A great deal of prosecutorial error also results from prosecutorial overzealousness. Judge Jerome Frank wrote, "An overzealous prosecutor is as great a menace to public safety and tranquility as a deficient, slothful, or corrupt one" (Radin 1964: 45). Huff et al. (1996) suggest that a prosecutor's overzealousness may occur because a prosecutor's office does not have adequate funds needed to do proper investigations. Lacking resources, and pressed by caseload pressure and the need to close cases, a prosecutor may resort to unethical tactics in order to gain a conviction. A favored method of closing cases, especially weak cases against wrongfully accused individuals, is the use of plea-bargaining.

Plea Bargaining

Many researchers have long questioned the so-called ‘voluntariness’ of the negotiated plea and have raised questions concerning the coercion of innocent defendants (Brunk 1979; Yant 1991). Innocent individuals who find themselves charged with a crime, thus, can view plea-bargaining, as a dangerous practice. Lacking sufficient evidence to guarantee a conviction, a prosecutor will often initially “over-charging” suspects in order to put significant pressure on them to plead guilty to a crime they did not commit. Plea bargaining pressures are likely to be increased when a prosecutor’s case against a defendant is weak. Prosecutors, unsure they will be able to gain a conviction, will often use the power and influence of their office to make a plea-bargain an attractive option – especially for a defendant with few resources to garner in a battle against the state. In capital cases the prosecutor may offer to the defendant an agreement not to request the death penalty, or in non-capital cases, the prosecutor may agree to recommend a reduction in sentence length – even to time already served. In sum, prosecutors are often in the position to offer a defendant liberty in exchange for a guilty plea; in capital cases they may be offering a defendant an option of life or death.

Due to the fact that all wrongfully convicted suspects have not committed the crime they are accused of, the cases against them (if ethically processed) are inherently weak. Plea-bargaining pressure, therefore, will typically be inflicted on the wrongfully accused. Huff and Rattner (1988) suggest that plea bargaining abuses, especially the piling on of numerous charges by the prosecutor in order to up the ante of a defendant going to trial, are responsible for many wrongful convictions. They note that defendants have been known to plead guilty to something they did not do rather than take the risk of facing a long prison term (Bordenkircher v. Hayes

1978; Gregory, Mowen, and Linder 1978). (The topic of coerced false confessions will be specifically discussed in a subsequent chapter.)

Arenella (1968) asserts that the plea-bargain process adversely affects innocent defendants because, during the plea-bargaining process, the defendant's presumption of innocence, which should be acknowledged in a jury trial, is replaced by a presumption of guilt in the pre-trial, or plea-bargaining, stage. Arenella states, "When prosecutors respond to a likelihood of acquittal by magnifying the pressures to plead guilty, they seem to exhibit a remarkable disregard for the danger of a false conviction" (1968, 32). In the plea-bargaining stage a prosecutor is not required to present compelling evidence of factual guilt to an independent factfinder, but instead makes a personal judgment concerning the defendant's guilt or innocence, and becomes not only prosecutor but also both judge and jury.

Prosecutorial Misconduct and Wrongful Conviction

Prosecutorial misconduct involves the purposeful use of illegal or unethical prosecutorial tactics in order to gain a conviction. These tactics can include: suppression of exculpatory evidence, knowingly using false testimony, making false and improper statements to a jury in closing arguments, coercion of witnesses, and fabrication of evidence (Huff et al 1996; Humes 1999; Scheck et al. 2000; Yant 1991). Why do prosecutors engage in misconduct? A report in the *Chicago Tribune* suggests that prosecutors do so because they can (*Break Rules, Be Promoted*). According to the report, prosecutors who engage in misconduct are rarely punished. The story notes that not one prosecutor was ever convicted of a crime in the 381 cases involving prosecutor misconduct that was reviewed by the *Tribune*. (Many of these cases involved incidents where exculpatory evidence was concealed, or evidence was presented that the prosecutor knew to be false). Not only were these prosecutors not convicted, many of them later

saw their careers advance and became judges or district attorneys; one of the prosecutors who had engaged in misconduct became a congressman.

Compounding the problem of lack of accountability is the increased power imputed to prosecutors during the current “get-tough” era of crime control. Gershman (1999) who annually publishes *Prosecutorial Misconduct*, the seminal legal work on its titled subject states,

[It] becomes inescapably clear that the prosecutor, for good or ill, is the most powerful figure in the criminal justice system. To be sure, the judge exercises considerable power, but only after the prosecutor has made the critical decision about whom to charge, whom to punish, and how severely. And this power to charge, plea bargain, grant immunity, and coerce evidence is largely uncontrolled. Second, acts of misconduct by prosecutors are recurrent, pervasive, and very serious. Case reports do not adequately describe the extent of such misconduct because so much of the prosecutor’s work is conducted secretly and without supervision (Humes 1999: 529).

Prosecutorial misconduct is handled differently, and more discretely, than any other transgression in the justice system (except for judicial misconduct which is handled the most discretely of all). When cases are reversed because of prosecutorial misconduct, the names of the individual prosecutors are rarely noted in the decision. It is rare when the public finds out about prosecutorial misconduct and even rarer when it learns the name of the perpetrator (Scheck et al 2000). What can the hapless victim of prosecutorial misconduct do? Usually, they can do nothing but complain – and those complaints almost always, ultimately, fall on the deaf ears of those who could take official action. Wrongly charged defendants cannot sue the prosecutor because prosecutors, in almost every circumstance, have absolute immunity. In sum, there is no reasonable check in place to balance the power of the prosecutor with the rights the wrongfully

accused. Without proper checks and balances, some prosecutors are able to take advantage of their situation and circumvent the law in order to gain a conviction.

Crank and Caldero (2000) suggest that prosecutorial misconduct often takes place because prosecutors are in pursuit of the “noble cause”; often a prosecutor feels that the end justifies the means if a ‘bad guy’ is removed from the streets. The “means” taken by a prosecutor is most often the withholding of exculpatory evidence, coercing witnesses, or using false evidence. According to Crank and Caldero, “Prosecutors themselves are often committed to the noble cause, and in their zeal to convict, step across the line in order to prove guilt in courtroom proceedings. Unfortunately they all too many times strike ‘foul blows’ as well as ‘hard ones’ (2000, 133).

Huff et al. (1996) suggest, however, that the reasons for prosecutorial misconduct may not always be noble. Instead, they suggest that misconduct can occur because of bigotry, racism, or even greed. Misconduct can occur because prosecutors simply want to win – they wish to add points to their scorecard. They wish to be viewed as a successful and tough prosecutor. In sum, they often wish to enhance their reputation in order to receive a promotion, more money, more prestige – and possibly a judgeship. Edwin Borchard, over 70 years ago stated, “It is common knowledge that the prosecuting technique in the United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor; it is the environment in which they live, with an indiscriminating public clamor for them to stamp out crime and make short shift of suspects, which often serves to induce them to pin a crime on the person accused” (1932, 369).

Yant (1991) determined the primary activity engaged in by unethical prosecutors is the withholding of exculpatory evidence, which if known to the defense attorney or jury, might

exonerate a defendant. Prosecutors may also, on occasions, allow witnesses to give knowingly perjured testimony, or use people of questionable character to testify as to a “jail-house confession.” Scheck et al. (2000) agree. They found that the major types of prosecutorial misconduct found to be associated with wrongful conviction are: suppression of exculpatory evidence, knowingly using false testimony, making false and improper statement to a jury in closing arguments, coercion of witnesses, and fabrication of evidence. A short discussion follows concerning each type of misconduct.

Suppression Of Exculpatory Evidence

Suppression of exculpatory evidence by a prosecutor refers to the withholding of evidence from a defense attorney that could either help the defendant establish innocence or hinder the prosecutor in obtaining a conviction. McCloskey (1989) lists “prosecutorial misconduct” as one of the seven major causes of wrongful conviction, and notes, “a common trait of wrongful convictions is the prosecutor’s habit of suppressing or withholding evidence which he is obligated to provide to the defendant in the interests of justice and fairness.

Numerous cases of wrongful conviction have occurred because prosecutors failed to provide the defense with known exculpatory evidence (See Adams v. State 1979; Brady v. Maryland 1963; Miller v. Pate 1967; Oklahoma v. Miller 1987). Scheck et al. (2000) found that exculpatory evidence was suppressed by prosecutors in 43 percent of the cases of wrongful conviction in their study.

The case of Todd Neeley demonstrates how the suppression of exculpatory evidence can lead to a wrongful conviction. Prosecutorial misconduct in this case was revealed when the press began receiving calls from outraged neighbors who said that they had told police about another

suspect – a young boy who lived in the neighborhood, wore braces, had a history of voyeurism and exhibitionism, and had even bragged about committing the crime. Public outcry called for the release of Neeley. When the court learned that the prosecutor had never investigated reports of another suspect, nor had they informed Neely’s attorney about the reports, Neely, after spending 92 days in jail, was released pending appeal. Four years later, on June 27, 1990, the appeals court threw out Neely’s “seriously flawed” conviction. The appeals court ordered a new trial after determining that prosecutors had withheld critical evidence leading to another suspect in the attack. A judge wrote, “Had this newly discovered evidence been presented to the court in the original trial, such evidence would have conclusively prevented the entry of a judgment of guilt” (Yant 1991: 137).

Knowingly Using False Testimony

Scheck et al. (2000), in their investigation of 62 cases of wrongful conviction, determined that prosecutors knowingly used false testimony in 22 percent of the cases where prosecutorial misconduct was present. False testimony refers to the making of a false statement(s) under oath, when one does not believe that statement to be true. Prosecutors knowingly used false testimony in a 1997 case involving Lisa Lambert. After serving five years in a Pennsylvania prison for the murder of a romantic rival, Lambert was declared innocent and set free by U.S. District Court Judge Stewart Dalzell. Dalzell found that prosecutors in the cases had obstructed justice, knowingly used perjured testimony, and manufactured evidence of Lambert’s guilt while suppressing evidence of her innocence – all while permitting the real killer, Lambert’s boyfriend, to escape with a light sentence as a mere accomplice in exchange for his testimony against Lambert. Judge Dalzell wrote that the justice system had “lost its soul and almost executed an

innocent, abused woman. Its legal edifice now in ashes, we can only hope for a barn raising of the temple of justice” (Pennsylvania v Lambert 1992).

Making False And Improper Statements To A Jury

Scheck et al. (2000) determined that prosecutors had knowingly made false statements or improper closing arguments in 16 percent of their 62 cases where prosecutorial misconduct was present. Making false and improper statements to a jury refers to declarations made by prosecutors that they know to be untrue. An example of a prosecutor making a false statement in court is demonstrated in the cases of Patricia Donato. She had a conspiracy and fraud conviction against her overturned when the U.S. Court of Appeals determined that there had been “severe” prosecutorial misconduct. Donato was accused by the prosecutor of arranging for the theft of her own car in order to rid herself of burdensome payments and to collect on an insurance policy. The actual car thief, in exchange for a lighter sentence, accused Donato of paying him to steal the car. During closing arguments the prosecutors provided the jury with a false motive for the crime – that returning the car before the lease expired would cost Donato a great amount of money, leaving fraud as the only way out. Upon investigation, the court determined that returning the car early would have been a breakeven proposition for Donato and would had cost her no out-of-pocket money. The court therefore found that there was no reasonable motive for her to enter into a conspiracy to have her car stolen; they further determined that the prosecutor had made-up the motive to mislead the jury (Humes 1999).

Coercion Of Witnesses

Scheck et al. (2000) determined that prosecutors knowingly coerced witnesses in 13 percent of their cases where prosecutorial misconduct was present. Coercion of witnesses by prosecutors refers to the compelling of a witness to falsely testify in a criminal trial – through the threat of physical force or by some other threats to a witness’s well-being. A review of the case of Ricardo Guerra illustrates how prosecutorial coercion of witnesses can lead to a wrongful conviction. Guerra was sentenced to death in 1982 for murdering a Houston police officer. After fourteen years in prison he was freed by an appeals court due to, what a federal judge called “outrageous misconduct” by prosecutors and police. The court accused prosecutors of manipulating evidence to falsely convict Guerra when all physical evidence pointed to another man that was killed in a shootout with police. The judge accused prosecutors of “threatening and intimidating witnesses, most of whom were children, and hiding evidence of Guerra’s innocence while lying in closing arguments about evidence of his guilt” (Humes 1999: 639).

Fabrication Of Evidence

Scheck et al. (2000) found that prosecutors knowingly fabricated evidence in 3 percent of the cases where prosecutorial misconduct was present. Fabrication of evidence refers to the intentional manufacturing of false proof of a suspect’s guilt, e.g. planting drugs on a suspect, presenting false forensic results to a court, transferring fingerprints to a weapon, or producing altered photographs. The Supreme Court case *Miller v. Pate (1967)* provides an example of the type of prosecutorial mischief that can occur when evidence is fabricated. The case involved the murder of an eight-year-old girl. A prosecutor presented to the jury a pair of red-stained men’s shorts that were found a short distance from a murder scene. The prosecutor alleged the shorts belonged to defendant, Lloyd Miller, and that the stains on the shorts consisted of blood – and

that the blood was of the same blood-type as that of the victim. The defendant denied that the shorts were his. The prosecutor refused to let the defense attorney examine the shorts and, based primarily on this evidence, the accused was convicted of murder. It was later discovered that the red stain was not blood, but instead was red paint. The prosecutor admitted to having known, during the trial, that the stains were red paint – a fact that he did not reveal to the defense attorney or the jury. In a unanimous Supreme Court decision Millers conviction was overturned. Justice Stewart wrote, “the Fourteenth Amendment cannot tolerate a state conviction obtained by the knowing use of false evidence” (*Miller v. Pate* 1966: 7).

Solutions

In order to reduce the effect of prosecutorial error and misconduct on wrongful convictions Huff et al. suggest (1996): basic training for prosecutors should include consideration of wrongful conviction, including its causes, and methods for prevention – training should include detailed case studies of wrongful conviction focusing on witness errors, police and prosecutorial errors, and official misconduct. They also suggest prosecutor’s performance should be routinely evaluated by state attorney general’s offices, and that prosecutors who participate in misconduct should be subjected to the most severe professional, civil, and (were applicable) criminal penalties. In order to reduce the number of wrongful conviction, Yant suggests that prosecutor’s offices should be “greatly altered”, and that its investigative responsibilities be “transformed into a subsidiary of an investigating magistracy similar to those that exist in almost all industrial nations other than the United States” (1991: 219). Yant notes that this transformation would allow for a single investigative agency that could independently

examine the evidence for the police, prosecution, and defense, with “the declared purpose of the investigation should be to find out what happened and not to develop a case for either side” (1991: 219). He suggests that such a system would “be a limitation of the uniquely American adversarial process that turns trials into time-consuming battles between lawyers over issues that are greatly irrelevant to the question of guilt or innocence” (1991: 219). Sheck et al. (2000) suggest: prosecutors should be trained concerning the risks of providing collaborating details that may disguise a witness’s doubts about their testimony, that the testimony of jail-house snitches should be subjected to heightened scrutiny, and that specialized blue-ribbon disciplinary committees should deal with misconduct by prosecutors.

Conclusion

Considerable research regarding wrongful conviction indicates that prosecutorial error and misconduct is increasing in frequency. Error involving the wrongfully convicted usually occurs when prosecutors unknowingly receive tainted evidence developed by police agencies. Error also results from prosecutorial overzealousness which can be manifested in plea-bargaining arrangements where prosecutors, with weak cases, will exert undue pressure on a suspect to accept an offer of a reduce charge or punishment. Prosecutorial misconduct usually involves withholding exculpatory evidence from the court; to a lesser degree, prosecutorial misconduct involves the coercion of witnesses, knowingly using false testimony, fabricating evidence, and making false or improper statement to a jury. Prosecutorial error and misconduct that can lead to wrongful convictions may best be reduced through better training of both new and experienced prosecutors concerning its causes and methods of prevention. More than ever before, defense

attorneys must be aware of the sources of prosecutorial error and misconduct, and approach each case with due skepticism.

CHAPTER SEVEN

WRONGFUL CONVICTION AND INADEQUACY OF COUNSEL

The wrongfully convicted invariably find themselves between the rock of police and prosecutorial misconduct and the hard place of an incompetent and irresponsible defense attorney.

**James McCloskey (1989)
Director of Centurion Ministries**

Defense attorneys carry a lion's share of the burden of responsibility for wrongful conviction. When the resources of the state (forensic experts, eyewitnesses for the state, police officials, prosecutors, and sometimes judges) are gathered against an individual who is wrongly accused, it is often the defense attorney who stands alone with the accused against these powers. These forces are formidable not only because of their implied credibility, but also because they have the financial backing of the government. Law schools attempt to train defense lawyers to adequately represent their clients in these circumstances, but case histories of wrongful conviction have demonstrated that attorneys, for a variety of reasons, are sometimes unable to provide adequate counsel to the wrongly accused. Sheck et al. determined that 27 percent of the defendants in their study "had subpar or outright incompetent legal help" (2000: 187). Other research confirms the contribution of inadequate defense lawyers to the incidence of wrongful conviction (Bedau and Radelet 1987; Borchard 1932; Connors et al. 1996; Huff et al. 1996; McCloskey 1989; Radelet, Bedau and Putnam 1992; Yant 1991).

The following three vignettes illustrate some of the problems wrongly accused individuals have experienced due to incompetent attorneys.

Good Samaritan Goes to Death Row – The Case of Larry Hicks

Larry Hicks was wrongfully convicted of murder and sentenced to die in the electric chair. At Hicks' original trial the only significant evidence against him was the testimony of one of the women who he had helped move. The other woman changed her story so many times the prosecutor no longer used her as a witness. During the trial Hicks' court appointed defense attorney presented a lackluster defense. He did not challenge any of the woman's statements, nor did he object to the prosecution's failure to present bloodstained clothing claimed to have belonged to Hicks. The defense lawyer also failed to call an alibi witness who was with Hicks at the time the murder took place, and he ignored statements by the county coroner that an argument between the murdered man and the killer did not start until after 6 a.m. the next morning (a fact also apparently missed by the jury). The original attorney was so incompetent that he did not even file routine appeals on Hicks' behalf after the guilty verdict.

Less than two weeks before Hicks' execution, an appellate attorney was able to have Hicks' case reopened. A post-conviction investigation determined that: (a) the knife presented as evidence against Hicks was not the murder weapon. (b) police found no physical evidence against Hicks, and lost what other evidence they did find, (c) prosecutors had ignored a report by the chief homicide detective that the investigation had been totally botched, (d) witnesses had been threatened not to come forward, (e) one of the victims had not been stabbed in the back as the prosecutor alleged, and (f) the victims were not killed in the place where Hicks' accuser had said the killings took place. Despite the new exculpatory evidence, a politically motivated chief prosecutor, who hated to admit that a mistake had been made, insisted that the new trial go forward (Yant 1991). At Hick's second trial, based on the new evidence, he was found to be not-guilty.

The Case of Edward Honaker

Then there's the case of Edward Honaker who was accused of rape and kidnapping in 1984. He produced testimony that he was one hundred miles away when the crime was committed, but was still found guilty and sentenced to a life term. In his trial the state forensic expert testified that he had examined the slides of the rapist's semen and determined that the sperm belonged to Honaker. After spending several years in prison, Honaker was able to get DNA analysis of the rape evidence, which proved the rapist's sperm did not belong to him. It was also learned, when his case was reviewed, that Honaker had received a vasectomy two years before the rape was committed – a procedure which made it impossible for him to produce sperm. Although Honaker's original defense attorney had been informed of the vasectomy, he decided, for tactical reasons, not to use that information at the trial. The state's forensic expert later swore in an affidavit that, had he known about the vasectomy, he would have testified that Honaker was not the rapist (Scheck et al. 2000). Based on the DNA evidence, and the fact that Honaker had a vasectomy, the district attorney urged the governor of Virginia to pardon him. After spending ten years in prison he was freed by the governor in 1994.

The Case Of Frederick Daye

Attorney incompetence affecting the wrongfully convicted also extends to the appellate level. Frederick Daye maintained his innocence throughout a rape trial and several years in prison. While Daye was in prison he attempted to get a DNA analysis of the rape evidence used to convict him; he was sure the analysis would finally exonerate him. The request for DNA

analysis was sent to a post-conviction attorney assigned to Daye. Two years passed, and Daye wrote the attorney from his prison cell to find out if there were any recent developments in his case. Scheck et al. note,

It turned out that the post-conviction lawyer didn't have the first idea about how to handle the new evidence, so he did nothing. And by the way, even if he had figured out the procedure, he had managed to lose the files. At the same time the court was preparing to destroy the evidence from the rape case, which would have eliminated Daye's ability to prove that he wasn't part of the rape (2000: 187).

Fortunately for Daye, another attorney had worked on his appeal before turning it over to his current attorney. That attorney investigated and was shocked to discover that nothing had been done with the information she had compiled. She successfully filed a motion to preserve the evidence and, in effect, seized the case. In a few months Daye was freed – proven innocent by both the forensic DNA test and the affidavit. When news reporters contacted the appellate attorney who had sat on the case for two years, they asked him if he was concerned about a malpractice suit. He shrugged his shoulders and told them that he had just filed for bankruptcy (Scheck et al. 2000).

Defense Attorney Incompetence or Inadequacy

A defendant's right to counsel is well established in felony cases (*Gideon v. Wainwright* 1963), and in cases of minor crimes or misdemeanors where imprisonment is possible (*Argersinger v. Hamlin* 1972). In the cases of the wrongfully accused, however, the right-to-counsel *per se* is not as important as having counsel that is competent and adequate. McCloskey

(1989: 57) succinctly describes the typical interaction between assigned counsel and a wrongfully accused client,

Communication with the defendant is almost non-existent. When it does take place, it is carried on in a hurried, callous, and dismissive manner. Attempts at discovery are made perfunctorily. Prosecutors are not pressed for material. Investigation is shallow and narrow, if conducted at all. Preparation meets minimal standards. And advocacy at trial is weak. Cross-examination is superficial and tentative. Physical evidence is left untested. And forensic experts are not called to rebut whatever scientific evidence the state introduces through its criminalists..... There are some outstanding examples of vigorous and thorough defense lawyers that leave no stone unturned, but [they] are a rare and inspiring sight!

Huff and Rattner (1988) list “inadequacy of counsel” as a leading factor in cases of wrongful conviction, and note that in many cases original defense counsel do not adequately represent the interests of the suspect because of inexperience or inadequate investigative resources. Yant (1991) asserts that defense attorneys representing the wrongfully accused often are lazy and ill-prepared for trial. He criticizes attorneys who, without fully investigating claims of innocence, tend to use plea-bargaining as a standard operating procedure in order to reduce their workload. He also criticizes defense attorneys for seldom taking the time to properly challenge forensic evidence offered by the prosecution.

Inadequacy of counsel has been a basis for appealing criminal convictions since 1932 (*Powell v. Alabama*). In cases involving wrongful convictions, defense attorneys have ineptly or inadequately represented their innocent clients for numerous reasons, e.g., laziness, sleeping during the trial, appearing at trial in a drunken state or under the influence of an illegal drug, and poor preparation (failure to make discovery motions, depose witnesses, challenge forensic

evidence, etc.). Few criminal cases, however, are overturned on the basis of inadequacy or incompetence of counsel. Scheck et al. (2000) assert that defense attorneys, in order to be determined 'effective' by the appellate courts, usually must only pass the 'breath test', i.e. "if a mirror fogs up when placed beneath the lawyer's nostrils, he or she is not ineffective, as a matter of law" (Scheck et al 2000: 183). Also, attorneys are often reluctant to allege that another attorney is incompetent. Huff et al note,

The rationale that the original defense counsel, for whatever reasons, did not adequately represent the client's interest in the case makes the appeal difficult to win. Collegial relationships within the legal profession, though pitting lawyer against lawyer as adversaries, generally stop short of promoting the idea of attacking colleagues for mishandling cases, just as doctors are not eager to testify against other doctors, police against police, and so forth. Lawyers assigned anew, or on appeal, are not eager to pursue this line to gain reversals, preferring to characterize as "new" evidence anything that was previously overlooked (1996: 77).

What follow is a brief discussion of defense attorney incompetence as it is related to some of the major factors associated with wrongful conviction.

Defense Attorney Incompetence and the Factors Associated with Wrongful Conviction

Defense attorneys who participate in pre-trial identification procedures are sometimes unable to recognize damaging and biased actions when they are taking place because the attorney is unknowledgeable concerning these procedures (Devenport, Penrod, and Cutler 1998; Stinson, Devenport, Cutler, and Kravitz 1997; Wells et al. 1998). Once at trial, due to poor training or other reasons of incompetency, defense attorneys sometimes do not adequately

cross-examine eyewitnesses, nor do they investigate changes that may have occurred in witness confidence concerning damning statements made by witnesses.

Defense attorneys at times do not adequately challenge the forensic evidence presented against their clients. West Virginia public defender George Castelle (1999) noted that, if even one defense lawyer had challenged corrupt forensic expert Fred Zain to present his notes during his reign of error, the charade he was perpetuating would have come to an end. Saks and Koehler note, “Lawyers as a group evidence an appalling degree of scientific illiteracy, which ill-equips them to educate and guide the bench in its decisions on the admissibility of evidence proffered through expert witnesses” (1991: 364). Castelle (1999) suggests that defense attorneys who represent wrongfully convicted clients too often accept at face value the written forensic reports from prosecution expert witnesses, and fail to: (a) schedule pre-trial hearings to challenge the admissibility of questionable prosecution science, (b) obtain the written notes of telephone communications between the investigating officers and the lab, (c) submit the underlying data for review by an independent expert, (d) obtain independent retesting of any questionable results, (e) consult relevant forensic scientific manuals when funds to obtain expert testimony is limited, (f) and adequately investigate crime evidence that was suspiciously “overlooked” by police during their original investigation (e.g. evidence that appeared in unexpected locations, or was found in amounts ‘just large enough to be testable’).

Issues concerning police and prosecutorial error and misconduct are sometimes not adequately addressed by defense attorneys who may fail to use pretrial motions to identify instances of suppression of exculpatory evidence, evidence fabrication, undue suggestiveness in pre-trial procedures, coercion of witnesses, and coerced confessions.

Defense attorneys also are many times too ready to accept a plea-bargain offer made by a prosecutor who has a weak case against their client.

Defense attorneys representing wrongfully accused individuals often do not adequately investigate the circumstances and motives behind accusations against their client. Sometimes the witness against the innocent accused is the individual who actually committed the crime, or is someone who wishes to receive reward money; occasionally an individual who is vindictive toward the accused will make a false accusation concerning a crime that never took place (e.g. rape). Failure to challenge false accusations in court may result from the fact that the defense attorneys themselves often believe their client is guilty and do not provide them with the presumption of innocence necessary to receive a fair trial. (A detailed discussion of false accusations is found in chapter eight).

In a similar manner, defense attorneys may not adequately investigate the circumstances and motives behind confessions made by their clients – because defense attorneys sometimes work under the assumption that their clients are guilty. Defense attorneys often do not vehemently challenge testimony regarding so-called ‘jail-house’ confessions where another prisoner is given a reduced sentence in exchange for testimony regarding the suspect’s supposed confession to the crime while awaiting trial. Also, false confessions made by wrongfully accused individuals may occur due to physical beatings by the police, or due to extreme plea-bargaining pressures exerted by a prosecutor. (A detailed discussion of false confessions is found in chapter nine).

Lastly, defense attorneys, like other members of the courtroom work group, are susceptible to community pressure for a conviction. Defense attorneys, in these circumstances,

sometimes evade their sworn duty to defend their client to the best of their ability. (A detailed discussion of community pressure is found in chapter ten).

Why Wrongful Convictions Result from Inadequate Counsel

Inadequate or incompetent representation by defense attorneys of the wrongfully accused attorneys may result due to one or more of the following four issues: First, eighty-five percent of criminal defendants cannot afford an attorney and are either assigned a public defender or court appointed attorney paid for by the government (McCloskey 1989).

Incompetent counsel, therefore, is not typically chosen by the wrongfully accused, but instead is assigned to the wrongfully accused by the government. Regarding assigned counsel, Scheck et al. note,

In the famous case *Gideon v. Wainwright*, the Supreme Court said every defendant, rich or poor, was entitled to an attorney. For the most part, the systems of “indigent defense” that have emerged in the last thirty years makes no pretense of complying with *Gideon’s* mandate of supplying counsel to improve the defendant’s chances of receiving a fair trial. The poor person is often assigned a lawyer who lacks knowledge, skills, or even the spirit to defend the case properly. (2000: 188)

Due to the fact that eighty-five percent of criminal defendants are indigent, the wrongly accused typically receive either an attorney from a public defender’s office or have counsel assigned to them. Public defender offices often have capable defenders but, due to the overwhelming caseloads and low-level of compensation, the burnout rate is high. McCloskey (1991: 57) notes, “As competent as full-time salaried public defenders generally are, their resources (budget and people) are vastly inadequate and are dwarfed by those of their adversaries

(the local prosecutor's office)." The compensation paid to assigned private attorneys who defend indigent clients is usually also woefully low. Scheck et al. (2000) report that the maximum fee for a non-death penalty case in Mississippi is \$1,000. In some areas of Texas the limit is \$800. In Virginia the most a court-appointed attorney can receive is \$305 for defending a client facing punishment of less than twenty years. The low compensation, of course, typically keeps the more experienced and competent attorneys from taking the cases of the indigent, resulting in the cases being distributed to a pool of younger, less experienced attorneys. Another consequence of low compensation is that, in some cases, it has actually led to profiteering by some defense attorneys. So-called 'cop-out lawyers' are able to make a comfortable living by simply pleading their clients guilty without adequately investigating their cases or even interviewing their clients. Many wrongfully accused individuals have pleaded guilty to a crime they did not commit because of pressures exerted on them by defense attorneys and prosecutors. (See 'false confessions' chapter nine.) Silberman (1980) reported that attorney "wholesalers," who charged only \$50 per case, were able to earn over \$50,000 per year by having their clients plead guilty in five cases per day. Huff et al. (1996) report that one Los Angeles attorney entered as many as 25 guilty pleas per day and received \$200 a case; his income was as high as \$5,000 per day.

Second, some defense lawyers are poorly trained to protect the innocent individual who is accused of committing a crime. All basic and advanced training should include consideration of wrongful conviction, its causes, methods of prevention, and its implications to society. Huff et al. (1996: 151) suggest, "This training should include the presentation of detailed case studies of wrongful conviction, focusing on witness errors, police and prosecutorial errors, official misconduct, and judicial failure to detect errors at trial and on appeal."

Third, defense attorneys who are involved in substance abuse sometimes represent wrongfully convicted individuals. The State Bar of California admits that thousands of lawyers in that state alone come to court each day either drunk or high on drugs (Yant 1991). In the early 1990's the American Bar Association went public with a high-profile campaign to combat substance abuse among lawyers. Surveys conducted by the bar associations in Oregon and Washington indicate that 15-18 percent of lawyers are alcoholics. The Texas State Bar estimates 20 percent of its members has a substance abuse problem – twice as high as the general population (Yant 1991). “We find that in a lot of cases, the person suffering from substance abuse is not handling business as they should’, said Bill Davis, who handles complaints about attorneys filed with the ABA” (Yant 1991: 167). Yant (1991) notes that lawyers who turn to drugs and alcohol usually end up hurting their clients financially, although not before many have been already been victimized by inadequate counsel

Lastly, another reason incompetent lawyers continue to represent the wrongfully accused is because such lawyers are usually not disciplined when their conduct is unprofessional and unethical. Most states have systems of ‘self-regulation’ that are developed, according to the American Bar Association, “to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated by their conduct, that they are unable or unlikely to be able to properly discharge their professional duties” (ABA Standards for Lawyer Discipline and Disability Proceedings, Standard 1.1, 1979). ABA standards, however, are often not enforced. Guttman and Bumstead (1986 E-1) note;

Nationally, lawyer discipline is a travesty. Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are

imposed, the lawyer soon returns to practice, in one state or another.

Even when appellate courts overturn convictions based on misconduct, nothing typically happens to those who broke the law and their oaths. According to Ramsey (1994: 73), “Self-regulation has always served primarily as a vehicle to maintain lawyer’s autonomy, economic position, and established status in society rather than as a vehicle to cleanse the profession of unqualified members and protect the public.”

Conclusion

Reducing the incidence of wrongful conviction due to inadequate or incompetent defense counsel might be realized if the compensation for public defenders and assigned private counsel would be increased so as to attract more experienced, competent, and ethical lawyers. The salaries of public defenders should be at the same level as that of local prosecutors. At the appellate level, Scheck et al. (2000) note that the direction of compensation appears to be going in the opposite direction since Congress has defunded the program that provides money to appellate attorneys after capital convictions. Public defender caseloads should not exceed accepted standards that are sanctioned by the National Legal Aid and Defenders Association, and public defenders should receive increased continuing legal education and more flexible work plans. Law schools should train attorneys concerning the phenomenon of wrongful conviction so students can understand its causes and methods of prevention. Local bar associations and appellate courts should enforce performance standards, and penalties should be applied to public defenders or private attorneys who fail to meet these standards (Huff et al. 1996). Scheck et al.

(2000) suggest that the courts, by failing to find fault with even the worst examples of incompetence, have ratified such conduct.

CHAPTER EIGHT

WRONGFUL CONVICTION AND FALSE ACCUSATIONS

[In some cases] the prosecuting attorney [is] obliged to take the evidence presented to him, including the uncontrollable perjury of a vengeful witness, and lay it before the jury without realization of its worthlessness.

Edwin Borchard *Convicting the Innocent* 1932

False accusations are distinguished from eyewitness error in that false accusations are purposeful and perjured untrue statements intended to convict an innocent person. Unless the false accuser's lies are exposed, judges and jurors will often give great weight to their testimony, and may convict an innocent person based solely on this testimony. Scheck et al. (2000) determined that "false witness testimony" was the sixth most prevalent factor associated with wrongful conviction. In their study they found that "snitches or informants" gave erroneous, and often self-serving information that implicated an innocent individual in 21 percent of the cases they examined. Huff and Rattner (1988) also classify "false accusations" as being a major problem leading to wrongful convictions. Borchard (1932) in his classic study of convicting the innocent determined that in 25 percent of the cases he studied there was a "frame-up" involved; i.e., an individual was wrongfully convicted due to a story that was fabricated by someone else. Bedau and Radelet (1987) in their study of miscarriages of justice set up the highest incidence of false accusations; they found false accusations in one-third (117) of the cases they studied – almost double their findings of innocent eyewitness error (in 57 cases). They note, "This type of corruption spans the years and the jurisdictions; it is too frequent and too familiar" (1987, 60). Huff, Rattner, and Sagarin (1996) found "perjury by witness" and "frame up" in approximately 15% of the 205 cases of wrongful conviction they studied.

On the Wrong Side of the Thin Blue Line – The Case of Randall Adams

False accusation tragically affected the life of Randall Dale Adams. Adams was convicted and sentenced to death by a Dallas, Texas, jury for the November 28, 1976 murder of Dallas police officer Robert Wood. A young man named David Harris linked Adams to the crime. Adams had met Harris when he ran out of gas and was offered a ride by Harris to a gas station. Adams ended up spending the day with Harris. Later that evening, after Harris had dropped off Adams at a motel, Harris murdered Officer Wood when he was pulled over because his automobile's headlights were off. It was Harris who was later to frame Randall Dale Adams for the crime and send Adams to Texas's death row.

One month after the murder of Officer Woods, detectives learned that Harris was bragging to his friends about killing a police officer. When police interrogated Harris he admitted to being at the scene of Wood's murder, and gave the police the murder weapon. Harris accused Adams as being the individual who pulled the trigger of the gun that killed Officer Woods. Adams (who had no criminal record) was then arrested at gunpoint at his place of employment. He was taken to the police station and subjected to an exhausting interrogation with no attorney present, no food, no water, and no rest breaks. According to Adams, when the detectives were unable to get him to confess to the crime, they threw a gun on a table and told him to "Pick the son of bitch up and look at it!" When Adams would not pick up the gun and put his fingerprints on it the detective purportedly pulled his service revolver and, according to Adams, pointed it at Adams' forehead, cocked it, and said, "I ought to blow your shit away" (Adams 1991: 28).

The district attorney's star-witness was David Harris. In exchange for Harris's testimony, all charges against him concerning the crime were dropped. The prosecutor and judge

withheld from the jury information that Harris had picked up Adams in a stolen car and that, after the murder of Officer Wood, Harris, by himself, had for the next several weeks, participated in an extensive crime-spree. Still the prosecutor had a weak case against Adams. In order to buttress his case, the prosecutor, on the last day of the trial, produced three eyewitnesses who testified that they were driving by the crime-scene the night Officer Wood was murdered and had seen Adams sitting behind the wheel of the car that Wood had pulled over. Until this last day of trial, neither Adams nor his attorney had ever been told that anyone had witnessed the crime. Stunned by the new testimony of these witnesses Adams' defense attorney asked for a continuance and investigated. Three days later the defense attorney attempted to recall all three witnesses for cross-examination. The prosecutor told the court that the witnesses had left town and could not be located; it was discovered much later that the witnesses were still in Dallas but had moved to a different motel. Telephone records later proved that the prosecutor knew where the witnesses were, but withheld that information from Adams' attorney (Radelet, et al. 1992).

Adams was convicted due to prosecutorial misconduct and the false accusations of four individuals – Davis Harris and the three surprise “eyewitnesses.” Harris, who later admitted to committing the crime alone, stated that he had testified against Adams in exchange for immunity from prosecution. It was also revealed that the prosecutor's three ‘surprise’ eyewitnesses had lied on the witness stand in order to collect the reward money offered to solve Officer Wood's murder (Huff et al. 1996). It was also discovered that the prosecutor had failed to turn over to the defense written affidavits from the three witnesses, and the original police report of the murder – all of which contained conflicting information that could have exonerated Adams. In 1989 Randall Adams was pardoned by the Texas governor and released from prison.

Pursued for Eight Years – The Case of Tony Cooks

In 1978 Cooks, who had just turned 18, was accused of murdering John Gould. The forty-two-year-old Gould had been accosted by three black teenage youths one evening while he and his wife walked down a street near their home. Seeing the crime from her apartment window, Helen Foster identified Cooks as one of the assailants. Gould's wife told police that the assailant was "a light-skinned black." Police showed her a photo-lineup in which Cooks was the only light-skinned black, and she told police, "I can't be positive, but I think that's him" (Radelet et al. 1992: 191). Two days after Cooks' arrest another 14-year-old youth was also arrested after he confessed to his own involvement in the crime; the young man then falsely accused Cooks as also being involved in the crime. Based on these eyewitness identifications, Cooks was indicted for murder.

Cooks' first trial ended up in a hung jury; his second trial ended in a mistrial; his third trial ended in a hung jury. Finally, at his fourth trial, Cooks was successfully prosecuted on the murder charge. The most damaging evidence presented to the jury came from the 14-year-old youth who pointed to Cooks and identified him as an accomplice to the crime. Also, the victim's wife, who had originally stated "I can't be positive, but I think that's him," then positively identified Cooks as the killer. In his opinion Judge Roosevelt Dorn scoffed at the idea that the witness Helen Foster could have positively identified anyone at nighttime in the street 177 feet from her apartment window; he also believed that the victim's wife might have been misled into making a false identification due to the biased photo-lineup procedure used by the police. The prosecutor appealed the judge's decision and the appellate court reinstated the conviction. The

judge, now forced to pronounce sentence, ordered Cooks to prison for sixteen years to life, but freed him on \$5,000 bond pending appeal. On appeal Cooks won his right to a fifth trial.

In 1986, at Cooks' fifth trial, it was revealed that the case against him was based on the false identification by a self-confessed participant in the murder, and on mistaken identification by an eyewitness. Previously uncovered evidence was introduced at the new trial showing that the 14 year-old eyewitness against Cooks had told his probation officer that his testimony was a "lie" he made up in order to satisfy a persistent detective who would not take 'no' for an answer. The jury voted to acquit Cooks. His wrongful conviction had been based on: (a) the false accusation of the 14 year-old youth who testified against him to make things easier for himself, (b) the acts of an overzealous detective and prosecutor, (c) the suspicious testimony of a woman who possibly had an axe to grind against Cooks for his previous encounter with his son, and (d) the mistaken identification of the victim's wife whose confidence in her original tentative identification of Cooks was likely bolstered at trial (and made more believable to the jury) when she discovered that Helen Foster and the 14 year-old youth had identified Cooks as the culprit who had murdered her husband.

Types of False Accusations

False accusations are always made because the accuser has something to gain (except in cases where the accuser is mentally-ill). False accusations can originate from numerous sources. For example, an individual who commits a crime may falsely accuse an innocent person of the offense in order to cover-up his or her own involvement in the incident (Bedau and Radelet 1987; Radin 1964). Bedau and Radelet (1987) found that the possibility of a false accusation increases when an accomplice to a crime makes the accusation. False accusations also occur

even when no crime was committed (Huff et al. 1996). This type of false accusation can come from vengeful spouses (due to infidelity or divorce), mistresses (revenge or money), business partners (to take control of a business), or from acquaintances that believe they can profit, either emotionally or financially, by seeing an innocent person convicted of a crime (Bedau and Radelet 1987; Radin 1964). Yant (1991) notes that the two most common reasons uncovered by research for false accusations of rape are: (a) to explain a problem of pregnancy, venereal disease, or evidence of promiscuity, and (b) revenge. Some individuals have even admitted to falsely accusing an individual of a crime “just for fun” (Frank and Frank 1957:193; Rattner 1983). False accusations may also occur so that the accuser can benefit from a civil lawsuit, or to gain reward money (Huff et al. 1996; see also *Adams v. State* 1979). False accusations of child molestation and other sex crimes for financial gain are common, and do a great disservice to those victims who truly are the subjects of these types of crimes (Yant 1991).

Some types of false accusations are either initiated, or aided and abetted, by criminal justice officials. For example, police officers have falsely accused innocent individuals in order to increase their number of “collars,” or to satisfy their own racial or ethnic biases and urges. In 1999, disgraced police officer Rafael Perez of the Los Angeles Police Department admitted to fabricating evidence in order to convict at least 99 innocent people of crimes they did not commit (*LAPD Chief Calls for Dismissal of All Rampart Cases*). Prosecutors have knowingly accused innocent individuals of committing crimes they did not commit (see *Pennsylvania v Lambert* 1992). Also, prosecutors have unknowingly accused (and convicted) innocent individuals of murder when the victims actually had died of natural causes or by accidental death (Radelet et al. 1992). Perhaps the most troubling false accusations that involve criminal justice officials are those that come from so-called ‘jailhouse snitches.’

Jailhouse Snitches

A major source of false accusation comes from criminals who are already locked up in jails and prisons. Jailhouse snitches are inmates who, in exchange for their false testimony, will typically be rewarded by the prosecution with a reduction in sentence or outright release. In order to gain the favor of police and prosecutors, these jailhouse snitches will concoct stories of a so-called 'jailhouse confession' which was purportedly made by an innocent suspect who was charged with a crime and awaiting trial – and then testify in court to the authenticity of their claim (McCloskey 1989). False testimonies by jailhouse snitches may also involve the snitch stating that they saw a defendant fleeing a crime-scene, or that they saw them near a crime-scene shortly before a crime took place. What makes this type of false accusation so troubling is the participation of criminal justice officials in the snitch's scheme; in essence, these officials are sub-optimized by the jailhouse snitch, and lend creditability and legitimacy to the false accusations. James McCloskey, advocate for the wrongfully convicted, notes,

If I have seen one, I have seen a hundred “jailhouse confessions” spring open the prison doors for a witness who will tell a jury on behalf of the state that a defendant confessed a crime to him while they shared the same cell or tier. When the state needs important help, it goes to its bullpen, the local county jail, and brings in one of the many ace relievers housed there to put out the fire. As several of these “jailhouse priests” have told me, “It’s a matter of survival: either I go away or he [the defendant] goes away, and I’m not goin’.” Jailhouse confessions are a total perversion of the truth-seeking process (1989, 55).

Conclusion

False accusations often lead to the conviction of innocent individuals and devastate the lives of not only the accused, but also that of their families. Many times false accusations only

serve to divert suspicion from the truly guilty person. Ultimately, false accusations are tendered by pernicious perjurers who, for the sole reason of financial or emotional gain, use the criminal justice process to attain their goals. Sadly, false accusations sometimes occur because it creates a win-win situation for both the accuser and criminal justice officials; the false-accusers accomplish their sorted goals, and the criminal justice officials get a conviction. Prosecutors and police officials may contribute to the incidence of false accusations because they too readily accept them. Especially in the events of weak cases, where criminal justice authorities need additional evidence in order to increase their chances of gaining a conviction, they may welcome anyone who will provide them with testimony that will bolster their case. The use of jailhouse snitches is possibly the most blatant example of the misuse of false accusations because of the active role taken by criminal justice authorities in many of these cases. Leslie Abramson, past president of the California Attorneys for Criminal Justice, notes, “They [police and prosecutors] shouldn’t be using these people [jailhouse snitches] because they know they’re lying. The real tragedy is that they only use these guys in cases where the evidence is weak. So they increase the risks of convicting the innocent” (Yant 1991: 128). Some states have taken steps to reduce false accusations in capital cases by providing for the death penalty for anyone convicted of perjury where an innocent defendant was convicted and executed (Bedau and Radelet 1987).

CHAPTER NINE

WRONGFUL CONVICTION AND FALSE CONFESSIONS

Confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence.

Escobedo v. Illinois, United States Supreme Court (1964)

False confessions are especially dangerous to innocent suspects because this type of evidence is likely to dominate all other case evidence and lead a trier of fact to convict a defendant. False confessions are universally treated as compelling and damning evidence of guilt by judges and jurors simply because most suspects who confess are guilty. Scheck et al. (2000) note that, in cases where false confessions are presented as evidence to juries, 73 percent of juries will vote for conviction, even when the confession is repudiated by the defendant and contradicted by the physical evidence. False confessions are one of the least publicized and most misunderstood dynamics of wrongful convictions. Why, after all, would a perfectly innocent person plead guilty to a crime he or she did not commit? False confessions occur for numerous reasons, and can be divided into two categories: coerced and voluntary.

Coerced False Confessions

Coerced police-induced false confessions rank among the most significant of all official transgressions. In 1931 the Wickersham Commission devoted one volume of its 14-volume report to police lawlessness and widespread police abuses to obtain coerced confessions. In 1966 the Supreme Court handed down its landmark *Miranda v. Arizona* decision in which the Court sought to protect all suspects from acts intended to get them to make confessions against their will – confessions blatantly in violation of a suspect's Fifth Amendment protection against self-incrimination. Yant (1991) notes that false confessions still occur when police forego the

Miranda warning and tell suspects they must talk to them. Researchers have documented numerous cases of police-induced false confessions in the decade of the 1990's alone (Connors et al. 1996; Huff et al. 1996; Kassin 1997; McMahon 1995; Ofshe and Leo 1997; Yant 1991).

After innocent suspects are arrested, they will typically protest their innocence to the police. Due to the fact that police officials tend to assume guilt as a working premise of their craft, claims of innocence are usually given little creditability (Klockars 1991). Police, assuming the accused is guilty, may attempt to coerce a confession from a suspect by using one of many available interrogation techniques. These techniques can utilize, for example: threats, tricks, manipulation, torture and brutality, exhaustion, starvation, fear, and fatigue (Huff et al. 1996). Leo and Ofshe (1998) note that police officials often use techniques from influential training manuals such as *Criminal Interrogation and Confessions* (Inbau et al. 1986) and *Practical Aspects of Interview and Interrogation* (Zulawski and Wicklander 1993), which have been shown to be coercive and produce false confessions.

If police officials are unable to extract a confession from a suspect, then prosecutors (who may also be skeptical of a suspect's claim of innocence) will begin to apply pressure on the defendant to confess. Prosecutor-induced false confessions are especially prominent in cases involving the wrongfully accused; due to the fact that the suspect actually did not commit the crime, prosecutors may lack sufficient evidence to guarantee a conviction. In response to this dilemma, and to avoid going to trial, prosecutors often apply significant plea-bargaining pressure in order to persuade the accused to confess (Brunk 1979; Yant 1991). Huff and Rattner (1988) suggest that plea bargaining abuses, especially the piling on of numerous charges by the prosecutor in order to up the ante of a defendant going to trial, are responsible for many defendants pleading guilty to a crime they did not commit rather than taking the risk of facing a

long prison term (see also *Bordenkircher v. Hayes* 1978; Gregory, Mowen, and Linder 1978). In some cases the prosecutor may offer to recommend a reduction in sentence to time-served if a defendant will confess; in capital cases the prosecutor may offer the defendant an agreement not to request the death penalty. In sum, prosecutors are often in the position to offer to the innocent suspect, in exchange for a guilty plea, liberty; in some cases prosecutors offer the suspect an option of choosing between life and death.

In at least two instances the Supreme Court has heard cases where defendants repudiated their confessions and sought to have their cases retried because they alleged that their confessions were not voluntary but were instead offered to avoid the death penalty. In both cases (*Brady v. U.S.* [1970] and *North Carolina v. Alford* [1970]) the Court refused to order new trials. The 1982 trial of Harry Siegler illustrates the high-stakes game a defendant may be forced to play as the result of plea-bargaining offers from the prosecution. While Siegler was waiting for a jury to issue a verdict in his first-degree murder case, he panicked – fearful that he would be found guilty and be sentenced to death. The prosecutor had offered to drop the death specification if Siegler plead guilty and, just minutes before the jury returned, Siegler desperately changed his plea from innocent to guilty of a lesser charge. Siegler then learned that the jury had already voted to acquit him. Unfortunately for Siegler his guilty plea took precedence and the judge sentenced him to 60 years in prison. In cases involving the death penalty, Huff, et al. (1986: 529) note, “with so much to lose, who among us would not plead guilty if he thought that by doing so, he could save his own life, and perhaps, eventually go free when the error is discovered?”

Adding to the innocent suspects’ predicaments during periods of police and prosecutorial coercion is the fact that the defendants’ own defense attorney may also believe them to be guilty.

In the same way that prosecutor and police authorities are skeptical to claims of innocence, defense attorneys also usually treat such claims with cynicism (McCloskey 1989). Defense attorneys may not adequately defend their client's during periods of coercion because attorneys may feel pressure from prosecutors and other court personnel to play the game of speedy disposal of cases (Heumann 1978). Wrongfully accused individuals thus find themselves under extreme pressure from prosecutors and their own defense attorney to falsely confess or possibly suffer severe consequences.

Voluntary False Confessions

Bedau and Radelet, in their study of 350 cases of wrongful convictions found a “disturbing number of cases, where innocent defendants had confessed voluntarily, even eagerly, but falsely” (1987: 62). One type of voluntary false confession comes from individuals who are mentally unstable. According to Huff et al. (1996: 112), “some people confess because certain crimes have caught the public eye; they claim guilt because of their own emotional disturbances, their need for the limelight, or the fantasies of power they create for themselves.” Huff et al. cite the California case of the unsolved murder of the young attractive woman who became known as the ‘Black Dahlia’; her case drew almost 2,000 confessions from individuals of questionable mental stability. Criminal justice officials, at times, may take advantage of an individual's reduced mental capacity, and accept a “confession” that will close a case. In 1983 Ft. Lauderdale police extracted a false confession to a double murder from mentally handicapped John Purvis – who was sentenced to life plus two twenty-year terms; after nine years of incarceration Purvis was released when the actual killers were caught (Leo and Ofshe 1998). In 1979 a mentally handicapped adult named Melvin Reynolds, after thirteen hours of interrogation, falsely

confessed to the abduction and murder of a four-year-old boy. Reynolds was convicted and sentenced to life in prison. He was released from prison four years later after a serial killer confessed to a series of brutal murders – including the one for which Reynolds was found guilty (Leo and Ofshe 1998).

False confessions can be voluntarily tendered in order to deliberately shield someone else from harm (e.g., a spouse, relative, friend, lover). Sometimes, when a husband and wife are accused of a crime, the man will falsely confess so the wife can go home with the children. In other cases a father or mother will falsely confess to protect their child. In 1973 Phoenix, Arizona, police extracted a false confession from John Knapp who admitted to setting a fire at his home that killed two of his children. There was no inculpatory evidence supporting the confession, but considerable evidence supporting Knapp's innocence. Based on the confession Knapp was convicted of murder and arson. It was later discovered that one of Knapp's children had set the fire, and that Knapp had confessed to protect the child.

False confessions are also voluntarily made in order to protect oneself. For example, in 1944 Delphine Bertrand pleaded guilty to manslaughter and was sentenced to ten to fifteen years in prison. She falsely confessed to the murder because she was having sex in another part of the house when the murder took place and, rather than publicly reveal her sex life, she chose to confess (Yant 1991). In 1995, 62-year-old Laverne Pavlinac falsely confessed to a murder and implicated her boyfriend in order to escape from their abusive relationship. She later recanted but was convicted anyway, and she and her boyfriend were sentenced to life in prison (Humes 1999). A few years later the real murderer was caught and provided details of the crime that only the killer could know (and that Pavlinac had gotten wrong).

Lastly, some voluntary false confessions occur simply because a defendant's legal expenses are mounting, and he or she cannot afford to continue defending themselves. Rather than possibly losing their home or a lifetime of savings, defendants may falsely confess to a crime they did not commit because the probable consequences of the confession are considered less threatening than the possible consequences of going to trial.

Confessions from Three Innocent Men – The Cases of Joseph Broderick, George Bigler and Rudolph Sheeler

Philadelphia patrolman James T. Morrow was murdered while tracking down a suspected robber who had been terrorizing the northeast section of the city. Philadelphia police, in efforts to solve the murder, arrested and extracted confessions from three different innocent men over a several year period – two of who were convicted and sentenced to life in prison before being exonerated.

During the first few months of the investigation following Morrow's murder, police arrested Joseph Broderick and quickly extracted a confession from him. A few days later Broderick recanted. When it became evident to police officials that the confession was coerced, Broderick was released. Approximately one year later Philadelphia arrested another suspect, Bigler, for Morrow's murder. Bigler then became the second man to confess to Morrow's murder. In his confession Bigler implicated a Philadelphia patrolman as an accomplice in the murder. At his trial Bigler repeated his confession and the jury promptly found him guilty of first-degree murder and recommended that he receive the death penalty. However, the case against the patrolman Bigler had implicated quickly fell apart and that trial ended in an acquittal. The judge in Bigler's trial then became suspicious of the confession and ordered a new trial for Bigler. At the second trial Bigler again pled guilty and the judge had no alternative but to

sentence him; still unsure of the “confession”, the judge sentenced him to life in prison instead of death. Two years later the same type of robbery that had been attributed to Bigler began to reoccur in northeast Philadelphia. Police received a tip that the robber was a known criminal named Jack Howard. When police tracked Howard down, they mortally wounded him in a gunfight. In Howard’s possession was the murder weapon that had been used to kill Officer Morrow. Although police had no reason to believe that Howard had an accomplice, they staked out the hospital room of a friend of his, Elizabeth Morgan, to see if any of Howard’s acquaintances might visit her. When Morgan’s brother, Rudolph Sheeler, came to visit his sister he was immediately arrested and taken to police headquarters. Sheeler became the third man to confess to Officer Morrow’s murder after he was beaten for hours at a time over a two-week period and finally confessed to aiding Howard in the murder. At trial Sheeler pled guilty and was sentenced to life in prison. Bigler, who by this time had spent two years in prison was pardoned and transferred to a mental hospital.

Twelve years passed until proof surfaced that Sheeler was at work hundreds of miles away at the time of officer Morrow’s murder. A judge reviewed the case and found that key details of the case were contradicted by his confession, and that his confessions and court statements contradicted each other. The judge concluded that Sheeler had been forced to confess because police were eager to free Bigler and therefore clear the reputation of the officer he has implicated – even though that officer had been acquitted. The Pennsylvania Supreme Court, calling the case “a black and shameful page in the history of the Philadelphia police department” (Yant 1991: 49), overturned Sheeler’s conviction and ordered his immediate release. Four detectives and two superior officers were suspended for their roles in Sheeler’s coerced confession.

Extent Of the Problem of False Confessions

False confessions occur frequently (see *Miller v. Illinois*, 1977; *Blackburn v. Alabama* 1960; *Bumper v. North Carolina* 1968; *Chambes v. Florida* 1940). Bedau and Radelet (1987: 58), in their study of 350 cases of wrongful convictions in capital, or potentially capital cases, found that in 14 percent of the cases they studied, police coerced innocent defendants into confessing to crimes they did not commit by using methods that “ranged from those in which the police used the ‘third-degree,’ to others where less brutal tactics were employed.” Leo and Ofshe, in their 1998 study of sixty cases of police-induced false confessions in the post-*Miranda* era, found that American police continue to elicit false confessions even though the era of third degree interrogation has purportedly passed. Scheck, et al (2000) found that “false confessions” were a factor in 24 percent of their cases, and rated it seventh among the most prevalent factors leading to wrongful conviction.

Conclusion

False confessions are one of the least publicized aspects of wrongful conviction. A probable reason why so few instances come to the public’s attention is because the individuals are often given probation, suspended sentences, or sentences limited to time-served. There is, therefore, usually little incentive for anyone to pursue the case further. Police officials and prosecutors typically apply pressure on a suspect to confess because they believe that the suspect is, in fact, guilty, and they wish to speedily dispose of the case. Defense attorneys, who may themselves be cynical of their client’s claim of innocence, may not vigorously defend their client’s interests, but instead may respond to pressures from the courtroom workgroup to close

cases. Wrongfully accused individuals thus find themselves under extreme pressure to falsely confess or possibly suffer severe consequences.

False confessions are problematic to the criminal justice system. Leo and Ofshe (1998: 432) explain,

A lack of information prevents researchers from estimating the full magnitude of personal and social harm that police-induced false confessions cause: the days and months innocent persons spend in pre-trial incarceration; the resources, time, and dollars wasted prosecuting and defending them; the months and years defendants languish in prison after wrongful conviction; and the additional crimes carried out by the true perpetrators.

Huff et al (1996) suggest that better police training can reduce the incidence of false confessions, with an emphasis on the investigators' duty to uncover the truth – and not to break big cases whatever the cost to further their own careers. Prosecutors, they suggest, can reduce the incidence of false confessions by more carefully scrutinizing the details and discrepancies contained within confessions, and by considering the motives or conditions that might lead to a confession. Also confessions that are repudiated, and which have no other collaboration, should be deemed insufficient to warrant a conviction.

Leo and Ofshe (1998) suggest that if police and prosecutors wish to prevent false confessions, “they must acknowledge the reality of false confessions, seek to understand their causes and consequences, and work to implement policies that will both decrease the likelihood of eliciting false confessions and increase the likelihood of detecting them (1998: 492). They further suggest that shoddy police practice often results from poor interrogation training, and the use of influential training manuals that have been shown to be coercive and produce false

confessions. Leo and Ofshe suggest that the incidence of false confessions could be reduced if legislatures would mandate that all interrogations be recorded in their entirety.

CHAPTER TEN

WRONGFUL CONVICTION AND COMMUNITY PRESSURE

Behind [the mob] is the cry for blood, but it is muted, more gentle in appearance, and sugar-coated with law-abiding respectability. It manifests itself in various ways: people are emotionally aroused by a crime and display above-normal interest; there is a restless rumbling by this disturbed public and a sharp increase in letters and telephone calls to the police, to newspapers, to officials, all insistently demanding action. Newspapers reflect the general temper of its readers and become more shrill, and so the heat is on. Police, prosecutors, and even judges may be goaded into hasty action; judgment becomes blurred under this pressure; suppositions replace facts, and since jurors are selected from among the excited public, little attention is paid to actual evidence, the guilty verdict is a foregone conclusion, and the net result is a legal lynching. And a study of cases where innocent persons have been convicted shows that this happens more frequently than is realized.

Edward D. Radin “The Innocents” (1964: 55)

Pressure from the public to convict a criminal suspect can be viewed as an expression of democratic participation in the criminal justice process. Public pressure, therefore, can make the criminal justice system more responsive to the needs of a community. A question of interest is whether society is willing to tolerate wrongful conviction in exchange for an increased sense of deterrence and public safety. Huff and Rattner describe community pressure for conviction as a time “when hatred replaces reason and due process” (1988: 158). Public pressure exerted to solve a crime, sometimes fanned by newspaper publicity, is often as much to blame for a wrongful conviction as is eyewitness error, faulty science, or official misconduct. Police, prosecutors, judge and jurors are not impervious to public demands for revenge and closure in high profile criminal trials that take place in highly charged settings where public interest and passions are aroused. Huff et al. (1996) suggest that in periods of high crime rates and great public outcry against criminals, and when group pressures are felt in the courtroom, conviction rates may be higher than at other times. They note, “it is undeniable that efforts to influence what is happening in the world often extend to the courtroom” (1996: 75). A review of the

literature on wrongful conviction suggests that when community pressures for solving a crime increases, there is a tendency for carelessness and lawlessness to also increase, and that the probability of a wrongful conviction increases when enforcement agencies are willing to respond to the public's demand for punishment (Rattner 1983). Humes (1999) suggests that a growing national trend is occurring in which innocence defendants have become unintended casualties of the current war on crime.

Wrongful convictions that result from community pressure have been a major concern of many researchers. Borchard (1932), in his pioneering study of wrongful conviction, noted that "community opinion demanding a conviction" contributed to 22 percent of the 65 cases of wrongful convictions in his study. Radin (1964) devoted 30 pages of his book on wrongful conviction to the topic of community pressure. Bedau and Radelet (1987: 63) noted that, "sometimes community outrage over a crime turns the criminal proceedings into a near lynching, as the trial degenerates into a kangaroo court;" they determined that "community opinion demanding a conviction" contributed to 22 percent of the erroneous convictions in their study.

The Case of Clarence Brandley

On August 23, 1980, Brandley was a janitor in a high school in Belleville, Texas where a girls' volleyball tournament was being played. While the team was warming-up someone noticed that the female student-manager was missing. An exhaustive search was made of the high school until Brandley and another janitor, Henry 'Icky' Peace, found the 16-year-old blond-haired girl's body, strangled and nude, in a loft where theater props were kept. She had been raped.

With a rapist and murderer loose in the community, townspeople panicked. Radelet et al. (1992: 120) note, “The town was in an uproar. Summer was coming to an end, and the school year was about to start. Parents threatened to keep their children (especially the girls) home unless the murderer was arrested by the time school registration was completed. Town and school officials alike recognized that they had to act fast if the growing panic and outrage was not to overwhelm the community.” Suspicion quickly fell on the two janitors who discovered the girl’s body. Two days after the crime they were both given a lie-detector test, but both men passed and were released. Four more days passed and time was running out for authorities because school was to begin the following Monday. Intense meetings were held between the police and the county district attorney to find a way to quickly solve the case so that school could begin on time. It was decided to arrest Clarence Brandley for capital murder.

From the beginning, Brandley insisted he was innocent. Five days after his arrest he voluntarily appeared before an all-white grand jury. He was indicted and then tried by an all-white petit jury. In Brandley’s first trial one juror refused to vote for guilt, and the jury was hung. When the identity of the dissenting juror was publicly revealed, he received numerous harassing telephone calls and threats from local citizens. At Brandley’s second trial, also before an all-white jury, he was convicted of murder and sentenced to death. Eleven months after Brandley’s conviction his appellate attorney discovered that more than half of the evidence used to convict Brandley had mysteriously disappeared – including the rape kit containing the killer’s sperm, and three reddish-blond hair samples of Caucasian origin that were found on the victim’s nude body. An appellate court was unsympathetic with the claim that Brandley was denied a fair trial because the evidence that could exonerate him was lost or purposely destroyed by criminal justice authorities. Brandley was given his first execution date: January 16, 1986.

The first break in Brandley's case came when the wife of ex-janitor James Robinson told investigators that her husband had admitted to killing the girl. Friends of Robinson's wife urged her to contact the state district attorney, but when she did the district attorney did not believe her story. An investigation revealed that James Robinson was at the high school visiting with another janitor, Gary Acreman, on the morning of the murder. When Acreman's father-in-law was questioned, he told investigators that his son-in-law had told him where the victim's clothes had been hidden – two days before police were able to locate them. Finally another janitor admitted to investigators that he had seen Robinson and Acreman grab the screaming girl while she was in the woman's restroom.

Brandley's attorney filed a writ of habeas corpus to present the new evidence. A judge issued a stay of execution on March 20, 1987 – six days before Brandley's second execution date. At the evidentiary hearing the judge found that the State's investigation of the crime was "so impermissibly suggestive that false testimony was created, thereby denying Brandley due process of law and a fundamentally fair trial" (Radelet et al 1992: 133). In December 1989, the judge ordered a new trial; the prosecutor, however, refused to agree that Brandley could be released on bond pending the new trial. Brandley remained in prison for almost another year until October 1, 1990, when, after more than ten years of incarceration on death-row, all charges were dismissed against Brandley and he was released from prison.

Reducing the Effects of Community Pressure

Community pressure for conviction is not limited to instances of racism. Pressure may also be exerted by woman's groups, homosexual and anti-homosexual interests, child-protection

interests, and even business groups who want crimes solved because business interests are being adversely affected. Sometimes these pressures are exerted not only by local citizens, but also by national special interest groups. Recent attention to domestic violence (Taylor, Davis and Maxwell 2001), date-rape (Kingsworth, MacIntosh, and Wentworth 1999), and child molestation (Humes 1999) are reflections of increased national and community sensitivity to these issues, and thus increased community pressure on criminal justice officials to obtain convictions for these types of crimes. Huff et al. (1996) suggest that the increasing number of instances of wrongful imprisonment in rape cases since the 1970's might be a result of increasing public pressure to obtain convictions in such cases. Another type of community pressure can be fanned by police organizations who seek to compel prosecutors, judges, and jurors to convict accused "cop-killers" – as was demonstrated in the wrongful conviction cases of Randall Adams, Joseph Broderick, George Bigler, and Randolph Sheeler.

In some cases community pressure for conviction can be mitigated with a change of venue. If mob violence threatens a case, a change of venue must be allowed (*Blevins v. State*, 1963); if an impartial jury cannot be selected in the original venue, a change of venue must be granted (*People v. Harris*, 1981). In *State v. Engle* (1980) the Court determined that, in order to grant a fair trial, the court must consider all relevant factors: e.g., the nature and gravity of the offense, the amount of pre-trial publicity, the size of the community, the defendants status in the community, the prominence of the victim, and the likelihood of finding a substantially fairer jury elsewhere. Even in cases where venue is changed, however, there is no guarantee that trials will be free of community pressures. Newspapers in the newly venued community may pick up the story and sensationalize it in a way similar to the way the story was sensationalized in the community of original jurisdiction. Issues of the case may appear so outrageous that citizens in

‘any’ community might feel the need to pressure criminal justice authorities to convict the accused.

Conclusion

Numerous cases presented in this dissertation have demonstrated the effect of community pressure on wrongful conviction. In the case of James Richardson who was wrongfully convicted of killing his seven children, Radelet et al. (1992: 197) noted, “News of the tragedy that struck the dusty Florida town of Arcadia in October, 1967, spread quickly. Reporters flocked to the region. For a few days, the deaths of those seven children, assumed to be murdered, was one of the top stories in the nation The national media was on hand, and the pressure on [sheriff] Cline to make an arrest was strong.” Twenty years after the news-blitz, the innocent Richardson was exonerated and set free from prison. The high-profile case of Dr. Sam Shepard, convicted in Ohio in 1954 of the brutal murder of his pregnant wife, was described as “a circus, with the judge as ringmaster” that took place in a “cyclone of publicity” (Bedau and Radelet 1987: 32). After serving several years in prison Shepard’s innocence was established, his conviction was set aside, and he was released from prison.

Public pressure to convict is a double-edged sword that can cut two ways: it can serve as a watch dog, forcing prosecution of cases that might otherwise be dropped because of an accused’s standing or influence in the community, or it can be used as a tool of fear and prejudice by community members to persecute and prosecute, as scapegoats, wrongfully accused defendants who have few or no resources. Community pressure for conviction also has an antithesis – community apathy. Community apathy is undoubtedly more destructive to the cause of the wrongfully accused than is community concern. During abnormal periods of community tension which may arise as the result of a high-profile crime, at least the community is

“involved” in the criminal justice process; i.e., citizens are actively exerting pressure on authorities to see that justice is served.

CHAPTER ELEVEN

WRONGFUL CONVICTION AND “OTHER” FACTORS

Previous sections of this dissertation explored research concerning the eight factors most associated with wrongful conviction. Also deserving mention are the following, less empirically studied, but also important “other” factors associated with wrongful conviction.

Presumption of Guilt – A cornerstone of the U.S. criminal legal system is the presumption of innocence. Yant notes, “Despite all the alleged protections built into the trial process, the sad fact is that a person facing criminal charges is actually presumed guilty until proven innocent rather than presumed innocent until proven guilty” (1991: 11). The ‘presumption of guilt’ attitude held by many criminal justice officials adversely affects wrongfully accused individuals at every step of the criminal justice process (Lane 1970; Linscott 1994; McCloskey 1989; Packer 1968; Rattner 1983; Scheck et al. 2000). James McCloskey (1989) lists ‘presumption of guilt’ as the number one factor leading to wrongful conviction. He states that most people are inclined to believe the adage where-there-is-smoke-there-is-fire; lay-people and criminal justice professionals alike tend to believe that suspects probably committed the crime of which they are accused.

Klockars suggests that police officers “tend to assume guilt as a working premise of their craft” (1980: 37), and are inclined to use a “not guilty (this time) assumption,” during stops with seemingly innocent citizens. In these instances police officers may be predisposed to believe, even if no evidence of unlawful behavior is initially found, that a suspect may be hiding an undisclosed truth regarding a previous crime, and that a little additional pressure might cause it to be revealed.

Existence of a Prior Criminal Record – is a key factor in the wrongful conviction of innocent individuals (Huff et. al 1996; McCloskey 1989; Rattner 1983, Yant 1991). Borchard (1932), in his pioneering study of wrongful conviction, determined that “prior convictions and ‘unsavory’ record” contributed to 35 percent of the convictions he studied. Once judges or jurors know that a defendant has a prior criminal record, they tend to label the suspect as a “criminal” and any evidence presented against him or her will be considered from that perspective. Huff et al. (1996) note that a prior criminal record may increase an individual’s chances of being wrongly accused because: (a) it places that individual’s picture in police files (that victims of crimes are constantly viewing), and (b) it makes an individual more vulnerable to police interrogation and to making false confessions. Innocent defendants with criminal records often find themselves in no-win situations when their cases go to trial. They are less likely to take the witness-stand and testify in their own behalf because their record might be questioned during cross-examination, and the refusal of a defendant to take the witness-stand is often viewed by jurors as a sign of guilt (McCloskey 1989; Rattner 1983).

Race – Just as our prisons contain a disproportionate number of blacks and Hispanics, so are there a disproportionate number of convicted innocents whom are black or Hispanic (Huff et al 1996). The biases and prejudices of police, prosecutors, judges, and jurors can be a factor in any case of wrongful conviction. Prejudicial justice is common in most states, and many wrongful convictions are the result of racial motivations (Yant 1991). Scheck et al. (2000) note that racism and bigotry, written out of the law, still shadows police precincts, courtrooms and jury boxes. Summarizing their findings concerning wrongful conviction, they state, “among the more troubling findings, is that several of these factors (eyewitness misidentification, false

accusations, false confessions, police and prosecutorial misconduct, inadequacy of counsel) are more pronounced in the conviction of innocent black men” (2000: 246; see also Huff et al. 1996).

Racism is even found in the areas of forensic science (Castelle 1999; Scheck et al. 2000). Documents presented in a 1997 Inspector General’s investigation of the FBI Crime Lab contain disturbing allegations of fraud and racism. According to one interview contained in the report, FBI agent Greg Parsons stated that a lab technician “would determine if the suspects were Afro-Americans; if so, he would manipulate the tests to prove guilt” (Office of Inspector General, Memorandum of Investigation, 1/23/97).

Poverty – Clarence Darrow is credited with making the cynical observation, “I’ve never heard of a millionaire going to the chair” (Radin 1964: 233). In a majority of cases of wrongful conviction, the defendants had one thing in common – a lack of money. Poverty will first impact a defendant when bail is set. When indigent defendants are sitting in jail there is an extreme pressure on them, even when innocent, to plead guilty to a crime they did not commit in exchange for a recommended reduced sentence. Even when a wrongfully accused defendant has the resources necessary to hire his own attorney, he still may lack sufficient funds to make a thorough investigation of the cases against him; attorney fees may be small in comparison to the funds needed to hire investigating detectives, or to hire technical experts to examine and testify regarding physical evidence. The prosecution, with relatively unlimited investigative resources, can overwhelm all but the richest of defendants.

Mental Incompetence – is a factor in wrongful conviction when the accused is intellectually unable to articulate a defense, or does not have enough mental capability to be considered legally culpable of committing a crime (see Ake v. Oklahoma 1985; Huff et al. 1986). Rattner (1983) reports several known cases of false convictions that involve persons of low I.Q.; he notes that mentally incompetent defendants are often unable to inform their attorneys of salient facts which might exonerate them, and were often unable to make a satisfactory impression on the jurors. Radelet et al. (1992), in their study of erroneous convictions in capital cases, discuss almost two-dozen separate cases where individuals with low I.Q.'s were wrongfully convicted of capital crimes.

Jurors – The jury system used in the United States is not perfect, but it may represent the best system available for meting out justice. The general consensus among criminal justice authorities is that juries are right more often than they are wrong (McCloskey 1989). The idea that juries are right more often than they are wrong, however, presents small comfort to the innocent defendant convicted by one of the 'wrong' juries. Jurors, according to Scheck et al. (2000: 109), are “panning for nuggets of truth in the muddy rivers of conflicting stories and rickety memories.” They are ultimately forced to make one subjective call after another when deciding whom to believe and what inferences to draw from conflicting statements.

Radin (1964: 230), however, exonerates juries from most of the blame regarding wrongful convictions,

In my research I have found that the jury is seldom a primary cause of the conviction of the innocent. To blame jurors would be an easy way to find a scapegoat. A jury has every right to believe that police and a prosecutor have checked thoroughly into the identification by an eyewitness, whereas this usually marks the end of any further investigation by authorities. If the judge allows the

courtroom to become a theater for histrionic displays by contending defense counsel and the district attorney, instead of a calm, impartial forum where facts are presented and truth is sought, the fault is more with the judge than the jury if jurors are allowed to be carried away by emotions.

Judges – Responsibility for allowing all types of misleading evidence to enter the courtroom ultimately falls on the bench. Rattner (1983) lists three major types of judicial error associated with wrongful conviction: judicial errors affected by bias, judicial neglect of duty, and technical errors in judicial decisions. Often wrongful convictions occur because judges allow incompetent defense attorneys, overzealous police and prosecutors, and questionable forensic evidence to permeate the courtroom. Sometimes the biases of the judges themselves lead to trial errors that are not reversible but never-the-less influence decision-making (Huff et al. 1996; Rattner 1983). Sheck et al. (2000) note that the occurrences of wrongful conviction are attenuated when appellate judges issue only one-line judicial orders that do not specify the reasons for overturning a conviction.

Simple Mistake – wrongful conviction of the innocent can occur even when the criminal justice process is operating as it should. Radin (1964) suggest that a “sardonic fate” sometimes seems to operate in some cases of wrongful conviction. These are the types of cases in which eyewitnesses honestly make mistakes, police departments use proper investigative techniques, prosecutors are zealous but not over-zealous, defense attorneys do a credible job of defending their client, and still an innocent person is still convicted. No system is perfect. A system in which honest mistakes occur can be tolerated – if those mistakes are minimized; a system in which preventable errors are continually made and repeated should not be tolerated.

CHAPTER TWELVE

RESEARCH METHODOLOGY

Introduction

This chapter describes the methods used in this study. The study's objectives were to obtain from criminal justice professionals their perceptions regarding: (1) the frequency of wrongful conviction in their own jurisdictions, and in the United States, (2) the frequency of occurrence of factors which previous research has associated with the incidence of wrongful conviction, and (3) the general reliability of eyewitness and forensic expert testimony and the general reliability of the work product of police officials, prosecutors, defense attorneys, and judges.

In order to examine these issues a 53-item survey questionnaire was administered to four groups of Ohio criminal justice professionals: law enforcement (sheriffs and chiefs of police), prosecutors (chief and assistant), defense attorneys (private and public defenders), and judges (Common Pleas, Appellate, and Supreme Court). The opinions of these professionals were sought for two reasons: (1) they are close to the trial process and are in a position to observe incidents of wrongful conviction, (2) their experience should provide them with knowledge of criminal justice system successes and failures

State of Ohio criminal justice professionals were targeted for this study because the use of a single large state, such as Ohio, serves to control for the effect of varying legal definitions, while still allowing for a diversity of settings. Ohio is the sixth largest state in the United States, with a population of 11,353,140 (Bureau of Census, 2001), and has a blend of urban, suburban, and rural areas.

The “perceptions” of criminal justice professionals were chosen as a measure because there may be no better way to approach the question of prevalence than through perceptions. Due to the fact that no research approach has yet been devised to exactly measure the extent of the problem, the perceptions elicited in the present study may offer a ‘best-estimate’ of the phenomenon. The professionals surveyed are in a position to make such observations because they are exposed, on almost a daily basis, to the environment where wrongful convictions can occur. Due to their experience within the criminal justice system, their perceptions regarding the issues of this study may enable them to offer data close enough to objective truth to provide a baseline estimate of the frequency of system errors.

Section one of this chapter discusses the research questions that guide the study.

Section

two provides a discussion of the sampling frame and sample size. Section three focuses on data sources. Section four discusses survey administration/data collection. Section five discusses variable measures. Section six outlines the statistical analyses used to interpret the data, and provides a description and rationale for these techniques. Finally, section seven discusses the limitations of the study.

Research Questions

The research reported here is designed to answer the following questions regarding the perceptions of criminal justice professionals:

1. How frequently does wrongful felony conviction occur?
2. How frequently do criminal justice professions (police officials, prosecutors, defense attorneys, and judges) commit errors associated with the incidence of wrongful conviction?

3. What is the general reliability of the work product of police officials, prosecutors, defense attorneys, and judges?
4. How frequently do non-criminal justice personnel commit errors associated with the incidence of wrongful conviction (eyewitness error, forensic witness error, false accusations, false confessions, and community pressure)?
5. What is the general reliability of eyewitness and forensic expert testimony?
6. What do criminal justice professionals consider an “acceptable” level of wrongful convictions, and do they believe changes warranted in the criminal justice system?
7. Do groups of criminal justice professionals differ in their perceptions as they relate to the issues delineated in the first six research questions?

Sampling Frame and Sample Size

Sampling Frame

The sampling frame consists of: (1) all Ohio Common Pleas Court judges, (2) all Ohio Appellate Court judges, (3) all Ohio Supreme Court judges, (4) all Ohio chief county prosecutors, (5) a random sample of Ohio assistant prosecutors, (6) all Ohio county sheriffs, (7) a random sample of Ohio chiefs of police, (8) a random sample of Ohio county public defenders, and (9) a random sample of Ohio private defense attorneys.

Sample Size

The sample size consists of: (1) 230 presiding Common Pleas Court Judges, (2) 67 Appellate Court Judges, (3) 7 Supreme Court judges, (4) 88 chief county prosecutors, (5) 132 assistant prosecutors, (6) 88 county sheriffs, (7) 400 chiefs of police, (8) 250 county public

defenders, and (9) 238 private defense attorneys. The total sample comprises 1500 Ohio criminal justice professionals.

Sample sizes were determined using Dillman's (2000) "Tailored Design Method for Mail and Internet Surveys." The Dillman (2000) method utilizes a formula based on: the amount of sampling error that can be tolerated, the population size from which the sample is to be drawn, how varied the population is with respect to the characteristics of interest, and the required confidence level. Sample sizes for the present survey were determined using the formula to target a 95% confidence level, with a +/- 5 percent sampling error.

Date Sources

Ohio Common Pleas Court, Appellate Court, and Supreme Court Judges

Names of members of the Ohio Common Pleas Judges Association were obtained from the Association's 2001 President, Hon. Margaret K. Weaver. Judge Weaver provided a list of all 230 Ohio Common Pleas Court judges, all 67 Ohio Appellate Court judges, and all 7 Ohio Supreme Court judges. Judge Weaver was succeeded by the association's 2002 president, Hon. James R. Williams, who approved a letter stating the association's cooperation with the survey. All 304 judges were mailed questionnaires.

Ohio Criminal Defense Attorneys

A list containing the names of approximately 23,000 attorneys was obtained from the Ohio Bar Association 2000 "Official Legal Directory." The Association's web page was used to identify Association members who specialize in private practice criminal law. A random numbers table was used to randomly select 238 private criminal defense attorneys who were

mailed questionnaires. The Association's website also contains a list of Ohio public defenders. Again, a random numbers table was used to randomly select 250 Ohio public defenders who were mailed questionnaires.

Ohio Prosecutors

A list of names of all 88 Ohio chief county prosecutors was provided by Mr. John Murphy, Executive Director of the Ohio Prosecuting Attorneys Association. All Chief County Prosecutors in Ohio were mailed a questionnaire. The names of Assistant County Prosecutors were obtained from the Ohio State Bar Association's website. A random numbers table was used to randomly select the 132 Assistant Ohio Prosecutors who were mailed questionnaires.

Ohio County Sheriffs

Names of all 88 Ohio county sheriffs were obtained from a list acquired from the Ohio Attorney General's "2001 Law Enforcement Directory." All 88 county sheriffs were mailed a questionnaire.

Ohio Chiefs of Police

The names Ohio's 857 chiefs of police were obtained from a list acquired from the Ohio Attorney General's "2001 Law Enforcement Directory." A random numbers table was used to randomly select 400 chiefs who were mailed questionnaires.

Survey Administration/Data Collection

In order to minimize the four sources of survey error (sampling error, coverage error, measurement error, and non-response error), the survey was administered using a version of Dillman's (2000) Tailored Design Method (TDM). As recommended by Dillman, multiple

mailings were conducted to improve survey response rates. (The survey instrument and accompanying letters are included in Appendix A). Initially, each member of the sample was mailed a “pre-notice” postcard introducing the study, announcing that a survey would soon follow, and emphasizing the importance of each respondent to the study. Three days later, each member of the sample was mailed a questionnaire, an addressed postage-paid return envelope, and a cover letter which introduced the survey and reemphasized the importance of each individual’s response. The cover letter was limited to one page and briefly asked for the respondent’s help, stated why the survey was important, and assured confidentiality to respondents. Two weeks after the original survey was mailed, a follow-up “thank you - reminder” postcard was sent to all non-respondents to remind them to return a completed survey (or to thank them if the survey had recently been returned). Two weeks after the “reminder” postcard was mailed, a second survey, cover letter, and addressed postage-paid return envelope was mailed to all non-respondents – again reminding them of the importance of their response and urging them to fill out and return the questionnaire. Four weeks after the second questionnaire was mailed, a final questionnaire, cover letter, and addressed postage-paid return envelope was mailed to the remaining non-respondents with a final plea for a response. This reminder-letter was insistent in nature – simply because it constituted a fifth request. It again reminded the respondent of the importance of the study as well as the importance of the respondent’s participation. Using Dillman’s five-step TDM method, a response rate of 53.2 percent was attained.

Study Variables And Measures

Measures/Variables

In general, previous research concerning the topic of wrongful conviction discussed the following issues: frequency of wrongful conviction, eyewitness error, error concerning the presentation of forensic evidence, law enforcement error, prosecutorial error, inadequacy of defense counsel, judicial error, false accusations and false confessions, community pressure to obtain a conviction, and presumption of guilt. The survey instrument (Appendix A) contains 53 questions intended to tap the perceptions of respondents concerning these issues.

Frequency of Wrongful Conviction. Two questions using 10-item scales ranging from ‘zero percent’ to ‘over 25 percent’ were utilized to allow respondents to estimate what they perceive to be the percentage of wrongful felony conviction occurring in their own jurisdiction, and in the United States in general. A third question, using the same 10-item scale, allowed respondents to indicate what they consider to be an “acceptable level” of wrongful convictions.

Professional and Non-Professional Error. Following is a description of how the variables which are the subject of this study are operationalized. (All “9-item scales” used in the survey instrument ask respondents to estimate, in a range from “never” to “always,” how often they perceive a specific type of error to occur.)

Eyewitness Error. Three questions were utilized to operationalize this variable. Two questions asked respondents to estimate how often (never, seldom, often, very often) they believe eyewitnesses misidentify a defendant – either intentionally or in good-faith. A third question asked respondents to estimate how reliable (very reliable, usually reliable, usually unreliable, very unreliable) they believe are the testimonies of eyewitnesses in criminal cases.

Forensic Expert Error. The survey contained two 9-item scale questions asking respondents how often they believe forensic experts – either in good-faith, or intentionally – misrepresent forensic evidence. A third question asked respondents to estimate how reliable (very reliable, usually reliable, usually unreliable, very unreliable) they believe are the scientific conclusions of forensic experts.

Police Error. Three questions were used to operationalize this variable. The first questions, containing five parts, asked respondents to estimate on a 9-item scale how often they believe police officials are involved in the following five types of police error:

- Inadequate police investigation
- Police coaching witnesses in pretrial identification procedures
- Police suppressing exculpatory evidence
- Police using false evidence
- Police using undue pressure to obtain a confession

A second question asked respondents to estimate how reliable (very reliable, usually reliable, usually unreliable, very unreliable) they believe is the evidence presented in court by police officials. Finally, a question asked respondents how often, in general, they believe police identification procedures contribute to misidentification (never, seldom, often, very often).

Prosecutorial Error. One five-part question asked respondents to estimate, using a 9-item scale, how often they believe prosecutors are involved in the following five types of prosecutorial error:

- Inadequate investigation of case by prosecutor
- Prosecutor suppressing exculpatory evidence
- Prosecutor using undue plea bargaining pressure
- Prosecutor prompting witnesses
- Prosecutor knowingly using false testimony

A second question asked a respondent how reliable (very reliable, usually reliable, usually unreliable, very unreliable) they believe is the evidence presented in court by prosecutors.

Defense Attorney Error. In order to operationalize the variable “defense attorney error,” two questions were asked. The first question again contained five-parts. Respondents were asked to indicate, on a 9-item scale, how often they believe defense attorneys are involved in the following five types of defense error:

- Inadequate investigation of case by defense attorney
- Defense attorney failing to file proper motions
- Defense attorney not adequately challenging forensic evidence
- Defense attorney not adequately challenging witnesses
- Defense attorney making unwarranted plea bargain concessions

Respondents were then asked to estimate how well (very well, moderately well, not very well, poorly) they believe defense attorneys defend their clients.

Judicial Error. The variable “judicial error” was operationalized by first utilizing a four-part question asking respondents to indicate how often they believe judges are involved in the following four types of judicial error:

- Judicial error concerning the admissibility of physical evidence
- Judicial error concerning the admissibility of eyewitness testimony
- Judicial error concerning the admissibility of expert testimony
- Error resulting from judicial bias

A second question sought information regarding how reliable (very reliable, usually reliable, usually unreliable, very unreliable) respondents believe are the decisions made by judges concerning defendants’ guilt or innocence.

False-Witness Errors. Respondents were asked how often they believe false accusations occur: frequently, occasionally, or seldom.

False Confessions. This measure is operationalized using a “yes-no” format asking respondents if they personally knew of a case in which an innocent individual confessed to a crime he or she did not commit.

Community Pressure. A “yes-no” question was again used asking respondents if they personally knew of a case in where community pressure to quickly solve a crime lead to a wrongful conviction.

Sample Demographics. Five questions ask for basic demographic information concerning respondent’s age, gender, race, professional background, and current jurisdiction:

Statistical Analysis

It was the intention of this dissertation to examine the perceptions of individual actors within the criminal justice system concerning systemic factors associated with wrongful conviction, and to compare these perceptions across groups. The main emphasis of the statistical analysis was to measure the total response rate of all participants regarding each of the study’s research questions, and to utilize statistical tests to measure variations in frequency of responses across groups of participants. Following is a description of the types of statistical analysis techniques and procedures used to analyze the data – and the rationale for using each technique.

The responses to three questions concerning the frequency of wrongful conviction utilized a ratio scale that allow respondents to select from a range of “zero” to “over twenty-five percent,” how often they believe wrongful convict does, or should, occur. In order to determine if differences in means existed in the answers to these questions, an analysis of variance test was used.

Twenty-two questions utilized an interval scale to allow respondents to select, from the category of interest, responses ranging from “1” (never) through “9” (always) – with equal

intervals between the numbers one through nine. Although this type of scale has some “ordinal” qualities (order and direction), it also possesses “interval” qualities (equal distances between observation points). Analysis of variance tests were also performed on this data – a method currently accepted and in use in the majority of scientific journals. If analysis of variance tests determined that differences existed among means, post hoc range tests and pairwise multiple comparisons were used to determine which means differ. Where analysis of variance indicated significant differences in mean responses across groups, a post hoc Tukey HSD (honesty significant difference) test was utilized to determine which means differed significantly.

Ten survey questions required responses using an ordinal scale. For these responses only frequencies are reported. A chi-square test was not able to be used because the data did not meet the statistical assumptions necessary to run chi-square.

Thirteen questions required nominal-scale responses. For these questions, only frequency distributions are reported. Finally, one open-ended question, asking respondents for their opinions regarding what steps can be taken by criminal justice professionals to reduce the incidence of wrongful conviction, was located at the conclusion of the survey instrument. A representative sample of these responses is presented in the discussion section in chapter fourteen.

Limitations of the Study

Although the findings presented in this study advance the current state of knowledge regarding wrongful conviction, the reader should be aware of limitations in the data. The present study utilized survey research to ask criminal justice professionals their opinions regarding the extent and causes of wrongful conviction. In regard to the issue of the “extent” of wrongful conviction, a limitation of the study is that the actual rate of error was not measured, but only a

“perceived” rate of error; the actual extent of wrongful conviction remains an empirical question. Another limitation of the study involves the “types” of errors which were offered to respondents for comment. Prior research has indicated that these errors are only “associated” with wrongful conviction, and have not been proven to be “causative” of wrongful conviction. It is possible, therefore, that the reported frequency of a particular type of error may be spurious and irrelevant to the incidence of wrongful conviction. Also, data from the present study was obtained from only one state, Ohio, and therefore has limited generalizability.

CHAPTER THIRTEEN

FINDINGS

Introduction

This chapter is organized to correspond to the research goals outlined in the methods section. First the survey response rates and the descriptive properties of the response sample are presented. Then each of the seven research questions are restated. The pertinent survey questions are listed under each research question, and the findings are presented.

Survey Response Rates

A survey questionnaire concerning the topic of wrongful conviction was mailed to 1500 Ohio criminal justice professionals. A total of 798 (53.2%) questionnaires were completed and returned. The findings presented in this chapter reflect an analysis of these completed questionnaires. Table 1 reports the response rates by group.

Table 1 – Survey Response Rates

<u>Group</u>	<u>Surveys Mailed</u>	<u>Responses</u>	<u>Response Rate</u>
Police	488	274	56.1
Sheriffs	88	62	70.4
Chiefs of Police	400	212	53.0
Prosecutors	220	103	46.8
Chief Prosecutors	88	62	70.4
Assistant Prosecutors	132	41	31.1
Defense Attorneys	488	235	48.2
Private	238	98	41.1
Public Defenders	250	137	54.8
Judges	304	186	61.2
Common Pleas	230	142	61.7
Appellate	67	41	61.2
Supreme Court	<u>7</u>	<u>3</u>	<u>42.9</u>
TOTAL	1500	798	53.2

Descriptive Properties of the Sample

Of the 798 individuals who responded to the survey, 274 (34.3%) work in law enforcement (“police”), 103 (12.9%) are prosecutors, 235 (29.4%) are defense attorneys, and 186 (23.3%) are judges. Many respondents have, at some time in their career, gained experience in more than one of these areas. A comparison of the descriptive variables of the four groups is reported in Table 2.

Table 2 – Group Comparisons: Sociodemographic Variables

<u>Variables</u>	<u>Police</u>	<u>Prosecutors</u>	<u>Attorneys</u>	<u>Judges</u>	<u>Total*</u>
Age					
18-29	5	7	13	0	25
30-39	32	22	71	4	129
40-49	106	34	66	30	236
50-59	112	37	67	82	298
60-69	18	0	16	50	94
70-79	2	0	4	9	15
80+	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
TOTAL	275	100	237	175	787
Race					
White	272	98	219	167	756
Black	0	1	8	2	11
Hispanic	0	0	2	1	3
Asian	0	0	1	0	1
Other	<u>1</u>	<u>1</u>	<u>3</u>	<u>1</u>	<u>6</u>
TOTAL	273	100	234	171	778
Gender					
Male	271	86	194	148	699
Female	<u>4</u>	<u>14</u>	<u>43</u>	<u>31</u>	<u>92</u>
TOTAL	275	100	237	179	791
Jurisdiction					
Village	98	0	2	0	100
Township	28	2	1	2	33
City	82	2	29	2	115
County	61	92	112	123	388
State	1	0	20	32	53
Multiple	<u>5</u>	<u>3</u>	<u>70</u>	<u>19</u>	<u>97</u>
TOTAL	275	99	234	178	786

* Not all respondents provided demographic data

The average respondent has 18 years of experience in the criminal justice profession. Respondents work in a wide range of jurisdictions including: villages (12.7%), townships (4.2%) cities (14.6%) counties (49.4%), and state (6.7%); approximately 12 percent of respondents work in multiple jurisdictions. The ranges of ages of all respondents are reported as: 50-59 years-old (37.9%), 40-49 years-old (30.0%), 30-39 years-old (16.4%), 60-69 years-old (10.7%), 18-29 years-old (3.2%) and 70-79 years-old (1.9%). The mean-age of respondents is age 49. The majority of the respondents are male (88%). Caucasians comprise 97.1 percent of the sample, African Americans 1.4 percent, Hispanic 0.4 percent, Asian 0.1 percent, and 0.8 percent of respondents identify themselves as “other.”

Research Questions and Statistical Analysis

In this section each research question is stated along with the related survey questions. The findings are then presented. Frequency distribution charts display bivariate analysis of the responses of the members of each group to each question. In order to examine group differences, analysis of variance tests are conducted on all interval-scale items in order to determine if significant differences ($p = .05$) exist between group-means. If significant differences are determined, a post hoc Tukey HSD analysis is completed in order to determine which group-means differ significantly. Only frequencies and means are reported for ordinal-scale data. Nonparametric chi-square tests which may, under certain circumstances, be conducted on ordinal-scale data were not used because the data violated chi-square assumptions that (1) no cell have an observed raw frequency of “zero,” and (2) all expected frequencies but one are least “five.” (Bartz 1999)

Research Question # 1 – How Frequently Does Wrongful Felony Conviction Occur?

To measure the frequency of wrongful conviction, respondents were asked two questions. First, respondents were asked to estimate the percentage of all cases in the own jurisdiction that involve wrongful felony conviction. Second, they were asked to estimate the percentage of all cases in the United States that involve wrongful felony conviction. The second question was asked because criminal justice professionals often have access to information from outside their own jurisdiction (meetings and seminars, professional journals, information exchanges, private conversations and with other professionals, etc.) which should enable them to make educated estimates concerning events in other jurisdictions.

How frequently do criminal justice professional estimate wrongful conviction occurs in their own jurisdiction?

To measure perceptions of the extent of wrongful felony conviction in their own jurisdiction, respondents answered a 10-item Likert scale question with values ranging from “0%” to “over 25%.” Results are reported in Table 3. Overall, respondents believe

**Table 3
Percentages – Wrongful Conviction in Own Jurisdiction**

Response	Police	Prosecutors	Def. Attys.	Judges	All
1 = 0%	33.2 (91)*	29.0 (29)	1.8 (4)	15.5 (26)	19.5 (150)
2 = < than ½%	43.4 (119)	49.0 (49)	2.2 (5)	31.0 (52)	29.3 (225)
3 = ½ % - 1%	13.5 (37)	13.0 (13)	9.3 (21)	21.4 (36)	13.9 (107)
4 = 1% - 3%	6.2 (17)	6.0 (6)	26.5 (60)	19.0 (32)	15.0 (115)
5 = 4% - 5%	3.3 (9)	1.0 (1)	18.6 (42)	6.0 (10)	8.1 (62)
6 = 6% - 10%	0.4 (1)	2.0 (2)	17.3 (39)	5.4 (9)	6.6 (51)
7 = 11% - 15%	---	---	9.3 (21)	1.2 (2)	3.0 (23)
8 = 16% - 20%	---	---	7.1 (16)	0.6 (1)	2.2 (17)
9 = 21% - 25%	---	---	5.3 (12)	---	1.6 (12)
10 = Over 25%	---	---	2.7 (6)	---	0.8 (6)
TOTAL	100.0 (274)	100.0 (100)	100.0 (226)	100.0 (168)	100.0 (768)
MEAN	2.04	2.07	5.33	2.93	3.21

* Number of respondents in parentheses

wrongful felony conviction occurs in their own jurisdictions between one-half percent and one percent of the time. When group responses are compared, defense attorneys perceive higher rates of wrongful conviction in their jurisdictions than do judges, prosecutors, and police. Defense attorneys believe that in-jurisdiction wrongful conviction occurs in four to five percent of all felony cases – several times higher than is estimated by prosecutors, judges, and police who believe wrongful conviction occurs in their jurisdictions in less than one-half percent of all felony cases.

Statistically significant differences ($p = .000$) in the mean scores among the four groups were determined by analysis of variance. The results of a post hoc Tukey HSD analysis are reported on Table 4. All group responses significantly differ from one another except those of prosecutors and police.

Table 4
Wrongful Conviction in Own Jurisdiction
Significance Levels (Tukey HSD) for Comparison of Group Responses

	Police	Prosecutors	Defense Attys
Prosecutors	.998		
Defense Attorneys	.000	.000	
Judges	.000	.000	.000

How frequently do criminal justice professionals estimate wrongful conviction occurs in the United States?

To measure beliefs about the extent of wrongful felony conviction in the United States, respondents answered another 10-item Likert scale question with values ranging from “0%” to “over 25%.” Table 5 reports the results.

Overall, respondents perceive that wrongful convictions occur in the United States between one and three percent of the time. This estimate is higher than the estimate given by the respondents on the previous question concerning their own jurisdictions (½ % - 1%). When

group responses are compared, defense attorneys again report higher rates of wrongful conviction than do judges, prosecutors, and police. Defense attorneys believe the rate of wrongful conviction in the United States to be between four and five percent (the same as their in-jurisdiction estimates), while prosecutors and police believe wrongful convictions occur in one-half to one percent of all felony cases (higher than their in-jurisdiction estimates). Judges perceive the rate to be slightly greater than prosecutors and police, between one percent and three percent (also higher than their in-jurisdiction estimates).

Table 5
Percentages – Wrongful Conviction in United States

Response	Police	Prosecutors	Def. Attys.	Judges	All
1 = 0%	1.1 (3)	1.0 (1)	0.5 (1)	---	0.7 (5)
2 = < than ½%	21.3 (57)	30.2 (29)	1.9 (4)	17.0 (26)	15.8 (116)
3 = ½% - 1%	23.6 (63)	31.3 (30)	6.0 (13)	20.3 (31)	18.7 (137)
4 = 1% - 3%	29.6 (79)	24.0 (23)	14.4 (31)	28.1 (43)	24.0 (176)
5 = 4% - 5%	14.2 (38)	10.4 (10)	25.9 (56)	18.3 (28)	18.0 (132)
6 = 6% - 10%	5.2 (14)	1.0 (1)	19.4 (42)	10.5 (16)	10.0 (73)
7 = 11% - 15%	2.2 (6)	2.1 (2)	8.8 (19)	3.9 (6)	4.5 (33)
8 = 16% - 20%	2.2 (6)	---	13.0 (28)	1.3 (2)	4.9 (36)
9 = 21% - 25%	0.4 (1)	---	2.3 (5)	---	0.8 (6)
10 = Over 25%	---	---	7.9 (17)	0.7 (1)	2.5 (18)
TOTAL	100.0 (267)	100.0 (96)	100.0 (216)	100.0 (153)	100.0 (732)
MEAN	3.73	3.24	5.91	4.06	4.38

An analysis of variance test indicates statistically significant differences in the mean scores among the four groups. Analysis of the subgroups again reveals that the responses of defense attorneys differ significantly ($p = .000$) from those of the other three groups (Table 6). In this case, however, judges' responses differ only from those of prosecutors ($p = .001$) and defense attorneys ($p = .000$). Again, no significant differences are reported in the police perceptions when compared with those of prosecutors or judges.

Table 6 – Frequency of Wrongful Conviction in United States Significance Levels (Tukey HSD) for Comparison of Group Responses

	Police	Prosecutors	Defense Attys
Prosecutors	.053		
Defense Attorneys	.000	.000	
Judges	.174	.001	.000

Research Questions # 2 and # 3. How Frequently Do Criminal Justice Professions

Commit Errors Associated With The Incidence Of Wrongful Conviction, and What is the General Reliability of the Work Product of Police, Prosecutors, Defense Attorneys, and Judges?

Police Error

Police error has been found to be associated with cases of wrongful conviction. To examine the issue of police error, criminal justice professionals were asked three questions. One question asked respondents for their opinions regarding the frequency of five types of police error. A second question asked respondents how often they believed police identification procedures (e.g. showups, photospreads, lineups) contribute to misidentification. A final question asked respondents to state their perceptions regarding the general reliability of evidence presented in court by police officials.

How frequently do police officials engage in the following conduct: inadequate investigation, coaching witnesses in pretrial identification procedures, suppressing exculpatory evidence, using false evidence, and using undue pressure to obtain a confession?

Another pattern is evident. Across all five categories, defense attorneys perceive each type of police error as occurring more frequently than do the other three groups. Mean-response ratings of defense attorneys are double those of police and prosecutors, and are fifty-percent higher than those of judges. Prosecutors, on the other hand, in four of the five categories of police error perceive less error than do police themselves.

A reliability test was conducted to determine if all five items in Table 7 are measuring the same concept of police error. The Cronbach alpha (.9179) suggests that all five items can be combined as a single variable. As such, an additive scale was produced and a single variable “Police Error” created (Table 8).

Table 8
Percentages – Index Variable “Police Error”

	Police	Prosecutors	Def. Attys.	Judges	All
5=Never	13.9 (188)	21.6 (106)	.6 (7)	5.8 (51)	9.0 (352)
10=> Never <Infrequent	31.9 (432)	31.0 (152)	4.1 (48)	18.2 (159)	20.3 (791)
15=Infrequent	33.5 (454)	28.2 (138)	13.9 (164)	34.2 (299)	27.1 (1055)
20=>Infrequent <Mod. Freq.	10.9 (148)	10.0 (49)	10.5 (124)	15.9 (139)	11.8 (460)
25=Moderately Frequent	7.5 (101)	5.5 (27)	25.7 (303)	17.1 (149)	14.9 (580)
30=>Mod Freq <Very Freq	1.5 (20)	1.6 (8)	10.5 (124)	3.9 (34)	4.8 (186)
35=Very Frequent	0.9 (12)	1.6 (9)	23.7 (279)	4.2 (37)	8.7 (337)
40=>Very Freq <Always	---	.2 (1)	8.4 (99)	.6 (5)	2.7 (105)
45=Always	---	---	2.5 (29)	---	0.7 (29)
TOTAL	100.0 (1355)	100.0 (490)	100.0 (1177)	100.0 (873)	100.0 (3895)
MEAN	13.17	13.00	27.00	17.58	18.50

Mean-response to the variable Police Error (18.50) indicates respondents believe this type of error to occur slightly above the “infrequent” level. Fifty-seven percent of all respondents believe Police Error occurs “infrequent,” or less, while forty-three percent of all respondents perceive police error to occur more than “infrequent.” When group responses are analyzed separately, defense attorneys think Police Error occurs more often than do prosecutors and police (moderately frequent vs. less than infrequent). Judges perceive police error to occur more frequently than do prosecutors and police, but less frequently than do defense attorneys.

An analysis of variance test of the variable Police Error indicates that statistically significant differences ($p = .000$) in the mean-scores of the four groups. The results of the post hoc Tukey HSD test are shown in Table 9. Responses of defense attorneys are significantly different ($p = .000$) than members of the other three groups. Judges’ responses also significantly differ ($p = .000$) from those of the other three groups. The responses of police and prosecutors do not differ significantly.

Table 9
Additive Scale Variable “Police Error”
Significance Levels (Tukey HSD) for Comparison of Group Responses

	Police	Prosecutors	Defense Attys
Prosecutors	.808		
Defense Attorneys	.000	.000	
Judges	.000	.000	.000

How often do police identification procedures contribute to misidentification?

Perceived frequency of error contributed to by police identification procedures is measured using a 4-item Likert scale. Table 10 reports the findings. Overall, respondents believe that this type of error occurs slightly more than “seldom.” When examining the responses by group, the great majority of police, prosecutors and judges perceive that police identification procedures “seldom” contribute to misidentification. However, only about one-

third of defense attorneys selected the “seldom” response. Instead, mean response of defense attorneys were closer to “often,” with over half (54.9%) of the defense attorneys selecting the “often” response – which is several times higher than prosecutors, police and judges.

Table 10 –Percent - Police Identification Procedures Contribute to Misidentification

Response	Police	Prosecutors	Def. Attys	Judges	All
1 = Never	4.1 (11)	8.0 (8)	1.3 (3)	4.6 (8)	3.9 (30)
2 = Seldom	92.3 (250)	89.0 (89)	33.0 (77)	84.0 (147)	72.3 (563)
3 = Often	3.7 (10)	2.0 (2)	54.9 (128)	11.4 (20)	20.5 (160)
4 = Very Often	---	1.0 (1)	10.7 (25)	---	3.3 (26)
TOTAL	100.0 (271)	100.0 (100)	100.0 (233)	100.0 (175)	100.0 (779)
MEAN	2.00	1.96	2.75	2.07	2.23

In general, how reliable is the evidence presented in court by police officials?

The reliability of evidence presented in court by police is measured using a 4-item Likert scale asking respondents to indicate whether they think such evidence is “very reliable,” “usually reliable,” “usually unreliable,” or “very unreliable.” Response frequencies and group means are reported in Table 11. General reliability of police evidence is perceived by all respondents to be slightly more than “usually reliable.” When group differences are examined, the largest differences in responses occur in the “very reliable” category. While the majority of police and prosecutors say police evidence is “very reliable,” only 33.4 percent of judges and 1.8 percent of defense attorneys select this response. Also, approximately one third of defense attorneys select the “usually unreliable” response, as compared to only 1.0 percent of prosecutors, 1.8 percent of judges, and 1.9 percent of prosecutors. In sum, while the majority of all respondents perceive the general reliability of police evidence to be “usually reliable,” police officials viewed their own groups’ evidence as more reliable than prosecutors, judges, and defense attorneys.

Table 11
Percentages – General Reliability of Police Evidence

Response	Police	Prosecutors	Def. Attys	Judges	All
1 = Very Reliable	62.0 (160)	55.6 (55)	1.8 (4)	18.3 (31)	33.4 (250)
2 = Usually Reliable	35.3 (91)	43.4 (43)	60.5 (135)	79.3 (134)	53.8 (403)
3 = Usually Unreliable	1.9 (5)	1.0 (1)	35.0 (78)	1.8 (3)	11.6 (87)
4 = Very Unreliable	0.8 (2)	---	2.7 (6)	0.6 (1)	1.2 (9)
TOTAL	100.0 (258)	100.0 (99)	100.0 (223)	100.0 (169)	100.0 (749)
MEAN	1.41	1.45	2.39	1.85	1.81

Prosecutorial Error

Previous research suggests that prosecutorial error is associated with cases of wrongful conviction. To examine this issue, respondents were asked two questions. One question, asked respondents their opinions regarding to indicate their perceptions regarding the frequency of five types of prosecutorial error. Respondents were also presented with a question asking them their opinions regarding the general reliability of evidence presented in court by prosecutors.

How frequently do prosecutors engage in the following conduct: inadequate investigation of case, suppressing exculpatory evidence, using undue plea bargaining pressure, prompting a witness, knowingly using false testimony?

These five categories are measured using a 9-item Likert scale (see below).

1-----2-----3-----4-----5-----6-----7-----8-----9
Never Infrequent Moderately Frequent Very Frequent Always

Respondents were asked to indicate, in a range from “never” to “always,” how often they believed each type of error occurs. Mean responses of all four groups of criminal justice professionals, individually and compositely, are reported in Table 12.

Table 12
Perceptions of Five Types of Prosecutorial Error (Mean Responses)

Based on your knowledge and experience, estimate the frequency of each type of prosecutorial error:

<u>Type of Prosecutorial Error</u>	<u>Police</u>	<u>Prosecutors</u>	<u>Defense Attorneys</u>	<u>Judges</u>	<u>All Respondents</u>
Inadequate Investigation of Case by Prosecutor	3.67	2.67	5.28	4.03	4.11
Prosecutor Using Undue Plea Bargain Pressure	3.94	2.20	5.65	3.57	4.15
Prosecutor Prompting a Witnesses	3.27	2.22	5.83	3.73	4.01
Prosecutor Suppressing Exculpatory Evidence	2.67	1.59	4.66	2.88	3.18
Prosecutor Knowingly Using False Testimony	1.84	1.25	3.11	1.96	2.17

An examination of Table 12 reveals that each group of respondents agree that Prosecutor Knowingly Using False Evidence occurs the least frequently of the five types of error. Inadequate Prosecutorial Investigation was indicated by prosecutors and judges to occur the most frequently of the five types of error. (However, prosecutors indicated Inadequate Investigation occurs “less than infrequent,” while judges indicated that it occurs “between “infrequent: and “moderately frequent.”) Police thought that Prosecutors Using Undue Plea Bargaining Pressure occurred the most often of the five types of error (between “infrequent” and “moderately frequent”), and defense attorneys perceived Prosecutors Prompting Witnesses as occurring the most often (between “moderately frequent” and “very frequent”). Defense attorneys perceived all types of prosecutorial error as occurring more often than any of the other three groups. Prosecutors, on the other hand, perceived that their own group commits less error than is perceived by the other three groups.

A reliability test was conducted to determine if all five items in Table 12 are measuring the same concept of prosecutor error. A high Cronbach alpha (.8998) suggests that all five items can be included into a single variable. As such, an additive scale was produced (Table 13) using all five survey items, and a single variable “Prosecutor Error” was created.

Table 13
Percentages – Index Variable “Prosecutor Error”

	Police	Prosecutors	Def. Attys.	Judges	All
5=Never	12.6 (171)	39.9 (199)	2.0 (24)	12.3 (107)	12.8 (501)
10=> Never <Infrequent	26.6 (359)	31.7 (158)	8.2 (97)	22.3 (194)	20.7 (808)
15=Infrequent	31.1 (420)	21.0 (105)	19.5 (230)	32.5 (283)	26.6 (1038)
20=>Infrequent <Mod. Freq.	11.8 (159)	5.2 (26)	11.4 (134)	12.3 (107)	10.9 (426)
25=Moderately Frequent	10.9 (148)	1.8 (9)	22.5 (265)	13.0 (113)	13.7 (535)
30=>Mod Freq <Very Freq	2.3 (35)	.4 (2)	9.2 (109)	2.8 (24)	4.4 (170)
35=Very Frequent	4.0 (54)	---	19.4 (229)	4.0 (35)	8.3 (318)
40=>Very Freq <Always	.4 (5)	---	5.2 (61)	.7 (6)	1.8 (72)
45=Always	.1 (1)	---	2.5 (30)	.1 (1)	0.8 (32)
TOTAL	100.0 (1352)	100.0 (499)	100.0 (1179)	100.0 (870)	100.0 (3900)
MEAN	15.39	9.93	24.53	15.99	17.59

The mean-response for all respondents for the variable Prosecutor Error is slightly above the midpoint between “infrequent” and “more than infrequent but less than moderately frequent” (mean = 17.59). Sixty percent of all respondents are of the opinion that Prosecutor Error occurs at the “infrequent” or less level, and forty percent of respondents believe that Prosecutor Error occurs “more than infrequently.” When the groups are analyzed separately, the major differences in perceptions are best understood when the responses are broken down into “infrequent or less” and “more than infrequent” categories. Only 29.7 percent of defense attorneys perceive Prosecutor Error to occur at the “infrequent or less” level. On the other hand, prosecutors selected responses of “infrequent or less,” at a rate three times higher than do defense attorneys, and two times higher than did judges and police. Conversely, 60.3 percent of

defense attorneys perceive Prosecutor Error to occur “more than infrequent” – almost double the perceptions for the same categories as those of judges and police, and is seven times higher than perceived by prosecutors.

An analysis of variance test of the variable Prosecutor Error reveals statistically significant ($p = .000$) differences in mean scores of the four groups. The results of a post hoc Tukey HSD test are shown in Table 14. Defense attorneys perceive a significantly ($p = .000$) different rate of Prosecutor Error than do members of the other three groups. Prosecutor responses also differ from the other three groups ($p = .000$), while judges and police responses perceptions do not differ.

Table 14
Additive Scale Variable “Prosecutor Error”
Significance Levels (Tukey HSD) for Comparison of Group Responses

	Police	Prosecutors	Defense Attys
Prosecutors	.000		
Defense Attorneys	.000	.000	
Judges	.315	.000	.000

In general, how reliable do criminal justice professionals believe is the evidence presented in court by prosecutors?

Perceived reliability of evidence presented in court by prosecutors is measured using a 4-item Likert scale. Table 15 reports the findings. When all responses are examined respondents perceive the general reliability of prosecutorial evidence to be slightly above “usually reliable.” When group differences are examined, the largest differences occur in the “very reliable” category. While a large majority of prosecutors (74.5%) perceive their own evidence to be “very reliable,” as do a near majority of police (45.9%), only about one-fourth of judges (25.9%) perceive prosecutorial evidence to be “very reliable.” Most judges perceive

prosecutorial evidence to be “usually reliable.” Defense attorneys have dramatically different views from those of the other three groups. Only 1.3 percent of defense attorneys indicate that prosecutorial evidence is “very reliable,” and 20.7 percent believe the evidence to be “usually unreliable.”

Table 15
Percentages – General Reliability of Prosecutorial Evidence

Response	Police	Prosecutors	Def. Attys	Judges	All
1 = Very Reliable	45.9 (123)	74.5 (73)	1.3 (3)	25.9 (44)	31.6 (243)
2 = Usually Reliable	51.9 (139)	25.5 (25)	78.0 (181)	72.9 (124)	61.1 (469)
3 = Usually Unreliable	1.1 (3)	---	20.7 (48)	0.6 (1)	6.8 (52)
4 = Very Unreliable	1.1 (3)	---	---	0.6 (1)	0.5 (4)
TOTAL	100.0 (268)	100.0 (98)	100.0 (232)	100.0 (170)	100.0 (768)
MEAN	1.57	1.26	2.19	1.76	1.76

Defense Attorney Error

Previous research indicates that defense attorney error is associated with cases of wrongful conviction. To examine this issue, criminal justice professionals were asked two questions. One question asked respondents to indicate their perceptions regarding the frequency of five types of defense attorney error. Respondents are also presented with a question asking them their opinions regarding how well they believe defense attorneys defend their clients.

How frequently do defense attorneys engage in the following conduct: inadequate investigation of case, failing to file proper motions, not adequately challenging forensic evidence, not adequately challenging witnesses, making unwarranted plea bargain concessions?

These five categories are measured using a 9-item Likert scale (see below) asking respondents to indicate, in a range from “never” to “always,” how often they perceive these

1-----2-----3-----4-----5-----6-----7-----8-----9

Never Infrequent Moderately Very Always
Frequent Frequent

types of error to occur. Mean response of all four groups of criminal justice professionals, individually and compositely, are reported in Table 16. Of the five categories of defense attorney error, all respondents perceive that Inadequate Investigation of Case by Defense Attorney occurs the most frequently. Of the four types of affirmative error, police believe that Defense Attorney Making Unwarranted Plea Bargain Concessions occurs the most frequently, and prosecutors think Defense Attorney Failing to File Proper Motions occurs most often. Judges, and the defense attorneys themselves, believe that Not Adequately Challenging Forensic Evidence occur with the most frequency. The least frequently occurring error, according to prosecutors, judges, and defense attorneys is Defense Attorney Making Unwarranted Plea Bargain Concessions, while police believe that Defense Attorneys not Adequately Challenging Witnesses occurs the least often. Defense attorneys rate their own error, in all five categories, higher than do members of the other groups. Of interest is the fact that prosecutors rate defense attorney error lower than is rated by members of the other three groups.

Table 16
Perceptions of Five Types of Defense Error (Mean Responses)

Based on your knowledge and experience, estimate the frequency of each type of defense attorney error:

<u>Type of Defense Attorney Error</u>	<u>Police</u>	<u>Prosecutors</u>	<u>Defense Attorneys</u>	<u>Judges</u>	<u>All Respondents</u>
Inadequate Investigation of Case by Defense Attorney	4.54	4.31	5.35	4.70	4.79
Defense Attorney Not Adequately Challenging Forensic Evidence	3.84	3.71	5.24	4.07	4.30
Defense Attorney Failing to File Proper Motions	4.02	3.87	4.69	4.02	4.21
Defense Attorney Making Unwarranted Plea Bargain Concessions	4.30	3.12	4.59	3.85	4.14
Defense Attorney Not Adequately Challenging Witnesses	3.68	3.43	4.61	3.96	3.99

A reliability test was conducted to determine if all five items in Table 16 were measuring the same concept of “defense attorney error.” A high Cronbach alpha (.8879) suggests that all five variables can be included in a single variable. As such, an additive scale was produced

using the five survey items, and a single variable “Defense Attorney Error” was created (Table 17).

Table 17
Percentages – Index Variable “Defense Attorney Error”

	Police	Prosecutors	Def. Attys.	Judges	All
5=Never	.8 (11)	4.6 (23)	.3 (4)	.7 (6)	1.1 (44)
10=> Never <Infrequent	9.5 (129)	15.0 (75)	4.0 (48)	9.2 (82)	8.5 (334)
15=Infrequent	32.3 (440)	37.0 (185)	17.8 (211)	31.1 (278)	28.3 (1114)
20=>Infrequent <Mod. Freq.	22.1 (301)	14.6 (73)	16.1 (191)	18.9 (168)	18.6 (733)
25=Moderately Frequent	20.1 (273)	16.4 (82)	30.8 (366)	26.1 (233)	24.2 (954)
30=>Mod Freq <Very Freq	6.3 (86)	7.0 (35)	11.3 (134)	5.9 (53)	7.8 (308)
35=Very Frequent	7.1 (97)	4.2 (21)	16.1 (191)	7.5 (67)	9.5 (376)
40=>Very Freq <Always	1.5 (20)	1.0 (5)	3.3 (39)	.8 (7)	1.8 (71)
45=Always	.3 (4)	.2 (1)	.3 (4)	---	0.2 (9)
TOTAL	100.0 (1361)	100.0 (500)	100.0 (1188)	100.0 (894)	100.0 (3943)
MEAN	20.39	18.36	24.51	20.60	21.44

Overall, the mean-response for Defense Attorney Error is below the “moderately frequent” level (mean = 21.44). There is a large consensus among prosecutors, police, and judges that Defense Attorney Error occurs below “moderately frequently.” Only defense attorneys believe their group’s own error to be at the “moderately frequent” level.

An analysis of variance test reveals that significant differences ($p = <.05$) exist in the mean scores of the four groups. Table 18 reports the results of a post hoc Tukey HSD test. Defense attorneys perceive significantly ($p = .000$) different rates of their own group’s error than do members of the other three groups. Prosecutors report significantly different rates of Defense

Attorney Error than do police ($p = .039$) and judges ($p = .025$). Police and judges' perceptions do not significantly differ.

Table 18
Additive Scale Variable “Defense Attorney Error”
Significance Levels (Tukey HSD) for Comparison of Group Responses

	Police	Prosecutors	Defense Attys
Prosecutors	.039		
Defense Attorneys	.000	.000	
Judges	.973	.025	.000

In general, how well do criminal justice professionals believe that defense attorneys defend their clients?

Table 19 reports the findings of a 4-item Likert scale question which asked respondents to indicate how well they believe defense attorneys defend their clients.

While respondents from all groups believe defense attorneys defend their clients “moderately well,” defense attorneys are more critical of their own group than are prosecutors, judges, and police. The differences in group perceptions are most evident in the “very well” category.

Approximately one in ten defense attorneys rate their own groups' defense of clients as “very well,” compared to about one in four prosecutors and judges. Across all groups, however, a majority of respondents agree that defense attorneys defended their clients “moderately well.”

Table 19
Percentages – How Well Defense Attorneys Defend Clients

Response	Police	Prosecutors	Def. Attys	Judges	All
1 = Very Well	15.5 (41)	28.3 (28)	11.1 (26)	25.6 (43)	18.0 (138)
2 = Moderately Well	72.3 (191)	64.6 (64)	76.6 (180)	67.9 (114)	71.7 (549)
3 = Not Very Well	11.0 (29)	7.1 (7)	11.9 (28)	6.5 (11)	9.8 (75)
4 = Poorly	1.1 (3)	---	0.4 (1)	---	0.5 (4)
TOTAL	100.0 (264)	100.0 (99)	100.0 (235)	100.0 (168)	100.0 (766)

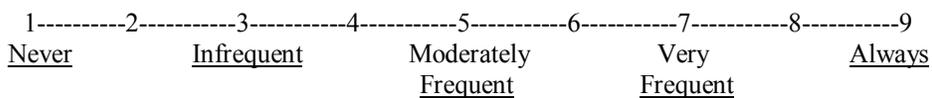
MEAN	1.98	1.79	2.02	1.81	1.93
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Judicial Error

Previous research contends that judicial error is associated with cases of wrongful conviction. To examine this issue, criminal justice professionals were asked two questions. One question asked respondents to indicate their perceptions regarding the frequency of four types of judicial error. Respondents were also presented with a question asking them their opinions regarding how reliable they believe are judicial decisions regarding defendants’ guilt or innocence.

How frequently do judges engage in the following conduct: error concerning admissibility of physical evidence, error concerning admissibility of eyewitness testimony, error concerning admissibility of expert testimony, error resulting from judicial bias?

These four categories are measured using a 9-item Likert scale (see below) asking respondents to indicate, in a range from “never” to “always,” how often they perceive these types of error to occur.



Mean response rates of all four groups of criminal justice professionals, individually and compositely, are reported in Table 20.

Table 20
Perceptions of Four Types of Judicial Error (Mean Responses)

Based on your knowledge and experience, estimate the frequency of each type of judicial error:

Type of Judicial Error	Police	Prosecutors	Defense Attorneys	Judges	All Respondents
Error Concerning Admissibility of Physical Evidence	3.00	2.87	4.55	3.00	3.45
Error Resulting From Judicial Bias	2.90	2.36	5.07	2.69	3.44
Error Concerning Admissibility of Eyewitness Testimony	3.01	2.50	4.45	2.84	3.35
Error Concerning Admissibility of Expert Testimony	2.79	2.54	4.25	2.94	3.23

Overall, the respondents report that “error concerning admissibility of physical evidence” occurs the most often – slightly above the “infrequent” level. When comparing across the four groups, mean responses of prosecutors are below the “infrequent” level, and mean responses of police and judges are at the “infrequent” level. Defense attorneys say this type of judicial error occurs near the “moderately frequent” level.

The second category, “error resulting from judicial bias,” is also perceived to occur more than infrequently. When comparing across the four groups, mean responses of prosecutors, police, and the judges themselves are below the “infrequent” level, while defense attorneys are of the opinion that judicial bias occurs above the “moderately frequent” level – with a mean-response more than double prosecutors and approximately 40 percent higher than judges.

Perceptions of “error concerning admissibility of eyewitness testimony,” follow along similar lines. Overall, respondents say this type of error occurs above the “infrequent” level. Comparing the four groups, prosecutors feel this type of error occurs less than “infrequent,” while police and judges say error concerning admissibility of eyewitness testimony occurs more than “infrequent.” Again, defense attorneys believe this type of error occurs at a higher level than do the other three groups, at slightly below the “moderately frequent” level.

The final category, “error concerning admissibility of expert testimony,” is viewed by all respondents as occurring more than infrequently. When responses of the four groups are compared, the pattern slightly changes. Prosecutors, police, and judges all say this type of error occurs below the “infrequent” level, while defense attorneys believe this occurs at below the “moderately frequent” level.

For every category there appears to be a basic agreement among prosecutors, police, and judges that judicial error is “infrequent” or less. Defense attorneys, on the other hand, perceive

judicial error as occurring either at or below the “moderately frequent” level. Of interest is the fact that prosecutors, in each of the four categories, estimate less error for judges than do judges themselves. Police also report less error for judges than do the judges themselves in the category “error concerning admissibility of expert testimony.”

A reliability test was conducted to determine if all four items in Table 20 are measuring the same concepts of “judicial error.” A high Cronbach alpha (.8772) suggests that all four items can be combined as a single variable. As such, an additive scale was produced using the four survey items and a new variable “Judicial Error” was created (Table 21).

Overall, the mean-response for the variable Judicial Error is above the “infrequent” level (mean = 13.41). There is basic consensus among prosecutors, police, and judges that judicial error occurs at the less than “infrequent” level. Defense attorneys perceive Judicial Error to occur slightly below the “moderately frequent” level.

Table 21
Percentages – Index Variable “Judicial Error”

	Police	Prosecutors	Def. Attys.	Judges	All
4=Never	7.0 (76)	10.8 (43)	.1 (1)	3.7 (25)	4.7 (145)
8=> Never <Infrequent	33.4 (363)	40.0 (160)	6.0 (56)	30.7 (210)	25.5 (789)
12=Infrequent	37.4 (407)	36.5 (146)	28.0 (260)	46.6 (318)	36.5 (1131)
16=>Infrequent <Mod. Freq.	12.0 (130)	8.3 (33)	18.0 (167)	9.8 (67)	12.8 (397)
20=Moderately Frequent	7.3 (79)	3.5 (14)	23.4 (217)	6.3 (43)	11.4 (353)
24=>Mod Freq <Very Freq	1.3 (14)	1.0 (4)	10.1 (94)	1.2 (8)	3.9 (120)
28=Very Frequent	1.5 (16)	---	9.6 (89)	1.8 (12)	3.8 (117)
32=>Very Freq <Always	.2 (2)	---	3.9 (36)	---	1.2 (38)
36=Always	---	---	.9 (8)	---	.9 (8)
TOTAL	100.0	100.0	100.0	100.0	100.0

	(1087)	(400)	(928)	(683)	(3098)
MEAN	11.59	10.27	18.07	11.80	13.41

An analysis of variance test of the variable Judicial Error reveals that significant differences exist in the group mean scores. Table 22 reports the results of a post hoc Tukey HSD test. Defense attorneys perceive a significantly ($p=.000$) different rate of judicial error than do members of the other three groups. Prosecutors, police, and judges' perceptions do not differ significantly.

Table 22
Additive Scale Variable “Judicial Error”
Significance Levels (Tukey HSD) for Comparison of Group Responses

	Police	Prosecutors	Defense Attys
Prosecutors	.110		
Defense Attorneys	.000	.000	
Judges	.937	.348	.000

In general, how reliable do criminal justice professionals believe are judicial decisions concerning defendants' guilt or innocence?

Perceived reliability of judicial decisions concerning guilt or innocence is measured using a 4-item Likert scale. Table 23 reports the findings. The mean-response of all groups indicates perceptions regarding judicial decisions concerning guilt or innocence to be above the “usually reliable” level. When individual group responses are investigated, prosecutors, judges, and police all believe these types of judicial decisions are between “very reliable” and “usually reliable” (although closer to “usually reliable” than “very reliable”). Defense attorneys are more critical of judges, and find the quality of judicial decisions concerning guilt or innocence to be between “usually reliable” and “moderately reliable.”

Table 23
Percentages – Reliability of Judicial Decisions
Concerning Defendants’ Guilt or Innocence

Response	Police	Prosecutors	Def. Attys	Judges	All
1 = Very Reliable	39.6 (107)	53.0 (53)	3.0 (7)	45.5 (81)	31.7 (248)
2 = Usually Reliable	50.4 (136)	42.0 (42)	47.7 (112)	48.3 (86)	48.0 (376)
3 = Moderately Reliable	9.6 (26)	5.0 (5)	43.8 (103)	6.2 (11)	18.5 (145)
4 = Unreliable	0.4 (1)	---	5.5 (13)	---	1.8 (14)
TOTAL	100.0 (270)	100.0 (100)	100.0 (235)	100.0 (178)	100.0 (783)
MEAN	1.71	1.52	2.52	1.61	1.90

Research Questions # 4 and #5. How Frequently Do Non-Criminal Justice Personnel Commit Errors Associated with the Incidence of Wrongful Conviction and What is the General Reliability of Eyewitness and Forensic Testimony?

Eyewitness Error

Previous research suggests that eyewitness error is associated with cases of wrongful conviction. To examine this issue, respondents are asked to indicate their perceptions concerning three survey questions.

How frequently do eyewitnesses, in good faith, misidentify a defendant?

Perceived frequency of good-faith eyewitness error is measured using a 4-item Likert scale question. Respondents were asked to indicate whether they believe this type of error occurs “never,” “seldom,” “often,” or “very often.” Error is perceived by all respondents to occur slightly above the “seldom” range (Table 24). A substantial majority (79.8% to 89.2%) of police, prosecutors, and judges say good-faith eyewitness error

Table 24
Percentages – Good-faith Eyewitness Misidentification

Response	Police	Prosecutors	Def. Attys	Judges	All
1 = Never	0.7 (2)	4.9 (5)	0.4 (1)	4.6 (8)	2.0 (16)
2 = Seldom	85.0 (232)	89.2 (91)	41.2 (98)	79.8 (138)	71.2 (559)
3 = Often	14.3 (39)	4.9 (5)	50.8 (121)	15.0 (26)	24.3 (191)
4 = Very Often	---	1.0 (1)	7.6 (18)	0.6 (1)	2.5 (20)
TOTAL	100.0 (273)	100.0 (102)	100.0 (238)	100.0 (173)	100.0 (786)
MEAN	2.14	2.02	2.66	2.12	2.27

“seldom” occurs. In contrast, defense attorneys are essentially split in their opinions – approximately 41 percent of defense attorneys perceive good-faith eyewitness testimony to “seldom” occur, while approximately 59% think it occurs “often” or “very often.”

How frequently do eyewitnesses intentionally misidentify a defendant?

Frequency of intentional eyewitness misidentification is measured using another 4-item Likert scale. This type of eyewitness error is perceived by all respondents to occur at

Table 25
Percentages – Intentional Eyewitness Misidentification

Response	Police	Prosecutors	Def. Attys	Judges	All
1 = Never	8.4 (23)	25.5 (26)	3.8 (9)	19.4 (34)	11.7 (92)
2 = Seldom	88.3 (242)	73.5 (75)	79.4 (189)	80.0 (140)	81.9 (646)
3 = Often	3.3 (9)	1.0 (1)	16.0 (38)	0.6 (1)	6.2 (49)
4 = Very Often	---	---	0.8 (2)	---	0.3 (2)
TOTAL	100.0 (276)	100.0 (102)	100.0 (240)	100.0 (180)	100.0 (789)
MEAN	1.95	1.75	2.14	1.81	1.95

slightly below the “seldom” range (Table 25). Defense attorneys believe intentional eyewitness misidentification occurs more often than prosecutors, law enforcement, and judges, but still only slightly above the “seldom” level. Only 6.5 percent of all respondents report that intentional eyewitness misidentification occurs “often” or “very often” – primarily due to the opinions of

defense attorneys. Approximately one-fourth of prosecutors and one-fifth of judges say that intentional misidentification “never” occurs.

In general, how reliable is eyewitness testimony?

Table 26 reports respondents’ perceptions of the reliability of eyewitness testimony.

Table 26
Percentages – General Reliability of Eyewitness Testimony

Response	Police	Prosecutors	Def. Attys	Judges	All
1 = Very Reliable	18.6 (51)	35.6 (36)	1.7 (4)	16.0 (28)	15.1 (119)
2 = Usually Reliable	73.0 (200)	59.4 (60)	57.6 (136)	78.9 (138)	67.9 (534)
3 = Usually Unreliable	7.7 (21)	3.0 (3)	37.7 (89)	4.6 (8)	15.4 (121)
4 = Very Unreliable	.7 (2)	2.0 (2)	3.0 (7)	.6 (1)	1.5 (12)
TOTAL	100.0 (274)	100.0 (101)	100.0 (236)	100.0 (175)	100.0 (786)
MEAN	1.91	1.71	2.42	1.90	2.03

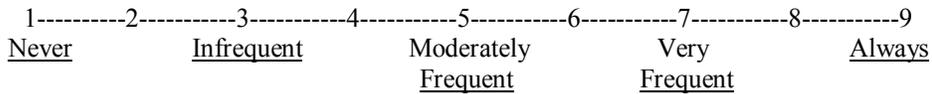
Overall, a great majority of the respondents report the reliability of eyewitness testimony to be “usually reliable” (67.9%). When group differences are examined, defense attorneys find eyewitness testimony to be significantly ($p=.000$) less reliable than is perceived by prosecutors, judges, and police. Approximately forty percent of defense attorneys perceive the general reliability of eyewitness testimony to be “usually unreliable” or “very unreliable” – a rate twelve times higher than prosecutors, five times higher than police, and twice as high as judges.

Forensic Error

Forensic error has also been found to be associated with cases of wrongful conviction. To examine the issue of forensic error, respondents are asked to indicate their perceptions concerning three survey questions.

How frequently do forensic experts make good-faith error?

Good-faith error by forensic experts is measured using a 9-item Likert scale (see below) asking respondents to indicate, in a range from “never” to “always,” how often they believe



this type of error occurs. Response frequencies are reported on Table 27. Overall, respondents perceive this type of error to occur at slightly below the “infrequent” level. Approximately one-fourth of all respondents, however, say this type of error occurs more than “infrequent.” Defense attorneys report that good-faith forensic error occurs more often than do prosecutors, police, and judges. A majority of defense attorneys indicate that this type of error occurs more than “infrequent,” and almost one-fourth (24.7%) of defense attorneys report that good-faith forensic error occurs “moderately frequent” or more.

Table 27
Percentages – Good-Faith Errors by Forensic Experts

	Police	Prosecutors	Def. Attys.	Judges	All
1=Never	5.2 (14)	15.7 (16)	.4 (1)	5.6 (10)	5.2 (41)
2=> Never <Infrequent	42.4 (115)	41.2 (42)	6.5 (15)	26.0 (46)	27.9 (218)
3=Infrequent	41.0 (111)	41.2 (42)	41.6 (96)	54.8 (97)	44.3 (346)
4=>Infrequent <Mod. Freq.	9.2 (25)	1.0 (1)	26.8 (62)	9.6 (17)	13.4 (105)
5= Moderately Frequent	.7 (2)	1.0 (1)	20.8 (48)	3.4 (6)	7.3 (57)
6=>Mod Freq <Very Freq	.4 (1)	---	2.2 (5)	---	.8 (6)
7=Very Frequent	1.1 (3)	---	1.3 (3)	---	.8 (6)
8=>Very Freq <Always	---	---	.4 (1)	---	.1 (1)
9=Always	---	---	---	.6 (1)	.1 (1)
TOTAL	100.0 (271)	100.0 (102)	100.0 (231)	100.0 (177)	100.0 (781)
MEAN	2.63	2.30	3.75	2.82	2.96

Statistically significant differences ($p = <.05$) in the mean scores among the four groups were determined by ANOVA. The results of a post hoc Tukey HSD analysis are reported in Table 28. Defense attorneys report significantly ($p = .000$) different levels of good-faith

Table 28
Good-Faith Error by Forensic Experts
Significance Levels (Tukey HSD) for Comparison of Group Responses

	Police	Prosecutors	Defense Attys
Prosecutors	.015		
Defense Attorneys	.000	.000	
Judges	.165	.000	.000

forensic error than do the other three groups. Likewise, the perceptions of prosecutors and judges differ significantly ($p = .000$), as do the views of prosecutors and police ($p = .015$). The views of judges and police do not differ significantly.

How frequently do forensic experts intentionally misrepresent evidence?

Perceptions of intentional misrepresentation by forensic experts is also measured using the same 9-item Likert scale asking respondents to indicate how often they believe this type of error occurs. Table 29 presents the findings. Intentional forensic error is perceived to occur by all respondents at the more than “never” but less than “infrequent” level. Defense attorneys believe this error occurs more often than do prosecutors, police, and judges, though most all respondents say that intentional misrepresentation occurs infrequently – or less than infrequently. Approximately one-half of prosecutors (55.9%) believe this type of error “never” occurs – as do approximately one-third of police (32%) and judges (31.1%). In contrast, only 7 percent of defense attorneys say that intentional forensic misrepresentation “never” occurs.

Table 29
Percentages – Intentional Misrepresentation of Evidence by Forensic Experts

	Police	Prosecutors	Def. Attys.	Judges	All
1=Never	32.0 (86)	55.9 (57)	7.0 (16)	31.1 (55)	27.5 (214)
2=> Never <Infrequent	42.8 (115)	35.3 (36)	33.9 (78)	44.1 (78)	39.5 (307)
3=Infrequent	22.7 (61)	8.8 (9)	38.3 (88)	21.5 (38)	35.2 (196)
4=>Infrequent <Mod. Freq.	1.1 (3)	---	8.7 (20)	1.1 (2)	3.2 (25)
5= Moderately Frequent	.7 (2)	---	10.0 (23)	2.3 (4)	3.7 (29)
6=>Mod Freq <Very Freq	.7 (2)	---	.9 (2)	---	.5 (4)
7=Very Frequent	---	---	.9 (2)	---	.3 (2)
8=>Very Freq <Always	---	---	---	---	---
9=Always	---	---	.4 (1)	---	.1 (1)
TOTAL	100.0 (269)	100.0 (102)	100.0 (230)	100.0 (177)	100.0 (778)
MEAN	1.98	1.53	2.90	1.99	2.20

An analysis of variance test reveals that there are significant statistical differences in responses across the four groups (Table 30). When perceptions of the four groups of respondents are compared defense attorneys report significantly ($p = .000$) different mean-responses than do

Table 30
Intentional Misrepresentation of Evidence by Forensic Experts
Significance Levels (Tukey HSD) for Comparison of Group Responses

	Police	Prosecutors	Defense Attys
Prosecutors	.000		
Defense Attorneys	.000	.000	
Judges	.999	.001	.000

the other three groups. Also, prosecutors' views differ significantly from those of judges ($p = .001$) and police ($p = .000$). Judges and police shared the view that intentional misrepresentation

of evidence by forensic experts occurred more frequently than perceived by prosecutors, but less often than thought by defense attorneys.

In general, how reliable are the scientific conclusions of forensic experts?

Table 31 reports respondents’ beliefs concerning the general reliability of the conclusions of forensic experts. Almost all respondents (95.1%) stated that the conclusions of forensic

Table 31
Percentages – Reliability of Scientific Conclusions of Forensic Experts

Response	Police	Prosecutors	Def. Attys	Judges	All
1 = Very Reliable	61.8 (168)	74.5 (76)	8.2 (19)	35.2 (62)	41.6 (325)
2 = Usually Reliable	33.8 (92)	24.5 (25)	81.5 (189)	63.6 (112)	53.5 (418)
3 = Usually Unreliable	2.2 (6)	---	10.3 (24)	---	3.8 (30)
4 = Very Unreliable	2.2 (6)	1.0 (1)	---	1.1 (2)	1.2 (9)
TOTAL	100.0 (272)	100.0 (102)	100.0 (232)	100.0 (176)	100.0 (782)
MEAN	1.45	1.27	2.02	1.67	1.65

experts are “usually reliable” or “very reliable.” Although most respondents said these conclusions are reliable, defense attorneys and judges perceived that the conclusions are “usually reliable,” while prosecutors and police said the conclusions are “very reliable.” When looking only at the opinions of defense attorneys, they perceive these types of conclusions as being less reliable than is believed by members of the three other groups. Only one in twelve defense attorneys report the general reliability of scientific conclusions by forensic experts to be “very reliable.”

False Accusations

To examine this issue the following question was presented:

How frequently do false accusations occur?

Perceived frequency of false accusations is measured using a 3-item Likert scale asking respondents to indicate whether they believe this type of error occurs:

(a) seldom, (b) occasionally, or (c) frequently. Frequencies, response percentages, and means are reported in Table 32. The frequency of false accusations is viewed by all respondents to occur at

Table 32
Percentages – False Accusation

Response	Police	Prosecutors	Def. Attys.	Judges	All
1=Seldom	38.8 (106)	53.0 (53)	5.1 (12)	31.8 (56)	28.9 (227)
2= Occasionally	53.5 (146)	44.0 (44)	54.2 (128)	59.7 (105)	53.9 (423)
3=Frequently	7.7 (21)	3.0 (3)	40.7 (96)	8.5 (15)	17.2 (135)
TOTAL	100.0 (273)	100.0 (100)	100.0 (236)	100.0 (176)	100.0 (785)
MEAN	1.69	1.50	2.36	1.77	1.88

slightly below the “occasional” level. When group differences are analyzed, prosecutors are of the opinion that false accusation occurs the least often – at the midpoint between “seldom” and “occasionally,” while police and judges believe false accusations occur slightly more often.

Defense attorneys think false accusations occur between “occasionally” and “frequently.”

Differences between the responses of defense attorneys and the other three groups are highlighted in the “frequently” category. Over 40 percent (40.7%) of defense attorneys perceive false accusations occur “frequently,” in comparison to only 3 percent of prosecutors, 7.7 percent of police, and 8.5 percent of judges

False Confession

Prior research contends that false confessions are associated with cases of wrongful conviction. The following question was asked:

Do you personally know of a case where an innocent individual confessed to a crime he or she did not commit?

Personal knowledge of a false confession is measured using a Yes-No format. Response frequencies and percentages are reported in Table 33. Almost 65 percent of all respondents

Table 33
Percentages – False Confessions

Response	Police	Prosecutors	Defense Attys.	Judges	All
1 = Yes	21.4 (59)	17.0 (17)	66.5 (155)	25.4 (45)	35.2 (276)
2 = No	78.4 (214)	83.0 (83)	33.5 (78)	74.6 (132)	64.8 (507)
TOTAL	100.0 (273)	100.0 (100)	100.0 (233)	100.0 (177)	100.0 (783)

had no personal knowledge of a false confession. Conversely, 35 percent of all respondents do have personal knowledge of a wrongful confession. When group differences are analyzed, the disparity in the experiences of defense attorneys in comparison to those of the other three groups is dramatic. Two-thirds of responding defense attorneys personally knew of a false confession, while less than one-quarter of prosecutors, police, and judges knew of a case where an individual falsely confessed.

Community Pressure

Community pressure on criminal justice professionals to solve a case has been found in previous research to be associated with cases of wrongful conviction. To examine this issue one question is presented.

Do you know of a case in your jurisdiction where community pressure to quickly solve a crime led to a wrongful conviction?

Response frequencies and percentages are reported in Table 34. Personal knowledge of community pressure is measured using a Yes-No format. Twenty percent of all respondents

Table 34
Percentages – Community Pressure

Response	Police	Prosecutors	Defense Attys.	Judges	All
1 = Yes	3.3 (9)	2.0 (2)	49.8 (116)	15.7 (28)	19.8 (155)
2 = No	96.7 (264)	98.0 (98)	50.2 (117)	84.3 (150)	80.2 (629)
TOTAL	100.0 (273)	100.0 (100)	100.0 (233)	100.0 (178)	100.0 (784)

report personal knowledge of a case of wrongful conviction involving community pressure.

When group differences are analyzed, the disparity in the experiences of defense attorneys in comparison to the other three groups is, again, dramatic. One-half of responding defense attorneys personally know of such a case, while only 15.7 percent of judges, 3.3 percent of police, and 2 percent of prosecutors stated they know of a case involving community pressure and wrongful conviction. In sum, the percentage of defense attorneys who reported knowing of a case of wrongful conviction involving community pressure was three times greater than the percentage reported by judges, fifteen times higher than the percentage reported by police, and 25 times higher than the percentage reported by prosecutors.

Research Question # 6 – What Do Criminal Justice Professionals Believe is an Acceptable Level of Wrongful Convictions, and Do They Believe Changes are Warranted in the Criminal Justice System?

The survey-questionnaire contained two questions regarding what respondents considered an “acceptable” level of wrongful conviction, and if respondents perceive a need for change in the criminal justice system.

Acceptable Levels of Wrongful Conviction

To measure respondents’ opinions regarding an acceptable level of wrongful conviction a 10-point Likert scale question was presented with values ranging from “0%” to “over 25%.” Results are reported in table 35. Approximate one-half of all respondents (51.4%) believed that a “zero” percent rate of wrongful conviction is acceptable. Another one-fourth of all respondents (26.6%) think that a “less than one-half percent” rate is acceptable, and approximately one-tenth

Table 35
Percentages – Acceptable Level of Wrongful Conviction

Response	Police	Prosecutors	Def. Attys.	Judges	All
1 = 0%	54.6 (148)	48.5 (48)	49.1 (113)	51.1 (89)	51.4 (398)
2 = < than ½%	24.7 (67)	29.3 (29)	27.0 (62)	27.6 (48)	26.6 (206)
3 = ½ % - 1%	10.7 (29)	13.1 (13)	10.9 (25)	12.6 (22)	11.5 (89)
4 = 1% - 3%	6.3 (17)	8.1 (8)	8.3 (19)	6.3 (11)	7.1 (55)
5 = 4% - 5%	1.1 (3)	1.0 (1)	3.0 (7)	2.3 (4)	1.9 (15)
6 = 6% - 10%	1.5 (4)	---	1.7 (4)	---	1.0 (8)
7 = 11% - 15%	0.7 (2)	---	---	---	0.3 (2)
8 = 16% - 20%	0.4 (1)	---	---	---	0.1 (1)
9 = 21% - 25%	---	---	---	---	---
10 = Over 25%	---	---	---	---	---
TOTAL	100.0 (271)	100.0 (99)	100.0 (230)	100.0 (174)	100.0 (774)
MEAN	1.84	1.84	1.94	1.81	1.86

of all respondents (11.5%) feel that a “one-half to one percent” rate is acceptable. Only ten percent of all respondents choose a wrongful conviction rate of one percent or more rate as being an acceptable level. This is the only question in the study of which all groups basically agreed. An analysis of variance test revealed that no significant differences in the mean scores among the four groups.

Does wrongful conviction occurs frequently enough to warrant changes in the criminal justice system?

Respondents’ opinions regarding this question were measured using a Yes-No format. Approximately two-thirds (63.4%) of all respondents say that changes are not

Table 36
Percentages – Changes in Criminal Justice System

Response	Police	Prosecutors	Defense Attys.	Judges	All
1 = Yes	21.9 (59)	7.1 (7)	74.5 (175)	24.7 (43)	36.6 (284)
2 = No	78.1 (210)	92.9 (92)	25.5 (60)	75.3 (131)	63.4 (493)
TOTAL	100.0 (269)	100.0 (99)	100.0 (235)	100.0 (174)	100.0 (777)

warranted (Table 36). Conversely, approximately one-third of all respondents believe that changes are warranted. When group responses are compared, most defense attorneys think that changes are warranted, while only about one-fourth of judges and police believe changes are warranted. Prosecutors almost unanimously agree (92.9%) that changes in the criminal justice system are not warranted.

Concluding Question

The final page of the questionnaire provided space for respondents to suggest how the criminal justice process might be improved. Approximately 60 percent of respondents provided written suggestions. A sample of these suggestions is presented in chapter fourteen.

CHAPTER FOURTEEN

DISCUSSION

The present study examines how frequently systemic errors identified by previous research occur by asking four groups of criminal justice professionals (police, prosecutors, defense attorneys, and judges) their opinions regarding this issue. Only one other empirical study (Rattner 1983) has examined the perceptions of criminal justice professionals regarding the frequency of wrongful conviction and its' associated errors. The present study extends this research by examining six types of police error, five types of prosecutorial error, five types of defense attorney error, four types of judicial error, and by examining issues related to eyewitness error, forensic error, false accusations, false confessions, and community pressure.

This chapter contains a discussion of the findings presented in chapter 13. The discussion is organized around three issues: (1) how frequently do criminal justice professionals believe certain previously identified types of errors occur, (2) what is the perceived quality of the work product of each group of professionals, and (3) how frequently do criminal justice professionals estimate wrongful convictions occur in their own jurisdiction and in the United States? Each of these issues is discussed in relation to the overall opinions of all respondents to the survey, and in relation to group differences. The discussion then focuses on placing these findings in the context of the existing literature, explores implications for policy and future research, and discusses the limitations of this study.

Do criminal justice professionals believe intentional misconduct occurs as often as unintentional error?

Respondents to the present study believe that intentional error (e.g. intentional eyewitness misidentification, intentional misrepresentation by forensic experts, prosecutor suppressing evidence, or police using false evidence) is not a widespread problem in the criminal justice system, and is not a major factor associated with wrongful conviction. Respondents, in sum, indicated that ‘intentional’ error occurs very infrequently. There is, however, a belief among criminal justice professionals that ‘unintentional’ error does occur at various degrees of frequency. Perceptions regarding how often unintentional error occurs, and under what circumstances, vary significantly between groups – depending on the category of error.

How frequently do criminal justice professionals believe certain previously identified types of unintentional errors occur?

Two types of unintentional error are discussed: (1) professional error (error by police, prosecutor, defense attorney, or judge), and (2) non-professional error (error by eyewitnesses, forensic experts, false confessions, false accusations, and community pressure).

All Respondents

In the opinion of all respondents, “professional error” is believed to occur most often by defense attorneys (moderately frequently), and least often by judges (infrequently). Police error and prosecutor error are viewed as occurring between ‘infrequently’ and ‘moderately frequent’ – not as often as defense attorney error, but more often than judicial error.

Regarding the five types of “non-professional error” that were a topic of this study, respondents in total perceive eyewitness error to “seldom” occur, forensic error to occur

“infrequently,” and false accusations to occur “occasionally.” Approximately two-thirds (64.8%) of all respondents know of a case where an innocent person falsely confessed to a crime he or she did not commit, and about one-fifth (19.8%) of all respondents know of a case where community pressure to solve a case led to a wrongful conviction.

Prosecutors

Prosecutors, as a group, gave the lowest estimations of error in regard to every topic area that was a subject of this study. Of the four groups of respondents, prosecutors perceive the least error across all items. When rating the behavior of their own group, prosecutors attributed significantly less error to the behavior of their own group than did other groups.

Defense Attorneys

Defense attorneys’ opinions concerning frequency of error were the exact opposite of those reported by prosecutors. Whereas prosecutors perceive the least frequency of error across all categories, defense attorneys believe that system error occurs more often, across all categories, than does any other respondent groups – even when rating errors committed by defense attorneys.

Police and Judges

In general, police officials and judges agreed with each other. In six out of nine categories of error (eyewitness error, forensic error, prosecutor error, defense error, judicial error, false accusations, false confessions) police and judges agreed that error occurred more often than perceived by prosecutors, but less often than believed by defense attorneys. In two areas, however, (police error and community pressure) police agreed with prosecutors and not with judges. In these two areas judges stood alone – perceiving significantly more police error

and error due to community pressure than prosecutors or police, but significantly less error than defense attorneys.

Police and judges, like prosecutors, are conservative in the ranking of their own groups' error. Both police and judges rate their group's own rate of error at the lowest level of all four groups (slightly higher than prosecutors' estimations, but not significantly different).

What is the perceived quality of the work product of each group of professionals?

All Respondents

In the opinion of all respondents to the survey, the general reliability of judicial decisions concerning guilt or innocence, and the reliability of evidence presented in court by police officials and prosecutors was rated as being closer to "usually reliable" than "very reliable." Defense attorneys were rated by all respondents to defend their clients closer to "moderately well" than "very well."

Respondents to the survey were also asked to comment on the general reliability of eyewitness and forensic expert testimony. Respondents in total believe the reliability of both types of testimony to be closer to "usually reliable" than "very reliable" – although when comparing the reliability of eyewitness testimony to that of forensic expert testimony, respondents believe that forensic testimony is more reliable than eyewitness testimony.

Prosecutors

Following the pattern set by prosecutors regarding perceptions of error among criminal justice professionals, prosecutors also estimated the reliability of the work product of criminal justice professionals to be the highest – in all categories. Prosecutors also give the highest ratings of the four groups concerning the reliability of eyewitness and forensic testimony.

Defense Attorneys

The views of defense attorneys again are in direct contrast with those of prosecutors. Whereas, among the four groups of professionals, prosecutors rated the highest levels of reliability across all categories, defense attorneys instead perceive the reliability of the work product of criminal justice professionals, across all categories, to be the lowest. Defense attorneys also give the lowest ratings of the four groups concerning the reliability of eyewitness and forensic testimony.

Police and Judges

Police officials and judges again tend to agree with one another regarding the reliability of the work product of criminal justice professionals. Members of these two groups generally agreed that professional outputs were more reliable than believed by defense attorneys, but less reliable than perceived by prosecutors. Concerning the reliability of eyewitness testimony, police and judges also agreed that such testimony is more reliable than perceived by defense attorneys, but less reliable than estimated by prosecutors. These two groups, however, have different perceptions regarding the reliability of forensic expert testimony. Judges perceive such testimony is less reliable than believed by police officials.

How frequently do criminal justice professionals perceive wrongful convictions occur in their own jurisdiction and in the United States?

All Respondents

Respondents to the survey estimate that wrongful conviction occurs in their jurisdictions in one-half to one-percent of all felony convictions. Respondents further estimate that wrongful conviction in the United States occurs in between one to three percent of all felony convictions.

When asked what an “acceptable” level of wrongful conviction might be – given the reality of ever present human error – respondents in total agreed that a zero percent rate of wrongful conviction was the only acceptable level. Finally, when asked if wrongful conviction occurs frequently enough to warrant changes in the criminal justice process, approximately two-thirds (63.4%) of all respondents think that changes are not warranted, while approximately one-third (36.6%) believe that changes are warranted.

Prosecutors

Prosecutors (along with police) perceive the lowest percentage of wrongful conviction in their own jurisdiction (more than zero but less than one-half percent), and in the United States (between ½ and 1 percent). Only seven percent of prosecutors thought that the frequency of wrongful conviction warranted changes in the criminal justice system.

Defense Attorneys

Defense attorneys estimate the highest percentage of wrongful conviction in their own jurisdictions (between four and five percent) and in the United States (almost 6 percent). Approximately three quarters (74.5%) of defense attorneys believe that the frequency of wrongful conviction warrants changes in the criminal justice system.

Police

Police agree with prosecutors that wrongful conviction occurs in their own jurisdictions more than “never” but in less than one-half percent of all felony convictions, and across the United States in one-half to one-percent of all felony convictions. Regarding the need for changes in the criminal justice system, police see more need for change than prosecutors (21.9% to 7.1%), and less need for change than defense attorneys (21.9% to 74.5%). There were no

significant differences in the opinions of police and judges regarding the need for change in the criminal justice system.

Judges

Judges agree with prosecutors and police that wrongful conviction occurs in their own jurisdiction in less than one-half percent of cases, but although all three groups selected the “less than one-half percent” range, judge’s estimates are significantly higher than those of prosecutors and police (i.e. closer to one-half percent). In regard to the frequency of wrongful conviction across the United States, judges perceive a higher frequency rate (between one and three percent) than do prosecutors and judges, but a lower rate than estimated by defense attorneys. Finally, in regard to the need for changes in the criminal justice system, judges agree with police.

Significantly more judges and police believe that changes are warranted than do prosecutors, and significantly less believe changes are warranted than do defense attorneys

Overall Conclusions

Certain trends are apparent in the findings. Across all categories, in regard to error, reliability of work product, and frequency of wrongful conviction, prosecutors proffered the lowest estimates of error. Their views appear to be “defending the system.” Prosecutors, in sum, perceive little error, high reliability, and a low frequency of wrongful conviction. Defense attorneys are at the opposite pole. Their views appear to be more critical of the criminal justice system. In contrast to prosecutors, defense attorneys perceive the highest level of error of all groups, the lowest level of reliability, and the highest estimates concerning the frequency of wrongful conviction. Judges and police tend to agree with each other that the “system” is not as

error-prone or unreliable as perceived by defense attorneys, but more prone to error and less reliable than is estimated by prosecutors.

A point needs to be made concerning the issue of “frequency” of error. Several types of error are discussed in this study. The frequency of error is often perceived by respondents to “seldom” occur. Likewise, evidence presented in court by prosecutors and police, or judicial decisions are often believed to be “usually” reliable. On the surface these ratings may appear acceptable. However, in the case of the criminal justice system, error that occurs “seldom,” or evidence that is “usually” reliable – may be indications that error is occurring too often – at least from the point of those who would like the criminal justice system to function more effectively. In many areas of public administration “seldom” would be acceptable, e.g. when power failures seldom occur, or when planned meetings are seldom missed. In the field of criminal justice, however, errors that “seldom” occur can have devastating, long-lasting, and even fatal consequences to the lives of numerous people, e.g., the wrongfully convicted themselves, their families, trial witnesses, jurors, and even criminal justice professionals themselves.

Respondents to the survey were given a range of possible responses for each question in the survey – usually from “never” to “always,” or from “very reliable” to “very unreliable.” It was not expected that respondents would indicate that error “always” occurs. Likewise, it was not expected that most respondents would believe that error “never” occurs. It was expected that respondents would perceive that most types of system error occurs “infrequently” or less. What in fact occurred was, when respondents were given an opportunity to rate the frequency of specific error, they rated error as occurring between “infrequent” and “moderately frequent,” instead of between “never” and “infrequent.” Likewise respondents had opportunities to rate the reliability of police and prosecutorial evidence, and the reliability of judicial decisions, as being

closer to ‘very reliable’ than ‘usually reliable,’ but instead they rated reliability closer to ‘usually reliable.’ Finally, respondents had opportunities to rate how well defense attorneys defend their clients as closer to “very well” than “moderately well,” but instead they rated it closer to “moderately well.” The results of this survey, therefore, indicate unacceptably high rates of professional error and unacceptably low rates of professional reliability.

A similar point can be made regarding the “frequency” of wrongful conviction per se. A significant finding of this study is that, when the views of all respondents are tallied, there is a belief that wrongful conviction occurs at a rate of between one-half and one percent in respondents’ jurisdictions, and at a rate of between one and three percent across the United States. Today there are in excess of 2,000,000 individuals incarcerated in our nation’s prisons and jails (Silverman, 2001). If error “only” leads to a wrongful conviction in one percent of all cases, there are then presently 20,000 individuals currently wrongfully incarcerated in the United States – some possibly on death row. If the three percent estimate is correct, there are 60,000 individuals currently serving jail and prison sentences for crimes they did not commit. In other words, according to the criminal justice professionals that were the subject of this study, there are currently between 20,000 and 60,000 individuals incarcerated in the United States for crimes they did not commit.

The consequences of error in the criminal justice system might best be compared to the consequences of error in the commercial airline industry. During the year 2000 there were 18 million commercial flights with 20 fatal accidents – a .0000011 “error rate” (Byrne-Crangle, 2001). In contrast, in the year 2000 there were 2,000,000 prisoners incarcerated in U.S. prisons and jails with between 20,000 and 60,000 of those individuals wrongfully convicted – an error rate of 1 to 3 percent. If an error rate of 1 to 3 percent was experienced by the airline industry

there would be between 180,000 and 540,000 fatal commercial airline accidents per year. To put it another way, if commercial airlines experienced the same error rate as does the criminal justice system, between one and three of every 100 commercial airlines that took off would crash.

Findings in the Context of Existing Literature

The present findings confirm many of the findings of Scheck, Neufield, and Dwyer (2000), as well as the findings of the National Institute of Justice study on wrongful conviction (Conners, Lundregan, Miller, and McEwen 1996). These studies suggest that certain types of error are associated with the incidence of wrongful conviction, and that wrongful conviction per se does occur, albeit relatively infrequently, but in sufficient quantity to disrupt the administration of justice in the United States and to negatively affect the lives of thousands of individuals. The Scheck et al. (2000) study, however, suggests higher levels of professional misconduct and intentional error than was found in the present study.

The present study also confirms and expands on Rattner's (1983) pioneering study of the perceptions of criminal justice professionals concerning the topic of wrongful conviction. These new data are important because: (1) they confirm Rattner's findings that wrongful conviction occurs more often than is believed by some individuals – hopefully leading to a greater “consciousness” of the problem by policymakers and criminal justice professionals, and (2) they expand Rattner's study by investigating areas of potential error that were not a subject of his research – hopefully leading to a better “understanding” of the factors associated with the phenomenon, and ultimately to solutions that will reduce the incidence of wrongful conviction. In the present study almost four out of five respondents (79.5%) reported that wrongful conviction occurs in their own jurisdiction. This figure is higher than was reported by Rattner

(1983) almost twenty years ago in his survey of a similar group of criminal justice professionals when only 63.3% of respondents reported that wrongful conviction occurred in their jurisdictions. It should be noted that Rattner's study took place before modern DNA identification methods were able to be used – methods which have ultimately led to the exoneration of numerous wrongfully convicted individuals. It is likely that knowledge of these exonerations has increased the awareness of criminal justice professionals to the problem of wrongful conviction and influenced their perceptions as to the frequency of the phenomenon. Also, in the present study, the frequency of wrongful conviction in respondents' own jurisdictions is estimated at between one-half and 1 percent of all felony cases. Respondents to Rattner's survey estimated the level of wrongful felony conviction in their own jurisdictions to be "less than one percent" – a finding that appears to be similar to that of the present study. However, in the Rattner study, 36.8 percent of respondents believed that wrongful felony conviction "never" occurred in their own jurisdiction, while in the present study only 19.5 percent of respondents believe wrongful conviction "never" occurs in their jurisdictions.

When asked to estimate how frequently wrongful conviction occurs in the United States, respondents to Rattner's survey estimated a rate of "less than one percent" – the same as they had estimated for their own jurisdictions. In the present study, respondents estimate a national rate of between 1 and 3 percent of all felony convictions.¹ Almost six percent (5.6%) of those professionals responding to Rattner's survey believed wrongful felony conviction "never" occurred, while only seven-tenths of a percent (0.7%) of respondents to the present survey believed wrongful felony conviction "never" happens. The largest contrast in estimations

¹ This estimate is higher than estimates by respondents for their own jurisdictions. It is believed the differences in these two estimates result from estimations made by respondents from smaller jurisdictions, where smaller caseloads prevail, and rates of wrongful conviction may be lower than in larger jurisdiction where caseloads are heavier.

between the two studies is indicated in the ‘one to five percent’ category. Six and one-half percent of respondents to Rattner’s survey estimated that wrongful conviction occurs in 1 to 5 percent of all felony convictions. In contrast, almost four times as many respondents to the present survey (23.1 %) estimate that wrongful conviction occurs in 1 to 5 percent of all felony cases. In sum, when the results of the current study are compared with the Rattner study of 20 years ago, perceptions and estimations of wrongful conviction appear to have increased. Whether these increases are due to factors associated with the revelations of modern DNA technology, and the accompanying media attention and professional discussion, remains an open empirical question.

Policy Implications

One finding of this study is that there is a gap between what the professionals in the criminal justice system think is an acceptable level of wrongful convictions in the United States, and what they perceive to be the current level. When respondents were specifically asked what they considered to be an acceptable level of inevitable wrongful conviction, the majority (51.4%) declared that only a zero level of wrongful conviction is acceptable; when asked what they believe is the current rate of wrongful conviction, a majority of respondents (64.7%) perceive a one to three percent (or greater) error rate. A foundation for reform, therefore, appears to be in place.

According to the respondents of this survey, reductions in the rate of system error are possible. The final two pages of the survey instrument used to conduct this study provided space that allowed respondents to offer suggestions regarding how, in their professional opinions, the incidence of wrongful conviction might be reduced. One judge wrote:

The tools are available to improve upon reducing the rate of wrongful conviction. However, the overwhelming volume

of cases imposed upon the courts in certain jurisdictions within certain time spans without adequate investigation and/or preparation by law enforcement, prosecutors, defense counsel and the courts, will always impact upon a perfect system. Leadership by professionals in the respective fields will affect the wrongful conviction rate.

Two-thirds of the 698 respondents offered written comments. Respondents to the survey had numerous insights and suggestions to policymakers as to how the system could be improved to reduce error.

Unintentional Error

One policy implication of this research is that resources targeted at reducing the incidence of wrongful conviction should be targeted at reducing “unintentional” error. The findings of this study clearly indicate that professional misconduct and intentional error – although disturbing and unacceptable at any level – are not viewed as significant a factor associated with wrongful conviction as is unintentional error. Whatever initial resources that may be allocated to reduce the incidence of wrongful conviction would therefore best be spent implementing policies or programs to reduce unintentional error.

Reduce System “Overload”

Members of all groups agree that many actors in the criminal justice system are overwhelmed by the avalanche of cases – especially in large cities. Over 100 respondents provided written suggestions and comments concerning high caseloads which may contribute to mistakes that could lead to wrongful conviction. A chief county prosecutor wrote:

The biggest problem I see is that all of us – at every step – have so darn many cases that it is sometimes very difficult to do the job you know needs to be done.

A judge wrote:

Prosecutors need to focus on more important cases, by more

intense investigation and trial preparation. Many are overburdened by lesser felony cases that they are not prepared for trial, thus – errors on the most serious felonies.

A second policy implication of this study would therefore be that caseloads be reduced by either:

(a) increasing personnel, or by (b) narrowing the “net-of-law.”

Increased Professionalism

The findings of this study also suggest that policies be devised to increase professionalism in the criminal justice system. Almost 100 respondents provided written comments suggesting that wrongful convictions might be reduced if more stringent selection and hiring standards were put in place in order to reduce the number of individuals in the criminal justice system that are ill-suited for their jobs and who often approach their duties with biases and ill-conceived ideas of justice. Another consistent suggestion was that better training should be provided (including ethical training). Training should be enhanced both when individuals are initially hired, and then on a continuing basis. Finally, many respondents call for higher professional standards and stricter discipline for those who engage in professional misconduct and for those criminal justice actors who consistently make unintentional errors. A police official wrote:

Set minimum requirements of training and continuing legal education for criminal defense attorneys – particularly in death-penalty cases nationwide. Also, a minimum requirement of continuing training hours (annually) for police officers in general, and detectives in particular, regarding identification procedures, forensic evidence collection, and securing statements, in addition to others.

Others have suggested that improved selection and training policies would improve professionalism, and reduce professional misconduct and unintentional error (Deakin, 2001; Kelly and Wearne 1998; Sammons 1988; Wrobley and Hess 2003). Concerning police

training, Birzer and Tennehill (2001:233) note, “there is an obvious need for police officers to acquire knowledge of the latest legal decisions, technological advances, and tactical developments in the field, and to remain proficient in a number of job-related skills.”

In addition to overall concerns regarding the overburdened criminal justice system and the need for professionalism, there were numerous suggestions with policy implications targeted at each particular group that was a part of this study.

Police Practices

Policy implications for police practices were suggested by numerous respondents. A major topic concerning the police involved criticisms of the lack of thoroughness of many police investigations. One police official said:

Law enforcement investigators absolutely need to build their investigation on factual information only. Many experienced and inexperienced investigators form an opinion at the onset of their investigation and develop their fact base on their preconceived opinions. The facts need to speak for themselves.

Police practices involving identification procedures were also a topic of much criticism. The majority of suggestions revolved around the need to videotape all police interrogations and confessions. A defense attorney wrote:

Supposed “confessions” are often summaries prepared by the police and signed by an undereducated, unsophisticated, client who is assured of leniency for cooperating and giving a statement. In this day and age, all statements should be videotaped. In fact, arrest to booking should be videotaped. When police video or audio an interview, they frequently do a “run-through” ahead of time. What is not on the tape is the three hours of interviews where the accused is told he “will fry” if he doesn’t confess or some other such nonsense

Prosecutorial Practices

Prosecutors also received their share of criticism – primarily revolving around overzealousness and not providing open discovery. Regarding overzealousness, one defense attorney commented, “Chief prosecutor should refrain from pushing their assistant ‘to win at all costs’ irregardless of justice,” while a judge wrote, “Prosecutors need to be better prepared, less over-indicting, and realize the abuses of their power and be held accountable.” Another typical comment came from a police official who said, “Prosecuting attorneys are “graded” on conviction rates. Young prosecutors appear pressured to get some type of conviction. Emphasis must be placed on the truth.”

Regarding the need for prosecutors to provide “open” discovery, a criminal defense attorney wrote:

The rules of discovery are an embarrassment to the right of a defendant to a fair trial. The defendant is forced to blindly go to trial with a small fraction of disclosed evidence. The Ohio Rules of Criminal Procedure is the most significant source of wrongful conviction, followed closely by overzealous police and prosecutors.

Defense Attorney Practices

Defense attorneys were often criticized for lack of preparedness. A police official wrote, “I feel public defenders do not prepare their cases adequately,” and a judge commented, “Improve the quality of the defense bar.” A major topic concerning the ability of defense attorneys to properly defend their clients revolved around the need for adequate resources to combat the resources available to the prosecutor. A prosecutor commented:

Police officers do occasionally get sloppy and arrest the wrong person. It would be nice if we could make police more thorough and objective, but the reality is that our system relies on defense lawyers to make sure justice is done. Unfortunately it is rare for a lawyer to have the

resources necessary to properly investigate and defend. In other words, sadly, justice requires money.

Judicial Practices

Criticism of judges primarily revolved around personal bias and judicial pressure exerted on the plea-bargaining process. One defense attorney wrote:

Most judges in my county are less than impartial in criminal cases. Individuals very often confess to a crime they did not commit because most judges will tell the defense attorney they will max your client's sentence if they go to trial and lose.

Increased Diligence

Reducing the incidence of wrongful conviction likely involves a more intense study of why and how the phenomenon occurs than is currently being undertaken. Although there are presently more researchers looking at the phenomenon than ever before, many policymakers who might be in the position to make warranted changes are not doing so. Of course no one today wants to appear "soft-on-crime." There is also present the belief among many in the criminal justice system that, if additional resources are to be spent, they should be targeted at increasing the conviction rate instead of the exoneration rate. Comments volunteered by respondents to this study suggest the controversial nature of research on wrongful conviction. One respondent commented, "Why don't you study wrongful acquittal." Another wrote, "It would be nice, for once, if academics such as yourself could initiate research projects that actually help those of us engaged in the everyday work of the criminal justice system." Of course there were also encouraging words. One police officer stated, "Hopefully I have never convicted an innocent person. I have never perjured myself in court, even if it meant losing the case. I would rather see a 1000 guilty people go free than convict an innocent person," and a judge wrote, "Our

forefathers intended the criminal justice process to be difficult so innocent persons would not be prosecuted. The law should always be a check or a governor on the police power of the state.

Thank you for your vigilance.”

Just as the commercial airline industry dissects each airline accident, the criminal justice system should likewise dissect each proven wrongful conviction in order to determine how it occurred and what can be done to prevent, or at least reduce, the chances that such errors reoccur. The goal should be to reduce the error rate in the criminal justice process from its current .01 to .03 rate to the commercial airlines’ error rate of .0000011. This will only be possible if those in the criminal justice system give the same intense attention to the types of error that are the subject of this study as do the overseers of the commercial airline industry give intense attention to the causes of airline crashes. Each proven case of wrongful conviction should be placed in a national registry, and then studied in order to determine when, where, why, and how the criminal justice process faltered.

Directions for Future Research

Prior research has only indicated that the types of errors that were a subject of this study are “associated” with wrongful conviction. To-date, no direct causal relationship has been proven. Future research should focus on determining the causal elements and relationships that lead to wrongful conviction – of which there may be many. The present study, as well as all previous research, suggests that no single factor “causes” a wrongful conviction. In almost every proven case of wrongful conviction, numerous errors had occurred in the processing of the defendant. The challenge for the future, therefore, is to determine which errors, and which interactions contribute to wrongful conviction, and to make that information available to policy makers so remedial steps may be taken.

Future research regarding the perceptions of criminal justice professionals should be conducted in other geographic areas to determine the generalizability of the findings of the present study (which was limited to one geographic area – the State of Ohio). Finally, future research should be conducted to determine if the dynamics of wrongful conviction vary when large metropolitan jurisdictions are compared to smaller rural jurisdictions.

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APPENDIX A
EXHIBIT 1
PRE-NOTICE LETTER

UC

University of Cincinnati

Division of Criminal Justice

A few days from now you will receive in the mail a request to fill out a brief questionnaire for an important research project being conducted at the University of Cincinnati. The questionnaire concerns the perceptions of criminal justice professionals regarding the frequency and major causes of wrongful conviction (the conviction of innocent people). Information obtained from people like yourself will be used to assist criminal justice agencies in better serving the administration of justice.

I am writing you in advance because we have found many people like to know ahead of time that they will be contacted. It's only with the generous help of people like you that our research can be successful.

Thank you for your time and consideration

Dr. James Frank/Robert J. Ramsey
Project Director

EXHIBIT 2

INITIAL COVER-LETTER SENT WITH SURVEY

I am writing to ask your assistance in a very important research project which is being conducted at the University of Cincinnati as part of a dissertation project. The topic of the investigation is "wrongful conviction," i.e., the conviction of innocent individuals. Primarily due to advancements in DNA technology, there have recently been a large number of reported cases of wrongful conviction around the United States. While it is believed the great majority of individuals convicted in our criminal courts are in fact guilty, cases involving the conviction of innocent persons are of concern to many involved in the criminal justice process. This study is aimed at obtaining a better understanding of the extent and dynamics of wrongful conviction in order to assist criminal justice agencies in better serving the administration of justice.

Enclosed is a brief questionnaire that is designed to collect valuable information from knowledgeable persons such as yourself whose position brings them into contact with criminal cases. The questionnaire takes approximately 10 minutes to complete. I respectfully request your help in our efforts to collect information on this topic. Your response will be treated with absolute confidence; our project is concerned with overall patterns of responses, and no individual or his/her response will ever be identified. You will note that a code number is at the bottom of the last page of the questionnaire. This is only to allow us to know which questionnaires are missing, so that we can send a reminder later, where indicated. Once your questionnaire has been received, the code number will be cut off and destroyed, leaving no way of identifying individual respondents.

If you have any questions about the questionnaire, or the study in general, please contact Robert Ramsey, Project Director, or Dr. James Frank at any time. When you have completed the questionnaire, simply put it in the enclosed self-addressed envelope and return it to the University of Cincinnati. We are estimating that this study will be completed by June 1, 2002. By completing this questionnaire, you are indicating your consent to participate in the study. If you would like a summary of the findings when the study is completed, please write your name and address on the back of the return envelope (not the questionnaire). Thank you in advance for your assistance in our efforts to better understand the extent and dynamics of wrongful conviction.

Sincerely,

Robert J. Ramsey, Project Director
James Frank, PHD
University of Cincinnati
Division of Criminal Justice
Phone: (513) 556-5832

EXHIBIT 3

FOLLOW-UP “THANK YOU/REMINDER” POSTCARD

UC

University of Cincinnati

Division of Criminal Justice

REMINDER !!!!!

Recently a questionnaire seeking your opinion about the topic of wrongful conviction was mailed to you. If you have already completed and returned the questionnaire to us, please accept our sincere thanks. If not, would you please do so today? We are especially grateful for your help because it is only by asking people like you to share information about your profession, that we can understand the major causes of wrongful conviction and its frequency of occurrence.

If you did not receive a questionnaire, or if it was misplaced, please contact Dr. James Frank, University of Cincinnati Division of Criminal Justice, at 513-556-5832, or e-mail rjramsey@hotmail.com, and we will get another one in the mail to you today. Thank you for your help.

Dr. James Frank/Robert J. Ramsey
Project Directors

EXHIBIT 4

COVER LETTER SENT WITH FIRST REPLACEMENT SURVEY

About three weeks ago we sent a questionnaire to you that asked about your perceptions regarding the wrongful felony conviction of innocent defendants. To the best of our knowledge, it's not yet been returned. The comments of people who have already responded include a wide variety of reasons for the occurrence of wrongful conviction and its perceived frequency. We think that the results are going to be very useful to criminal justice agencies and members of the criminal justice profession.

We are writing again because of the importance that your questionnaire has for helping to get accurate results. Although we sent questionnaires to criminal justice professionals like yourself in every county in the state, it is only by hearing from nearly everyone in the sample that we can be sure that the results are truly representative.

A few people have written to say that they no longer are in the criminal justice profession. If this concern applies to you, we will still like to have you respond to the questionnaire. If you do not wish to answer the questions, please let us know on the cover of the questionnaire and return it in the enclosed envelope so that we can delete your name from the mailing list.

A comment on our survey procedures. A questionnaire identification is printed on the back of the cover of the questionnaire so that we can check you name off the mailing list when it is returned. The list of names is then destroyed so that individual names can never be connected to the results in any way. Protecting the confidentiality of people's answers is very important to us, as well as the University of Cincinnati.

We hope you will fill out and return the questionnaire soon, but if for any reason you prefer not to answer it, please let us know by returning a note or blank questionnaire in the enclosed stamped envelope.

Sincerely,

Robert J. Ramsey, Project Director
James Frank, P.H.D.
University of Cincinnati
Department of Criminal Justice
P.O. Box 210389
Cincinnati, Ohio 45221-0389

EXHIBIT 5

FINAL COVER LETTER SENT WITH SECOND REPLACEMENT SURVEY

During the last two months we have sent you several mailings about an important research project we are conducting at the University of Cincinnati. The purpose of the study is to help state criminal justice agencies understand the reasons for wrongful conviction, and to assist them in reducing the frequency of such occurrences.

The study is drawing to a close, and this is the last contact that will be made with the sample of people who we think, based on their position within the criminal justice system, are best able to provide the necessary answers to reduce the incidence of wrongful conviction. We are sending you this final contact by priority mail because of our concern that people who have not responded may have had different experiences than those who have. Hearing from everyone in the statewide sample helps assure that the results are as accurate as possible.

Finally, we appreciate your willingness to consider this final request to fill out the questionnaire in order to give us a better understanding of the problem of wrongful conviction. Your answers will be held in strict confidentiality; our project is concerned with overall patterns of responses, and no individual or his/her response will ever be identified. You will note that a code number is at the top of the first page of the questionnaire. This is only to allow us to know which questionnaires are missing. Once your questionnaire has been received, the code number will be cut off and destroyed, leaving no way of identifying individual respondents. Thank you very much for your time and consideration.

Sincerely,
Robert J. Ramsey, Project Director
James Frank, P.H.D.
University of Cincinnati
Department of Criminal Justice
P.O. Box 210389
Cincinnati, Ohio 45221-0389

P.S. If you do not wish to participate in the study it would be helpful if you would return the blank questionnaire with a note that you do not wish to participate so we can remove your name from the mailing list.

APPENDIX B

EXHIBIT 6 (A)
SURVEY INSTRUMENT – FRONT COVER

Wrongful Conviction Survey

*When Innocent People Are Convicted of Crimes
A Study of Wrongful Conviction –
Its Extent and Associated Factors.*

A Survey of Criminal Justice Professionals

**Sponsored by
The University of Cincinnati
Division of Criminal Justice**

Please fold and place your completed survey in the stamped self-addressed envelope and return it to: Division of Criminal Justice, University of Cincinnati, P.O. Box 210389, Cincinnati, Ohio 45221-0389

EXHIBIT 6 (B)
SURVEY INSTRUMENT – INSIDE FRONT COVER

What Is Wrongful Conviction?

Directions. For purposes of this survey the term ‘wrongful conviction’ refers to “people who have been convicted of a criminal offense, but are in fact innocent.” Most of the questions are multiple-choice; however, at the end of the survey there is additional space provided where you may expand upon any response you feel needs additional comments. It should take between 8 and 10 minutes to complete this questionnaire.

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14. Preliminary analyses of known cases of wrongful conviction suggest that error can occur at all stages of the criminal justice process. Based on your knowledge and experience, please rank-order the following (randomly listed) four categories according to their frequency of errors. (1 = most frequent; 4 = least frequent). ↓

- a. errors by defense attorneys . . # _____
- errors by prosecutors # _____
- errors by police officials # _____
- errors by judges # _____

15. Defendants who are charged with a crime are guilty in: (Circle One) ↓

- a. 99-100 % of cases
- b. 95-98 % of cases
- c. 90-94 % of cases
- d. 80-89 % of cases
- e. 70-79% of cases
- f. 60-69% of cases
- g. 50-59 % of cases
- h. less than 50 % of cases

16. False accusations occur: (Circle One) ↓

- a. frequently
- b. occasionally
- c. seldom

17. Do you personally know of a case in which an innocent individual confessed to a crime he or she did not commit? (Circle one) ↓

- a. Yes
- b. No

18. Do you know of a case in your jurisdiction where community pressure to quickly solve a crime lead to a wrongful conviction? (Circle one) ↓

- a. Yes
- b. No

19. Errors in police identification procedures (e.g. showups, photospreads, lineups,) have been found to be associated with some cases of wrongful conviction. In general, how often do you believe that police identification procedures contribute to misidentification? (Circle One) ↓

- a. never
- b. seldom
- c. often
- d. very often

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20. I would estimate that wrongful conviction occurs in my jurisdiction in _____

percent of all felony convictions. (Circle one) ↓

- | | |
|------------------|----------------|
| a. 0 % | f. 6 % – 10 % |
| b. less than ½ % | g. 11 % – 15 % |
| c. ½ % - 1 % | h. 16 % - 20 % |
| d. 1 % - 3 % | i. 21 % - 25 % |
| e. 4 % - 5 % | j. over 25 % |

21. I would estimate that wrongful conviction occurs in the United States in _____ percent of all felony convictions. (Circle one) ↓

- | | |
|------------------|----------------|
| a. 0 % | f. 6 % – 10 % |
| b. less than ½ % | g. 11 % – 15 % |
| c. ½ % - 1 % | h. 16 % - 20 % |
| d. 1 % - 3 % | i. 21 % - 25 % |
| e. 4 % - 5 % | j. over 25 % |

22. What would you consider an acceptable level of inevitable wrongful convictions? (Circle One) ↓

- | | |
|------------------|----------------|
| a. 0 % | f. 6 % – 10 % |
| b. less than ½ % | g. 11 % – 15 % |
| c. ½ % - 1 % | h. 16 % - 20 % |
| d. 1 % - 3 % | i. 21 % - 25 % |
| e. 4 % - 5 % | j. over 25 % |

23. Do you support the use of the death penalty in the United States? (Circle One) ↓

- a. Yes b. No

24. In your opinion, do wrongful convictions occur frequently enough to warrant procedural changes in the criminal justice system? (Circle One) ↓

- a. Yes b. No

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25. Have you had experience as a police officer? YES NO # of years _____
“ “ “ “ “ “ prosecutor?YES NO # of years _____
“ “ “ “ private defense lawyer? YES NO # of years _____
“ “ “ “ “ “ public defender?YES NO # of years _____
“ “ “ “ “ “ judge? YES NO # of years _____
26. What is your present jurisdiction? (Circle one or more) ↓
a. Village b. Township c. City d. County e. State f. Other _____
(please specify)
27. What is your gender? (Circle One) ↓
a. Male b. Female
28. In which of the following racial categories do you consider yourself? (Circle One) ↓
a. White b. Hispanic c. Black d. Asian e. Other _____
(please specify)
29. What is your age? (Circle One) ↓
a. 18-29 b. 30-39 c. 40-49 d. 50-59 e. 60-69 f. 70-79 g. 80+
30. In your opinion, what steps could be taken by criminal justice professionals to reduce the incidence of wrongful conviction?

EXHIBIT 6 (L)
SURVEY INSTRUMENT – BACK COVER

You Are Finished.

**THANK YOU FOR PARTICIPATING
IN THIS IMPORTANT STUDY !**

Your contribution to this project is greatly appreciated.
If you would like a summary of results, please print your
name and address on the back of the return envelope
(NOT the questionnaire), and you will be mailed a copy.

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