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WRONGFUL CONVICTIONS IN SWITZERLAND: A PROBLEM OF SUMMARY PROCEEDINGS

*Gwladys Gilliéron**†

I. INTRODUCTION

The risk of wrongful conviction is an inevitable part of any criminal justice system. It is related to the way in which criminal inquiries and trials are conducted in order to establish the truth. Recently, Switzerland has seen significant legal reform in its criminal justice system. On January 1, 2011, the first Swiss Code of Criminal Procedure came into force and replaced the 26 cantonal criminal procedure codes and the Federal Act on the Administration of Federal Criminal Justice. For efficiency reasons the role of the examining magistrate, which had previously existed in some cantons, was abolished. Thus, the prosecution occupies a pivotal position. It directs examination, charges, and prosecutes. Moreover, in order to deal with an increasing caseload, prosecutors have been given more power and discretion to divert cases. However, simplification of procedures may be a risk for wrongful convictions. Since the vast majority of cases are resolved by alternative proceedings, the traditional distinction between criminal justice systems that adhere to the principle of legality and those that adhere to the principle of opportunity shrinks gradually.

After a brief overview of the Swiss legal system, I will outline the criminal procedure in Switzerland and identify its strengths and weaknesses in regard to the prevention of wrongful convictions. This will be followed by the results of a study on wrongful convictions supported by the Swiss National Science Foundation. In the final section, I will present the mechanism that controls accuracy and reliability of the forensic sciences and describe the legal framework of the Swiss forensic DNA database.

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II. SHORT OVERVIEW OF THE SWISS LEGAL SYSTEM

Switzerland, like the United States, is a federal state. The Swiss Confederation consists of twenty-six federated states called cantons, which enjoy some degree of autonomy. Similar to the United States, all powers not specifically given to the Confederation belong to the cantons.¹ Under the 1848 federal Constitution, the cantons were responsible for commercial, civil, and criminal law. Thus, Switzerland had 26 different codes regulating these matters. At the end of the nineteenth century, the Confederation was granted the power to unify commercial, civil, and criminal law. A Swiss Code of Obligations was adopted by the federal Parliament in 1881, followed by a Civil Code in 1907, a new Code of Obligations in 1911, and finally a Criminal Code in 1937. However, the procedural laws regulating these matters were still vested in the cantons. As a consequence, each canton had its own code of civil procedure and its own code of criminal procedure. In addition, the Confederation adopted its own code of criminal procedure. The new federal Constitution, which came into force on January 1, 2000, transferred the powers to unify the law of criminal procedure² and civil procedure³ to the Confederation. On January 1, 2011, the Swiss Code of Criminal Procedure (hereafter referred to as CCrP)⁴ and the Swiss Code of Civil Procedure came into force and replaced the 26 cantonal codes of criminal and civil procedure.

III. CRIMINAL PROCEDURE IN SWITZERLAND

As a consequence of the implementation of the CCrP, criminal acts in Switzerland are now prosecuted and judged under the same procedural rules,⁵ the hope being that the elimination of legal fragmentation will ensure increased equality before the law and greater legal certainty.

The absence of an examining magistrate is a characteristic feature of the CCrP. Thus, the prosecution holds a central position and its powers are wide. It conducts the preliminary proceedings, pursues criminal

1. BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT (Federal Constitution of the Swiss Confederation) Apr. 18, 1999, SR 101. art. 42, para 1.

2. *Id.* at art. 123, para 1.

3. *Id.* at art. 122, para 1.

4. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312. A complete translation of the CCrP into English is provided by Sarah Summers in KOMMENTAR ZUR SCHWEIZERISCHEN STRAFPROZESSORDNUNG (STPO) (Andreas Donatsch et al. eds., 2010).

5. For a description of a cantonal criminal justice system before the introduction of the CCrP, see Gwladys Gilliéron & Martin Killias, *The Prosecution Service within the Swiss Criminal Justice System*, 14 EUR. J. CRIM. POL. RES. 333 (2008).

offenses within the scope of the investigation, brings charges, and pleads in favor of the criminal charge.⁶ The advantage of such a model is the achievement of a high grade of efficiency of prosecution by realizing homogenous investigation, examination, and charging. Moreover, allowing the public prosecutor to carry out the investigation from the beginning avoids dual proceedings as conditioned by the alternate work of the examining magistrate and prosecution. In this way, a considerable expenditure of time and personnel is avoided.⁷ The enormous power vested in the prosecution is compensated by the judge being responsible for compulsory acts and extended defense powers.

A. The Prosecution

1. Duties

The prosecution service has the monopoly over prosecution. The public prosecutor investigates criminal offenses, files criminal charges as soon as there is a sufficient degree of suspicion, and represents the state at the trial. He is obliged to investigate in an objective and neutral way and must therefore take into account both the incriminating and the exculpatory circumstances.⁸ If the public prosecutor is convinced that a decision needs to be reviewed for factual or legal reasons, he is entitled to appeal. He may do so to the disadvantage, as well as to the advantage, of the condemned.

2. Organization

Due to the country's federal structure, the prosecution service is organized on a cantonal and federal level.

Public Prosecutor of the Confederation: On the federal level, the Office of the Attorney General (Bundesanwaltschaft) is responsible for the prosecution of criminal offenses that are directed against the Confederation or that affect its interests (e.g. organized crime, white collar crime, money laundering, and corruption). The criminal offenses that fall within the jurisdiction of the Confederation are expressly listed

6. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 16, para 2.

7. BUNDESRAT, BOTSCHAFT ZUR VEREINHEITLICHUNG DES STRAFPROZESSRECHTS VOM 21. DECEMBER 2005 1106–1109 (2006).

8. For examples of prosecutors being subject to criminal prosecution if they withhold evidence favorable to the defendant, see Martin Killias, Wrongful Conviction in Switzerland: The Experience of a Continental Law Country, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 139, 146-148 (C. Ronald Huff & Martin Killias eds., 2008).

in the CCrP.⁹ By far the majority of criminal acts are prosecuted by the cantons. The Office of the Attorney General has neither supervisory power over the cantonal authorities, nor does it have the right to issue any directives to them.

The Attorney General is appointed by the federal Parliament for a term of four years. Since January 1, 2011, the Office of the Attorney General is answerable to a supervisory authority elected by the federal Parliament.¹⁰ Previously, the supervision of the activities of the Office of the Attorney General was carried out by the Swiss Federal Supreme Court, the highest court in Switzerland. The supervisory authority has the right to issue general rules and regulations but not to give orders concerning individual proceedings.

Public Prosecutors of the Cantons:¹¹ As has been the case up to now, the organization of the public prosecution service in Switzerland, like its court system, remains a matter for the cantons and is therefore highly decentralized. In general, prosecution services are organized hierarchically. This means that prosecutors have to follow directives and instructions received from their superiors. In most cantons the Minister of Justice, and hence the cantonal government, stands at the top of the hierarchy. In some other cantons, the public prosecutor's office is part of the judiciary and under supervision of the cantonal Supreme Court. In those cantons where the public prosecutor is subordinate to the cantonal government, the latter rarely exercises the power of issuing instructions. Therefore, the public prosecutor's office is autonomous and independent in a factual way regarding the functional scope (i.e. when fulfilling the tasks and in the decision practice).¹² At most, the cantonal government will issue general recommendations in order to ensure that certain aims of criminal policy are pursued. In the other cantons, where the public prosecutor is as independent as the judiciary, the cantonal Supreme

9. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 23 and 24.

10. The supervisory authority is composed of seven members (one judge from the Swiss Federal Supreme Court, one judge from the Swiss Federal Criminal Court, two attorneys recorded in a cantonal attorneys register, and three specialists not belonging to a Federal Court and not inscribed in a cantonal attorneys register).

11. For a detailed discussion of the position and function of the public prosecution service and its control in the 26 cantons, see CHRISTOPH METTLER, STAATSANWALTSCHAFT: POSITION INNERHALB DER GEWALTENTRIAS, FUNKTION IM STRAFPROZESS UND AUFSICHTSRECHTLICHE SITUATION SOWIE EIN VORSCHLAG ZUR NEUORDNUNG (2001). For an overview, see Pierre Cornu, *The Swiss public prosecutor's office: Its role in criminal procedure, its relations with political authorities and the police, its role in crime policy*, in WHAT PUBLIC PROSECUTION IN EUROPE IN THE 21ST CENTURY – PROCEEDINGS MAY 2000 109 (Council of Europe ed., 2000); see also Johannes Driendl, *Staatsanwaltschaft und Strafverfolgung in der Schweiz*, in FUNKTION UND TÄTIGKEIT DER ANKLAGEBEHÖRDE IM AUSLÄNDISCHEN RECHT 329 (Hans-Heinrich Jescheck & Rudolf Leibinger eds., 1979).

12. ROBERT HAUSER ET AL., SCHWEIZERISCHES STRAFPROZESSRECHT 97-98 (6th ed. 2005).

Court is normally not allowed to give any instructions. Its supervision is limited to receive and control the annual report.¹³

Each prosecutor's office is headed by a Chief Public Prosecutor (Leitender Staatsanwalt). The Chief Public Prosecutor decides on the assignment of business. He can issue decrees and can reverse decrees issued by personnel under his control. Furthermore, he has the ability to declare decrees as subject to his consent. The Chief Public Prosecutor ensures a lawful and expedient carrying out of investigations and provides for a homogenous exercise of substantive criminal and procedural law. In general, the public prosecutor's office consists of several divisions, such as a universal division, a division for economic crime, and a juvenile division.

The mode of nomination varies between the cantons. Chief Public Prosecutors are either elected by the executive power, by the parliament, or by another authority such as the Cantonal Supreme Court. Depending on the canton, they are appointed for a term of four, five, or six years with possible renewal on expiration of the term. A prosecutor who has the status of an independent judge and has been elected by the parliament will be in a stronger position vis-à-vis the political authorities than one who has been appointed by the cantonal government.¹⁴ The occupation as public prosecutor usually requires a legal degree and working experience, for instance as a lawyer, prosecutor, or court clerk.

B. Main Features of the Swiss Legal Procedure

The following section describes some striking differences between the inquisitorial and the adversarial criminal justice systems and discusses the principles governing the Swiss criminal procedure.

1. Inquisitorial Criminal Justice System

The inquisitorial criminal justice system is generally contrasted with the common law adversarial system. The Swiss criminal justice system is based on the inquisitorial tradition. The goal of every criminal justice system is to ensure that those guilty of committing a criminal offense are convicted and that innocents are acquitted. In achieving this goal, the different criminal justice systems provide for different safeguards.

Briefly, in an adversarial system, the parties, acting independently, are responsible to investigate the case and to present their evidence before a passive and neutral judge or jury that will decide on guilt. The

13. Cornu, *supra* note 11, at 112.

14. *Id.* at 111.

duty of the judge is to ensure the fair play of due process, whereas the responsibility in seeking the truth of the case relies on the defense and prosecution. In an inquisitorial system on the other hand, the prosecution has the obligation to gather evidence against, as well as in favor of, the accused.¹⁵ Furthermore, as a consequence of the right to be heard,¹⁶ it is obliged to fully disclose its files to the defense. Therefore, the defense lawyer usually does not conduct his own investigation and plays a limited role in establishing the relevant facts. The court is required to actively investigate the case and is ultimately responsible for discovering the truth. The examination hearings are conducted through the court. There is no cross-examination. However, the parties may suggest additional questions to the judge.¹⁷ Expert witnesses are appointed by the prosecution, or by the court, after the decision to charge a defendant with a crime has been made.¹⁸

In contrast to the adversarial system, a defendant's confession is just one more fact to be entered into evidence and the prosecution is still required to present a full and compelling case.¹⁹ The prosecution and the court examine the credibility of the confession before accepting it. In doing so, the accused should be asked to provide in detail further information about the criminal act.²⁰ In the Swiss criminal justice system, a confession is a mitigating factor of limited impact on the sentence. A confession qualifies the defendant for a sentence reduction of about ten percent.²¹

The presumption of innocence of the accused is also fundamental in an inquisitorial criminal justice system.²² The court reaches the decision about the innocence or guilt of the accused based on the "free evaluation" (freie Beweiswürdigung) of all available evidence.²³ A minimum standard of persuasion is provided with the principle of *in-time conviction*. The judge is required to be intimately convinced regarding the truth of the facts unless he admits them as being proven.²⁴

15. HAUSER ET AL., *supra* note 12, at 243.

16. About the "right to be heard," *see infra* Part III.B.2.

17. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 341.

18. *Id.* at art. 184.

19. HAUSER ET AL., *supra* note 12, at 242, 288.

20. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 160.

21. Killias, *supra* note 8, at 144.

22. The presumption of innocence is guaranteed in Article 32 para 2 Federal Constitution of the Swiss Confederation, Article 6 subparagraph 2 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 14 para 2 International Covenant on Civil and Political Rights (ICCPR).

23. HAUSER ET AL., *supra* note 12, at 244–246.

24. *Id.* at 247.

In the Swiss criminal justice system, juries have been abolished. Instead, criminal cases are judged by professional benches of judges, or by benches of lay judges with at least one professional judge as chair.

2. The Right to be Heard and the Right to Remain Silent

The right to be heard (Rechtliches Gehör) – one of the basic fundamental legal rights in Switzerland – is explicitly guaranteed in the federal Constitution²⁵ and in the CCrP.²⁶ In particular, this rule contains the right of the parties (a) to have access to the files, (b) to take part in procedural activities, (c) to appoint a legal adviser, (d) to comment on the facts and proceedings, and (e) to submit a claim that evidence be heard. Another consequence of the right to be heard is the court's obligation to cite its rationale for the verdict and the sentence. The aim of this duty is the protection of citizens against arbitrary state decisions. The right to be heard gives the opportunity to the parties to present their case and more specifically to ensure that the point of view of the accused has been taken into account before a decision affecting him has been taken. Unlike the United States, since all authorities are obliged to fully disclose the files of the case to the parties, there are no specific rules of disclosure. The entire disclosure of the files may be restricted only under certain conditions. A restriction of the right to be heard may be necessary if there is reasonable suspicion that a party is misusing its rights, to ensure the safety of people, or to guarantee public or private confidentiality interests.²⁷

In the context of the abridged proceedings, which is comparable with the plea bargaining under the US system,²⁸ this rule may be of particular importance. In case the accused confesses to a criminal offense, he will act in full knowledge of the prosecutor's file and will hence be aware of the relative strengths and weaknesses of his case.

The CCrP also guarantees the right to remain silent.²⁹ The accused is not required to incriminate himself. He has the right to refuse any cooperation in the criminal proceedings, but must submit to those coercive measures designated by law. This right implies that no disadvantageous conclusions can be drawn from silence.

25. BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT (Federal Constitution of the Swiss Confederation) Apr. 18, 1999, SR 101, art. 29, para 2.

26. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 107.

27. *Id.* at art. 108.

28. About the abridged proceedings, see *infra* Part III.C.2.

29. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 117.

3. Principle of Legality

The Swiss criminal justice system adheres to the principle of legality (Verfolgungszwang). This rule is based on the absolute equality of all citizens before the law. Hence, the prosecutor is required by law to prosecute whenever there is sufficient evidence that a criminal offense has been committed.³⁰ In contrast to the court, which may acquit of a charge in case of doubt, the prosecution may not. The prosecution only has the power to decide whether it is obvious from the start that, for lack of sufficient evidence, a condemnation may never be made by court. However, this rule is not strictly applied anymore. The CCrP has introduced a moderate principle of opportunity,³¹ which dictates that the prosecution shall refrain from conducting a prosecution if (1) the level of culpability and consequences of the offense are negligible; if (2) the offender has made reparation for the loss, damage, or injury, or made every reasonable effort to right the wrong that he has caused; or if (3) the accused is so stricken by the immediate consequences of the offense that an additional penalty would be inadequate. As soon as the conditions are fulfilled, the prosecution must drop the case.

4. The Principles Governing the Investigation

The Swiss procedure is guided by the principle of the factual truth (Prinzip der materiellen Wahrheit). Since the goal of the prosecution is not to seek a conviction but instead to discover the truth and to apply the law, it is under an obligation to investigate exculpatory and incriminatory circumstances with equal care.³²

C. Alternative Proceedings

In order to deal with an increasing caseload, the CCrP provides for different proceedings. These will be discussed in the following section.

1. Penal Order Proceedings

A preliminary investigation does not always lead to charges being brought before the court, even though the prosecutor may feel that there

30. Article 7 para 1 CCrP states: "The criminal justice authorities are required, within the scope of their competence, to institute and carry out criminal proceedings if they are aware, or have sufficient grounds to suspect, that a criminal offense has been committed."

31. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 8.

32. *Id.* at art. 6, para 2.

is sufficient reason to suspect the accused person of having committed the crime. Rather, he shall issue a penal order (*Strafbefehl*) if the accused person has, in the preliminary proceedings, accepted responsibility for the factual circumstances of the case or if the circumstances have been otherwise sufficiently resolved. This summary punishment is normally used when the prosecutor seeks a minor sanction, typically a fine. However, in the Swiss criminal justice system, the use of the penal order has considerably expanded over time. The CCrP allows the prosecutor to impose a prison sentence of up to six months.³³ This rule is rather critical. Imprisonment is a sanction serious enough that it should not be imposed by the sole appreciation of the prosecutor without a compulsory preliminary hearing of the defendant and without any judicial control.

The prosecutor has no discretion in deciding whether he wants to use the ordinary proceedings or the way of summary punishment. As soon as the conditions are fulfilled, the prosecutor has the obligation to issue a penal order.

In the case of summary punishment, the prosecutor writes out a form on which the circumstances of the case are described and a sentence is imposed.³⁴ If the suspect does not agree with the penal order, he has the possibility to raise a written objection to the order within ten days.³⁵ Consequently, the case is tried in court.³⁶

This written procedure results in a judgment without the parties being heard. Since the defendant can raise objection and ask for a full trial, this procedure is not considered as incompatible with the constitutional right to be heard. In the absence of an objection, the penal order becomes final and has the same effect as a judgment following a main hearing.³⁷

33. A penal order shall be issued if the case can be terminated by the imposition of one of the following sentences: (a) a fine; (b) a financial penalty of up to a maximum of 180 day units; (c) a community service of up to a maximum of 720 hours; (d) a prison sentence of up to 6 months, SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 352 para 1.

34. Prior to the introduction of the CCrP, in some cantons it was the examining magistrate or a judge (*Strafbefehlsrichter*) who was responsible to issue the penal order. For an overview, see GWLADYS GILLIÉRON, STRAFBEFEHLSVERFAHREN UND PLEA BARGAINING ALS QUELLE VON FEHLURTEILEN 109–113 (2010).

35. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 354, para 1. Before the introduction of the CCrP, the time period to make opposition varied between the cantons. An objection could be raised between 10 and 30 days.

36. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 356. After the prosecution has taken any further evidence which is necessary to enable the objection to be determined, the prosecution can also decide to discontinue the proceedings, to issue a new summary punishment order, or to bring charges at the Court of First Instance (*Id.* at art. 355, para 3).

37. *Id.* at art. 354, para 3.

In Switzerland this procedure is used in the overwhelming majority of cases. Approximately 90 percent of the convictions are based upon a penal order.³⁸ The procedure is often used in cases of traffic offenses, minor thefts, and possession of drugs.

The penal order is also used in many other continental countries and is commonly referred to as the continental form of plea bargain.³⁹ However, it differs from the US system in many ways. A defendant who does not agree with the order and insists on a full trial does not run the risk of having a harsher sentence imposed by the court. Since a penal order can only be issued if the facts are sufficiently clear and the culpability is not dubious, a reduction of the charges is not possible. Therefore, the risk of a false confession (i.e. accepting the order) does not exist to the same extent in the continental law as in the US system.⁴⁰ In the case of a penal order, the prosecutor evaluates the case alone and imposes a sentence. During this process, the accused is not represented by a lawyer and does not participate. The accused only has the possibility to accept or to refuse the order. A bargain between prosecution and defendant does not take place.

2. Abridged Proceedings

The CCrP has introduced the possibility of ending a case by the way of abridged proceedings (*abgekürztes Verfahren*). Prior to the introduction of the CCrP, only three cantons offered a similar procedure. This procedure is quite similar to plea bargaining under US system.

The accused person may make an application to the prosecution for the case to be conducted by the way of abridged proceedings if he accepts liability for those circumstances which are essential to the legal evaluation of the case and accepts at least in principle the civil claims.⁴¹ An abridged proceeding is excluded if the prosecution requests the imposition of a prison sentence of more than 5 years.⁴² The prosecution decides definitively whether the case is to be conducted by way of abridged proceedings. Even if the conditions for an application are

38. DORIS HUTZLER, AUSGLEICH STRUKTURELLER GARANTIEDEFIZITE IM STRAFBEFEHLSVERFAHREN: EINE ANALYSE DER ZÜRCHERISCHEN, SCHWEIZERISCHEN UND DEUTSCHEN REGELUNGEN, UNTER BESONDERER BERÜCKSICHTIGUNG DER GESTÄNDNISFUNKTION 51 (2010). In some cantons, 97 percent of the cases are dealt with by penal order (e.g. Basel in 2010; <http://www.statistik-bs.ch/tabellen/t19/2>).

39. See John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974).

40. About wrongful convictions in the penal order proceedings, *see infra* Part IV.

41. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 358, para 1.

42. *Id.* at art. 358, para 2.

fulfilled, the prosecutor may decline the petition. There is no legal right of the accused to have the case proceed by the way of abridged proceedings. Since the prosecutor is not required to mention the reasons for the decision, his discretion remains uncontrolled.

If the case is handled by way of abridged proceedings, the accused must have a lawyer to represent him.⁴³ This rule aims to protect the accused during the informal negotiations with the prosecution.

The prosecution writes out an indictment and conveys it to the parties, who have 10 days to accept or reject the indictment. Among others, the indictment contains the sentence and the warning to the parties that by accepting the indictment they waive the right to ordinary proceedings and to initiate legal remedies. As a consequence, the convicted may not file a petition for revision based on new evidence.⁴⁴ An exception to this rule is made if new evidence concerning the criminal responsibility can be presented. If the indictment is rejected by the parties, the prosecution will conduct ordinary proceedings. If the indictment is accepted, the prosecution transmits the indictment together with the files to the Court of First Instance. The Court will then conduct a principal hearing and will have to establish whether the accused accepts the circumstances of the case on which the charge is based and whether this assertion corresponds to the position as set out in the files. It is important to note that the court will not conduct an evidentiary hearing, this in contrast to the normal proceeding.⁴⁵ Following the principal hearing, the court retires and conducts its deliberation in private. In particular, it determines whether the carrying out of abridged proceedings is lawful and appropriate, whether the charge corresponds to the conclusions of the principal hearing and to the files, and whether the sanctions requested are reasonable. If the conditions for a judgment by way of abridged proceedings are met, the court converts the criminal offenses, sentence, and civil claim of the indictment into a judgment. To the contrary, if the requirements are not met, the court sends the files back to the prosecution in order to proceed by way of ordinary proceedings. Declarations, like confessions, provided by the parties in respect of the abridged proceedings cannot be used in ordinary proceedings.

An abridged proceeding was introduced in 2000 in the canton of Basel-Landschaft. From its experience, sentences are not less severe in this kind of proceeding as compared to similar cases judged by way of ordinary proceedings. The danger exists that the accused may confess to an offense he did not commit. It may happen that the defense lawyer suggests his client to the abridged proceedings, although he did not

43. *Id.* at art. 130 (e).

44. About the petition for revision, *see infra* Part III.D.2.

45. This fact explains why a petition of revision based on new evidence cannot be filed.

confess to the offense during the preliminary proceedings. As a consequence, it is not unusual that the court rejects to handle the case by way of abridged proceedings.⁴⁶ Therefore, to a certain degree, the court is a safeguard against false confessions.

D. System of Appeal

1. Legal Remedies

The prosecution, and any person who has a legally protected interest in the quashing or amendment of a decision, has the right to appeal verdicts and sentences. The Court of Appeal will fully review the case. The appeal may be used to contest a violation of the law or an incorrect establishment of the facts. The Court of Appeal may not alter a decision to the disadvantage of the convicted if the appeal has been made to his advantage. Hence, legal remedies are subject to the proscription of *reformatio in peius*.⁴⁷

2. The Petition for Revision (Motion for Retrial)

A petition for revision (Revisionsgesuch) can be filed once all procedural remedies have been exhausted and the decision has become final and legally binding. The motion may be granted if either (1) new facts or new evidence which were not available at the first trial may lead to a different conclusion, (2) the decision is irreconcilably in contradiction with a later criminal decision which involves the same factual circumstances, or (3) in the course of other criminal proceedings it turns out that the findings of the proceedings were influenced by criminal activity.⁴⁸

If the petition for revision is based on the ground of new facts or new evidence, these new facts must likely result in an acquittal, the imposition of a substantially less severe or more severe sentence on a person who was convicted, or the conviction of a person who was acquitted. This rule makes it clear that a motion for retrial can be filed either in favor of the convicted or against an acquitted person. This means that the rule *ne bis in idem*⁴⁹ does not apply to the provisions on

46. GILLIÉRON, *supra* note 34, at 87–88.

47. *Reformatio in peius* means that no decision should be amended, in the course of appeals, in a way that is unfavorable to the person who files an appeal.

48. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 410.

49. According to Art. 11 of the CCRP, a person who has been convicted or acquitted in Switzerland shall not be prosecuted again for the same criminal offense.

retrial. In contrast, in the United States there is a strict application of the rule against double jeopardy.⁵⁰

Petitions for revision are rarely accepted. In Switzerland, on average, about two out of five motions for retrial are granted.⁵¹

E. Compensation and Reparation

Any person having been illegally deprived of liberty or having been acquitted has the right to compensation for financial loss and reparation for non-pecuniary loss.⁵² The same rule applies for an accused who, following a retrial, has been acquitted or on whom a milder sentence has been imposed.⁵³ Compensation should include attorneys' fees and costs incurred in bringing a claim. The amount of reparation awarded varies from case to case. In general, the amount of reparation has been fixed to 200 Swiss francs (approximately \$210) per day passed in prison.⁵⁴

F. Strengths and Weaknesses of the Swiss Criminal Justice System

1. Strengths of the Swiss Criminal Justice System

The right to be heard is a fundamental legal principle in the Swiss criminal justice system. The full disclosure of the prosecutor's files and the obligation of the courts to cite their rationale for the verdict and the sentence help to prevent wrongful convictions. Furthermore, the prosecutor's duty to investigate in an objective and neutral way may contribute to avoid and correct the conviction of an innocent person. The following case illustrates the importance of the prosecutor's objectivity.

Henri Poulard was convicted in 1991 by a jury for participation in a robbery and was sentenced to 5 years imprisonment. On a Saturday morning in November 1983, three robbers entered a jewelry shop in downtown Geneva and stole goods worth more than a million dollars. This crime remained unsolved until seven years later, when Poulard was arrested for drunk driving. The police officer in charge noticed a similarity between Poulard's picture on the driver's license and one of the artist's impressions of the robbers. At a lineup, the manager of the

50. Stefan Trechsel & Martin Killias, *Introduction to Swiss Law*, in INTRODUCTION TO SWISS LAW 245, 285 (François Dessemontet & Tugrul Ansay eds., 3d ed. 2004).

51. Estimate based on the number of submitted and accepted petitions for revision in ten out of 26 cantons between 1995 and 2004 (Gilliéron, *supra* note 34, at 103).

52. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 429.

53. *Id.* at art. 436, para 4.

54. HAUSER ET AL., *supra* note 12, at 572.

jewelry shop and two employees identified Poulard as one of the robbers. Despite Poulard's denegation and his alibi, he was convicted. He was released after 40 months in prison. This release was due to the fact that the Chief Prosecutor of Geneva discovered exculpatory evidence in favor of Poulard. An Italian prosecutor requested legal cooperation from the Public Prosecutor's Office of Geneva. From the Italian file it emerged that the robbery in Geneva had been committed by an Italian gang and excluded any participation of Poulard. The Chief Prosecutor of Geneva filed a petition of revision in favor of the convicted. Poulard was acquitted and received a sum of 370,000 Swiss francs (approximately \$387,000) in damages for unjust detention. This case illustrates the importance of the impartiality maxim and how prosecutors see their role.

2. Weaknesses of the Swiss Criminal Justice System

Simplification of proceedings like the summary punishment where the prosecutor has uncontrolled power and where the defendant's rights are restricted may lead to more convictions of innocent people.

As will be seen in the last part of this article, physical evidence such as human cells are destroyed within a few months by the lab. Hence, there is no possibility to redo some analysis. This fact might explain why, to this point, no exonerations due to DNA evidence have been found in Switzerland. In the interest of justice, items of physical evidence should be retained over extended periods.⁵⁵

IV. WRONGFUL CONVICTIONS IN SWITZERLAND

A. Research

A project supported by the Swiss National Science Foundation (SNSF) has analysed all wrongful convictions (successful petitions of revision) in Switzerland between 1995 and 2004.⁵⁶ Since in Switzerland a national database of all admitted petitions of revision does not exist, each cantonal court has been contacted with the request to provide the relevant opinions.

55. Killias, *supra* note 8, at 152.

56. This research was inspired by the study on wrongful convictions in Germany conducted by Karl Peters. See Karl Peters, *Fehlerquellen im Strafprozess: Eine Untersuchung der Wiederaufnahmeverfahren in der Bundesrepublik Deutschland*, 3 vols. (1970). Although the research in Switzerland had been conducted prior to the introduction of the CCrP, the results remain valid. The complete results of the research are to be found in Martin Killias et al., *Erreurs judiciaires en Suisse de 1995 à 2004: Report to the Swiss National Science Foundation* (July 2007).

B. Number of Admitted Petitions of Revision

A total of 236 petitions for retrial have been admitted between 1995 and 2004.⁵⁷ The vast majority concerned penal orders with 159 successful petitions for revision. This outcome is not out of proportion when considering the number of cases that are dealt with in this kind of summary proceeding. Over the considered time period, prosecutors issued over 500,000 penal orders.⁵⁸ However, it is highly probable that in this field, there are many more wrongful convictions than those discovered by the research. It can be assumed that the majority of convicted waive their right to challenge the decision and prefer to pay a fine.

C. Sources of Wrongful Convictions

1. Verdicts

The ignorance by the court of some mental problems of the convicted affecting his criminal responsibility was a factor in 46.4 percent of admitted petitions of revision based on new evidence.⁵⁹ In fact, in 26 cases a motion for retrial has been granted on the basis of new psychiatric expertise. This means that the verdict as such had been correct but that the sentence should have been reduced or a treatment order imposed. In 3 out of 4 cases where the defendant had initially been convicted of homicide (attempt in 3 cases), a new psychiatric expertise led to the acceptance of the petition. The fourth case concerned a case where multiple children were killed and the accused was exonerated in only one of the five murders. The conviction in this case rested largely on one eyewitness identification. The petition of revision was granted because the convicted could show that another person looking similar to him could be the real perpetrator of the crime. Moreover, two forensic science experts could present some evidence that the bite marks found on the victim's body were more likely to belong to this other person. Nevertheless, the forensic science expert from the first trial was still convinced that the convicted was the owner of the bite marks. Because of the other murders, this exoneration did not lead to the reduction of the life sentence imposed after the first trial. Beside eyewitness error – one

57. In 230 cases, the motion for retrial has been filed in favor of the defendant; in only 6 cases, it has been filed against the defendant.

58. Killias, *supra* note 8, at 151.

59. In 56 cases (or 78.9 percent), the petition was accepted because new evidence could be presented. In 9 cases, the reason was that a second court decision was in contradiction with the cancelled one, and in 2 cases, the defendant had been convicted twice for the same facts.

of the leading sources of wrongful convictions – this case illustrates how the progress of technology in forensic sciences can lead to a different conclusion, as well as the dangers of taking into account the opinion of a single expert. In about one third of the admitted motions for retrial, the court had convicted a factually innocent person,⁶⁰ mostly due to perjury by victims of crimes against sexual integrity, or, in other cases, because of witnesses misidentifying persons or false confessions by the defendant that he later repealed.⁶¹ In the research, no exonerations due to DNA evidence were found.

In sum, wrongful conviction of a factually innocent person plays a minor role. In the majority of cases, the sentence imposed by the court was too high because a reduced criminal responsibility of the convicted had not been recognized and hence not been taken into account.

2. Penal Order

As stated above, 159 penal orders have been overturned in ten years. In 116 cases, the convicted defendant had filed the petition for revision, while in 41 cases, the prosecution had asked for a new trial.⁶² This means that in at least 25 percent of the cases, the proceedings had been initiated by the prosecution. In 136 cases, a new trial was granted because new evidence could be presented. In 11 cases, a second court decision was in contradiction with the cancelled one, and in 6 cases, the defendant had been convicted twice for the same facts.

In 93 cases, the offender had originally been found guilty of a traffic violation. In 19 cases, the defendant had been convicted of a criminal code offense, whereas the majority concerned minor thefts. In 113 cases, the defendant had been sentenced to a fine. In 80 cases, fines were 500 Swiss francs or less (approximately \$525), and in 6 cases above 1,000 Swiss francs. In 15 cases, the defendant had been sentenced to an unsuspended sentence, and in 30 cases, a custodial sentence was suspended. In 31 cases the sentence was less than one month, and in 15 cases, above one month but below six months.

In 54 cases, wrongful identification (e.g. confusion of names as a result of insufficient investigation by the police or through the behavior of the accused who gives a wrong identity to the police) played a role in

60. Overall, in about 50 percent of the cases, the accepted petition of revision led to a reduced sentence, and in about 20 percent of the cases it led to another outcome (e.g. harsher sentence, influence on the decision of expulsion of foreigners convicted in Switzerland). See Killias et al., *supra* note 56, at 43.

61. Information is based on those cases for which the source of wrongful conviction could clearly be identified. In 49 cases the reason that led to the conviction was unknown.

62. This number includes petitions filed by public prosecutors and examining magistrates.

mistaken convictions. Moreover, false testimony contributed in 17 cases, and false confession in 3 cases, to the conviction of an innocent person. In 85 cases, the source of wrongful conviction could not be clearly identified. However, in the majority of these cases, the police and prosecutors have been negligent in their inquiry.⁶³

Based on the available opinions, the granting of the petition of revision led to a reduced sentence in 21 cases, led to a harsher sentence in 1 case, and resulted in an acquittal in 109 cases.

In sum, whereas wrongful convictions by penal order mainly concern factually innocent defendants, revisions of verdicts and/or sentences where a court trial had taken place often involve the discovery, after a new psychiatric examination, of some mental problem not identified before and ultimately lead to a reduced sentence or a treatment order.

E. Limits of the Study

The conditions for filing a motion for retrial are quite restrictive. A very high burden must be met before such a motion is accepted (i.e. presenting new evidence). As a result, the research is unable to provide the exact number of wrongful convictions in Switzerland. However, the study gives important information about the sources of wrongful conviction and indicates where mistaken convictions are most likely to occur.

63. The following examples shall illustrate the importance of complete and accurate reports for the prosecutor in order to avoid the conviction of innocent persons:

(1) *X* was caught driving above the speed limit on motorways and sentenced by penal order to a fine of 120 Swiss francs (approximately \$125). *X* didn't make opposition. The public prosecutor issued the penal order, although the vehicle registration plate wasn't clearly readable. It was assumed that the car was from the canton of Bern (BE), but it could also be from the canton of Geneva (GE) (The Swiss car number plates consist of a two letter code for the canton followed by up to 6 numerical digits). In addition, the person that could be identified on the photo taken by the speed camera was a woman and not *X* (who was male). The petition of revision was granted.

(2) *Y* was caught driving 125 km/h in an 80 km/h zone and sentenced by penal order to a fine of 750 Swiss francs (approximately \$785). *X* filed a motion for retrial based on the fact that the speed limit at the relevant place was 100 km/h (and not 80 km/h). The police report transmitted to the prosecutor assumed that due to road works the speed limit had been reduced from 100 to 80 km/h. Although the police knew from different sources that no road signs had been installed, this circumstance was not mentioned in the police report. The petition of revision filed by *X* was admitted.

(3) While police conducted a speed trap, *X* was caught driving above the speed limit on motorways. He was fined by penal order to 450 Swiss francs (approximately \$470). *X* filed a petition of revision. It turned out that *Y* was the person driving the car at the critical moment and that he presented the identity card of *X* to the police officer. The petition of revision filed by *X* was admitted.

*F. Risk of Wrongful Conviction Inherent in the Penal
Order Proceedings*

Various factors specific to the penal order proceedings contribute to the risk of wrongful conviction:

Investigation: The investigation is often not conducted with the required diligence. There is no obligation to hear the defendant, even if a custodial sentence is imposed. The prosecution bases its decision solely based off of the police accounts, which can be inaccurate or incomplete. It is also possible that the prosecution expects the defendant to object in case of his innocence.

Prosecution: The fact that it is the prosecutor who issues the decision without any control (e.g. a judge) may contribute to the risk of wrongful conviction.

Form and time limit to make opposition: Defendants have the right to object in writing within 10 days if they do not agree with the decision of the prosecutor. The short time limit to make objection, as well as the written form, may be a barrier to exercise this right.

Defendant's behavior: Different reasons can explain why defendants miss the deadline to make opposition or fail to exercise this right. Due to functional illiteracy, the defendant might not understand the instructions about the right to appeal. In fact, about 16 percent of the Swiss population is unable to understand a text of some complexity.⁶⁴ Further reasons for not contesting the decision include indifference, ignorance of the law, and fear of unfavorable outcome, such as costs of the procedure.

V. FORENSIC EXPERTISE

A. Accreditation and Storage of Evidence

To provide a high degree of accuracy and reliability in forensic expertise, all genetic units and most toxicology units of the Swiss Institutes of legal medicine (Basel, Bern, Geneva, Lausanne, St. Gallen, Zurich) have been accredited according to ISO/EN 17025 since 2004.⁶⁵

64. PHILIPP NOTTER ET AL., *LESEN UND RECHNEN IM ALLTAG. GRUNDKOMPETENZEN VON ERWACHSENEN IN DER SCHWEIZ: NATIONALER BERICHT ZU DER ERHEBUNG ADULT LITERACY AND LIFESKILLS SURVEY 6*, 19 (2006).

65. ISO/IEC 17025 specifies the general requirements for the competence to carry out tests and/or calibrations, including sampling. It covers testing and calibration performed using standard methods, non-standard methods, and laboratory-developed methods. Laboratories use ISO/IEC 17025 to implement a quality system aimed at improving their ability to consistently produce valid results. It is also the basis for accreditation from an accreditation body. Since the standard is about competence, accreditation is simply formal recognition of a demonstration of that competence.

In the research on wrongful convictions in Switzerland between 1995 and 2004, no conviction of innocent persons has been discovered due to the mishandling of scientific evidence, even though the Swiss institutes of legal medicine were not accredited at that time. This might be the consequence of not storing items of physical evidence over a long period. Certainly, the strength of the accreditation lies in its transparency and traceability.

In theory, physical evidence should be kept indefinitely. In practice however, such evidence is usually destroyed once a judgment has become definitive and legally binding. For practical reasons, the labs do not have the available resources to store all exhibits. Once the forensic science expert has delivered his report, the institute of legal medicine in Bern, for example, provides for storage of 6 months, or 3 years in cases of homicide and sexual offenses. In the interest of justice however, at least for misdemeanors and felonies, items of physical evidence should be preserved over extended periods.

B. DNA Analysis

In Switzerland, a central DNA profile database (CODIS: Combined DNA Index System) was established on July 1, 2000, for a test period of four years under a temporary legal regulation. During the test period, only DNA profiles of suspects associated to crimes that were specified in a legal ordinance were entered into the database. The catalogue contained crimes like homicide, assault, kidnapping, sexual offenses, theft, drug offenses, arson, and participation in criminal organizations.

Based on that experience, the DNA Profiles Act (DNA-Profil-Gesetz) and the corresponding implementing regulation (DNA-Profil-Verordnung) became effective on January 1, 2005. Hence, the national DNA database was set into routine operation. Criteria for entering DNA profiles into the database were no longer based on a catalogue. Rather, CODIS stores DNA profiles of offenders, suspects, and crime scene traces. The legal criterion for the inclusion of a convicted or suspected person in the DNA database is the maximum punishment the law allows for a crime.⁶⁶ Furthermore, missing or unidentified persons and relatives of dead or missing persons can be entered.

All samples taken by the police are given a unique 10-digit identification number so that the suspects' names are never revealed to lab employees.⁶⁷ The DNA sample is analyzed through one of the six

66. The DNA database includes misdemeanors as well as felonies. Misdemeanors (Vergehen) are actions with a threat of imprisonment of up to three years. Felonies (Verbrechen) are actions punishable with imprisonment of more than three years.

67. For more information about the whole procedure, see Marco Strehler et al., *Swiss federal*

licensed DNA laboratories (Basel, Bern, Geneva, Lausanne, St. Gallen, Zurich). All genetic units of the Swiss Institutes are accredited according to ISO/EN 17025. To prevent mismatches in the DNA profiling of traces and samples acquired through a buccal swab, laboratories rely on a second independent analysis.

The protection of the right of privacy is of highest importance. In DNA analysis, only noncoding DNA is used. The DNA database is strictly separated from the database containing personal and case data. The DNA profile will only be linked with the corresponding names and case information if a database inquiry has resulted in a hit. The DNA profiles of convicted persons are kept for a variable time, depending on the offense. Other DNA profiles are removed when a person is not charged or is acquitted. The biological sample is destroyed after analysis, or not later than 3 months after reception by the lab.

As of December 2012, the database contained 145,284 personal profiles and 41,920 crime scene samples.⁶⁸ About 1.5% of the Swiss population is stored in the DNA profile database.

While the use of a DNA database is praised when used to catch a murderer or a rapist, it is also frequently vilified as an infringement of privacy and civil liberties. Since under the new law even DNA samples from suspects of misdemeanors can be taken, critics argue that the power of the police is too wide.⁶⁹ However, the entry of misdemeanors into the DNA database proved to be important for the clarification of more serious crimes.⁷⁰

VI. CONCLUSIONS

Over time Swiss public prosecutors have gained more and more power. Now they play a central role in the criminal justice system. With the introduction of the CCrP on January 1, 2011, the examining magistrate has been eliminated with the consequence that the public prosecutor is responsible for conducting investigation in the preliminary proceedings and representing the prosecution service in criminal court.

DNA profile information system, 1239 INTERNATIONAL CONGRESS SERIES 777 (2003); Cordula Haas et al., *A new legal basis and communication platform for the Swiss DNA database*, 1288 INTERNATIONAL CONGRESS SERIES 734 (2006).

68. SCWEIZERISCHE EIDGENOSSENSCHAFT, FEDERAL DEPARTMENT OF JUSTICE AND POLICE, http://www.ejpd.admin.ch/content/ejpd/en/home/themen/sicherheit/ref_personenidentifikation/ref_dna-profile/ref_die_datenbank.html (last visited May 8, 2013).

69. SWISS.INFO.CH, INTERNATIONAL SERVICE OF THE SWISS BROADCASTING CORPORATION, http://www.swissinfo.ch/eng/index/DNA_testing.html?cid=7860352&itemId=7860348 (last visited May 8, 2013).

70. Cordula Haas et al., *Die schweizerische DNA-Datenbank: Rückblick auf sechs erfolgreiche Jahre*, 60 KRIMINALISTIK 558, 563 (2006).

Furthermore, the vast majority of cases are no longer handled through ordinary proceedings but by way of summary proceedings. All procedural rules applicable in the ordinary proceedings are significant safeguards against wrongful convictions. The right to be heard, and in particular the full disclosure of the prosecutor's file in a given criminal case, may prevent the conviction of innocent people. A simplified procedure, such as the abridged proceedings, still requires a decision by the judge. However, the court hearing in this kind of procedure provides restriction on prosecutorial power of a much lesser degree. The penal order proceedings, in which the prosecutor usually only bases his decision on the police report, is particularly inclined to produce wrongful convictions. The use of the penal order proceedings, originally designed for petty offenses punishable with a fine, has widely expanded. The prosecutor can impose a custodial sentence of up to six months and this—in case the defendant does not object to the decision—without judicial control. As a consequence, the penal order proceeding is not limited to petty offenses anymore but extends into criminal acts of some gravity, such as misdemeanors. This rule is rather critical since these kinds of proceedings tend to produce wrongful convictions and since the majority of defendants are convicted in this way.