REPORT OF THE ADVISORY COMMITTEE ON WRONGFUL CONVICTIONS

SEPTEMBER 2011

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
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The release of this report should not be interpreted as an endorsement by the members of the Executive Committee of the Joint State Government Commission of all the findings, recommendations and conclusions contained in this report.

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EXECUTIVE SUMMARY

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

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

These exonerations challenge long-accepted assumptions in the soundness of certain practices of the criminal justice system both nationwide and in Pennsylvania. They cast a disturbing doubt on the reliability of eyewitness identifications, confessions, and overly aggressive practices within the adversarial legal system. Victims can often be mistaken in their identifications of perpetrators, especially when influenced, often unintentionally, by subtly suggestive procedures for lineups, photo arrays, and showups. Interrogation techniques applied to suspects are calculated to obtain a confession and recurrently "work" against innocent suspects, especially those who are inexperienced, suggestible, unintelligent, mentally defective or anxious to end the interrogation. Many

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

defendants cannot afford a private attorney and therefore receive less thorough representation by overworked public defenders and appointed counsel. In many places, this lack of adequate representation is due to underfunding of public defender offices and substantial underpayment of appointed counsel representing indigent defendants. Although untested for the trial or tested by outdated methods, inmates seeking post trial testing of DNA biological evidence often encounter unreasonable obstruction and opposition to its testing or learn that their petition is jurisdictionally barred.

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

Senate Resolution No. 381[2] directs the commission "to study the underlying causes of wrongful convictions." This charge calls for an inquiry that in other contexts is characterized as a failure analysis, much like a professional inquiry into a routine surgical procedure that unexpectedly results in a bad outcome or into a chain of events that causes a plane crash. In a failure analysis, the focus is on determining what went wrong in order to prevent recurrence of the problem. We can rightly celebrate the presumption that a great majority of criminal cases reach a just outcome. But the focus in this report is necessarily on the reasons why justice miscarries in a minority of cases. Many scholars, practitioners, law enforcement agencies, and the courts, among others, have examined these cases and advocate for a variety of responses and remedies to the problems revealed by the wrongful convictions. This report attempts to bring the General Assembly's attention to policies for Pennsylvania that may reduce the likelihood that innocent people will suffer imprisonment for crimes they did not commit while further ensuring that the actual perpetrator of the crime is brought to justice.

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

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

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

2) review any other relevant materials;

3) identify the most common causes of wrongful convictions;

4) identify current laws, rules and procedures implicated in each type of causation;

5) identify potential solutions in the form of legislative, rule or procedural changes or educational opportunities for elimination of each type of causation; and

6) consider implementation plans, cost implications and the impact of potential solutions on the criminal justice system.

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

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

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

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

[3] 12 Widener L. Rev. 359 (2006); its author is John T. Rago, the chairman of the advisory comm.
[4] Cal. Comm'n on the Fair Admin. of Just., Final Rep., Letter from the Executive Dir. (2008).
[5] Boston Bar Ass'n, Getting it Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts 3 (Dec. 2009).

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

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

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

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

[6] *Infra* p. 309.

Summary of Key Proposals Generated by the Subcommittees[7]

Eyewitness Identification

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

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

Confessions

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

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

Indigent Defense Services[8]

Defense services for indigency should be standardized throughout our Commonwealth.

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

Informant Testimony

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

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

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

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

A statute should:

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

Prosecutorial Practice

Prosecutorial offices should:

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

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

Postconviction Relief[10]

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

The statute should be amended to eliminate:

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

The statute should be amended to clarify:

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

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

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

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

Redress

A statute should:

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

A statutorily created commission should convene to periodically review:

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

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

Science

A statute should:

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

A statutorily created forensic advisory board should be established to:

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

INTRODUCTION

Senate Resolution No. 381[11] directed "the Joint State Government Commission to establish an advisory committee to study the underlying causes of wrongful convictions so that the advisory committee may develop a consensus on recommendations intended to reduce the possibility that in the future innocent persons will be wrongfully convicted in this Commonwealth." This resolution further directed the advisory committee to:

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

2) review any other relevant materials;

3) identify the most common causes of wrongful convictions;

4) identify current laws, rules and procedures implicated in each type of causation;

5) identify potential solutions in the form of legislative, rule or procedural changes or educational opportunities for elimination of each type of causation; and

6) consider implementation plans, cost implications and the impact of potential solutions on the criminal justice system.

The starting point for an informal review of cases in which an innocent person was wrongfully convicted and subsequently exonerated were several cases from our Commonwealth that are related in the law review article, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsylvania Eight*.[12] Several advisors were personally familiar with some of these cases and there was a limited discussion of these and other cases.

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

[11] Sess. of 2006, appendix A, *infra* p. 229.
[12] *Supra* note 3.

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

"The excellent work done by academic researchers, the Innocence Project in New York, and similar Commissions in other [s]tates made the task of identifying the causes of wrongful conviction easier."[13] These causes are "mistaken eyewitness identifications; false confessions; perjurious informant testimony; inaccurate scientific evidence; prosecutorial and defense lawyer misconduct; and inadequate funding for defense services."[14] Some of these causes are sometimes described by varying terminology, but "at this juncture, the primary causes of wrongful convictions are well understood."[15]

Each subcommittee became aware of laws, rules and procedures from other jurisdictions that address common causes of wrongful convictions.[16] These examples from elsewhere were considered as the subcommittees decided which solutions to recommend for our Commonwealth.

The full advisory committee initially convened twice in person and then the subcommittees convened via personal and telephonic conferences. Subcommittees invited individuals with relevant expertise to share their experiences and recommendations. The subcommittees deliberated primarily recommendations that have been and continue to be considered throughout other states. As some of these recommendations receive consideration, they have been adopted in some fashion by more and more jurisdictions.

After all the subcommittees completed their deliberations, their recommendations were shared with the full advisory committee. The full advisory committee was afforded an opportunity to comment on all the proposals regardless of which subcommittee generated the specific proposal. While there was some general consensus on these recommendations, particular interests remain sharply divided on the advisability of implementing these recommendations. Some advisors question that a foundation has been established to recommend any of these proposals and fear that their implementation could create more injustice rather more justice. Conversely, advisors who endorse these recommendations have not been persuaded that a foundation has been established to justify that fear recognizing that good faith, the best intentions and a genuine commitment to justice are not always enough to prevent the injustice of an innocent person being wrongfully convicted. Comments of advisors criticizing the proposals appear in the final appendix.

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[13] Cal. Comm'n on the Fair Admin. of Just., *supra* note 4.
[14] *Id.*
[15] Boston Bar Ass'n, *supra* note 5.
[16] Appendices C through I, *infra* pp. 255-308.

Exonerations

It is difficult to accurately count the number of wrongful convictions in any jurisdiction. None is considered wrongful until there is an exoneration. The wrongfulness of convictions for some exonerees remains disputed. The focus of this advisory committee are the convictions that are wrong because the convict is factually innocent of the crime for which he was convicted. While it is reassuring that there are not large numbers of verified wrongful convictions, it is disturbing to learn of painful injustices that took a long time to discover and can never be truly remedied. The number of wrongful convictions cannot be reliably determined so that it would be falsely reassuring for our Commonwealth to ignore potential lessons from wrongful convictions here and in other jurisdictions that have the same or similar criminal justice practices and conventions. The number of false (factually wrong) convictions and false (factually wrong) acquittals simply cannot be counted nor can reliability studies be crafted to validate the probability of any verdict reflecting the factual truth. In other words, the results of a trial can not typically be validated because trials are not experiments. Trials present disputed facts to a finder of fact who must decide the facts.[17] Our Commonwealth has had 11 convicts exonerated partly or totally on the basis of DNA.[18] The causes of these wrongful convictions are the same as the causes of wrongful convictions proven by DNA evidence in other states. Absent this DNA, there would be no compelling reason to recognize their factual innocence.

Another source identifies 33 convicts in our Commonwealth who have been exonerated based partly or totally on evidence of actual innocence, although not all are due to DNA.[19] They later became legally innocent "based on evidence" of actual innocence "not presented at the defendant's trial".[20]

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[17] Truth in any particular case is rarely known so that the outcome of adversarial proceedings cannot be used to assess and validate their rates of error. Consequently, that absence of large numbers of known errors is insufficient criteria to establish accuracy. "[W]here a method depends . . . on subjective human judgment . . ., the method *is* the people who employ it." Jonathan J. Koehler, *Fingerprint Error Rates and Proficiency Tests: What They Are and Why They Matter*, 59 Hastings L. J. 1077, 1090 (2008). Existent data is inadequate to calculate any meaningful error rate of convictions.

[18] Innocence Project, News & information, http://www.innocenceproject.org/news/state.php?state=pa (last visited June 3, 2011). The profiles of these exonerees appear in Appendix B, *infra* p. 235.

[19] Nw. L. Bluhm Legal Clinic, Ctr. on Wrongful Convictions, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/paIndex.html (last visited Jan. 3, 2010).

[20] *Id.*, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ (last visited Jan. 27, 2011). The list of these exonerees appear *infra* p. 252.

Still another source identified 13 convicts exonerated in Pennsylvania during a recent 14-year period.[21] These exonerations are based on "an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted."[22] Six of these 13 were exonerated on the basis of DNA evidence.[23]

Edwin Borchard's book about errors in criminal justice was published in 1932.[24] It is about 65 cases "selected from a much larger number" to refute an assertion that "'[i]nnocent men are never convicted.'"[25] One of these cases is from Pennsylvania and 61 others are from District of Columbia and other U. S. states.[26] The "mistake in identity" for the Pennsylvania case resulted from "inadequate investigation by prosecuting authorities and of response to popular demands for vengeance."[27]

Most of the recent, highly publicized exonerations have been judicially determined, but they can also occur via executive clemency in the form of pardons for innocence. These pardons for innocence have occurred in Pennsylvania and predate the more recent, high-profile exonerations based upon postconviction DNA analysis.[28] Erroneous criminal convictions of innocent people are thus not a new phenomenon in Pennsylvania or other states. Borchard's book notes that "particular errors are so typical that it seems permissible to draw certain inferences from them in order that their repetition may be minimized."[29] As it identifies the same errors that concern observers today, it is remarkable how relevant to this topic Borchard's book remains when it was published almost 80 years ago. He characterizes eyewitness identification as "[p]erhaps the major source of these tragic errors."[30] This characterization has been confirmed by more recent exonerations based upon DNA analysis postconviction. Perjury of witnesses "taking advantage of circumstantial evidence" was another significant cause in the cases Borchard collected and this has also been confirmed by more recent exonerations based upon DNA analysis postconviction.[31] Overzealous and grossly negligent police work contributed to the old cases of erroneous convictions[32] as well as to the more recent ones. Just as with the recent exonerations based on DNA analysis postconviction, the old cases had false confessions, frequently from those with inferior intelligence.[33] The old cases resultant from unreliable expert evidence are equivalent to more recent exonerations in

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[21] Samuel R. Gross et al., *Exonerations in the U.S. 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 559 (2005).
[22] *Id.* at 524. The official acts for this article are: pardons based on innocence, judicial dismissals of criminal charges after evidence of innocence emerged and acquittals on retrial based upon evidence of no involvement in the crimes. *Id.*
[23] *Id.* at 559. The list of these exonerees appear *infra* p. 251.
[24] Edwin Borchard, *Convicting the Innocent* (1932).
[25] *Id.* at vii.
[26] *Id.* at vii-viii.
[27] *Id.* at 292.
[28] A sample of these exonerations were randomly selected from the middle of the last century and appear at the end of Appendix B, *infra* p. 253.
[29] Borchard, *supra* note 24, at xiii.
[30] *Id.*
[31] *Id.* at xv.
[32] *Id.*
[33] *Id.* at xvii-xviii.

which convictions were at least partly based upon invalid or unvalidated scientific assertions.[34] Another contemporaneous cause of these erroneous convictions is also an older cause: poor persons receiving inadequate defense.[35]

Another old phenomenon that still persists is the finality of judgment after which "courts maintain their incompetence to" set aside unjust verdicts or correct substantial errors leaving "executive clemency as the only available remedy."[36] This is precisely the current situation under 42 Pa.C.S. § 9545(b) (relating to jurisdiction and proceedings). At least for DNA testing postconviction, "[t]here is no good reason why the courts should not remain open to correct substantial errors in the administration of justice."[37]

An innocent defendant convicted of a crime becomes an innocent victim himself. A number of the advisors propose that statutory restitution be available to these exonerees[38] instead of limiting restitution to those who can successfully prove civil rights violations or malicious prosecution or who can persuade our Commonwealth to enact a special appropriation to provide this restitution as a matter of grace and favor instead of a matter of right.

COMMON CAUSES[39] OF WRONGFUL CONVICTIONS

Postconviction DNA exonerations	Total	Eyewitness misidentification	Invalid science	False confession or other incriminating admission	Governmental misconduct	Informants	Bad lawyering
Nationally (including Pennsylvania)	273	198 (73%)	125 (46%)	66 (24%)	46 (17%)	32 (12%)	13 (5%)
Commonwealth of Pennsylvania	11	9 (82%)	3 (27%)	4 (36%)	4 (36%)	4 (36%)	0 0

[34] *Id.* at xix.
[35] *Id.* at xx.
[36] *Id.* at xxi-xxii.
[37] *Id.* at xxii.
[38] *Infra* p. 234.
[39] Many wrongful convictions had more than one cause that contributed to the erroneous conviction. Innocence Project, Know the Cases, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Aug. 1, 2011).

There was much debate within the advisory committee on the magnitude of the wrongful convictions issue, the scientific basis for the purported causes thereof and the advisability and utility of any proposed remedies. These views reflect the debate both nationally and internationally, and within the scientific and criminal justice communities. Some individuals believe that the 273 wrongful convictions[40] identified by the Innocence Project[41] that have been the result of DNA exonerations are an extremely rare phenomenon. Proponents of the atypical school argue that existent investigative procedures usually work properly and accurately, and that when errors occur, they can already be remedied. They contend that proper and complete cross-examination and discovery can reveal any irregularities with investigative procedures, and that judges and juries are capable of sorting out conflicting evidence. Because there have only been 11 DNA exonerations in Pennsylvania, some don't regard them as a solid foundation for consideration of responsive policies. Of great concern to this group is the possibility that wide-scale "improvements" in investigative procedures that are intended to protect an extremely small set of innocent suspects will result in a failure to convict guilty criminals.

Others view these cases as the "tip of the iceberg." Even if the incidence is low, others think that reasonable measures to reduce the likelihood of their occurrence should be considered. They presume that the same or similar errors that led to these DNA exonerations must have occurred in convictions where DNA was not recovered or was not tested or was irrelevant as evidence. They maintain that improvements to investigative procedures can greater protect the innocent without significant loss of correct convictions. They further claim that the existent protections cited by their opponents are insufficient.

Most researchers will concede that it is extremely difficult to prove or disprove the magnitude of wrongful convictions through statistical projections beyond the existent DNA exoneration cases. However, these proven[42] cases of wrongful convictions can be examined to determine what factors played a role in those convictions. Additionally, laboratory research has shown that certain behavioral and systemic factors can contribute to false identifications and confessions. As a policy matter, a balance between the protection of the innocent and the conviction of the guilty must be determined, as most researchers agree that there is a trade-off of varying degree between guaranteeing that no innocent person is ever wrongfully convicted and ensuring that every person who commits a crime is brought to justice. It has been suggested that reforms intended to increase the reliability of evidence through the use of best practices models could have the laudable effect of reconciling the aims of crime control (convicting the guilty) and

[40] Innocence Project, Know the Cases, http://www.innocenceproject.org/know/ (last visited Aug. 1, 2011).
[41] "[A] national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent further injustice." Innocence Project, About Us, http://www.innocenceproject.org/Content/What_is_the_Innocence_Project_How_did_it_get_started.php (last visited Feb. 12, 2011).
[42] There are those who will point out that a DNA exoneration "proves" nothing more than that the individual in question did not deposit the biological evidence that was found at the crime scene.

due process (protecting the innocent).[43] To that end, this report will provide information on the current thinking of the psychological scientific community regarding the causes of eyewitness identification errors and false confessions and survey the potential remedies that could be adopted by the Commonwealth.

Presentations

During its deliberations, the advisors heard from a number of experts in person and via phone conferences.

The full committee was able to hear from:

- **Dr. Tara Burke**, Associate Professor of Psychology, Ryerson University. She examines factors that increase the likelihood of wrongful convictions and discussed *alibi* evidence, psychological research on factors that have contributed to wrongful convictions, and researching wrongful convictions and their sources of error.

- **Dr. Ted Yeshion**,[44] Associate Professor of Forensic Science, Edinboro University of Pennsylvania of the State System of Higher Education. He related the exoneration of Alan Crotzer, who was wrongly convicted in Florida and spent more than 24 years in prison. Even though Crotzer had an *alibi* and did not know his co-defendants prior to trial, he was convicted based on the victims' misidentification of him, serological evidence and hair analysis, all of which was later disproven by DNA testing.

The subcommittees on investigation and legal representation were able to hear from:

- **Sergeant Raymond C. Guth**, Pennsylvania State Police, Criminal Investigation Section Supervisor,[45] and **Captain Bret K. Waggoner**, Pennsylvania State Police Special Investigations Division.[46] Captain Waggoner and Sergeant Guth discussed state police lineup procedures.

[43] Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 Tex. Tech L. Rev. 1-15 (2008).
[44] Dr. Yeshion also served as chairman of the subcomm. on sci.. He has more than 30 years experience as a forensic scientist, crime lab dir. and special agent and shared this experience during subcomm. confs. as well.
[45] Troop L, Reading.
[46] Bureau of Criminal Investigation.

- **Dr. Saul Kassin,**[47] Distinguished Professor of Psychology, John Jay College of Criminal Justice, New York City. Dr. Kassin is a nationally known expert on the psychology of false confessions. He discussed this psychology and its application to interrogations.

- **Lori Linskey**, Senior Counsel, Deputy Attorney General, New Jersey Division of Criminal Justice. Ms. Linskey presented information on sequential, double-blinded lineup procedures. New Jersey was the only state that had adopted these procedures at the time of her presentation, although legislation had been introduced in other states and some individual police departments elsewhere adopted their use.

- **Jonathyn Priest**, Commander of the Major Crimes Section, Denver Police Department, Denver, Colorado. Mr. Priest presented information on his department's 25 years' experience with recording custodial interviews and interrogations.

- **Thomas Sullivan, Esq.** and **Andrew Vail, Esq.**, Jenner & Block, LLP, Chicago. Sullivan and Vail presented information on the use of recordings of custodial interrogations. They survey law enforcement agencies and manage a national database of their practices regarding recordation of custodial interrogations. They related information learned over several years from these surveys.

- **Dr. Gary Wells,**[48] Distinguished Professor of Psychology, Iowa State University, is a nationally recognized expert on eyewitness identification procedures and lectured on this topic.

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[47] Dr. Kassin is also Mass. Professor of Psychol. at Williams College. He pioneered the scientific study of false confessions by developing a widely accepted classification system and experimental models that enable tests of why innocent people are targeted for interrogation, why they confess and the impact this evidence has on juries. He has also studied eyewitness identifications, especially with regard to "general acceptance" within the scientific community. Kassin is the author of *Psychology* and the new *Psychology in Modules.* He has co-authored or edited other works, including: *Social Psychology* (7th edition), *Confessions in the Courtroom, The Psychology of Evidence and Trial Procedure, The American Jury on Trial: Psychological Perspectives,* and *Developmental Social Psychology*. He has written the Psychology & Social Psychology entries for Microsoft's Encyclopedia, *Encarta,* and published numerous research articles. He is a Fellow of the Am. Psychol. Ass'n (APA) and Ass'n for Psychol. Sci.. In 2007, he received a Presidential Citation Award from APA for his work on false confessions and is currently President-Elect of Div. 41 of APA (The Am. Psychol.-L. Soc'y). He lectures frequently to judges, lawyers, psychologists, psychiatrists and law enforcement groups.

[48] Dr. Wells is also Dir. of Soc. Sci. for the Am. Judicature Society's Inst. of Forensic Sci. & Pub. Pol'y. He is an internationally recognized scholar in scientific psychology and his studies of eyewitness memory are widely known and cited. He has authored over 175 articles and chapters and two books. Most of this work has been focused on the reliability of eyewitness identification. Nat'l Scie. Found. has funded his research on eyewitness identification and his findings have been incorporated into standard textbooks in psychology and law. He was a founding member of the U.S. Dep't of Just. group that developed the first set of national guidelines for eyewitness evidence and co-chaired the panel that wrote the departmental training manual for law enforcement on eyewitness identification evidence. He has worked with prosecutors and police across the U.S. to reform eyewitness identification procedures.

- **Detective William Wynn (Ret.)**, City of Philadelphia Police Department, Major Crimes Unit. Detective Wynn conducted all of the city's lineups for over 25 years and presented information on his experiences with simultaneous lineups.

The subcommittee on legal representation was able to hear from:

- **Thomas M. Place**,[49] Professor of Law, Penn State (The Dickinson School of Law). He spoke on suggested amendments to our Post Conviction Relief Act. One of these amendments would permit those who were sentenced to terms of one year or less to litigate ineffectiveness of counsel claims, which they cannot do now. A second suggested change would treat the time periods in the act as a statute of limitations that can be avoided by equitable tolling when extraordinary circumstances make timely filing impossible.[50] A third suggested change would also extend some other time limits under the act to accurately correspond with the inherent judicial power to alter an illegal sentence as well as provide potential relief for evidence that is newly discovered by those who may not have access to legal materials and may not have the skills to prepare a petition on their own. Another suggested change would conform the statute to current judicial precedent that allows DNA testing to convicts who confessed voluntarily or pled guilty.

The subcommittee on science was able to hear from:

- **Major Nancy Kovel**,[51] Pennsylvania State Police, Director, Bureau of Forensic Services. Major Kovel discussed her bureau's accreditation, its services to law enforcement, preservation of evidence and DNA sampling.

- **Dr. Fred Fochtman**,[52] Director and Chief Toxicologist at Allegheny County Office of the Medical Examiner, Forensic Laboratory Division. He discussed his division's accreditation, training, its services to law enforcement, and the preservation and admissibility of evidence.

- **Dr. Terry Melton**, President and CEO Mitotyping Technologies. She discussed accreditation, training and retention of evidence.

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[49] An expert in criminal law and procedure, Professor Place is the author of *Pennsylvania Post Conviction Relief Act — Practice and Procedure*.

[50] Instead of a jurisdictional deadline, which is particularly inappropriate for proceedings that are typically initiated by *pro se* litigants when the defendant is not entitled to publicly funded counsel until after the petition has been filed.

[51] Maj. Kovel has since retired from Pa. State Police. Syndi Guido directs the policy office at Pa. State Police and served as an advisor on the subcomm. on investigations but graciously assisted Maj. Kovel in providing information from the State Police to the subcomm. on sci.

[52] Since speaking to the subcomm. on science, Dr. Fochtman became Dir. of the Wecht Inst. of Forensic Sci. & L. at Duquesne U. Sch. of L. and Dir. of the Forensic Sci. & L. Masters Program at Duquesne U.

- **Dr. Michael Rieders**,[53] Chairman of the Board of Directors of NMS Labs. He served as an advisor on the subcommittee on science and discussed accreditation, forensic research services and testing.

In addition to these presentations to the advisory committee, some similar presentations were made at successive, annual meetings of the Pennsylvania judiciary through Administrative Office of Pennsylvania Courts. In 2009, Dr. Kassin presented a full three-hour program on false confessions. In 2010, Jennifer E. Dysart,[54] The Honorable William R. Carpenter,[55] Bruce Godschalk,[56] and John T. Rago[57] gave presentations on eyewitness and victim identification issues as well as false confessions and their particular impact in the conviction of Godschalk. In the fall of 2010, presentations were made on custodial taping, false confessions and eyewitness identification practices at the Pennsylvania District Attorneys Association's executive committee conference in State College. These presentations were made by Dr. Kassin, Dr. Dysart, Andrew Vail, Judge Carpenter and John Rago.

In addition to the foregoing presentations and meetings, similar study commissions in California, Wisconsin, and North Carolina were consulted as was Dallas County District Attorney's Office, which established a Conviction Integrity Unit.[58] Additionally, in the summer of 2009, the chairmen of the advisory committee and subcommittees made a formal presentation at the National Conference of State Legislatures legislative summit in Philadelphia discussing wrongful convictions[59] and the committee's efforts to date. The national conference has been a source of policy information for the committee's efforts.

Subcommittee on Investigation

The subcommittee convened in person or by phone six times during 2007 through 2009. Three of the meetings were held jointly with the subcommittee on legal

[53] He is a Forensic Toxicologist and a licensed Laboratory Dir.

[54] Assoc. Professor at John Jay College of Crim. Just., The City U. of N.Y. Dr. Dysart is a nationally known expert on the psychology of eyewitness identification and memory science. She discussed this psychology and its application to eyewitness accounts of witnesses and victims in show ups, line-ups and photo arrays. Dr. Dysart is a frequent speaker and trainer for law enforcement agencies throughout the nation.

[55] Ct. of C.P., 38th Jud. Dist. (Montgomery Cnty., Pa.); he served as chairman of the subcomm. on legal representation.

[56] One of the 11 DNA exonerees in Pa., *infra* p. 237.

[57] Assoc. Professor of L. at Duquesne U. & founding Executive Dir. of Cyril H. Wecht Inst. of Sci. & L.; he served as chairman of the advisory comm.

[58] This unit "reviews and re-investigates legitimate post conviction claims of innocence" and "is the first of its kind in the" U.S. Dallas Cnty. Dist. Attorney's Office, http://www.dallasda.com/. It also prosecutes old cases if different or additional perpetrators are identified. *Id.*

[59] The summit discussed the causes of wrongful convictions and recommendations to reduce or eliminate practices leading to them.

representation. These meetings were lively, involving vigorous debate and afforded the members the opportunity to hear from several presenters, including nationally recognized researchers as well as experienced law enforcement individuals from different jurisdictions. As with the other subcommittees, this one did not share a unanimous perspective.

The work of the subcommittee was to evaluate:

1) The research on the causes of mistaken identifications and false confessions.[60]

2) The remedies proposed to address these issues.

3) The efficacy of the remedies that have been adopted elsewhere.

Subcommittee on Legal Representation

In addition to the three meetings held jointly with the subcommittee on investigation, this subcommittee convened in person or by phone seven times during 2007 through 2009. Because the membership of this subcommittee along with the membership of the subcommittee on investigation was almost exclusively police or former police, current and former prosecutors and current and former defense attorneys, there was some overlap in the topics that they considered. This subcommittee divided into working groups to consider individual topics and report back to the subcommittee. This subcommittee did not unanimously support its proposals; for some topics, even the members of the working groups reporting back to the subcommittee disagreed. The topics were: eyewitness identification; confessions; adequacy of representation; postconviction relief; misconduct and other personnel issues; and, scientific and informant evidence.

Subcommittee on Redress

Most of the deliberations of the subcommittee on redress concerned the propriety and desirability of compensating exonerees via a statutorily claim against our Commonwealth. The *status quo* to claim compensation is via the common law action of malicious prosecution, which would likely preclude most exonerees' claims, or asserting a depravation of civil rights under 42 U.S.C. § 1983, which would also preclude liability if there was no depravation of these rights. Until all the proposals were circulated to the entire advisory committee, support for statutory compensation to exonerees who are actually innocent was almost unanimous in the subcommittee. The subcommittee also

[60] *Infra* pp. 21-127.

sought to extend to exonerees the same or similar transitional services for which unexonerated convicts are eligible when they leave prison. Finally, the subcommittee also developed a proposal to consider new reforms to prevent wrongful convictions and review subsequent exonerations to learn specific causes of those wrongful convictions. This subcommittee convened in person or by phone eight times during 2007 through 2009.

Subcommittee on Science

The subcommittee on science deliberated about the preservation of evidence, oversight of forensic services, training and accreditation of forensic laboratories. During its deliberations, this subcommittee consulted several forensic scientists and providers of forensic services. It surveyed both the judiciary and district attorneys to gather facts and opinions to better inform itself on the preservation of evidence and provision of forensic services. Partly because of the nature of the issues on which this subcommittee deliberated, its conferences were much less contentious than other subcommittees. As with the proposals generated from each of the other subcommittees, this subcommittee also did not unanimously support its proposals. This subcommittee convened in person or by phone 11 times during 2007 through 2009.

Organization of Report

This report is organized as follows. Research on eyewitness identification is related as are reforms in other jurisdictions and a summary of the proposals on this topic. Similarly, research on interrogations and false confessions is related as are reforms in other jurisdictions that electronically record interrogations and a summary of the proposals on this topic. These two topics were considered by the subcommittees on investigation and legal representation.

The subcommittee on legal representation discussed issues relating to postconviction relief, representation of indigent defendants, professional responsibility and informant witnesses. The discussion of these topics and the summary of the subcommittee's proposals are divided between two sections. The next two sections concern redress and science. They discuss the topics these subcommittees considered and summarize their proposals.

The full text of the proposals developed by the subcommittees appear in the section of proposals, which is followed by a section covering the costs to implement these proposals. Reforms elsewhere are summarized in the following section. The final third of this report contains appendices.

EYEWITNESS IDENTIFICATION

Mistaken Eyewitnesses are a Primary Cause of Wrongful Convictions

Eyewitness error and false confessions[61] were a primary focus because of their significant role in wrongful convictions. Accordingly, a large portion of this report addresses the purported causes of investigational errors by analyzing the scientific research regarding the cause, corrective recommendations, efforts to implement these recommendations and their relative success.

Other causes of wrongful convictions have been recurrently found, but convictions based partly or completely on mistaken eyewitness identifications have been shown to comprise the vast majority of the DNA exoneration cases in the United States.[62] As importantly, this reflects data for the past 100 years as almost every study of wrongful convictions confirms that roughly two-thirds or more involve eyewitness misidentification.

In an early 20th century study of wrongful convictions, the author described the problem of eyewitness identification:

> Juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence by or on behalf of the accused . . . . [T]he emotional balance of the victim or eyewitnesses is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. . . . How valueless are these identifications by the victim of a crime is indicated by the fact that in eight of these cases the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other . . . .[63]

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[61] Of the first 273 DNA exonerations nationally, Innocence Project lists 66 of them in which a false confession or other admission contributed to the conviction. This represents almost ¼ of these cases. Of the 11 exonerations from our Commw., four are listed for a false confession or other admission as having contributed to the conviction. That number represents approximately 36% of these Pa. exonerations. Innocence Project, Know the Cases, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Aug. 1, 2011).

[62] Of these 273 exonerations, Innocence Project lists 198 of them in which eyewitness misidentification contributed to the conviction. This represents almost ¾ of these cases. Of the 11 exonerations from our Commw., nine are listed for eyewitness misidentification as having contributed to the conviction. That number represents more than 80% for these Pa. exonerations. *Id.*

[63] Borchard, *supra* note 24, at xiii.

Judge Frank elaborated on this work in the 1950s. His book studied 36 wrongful convictions and found mistaken eyewitnesses to be the leading cause of error.[64] Studies continued, including one published by a law review in 1987 that was later expanded and published as a book.[65]

> By far the most frequent cause of erroneous convictions in our catalogue of 350 cases was error by witnesses; more than half of the cases (193) involved errors of this sort. Sometimes such errors occurred in conjunction with other errors, but often they were the primary or even the sole cause of the wrongful conviction.[66]

Governmental studies have shown the same. A study of the importance of DNA evidence as an adjudicatory tool made unquestionable the claim that eyewitnesses can misidentify culprits. "In all 28 cases, without the benefit of DNA evidence, the triers of fact had to rely on eyewitness testimony, which turned out to be inaccurate."[67] These findings are echoed in a 2002 report from Illinois, which concluded from its study of wrongful convictions that identified "several cases where there was a question about the viability or reliability of eyewitness evidence."[68] A 2005 Canadian report contains an accumulation of scholarly and governmental studies and again confirms that mistaken eyewitnesses can and do lead to wrongful convictions (and, therefore, the continued freedom for the actual perpetrator).[69]

More recently, the Innocence Project has identified contributing causes in the 273 DNA exonerations and almost ¾ of them were based partly or wholly on eyewitness misidentifications.[70] The percentage varies among sources but remains significant for other samples of wrongful convictions.[71] Nationally, law enforcement has recognized this problem. The official publication of the International Association of Chiefs of Police reported on the phenomenon of wrongful convictions and emphasized the role eyewitness misidentification plays. "[T]he vast majority" of wrongful convictions "have followed clear, convincing testimony by sincere eyewitnesses, which, quite simply, turned out to be inaccurate."[72] In some cases of wrongful convictions, eyewitness testimony was the

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[64] Jerome Frank & Barbara Frank, *Not Guilty* (1957).
[65] Michael L. Radelet et al., *In Spite of Innocence* (1992).
[66] Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 60 (1987).
[67] Edward J. Imwinkelried, *Foreword* to Nat'l Inst. of Just, U.S. Dep't of Just., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial xiv (1996).
[68] George H. Ryan, Report of the Governor's Commission on Capitol Punishment 8 (2002).
[69] FPT Heads of Prosecutions Comm. Working Group, Can. Dep't of Just., Report on the Prevention of Miscarriages of Justice 42 (2004).
[70] *Supra* note 62.
[71] *E.g.*, Nw. L. Bluhm Legal Clinic, False Confessions Study: Ill. Cases, http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/FalseConfessionsStudy.html (last visited Feb. 18, 2011).
[72] Peter Modaferri et al., *When the Guilty Walk Free: The Role of Police in Preventing Wrongful Convictions*, The Police Chief (Oct. 2010), *available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2212&issue_id=102010.

only incriminating evidence presented. In other cases of wrongful convictions, eyewitness testimony was supplemented with other incriminating evidence that was later discredited, such as visual comparison of hair.[73]

Mistaken and false identifications can be made by different witnesses, whether an absolute stranger or an acquaintance. The ability to identify is often impeded by the criminal and the circumstances of the crime. Accordingly, police must be better trained to recognize which circumstances might increase the risk of mistaken identification, and investigative procedures must be improved to ensure use of the methods best suited to identify the correct perpetrator. Just as with other evidence collected, special care must also be taken so that eyewitness evidence is not subsequently contaminated.

Some Factors Affecting Eyewitness Identifications

Cross-Race Effect

It has been consistently shown that witnesses have greater difficulty identifying a person of another race than of the same race. This "cross-race effect" was one of the earliest causes of mistaken identification to be studied. It has been consistently shown to exist, though to varying degrees.

A number of recommendations have been made in literature regarding the cross-race effect, including:

- Increased number of fillers in other-race lineups
- Lineup constructed by a person of the same race as the suspect
- A blank lineup control procedure, in which a witness would first view a lineup without the suspect – if he did not identify anyone, he would be permitted to view the lineup containing the suspect
- Model jury instructions to warn jurors about the cross-race effect

Christian A. Meissner and John C. Brigham meta-analyzed[74] research relating to cross-race bias in 2001.[75] They observed that most researchers agree that the effect is "reliable across cultural and racial groups", but that "little is known regarding variables

[73] Nat'l Inst. of Just., U.S. Dep't of Just., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* xiv (1996).
[74] Meta-analysis is the statistical analysis of a collection of individual studies.
[75] Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol., Pub. Pol'y, & L. 3 (2001).

that might moderate the effect."[76] Racial attitudes and physiognomic homogeneity[77] appear unrelated to memory performance,[78] whereas interracial contact is seen to be somewhat related.[79] Among their findings was a pattern in which identifications of other-race faces show lower hits and higher false identifications than those of same-race faces.[80] If the amount of study time [of the photos] is reduced, the cross-racial effect is increased. Lengthening the time between the observation of the photo and the memory test increased the effect; whites were more likely to demonstrate the effect.[81] They concluded that the effect of racial attitudes had diminished over the previous 30 years, as the effects of interracial contact had increased.[82]

Siegfried Ludwig Sporer proposed an integrated theory to explain the cross-race effect.[83] He noted some researchers have suggested that the cross-race effect may consist not only of a cross-race recognition problem, but a "response bias", *i.e.*, a witness is more likely to indict a person not of his own race as the culprit, whether or not the person was seen at the crime scene. After reviewing multiple studies, he concluded that the cross-race effect is robust, and that evidence exists to support the theory of a "response bias."

Dr. Wells and Elizabeth A. Olson reviewed the issue of Psychology, Public Policy and Law that contained the articles by Drs. Meissner, Brigham and Sporer and recommended eyewitness procedures that would ameliorate the cross-race effect, which they define as the following: "Eyewitnesses are less likely to misidentify someone of their own race than they are to misidentify someone of another race."[84] The authors argued that the cross-race effect has been proven to exist, although the strength of it may vary, based on a number of modifying facts, including social contact, distinctive features, the extent of delay or time lapse between the crime and the lineup. While not objectionable, expert testimony on the subject would be costly and ineffective. Procedural changes can be made that would prevent mistaken identifications on the basis of the cross-race effect. These changes would attempt to prevent or minimize the cross-race effect, rather than try to correct its causes.

The New Jersey Supreme Court discussed the cross-race effect, and concluded that a model jury instruction should be drafted to address it.[85] It stated that the instruction should be given only when identification is a critical issue in the case, and there is no

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[76] *Id.* at 4.
[77] The hypothesis that some groups show less variation in physical facial features within the group than other groups.
[78] Meissner & Brigham, *supra* note 75, at 7.
[79] *Id.* at 8.
[80] *Id.* at 15.
[81] *Id.* at 19-20.
[82] *Id.* at 20-21.
[83] Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 Psychol., Pub. Pol'y, & L. 36 (2001).
[84] Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psychol., Pub. Pol'y & L. 230 (2001).
[85] *State v. Cromedy*, 727 A.2d 457, 468 (N.J. 1999).

corroborating evidence to bolster its reliability.[86] The court also stated that expert testimony on this subject would not assist a jury and therefore would be inadmissible.[87] The Model Jury Charge Committee included the following statement in New Jersey's model jury instructions, known as the *Cromedy* instruction:

> The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.[88]

In 2007, the New Jersey Supreme Court refused to extend this instruction to "cross-ethnic" identifications.[89] "[S]tudies do not provide substantial support for defendant's claim that a *Cromedy* jury instruction must be administered when a cross-ethnic identification is involved."[90]

Ebbe B. Ebbesen and Vladimir J. Konečni suggested that the outcomes of testing of the cross-racial effect are less consistent than experts report, that the effect is small, and that the size of the effect may depend upon the witness's experience with the other racial group.[91] They argued that the cross-race effect does not make cross-racial identifications inaccurate, but that they are "less accurate than within-race identifications."[92]

Stress

Kenneth A. Deffenbacher and others meta-analyzed the effect of high stress on eyewitness memory in 2004.[93] They reviewed 27 independent tests of the effect of stress

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[86] *Id.* at 467.
[87] *Id.* at 468.
[88] Model Jury Charge (Crim.), Identification: Out-of-Court Identification Only, *available at* http://www.judiciary.state.nj.us/criminal/charges/non2c031.pdf; Model Jury Charge (Crim.), Identification: In-Court and Out-of-Court Identifications, *available at* www.judiciary.state.nj.us/criminal/charges/non2c032.pdf.
[89] *State v. Romero,* 922 A.2d. 693, 701 (N.J. 2007). (Hispanic defendant and a Caucasian witness, *id.* at 695.)
[90] *Id.* at 700.
[91] Ebbe B. Ebbesen & Vladimir J. Konečni, *Eyewitness Memory Research: Probative v. Prejudicial Value*, 5 Expert Evidence 2, 16 (1996). Citing a survey of scores of cognitive and social psychologists published a decade ago, N.J. Sup. Ct. related that 90% or more found research on eight eyewitness testimonial topics to be reliable, and 70-87% of the same experts found research on nine more of these topics to be reliable. *State v. Henderson*, (A-8-08) (062218) 91 (N.J. 2011) (citations omitted). This sup. ct. ruling finds "the scientific evidence . . . both reliable and useful." *Id.* at 103. It further stated that "consensus exists . . . within the broader research community." *Id.* If so, Dr. Ebbesen would represent the minority view on a number of these topics.
[92] *Id.*
[93] Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Human Behav. 687 (2004).

on identification of perpetrators and "36 tests of eyewitness recall of details associated with the crime."[94] They noted that the research over the prior 30 years on the effects of heightened stress on eyewitness memory did not produce a consistent result.[95] The authors concluded that in experiments calculated to produce defensive responses to stimulating conditions, high levels of stress diminish the accuracy of eyewitness identification in target-present lineups.[96] Stress had no significant effect on correct rejection rates (not identifying anyone in a target absent lineup) or false alarm rates (mistakenly identifying an innocent person from a target absent lineup).[97] In sum, if the perpetrator is not in the lineup, stress should have no impact on the likelihood of a mistaken identification. However, if the perpetrator is included in the lineup, high stress can result in a failure to identify the guilty culprit or a mistaken identification of an innocent person. High stress affects the accuracy of eyewitness recall for crime-related details and seems to have a much greater negative impact on interrogative recall than on narrative or free recall.[98] They pointed out, however, that personality type can cause significant variability in the effect of stress on accuracy: neurotics lost accuracy as stress increased while emotionally stable persons showed an increased level of accuracy as stress levels increased.[99] The level of violence involved in the crime observed also varies the effect of stress.[100]

Charles A. Morgan III and others studied 509 "active-duty military personnel enrolled in military survival school training" to assess "accuracy of suspect recognition after high-stress and low-stress interrogation".[101] In either photograph displays or live line-ups conducted twenty-four hours after release from prisoner of war camp, high-stress interrogations produced accurate identification rates that were less than half of the low-stress interrogations; perhaps more significantly, the rate of mistaken identifications substantially increased in the high-stress cases.[102]

> Contrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 min, a large number of subjects in this study were unable to correctly identify their perpetrator. These data provide robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error. . . . All

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[94] *Id.*
[95] *Id.* at 689.
[96] *Id.* at 699-700.
[97] *Id.* at 701.
[98] *Id.* at 703-04.
[99] *Id.* at 703.
[100] *Id.*
[101] Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered during Exposure to Highly Intense Stress*, 27 Int'l J.L & Psychiatry 265, 266-67 (2004).
[102] *Id.* at 269, 272. The percentages of mistaken identifications were almost one-third higher for live line-ups and more than four-fifths higher for photo-spreads. *Id.* at 272.

> professionals would do well to remember that a large number of healthy individuals may not be able to correctly identify suspects associated with highly stressful, compared to moderately stressful, events.[103]

Drs. Ebbesen and Konečni related that studies of the relationship between stress and memory are inconsistent, in that multiple variables may affect stress levels, and different types of stress may affect persons differently.[104] They rejected the notion that stress follows an inverted U curve, with high and low level stress producing poorer results than medium level stress.[105] Drs. Wells's and Olson's 2003 article found that the effects of stress on memory were still subject to debate.[106]

Weapons Focus

The weapons focal effect was identified in early research. In an early meta-analysis of 19 sets of data testing involving 2,082 subjects, all from studies available prior to March 1991, Nancy Mehrkens Steblay found that weapons presence had a small, but consistent, negative effect on lineup identification accuracy.[107] The author stated that this effect is increased by longer intervals between the event witnessed and the lineup and also noted that high arousal (*e.g.*, fear) and focus of attention could accentuate the effect.[108]

The 2003 study by Dr. Wells and Olson recognized studies supporting the weapons-focus effect but added that the stress accompanying a display of a weapon by the culprit can complicate the effect.[109] A 2006 FBI study found that police officers involved in violent encounters are often affected by weapons focus, a few severely enough to experience dissociative symptoms.[110] Some officers reported visual and auditory distortions when they were victims of armed assault.[111] The report added that training and experience might help police officers overcome such a response.[112]

Lorraine Hope and Daniel Wright studied to determine if the weapons effect could be accounted for by stimulus novelty and an associated reduction in attentional capacity.[113] While the authors concluded that the novelty or unusualness of the presence of a weapon could distract attention away from the culprit's appearance and other

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[103] *Id.* at 274, 277.
[104] Ebbesen & Konečni, *supra* note 91, at 8.
[105] *Id.* at 10.
[106] Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psycho1. 277, 282 (2003).
[107] Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Human Behav. 413 (1992).
[108] *Id.* at 421-22.
[109] Wells & Olson, *supra* note 106.
[110] Crim. Just. Info. Servs. Div., U.S. Dep't of Just., *Violent Encounters: A Study of Felonious Assaults on Our Nation's Law Enforcement Officers* 70-72 (2006).
[111] *Id.* at 67-69.
[112] *Id.* at 75-76, 78.
[113] Lorraine Hope & Daniel Wright, *Beyond Unusual? Examining the Role of Attention in the Weapon Focus Effect*, 21 Applied Cognitive Psychol. 951 (2007).

peripheral activities, they suggested that it was simplistic to assign novelty as the sole cause of weapons focus.[114] Other factors, such as fear and the role a weapon may play in the individual's recognition of the event involving the weapon, could help account for the weapon focal effect.[115]

Drs. Ebbesen and Konečni challenged studies that conclude a weapons focus can detract from the witness's ability to identify the culprit.[116] "[A]n agreed-upon theory for a weapon focus effect does not exist."[117] They cautioned that the effect appears to diminish if the encounter is of a longer duration, and that studies have not quantified the duration necessary to see the drop-off occur.[118] They asserted that additional studies are needed to determine the accuracy of witnesses who said they looked at the weapon and those who looked at the perpetrator despite the presence of a weapon.[119]

Response Latency, Eyewitness Memory Strength, Retention Interval and the Forgetting Curve

To test the accuracy of an eyewitness's memory, the witness's memory strength and retention interval must be examined. The forgetting curve represents the strength of the face recognition memory over the retention interval.[120] Dr. Deffenbacher and others meta-analyzed "the effects of retention interval on the strength of a witness's memory representation for the once-seen face."[121] Their analysis confirmed that there is an "association between longer retention intervals and decreased face recognition memory".[122] They concluded that the "[r]ate of memory loss for an unfamiliar face is greatest right after the encounter and then levels off over time."[123]

Neil Brewer and others studied response latency, attempting to verify earlier studies that suggested that identifications made within the first 10 to 12 seconds of viewing resulted in highly accurate identifications.[124] The authors found that correct identifications, on average, were made faster than incorrect identifications, but that the time boundary between correct and incorrect identifications vary, and thus the 10-12 second rule is insufficient to determine accuracy of identifications. They demonstrated that two variables, retention interval and lineup size, contribute to the variability of the optimal time boundary.

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[114] *Id.* at 957-58.
[115] *Id.* at 959.
[116] Ebbesen & Konečni, *supra* note 91, at 12.
[117] *Id.* (citation omitted).
[118] *Id.*
[119] *Id.*
[120] Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139-40 (2008).
[121] *Id.* at 140.
[122] *Id.* at 147.
[123] *Id*. at 148.
[124] Neil Brewer et al., *Eyewitness Identification Accuracy and Response Latency*, 30 Law & Human Behav. 31 (2006).

Drs. Ebbesen and Konečni have suggested that retention interval varies greatly among individuals and is very easily influenced.[125] An implication that the culprit is present in a lineup sometimes influences the witness to pick someone.[126] "This analysis raises the possibility that accuracy results will depend not only on variables such as duration and retention interval but also on whether witnesses are given the opportunity to say, 'I can't remember,' or even the opportunity to indicate that they are less than completely confident."[127] The authors' own simulation studies revealed a tendency among witnesses to overestimate short event durations.[128] They added that some research suggests that at exposure durations above two minutes witnesses might begin to underestimate durations.[129]

Sex, Intelligence and Age

The sex of the witness does not affect the overall ability to identify a person, and little evidence has been found to suggest that intelligence is related to identification accuracy, except for very low intelligence.[130] No strong theory relating personality to identification accuracy has emerged. In contrast, age has consistently been found to affect performance, with the elderly and very young children doing poorer than younger adults.

A 1994 study found an own-sex bias, *i.e.*, women are better at identifying women and men are better at identifying men.[131] A partial own-age bias has also been discussed.[132] While not as strong as the cross-race effect, Daniel B. Wright and Joanne N. Stroud found that an own-age effect existed in their experiments: younger adults (ages 18-25) were better at identifying younger culprits and older adults (ages 35-55) were better at identifying older adults in lineups where the culprit is present, with an increased overall accuracy rate of 10%. When the authors tested their hypothesis against culprit-absent lineups, they found no same-age bias. "It appears that older witnesses will not be more likely than younger participants to identify an innocent young suspect, but they will be more likely to fail to identify a guilty young culprit."[133]

In a recent study of recognition memory, Matthew J. Sharps and others found that witness recall of perpetrator clothing was accurate 80.3% of the time, and that women were better than men at describing perpetrator clothing.[134] Witness recall of perpetrator

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[125] Ebbesen & Konečni, *supra* note 91, at 7-8.
[126] *Id.* at 8.
[127] *Id.* (citation omitted).
[128] *Id.* at 16.
[129] *Id.* at 17.
[130] Equivalent to that of a young child.
[131] Jerry I. Shaw & Paul Skolnick, *Sex Differences, Weapon Focus, and Eyewitness Reliability*, 134 J. Soc. Psychol. 413 (1994).
[132] Daniel B. Wright & Joanne N. Stroud, *Age Differences in Lineup Identification Accuracy: People Are Better with Their Own Ag*e, 26 Law & Human Behav. 641 (2002).
[133] *Id.* at 652.
[134] Matthew J. Sharps et al., *Eyewitness Memory in Context: Toward a Systematic Understanding of Eyewitness Evidence*, Forensic Examiner 20 (Fall 2007).

physical characteristics had a 70.6% accuracy rate. Memory for weapons varied, with an overall accuracy rate of 68.9%, although in one test, even with ideal light and optimal exposure time, most witnesses mistook a power screwdriver for a gun. Identification of peripheral hazards was extremely poor.

Additional Factors

Many other factors have been researched in an attempt to determine what causes an eyewitness to misidentify someone, including:

- Confirmation bias/tunnel vision[135]
- Passage of time since the encounter
- Duration of encounter
- Level of violence involved in encounter
- Physical circumstances of the encounter (darkness, awakened from sleep, lights in eyes)
- Perception, memory storage and recall of details – filtered by experiences, training, hopes, fears, expectations, biases, desires; self-preservation instinct, fight or flight instinct
- Time distortion
- Impact of emergency and trauma
- Information acquired after the encounter

The first fix for these variables is to make the police aware of their potential impact before deciding whether an eyewitness is accurate. At trial, these issues may occasion testimony from an expert or a jury instruction.

Proposals for change generally fall into four categories, but the major ones are procedural changes to investigations and training all the key actors in the criminal justice system on causes of error and best practices to prevent or minimize them.[136] Secondary issues involve the use of expert testimony and model jury instructions. In both the areas of eyewitness identifications and false confessions, the bulk of the reviewed recommendations are aimed at preserving the best evidence of the investigation prior to

[135] This issue will be discussed at greater length in the portion of this report relating to false confessions.
[136] *See, e.g.,* Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. Crim. L. & Criminology 807-71 (Spring 2007).

commencement of any judicial proceeding. This section of the report will describe procedural changes and training, both crucial to the investigative stage of any criminal proceeding. Where relevant, recommendations for expert testimony and jury instructions will be discussed.

Research Techniques

The literature and research in these areas are primarily the work of experimental psychologists. Historically, two groups of studies comprise the majority of the research: experimental studies that stage eyewitness encounters (frequently using college students in the roles of witness and suspect) and archival studies that review actual cases. Many of the experimental studies have been reviewed in the literature using meta-analysis for which research studies are collected, coded and interpreted using statistical methods similar to those used in primary data analysis. The result is an integrated review of findings that is more objective and exact than a narrative review.[137] Field studies, a third type of study, have not been widely done, but more are underway now. Much debate has ensued in the literature as to the validity and utility of various methods[138] studying investigative procedures, and these concerns will be noted as well.

Eyewitness Identification Procedures: Best Practices

While there have been concerns and suggestions relating to how 9-1-1 calls are answered, how crime scenes are investigated and how witnesses are initially interviewed, the bulk of curative measures discussed in the literature relate to the conduct and structure of eyewitness identification procedures, including mug books or photoarrays, composites, field identifications (showups) or lineups. Within that group of identification procedures, lineups are the most frequently discussed.

Summary of Common Best Practices Recommendations

The following recommendations summarize those practices frequently cited as the best ways to prevent mistaken identifications. These recommendations can be statutorily mandated or implemented individually by law enforcement jurisdiction. Following this section is a section describing various surveys and guidelines to implement these

[137] Meta-Stat**,** The Meta-analysis of Research Studies, http://echo.edres.org:8080/meta/ (last visited Feb. 18, 2011).
[138] Including ones in a laboratory, archival ones and those in the field.

recommendations, a section examining how states and other municipalities have adopted these recommendations, and a section that discusses the research and theory behind each individual recommendation.

Recommendation: State Police and all local and regional law enforcement agencies should adopt written eyewitness identification procedures and policies.

Recommendation: Written lineup procedures should include instructions on lineup composition: lineup fillers should match the description of the culprit, not the suspect; only one suspect should be included in each lineup; and, photo arrays and live lineups should include at least six persons.

Recommendation: Written lineup procedures should include pre-lineup instructions for the witness, including:

- The culprit might or might not be present
- The witness should not feel compelled to identify anyone
- The administrator does not know who the suspect is
- It is just as important to clear innocent persons from suspicion as to identify guilty parties
- The culprit may have changed his appearance (*e.g.*, head and facial hair)
- Police will continue to investigate regardless of whether an identification is made

Recommendation: Written eyewitness procedures should direct "blind" administration of the lineup (*i.e.*, done by one who does not know the identity of the suspect).

Recommendation: Written eyewitness procedures should direct police to obtain a statement of the witness's confidence in the identification immediately after the identification.

Recommendation: Written eyewitness procedures should direct the lineup administrator to avoid providing the witness with any post-identification feedback prior to obtaining the witness's confidence statement.

Recommendation: If a law enforcement agency chooses to use the sequential lineup method, the written procedures for this method should include the requirement of a blind administrator and a written record of the number of laps (views of the lineup) the witness uses. Also, the lineup should be presented in the same sequence on each lap.

Recommendation: The state should grant various municipalities funds to study simultaneous versus sequential lineup procedures in the field.

Recommendation: All law enforcement agencies should provide, and personnel should receive, training in their agency's written eyewitness procedures.

Recommendation: Additional training should be provided for defense counsel in capital cases.[139]

Recommendation: Showups should follow specific procedures to avoid biasing an eyewitness.

Best Practices Recommendations: Models

Jurisdictions have been establishing formal lineup procedures since the 1960s.[140] In 1998, a Scientific Review Paper for the American Psychology/Law Society proposed best practices guidelines for lineups and photospreads.[141] These recommendations were "based on psychological theory about human memory and social influence, scientific findings in eyewitness experiments, and the scientific logic of testing."[142] The recommendations relied heavily on relative-judgment theory, which holds that witnesses will pick the person in the lineup that looks most like the culprit compared to the other persons in the lineup.[143] The experimental data is comprised of studies where procedures for obtaining identifications are compared, and the logic of scientific testing analogizes a lineup to an experiment. In one well-known experiment, 200 eyewitnesses to a staged crime were shown either a lineup in which the culprit was present or a lineup where the culprit was removed and not replaced. In that experiment, 54% of the witnesses who viewed the culprit-present lineup picked the culprit from the lineup and 21% made no choice. Of the witnesses who viewed the culprit-absent lineup, only 32% made no choice, and the remainder chose a foil.[144] The leading studies showed that witnesses tend to behave as predicted by relative-judgment theory. These studies tested various procedural changes, including use of warnings that the culprit may not be present, foils similar to the description given by the witness, dual lineups (one with culprit included, one with culprit excluded) and sequential procedures.[145] When these various changes were tried, false identifications decreased again, supporting the relative judgment

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[139] *Infra* p. 167.
[140] "The earliest set of published recommendations . . . is . . . found in a 1967 article" that "outlines a joint memorandum from the Offices of the District Attorney and the Public Defender in Clark County, Nevada directed to 'all law enforcement agencies' in the county." Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Human Behav. 603, 610 (1998).
[141] *Id.*
[142] *Id.* at 612-13.
[143] *Id.* at 613, 614.
[144] *Id.* at 614-15.
[145] *Id.* at 615-17.

account. However, these measures did not generally increase accurate identifications. By treating a lineup similarly to a scientific experiment that can be contaminated, these researchers could explore methods to prevent contamination.

In May 1998, the U.S. Department of Justice's National Institute of Justice established the Technical Working Group for Eyewitness Evidence to identify those investigative procedures that can best ensure the accuracy and reliability of eyewitness evidence.[146] The resultant guide for law enforcement

> represents a combination of the best current, workable police practices and psychological research . . . This *Guide* assumes good faith by law enforcement . . . This *Guide* describes practices and procedures that, if consistently applied, will tend to increase the accuracy and reliability of eyewitness evidence, even though they cannot guarantee the accuracy (or inaccuracy) of a particular witness' testimony in a particular case. Adherence to these procedures can decrease the number of wrongful identifications and should help to ensure that reliable eyewitness evidence is given the weight it deserves in legal proceedings.[147]

Research recommendations that were incorporated into this guide include directives to avoid influencing the eyewitness, either before or after the identification; obtaining certainty statements immediately after the identification; recording live lineups, either photographically and by video; use of fillers in lineups who match the description of the perpetrator rather than the suspect; and instructions to witnesses that the culprit may or may not be in the lineup. To further implement the recommended procedures found in the guide for law enforcement that it published four years earlier, National Institute of Justice published a special report[148] in 2003 that is a law enforcement trainer's manual containing lesson plans and training materials for eyewitness interviewing procedures and eyewitness identification procedures.

A 2000 survey of eyewitness experts by Dr. Kassin and others reinforced the guidelines by finding the following issues to be reliable and in accord with their 1989 study: wording of questions, lineup instructions, pre-event expectations, post-event information, the accuracy-confidence correlation; the forgetting curve; exposure time and

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[146] Nat'l Inst. of Just., U.S. Dep't of Just., *Eyewitness Evidence: A Guide for Law Enforcement* 3 (1999) [hereinafter *Guide*]. The technical working group was composed of law enforcement representatives, prosecutors, defense counsel and academicians. *Id.* at v-vi. Six research members of the working group prepared a review of the development of eyewitness research and the process involved in developing these guidelines. Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 Am. Psychologist 581 (2000).

[147] *Guide, supra* note 146, at 2.

[148] Nat'l Inst. of Just., U.S. Dep't of Just., *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (2003).

unconscious transference.[149] The authors found lesser consensus on effects of color perception in monochromatic light, training of observers, elevated levels of stress, accuracy of hypnotically refreshed testimony and event violence. Greater consensus was found on weapons focus and hypnotic suggestibility effects.[150]

Thirteen "new" propositions were reviewed during the study, and the authors related that the following were viewed as reliable:

1) eyewitness confidence is malleable and susceptible to influence by factors unrelated to accuracy;

2) exposure to mug shots of a suspect increases the likelihood of selecting the same person in a subsequent lineup;

3) young children are more susceptible to suggestion and other social influences than adults;

4) alcohol impairs eyewitness performance;

5) eyewitnesses find it relatively difficult to identify members of a race other that their own; and

6) the risk of false identification is greater in simultaneous lineups than in sequential ones.[151]

Additionally, more than two-thirds of the experts agreed that identification accuracy is increased by the use of fillers who are a match to the witness's description of the culprit.[152] They rejected the notions that identification speed is predictive of accuracy, that true and false memories can be differentiated, or that traumatic memories can be repressed and then recovered.[153]

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[149] Saul M. Kassin et al., *On the 'General Acceptance' of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405 (2001). Questionnaires were sent to 186 prospective participants; 64 submitted data in usable form. They included individuals in the following areas: cognitive psychology (34), personality/social (17), child/developmental (6), and clinical/counseling (3). As to credentials, 62 had Ph.D.s in psychology (4 had also earned a J.D.). The authors noted that the actual respondents "constituted a highly prolific subgroup" with a mean of 17.98 publications for the respondents, versus a mean of 7.92 publications for all prospective participants. "It appears that the experts in our study could be described as a blue-ribbon group of leading researchers." *Id.* at 407. The list of experts was drawn from the membership rosters of Am. Psychol.-L. Soc'y; Soc'y of Applied Research on Memory & Cognition and the attendee lists of the 1995 and 1997 Eur. Ass'n of Psychol. & Law biennial meetings. Also used was a PsycINFO search for individuals who had published an article, book chapter or other paper on eyewitness identifications during the previous ten years and a list of names of eyewitness experts was solicited from subscribers to the PSYCHLAW listserve. *Id.*

[150] *Id.* at 413-14.

[151] *Id.* at 410-11.

[152] *Id.* at 411.

[153] *Id.*

In 2003, Dr. Wells and Olson reviewed major developments in experimental literature concerning various factors that can impact the accuracy of eyewitness identifications, including factors that relate to characteristics of the witness, the witnessed event, testimony of the witness, the lineup content, the lineup instructions and methods of testing.[154] Among the problems with the literature were "a relative paucity of theory and the scarcity of base-rate information from actual cases."[155] They opined that while information about estimator variables may be useful for assessing the chances of mistaken identification after the fact, system variable information can help determine how eyewitness identification errors can be prevented in the first place, supporting the notion that improvements in the investigative process can proactively prevent mistaken identifications from occurring.

Also in 2003, Steven Penrod reviewed research on police identification procedures to evaluate the effectiveness of police and witnesses in eyewitness identifications.[156] He determined that a number of variables could affect the rate of mistaken identifications, including witnesses who identify the suspect by guessing and the construction of the lineup. He advocated the following procedural changes: use larger lineups; use blind presentation; give strong cautionary instructions; match foils to the description of the perpetrator; collect confidence judgments; sequentially present the lineup one person at a time; and use lineups "only when there is a reasonably strong likelihood the suspect is the perpetrator."[157]

John Turtle and others attempted to summarize best practice recommendations for collecting and preserving evidence using eyewitness procedures geared toward maximizing accurate eyewitness identifications while minimizing inaccurate ones.[158] These recommendations were supported by over 20 years of research and are consistent with the National Institute of Justice's 1999 guide.[159] They recommended that police should select lineup fillers who match the description of the perpetrator as given by the witness, as long as the suspect does not unduly stand out.[160] If witness descriptions differ sufficiently, it may be prudent to use a different lineup for each witness.[161] Before the lineup, the witness should be instructed that the culprit may not be present in the lineup, and after the lineup, the investigator should obtain the witness's statement of certainty.[162] The authors advocate blind, sequential lineups.[163] "Blind" could mean that the lineup

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[154] Wells & Olson, *supra* note 106, at 277. Dr. Wells distinguished between estimator (relating to the witness & event) and system (relating to investigative procedures) variables in eyewitness identifications in earlier writings.
[155] *Id.*
[156] Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?* 18 Crim. Just. 36 (2003), *available at* http://www.americanbar.org/publications/criminal_justice_section_newsletter_home/crimjust_spring2003_eyewitness.html.
[157] *Id.*
[158] John Turtle et al., *Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case*, Canadian J. Police & Sec. Servs. 5 (Mar. 2003).
[159] *Id.*
[160] *Id.* at 9-10.
[161] *Id.* at 11.
[162] *Id.* at 11-12.
[163] *Id.* at 12-15.

administrator does not know which one is suspected or that the administrator cannot see (in the case of a photo lineup) the lineup while the witness is viewing it.[164] The authors list four situations in which sequential lineups may give less accurate results than simultaneous ones, and as such, they do not recommend using sequential lineups in those situations: the witness is a child under the age of 10; the suspect does not match the original description by the witness on a central detail; there are multiple perpetrators; and, cases of cross-racial identifications, as the ability of a witness to accurately identify a person of a different race does not improve with the use of a sequential procedure.[165]

In 2003, a survey was sent to police departments in 500 jurisdictions of various population sizes across the United States.[166] Of these, 220 surveys were returned; smaller cities and counties had the lowest return rate.[167] Most of the lineups in the survey were photographic, although the largest cities conducted more live lineups than the other jurisdictions.[168] The mean number of photographs in a photo lineup was 6.5.[169] Most of the respondents reported usually placing suspects in the middle of lineups.[170] Both sequential and simultaneous lineups were used, although overall use of sequential lineups was small.[171] Eighty-three percent of the officers selected foils on the basis of similarity to the suspect,[172] and 94% stated that they used their own judgment to determine if the lineup was fair.[173] The suspect's attorney is not present at the lineup approximately 50% of the time.[174] With regard to pre- and post-lineup instructions, 52% stated that witnesses are told that they don't have to choose anyone; 20% warn that the culprit's appearance may have changed; 26% tell witnesses to select only if they are sure; 95% say they give witnesses the option of not selecting anyone; and 86% obtain a confidence assessment.[175]

The U.S. Department of Justice's Office of Community Oriented Policing Services and Police Executive Research Forum held conferences in 2006, intended to promote effective homicide investigations.[176] The resultant report recommended law enforcement agencies to examine their current policies and compare them to the following procedures to determine if they are appropriate for their agencies:

- Instructions–All eyewitnesses should be told that the culprit may or may not be present in the lineup.

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[164] *Id.* at 13-14.
[165] *Id.* at 14-15.
[166] Michael S. Wogalter et al., *A National Survey of U.S. Police on Preparation and Conduct of Identification Lineups*, 10 Psychol., Crime & L. 69, 70-71 (2004).
[167] *Id.* at 71.
[168] *Id.* at 71-72.
[169] *Id.* at 72.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* at 73.
[174] *Id.*
[175] *Id.* at 74.
[176] James M. Cronin et al., *Promoting Effective Homicide Investigations* 1 (2007), *available at* http://www.cops.usdoj.gov/files/RIC/Publications/promoting%20effective%20homicide%20investigations.pdf.

- Double blind–Lineups should be administered by law enforcement personnel who do not know the identity of the culprit. Although implementing double-blind lineups may create operational challenges, many departments have overcome those challenges.

- One suspect per lineup–A lineup should include only one suspect.

- Number of lineup members–At least six photographs should be used in any photo array, and six persons in any live lineup.

- Sequential–To the extent possible, photographs and live lineup members should be presented sequentially to eyewitnesses.

- Number of viewings–Eyewitnesses should be limited to no more than two cycles (laps) when viewing photographs, and the photographs should be presented in the same order. The lineup administrator should record the results of each lap.

- Witness statements–Witnesses should not be coached in any manner, and any statements should be in the witnesses' own words.

- Lineup reports–Agencies should develop and use more complete lineup reports. Many agencies simply use "identification" or "no identification" in their reports. Agencies should require more specificity about the selection (*e.g.*, suspect, filler, no choice, and all members excluded), as well as level of eyewitness confidence and speed with which the identification was made, if applicable.

- Training–Investigators need training in, and written instructions for, carrying out new procedures.

- Computers–Agencies should consider using computers to arrange photo arrays, if possible.[177]

A group of researchers presented a set of recommended procedures regarding eyewitness evidence, "based on a review of current psychological literature and two guides developed for law enforcement agencies by the National Institute for Justice" from 1999 and 2003, which "are generally accepted in the field."[178] Kimberly MacLin and others suggested that investigators review certain witness and crime scene characteristics to determine the quality and accuracy of a witness's memory as follows: determine if a weapon was used; determine if the witness was under a high level of stress during the

[177] *Id.* at 55, 59.
[178] M. Kimberly MacLin et al., *The Science of Collecting Eyewitness Evidence: Recommendations and the Argument for Collaborative Efforts between Researchers and Law Enforcement* 5, *available at* http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1030&context=christian_meissner.

event and when the stress occurred; note the race of the witness and the perpetrator; determine how much time elapsed since the crime occurred; and evaluate and note the factors that may have affected the witness's view of the perpetrator.[179] When interviewing the witness, they suggested: separation of multiple witnesses to guard against influence and contamination; establishment of rapport; using open-ended questions (and avoidance of leading questions); allowing witnesses to control the direction of the interview; interviewing slowly; reinstatement of the context of the original event by returning to the scene or asking the witness to imagine being there; and cautioning witnesses against guessing.[180]

For lineup construction, they recommended: one suspect per lineup; fillers matching the verbal description of the perpetrator provided by the witness; attempt to create a "reasonable" test of the witness's memory; and selection of a person of the same race or ethnic background as the suspect to construct the lineup.[181] While administering the lineup, they advised: pre-lineup instructions to the witness that the perpetrator may not be present; that it is permissible to respond "I don't know;" that it is as important to clear an innocent person as it is to identify a guilty one; that the offender may or may not be present at the lineup; and, that there is no obligation to identify anyone.[182] They also advocated: obtaining and documenting a statement of certainty immediately following the identification; avoidance of feedback; videotaping live lineups; and documenting photo lineups.[183] They further encouraged collaboration between researchers and law enforcement to test laboratory results in the field and develop training programs for those procedures found to be scientifically valid.[184]

Best Practices and Other Reforms by State

Connecticut

Office of The Chief State's Attorney issued a protocol to Division of Criminal Justice and the law enforcement community in 2005 that incorporates double-blind procedures where practical. The protocol is taught at comprehensive and ongoing training programs that are mandated for police and other law enforcement officers. The Advisory Commission on Wrongful Convictions was statutorily directed to monitor and evaluate the implementation of double-blind administration.[185]

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[179] *Id.* at 5-6.
[180] *Id.* at 6-7.
[181] *Id.* at 8.
[182] *Id.*
[183] *Id.* at 8-9.
[184] *Id.* at 10.
[185] Appendix D, *infra* p. 263.

Florida

In 2010, Florida's Supreme Court established its innocence commission to study ways to prevent wrongful convictions, covering the topics included in this report. In an interim report issued in June 2011, the commission issued standards for state and local law enforcement to administer photographic and live lineups. Each law enforcement agency is to establish its own written policy conforming to the commission's standards. Policies must be in place and filed with the local state's attorney's office by November 1, 2011. A final report covering the remaining topics is due in 2012.

Georgia

Representative Stephanie Stuckey Benfield was the prime sponsor of Georgia House Resolution 352 (2007), which established the House Study Committee on Eyewitness Identification Procedures. The study committee reported to the General Assembly in January 2008 and recommended enactment of a statute mandating that law enforcement agencies create written eyewitness identification policies, and passage of a resolution detailing procedures that should be incorporated into policies, including: blind administration where possible; one suspect per lineup; confidence assessments; fillers matching the description of the perpetrator; specific instructions to the witness; and documentation of the results of the identification procedure. Legislation introduced to implement these reforms failed, but all of the interested law enforcement agencies met with legislators and agreed that law enforcement should be given the opportunity to address the issue. In response, the Georgia Public Safety Training Center of the Georgia Police Academy developed a training program, which was approved by the Georgia Peace Officer Standards and Training Council for their member agencies in 2008.[186]

Illinois

In 2003, Illinois enacted lineup reforms with these mandates:

- Record all lineups
- Disclose all photospreads and lineup photographs to defense during discovery
- Require the eyewitness to acknowledge that the suspect may not be in the lineup and that the witness does not need to make an identification
- Instruct the witness that the administrator may not know who is suspected
- Present suspects in a way the does not make them stand out[187]

[186] *Id.*
[187] 725 Ill. Comp. Stat. 5/107A-5.

Maryland

In 2007, Maryland enacted a statute requiring law enforcement agencies to adopt written policies relating to eyewitness identification that comply with U.S. Department of Justice standards. These written policies must be filed with Department of State Police, which is required to compile the policies for public inspection.[188]

New Jersey

Unlike our Commonwealth, New Jersey's Attorney General has sole authority over all law enforcement personnel in that state so that he could issue "Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures."[189] These procedures are similar to the 1999 National Institute of Justice guidelines, with two significant additions: the blind administration of lineups and a preference for the use of sequential lineups wherever possible.

Additionally, the New Jersey Supreme Court mandated

> that, as a condition to the admissibility of an out-of-court identification, law enforcement officers must make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results. . . . When feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared.[190]

Furthermore, the New Jersey Supreme Court has mandated a jury charge on the reliability and believability of eyewitness testimony for an out-of-court identification.[191]

Less than a month before publication of this report, New Jersey Supreme Court ruled to allow pretrial hearings to explore "relevant system and estimator variables . . . when there is some actual evidence of suggestiveness."[192] System variables are blind administration, pre-identification instructions, lineup construction, feedback, recording confidence, multiple viewings, showups, private actors, other identifications made, etc.[193] Estimator variables are stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of perpetrator, memory decay, race-bias, opportunity to view the criminal at the time of the crime, degree of attention, accuracy of prior

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[188] Md. Code, Pub. Safety § 3-506. Currently, 121 jurisdictions have filed their policies with the State Police, which only releases them via e-mail and limited to one police agency per e-mail.
[189] *Available at* http://www.nj.gov/lps/dcj/agguide/photoid.pdf.
[190] *State v. Delgado*, 902 A.2d 888, 897 (N.J. 2006).
[191] *State v. Romero*, 922 A.2d 693, 702-03 (N.J. 2007); Model Jury Charge (Crim.), Identification: Out-of-Court Identification is *available at* http://www.judiciary.state.nj.us/criminal/charges/non2c031.pdf.
[192] *State v. Henderson*, (A-8-08)(062218) 110-11 (N.J. 2011).
[193] *Id.* at 113-14.

description of the criminal, level of certainty demonstrated at the confrontation, the time between the crime and the confrontation, etc.[194] Of course, these pretrial hearings would determine admissibility of an identification. Once admitted, "courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence."[195] The ruling also allows for expert testimony "about the import and effect of certain variables" but not "on the credibility of a particular eyewitness."[196]

North Carolina

In 2007, North Carolina enacted the Eyewitness Identification Reform Act.[197] The statute requires blind administration and sequential presentation of lineups.[198] If sequential presentation is infeasible, use of a computer program or folder system is authorized.[199] Specific instructions to eyewitnesses viewing a lineup are detailed.[200] Lineup fillers should match the description of the perpetrator while ensuring that the suspect does not stand out, and only one suspect should be included in each lineup.[201] A confidence statement should be obtained at the time of the identification,[202] and lineup procedures should be documented by video, audio or in writing (in that order of preference).[203]

Ohio

Ohio's recently enacted criminal procedural reform adopts eyewitness identification reforms.[204] Both blind and blinded lineup administrators are called for, and a folder system for use of photo arrays is detailed.[205] Each witness views each folder individually.[206] For each folder, the witness must state whether or not the picture is of the perpetrator and his confidence in that identification.[207] A second viewing in the same order is permitted,[208] and all procedures, including the source of the photos, must be documented.[209] The statute requires criminal justice entities and law enforcement agencies to adopt specific procedures with the following minimum requirements:

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[194] *Id.* at 115-17.
[195] *Id.* at 111. This directive is repeated, *id.* at 123.
[196] *Id.* at 125.
[197] N.C. Gen. Stat. §§ 15A-284.50 to -284.53.
[198] *Id.* § 15A-284.52(b).
[199] *Id.* § 15A-284.52(c).
[200] *Id.* § 15A-284.52(b)(3).
[201] *Id.* § 15A-284.52(b)(5).
[202] *Id.* § 15A-284.52(b)(12).
[203] *Id.* § 15A-284.52(b)(14).
[204] Ohio Rev. Code § 2933.83.
[205] The folder system is defined to use a suspect photo, five fillers and four blank folders. *Id.* § 2933.83(A)(6)(a).
[206] *Id.* § 2933.83(A)(6)(f).
[207] *Id.*
[208] *Id.* § 2933.83(A)(6)(g).
[209] *Id.* § 2933.83(A)(6)(h).

blind/blinded administrator (unless impractical); written record; witness to be informed that the perpetrator may or may not be in lineup and that administrator does not know which one is suspected.[210] In moving to suppress, failure to comply can be used as evidence to support any claim of eyewitness misidentification; failure to comply can also be included in a jury instruction.[211] The statute affirmatively states that it does not prevent law enforcement agencies or criminal justice entities "from adopting other scientifically acceptable procedures . . . that the scientific community considers more effective."[212]

Rhode Island and Providence Plantation

A statutorily created task force unanimously recommended:[213]

- A written policy relating to eyewitness identifications for every law enforcement agency
- Blind administration of lineups
- Use of at least five fillers who generally fit the description of the perpetrator and do not unduly stand out
- Instructions in the eyewitness's most fluent language that the perpetrator might or might not be displayed and that there is no necessity to identify anyone displayed
- Immediate memorialization of the eyewitness's confidence in his selection
- No feedback about the selection should be given to the eyewitness
- Strong consideration of the use of sequential lineups
- Documentation of the identification procedure
- Incorporation of these recommendations in training by Rhode Island Municipal Police Training Academy and training all law enforcement officers in the state accordingly

[210] *Id.* § 2933.83(B).
[211] *Id.* § 2933.83(C).
[212] *Id.* § 2933.83(D).
[213] Task Force to Identify & Recommend Policies & Procedures to Improve the Accuracy of Eyewitness Identification, Final Rep. 6-19 (2010).

Texas

Based on recommendations from Timothy Cole Advisory Panel on Wrongful Conviction,[214] Texas amended its Code of Criminal Procedure to require:[215]

- Bill Blackwood Law Enforcement Management Institute of Texas to develop a model policy and disseminate training materials for eyewitness identification procedures based on best practices supported by credible research

- Law enforcement agencies to adopt a detailed, written policy for eyewitness identification procedures, which must be consistent with the B. Blackwood Law Enforcement Management Institute model or based on research addressing selection of fillers, instructions to witnesses, documentation of the outcome, administration to a person with a language deficiency and blind administration

- A review every other year of both the model policy and the policies adopted by each law enforcement agency and an update of them as appropriate

Vermont

Act No. 60 of 2007 established the Eyewitness Identification and Custodial Interrogation Recording Study Committee. The study is focused on eyewitness identification procedures for conducting lineups and audio and audiovisual recording of custodial interrogations. The committee reported that the Vermont Police Academy currently teaches enrollees the Innocence Project's recommendations to minimize the suggestibility of the lineup, and all full-time law enforcement officers are trained there.[216] Committee recommendations included the preferred use of sequential photo lineups, so long as they are coupled with blind administration.[217] If a live lineup is used, the committee recommends following the guide published by National Institute of Justice in 1999.[218]

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[214] This panel noted that erroneous eyewitness identification contributed to more than 80% of the wrongful convictions in Tex. and judicial remedies apply after potentially flawed eyewitness evidence has been presented to jurors. Timothy Cole Advisory Panel on Wrongful Convictions, Rep. to the Tex. Task Force on Indigent Defense ii, 5-6 (2010), *available at* http://www.courts.state.tx.us/tfid/pdf/FINALTCAP report.pdf.

[215] Tex. Code Crim. Proc. art. 38.20. Noncompliance with a policy won't necessarily bar admission because admissibility is controlled by Tex. R. Evid. *Id.*

[216] Rep. of the Eyewitness Identification & Custodial Interrogation Study Comm. (2007).

[217] *Id.* Fillers should match the perpetrator's description so that the suspect doesn't stand out. *Id.*

[218] *Id.* This guide doesn't mandate sequentially presenting potential suspects.

Virginia

In 2005, Virginia enacted a statute requiring Department of State Police and each local police department and sheriff's office to "establish a written policy and procedure for conducting in-person and photographic lineups."[219] Pursuant to Joint House Resolution 79 (2004), Virginia State Crime Commission studied and made recommendations regarding lineup procedures in 2005. A sample directive[220] was produced, advising law enforcement to: avoid suggestiveness; train personnel to establish uniformity and consistency; confer with Commonwealth's Attorney to determine best use of lineups and best instructions to witnesses; use blind administration; use one suspect per identification procedure; select fillers to match the witness's description of the offender; ensure that the suspect does not stand out; document the procedure; use the sequential lineup procedure; permit a second look-through of the lineup; and, obtain a certainty assessment.

West Virginia

In 2007, West Virginia enacted the Eyewitness Identification Act.[221] The act established procedures and protocols for lineup administration, including: witness instructions;[222] certainty assessments;[223] and, other documentation of the procedure and optional videotaping.[224] A task force was created[225] to develop guidelines for policies, procedures and training[226] and report to standing legislative committees.[227] Blind administration of lineups and simultaneous versus sequential lineups were among the practices to be considered.[228] The Superintendent of State Police was authorized "to create educational materials and conduct training programs . . . how to conduct lineups in compliance with" this law.[229]

Wisconsin

Wisconsin's statute mandates that each law enforcement agency adopt written policies designed to reduce eyewitness mistakes.[230] Law enforcement agencies must consider including the following specific policies: the person administering a lineup or photo array should not know the identity of the suspect; the use of sequential, not

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[219] Va. Code § 19.2-390.02.
[220] The sample directive was based in part on Va. Beach Police Dep't written policy, No. 10.08, "Eyewitness Identification Procedures" effective Nov. 15, 2002.
[221] W. Va. Code §§ 62-1E-1 to -1E-3.
[222] *Id.* § 62-1E-2(a).
[223] *Id.* § 62-1E-2(b)(3).
[224] *Id.* § 62-1E-2(b).
[225] *Id.* § 62-1E-2(c).
[226] *Id.* § 62-1E-2(d).
[227] *Id.* § 62-1E-2(f).
[228] *Id.* § 62-1E-2(e).
[229] *Id.* § 62-1E-3.
[230] Wis. Stat. § 175.50(2).

simultaneous, showings; minimization of influence of verbal or nonverbal reactions of the person administering a showing; and, documentation of the viewing procedure and results or outcome.[231]

Discussion of Specific Recommendations for Lineups

Recommendation:

Lineup fillers should match the description of the culprit, not the suspect.

Research and reasoning:

In 1998, Dr. Wells and others recommended that the suspect not stand out as being different from the fillers based on the eyewitness's description of the culprit or "other factors that would draw extra attention to the suspect."[232] Fillers should match the description of the culprit that was given by the eyewitness rather than the appearance of the suspect.[233] Where the description of the perpetrator given by the eyewitness does not fit the physical characteristics of the suspect, the fillers should be selected to match both the eyewitness's description and the suspect; where there is disagreement between the two on a specific item, they recommend use of the suspect's appearance.[234] If there is more than one witness, and their descriptions differ, separate lineups should be done for each witness.[235] Other than suggesting that six lineup members are not enough, the authors do not specifically recommend how many to have.[236]

Jennifer L. Tunnicliff and Steven E. Clark conducted two experiments to test whether suspect-matched or description-matched foil selection produced less false identifications.[237] The first experiment staged a crime; police officers constructed the lineups, which were viewed two weeks after the staged crime. The second used student candid yearbook photographs as the "crime scene"; other college students constructed the lineups, using college yearbook graduation photographs, with the lineups viewed one week after the initial viewing of the candid photographs. Despite the differences between the two experiments, correct identifications rates were the same across both experiments and both types of foil selection. If foils are selected to be very similar to the suspect, correct identifications fall substantially. While false identifications rates were higher for description-based lineups, the rate of error was consistent across foil selection methods, and these rates were too low for statistical interpretation. They concluded that in multiple

[231] Id. § 175.50(5).
[232] Wells et al., s*upra* note 140, at 630.
[233] *Id.* at 632.
[234] *Id.* at 632-33.
[235] *Id.* at 634.
[236] *Id.* at 634-35.
[237] Jennifer L. Tunnicliff & Steven E. Clark, *Selecting Foils for Identification Lineups: Matching Suspects or Descriptions?*, 24 Law & Human Behav. 231-58 (2000).

eyewitness cases, description-matched lineups should be constructed to meet each witness's description. Correct rejections were higher for suspect-matched lineups. A major issue left to further research was the question of what is "similar enough." Wells and Olson's 2003 article suggested that creating lineups with fillers who fit the description of the culprit (rather than who look like the suspect) are less likely to result in mistaken identifications, although the former method is still subject to mistakes.[238]

In 2006, Dr. Wells outlined six recommendations to improve lineup administration.[239] His first recommendation was to include only one suspect in each lineup, with known-innocent fillers completing the lineup.[240] He also suggested that the suspect should not "stand out."[241] Selection of fillers is critical, and witnesses must be cautioned that the perpetrator may or may not be included in the lineup.[242]

Heather D. Flowe and Dr. Ebbesen studied to determine if similarity of lineup members influenced the witness's identification in simultaneous and sequential lineups.[243] They predicted that fillers who are low in similarity to the culprit will lead witnesses to use a more liberal decision criterion, increasing the likelihood that a suspect who looks similar to the culprit will be identified as the culprit;[244] conversely, the more similar all the lineup members are to the suspect, the less likely the suspect will be identified as the culprit in both simultaneous and sequential lineups.[245] When a look-alike suspect who resembled the culprit was in a lineup with fillers who did not, the suspect was more likely to be chosen in both types of lineups. The rate of choosing any face was higher when the fillers were dissimilar to the culprit. When the culprit was present in the lineup, the makeup of the lineup had no effect on sequential lineups and a marginal effect on simultaneous lineups. Position in the lineup affected accuracy differently, depending on the degree of similarity of the fillers to the culprit. The authors recommended further study of this effect.[246]

Recommendation:

Give pre-lineup instructions, specifying that:

- The culprit might or might not be present
- The witness should not feel compelled to make any identification

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[238] Wells & Olson, *supra* note 106, at 287.
[239] Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2 Wis. L. Rev. 615, 622-31 (2006).
[240] *Id.* at 623.
[241] *Id.* at 623-24.
[242] *Id.* at 624-25.
[243] Heather D. Flowe & Ebbe E. Ebbesen, *The Effect of Lineup Member Similarity on Recognition Accuracy in Simultaneous and Sequential Lineups*, 31 Law & Human Behav. 33-52 (2007), *available at* http://psy2.ucsd.edu/~hflowe/similaritylhb06.pdf, at 5.
[244] *Id.*
[245] *Id.* at 29.
[246] *Id.* at 35.

- The administrator does not know which one is suspected
- It is just as important to clear innocent persons from suspicion as to identify guilty parties
- The culprit may have changed his appearance (*e.g.*, head and facial hair)
- Police will continue to investigate the incident regardless of whether an identification is made

Research and reasoning:

Nancy Mehrkens Steblay published a meta-analysis of the potential effects of lineup instructions in 1997.[247] She found a significant negative effect on identification accuracy when "biased" instructions were given to the witness, such as a statement or strong implication that the culprit is in the lineup or a failure to offer the option of not choosing, especially in non-target lineups.[248] Use of the recommended instruction "might or might not be present" reduced mistaken identification rates by 41.6% in lineups in which the culprit was removed, and accurate identifications rates in lineups in which the culprit was present were only reduced by 1.9%. This effect occurred across photo, live and video displays, with no difference between simultaneous and sequential lineups or after a time delay between witnessing event and identification procedure.

Dr. Wells and others reviewed studies indicating that a "might or might not be present" instruction to the eyewitness can reduce identifications when the culprit is absent from the lineup but has no impact when he is present in the lineup. In one study, 78% of the witnesses selected someone even though the culprit was absent from the lineup. When given the instruction that the culprit might not be in the lineup, the rate dropped to 33% false identifications. The instruction appears to have decreased, but not eliminated, the tendency of witnesses to pick someone, even if the culprit is not present. They recommended that eyewitnesses should be explicitly told that: the suspect might not be present in the lineup; they should not feel they must make any identification; and, the administrator does not know who is suspected.

Steve D. Charman and Dr. Wells questioned the wisdom of using the instruction that the culprit's appearance may have changed since the time of the crime.[249] They said that no research supported this instruction when it was earlier incorporated into guidelines that were given to law enforcement agencies;[250] it appears to be based on the assumption that it may reduce missed identifications when the culprit is present in the

[247] Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 Law & Human Behav. 283 (1997).
[248] *Id.* at 294.
[249] Steve D. Charman & Gary L. Wells, *Eyewitness Lineups: Is the Appearance-Change Instruction a Good Idea?*, 31 Law & Human Behav. 3 (2007).
[250] *Id.* at 4.

lineup.[251] Although various proposed lineup improvements have been directed at reducing false identifications, "[n]o system-variable intervention has yet shown that it can reliably increase the rate of accurate identifications (reduce miss rates) from culprit-present lineups."[252] The appearance-change instruction increased false identifications while significantly decreasing identifications of culprits in target-present lineups; overall, while more identifications were made, accuracy did not increase.[253] Study participants reported less confidence in their choices, and took more time to make their choices when they received the appearance-change instruction.[254]

Kenneth A. Deffenbacher and others tested the hypothesis that familiarity gained by mug shot exposure to a previously unfamiliar face would influence a witness to identify that person as the culprit at a subsequent lineup, thus making the identifications less reliable.[255] Based on prior research the authors concluded that "[d]issociations between recognition and awareness of context are common." The reported results were consistent with their hypothesis. The effect of increasing false identifications was significantly greater than the loss of correct identifications.

Drs. Charman and Wells studied to determine if witnesses could recall and identify a pre-identification instruction that the culprit may or may not be in the lineup.[256] The authors found that 82.5% of witnesses who received the cautionary instruction were able to recognize the receipt of the instruction, and 84.6% could identify the specific instruction received.[257] The authors further found that witnesses who received the cautionary instruction underestimated its influence compared to those witnesses who did not receive the instruction but who accurately estimated its influence.[258]

Recommendation:

A "blind" administrator (*i.e.*, one who does not know the identity of the suspect) should administer the lineup.

Research and reasoning:

In 1998, Dr. Wells and others recommended that that the person conducting the lineup should not be aware of which member of the lineup is suspected (double-blind administration).[259] At the time, the authors were unaware of any studies indicating that

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[251] *Id.* at 5.
[252] *Id.* at 9.
[253] *Id.* at 17-18.
[254] *Id.* at 19.
[255] Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 Law & Human Behav. 287 (2006).
[256] Steve D. Charman & Gary L. Wells, *Can Eyewitnesses Correct for External Influences on Their Lineup Identifications? The Actual/Counterfactual Assessment Paradigm*, 14 J. Experimental Psychol.: Applied 5, 15 (2008).
[257] *Id*.
[258] *Id.* at 16-17.
[259] Wells et al., *supra* note 140, at 627-29.

lineup administrators influenced identifications by eyewitnesses in actual cases but cited a case in which "there seems to be no other explanation" for the redundant selection of different persons that the administrator suspected.[260] This recommendation was based on observations in experiments of certain behaviors by administrators that may unintentionally encourage false identifications, including: subconscious facial expressions and other non-verbal cues; remarks that direct the witness's attention to the suspect; and. comments of positive reinforcement, *e.g.,* "you got him," after the identification that can falsely enhance witness confidence.[261]

In a 2004 article, Ryann M. Haw and Ronald P. Fisher noted that there is considerable police resistance to blind administration of lineups, on several grounds, including the implication that lineup administrators cannot conduct a fair lineup, concerns that inexperienced persons may conduct the lineup and the feasibility of doing so in small police departments.[262] Researchers are reluctant to endorse sequential lineups without blind administration, as they fear it would create a situation more susceptible to intentional and unintentional manipulation.[263] They proposed an alternative technique that minimizes the contact between the administrator and the eyewitness, so that the administrator has limited opportunities to convey his knowledge or unintentional behavior.[264] In this study, photo lineups were used.[265] To minimize contact between the administrator and the witness, the authors conducted the experiment as follows: the administrator played recorded lineup instructions for the witness, then gave the witness written instructions, the photo array, and a decision form.[266] The administrator sat in a chair 3-5 feet to the side and slightly behind the witness, out of the witness's direct view.

> The lineup administrator remained in the room and could view the witness to ensure that he or she followed the proper procedure; however, the witness could not see the administrator directly while performing the identification task. If the witness violated the procedure or asked a question, the lineup administrator would tell the witness to review the written instructions and follow the procedure.[267]

This study found that for simultaneous lineups there were more false identifications when there was a high level of contact (30%) than when there was a low level of contact (3%), while there was no difference for sequential lineups, suggesting that false identifications in simultaneous lineups could be reduced by the use of a low contact format.[268] In lineups that do not contain the culprit, 18% choose the "I do not know" response in sequential lineups compared to the 5% who do so in simultaneous

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[260] *Id*. at 628.
[261] *Id*.
[262] Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1110-11 (2004).
[263] *Id.* at 1106.
[264] *Id.* at 1107.
[265] *Id.*
[266] *Id.* at 1108.
[267] *Id.*
[268] *Id.* at 1108-09.

lineups,[269] reinforcing the theory that sequential lineups produce fewer false identifications. Consistent with Dr. Steblay and others' 2001 findings, there was no significant difference in the number of correct identifications in either format (sequential v. simultaneous) or form of contact (high v. low). However, there were more misses (failure to identify the culprit when present in the lineup) in low contact situations (18%) versus high contact situations (7%).[270] Unlike the tradeoff between sequential and simultaneous lineups found in Dr. Steblay and others' research, it appears that low contact administration yields less "false identifications with no apparent influence on hits."[271]

Amy Bradfield Douglass and others endorsed double-blind photospreads and recommended that different investigators be used for each eyewitness in multiple eyewitness situations.[272] They studied the effect of an eyewitness's confidence on a photospread administrator who subsequently conducts a lineup for a second witness to the same event. The authors cited research indicating that photospread administrator bias affects sequential procedures and not simultaneous ones. The experiment was designed so that the photospread administrator did not know the identity of the suspect. Photospread administrators transmitted identification cues to the second eyewitness when the first eyewitness displayed low confidence in selecting a photograph. The authors hypothesized that a photospread administrator may perceive the identification by a witness with low confidence as difficult, and then subconsciously try to "help" the second witness with the difficult task. A second experiment further supported that interpretation.

Recommendation:

Immediately after an identification is made, a statement of the witness's confidence in the identification should be obtained.

Recommendation:

Prior to obtaining a statement of the witness's confidence in the identification, post-identification feedback should not be provided to the witness.

Research and reasoning:

These are two interrelated points. The first is that a witness's personal assessment of confidence[273] is often an incorrect measure of accuracy. The second is that if a witness is told that he selected the right person, this might inflate the witness's confidence by the time of trial and cause the witness to remember more of the event than he can accurately do so. This section focuses first on the research on the latter point. In the 1998

[269] *Id.* at 1109.
[270] *Id.*
[271] *Id.* at 1110.
[272] Amy Bradfield Douglass et al., *A Problem With Double-Blind Photospread Procedures: Photospread Administrators Use One Eyewitness's Confidence to Influence the Identification of Another Eyewitness*, 29 Law & Human Behav. 543 (2005).
[273] How certain he is that the identification is accurate.

recommendations by Dr. Wells and others, they concluded that eyewitness confidence could be artificially increased with positive feedback about the witness's identification or information about other eyewitnesses' identifications.[274]

Amy L. Bradfield and others investigated the correlation between eyewitness certainty and identification accuracy.[275] They too recognized that other factors, not under the control of the justice system, affect the strength of the certainty-accuracy relation; however, they identified variables affecting the certainty-accuracy relation that are under the control of the justice system and can be addressed through that system.[276] Prior studies have shown that post-identification feedback inflates retrospective certainty reports.[277] They concluded "[c]onfirming feedback diminished the strength of the relation between retrospective certainty and accuracy by inflating the retrospective certainty of inaccurate witnesses but not the retrospective certainty of accurate witnesses".[278] Confirming feedback resulted in witnesses reporting "having a better view of the culprit, paying more attention to the video, having a better basis for the identification, more easily making their identification, being more willing to testify, and having a clearer image of the culprit's face in their mind".[279] The test witnesses also reported that they had a better ability to make out details of the culprit's face.[280] Feedback did not significantly affect reports on how long the test witnesses took to make their identifications "or their general ability to recognize strangers seen on only one prior occasion."[281] In view of the results, the authors made two procedural recommendations: double blind testing, in which the person administering the lineup does not know which person is suspected, or using other techniques that keep the investigating officer from influencing the witness;[282] and collection of certainty reports immediately after the identification, including information regarding recollections of view and attention paid.[283]

Dr. Wells and others studied the effect on witness' confidence in their identifications of delaying post-identification feedback or the confidence assessment, in each case, by 48 hours.[284] Neither significantly moderated the post-identification feedback effect.[285] The authors cautioned that feedback must therefore be avoided at the time of the identification and that the eyewitness's confidence should be assessed at that time as well; otherwise, other factors could influence the eyewitness's confidence after the fact.[286] Confirming feedback also lead witnesses "to recall their view as having been

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[274] Wells et al., *supra* note 140, at 624-26.
[275] Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112 (2002).
[276] *Id.* at 112-13, 114.
[277] *Id.* at 113.
[278] *Id.* at 116.
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.* at 118.
[283] *Id.* at 119.
[284] Gary L. Wells et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, 9 J. Experimental Psychol.: Applied 42 (2003).
[285] *Id.* at 42, 49.
[286] *Id.* at 50, 51-52.

better, . . . having paid more attention . . . , having been better able to make out details of the culprit's face," and several other stronger clarity of recall effects.[287] "[C]onfirming feedback leads eyewitnesses to be more willing to testify and report that they have good abilities to recognize strangers."[288] The authors concluded:

> The confidence that eyewitnesses express in their identifications is a primary determinant of whether triers of fact will believe that the identification was accurate . . . . We observed very strong effects of postidentification feedback not only on eyewitness confidence but also other factors that are known to affect the perceived credibility of eyewitness identification testimony, such as how good the witness says his . . . view was of the culprit and how much attention they were paying at the time . . . . [W]e found no support for the contention that either delayed feedback or delayed measures moderates these very strong effects. Recommendations for double-blind lineup procedures and securing confidence statements at the time of the identification (prior to feedback) appear to be well-founded.[289]

Drs. Douglass and Steblay meta-analyzed 14 experimental tests on the effects of post-identification feedback, which included 2,477 participant-witnesses.[290] They found that a simple confirming feedback statement caused witnesses to "inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general", and that this effect is consistent and robust. Retrospective certainty, opportunity to view the perpetrator and attention paid to the event were significantly inflated. Participants reported that they had a significantly better basis to identify, greater clarity of the perpetrator's image in mind, greater ease of identification, needing less time to identify, better memory for strangers' faces and greater trust in the memory of another witness with a similar experience. Accordingly, they recommended: no feedback to the eyewitness on his identification; using a blind lineup administrator; thoroughly recording the lineup process; and, obtaining eyewitness reports, including confidence reports, immediately after the identification.[291]

Jeffrey S. Neuschatz and others examined whether the effect of post-identification feedback on confidence could be minimized.[292] The first method they considered to reduce the effect was to create suspicion on the part of the witness as to the lineup administrator's motives, in an attempt to motivate them to scrutinize the feedback rather than accept it at face value. Their experiment revealed that the inflation of certainty caused by feedback is eliminated or significantly reduced with the introduction of

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[287] *Id.* at 50.
[288] *Id.*
[289] *Id.* at 51.
[290] Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 Applied Cognitive Psychol. 859 (2006).
[291] *Id.*
[292] Jeffrey S. Neuschatz et al., *The Mitigating Effects of Suspicion on Post-Identification Feedback and on Retrospective Eyewitness Memory*, 31 Law & Human Behav. 231 (2007).

suspicion, either immediately or after a one-week retention interval. The second method studied was the "confidence prophylactic effect," in which a post-identification confidence assessment is made prior to receipt of any feedback. The authors found that the confidence assessment was effective when made immediately after the identification, but was not after an interval of one week.

Drs. Charman and Wells studied to determine if witnesses could recall and identify any post-identification feedback they received, and if they were capable of assessing its impact on their confidence in their identifications.[293] The authors found that 80.8% of witnesses who received confirming feedback were able to recognize the receipt of feedback,[172] and 90.3% could identify the specific feedback received.[294] They also found that witnesses who received feedback accurately estimated its influence compared to witnesses who did not receive the feedback but overestimated its influence.[295]

Concerning post-event information, Drs. Ebbesen and Konečni wrote that there is no consistent theory to predict "under what circumstances witnesses" will misattribute the source of a memory.[296] Dr. Ebbesen later argued that for post-event misleading information studies to be generalized for use in expert testimony, it must be determined whether there are motivational differences between laboratory witnesses and real-world witnesses.[297] For example, in a laboratory study, a witness may make a "true" memory error or may make a strategic error, often privately recalling correctly but publicly responding with the answer the individual believes the experimenter is seeking.[298] A real-world witness may be reluctant to testify out of fear of retribution and make such a strategic error.[299] Additional factors that may affect the impact of post-event information are the credibility or perceived expertise of the source, the strength of the witness's original memory, and the similarity of the content of the original information and the misleading information.[300]

Various researchers have observed that the correlation between witnesses' confidence in their identifications and the accuracy thereof is weak, and that conclusions about a witness's accuracy should not be based on how confident the witness appears. Dr. Wells and others reviewed a number of studies and surveys and concluded that "there is a substantial, cross-cultural belief that confidence predicts accuracy."[301] Studies involving mock juries have also indicated that juries are more likely to believe an eyewitness has made a correct identification if the eyewitness expresses a high level of

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[293] Charman & Wells, *supra* note 256.
[172] *Id.* at 10.
[294] *Id.* at 11.
[295] *Id.* at 16.
[296] Ebbesen & Konečni, *supra* note 91, at 2, 13.
[297] Ebbe B. Ebbesen, *Why We Cannot Generalize Conclusions from Source Misattribution (or Misleading Post-Event Information) Studies to Actual Crime Situations* (draft in progress Sept. 2001), www.psy.ucsd.edu/~eebbesen/Misleading.html.
[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] Wells et al., *supra* note 140, at 620.

confidence in it.[302] For these reasons, the authors argued that understanding the correlation between confidence and accuracy is extremely important in preventing wrongful convictions.[303] They cited studies suggesting "that witnesses who are highly confident are somewhat more likely to be correct as compared to witnesses who express little confidence."[304] In some of the studies they reviewed, "findings indicate that, when limited to witnesses who make positive identifications, confidence appears to be a modest predictor of accuracy, whereas, among witnesses who reject lineups, confidence appears to be very weakly related to accuracy." Other studies showed a weak correlation between accuracy and confidence. The authors said that this topic is ideal for meta-analysis, which had recently been done.[305]

Dr. Wells and others recommended that "[a] clear statement should be taken from the eyewitness at the time of the identification and prior to any feedback as to his or her confidence that the identified person is the actual culprit."[306] They suggested that a witness who shows a higher level of confidence at trial than at the time of identification might have been influenced by factors other than memory.[307] In his 2006 law review article, Dr. Wells reiterated his support for assessing confidence immediately after the identification, arguing that "[j]urors have a right to expect that an eyewitness's expression of confidence in an identification is based purely on the eyewitness's independent recollection."[308]

Drs. Ebbesen and Konečni argued that as to the confidence-accuracy correlation or lack thereof, an individual's overall strength of memory for people and faces may be a more significant indicator of accuracy than other situational factors, and that the witnesses chosen to testify are usually those expressing the most confidence.[309] Factors such "as racial similarity, stress, duration" and other factors should be "examined separately for" both "confident and non-confident identification responses."[310] Dr. Ebbesen expressed misgivings about the efforts of experts to generalize research regarding the confidence-accuracy correlation.[311] He argued that the underlying theory and methodology of most memory research fails to accurately assess the confidence-accuracy correlation.[312] In a real-life situation, a defendant's position that the witness identified the wrong person represents the proposition that the witness was presented with a target-absent lineup and chose an innocent suspect.[313] Some research in

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[302] *Id.* at 620-21.
[303] *Id.* at 621.
[304] *Id.* at 622.
[305] *Id.* at 621.
[306] *Id.* at 635.
[307] *Id.*
[308] Wells, *supra* note 239, at 631.
[309] Ebbesen & Konečni, *supra* note 91, at 14.
[310] *Id.*
[311] Ebbe B. Ebbesen, *Some Thoughts about Generalizing the Role that Confidence Plays in the Accuracy of Eyewitness Memory* (Nov. 3, 2000), http://psy2.ucsd.edu/~eebbesen/confidence.htm.
[312] *Id.*
[313] *Id.*

the late 1990s indicated that the confidence-accuracy correlation for witnesses who have identified someone is stronger than that for a witness who chose no one, and that conclusions about the confidence-accuracy relationship should focus on choosers only.[314]

Dr. Ebbesen further argued that many variables may affect a witness's level of confidence, which is not considered in some memory research, such as situational factors, witness motivation and information.[315] His primary complaint appeared to involve the methodologies used in memory research and the way the research has been generalized.[316] He postulated that in actual settings, police and prosecutors tend to use only the most confident witnesses.[317] He added that studies should examine the other purported factors affecting the reliability of eyewitness identifications to determine what effect they have on a confident witness's memory.

> [I]t is a mistake to believe that the results of research that is currently being done on eyewitness memory and confidence can help jurors or experts improve their ability to tell accurate from inaccurate witnesses. Fortunately, this is not a major problem because for the huge majority of cases, decisions about guilt are made on the basis of the totality of the evidence against the defendant and not on the size of the correlation between confidence and accuracy.[318]

D. Steven Lindsay and others examined investigators' assessments of witness accuracy, which may influence subsequent investigative efforts, and evaluated the correlation between witness confidence and accuracy using college students to play the roles of investigators and witnesses.[319] They found that good witnessing conditions can lead to higher confidence and more accuracy, especially if the identification is made shortly after the witness views the target. Good witnessing conditions yield significantly more accurate identifications and higher self-confidence assessments; investigators' confidence overall, as well as in the witness's accuracy is significantly higher in good witnessing conditions but not in poor conditions. The investigators were biased toward believing witnesses to be accurate, as the investigators identified 22% less inaccurate identifications compared to accurate identifications. Based on these results, the authors supported the practice of obtaining confidence assessments from witnesses immediately after the identification.

Dr. Wells and Olson stated that conditions have been "found in which eyewitness certainty might be more closely related to eyewitness identification accuracy than once thought, especially when external influences on eyewitness certainty are minimized"

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[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] *Id.* "[T]he legal system is likely to ignore witnesses whose confidence is weak. Although we have no research that assesses the average cutoff point used by the legal system . . . ." *Id.*
[318] *Id.*
[319] D. Stephen Lindsay et al., *Witnessing-Condition Heterogeneity and Witnesses' Versus Investigators' Confidence in the Accuracy of Witnesses' Identification Decisions*, 24 Law & Human Behav. 685 (2000).

(*e.g.*, eliminating reinforcing feedback).[320] They noted "recent" (pre-2003) studies that correlated speedier identifications with greater accuracy; one study had shown that an identification made within 10-12 seconds is 90% accurate compared to 50% accuracy for those taking longer to identify.[321]

With respect to the relationship between confidence and accuracy, Bruce W. Behrman and Regina E. Richards compared an archival study to a similar laboratory study in 2005.[322] For the archival study, the authors reviewed case files from the Sacramento City Police Department and several northern California counties.[323] They reviewed studies that have shown false identifications to be associated with more deliberative, reflective processes and a greater degree of cognitive effort than accurate memories and that accurate memories tend to be more automatic, with less conscious effort. The witnesses were divided into two groups: those who made a spontaneous choice with little cognitive effort and those who selected a person only after a more reflective process of comparison and elimination. A total of 461 identification attempts were analyzed; all were single suspect lineups and all were initial identification procedures (*i.e.*, the witnesses had not previously been exposed to an identification procedure with the same suspect). Accurate identifications were made quickly and automatically with verbal confidence and without elimination strategies. No witnesses made quick, false identifications. Attempting to confirm the findings of the archival study, the authors structured the laboratory study to replicate the archival study as closely as possible. They found remarkable similarity between the two studies. In both cases, witnesses with high levels of certainty or who made quick decisions without eliminative processes were unlikely to select an innocent person from a lineup. Their study also found that 2.5% of the witnesses who made a choice with high confidence selected an innocent foil.[324]

Neil Brewer and Dr. Wells researched the effects of lineup instructions and foil similarity on the confidence-accuracy relationship.[325] They found a positive correlation between high confidence identifications and accuracy for persons who make identifications when there are unbiased instructions[326] and when the confidence level is assessed immediately after the identification. They cautioned that this positive correlation should not be applied in courtroom situations. "[I]dentification confidence expressed in the courtroom (and not previously recorded at the time of the identification)

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[320] Wells & Olson, *supra* note 106, at 291.
[321] *Id.* at 284.
[322] Bruce W. Behrman & Regina E. Richards, *Suspect/Foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis*, 29 Law & Human Behav. 279 (2005).
[323] Some of these cases were previously studied by Dr. Behrman and Sherrie L. Davey in an archival study, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 Law & Human Behav. 475, 479 (2001).
[324] These were initial identifications, with confidence assessments obtained immediately after the identification procedure.
[325] Neil Brewer & Gary L. Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity and Target-absent Base Rates*, 12 J. Experimental Psychol.: Applied 11 (2006).
[326] The perpetrator may or may not be present. *Id.* at 14, 16.

should be ignored."[327] The authors suggested that this correlation might be of value to the police investigative process, in that "knowing that an unconfident identification from a particular witness has, in many conditions, a low probability of being accurate should raise serious doubts about the offender's identity in the minds of the investigating police."[328]

Recommendation:

The Commonwealth should fund field studies by various municipalities of simultaneous versus sequential lineup procedures.[329]

Research and reasoning:

There have been numerous calls to adopt blind, sequential lineups as the preferred method of conducting lineups, which the research generally supports as capable of reducing the number of false identifications. Few field studies of this have been conducted. The first major study, which occurred in Illinois, is surrounded by controversy. A few other field studies have reported successful use of sequential lineups, but many researchers agree that further field studies are needed.

A great deal of the debate surrounding the use of sequential[330] versus simultaneous[331] lineups involves the causes, strength and authenticity of the sequential effect. For the most part, laboratory studies have found that sequential lineups can reduce the number of false identifications in lineups in which the culprit is present, with a small degree of loss of correct identifications. Efforts to reproduce that effect in the field have had mixed results. Part of the inconsistency of field results can be attributed to variations in the methodologies used, including a failure to apply a standard protocol for the lineup comparisons.

The theory of how witnesses view a lineup is important to determine how to structure a lineup that will result in the most correct identifications and the least false ones. Dr. Wells first proposed that witnesses viewing a simultaneous lineup may employ "relative judgment"[332] to determine who best resembles their memory of the culprit, thus leading to false identifications on the basis of who in the lineup looked most like the culprit.[333] Proposing instead that signal detection theory best explains how false identifications occur, Dr. Ebbesen has disputed that theory. In his view, use of a sequential lineup causes a witness to experience a "criterion shift", *i.e.*, because the witness is forced to view one lineup member at a time, the witness may use stricter criteria to determine if a particular person matches his memory of the culprit. For this

[327] *Id.* at 25.
[328] *Id.*
[329] Alternatively, it could simply await the outcome of field studies elsewhere.
[330] Showing the lineup to the witness one photograph or person at a time.
[331] Showing the full lineup to the witness all at once.
[332] Comparing lineup members to each other.
[333] Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. Applied Soc. Psychol. 89 (1984).

reason, sequential presentation reduces the number of false identifications, but may also increase the number of times when the witness fails to identify a culprit who is present in the lineup.

Dr. Wells co-developed the sequential lineup procedure.[334] In December 2001, he discounted the importance of the presentation issue:

> I think that it is unfortunate that the sequential procedure has come to dominate so much of the discussion regarding lineup procedures. Most of my research and writing over the years has been addressed at problems with lineup procedures that are independent of the simultaneous versus sequential lineup issues. Regardless of whether one uses a simultaneous or sequential procedure, there are other important problems with lineups that have to be addressed. These other problems include: instructions to eyewitnesses, the selection of lineup fillers, how witness certainty is assessed, how to eliminate inadvertent influences from the lineup administrator, what records must be kept, and so on. . . . As for the sequential lineup itself, I recommend the sequential lineup when it is properly conducted (*e.g.*, using double-blind procedures). Overall, I believe that the scientific literature shows that the sequential lineup, although perhaps a conservative test, helps to make the identification evidence more reliable.[335]

In 1998, Dr. Wells and others supported the use of sequential lineups but considered it important that they be coupled with blind administration to reduce the risk of inadvertent cues leading an eyewitness to falsely identify an individual.[336] Studies showed that sequential presentations are superior to simultaneous presentations in that "the sequential procedure produces a lower rate of mistaken identifications (in perpetrator-absent lineups) with little loss in the rate of accurate identifications (in perpetrator-present lineups)."[337] Additionally, Dr. Wells cited the 2001 meta-analysis by Dr. Steblay and others in support of his position.[338]

Dr. Steblay and others meta-analyzed accuracy rates in sequential and simultaneous lineups.[339] Her team analyzed 23 papers, which presented 30 tests that included 4,145 participants, in which an experimental study compared sequential to simultaneous lineups and provided a statistical test of lineup presentation and identification accuracy.[340] The vast majority (93%) of the studies involved photo lineups,

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[334] Gary L. Wells, *You Asked About the Sequential Lineup: Could You Read This First?* (Dec. 2001), www.psychology.iastate.edu/faculty/gwells/Youaskedaboutsequential.htm.
[335] *Id.*
[336] Wells et al., *supra* note 140, at 640.
[337] *Id.* at 639.
[338] Wells, *supra* note 334.
[339] Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 Law & Human Behav. 459 (2001).
[340] *Id.*

of which 67% consisted of six photographs.[341] This study has been the cornerstone of the argument that sequential presentation is superior to simultaneous and has been instrumental in stimulating further research and writing on the subject.

This meta-analysis found that if a perpetrator is present in the lineup, simultaneous lineups are more likely to result in the perpetrator being correctly identified, but if the perpetrator was not present in the lineup, simultaneous lineups were more likely to produce a false identification.[342] In short, simultaneous lineups appear to capture more criminals, but are also more likely to falsely identify an innocent person because those with weaker memories can more easily guess via relative judgment for this method.[343] However, moderator effects suggest that the extent of this quandary is insignificant because those effects reduce the relative advantage simultaneous lineups have in target-present lineups.[344] "Under the most realistic simulations of crimes and police procedures, (live staged events, cautionary instructions, single perpetrators, adult witnesses asked to describe the perpetrator), the differences between the correct identification rates for simultaneous and sequential lineups are likely to be small or nonexistent."[345] They conceded that not enough research has been done for cases involving multiple perpetrators and suspects or child witnesses to determine if any procedure is superior for those cases.[346]

Specifically, in target-present lineups, this meta-analysis found that correct identifications were 15% more likely in simultaneous lineups, false rejections were 20% fewer in simultaneous lineups, and an incorrect choice of foil was not significantly different in the two lineup procedures.[347] In target-absent lineups, correct rejections of the lineup are 23% more likely in sequential lineups, and false choices are also 23% less likely.[348] When a suspect is included "in the lineup that closely matches the description of the perpetrator", sequential lineups are 18% less likely to result in a false identification of that person as the perpetrator.[349]

With respect to a witness making any choice from a lineup in target-present lineups, 74% of witnesses identify someone in a simultaneous lineup, while 54% do so in a sequential lineup.[350] In both types of lineups, choosers are correct approximately two-thirds of the time, and make a mistaken choice one-third of the time.[351] In target-absent

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[341] *Id.* at 461.
[342] *Id.* at 464.
[343] Gary L. Wells, *Does the Sequential Lineup Reduce Accurate Identifications in Addition to Reducing Mistaken Identifications? Yes, but . . .*, www.psychology.iastate.edu/faculty/gwells/SequentialNotesonlossofhits.htm.
[344] Steblay et al., *supra* note 339, at 470.
[345] *Id.* at 471.
[346] *Id.*
[347] *Id.* at 463.
[348] *Id.*
[349] *Id.* at 463-64.
[350] *Id.* at 464.
[351] *Id.*

lineups, 51% of witnesses choose someone from a simultaneous lineup, while 28% do so from a sequential lineup.[352] This analysis seems to suggest that previous research had exaggerated the difference in effect between sequential and simultaneous lineups:

> The more realistic the stimuli used in the research, the smaller the difference in correct identification rate produced by the simultaneous and sequential lineup procedures. As experimental conditions become more realistic, the results increasingly approach the pattern of results frequently attributed to lineup procedures: sequential lineups result in approximately the same rate of correct identification and significantly lower rates of false identification than simultaneous lineups.[353]

A potential means of defeating the use of relative judgments in viewing simultaneous lineups was suggested by Jennifer E. Dysart and R. C. L. Lindsay, who experimented to determine if asking witnesses certain questions prior to viewing the lineup would affect accuracy.[354] Dr. Dysart had investigated the effects of delay on identification accuracy; her study showed that simultaneous lineups have a high correct rejection rate comparable to that of sequential lineups.[355] Drs. Dysart and Lindsay experimented to determine how this result occurred. The authors concluded that the standard warning, "the culprit may or may not be present in the lineup," coupled with a memory questionnaire asking about the clarity of the witness's memory of the criminal's face, the witness's confidence level regarding his ability to identify the culprit in the lineup, and the witness's confidence that he will be able to realize that the guilty person is not in the lineup if shown a lineup of all innocent people, "directs" witnesses to use an absolute judgment strategy in simultaneous lineups. This leads to decreased mistaken identifications equivalent to those found in sequential lineups.

Drs. Ebbesen and Flowe rejected the relative judgment model as the correct model for the behavior of eyewitnesses viewing a simultaneous lineup.[356] They argued that witnesses may "set 'absolute' degree-of-match criteria in both sequential and simultaneous lineups", and offered an alternative explanation for the findings that have been used to support the relative judgment theory.[357] They stated that in real world settings, individual memory factors in witnesses (*e.g.*, how well the witnesses learned the culprit's face and their confidence level) affect the criteria determining if a member of the lineup matches their memory of the culprit, and that such criteria is higher for sequential versus simultaneous lineups. Position in the lineup effects choice rates in sequential lineups. The authors' simulation study indicated that both innocent suspects and culprits are less likely to be chosen if they are in later positions. The observation suggests that witnesses have strict criteria for selecting the first person present, which may loosen as

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[352] *Id.*
[353] *Id.* at 469-70.
[354] Jennifer E. Dysart & R. C. L. Lindsay, *A Preidentification Questioning Effect: Serendipitously Increasing Correct Rejections*, 25 Law & Human Behav. 155 (2001).
[355] A high, correct rejection rate translates to a low rate of mistaken identifications.
[356] Ebbe B. Ebbesen & Heather D. Flowe, *Simultaneous v. Sequential Lineups: What Do We Really Know?*, http://psy2.ucsd.edu/~eebbesen/SimSeq.htm.
[357] *Id.*

the lineup continues. If this theory is correct, the use of sequential lineups could result in a reduction in the number of guilty culprits identified, along with a decrease in false identifications. They suggested that much empirical work should be done to determine what judgment processes witnesses apply before policymakers can compare the accuracy of the two types of procedures.

Scott D. Gronlund attempted to determine if Dr. Wells and others or Drs. Ebbesen and Flowe had proposed the better theory to explain the decrease in false identifications attributed to sequential lineups.[358] His findings supported the contention that a sequential lineup prompts witness to use an absolute decision strategy, as apposed to a relative judgment strategy in simultaneous lineups.[359] Although his study (limited to testing memory for height) yielded a decrease in false alarms when using sequential lineups that was larger than the concomitant decrease in hit rate, he found the difference insignificant.[360]

Christian A. Meissner and others tested Dr. Wells's relative judgment and Drs. Ebbesen and Flowe's criterion-shift explanations to attempt to determine why sequential lineups result in less false identifications.[361] They concluded that while Dr. Wells's theory may well explain the decrease in false identifications found in the use of sequential lineups, Drs. Ebbesen and Flowe's conservative criterion shift could explain the increase in the number of "missed" identifications that also occur with sequential lineups.[362] They recommended implementing procedures that isolate the change in performance to false identifications only.[363] One procedure they suggested is to instruct witnesses to positively identify a face only if they are 100% confident that it is the correct one.[364] In their experiments, they found that this procedure resulted in improved diagnosticity[365] of approximately 50% for both types of lineups.[366]

Otto H. MacLin and others assessed the accuracy of simultaneous versus sequential lineups using computerized lineup administration to compare the computer program against Dr. Steblay and others' 2001 meta-analysis.[367] In their first experiment, the authors used a pencil and paper test to determine if the Dr. Steblay and others' pattern of results could be replicated.[368] This experiment only partially replicated the patterns in

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[358] Scott D. Gronlund, *Sequential Lineups: Shift in Criterion or Decision Strategy?*, 89 J. Applied Psychol. 362-63 (2004).
[359] *Id.* at 366-67.
[360] *Id.* at 366.
[361] Christian A. Meissner et al., *Eyewitness Decisions in Simultaneous and Sequential Lineups: A Dual-process Signal Detection Theory Analysis*, 33 Memory & Cognition 783-84 (2005).
[362] *Id.* at 790-91.
[363] *Id.* at 791.
[364] *Id.*
[365] The proportion of correct identifications divided by the proportion of false identifications. *Id.*
[366] *Id.*
[367] Otto H. MacLin et al., *PC_Eyewitness and the Sequential Superiority Effect: Computer-Based Lineup Administration*, 29 Law & Human Behav. 303 (2005).
[368] *Id.* at 310.

the 2001 meta-analysis.[369] Overall, sequential lineups resulted in fewer identifications.[370] In lineups where the culprit was present, the authors found, contrary to the Steblay study, that simultaneous lineups did not produce a statistically significant advantage in correct identifications (40% to 33%).[371] Simultaneous lineups produced significantly more false identifications (43% to 16%);[372] sequential lineups produced significantly more false rejections of the lineup (missed identifications – 50% to 17%).[373] Simultaneous target-absent lineups produced an overall choosing rate insignificantly higher than sequential lineups (63% to 40%),[374] consistent with Dr. Steblay and others' study. In contrast to Dr. Steblay and others' study, sequential lineups resulted in 60% of the witnesses correctly rejecting the lineup, comparing insignificantly to 37% for the simultaneous lineups.[375] False identifications and filler identifications were statistically similar, with simultaneous lineups producing 11% false identifications to 7% for sequential lineups and false filler identification rates of 52% to 33%.[376]

In their second experiment, the authors used the program, PC_Eyewitness, to test the two lineup procedures.[377] The program yielded similar results to pencil and paper method in the first experiment for lineups that included the culprit.[378] Simultaneous lineups insignificantly outperformed sequential lineups in correct identifications (47% to 27%); sequential lineups resulted in more missed identifications of the lineup (57% to 30%), again consistent with Dr. Steblay and others' meta-analysis.[379] Fillers were chosen at a similar rate of 23% for simultaneous, 16% for sequential.[380] For target-absent lineups, witnesses correctly rejected the lineup 77% of the time for sequential lineups, 50% of the time for simultaneous ones.[381] False identifications of a suspect were statistically equivalent (8% simultaneous versus 4% sequential).[382] Filler identifications significantly differed, 42% simultaneous versus 19% sequential.[383] PC_Eyewitness only partially replicated the Steblay meta-analysis.[384] Consistent with the meta-analysis, simultaneous lineups produced fewer false rejections of lineups containing the culprit; sequential lineups produced more correct rejections of lineups not containing the

[369] *Id.* at 313.
[370] *Id.*
[371] *Id.* at 311.
[372] *Id.*
[373] *Id.* at 311-12.
[374] *Id.* at 312.
[375] *Id.*
[376] *Id.*
[377] *Id.* at 313.
[378] *Id.* at 314.
[379] *Id.*
[380] *Id.* Simultaneous lineups also produced a significant correlation between confidence and accuracy for target-present lineups. *Id.*
[381] *Id.*
[382] *Id.* at 315.
[383] *Id.*
[384] *Id.*

culprit.[385] Simultaneous lineups produced more choosing than sequential did, although the overall choosing rate for both types of lineups was slightly lower when using PC_Eyewitness.

Dawn McQuiston-Surrett and others reviewed methods, data and theory in the testing of simultaneous versus sequential lineups, and challenged conclusions of the 2001 meta-analysis by Dr. Steblay and others.[386]

> Many studies are reported with insufficient detail needed to judge the adequacy of the research design, new data show that the sequential superiority effect may vary as a function of study methodology, theoretical assumptions have not been adequately tested, and important comparisons that may rule out the ostensible superiority of the sequential lineup have not been studied.[387]

The team reviewed the studies used in the 2001 meta-analysis, broke down the overall correct decisions data, and concluded that the sequential lineups are superior to minimize false identifications of designated innocent suspects and increase correct lineup rejections when the perpetrator is absent from the lineup;[388] when the perpetrator is present, simultaneous lineups produce more correct identifications and reduced false lineup rejections.[389] In short, sequential lineups protect more innocent persons but simultaneous lineups catch more perpetrators. The authors questioned the use of unpublished studies by undergraduate researchers in the meta-analysis.[390] The relatively small (30) number of studies reviewed in the meta-analysis and paucity of research in this area, should lead to caution in drawing conclusions.[391] There has been limited research into the claim that blind testing is an essential aspect of the sequential procedure.[392] These researchers echoed a concern expressed by several other authors that the use of unpublished studies in a meta-analysis would cause courts to reject the study as evidence on the basis that it was not subjected to peer review or publication.[393]

The authors pointed out the great variability in the construction of the lineups as well as the instructions used in the two types of lineups in the existing research; it is therefore difficult to determine what factors actually produce the sequential superiority

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[385] *Id.*
[386] Dawn McQuiston-Surrett et al., *Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory*, 12 Psychol., Pub. Pol'y & L. 137 (2006).
[387] *Id.*
[388] *Id.* at 138.
[389] *Id.* at 138-39.
[390] *Id.* at 139.
[391] *Id.* at 140.
[392] *Id.* at 148.
[393] *Id.* at 139. This remark is made in consideration of Fed. R. Evid. as interpreted by the U.S. Sup. Ct. in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U. S. 579 (1993). Among others things, proposed testimony must be appropriately validated. *Id.* at 590. Our Commonwealth's applicable evidentiary rule on this is a little different, but the observation about the validation of the data could lead to the same or similar concern.

effect.[394] "Counterbalancing" has a role in the relative strengths of simultaneous and sequential lineups.[395] Placement order and position in the lineup sometimes produces misleading results.[396] Counterbalancing is intended to prevent such position effects.[397]

The authors also questioned whether the relative and absolute judgment theories have been adequately tested.[398] They suggest that a criterion-shift model may more accurately explain the sequential superiority effect: eyewitnesses may use relative judgment in both types of lineups, and the reduction in false identifications from sequential lineups may be the product of the witness imposing more stringent criteria on which to identify.[399]

Dr. Wells acknowledged relatively recent research that suggests an overall rate of lower identifications in sequential lineups but argued that there is no evidence to indicate that the sequential procedure produces a worse ratio of accurate to mistaken identifications.[400]

> [I]n spite of some reduction in accurate identifications, the sequential appears to improve the *odds* that a suspect, if identified, is the actual culprit. This is consistent with the idea that the sequential procedure is more conservative than the simultaneous procedure. . . . Ultimately, policy makers will need to balance the chance that a guilty person might not be identified using the sequential lineup procedure against the odds that an innocent person will be identified using a simultaneous lineup.[401]

Roy S. Malpass analyzed simultaneous versus sequential lineups, finding that simultaneous lineups were superior to sequential lineups under most conditions.[402]

> The utility of simultaneous and sequential lineups is responsive to two factors external to their actual performance: the values that are placed on the various eyewitness identification outcomes and the a priori probability that the police have been able to place the actual criminal in the identification procedure. With no change in the actual performance of the two lineup procedures, there seem to be many circumstances in which simultaneous lineups have a utility advantage, as long as the probability that the criminal is in the lineup is better than .50.[403]

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[394] McQuiston-Surrett et al., *supra* note 386, at 149-50.
[395] *Id.* at 148-49.
[396] *Id.* This is apparently common knowledge among police officers, as a police representative on the subcomm. on investigation shared a rule of thumb to never place the suspect in the number one position, because no one ever picks the first picture or person in a lineup.
[397] *Id.* at 148.
[398] *Id.* at 158-60.
[399] *Id.* at 159.
[400] Wells, *supra* note 239, at 626.
[401] *Id.* at 626, 627-28.
[402] Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 Psychol., Pub. Pol'y & L. 394, 415 (2006).
[403] *Id.*

Curt A. Carlson and others reported the results of their study on the sequential lineup advantage concluding that the sequential lineup advantage is only found in the false identification rate and then only when the lineup composition is "biased"[404] or the suspect was one of the later photographs shown in a sequential lineup.[405] They found no difference in false identification rates between simultaneous and sequential lineups when the lineup was "fair" and a lower rate of perpetrator identifications in some sequential lineups.

Experiences in Other Jurisdictions: Field Studies

Hennepin County, Minnesota

In the fall of 2003, the Attorney's Office of Hennepin County, Minnesota adopted a new photographic lineup protocol, developed as part of a year-long pilot program to examine recommended eyewitness procedures in real police field investigations, testing the accuracy of blind sequential lineups.[406] The pilot project involved four municipal police departments, suburban and urban, from four cities ranging in population from approximately 20,900 to 382,600.[407] Only felony cases were included, involving 280 lineups from 117 cases, representing 206 eyewitnesses.[408] Five principles were followed as part of the protocol:

- Six-member lineups that included one suspect and five fillers
- The cautionary instruction "may or may not be in the lineup"
- Confidence statements were obtained at the time of the identification and before any feedback
- The lineup administrator did not know who was suspected and the witness was so informed
- Sequential presentation[409]

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[404] *E.g.*, the fillers are a poor match to the perpetrator's description and the innocent suspect is a good match.
[405] Curt A. Carlson et al., *Lineup Composition, Suspect Position, and the Sequential Lineup Advantage*, 14 J. Experimental Psychol.: Applied 118 (2008).
[406] Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub. L. Pol'y & Ethics J. 381, 383 (2006).
[407] *Id.*
[408] *Id.* at 391.
[409] *Id.* at 393.

Simultaneous lineups were not tested. Dr. Steblay analyzed and evaluated the results.[410]

> [The] blind sequential field tests produced suspect identification rates relatively comparable to those in prior laboratory and field tests. Repeated viewing of the lineup was associated with increased filler identifications (errors). The new procedures do not appear to have sacrificed jump-out identifications. . . . Confidence and suspect identifications were significantly related, particularly for jump-out identifications. For other categories of expressed confidence (even high), confidence and decision outcome were not significantly related. A positive outcome of the project was the low filler identification rate, which demonstrates increased protection for innocent suspects.[411]

Initially, the police chiefs were apprehensive[412] but overcame reservations about blind administration of the sequential lineup procedure, including concerns about availability of personnel who aren't aware which one is suspected, recognition of chronic offenders as a suspect; disruption of the rapport between a victim and investigator, especially for a violent crime, and multiple witnesses.[413] The study found that these concerns were readily overcome "with minimal difficulty."[414] Witnesses understood and appreciated the purpose of the blind administration, personnel shortages were met by use of patrol officers, captains and sergeants, and by use of property crime investigators as administrators of lineups for crimes against persons and *vice versa*.[415] The concerns over multiple witnesses and repetitive offenders was addressed by the use of computer generated photo lineups.[416]

> Overall, police chiefs and investigators alike found the pilot project to be easier to implement and less work than anticipated. Implementation was extremely efficient. [From less than a week in one community to less than a month in the larger jurisdictions] Initial skepticism and unease faded and attitudes mellowed. . . .
>
> The pilot project also involved minimal cost. From an administrative prospective, the police chiefs initially wondered whether the need for blind administrators would significantly increase work-hours. As Minnetonka Police Chief Joy Rikala noted, however, "There [are] no cost implications of this. It's negligible."

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[410] *Id.* at 383.
[411] *Id.* at 404.
[412] *Id.* at 405, 406.
[413] *Id.* at 407.
[414] *Id.* at 408.
[415] *Id.*
[416] *Id.*

> Since the biggest hurdle in implementation was overcoming a general resistance to change, even fewer problems are expected the longer the protocol is used. New investigators will be trained in the new procedures, and will not be tied to the old methods.[417]

Illinois Pilot Program on Sequential Double-Blind Identification Procedures

In 2003, Illinois enacted a law that mandated lineup procedures and photo spread procedures[418] as well as a pilot study on sequential lineup procedures.[419] The yearlong study involved three jurisdictions of differing size: Chicago, Joliet and Evanston.[420] The Illinois State Police appointed Sheri H. Mecklenberg as Program Director; Dr. Malpass analyzed the data.[421] Dr. Ebbesen also consulted and analyzed the data independently.[422] Blind sequential lineups were compared to simultaneous lineup procedures used by the individual police departments.[423] Filler identifications were treated as known false errors, and suspect identifications were considered accurate.[424] The study showed an unexplained lower overall rate of filler identifications than research has predicted.[425] The study found that the sequential double-blind method showed a higher rate of filler (false) identifications and a lower rate of suspect (accurate) identifications than the simultaneous method.[426]

Sequential lineups were "difficult and confusing to implement" in live lineups involving cases where there were multiple perpetrators and were discontinued mid-program.[427] If witnesses requested second rounds, that can lead to a shift toward a relative judgment assessment.[428] The police departments reported "concern" in finding blind administrators, resulting in delays in investigations that damaged investigator relationships with victims and witnesses.[429] Contrary to results from other studies, the data showed no cross-race[430] or weapons focus effects.[431]

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[417] *Id.* at 409-10.
[418] 725 Ill. Comp. Stat. 5/107A-5.
[419] *Id.* 5/107A-10.
[420] Sheri H. Mecklenberg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* 24, https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Legal%20Reports/Illinois%20Pilot%20Report%20on%20Eyewitness%20Identification%20Methods (2006).
[421] *Id.* at 22.
[422] *Id.* at 23.
[423] *Id.* at 25.
[424] *Id.* at 29-31.
[425] *Id.* at 42.
[426] *Id.* at 45-46.
[427] *Id.* at 51.
[428] *Id.* at 53, n.52.
[429] *Id.* at 57-59.
[430] *Id.* at 39.
[431] *Id.* at 41-42.

The police departments under study determined which lineups would be administered as double-blind sequential lineups, based on three protocols: the selection had to be random and predetermined; the same officers would conduct both the simultaneous and sequential lineups; and, the selection of cases would be random in terms of crimes committed.[432] Two of the departments used their trained investigators to serve as blind administrators; Chicago obtained blind administrators from two divisions adjoining the area division in the study.[433] The study used filler identifications, *i.e.*, known false identifications to compare the rate of identification errors.[434] The rate of suspect identifications was used to measure correct identifications.[435] Acknowledging that erroneous suspect identifications can lead to wrongful convictions, the study attempted to compare suspect picks between the two lineup methods, using the 15% differential found in the 2001 meta-analysis as a guide.[436] The rate of "no picks" was measured, as was the number of sequential procedures in which the witness needed a second viewing of the lineup.[437] The program protocols and forms, as well as post-study survey forms, were reviewed and approved by Drs. Malpass and Ebbesen.[438] In addition to these two, Drs. Wells and Steblay examined the post-study survey forms.[439]

Dr. Malpass analyzed the data collected, and determined that the double blind sequential lineups produced fewer suspect identifications and a higher rate of filler identifications in two of the three jurisdictions studied.[440] In the third, both lineup methods showed equivalent rates.[441] Looking at other factors, this analysis found evidence that: second viewings result in fewer suspect identifications, slightly more filler identifications and more no-picks;[442] the cross-race effect is not altered by the lineup method;[443] and, live lineups result in slightly more correct identifications in simultaneous lineups than photo arrays produce.[444] The number of suspects (one or two) per lineup had no effect on simultaneous lineups and a negative effect on sequential lineups.[445] Identification rates were unaffected by delay, age of the witness, whether the witness was injured in the crime, whether there was violence involved, or the presence of a weapon.[446] Mecklenberg suggested that the number of target-absent lineups presented in the field

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[432] *Id.* at 25.
[433] *Id.* at 28-29.
[434] *Id.* at 29-30.
[435] *Id.* at 30-31.
[436] *Id.* at 31.
[437] *Id.*
[438] *Id.* at 32.
[439] *Id.*; Gary L. Wells, *Gary L. Wells' Comments on the Mecklenberg Report*, www.psychology.iastate.edu/~glwells/Illinois_Project_Wells_comments.pdf; *Addendum to the Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures*, http://www.chicagopolice.org/Addendum%20to%20IP-Report.pdf 4-5 n.1.
[440] Mecklenberg, *supra* note 420, at 37-39.
[441] *Id.* at 39.
[442] *Id.* at 40.
[443] *Id.* at 39.
[444] *Id.* at 40.
[445] *Id.* at 41.
[446] *Id.* at 41-42.

study were reduced by current safeguards involving corroborating evidence and other standards for charging,[447] and that the use of mandatory witness instructions may also lead witnesses to make more conservative identifications.

This report on the Illinois pilot program was immediately subject to commentary by researchers in support of and against its conclusions. Dr. Ebbesen and Kristin M. Finklea were among the first to comment.[448] They looked for reasons why the field results differed from the laboratory results. They suggested that lineup construction could be a possible problem, in that laboratory studies typically present an equal number of target present and target absent lineups, but observed that researchers have not determined if this proportion accurately reflects the proportion found in actual lineups. The authors further explained that if guilty suspects are more frequently present in real world lineups, then the lower choosing rate of sequential lineups will have the effect of suppressing the hit rate more than the false alarm rate in such lineups. They also suggested that foil selection could have an effect. Addressing criticism of the Illinois study, they pointed out that the study was conducted to test double-blind sequential lineups against the current policy of using non-blind simultaneous lineups. "The primary conclusion researchers can make is that the sequential double-blind procedure, as tested in Illinois, is not superior to traditional simultaneous lineups."[449]

Dr. Wells argued that the report could not be used to draw any "clear conclusions" because double-blind simultaneous procedures were never used and double-blind sequential procedures were always used.[450] Lineup-administrator influence, which can suppress filler identifications and enhance suspect identifications, was not controlled in the simultaneous lineups. Dr. Ebbesen and Finklea had attempted to assess the lineup administrator influence effect by looking at suspect identification rates, on the basis of whether or not the witness had a prior relationship with the suspect.[451] They posited that administrator influence in simultaneous lineups would be strongest in those situations where the suspect and witness were strangers, and should not occur with blind, sequential lineups. On the contrary, the difference in choice rates between non-blind simultaneous and blind sequential photo lineups was greater for acquaintance choices (90.3% v. 76.3%) than for stranger choices (53.6% v. 43.8%).[452]

Dr. Wells added that filler identifications might appear higher in sequential lineups because blind administration of the lineup forces the administrator to more accurately record identifications, because the administrator does not know if the person is

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[447] *Id.* at 44.
[448] Ebbe B. Ebbesen & Kristin M. Finklea, *In Response to the Illinois Pilot Program on Simultaneous v. Sequential Lineups*, http://www-psy.ucsd.edu/~eebbesen/Loyola_PILR_final.htm.
[449] *Id.*
[450] Gary L. Wells, *Gary L. Wells' Comments on the Mecklenberg Report*, www.psychology.iastate.edu/~glwells/Illinois_Project_Wells_comments.pdf. *Rep. to the Legis. of the State of Ill.: The Ill. Pilot Program on Sequential Double-Blind Identification Procedures*, *supra* note 420, is commonly referred to as the Mecklenberg Rep.
[451] Ebbesen & Finklea, *supra* note 448.
[452] *Id.*

a suspect or a filler.[453] In simultaneous lineups, an administrator, who knows which one is suspected, may record a filler identification as non-identification or as a filler identification. The filler identification rates in the Illinois study were inconsistent with results found in other field studies, including the archival study involving Sacramento County and several other northern California counties,[454] and two British studies.[455]

Dr. Ebbesen responded to concerns that the Illinois study was flawed.[456] He argued that criticism of the failure to use a blind simultaneous lineup procedure is irrelevant because this evaluation was a comparison of the old method against the new proposal. Since proponents of blind sequential lineups have argued that both aspects (blind and sequential) are necessary to have the maximum effectiveness for the new procedure, both should be compared to the existing practice of non-blind simultaneous lineups. Other jurisdictions claiming to have successfully used the sequential lineup did not use control groups or randomized experimental design and thus base their conclusions of success on "vague subjective impressions." He tested the administrator influence hypothesis against memory strength, social context (cross-racial identifications), witness confidence and witness status (victim or witness) and concluded that administrator influence in the simultaneous lineups do not explain the results of the Illinois report. The explanation for the results lay in the possibility that sequential presentation discourages witnesses from picking the best match to their memory "above a good enough criterion." He also addressed the variability among sequential protocols.[457] He concluded that much theoretical research is needed and more specificity in proposals is required.

Dr. Steblay commented, too, responding to criticism of the Hennepin County pilot project[458] for which she analyzed the data.[459] Most of the crimes in that pilot program involved crimes of very short duration in which the witness did not know the perpetrator, leading to slightly higher filler choice rates than situations where the witness had longer or multiple exposures to the perpetrators.[460] The additional viewings of the lineup that were allowed in Hennepin County proved that filler rates decline if witnesses are held to a single viewing.[461] Looking at the Illinois data, she expressed concern regarding the non-blind aspect of the simultaneous lineups; the zero filler identifications found in two of the jurisdictions is surprising; and, the problem of variability in and lack of detailed protocols for the simultaneous procedure.[462] On this basis, she found the Illinois data

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[453] Wells, *supra* note 450.
[454] Behrman & Davey, *supra* note 323.
[455] Wells, *supra* note 450.
[456] Ebbe B. Ebbesen, *Comments on IL Simultaneous v. Sequential Lineup Field Test*, http://psy2.ucsd.edu/~eebbesen/SimSeqIL.htm (2006).
[457] *E.g.*: What information does a witness have about the lineup size prior to viewing it? What are witnesses told about what would happen after they choose a person? Will the witness be told in advance that they will be allowed to go through the lineup more than once? What will the witness be told about the disposition of photographs after the first viewing? How are suspects assigned position in the lineup?
[458] Klobuchar et al., *supra* note 406.
[459] Nancy Steblay, *Observations on the Illinois Lineup Data* 1, www.psychology.iastate.edu/~glwells/Steblay_Observations_on_the_Illinois_Data.pdf (2006).
[460] *Id.*
[461] *Id.*
[462] *Id.* at 3-4.

incomplete and confusing, and therefore insufficient to base a change in her previous position. "My inclination is to assume that the blind sequential has much to offer and to reject the notion that the status quo should be the 'standard to beat,' particularly given the demonstrated vulnerability to witness error of standard lineup procedures."[463]

Wisconsin's Office of Attorney General also responded to the Illinois study, arguing that "[s]cientific research demonstrates that double-blind administration is superior, and the results of the" Illinois "program do not suggest otherwise."[464] The higher suspect identification rates found in the simultaneous lineups was to be expected, due to administrator influence. The Illinois results "could be seen to reinforce the principle that double-blind procedures are necessary to ensure that eyewitnesses make identifications . . . because the memory of the perpetrator matches the suspect, not because of unintentional suggestion from lineup administrators."[465] The relatively higher rate of filler selections in the sequential lineups is probably the result of administrator influence directing simultaneous identifications away from fillers and to suspects.[466] Whether witnesses pick suspects or fillers doesn't necessarily mean the witnesses were accurate when they identified a suspect "because some of the suspects identified could potentially be actually innocent."[467] In other words, the Illinois report "would have counted every single one of the DNA exonerations as 'correct' identifications."[468] The Wisconsin Attorney General's office concluded that the Illinois study failed to dislodge the scientific underpinnings for Wisconsin's model policy.[469]

The National Association of Criminal Defense Lawyers published an article by Timothy P. O'Toole, who criticized the Illinois report by pointing out several flaws with the study.[470] The failure to use blind administration in the simultaneous lineups, the assumption that selection of a police suspect was a correct identification, and the use of suspect identifications as a benchmark rewarded suggestive police procedures. Using suspect identifications as a benchmark created a great risk of inflating the perceived reliability of the most suggestive procedures instead of the most accurate ones. The fact that two jurisdictions reported no filler identifications was suspect, as it is contrary to published data on other non-blind lineups, which have a typical filler identification rate approaching 20%. Other field studies that consider selection of suspects as accurate identifications are ones using double-blind procedures so that the administrator does not know who the suspect is and can not influence a selection accordingly. Another indication that the data from Illinois may be unreliable is the fact that the data seemed to indicate witness procedures conducted 30 days after the incident were more accurate than

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[463] *Id.* at 6.
[464] Bureau of Training & Standards for Crim. Just., Wis. Dep't of Just., *Response to Chicago Report on Eyewitness Identification Procedures* 2, www.doj.state.wi.us/dles/tns/ILRptResponse.pdf (2006).
[465] *Id.* at 3.
[466] *Id.*
[467] *Id.* at 4.
[468] Timothy P. O'Toole, *What's the Matter with Illinois?*, 30 *Champion* 18 (August 2006), *available at* http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/03c451bfa6487584852571e300634d51?OpenDocument.
[469] Bureau of Training & Standards for Crim. Just., *supra* note 464, at 4.
[470] O'Toole, *supra* note 468.

those conducted immediately after the incident, contrary to the findings of research and experience elsewhere. The article asserted that the study was conducted by the Chicago Police Department in secret, and that the department had adamantly opposed the use of sequential procedures and allowed that bias to dictate the study protocols.

In a series of commentaries published in *Law and Human Behavior*, experts in the field of eyewitness identifications offered their opinions of the Illinois study. In the introduction to the commentaries, Brian L. Cutler and Margaret Bull Kovera made some observations of the overall import of the various writers' comments as well as some of their concerns with the study.[471] They emphasized the need for additional field research on eyewitness procedures. With regard to the Illinois study in particular, they were concerned that the Mecklenberg Report was not peer-reviewed prior to publication, which may have addressed some of the alleged methodological flaws in the study.

Dr. Wells's comments focused on the methods, measures and interpretations of field experiments.[472] Much of the debate about improving eyewitness procedures revolves around the difference between laboratory settings and "real life" situations. Well-controlled field experiments with actual eyewitnesses could help resolve discrepancies about applying proposed improvements to the criminal justice system. The Illinois study should be viewed in light of what can be learned about how to better structure field studies in the future. A major flaw in the Illinois study was that the study compared non-blind simultaneous lineups with double-blind sequential lineups, and it was therefore impossible to tell if the results were the product of sequential v. simultaneous, or if they were due to the blind v. non-blind difference.[473] He argued that suspect identification rates are not a useful measure of accuracy, because an identified suspect may or may not be guilty of the crime committed, and thus mistaken identifications can be inappropriately counted as if correct.

Dr. Wells examined whether filler identification rates reveal the best procedure. Lower filler rates would seem to indicate the better procedure but only if the compared procedures use the same constraints.[474] For example, using fillers that match the description of the suspect in a lineup that is then compared to a lineup in which fillers do not match the description could lead to a higher filler rate for the lineups that match the description of the suspect. As noted earlier, filler selection based on the victim's description of the culprit is less likely to single out any particular person and can help avoid mistaken identifications.

Dr. Wells also addressed concerns about bias in non-blind procedures.[475] Administrator influence, intentional or not, even to the extent of the witness's tacit assumption that the administrator knows who the suspect is, is believed to lead to

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[471] Brian L. Cutler & Margaret Bull Kovera, *Introduction to Commentaries on the Illinois Pilot Study of Lineup Reforms*, 32 Law & Human Behav. 1 (2008).
[472] Gary L. Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, *id.* at 6.
[473] *Id.* at 7.
[474] *Id.* at 7-8.
[475] *Id.* at 8-9.

mistaken identifications.[476] Non-blind procedures tend to suppress filler identification rates and influence eyewitness confidence. Additionally, he argued that non-blind administration might influence an eyewitness's confidence negatively if a filler identification is made; if the administrator knows that the witness has identified a filler, he or she may subconsciously cue the witness, thus weakening the witness's confidence to the point that the filler identification becomes so tentative as to not be counted as such.[477] In an addendum to the Illinois report in response to criticism of the report based on the complete absence of filler identifications in Chicago and Evanston lineups, the author disclosed that some filler identifications were made in those jurisdictions but were not counted as such because of the tentativeness of the identifications.[478]

To improve field experiments, Dr. Wells suggested conducting all experiments using the double-blind method, randomly assigning a sequential or simultaneous procedure to cases, making the assignment after all other decisions regarding the lineup structure have been made and preserving tapes of the actual lineups for additional analysis.[479] From the initial design of the experiment through the data analysis, field experiments should be a collaborative effort among scientists, police and prosecutors.[480]

A panel of seven experts from six universities discussed the central problem with conducting field studies of lineup procedures.[481] They noted that the Hennepin County study, which confirmed the laboratory studies and did not compare simultaneous to sequential procedures, has not been controversial, whereas the Illinois report, by contradicting laboratory results, and thus undermining efforts to implement proposed changes, has been.[482] While it seems clear that all involved agree further field studies are needed, the structure of those studies remains under dispute.[483] The authors acknowledge that the intent of the Illinois study, to compare current practices to proposed practices would seem reasonable, but the study design made interpretation of the outcomes extremely difficult. "[I]t is critical to determine whether the seemingly better result from the simultaneous procedure is attributable to properties of the simultaneous procedure itself, or to the influence of the non-blind administrator."[484] The authors noted that the zero filler rates found in Chicago and Evanston are evidence that administrator bias affected filler identification rates in those jurisdictions.[485] They called for further carefully designed field studies because the results published in the Illinois report "do not inform everyday practice in a useful manner."[486]

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[476] *Id.* at 8.
[477] *Id.* at 7-8.
[478] Addendum to the Rep., *supra* note 439, at 8 n.3.
[479] Wells, *supra* note 472, at 9-10.
[480] *Id.* at 10.
[481] Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 Law & Human Behav. 3 (2008).
[482] *Id.* at 4.
[483] *Id.*
[484] *Id.*
[485] *Id.* at 5.
[486] *Id.*

Dr. Steblay agreed with the need for carefully constructed field studies that include double-blind testing, random assignment to experimental conditions, clear operational protocols for lineup construction and presentation, and documentation of the lineup experience.[487] However, even with carefully designed field studies, the interpretation of those field studies may still face obstacles. High suspect identifications and low filler identifications, which normally would be interpreted as a successful lineup result, might mask problems such as poorly structured lineups, bias and other problems. Attempts to compare field study results across jurisdictions could fail if individual police departments within each study vary the protocols, such as merging existent practices with the protocols. Several aspects of field experiments must be held constant, including background factors, construction of the lineup, and conditions of the lineup procedure for the witness. No single field study could be used to evaluate lineup procedure, but the trends and patterns should be revealed as evidence from various studies accumulates. Although future laboratory and field tests may produce refinements in lineup practices, "laboratory research has already provided the empirical basis for better practice in collection of eyewitness evidence," and the concerns in her commentary should not impede lineup reform efforts.

Stephan J. Ross and Dr. Malpass voiced concern that the recommendation by scientists to use the sequential method to prevent wrongful convictions may need to be rescinded because questions remain regarding the theoretical and empirical bases for the research and the utility and value of simultaneous versus sequential lineup.[488] "While SEQ [sequential] advocates favor a particular family of lineup procedures, we favor a broader search for ways to confront identification errors--both failures to identify offenders and failures to reject identification of innocent suspects--that are theoretically well understood and empirically stable."[489]

Drs. Ross and Malpass also voiced disappointment at the failure of research to test other aspects of the sequential lineup procedure in combination with the simultaneous procedure to determine whether they help lower false identifications or actually create the sequential effect even within a simultaneous lineup rather than the sequential lineup presentation itself.[490] With respect to the Illinois study, they criticized the focus of many of the critics of the study on the blind/non-blind issue and its potential effect on filler identification rates.[491] Noting comments by Drs. Wells, Schacter, Ebbesen and Finklea on the potential for lineup administrator bias to direct identifications from fillers and toward suspects, they conclude "there is little evidence that the filler identification rate in simultaneous lineups is a product of administrator bias."[492] The authors discussed alternative reasons for the lower filler identification rate when compared to other field studies and suggested that it may arise from poor monitoring of protocol compliance,

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[487] Nancy Kay Steblay, Commentary on *"Studying Eyewitness Investigations in the Field": A Look Forward*, 32 Law & Human Behav. 11 (2008).
[488] Stephen J. Ross & Roy S. Malpass, *Moving Forward: Response to "Studying Eyewitness Investigations in the Field"*, 32 Law & Human Behav. 16, 17 (2008).
[489] *Id.* at 16.
[490] *Id.* at 17.
[491] *Id.*
[492] *Id.* at 18.

especially with regard to reporting.[493] They proposed that policy formation and implementation should only occur after any academic debate is resolved by sound research.[494]

Drs. Ross and Malpass identified limitations to all field studies that diminish their utility, including lack of knowledge about the actual guilt or innocence of each suspect.[495] Using suspect identifications as a proxy for accurate identifications ignores the possibility that the suspect may be innocent.[496] They urged law enforcement and social scientists to work closely together to develop and implementing field studies on lineup accuracy.[497] They proposed the following lineup procedure requisites: ensuring consistency in background variables; monitoring protocol compliance; training before implementing the study; allowing lineup quality assessment; allowing researchers access to case files to make independent estimates of guilt; and, improving reporting standards in case reports and final manuscripts.[498]

Mecklenberg, the program director for the Illinois study, and others characterized the Illinois data as "significant and valuable."[499] They noted that many previously conducted laboratory and field studies have involved confounds,[500] and that the Illinois study produced valuable information comparing blind versus non-blind lineups. They argued that the study can be evaluated looking solely at the sequential lineup results to determine if the filler identification rates found in the study are acceptable,[501] and that it is presumptuous to assume that lineup administrator bias accounts for the variations in filler identification rates.[502] They claimed that the report offers information on other aspects of lineup procedures unrelated to the sequential/simultaneous debate, including cross-racial bias, identifications by victims versus witnesses and the effect of the use of a weapon or the threat of violence.[503] They welcomed further field studies on the issues raised by the study.[504]

All of the writers supporting or decrying the Illinois study seem to agree field studies of sequential and simultaneous lineups should follow detailed protocols designed to compare the two procedures fairly.

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[493] *Id.* at 18-19.
[494] *Id.* at 19.
[495] *Id.*
[496] *Id.*
[497] *Id.* at 20.
[498] *Id.*
[499] Sheri H. Mecklenberg et al., *The Illinois Field Study: A Significant Contribution to Understanding Real World Eyewitness Identification Issues*, 32 Law & Human Behav. 22, 23 (2008).
[500] *E.g.*, varying lineup sizes, video v. photo arrays, lineup member dress, foil similarity, different lineup instructions and use of randomized and non-randomized lineup placement of suspects. *Id.*
[501] *Id.* at 24.
[502] *Id.* at 25.
[503] *Id.* at 26.
[504] *Id.*

Dr. MacLin and others summarized the current state of research on lineup issues:

> Research has indicated that sequential lineups reduce false identifications when the actual perpetrator is absent from the lineup, a factor significant enough for policy makers in Wisconsin and New Jersey to adopt versions of the sequential procedure for their jurisdictions. However, the sequential lineup also appears to lower the rate of correct identifications. Researchers are actively working to uncover the mechanisms that underlie this effect. The U.S. Department of Justice (1999) provides guidelines for constructing both types of lineups.[505]

Ongoing Field Studies

There have been numerous calls for additional field studies to test lineup procedures to verify if the sequential superiority effect seen in some laboratory studies holds true in real-life situations. In 2007, National Institute of Justice (NIJ) funded Urban Institute to test the reliability of simultaneous and sequential, as well as blind and nonblind lineups in the field. The study will be guided by a NIJ-sponsored study group consisting of law enforcement officers, defense counsel, prosecutors, victim and witness advocates and other interested persons.[506] Dallas County, Texas, was to begin participating in this study in January 2008, but funding for this project was lost due to delays in implementation. Instead, the Dallas department announced in January 2009 that it would implement blind sequential lineups without completing the study. Dallas County has seen 21 people exonerated by DNA testing since 2001.[507] The pilot study was designed to examine 800 stranger-on-stranger robbery cases, which were to be divided into four groups of 200, to be tested by either sequential double-blind, sequential nonblind, simultaneous double-blind or simultaneous nonblind methods.

In 2006, The American Judicature Society's Center for Forensic Science and Public Policy met to develop field study protocols.[508] In 2007, The JEHT Foundation granted $700,000 to support Eyewitness Identification Field Studies sponsored by the American Judicature Society. Dr. Wells was to lead the 18-month national study, with the intent of conducting studies in four jurisdictions. Data has been collected from a study in Tucson and its summary analysis will probably be released later this year. Unfortunately, only part of the grant was received before the JEHT Foundation was forced to shut down, a victim of the Madoff Ponzi scheme. This study was built around computer-generated random assignment of lineup type and lineup position of the suspect and the project incorporates law enforcement training programs, protocol compliance monitoring, recording of identification sessions and improved reporting standards.

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[505] MacLin et al., *supra* note 178, at 7-8 (citations omitted).
[506] Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, NIJ J. 8, (Oct. 2007), *available at* http://www.ojp.usdoj.gov/nij/journals/258/police-lineups.html.
[507] Danny Robbins, *Dallas exonerees band together* (Feb. 17, 2011), theeagle.com, http://www.theeagle.com/texas/Dallas-exonerees-band-together.
[508] Am. Judicature Soc'y, Meetings / Events of the AJS Center for Forensic Science and Public Policy, www.ajs.org/wc/wc_meetings.asp (last visited Mar. 21, 2011).

Last year, NIJ solicited proposals to "conduct research on current eyewitness identification practices of police departments" and to "examine the impact of photo array policies and procedures on eyewitness identification outcomes in . . . police departments."[509] NIJ expected to have up to $1,500,000 to fund two to four awards with awardees having up to three years to use the award.[510] The deadline to apply for a grant was June 14, 2010,[511] but it doesn't appear that any awards were made during fiscal year 2010 for the experimental part;[512] however, Police Executive Research Forum was awarded $323,966 for a national survey of eyewitness identification processes in law enforcement agencies.[513]

Reasonable Basis Model

Recommendation and reasoning:

Dr. Wells has proposed a new recommendation regarding the use of lineups, *i.e.*, "a reasonable basis for suspecting a person should exist before placing that person (or his or her photo) into a lineup."[514] He argued that doing so increases the likelihood that the suspect in the lineup is the actual culprit and can decrease the likelihood of a mistaken identification.[515]

Show-Ups

Recommendation:

Showups should follow specific procedures to avoid biasing the eyewitness.

Research and reasoning:

It has long been recognized in law and research that showups done shortly after a crime may have great investigative use, but they are also offer an inherent risk of suggestiveness. The dilemma is to balance their appropriate use while reducing their inherent risk of suggestiveness.

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[509] Nat'l Inst. of Just., U.S. Dep't of Just., *Solicitation: Research on Eyewitness Identification Policies and Procedures* 4, OMB No. 1121-0329, *available at* http://www.ncjrs.gov/pdffiles1/nij/sl000904.pdf.
[510] *Id.* at 5.
[511] *Id.* at 4.
[512] Nat'l Inst. of Just., U.S. Dep't of Just., Fiscal Year 2010 Awards, http://www.nij.gov/nij/awards/2010-table.htm.
[513] Award Number 2010-IJ-CX-0032, *id.*
[514] Wells, *supra* note 239, at 635.
[515] *Id.* at 636.

Dr. Steblay and others meta-analyzed show-ups and lineups,[516] which was adapted into a presentation.[517] She found that the "correct identification rate was approximately equal for witnesses shown either a lineup or a show-up when the perpetrator was . . . present in the display. False identification rates in target-absent show-up and lineup presentations were also approximately equal."[518] However, in the studies where an innocent suspect who closely matched the description of the perpetrator was included, false identification rates were 6% higher in show-ups.[519] She found that suggestibility was not a major factor in show-ups, and that witnesses appeared to be more cautious in their identifications during show-ups, which is consistent with the hypothesis that absolute judgment occurs when a witness is presented with one photograph.[520] She cautioned, however, that these studies were conducted under laboratory conditions and included many best-practice features; in the field, show-ups may be more dangerous than the data indicated.[521]

Rejecting claims that show-ups are extremely biased, Drs. Ebbesen and Konečni argued that studies have suggested that show-ups result in a lower probability of false alarms than lineups. They reasoned that a witness viewing a lineup may pick the person who most looks like the culprit while the witness experiencing a show-up makes a judgment as to whether or not the person is the culprit. Addressing a study cited by them, Dr. Wells and others countered that show-ups are more likely to yield false identifications because of their suggestiveness. The witness is shown someone known to be a suspect, and that may unintentionally heighten any confidence the witness has in the identification.

Experience in another jurisdiction:

Recently, the Dallas Police Department implemented a new show-up policy that limits when and how show-ups can be done. Police should take the witness to view the suspect, not return the suspect to the crime scene for identification. The witness should be cautioned that the suspect may or may not be the offender, and that the investigation will continue regardless of whether an identification is made. If there are multiple witnesses and one witness makes an identification from the show-up, no more witnesses should participate in the show-up. The policy requires supervision by a sergeant at the scene, who must obtain approval from the watch commander for a show-up. Documentation of the procedure is also required.[522]

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[516] Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 Law & Human Behav. 523 (2003).
[517] Nancy K. Mehrkens Steblay, *Reforming Eyewitness Identification: Cautionary Lineup Instructions; Weighing the Advantages and Disadvantages of Showups versus Lineups*, 4 Cardozo Pub. L. Pol'y & Ethics J. 341 (2006).
[518] *Id.* at 351.
[519] *Id.*
[520] *Id.* at 352.
[521] *Id.*
[522] Roll Call Training Bulletin #2008-27, Dall. Police Acad., Document Control #46-08 (Nov. 24, 2008).

Other Proposals to Prevent Eyewitness Misidentifications

Various other proposals have been made to avoid wrongly convicting someone based upon an eyewitness's misidentification. They include use of expert testimony and model jury instructions. These two proposals have been suggested because cross-examination can be inadequate to reveal a mistaken identification.[523] Richard A. Wise and others have advocated a "tripartite solution," which combines procedural improvements with increased use of expert testimony and jury instructions.[524] Some preliminary observations regarding the current status of jury instructions and expert testimony follow.

Jury Instructions

Regarding jury instructions in general, Pennsylvania's Supreme Court has rejected the notion that jury instructions as to the reliability of eyewitness identifications are necessary.

> Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross-examination, positive and unqualified, the testimony as to identification need not be received with caution--indeed, the cases say that "his [positive] testimony as to identity may be treated as the statement of a fact". For example, a positive, unqualified identification of defendant by one witness is sufficient for conviction even though half a dozen witnesses testify to an alibi.[525]

This belief in the infallibility of an eyewitness who testifies with certainty has been challenged by several of the DNA exoneration cases. The most well-known might be that of Ronald Cotton, who was convicted in North Carolina of raping Jennifer Thompson, a college student at the time of the attack. Ms. Thompson has since begun speaking publicly about the need for eyewitness identification reform. She has stated that during the rape she made a conscious effort to memorize her assailant's face, look for distinguishing marks and any other details that might assist her in identifying him. "I was absolutely, positively, without-a-doubt certain he was the man who raped me when I got on that witness stand and testified against him."[526] However, Ronald Cotton was exonerated when another man was identified as the rapist through DNA testing.

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[523] Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L.Rev. 727, 774-82, 783 (2007).
[524] Wise et al., *supra* note 136.
[525] *Commonwealth v. Kloiber,* 106 A.2d 820, 826 (Pa. 1954) (citations omitted).
[526] Mark Hansen, *Forensic Science: Scoping out eyewitness IDs*, 87 A.B.A.J. 89 (Apr. 2001), *available at* www.nersp.nerdc.ufl.edu/~malavet/evidence/notes/thompson_cotton.htm.

Expert Testimony

With respect to expert testimony, Pennsylvania currently does not admit expert testimony regarding eyewitness credibility because a jury's basic function is to decide credibility, and "[i]t has long been established that expert testimony is only admissible where formation of an opinion on a subject requires knowledge, information, or skill beyond that possessed by the ordinary juror."[527] In general, admissibility of expert testimony in Pennsylvania is governed by an evidentiary rule, which states:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.[528]

Saul Kassin and his colleagues surveyed eyewitness experts in 1989 and again in 2000, to determine what eyewitness testimony research had reached "general acceptance in the particular field in which it belongs", under the *Frye* test,[529] the applicable test for admissibility of expert testimony in several states, including Pennsylvania.[530] While much of the research in that article refers to expert testimony on the reliability of eyewitness identifications, it is informative as to those areas of eyewitness identification research that the "experts" had determined are generally accepted by the scientific community. The 1989 report surveyed 63 experts and found that most of them agreed that research findings on the following areas were reliable: effects of exposed time, lineup instructions, the wording of questions, pre-event expectations, post-event information, and the accuracy-confidence correlation.

Some writers have advocated for the admissibility of expert testimony on the psychology of false identifications and false confessions. It is not the first choice of the experts that have spoken to the advisory committee. Dr. Wells has consistently argued that the researcher's approach is not to make juries more skeptical, but to make eyewitness identification evidence more reliable.[531] This distinction is important.

Dr. Wells has suggested that the need for much expert testimony regarding eyewitness identifications could be eliminated if investigative procedures can be improved so that they produce faultless identifications that are accurate and fair. Similarly, Dr. Kassin has suggested that the need for expert testimony regarding false

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[527] *Commonwealth v. Simmons*, 662 A.2d 621, 630-31 (Pa. 1995).
[528] Pa. R. Evid. 702.
[529] Saul M. Kassin et al., *On the 'General Acceptance' of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405, 406 (2001).
[530] "Adoption of Pa.R.E. 702 does not alter Pennsylvania's adoption of the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which requires scientific evidence to have 'general acceptance' in the relevant scientific community." Pa. R. Evid. 702 Comment.
[531] Wells et al., *supra* note 140, at 603. "In 1996 . . . the American Psychology/Law Society . . . appointed a subcommittee to draft good-practice guidelines for . . . conducting lineups and photospreads for eyewitnesses to crimes." *Id.*

confessions could be reduced by video-recording custodial interrogations, thereby providing the best evidence of the voluntariness and reliability of a defendant's confession.

Proposals in this Report for Eyewitness Identification

The proposals relating to eyewitness identification were generated by the subcommittees on investigation and legal representation. The subcommittee on investigation proposes amending a rule of criminal procedure to require defense counsel in capital cases to be educated on evidence relating to eyewitness identification.[532] This rule[533] already requires "training relevant to representation in capital cases" and eyewitness identification would be included with other specified areas.[534]

Both subcommittees considered the statutory proposal,[535] but it was principally authored by the subcommittee on legal representation. If enacted, the administration of lineups and photo arrays would generally be conducted by a person who does not know either which one is suspected by investigators or which one is being viewed by the witness. There would be some exceptions to the general requirement, but instructions to the witness would still be required along with some other prescribed procedures. Each law enforcement agency would have to adopt a written protocol consistent with the statute, and a training program would be developed for officers and recruits.

These proposals were generated based upon the academic material reviewed along with experiences related by presenters and shared among the advisors.

Summary of Eyewitness Identification Proposals

A rule of criminal procedure should be amended to require defense counsel[536] in capital cases to be educated on evidence relating to eyewitness identification.

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

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[532] *Infra* p. 167.
[533] Pa. R. Crim. P. 801.
[534] *E.g.*, pleading & motion practice, pretrial investigation, jury selection, etc. *Id.*
[535] *Infra* p. 172.
[536] This rule mandates "educational and experiential criteria" for retained or appointed counsel "[i]n all cases in which the district attorney has filed a Notice of Aggravating Circumstances." Pa. R. Crim. P. 801. The educ. is approved by Pa. Continuing Legal Educ. Bd. so that prosecutors may attend courses focusing on capital litigation as well.

ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

False Confessions and other Incriminating Admissions are Substantial Causes of Wrongful Convictions

Other causes of wrongful convictions have been recurrently found, but convictions based partly or completely on false confession or other incriminating admissions have been shown to comprise a substantial percentage of the DNA exoneration cases in the United States. Of these 273 exonerations, Innocence Project lists 66 of them in which a false confession or other incriminating admission contributed to the conviction. This represents almost ¼ of these cases. Of the 11 exonerations from our Commonwealth, four are listed for a false confession or other incriminating admission as having contributed to the conviction. That number represents more than 36% for these Pennsylvania exonerations.[537] "We need not be reminded of the countless situations where persons confess to crimes of which they are innocent . . . ."[538]

Causes of False Confessions

This section will review some of the literature from the last ten years that explains how false confessions occur. Training is uniformly recommended in all the areas studied by the advisory committee, including custodial interrogations. Other recommendations have ranged from the far-reaching call for abolition of *Miranda* warnings[539] in their entirety, to suggestions that confessions should have independent corroborating evidence to support them, to a determination by the trier of fact that the confession meets minimal indicia of reliability before being ruled admissible. As with eyewitness identifications, Pennsylvania's courts have been reluctant to admit expert testimony on false confessions, stating that the average juror is capable of assessing the veracity of a confession, and that the probative value of any testimony is outweighed by its potential prejudicial effect.[540] While these other recommendations have zealous supporters and detractors, the principal

[537] Innocence Project, Know the Cases, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Aug. 1, 2011).
[538] *Commonwealth v. Conklin*, 160 A.2d 566, 568 (Pa. 1960).
[539] *Miranda v. Arizona*, 384 U.S. 436, 467-73, 478-79 (1966).
[540] *Pennsylvania v. Robinson* (No. CP-03-CR-0000865-2005, Armstrong Cnty. Ct. of C.P., Apr. 3, 2009).

recommendation that is consistently put forth by individuals who believe that there is a problem with custodial interrogations and false confessions is to mandate electronic recording of custodial interrogations.[541]

Saul M. Kassin has studied false confessions and written about them extensively.[542] At a 2008 joint conference of the subcommittees on investigation and legal representation, he gave a presentation on false confessions and the value of electronically recording interrogations. He stated that proven false confessions naturally sort themselves into three groups:

> (1) Voluntary false confessions, without external pressure–these frequently occur in high profile cases, involving persons who are seeking attention or are delusional but most prevalently involve a confession made to protect the actual perpetrator.
>
> (2) Compliant false confessions (the vast majority of cases) given by innocent people subject to interrogation–the person knew he was innocent but consciously decided to falsely confess under the stress of the interrogation to gain something such as release, end of interrogation or avoidance of penalty. Frequently, the person retracts the confession once the interrogation is concluded. In corporate security, persons will frequently confess to save their jobs. Suspects in these cases perform a cost-benefit analysis, balancing the pressure to confess against the inducement being offered and decide to "cut their losses" by confessing.
>
> (3) Internalized false confessions, where an innocent person, subjected to certain suggestive techniques of interrogation, comes to believe that he actually committed the crime. False memories are created in these cases, sometimes by police tactics that manipulate the suspect's perception or are simply deceptive, presenting seemingly objective evidence implicating the person. Frequently, the suspects report that they were confused at the time of the confession.

Acknowledging that false confessions occur, Dr. Kassin said two questions then arise: why does this happen and what are the risks? He has testified as an expert in about a dozen cases and has declined to do so in hundreds more. In reviewing these and other cases, three more questions arise: Why was this innocent person targeted for interrogation in the first place? What about the process of interrogation puts innocent people at risk? Why are false confessions so powerful, that they are instantly believed?

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[541] *E.g.*, Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 Current Directions in Psychol. Sci. 249, 252 (2008).

[542] *E.g.*, Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol. Sci. in the Pub. Int. 33 (2004).

Dr. Kassin discussed the process and value of electronic recordings. He advocated recording beginning with the minute everyone enters the interview room, so that the entire process is captured, even pre-*Miranda* communications, as is done in District of Columbia. He noted that law enforcement draws a distinction between interviews (pre-*Miranda*) and interrogations (post-*Miranda*). Law enforcement training professionals will also differentiate between these two dialogues. He observed that The Reid Technique®[543] is not the only modern method of police interrogation; at least a dozen others exist. The Reid Technique® is the most important and influential, and many of the other methods draw inspiration from it. This psychological approach to interrogation arose in the 1930s, and was first published by Fred E. Inbau and John E. Reid in 1962 as *Criminal Interrogation and Confessions*.[544] Variations on The Reid Technique® are used loosely by both trained and untrained personnel.

The Reid Technique® is a nine-step process. The initial interview is a pre-interrogation conversation, intended neither to be confrontational nor to elicit a confession. It is designed to ask open-ended questions to give the interrogator clues from the suspect's behavior as to whether the suspect is truthful or lying. Verbal and nonverbal behavior is observed as part of a lie-detecting process.[545] The Reid school claims that its training programs can teach an interrogator to be 80 to 85% accurate in detecting deception.[546] Behavioral symptoms are analyzed by watching for eye contact, posture and position changes, as well as other behavioral cues. Dr. Kassin added that while it is relatively easy to recognize anxiety in a suspect, it does not follow that the cause of that anxiety is easily discernible. The Reid Technique® presumes that anxiety denotes lying.

Dr. Kassin asserted that scientific research regarding lie detection has taken place for over 50 years, and researchers concluded over a range of studies that people average 54% accuracy in recognizing lying. He added that odds are that any individual will accurately detect a lie 50% of the time, so that this accuracy level is barely statistically significant. Looking at various groups of people, a 1991 study by Paul Ekman and Maureen O'Sullivan found that college students were 53% accurate; psychiatrists, 58%; and, U.S. secret service agents, 64%.[547]

Dr. Kassin described a study in which he had some college students commit a mock crime.[548] Other students were instructed to simply show up at the "crime scene," to not do anything but be picked up by the police for questioning. They were all instructed that their best interest was to completely maintain their innocence, as they would be subject to public arrest and custody if they could not convince the interrogator of their

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[543] John E. Reid & Assocs., http://www.reid.com/.

[544] The 4th edition of this has been published with the additional authorship of Joseph P. Buckley III and Brian C. Jayne, http://www.reid.com/store2/detail.html?sku=cic4th.

[545] Saul M. Kassin & Christina T. Fong, *'I'm Innocent!': Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 Law & Human Behav. 499, 500 (1999).

[546] *Id.* at 505.

[547] Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 Am. Psychologist 913, 916 (1991).

[548] Shoplifting, vandalism, breaking into a building and setting off an alarm, and breaking into an e-mail account and reading someone's private e-mail. Kassin & Fong, *supra* note 545, at 502-03.

innocence. The students were then interrogated by a person who knew what crime he was investigating but had no information as to whether the suspect committed the crime. The study recruited a "naïve" group of untrained individuals to review the videotapes of these interrogations; a second group was trained according to The Reid Technique®,[549] and the two groups were then tested to see if accuracy was improved by training. The results of the study showed that the trained people were significantly poorer at identifying deception.[550] The trained people, however, were more confident in their ability to spot lying.[551] They also revealed that their confidence in their assessments was based on the training they received.[552] Dr. Kassin asserted that the behaviors asserted in the training manuals as indicative of lying are not diagnostic cues.[553] For example, he claimed that across all studies worldwide, the correlation between eye contact and deception is zero.

Dr. Kassin argued that the pre-interrogation interview is important because, as a result of the behavioral analysis, the interviewer determines whether the suspect is lying or telling the truth and thus dictates whether an interrogation will occur. That presumption of guilt then dictates the psychological techniques used to elicit a confession from the suspect during the interrogation. He noted that studies have shown that most diagnostic visual cues can be manipulated by a good liar, and that simply listening to the interview without looking at the suspect can improve lie detection ability by 9%. He contended that liars hesitate before answering accusatory questions, speak rapidly to compensate for the hesitation, all the while increasing their pitch, and that these are better cues for lie detection. He recommended that interrogators shift their focus from anxiety to cognitive effort to determine deception. Another suggestion is to strategically withhold evidence until after the suspect tells his story, to then trap the person in their lies.

Dr. Kassin noted that the opening salvo in a Reid interrogation is always an accusation of guilt, called a positive confrontation.[554] He explained that he and others surveyed police investigators to try to determine the components of a typical interrogation.[555] The investigators were asked to estimate how often they used various interrogation techniques.[556] The top four tactics were isolating the suspect from family and friends; interrogating in a small, private room; identifying contradictions in the suspect's story; and, establishing rapport and gaining trust.[557] He noted that these methods map onto The Reid Technique®. He pointed out that interrogations do not follow the step-by step process set out in The Reid Technique®, but follow a more fluid process. He reduced the nine steps of the Reid technique to three psychological processes:

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[549] *Id.* at 505.
[550] *Id.* at 508.
[551] *Id.* at 509.
[552] *Id.* at 510.
[553] *Id.* at 500-01.
[554] "We know you did it, so don't lie to us!
[555] Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 Law & Human Behav. 381 (2007).
[556] *Id.* at 387.
[557] *Id.* at 388, 389.

(1) Custody and isolation. The interrogation room is designed to create an uncomfortable environment to motivate the suspect to escape via confession. The underlying psychology is to increase the suspect's anxiety associated with denial and decrease the suspect's anxiety associated with confession, so that confession becomes relatively more desirable.

(2) Confrontation. The interrogation begins with the accusation. The immediate next steps involve managing denials and overcoming objections. The U.S. Supreme Court has sanctioned the use of lying or bluffing about the evidence to suspects to induce confessions.

(3) Minimization. To normalize the crime, the interrogator will sympathize and be understanding. The interrogator will develop themes that will allow the suspect to develop moral justifications and face-saving excuses. Courts allow this technique. Although explicit promises of leniency are prohibited, Dr. Kassin stated that minimization contains an implicit promise of leniency.

Dr. Kassin queried the risks by these techniques on an innocent person. Time is an important risk factor. He reported that the vast majority of U.S. interrogations last from 30 minutes to an hour; 90% last less than two hours; and, 95% to 99% last less than four hours. Experts suggest that any interrogation exceeding six hours be considered legally coercive. In Richard A. Leo and Steven A. Drizin's study of proven false confession cases, the average interrogation lasted 16.3 hours for 44 cases in which the duration of interrogation could be determined or was reported.[558] Dr. Kassin asserted that psychological studies have proven that stress, fatigue and sleep-deprivation cause a person to become more focused on immediate benefits and consequences (e.g., ending the interrogation) rather than long-term consequences (*e.g.*, potential imprisonment resulting from the confession).

A second factor he discussed was the presentation of false evidence. False confession studies have shown that people confess because they feel trapped by the evidence. The U.S. Supreme Court sanctioned the use of an outright lie in 1969 and has not revisited the issue.[559] Dr. Kassin indicated that false evidence is not ubiquitously used in interrogations; studies have shown that it is used 10% to 30% of the time on average but is found in almost all proven false confessions cases. In his and Jennifer T. Perillo's recent study, he found a "bluff effect," when told that a record existed that could

[558] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 946-47 (2004).

[559] "The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the 'totality of the circumstances,' and, on the facts of this case we can find no error in the admission of petitioner's confession." *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (citation omitted).

be checked to verify the subject's actions (but had not yet been so checked), innocent persons would falsely confess out of compliance with the interrogator in the expectation that the evidence would prove their innocence.[560]

Dr. Kassin explained that some basic principles of human behavior have been revealed by thousands of studies of human behavior across groups of people of varying age and sex in various venues over a 100 year period. He said a general law of human behavior is that misinformation can substantially alter a person's visual perception, emotional state, personal memories and medical outcomes,[561] and generally give the individual an altered view of reality. He said that lie detectors and polygraphs can be useful, but that polygraphs are frequently used to leverage confessions and can induce false confessions because a suspect is presented with what is considered incontrovertible scientific evidence of guilt.

Dr. Kassin defended his deception studies as inspired by real-life false confession cases in which confessions were induced by police misinforming the suspect about evidence from the crime. Cases and laboratory studies taken together show that lies can contribute to false confessions.[562] Other risks factors include youth and inexperience, and intellectual or other mental deficiencies.[563] People who are highly dependent, suggestible, delusional, have an anxiety disorder or who are in grief or shock are also at risk.[564] Anyone who is extremely vulnerable to manipulation is also at risk.

Recent research has revealed that the individual's own innocence is a risk factor.[565] Dr. Kassin mentioned that innocent suspects waived their *Miranda* rights at a much higher rate than people who have criminal records.[566] Studies have shown that: the suspect's own innocence predisposes him to place himself in an interrogation situation;[567] innocent suspects are more open and forthcoming; they agree to polygraphs; and, they agree to searches of their homes and vehicles. He opined that substantial lies by investigators can cause major problems; he had previously believed that the harmless bluff technique would snag the offender but not the innocent. His belief regarding bluffs has been proven wrong in that several exonerees indicated they interpreted the bluff as a promise of future exoneration making it easier for them to confess and terminate the interrogation. The confession rate was substantially increased during his study to test this theory, but further study is needed on this point.

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[560] Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, Law & Human Behav. (published online Aug. 24, 2010), *available at* http://web.williams.edu/Psychology/Faculty/Kassin/files/Perillo%20&%20Kassin%20(in%20press)%20-%20LHB%20bluff%20studies.pdf.

[561] The placebo effect.

[562] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Human Behav. 3, 17-18 (2010).

[563] *Id.* at 19-21.

[564] *Id.* at 21-22.

[565] Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 Am. Psychologist 215 (2005).

[566] *Id.* at 218-19.

[567] Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 Law & Human Behav. 211, 218 (2004).

A third question discussed by Dr. Kassin was why people always believe a false confession. For his purposes, he defined a false confession as the full narrative statement rather than just the initial admission. In an experiment with a group of prisoners, he asked them to confess to the crime that resulted in their incarceration. He then asked them to confess to a made-up crime. The confessions were all videotaped. The tapes were shown to lay people, who recognized false confessions 54% of the time. Detectives had a lower recognition rate, which Dr. Kassin attributed to their tendency to assume confessions are true. In a second experiment with the tapes, when told that half the confessions were false and half were true, the detectives' rate increased into the 50% range. He added that all the test subjects recognized false confessions at a 10% higher rate when they only listened to and did not view the tapes.

To determine why false confessions are so credible, Dr. Kassin analyzed the content of known false ones. Many of the narratives have a high level of specific detail and frequently touch on motive, which frequently track the "themes" developed by interrogators using The Reid Technique®. Apologies, expressions of remorse and promises to never do it again are frequently found in both false and true confessions, making it harder for judges and juries to differentiate between the two types. Dr. Kassin found that this is partially due to the fact that they are privy only to the final recorded narrative confession (either in writing or on tape), and do not observe the entire interrogation process that developed that confession.

Dr. Kassin reviewed the Barry Laughman case, a Pennsylvania DNA exoneree.[568] He argued that Laughman was a very vulnerable individual having a verbal IQ in the 70s and a severe anxiety disorder with a very low tolerance for stress. His confession was unrecorded, in that one officer questioned Laughman while a second officer wrote down the responses. One of the officers then read the entire exchange on tape, and Laughman was simply asked to affirm the statement. This process denied the judge and jury the ability to assess the confession; they were unable to evaluate his demeanor, willingness and vocal inflections. He noted that the confession contained extreme details of the crime as well as his motivation for the rape and murder. He physically reenacted part of the crime. He expressed shame and remorse; at trial, the trooper described Laughman's demeanor during the interrogation.

Dr. Kassin added that false written statements will frequently contain corrections by the suspect. Deliberately including mistakes in the written false confession is a Reid Technique® that is intended to create an illusion of guilt and shore up the credibility of the confession.

Dr. Kassin detailed an experiment in which study participants witnessed a robbery and identified a culprit. They were then told that someone else had confessed to the crime. Roughly 60% of the witnesses changed their identification, and their confidence levels in those identifications were increased. Confessions have a way of tainting every

[568] *Infra* p. 240.

other aspect of an investigation. He cited another study in which 17% of latent fingerprint analysts changed their analysis when told that someone other than the person they had originally identified had confessed.

Dr. Kassin commented on the value of videotaping custodial interrogations. There is much variability in the extent of videotaping; he distinguished between videotaping a confession and videotaping an entire interrogation. Using *Miranda* warnings as a starting point can also create some ambiguity.

Dr. Kassin related that mandatory video recording of interrogations began in United Kingdom of Great Britain and Northern Ireland in 1986. The current policy and practice has greatly limited the interrogation techniques that may be used, but the false confession rate has not changed. District of Columbia and almost 20 states now mandate recordings, while numerous other jurisdictions voluntarily record.[569] Among other presumptive benefits, cameras might deter the use of highly coercive tactics. Recording should also prevent baseless claims of abuse or coercion and can provide a full and accurate memory of the transaction. Recording will also improve fact-finding accuracy of judges and juries. In a preliminary study he conducted to measure this effect, mock juries revealed that when seeing the entire taped interrogation, they were more likely to believe it was coercive than when they only saw tape of the summary confession. In reviewing the tapes, their determination of guilt or innocence was based in part on the conclusion that the suspect seemed to know things that an innocent person would not be expected to know.

Dr. Kassin remarked that, over time, detectives who have recorded like it. John E. Reid and Associates, which initially opposed recordings, now offers a book on how to videotape confessions and interrogations.[570] There are questions about the effect of the presence of the camera on the suspects, and Dr. Kassin would like to test the effect in a fully randomized field study. However, he believes that the presence of a camera would have minimal effect as other studies have shown that people habitualize very quickly the presence of a video camera or tape recorder. At least one advisor with relevant experience indicated that the presence of a camera on suspects has more than minimal effects.

Dr. Kassin stated that videotaping can address all the concerns that are raised about confessions:

- Was the suspect's admission voluntary or coerced?
- Did the suspect follow the admission with a narrative statement of his own or was it prompted?
- If so, were the details accurate or erroneous?

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[569] *Infra* p. 269.

[570] David M. Buckley & Brian C. Jayne, *Electronic Recording of Interrogations* (2005), *available at* http://www.reid.com/store2/detail.html?sku=eri.

- If accurate, were the details derived from first-hand knowledge, or was the suspect tainted by other information (either advertently or inadvertently)?

- Did the suspect lead the police to information that they did not already know or provide other new corroborating evidence of their confession?

Dr. Kassin and others suggested either an overall modification of the concept of interrogation from "confrontational" to "investigative" or specific reforms to certain at-risk factors inherent in interrogations.[571] As to the former, they reviewed efforts made in Great Britain, New Zealand and Norway to shift the intent of interrogation from a guilt-presumptive, confession-seeking exchange to an investigative interview focused on fact-finding.[572] They reported that recent laboratory research in this area has shown that it can reduce the number of false confessions without decreasing the rate of true confessions, but that additional research is needed.[573] As to the latter reforms, they suggest that detention and interrogation have time limits or at least guidelines with breaks for rest and meals.[574] While not urging an outright ban on the use of false evidence and lying by police, they also recommend that some types of false evidence be prohibited against certain suspects, to be evaluated on a case by case basis by the judge.[575] Permitting only moral and psychological minimization ("confession is good for the soul" type exchanges with suspects), while prohibiting legal minimization (implicit promises of leniency, or offering legal justifications for the crime) was also recommended.[576] They also recommended specific protections for juveniles and persons with cognitive impairments of psychological disorders, including requiring the presence of an attorney at all questioning, and special training for investigators in interrogation techniques and their effect on vulnerable populations.[577]

While expressing full support for the concept of videotaping, G. Daniel Lassiter cautioned that the mere existence of the tape does not guarantee that judges and juries viewing the tape will necessarily be able to differentiate false from true confessions, but that more widespread knowledge of the causes of false confessions may increase their value.[578] Christian A. Meissner and others further urged researchers to "develop alternative, evidence-based approaches that improve the diagnostic value of confession evidence."[579] They also recommend that researchers reach out to the law enforcement community to test and evaluate new interrogation methods.[580]

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[571] Kassin et al., *supra* note 562, at 27-30.
[572] *Id.* at 27-28.
[573] *Id.* at 28.
[574] *Id.*
[575] *Id.* at 28-29.
[576] *Id.* at 29-30.
[577] *Id.* at 30-31.
[578] G. Daniel Lassiter, *Videotaped Interrogations and Confessions: What's Obvious in Hindsight May Not Be in Foresight*, 34 Law & Human Behav. 41 (2010).
[579] Christian A. Meissner et al., *The Need for a Positive Psychological Approach and Collaborative Effort for Improving Practice in the Interrogation Room*, 34 Law & Human Behav. 43, 44 (2010).
[580] *Id.*

Interrogation Practices and Techniques

Dr. Leo has written that as a partial response to the 1966 U.S. Supreme Court ruling in *Arizona v. Miranda*, police interrogation techniques have shifted from the overt, physical intimidation portrayed in the gangster movies of the first half of the 20th century (*e.g.*, the use of rubber hoses and bright lights) to very subtle psychological manipulation and deception of suspects in the interrogation rooms of today.[581] Dr. Leo said "In general, contemporary American police interrogations resemble confidence games to the extent that they involve the systematic use of deception, manipulation, and the betrayal of trust in the process of eliciting a suspect's confession."[582] Suspects also may deceive and manipulate to convince investigators of either their innocence or the futility of trying to prove their guilt, but the level of sophistication of suspects is so far below that of police investigators that the suspect's manipulative skills are no match for a seasoned detective's powers of persuasion.[583] He described "[t]he essence of a confidence game" as "the exchange of trust for hope."[584]

Dr. Leo conducted one of the first field studies of custodial interrogations in which he observed, either personally or via videotapes, 182 police interrogations of custodial suspects in 3 jurisdictions, a major urban area (pop. 372,242) and two smaller metropolitan areas (pop. 121,064 and 116,148).[585] He observed only felony cases,[586] but was unable to obtain a random sample. The bulk of the crimes reviewed were robbery (42.86%).[587] Overall the suspects were young (66% under the age of 30), poor (87% from lower or working class backgrounds), non-white (more than 85% from minorities) males (90%).[588] Almost 90% of the suspects had prior criminal records,[589] and 78% of them waived their Miranda rights.[590] The two interrogation techniques used most often (88% and 85% of the time) were to appeal to the suspect's self-interest and to confront the suspect with existing evidence of guilt.[591] Other techniques, used from 43% of the time to 22% of the time, are, in descending order of use:

- Undermine the suspect's confidence in denial of guilt
- Identify contradictions in the suspect's story
- Use of behavioral analysis questions

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[581] Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 Law & Soc'y Rev. 259 (1996).
[582] *Id*. at 261.
[583] *Id.* at 262.
[584] *Id.* at 264.
[585] Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 268 n.13-15 (1996).
[586] *Id.* at 274.
[587] *Id.*
[588] *Id.* at 273-74.
[589] *Id.* at 275.
[590] *Id.* at 276.
[591] *Id.* at 278.

- Appeal to the importance of cooperation
- Offer moral justifications/psychological excuses
- Confront the suspect with false evidence of guilt
- Use praise or flattery
- Appeal to the detective's expertise/authority
- Appeal to the suspect's conscience
- Minimize the moral seriousness of the offense[592]

He also found that approximately 71% of the interrogations lasted one hour or less, while a little more than 8% lasted over than two hours.[593] More than ¾ of the interrogations yielded some incriminating information, which includes full confessions in almost ¼ of the cases.[594]

The only variable Dr. Leo found that significantly affected the suspect's likelihood to waive *Miranda* was whether the suspect had a prior criminal record.[595] "The more experience a suspect has with the criminal justice system, the more likely he is to take advantage of his *Miranda* rights to terminate questioning and seek counsel."[596] He also found that the only variables significantly related to the likelihood of a successful interrogation (yielding some incriminating information) are the number of interrogation tactics used and the length of the interrogation.[597]

Dr. Leo described the interrogation process in four steps, which he labeled "qualifying" the suspect, "cultivating" the suspect, "conning" the suspect and "cooling out" the suspect.[598] Qualifying the suspect occurs before the suspect is taken into custody in the form of personal and situational profiling.[599] A detective determines the likelihood of the suspect's guilt, the "righteousness" of the victim and the seriousness of the case, all of which contribute to how much effort a detective will devote to attempt to elicit incriminating admissions from a suspect.[600] Once the interrogation begins, the detective

[592] *Id.*
[593] *Id.* at 279.
[594] *Id.* at 280-81.
[595] *Id.* at 286.
[596] *Id.*
[597] *Id.* at 292.
[598] Leo, *supra* note 581, at 266-84.
[599] *Id.* at 267.
[600] *Id.* at 267-68.

qualifies the suspect on a secondary level–his personality and vulnerability to manipulation.[601] He cited the Behavioral Analysis Interview developed by Reid & Associates as a means by which police attempt to determine deceptiveness in suspects.[602]

As part of cultivating the suspect, police attempt to establish rapport with the suspect to create a psychological dependence on the detective by the suspect so that the suspect will waive his constitutional rights and speak with the detective without an attorney present. Dr. Leo described this part of the interrogation as one of psychological manipulation, intended to elicit "truth-telling," as in the truth as the detective believes it to be. His interpretation of conning the suspect is the detective's exploitation of the suspect's trust and ignorance to elicit a confession in exchange for implied promises of leniency from the judge and jury, "good" recommendations to the district attorney and other efforts to minimize the potential charges and punishment faced by the suspect.[603]

Dr. Leo described the "cooling out" of the suspect as positive reinforcement and morale building intended to convince the suspect to take responsibility for his actions and to believe that confessing to the police was his best course of action.[604]

Using the results of his field study, Dr. Leo discussed the impact of *Miranda* on police attitudes, behavior and culture and recommended mandatory videotaping of custodial interrogations in all felony cases.[605] He reviewed the evolution of interrogation and confession law in the United States, noting that "[t]he initial rationale underlying the voluntariness standard was that overbearing police methods created too high a risk of false confession and were not likely to yield factually reliable information from the

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[601] *Id.* at 269.

[602] *Id.* The Behavioral Analysis Interview consists of approximately 15 hypothetical questions posed to the suspect to evoke behavioral responses that are believed to assist the police officer in determining the truthfulness of the suspect's responses and identify behavioral markers for deception. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. &Criminology 621, 672-73 (1996). Reid & Associates' training seminars teach that deceptive responses to four or more of the questions indicates that the interviewer to treat the suspect as guilty. *Id.* at 673. After this preliminary interview, the interrogation follows a nine-step method, outlined as follows:

- Step 1–Accuse the suspect of the crime
- Step 2–Develop psychological "themes" that morally excuse or justify the suspect's behavior
- Step 3–Weaken and suppress the suspect's denials
- Step 4–Overcome the suspect's emotional, factual or moral objections to the interviewer's assertions
- Step 5–Retain the attention of the suspect (primarily through physical gestures)
- Step 6–Shorten and embellish the themes presented in Step 2, focusing on one compelling moral theme
- Step 7–Present the suspect with an alternative question consisting of a good choice and a bad choice to account for the commission of the activity, and encourage the suspect to select the good choice
- Step 8–Enjoin the suspect to orally reveal details of the offense
- Step 9–Convert the suspect's oral statements into a written confession of guilt

Id. at 673-74.

[603] Leo, *supra* note 581, at 276-77.

[604] *Id.* at 282-83.

[605] Leo, *supra* note 602, at 681-92.

accused."[606] He further noted that the voluntariness test for admissibility developed into "the touchstone of due process in confession cases as the Supreme Court sought to strike an appropriate balance between protecting the rights of the criminally accused and allowing police to employ effective interrogation methods."[607] He added

> As we have seen, . . . *Miranda* displaced the case-by-case approach of the voluntariness test by requiring the reading of standard warnings prior to custodial police questioning. By providing police with a clear rule that allows for mechanical compliance and by providing courts with an objective standard with which to judge the admissibility of confession evidence, the Warren Court effectively formalized American custodial police questioning procedures. As we have also seen, American police have generally complied with the letter of the *Miranda* requirements, typically reading to custodial suspects their *Miranda* rights from standard cards or advisement forms prior to any questioning. Despite this standardization of police interrogation practices, however, the *Miranda* formula did not entirely remove the pre-interrogation discretion of police officers and detectives. Consequently, the *Miranda* waiver is not always automatically obtained but often becomes an act of consent negotiated as police detectives employ subtle psychological strategies to predispose a suspect toward voluntarily waiving his or her *Miranda* warnings.[608]

The psychological manipulations discussed by Dr. Leo include conditioning and positively reinforcing the suspect, de-emphasizing the potential importance of the suspect's *Miranda* rights, and persuasion.[609]

> [F]irst, *Miranda* has exercised a civilizing influence on police interrogation behavior, and in so doing has professionalized police practices; second, *Miranda* has transformed the culture and discourse of police detecting; third, *Miranda* has increased popular awareness of constitutional rights, and; fourth, *Miranda* has inspired police to develop more specialized, more sophisticated and seemingly more effective interrogation techniques with which to elicit inculpatory statements.[610]

However, Dr. Leo concluded that *Miranda* fails to address the problems of conflicting statements from police and suspects in court, false allegations of police misconduct, police perjury, false confessions and determining the voluntariness of confessions.[611] "[M]andatory videotaping represents the most adequate solution to all of these problems."[612]

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[606] *Id.* at 625.
[607] *Id.* at 626.
[608] *Id.* at 659-60 (footnotes omitted).
[609] *Id.* at 660-65.
[610] *Id.*, at 668.
[611] *Id*. at 681.
[612] *Id*.

Dr. Leo and Richard J. Ofshe examined 60 cases of "police-induced" false confessions, in an attempt to discern the effect of an untrue admission on various actors in the criminal justice system when there is no corroborating evidence to support the confession.[613] The cases studied all shared the following characteristics: no physical or significant and credible evidence of guilt; the state's evidence consisted of little or no more than the suspect's admission; and, the suspect's factual innocence was supported by a variable amount of evidence, including exculpatory evidence from the confession.[614] The 60 cases were subdivided into three categories: 34 proven false confessions (based on dispositive independent evidence), 18 highly probable false confessions (based on overwhelming evidence that led to the conclusion that innocence was beyond a reasonable doubt), and 8 probable false confessions (based the lack of physical or other significant, credible evidence that led to the conclusion of innocence by a preponderance of the evidence).[615]

Among the proven false confessions, Drs. Leo and Ofshe identified: "four sub-types of false confessions: the suspect confessed to a crime that did not happen; the evidence objectively demonstrates that the defendant could not possibly have committed the crime; the true perpetrator was identified and his guilt established; or the defendant was exonerated by scientific evidence."[616]

Drs. Leo and Ofshe categorized the outcomes of the cases they studied by four types. False confessions that do not lead to a conviction (52%) resulted from the police or prosecutor changing their minds after further reflection, confessions by the true perpetrator, prosecutorial intervention, judicial suppression and jury acquittals.[617] False confessions that lead to wrongful conviction and imprisonment comprised 48% of the cases reviewed.[618] If a false confessor went to trial (as opposed to accepting a plea bargain), he faced a 73% chance of a guilty verdict.[619]

Drs. Leo and Ofshe concluded their review with the following recommendations to prevent wrongful convictions:

- Police should be "trained to seek independence evidence of guilt and internal corroboration for every confession before making an arrest"

- Prosecutors should require admissions to "be corroborated by the details of" the "post-admission narrative before" prosecuting

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[613] Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 433-35 (1998).
[614] *Id.* at 436.
[615] *Id.* at 436-37.
[616] *Id.* at 449.
[617] *Id.* at 473-77.
[618] *Id.* at 477-78.
[619] *Id.* at 481-83.

- Courts should require "minimal indicia of reliability before admitting" a confession evidence

- Legislators should "mandate the recording of interrogations in their entirety"[620]

Drs. Drizin and Leo's study of "proven interrogation-induced false confessions" discussed the central role of modern police interrogation techniques in producing false confessions:

> The purpose of interrogation is not to determine whether a suspect is guilty; rather, police are trained to interrogate only those suspects whose guilt they presume or believe they have already established. The purpose of interrogation, therefore, is not to investigate or evaluate a suspect's alibi or denials. Nor is the purpose of interrogation necessarily to elicit or determine the truth. Rather, the singular purpose of American police interrogation is to elicit incriminating statements and admission–ideally a full confession . . . to assist the State in its prosecution of the defendant.[621]

Police persuade innocent persons to falsely confess by convincing them that the evidence implicates them in such a manner as to make their claims of innocence unbelievable and that their best recourse is to cooperate in an effort minimize any potential punishment or that the evidence is so strong that the person must have committed the crime, but for reasons such as drug or alcohol abuse, they are unable to remember doing so.[622] Additionally, juveniles and those with intellectual impairments are also more likely to be "persuaded" to falsely confess.[623] The authors studied 125 "proven" false confessions, which were split into four categories: those in which no crime occurred; those in which the confessor was physically unable to commit the crime; those in which the true perpetrator of the crime was found; and those in which DNA or other scientific evidence dispositively established the confessor's innocence.[624] It is impossible to quantitatively determine the extent of interrogation-induced false confessions because data is not collected on the number of interrogations or false confessions and the high hurdle of proving the falsity of a confession.[625]

Of the 125 "proven" false confessions examined by Drs. Drizin and Leo, approximately 1/3rd were made by juveniles, with over half of the confessors under the age of 25, and 93% of the confessors were men.[626] Geographically, almost ¾ of false confessions occurred in the South and Midwest, with more than a fifth of the cases

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[620] *Id.* at 495-96.
[621] Drizin & Leo, *supra* note 558, at 910 (citations omitted).
[622] *Id.* at 912-13, 916.
[623] *Id.* at 916.
[624] *Id.* at 922-24.
[625] *Id.* at 928.
[626] *Id.* at 941-42.

arising in Illinois (and over half of those in City of Chicago).[627] Murder cases accounted for 81% of false confessions;[628] and, "[m]ore than 80% . . . were interrogated for more than six hours."[629] Of the cases studied, 35% resulted in conviction and incarceration.[630]

Drs. Drizin and Leo recommended electronic recording of custodial interrogations in their entirety for several reasons: taping "creates an objective, comprehensive and reviewable record"; taping will deter police misconduct, improve the quality of interrogation practices and increase police ability to distinguish guilt from innocence; and, taping enables criminal justice officials to monitor the quality of police interrogations and the reliability of confessions.[631] Additionally, the authors recommended greater education and training in false confessions for police, prosecutors and the judiciary.[632]

Marvin Zalman and Brad W. Smith surveyed 144 municipal police departments in cities or municipal areas with populations greater than 150,000; almost 69% of the departments responded. The authors found that most police executives pragmatically comply with *Miranda,* deferring to its legality and legitimacy. Most of the persons surveyed disagreed with the supposition that current police interrogation techniques contribute to false confessions, and "support for videotaping exists but is not overwhelming."[633]

Gisli H. Gudjonsson and others studied Icelandic college students to determine if certain personal experiences made individuals more susceptible to false confessions. The study participants were all students who self-reported falsely confessing during a police interview as some point in their lives. The authors found that individuals who reported experiencing a number of very adverse life events[634] were more likely to report having falsely confessed. They concluded that one possible interpretation of the results is that negative life events and chronic strain make a person more likely to falsely confess during custody and police interrogation.[635]

Dr. Meissner and others have identified three primary factors associated with false confessions: investigative biases, psychologically-coercive interrogation techniques and psychological vulnerabilities of the suspect. Because of these factors, the authors recommended best practices for police investigations. Interrogations should be "transparent" via videotape to include all interactions between suspect and investigator

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[627] *Id*. at 943.
[628] *Id.* at 944-45.
[629] *Id.* at 946. This percentage is for the interrogations whose duration was "reported or could be determined." *Id.*
[630] *Id.* at 949.
[631] *Id.* at 994.
[632] *Id.* at 997, 1002.
[633] Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. Crim. L. & Criminology 873 (2007).
[634] *E.g.*, abuse, drug use, death of an immediate family member.
[635] Gisli H. Gudjonsson et al., *Custodial Interrogation: What Are the Background Factors Associated with Claims of False Confession to Police?*, 18 J. Forensic Psychiatry & Psychol. 266 (2007).

and should be focused equally on both parties. Investigators should evaluate suspects to determine the existence of any vulnerabilities, such as age, mental ability or psychological state that may put the person at risk. Persons under the influence of drugs or alcohol or suffering withdrawal symptoms should not be interviewed until normal cognitive functioning has returned. Finally, the suspect's statement should be compared to the other known evidence and facts in the case to determine its consistency. To avoid contamination of the suspect's statement, investigators are advised to withhold case details from the media and to not share details with the suspect during the interrogation.[636]

Brandon L. Garrett studied the transcripts of false confessions in 38 DNA exonerations.[637] Looking at the characteristics of these false confessions, almost all had "specific details about how the crime occurred" that he concludes was the result of accidental or deliberate contamination of the interrogation.[638] "A complete interrogation record enables meaningful reliability review and could help to prevent the problem of confession contamination."[639] He also recommended interrogation reforms, such as using a detective unfamiliar with the case to initially interrogate and modifying psychological techniques when faced with vulnerable populations.[640] With respect to vulnerable persons, he further suggested that extra protections be afforded such as formal time limits for interrogations or automatic retention of an attorney before beginning any interrogation.[641]

Dr. Leo has identified the processes that drive a suspect to make a false confession.

> There are three sequential errors, which occur during a police-elicited false confession, that lead to a wrongful conviction. Investigators first misclassify an innocent person as guilty; they next subject him to a guilt-presumptive, accusatory interrogation that invariably involves lies about evidence and often the repeated use of implicit and explicit promises and threats as well. Once they have elicited a false admission, they pressure the suspect to provide a postadmission narrative that they jointly shape, often supplying the innocent suspect with the (public and nonpublic) facts of the crime. These have been referred to as the misclassification error, the coercion error, and the contamination error.[642]

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[636] Christian A. Meissner et al., *False Confessions*, *in* Applied Criminal Psychology: A Guide to Forensic Behavioral Sciences 191 (Richard N. Kocsis ed., 2009)
[637] Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1062 (2010).
[638] *Id.* at 1066.
[639] *Id.* at 1113.
[640] *Id.* at 1116. Juveniles and mentally disabled individuals are "populations vulnerable to suggestion and coercion." *Id.*
[641] *Id.* at 1116-17.
[642] Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. Am. Acad. Psychiatry & L. 332, 333-34 (2009).

Inability to accurately detect deception can cause police to focus on an innocent suspect. "Tunnel vision" resultant from police attention and resources focused on that misidentified suspect can then lead to "coerced" confessions that seem reliable because they contain detailed information of the crime, which deliberately or inadvertently has been revealed to the suspect during the course of the interrogation. These errors are discussed in detail below.

Detecting Deception

Much of modern police interrogation relies on psychological manipulation and interpretation. The behavioral analysis aspects of The Reid Technique® are used by investigators to determine the veracity of an individual during the interview process. Looking at verbal and nonverbal cues to deception, an interrogator determines guilt or innocence; and, if guilt is determined, he then proceeds to psychologically manipulate the individual to confess. However, there continues to be much debate as to two aspects of this process: the constancy of deception cues across all interviewees[643] and the allegedly enhanced ability of interrogators to detect deception. Even as research continues to show that detection of deception is rarely better than chance, the reliability and sources of deception cues continues to be studied.

Dr. Kassin and Christina Fong tested whether people can distinguish between truthful and false denials made during a criminal interrogation to determine if training in the use of verbal and nonverbal cues can increase the ability to tell true from false statements.[644] Volunteers were divided into two groups. The "guilty" were instructed to commit a mock crime, and the "innocent" were to engage in an innocent activity at the same location as the mock crime. Each participant was "arrested" and submitted to a blind interrogation geared toward eliciting a confession, which was videotaped. A second group of people was divided into two sections; one section received one hour of training in The Reid Technique®, half of which was devoted to detecting deceptive behavior and the other section received no training. A survey of the mock suspects showed that most of the suspects believed that both the interrogator and others viewing the interrogation would accurately assess their guilt or innocence. They found that the untrained observers were 10% more accurate in judging truth versus deception than the trained observers. Both groups were more confident in their ability to detect deception before viewing the tapes than after, although the trained observers showed less of a difference than the untrained. They concluded that the trained observers, using The Reid Technique®, were less successful at judging deception than the untrained observers, partly because the nonverbal behaviors indicating deception as taught by The Reid Technique® can just as readily simply indicate anxiety due to the interrogation and not due to deception.

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[643] *I.e.*, does eye aversion always signal deception or does it also result from situational stress unrelated to deception?

[644] Kassin & Fong, *supra* note 545.

Dr. Kassin and others tested whether police investigators were better than lay people at recognizing a false confession.[645] A group of college students was compared to a group of police investigators in an experiment that had the subjects listening to audiotapes and viewing videotapes of prison inmates offering "true" confessions to the crimes that resulted in their incarceration, and "false" confessions to each others' crimes.[646] The study revealed that the students were more accurate in their judgments, but the police were more confident.[647] The authors also looked at the years of experience and amount of specialized training police had received in detecting deception.[648] They found that neither of these elements improved accuracy and may be responsible for a bias toward presuming guilt.[649] They also confirmed previous studies that had found subjects to be more accurate when listen to an audio recording than viewing a visual recording.[650] When the subjects were informed that one-half of the confessions were true and one-half false (correcting for a perceived bias that in real life, investigators are more likely to encounter predominately true confessions) accuracy rates were approximately equal (around 50%), but investigators still expressed more confidence in their assessments.

A 2005 study attempted to determine if behavioral cues to deception increase as the incriminating potential of the subject matter of an interrogation increases.[651] One difficulty in assessing deception cues was distinguishing them from manifestations of stressful truth-telling. The authors reviewed videotaped interviews with convicted criminals where strong corroborating evidence existed to confirm whether statements were true or false. Compared to prior experimental research, the authors did not find many of the correlations between verbal and nonverbal cues and deception that have previously been identified. Instead, they determined that the cues were related to incriminating potential.[652]

A 2007 British study attempted to determine if interview technique affected the ability to detect deception. The method of interview[653] used did not affect accuracy of police officers in predicting the truthfulness or mendacity of the suspect, which, like previous studies, was slightly more than chance. However, the accusatory interview method resulted in more false accusations of truth tellers, and those accusations were highly confident. The authors concluded that the accusatory style of interviews was dangerous, in that the interviewer that is highly confident in the deceitfulness of the suspect is more likely to attempt to obtain a confession, which could produce a false one.[654]

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[645] Saul M. Kassin et al., "*I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 Law & Human Behav. 211, 213 (2005).
[646] *Id.*
[647] *Id.* at 216.
[648] *Id.* at 222.
[649] *Id.*
[650] *Id.*
[651] Martha Davis et al., *Behavioral Cues to Deception vs. Topic Incriminating Potential in Criminal Confessions*, 29 Law & Human Behav. 683 (2005).
[652] *Id.* at 701.
[653] Accusatory, information gathering or behavior analysis.
[654] Aldert Vrij et al., *Cues to Deception and Ability to Detect Lies as a Function of Police Interview Styles*, 31 Law & Human Behav. 499 (2007).

Christopher Slobogin has written about the legitimacy of the use of deception by police during interrogations. He reviewed various studies on the effect of deception in producing confessions and has proposed that deception be permissible when:

> (1) it takes place in the window between arrest and formal charging; (2) it is necessary (i.e., non-deceptive techniques have failed); (3) it is not coercive (i.e., avoids undermining the rights to silence and counsel and would not be considered impermissibly coercive if true); and (4) it does not take advantage of vulnerable populations (i.e., suspects who are young, have mental retardation, or have been subjected to prolonged interrogation).[655]

Presumption of Guilt – "Tunnel Vision"

Interrogative techniques that are geared toward detecting deception and eliciting a confession are all predicated upon the notion that the suspect is guilty and the interrogator's obligation is to ferret out proof of that guilt. Protestations of innocence are assumed to be devious behavior on the part of the guilty suspect attempting to avoid incarceration.

Tunnel vision has been described as a process that

> leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion. Through that filter, all information supporting the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable. Properly understood, tunnel vision is more often the product of the human condition as well as institutional and cultural pressures, than of maliciousness or indifference.[656]

Keith A. Findley and Michael S. Scott detailed various cognitive biases that contribute to tunnel vision, including confirmation bias (where evidence is sought that supports the persons underlying hypothesis) that results in persons both seeking and recalling information is a biased manner.[657] They reviewed studies that have found a belief persistence tendency, whereby once a hypothesis (*e.g.*, the suspect is the perpetrator) is drawn, it is extremely difficult to convince a person to reconsider or

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[655] Christopher Slobogin, *Lying and Confessing*, 39 Tex. Tech L. Rev. 1275 (2007).
[656] Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 292.
[657] *Id.* at 309, 312.

change that hypothesis.[658] The authors also discussed "hindsight" bias in which a person reanalyzes an event, emphasizing evidence that supports the desired outcome and minimizing evidence that is inconsistent so that the outcome appears more likely than any other.[659]

Findley and Scott also argued that the nature of the adversarial system itself contributes to tunnel vision.[660] Institutional pressures to solve cases quickly, the volume of reported crimes and the need to meet performance measurement standards can all affect police officers.[661] Prosecutors are subject to public pressures to prosecute and convict perceived offenders and institutional and cultural pressures within their offices to maintain high conviction rates.[662] From an ethical standpoint, a prosecutor must believe in the guilt of the person being tried and may have received biased or incomplete information regarding the evidence of guilt due to investigative errors on the part of police.[663] Defense counsel are encouraged to arrange plea bargains in the interests of expediting procedures, so that they fail to fully investigate client claims of innocence.[664]

The authors argued that tunnel vision is not only encouraged, but prescribed as part of the criminal justice system.[665] The Reid Technique® is cited as an example of how interrogators are trained to assume guilt and to discount or discredit alternative suspects or evidence.[666] Rules of evidence at trial that limit the defense from proposing alternative suspects, appellate court deference to trial courts on questions of fact, findings of "harmless error" on appeal and doctrines like the *Brady* rule that shift the burden of proving the significance of evidence to the defense all contribute to tunnel vision.[667] Additionally, they stated that restrictive post-conviction review procedures further bolster institutionalized tunnel vision.[668]

The authors suggested that "improving procedures for handling eyewitness identifications, greater safeguards against unreliable jailhouse snitch testimony, electronic recording of interrogations, and better oversight of crime laboratories" will all help to correct the problem of tunnel vision.[669] In jurisdictions that electronically record interrogations, its incumbent transparency has modified interrogative techniques, so that "[i]nstead of cutting off denials and pressuring suspects to confess, the new approach permits the suspect to keep talking and responding to cordial but challenging questions until the suspect's own statements either convince the observer of innocence, or trap the suspect in a web of lies."[670]

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[658] *Id.* at 314-15.
[659] *Id.* at 316-22.
[660] *Id.* at 322-23.
[661] *Id.* at 323-27.
[662] *Id.* at 327-28.
[663] *Id.* at 329-31.
[664] *Id.* at 331.
[665] *Id.* at 333.
[666] *Id.* at 333-40.
[667] *Id.* at 342-52.
[668] *Id.* at 353.
[669] *Id.* at 375.
[670] *Id.* at 392.

Investigator bias has been found to be a major contributor to false confessions and has been studied at length. Drs. Meissner and Kassin found that training and experience in detecting deception led investigators to inaccurately presuppose that suspects were guilty based on verbal and nonverbal behavioral cues.[671] Their study involved 44 North American law enforcement investigators with an average of 13.7 years of law enforcement experience, 68% of whom had received "formal professional training in interviewing, interrogation, and" deception detection.[672] Although they were more confident in their judgments than the students were, the trained and experienced investigators were more likely to judge "suspects" as deceitful but were no better at discriminating between deceit and truth.[673] "In short, the pivotal decision investigators must make regarding whether to further interrogate a suspect may be based on prejudgments of guilt, confidently made, but frequently in error."[674]

Dr. Kassin and others have further explored the effect that an investigator's presumption of guilt has on the behavior of both the investigator and the suspect.[675] In an experiment, "guilty" and "innocent" groups of suspects were interrogated by mock interrogators. Both groups of suspects were instructed to deny guilt at all times and would be rewarded after the interrogation if the interrogator judged them to be innocent.[676] Interrogators were instructed to secure a confession and accurately determine guilt or innocence.[677] One group entered the interrogations with the expectation that 80% of the suspects were guilty, while the other group were told only 20% were guilty.[678] The group of investigators who were expecting to interview predominantly guilty suspects chose more guilt-presumptive questions.[679] Interrogative techniques (high v. low coerciveness) were unaffected by presumptions of guilt, although more techniques were used overall in the interrogation of innocent suspects than guilty ones.[680] Post interrogation self-reports indicated that interrogators saw themselves as trying harder to get a confession and exerting more pressure when the suspect was actually innocent, although it did not ultimately affect their judgment of guilt or innocence. The presumption of guilt led neutral observers to determine that suspects in those circumstances were more defensive, suggesting that "behavioral confirmation is a risk that is incurred when the police presume guilt as a bias of interrogation."[681]

Tunnel vision is a major contributing factor in false confessions that result in wrongful convictions. A teenager in New York, Jeffrey Deskovic, falsely confessed to raping and murdering a classmate and is an example of tunnel vision run rampant. Based

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[671] Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 Law & Human Behav. 469 (2002).
[672] *Id.* at 474.
[673] *Id.* at 476, 478.
[674] *Id.* at 478.
[675] Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 Law & Human Behav. 187-203 (2003).
[676] *Id.* at 192.
[677] *Id.* at 191.
[678] *Id.*
[679] *Id.* at 197-98.
[680] *Id.* at 197.
[681] *Id.* at 200.

on an ultimately inaccurate profile, police and prosecutors focused on Deskovic to the exclusion of any other suspects. They used heavy-handed (albeit legal), mostly unrecorded interrogative methods to elicit a confession and constructed alternative theories to explain away scientific evidence, including a DNA analysis that conclusively excluded Deskovic as the rapist.[682] A report commissioned by the district attorney analyzed his case to determine "what went wrong" and suggested several ways to avoid similar mistakes in the future.[683] Police, the prosecution and defense counsel made multiple errors,[684] and the report made several suggestions for change.[685] For purposes of this discussion, their endorsement of videotaping entire interrogations is most important.[686]

Dr. Leo and Deborah Davis recently reviewed the case of the Norfolk Four, a group of sailors convicted of the rape and murder of another sailor's wife in 1997.[687] The four sailors were convicted even though DNA testing excluded each as the rapist.[688] The authors examined "seven psychological processes linking false confessions to wrongful convictions and failures of post-conviction relief."[689] The seven processes are:

- Biasing effects of the confession itself, which tend to make police, prosecutors, judges, juries and even defense counsel disbelieve claims of innocence and false confession based on the belief that no one would falsely confess to a crime he did not commit. Particularly damning is the incorporation of "misleading specialized knowledge" in the confession. While a guilty party will have knowledge of the crime known only to himself and the police, an innocent person may acquire specific knowledge of the crime during the course of the interrogation when police show a suspect crime scene photos or mention details of the crime during efforts to elicit a confession. Incorporated into a false confession, this type of knowledge inflates the credibility of the confession and makes later renunciations and denials by the suspect unbelievable. The authors argue that recording interrogations can help identify the source of the "inside" information offered in a confession.[690]

- Tunnel vision and confirmation bias were also found to contribute to wrongful convictions, beginning with the decision that an individual is guilty. This decision, if based on erroneous assumptions, profiles of likely perpetrators or "gut" hunches that lead to a particular suspect being misclassified as guilty.

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[682] Judge (ret.) Leslie Crocker Snyder et al., *Rep. on the Conviction of Jeffrey Deskovic* 2, 3, 5-6, 7-24 (2007).
[683] *Id.* at 5.
[684] *Id.* at 5-29.
[685] *Id.* at 31-35.
[686] *Id.* at 32-34.
[687] Richard A. Leo & Deborah Davis, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 38 J. Psychiatry & L. 9 (2010).
[688] Two of whom pled guilty to avoid the death penalty; the other two were convicted by juries. *Id.* at 18.
[689] *Id.* at 9.
[690] *Id.* at 19-29.

Tunnel vision is viewed by these authors as affecting not only police and prosecutors but also defense counsel, who may also erroneously assume the suspect is guilty and focus on obtaining the minimal sentence or avoiding the death penalty rather than maintaining the defendant's innocence. Confirmation biases broadly refer to selectively seeking, producing and interpreting evidence that support existent beliefs while rejecting evidence to the contrary.[691]

- Motivational biases are also considered a major factor. The primary goal of investigators should be accuracy, but personal, institutional and external sources of pressure push investigators to quickly and efficiently solve crimes by identifying a perpetrator and obtaining a confession to facilitate a conviction.[692]

- Escalating commitment and the roles of self-protection and self-justification also come into play, which can lead to refusals to recognize mistakes, even when faced with exculpatory evidence.[693]

- Suspects under interrogation may experience strong emotions, which can motivate them to confess to escape lengthy interrogations, impair their thinking and cause them to be more susceptible to influence. Strong emotions on the part of investigators hoping to solve a heinous crime may further promote a narrowing of focus and concentration on a particular suspect.[694]

- Institutional influences on decisions and production of evidence also lead to wrongful convictions based on false confessions. Financial consideration may make pursuit and collection of additional evidence less desirable when a confession has already been obtained. Case loads of investigators and attorneys can also impact their allocation of resources.[695]

- Inadequate context for evaluation of evidence and inadequate or misleading relevant knowledge and beliefs also create problems. Some do not know the contributing factors to false confessions or misunderstand that an otherwise rational person may falsely confess for various reasons. Other beliefs regarding signs of deception and guilt can cause interrogators to confuse anxiety with deception. Faith in and reliance on some psychological interrogation methods that have been implicated in false confessions also play a prominent role in the conversion of a false confession into a wrongful conviction.[696]

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[691] *Id.* at 29-34.
[692] *Id.* at 34-36.
[693] *Id.* at 36-38.
[694] *Id.* at 38-41.
[695] *Id.* at 41-42.
[696] *Id.* at 42-46.

- Inadequate context for evaluation of evidence and the progressive constriction of relevant information is the final process set forth. In the absence of taping, evidence of the interrogation itself is selectively filtered. Because of the early focus on one suspect/confessor, other suspects are ignored, and evidence inconsistent with the confession, which might have proven exculpatory, is neglected.[697]

"The key to preventing confession-based miscarriages of justice is therefore to better understand why some false confessions lead to wrongful convictions and others do not."[698]

Best Practices Recommendation

> All law enforcement agencies should electronically record custodial interrogations. Exceptions should be provided for special circumstances that render recordation impractical.

There is almost unanimous accord in the literature on the subject of false confessions that electronic recording of custodial interrogations is the best evidence by which to judge the validity of a confession. Calls have been made at least since the 1930s for some form of neutral, contemporaneous recording of interrogations.[699]

Including decreases in suppression motions alleging police and prosecutorial misconduct and increases in guilty pleas, numerous benefits have been touted for electronic recording of custodial interrogations.

> [R]ecording protects officers from claims of misconduct, and practically eliminate motions to suppress based on alleged police use of overbearing, unlawful tactics; remove the need for testimony about what was said and done during interviews; allow officers to concentrate on the suspects' responses without the distraction of note taking; permit fellow officers to view interviews by remote hookup and make suggestions to those conducting the interview; disclose previously overlooked clues and leads during later viewings; protect suspects who are innocent; make strong, often invincible cases against guilty suspects who confess or make guilty admissions by act or conduct; increase guilty pleas; serve as a training tool

[697] *Id.* at 46-49.
[698] *Id.* at 50.
[699] Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 Drake L. Rev. (2004) 619, 621-23.

> for the officers conducting interviews, as well as for officers aspiring to become detectives; and provide protection against civil damage awards based on police misconduct.[700]

Slobogin has offered several constitutional grounds for mandating electronic recording of custodial interrogations.[701] On due process grounds, he argued that the court can not assess voluntariness[702] without being able to review the interrogation.[703] As a Fifth Amendment protection, he argued that there must be evidence that the police gave warnings, the suspect understood them and knowingly waived his constitutional rights against self-incrimination.[704] From a Sixth Amendment perspective, he argued that the right of confrontation is violated when interrogations are unrecorded.[705] He additionally argued that recording should not be waivable by the suspect.[706] Dr. Drizin and Reich have suggested that mandatory recording of police interrogations can prevent false confessions,[707] increase the effective administration of justice[708] and improve relations between the police and the public.[709]

Concerns have been expressed about the effect of videotaping confessions, however. Dr. Lassiter and others have suggested that videotaping in which the camera focuses solely on the suspect creates a camera perspective bias[710] that could result in jurors and judges more likely to determine that a confession was voluntary. Their studies revealed that such a bias does not occur when the focus is equally distributed between suspect and interrogator. They also found that an interrogator-focus camera may be the best perspective to allow judges and jurors to accurately assess reliability. However, the authors suggested that an interrogator-only focus prevents any observation of the suspect. Ideally, they would prefer two cameras to be used, one focused on the suspect and one on the interrogator, but if that is not feasible, they recommend a single camera equally focused on both parties. In a subsequent study, Dr. Lassiter and other colleagues tested judges and law enforcement officers to see if their relative experience and expertise could

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[700] Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 Golden Gate U. L. Rev. 175, 178-79 (2006).
[701] Christopher Slobogin, *Toward Taping*, 1 Ohio State J. Crim. L. 309 (2003).
[702] *Id.* at 312-14.
[703] *Id.* at 317-18.
[704] *Id.* at 319-20.
[705] *Id.* at 320-21.
[706] *Id.* at 321.
[707] Drizen & Reich, *supra* note 699, at 622-24.
[708] *Id.* at 624-28.
[709] *Id.* at 628.
[710] G. Daniel Lassiter et al., *Videotaped Confessions: Panacea or Pandora's Box?*, 28 Law & Pol'y 192 (2006).

help counter the camera perspective bias previously detected.[711] They concluded that it did not, and that jurisdictions that mandate videotaping should also mandate that an equal-focus camera perspective should be the standard.[712]

In addition to other justifications for electronic recording of interrogations, the primary benefit believed to flow from the practice is the prevention of false confessions. In reviewing cases in which individuals have been exonerated on the basis of DNA evidence, false confessions have been found to contribute to the problem of wrongful convictions. The Innocence Project has found that "[i]n about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright false confessions or pled guilty."[713] Reasons for false confessions vary and can include duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, fear of violence, actual infliction of harm, the threat of a harsh sentence and misunderstanding the situation.[714]

Much has been written about the power of confessions. Many researchers and analysts claim that because police, judges, juries and the general public all tend to believe that an individual will not admit against his own interest, they assume that confessions must necessarily be true. That assumption creates a tremendous hurdle for the innocent person, who, for any number of reasons, falsely confesses and then attempts to retract it.

Implementation Models

Model Bill for Electronic Recording of Custodial Interrogations

Originally published by Northwestern University School of Law, this model bill would require electronic recording of all interviews that occur in a place of detention, involving a law enforcement officer's questioning that is likely to elicit incriminating responses, beginning with the advice of the suspect's constitutional rights and ending at the conclusion of the interview.[715] Applicable crimes would be defined by the jurisdiction adopting the model.[716] Exceptions for equipment malfunction, human error, and certain types of non-interrogative questioning would be excused from the recording requirement, but failure to record would result in the statement's presumptive

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[711] G. Daniel Lassiter et al., *Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect*, 18 Psychol. Science 224-25 (2007). Subsequent studies have confirmed the camera perspective bias. *E.g.*, Lezlee J. Ware et al., *Camera Perspective Bias in Videotaped Confessions: Evidence That Visual Attention Is a Mediator*, 14 J. Experimental Psychol.: Applied 192 (2008).
[712] Lassiter et al., *supra* note 711, at 225.
[713] Innocence Project, Understand the Causes, www.innocenceproject.org/understand/False-Confessions.php (last visited Mar. 28, 2011).
[714] *Id.*
[715] Sullivan, *supra* note 700, at 188.
[716] *Id.*

inadmissibility.[717] Thomas P. Sullivan and Andrew W. Vail have since revised the model to replace the presumption of inadmissibility with cautionary jury instructions instead.[718] Based upon updated surveys, Sullivan and Vail have determined that the threat of inadmissibility is not needed to ensure compliance with recording requirements due to the enthusiastic reception they have seen for the process by police departments recording interviews.[719] Responding to strong concerns of law enforcement about the potential for excluding testimony of unrecorded interviews, the model has been revised to permit admission of all interviews, with the jury given an instruction as to the greater value of recorded interrogations.[720]

National District Attorneys Association

"The National District Attorneys Association" Policy on Electronic Recording of Statements "opposes the exclusion of otherwise truthful and reliable statements by suspects and witnesses simply because the statement was not electronically recorded."[721]

American Bar Association

American Bar Association policy recommended that all law enforcement agencies "videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers or other places where suspects are held for questioning" and urged enactment of laws or promulgation of procedural rules to require this recording.[722] Where videotaping is impractical, it recommends making an audiotape of the interrogation in its entirety.[723]

The National Conference of Commissioners on Uniform State Laws

In 2010, The National Conference of Commissioners on Uniform State Laws approved and recommended Uniform Electronic Recordation of Custodial Interrogations Act for enactment in all the states.[724] The uniform act requires custodial interrogations to be recorded electronically in their entirety but leaves it up to the enacting jurisdiction which specific or class of crimes to apply this mandate.[725] It forbids recording private

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[717] *Id.* at 189.
[718] Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interview as Required by Law*, 99 J. Crim. L. & Criminology 215 (2009).
[719] *Id.* at 220-22.
[720] *Id.* at 222-23.
[721] Nat'l Dist. Att'ys Ass'n, Policy on Electronic Recording of Statements, http://www.ndaa.org/pdf/ndaa_policy_electronic_recording_of_statements.pdf (2004).
[722] Am. Bar Ass'n Crim. Just. Section, *Achieving Justice: Freeing the Innocent, Convicting the Guilty* 11 (2006).
[723] *Id.*
[724] Nat'l Conf. of Commissioners on Unif. State Laws, Unif. Elec. Recordation of Custodial Interrogations Act, *available at* http://www.law.upenn.edu/bll/archives/ulc/erci/2010final.htm.
[725] *Id.* § 3.

communications between an individual and his counsel but does not require permission to record the interrogation.[726] There are a half-dozen exceptions to the recording requirement; these are uncontroversial exceptions such as the one for equipment failure despite its reasonable maintenance.[727] A court could still admit an unrecorded statement that was required to be recorded, but the defense could get the court to give a cautionary instruction.[728] Law enforcement agencies would need to comply with rules to implement this act.[729] Some jurisdictions mandate these recordings via statute, others mandate them judicially and still others have voluntarily recorded via executive policy.[730] The uniform act is intended to resolve "differences found around the nation" in a fair and professional way.[731] The uniform act

> promotes accuracy and the truth finding process. Electronic recordation of custodial interrogations will benefit law enforcement agencies, improving their ability to prove cases while lowering overall costs of investigation and litigation. Systemic recordation will also improve accuracy and fairness to the accused and the state, protect constitutional rights, and most importantly increase public confidence in the justice system.[732]

The uniform act purports to enhance the quality of investigations and increase efficiency in the criminal justice system.[733]

Judicial Rulings

Rulings by state supreme courts on electronic recording of custodial interrogations are of three varieties: non-recorded statements are declared inadmissible, a cautionary jury instruction is given if a recording was not made or the court may recommend use of electronic recordings as the best evidence of an interrogation.

Alaska

Alaska's Supreme Court has ruled that an unexcused failure to entirely electronically record a custodial interrogation conducted in a place of detention violates a

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[726] *Id.* § 4.
[727] *Id.* §§ 5-10.
[728] *Id.* § 13.
[729] *Id.* § 15.
[730] Nat'l Conf. of Commissioners on Unif. State Laws, Elec. Recordation of Custodial Interrogations Summary, *available at* http://www.uniformlaws.org/ActSummary.aspx?title=Electronic Recordation of Custodial Interrogations.
[731] *Id.*
[732] *Id.*
[733] Nat'l Conf. of Commissioners on Unif. State Laws, Why States Should Adopt UERCIA, *available at* http://www.uniformlaws.org/Narrative.aspx?title=Why States Should Adopt UERCIA.

suspect's right to due process under the Alaska Constitution and any statement thus obtained is generally inadmissible.[734] "[O]nly part of the questioning" and a full recording would "entail minimal cost and effort" that would be offset by the resources consumed in resolving the disputes that arose over the events that occurred during the interrogations.

> The only real reason advanced by police for their frequent failure to electronically record an entire interrogation is their claim that recordings tend to have a 'chilling effect' on a suspect's willingness to talk. Given the fact that an accused has a constitutional right to remain silent, . . . and that he must be clearly warned of that right prior to any custodial interrogation, this argument is not persuasive.[735]

Indiana

Under Rules of Court, an unrecorded statement made during a custodial interrogation for a felony criminal prosecution is inadmissible unless it is electronically recorded completely and continuously. It applies to custodial interrogations conducted in a place of detention and the recording must be audio-video. This is a fairly detailed rule and includes a number of the exceptions found in legislative mandates discussed further below. A substantial exigency is one of the exceptions to this rule so that circumstances making it infeasible to record a custodial interrogation as otherwise required or circumstances preventing its preservation and availability at trial could allow admission of an unrecorded statement.[736]

Iowa

The Iowa Supreme Court encouraged electronic recording, especially videotaping, of custodial interrogations.[737] In this particular case involving a minor suspect, the videotape allowed the court to conclude that the appellant validly waived his *Miranda* rights and that his confession was knowing, voluntary and intelligent.[738] The videotape also displayed no indication of improper threats or promises by the interrogating officer.[739]

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[734] *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985)
[735] *Id.*
[736] Ind. R. Evid. 617.
[737] *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006).
[738] *Id.*
[739] *Id.*

Massachusetts

Rather than mandate recording interrogations as a prerequisite to admit a defendant's statement, Massachusetts will admit it but considers

> it only fair to point out to the jury that the party with the burden of proof has, for whatever reason, decided not to preserve evidence of that interrogation in a more reliable form, and . . . they may consider that fact as part of their assessment of the less reliable form of evidence that the Commonwealth has opted to present.[740]

The Massachusetts Supreme Judicial Court ruled that

> the admission into evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant . . . to a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution.
> . . . .
> As is all too often the case, the lack of any recording has resulted in the expenditure of significant judicial resources . . ., all in an attempt to reconstruct what transpired during several hours of interrogation conducted in 1998 and to perform an analysis of the constitutional ramifications of that incomplete reconstruction. We will never know whether, if able to hear . . . the entirety of the interrogation, the impact of the officers' trickery and implied offers of leniency might have appeared in context sufficiently attenuated to permit the conclusion that DiGiambattista's confession was nevertheless voluntary. 'Given the fine line between proper and improper interrogation techniques, the ability to reproduce the exact statements made during an interrogation is of the utmost benefit.' . . . [F]ailure to preserve evidence of the interrogation in a thorough and reliable form can comprise a basis for concluding that voluntariness and a valid waiver have not been established beyond a reasonable doubt.
> . . . .
> Where . . . interrogating officers have chosen *not* to preserve an accurate and complete recording of the interrogation, that fact alone justifies skepticism of the officers' version of events, above and beyond the customary bases for impeachment of such testimony. We believe that a defendant whose interrogation has not been reliably preserved by means of a complete electronic recording should be entitled . . . to a cautionary instruction concerning the use of such evidence.[741]

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[740] *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 534-35 (Mass. 2004).
[741] *Id.* at 518, 529, 533 (citation omitted).

The court cited other jurisdictions that also were reluctant to mandate recording interrogations all the while acknowledging that recording interrogations would deter police misconduct, reduce contested motions to suppress, allow more accurate resolutions of those suppression motions and give the fact finder a more complete version of the statement or confession.[742] The court did not think much of the objection that suspects will refuse to talk or confess if they are recorded because that "is itself inherently contrary to our requirement of a knowing and voluntary waiver of the right to remain silent."[743] The financial cost to record is insignificant because the equipment cost "is minimal, and that cost is dwarfed by comparison to the costs of having officers spend countless hours testifying at hearings and trials in an attempt to reconstruct the details of unrecorded interrogations."[744] Because this is a condition to admit evidence into court, it does not regulate law enforcement activity in violation of separation of powers.[745] In a footnote, the court noted that the prosecutor would not need to introduce the entire recorded interrogation to avoid the cautionary instruction because the instruction relates more to the preservation rather than the introduction of the evidence.[746] Ordinary evidentiary rules could exclude portions of it, but the defendant would have the entire recording should an issue of completeness or reliability about the testimony relating to interrogation arise.[747]

Minnesota

The Minnesota Supreme Court held

> that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded . . . at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.[748]

This rule applied prospectively,[749] and the court was apparently persuaded that recording provides a more accurate record of the interrogation as well as reduces disputes over the validity of Miranda warnings and the voluntariness of the waiver of those rights.[750] "In addition, an accurate record makes it possible for a defendant to challenge

[742] *Id.* at 530.
[743] *Id.* at 531.
[744] *Id.* at n.21.
[745] *Id.* at 531.
[746] *Id.* at 533 n.23.
[747] *Id.*
[748] *State v. Scales*, 518 N.W.2d 587, 592 (1994), *aff'd*, 620 N.W.2d 706 (Minn. 2001).
[749] *Id.,* 518 N.W.2d at 593.
[750] *Id.* at 591.

misleading or false testimony and . . . protects the state against meritless claims. . . . A recording requirement also discourages unfair and psychologically coercive police tactics and thus results in more professional law enforcement."[751]

New Hampshire

New Hampshire's Supreme Court decided to "steer a narrow course between Alaska and Minnesota."[752] Alaska would suppress the evidence from an unexcused failure to record as a due process violation and Minnesota would suppress an unrecorded or incompletely recorded interrogation based upon the court's supervisory authority. Like Minnesota, New Hampshire's Supreme Court ruling is based upon its supervisory authority but would suppress the recorded evidence from incompletely recorded interrogations and allow alternative forms of evidence from the interrogation:

> To avoid the inequity inherent in admitting into evidence the selective recording of a post-*Miranda* interrogation, we establish the following rule: . . . to admit . . . the taped recording of an interrogation, which occurs after *Miranda* rights are given, the recording must be complete. . . . [I]mmediately following the valid waiver of a defendant's *Miranda* rights, a tape recorded interrogation will not be admitted . . . unless the statement is recorded in its entirety. . . . [W]here the incomplete recording of an interrogation results in the exclusion of the tape recording itself, evidence gathered during the interrogation may still be admitted in alternative forms . . . admission of the incomplete recording of the defendant's interrogation is not permissible.[753]

New Jersey

By rule of court, New Jersey mandates recording all custodial interrogations conducted at a place of detention when the person being interrogated is charged with murder, aggravated sexual assault, aggravated arson, any crime involving the use or possession of a firearm and a number of other specified crimes as well as conspiracy and attempt to commit them.[754] The mandate to record does not apply if it is unfeasible to record, the interrogation was outside of the state and for five other standard exceptions

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[751] *Id.*

[752] *State v. Barnett*, 789 A.2d 629, 632 (N.H. 2001). Subsequent to establishment of this rule, the erroneous admission of a partially recorded interrogation was found to be harmless because "the alternative evidence of the defendant's guilt is of an overwhelming nature . . . and there was no evidence the defendant made exculpatory or otherwise inconsistent statements during the unrecorded portion." *State v. Dupont*, 816 A.2d 954, 958-60 (N.H. 2003).

[753] *Barnett*, 789 A.2d at 632-33.

[754] N.J. R. Crim. P. 3.17(a).

that are used elsewhere.[755] If no recording is made, the lack of recording is a factor considered in determining its admissibility and, if used, a cautionary instruction is given upon request of the defendant.[756]

Legislative Mandates

Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Texas, Wisconsin and the District of Columbia, have legislatively addressed recording of custodial interrogations.[757] Most are limited to custodial interrogations in a place of detention. Most begin the taping with the *Miranda* warnings. Illinois, Maryland, Missouri, Oregon and Wisconsin specifically state that the consent of the person to be interrogated is not required. Where the crimes to be covered are specified, the requirement is almost exclusively limited to investigations for felonies and violent crimes; Illinois and North Carolina further limit the application to homicide investigations.

Numerous exceptions are granted, including equipment failure, operator failure, suspect refusal to be recorded, spontaneous outbursts and responses to routine booking questions. Out-of-state interrogations are not typically required to have been recorded. Other exigent circumstances are also exceptions to the recording mandate.

Consequences for failure to record vary greatly. In some instances, no consequences are specified; Ohio specifically declares that failure to record does "not provide a basis to exclude or suppress the statement", nor does it create private cause of action against a law enforcement officer.[758] Other consequences include automatic inadmissibility, a rebuttable presumption of inadmissibility, a cautionary jury instruction, withholding state funding and a rebuttable presumption of involuntariness. Most require recordings to be retained until all appeals are exhausted and until the statute of limitations on any underlying offenses has run.

Texas does not statutorily mandate recording the custodial interrogation but requires that any oral or sign language statements resultant from a custodial interrogation be electronically recorded to be admitted against the accused in a criminal proceeding.[759]

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[755] *Id.* 3.17(b).
[756] *Id.* 3.17(d), (e).
[757] *Infra* p. 270.
[758] Ohio Rev. Code § 2933.81. Law enforcement agencies also may not penalize officers who fail to record as statutorily required. *Id.*
[759] Tex. Code Crim. Proc. art. 38.22, § 3.

Executive Policy

New York

New York's is a statewide set of voluntary guidelines adopted by a group of law enforcement entities.[760] The general guideline is to electronically record

> a custodial interrogation of someone suspected of committing a qualifying offense. . . . . The recording equipment should be turned on prior to the subject being placed within the interview room and should only be turned off after the subject has left the room after the interrogation is completed. All discussions in the interview room, including any pre-interrogation discussions, even if they occur before the reading of Miranda Warnings, must be included in the recording. . . . . Any custodial interrogation must be preceded by the reading of Miranda Warnings. This does not preclude pre-interrogation discussions with the subject before Miranda Warnings are read and the actual interrogation commences. In qualifying cases where the interrogation is to be recorded, all conversations that occur inside the interview room must be recorded, including pre-interrogation discussions and the administration of the Miranda Warnings.[761]

Utah

Utah's Office of the Attorney General has established a policy mandating that custodial interrogations held in a place of detention, and beginning with the *Miranda* warnings, be recorded. The usual legislative exemptions and records retention found in other states apply, and no consequences for failure to record are established.

Police Experiences

Sullivan has studied the merits of electronically recording custodial interrogations for years. At a 2008 joint meeting of the subcommittees on investigations and legal representation, he presented the value of electronically recording interrogations.

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[760] N.Y. Dist. Att'ys Ass'n, N.Y.C. Police Dep't, N.Y. Div. of Crim. Just. Servs., N.Y. Ass'n of Chiefs of Police, N.Y. Police & N.Y. Sheriffs' Ass'n.

[761] N.Y. Dist. Att'ys Ass'n., N.Y. State Guidelines for Recording Custodial Interrogations of Suspects 2, 5, 6, *available at* http://daasny.org/most%20recent%20Video%20Recording%20Interrogation%20Procedures%20-%20Custodial%20-%20FINAL%20-12-8-10.pdf.

Sullivan described his legal background, highlighting his service as co-chairman for the Illinois Commission on Capital Punishment, which led to his interest in recording custodial interrogations. Rather than determine the desirability of this punishment, the commission studied how to make the punishment fairer. It recommended electronically recording "all questioning of homicide suspects in custody in police facilities."[762] When legislation was introduced in 2003 to mandate recording of custodial interrogations in Illinois homicide cases, law enforcement vigorously opposed it.[763] Because he had expected that law enforcement would welcome this reform as a useful tool, he decided to survey law enforcement agencies that voluntarily record custodial interrogations to evaluate their experiences.[764] His research revealed that most departments that voluntarily recorded interrogations did so without written guidelines or regulations.[765] Recording is usually at the discretion of the officer in charge.[766] Recordings are made from *Miranda* warnings to the conclusion of the interrogation.[767] Most departments record only for serious felonies.[768] Audio and audiovisual recordings are made; and, even when not required to do so, police officers usually inform suspects that they are being recorded.[769]

Recording helps prevent disputes about police misconduct, their treatment of suspects and the completeness of statements made by the person being questioned.[770] "[D]efense motions to suppress statements and confessions" are dramatically reduced.[771] Recording further allows the police "to focus on the suspect" and not copious note-taking.[772] Reviewing recordings allow police to identify inconsistencies and other incriminating behaviors,[773] and can also be used to train and self-evaluate.[774] Prosecutors benefit from increased numbers of guilty pleas and greater negotiating power at sentencing.[775]

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[762] Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations* 2 (2004), *available at* www.law.northwestern.edu/wrongfulconvictions/Causes/CustodialInterrogations.htm.
[763] The commission's recommendation was enacted by making unrecorded statements presumptively inadmissible. 725 Ill. Comp. Stat. 5/103-2.1.
[764] Sullivan, *supra* note 762, at 2-3.
[765] *Id.* at 4.
[766] *Id.* at 5.
[767] *Id.* "We did not include departments that conduct unrecorded interviews followed by recorded confessions." *Id.*
[768] *Id.*
[769] *Id.*
[770] *Id.* at 6.
[771] *Id.* at 8.
[772] *Id.* at 10.
[773] *Id.*
[774] *Id.* at 18.
[775] *Id.* at 12.

Arkansas

Rather than require recording itself, Arkansas's Supreme Court stated "that the criminal justice system will be better served if our supervisory authority is brought to bear on this issue. We therefore refer the practicability of adopting such a rule to the Committee on Criminal Practice for study and consideration."[776]

California Commission on the Fair Administration of Justice

Concluding its study and finally reporting in 2008, the commission called for statutorily mandating recording of custodial interrogations as a means to prevent wrongful convictions based on false confessions.[777] To date, legislation has not been enacted in California to do so.

Connecticut

Since mid-2008, the Connecticut State Police Eastern and Western District Major Crime Squads and four municipal police departments have been conducting a pilot program initiated by the Connecticut Division of Criminal Justice to video-record interrogations in serious felony cases.[778] As of March 2010, 587 interviews had been conducted, all at stationary locations; over 60% had been done covertly.[779] While the division has reported favorable police support and strong initial indications of success, it has testified in opposition to a legislative mandate for electronic recording of custodial interrogations on the basis of the need for additional study through the pilot program.[780] Despite noting "benefits to be realized by a recording requirement" for custodial interrogations, Connecticut's Supreme Court declined to require recording under its supervisory powers noting that the requirement is not constitutionally mandated.[781] "[W]e find persuasive the reasoning of courts that have determined that, where a recording requirement is not mandated by the state constitution, the legislature is better suited to decide whether to establish a recording policy."[782]

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[776] *Clark v. State*, 287 S.W.3d 567, 576 (Ark. 2008).
[777] Cal. Comm'n on the Fair Admin. of Just., *supra* note 4, at 12, 38-41.
[778] Conn. Div. of Crim. Just., Testimony in Opposition to: S.B. 230 (RAISED) An Act Concerning the Videotaping of Custodial Interrogations, before Conn. Gen. Assem. J. Comm. on Judiciary, Mar. 10, 2010, *available at* http://www.cga.ct.gov/2010/JUDdata/Tmy/2010SB-00230-R000310-Chief%20State's%20Attorney-Kevin%20Kane-TMY.PDF.
[779] *Id.*
[780] *Id.*
[781] *State v. Lockhart*, 4 A.3d 1176, 1180 (Conn. 2010).
[782] *Id.* at 1191.

New York

New York City's Police Department "will be starting two pilot programs, one in Brooklyn and one in the Bronx, where detectives will video record the interrogations of arrested suspects in felony assault cases."[783] New York's Police Commissioner announced in February 2010 that it would begin a pilot program to videotape custodial interrogations in felony-level investigations. The Long Island suburban counties of Nassau and Suffolk announced that they would begin videotaping police interrogations in 2008.[784] "As of Fall 2010, pilot projects have been funded and are on-going in Schenectady, Broome, Greene, Westchester, and Franklin counties."[785]

Vermont

Act 60 of 2007 established the Eyewitness Identification and Custodial Interrogation Study Committee, which submitted its report to the Vermont House and Senate Committee on Judiciary in December 2007. The committee recommended that custodial interrogations in felony cases should be audio and video recorded, but at a minimum, audio-taped.

Other Jurisdictions

Sullivan and Vail's surveys have discovered over 600 "police and sheriff departments that electronically record . . . the entirety of most of their stationhouse interviews in serious felony investigations."[786] Some of the larger metropolitan areas include Atlanta, Boston, Dallas, Denver, Detroit (beginning in 2006),[787] Las Vegas, Nashville, Prince George's County (Md.), Richmond and Salt Lake City.

Other Proposals to Prevent False Confessions

Various other proposals have been made to avoid false confessions. They include: admitting expert testimony on the causes of false confessions; restricting police

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[783] Press Release, N.Y. Dist. Att'ys Ass'n, New York State Law Enforcement Agencies Endorse Video Recording of Interrogations, Statewide Guidelines to Ensure Integrity of the Practice (Dec. 14, 2010), *available at* http://daasny.org/. In 2011, the state Div. of Crim. Just. Servs. granted $400,000 to supplement the purchase and installation of equipment by jurisdictions within the state. *Id.*

[784] *Newsday*, Long Island, NY (Feb. 11, 2008) A.26.

[785] N.Y. Bar Ass'n, Current Legal Issues Affecting the Profession 30 (2011), *available at* http://www.nysba.org/Content/NavigationMenu/AboutNYSBA/CurrentLegalIssues2008/CLI2011.pdf.

[786] Thomas P. Sullivan et al., *The Case for Recording Police Interrogations*, Litigation (Spring 2008).

[787] Jeremy W. Peters, *Wrongful Conviction Prompts Detroit Police to Videotape Certain Interrogations*, N.Y. Times, Apr. 11, 2006, at A14.

interrogative techniques; urging courts to require minimal indicia of reliability before admitting a confession into evidence; and, abolishing or modifying the use of *Miranda* warnings.

Admission of Expert Testimony

Expert testimony is sometimes offered to explain how a suspect was induced to falsely confess or how the suspect fits the profile of someone likely to falsely confess.[788] Testimony on false confessions has been rejected by various courts for several reasons, including that the conclusions from research on the topic have not been generally accepted in the scientific community, expert opinions on the topic are not scientifically reliable, testimony would not assist the trier-of-fact in understanding the issue and the subject is not beyond the ability of jurors to comprehend.[789] When admitted, it has been to the extent that the testimony dealt with false confessions in general and not to the reliability of a specific defendant's confession. Expert testimony on false confessions has been admitted at some trials in Pennsylvania. One trial court permitted expert testimony generally about false confessions but not to the specificities of the case being tried.[790] The defendant unsuccessfully appealed the ruling that forbade expert testimony about the specificities of his case; because his argument was underdeveloped in his appellate brief, the superior court considered this issue to be waived.[791] In another case, expert psychiatric testimony was admitted at trial that alcohol-induced amnesia made a confession inaccurate, but this same expert was forbidden to testify about a hypnotic interview that generated a substantially different version.[792] Aside from the psychiatrist's proffered testimony about the hypnotic statements, the videotape of the hypnotic interview was not admitted either because hypnotic evidence is deemed too unreliable to be proper scientific evidence.[793]

Restrict Interrogative Techniques

Laurie Magid has written that the voluntariness standard used to determine the reliability of a confession (based on the assumption that coerced statements are unreliable) as used by the U.S. Supreme Court sufficiently limits current interrogative practices.[794] She rejected other theories used to justify curtailing interrogation practices, such as the sporting theory of equality between interrogator and suspect, equal protection of suspects (*i.e.*, all suspects should be equally aware of their rights), development of trust by the suspect for the interrogator, preservation of the suspect's dignity and the

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[788] Peter Quintieri & Kenneth J. Weiss, *Admissibility of False-Confession Testimony: Know Thy Standard*, 33 J. Am. Acad. Psychiatry L. 535 (2005).
[789] *Id.* at 535-37.
[790] *Commonwealth v. Cornelius*, 856 A.2d 62, 77 (Pa. Super. Ct. 2004).
[791] *Id.*
[792] *Commonwealth v. Reed*, 583 A.2d 459, 466 (Pa. Super. Ct. 1990).
[793] *Id.* at 468-69.
[794] Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 Mich. L. Rev. 1168, 1178 (2001).

morality of lying to a suspect, and concerns that lying during interrogations can lead to lying in other areas, such as the courtroom, as unsound.[795] She further argued that claims as to the proliferation of psychologically-induced false confessions are unsupported by empirical data.[796] False-confession research has only shown that some techniques are more likely than others to result in false confessions, and that some people, primarily juveniles and the mentally impaired, are more likely to falsely confess; no research has shown a rate of occurrence to justify limitations.[797] At the time this was published, she asserted that there was a lack of credible evidence of a serious problem that needed to "be addressed by substantially limiting police efforts to obtain confessions."[798] She further maintained that the methods used to determine the innocence of false confessors, outside the DNA arena, are subjective and unreliable.[799]

Additionally, Magid contended that deception is useful and necessary in some cases to obtain a confession and subsequent conviction.[800] She concluded that the risk of losing confessions and convictions of guilty persons far outweighs the risk of the few anecdotal cases of false confessions found in the pre-2000 literature.[801] Because some concerns about false confessions could be addressed by videotaping them, this is preferable to limiting interrogative techniques.[802]

Promote Reliability over Voluntariness

Boaz Sangero has recommended a requirement for strong corroboration linking the defendant to the crime to meet

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[795] *Id.* at 1179-85.
[796] *Id.* at 1190-91.
[797] *Id.* at 1191-92.
[798] *Id.* at 1195.
[799] *Id.* at 1195-97.
[800] *Id.* at 1205-06.
[801] *Id.* at 1206-07.
[802] *Id.* at 1210. The author is persuaded that reliability is and should remain the primary reason to limit interrogative techniques with fewer and narrower reasons relating to those violating due process of law. *Id.* at 1208-09. Unimpressed by anecdotal accounts of false confessions up to the time of publication, the author called for "statistically sound, empirical research to determine if there truly is a widespread problem with police-induced false confessions" before drastically limiting deceptive techniques to interrogate. *Id.* at 1210. It is true that anecdotes do not establish frequency, but it is unrealistic to compare the number of false to true confessions as the author suggests. *Id.* at 1201-03. The author concedes that DNA evidence unequivocally establishes innocence and accepts convictions overturned on the grounds of innocence as clearly established innocence, but considers actual innocence to be certain "in only a small fraction of the cases . . . used to illustrate . . . wrongful convictions in general and false confessions in particular." *Id.* at 1195-96. This might be an unremarkable position except that the author discounts this consideration as a reason why it is impossible to simply compare the number of false to true confessions. *Id.* at 1204. The author thinks that studying a random sample of false confession cases can establish the frequency of their occurrence, but this disregards her own remarks in the immediately preceding footnote when she approvingly uses the assertion of "most other researchers" to say the frequency of wrongful convictions is "either elusive or unknowable" when she refutes an estimate of the number of wrongful convictions from an earlier study. *Id.* at 1195 n.122, 1194 n.121.

> two central objectives: the first is to eliminate the fear of a false confession (even when voluntary) and the second is to direct police investigators not to limit themselves to the interrogation of a suspect and the attempt to extract a confession, but rather to use sophisticated investigative techniques and to make an assiduous effort to locate objective, tangible evidence extrinsic to the suspect.[803]

"[A]s long as investigations focus on the interrogees themselves" instead of gathering other evidence, "the greater risk that . . . false confessions will continue to be elicited."[804] Dr. Sangero suggests that the burden of proof of the voluntariness of a confession should be "beyond a reasonable doubt" rather than "by a preponderance of the evidence."[805] He further argues against the use of detention to conduct interrogations and suggests that to the extent detention is necessary, the suspect should be made comfortable and not inconvenienced.[806] "Documentation of the interrogation . . . is very important. . . . [D]ocumentation provides . . . a much more reliable tool . . . of evaluating the confession, regarding both the pressure exerted on the interrogee as well as the need to distinguish between information that was obtained from the suspect himself and information that was fed to him."[807] While he strongly supported the video documentation of interrogations, Sangero opined that it alone is insufficient to prevent false confessions and stressed the need for extrinsic, objective tangible evidence of the suspect's guilt.[808] Rather than determining the truth or falsity of a confession, this documentation "can only rule out certain negative factors regarding the circumstances in which the confession was made."[809]

Eugene R. Milihizer has recently written on the admissibility of confession evidence and criticized the reliance on the voluntariness standard as expressed in *Miranda* and similar cases.[810] He recommended a return to a reliability standard through the use of a new rule of evidence.[811] Under this proposed new rule, a judge would determine whether the suspect made a knowing and intelligent waiver of his Fifth Amendment rights under *Miranda*, then whether that the confession was produced by coercive governmental conduct under *Connelly*, and, finally, whether the confession was reliable enough to be admitted on its merits.[812] Milhizer further argues against a systematic preference for recorded confessions on the grounds that they may affect the perceived reliability of a confession–that suspects and police may manipulate the process and that candor by suspects may be suppressed.[813]

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[803] Boaz Sangero, *Miranda is Not Enough: A New Justification of Demanding "Strong Corroboration" to a Confession*, 28 Cardozo L. Rev. 2791, 2803 (2007).
[804] *Id.* at 2817.
[805] *Id.* at 2808-09.
[806] *Id.* at 2816.
[807] *Id.* at 2826. Documentation means audiovisual or at least audio. *Id.*
[808] *Id.* at 2827-28.
[809] *Id.*
[810] Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 Temp. L. Rev. 1, 28 (2008).
[811] *Id.* at 47.
[812] *Id.* at 56.
[813] *Id.* at 63-64.

Drs. Leo and Ofshe proposed a test to determine the reliability of an uncontaminated confession by analyzing the fit between the description of the crime given in the confession and the facts of the crime itself.[814] Does the confession reveal guilty knowledge and is it corroborated by objective evidence? Details of the criminal act itself are important, but also descriptions of minutiae, such as the color of the wall paint, can be used to test if the suspect has actual knowledge or is just guessing. Three indicia of reliability were identified by them to determine the reliability of a confession:

> Does the statement (1) lead to the discovery of evidence unknown to the police? . . . (2) include identification of highly unusual elements of the crime that have not been made public? . . . (3) include an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly?[815]

To properly analyze the fit between the confession and the crime itself, an electronic record of the entire interrogation must be available to be reviewed.[816]

More recently, Dr. Leo and others proposed new reliability tests to be used by judges to evaluate interrogations and confessions.[817] For recorded interrogations and confessions, the 1998 Leo-Oshe test that asks the three questions above would apply with the defendant bearing the burden of production on the issue of reliability and a standard of admissibility by a preponderance of the evidence.[818] For unrecorded interrogations and confessions to be admitted, the prosecution would first have to clearly and convincingly demonstrate that recording was not feasible through no fault of law enforcement.[819] Additionally, the three factors in the standard Leo-Oshe test would be analyzed and the prosecutors would be required to produce evidence "previously unknown to them" tying the suspect to the crime, knowledge of which arose from the suspect's unrecorded interrogation."[820]

Abolish or Modify Miranda

Paul G. Cassell rejected calls to prohibit police from falsifying evidence and exaggerating the strength of evidence, as well as suggestions that special interrogation rules apply to ill-defined groups of "vulnerable" suspects. He argued that these types of police and court procedures run the risk of increasing the number of "lost confessions," *i.e.*, true confessions that are not made because police interrogation methods are constrained. In turn, these lost confessions affect innocent persons who might have been exonerated through a confession by the real perpetrator and future victims of criminals

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[814] Leo & Ofshe, *supra* note 613, at 438-40.
[815] *Id.* at 438-39.
[816] *Id.* at 494-95.
[817] Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, Wis. L. Rev. 479, 530-34 (2006).
[818] *Id.* at 530-31. The prosecution would still have the burden of persuasion. *Id.* at 531.
[819] *Id.* at 532.
[820] *Id.* at 532-33.

who have escaped prosecution. The ideal public policy reform reduces false confessions while increasing truthful confessions. He argued that the *Miranda* decision has had the opposite effect. He contended that innocent people are more trusting of police, and almost invariably waive their *Miranda* rights because they either believe that invoking those rights is tantamount to an admission of guilt or they do not need the protection because of their innocence. He claimed that *Miranda* is most beneficial to career criminals, who are more likely to invoke those rights and less likely to confess. A further danger cited by Cassell is that "*Miranda* has shifted the focus of the courts away from the reliability of the methods used to obtain confessions and towards technical procedural questions about warnings and waivers."[821] He also argued that defense counsel have shifted their focus from a factual investigation of the alleged criminal conduct of the defendant to procedural litigation over *Miranda* compliance by investigators.

Cassell recommended modifying the *Miranda* warnings and procedures and requiring videotapes of police interrogations. Specifically, he advocated eliminating the need for police to obtain an affirmative waiver of *Miranda* rights and the requirement that all questioning be halted after the suspect has requested legal representation. He stated, "[V]ideotaping provides an excellent protection for false confessors, by allowing judges and juries to see when police have led an innocent person to admit to a crime he did not commit." He argued that innocent people are usually the ones who waive *Miranda* rights, while career criminals manipulate the rules to their advantage so that *Miranda* has a limited effect. He further argued that *Miranda* has harmed police ability to obtain truthful confessions from actual perpetrators, putting both potential victims and innocent suspects at risk.[822]

Drs. Leo and Ofshe denounced Cassell's supposition that *Miranda* harms innocent suspects, arguing that his theory is "unsupported by any evidence, [and] it also flies in the face of reason."[823] With respect to Cassell's recommendation that *Miranda* procedures be loosened to garner more truthful confessions, they argued that doing so would more likely increase false confessions by innocent suspects. In his article, Cassell claimed to be able to estimate the occurrence of wrongful convictions. Drs. Leo and Ofshe insisted that Cassell's efforts were based on speculation, and that quantification is neither possible nor necessary. They stated that because interrogations are not typically recorded in their entirety, it is impossible to determine the validity of confessions statements or the truth of what occur in the interrogation room with any certainty. Further, information on the number of interrogations nationally, and the number of truthful or false confessions they produce is unavailable. Additionally, they suggested that most false confessions are undiscovered. Drs. Leo and Ofshe

> reject not only Cassell's assertion that reasonable quantification is presently possible, but also his insistence that this is somehow necessary

[821] Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions–and from Miranda*, 88 J. Crim. L. & Criminology 497, 544 (1998).
[822] *Id.* at 503.
[823] Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. Crim. L. & Criminology 557, 558 (1998).

> to make considered public policy decisions about the regulation of interrogation methods. It is well established that psychologically-induced false confessions occur frequently enough to warrant the concern of criminal justice officials, legislators and the general public.[824]

Cassell suggested that false confessions are extremely rare. He further suggested that they are outweighed by the number of "lost" confessions that do not occur due to the dampening effect of *Miranda*.[825] Cassell reviewed nine of the "proven" false confession cases cited by Drs. Leo and Ofshe, and declared that the defendant was factually guilty in each case.[826] Cassell argued that the problem of false confessions is concentrated among persons "with serious mental problems", and that "even those who are guilty of crimes will frequently give a confession that is inconsistent with the" evidence.[827] As to potential preventive messages, he rejected the use of expert testimony on confessions on the grounds that there is no clear empirical, scientific foundation for such testimony.[828] He also rejected the recommendation that defendants' post-admission narratives be analyzed against the known facts of the case.[829]

Lawrence Rosenthal has argued that the holding in *Miranda* was intended to ensure that a suspect knowingly and intelligently waived his Fifth Amendment right against compelled self-incrimination before being subject to custodial interrogation and nothing more.[830] He further posited that any attempts under the Due Process clause to regulate post-waiver custodial interrogations are constitutionally unjustifiable.[831] These include efforts to regulate police conduct during interrogations, videotaping of interrogations, and stricter judicial review of reliability and voluntariness of statements.[832]

Proposals in this Report for Electronic Recording of Custodial Interrogations

The proposals relating to electronic recording custodial interrogations were generated by the subcommittees on investigation and legal representation. The subcommittee on investigation proposes amending a rule of criminal procedure to require

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[824] *Id.* at 561.
[825] Paul G. Cassell, *The Guilty and the 'Innocent': An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 Harv. J.L. & Pub. Pol'y 523, 526-33 (1999).
[826] *Id.* at 536-67. One of these confessions was videotaped; in another case, the initial police interview was audiotaped. In a third case, the defendant repeated his confession in a recorded interview after his conviction.
[827] *Id.* at 569.
[828] *Id.* at 577-79.
[829] *Id.* at 579-89.
[830] Lawrence Rosenthal, *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*, 10 Chap. L. Rev. 579, 586-603 (2007).
[831] *Id.* at 603-20.
[832] *Id.*

defense counsel in capital cases to be educated on evidence relating to confessions.[833] This rule[834] already requires "training relevant to representation in capital cases" and confessions would be included with other specified areas.[835]

Both subcommittees considered the statutory proposal,[836] but it was principally authored by the subcommittee on legal representation. If enacted, custodial interrogations would generally be required to be recorded whenever the *Miranda* warning is mandated. A wiretap exception would allow police to surreptitiously record the same interrogations that they are required to record. In other words, police may but need not obtain permission to record. If no recording was made as required by the proposed statute, the statement could still be admitted, but the court would instruct the jury about the statutory requirement that was disobeyed.

These proposals were generated based upon the academic material reviewed along with experiences related by presenters and shared among the advisors themselves.

Summary of Electronic Recording of Custodial Interrogations Proposals

A rule of criminal procedure should be amended to require defense counsel[837] in capital cases to be educated on evidence relating to confessions.

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

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[833] *Infra* p. 167.
[834] Pa. R. Crim. P. 801.
[835] *E.g.*, pleading & motion practice, pretrial investigation, jury selection, etc. *Id.*
[836] *Infra* p. 169.
[837] This rule mandates "educational and experiential criteria" for retained or appointed counsel "[i]n all cases in which the district attorney has filed a Notice of Aggravating Circumstances." Pa. R. Crim. P. 801. The educ. is approved by Pa. Continuing Legal Educ. Bd. so that prosecutors may attend courses focusing on capital litigation as well.

Even when earnest and continuing efforts are made to eliminate wrongful convictions, the possibility that they will recur remains as well as the possibility that previously unidentified causes of wrongful convictions will be recognized. Most of Pennsylvania's 11 DNA exonerees would have been exonerated postconviction rather than on direct appeal, and this is also typical for the 273 DNA exonerees nationally. The response to wrongful convictions includes correcting these erroneous convictions when they can be identified. "[T]he sole means of obtaining collateral relief" for a criminal conviction when the convict either did not commit the crime or is serving an illegal sentence is via our Post Conviction Relief Act.[838] For these reasons, the subcommittee on legal representation considered Pennsylvania's current law[839] and offered some revisions to improve and update it.

Almost all the recommended revisions to our Post Conviction Relief Act relate to postconviction DNA testing. Currently, a motion for postconviction DNA testing is limited to convicts who are serving a term of imprisonment or awaiting execution.[840] The proposed amendment would allow anyone convicted of a crime to file for postconviction DNA testing. In other words, the motion for relief would no longer be restricted to those serving a term of imprisonment or awaiting execution so that those civilly committed or on probation or parole or even those required to register as sex offenders could still petition for the test.

The proposed section to statutorily allow an indigent convict to request appointment of counsel to prepare a petition to test DNA postconviction is similar to the *status quo*.[841] However, the proposal would extend the time to file a petition for postconviction relief under one of the exceptions. The time to file under a statutory exception would be the same as the time to file is ordinarily[842] and there would no time

[838] 42 Pa.C.S. § 9542. This act does not limit remedies at trial or on direct appeal but "encompasses all other common law and statutory remedies for the same purpose" so that the exclusive way to pursue these available remedies is statutorily. *Id.*

[839] *Id.* §§ 9541-9546.

[840] *Id.* § 9543.1(a)(1).

[841] Indigent defendants get appointed counsel for the initial petition for postconviction relief; for a subsequent petition for postconviction relief, indigent defendants get appointed cousel when evidentiary hearings are required and "whenever the interests of justice require". Pa. R. Crim. P. 904.

[842] Under an exception, this would extend the time to petition postconviction from 60 days to one year making it the same period that it already is otherwise. 42 Pa.C.S. § 9545(b).

limitation to petition to test DNA postconviction.[843] Because DNA tests can be dispositive in these cases, any time limit for postconviction relief after receiving favorable test results does not serve justice, especially one so artificially truncated as the current 60-day period. A 60-day time limit can be unrealistic for many incarcerated convicts who lack resources[844] to timely petition. It is critical to liberalize the timeliness requirements for these limited exceptions because if an appellant does not satisfy the time requirements in our Post Conviction Relief Act, the judiciary has no jurisdiction to entertain the petition.[845] This means that even a strong, *prima facie* showing that demonstrates a genuine miscarriage of justice occurred will not be judicially considered if the petition is untimely filed.[846] It is unjust to allow one to move for postconviction DNA testing anytime and then effectively tell a prisoner exonerated by that test that he has only 60 days after those favorable results to petition for postconviction relief or he will never get out of jail, especially when the prisoner is unlikely to want further delay.

The proposed section specifying the right to file a petition for DNA testing postconviction is intended to clarify the current law by permitting a convicted individual who has confessed to a crime to obtain this testing postconviction. "[A] confession . . . is not a *per se* bar . . . to a convicted individual establishing a *prima facie* case that DNA testing would establish actual innocence of the crime for which he . . . was convicted, even if the voluntariness of that confession has been fully and finally litigated."[847] The proposed section would also make this right unwaivable.

Some assert that allowing DNA testing on collateral attack to support a claim of actual innocence is an incentive to litigate because a new trial might be granted, which is not necessarily a determination of actual innocence.[848] Collateral attacks have been also characterized as "the litigation incentive at work" by advocates for defendants and

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[843] Other than while serving a term of imprisonment or awaiting execution after being convicted, there are no time limits to move for DNA testing postconviction; however, there are timeliness requirements for postconviction relief based those test results. *Id.* § 9543.1(a)(1), (f)(1). Because action should not be separate from logic, the proposal would allow postconviction relief anytime based upon favorable test results.

[844] Inmates are paid 19-51¢/hour so that most do not earn enough during one hour of work to purchase the minimal postage to send a letter via first-class mail (if the letter weighs one ounce or less). E-mail from John G. Peslis to J. State Gov't Comm'n (July 18, 2011, 13:00 EST) (on file with J. State Gov't Comm'n). Postage costs 44¢-$1.04 to send a letter in a regularly sized envelope via first class (dependent on weight, up to 3½ ounces). Postage for large envelopes sent first class costs 88¢-$3.28 (dependent on weight, up to 13 ounces). U.S. Postal Serv., First-Class Mail Prices, http://www.usps.com/prices/first-class-mail-prices.htm (last visited July 1, 2011).

[845] *Commonwealth v. Fahy*, 737 A.2d 214, 220 (Pa. 1999).

[846] *Id.* at 223.

[847] *Commonwealth v. Wright*, 14 A.3d 798, 817 (Pa. 2011).

[848] This includes Chief Justice Castille. *Id.* at 819 (concurring). This concurring opinion mentions three examples from our Commw. in the same paragraph that says, "I am wary . . . of accepting at face value characterizations of cases as representing determinations of 'actual innocence' or 'exoneration' when no such judicial finding has been made." *Id.* The three Pa. exonerations specified involved four sexual attack victims (two of whom were murdered). The DNA testing later dispositively exonerated all three convicts of at least the sexual attacks, so that they seem to be actually innocent of these crimes regardless of wariness to accept determinations of actual innocence in other cases.

others.[849] If so, there has been no flood of litigation seeking DNA testing postconviction.[850] In any event, the proposal includes provisions to prevent a convict from besieging the judiciary with an endless stream of repetitive petitions to test DNA postconviction. A court can summarily dismiss a frivolous petition or successive petitions failing to allege either new grounds for relief or that more probative results could be obtained from advanced DNA technology.

There is no centralized database to track this litigation nationally, but efforts were made to obtain this information in 2006 and 2007.[851] Sources in eight states identified a range of no known petitions to test DNA postconviction in one state with a small population[852] to a stream of one or two/month in our most populous state.[853] (Another state had hundreds, but that one had a deadline to apply.)[854] Attorneys typically vet these before petitioning a court, and many of these prisoners seek assistance from an attorney.[855] No state has seriously claimed that postconviction DNA testing has caused a significant problem for its judiciary.

In 2008, prosecutors on the advisory committee were asked about postconviction DNA testing petitions filed in their districts during the most recent year. The district attorney's office for a middle-sized district could only remember one petition being filed and thought that it might be useful for Administrative Office of Pennsylvania Courts to collect this data. Similarly, the district attorney's office for a large-sized district could only remember one petition being filed. (Incidentally, both of these petitions were pursued based upon ineffective assistance of counsel[856] rather than on the postconviction DNA testing statute.[857]) The district attorney's office for a small-sized district did not have any petition filed in its district and supposed that the number statewide would be "very low."

To the extent that the proposed statutory amendment would liberalize the right to petition for DNA testing, this largely comports with a recent judicial ruling on "a convicted state prisoner seeking DNA testing on crime-scene evidence" via a civil rights action under 42 U.S.C. § 1983.[858] In this case, a state court of criminal appeals denied motions by the prisoner seeking postconviction DNA testing under a state statute of

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[849] *Id.*
[850] E-mail from Rebecca Brown, Senior Pol'y Advocate for State Affairs, Innocence Project, to J. State Gov't Comm'n (Jan. 14, 2011) (on file with J. State Gov't Comm'n).
[851] *Id.*
[852] Wyo., *id.*
[853] Cal., *id.* This state peaked at about 20/month earlier in the decade but became much fewer than that. *Id.*
[854] Ohio, *id.*
[855] *Id.*
[856] 42 Pa.C.S. § 9543(a)(2)(ii).
[857] *Id.* § 9543.1.
[858] *Skinner v. Switzer*, 131 S.Ct. 1289, 1293 (U.S. 2011). The statute authorizes civil actions for the deprivation of constitutional and statutory rights. The year before this ruling, U.S. Ct. of Appeals for the 3d Cir., which is the one with jurisidiction for our Commw., also ruled that a claim under this statute can be used "to request access to evidence for postconviction DNA testing." *Grier v. Klem*, 591 F.3d 672, 679 (3d Cir. 2010).

untested biological evidence.[859] United States Courts of Appeals in at least three circuits had already allowed this and there was no "litigation flood or even rainfall" in those circuits.[860] United States Supreme Court sided with these circuits to allow these civil rights actions by convicted state prisoners to seek DNA testing in federal court actions in every circuit.[861]

Two sections are proposed to explicitly authorize comparisons with our State DNA Data Base. These amendments reflect current statutory policy to use DNA data banks to exclude individuals subject to criminal investigation and prosecution as well as to deter recidivist acts.[862] If the wrong person was convicted, recidivist acts by the right person will not be deterred.

To the extent that the proposed statutory amendments are rewrites to incorporate and clarify judicial rulings, this is within the orthodoxy of the *status quo*. The postconviction "DNA testing statute . . . should be regarded as a remedial statute and interpreted liberally in favor of the . . . citizens who were intended to directly benefit therefrom, namely, those wrongly convicted of a crime."[863] The proposal would allow adjudication of any petition to test DNA postconviction "if the interests of justice so require."

Summary of Proposed Amendments to the Postconviction DNA Testing Law[864]

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

The statute should be amended to eliminate:

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

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[859] *Skinner*, 131 S.Ct. at 1295. This case is distinguished from the earlier U.S. Sup. Ct. ruling that there is no substantive due process right to DNA access under the circumstances of the earlier case in which a state statutorily provided postconviction relief for newly discovered evidence but had not yet enacted its postconviction DNA testing statute. *District Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2322 (U.S. 2009).

[860] *Skinner*, 131 S.Ct. at 1299.

[861] *Id.* at 1300. To clarify, the ruling did not order the DNA testing, it just allowed the state convict's suit seeking this testing to proceed in federal court and be decided on its merits.

[862] 44 Pa.C.S. § 2302(1).

[863] *Commonwealth v. Conway*, 14 A.3d 101, 113 (Pa. Super. Ct. 2011).

[864] *Infra* pp. 180-93.

The statute should be amended to clarify:

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

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

Representation of Indigent Defendants

Because another advisory committee of the Joint State Government Commission is considering adequacy of legal representation for indigent defendants under Senate Resolution No. 42,[865] this advisory committee did not consider this important issue at length.

Without detailing the results of the other study, some of its expected findings can be described here. Pennsylvania is the only state that does not contribute any funds to its indigent defense system. Our Commonwealth also has no statewide body to oversee its indigent defense system. Consequently, the quality of representation varies greatly dependent on the county where the offense is tried. An entirely county-based system creates a potentially destructive dependence on the county executive and the court of common pleas of the particular county that may cause the system to deteriorate due to understaffing, high caseload, low professional and support pay, and real or perceived pressure to sacrifice the clients' interests for fear of incurring retaliation.[866] At least in some counties, caseloads are so high that it is virtually impossible for defenders to render competent and ethically adequate representation to all clients. Because there is no centralized office, essential data is not collected, professional training is inadequately provided and performance standards may not be formulated and implemented. In these and other ways, Pennsylvania's indigent defense system falls short of the standards for an effective system as set forth in American Bar Association's *Ten Principles of an Effective Public Defense System*.[867]

The subcommittee on legal representation urges enactment of the following recommendations of the Supreme Court Committee on Racial and Gender Bias in the Justice System relating to the public defender program: "Establish an independent Indigent Defense Commission to oversee services throughout the Commonwealth and to promulgate uniform, effective minimum standards. . . . Appropriate funding for indigent

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[865] Sess. of 2007.

[866] Of 273 DNA exonerations nationally, Innocence Project lists 13 of them in which bad lawyering contributed to the conviction. This represents approximately 5% of these cases. Of the 11 exonerations from our Commw., none is listed for bad lawyering as having contributed to the conviction. Innocence Project., Know the Cases, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Aug. 1, 2011). The project cautions, "Contributing causes are selected examples and do not represent a comprehensive listing."

[867] Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys., Final Rep. 163-97 (2003). *See also* Am. Bar Ass'n, *Ten Principles of a Public Defense Delivery System*, (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf.

defense services from Commonwealth funds and adopt adequate uniform attorney compensation standards."[868] The subcommittee emphasizes the importance of adequate funding as a critical concern for both the defense and the prosecution in their respective roles.

To enable young attorneys to consider starting or continuing a career as a prosecutor or public defender, the subcommittee urges consideration of establishing an educational loan forgiveness program for lawyers who take such public service jobs after law school.

It is anticipated that the recommendations coming out of the other study[869] will be consistent with the recommendations of the Supreme Court Committee on Racial and Gender Bias as set forth above and will include draft legislation to implement those recommendations along with other suggestions for improving Pennsylvania's indigent defense system. In view of the other study, the subcommittee makes no further recommendations relating to indigent defense.

Governmental Misconduct

Duties of the Prosecutor

Prosecutors perform a unique function within the criminal justice system. Like all other lawyers, prosecutors are advocates who are expected to zealously advocate their cases. The advisory committee recognizes that a felony prosecution is "not a dinner party, or writing an essay, or painting a picture, or doing embroidery; it cannot be so refined, so leisurely and gentle, so temperate, kind, courteous, restrained, and magnanimous."[870] Criminal prosecution is intended to preserve public order by determining when stern punishment is justified for serious offenses against the standards of conduct that a civilized society imposes. Accordingly, the measures adopted to reduce the incidence of wrongful convictions must avoid undue restrictions that would so inhibit the effectiveness of prosecutors as to unacceptably impede the deterrent and retributive effect of criminal sanctions.

At the same time, the prosecutor has special responsibilities to ensure that prosecution serves the ends of justice:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,

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[868] Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys., *supra* note 867, at 193.
[869] S. Res. No. 42 (Sess. of 2007).
[870] Apologies to Mao Zedong. PoemHunter.com, Quotations from Mao Zedong, http://www.poemhunter.com/quotations/famous.asp?people=Mao+Zedong (last visited July 9, 2011).

> therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He 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 every legitimate means to bring about a just one.[871]

The demands of serving simultaneously as minister of justice and zealous advocate create something of an ethical tightrope act. Most prosecutors deal with these imperatives skillfully and conscientiously. But there can be devastating consequences when they do not.

The Innocence Project has identified the following types of misconduct by police or prosecutors as contributing to wrongful convictions: deliberate suggestiveness in identification procedures; withholding of evidence from the defense; deliberate mishandling, mistreatment, or destruction of evidence; coercion of false confessions; and, the use of unreliable government informants or snitches.[872] Governmental misconduct was a contributing factor in 46 of the first 273 DNA exonerations nationally.[873] This represents approximately 17% of those cases. In view of the growing number of documented instances of wrongful convictions due in part to prosecutorial misconduct and the intense public attention to those cases, public confidence in the criminal justice system can only be preserved if effective measures are taken to address misconduct by prosecutors and law enforcement personnel.

The most serious and prevalent kinds of prosecutorial misconduct are subornation of perjury, knowing presentation of false testimony and failure to disclose exculpatory evidence to the defense.[874] Under the Due Process Clause, prosecutors must disclose exculpatory material to the defense, including evidence relating to a witness's credibility.[875] Failure to disclose such evidence[876] is the single most common form of prosecutorial misconduct. As will be discussed below, the use of unreliable testimony from informants in custody also recurrently causes wrongful convictions and

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[871] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[872] Innocence Project, Understand the Causes, http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited July 9, 2011). In other contexts, the term, snitch, implies a person who informs on another about a matter that is none of the informer's business, which is considered objectionable whether or not the what the informer says is true, as when a pupil snitches on a classmate. In the criminal justice context, the term can imply that the informer is or might be conveying false information.

[873] Innocence Project, Know the Cases, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Aug. 1, 2011). Of the 11 DNA exonerations from our Commw., four are listed for governmental misconduct having contributed to the conviction. This number represents approximately 36% of these Pa. cases.

[874] Spero T. Lappas, Remarks at the Meeting of the subcomm. on legal representation (July 7, 2008).

[875] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

[876] This is referred to as a *Brady* violation.

inappropriate capital convictions. "Other forms include courtroom misconduct, mishandling of physical evidence, threatening or badgering witnesses, using false or misleading evidence, and improper behavior during grand jury proceedings."[877]

Because they present evidence gathered by law enforcement investigators in court, prosecutors are responsible for the misconduct of investigators as well as themselves and are required to ensure that professional standards are systematically maintained. Obviously, the culpability of prosecutors for improper investigative practices is greater when the prosecutors are aware of them, but prosecutors are responsible for managing the practices of investigators so that the latter avoid unprofessional conduct.

American Bar Association has recommended adoption of internal policies that promote ethical conduct and the creation of professional guidelines that include a statement of those expectations regarding professional ethics.[878] Only a small number of prosecutorial offices have internal documents that afford guidance on expected ethical conduct.[879] Prosecutorial offices should implement such guidelines and include them in a publicly accessible manual.[880]

Along with tightening and enforcement of standards, attention must be paid to the underlying causes of some prosecutorial and investigatory misconduct. Some prosecutorial offices suffer from inadequate resources and understaffing, and efforts should be made to address these problems. If higher standards are to be implemented successfully, provision must be made for better training and supervision.

Professor Peter A. Joy argued that "prosecutorial misconduct results from three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct."[881] He suggested the implementation of graduated discipline each time there is a finding by a trial judge or appellate court of prosecutorial misconduct, along with disciplinary actions by the bar.[882] A system should be established to review allegations of prosecutorial misconduct, investigate them, and recommend discipline where appropriate.[883] An alternative is to rely more on internal regulation and discipline through the creation of a body within the prosecutor's office that would provide it "with the ability to engage in hindsight analysis of what went wrong in individual cases to strengthen future ethical prosecutions, but is

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[877] The Just. Project, *Improving Prosecutorial Accountability: A Policy Review* 2 (2009).
[878] Am. Bar Ass'n, ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-1.5 & 3-2.5 (3d. 1993).
[879] Peter A. Joy, *The Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, Wis. L. Rev. 399, 421 n.123 (2006).
[880] *Id.* at 422.
[881] *Id.* at 400.
[882] *Id.* at 425-26.
[883] *Id.* at 426.

not subject to pressure by groups outside of the prosecutorial community."[884] Currently, prosecutors seldom face professional discipline for misconduct.[885] Nor do errant prosecutors face serious sanctions in particular appellate cases; courts have a strong tendency to view such misconduct as harmless error and rarely reverse convictions on that ground.[886]

Prosecutors on the subcommittee on legal representation cautioned that no hard data exists on the incidence of misconduct. In their view, the management of prosecutorial offices, supplemented by formal professional discipline, is sufficient to control misconduct. For the defense and academic members (who regularly represent criminal defendants on appeal), prosecutorial misconduct, especially withholding exculpatory evidence, occurs frequently enough to be cause for concern. Both sides agree that prosecutors are rarely subject to formal professional discipline. Prosecutors argue that this is because such misconduct rarely occurs; other members attribute it to the laxity of the current regime of professional discipline.

Current Standards

To balance the competing imperatives that regulate the prosecutorial function, a variety of standards have been formulated. In Pennsylvania, the most authoritative and binding of these is Rule 3.8 of the Pennsylvania Rules of Professional Conduct (Pa. Rules of Prof'l Conduct R. 3.8):

> Rule 3.8. Special Responsibilities of a Prosecutor
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> The prosecutor in a criminal case shall:
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> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
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> (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel;
>
> (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
>
> (e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law

[884] Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 Fordham L. Rev. 1413, 1451-52 (2007).
[885] Joy, *supra* note 879, at 424-25.
[886] *Id.*; Raeder, *supra* note 884, at 1424-25, 1433-34.

> enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6[887] or this Rule.

Following an amendment to a Model Rule of Professional Conduct by the American Bar Association, the Pennsylvania Bar Association has recommended two changes in Rule 3.8 that would expand the prosecutor's duty with respect to evidence of innocence. Under these measures, "when a prosecutor knows of 'new, credible and material' evidence creating a reasonable likelihood that a convicted defendant did not commit the offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority; and (2) if the conviction was obtained in the prosecutor's jurisdiction, (A) promptly disclose that evidence to the defendant unless a court authorizes delay, and (B) undertake further

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[887] Rule 3.6. Trial Publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) that an investigation of the matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

investigation, or make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit." Where the prosecutor becomes aware of "'clear and convincing' evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."[888] These changes were endorsed by the Pennsylvania Bar Association on December 4, 2009. On May 15, 2010, the Disciplinary Board of the Pennsylvania Supreme Court published a notice that it is considering recommending the Court to adopt these changes; the notice set forth the proposed changes to Pa. Rules of Prof'l Conduct R. 3.8 and called for interested persons to submit written comments by July 2, 2010.[889] These proposals have not been adopted as of this writing. The subcommittee recommends that our Supreme Court adopt these amendments.

A key provision for implementing the duties of the legal profession is the self-reporting requirements of Pa. Rules of Prof'l Conduct R. 8.3(a): "A lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

Recommendations

The subcommittee on legal representation proposes the following recommendations relating to prosecutorial practice.

1. In addition to the ethical obligations which prosecutors are bound by, as encompassed in their oath of office and pursuant to their obligations under Pa. Rules of Prof'l Conduct R. 3.8 (relating to special responsibilities of a prosecutor), prosecutorial offices throughout the Commonwealth are called upon to implement internal policies that encourage ethical conduct, implement and enforce internal discipline when ethical standards are violated, and develop other mechanisms to provide internal oversight with the objective of ensuring, to the fullest possible extent, the integrity of investigations, evidence development, and trial and postconviction practices.

American Bar Association suggests that standards governing the prosecutorial function should be adopted and implemented. These mandate that each prosecutor's office adopt a "prosecutor's handbook" that contains "a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures in the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of criminal law."[890] These standards "should be

[888] Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., "Resolution to Amend Rule 3.8 of the Pennsylvania Rules of Professional Conduct Regarding Special Responsibilities of a Prosecutor" (Harrisburg: PBA, n.d. [2009]).
[889] 40 Pa. Bulletin 2516 (2010).
[890] Am. Bar Ass'n, *supra* note 878, at 3-2.5.

available to the public, except for subject matters declared 'confidential' when it is reasonably believed that public access to their contents would adversely affect the prosecution function."[891]

National District Attorneys Association similarly recommends: "Each prosecutor's office should develop written and/or electronically retrievable statements of policies and procedures that guide the exercise of prosecutorial discretion and that assist in the performance of those who work in the prosecutor's office."[892] Except for confidential material, the written policy "should be accessible to the public."[893]

Each prosecutor's office should form a separate division to handle postconviction matters. This measure would centralize procedural and substantive knowledge about these types of claims. The lawyers could become experts in this area and be better equipped to assess the merits of these petitions. It would also encourage defense attorneys to discuss their claims informally with the prosecution at the outset instead of simply filing a motion as an opening salvo. Defense attorneys would know the appropriate lawyers to contact, and the prosecutors in the postconviction division would be more amenable to meeting with defense counsel in advance of formal proceedings. Early consultation may assist both sides to dispose of postconviction claims more fairly and expeditiously. Postconviction units in Office of the Attorney General could be an efficient alternative to placing them in county prosecutorial offices and minimize resentment by creating greater distance between trial and postconviction prosecutors.

Changing the performance measures by which individual prosecutors are judged to take account of factors other than conviction rates, such as decisions not to prosecute, would diminish the influence of conviction psychology within the institutional culture of prosecutors' offices. For instance, a prosecutor's decision to turn over biological evidence for DNA testing without futile litigation should be lauded within the office and considered favorably for promotion purposes where the testing ultimately exonerates the inmate. The choice to work with the defense saves time and may avoid the possibility of a flogging by the media.

2. In addition to the ethical obligations which prosecutors are bound by, as encompassed in their oath of office and pursuant to their obligations under Pa. Rules of Prof'l Conduct R. 8.3 (relating to reporting professional misconduct), prosecutorial offices throughout the Commonwealth are called upon to adopt clear guidelines and appropriate sanctions in instances where purposeful or otherwise egregious prosecutorial misconduct is discovered or revealed.

[891] *Id.*
[892] Nat'l Dist. Att'ys Ass'n, Nat'l Prosecution Standards 1-5.4 (3d ed.).
[893] *Id.* at 1-5.4 Commentary.

Prosecutors' offices should be required to implement a system of graduated discipline each time there is a finding by a trial judge or appellate court of prosecutorial misconduct. Professional disciplinary authorities should implement a system to review reported instances of prosecutorial misconduct and appropriately investigate or recommend discipline.

3. Pennsylvania Supreme Court is urged to adopt proposed amendments to *Pa. Rules of Prof'l Conduct R. 3.8, relating to evidence of wrongful conviction.*

These amendments[894] would require prosecutors to disclose new, credible and material evidence that make it reasonably likely that a convict did not commit the offense. If the conviction occurred within his jurisdiction, the defendant and the court would be notified. The prosecutor would need to investigate further and remedy the conviction if the evidence is clear and convincing.

These amendments are necessary to ensure that prosecutors will respond constructively to evidence of wrongful convictions and to require prosecutors to remedy wrongful convictions despite having to admit an official mistake.

Jailhouse Witnesses

A recurrent cause of wrongful convictions is the testimony of witnesses who testify against a defendant in exchange for a promised or implicit reward. Informant or jailhouse testimony was a contributing factor in 32 of the first 273 DNA exonerations nationally.[895] This number represents 12% of those convictions. Two classic examples of this pattern are the accomplice who "turns state's evidence" against a fellow perpetrator in exchange for a lighter sentence and the jailhouse informant who falsely testifies that the defendant admitted the crime to him while they were both imprisoned. An accomplice or jailhouse informant who is under suspicion or in custody for one or more serious offenses offers to testify for the advantages his testimony will afford, such as a monetary reward, a reduced sentence or better treatment in prison.

> [C]ommentators have recognized that despite rules of disclosure and trial safeguards, there is an inherently high risk that cooperating witnesses will testify falsely and will be believed by juries, thus resulting in convictions of the innocent. Prepped at length and in secret, skilled at lying, armed with important facts that may have been inadvertently (or deliberately) fed to them by the prosecution, cooperators often appear highly confident and

[894] Model Rules of Prof'l Conduct R. 3.8(g), (h).

[895] Innocence Project, Know the Cases, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Aug. 1, 2011). Of the 11 DNA exonerations from our Commw., four are listed for informant or jailhouse testimony having contributed to the conviction. This number represents approximately 36% of these Pa. cases.

> credible on the witness stand. Because the cooperator's testimony is developed in secret and without documentation, his polished, incriminating account is largely unassailable on cross-examination. Lacking any knowledge of what transpired between the prosecutor and the cooperating witness during pretrial proffer sessions and interviews, defense counsel has little basis from which to cross-examine the cooperator about the process by which the government developed the cooperator's testimony. Thus, a jury may not learn whether the cooperating witness made inconsistent statements over the course of the interview process, whether the prosecution inadvertently (or deliberately) fed information to the witness that made the witness's testimony appear more credible and confident than it otherwise would have appeared, or whether the prosecution made any unrecorded threat or inducement to the cooperator that may have motivated the witness to testify. For many reasons, prosecutors, during their pretrial preparation of cooperating witnesses, either fail to identify these instances when they occur or decide that the evidence that comes to light during the pretrial interviews is not sufficiently exculpatory or impeaching to warrant disclosure.[896]

Jailhouse informants especially have been identified as a key contributing cause of wrongful convictions:

> Often, statements from people with incentives to testify – particularly incentives that are not disclosed to the jury – are the central evidence in convicting an innocent person.
>
> People have been wrongfully convicted in cases in which snitches:
>
> - Have been paid to testify
> - Have testified in exchange for their release from prison.
> - Have testified in multiple distinct cases that they have evidence of guilt, through overhearing a confession or witnessing the crime.
>
> DNA exonerations have shown that snitches lie on the stand. . . . Testifying falsely in exchange for an incentive — either money or a sentence reduction — is often the last resort for a desperate inmate. For someone who is not in prison already, but who wants to avoid being charged with a crime, providing snitch testimony may be the only option.
>
> In some cases, snitches or informants come forward voluntarily, often seeking deals or special treatment. But sometimes law enforcement officials seek out snitches and give them extensive background on cases — essentially feeding them the information they need to provide false testimony.

[896] Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 Fordham L. Rev. 257, 260-61 (2005) (footnotes omitted).

> Snitches continue to testify in courtrooms around the country today. In some cases without biological evidence, the snitch testimony is the only evidence of guilt.[897]

Up to 2004, informant testimony was the most prevalent contributing factor in wrongful convictions nationally in capital cases.[898] Informant testimony is also often used to establish aggravating circumstances that may justify imposition of the death penalty.[899] Because of questionable motives of such witnesses and their obvious motives to fabricate, prosecutors should avoid reliance on jailhouse informants, and a case that relies primarily or exclusively on such testimony is considered weak.

Disclosure and Pretrial Hearing

The defense can request a pretrial hearing on the admissibility of a particular witness on the grounds that his testimony is so unreliable that the judge should exclude it. Based on the evidence presented at that hearing, the trial judge can then determine whether the informant testimony is reliable enough to bring before the jury. The necessity for the hearing depends in part on whether the judge considers cross-examination a sufficient safeguard against perjurious informant testimony. Reliability can be better determined if the prosecution fully discloses the circumstances of the proffered testimony. The subcommittee on legal representation proposes requiring a preliminary hearing in capital cases; in other cases, granting the pretrial hearing should be left to the sound discretion of the trial court.

After considering the Illinois statute relating to informant testimony,[900] the subcommittee proposes similar legislation for our Commonwealth. This proposal would require the prosecution to fully disclose the informant testimony and requires a preliminary hearing in capital cases, subject to waiver by the defense.[901]

Jury Instruction

The subcommittee on legal representation also proposes usage of a cautionary jury instruction for the testimony of a jailhouse informant.[902]

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[897] Innocence Project, Understand the Causes, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited June 23, 2011).
[898] Ctr. on Wrongful Convictions, Nw. U. Sch. of L., *The Snitch System: How Snitch Testimony sent Randy Steidl and Other Innocent Americans to Death Row* 3 (2004-05), *available at* http://www.law.northwestern.eduwrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf.
[899] Cal. Comm'n on the Fair Admin. of Just., *supra* note 4, at 45.
[900] 725 Ill. Comp. Stat. § 5/115-21.
[901] *Infra* p. 178.
[902] *Id*.

Other Recommendations

Law enforcement agencies are called upon to adopt the following practices:

1. Where possible, a jailhouse informant should be wired so that the suspect's confession to him can be recorded.

2. The informant's statement should be electronically recorded.[903]

A variety of other measures have been proposed to deal with the testimony of jailhouse informants, but the subcommittee on legal representation did not specifically consider them. These other measures include requiring approval by a senior district attorney of any use of informant testimony, training of prosecutors and defense attorneys, corroboration of the testimony by independent evidence, and maintaining a central record of all contact between law enforcement personnel and in-custody informants.[904]

In a well-known book on wrongful convictions, veteran defense attorneys Barry Scheck and Peter Neufeld advocate that:

- a vetting committee of senior prosecutors approve use of testimony from jailhouse informants

- trial courts apply a presumption of unreliability that the prosecutor must overcome before the jury may hear such testimony

- all deals with jailhouse witnesses be written and all communications with them by police or prosecutors be videotaped or audiotaped.[905]

[903] An argument in favor of mandating this practice appears in Roberts, *supra* note 896, at 289-94. These recommendations are also supported by Ctr. on Wrongful Convictions, Nw. U. Sch. of L. Ctr. on Wrongful Convictions, *supra* note 898, at 15.
[904] Cal. Comm'n on the Fair Admin. of Just., *supra* note 4, at 47-50.
[905] Barry Scheck et al., *Actual Innocence* 256-57 (2000).

Summary of Proposals

Indigent Defense Services[906]

Defense services for indigency should be standardized throughout our Commonwealth.

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

Informant Testimony[907]

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

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

A statute should:

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

Prosecutorial Practice[908]

Prosecutorial offices should:

1) implement internal policies that encourage ethical conduct;
2) implement and enforce internal discipline when ethical standards are violated;

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[906] These recommendations originated from Final Rep. of the Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys. 163-97 (2003). These recommendations were intentionally underdeveloped by this advisory committee because S. Res. No. 42 (Sess. of 2007) established a task force with an advisory committee to "study the existing system for providing services to indigent criminal defendants." The report for this other resolution will be published approximately the same time as this report is being published and is exclusively on this topic. *Infra* p. 176.

[907] *Infra* p. 178.

[908] *Infra* p. 177.

3) develop other mechanisms to provide internal oversight to ensure, to the fullest possible extent, the integrity of investigations, evidence development, and trial and postconviction practices; and,
4) adopt clear guidelines and appropriate sanctions in instances where purposeful or otherwise egregious prosecutorial misconduct is discovered or revealed.

Pennsylvania Supreme Court should adopt proposed amendments to Pa. Rules of Prof'l Conduct R. 3.8, relating to evidence of wrongful conviction.[909]

[909] These amendments were endorsed by Pa. Bar. Ass'n.

REDRESS

> Wrongfully convicted individuals have suffered severe harm as a consequence of their imprisonment: they have lost their jobs and their good reputations, were unable to earn income while incarcerated, have often expended large amounts of money on legal services, have been deprived of liberty, sometimes for years, and have suffered detrimental psychological consequences. Yet under existing law, most of the individuals who are freed after being found innocent of the crimes for which they were convicted are unable to obtain any compensation from government or other sources for the losses they sustained.[910]

The subcommittee on redress examined issues relevant to providing redress to those found to have been wrongfully convicted in Pennsylvania. Specifically, the subcommittee settled on the following three main areas for its consideration: (1) financially compensating those who have been wrongfully convicted; (2) providing transitional services for those released from prison after a wrongful conviction; and, (3) establishing a commission to review cases of those found to be wrongfully convicted, so that the Commonwealth can learn from errors made in those cases to prevent them from recurring. Four of the 11 individuals exonerated via postconviction DNA testing in Pennsylvania have been compensated.[911] This number represents approximately 36% of those convictions. For the other DNA exonerees nationally, 176 of the remaining 262 have been compensated.[912] This number represents more than two-thirds of the rest.

In regard to the matter of compensating an individual who has been wrongfully convicted, the subcommittee found that most jurisdictions[913] statutorily provide for compensation of varying amounts with varying eligibility for this payment. Similarly, a handful of states have either established commissions to review cases of wrongful convictions or are considering establishing such entities. These bodies vary considerably in their organization, duties and powers. Some transitional services are provided by our Commonwealth to individuals who have been convicted and subsequently released from prison. These same services are not typically provided to those who were wrongfully convicted and then released because there is generally little or no lead time before a court orders release, and there is no time for the Department of Corrections to prepare itself or the individual for release. Plus, these exonerees are typically no longer under state

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[910] Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. Ann. Surv. Am. L. 97, 100 (2004).
[911] Innocence Project, Know the Cases, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Aug. 1, 2011).
[912] *Id.*
[913] 29.

supervision. The subcommittee decided it was a matter of fairness that a wrongfully convicted individual should receive as much assistance as a released individual who had been properly convicted of his crimes, and the subcommittee advocates extending these or similar services to exonerees.

The subcommittee advances proposals consistent with principles of basic fairness and practices within our Commonwealth or elsewhere in the nation. However, not all members of the subcommittee agreed with its proposals. Those objections are set forth in a broad statement of opposition at the conclusion of this narrative. It's true that there are civil remedies for wrongful imprisonment, but only when it was caused by a civil rights violation, an intentional tort or malicious prosecution. Many of the wrongful convictions did not result from misconduct by prosecutors and police (and they have immunity for some misconduct). When this statutory or common law tortious conduct is absent, there is no civil remedy. Nonetheless, these wrongful convictions represent an injustice that call for relief. If justice and consequence should not be separate, neither should injustice and consequence.

Statutory Compensation

To compensate individuals who were wrongfully convicted, the subcommittee proposes the enactment of legislation[914] drawn from a number of sources within and outside of the Commonwealth, with modifications made by the subcommittee on redress. The subcommittee recommends that the Commonwealth statutorily compensate any person who is released from prison on the grounds that he was wrongfully convicted and has had his actual innocence established. Actual innocence could be established judicially or by the executive via a pardon for innocence.[915]

The exoneree or his surviving heirs could claim compensation by filing for it in Commonwealth Court. The Commonwealth Court is proposed as the judicial forum for these matters because of the court's position as a court of appeals and because it is not typically involved in matters of criminal law. The subcommittee reasons that this is essential and would best assure absolute neutrality in such cases. The subcommittee recommends that the district attorney from the prosecuting district be charged with the decision as to whether to oppose the claim of compensation. This law will have a fiscal impact; thus, adequate funding would be required.

The subcommittee reviewed the current levels of compensation statutorily provided by more than half of the other states and settled on a floor of $50,000 per each year of incarceration. Based on several statutory factors, the total amount of any actual

[914] *Infra* p. 193.

[915] "[T]he historic remedy for preventing miscarriages of justice where judicial process has been exhausted" is clemency. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). An exoneree would not be barred from this statutory compensation dependent upon the relief mechanism that established his actual innocence.

award would be determined by Commonwealth Court on a case-by-case basis. In addition to cash, an award of damages could include reasonable attorney's fees, compensation for child support payments, healthcare and reintegrative services, among other forms of compensation. The award of damages is intended to be conclusive and completely bar any further action by the claimant against the Commonwealth for the same subject matter. The proposal also would extend to automatic expungement of the criminal record and an amendment of current law to eliminate sovereign immunity as an obstacle to this claim.

Office of Attorney General characterizes the proposal as "not properly grounded in the law. Compensation should be forthcoming only upon a finding of wrongdoing."[916] As a matter of statutory law, it is well grounded because most other jurisdictions have statutes very comparable to this proposal. The absence of such a statute places our Commonwealth in the minority of jurisdictions. If it is characterized as "not properly grounded in the law" because it does not codify the common law, that is an irrelevant observation because the General Assembly is not restricted to codifying the common law. To date, 75 enactments have occurred during this General Assembly and none appear to be codifications of the common law. Two were enacted to specifically change common law doctrines. "Where the Legislature expressly provides a comprehensive legislative scheme, these provisions supersede the prior common law principles."[917]

Status Quo

42 U.S.C. § 1983

Federal law authorizes a civil action for a deprivation of a constitutional or federal statutory right, but it is totally inadequate in assuring that the wrongfully convicted are compensated. To prevail on this statutory claim, the claimant must prove official misconduct that led to a constitutional violation at the time of the conviction.[918] Even when a district attorney concedes a constitutional violation, he will not be liable for it unless he was deliberately indifferent.[919] For this reason, U. S. Supreme Court recently invalidated an award to an exoneree who spent 18 years in prison, 14 of them on death row.[920] Another U.S. Supreme Court ruling extended the absolute immunity of witnesses from damages liability for their testimony to governmental officials testifying about performing their official duties in an unsuccessful claim under this law against a police officer for giving perjured testimony at the claimant's criminal trial.[921]

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[916] *Infra* p. 155.
[917] *Sternlicht v. Sternlicht*, 876 A.2d 904, 912 (Pa. 2005).
[918] The claim requires deprivation of a federal right by a person acting under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).
[919] *Connick v. Thompson*, 131 S.Ct. 1350, 1358 (U.S. 2011).
[920] *Id.* at 1355-56.
[921] *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983).

A recent U.S. Supreme Court ruling also applied absolute immunity under this law for a claim "that a prosecutor's management of a trial-related information system is responsible for a constitutional error at" a "particular trial".[922] In this particular case, an exoneree was imprisoned for 24 years before being released; the prosecution had failed to provide the defense potential impeachment information about critical testimony from a jailhouse informant.[923] It seems unfair to deny compensation to an exoneree under these circumstances. "[S]ometimes such immunity deprives a plaintiff of compensation that he undoubtedly merits;"[924] the subcommittee's proposal would provide a route to obtain that compensation.

Malicious Prosecution

This originated as a common law tort applicable to both civil and criminal proceedings. Our Commonwealth has statutorily based this cause of action for an underlying civil proceeding[925] but has not yet done so for an underlying criminal proceeding so that the latter claim remains one at common law. A common law claim for malicious prosecution in criminal proceedings lies where the defendant (in the civil claim) initiated a criminal proceeding against the plaintiff (who was the defendant in the criminal prosecution) *sans* probable cause with malice and the proceedings terminated in the criminal defendant's favor.[926]

So long as a mistaken accuser's belief was reasonable, prosecutorial discretion immunizes the accuser from liability. If a prosecutor reasonably relies upon third party information and actually believes there is probable cause to prosecute, there is a probable cause defense even if the probable cause was mistaken.[927] Malice is established if the prosecution was for an improper, extraneous purpose and can be inferred from an absence of probable cause; however, if there is probable cause to prosecute, malice is immaterial. An acquittal or other termination in the defendant's favor does not present a *prima facie* case of malicious prosecution.[928]

In 1952, our Supreme Court accorded our Attorney General absolute privilege, or immunity, from civil suit for an official act within his jurisdiction.[929] In 1971, our Superior Court recognized district attorneys to be high public officials and extended this immunity to them for acting within the scope of their official duties.[930] More recently,

[922] *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 864 (U.S. 2009).
[923] *Id.* at 859.
[924] *Id.* at 864.
[925] 42 Pa.C.S. §§ 8351-8355.
[926] *Walker v. North Wales Borough*, 395 F.Supp.2d 219, 231 (E.D.Pa. 2005) (citations omitted).
[927] *Mitchell v. Logan*, 33 A. 554, 555 (Pa. 1896).
[928] *Neczypor v. Jacobs*, 169 A.2d 528, 530-31 (Pa. 1961) (citations omitted).
[929] *Matson v. Margiotti*, 88 A.2d 892, 205 (Pa. 1952).
[930] *McCormick v. Specter*, 275 A.2d 688, 689 (Pa. Super. Ct. 1971).

our Supreme Court immunized assistant district attorneys from suit for actions taken in their official capacity.[931] This immunity means that a malicious prosecution claim would no longer lie against a prosecutor.

Conviction Integrity

The subcommittee on redress recommends the establishment of a commission to (1) review subsequent cases of wrongful conviction to determine why these convictions recurred; (2) recommend ways to prevent similar occurrences in the future; and, (3) study developments and reforms to maintain the integrity of convictions. The subcommittee felt strongly that the commission should be as non-political in its composition as possible. It should be composed of representatives from the law enforcement community, the judiciary, and members appointed by the Governor and the leaders of both parties in the General Assembly. The commission should be adequately funded and staffed, as well as housed in a manner that ensures its neutrality and impartiality to the greatest degree possible. To ensure that the commission can protect the confidentiality of the individuals involved in the cases under its review, the subcommittee recommends exempting it under the open meetings law.

> The only reliable way to correct any flawed system is to study cases of failure to understand what went wrong and then propose remedies and reforms to prevent reoccurrence. . . . [E]xonerations, as is evident in exonerations nationally, reveal recurring factors that are present in wrongful convictions. . . . There is no reason why the criminal justice system should not do what industry . . . and the transportation sector does when there is a major accident or failure: launch a thorough investigation, including the procurement of all relevant evidence and testimony to identify precisely how an innocent person came to be convicted of a crime. The conviction of an innocent person is the justice system's equivalent of factory catastrophe, a plane crash or the bombardment of the wrong target. It deserves to be investigated fully . . . .[932]

Contrary to Office of Attorney General's opposition to this proposal, it is not an "avenue of appellate procedure" and does not "identify those who are actually innocent."[933] This commission would not inquire about a case until *after* the Board of Pardons or a court released "a person based upon a finding of actual innocence"[934] Then, it would attempt to determine what caused the wrongful conviction so that it is a retrospective

[931] *Durham v. McElynn*, 772 A.2d 68, 69 (Pa. 2001).
[932] N.Y. Bar Ass'n Task Force on Wrongful Convictions, Final Rep. 102 (2009)
[933] *Infra* p. 155.
[934] *Infra* p. 199.

inquiry. It would also review reforms adopted elsewhere and then report to legislative committees. In a sense, the commission would carry on some of the work of this advisory committee.

Transitional Services

People released from prisons through exonerations need a range of immediate and well-coordinated services to ensure a smooth transition from prison to life outside of prison. Needs after release are immediate, but it averages close to three years to get compensated by the other states.[935] To re-establish themselves in society, released prisoners require money, housing, jobs, mental and physical healthcare, education, vocational training, transportation and identification documents, among other possible needs.

Generally, those who are released from prison after the determination that they were wrongfully convicted are released suddenly by court order. There is no individual or entity charged with assisting the individual to re-establish himself within society. This can lead to homelessness, health problems and a general inability to overcome the disadvantages of spending time in prison. The subcommittee recommends establishing and adequately funding a program to be administered by the Pennsylvania Commission on Crime and Delinquency (PCCD), or other appropriate public entity, to contract with private providers in the Commonwealth for needed services to those who have been released after a wrongful conviction. Assuming PCCD is assigned this role, it would be charged with responsibility for the proper functioning of the program, including ensuring the immediate availability of services to those individuals in need and fiscal oversight.

The role of the private providers would be to provide and coordinate services on behalf of the released individuals who had been wrongfully convicted. Their duties would include assisting the recently released individual to maximize available federal and private funding and services to ensure that he can meet basic life needs for an adequate period of time to re-establish himself in the community. The providers would assess the needs of each client individually and provide counseling and other required services as long as necessary to allow the client to get back on his feet.

[935] Innocence Project, *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* 17-18, *available at* http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf.

Summary of Proposals[936]

A statute should:

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

A statutorily created commission should convene to periodically review:

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

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

Position of the Office of Attorney General in Regard to the Recommendations of the Subcommittee on Redress

"The Subcommittee should not recommend or create a new civil action for 'wrongfully convicted' persons. The law provides civil remedies for wrongful imprisonment, wrongful prosecution, malicious prosecution, misuse of office, etc. Persons who are actually innocent may seek redress using existing remedies.

The Subcommittee's proposed statutes are not properly grounded in the law. Compensation should be forthcoming only upon a finding of wrongdoing. The proposed statute does not require such a finding.[937]

The OAG is opposed to the creation of an Innocence Commission. We should not create a new avenue of appellate procedure. After conviction at trial, we have the appellate process, the Post-Conviction Relief Act process, and federal *habeas corpus*. Those processes are sufficient to identify those who are actually innocent."

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[936] *Infra* p. 193.

[937] The common law elements of malicious prosecution are: (1) a criminal prosecution, (2) a favorable outcome to the Defendant, who is now the Plaintiff, (3) the prosecution was initiated without probable cause, and (4) the prosecution was initiated with malice. The proposed statute eliminates the third and fourth elements.

A few years ago, United States Attorney General funded National Academy of Sciences to create an independent forensic science committee to identify the needs of the forensic science community, recommend ways to maximize the use of forensic techniques and disseminate guidelines "to help ensure quality and consistency in the use of forensic technologies and techniques to solve crimes . . . and protect the public."[938] This entailed a broader consideration of forensic science than the subcommittee on science pursued under Senate Resolution No. 381 and those resultant recommendations were correspondingly more comprehensive. Nonetheless, a few of those national recommendations deserve mention here before the subcommittee's considerations and proposals are mentioned.

Among other recommendations, the National Academy of Sciences independent forensic science committee recommended:[939]

- An independent, federally funded National Institute of Forensic Science
- Standardized terminology to report on and testify about results of forensic science investigations
- Research on accuracy, reliability and validity of forensic science disciplines
- A federally funded incentive to remove public forensic laboratories from administrative control of law enforcement and prosecutors
- Research on human observer bias and sources of human error in forensic examinations
- Federal funding and collaboration to advance measurement, validation, reliability, information sharing, proficiency testing and protocols for forensic examinations, methods and practices
- Mandatory accreditation of laboratories and individual certification of forensic science professionals

[938] Nat'l Research Council of the Nat'l Academies, *Strengthening Forensic Science in the United States: A Path Forward* S-1 (2009).
[939] Id. at S-14 to -20.

- Routine quality assurance and control procedures to ensure accuracy of forensic analyses

- A national code of ethics for all forensic science disciplines

- Graduate education programs in multidisciplinary fields critical to forensic science practice

National District Attorneys Association opposes the creation of National Institute of Forensic Science and removal of public forensic laboratories from administrative control of law enforcement and prosecutors.[940] It considers accreditation of these laboratories as promoting "the integrity of a scientific testing or examination process, while removal and independence of laboratories is extremely costly and ineffective in improving reliability of the testing process."[941] The association seems to endorse the remaining recommendations.[942]

After the report was published by National Academy of Science, American Academy of Forensic Science supported those recommendations and particularly emphasized and endorsed the following principles:

1. All forensic science disciplines must have a strong scientific foundation.

2. All forensic science laboratories should be accredited.

3. All forensic scientists should be certified.

4. Forensic science terminology should be standardized.

5. Forensic scientists should be assiduously held to Codes of Ethics.

6. Existing forensic science professional entities should participate in governmental oversight of the field.

7. Attorneys and judges who work with forensic scientists and forensic science evidence should have a strong awareness and knowledge of the scientific method and forensic science disciplines.[943]

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[940] Nat'l Dist. Att'ys Ass'n, Resolution in Support of Efforts to Strengthen Forensic Science in the U.S. (adopted 2010), *available at* http://www.ndaa.org/pdf/NDAA_strengthen_forensic_science_resolution_4_10.pdf.
[941] *Id.*
[942] *Id.*
[943] Am. Acad. of Forensic Scis., *AAFS Position Statement in Response to the NAS Report*, Acad. News 4 (Nov. 2009).

The subcommittee on science largely focused its deliberations on three key areas of interest:

- The proper preservation of biological evidence
- Accreditation of forensic laboratories and independent oversight of these labs
- Suitable training of attorneys, judges and others to better familiarize them with forensic science

An overall theme of these three topics might be standardization. The subcommittee ended up considering a subset of the issues that the independent, national committee considered but the proposals from both are largely complementary rather than discordant. The subcommittee tailored its consideration and deliberations to the current practices in our Commonwealth. To do this, it consulted experts who were not on the advisory committee and surveyed district attorneys and judges.

A recurrent cause of wrongful convictions is invalid or improper science, which was a contributing factor in 125 of the first 273 DNA exonerations nationally.[944] This number represents approximately 46% of those convictions. Proper accreditation can help prevent this as a contributing cause as can suitable training for judges and attorneys, many of whom do not have a scientific background. Plus, properly preserved evidence can allow for correction of erroneous convictions based upon invalid science. This has happened to some individuals who had been wrongly convicted based upon microscopic hair analysis, which turned out to be Sesame Street Science.[945] Mitochondrial DNA analysis has illustrated inherent limitations in microscopic hair comparisons.[946] There is "no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA"[947] despite the admission of hair evidence in trials for over a century.[948]

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[944] Innocence Project, Know the Cases, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Aug. 9, 2011). Of the 11 DNA exonerations from our Commw., three are listed for invalid or improper science having contributed to the conviction. This number represents approximately 27% of these Pa. cases.

[945] "[A] forensic analyst compares a known sample to a questioned sample and makes a highly subjective determination that the two samples originated from the same source." This is an unscientific version of a Sesame Street match game: visually comparing items and declaring that one of these is not like the other. Jessica D. Gabel & Margaret D. Wilkinson, *"Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 Hastings L.J. 1001, 1002 n.11 (2008).

[946] Nat'l Research Council of the Nat'l Academies, *supra* note 938, at 5-25.

[947] *Id.* at 5-26.

[948] Paul C. Giannelli, *Microscopic Hair Analysis: A Cautionary Tale*, Working Paper 1 (2010) (citations omitted).

Accreditation and Oversight of Forensic Laboratories

The subcommittee on science proposes statutorily requiring that governmentally operated laboratories be accredited by a nationally recognized accrediting board for the forensic tests that they perform.[949] This would cover state and municipal laboratories but not federally operated ones. By not specifying which nationally recognized accrediting board from whom to obtain accreditation, it could also avoid duplicative accreditation for those laboratories already suitably accredited. The proposal relies on existent nationally recognized accrediting boards that accredit many laboratories rather than create a bureau in an existent Commonwealth department to do the same thing.[950] In addition to the subcommittee, both American Academy of Forensic Science and the independent forensic science committee of National Academy of Sciences advocate accreditation of forensic laboratories. At least five jurisdictions mandate accreditation of these laboratories.[951]

Philadelphia Police Department's Forensic Services Bureau is accredited to examine controlled substances, trace-chemistry flammables, biology, crime scene and firearms.[952] It is also accredited for these analytical techniques: chemical screening tests, genetic analysis, electrophoresis, chromatography, spectroscopy, physical examination, microscopy and general laboratory procedures.[953] Allegheny County Office of the Medical Examiner's Forensic Laboratory is accredited in the disciplines of controlled substances, toxicology, trace evidence, biology, firearms/toolmarks and latent prints.[954] Pennsylvania State Police is accredited in the disciplines of controlled substances, toxicology, biology, firearms/toolmarks, questioned documents, trace evidence, digital & multimedia evidence and latent prints.[955] This accreditation means that these governmentally operated laboratories are compliant in the accredited disciplines and techniques with the proposed legislation from the subcommittee.

A former director of one of these laboratories told the subcommittee that accreditation:

- Immeasurably improves processes and testing analysis

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[949] *Infra* p. 202.

[950] Some juriss. license or approve laboratories through an exec. dep't, *e.g.*, Md. & Tex. A comm'n in N.Y. accredits its labs but applies the standards from nationally recognized accrediting bds.

[951] Haw. & Tex. mandate accreditation of both pub. and private labs, which is what is recommended by Nat'l Research Council of the Nat'l Academies, *supra* note 938. Md., N.Y. & Okla. mandate accreditation of pub. labs (governmental labs excluding the fed. gov't), which is what was proposed by the subcomm.

[952] Phila. Police Dep't Forensic Sci. Bureau Scope of Accreditation, *available at* http://forquality.org/uploads/Philly_ScopeFinal.pdf (last visited Aug. 17, 2011).

[953] *Id.*

[954] The Am. Soc'y of Crime Laboratory Dirs. Laboratory Accreditation Bd., Certificate of Accreditation, *available at* http://www.ascld-lab.org/cert/cert351.pdf (last visited Aug. 17, 2011).

[955] *Id.*, available at http://www.ascld-lab.org/cert/cert247.pdf, http://www.ascld-lab.org/cert/cert248.pdf, http://www.ascld-lab.org/cert/cert249.pdf &http://www.ascld-lab.org/cert/cert250.pdf, http://www.ascld-lab.org/cert/cert251.pdf (last visited Aug. 17, 2011).

- Provides a comfort level of results
- Has a tremendous effect on increasing the quality of work
- Initially stretches resources but, once in place, everybody realizes the advantages

Since our Commonwealth's principal, publicly operated forensic laboratories are already accredited, the proposal to mandate accreditation would only impact any smaller publicly operated forensic laboratories.

The subcommittee did not propose to mandate accreditation for privately operated laboratories primarily because it did not have enough data to determine how many privately operated laboratories offer which forensic services within our Commonwealth, and some thought that extending the mandate to privately operated laboratories might limit defendants' ability to offer scientific evidence. Evidence tested by an unaccredited laboratory might still be reliable if it is validated in house, protocols are followed and there is an external peer review. Of course, some notable privately operated laboratories within our Commonwealth are accredited and the subcommittee consulted experts from these laboratories, one of whom was also a member of this subcommittee. Those who would have preferred that the recommendation to mandate accreditation apply to both publicly and privately operated laboratories (as Texas does) wanted to avoid dual standards.

Nationally, approximately 80% of publicly funded forensic crime laboratories are accredited, almost all by American Society of Crime Laboratory Directors/Laboratory Accreditation Board.[956] More than 90% of the state-operated laboratories are accredited and more than 60% of the ones serving counties and other municipalities are.[957] Laboratory accreditation and individual certification reduces the application of pseudoscientific protocols as they are disclosed to the accrediting boards. "While accreditation is not a promise of perfection, it has enforced professional accountability and transparency that has benefited all stakeholders of forensic science for over 25 years. There is simply no reason to believe that it won't do the same in the years to come."[958]

Forensic science helps to determine if a specific object or person is implicated in a crime. Experience reveals that errors have occurred in the collection, processing and analysis of evidence; some of those errors have contributed to wrongful convictions here and elsewhere. Establishing uniform procedures to collect, process and analyze evidence, establishing uniform peer review of work product as well as hiring standards and regular proficiency testing of individual technicians would go a long way toward reducing factors that lead to inaccurate results and considerably improve the ability to audit those results.

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[956] Bureau of Just. Statistics, U.S. Dep't of Just., Bulletin: Census of Publicly Funded Crime Laboratories, 2005 3 (2008).
[957] *Id.* The census for 2009 has not yet been published.
[958] John M. Collins & Jay Jarvis, *The Wrongful Conviction of Forensic Science*, Forensic Sci. & Pol'y Mgmt.: An Int'l J. 17, 28 (2009).

If it does not yet meet that minimum acceptable level, accreditation would require each laboratory to improve its operation. Although larger governmentally operated laboratories in our Commonwealth are already accredited (or are becoming accredited), the subcommittee proposal phases in the accreditation requirement over a period of seven years with technical peer review systems and proficiency testing programs required earlier. This should allow adequate time to accomplish all of this, adding any smaller governmentally operated laboratories that are not yet accredited.

In conjunction with accreditation, the subcommittee proposes creating a forensic advisory board to advise on the delivery of forensic laboratory service by state and municipal laboratories.[959] This board would also investigate reported professional negligence and misconduct in publicly operated forensic laboratories and ensure corrective actions. It would promulgate some standards to preserve biological evidence and offer continuing education on forensic science and its application to crimes to those involved in criminal justice that could benefit from this education.

> The exonerations conclusively demonstrate, however, that when forensic evidence is misunderstood, misapplied or mishandled, it is just as capable of producing an erroneous result. Judges, prosecutors and defense attorneys cannot discharge their responsibility unless they are fully conversant with the nuances and emerging technologies in the forensic evidence fields. Sustained and focused training is essential.[960]

In some ways, the proposed board combines advice with supervisory and regulatory or investigatory functions. At least nine other jurisdictions have or had boards to provide one or more of these functions.[961]

In recent years, National Institute of Justice[962] solicited applicants for funding "to States and units of local government to help and improve the timeliness of forensic science and medical examiner services."[963] Among other qualifications for eligibility, applicants must certify "that any forensic laboratory system . . . that will receive any portion of the grant amount . . . uses generally accepted laboratory practices and procedures established by accrediting organizations or appropriate certifying bodies."[964] Applicants must also certify that "a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system . . . in the State

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[959] *Infra* p. 202. Some advisors continue to advocate that private ass'ns appoint members to the bd. instead of the governor. Their repeated preference is unconstitutional; "[t]he power to appoint persons to conduct governmental functions cannot be delegated to private organizations." *Hetherington v. McHale*, 329 A.2d 250, 251 (Pa. 1974).

[960] N.Y. Bar Ass'n Task Force on Wrongful Convictions, *supra* note 932, at 101.

[961] Cal., Ill, Ind., Mass., Minn., R.I., Tex., Va. & Wash.

[962] An agency of U.S. Dep't of Just. & a component of Office of Just. Programs.

[963] Nat'l Inst. of Just., U.S. Dep't of Just., Solicitation: Paul Coverdell Forensic Science Improvement Grants Program 3 (OMB No. 1121-0329).

[964] *Id.* at 4.

that will receive a portion of the grant amount."[965] The funding can be used for personnel, computerization, laboratory equipment, supplies, accreditation, education, training, certification, facilities and administrative expenses.[966] Our Commonwealth has received funding from this program in the past; evidently, the state is eligible; however, not all units of local government that have forensic laboratory systems are eligible. The proposals from the subcommittee relating to accreditation and oversight could expand eligibility within our Commonwealth for funding from this program.

The National Academy of Sciences independent forensic science committee recommended that all public forensic laboratories and facilities be removed from administrative control of law enforcement agencies and prosecutors' offices.[967]

> The best science is conducted in a scientific setting as opposed to a law enforcement setting. Because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.[968]

The rest of this recommendation is for federal funding to state and local jurisdictions as an incentive to create this administrative independence.[969] While laudable, the subcommittee did not regard administrative independence to be a realistic objective in the near term. The regulatory and supervisory authority vested in the forensic advisory board might serve as a suitable substitute for independent administration, especially since these laboratories would be accredited.

Preservation of Evidence

After postconviction access to DNA testing, the most common statutory reform of the types considered for this report is a requirement to preserve evidence. Including our Commonwealth, almost every jurisdiction statutorily provides postconviction access to DNA. Excluding our Commonwealth, most jurisdictions statutorily require that some evidence be preserved for prescribed periods. Almost all of these jurisdictions are required to preserve biological evidence and material that can be tested for DNA. This statutory mandate is in more than 70% of our jurisdictions, so that Pennsylvania really lags most of the rest of the country by having not adopted this requirement itself. Postconviction access to DNA testing becomes moot if the evidence is not preserved.

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[965] *Id.*
[966] *Id.* at 9-11.
[967] Nat'l Research Council of the Nat'l Academies, *supra* note 938, at S-17.
[968] *Id.*
[969] *Id.*

> In cases where crucial evidence is not preserved, is preserved but is later lost, or where it is never properly analyzed, a wrongful conviction may never be uncovered. . . . Recent experience has demonstrated that evolving technology makes possible exclusions and inclusions that were not feasible years ago. . . . The loss or destruction of forensic evidence renders later testing impossible. . . . Plainly there is a need for reform in this area.[970]

In recent years, National Institute of Justice[971] solicited applicants for funding "to receive funding to help defray the costs associated with postconviction DNA testing in cases that involve violent felony offenses . . . in which actual innocence might be demonstrated. Funds could be used to review such postconviction cases and to locate and analyze biological evidence associated with these cases."[972] To be eligible, our Office of Attorney General would need to certify that our state law provides postconviction DNA testing "in a manner intended to ensure a reasonable process for resolving claims of actual innocence."[973] Our Office of Attorney General could certify this requirement for eligibility but would not be able to certify the remaining requirement for eligibility: a state law "[p]reserves biological evidence secured in relation to the investigation or prosecution of a State offense of murder or forcible rape . . . in a manner to ensure that reasonable measures are taken by all jurisdictions within the State to preserve such evidence."[974] The "DNA analysis conducted using this funding . . . must be performed by a laboratory . . . that is accredited and that undergoes external audits . . . ."[975] The funding can be used for supplies, overtime, consultant and contractor services, computer equipment, and salary and benefits of additional employees.[976]

The subcommittee on science surveyed our Commonwealth's judicial districts during its deliberation. Almost half of the judicial districts responded with more than four-fifths of the respondents saying there are no written policies to guide the preservation of biological evidence of crime between the conviction and filing of a petition to test DNA postconviction. A little over a quarter of the respondents cited premature destruction of evidence as significantly problematic. If enacted, the subcommittee's proposal would require both preservation of this evidence and written policies to guide the mandated preservation. Originally, the subcommittee would not have required evidence be preserved if the defendant knowingly and voluntarily waived the right to test it in a court proceeding; however, this was inconsistent with the legal representation subcommittee's proposed Pennsylvania Postconviction DNA Testing Act. That proposal would make these waivers ineffective even if they are in a plea agreement. The preservation requirement and the postconviction access go together so that these two proposals must be consistent.

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[970] N.Y. Bar Ass'n Task Force on Wrongful Convictions, *supra* note 932, at 90, 97, 98.
[971] An agency of U.S. Dep't of Just. & a component of Office of Just. Programs.
[972] Nat'l Inst. of Just., U.S. Dep't of Just., Solicitation: Postconviction DNA Testing Assistance Program 3 (NIJ-2011-2813).
[973] *Id.*
[974] *Id.* at 4.
[975] *Id.*
[976] *Id.* at 5-6.

Training[977]

> Education and training in the forensic science disciplines serve at least three purposes. First, educational programs prepare the next generation of forensic practitioners. . . . Second, forensic science practitioners require continuing professional development and training. . . . Third, there is a need to educate the users of forensic science analyses, especially those in the legal community. Judges, lawyers, and law students can benefit from a greater understanding of the scientific bases underlying the forensic science disciplines and how the underlying scientific validity of techniques affects the interpretation of findings.[978]

The proposed authority for the forensic advisory board's training focuses on the second and third purposes of education and training. For forensic scientists,

> training is needed to stay up to date in theoretical and practical issues . . . . Everyone in a laboratory needs orientation in such topics as the criminal justice system, the legal system, ethics, professional organizations, the basic philosophy of forensic science, overview of disciplines of forensic science, quality control (e.g., good laboratory practice), effective expert testimony, and safety. . . . Continuing education is critical for all personnel working in crime laboratories as well as for those in other forensic science disciplines . . . .[979]

The board would be authorized to coordinate, offer and collect a fee for this training and continuing education.

Users of forensic science analyses need "to understand increasingly complex scientific evidence."[980] The board would also be authorized to coordinate, offer and collect a fee for this training and continuing education of judges and lawyers.

> The forensic science community needs to educate those who use their services and therefore needs to understand the services and their terminology. . . . Lawyers and judges often have insufficient training and background in scientific methods, and they often fail to fully comprehend the approaches employed by different forensic science disciplines and the strengths and vulnerabilities of forensic science evidence offered during trials.[981]

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[977] *Infra* p. 206.
[978] Nat'l Research Council of the Nat'l Academies, *supra* note 938, at 8-1, 8-2.
[979] *Id.* at 8-12, 8-13.
[980] *Id.* at 8-14.
[981] *Id.* at 8-13, 8-16, 8-17.

Summary of Proposals[982]

A statute should:

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

A statutorily created forensic advisory board should be established to:

1) advise the Commonwealth on the configuration of forensic laboratories and the delivery of their services to state and local government;
2) offer continuing education relating to forensic science to investigators, attorneys, scientists and others[983] involved in criminal justice; and
3) timely investigate allegations of professional negligence and misconduct affecting the integrity of forensic analyses.

[982] *Infra* p. 202.

[983] Emergency room physicians, sexual assault nurse examiners, med. examiners, coroners, clerks of ct., ct. reporters, etc.

Training Attorneys Relating to Eyewitness Identification and Confessions

Recommended Rule Change to require defense counsel in capital cases be educated on evidence relating to eyewitness identifications and confessions:

Rule 801.[985] Qualifications for Defense Counsel in Capital Cases

In all cases in which the district attorney has filed a Notice of Aggravating Circumstances pursuant to Rule 802, before an attorney may participate in the case either as retained or appointed counsel, the attorney must meet the educational and experiential criteria set forth in this rule.

(1) EXPERIENCE: Counsel shall

(a) be a member in good standing of the Bar of this Commonwealth;

(b) be an active trial practitioner with a minimum of 5 years criminal litigation experience; and

(c) have served as lead or co-counsel in a minimum of 8 significant cases that were given to the jury for deliberations. If representation is to be only in an appellate court, prior appellate or post-conviction representation in a minimum of 8 significant cases shall satisfy this requirement. A "significant case" for purposes of this rule is one that charges murder, manslaughter, vehicular homicide, or a felony for which the maximum penalty is 10 or more years.

(2) EDUCATION:

(a) During the 3-year period immediately preceding the appointment or entry of appearance, counsel shall have completed a minimum of 18 hours of training relevant to representation in capital cases, as approved by the Pennsylvania Continuing Legal Education Board.

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[984] These proposals were developed by the subcomms.; comments of advisors criticizing the proposals appear in appendix J, *infra* p. 309.

[985] Pa. R. Crim. P. 801. This rule mandates "educational and experiential criteria" for retained or appointed counsel "[i]n all cases in which the district attorney has filed a Notice of Aggravating Circumstances." Pa. R. Crim. P. 801. The education is approved by Pa. Continuing Legal Educ. Bd. so that prosecutors may attend courses focusing on capital litigation as well.

(b) Training in capital cases shall include, but not be limited to, training in the following areas:

(i) relevant state, federal, and international law;

(ii) pleading and motion practice;

(iii) pretrial investigation, preparation, strategy, and theory regarding guilt and penalty phases;

(iv) jury selection;

(v) trial preparation and presentation;

(vi) presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts;

(vii) presentation and rebuttal of evidence related to eyewitness identification evidence;

(viii) presentation and rebuttal of evidence related to confessions;

(ix) ethical considerations particular to capital defense representation;

(x) preservation of the record and issues for post-conviction review;

(xi) post-conviction litigation in state and federal courts;

(xii) unique issues relating to those charged with capital offenses when under the age of 18;

(xiii) counsel's relationship with the client and family.

(c) The Pennsylvania Continuing Legal Education Board shall maintain and make available a list of attorneys who satisfy the educational requirements set forth in this rule.

Taping of Interrogations – Electronic Recording Statute

AN ACT

Amending Title 44 (Law and Justice) of the Pennsylvania Consolidated Statutes, providing for recording of custodial interrogations.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 44 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:

CHAPTER 83
INVESTIGATION

Subchapter
A. Recording of Interrogations

SUBCHAPTER A
RECORDING OF INTERROGATIONS

Sec.
8301. Definitions.
8302. Recording requirement.
8303. Applicability.
8304. Wiretap exception to recording.
8305. Sanctions.
8306. Handling and preservation of electronic recordings.

§ 8301. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Custodial interrogation." An interview in which a question, statement or other conduct is reasonably likely to elicit an incriminating response and occurs while the individual interviewed is in custody.

"Custody." A state of affairs in which the individual who is interviewed by a law enforcement officer is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes his freedom of action or movement is restricted.

"Electronic recording." An audiovisual or audio recording of a statement.

"Interview." A conversation between a law enforcement officer and another individual that takes place in the course of a criminal investigation.

"Law enforcement agency." A government entity whose responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

"Law enforcement officer." An officer or other employee of a law enforcement agency whose personal responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

"Statement." An oral, written, sign language or nonverbal communication that takes place during a custodial interrogation.

§ 8302. Recording requirement.

An electronic recording must be made of any custodial interrogation relating to the investigation of the following offenses:

(1) An offense under 18 Pa.C.S. Ch. 25 (relating to criminal homicide).

(2) An offense classified as a felony under 18 Pa.C.S. Ch. 31 (relating to sexual offenses).

(3) An offense under 18 Pa.C.S. Ch 37 (relating to robbery).

(4) An offense classified as a felony under 18 Pa.C.S. § 3301 (relating to arson and related offenses).

(5) An attempt under 18 Pa.C.S. § 901 (relating to criminal attempt) or conspiracy under 18 Pa.C.S. § 903 (relating to criminal conspiracy) to commit an offense referred to in paragraph (1), (2), (3) or (4).

§ 8303. Applicability.

(a) Exceptions.—Section 8302 (relating to recording requirement) does not apply if the court finds all of the following:

(1) That the statement is admissible as evidence.

(2) That the statement is proven by a preponderance of the evidence to have been made voluntarily and to be reliable.

(3) That a law enforcement officer made a contemporaneous record of the reason for not making an electronic recording of the statement, or it was proven by a preponderance of the evidence that it was not feasible to make such a record. The reason provided must be consistent with paragraph (4).

(4) That it is proven by a preponderance of the evidence that one or more of the following circumstances existed at the time of the custodial interrogation:

(i) The statement was made spontaneously and was not made in response to a question.

(ii) The statement was made spontaneously in the course of the routine intake processing of the individual.

(iii) The law enforcement officer in good faith failed to make an electronic recording of the custodial interrogation because the officer inadvertently failed to operate the recording equipment properly, or without the officer's knowledge, the recording equipment malfunctioned or stopped operating.

(iv) The custodial interrogation took place in another jurisdiction and was conducted by an official of that jurisdiction in compliance with the law of that jurisdiction.

(v) The law enforcement officers conducting or contemporaneously observing the custodial interrogation reasonably believed that the making of an electronic recording would jeopardize the safety of the individual, a law enforcement officer, a confidential informant or another individual.

(vi) The law enforcement officers conducting or contemporaneously observing the custodial interrogation reasonably believed that the crime for which the individual was subjected to custodial interrogation was not among those listed in section 8302.

(vii) Exigent circumstances existed which prevented or made infeasible the making of an electronic recording of the custodial interrogation.

(viii) Before the custodial interrogation, the individual to be interrogated indicated that he would participate only if the custodial interrogation were not electronically recorded and, if feasible, the agreement to participate without recording were electronically recorded.

(b) Exclusions.—Section 8302 does not apply to a statement if any of the following apply:

(1) The statement is offered as evidence solely to impeach or rebut the testimony of the individual interrogated and not as substantive evidence.

(2) The custodial interrogation takes place before a grand jury or court of record.

§ 8304. Wiretap exception to recording.

Notwithstanding 18 Pa.C.S. Ch. 57 (relating to wiretapping and electronic surveillance), a law enforcement officer engaged in custodial interrogation under section 8302 (relating to recording requirement) may record that custodial interrogation without consent or knowledge of that individual being held or interrogated. A law enforcement officer may nevertheless obtain an individual's consent to recording or inform that individual that the custodial interrogation will be recorded.

Comment: The wiretap exception is coextensive with the recording requirement. If the parties consent, interviews and interrogations that precede custody may also be recorded.

§ 8305. Sanctions.

Except as provided in section 8303 (relating to applicability), if the statement is obtained in violation of this subchapter and is otherwise admissible, the trial court shall instruct the jury that a State statute required the recording of the statement to ensure a more reliable determination at trial as to the circumstances and substance of any statement made by the defendant, that the police failed to abide by the terms of the statute and therefore no recording is available for the jury and that the jury may take into account the failure to record the statement in determining what weight to give the statement.

§ 8306. Handling and preservation of electronic recordings.

(a) Handling—The law enforcement agency shall clearly identify and catalogue all electronic recordings.

(b) Preservation.—

(1) If a juvenile or criminal proceeding is brought against a person interrogated in an electronically recorded custodial interrogation, law enforcement personnel shall preserve the electronic recording until all appeals, postconviction and habeas corpus proceedings by the individual interrogated are concluded or the time within which such proceedings must be brought has expired.

(2) If a juvenile or criminal proceeding is not brought against an individual interrogated in an electronically recorded custodial interrogation, law enforcement personnel shall preserve the electronic recording until all applicable Federal and State statutes of limitations bar prosecution of the individual.

Section 2. This act shall take effect in one year.

Eyewitness Identification – Eyewitness Identification Improvement Act

AN ACT

Amending Title 44 (Law and Justice) of the Pennsylvania Consolidated Statutes, providing for eyewitness identifications.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Chapter 83 of Title 44 of the Pennsylvania Consolidated Statutes is amended by subchapter to read:

SUBCHAPTER B
EYEWITNESS IDENTIFICATIONS

Sec.
8311. Short title of subchapter
8312. Legislative purpose.
8313. Definitions.
8314. Eyewitness identification procedures.
8315. Trial practice.
8316. Dissemination of identification procedures.

§ 8311. Short title of subchapter.

This subchapter shall be known and may be cited as the Eyewitness Identification Improvement Act.

§ 8312. Legislative purpose.

The purpose of this subchapter is to help solve crime, convict the guilty and protect the innocent in criminal proceedings by improving procedures for eyewitness identification of suspected perpetrators while ensuring that police can promptly, safely and effectively investigate crimes.

§ 8313. Definitions.

The following definitions when used in this subchapter shall have the meanings given to them by this section unless the context clearly indicates otherwise:

"Administrator." The individual who conducts a live or photo lineup.

"Blind lineup." A lineup where either of the following occurs:

(1) In the case of a live or photo lineup, the administrator does not know the identity of the suspect.

(2) In the case of a photo lineup in which the administrator knows the identity of the suspect, the administrator does not know which photograph the eyewitness is viewing at any given time.

"Eyewitness.**"** An individual who observes another individual at or near the scene of a criminal offense.

"Filler." An individual who is not suspected of an offense and is included in an identification procedure.

"Identification procedure." An investigative procedure in which a law enforcement official requests an eyewitness to attempt to identify an individual who perpetrated a criminal offense. The term includes a live lineup, a photo lineup or a show-up.

"Law enforcement agency." A governmental entity whose responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

"Law enforcement officer." An officer or other employee of a law enforcement agency whose personal responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

"Live lineup." An identification procedure in which several individuals, including the suspect and fillers, are displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

"Photo lineup." An identification procedure in which an array of photographs, comprising a photograph of the suspect and photographs of fillers, is displayed to an eyewitness either in hard copy form or via computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

"Show-up." An identification procedure in which an eyewitness is presented with a suspect for the purpose of determining whether the eyewitness identifies the individual as the perpetrator.

"Suspect." The individual believed by law enforcement investigators to be the possible perpetrator of the crime.

§ 8314. Eyewitness identification procedures.

(a) General rule.—An eyewitness identification procedure conducted by a law enforcement agency must comply with this section.

(b) Description of the perpetrator.—Except as provided in subsection (h)(1), the eyewitness's description of the perpetrator and the circumstances under which the eyewitness observed the perpetrator, in the eyewitness's own words, shall be obtained and documented immediately prior to a live or photo lineup, unless such a description was recorded or otherwise documented by law enforcement personnel before the commencement of the identification procedure.

(c) Blind lineup administration.—Subject to the exceptions in this subsection, a blind lineup shall be conducted. If the lineup is not blind, the administrator shall state in writing the reason that a blind lineup was not used. A blind lineup need not be conducted if any of the following apply:

(1) A blind lineup is not practicable under the circumstances. The administrator shall state in writing the reasons that a blind lineup is not practicable.

(2) The law enforcement agency employs a single lineup administrator who conducts all of its lineups, counsel for the suspect is present at the lineup, and the identification procedure complies with subsections (d), (e), (f), (g), (i) and (j).

(3) The law enforcement agency audiovisually records the identification process and that identification procedure complies with subsections (d), (e), (f), (g), (i) and (j).

(d) Prelineup instructions.—Prior to a live or photo lineup, the administrator shall apprise the eyewitness of all of the following:

(1) That the perpetrator may or may not be among the individuals presented in the identification procedure.

(2) That the eyewitness should not feel compelled to make an identification.

(3) That the investigation will continue whether or not an identification is made.

(4) That if an identification is made, the administrator will ask the eyewitness to state, in his own words, how certain he is of the identification.

(e) Contact among eyewitnesses.—If more than one eyewitness views a live or photo lineup in a session, the administrator shall not permit the eyewitnesses to communicate with each other until all identification procedures in the session have been completed. Reasonable efforts shall be made so that an eyewitness does not see or hear the identification or nonidentification made by any other witness.

(f) Lineup composition.—The administrator shall conduct the lineup such that:

(1) Only one suspect is included in a live or photo lineup.

(2) In a live lineup, the following apply:

(i) All lineup participants are out of view of the eyewitness prior to the identification procedure.

(ii) At least five fillers are used.

(iii) Any identifying actions, such as speech, gestures or movements, are performed by all lineup participants.

(3) In a photo lineup, the following apply:

(i) The photograph of the suspect is placed in a different position in the lineup for each eyewitness.

(ii) At least five fillers are used.

(g) Comment after lineup.—An administrator or law enforcement officer may not comment or otherwise indicate whether an identification has identified a suspect.

(h) Show-ups—The following apply to show-ups:

(1) When practicable and when safe for the witness and law enforcement officers, the person conducting the show-up shall obtain the eyewitness's description of the perpetrator and shall record or otherwise document the description before commencing the show-up. If compliance with this paragraph is not practicable or safe, the person conducting the show-up shall state in writing the reasons for the failure to comply.

(2) When practicable and when safe for the witness and the law enforcement officers, the person conducting the show-up shall apprise the eyewitness of all of the following before commencing the show-up:

(i) That the perpetrator may or may not be the individual presented to the eyewitness.

(ii) That the eyewitness should not feel compelled to make an identification.

(iii) That the investigation will continue whether or not an identification is made.

(iv) That if an identification is made, the administrator will ask the eyewitness to state, in his own words, how certain he is of the identification.

(3) When performing a show-up, law enforcement personnel shall take reasonable measures to preclude the eyewitness from drawing inferences prejudicial to the suspect, including the following:

(i) Refraining from suggesting through statements or nonverbal conduct that the suspect is or may be the perpetrator of the crime.

(ii) When practicable and when safe for the witness and the law enforcement officers, removing handcuffs from the suspect and having the show-up take place at some distance from a squad car.

(4) If there are multiple eyewitnesses to a criminal offense under investigation, police shall make reasonable efforts to prevent an eyewitness from seeing or hearing the identification or nonidentification made by any other witness.

(5) If an eyewitness is requested to make an identification of more than one suspect at a show-up, the suspects shall be separated and the person conducting the show-up shall perform a separate show-up for each suspect when practicable and when safe for the witness and the law enforcement officers.

(i) Confidence statement.—If an eyewitness identifies an individual as the perpetrator at an identification procedure, the administrator shall immediately request a statement from the eyewitness, in the eyewitness's own words, as to the eyewitness's confidence level that the individual he identified is the perpetrator. The eyewitness must not be permitted to see or hear any information concerning the identified individual until after the administrator obtains the eyewitness's confidence statement.

(j) Record.—The administrator shall make a record of the identification procedure. The record must include all identification and nonidentification results obtained during the identification procedure as well as any confidence statement.

Comment: These identification procedures allow lineups to be presented simultaneously and sequentially.

§ 8315. Trial practice.

(a) Suppression.—The trial court may consider evidence of failure to comply with this subchapter in adjudicating a motion to suppress an eyewitness identification.

(b) Misidentification—Evidence of failure to comply with this subchapter may be admitted at trial in support of a claim of eyewitness misidentification.

(c) Jury instruction.—

(1) If sufficient evidence of failure to comply with this subchapter is presented at trial, the trial court shall instruct the jury that it may consider the evidence of noncompliance as a reason to view the identification evidence with caution.

(2) At the request of either party, the trial court may instruct the jury as to the requirements of this subchapter and how compliance or failure to comply with those requirements may affect the reliability of the identification.

§ 8316. Dissemination of identification procedures.

(a) Training.—The Pennsylvania State Police and the Municipal Police Officers' Education and Training Commission shall develop and conduct a training program for law enforcement officers and recruits regarding the method of conducting identification procedures under this subchapter and the scientific findings supporting the methods prescribed by this subchapter.

(b) Adoption of procedures.—Each law enforcement agency shall adopt a written protocol for eyewitness identification procedures consistent with this subchapter.

Section 2. This act shall take effect in 120 days.

Adequacy of Legal Representation

While recognizing their importance, the subcommittee did not consider in detail the issues relating to the adequacy of the current legal representation of indigent defendants because another advisory committee of the Joint State Government Commission is currently considering that topic pursuant to Senate Resolution No. 42.[986]

At the same time, the subcommittee urges enactment of the following recommendations issued in 2003 by the Supreme Court Committee on Racial and Gender Bias in the Justice System relating to the public defender program:

[986] Sess. of 2007.

> Establish an independent Indigent Defense Commission to oversee services throughout the Commonwealth and to promulgate uniform, effective minimum standards.
>
> Appropriate funding for indigent defense services from Commonwealth funds and adopt adequate uniform attorney compensation standards.[987]

It is anticipated that the recommendations from the Senate Resolution No. 42 study will be consistent with the two immediately above. The subcommittee wishes to emphasize that adequate funding is a critical concern for both the defense and the prosecution in their respective roles.

To enable young attorneys to consider starting or continuing a career as a prosecutor or public defender, an educational loan forgiveness program should be established for lawyers who take such public service jobs after law school.

Prosecutorial Practice

1. In addition to the ethical obligations which prosecutors are bound by, as encompassed in their oath of office and pursuant to their obligations under Pa. Rules of Prof'l Conduct R. 3.8 (relating to special responsibility of a prosecutor), prosecutorial offices throughout the Commonwealth are urged to implement internal policies that encourage ethical conduct, implement and enforce internal discipline when ethical standards are violated, and develop other mechanisms to provide internal oversight with the objective of ensuring, to the fullest possible extent, the integrity of investigations, evidence development, and trial and post conviction practices.

2. In addition to the ethical obligations which prosecutors are bound by, as encompassed in their oath of office and pursuant to their obligations under Pa. Rules of Prof'l Conduct R. 8.3 (relating to reporting professional misconduct), prosecutorial offices throughout the Commonwealth are urged to adopt clear guidelines and appropriate sanctions in instances where purposeful or otherwise egregious prosecutorial misconduct is discovered or revealed.

3. Pennsylvania Supreme Court is urged to adopt proposed amendments to Pa. Rules of Prof'l Conduct R. 3.8, relating to evidence of wrongful conviction.[988]

[987] Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys., *supra* note 867. The work of this comm. has been continued by the Interbranch Comm'n for Gender, Racial &Ethnic Fairness.
[988] These amendments are endorsed by Pa. Bar Ass'n.

Informant Testimony

Jury Instruction

Judges should use a cautionary jury instruction similar to the following for the testimony of a jailhouse informant:

> (1) When a Commonwealth witness is a jailhouse or prisoner informant his testimony has to be judged by special precautionary rules. Experience shows that a prisoner informant may testify falsely in the hope of obtaining favorable treatment, or for some corrupt or wicked motive. On the other hand, a prisoner informant may be a perfectly truthful witness. The special rules that I shall give you are meant to help you distinguish between truthful and false informant testimony.
>
> (2) These are the special rules that apply to informant testimony:
>
> *First,* you should review the motives or reasons for the informant giving testimony in this case.
>
> *Second,* you should examine the testimony of an informant closely and accept it only with care and caution.
>
> *Third,* you should consider whether the testimony of an informant is supported, in whole or in part, by other evidence. Accomplice testimony is more dependable if supported by independent evidence. However, even if there is no independent supporting evidence you may still find the defendant guilty solely on the basis of an informant's testimony if, after using the special rules I just told you about, you are satisfied beyond a reasonable doubt that the informant testified truthfully and the defendant is guilty.

Statute Relating to Informant Testimony

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for informant testimony.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 42 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 5919.1. Informant testimony.

(a) Disclosures.—In any case in which the prosecution attempts to introduce evidence of incriminating statements made by the accused to an informant or overheard by an informant, the prosecution shall timely disclose all of the following to the defense:

(1) The intention of the prosecution to introduce the testimony of an informant.

(2) The complete criminal history of an informant.

(3) Any deal, promise, inducement or benefit which the offering party has made or will make to the informant.

(4) The substance of the testimony to be given by the informant, including all statements made by the accused and heard by the informant.

(5) The time and place of each statement, the time and place of its disclosure to law enforcement officials and the names of all persons who were present when the statement was made.

(6) Whether, at any time, the informant recanted his testimony and, if so, the time and place of the recantation, the nature of the recantation and the names of the persons who were present at the recantation.

(7) Other cases in which the informant testified and whether the informant received any promise, inducement or benefit in exchange for or after that testimony.

(8) Any other information relevant to the credibility of the informant.

(b) Hearing.—In any capital case in which the prosecution attempts to introduce testimony of incriminating statements made by the accused to an informant or overheard by an informant, the court shall conduct a hearing before the introduction of the testimony to determine whether the testimony is reliable. If the prosecution fails to show by a preponderance of the evidence that the statement is reliable, the court may not allow the testimony to be heard at trial. At this hearing, the court shall consider the factors enumerated in subsection (a) as well as any other factors relating to reliability. A hearing under this subsection is not required if the defendant waives the right to the hearing or if an electronic recording was made of the statement of the accused.

(c) Applicability.—This section applies to informant evidence obtained in the course of the investigation of a felony.

(d) Definitions.—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Electronic recording." An audio or audiovisual recording of a statement.

"Informant." An individual whom the prosecution offers as a witness to testify about admissions of an accused that were made to or overheard by the informant while both the informant and the accused were incarcerated in a penal institution.

Section 2. This act shall take effect in 60 days.

Other Proposals Relating to Informants

The advisory committee calls upon law enforcement agencies to adopt the following practices:

1. Where possible, a jailhouse informant should be wired so that the suspect's confession to him can be recorded.

2. The informant's statement should be electronically recorded.

Postconviction Relief

Pennsylvania Postconviction DNA Testing Act and Preservation of Evidence

AN ACT

Amending Titles 18 (Crimes and Offenses), 42 (Judiciary and Judicial Procedure) and 44 (Law and Justice) of the Pennsylvania Consolidated Statutes, providing for tampering with biological evidence; further providing for controlled substance forfeiture; providing for preservation of biological evidence; repealing provisions relating to postconviction DNA testing; further providing for jurisdiction and proceedings; and providing for postconviction DNA testing.

.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 18 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 5113. Tampering with biological evidence.

A person commits a misdemeanor of the first degree if he knowingly and intentionally destroys, alters or tampers with biological evidence that is required to be preserved under 42 Pa.C.S. § 9502 (relating to preservation of biological evidence) with the intent to prevent that evidence from being subjected to DNA testing or prevent the production or use of that evidence in an official proceeding.

Section 2. Section 6801(f) and (h) of Title 42 are amended to read:

§ 6801. Controlled substances forfeiture.

*** * ***

(f) Use of cash or proceeds of property.--Cash or proceeds of forfeited property transferred to the custody of the district attorney pursuant to subsection (e) shall be placed in the operating fund of the county in which the district attorney is elected. The

appropriate county authority shall immediately release from the operating fund, without restriction, a [like amount] portion for the use of the district attorney enforcing the provisions of The Controlled Substance, Drug, Device and Cosmetic Act while retaining an adequate balance to preserve biological evidence as required by section 9502 (relating to preservation of biological evidence). The entity having budgetary control shall not anticipate future forfeitures or proceeds therefrom in adoption and approval of the budget for the district attorney.

*** * ***

(h) Authorization to utilize property.--The district attorney and the Attorney General shall utilize forfeited property or proceeds thereof for the purpose of enforcing the provisions of The Controlled Substance, Drug, Device and Cosmetic Act, 18 Pa.C.S. (relating to crimes and offenses) and 75 Pa.C.S. (relating to vehicles). In appropriate cases, the district attorney and the Attorney General may designate proceeds from forfeited property to be utilized by community-based drug and crime-fighting programs and for relocation and protection of witnesses in criminal cases.

* * *

Section 3. Title 42 is amended by adding a section to read:

§ 9502. Preservation of biological evidence.

(a) General rule.--Notwithstanding any other provision of law, the prosecuting jurisdiction or its designee shall preserve biological evidence that was secured in the investigation or prosecution of a criminal offense, if criminal proceedings are pending or if a defendant is under a sentence of imprisonment for that offense. Prosecuting jurisdictions may act jointly to comply with this section.

(b) Applicability.--Subsection (a) shall not apply if:

(1) a court has denied a request or motion for DNA testing of the biological evidence by the defendant under Ch. 95 Subch. E (relating to postconviction DNA testing), and no appeal is pending;

(2) after a conviction becomes final and the defendant has exhausted all opportunities for direct review of the conviction, the defendant, his counsel of record and the public defender is notified that the biological evidence may be destroyed and the defendant does not file a motion under Ch. 95 Subch. E within one year of receipt of the notice; or

(3) the evidence must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impractical and:

(i) the prosecuting jurisdiction or its designee takes reasonable measures to remove and preserve portions of the material evidence sufficient to permit future DNA testing; or

(ii) the biological evidence has already been subjected to DNA testing under Ch. 95 Subch. E and the results included the defendant as the source of the evidence.

(c) Other preservation requirement.--Biological evidence required to be preserved by this section shall be preserved under reasonable conditions designed to preserve the integrity of the evidence and the testing process, which must be consistent with applicable standards promulgated by a nationally recognized accrediting board and

approved by the Forensic Advisory Board. Nothing in this section preempts or supersedes any statute, regulation, court order, or other provision of law that may require evidence, including biological evidence, to be preserved.

(d) Regulations.--Not later than 180 days after the date of this section's enactment, the prosecuting jurisdiction shall promulgate rules or regulations to implement and enforce this section, including appropriate disciplinary sanctions to ensure compliance.

(e) Fee.--Unless the court finds that undue hardship would result, a fee of $125 shall automatically be assessed on a person convicted or adjudicated delinquent for a criminal offense requiring preservation of biological evidence under this section. All proceeds derived from this fee shall be transmitted to the prosecuting jurisdiction. This fee is in addition to any other fees imposed by statutory authority and the fee shall be assessed per capita rather than per criminal offense or amount of biological evidence. This fee shall be collected in accordance with section 9728 (relating to collection of restitution, reparation, fees, costs, fines and penalties). Subsection (a) applies regardless whether a fee under this subsection is assessed and collected. If the conviction or adjudication of delinquency is reversed or vacated or if the sentence is vacated, the prosecuting jurisdiction shall promptly refund the fee.

(f) Definition.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Biological evidence." The contents of a sexual assault examination kit, and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other biological material that was collected as part of the criminal investigation that may be probative of the perpetrator's identity or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately, *e.g.*, on a slide or swab or in a test tube, or is present on other evidence, including clothing, ligatures, bedding or other household material, drinking cups or cigarettes.

"Criminal offense." An act that can be prosecuted under any of the following provisions of 18 Pa.C.S. (relating to crimes and offenses):

Chapter 25 (relating to criminal homicide).
Chapter 27 (relating to assault).
Chapter 29 (relating to kidnapping).
Chapter 31 (relating to sexual offenses).
Chapter 37 (relating to robbery).

"Prosecuting jurisdiction." The county where the criminal offense occurred.

Section 4. Section 9543.1 of Title 42 of the Pennsylvania Consolidated Statutes is repealed:

[§ 9543.1. Postconviction DNA testing.

(a) Motion.--

(1) An individual convicted of a criminal offense in a court of this Commonwealth and serving a term of imprisonment or awaiting execution because of a sentence of death may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.

(2) The evidence may have been discovered either prior to or after the applicant's conviction. The evidence shall be available for testing as of the date of the motion. If the evidence was discovered prior to the applicant's conviction, the evidence shall not have been subject to the DNA testing requested because the technology for testing was not in existence at the time of the trial or the applicant's counsel did not seek testing at the time of the trial in a case where a verdict was rendered on or before January 1, 1995, or the applicant's counsel sought funds from the court to pay for the testing because his client was indigent and the court refused the request despite the client's indigency.

(b) Notice to the Commonwealth.--

(1) Upon receipt of a motion under subsection (a), the court shall notify the Commonwealth and shall afford the Commonwealth an opportunity to respond to the motion.

(2) Upon receipt of a motion under subsection (a) or notice of the motion, as applicable, the Commonwealth and the court shall take the steps reasonably necessary to ensure that any remaining biological material in the possession of the Commonwealth or the court is preserved pending the completion of the proceedings under this section.

(c) Requirements.--In any motion under subsection (a), under penalty of perjury, the applicant shall:

(1) (i) specify the evidence to be tested;

(ii) state that the applicant consents to provide samples of bodily fluid for use in the DNA testing; and

(iii) acknowledge that the applicant understands that, if the motion is granted, any data obtained from any DNA samples or test results may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against the applicant in other cases.

(2) (i) assert the applicant's actual innocence of the offense for which the applicant was convicted; and

(ii) in a capital case:

(A) assert the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) (relating to sentencing procedure for murder of the first degree) if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(B) assert that the outcome of the DNA testing would establish a mitigating circumstance under section 9711(e)(7) if that mitigating circumstance was presented to the sentencing judge or jury and facts as to that issue were in dispute at the sentencing hearing.

(3) present a prima facie case demonstrating that the:

(i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and

(ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:

(A) the applicant's actual innocence of the offense for which the applicant was convicted;

(B) in a capital case, the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(C) in a capital case, a mitigating circumstance under section 9711(e)(7) under the circumstances set forth in subsection (c)(1)(iv).

(d) Order.--

(1) Except as provided in paragraph (2), the court shall order the testing requested in a motion under subsection (a) under reasonable conditions designed to preserve the integrity of the evidence and the testing process upon a determination, after review of the record of the applicant's trial, that the:

(i) requirements of subsection (c) have been met;

(ii) evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect; and

(iii) motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice.

(2) The court shall not order the testing requested in a motion under subsection (a) if, after review of the record of the applicant's trial, the court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that:

(i) would establish the applicant's actual innocence of the offense for which the applicant was convicted;

(ii) in a capital case, would establish the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(iii) in a capital case, would establish a mitigating circumstance under section 9711(e)(7) under the circumstances set forth in subsection (c)(1)(iv).

(e) Testing procedures.--

(1) Any DNA testing ordered under this section shall be conducted by:

(i) a laboratory mutually selected by the Commonwealth and the applicant;

(ii) if the Commonwealth and the applicant are unable to agree on a laboratory, a laboratory selected by the court that ordered the testing; or

(iii) if the applicant is indigent, the testing shall be conducted by the Pennsylvania State Police or, at the Pennsylvania State Police's sole discretion, by a laboratory designated by the Pennsylvania State Police.

(2) The costs of any testing ordered under this section shall be paid:

(i) by the applicant; or

(ii) in the case of an applicant who is indigent, by the Commonwealth of Pennsylvania.

(3) Testing conducted by the Pennsylvania State Police shall be carried out in accordance with the protocols and procedures established by the Pennsylvania State Police.

(f) Posttesting procedures.--

(1) After the DNA testing conducted under this section has been completed, the applicant may, pursuant to section 9545(b)(2) (relating to jurisdiction and

proceedings), during the 60-day period beginning on the date on which the applicant is notified of the test results, petition to the court for postconviction relief pursuant to section 9543(a)(2)(vi) (relating to eligibility for relief).

(2) Upon receipt of a petition filed under paragraph (1), the court shall consider the petition along with any answer filed by the Commonwealth and shall conduct a hearing thereon.

(3) In any hearing on a petition for postconviction relief filed under paragraph (1), the court shall determine whether the exculpatory evidence resulting from the DNA testing conducted under this section would have changed the outcome of the trial as required by section 9543(a)(2)(vi).

(g) Effect of motion.--The filing of a motion for forensic DNA testing pursuant to subsection (a) shall have the following effect:

(1) The filing of the motion shall constitute the applicant's consent to provide samples of bodily fluid for use in the DNA testing.

(2) The data from any DNA samples or test results obtained as a result of the motion may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against the applicant in other cases.

(h) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Applicant." The individual who files a motion under subsection (a).

"DNA." Deoxyribonucleic acid.]

Section 5. Section 9545(b) of Title 42 is amended to read:

§ 9545. Jurisdiction and proceedings.

*** * ***

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within [60 days] <u>one year</u> of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

(5) This subsection does not apply to a petition filed under Subchapter E (relating to postconviction DNA testing).

* * *

Section 6. Chapter 95 of Title 42 is amended by adding a subchapter to read:

SUBCHAPTER E
POSTCONVICTION DNA TESTING

Sec.
9581. Short title of subchapter.
9582. Definitions.
9583. Right to file petition for DNA testing.
9584. Form of petition.
9585. Filing, docketing and effect of petition.
9586. Counsel for indigent petitioners.
9587. Dismissal or acceptance for adjudication.
9588. Proceedings on petition.
9589. Comparisons with CODIS data.
9590. Discovery.
9591. Testing procedures.
9592. Appeal.
9593. Procedure after test results.

§ 9581. Short title of subchapter.

This subchapter shall be known and may be cited as the Pennsylvania Postconviction DNA Testing Act.

Comment: The relationship between this subchapter and subchapter B (postconviction relief) is generally governed by 1 Pa.C.S. § 1933 (particular controls general), with this subchapter considered the particular provision where both it and subchapter B apply.

§ 9582. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given in this section unless the context clearly indicates otherwise:

"Biological evidence." The contents of a sexual assault examination kit and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other biological material that was collected as part of the criminal investigation that may be probative of the perpetrator's identity or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies

whether that material is catalogued separately, *e.g.*, on a slide or swab or in a test tube, or is present on other evidence, including clothing, ligatures, bedding or other household material, drinking cups or cigarettes.

"CODIS." The Federal Combined DNA Index System.

"DNA testing." Postconviction forensic DNA testing under this subchapter.

"State DNA Data Base." The State DNA Data Base established under 44 Pa.C.S. § 2312 (relating to State DNA Data Base).

"Successive petition." A petition for DNA testing filed by a petitioner who has previously filed a petition for DNA testing.

§ 9583. Right to file petition for DNA testing.

Notwithstanding any other provision of law governing postconviction relief, an individual convicted of a crime may file a petition for DNA testing under this subchapter. A waiver of the right to file a petition for DNA testing is not effective, whether the purported waiver is made by itself, as part of an agreement resulting in a plea of guilty or nolo contendere, or in any other manner.

> **Comment**: Individuals eligible for testing under this section may include any of the following, as well as any others to whom this section applies: (1) individuals currently incarcerated, civilly committed, on parole or probation, or subject to registration as a sex offender; (2) individuals convicted on a plea of not guilty, guilty or nolo contendere; (3) individuals who have provided a confession or admission related to the crime, either before or after conviction; or (4) individuals who have finished serving their sentences.

§ 9584. Form of petition.

(a) Contents of petition.—The petition for DNA testing must be made under oath by the petitioner and must include the following:

(1) A statement of the facts relied on in support of the petition, including a description of the physical evidence containing DNA to be tested and, if known, the present location or the last known location of the evidence and how it was originally obtained.

(2) A statement that the evidence was not previously tested for DNA or a statement that subsequent scientific developments in DNA testing techniques would likely produce a definitive result establishing that the petitioner is not the person who committed the crime.

(3) A statement that the petitioner is innocent of a crime for which the petitioner was sentenced.

(4) In a successive petition, the person's certification that he has not filed a previous petition on similar grounds, and a statement of the reason for the petitioner's failure to raise the current grounds in the previous petition.

(5) A statement describing how the requested DNA testing will exonerate the defendant of the crime or will mitigate the sentence received by the petitioner for the crime.

(6) The petitioner's consent to provide samples of bodily fluid for use in the DNA testing.

(7) The petitioner's consent that the data from any DNA samples or test results obtained as a result of the petition may be entered into law enforcement databases, used in the investigation of other crimes or used as evidence against the petitioner in other cases.

(b) Form—If the Supreme Court promulgates an official form for a petition for DNA testing, the Department of Corrections shall make the form available to prisoners.

§ 9585. Filing, docketing and effect of petition.

(a) Filing.—A request for DNA testing may be filed at any time following sentencing, and shall be by written petition and be filed with the clerk of courts of the judicial district in which the sentence was imposed.

(b) Notice to the Commonwealth.—A copy of the petition shall be served on the attorney for the Commonwealth. The Commonwealth may respond in accordance with the Pennsylvania Rules of Criminal Procedure.

(c) Court rules.—Except as otherwise provided in this subchapter, the Pennsylvania Rules of Criminal Procedure apply to a petition for DNA testing, and the petition shall be considered a petition for postconviction collateral relief under those rules.

(d) Effect of filing petition.—

(1) The filing of a petition for forensic DNA testing constitutes the petitioner's consent to provide samples of bodily fluid for use in the DNA testing.

(2) The filing of the petition also constitutes the consent of the petitioner that the data from any DNA samples or test results obtained as a result of the petition may be entered into law enforcement databases, used in the investigation of other crimes or used as evidence against the petitioner in other cases.

(3) The court shall ensure that the petitioner has filed the petition with knowledge of paragraphs (1) and (2) and has knowingly and intelligently consented to their provisions. Averments in the petition as provided under section 9584(a)(6) and (7) (relating to form of petition), or a written representation that the petitioner has filed the petition with knowledge of paragraphs (1) and (2) and has knowingly and intelligently consented to their provisions, filed of record and signed by petitioner or counsel for the petitioner, is sufficient to establish consent under this paragraph.

(e) Inventory.—Upon receipt of a petition for DNA testing, the Commonwealth shall promptly prepare an inventory of the evidence related to the case and serve a copy of the inventory to the prosecution, the petitioner, the petitioner's attorney and the court.

Comment: The rules relating to postconviction collateral proceedings are set forth in chapter 9 of the Pennsylvania Rules of Criminal Procedure.

§ 9586. Counsel for indigent petitioners.

(a) Request for counsel.—An indigent, convicted individual may request appointment of counsel to prepare a petition for DNA testing by sending a written request

to the court. The request shall include the individual's statement that he was not the perpetrator of the crime and that DNA testing is relevant to his assertion of innocence. The request also shall include the individual's statement as to whether he previously has had counsel appointed under this section. If any of the information required by this subsection is missing from the request, the court shall return the request to the convicted individual and advise him that the matter cannot be considered without the missing information or, if the Supreme Court has promulgated a form for a request for appointment of counsel to prepare a petition for DNA testing, the court may send him that form.

(b) Appointment of counsel.—Upon a finding that the individual is indigent:

(1) If counsel has not previously been appointed under this subsection, the court shall appoint counsel to investigate and, if appropriate, to file a petition for DNA testing and to represent the individual solely for the purpose of obtaining the testing.

(2) If counsel has been previously appointed under this section, the court may appoint counsel to perform the duties described in paragraph (1).

§ 9587. Dismissal or acceptance for adjudication.

(a) General rule.—Unless subsection (c) applies, the court shall dismiss the petition on its own motion without requiring the state to respond to the petition if either of the following apply:

(1) The petition is frivolous.

(2) In the case of a successive petition, the petition fails to meet the requirements of subsection (b).

(b) Successive petitions.—The court shall hear a successive petition if the petition alleges substantially new or different grounds for relief, including factual, scientific or legal arguments not previously presented, or the availability of more advanced DNA technology that provides a reasonable probability of more probative results.

(c) Interests of justice.—The court may adjudicate any petition under this subchapter if the interests of justice so require.

§ 9588. Proceedings on petition.

(a) Criteria for relief.—Unless the court dismisses the petition under section 9587 (relating to dismissal or acceptance for adjudication), the court shall promptly conduct a hearing on the petition. The court shall grant the DNA testing requested by the petition if it finds all of the following:

(1) The petitioner has demonstrated a reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing, under this subchapter or under previously applicable law, at the time of the original prosecution.

(2) The evidence to be tested was secured in relation to the offense underlying the challenged conviction and one of the following applies:

(i) The evidence was not previously subjected to DNA testing under this subchapter or under previously applicable law.

(ii) Although previously subjected to DNA testing under this subchapter or under previously applicable law, the evidence can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results.

(3) At least one item of evidence that the petitioner seeks to have tested is in existence.

(4) The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the results of the DNA testing can establish the integrity of the evidence. Evidence that has been in the custody of law enforcement, other government officials or a public or private hospital shall be presumed to satisfy this paragraph, absent specific evidence of material tampering, replacement or alteration.

(5) The petition is made to demonstrate factual innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.

(b) Other orders.—The court may make such other orders as may be appropriate in connection with proceedings under this subchapter, either on its own initiative or on motion of any party to the proceedings.

Comment: For relief under subsection (a), a "reasonable probability" is a probability great enough to reasonably justify an order that the biological material be tested. Following the analysis in *Strickland v. Washington*, 466 U.S. 668, 691-96 (1984), a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The showing required of the defendant is less than proof by a preponderance of the evidence that the previous outcome was erroneous. *Id.* at 693-94.

Where the petitioner is imprisoned under multiple charges, he may qualify for testing if testing would exonerate him of at least one charge, and the failure of conviction of that charge would have caused him to receive a shorter total sentence.

Subsection (b) applies whether or not the order is specifically mentioned in this subchapter.

§ 9589. Comparisons with CODIS data.

For purposes of supporting a petition under this subchapter, a petitioner may request and the court may order a law enforcement entity that has access to CODIS or the State DNA Data Base to submit the DNA profile obtained from probative biological material from crime scene evidence to those databases to determine whether that profile matches a profile of a known individual or a profile from an unsolved crime. The DNA profile submitted to the databases must comply with the Federal Bureau of Investigation's requirements for the uploading of crime scene profiles to CODIS.

§ 9590. Discovery.

(a) Court orders.--At any time after a petition has been filed under this subchapter, the court may order the Commonwealth to do any or all of the following:

(1) Locate and provide the petitioner with any reports, notes, logs or other documents relating to items of physical evidence collected in connection with the case, or otherwise assist the petitioner in locating items of biological evidence that the Commonwealth contends have been lost or destroyed.

(2) Take reasonable measures to locate biological evidence that may be in the custody of the Commonwealth.

(3) Assist the petitioner in locating evidence that may be in the custody of a public or private hospital, public or private laboratory or other facility.

(4) Produce laboratory reports prepared in connection with the DNA testing, as well as the underlying data and the laboratory notes, if evidence had previously been subjected to DNA testing under this subchapter or previously applicable law.

(b) Previous testing.--If the prosecution or the petitioner previously conducted DNA testing or other testing of biological evidence without knowledge of the other party, that testing shall be revealed in the petition for testing or the response.

(c) Reports and data.--If the court orders new DNA testing, the court shall order the production of any laboratory reports prepared in connection with the DNA testing. The court may also order production of the underlying data or other laboratory documents.

(d) Results.--The results of the DNA testing shall be disclosed to the prosecution, the petitioner and the court.

§ 9591. Testing procedures.

(a) Court supervision.--The court may order any or all of the following:

(1) The preservation of some portion of the sample for replication of the test.

(2) Additional DNA testing, if the results of the initial testing are inconclusive or additional scientific analysis of the results is otherwise required.

(3) The collection and DNA testing of additional reference samples for comparison purposes.

(b) Selection of laboratory.--DNA testing shall be conducted by a laboratory mutually selected by the Commonwealth and the petitioner. If the Commonwealth and the petitioner are unable to agree on a laboratory, the testing shall be conducted by a laboratory selected by the court. If the petitioner is indigent, the testing shall be conducted by the Pennsylvania State Police or, at the Pennsylvania State Police's sole discretion, by a laboratory designated by the Pennsylvania State Police. A laboratory selected under this subsection must be accredited.

(c) Costs.--The costs of DNA testing shall be paid by the petitioner, or in the case of an indigent petitioner, by the Commonwealth.

(d) Testing by the Pennsylvania State Police.—DNA testing conducted by the Pennsylvania State Police shall be carried out in accordance with the protocols and procedures established by the Pennsylvania State Police and approved by ASCLD/LAB.

(e) Confidentiality.--DNA profile information from biological samples taken from any individual under this subchapter is exempt from any law requiring disclosure of information to the public.

(f) Definition.—As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Accredited." Accredited by ASCLD/LAB.

"ASCLD/LAB." The Laboratory Accreditation Board of the American Society of Crime Laboratory Directors.

§ 9592. Appeal.

The petitioner may appeal a decision denying DNA testing under the Pennsylvania Rules of Appellate Procedure.

§ 9593. Procedure after test results.

(a) Results favorable to petitioner.--If the results of DNA testing are favorable to the petitioner, the court shall conduct a hearing to determine the appropriate relief to be granted. Based on the results of the testing and any evidence or other matter presented at the hearing, the court shall thereafter enter any order that serves the interests of justice. An order under this subsection may:

(1) Set aside or vacate the petitioner's judgment of conviction, judgment of not guilty by reason of mental disease or defect or adjudication of delinquency.

(2) Grant the petitioner a new trial or fact-finding hearing.

(3) Grant the petitioner a new sentencing hearing, commitment hearing or dispositional hearing.

(4) Discharge the petitioner from custody.

(5) Specify the disposition of any evidence that remains after the completion of the testing.

(6) Grant the petitioner additional discovery on matters related to DNA test results or the conviction or sentence under attack, including documents pertaining to the original criminal investigation or the identities of other suspects.

(7) Direct the Commonwealth to place any unidentified DNA profile obtained from DNA testing into CODIS or the State DNA Data Base.

(b) Results unfavorable to petitioner.--If the results of the tests are not favorable to the petitioner, the court shall dismiss the petition and may make any further orders that are appropriate. An order under this section may:

(1) Direct that the Pennsylvania Board of Probation and Parole be notified of the test results.

(2) Direct that the petitioner's DNA profile be added to the Commonwealth's convicted offender database.

Section 4. Title 44 is amended by adding a section to read:

§ 2319.1. Comparisons with CODIS data.

For purposes of obtaining exculpatory evidence prior to trial or supporting an application for executive clemency, a court may order that a law enforcement entity that has access to CODIS or the State DNA Data Base to submit the DNA profile obtained

from probative biological material from crime scene evidence to determine whether that profile matches a profile of a known individual or a profile from an unsolved crime. The DNA profile submitted to the data bases must comply with the Federal Bureau of Investigation's requirements for the uploading of crime scene profiles to CODIS.

Section 8. This act shall take effect in 120 days.

Redress for Wrongful Convictions

Expungement and Compensation

AN ACT

Amending Titles 18 (Crimes and Offenses) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, further providing for expungement, for sovereign immunity and for exceptions to sovereign immunity; and providing for wrongful conviction and imprisonment.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 9122(a) of Title 18 of the Pennsylvania Consolidated Statutes is amended to read:

§ 9122. Expungement.

(a) Specific proceedings**.**--Criminal history record information shall be expunged in a specific criminal proceeding when:

(1) no disposition has been received or, upon request for criminal history record information, no disposition has been recorded in the repository within 18 months after the date of arrest and the court of proper jurisdiction certifies to the director of the repository that no disposition is available and no action is pending. Expungement shall not occur until the certification from the court is received and the director of the repository authorizes such expungement;

(2) a court order requires that such nonconviction data be expunged; [or]

(3) a person 21 years of age or older who has been convicted of a violation of section 6308 (relating to purchase, consumption, possession or transportation of liquor or malt or brewed beverages) petitions the court of common pleas in the county where the conviction occurred seeking expungement and the person has satisfied all terms and conditions of the sentence imposed for the violation, including any suspension of operating privileges imposed pursuant to section 6310.4 (relating to restriction of operating privileges). Upon review of the

petition, the court shall order the expungement of all criminal history record information and all administrative records of the Department of Transportation relating to said conviction[.]; or

(4) an individual:

(i) is found by the Commonwealth Court under 42 Pa. C.S. Ch. 85 Subch. D (relating to claims for wrongful conviction and imprisonment) to have been wrongfully convicted and imprisoned;

(ii) has agreed to a favorable written settlement for a civil claim relating to a wrongful conviction and imprisonment; or

(iii) has obtained a civil judgment that establishes wrongful conviction and imprisonment.

*** * ***

Section 2. Sections 8521(a) and 8522(b) of Title 42 are amended to read:

§ 8521. Sovereign immunity generally.

(a) General rule.--Except as otherwise provided in this subchapter and Subchapter D (relating to claims for wrongful conviction and imprisonment), no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa.C.S. section 2310 (relating to sovereign immunity reaffirmed; specific waiver) or otherwise.

*** * ***

§ 8522. Exceptions to sovereign immunity.

* * *

(b) Acts which may impose liability.--The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

*** * ***

(10) Wrongful conviction and imprisonment.–Wrongful conviction and imprisonment for which claims may be brought under Subchapter D (relating to claims for wrongful conviction and imprisonment).

Section 3. Chapter 85 of Title 42 is amended by adding a subchapter to read:

SUBCHAPTER D
CLAIMS FOR WRONGFUL CONVICTION AND IMPRISONMENT

Sec.
8581. Eligibility.
8582. Statement of claim and basis of award.
8583. Commonwealth Court.
8584. Presentation of claim.
8585. Damages.
8586. Report and order.
8587. Notice.
8588. Statute of limitations.

§ 8581. Eligibility.

Any person convicted and subsequently imprisoned for one or more crimes that the person did not commit and who has been released from prison and is not subject to retrial, or the heirs of such person if the person is deceased, may present a claim for damages against the Commonwealth. Other than credit for time served, a claimant is not entitled to compensation under this subchapter for any portion of a sentence spent incarcerated during which the claimant was also serving a consecutive or concurrent sentence for another crime to which this subchapter does not apply. The acceptance by the claimant of any judicial award, compromise or settlement shall be in writing and shall, except when procured by fraud, be final and conclusive on the claimant and completely bar any further action by the claimant against the Commonwealth for the same subject matter.

§ 8582. Statement of claim and basis of award.

(a) Evidence of claim.--To present a claim for wrongful conviction and imprisonment, the claimant must establish that:

(1) He has been convicted of one or more crimes and subsequently sentenced to a term of imprisonment and has served all or any part of the sentence.

(2) His actual innocence has been established by:

(i) being pardoned by the Governor for the crime or crimes for which he was sentenced, and which are the basis for the claim, on the grounds that the crime or crimes were either not committed at all or, if committed, were not committed by the defendant;

(ii) having the judgment of conviction of the claimant reversed or vacated and the accusatory instrument dismissed if the judgment of conviction was reversed or vacated or the accusatory instrument was dismissed on grounds consistent with innocence; or

(iii) if a new trial was ordered, either being found not guilty at the new trial or not being retried and the accusatory instrument dismissed.

(b) Basis of award.--To obtain a judgment in the claimant's favor, the claimant must demonstrate that:

(1) The claimant was convicted of one or more crimes and subsequently sentenced to a term of imprisonment and has served all or any part of the sentence.

(2) By clear and convincing evidence his actual innocence has been established under subsection (a)(2).

§ 8583. Commonwealth Court.

Proceedings before the court shall be governed by rules established by the court, which shall emphasize, to the greatest extent possible, informality of proceedings. No claimant shall be required to be represented or accompanied by an attorney.

§. 8584. Presentation of claim.

All claims of wrongful conviction and imprisonment shall be presented to and heard by the Commonwealth Court. Upon presentation of a claim under section 8582

(relating to statement of claim and basis of award), the court shall fix a time and place to hear the claim. At least 15 days prior to the time fixed for the hearing, the court shall mail notice thereof to the claimant and to the district attorney in the district where the claimant was prosecuted for the crimes which serve as the basis for this claim. The district attorney may offer evidence and argue in opposition to the claim for damages. If the claimant was prosecuted by the Office of Attorney General, then that office, rather than the district attorney, must be notified that it may oppose the claim under this section.

§ 8585. Damages.

If the Commonwealth Court finds that the claimant was wrongfully convicted and imprisoned, it may award damages as follows:

(1) A minimum of $50,000 for each year of incarceration, as adjusted annually to account for inflation from the effective date of this section, and prorated for partial years served.

(2) In a lump sum or as an annuity as chosen by the claimant.

(3) Compensation for any reasonable reintegrative services and mental and physical health care costs incurred by the claimant for the time period between his release from incarceration and the date of his award.

(4) Reasonable attorney fees calculated at 10% of the damage award plus expenses. Exclusive of expenses, these fees may not exceed $75,000, as adjusted annually to account for inflation from the effective date of this section, unless the court approves an additional amount for good cause. These fees may not be deducted from the compensation due the claimant nor may his counsel receive additional fees from the client for this matter.

(5) Compensation to those entitled to child-support payments owed by the claimant that became due, and interest on child-support arrearages that accrued during the time claimant served in prison but were not paid. Such compensation is to be provided out of the total cash award to claimant under paragraph (1).

(6) In any case for which compensation is authorized by this subchapter, the payment of compensation may be:

(i) to or for the benefit of the claimant; or

(ii) in the case of death of the claimant, to or for the benefit of any one or more of the heirs at law of the claimant who at the time of the claimant's demise were dependent upon the claimant for support.

(7) To decide damages, the Commonwealth Court shall consider all circumstances surrounding the claim, including, but not limited to, the length of the claimant's wrongful incarceration, any injuries the claimant sustained while incarcerated, any other need for financial aid and any other relevant matters. Insofar as practical, the Commonwealth Court shall formulate standards for uniform application in recommending compensation.

(8) The damage award is not subject to any cap applicable to private parties in civil lawsuits.

(9) The damage award may not be offset by any expenses incurred by the Commonwealth or any political subdivision of the Commonwealth, including, but not limited to, expenses incurred to secure the claimant's custody or to feed,

clothe or provide medical services for the claimant, nor may the court offset the value of any services or reduction in fees for services or the value thereof to be provided to the claimant that may be awarded to the claimant under this section.

(10) The award of damages shall include reimbursement for any statutorily mandated and court-assessed costs, fines, restitution and fees to the extent that they have been collected.

(11) A decision of the Commonwealth Court on behalf of the claimant shall result in the automatic expungement of the criminal history record of the claimant as it relates to the crimes that form the basis of this claim. As part of its decision, the court shall specifically direct the Pennsylvania State Police and the prosecuting district attorney of the original crimes that form the basis of this claim to expunge the record consistent with this paragraph. Accordingly, the court shall forward a copy of its decision to the Pennsylvania State Police and to the prosecuting district attorney.

(12) The damage award is not subject to any Commonwealth taxes.

§ 8586. Report and order.

The Commonwealth Court shall issue a ruling and order and provide the State Treasurer a statement of the total compensation due and owing to the claimant from the Commonwealth.

§ 8587. Notice.

(a) Court.--A court granting judicial relief as described in section 8582(a) (relating to statement of claim and basis of award) shall provide a copy of this subchapter to the individual seeking such relief at the time the court determines that the claimant's claim is likely to succeed. The individual shall be required to acknowledge his receipt of a copy of this subchapter in writing on a form established by the Supreme Court. The acknowledgment shall be entered on the docket by the court and shall be admissible in any proceeding filed by a claimant under this subchapter.

(b) Board of Pardons.–Upon the issuance of a full pardon on or after the effective date of this subchapter, the Board of Pardons shall provide a copy of this subchapter to an individual when pardoned as described in section 8582(a). The individual shall be required to acknowledge his receipt of a copy of this subchapter in writing on a form established by the board, which shall be retained on file by the board as part of its official records and shall be admissible in any proceeding filed by a claimant under this subchapter.

(c) Failure to provide notice.--In the event a claimant granted judicial relief or a full pardon on or after the effective date of this subchapter shows he did not properly receive a copy of the information required by this section, the claimant shall receive a one-year extension on the two-year time limit provided in section 8588 (relating to statute of limitations).

(d) Notice by Supreme Court.--The Supreme Court shall make reasonable attempts to notify all persons who were granted judicial relief as described in section 8582(a), prior to the enactment of this subchapter, of their rights under this subchapter.

§ 8588. Statute of limitations.

An action for compensation brought by a wrongfully convicted person under this subchapter shall be commenced within two years after either the grant of a pardon or the grant of judicial relief and satisfaction of other conditions described in section 8582 (relating to statement of claim and basis of award). Any action by the Commonwealth challenging or appealing the grant of judicial relief tolls the two-year period. Persons convicted, incarcerated and released from custody prior to the effective date of this subchapter shall commence an action under this subchapter within five years of the effective date.

Section 5. This act shall take effect in 180 days.

Transitional Services

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

Subsequent Reviews of Wrongful Convictions

AN ACT

Establishing the Pennsylvania Commission on Conviction Integrity; and imposing powers and duties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Pennsylvania Commission on Conviction Integrity Act.

Section 2. Purpose.

This act provides a mechanism for investigating cases in this Commonwealth in which an innocent person is found to have been wrongly convicted and for recommending procedures to prevent similar recurrences. Existing practices and changes in the criminal justice system nationally that could be adopted to minimize the occurrence of wrongful convictions in this Commonwealth will be monitored and reported. This act is intended to improve the quality, efficiencies and resources of law enforcement in the execution of their duties.

Section 3. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Commission." The Pennsylvania Commission on Conviction Integrity.

Section 4. Establishment.

There is established the Pennsylvania Commission on Conviction Integrity.

Section 5. Duties and responsibilites.

Whenever the Board of Pardons or a court releases a person based upon a finding of actual innocence, the commission shall conduct an inquiry into the causes of the wrongful conviction. In addition, the commission shall annually review conviction integrity reforms introduced by statute, rule, or best practices and report its findings on these matters to the Judiciary Committee of the Senate and the Judiciary Committee of the House of Representatives.

Section 6. Subpoena power and ability to administer oaths.

The chairman of the commission may issue subpoenas for the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under formal investigation by the commission. The commission may administer oaths or affirmations and examine and receive evidence.

Section 7. Privilege and confidentiality.

In the interest of improving the quality of the criminal justice system and eliminating wrongful convictions in this Commonwealth, the deliberations, work and findings of the commission, as it relates to the examination of specific instances of wrongful conviction, shall be privileged and confidential. The proceedings and records of the commission shall be held in confidence and may not be subject to discovery or introduction into evidence in any action arising out of the matters that are the subject of evaluation and review of the commission, and no person who was in attendance at a meeting of the commission shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the commission or as to any findings, recommendations, evaluations, opinions or other actions of the commission or of any members thereof. Information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action solely because they were presented during proceedings of the commission, nor should any person who testifies before the commission who is a member of the commission be prevented from testifying as to matters within his knowledge, but such person cannot be asked about his testimony before the commission or opinions formed by him as a result of commission hearings.

Section 8. Membership.

The commission shall consist of the following members:

(1) The Attorney General, ex officio, or a designee.

(2) The Chief Justice of the Pennsylvania Supreme Court, ex officio, or a designee.

(3) A member of the Commonwealth's Forensic Science Advisory Board appointed by the chairperson of the board.

(4) A member appointed by the President pro tempore of the Senate.

(5) A member appointed by the Minority Leader of the Senate.
(6) A member appointed by the Speaker of the House of Representatives.
(7) A member appointed by the Minority Leader of the House of Representatives.
(8) An at-large member appointed by the Governor.

Any appointment to the commission shall be made no later than 60 days after the effective date of this act.

Section 9. Terms of membership.

The Attorney General or his designee, the Chief Justice of the Pennsylvania Supreme Court or his designee, and the member of the Commonwealth's Forensic Science Advisory Board appointed by the chairperson of the board shall each serve on the commission as long as they continue to serve in the qualifying position specified in section 8. The member appointed by the President pro tempore of the Senate and the member appointed by the Minority Leader of the House of Representatives shall each serve an initial term of two years. The member appointed by the Minority Leader of the Senate and the member appointed by the Speaker of the House of Representatives shall each serve an initial term of three years. The at-large appointee of the Governor shall serve an initial term of four years. Members may not be re-appointed to the Commission more than one time. If any member fails to complete his term, the appointing authority for that member shall, as soon as possible, appoint a replacement to complete that member's term. These appointees may also be reappointed only one time. Except in the case of members who serve ex officio, once all initial terms have expired, all subsequent appointees shall serve for a term of four years.

Section 10. Election and term of chairperson.

The commission shall elect a chairperson from its membership by majority vote. If the vote for a chairperson results in a tie, repeat balloting shall occur until a chairperson is elected by a vote of the majority of the members of the commission. The elected member shall serve as chairperson for a period of two years after which another election for chairperson shall be held. A member may only serve as chairperson for a maximum of two consecutive terms. Any vacancy in the position of chairperson shall be filled as soon as possible by the election of another member by majority vote.

Section 11. Compensation and quorom.

Other than for reimbursement of reasonable expenses actually incurred to attend the meetings of the commission, there shall be no compensation for serving as a member of the commission. A majority of the members shall constitute a quorum, and a vote of the majority of the members present shall be sufficient for all actions.

Section 12. Funding.

An appropriation shall be included annually in the General Appropriation Act to pay the expenses of the members of the commission as constituted by this act and for the office space and salary of a director, clerical and other hires and incidental expenses deemed necessary for performing the functions required by this act.

Section 13. Effective date.

This act shall take effect in 180 days.

AN ACT

Amending Title 65 (Public Officers) of the Pennsylvania Consolidated Statutes, further providing for exceptions to open meetings.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 707 of Title 65 of the Pennsylvania Consolidated Statutes is amended by adding a subsection to read:

§ 707. Exceptions to open meetings.

* * *

(d) Meetings of the Pennsylvania Commission on Conviction Integrity.--Meetings of the Pennsylvania Commission on Conviction Integrity shall not be open to the public.

Section 2. This act shall take effect in 60 days.

AN ACT

Amending the act of February 14, 2008 (P.L.6, No.3), entitled "An act providing for access to public information, for a designated open-records officer in each Commonwealth agency, local agency, judicial agency and legislative agency, for procedure, for appeal of agency determination, for judicial review and for the Office of Open Records; imposing penalties; providing for reporting by State-related institutions; requiring the posting of certain State contract information on the Internet; and making related repeals," further providing for exceptions for public records.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 708(b) of the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law is amended by adding a paragraph to read:

Section 708. Exceptions for public records.

* * *

(b) Exceptions.--Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

* * *

(31) A privileged or confidential record of the Pennsylvania Commission on Conviction Integrity.

* * *

Section 2. This act shall take effect in 60 days.

Accreditation and Oversight of Forensic Laboratories

AN ACT

Amending Title 44 (Law and Justice) of the Pennsylvania Consolidated Statutes, providing for public laboratories; establishing the Forensic Advisory Board; and providing for powers and duties of the board.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 44 of the Pennsylvania Consolidated Statutes is amended by adding a part to read:

PART V
FORENSIC LABORATORIES

Chapter
91. Preliminary Provisions (Reserved)
93. Accreditation
95. Oversight

CHAPTER 91
PRELIMINARY PROVISIONS
(RESERVED)
CHAPTER 93
ACCREDITATION

Subchapter
A. Public Laboratories
B. (Reserved)

SUBCHAPTER A
PUBLIC LABORATORIES

Sec.
9301. Definitions.
9302. Technical peer review system.
9303. Proficiency testing program.
9304. Accreditation.
9305. External investigation.

§ 9301. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Forensic laboratory." A laboratory operated by the Commonwealth or a municipality whose experts perform forensic tests and provide opinion testimony in a court of law.

"Forensic test." A medical, chemical, toxicological, ballistic or other expert examination or test performed on physical evidence, including DNA evidence, to determine the association of evidence to a crime.

"Nationally recognized accreditation standards." Standards adopted by the American Society of Crime Laboratory Directors Laboratory Accreditation Board, the American Board of Forensic Toxicology or a similar board that covers a forensic test or examination done by a forensic investigator or scientist.

"Physical evidence." A tangible object or substance relating to a crime.

"Proficiency testing program." A program whereby the competency of analysis and the quality of performance of a laboratory is evaluated by external testing.

"Technical peer review system." A system whereby the casework by an employee of a forensic laboratory is reviewed for administrative and technical correctness by a qualified administrator or peer or both.

§ 9302. Technical peer review system.

All forensic laboratories shall have a technical peer review system sufficient to meet or exceed nationally recognized accreditation standards.

§ 9303. Proficiency testing program.

All forensic laboratories shall have a proficiency testing program sufficient to meet or exceed nationally recognized accreditation standards.

§ 9304. Accreditation.

(a) General rule.--All forensic laboratories shall be accredited by a nationally recognized accrediting board for the forensic tests performed by the forensic laboratory.

(b) Exception.—A forensic laboratory may be exempt from the accreditation required by subsection (a) if independent accreditation by a nationally recognized accrediting board is unavailable or inappropriate for the forensic laboratory or the applicable forensic test.

§ 9305. External investigation.

The Commonwealth and municipalities with forensic laboratories shall have a governmental entity with an appropriate process in place to independently, externally investigate allegations of serious negligence or misconduct committed by employees or contractors of the forensic laboratory that substantially affect the integrity of forensic results.

SUBCHAPTER B
(RESERVED)
CHAPTER 95
OVERSIGHT

Subchapter
A. Advisory Board
B. (Reserved)

SUBCHAPTER A
ADVISORY BOARD

Sec.
9501. Establishment.
9502. Powers and duties.
9503. Cooperation.
9504. Report.
9505. Investigations.

§ 9501. Establishment.

(a) Membership.--There is hereby established a Forensic Advisory Board, which shall consist of:

(1) The director of Pennsylvania State Police's Bureau of Forensic Services, ex officio.

(2) A forensic scientist employed by the Pennsylvania State Police's Bureau of Forensic Services.

(3) Two forensic scientists employed by accredited, privately operated forensic laboratories.

(4) A director of a forensic laboratory operated by a municipality.

(5) The Attorney General, ex officio.

(6) A full-time, sworn chief of police.

(7) A district attorney.

(8) A public defender.

(9) A criminal defense attorney who is not a public defender.

(10) A judge from a court of common pleas.

(11) A criminal justice or forensic science faculty member from the Pennsylvania State System of Higher Education.

(12) A board-certified forensic pathologist who is a coroner or medical examiner.

(b) Terms.—The members under subsection (a)(1) and (5) shall serve ex officio. The member under subsection (a)(2) shall serve at the pleasure of the director of Pennsylvania State Police's Bureau of Forensic Services. All other members shall serve a term of three years, except the members initially appointed under subsection (a)(7), (9) and (12), whose initial term shall be one year and the members initially appointed under

subsection (a)(8) and (11) and one of those appointed under subsection (a)(3), whose initial term shall be two years. Vacancies shall be filled by the appointing authority for the remainder of the vacated term.

(c) Appointments.—The member under subsection (a)(2) shall be appointed by the director of Pennsylvania State Police's Bureau of Forensic Services. The ex officio members may designate a substitute to serve on the Forensic Advisory Board. The member appointed under subsection (a)(4) may designate a subordinate who is a forensic scientist to substitute for and serve on the Forensic Advisory Board. The chief justice shall appoint the member under subsection (a)(10). All other members shall be appointed by the Governor. Members may be reappointed. The board may annually select a chairman and vice chairman, who shall be selected from the members under subsection (a)(3), (10), (11) and (12).

(d) Quorum.—Seven members of the Forensic Advisory Board constitute a quorum.

§ 9502. Powers and duties.

(a) Recommendations.--The Forensic Advisory Board shall review and make recommendations as to how best to configure, fund and improve the delivery of State and municipal forensic laboratory services. To the extent feasible, the review and recommendations shall include, but are not limited to, addressing the following issues:

(1) If the existing mix of Commonwealth and municipal forensic laboratories is the most effective and efficient means to meet current and projected needs.

(2) Whether publicly operated forensic laboratories should be consolidated. If consolidation occurs, who should have oversight of forensic laboratories.

(3) Whether all publicly operated forensic laboratories should provide similar services or if certain services should be centralized.

(4) Consideration of how other states manage and oversee their forensic laboratories.

(5) With respect to staff and training, consideration of the following:

(i) How to address recruiting and retention of forensic laboratory staff.

(ii) Whether educational and training opportunities are adequate to meet projected staffing requirements of publicly operated forensic laboratories.

(iii) Whether continuing education is available to ensure that forensic science personnel are up-to-date in their fields of expertise.

(iv) If forensic laboratory personnel should be certified, and if so, the appropriate certifier.

(v) Whether continuing education available to the bar and judiciary adequately serves the needs of the criminal justice system.

(6) With respect to funding, consideration of the following:

(i) Whether the current method of funding publicly operated forensic laboratories is predictable, stable and adequate to meet future growth demands and to provide accurate and timely testing results.

(ii) The adequacy of salary structures at publicly operated forensic laboratories to attract and retain competent analysts and examiners.

(iii) Whether publicly operated forensic laboratories are appropriately maximizing their opportunities to receive grants and other supplements.

(7) With respect to performance standards and equipment, consideration of the following:

(i) Whether workload demands at publicly operated forensic laboratories are being prioritized properly to deal with backlogs and whether there are important workload issues not being addressed.

(ii) If existing publicly operated forensic laboratories have the necessary capabilities, staffing and equipment.

(iii) Whether publicly operated forensic laboratories are compliant with Chapter 93 (relating to accreditation).

(b) Reporting System.--The Forensic Advisory Board shall develop and implement a reporting system through which a publicly operated forensic laboratory reports professional negligence and misconduct.

(c) Standards.--The Forensic Advisory Board shall promulgate standards it approves under 42 Pa.C.S. section 9502(c) (relating to preservation of biological evidence).

(d) Training.—The Forensic Advisory Board may coordinate, offer and collect a fee to train or otherwise provide continuing education relating to forensic science and its applications to criminal investigators, crime scene investigators, prosecutors, defense attorneys, judges, forensic nurses, coroners, medical examiners, forensic scientists and others involved in criminal justice who would benefit from these educational opportunities.

§ 9503. Cooperation.

Forensic laboratories operated by the Commonwealth and municipalities shall cooperate with and assist the Forensic Advisory Board. Administrative support for the Forensic Advisory Board shall be provided by the Governor's Office.

§ 9504. Report.

The Forensic Advisory Board shall periodically report its recommendations and basis for its recommendations as well as the results of any investigations to the investigated entity or party, the Governor and General Assembly. The recommendations shall be made publicly accessible.

§ 9505. Investigations.

(a) Professional negligence; misconduct.--For an investigation under section 9305 (relating to external investigation), the Forensic Advisory Board shall timely investigate any allegation reported under section 9502(b) (relating to powers and duties) and may investigate other allegations of professional negligence or misconduct that would substantially affect the integrity of the results of forensic analyses.

(b) Costs.--Any costs incurred by the board shall be borne by the laboratory, facility or entity being investigated.

(c) Assistance.--If necessary, the board may contract with a qualified person or ask any publicly employed forensic scientist to assist the board in fulfilling its duties under this section. In obtaining assistance under this subsection, the board may neither ask nor accept assistance from a forensic scientist employed by a publicly operated forensic laboratory that is the subject of the investigation.

(d) Recusal.--Any member of the board associated with a publicly operated forensic laboratory that is the subject of an investigation under this section must recuse himself from any deliberation and action the board might take in the matter.

(e) Duties.--The board shall:

(1) Prepare a written report that identifies and describes all methods and procedures used to discover the alleged actions, whether the allegations are founded and any corrective actions taken or suggested.

(2) Conduct retrospective examinations of other forensic analyses to determine if a pattern of negligence or misconduct exists and to perform follow-up examinations to make certain any and all corrective actions were properly implemented.

(3) Ensure compliance with established retention and preservation of evidence regulations.

SUBCHAPTER B
(RESERVED)

Section 2. This act shall take effect as follows:

(1) The addition of 44 Pa.C.S. § 9302 shall take effect in three years.

(2) The addition of 44 Pa.C.S. § 9303 shall take effect in five years.

(3) The addition of 44 Pa.C.S. § 9304 shall take effect in seven years.

(4) The addition of 44 Pa.C.S. § 9305 shall take effect in two years.

(5) The remainder of this act shall take effect immediately.

COST IMPLICATIONS[989]

Training Attorneys Relating to Eyewitness Identification and Confessions[990]

This proposal would amend Pa. R. Crim. P. 801 to add training on eyewitness identification and confession evidence to the training that is required for capital cases. This additional training does not increase the amount of education that is already required during a three-year period, which must be approved by Pennsylvania Continuing Legal Education Board. This proposal increases the topics to be covered from nine to 11. It neither increases the number of hours of requisite training nor adds an extra approval because Pennsylvania Continuing Legal Education Board must already approve these training courses. **There is no additional cost to add these topics for this proposal.**

Taping of Interrogations – Electronic Recording Statute[991]

This proposal would require recording custodial interrogations for investigations of criminal homicide, felonious sexual offenses, robbery and felonious arson and related offenses, so that it adds no cost to the investigation of all other crimes. If exigencies make the recording of custodial interrogations for these four serious felonies infeasible, those custodial interrogations are not required to be recorded. Presumably, this would largely limit the applicability of the mandate to custodial interrogations at fixed locations.

The retail price of digital voice recorders ranges from $29.99 to $249.99.[992] The retail price of DVD-R ranges from $10.49/10-pack to $35.99/100-pack.[993] The retail

[989] Cost implications were prepared by staff shortly before publication and not shared with the comm. prior to publication but were shared with the subcomm. chairs.
[990] *Supra* p. 167.
[991] *Supra* p. 169.
[992] Best Buy, *available at* http://www.bestbuy.com/site/Office-Electronics/Recorders/abcat0805003.c?id=abcat0805003 (last visited Aug. 18, 2011).
[993] *Id*., *available at* http://www.bestbuy.com/site/TV-Video-Accessories/Blank-Media/abcat0107009.c?id=abcat0107009&&initialize=false&sp=-bestsellingsort+skuid&nrp=15&usc=abcat0100000&prids=&cp=1&qp=crootcategoryid%23%23-1%23%23-1%7E%7Eq70726f63657373696e6774696d653a3e313930302d30312d3031%7E%7Ecabcat0100000%23%230%23%23u8%7E%7Ecabcat0107000%23%230%23%23bt%7E%7Ecabcat0107003%23%230%23%23bi%7E%7Encabcat0107009%23%230%23%239&_requestid=182446 (last visited Aug. 18, 2011).

price of flash memory camcorders range from $39.99 to $1,499.99.[994] The retail price of secure digital memory cards range from $6.99 to $149.99.[995] The retail price of USB flash drives range from $6.99 to $179.99.[996] The retail price of DVD players range from $34.99 to $599.99.[997] The retail price of external desktop storage devices range from $69.99 to $1,799.99.[998]

Presumably, larger police departments that record interrogations already have some or all of this equipment. If the proposal is enacted, custodial interrogations would be required for the offenses covered by the statute. Departments that investigate many of those four types of offenses would have to record more than departments that investigate fewer of those four types of offenses. **If a department does not have any of this equipment, it would require approximately $2,150 to purchase equipment to be able to record routinely.** The following remarks suggest that recording interrogations essentially pays for itself.

> Concerns about the cost of recording are also unfounded. Many small departments use inexpensive audio recording equipment. Many larger departments use video cameras, often concealed. Some have spent substantial sums for purchase, installation, and training. None has said the expense was unjustified or excessive. They realize there are larger savings in officers' time in preparing written reports, preparing to testify, and testifying about what happened during unrecorded interviews, as well as saving the time of prosecutors and judges. Recordings usually eliminate time-consuming motions to suppress or disputes at trial about whether *Miranda* warnings were given, improper tactics were used, or what was said by suspects. Guilty pleas rather than costly trials often result from recorded confessions and admissions, which preclude appeals and post-conviction litigation, resulting in savings in both state and federal trial and appellate courts. Gone also is the threat of civil litigation and judgments based on allegations of coercive tactics, failure to give warnings, and false testimony as to what occurred, as well as wrongful convictions of innocent defendants.

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[994] *Id.*, *available at* http://www.bestbuy.com/site/Camcorders/cfcat/pcmcat186400050003.c?id=pcmcat186400050003 (last visited Aug. 19, 2011).

[995] *Id.*, *available at* http://www.bestbuy.com/site/olstemplatemapper.jsp?id=pcat17080&type=page&qp=q70726f63657373696e6774696d653a3e313930302d30312d3031~~cabcat0400000%23%230%23%23196~~cabcat0404000%23%230%23%232y~~cpcmcat225800050009%23%230%23%231~~ncabcat0404004%23%230%23%231j&list=y&nrp=15&usc=abcat0400000&sc=abCameraCamcorderSP (last visited Aug. 19, 2011).

[996] *Id.*, *available at* http://www.bestbuy.com/site/Camera-Memory-Cards-USB-Drives/USB-Flash-Drives/abcat0504010.c?id=abcat0504010 (last visited Aug. 19, 2011).

[997] *Id.*, *available at* http://www.bestbuy.com/site/Blu-ray-DVD-Players/DVD-Players/abcat0102005.c?id=abcat0102005 (last visited Aug. 19, 2011).

[998] *Id.*, *available at* http://www.bestbuy.com/site/Hard-Drives/Desktop-External-Hard-Drives/pcmcat186100050005.c?id=pcmcat186100050005 (last visited Aug. 19, 2011).

> We have heard a concern about the costs of transcripts and storage (although new technology has substantially reduced storage costs), and who should bear these costs—the police or the prosecutors? But these costs are not deemed to be a reason to stop recording because of the far greater savings that result to the public treasury, and the increased efficiency and accuracy in law enforcement.[999]

Eyewitness Identification – Eyewitness Identification Improvement Act[1000]

This proposal is not expected to require any additional cost. Some documentation of the eyewitness identification procedures is required. Presumably, police already memorialize eyewitness identifications for both investigative and evidentiary reasons and this proposal does not materially change that. The proposal generally requires that the administration of lineups and photo arrays be conducted by a person who does not know either which one is suspected by investigators or which one is being viewed by the witness.

The cost-free way to do this is to have personnel who are not investigating the crime administer the eyewitness identification. If the police department is too thinly staffed to always have unbiased administrators, it can have reciprocal agreements with neighboring departments to share personnel to administer these procedures. **If that alternative is unacceptable,** an investigator who knows which one is suspected could still administer the procedure by placing photo arrays in folders so that he does not know which picture the eyewitness is viewing at any particular time. **The retail price of file folders range from $9.99 for a box of 50 to $39.99 for a box of 250.**[1001]

Police must already be trained to investigate crimes and identify suspects. **The training programs required by the proposal can be incorporated into existent training programs for no additional cost.**

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[999] Sullivan et al., *supra* note 786.
[1000] *Supra* p. 172.
[1001] Staples, *available at* http://www.staples.com/100-Recycled-File-Folders/cat_CL141402#filterList=[6154,6156,6157,6158] (last visited Aug. 29, 2011).

Adequacy of Legal Representation[1002]

While recognizing their importance, the subcommittee did not consider in detail the issues relating to the adequacy of the legal representation of indigent defendants because another advisory committee of the Joint State Government Commission is currently considering that topic pursuant to Senate Resolution No. 42.[1003]

At the same time, the subcommittee recommends:

> An independent Indigent Defense Commission to oversee services throughout the Commonwealth and to promulgate uniform, effective minimum standards.[1004]
>
> Appropriate funding for indigent defense services from Commonwealth funds and adopt adequate uniform attorney compensation standards.[1005]

An educational loan forgiveness program for lawyers who take public service jobs as prosecutors and public defenders after law school.

It is anticipated that the recommendations from the Senate Resolution No. 42 study will be consistent with at least the first two immediately above. The subcommittee wishes to emphasize that adequate funding is a critical concern for both the defense and the prosecution in their respective roles. Any cost implications can be estimated after the report for Senate Resolution No. 42 is published; however, **these proposals would require a significant expenditure.**

Prosecutorial Practice[1006]

The proposals for prosecutors to have internal policies to assure compliance with ethical and professional responsibilities **should cost nothing**. Presumably, some district attorneys already have these internal policies and adequately supervise subordinates. **Similarly, the proposed amendment to a rule of professional conduct** is simply a formal, explicitly worded rule for something prosecutors should already be doing. Essentially, it requires them to remedy wrongful convictions, which they should be doing now in their roles as ministers of justice. If this is already done, it **would cost**

[1002] *Supra* p. 176.
[1003] Sess. of 2007.
[1004] Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys., *supra* note 867. The work of this comm. has been continued by the Interbranch Comm'n for Gender, Racial &Ethnic Fairness.
[1005] *Id.*
[1006] *Supra* p. 177.

nothing more; if this is represents a true change of professional practice, there will be increased cost, as additional investigations and proceedings on ostensibly closed cases will be required.

Informant Witnesses[1007]

Jury Instruction

The recommended cautionary jury instruction for the testimony of a jailhouse informant would cost nothing. **There would be no additional cost for a judge to instruct a jury to consider potential motives of an informant, carefully consider the informant's testimony and apply the reasonable doubt standard.**

Statute Relating to Informant Testimony

This proposal would require a prosecutor to timely disclose certain information to the defense before evidence of an incriminating statement is attempted to be offered via an informant. This is **a statutory version of existent prosecutorial obligations** so that part of the proposal **should cost nothing more**. If this informant testimony is offered for a capital case, a hearing on its reliability would be required before its admission. **This hearing would add a cost, the amount of which would depend upon how elaborate and extensive the hearing would be.** This capital case hearing would not be required if the defendant waives it or if there is an electronic recording of the incriminating statement.

Other Proposals Relating to Informants

There would be a small, additional cost if law enforcement agencies wired jailhouse informants or otherwise electronically recorded **the informant if this is not already done.**

[1007] *Supra* p. 178.

Preservation of Evidence

Part of this proposal is to criminalize knowingly and intentionally destroying or tampering with biological evidence that is statutorily required to be preserved but only if this was done to prevent its use as evidence or to prevent its testing. This proposal is similar to other, existent crimes of destroying evidence[1009] and destroying a thing received by the government.[1010] Judging from the number of reported appellate opinions, neither of these other, existent crimes seems to be prosecuted much and neither directly cover the proposed new crime.[1011] One of these other, existent crimes covers concealing another to hinder his prosecution so that some of these cases do not deal with destroyed evidence; the other one covers destroying a thing received by the government. Considering the few prosecutions under the current law and the scienter requirement in the proposed law, **this additional crime is unlikely to cost the Commonwealth any significant amount.**

The proposal to require the preservation of biological evidence could entail a significant cost for prosecuting jurisdictions that do not preserve it now. This proposal is limited to five categories of crime.[1012] The proposal includes ways to reduce the cost of preservation and two funding sources. The evidence would no longer need to be retained while a defendant is imprisoned if the prisoner does not move for postconviction DNA testing within a year of being notified that the biological evidence may be destroyed. **To offset the costs** expected to be incurred by the requirement to preserve this biological evidence, proceeds from property forfeited under The Controlled Substance, Drug, Device and Cosmetic Act could be used. Additionally, a fee of $125 would automatically be assessed per convict if biological evidence relating to the criminal conviction is required to be preserved. This fee would only be excused only upon a judicial finding of undue hardship.

Postconviction DNA Testing

It is unclear how much the proposed postconviction DNA testing amendments would financially impact our Commonwealth. The amendments expand eligibility for the testing because it would no longer be limited to those who are imprisoned. Most of the other amendments relating to postconviction DNA testing are

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[1008] *Supra* p. 180.
[1009] 18 Pa.C.S. § 5105(a)(3).
[1010] *Id.* § 4911(a)(3).
[1011] If one remains unconvinced that this proposed new crime is redundant to these other crimes, then this additional crime could not cost the Commonwealth any additional amount because an accused could then be convicted of only one of these crimes. However, relying on the adequacy of these preexistent crimes is not an option because penal provisions are strictly construed. 1 Pa.C.S. § 1928(b)(1). Grading of the crime further distinguishes the newly proposed crime from the two, existent ones.
[1012] Criminal homicide, assault, kidnapping, sexual offenses & robbery.

ones that clarify the existent law as interpreted by judicial rulings. For example, an admission will not automatically bar postconviction DNA testing. Our Commonwealth would pay for the test if the petitioner is indigent. Both of these examples are in the proposed amendments but do not change current law. The additional costs under these amendments would mostly depend upon how many petitioners who are not imprisoned obtain this test and how many of those are indigent.

In recent years, National Institute of Justice[1013] solicited applicants for funding "to receive funding to help defray the costs associated with postconviction DNA testing in cases that involve violent felony offenses . . . in which actual innocence might be demonstrated. Funds could be used to review such postconviction cases and to locate and analyze biological evidence associated with these cases."[1014] To be eligible, our Office of Attorney General would need to certify that our state law provides postconviction DNA testing "in a manner intended to ensure a reasonable process for resolving claims of actual innocence."[1015] Office of Attorney General could certify this requirement; unless the recommendation to statutorily require preservation of evidence is enacted, Office of Attorney General could not certify the remaining requirement for eligibility: a state law "[p]reserves biological evidence secured in relation to the investigation or prosecution of a State offense of murder or forcible rape . . . in a manner to ensure that reasonable measures are taken by all jurisdictions within the State to preserve such evidence."[1016] The "DNA analysis conducted using this funding . . . must be performed by a laboratory . . . that is accredited and that undergoes external audits . . . ."[1017] The funding can be used for supplies, overtime, consultant and contractor services, computer equipment, and salary and benefits of additional employees.[1018] These grants could subsidize postconviction DNA testing if the preservation of evidence proposal is enacted and funding is continued.

Redress for Wrongful Convictions[1019]

Expungement

The proposal to expunge criminal history record information of exonerees should cost almost nothing. The last time this statutory section was amended,[1020] Pennsylvania State Police calculated that each employee in its expungement unit processed "about 3,000 expungements per year." Although the proposal would increase the number of eligible exonerees beyond the 11 who were exonerated by postconviction

[1013] An agency of U.S. Dep't of Just. & a component of Office of Just. Programs.
[1014] Nat'l Inst. of Just., *supra* note 972, at 3.
[1015] *Id.*
[1016] *Id.* at 4.
[1017] *Id.*
[1018] *Id.* at 5-6.
[1019] *Supra* p. 193.
[1020] 2008.

DNA testing during a 19-year period,[1021] there is no expectation that anywhere near 3,000 expungements per year would occur resultant from the proposed expanded eligibility. Consequently, Pennsylvania State Police would not need to add staff to do this nor would it need to obtain additional office equipment and space to do this.

Compensation

The proposal would provide a minimum of $50,000 for each year of incarceration to those who are subsequently exonerated because their actual innocence was established. The intention is compensate those who are not compensated through a common law state action or a federal civil rights action. Four of the 11 postconviction DNA exonerees in our Commonwealth have been compensated when their civil rights claims were settled. If the proposal is enacted, they could receive compensation for a cumulative total of approximately 68 years. **If this calculation is reasonably accurate, the minimum obligation under this proposed statute would total $3,400,000.** The proposal would allow the claimant to choose to be paid in a lump sum or by annuity. If the proposal were amended to allow the court rather than the claimant to choose the lump sum or annuity, the immediate cost to our Commonwealth could be reduced.[1022] The postconviction DNA exonerations of the seven who have not been paid occurred over a 19-year period. The cost to pay them a total of $3,400,000 over that 19-year period averages $178,947.37 per year.

Transitional Services

The proposal to provide transitional services similar to those provided to correctly convicted individuals upon their release to those individuals who have been wrongly convicted but are no longer under correctional supervision is unlikely to cost much. More exonerees than those who were exonerated by postconviction DNA testing[1023] could qualify for these extended transitional services, but the number is expected to be small.

[1021] 1991-2000, *infra* p. 234.

[1022] A fair compromise between moderating immediate Commonwealth liability and protecting a potentially spendthrift claimant might be an amendment to let the court decide whether the payment is in a lump sum or by annuity if the recipient is reasonably expected to live 10 or more years and the award is a large amount. Looking at the seven Pa. exonerees, this possible amendment would certainly affect two of them who were imprisoned for a long time and would not affect two others who were imprisoned for short periods. It might or might not affect the remaining three, who were imprisoned for intermediate periods.

[1023] 1991-2000, *infra* p. 234.

Pennsylvania Commission on Conviction Integrity

This proposal would establish a commission to retrospectively inquire into the causes of a wrongful conviction after someone is exonerated based upon a finding of actual innocence. The commission would also annually review and report conviction integrity reforms or best practices.

The appointed commissioners would be unpaid but would be reimbursed for reasonable expenses actually incurred. The proposal authorizes paid staff to serve the commission. It is not clear that this would require full-time, permanent staff. Because they exempt the commission from statutory requirements, **the proposed amendments to the open records and public meetings statutes that relate to this commission would cost our Commonwealth nothing.**

Since the number and frequency of exonerations is inherently unpredictable and sporadic, there would be no reason to permanently retain staff for inquiries into the causes of subsequent wrongful convictions. Temporary staff could be hired for those inquiries when the need arises.

Aside from any inquiries into wrongful convictions, the annual report could be prepared at a modest expense. There is no reason to think that the commission would require permanent, full-time staff to assist it in preparing this report. A small, stipend could be paid to a law school professor and a student to assist him researching conviction integrity reforms for the commission. The law school could also host the commission's conference or the conference could be by phone. Instead of renting office space and renting or buying office equipment and supplies, the law school could be reimbursed for any reasonable expenses actually incurred to support the commission. This inexpensive way of operating would still cost our Commonwealth a small amount. **If pursued in this manner, our Commonwealth can realistically be expected to spend $20,000-40,000 annually on this plus the cost of any inquires into the causes of wrongful convictions.**

Accreditation of Forensic Laboratories[1024]

This proposal is unlikely to cost our Commonwealth much if any additional funding. The proposal applies to forensic laboratories operated by the Commonwealth or a municipality. The laboratories operated by Pennsylvania State Police, City of Philadelphia police and County of Allegheny are already accredited. This proposed requirement would only cost a municipality that operates an unaccredited forensic laboratory whose experts perform forensic tests and provide opinion testimony in court. Except for one municipality that uses its own laboratory exclusively, every district attorney responding to a survey by the subcommittee on science indicated that it uses Pennsylvania State Police for forensic laboratory services. The only additional cost that

[1024] *Supra* p. 202.

our Commonwealth might incur would be from the indirect result of a municipality with an unaccredited forensic laboratory that would increase its reliance on Pennsylvania State Police for forensic services rather than obtain accreditation. Laboratories must periodically be reaccredited, and there is an expense to accomplish this. Therefore, there would be a continuing expense for that.

In recent years, National Institute of Justice[1025] solicited applicants for funding "to States and units of local government to help and improve the timeliness of forensic science and medical examiner services."[1026] Among other qualifications for eligibility, applicants must certify "that any forensic laboratory system . . . that will receive any portion of the grant amount . . . uses generally accepted laboratory practices and procedures established by accrediting organizations or appropriate certifying bodies."[1027] Applicants must also certify that "a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system . . . in the State that will receive a portion of the grant amount."[1028] The funding can be used for personnel, computerization, laboratory equipment, supplies, accreditation, education, training, certification, facilities and administrative expenses.[1029] Our Commonwealth has received funding from this program in the past. Evidently, the state is eligible; however, not all units of local government that have forensic laboratory systems are eligible. The proposals from the subcommittee relating to accreditation and oversight could expand eligibility within our Commonwealth should funding continue from this program.

Forensic Advisory Board[1030]

This proposed board would require some funding, but its operational costs could be offset somewhat. **The costs that it would incur to periodically report its recommendations to the Governor and General Assembly would vary depending upon how frequently it needs to convene, but a realistic estimate would be at least $10,000-20,000 annually.** Administrative support for the board would be through the Governor's office. Cost of the training that it provides can be recouped by a fee that the board would be authorized to collect. If a laboratory is investigated by the board, the cost of investigation is to be borne by the laboratory. Any other costs associated with this board would depend on how active it is and any ancillary costs to develop and maintain its reporting system and standards.

[1025] An agency of U.S. Dep't of Just. & a component of Office of Just. Programs.
[1026] Nat'l Inst. of Just., *supra* note 963, at 3.
[1027] *Id.* at 4.
[1028] *Id.*
[1029] *Id.* at 9-11.
[1030] *Supra* p. 204.

Appendices B through I contain eight tables identifying relevant reforms throughout the nation.[1031]

Appendix B lists the 11 **individuals who have been exonerated** via posconviction DNA testing in Pennsylvania.[1032] They were sentenced to periods of incarceration ranging from nine years to life, and the death sentence was imposed in one of these cases. Their actual periods of imprisonment ranged from three to 21 years, with the average period of incarceration being over 12½ years. Four have been compensated for their wrongful convictions. In only two cases have the real perpetrators been found. Consistent with our research, eyewitness misidentification and false confessions/admissions were factors in more than 80% and close to 40% of the cases, respectively. Other factors included unvalidated or improper forensic science, government misconduct and the use of jailhouse informants.

Aside from briefly discussing each of the 11 postconviction DNA exonerees in our Commonwealth, this appendix lists some other nonDNA exonerations. Randomly selected from the middle of the last century, a sample of pardons based on innocence are noted. These remind the reader that exonerations can be both judicial and by executive clemency. They also show that exonerations based on innocence predate the recent, highly publicized DNA exonerations.

Appendix C[1033] **is a master table of citations** which compiles the statutory citations[1034] for each state in the substantive topic areas covered by the remaining six tables.

Appendix D[1035] **lists jurisdictions adopting eyewitness identification reforms** and summarizes those reforms. While there are individual municipalities in other states that have adopted eyewitness identification reforms in some form, 15 states have adopted statewide policies or procedures. Four states[1036] have enacted statutes directing law enforcement agencies to produce written procedures for the conduct of eyewitness identifications. Use of pre-lineup instructions to witnesses to minimize pressure to make a positive identification if the witness is uncertain has been adopted in eight states.[1037]

[1031] *Infra* pp. 233-308.
[1032] *Infra* p. 233.
[1033] *Infra* p. 255.
[1034] Almost all the citations are to statutes, but some are to resolutions and at least one is a rule of evidence.
[1035] *Infra* p. 263.
[1036] Md., Tex., Va. & Wis.
[1037] Fla., Ga., Ill., Md., N.J., N.C., Ohio & W.Va.

Directives to obtain confidence statements from witnesses immediately following an identification (and before any confirmatory statements may be made) are found in five of those states.[1038] Blind or double-blind lineup administration is found in nine states,[1039] and is coupled with a preference for sequential lineups in four states.[1040] At least two other states have either studied or considered simultaneous versus sequential lineups.[1041] New Jersey also uses a jury instruction regarding the reliability of eyewitness identifications. Aside from the entries in Appendix D, these reforms are discussed with some more individual detail in the part relating to eyewitness identification.[1042]

Appendix E[1043] **lists jurisdictions that have addressed the issue of recording custodial interrogations** and details the adopted requirements. While individual municipalities in all 50 states have adopted some type of recording requirement, 21 states and the District of Columbia have adopted statewide (or district-wide) electronic recording provisions. Utah's rule is the result of an Attorney General Policy and New York's is a statewide set of voluntary guidelines adopted by a group of law enforcement entities,[1044] while seven states' rules are judicially mandated via appellate decisions or rules of court.[1045] The remaining 12 jurisdictions have legislatively mandated electronic recording of custodial interrogations.[1046] The majority of states limit the requirement to interrogations that occur in a place of detention (15), and most states (12) record a custodial interrogation from the time the suspect is given his/her Miranda warnings until the conclusion of the interrogation,[1047] although four states also treat those situations in which a reasonable person would consider himself in custody as a custodial interrogation subject to the recording requirement.[1048] Six states do not require the consent of the suspect to the recordation.[1049] Fourteen states limit this requirement to major felonies or violent crimes, but among those, two apply the requirement to homicides only.[1050] The most common exceptions to the recording requirement are: equipment failure (11), suspects refusing to speak on tape (14), spontaneous statements not made in response to a question (10), responses to questions routinely asked during processing or booking (10), out of state interrogations (10) and interrogators unaware or do not reasonably believe that a crime has been committed that qualifies for recording (9). The most common consequence for failure to record is that the court will caution the jury (7). Among the

[1038] Fla., Ga., N.C., Ohio & R.I.
[1039] Ct., Fla., Ga., Ill., N.J., N.C., Ohio, R.I. & Tex.
[1040] N.J., N.C., R.I. & Vt.
[1041] Ill. & Va. The results of the Ill. study are discussed *supra* pp. .
[1042] *Supra* p. 39.
[1043] *Infra* p. 269.
[1044] N.Y. Dist. Att'ys Ass'n, N.Y.C. Police Dep't, N.Y. Div. of Crim. Just. Servs., N.Y. Ass'n of Chiefs of Police, N.Y. Police & N.Y. Sheriffs' Ass'n.
[1045] Alaska, Ind., Iowa, Mass., Minn., N.H. & N.J. (Iowa & N.H. aren't really mandates.)
[1046] D.C., Ill., Me., Md., Mo., Mont., Neb., N.M., N.C., Ohio, Tex. & Wis.
[1047] Of these, Tex. really only requires a statement resultant from a custodial interrogation be recorded rather than require recording the interrogation itself; Wis. requires custodial recordings of juveniles at places of detention. The N.Y. guidelines to record custodial interrogations directs the recording to begin before the subject enters the room so that discussion pre-*Miranda* is recorded.
[1048] Ind., N.Y., Ohio & Wis.
[1049] Ill., Md., Mo., N.Y., Or. & Wis.
[1050] Ill. & N.C.

seven states that address records retention, six of them require the recording to be kept until all appeals have been exhausted and the statute of limitations for the underlying offense has run;[1051] the seventh state[1052] mandates that records be kept for one year after all appeals are exhausted.

Appendix F[1053] lists jurisdictions that statutorily provide for DNA testing postconviction. The federal government, the District of Columbia and 49 states make some provision for post-conviction DNA testing. Massachusetts has several bills before its legislature this session to add that commonwealth to the list. At least 45 jurisdictions can allow testing if the evidence in question was not tested before. Some of these jurisdictions condition excusing a failure to test previously with prior unavailability of the technology[1054] or recognition of newer, more probative testing methods[1055] as common examples of these acceptable excuses to allow testing postconviction. A number of jurisdictions require either the evidence to be new or the test results be able to produce new, material evidence.[1056] Sixteen jurisdictions require that the test results would establish actual innocence.[1057] Three jurisdictions can authorize testing if it is in the interests of justice.[1058]

There must be a reasonable possibility that the test will produce exculpatory evidence or a reasonable probability that the defendant would have received a more favorable outcome for postconviction DNA testing in at least 29 jurisdictions. In 26 jurisdictions, identity of the perpetrator was or should've been at issue.[1059] A guilty plea can but will not necessarily preclude postconviction testing in two states[1060] and will preclude postconviction testing in a third.[1061] At least seven states allow applications until the end of the current term of imprisonment,[1062] which Colorado extends to include any period of parole. At least 20 jurisdictions specify in their statutes that there is no time limitation.[1063] A number of other 14 jurisdictions do not specify any time limitations in these statutes.[1064] Ohio prohibits posthumous applications. If a person pled guilty or *nolo contendere* in South Carolina, the period is reduced from during incarceration to the first seven years from sentencing. Vermont has a variable period

[1051] Ill., Mont., Ohio, Or., Tex. & Utah.
[1052] N.C.
[1053] *Infra* p. 275.
[1054] *E.g.*, Del., Ga., Idaho, Me., Mich., Minn., Pa. & Tex.
[1055] *E.g.*, Alaska, Ariz., Cal., D.C., Ill., Kan., Mont., Neb., N.H., N.J., N.C., S.C., S.D., Vt., W.Va., Wis., Wyo. & U.S.
[1056] *E.g.*, Ark., Del., Ill., Minn., Neb., N.J., N.D., Okla., S.C., Utah, Wash., Wyo. & U.S.
[1057] Ala., Ark., Colo., Del., D.C., Idaho, Ill., La., Minn., N.D., Or., Pa., S.D., Utah, Va. & Wyo.
[1058] Alaska, Haw. & Tex.
[1059] Ala., Alaska, Ark., Cal., Del., Fla., Ga., Haw., Idaho, Ill., Iowa, Me., Mich., Minn., Mo., Mont., N.J., N.M., N.D., Ohio, Or., Pa., S.D., Tex., W.Va. & U.S.
[1060] Alaska & Wyo.
[1061] Ohio.
[1062] Cal., Conn., Mo., Mont., S.C., S.D. & Colo., which extends to the end of parole.
[1063] Ariz., D.C., Fla., Haw., Kan., Ky., Miss., Neb., N.H., N.J. N.Y., N.D., Ok., R.I., Tenn., Utah, Va., Wash., W.Va. & Wis.
[1064] *E.g.*, Ga., Ill., Ind., Iowa, Md., Nev., N.M., Or., Tex. & Wyo.

with no limitation for 14 felonies and within 30 months after final conviction for other felonies unless there is good cause or the parties consent to a longer time.

Four states restrict postconviction DNA testing to those convicted of a capital offense.[1065] At least 18 jurisdictions allow postconviction DNA testing for those convicted of felonies and at least 15 jurisdictions allow it for those convicted of a criminal offense. Some jurisdictions further restrict to subsets of felonies and criminal offenses; *e.g.*, D.C.'s postconviction DNA testing eligibility is for crimes of violence while Kansas limits eligibility to those convicted of murder or rape and South Carolina specifies 24 offenses. Two states allow postconviction testing for those in custody pursuant to a court judgment[1066] and at least 11 jurisdictions specify that eligibility is limited to those imprisoned. Persons acquitted on grounds of mental or physical disease, or by reason of insanity can request postconviction testing in Hawaii and Wisconsin. Several states extend eligibility beyond incarceration to include parole, probation or a community control sanction.[1067] Oklahoma restricts its eligibility to felonious, indigent prisoners.

Approximately a dozen jurisdictions require the DNA testing to be generally accepted by the scientific community and the testing lab must be accredited or meet standards in at least 14 jurisdictions. Some jurisdictions allow the parties to agree on the testing facility with court approval and the court picking if the parties can not agree;[1068] others have a state department test or approve the testing facility.[1069] Testing may be paid for by the state,[1070] the applicant[1071] or upon determination of the court.[1072] Indigents may receive free testing in at least 26 jurisdictions, even if the jurisdiction otherwise requires the applicant to pay.[1073] Some jurisdictions condition payment upon circumstances or the outcome. *E.g.*, if postconviction DNA testing conclusively determines the applicant's culpability, Iowa requires him to pay all costs including that of any appointed attorney. Kentucky requires the applicant to pay if the outcome only lessened the sentence or improved the verdict. In Maryland, the state or the applicant pays dependent upon which side the test result favors. In Wyoming, the state will pay if the applicant is imprisoned, needs somebody to pay for the test and the results favor him.

At least 16 jurisdictions require the government to preserve the evidence relating to the motion. For some jurisdictions, upon filing, the court directs the state to preserve the evidence pending the outcome.[1074] In at least two jurisdictions,[1075] the court orders preservation if the motion is heard rather than upon filing. In other jurisdictions, the

[1065] Ala., Ky., Nev. & S.D.
[1066] Neb. & N.H.
[1067] *E.g.*, Alaska, Me., Miss. & Ohio
[1068] *E.g.*, Miss. & Mont.
[1069] *E.g.*, Alaska & Fla.
[1070] *E.g.*, Alaska, Haw., Nev., Okla. & Tex.,
[1071] *E.g.*, Ala., Colo., D.C., Fla., Idaho, Iowa, N.H., N.J. & Or.,
[1072] *E.g.*, Ariz., Ark., Conn., Del., Ga., Ind., Kan., Ky., N.M. & Wis.
[1073] *E.g.*, Or.
[1074] *E.g.*, Ga., Ky., Me., Nev. & Wyo.
[1075] *E.g.*, Haw. & Colo.

court is authorized rather than required to order preservation of the evidence.[1076] In other jurisdictions, the prosecutor is statutorily required to preserve biological material pending outcome of the proceedings.[1077]

Appendix G[1078] lists jurisdictions that statutorily require preservation of evidence. Thirty-six jurisdictions statutorily mandate the preservation of certain types of evidence. The types of evidence to be preserved varies, as does the type of offenses for which preservation is mandated. Preservation periods vary, too, and few jurisdictions provide for any remedy or punishment for violations of the statute. In short, there is very little uniformity or commonality among the statutes nationwide.

Twenty-seven jurisdictions mandate preservation of biological evidence or material. A few jurisdictions require preservation of physical evidence[1079] or physical evidence likely to contain biological material.[1080] Eight jurisdictions limit the mandate to evidence that could be tested for DNA or at least is believed to contain DNA material.[1081]

Twenty jurisdictions limit preservation to some combination of killings, criminal sexual conduct, violent felonies and felonies. Thirteen jurisdictions apply the law to all crimes. Two jurisdictions apply the mandate to crimes for which a postsentencing DNA test may be requested.[1082] Four jurisdictions extend the preservation mandate to investigations rather than limiting it to those crimes that were prosecuted or resulted in convictions.[1083]

The requirement to preserve evidence requirement is triggered in certain instances. Evidence must be preserved by at least 18 jurisdictions when it is obtained in an investigation, secured in connection with a crime or otherwise collected, gathered or identified. Several jurisdictions use a conviction as the trigger to require preservation.[1084] California requires preservation of evidence when jailed. Some jurisdictions attach the requirement to a motion or court order.[1085]

The requisite period to preserve evidence varies among jurisdictions and according to the penalty or crime. Evidence must be held indefinitely in three states.[1086] Colorado requires preservation during the life of the defendant. If there is a death penalty, some jurisdictions require preservation until execution.[1087] Some jurisdictions

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[1076] *E.g.*, Wash. & Ariz.
[1077] *E.g.*, D.C., Kan., Neb., S.D. & Wis.
[1078] *Infra* p. 287.
[1079] *E.g.*, Ark., Fla. & S.C.
[1080] *E.g.*, Ga. & Wis.
[1081] Colo., Haw., Iowa, La., Md., Mo., Mont. & N.M.
[1082] Fla. & Me.
[1083] N.H., N.M. N.C. & R.I.
[1084] *E.g.*, Conn., D.C., Haw., Mo., S.C., Tex. & Wis.
[1085] *E.g.*, Conn., Me., Va. & Wash.
[1086] Permanently for a crime of violence in Ark., death in Ill. & Ohio so long as the murder remains unsolved.
[1087] *E.g.*, Ga. & La. (Fla. requires preservation until 60 days after execution.)

require preservation during incarceration.[1088] Some jurisdictions extend the period to completion of supervised release.[1089] Some jurisdictions require preservation until the sentence expires.[1090] In one jurisdiction, the court specifies the period to preserve upon a motion at the time of sentencing.[1091] Mississippi requires preservation during the custody of all co-defendants. Two jurisdictions have specific dates for the statute's applicability.[1092]

Two jurisdictions disallow early disposition, but one of these only preserves via court order to begin with.[1093] At least 22 jurisdictions allow early disposition of evidence with notice. Some states specify to whom notice must be given and this can extend beyond the person in custody to the attorney of record, public defender association, district attorney, victim and attorney general. At least half a dozen jurisdictions allow early disposition of evidence too impractical to be retained with size as a common characteristic determining that impracticality;[1094] a few more jurisdictions allow early disposition of the same evidence if part of it is saved to test later.[1095] Two jurisdictions may dispose of evidence for "good cause."[1096]

At least 21 jusisdictions do not provide any penalties for violations of the preservation requirement. In two jurisdictions, a violation of the statute is a misdemeanor;[1097] in another two jurisdictions, a violation of the statute is a felony.[1098] Another two jurisdictions can fine and imprison statutory violators up to five years.[1099] Several jurisdictions provide appropriate remedies or sanctions for violations of the statute.[1100] Statutory violations in Iowa do not create a cause of action for damages and doesn't presume spoliation if the evidence is unavailable to test. Three jurisdictions condition liability of statutory violations on bad faith, gross negligence or misconduct.[1101]

Appendix H[1102] lists jurisdictions that provide statutory compensation for exonerees. Twenty-nine jurisdictions statutorily compensate exonerees. To qualify for compensation, a person must have been convicted of a crime (eight jurisdictions)[1103] or felony (13 jurisdictions)[1104] and have been incarcerated. Iowa includes convictions for

[1088] *E.g.*, Conn., Ky., Me., Mich., N.M. Okla. & S.C. (If the plea in S.C. was guilty or *nolo contendere*, the required period to preserve is the shorter of release, execution or seven yrs.)
[1089] *E.g.*, Ariz. & Haw. (Haw. is the later of exhausted appeals or completed sentence, which includes parole & probation.)
[1090] *E.g.*, Md., Minn. & Nev.
[1091] Wash.
[1092] La. & Or.
[1093] Fla. & Wash.; the latter uses a court order.
[1094] *E.g.*, Alaska, Ariz., Ark., Ill. & S.C.
[1095] *E.g.*, Colo., D.C., Miss., Nev., N.M., N.C., Ohio & Or.
[1096] Conn. & Va.
[1097] Ark. & S.C.
[1098] Ky. & N.C.
[1099] D.C. & U.S.
[1100] *E.g.*, Alaska, Me., Minn. & Miss.
[1101] La., S.C. & Tex.
[1102] *Infra* p. 295.
[1103] Conn., D.C., La., Me., Md., N.J., Vt. & Wis.
[1104] Ala., Cal., Fla., Mass., Miss., Mo., Mont., Neb., N.C., Ohio, Okla., Utah & Va.

aggravated misdemeanors if the person is incarcerated for up to two years, while New York includes felonies or misdemeanors and imprisonment. West Virginia also allows claims for unjust arrest. Several jurisdictions compensate based upon a pardon on the ground of innocence, a judicial certificate of innocence or a full pardon for error.[1105]

Three jurisdictions require DNA analysis to prove innocence to qualify for statutory compensation.[1106] To be compensated, California requires that the person suffered a pecuniary injury as a result of the erroneous conviction. The standard of proof of innocence is not always prescribed statutorily, but 10 jurisdictions require proof on the basis of clear and convincing evidence.[1107] The standard of proof of innocence in two jurisdictions is a preponderance.[1108] Florida provides for either standard of proof, dependent upon whether the prosecutor certifies or contests the innocence.

The statute of limitations for submitting a claim ranges from six months[1109] to 10 years,[1110] but the most of the states with a limit (13) use two years.[1111]

Amounts of compensation vary widely. It can be an indeterminate award, a fair and reasonable amount or actual damages. It can be based on a daily rate.[1112] It can be anywhere from $15,000 per year of incarceration[1113] to $100,000 per year.[1114] Daily rates can be capped annually,[1115] and total compensation amounts can also be capped, anywhere from $20,000[1116] to $2,000,000.[1117] Illinois determines the maximum amount receivable on the basis of the period of imprisonment.[1118] Texas pays $80,000 per year spent in prison and $25,000 per year while on parole or while registered as a sex offender.

Still others use an estimate of potential income foregone due to the incarceration: in Utah, it is the average annual nonagricultural payroll wage in the state for up to 15 years, and, in Virginia, it is 90% of the Virginia per capita personal income per year for up to 20 years. Iowa also allows up to $25,000 per year in lost earned income. New Jersey grants the greater of twice the amount of the person's income in the year prior to incarceration or $20,000 per year of incarceration, whichever is greater. Ohio also allows for recovery of lost income and the costs of debts recovered while in custody.

[1105] *E.g.*, Ill., Me. Md. & N.C.
[1106] Mo., Mont. & Vt. If there is biological evidence, DNA testing must also be sought in Utah.
[1107] D.C., Iowa, La., Me., Mass., Neb., N.J., N.Y., Utah & Wis,
[1108] Conn. & Vt.
[1109] Cal.
[1110] Mont.
[1111] Ala., Conn., Fla., Ill., Iowa, La., Me., Mass., Neb., N.J. N.Y., Ohio & W.Va. Mass. can extend this period by another year.
[1112] $50/day in Iowa; $100/day in Cal.
[1113] La.
[1114] U.S. for those sentenced to death.
[1115] Mo.
[1116] N.H.
[1117] Fla.
[1118] If a person is imprisoned for up to 5 years, the maximum receivable is $85,350; for up to 14 years, $170,000; for more than 14 years, $199,150.

Other compensation can include expenses of employment training and counseling[1119] and tuition and fees at a state institution of higher education.[1120] Tuition assistance can include assistance in meeting admissions standards.[1121] Several states specifically provide for reintegrative services,[1122] while others provide for medical and counseling services,[1123] living expenses[1124] and accrued child support arrears.[1125] Also recoverable are fines, penalties and court costs paid,[1126] reasonable attorneys' fees[1127] and expenses for all proceedings.[1128]

Payouts can be in a lump sum,[1129] installment[1130] or either.[1131] Five states provide for survivor benefits,[1132] while others extinguish the award at the death of the exonerated person.[1133] The state cannot offset expenses of arrest, prosecution and imprisonment against the award.[1134] Tennessee has a right to subrogate against any person who intentionally and willfully caused the wrongful conviction.

Other benefits include exclusion of the compensation from state gross income for tax purposes.[1135] Several of these statutes specifically call for expungement of sealing of criminal records.[1136]

Disqualifications for compensation can occur if the person is in prison for another crime.[1137] Conviction of other acts along with the charge resultant in the wrongful conviction precludes recovery in Alabama and Utah. While not always clearly defined, if the individual contributed to their arrest and conviction, *e.g.*, by tampering with evidence or committing perjury, 11 jurisdictions will not allow recovery.[1138] Additionally, persons wrongfully convicted of crimes for which they entered a guilty plea cannot receive compensation in several jurisdictions; Virginia makes an exception for this if the guilty plea resulted in the death penalty or imprisonment for life.[1139]

[1119] *E.g.*, Conn., La., Md., N.C. & Va.
[1120] *E.g.*, Conn., Fla., La., Mass., Mont. & N.C.,
[1121] Mont. & N.C.
[1122] Conn., Tex. & Vt.
[1123] La., Mass., Tex. & Vt.
[1124] Tex.
[1125] Tex.
[1126] Fla., Iowa, Me. & Ohio,
[1127] Fla., Ill. Iowa, Miss., N.J., Ohio & Vt.
[1128] Ala.
[1129] Conn.
[1130] Fla., La., Tex., Utah & Va.
[1131] Ala., Md., Mass., Okla. &Tenn.
[1132] Ala., La., Miss., Tenn. & Va.
[1133] Mo., Neb. & Tex.
[1134] Ala., La., Mass., Mo., Neb., Utah & Vt.
[1135] Cal., Miss., Utah & Vt.
[1136] Fla., Mass., Mo. & Utah.
[1137] Ala., Iowa, La., Mass., Mo., Neb., N.J., N.C., Okla., Tex. & Vt.
[1138] Cal., D.C., Miss., Neb., N.J., N.Y., Vt., Va., W. Va., Wis. & U.S.
[1139] D.C., Iowa, Mass., Okla., Va.

A subsequent felony conviction can result in forfeiture of any unpaid balance of the compensation in three states[1140] or general disqualification in Florida. Intentionally waiving other postconviction remedies to benefit by the compensation law will disqualify an exoneree from receiving statutory compensation in Mississippi. Payments are tolled during any subsequent felony incarceration and resume upon release in two states.[1141]

Appendix I[1142] lists jurisdictions that have established reform commissions to address wrongful convictions. Ten states have established organizations to study and review cases of wrongful convictions.[1143] North Carolina's Innocence Inquiry Commission uniquely investigates claims of factual innocence by living convicts to determine credible claims of factual innocence. Most of the remaining ones were directed to study the causes of wrongful convictions and recommend policies and procedures to prevent recurrences. Three of these were judicially established;[1144] the rest were legislatively established. Some of these are permanent; the rest have been scheduled to terminate following release of a final report.

[1140] Ala., Tex. & Va.
[1141] Utah & Vt.
[1142] *Infra* p. 305.
[1143] Cal., Conn., Fla., Ill, N.Y., N.C., Pa., Tex., Vt. & Wis.
[1144] Fla., N.Y. & Tex.

APPENDIX A

Senate Resolution No. 381 of 2006
(Printer's No. 2254)

PRINTER'S NO. 2254

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE RESOLUTION

No. 381 Session of 2006

INTRODUCED BY GREENLEAF, COSTA, LEMMOND, O'PAKE, BOSCOLA, FERLO, BROWNE, C. WILLIAMS, PILEGGI, MUSTO AND DINNIMAN, NOVEMBER 20, 2006

REFERRED TO RULES AND EXECUTIVE NOMINATIONS, NOVEMBER 20, 2006

A RESOLUTION

Directing the Joint State Government Commission to establish an advisory committee to study the underlying causes of wrongful convictions and to make findings and recommendations to reduce the possibility that in the future innocent persons will be wrongfully convicted.

WHEREAS, Nationally more than 180 individuals have been exonerated through postconviction DNA testing, and some of those individuals spent time on death row; and

WHEREAS, At least eight individuals have been exonerated in Pennsylvania through postconviction DNA testing, three of whom were in prison for murder and one of whom was on death row; and

WHEREAS, It is important for us to understand why these individuals were wrongfully convicted and how wrongful convictions may be avoided in the future; and

WHEREAS, Not only is it a great injustice to imprison an innocent person, but by incarcerating an innocent person, it is likely that a guilty person remains capable of committing additional crimes; therefore be it

RESOLVED, That the Senate direct the Joint State Government

Commission to establish an advisory committee to study the underlying causes of wrongful convictions so that the advisory committee may develop a consensus on recommendations intended to reduce the possibility that in the future innocent persons will be wrongfully convicted in this Commonwealth; and be it further

RESOLVED, That the advisory committee be comprised of approximately 30 members and represent at least the following constituencies: prosecution, defense, law enforcement, corrections, judiciary and victim assistance; and be it further

RESOLVED, That the advisory committee may include representatives of academia, the faith community, private and public organizations involved in criminal justice issues and other criminal justice experts; and be it further

RESOLVED, That the advisory committee review cases in which an innocent person was wrongfully convicted and subsequently exonerated, review any other relevant materials, identify the most common causes of wrongful convictions, identify current laws, rules and procedures implicated in each type of causation, and identify through research, experts and discussion potential solutions in the form of legislative, rule or procedural changes or educational opportunities for elimination of each type of causation; and be it further

RESOLVED, That the advisory committee consider potential implementation plans, cost implications, including possible savings, and the impact on the criminal justice system for each potential solution; and be it further

RESOLVED, That the advisory committee report to the Senate with its findings and recommendations no later than November 30, 2008.

APPENDIX B

Pennsylvania Exonerees

PENNSYLVANIA EXONEREES

Name	Conviction date	Exoneration date	Sentence	Contributing causes of conviction	Compensation	Real perpetrator found?	County
Brison, Dale	1990	1994	18-42 years	Eyewitness misidentification; government misconduct unvalidated or improper forensic science	Not yet	Not yet	Chester
Brown, Patrick	2002	2010	22-70 years	Eyewitness misidentification; government misconduct	Not yet	Yes	
Doswell, Thomas	1986	2005	13-26 years	Eyewitness misidentification; government misconduct	Yes	Not yet	Allegheny
Godschalk, Bruce	1987	2002	10-20 years	Eyewitness misidentification; false confessions/admissions; government misconduct; informants	Yes	Not yet	Montgomery
Kelly, William	1990	1993	10-20 years	Eyewitness misidentification; false confessions/admissions	Not yet	Yes	Dauphin
Laughman, Barry	1988	2004	Life	False confessions/admissions; unvalidated or improper forensic science	Yes	Not yet	Adams
Moto, Vincent	1987	1996	12-24 years	Eyewitness misidentification	Not yet	Not yet	Philadelphia
Nelson, Bruce	1982	1991	Life+	False confessions/admissions; informants	Not yet	Not yet	Allegheny
Nesmith, Willie	1982	2000	9-25 years	Eyewitness misidentification	Not yet	Not yet	Cumberland
Whitley, Drew	1989	2006	Life	Eyewitness misidentification; informants; unvalidated or improper forensic science	Not yet	Not yet	Allegheny
Yarris, Nicholas	1982	2003	Death	Eyewitness misidentification; informants	Yes	Not yet	Delaware

DALE BRISON

On July 14, 1990, the thirty-seven year old victim was walking home from a convenience store when she was approached from behind. The assailant put one hand on her throat, one on her waist, and forced her to walk with him. The assailant stabbed her in the side as they were walking and she became unconscious. When she woke up, they were walking to bushes near an apartment complex, where he sexually assaulted her repeatedly. Shortly thereafter, the victim gave a description of her assailant to police. Two weeks later, the victim purportedly saw her attacker while walking among a crowd of people in Oxford, Pennsylvania. The victim located a police officer and told the officer that she had seen her attacker. A description of the individual was given to the officer by the victim who subsequently detained Dale Brison based upon his clothing which matched the description given by the victim. Arrest and search warrants for Brison and his home were executed the next day. Once in custody, Brison was informed by the interrogating detective that DNA evidence in this case which would be "99.9% certain" of identifying Brison as the assailant. Despite the availability of physical evidence from Brison and the victim that could have been tested, Brison's request for DNA testing was denied.

Dale Brison was convicted of this rape, kidnapping, aggravated assault, carrying a prohibited offensive weapon, and three counts of involuntary deviate sexual intercourse. Brison was sentenced to eighteen to forty-two years of imprisonment. During the trial, Brison's repeated request for DNA testing was denied.

The victim had provided police and prosecutors with separate identifications of Brison near her apartment building. At trial, a hair sample from the scene of the crime was deemed consistent with Brison's. Because there is not adequate empirical data on the frequency of various class characteristics in human hair, however, an analyst's assertion that hairs are consistent is inherently prejudicial and lacks probative value. Brison presented an alibi defense, which was corroborated at trial by his mother.

In 1992, the Pennsylvania Superior Court ruled that DNA testing must be performed if evidence had been maintained and the semen stain from the victim's underwear was not too degraded.[1145] The cost of the test was placed upon the Commonwealth.

The laboratory reported that no result could be found from the vaginal swab, but testing on the spermatozoa found in the semen stain on the victim's underwear provided results that exculpated Brison. The district attorney's office performed the same tests and came up with the same results.

Brison was released after serving three and a half years of his sentence.[1146]

[1145] *Commonwealth. v. Brison*, 618 A.2d 420, 425 n.13 (Pa. Super. Ct. 1992).

[1146] Innocence Project, Know the Cases, http://www.innocenceproject.org/Content/Dale_Brison.php (last visited Feb. 2, 2011).

THOMAS DOSWELL

In March 1986, a white woman was attacked by an African American man as she entered the Forbes Health Center hospital where she worked located in east end of Pittsburgh, Pennsylvania. The victim told the investigating detective that the perpetrator followed her into the building and then the cafeteria. He locked the cafeteria doors behind him, threatened to kill the victim, and then forcibly raped her. A short while later, a co-worker began banging on the cafeteria doors in an effort to help the victim. The assailant fled the hospital and was chased for three blocks by another hospital employee.

The victim was taken to another hospital, where a rape kit was collected. Investigators also took the victim's clothing as evidence. Though nothing was found on the clothing, the Allegheny County Crime Laboratory found evidence of spermatozoa on the vaginal swabs from the rape kit.

On the day of the crime, the police showed the victim and the co worker who came to her defense a photographic lineup consisting of eight individuals. None of the photographs were marked except for Doswell's. His photograph had the letter "R" written on it. At trial, a police officer explained that photographs marked with an "R" represented photographs of people who had been charged with rape. Two years prior to this criminal incident, Doswell was acquitted on one count of rape of his former girlfriend who had brought charges against Doswell. Doswell's argument at trial was that the charges were brought as retribution for the alleged victim's unrequited affection. After trial, several witnesses heard the investigating detective in that case say to Doswell, that "he had not seen the last of him" and that he was "going to get him." This same detective was the investigating detective in the subsequent case that resulted in Doswell's exoneration.

After this identification by the victim and her co-worker, Doswell was arrested and charged. At trial, both the victim and the co-worker who had initially come to her aid made in-court identifications of Doswell. Testing was performed on samples from the rape kit. The serologist found A, B, and H antigens on the samples. Because the victim was a type AB secretor, no conclusions could be made about what blood type the rapist was because the victim's type masked the perpetrator's.

Doswell's defense challenged the reliability of the identifications, arguing that the photographic lineup was faulty due to Doswell's picture being the only picture that was marked. The defense also argued that Doswell did not fit the victim's initial description of her attacker.

A jury convicted Doswell of rape, criminal attempt, simple assault, terroristic threats, and unlawful restraint in November 1986. He was sentenced to 13-26 years (aggregate).

The physical evidence in the case at trial was largely unhelpful for the prosecution and the defense. Instead, Doswell continued to press his innocence attacking the reliability of the two eyewitnesses' evidence against him. Doswell was unsuccessful in his appeals. In 1998, he filed a request for DNA testing but was denied because the motion was filed too late. In 2004, after confirming that the evidence from trial was located in the police department's property room, Doswell filed a motion to gain access to the evidence and have it subjected to DNA testing. Testing was granted in March 2005.

For nearly 19 years, Doswell has maintained his innocence. Refusing to confess to a crime he did not commit, Doswell was turned down for parole four times. Only one week after exculpatory test results returned from the Allegheny County Crime Lab, prosecutors agreed to join in Doswell's motion to vacate his conviction and sentence.

After nineteen years in prison, Thomas Doswell was released on July 21, 2005. He was 25 years old when he was arrested for this crime in 1986.

BRUCE GODSCHALK

In May of 1987, Bruce Godschalk was convicted of two counts of forcible rape and two counts of burglary in Montgomery County, Pennsylvania. He received ten to twenty years for the crimes. Godschalk's conviction was based primarily on the eyewitness identifications of the victims and the detailed confession that was taken after his interrogation by police.

In 1986, two women in the same apartment complex were accosted by the same perpetrator. Both were awoken by an intruder and raped. Only one of the two victims was able to identify Godschalk. The second victim was able to assist police in creating a composite sketch of her assailant that was subsequently broadcast on television and placed in local newspapers. On December 30, 1986, the police received a call telling them that Bruce Godschalk resembled the man in the composite sketch.

On January 13, 1987, the police obtained a taped confession from Godschalk that contained information not available to the public. The tape consisted only of Godschalk's confession and did not include any part or portion of the interview/interrogation. The two rapes were tried together in May of 1987. The prosecution relied on the identification made by the second victim, Godschalk's confession, the testimony of a jailhouse informant who claimed that Godschalk had made inculpatory statements, and the presence of semen in the evidence collected from the investigation of both crimes. Conventional serology could not exclude Godschalk from being the donor of the semen. The defense put forth an alibi defense, but Godschalk was convicted of both crimes.

Godschalk's appeals were denied. His motion for post trial DNA testing was denied.[1147] In 1999, Godschalk obtained a copy of his taped confession that was sent to an expert, who concluded that it was likely that Godschalk had falsely confessed.

In November 2000, Godschalk filed a Section 1983 civil rights complaint seeking access to the evidence. After the Federal District Court granted access to the evidence and the prosecution's motion to dismiss was denied, the District Attorney consented to release the evidence in the spring of 2001.[1148]

The prosecution revealed that they had sent the relevant evidence to a laboratory for testing and had not been able to obtain results. The prosecution represented that the evidence had been consumed in this testing. In further support of it position, the District Attorney also provided an affidavit from the police officer who had elicited the confession from Godschalk.

Godschalk asserted that the District Attorney failed to send all of the evidence from one of the crimes to the laboratory. Godschalk specifically noted a carpet sample with semen that was never received by the laboratory. The District Attorney's Office responded to the Court that the carpet sample was not introduced as evidence and was not significant to the case. The sample originated from the home of the victim who could not identify Godschalk and was used at trial to place him to the scene of the crime.

The evidence from both cases was tested at Forensic Science Associates in January 2002. Profiles were obtained from the evidence in both rapes, and in both cases, the male profiles matched meaning that the same perpetrator committed both crimes. Bruce Godschalk was excluded. The District Attorney had their own laboratory perform testing.

The District Attorney's Office refused to release Godschalk from prison, citing concerns over possibly flawed testing in the face of the evidence, namely the confession and the identification.

Finally, on February 14, 2002, Bruce Godschalk was released after fifteen years in prison and seven years of trying to secure DNA testing.

[1147] *Commonwealth v. Godschalk*, 679 A.2d 1295, 1296 (Pa. Super. Ct. 1996).
[1148] *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F.Supp.2d 366, 370 (E.D.Pa. 2001).

WILLIAM M. KELLY, JR.

01/09/93
Jailed man set free after false confession
Proof of innocence approved at hearing
By Pete Shellem

A Dauphin County judge yesterday freed a man who pleaded guilty to murder two years ago after hearing evidence that Joseph D. Miller of Steelton, suspected of being a serial killer, committed the slaying.

President Judge Warren G. Morgan, after hearing prosecutors and defense attorneys making supporting arguments, ordered William M. Kelly Jr. released from county prison.

Kelly's attorney, David Foster, said Kelly will live with his grandmother in Harrisburg and continue undergoing psychiatric treatment.

Kelly had little comment upon being released, but did say he was going to try to get on with his life. "I couldn't believe it," he said. His grandmother, Murza K. Snavely, called his release the "best Christmas present I ever had."

While not faulting police, Foster said he would investigate the possibility of seeking retribution for his client.

In February 1990, Kelly confessed to killing Jeanette D. Thomas, 25, of Hall Manor, whose bludgeoned body was found in the old Swatara Twp. landfill. He was sentenced to 10 to 20 years in prison after pleading guilty to third-degree murder.

County District Attorney Richard A. Lewis reopened the investigation after Miller, 28, allegedly led investigators to the same landfill, where they discovered the bodies of two other city women, Selina M. Franklin 18, and Stephanie McDuffey, 23. Swatara Twp. Detective Ronald L. Fernsler, who investigated all three killing sites, said he immediately noticed the similarities between the deaths of the three women. All the bodies were found within yards of each other in the landfill and were covered with boards and other debris in a similar fashion.

All were beaten about the head, he said. Semen found in Thomas' body was matched to Miller, whom authorities said eventually confessed to her killing.

County Chief Detective Thomas P. Brennan Jr. said Miller confessed in a September interview to the Thomas slaying, but when asked to go into detail, asked for his attorney.

Witnesses who identified Kelly as the last person seen with Thomas now say they were mistaken. One has identified Miller as that person. Lewis said Miller and Kelly resembled each other at the time and have a similar speech impediment. Lewis said the investigation into bringing charges against Miller in Thomas' slaying is continuing.

Kelly has an IQ of 69 and a history of mental illness, alcoholism and manic depression. A psychiatrist who interviewed Kelly at length said the combination of alcohol blackouts and his mental condition made him susceptible to believing he had committed the crime when questioned by police.

The psychiatrist said Kelly was trying to please his interviewers by saying what they wanted to hear. Morgan commended Lewis and the investigators for pursuing the bizarre case.

"The conduct of the district attorney and these officers reflects the highest standards of prosecutorial ethics," Morgan said.

Miller is facing trial in deaths of Franklin and McDuffey, which date back to 1987, as well as for two assaults in which women were raped and told they were going to be killed.

He also is a suspect in an unsolved Perry County slaying and is being investigated in a string of slayings in North Carolina, where his relatives reside. An out-of-county jury will be selected to hear his case because of pretrial publicity. The trial is expected to start in the next several months after defense objections to statements given police are resolved.

BARRY LAUGHMAN

Barry Laughman was convicted of raping and murdering his Aunt in 1988. After serving 16 years of his sentence, DNA testing on vaginal swabs proved that Laughman had not committed the rape/murder. Though he was released in November 2003, he was finally exonerated on August 26, 2004.

On August 13, 1987, the victim was found dead in her home. She had been raped and suffocated with pills that had been forced down her throat. Police were initially looking for a stranger that was seen walking through back yards in the area that day. However, the police focused on 24-year-old Barry Laughman, a neighbor whose pinkie finger couldn't bend properly. Police suspected that this injury could have been sustained during the commission of the crime.

The eighty-five year-old woman had lived alone for twenty-five years. Most evenings she would eat dinner at the home of her nephew, Barry Laughman, his parents, two brothers and sister. They lived two homes apart. When the victim did not show up for dinner one evening, Barry Laughman, his mother Madeline, and her other two sons, David and Larry who was joined by his wife, Ruann, went looking for her.

Upon entering her home, Larry and his wife discovered the victim's body. She was found naked, all but for a bra pulled up over her breast and her dress covering her face. Her upper body was on the bed and her feet were on the floor. Three safety pins were found on her bra with one being opened. The victim had pills stuffed in her mouth with a pill bottle in her hand. A Marlboro cigarette was seen extinguished on a chair next to the bed.

Laughman had an IQ of 70 and was said to be functioning at the level of a 10-year-old. Several weeks after the crime, police told Laughman that his fingerprints were found at the scene. After about one hour of interrogation, the interrogating trooper who was alone with Laughman, asked his partner to come into the interview room, telling him that Laughman had something to say. He then confessed to the police in great and convincing detail. His statement consisted of responses to fifty-three questions put to him by the interrogating trooper. The second trooper transcribed Laughman's responses as they were being given. Afterwards, the interrogating trooper retrieved a tape recorder. Instead of having Laughman give an account of his own confession on tape, and without having taped any part of Laughman's prior interview and interrogation by this same trooper, the interrogating trooper instead read the transcription to Laughman on tape having instructed Laughman to respond "yes" as to whether the entire statement was true . . . which Laughman did.

There were numerous discrepancies between the crime scene and his confession, such as his explanation of his point of entry conflicting with a seemingly undisturbed window at the scene. He also stated that he had killed the victim on August 12, but a neighbor reported seeing her in her yard on the morning of August 13.

The Pennsylvania State Police conducted serology testing on semen found on the victim's vaginal swabs and found evidence of Type A blood, either from the victim or the perpetrator. The victim was a type A secretor and Laughman is a type B secretor. The police chemist testified correctly at trial that the victim's profile could have masked Laughman's profile. The analyst testified incorrectly, however, that bacterial degradation could have changed type A blood to type B or vice versa.

PCR/DQ Alpha DNA testing was attempted in 1993 by Cellmark Diagnostics on the vaginal swabs collected from the victim but results were inconclusive.

By 2003, the samples were thought to have been lost, but were then discovered to be in the possession of a former Penn State professor residing in Germany. This discovery was made possible by the tireless reporting of the late Harrisburg *Patriot-News* reporter, Pete Shellem. In November 2003, Orchid Cellmark performed Y-STR DNA

testing and reported that Laughman had been excluded. He was released from prison under supervised house arrest, but the district attorney still planned to press charges. On August 26, 2004, however, Adams County District Attorney Shawn C. Wagner dropped all charges against Laughman.

VINCENT MOTO

The victim in this case was attacked a little after midnight on December 2, 1985, while walking in Philadelphia. A Chevrolet Caprice pulled up beside her and the passenger of the car, later identified as Vincent Moto, got out, pulled a gun on the victim, and forced her into the car. The two men drove the car to another location and proceeded to simultaneously and continuously sexually assault the victim. They then stole her money, gold chain, and glasses, and drove around the block. She was pushed out of the car half naked. Five months later, in May of 1986, the victim was walking down the street when she saw Vincent Moto walking on a Philadelphia street with a young woman and child. She went to an office nearby and asked an individual to hold the defendant until the police arrived. That individual complied with her request. The police arrived and Moto was arrested.

At trial, the prosecution revealed, during cross examination of Vincent Moto's mother, that Moto had been convicted in the past for crimes in relation to his girlfriend. At trial, Moto and his parents testified that he was at home at the time of the crime. The prosecution's case hinged upon the victim's identification of Vincent Moto as being one of her two assailants.

Post-verdict motions were filed alleging ineffective trial counsel. Evidentiary hearings on September 11, 1987, and January 12, 1988, the court denied the motions and sentenced Moto to an aggregate term of twelve to twenty-four years. A motion was filed asserting that DNA testing should be conducted. The Court of Common Pleas denied the motion, but made sure that all evidence pertaining to this case would be preserved. A subsequent request for testing was made to be conducted on a pair of the victim's underwear, which contained semen from the crime.

Testing was performed at Forensic Science Associates in California. The results eliminated Vincent Moto as the source of the spermatozoa on multiple samples obtained from the victim's underwear. A motion was filed to vacate the conviction based on exculpatory test results.

> On November 13, 1995, Judge Joseph Papalini vacated Moto's conviction and granted him a new trial based on the DNA results, though the district attorney's office was not yet ready to drop the case against Moto, alleging that it wanted to have its own laboratory conduct PCR based DNA testing. Vincent Moto was released from prison after eight years of incarceration in July 1996. In 1998, an independent laboratory confirmed the exculpatory DNA test results.[1149]

Moto was granted a new trial but never retried because "the Commonwealth withdrew the charges . . ., and an order of *nolle prosse* was entered."[1150] The victim was "sexually assaulted and robbed" by two men.[1151] "DNA from three different men" was on her panties the night she was attacked, "none of whom could have been" Moto.[1152] Moto's petition expunge this criminal record was denied.[1153]

BRUCE NELSON

Two men had stolen a van with the intent to commit a robbery. On August 3, 1981, they came upon their victim in a parking garage where they proceeded to rob, rape and murder a Bethel Park, Pennsylvania woman. Bruce Neslon had already been in prison when Terrence Moore identified him as the individual who had initiated the crimes. On November 11, 1981, investigators staged a confrontation between Nelson and Moore at which time Moore pressed Nelson with his purported confession. Nelson asked Moore, "what did you tell them." Moore responded, "I told them everything." Nelson's query of Moore was, at trial, characterized as a confession.

Bruce Nelson was convicted of rape and murder based on the confession of Terrence Moore, who implicated Nelson as the instigator of a robbery scheme. Moore testified that the two men drove a van into a parking garage for the purposes of a robbery. The victim entered the garage, was attacked and thrown into the van, and was raped repeatedly before being strangled.

Based on this testimony, Nelson was convicted of rape and murder and sentenced to life for the murder, with a concurrent sentence of ten to twenty years for the rape.

Nelson's case was remanded in 1990. The Third Circuit Court of Appeals reversed the trial court's disposition of Nelson's Fifth Amendment claims. In preparation

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[1149] Innocence Project, Know the Cases, http://www.innocenceproject.org/Content/Vincent_Moto.php (last visited Feb. 4, 2011).
[1150] *Commonwealth v. Moto*, 23 A.3d 989, 991 (Pa. 2011)
[1151] *Id.*
[1152] *Id.*
[1153] *Id.* at 998-99. The Commw. didn't consider the exculpatory DNA results as exonerative of Moto and would've retried him because it was convinced by the victim's identification of him, but it couldn't find her after Moto was granted a new trial. *Id.* at 992.

for the 1991 trial, the District Attorney tested the biological materials taken from the victim's body and clothing. The results excluded Nelson as a perpetrator and matched Moore's profile. These materials included saliva on a cigarette, saliva on the victim's breast and bra, hairs, and fingerprints. All of these items were consistent with Moore. Nelson was exonerated of the rape and murder in August 1991 after serving nine years.

WILLIE J. NESMITH

Born on February 15, 1962, Willie Nesmith was the fifth of eight children born to a married couple who moved up and down the east coast picking fruit. In 1966, Willie's mother, Jesse Mae Nesmith, decided she wanted to establish a home for the children and stop the wandering lifestyle. Willie's father, Manning Nesmith, did not agree and moved back south. Not much is known about Manning Nesmith. During one of my first talks with Willie, I asked about his father. He couldn't think of his name and said he thought he met him once when he was little. Jesse Mae had only six years of education; the extent of Manning's education is unknown.

As a child, Willie was enrolled in the Carlisle Area School District. He spent his school years in special education classes, and his IQ was determined to be 69 in 1978. Willie dropped out of school on his 17th birthday in 1979.

Willie worked various low-paying, temporary jobs. He had no interests, and his Aunt Pat, Jesse Mae's sister, said that he got into a few actual fights over the years and looked so good that the family encouraged him to take up boxing. He joined the Carlisle Boxing Club, under professional boxer and trainer Bobby Wert, in 1981.

Mr. Wert trained the boxers at Dickinson College and also trained town kids from Carlisle, most of whom were from poor families and had no skills and little motivation. Willie had five bouts with the boxing club,[1154] with his last being the night of May 14, 1982. About two weeks prior to the last fight, Mr. Wert told Willie that if he applied himself to his

[1154] As an indication of Willie's lack of comprehension of many things, he has stated that he is a five-time Pennsylvania Golden Gloves winner. Mr. Wert states that Willie had a total of five bouts. One of those was a Golden Gloves bout, and Willie lost it. When other ex-boxers in the area complained to Mr. Wert about Willie's claim, Mr. Wert was inclined to let Willie keep this positive thing in his life, but he decided to talk with Willie when Willie was portrayed on local television and in the Patriot-News as a five-time Golden Gloves champion. Mr. Wert then explained to Willie that he was not a five-time Golden Gloves champion. Willie asked him, "Then what were those five fights I had?" Mr. Wert explained them, and Willie said, "Oh."

training, he could be somebody. Willie took this to heart and trained well those two weeks. He won his bout the night of May 14, and the trainers in the club decided to give him the night's award for best bout, considering how he had dedicated himself to serious training leading up to the bout. Mr. Wert said that the main reason for the award was that they wanted to give Willie something positive.

Unfortunately, the night of May 14, 1982 is notable for another reason: a 19-year-old Dickinson College student was brutally raped and beaten so severely about the face that her eyes swelled shut and the emergency room doctors at first thought her jaw and one side of her face were broken. Several other students heard the victim's screams and came to the scene. Some talked with the attacker, but none approached or touched him in any way. All were interviewed by a patrolman and then by the detective who was put in charge of the case, and all said it was dark (the attack lasted about 20 minutes around midnight of May 14 into May 15), that they only saw part of the attacker's face and only in shadow, and that they didn't know if they'd be able to identify the attacker if they saw him again. Only one said that he would be willing to try to identify the attacker.

The eyewitnesses all said the attacker was black, but their descriptions varied otherwise:

> 5'9", stocky build, white T-shirt, yellow shorts
> 5'8", stocky build – Said that the attacker said he was from South Philly and to leave him alone.
> 5'11", stocky build, white T-shirt, faded cut-off blue jeans, white tennis shoes
> [No height or build mentioned] Short hair, round face, dark shirt
> 5'11", light-colored shirt, cut-off blue jeans, white shoes (victim's description)
> 5'11", 180 lbs., well-built – Said "I am from South Philly and I got a piece." Thought he saw a knife. Attacker also said that if they didn't back up, he was going to go a few rounds with him.

A tracking dog was brought in and, at 1:10 a.m., picked up a scent from the crime scene. He and his handler followed it to a bar several blocks away. The dog wanted to enter the bar, but it was closed. They then went to a man standing on the corner. The policemen talked with the man, but did not think he was the attacker, and the dog did not alert his handler to the man.

Nothing in the record indicates why Willie Nesmith was interviewed about the rape. Possibly, the "going a few rounds" remark a witness heard made

the detective think of Willie. (The detective's son boxed in the same boxing club as Willie.) However, I learned during my conversation with Mr. Wert that other members of the club were always in trouble – and one particular member came to mind as actually being nasty. This happens to be the same person Willie told me he heard talk about being the actual rapist. He was never even interviewed. Willie believes that the detective was upset with him for dancing with the detective's wife during a boxing club party at the detective's home, but can't think of a better reason why he was suspected in the crime. The detective has since passed away.

While the reason for approaching Willie Nesmith about the rape is left unexplained in the record, nothing – in my opinion – indicates misconduct on the part of the detective, police department, or district attorney's office.

Willie was tried in September of 1982, and the jury was hopelessly deadlocked. A mistrial was declared.

In November of 1982, a man who was incarcerated with Willie over the summer said that Willie had told him he "raped that girl." He testified to this when Willie was re-tried in December of 1982, and Willie was found guilty. He was sentenced to an aggregate of nine to 25 years to be counted from May 16, 1982.

Willie was eligible for parole in 1991 upon fulfillment of his minimum sentence, but the prosecutor wrote an unfavorable letter to the Parole Board and parole was denied.

Willie was released on parole on December 30, 1993 after having been incarcerated for 11 years and 7 ½ months. He had no money, no job, no training, no health insurance, no counseling, no help at all in reintegrating into society. He moved back home with his mom.

Willie was arrested on drug charges – delivery of less than a gram of crack cocaine – on November 17, 1995 and was eventually sentenced to 12 months to five years on the charges. If not for the rape conviction, the sentence would have been lighter (and I believe he wouldn't have been involved with drugs at all). Understandably, Willie had a difficult time with the re-incarceration, with one of the reasons being that he had to attend classes for sex offenders.

DNA testing developed over the years of Willie's incarceration, and in 2000 he finally got his DNA test for the rape. The July 10, 2000 DNA report stated, "Willie Nesmith is excluded as a source of the DNA

obtained from the sample."[1155] Willie was released from prison on August 24, 2000, just 3 months shy of completely serving the maximum five-year-sentence on the drug charges.

Willie had a few more problems with drugs, but has been clean for quite some time. Willie has said, and the record shows, that he drank alcohol before his wrongful 1982 rape conviction, but he was not involved with drugs until he was released on parole from his long wrongful incarceration. He was released without a job, without training, without health insurance, and without a plan. He was also released into a rough community where many believed he was a rapist. Life was never easy for Willie, and it was even more difficult after over 11 ½ years[1156] of incarceration for a crime he did not commit.[1157]

DREW WHITLEY

On August 17, 1988, at around 3:00 AM, a 22-year-old McDonald's night manager in Duquesne was finishing her shift when she was confronted by a man with a nylon mask over his face demanding money. The assailant chased her to her car, pistol-whipped her, and shot her in the back. He then fled across the parking lot toward a wooded area, shedding his nylon mask, hat, and women's trench coat as he ran.

Another McDonald's employee lived in the building next to Drew Whitley, 32 years old at the time and had been waiting outside of the restaurant to start his 3:00 AM shift. While he was waiting, a man wearing a nylon mask, a hat, and trench coat approached him from behind and told him not to move. He then saw the robber fire a shot in the air, struggle with the victim, and shoot her. As the perpetrator ran into the parking lot, his hat fell off and Whitley's neighbor recognized the man as Whitley. The witness admitted that he could not see the perpetrator's face clearly, but he recognized Whitley by his voice, the shape of his head, and the way that he walked.

[1155] Cellmark Diagnostics of Germantown, Maryland performed polymerase chain reaction (PCR) testing on the panties the victim wore when she was raped. Cellmark used the AmpF/STR Profiler Plus PCR Amplification Kit to do the testing. "STR" stands for "short tandem repeat." Results found through use of this kit are accepted by the FBI for inclusion in its Combined DNA Index System (CODIS).
[1156] More than 16 years, counting the incarceration for parole violation.
[1157] E-mail from Karen Haley to J. State Gov't Comm'n (Aug. 4, 2011, 04:03 EST) (on file with J. State Gov't Comm'n).

At trial, another witness testified that he saw the perpetrator fire a warning shot and hit the victim with a gun. This witness then drove to a nearby supermarket to telephone the police. Another McDonald's employee saw the perpetrator order the victim to give him a bag of money, fire a shot into the air, and chase the victim around her car. He described the perpetrator as a man wearing a trench coat and a hat and subsequently identified Whitley in court. A third employee attempted to help the victim get away from the perpetrator but was unable to identify Whitley.

Further, a death row inmate testified at trial that Whitley confessed while they were incarcerated together at the State Correctional Institution in Pittsburgh.

The police collected a trench coat, hat, and a 12-inch long nylon stocking from the parking lot. At trial, an Allegheny County Crime Laboratory technician testified that tiny hairs in the mask were similar to Whitley's hairs, but could not be certain they were his. The technician also testified that saliva from the mask did not match Whitley's. The prosecutor, however, argued in his closing arguments that the hairs were positively Whitley's.

Police also collected Whitley's tennis shoes, which had a drop of blood on them. Whitley told police that his son had bled on his shoes the day before. When serology testing was performed, the blood was found to be type A. Both the victim and Whitley's son had type A blood.

In 1989, Drew Whitley was convicted of second degree murder of the McDonald's night manager in Duquesne, Pennsylvania, and sentenced to a term of life in prison.

In November 1995, the court approved Whitley's motion for DNA testing, specifically on two rooted hairs from the mask, the blood on Whitley's shoes, and the blood on the coat found at the crime scene. The prosecution reported that Cellmark Laboratories had attempted to conduct DNA testing on the rooted hairs in 1993 and had consumed the sample. This testing yielded inconclusive results. The prosecution also reported that the 39 hairs without roots and the tennis shoes from Whitley's case had been lost in a flood of the Allegheny County Police Evidence Room. DNA testing was, however, conducted on the blood on the coat found near the scene. It was consistent with the victim, with the profile being found in 1 in 30,000 Caucasian individuals.

Whitley continued to seek further DNA testing in his case. In 2005, his attorney, Scott Coffey, was informed by the prosecution that the 39 hairs without roots did, in fact, still exist. Coffey then filed a Post-Conviction Relief Act Petition on Whitley's behalf to have the hairs tested. Mitochondrial DNA testing was then ordered by the court.

On February 28, 2006, Mitotyping Technologies completed DNA testing on 6 representative hairs, of the 39 non-rooted hairs that were suitable for testing, found in the stocking mask. They determined that Whitley was excluded from all of the hairs. The prosecution then decided to send five hairs found in the hat to the lab for testing. Whitley was again excluded as a source of these hairs.

On May 1, 2006, the prosecution dropped all charges against Drew Whitley and he was released from prison.[1158]

NICHOLAS YARRIS

On December 16, 1981, a young sales associate from the Tri-State mall in Pennsylvania was abducted in her car after her shift ended. When she did not arrive at home, hours after she was due, her husband called the police. Investigators quickly located her yellow Chrysler Cordoba, abandoned on a roadway in Chichester, PA. The following day, the victim's body was found - beaten, stabbed, and raped - in a church parking lot a mile and a half away from her car. Newly fallen snow covered her body. She was still clothed but the murderer had cut open her thick winter clothing to commit the sexual assault. The police determined that she had bled to death from multiple stab wounds in her chest. Biological materials, including sperm samples and fingernail scrapings, were collected from the victim's body. Police also collected gloves believed to have been left by the perpetrator from the victim's car. The biological evidence collected from the crime scenes would prove to be pivotal in the years to come.

Four days after the discovery of the body, police stopped Nicholas Yarris on a Pennsylvania roadway for a traffic violation. The routine stop escalated into a violent confrontation between Yarris and the patrolman. The two wrestled one another to the ground causing the oficer's weapon to discharge. The altercation ended in Yarris's arrest for attempted murder of a police officer. While in custody for this offense, Yarris accused an acquaintance of committing the Tri-State mall murder in a gambit to gain his freedom. Yarris would later acknowledge he offered this information in an attempt to get out of custody where he was suffering from withdrawal as a result of his excessive drug use. When this suspect was ruled out by the police, Yarris became the prime suspect of the murder investigation.

[1158] Innocence Project, Know the Cases, http://www.innocenceproject.org/Content/Drew_Whitley.php (last visited Jan. 28, 2011).

Word leaked in prison that Yarris was a "snitch" resulting in his receiving numerous beatings. Yarris also failed at his attempt to commit suicide. Pressed to make a statement, Yarris confessed to participating in the crime, of rape, but that he had nothing to do with murder.

Conventional serological testing was performed on the rape kit, the results of which at that time could not exclude Yarris. Along with the biological evidence, prosecutors relied on the testimony of a jailhouse informant and identifications by the victim's co-workers, who identified Yarris as the man seen harassing the victim before her murder, to convict him. The jailhouse informant in this case was Charles Catalino who was serving a term of imprisonment of four to ten years for burglarizing the home of an assistant district attorney from the same county. Catalino was released from prison later in the year following Yarris' conviction in 1982. Nicholas Yarris was convicted of murder, rape, and abduction and sentenced to death.

Still, Yarris maintained his innocence, leading to a long struggle for DNA testing of the crime scene evidence. In 1989, he became one of Pennsylvania's first death row inmates to demand post-conviction DNA testing to prove his innocence. Successive rounds of DNA testing of various pieces of evidence followed throughout the 1990's. All failed to produce conclusive results until 2003 when Dr. Edward Blake conducted a final round of testing on the gloves found in the victim's car, fingernail scrapings from the victim, and the remaining spermatozoa obtained from the decedent's underpants. Significantly, the profiles obtained from the gloves and the spermatozoa evidence appeared to originate from the same person. On July 2, 2003, Nicholas Yarris was excluded from all biological material connected with this crime.

On September 3rd, 2003, based on Dr. Blake's results, the court vacated Yarris's conviction. Due, however, to a 1985 conviction for escape with connected charges in Florida, Yarris still had a 30 year sentence on his record and he remained in jail.

On January 15th, 2004, Florida reduced his sentence to 17 years (time served) and granted his release. The following day, Nicholas Yarris was released from a Pennsylvania prison after spending over 21 years for a crime he did not commit.[1159]

[1159] Innocence Project, Know the Cases, http://www.innocenceproject.org/Content/Nicholas_Yarris.php (last visited Jan. 27, 2011).

PENNSYLVANIA EXONERATIONS, 1989-2003
BY YEAR OF EXONERATION[1160]

"'[E]xoneration' is an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted."[1161]

(Exonerations based on DNA Evidence marked by *)

Matthew Connor, 1990
Bruce Nelson, 1991*
Jerry Pacek, 1991
Jay C. Smith, 1992
Dale Brison, 1994*
Vincent Moto, 1996*
Willie Nesmith, 2000*
William Nieves, 2000
Edward Baker, 2002
Steven Crawford, 2002
Bruce Godschalk, 2002*
Thomas Kimbell, Jr., 2002
Nicholas Yarris, 2003*

[1160] Gross et al., *supra* note 21, at 559.
[1161] *Id.* at 524. The official acts for this article are: pardons based on innocence, judicial dismissals of criminal charges after evidence of innocence emerged and acquittals on retrial based upon evidence of no involvement in the crimes. *Id.*

PENNSYLVANIA EXONEREES IDENTIFIED BY CENTER ON WRONGFUL CONVICTIONS AT NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Any Pennsylvania "case in which a defendant was convicted of a crime and later restored to the status of legal innocence based on evidence not presented at the defendant's trial. . . . The cases included on the" Center on Wrongful Convictions' "list are those — and only those — in which there is evidence of actual innocence."[1162]

Joseph Antoniewicz
Edward Baker
George Bilger
Dale Brison
George Bilger
Raymond Carter
Willie Comer
Matthew Connor
William Davis
Neil Ferber
Samuel Gleason
Bruce Godschalk
William S. Green
Ernest Haines
William A. Hallowell
Frank Harris
William Kelley
Thomas Kimbell Jr
Barry Laughman
Calvin Lyons
Vincent Moto
Bruce Nelson
Willie Nesmith
William Nieves
Anthony Piano
Edward H. Parks
Edward Ryder
Rudolph Sheeler
Michael Sabol
Jay C. Smith
Andrew Toth
Gerald C. Wentzel
Robert Wilkinson

[1162] Northwestern Law Bluhm Legal Clinic, Center on Wrongful Convictions, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ (last visited Jan. 27, 2011).

A SAMPLE OF PENNSYLVANIA PARDONS BASED ON INNOCENCE

Applicant: James Jose Gapasin, D-5092, No. 6471, Dec. Sess., 1944[1163]
Conviction: statutory rape, etc.
Reason: "The investigator finally secured from one of the victim's and from the mother of one of the victim's that the charges were false . . . . The district attorney . . . corroborated . . . this applicant was improperly convicted and is not guilty of the crime."

Applicant: Thomas E. Dougherty, No. 7479, Jan. Sess., 1949[1164]
Conviction: establishing gambling place
Reason: "[T]his applicant was not responsible for the commission of this crime but was . . . innocent."

Applicant: Louis Cabona, No. 4503, Oct. Sess., 1945[1165]
Conviction: enticing a minor for immoral purposes, statutory rape
Reason: "[d]ocumentary evidence . . . showed this applicant . . . at the time it was alileged this offense was committed . . . that he was on the high seas . . . . it is apparent from the records . . . he was not . . . guilty."

Applicant: Chester Latshaw, B-7828, No. 6509, Apr. Sess., 1946[1166]
Conviction: burglary, assault & battery w/intent to ravish
Reason: "We have . . . an affidavit which discloses that the applicant was not guilty . . . . Under these circumstances he could not have been guilty of the crimes."

Applicant: James Morran, No. 6753, No. 8946, June Sess., 1947[1167]
Conviction: rape & adultery
Reason: "The parole report indicates that from present investigation the brother of the applicant was the guilty person and not the applicant . . . . The record indicates applicant did not commit the crime."

Applicant: Michael John Dalessio, No. 9534, Nov. Sess., 1948[1168]
Conviction: vagrancy
Reason: "[T]he Board of Pardons is unable to see how he was charged with vagrancy and adjudged guilty. . . . [T]he investigation shows that the applicant did have sufficient funds on his person and was not engaged in any breach of the peace."

[1163] Legis. J., vol. VI, at 5913 (Pa. 1947).
[1164] *Id*., at 5904.
[1165] *Id*., at 5848.
[1166] *Id*., at 5810.
[1167] Legis. J., vol. VI, at 5525-26 (Pa. 1949).
[1168] *Id*., at 5658-59.

Applicant: Floyd T. Rager, B-8654, No. 8945, Oct. Sess. 1950[1169]
Conviction: burglary
Reason: "[S]ince he was not legally guilty of the crime of burglary . . . for a thing that was not a crime."

Applicant: Albert E. Florig, A-469, Dec. Sess. 1950[1170]
Conviction: passing worthless checks
Reason: "[T]his criminal prosecution should never have been brought and this applicant should never have been sentenced criminally. In our opinion it was a civil matter."

[1169] Legis. J., vol. VII, at 7107 (Pa. 1951).
[1170] Legis. J., vol. VI, at 5168-69 (Pa. 1953).

APPENDIX C

Master Table of Citations

MASTER TABLE OF CITATIONS

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Alabama	Ala. Code §§ 29-2-150 to 29-2-165	Ala. Code §15-18-200	None	None	None	None
Alaska	None	Alaska Stat. §§ 12.73.010 to 12.73.090	If feasible[1171]	Alaska Stat. § 12.36.200	None	None
Arizona	None	Ariz. Rev. Stat. §§ 13-4240, 13-4232	None	Ariz. Rev. Stat. § 13-4221	None	None
Arkansas	None	Ark. Code §§ 16-112-201 to 16-112-208	None	Ark. Code § 12-12-104	None	None
California	Cal. Penal Code §§ 4900 to 4906	Cal. Penal Code § 1405	None	Cal. Penal Code § 1417.9	None	S. Res. No. 244 (2003-04 Reg. Sess.)[1172]
Colorado	None	Colo. Rev. Stat. §§ 18-1-411 to 18-1-416	None	Colo. Rev. Stat. §§ 18-1-1101 to 18-1-1104	None	None
Connecticut	Conn. Gen. Stat. § 54-102uu	Conn. Gen. Stat. § 54-102kk[1173]	None	Conn. Gen. Stat. § 54-102jj	None	Conn. Gen. Stat. § 54-102pp
Delaware	None	Del. Code, tit. 11, § 4504	None	None	None	None
D.C.	DC Code § 2-421 to 2-425	D.C. Code §§ 22-4131, 22-4133	D.C. Code §§ 5-116.01 to 5-116.03	D.C. Code § 22-4134	None	None

[1171] *Stephan v. State*, 711 P.2d 1156, 1162 (1985)
[1172] Adopted Aug. 2004.
[1173] Conn. Gen. Stat. § 52-582 (2009).

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Florida	Fla. Stat. ch. 961	Fla. Stat. §§ 925.11, 925.12	None	Fla. Stat. § 925.11(4)	None	Fla. Sup. Ct. Admin. order No. AOSC10-39[1174]
Georgia	None	Ga. Code § 5-5-41	None	Ga. Code § 17-5-56	House Res. No. 352[1175]	None
Hawaii	None	Haw. Rev. Stat. §§ 844D-121 to 844D-133	None	Haw. Rev. Stat. § 844D-126	None	None
Idaho	None	Idaho Code § 19-4902	None	State police crime lab may dispose unused forensic samples in normal course of business	None	None
Illinois	Ill. Comp. Stat., ch. 705, §§ 505/8(c), 505/22(c); ch. 735, § 5/2-702	Ill. Comp. Stat., ch. 725 § 5/116-3	Ill. Comp. Stat., ch. 725, § 5/103-2.1	Ill. Comp. Stat., ch. 725, § 5/116-4	Ill. Comp. Stat., 725, §§ 5/107A-5, 5/107A-10	S. J. Res. Nos. 9 (2007) & 6 (2009)
Indiana	None	Ind. Code ch. 35-38-7	Ind. R. Evid. 617	evidence that could be tested for DNA--as long as appeals are pending	None	None
Iowa	Iowa Code § 663A.1	Iowa Code § 81.10	Recording encouraged[1176]	Iowa Code § 81.10(10)	None	None
Kansas	None	Kan. Stat. § 21-2512	None	[1177]	None	None
Kentucky	None	Ky. Rev. Stat. § 422.285	None	Ky. Rev. Stat. § 524.140	None	None

[1174] July 2, 2010.
[1175] Adopted Apr. 20, 2007.
[1176] *State v. Hajtic*, 724 N.W. 2d 449 (Iowa 2006).
[1177] If petition to test DNA postconviction is filed, until proceedings are completed.

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Louisiana	La. Rev. Stat. § 15:572.8; La. Code Civ. Pro. Ann. art. 87	La. Code Crim. Proc., Art. 926.1	None	La. Code Crim. Proc., Art. 926.1H(4) & (5)	None	None
Maine	Me. Rev. Stat., tit. 14, §§ 8241 to 8244	Me. Rev. Stat., tit. 15, §§ 2136 to 2138	Me. Rev. Stat., tit. 25, § 2803-B(1)(K)	Me. Rev. Stat., tit. 15, § 2138(14)	None	None
Maryland	Md. State Fin. & Proc. Code § 10-501	Md. Crim. Proc. Code § 8-201	Md. Crim. Proc. Code §§ 2-401 to 2-404	Md. Crim. Proc. Code § 8-201(j), (k)	Md. Pub. Safety Code § 3-506	None
Massachusetts	Mass. Gen. Laws ch. 258D	None[1178]	Cautionary jury instruction if unrecorded[1179]	None	None	None
Michigan	None	Mich. Comp. Laws §§ 770.16, 770.1	None	Mich. Comp. Laws § 770.16(12)	None	None
Minnesota	None	Minn. Stat. §§ 590.01 – 590.10	Admissibility rule[1180]	Minn. Stat. § 590.10	None	None
Mississippi	Miss. Code §§ 11-44-1 to 11-44-15	Miss. Code §§ 99-39-5, 99-39-11	None	Miss. Code §§ 99-39-5, 99-39-9, 99-39-11	None	None
Missouri	Mo. Rev. Stat. § 650.058	Mo. Rev. Stat. § 547.035	Mo. Rev. Stat. § 590.700	Mo. Rev. Stat. § 650.056	None	None
Montana	Mont. Code § 53-1-214	Mont. Code § 46-21-110	Mont. Code §§ 46-4-406 to 46-4-411	Mont. Code § 46-21-111	None	None
Nebraska	Neb. Rev. Stat. §§ 29-4601 to 29-4608	Neb. Rev. Stat. §§ 29-2101, 29-4116 to 29-4124	Neb. Rev. Stat. §§ 29-4501 to 29-4508	Neb. Rev. Stat. § 29-4125	None	None
Nevada	None	Nev. Rev. Stat. § 176.0918	None	Nev. Rev. Stat. §§ 176.0911 to 176.0919	None	None

[1178] *Commonwealth* v. *Donald*, 66 Mass. App. 1110, 848 N. E. 2d 447 (2006).
[1179] *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004).
[1180] Unrecorded statements generally inadmissible. *State v. Scales*, 518 N. 2d 587, 592 (Minn. 1994).

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
New Hampshire	N.H. Rev. Stat. § 541-B:14	N.H. Rev. Stat. §§ 651-D to 651-D:4	If record, must record in entirety[1181]	N.H. Rev. Stat. § 651-D:3	None	None
New Jersey	N.J. Stat. §§ 52:4C-1 to 52:4C-6	N.J. Stat. § 2A:84A-32a	N.J. Sup. Ct. R. 3.17	None	Guidelines mandated by Att'y Gen.[1182]	None
New Mexico	None	N.M. Stat. § 31-1A-2	N.M. Stat. § 29-1-16	N.M. Stat. § 31-1A-2	None	None
New York	N.Y. Ct. of Claims Act § 8-b	N.Y. Crim. Proc. Law § 440.30(1-a)	None	None	None	Justice Task Force[1183]
North Carolina	N.C. Gen. Stat. §§ 148-82 to 148-84	N.C. Gen. Stat. § 15A-269	N.C. Gen. Stat. § 15A-211	N.C. Gen. Stat. § 15A-268	N.C. Gen. Stat. §§ 15A-284.50 to 15A -284.53	N.C. Gen. Stat. §§ 15A-1460 to 15A-1475
North Dakota	None	N.D. Cent. Code § 29-32.1-15	None	None	None	None
Ohio	Ohio Rev Code §§ 2305.02, 2743.48 & 2743.49	Ohio Rev. Code §§ 2953.71 to 2953.84	Ohio Rev. Code §2933.81	Ohio Rev. Code § 2933.82	Ohio Rev. Code § 2933.83[1184]	None
Oklahoma	Okla. Stat. tit. 51, § 154(B)	Okla. Stat. tit. 22, §§ 1370.1, 1371, 1371.1, 1371.2	None	Okla. Stat. tit. 22, § 1372	None	None
Oregon	None	Ore. Rev. Stat. §§ 138.690 to 138.698	SB 309 (ch. 488)	SB 310 (ch. 489)	None	None

[1181] No due process right to have custodial interrogations recorded; however, if it is recorded, it must be recorded in its entirety but does not have to include *Miranda* warnings or waiver thereof. *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001).

[1182] *State v. Christopher Romero,* 922 A.2d 693, 702-703(N.J. 2007); *State v. Delgado*, 902 A.2d 888, 897 (N.J. 2006); *State v. Henderson*, (A-8-08)(062218) (N.J. 2011).

[1183] Created by N.Y. Ct. of Appeals in May 2009.

[1184] Section 3 of the statute enacting this provision calls for the Att'y Gen. to adopt rules prescribing specific procedures for law enforcement agencies and crim. just. entities to implement this provision. Additionally, it calls for the Ohio Judicial Conf. to review existing jury instructions regarding eyewitness identification to ensure compliance with the statute.

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Pennsylvania	None	42 Pa.C.S. § 9543.1	None	None[1185]	None	S. Res. No. 381(2006)
Rhode Island	None	R.I. Gen. Laws §§ 10-9.1-11, 10-9.1-12	None	R.I. Gen. Laws § 10-9.1-11	R.I. Gen. Laws § 12-1-16	None
South Carolina	None	S.C. Code §§ 17-28-10 to 17-28-120	None	S.C. Code §§ 17-28-300 to 17-28-360	None	None
South Dakota	None	S.D. Codified Laws ch. 23-5B	None	None	None	None
Tennessee	Tenn. Code § 9-8-108(a)(7)	Tenn. Code § 40-30-301 to 40-30-313	None	None	None	None
Texas	Tex. Civ. Prac. & Rem. Code §§ 103.001 to 103.154; Tex. Gov't Code § 501.091; Tex. Health & Safety Code § 614.021	Tex. Code Crim. Proc. arts. 64.01 to 64.05	Tex. Code Crim. Proc. art. 38.22, § 3	Tex. Code Crim. Proc. art. 38.43	Tex. Code Crim. Proc. art. 38.20[1186]	House Bill 498, 81st Leg. (R.S. 2009);[1187] Tex. Crim. Just. Integrity Unit[1188]
Utah	Utah Code §§ 78B-9-401 to 78B-9-405	Utah Code § 78B-9-300 to 78B-9-304	Office of Attorney General Policy	None	None	None
Vermont	Vt. Stat., tit. 13, §§ 5572 to 5577	Vt. Stat., tit. 13, §§ 5561 to 5570	None	None	Act No. 60 (2007) §§ 2, 3	Act No. 60 (2007) §§ 2, 3
Virginia	Va. Code Ann. §§ 8.01-195.10 to 8.01-195.12	Va. Code Ann. § 19.2-327.1	None	Va. Code Ann. § 19.2-270.4:1	Va. Code Ann. § 19.2-390.02	None

[1185] Receipt of a motion under 42 Pa.C.S. § 9543.1(b)(2) requires the Commw. and the ct. to preserve remaining biological material they possess pending completion of the proceedings.

[1186] Effective Sept. 1, 2011.

[1187] Established the Timothy Cole advisory panel on wrongful convictions.

[1188] Created by Tex. Ct. of Crim. Appeals in June 2008 (http://standdown.typepad.com/REPORT-TxCriminalJusticeIntegrityUnit-2008-Report.doc; http://alt.coxnewsweb.com/statesman/pdf/06/060408_integrityunit.doc).

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Washington	None	Wash. Rev. Code § 10.73.170	None	Wash. Rev. Code § 10.73.170(6)	None	None
West Virginia	W. Va. Code § 14-2-13A	W. Va. Code § 15-2B-14	None	None	W. Va. Code §§ 62-1E-1 to 1E-3	None
Wisconsin	Wis. Stat. § 775.05	Wis. Stat. § 974.07	Wis. Stat. §§ 938.31(3), 968.073 & 972.115	Wis. Stat. §§ 165.81(3), 757.54(2), 968.205, 978.08	Wis. Stat. § 175.50	Act No. 60 (2005)[1189]
Wyoming	None	Wy. Stat. §§ 7-12-302 to 7-12-315	None	None	None	None
U.S.	28 U. S.C. §§ 1495, 2513	18 U.S.C. § 3600	None	18 U.S.C. § 3600A	None	None

[1189] This Crim. Just. Reforms Package was enacted after its recommendation by Crim. Just. Reforms Task Force, which was created by the chairman of the State Assem. Judiciary Comm.

APPENDIX D

Jurisdictions Adopting Eyewitness Identification Reforms

JURISDICTIONS ADOPTING EYEWITNESS IDENTIFICATION REFORMS

Eyewitness identification reforms have been adopted in a variety of formats among the states. Some jurisdictions have drafted and adopted procedures specific for that state; others have adopted some form of model guidelines. Still others have appointed study groups to suggest reforms, while others have taken an experimental approach, authorizing pilot projects. The table below summarizes these reforms.

Juris.	Type of reform	Summary	Current status
CT	Div. of Crim. Just. and law enforcement community protocol	Issued by the Chief State's Att'y; incorporates double-blind procedures where practicable. Protocol is taught at comprehensive and ongoing training programs that are mandated for police and other law enforcement officers. Pub. Act 08-143 (2008) directs the Advisory Comm'n on Wrongful Convictions to monitor and evaluate the implementation of double-blind administration and report its findings to the Gen. Assem.	Issued September 23, 2005; recommendation to monitor and evaluate
FL	Sup. Ct. established Fla. Innocence Comm'n – Standards for State and Local Law Enforcement Agencies in Dealing With Photographic or Live Lineups in Eyewitness Identification	Interim Report issued June 2011 recommending that each law enforcement agency have a written policy regarding the conduct of lineups that conforms to the Commission's standards. Standards include composition of the lineup, instructions to witnesses, directions to the administrator not to provide feedback, taking of confidence statements immediately following the lineup view, documentation of the lineup procedure and training. No preference is expressed for sequential versus simultaneous lineups, blind administrators are preferred whenever possible and use of the folder system is also authorized for photo lineups.	Final rep. due by June 30, 2012
GA	House Study Comm. on Eyewitness Identification Procedures appointed by Gen. Assem.; policies and procedures voluntarily adopted by law enforcement	Rep. recommended enactment of a statute mandating that law enforcement agencies create written eyewitness identification policies, and passage of a resolution detailing procedures that should be incorporated into policies, including blind administration where possible; one suspect per lineup; confidence assessments; fillers should match description of perpetrator; specific instructions to the witness; and documentation of the result. Legislation introduced to implement these reforms failed, but all of the interested law enforcement agencies met with legislators and agreed that law enforcement should be given the opportunity to address the issue. The Ga. Pub. Safety Training Ctr. of the Ga. Police Academy developed a training program, which was approved by the Ga. Peace Officer Standards and Training Council for their member agencies in 2008.	Adopted Apr. 20, 2007; Rep. presented to Gen. Assem. Jan. 2008
IL	(1) Lineup procedures mandated (2) Pilot study of sequential lineup procedures authorized by State statute	(1) 725 Ill. Comp. Stat. 5/107A-5 lineups to be recorded; all photospreads and lineup photographs must be disclosed to defense during discovery; eyewitness must acknowledge that the suspect may not be in the lineup; the witness doesn't need to make an ID; instruction to the witness that the administrator may not know who the suspect is; suspects should not be presented in a way that makes them stand out (2) 725 Ill. Comp. Stat. 5/107A-10 Mandated a pilot study on sequential lineup procedures by Dep't of State Police, using 3 police depts., report due Sept. 1, 2005. Study results showed simultaneous lineups superior to sequential lineups; results disputed.	(1) Enacted Nov. 19, 2003; (2) Rep. released 2006

Juris.	Type of reform	Summary	Current status
MD	Adoption of written procedures that comply with U.S. Dep't of Just. standards	All law enforcement agencies to adopt procedures by Dec. 1, 2007; written policies must be filed with Dep't of State Police for public inspection	Enacted 2007
NJ	(1) Att'y Gen. Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (2) *State v. Delgado,* 902 A.2d 888, 897 (N.J. 2006); court rule on documenting eyewitness identification procedure (3) *State v. Romero,* 922 A.2d 693 (N.J. 2007); Sup. Ct. jury charge on reliability and believability of eyewitness testimony (4) *State v. Henderson*, (A-8-08)(062218) (N.J. 2011)	(1) Adopted procedures similar to 1999 Nat'l Inst. of Just. guidelines, with two significant additions: the blind administration of lineups, and a preference for the use of sequential lineups wherever possible. (2) Sup. Ct. mandated rule: as a condition to the admissibility of an out-of-court identification, officers must make a written record detailing the out-of-court identification procedure, including where it was conducted, the dialogue between the witness and the interlocutor, and the results. When feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared. Electronic recordation is advisable, although not mandated. "The making of a contemporaneous record is the preferred method. We suggest that law enforcement officers not delay in recording or summarizing the out-of-court identification procedures." (3) Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, although made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. In deciding what weight, if any, to give to the identification testimony, you may consider the following factors: [Model Jury Charge (Crim.), Identification: Out-of-Court Identification (2007) (New language underscored).] (4) Sup. Ct. found current test for reliability is inadequate; authorized suppression hearing when evid. of suggestiveness is shown that may lead to misidentification; also charged Crim. Prac. Comm. & Comm. on Model Crim. Jury Instructions to revise eyewitness id. charge, taking into account system & estimator variables	(1) Adopted 2001
NC	Eyewitness Identification Reform Act; failure to comply is admissible re suppression and misidentification	Adopted blind administration & sequential presentation; if blind admin. not feasible, use of computer program or folder system authorized or other neutral administrator approved by N.C. Crim. Just. & Educ. Standards Comm'n; specific instructions to eyewitness detailed; fillers to match description of perpetrator while ensuring suspect does not stand out; one suspect per lineup; confidence statement to be obtained; documentation of lineup procedures by video, audio or in writing (in order of preference)	Enacted 2007

Juris.	Type of reform	Summary	Current status
OH	Ohio Rev. Code § 2933.83	Blind administrator – one who does not know the identity of the suspect; Blinded administrator – may know the suspect's identity, but not which lineup member is being viewed (includes person administering a folder system of ID); Folder system defined as use of suspect photo, five fillers and four blank folders. Witness views each folder individually – for each folder, witness must state whether or not the picture is of the perpetrator, and the witness's confidence in that ID; second viewing in same order permitted; documentation of procedures, source of photos. Statute requires criminal justice entities and law enforcement agencies to adopt specific procedures with minimum requirements: blind/blinded administrator (unless impracticable); written record; witness to be informed that perpetrator may or may not be in lineup; administrator does not know who suspect is. Failure to comply can be used in suppression motion, as evidence in support of any claim of eyewitness misidentification, or included in jury instruction. Statute does not prevent agencies or entities from adopting other more effective scientifically acceptable procedures	Effective 7/6/10
RI	R.I.G.L. § 12-1-16 (2010); Task Force to Identify and Recommend Policies and Procedures to Improve the Accuracy of Eyewitness Identifications	Every LEA to have written eyewitness identification policy by June 1, 2011; blind administration unless not practicable, then use of blinded administrator; only one suspect per lineup; one witness viewing lineup at a time; suspect and five fillers for each lineup; fillers to match witnesses description of perpetrator; suspect should not unduly stand out; if sequential lineup, show all photos; specific instructions to witness; confidence statement after identification; no confirmatory feedback; LEAs should "strongly consider" use of sequential lineups; documentation of identification procedure; special rules for showups; Municipal Police Training Academy should develop a training curriculum and law enforcement officers to receive training by June 30, 2012; extend task force for 16 months to study sequential lineups more thoroughly	Guidelines issued Dec. 2010
TX	Tex. Code Crim. Proc. art. 38.20	Bill Blackwood Law Enforcement Mgmt. Inst. of Tex. to develop model policy & training materials for photo & live lineups based on best practices supported by credible research; all LEAs to adopt written eyewitness ID procedures consistent w/B. Blackwood Law Enforcement Mgmt. Inst. of Tex. model or based on research addressing selection of fillers, instructions to witnesses, documentation of the outcome, admin. to person w/language deficiency, & blind admin.; policy must be reviewed every other yr. & updated as appropriate; noncompliance doesn't necessarily bar admission, admissibility is controlled by Tex. R. Evid. compliance/noncompliance w/model possible to be admissible in court	Model policy must be adopted & disseminated (w/associated training materials) by the end of 2011; all LEAs must adopt policies by Sept. 1, 2012
VT	Eyewitness Identification and Custodial Interrogation Recording Study Comm. appointed by State legis.	Study focused on eyewitness identification procedures for conducting lineups and audio and audiovisual recording of custodial interrogations. Report noted that Vermont Policy Academy currently teaches enrollees Innocence Project recommendations to minimize the suggestibility of the lineup. Comm. recommendations included: preferred use of sequential photo lineups, so long as coupled with blind administration. Use of fillers matching perpetrator's description and not to cause suspect to stand out required. If live lineup is used, recommendation is to follow 1999 Nat'l Inst. of Just. guidelines [which do not mandate sequential procedures]	Comm. rep. released Dec. 14, 2007

Juris.	Type of reform	Summary	Current status
VA	(1) Written policies mandated by State statute. (2) Study of mistaken identification in criminal cases authorized by State legis.	(1) State police, local police departments and sheriff's offices required to establish written policies and procedures for in-person and photo lineups. (2) Va. State Crime Comm'n studied and made recommendations regarding lineup procedures. Sample directive produced: avoid suggestiveness, train personnel to establish uniformity and consistency; confer with Commonwealth's Att'y to determine best use of lineups and best instructions to witnesses; blind administration; one suspect per identification procedure; select fillers to match the witness' description of the offender; the suspect should not stand out; documentation of the procedure; use sequential procedure; certainty assessment to be obtained; second look-through permitted. Sample directive based in part on Va. Beach Police Dep't written policy, No. 10.08, "Eyewitness Identification Procedures" effective November 15, 2002.	(1) Enacted 2005 (2) Crime Comm'n rep. released in 2005.
WV	Eyewitness Identification Act. Lineup procedures established and task force to study blind administration and simultaneous versus sequential lineups	Established procedures and protocols for lineup administration, taking into account witness instructions; certainty assessments; documentation of the procedure and optional videotaping. Appointed a task force to develop guidelines for policies, procedures and training. Among topics to be considered are blind administration of lineups and simultaneous versus sequential lineups. Superintendent of State Police authorized to create educational materials and conduct training programs on how to conduct lineups in compliance with the act. Rep. due to legis. comm. 2008.	Enacted 2007
WI	Written policies for law enforcement agencies mandated by State statute	Each law enforcement agency (LEA) to adopt written policies designed to reduce mistakes; biennally review policies and consider what other jurisdictions have adopted. LEAs to consider the following specific policies: the person administering a lineup or photo array should not know identity of suspect; the use of sequential, not simultaneous showings; policies that would minimize influence of verbal or nonverbal reactions of person administering showing; and documentation of viewing procedure and results/outcome.	Enacted in 2005

APPENDIX E

Jurisdictions Adopting Electronic Recording of Custodial Interrogations

JURISDICTIONS ADOPTING ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

Approximately 650 police departments, county sheriffs and other local law enforcement agencies nationwide have adopted electronic recording of custodial interrogations in some form.[1190] In addition, 18 states and the District of Columbia require electronic recordings of custodial interrogations for all law enforcement entities within their jurisdiction, either by statute or Supreme Court ruling or rule. Two other states have minimal recording requirements, but not a statewide mandate.

	AK	DC	IL	IN	IA	ME	MD	MA	MN	MO	MT	NE	NH	NJ	NM	NY	NC	OH	OR	TX	UT	WI
Legislative or Judicial mandate	J	L	L	J [1191]	J [1192]	L [1193]	L	J	J	L	L	L	J [1194]	J	L	[1195]	L	L	L	L	[1196]	L
General Requirements:																						
In a place of detention[1197]	X	X [1198]	X	X				X	X		X	X		X	X	X	X	X	X		X	J [1199]
At other locations, if feasible									X												X	

[1190] Thomas P. Sullivan, chart dated 5/18/11, entitled *Departments That Currently Record a Majority of Custodial Interrogations.*

[1191] Ind. R. Evid. 617.

[1192] Sup. Ct. held that recording should be encouraged.

[1193] Law enforcement agencies to develop policies.

[1194] No due process right to have custodial interrogations recorded; however, if they are recorded, they must be recorded in their entirety, but do not have to include *Miranda* warnings or waiver thereof

[1195] The following N.Y. law enforcement agencies joined together to adopt statewide protocols for the video recording of custodial interrogations in Dec. 2010: the N.Y. Dist. Att's Ass'n, N.Y. Sheriffs' Ass'n, N.Y. Ass'n of Chiefs of Police, N.Y.C. Police Dep't & N.Y. State Police. "New York State Guidelines for Recording Custodial Interrogations of Suspects" can be found at http://daasny.org/most%20recent%20Video%20Recording%20Interrogation%20Procedures%20-%20Custodial%20-%20FINAL%20-12-8-10.pdf

[1196] Office of Att'y Gen. Policy.

[1197] Generally defined as a jail, police station, station house, or other building owned or operated by a law enforcement agency or other place where persons are or may be held in detention in connection with crim. charges. The statutory mandate to record custodial interrogations in N.M. doesn't "apply within a correctional facility" but does apply to police stations.

[1198] Only in Metropolitan Police Dep't interview rooms equipped with elec. recording equipment

[1199] "All custodial recordings of juveniles . . . shall be electronically recorded . . . when questioning occurs at a place of detention." *In re Jerrell C.J.*, 699 N.W.2d 110, 123 (Wis. 2005).

	AK	DC	IL	IN	IA	ME	MD	MA	MN	MO	MT	NE	NH	NJ	NM	NY	NC	OH	OR	TX	UT	WI
Custodial interrogation, from Miranda warnings to conclusion		X		X			X [1200]		X	X	X	X [1201]			X		X	X		X [1202]	X	
Custodial interrogation, a reasonable person considers himself to be in custody				X												X		X				X
Consent of suspect not required			X				X			X						X			X			X
Limited to particular crimes[1203]		X	H	X		X	X			X	X	X		X	X	X	H	X	X			X
Standard Exceptions:																						
Operator error				X												X			X		X	X
Equipment failure	X			X						X	X	X			X	X	X		X		X	X
Equipment unavailable										X		X			X	X					X	
Suspect refuses to speak	X	X	X	X						X	X	X		X	X	X	X		X		X	X
Statements in open court proceedings			X												X		X		X	X		
Spontaneous statement not made in response to a question			X	X						X	X			X	X	X	X		X			X

[1200] Custodial interrogation to retain its judicially determined meaning.
[1201] Custodial interrogation to retain its judicially determined meaning.
[1202] Oral or sign language statements that are the result of a custodial interrogation must be electronically recorded; no mandate to record the interrogation itself.
[1203] Generally only felonies/violent crimes. H=homicides.

	AK	DC	IL	IN	IA	ME	MD	MA	MN	MO	MT	NE	NH	NJ	NM	NY	NC	OH	OR	TX	UT	WI
Response to questioning routinely asked during processing or booking			X	X						X	X			X		X	X		X		X	X
Out of state interrogations			X	X						X	X	X		X	X		X		X	X		
Interrogators unaware/do not reasonably believe that person suspected of a crime that mandates recording			X	X								X		X		X	X		X		X	X
Recording not feasible/ practicable	X		X					X				X		X		X						
Substantial exigent circumstances				X						X	X								X		X	X
Other exceptions			X							X	X			X	X	X	X		X	X		
Consequences for failure to record:																		[1204]				
Statement automatically inadmissible	X			X					X [1205]											X		
Rebuttable presumption of inadmissibility																	X					
Cautionary jury instruction								X			X	X		X			X		X			X

[1204] No consequences for failure to record; statute specifically states that failure to record does not create private cause of action against the law enforcement officer; shall not provide a basis for exclusion or suppression of statement.
[1205] Exclusion is mandatory if "substantial" violation; otherwise optional.

	AK	DC	IL	IN	IA	ME	MD	MA	MN	MO	MT	NE	NH	NJ	NM	NY	NC	OH	OR	TX	UT	WI
Withholding of state funding										X												
Rebuttable presumption of involuntariness		X															X					
Records retention:																						
Appeals exhausted			X								X						X [1206]	X	X	X	X	
Statute of limitations on underlying offenses has run			X								X [1207]							X [1208]	X	X	X	

[1206] Records retained for one year after appeals are exhausted.

[1207] If a custodial interrogation is recorded and crim. proceedings are not brought, recording must be retained until all applicable state and fed. statutes of limitation have run.

[1208] Upon defendant's motion, a ct. can order that a copy of the recording be preserved for any period beyond the expiration of all appeals, postconviction relief proceedings and *habeas corpus* proceedings.

APPENDIX F

Jurisdictions with Postconviction DNA Testing Statutes

JURISDICTIONS WITH POSTCONVICTION DNA TESTING STATUTES

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
AL	Evidence wasn't tested for trial; results would demonstrate factual innocence; issue wasn't resolved by prior DNA testing. There must be a reasonable possibility that testing will produce exculpatory evidence to exonerate. There must be prima facie evidence that id. of perpetrator was at issue.	By Aug. 1, 2010; by one year after final judgment if not appealed; w/in one yr. of deadline after time for filing appeal; extended up to 6 mos. of discovery/dismissal/ denial/newly discovered facts[1209]	Conviction of capital offense & serving term of imprisonment or awaiting execution	Must be generally accepted in forensic community & results can be included in Nat'l DNA Index Sys.; upon receipt of motion, state must preserve remaining biological material it possesses; Dep't of Forensic Scis. or mutually selected lab tests (ct. selects if party can't agree) but lab must be nationally accredited. Unless indigent, the applicant pays for test.
AK	Evidence wasn't tested before or requested test is substantially more probative than prior test or for best interests of justice; defense has theory to establish innocence & DNA test would be new, material evidence in support of that; id. of perpetrator was disputed at trial; DNA test would raise reasonable probability that applicant didn't commit offense; applicant couldn't have admitted guilt under oath in official proceeding, but this can be waived & a guilty or *nolo contendere* plea doesn't count as this admission of disqualifying admission of guilt. (Prosecutor & convict can stipulate to test & bypass the statutory provisions)	Rebuttably timely if within 3 yrs. of conviction; rebuttably untimely thereafter	Conviction of felonious offense against a person & still under sentence (including probation & parole)	Method is scientifically sound & consistent with accepted forensic practice; test is at state expense by lab operated or approved by Dep't of Pub. Safety; add'l test requested by applicant & ordered by court is at applicant's cost but must be done by accredited lab
AZ	The court must order testing if it finds reasonable probability that defendant would not have been prosecuted or convicted had exculpatory test results been obtained; the evidence was not tested before, or was not tested by the same method and current test may resolve a doubtful issue. The court may order testing if it finds a reasonable probability that verdict or sentence would have been more favorable if DNA had been tested for trial or that test will produce exculpatory evidence, and the evidence was not tested before, or was not tested by the same method and current test may resolve a doubtful issue. Relief denied if case is on direct appeal or on post-trial motion, is finally adjudicated on merits or in previous collateral proceeding, or testing was waived.	None	Conviction and sentence for felony	Court may determine responsibility for payment. The court is directed to designate the lab, which must meet the standards of the DNA Advisory Bd. The court may make orders relating to preservation evidence and production of lab reports and may impose sanctions for knowing destruction of evidence.

[1209] Ala. R. Crim. P. 32.2(c).

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
AR	*Habeas corpus* can be sought if scientific evidence unavailable at trial establishes actual innocence or due diligence could not have discovered predicate for the claim & there is clear & convincing evidence that no reasonable fact finder would have found guilt. If evidence not tested before, there was no valid waiver or knowing failure to request in prior postconviction motion. If tested before, new testing method is more probative. Testing is consistent w/accepted forensic practices. Theory consistent w/ affirmative defense at trial & would establish actual innocence. ID was at issue. Defendant by preponderance can show that test might produce new material evidence supporting defense theory & raise reasonable probability of innocence. Relief denied if direct appeal is available.	Rebuttably timely if within 36 mos. of conviction	Conviction for any crime	Unless court approves another qualified lab, State Crime Lab does the test. Court may order defendant to pay for test.
CA	Identity was or should have been at issue; evidence is material; reasonable probability that defendant would have received a more favorable verdict or sentence if tested; test is generally accepted by scientific community; material has not been tested or new test is more probative of identity and has a reasonable probability of contradicting prior test result; motion is not filed solely for delay.	End of current term of imprisonment	Conviction for felony Right to test not waivable	Tested at lab mutually agreed with prosecutor. If parties disagree, court picks lab accredited by Lab Accreditation Board of the American Society of Crime Laboratory Directors. (ASCLD/LAB). Ct. pays.
CO	A preponderance of evidence that favorable result will demonstrate actual innocence; conclusive results were not available prior to the conviction; failure to test earlier due to unavailability of test or justifiable excuse, ineffective assistance, or excusable neglect.	End of imprisonment or parole	Conviction of felony	Court to order preservation of evidence upon grant of hearing. Test at law enforcement facility. Defendant pays: if indigent, public defender or assigned counsel may
CT	Reasonable probability that defendant would not have been prosecuted or convicted or the sentence would have been reduced if exculpatory results had been obtained; evidence not tested before or testing may resolve an issue; testing petition filed to demonstrate innocence and not for delay.	End of current term of imprisonment	Incarceration for crime	Court may order state or defendant to pay for test but cannot deny test for indigence.
DE	Evidence secured in relation to trial; no prior test because technology was unavailable; identity at issue; can produce new, noncumulative evidence materially relevant to actual innocence; test uses a generally accepted scientific method that satisfies evidentiary criteria. Relief denied if direct appeal is available.	3 yrs. after final judgment of conviction	Conviction of crime	Court determines responsibility for payment, unless the defendant is indigent.
DC	Evidence not tested before because test was unavailable or reasonable probability of more probative result than prior test, or is new evidence that was not known or could not have been known by the defendant or could not be produced at the time of trial. Reasonable probability that testing will produce non-cumulative evidence that would help to establish actual innocence.	None	Convicted or adjudicated delinquent for crime of violence	Prosecution must preserve biological material upon notice of application. Defendant pays for test, unless indigent.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
FL	Defendants sentenced after trial: reasonable probability of acquittal or lesser sentence if DNA evidence had been admitted at trial; no prior DNA test or results were inconclusive and subsequent testing techniques would likely produce definitive result; identity is genuinely disputed. Defendants sentenced after guilty or nolo plea: must also show that facts underlying the petition were unknown to defendant at the time of the plea and could not have been ascertained by due diligence or the physical evidence was not disclosed to defense by state prior to entry of plea.	None	Sentenced for felony	Unless indigent, defendant pays for test. Test done by Dep't of Law Enforcement or its designee. Gov't must preserve the evidence requested by the petition.
GA	Evidence not tested because defendant not aware of it prior to trial or technology unavailable; ID was/should have been a significant issue; if previously tested, test reasonably more discriminating for ID; test has scientific validity; evidence material to ID; test results would have raised reasonable probability of acquittal; motion not filed solely for delay or duplicative of a prior application.	30 days from entry of judgment	Convicted of serious violent felony	Upon motion, court orders state to preserve evidence containing biological material during pendency; ct. picks method of testing, who pays, orders Ga. Bureau of Investigation to test or other lab
HI	Reasonable probability that defendant would not have been prosecuted or convicted on favorable test results, even if the defendant later pled guilty or no contest; identity was at or should have been at issue; evidence was not tested before or prior test did not resolve issue that new analysis can; application is not filed solely for delay; reasonable probability that sentence or verdict would be more lenient. Successive motion must raise a new ground for relief, but court may hear a successive petition if interests of justice so require.	None	Convicted of and sentenced for a crime or acquitted on grounds of mental or physical disease	If motion is to be heard, court orders preservation of evidence that could be tested for DNA to be preserved pending outcome of proceeding. Tested at independent lab that must meet federal standards; ct. selects lab if parties cannot agree. Court can order the defendant, DNA registry special fund or both to pay, but DNA registry special fund pays for mandated tests.
ID	Identity was at issue; testing can produce new, noncumulative evidence of likely innocence. If material was not tested, technology for testing was not available at time of trial.	One year after conviction	Convicted of a crime	Defendant pays, unless indigent, then test paid for and conducted by state police forensic services.
IL	Material was not tested or a can be tested by a method not available at the time of trial that provides a reasonable likelihood of more probative results; identity was at issue; testing can produce new, noncumulative evidence materially relevant to innocence; scientific method is generally accepted within science community.		Convicted of a crime	

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
IN	Evidence is material to identity; sample was not tested before or the test is reasonably more discriminating or has a reasonable probability of contradicting prior test results; reasonably probable that defendant would not have been prosecuted or convicted or would have received a less severe sentence if exculpatory results had been obtained.		Convicted and sentenced for murder or felony of Class A, B, or C	Court orders method and responsibility for payment. Court determines the testing procedures and selects lab that must meet nationally recognized quality assurance and proficiency testing standards applicable to forensic DNA analysis. Upon filing, court directed to order preservation of evidence pending outcome.
IA	Identity was significant issue; reasonable probability that defendant would not have been convicted if DNA profile had been available at time of conviction. The evidence must be material and not merely cumulative to that in the trial record.		Convicted of felony	Test method within guidelines generally accepted within scientific community. Defendant pays all costs, including cost of appointed attorney, if culpability is conclusively determined.
KS	Testing may produce noncumulative, exculpatory evidence relevant to claim of wrongful conviction or sentence; material was not tested or new testing techniques provide a reasonable likelihood of more accurate and probative results.	None	In custody after conviction for murder or rape	If defendant is not indigent, court may make state or defendant pay; upon notice of filing. Prosecutor must secure remaining biological material pending outcome.
KY	Court directed to order testing if reasonable probability that defendant would not have been prosecuted or convicted if exculpated by testing and evidence was not tested before or requested test can resolve issue unresolved by prior test. Court may order testing if defendant would have received a more favorable verdict or lesser sentence if testing result had been available at trial and evidence was not tested before or requested test can resolve issue unresolved by prior test.	None	Convicted of and sentenced to death for capital offense	Court orders state to preserve all evidence in the state's possession or control that can be tested pending the outcome. Court can order payment for testing. Defendant pays if outcome will only lessen sentence or improve verdict.
LA	Articulable doubt based on competent evidence, whether or not introduced at trial, as to guilt; reasonable likelihood that the testing will establish innocence. Relief not granted solely because there is evidence available for testing but testing was not available or was not done at time of the conviction.	Aug. 31, 2014; thereafter either 1 or 2 yrs. after final judgment	Convicted of felony	Lab mutually agreed to by both parties; if disagree, ct. designates lab accredited by ASCLD/LAB. Application bars destruction until final resolution by court. DNA profile sent to state police for inclusion in the state’s database; defendant may seek removal. Special fund for indigent testing.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
ME	*Prima facie* evidence that the evidence was not previously tested or can be tested by a technology that was unavailable at time of conviction; identity was at issue; evidence or additional information obtainable through new technology is material to the defendant's guilt.	2 yrs. after conviction or availability of new technology	Convicted and sentenced for crime with potential imprisonment of at least 1 yr. and in prison, on parole or under a sentencing alternative	Court orders preservation of evidence pending proceeding. State police crime lab pays for test of indigent defendant.
MD	Reasonable probability that testing may scientifically produce exculpatory or mitigating evidence relevant to claim of wrongful conviction or sentencing; test method is generally accepted within the scientific community.		Convicted of murder, manslaughter, rape, or sex offense	If parties cannot agree on lab, ct. may approve any lab accredited by ASCLD/LAB or Nat'l Forensic Science Technology Center (NFSTC). If results favor defendant, state pays; otherwise, defendant pays. (Procedures for preservation & disposition of evidence included.)
MI	Prima facie proof that evidence is material to identity; clear and convincing evidence that the material was not tested before or can be tested by technology that was unavailable when convicted and identity was at issue.	By Jan. 1, 2012 if convicted of felony before Jan. 8, 2001 and in prison; if convicted after that date, no time limit	Convicted of a felony	Court approves lab. State pays for test of indigent defendant.
MN	Evidence not tested because technology was unavailable or testing was not available as evidence; identity was at issue; testing can scientifically produce new, noncumulative evidence materially relevant to actual innocence; scientific method is generally accepted within the scientific community.	2 yrs. after final conviction or sentence (with exceptions)	Convicted of a crime	Governmental entities must retain any biological evidence relating to the identity of a convicted defendant until end of sentence unless court approves earlier disposition.
MS	Biological evidence not tested or reasonable likelihood that additional testing will yield a more probative result; testing will show reasonable probability that defendant would not have been convicted or would have received lesser sentence if favorable results were obtained at time of prosecution. Grounds apply despite plea of guilty or nolo, confession to crime or admission of guilt.	While serving eligible penalty; only first five yrs. of registration as sex offender	Sentenced by court of record to incarceration, civil commitment, parole, probation or registration as a sex offender	Tested by facility mutually agreed upon and approved by the court or designated by the court if parties cannot agree. State pays for test by state or county crime lab if defendant is indigent. Court can order either state or defendant to pay for test at private lab.
MO	Evidence was not tested previously because technology was not reasonably available to defendant at time of trial; defendant was not aware of evidence at time of trial or evidence was otherwise unavailable; identity was at issue in the trial; reasonable probability that defendant would not have been convicted if exculpatory test results had been obtained.	End of custody	In custody of dep't of corrections for a crime	Tested by facility mutually agreed upon and approved by the court; or designated by the court if parties cannot agree.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
MT	Identity was or should have been at issue; prima facie case that evidence is material to identity; evidence was not previously tested or results of another test would be reasonably more discriminating and probative or have reasonable probability of contradicting prior test results.	End of incarceration for a felony conviction	Convicted of felony	Tested by facility agreed upon by the parties & approved by the court; or designated by the court if parties cannot agree. State pays if defendant cannot afford test.
NE	Evidence was not previously tested or can be retested with more current techniques that provide reasonable likelihood of more accurate and probative results; testing was not effectively available at time of trial and can produce noncumulative, exculpatory evidence.	None	In custody pursuant to court judgment	Prosecution must assure preservation pending outcome of proceeding. Tested by lab that is accredited by ASCLD/LAB or NFSTC or by any other national accrediting body or public agency w/substantially equivalent or more comprehensive requirements; if indigent, state pays for test.
NV	Reasonable possibility that defendant would not have been prosecuted or convicted if exculpatory test results had been obtained; evidence was not tested before or method of analysis may resolve unresolved issue.		Convicted of crime and under death sentence	Court orders preservation of biological evidence during pendency of proceeding. Court selects lab operated by state or a political subdivision, when possible, that satisfy federal standards, Dep't. of Corrections pays for test.
NH	Clear and convincing evidence that: exculpatory results will constitute new, noncumulative evidence that will establish that defendant was misidentified as the perpetrator; evidence was not tested before or the technology was unavailable at time of trial; if tested before, requested test would be more discriminating and probative on identity issue and has a reasonable probability of contradicting prior test results; testing method is generally accepted within the scientific community; petition is timely and not unreasonably delayed.	None	In custody pursuant to judgment	Court identifies evidence to be tested and the technology to be used. If possible, state police forensic lab performs test; otherwise, court designates a lab accredited by the ASCLD/LAB unless parties agree on the lab. Defendant pays for the test, but state pays for indigent defendant.
NJ	Identity was significant issue; reasonable probability that favorable test result would constitute grounds for granting a new trial based upon newly discovered evidence; evidence was not tested before or requested test is reasonably more discriminating and probative of identity or has a reasonable probability of contradicting prior test results; testing method is generally accepted within the scientific community; application is not made solely for delay.	None	Serving term of imprisonment for a criminal conviction	Parties may agree on lab if accredited by ASCLD/LAB or a lab with certificate of compliance with federal standards from NFSTC; otherwise, State Police Forensic Sci. Lab performs test. Defendant pays for test.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
NM	Reasonable probability defendant would not have been convicted if exculpatory results were obtained before; was not tested before, or test was not type requested or was incorrectly interpreted; identity was at issue.		Convicted of a felony	Court orders preservation of evidence pending proceeding. Court orders who pays for test. Lab must meet minimum standards of national DNA index system.
NY	Reasonable probability that verdict would have been more favorable to defendant if results of requested test had been admitted at trial.	None		
NC	If material was not tested before, reasonable probability that verdict would have been more favorable if test had been conducted; if tested before, requested test is significantly more accurate and probative of identity or has a reasonable probability of contradicting prior test results.			State pays for test if defendant is indigent. Parties may agree on lab approved by the State Bureau of Investigation; if parties cannot agree, court designates the lab.
ND	Evidence not tested because technology for testing was not available or testing was not available as evidence at time of the trial; identity was at issue; testing has scientific potential to produce new, noncumulative evidence materially relevant to actual innocence; testing requested employs method generally accepted within the scientific community.	None	Convicted of crime	
OH	Evidence not tested at trial and exclusionary result would most likely have changed the outcome of the trial; testing was not generally accepted, testing results were not admissible or testing was not available at time of trial; test at trial was not definitive, and exclusionary result with the other evidence would have most likely changed the outcome of the trial; identity was at issue.	Posthumous applications aren't permitted	Convicted of a felony & sentenced to prison or death, paroled or on probation, under post-release control/released from prison and under community control sanction regarding that felony or sentenced to community control sanction; required to register for sexually or child-victim oriented offense; cannot have pled guilty or no contest	Court may order comparison of test results from an unidentified person other than defendant against CODIS. Court selects lab approved by attorney general. Test results are public record.
OK	Clear and convincing proof that no reasonable jury would have found defendant guilty beyond reasonable doubt in light of new evidence.	None	Indigent, and imprisoned for a felony. Indigent defense system determines the cases to test.	Must ask State Bureau of Investigation or city to test before using other professional services. Testing is paid for by Forensic Testing Revolving Fund.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
OR	*Prima facie* showing that exculpatory test result would, establish actual innocence or mandatory reduction in sentence; reasonable possibility of exculpatory results; motion timely and not filed for delay; identity was at issue (or should've been at issue if mentally retarded)		Convicted and incarcerated for aggravated murder or person felony in Dep't of Corrections inst.; not in custody but convicted of aggravated murder, murder or sex crime	Dep't of State Police tests unless parties agree otherwise. Defendant pays for test unless defendant is indigent.
PA	Exculpatory result would establish *prima facie* case of actual innocence of offense or of conduct that would require vacation of death sentence or would establish a mitigating circumstance; identity was at issue; if evidence discovered prior to conviction but not tested because technology was available or if verdict was rendered before 1995 and testing was not sought, or testing was requested and defendant sought funds for testing for indigent defendant, but funds were denied despite indigency; exculpatory results would establish actual innocence; motion timely and not made for delay.	1 yr. post-final judgment if state interfered with claim or facts are newly discovered. 60 days if claim is based on constitutional right newly recognized and applied retroactively.	Convicted of criminal offense and serving term of imprisonment or awaiting execution.	Tested by facility mutually agreed upon and approved by the court; or designated by the court if parties cannot agree, but if defendant is indigent, State Police tests or selects lab. State pays for test of indigent defendant., State and court directed to take steps reasonably necessary to preserve biological material pending completion of proceedings.
RI	Testing required on reasonable probability that defendant would not have been prosecuted or convicted if exculpatory test results had been obtained; evidence was not tested before or requested testing can resolve unresolved issue; petition not filed solely for delay. Testing authorized on reasonable probability that testing results would have altered the verdict or reduced the sentence if they had been available; petition not filed solely for delay.	None	Convicted, sentenced, and serving actual term of imprisonment and incarceration for crime	State pays costs unless defendant has present ability to pay. Dep't of Health performs test unless good cause is shown.
SC	Evidence is material to identity; exculpatory result would be new evidence that will probably change the result of the conviction if a new trial is granted and is not merely cumulative or impeaching; evidence was not tested before or requested test will be substantially more probative; application is not filed solely for delay.	During incarceration (if pled not guilty); during incarceration but within 7 yrs. from sentencing if pled guilty or nolo contendere	Convicted of any of 24 specified offenses	State pays for test if defendant is indigent.
SD	Evidence was not tested before and defendant did not validly waive right to test or knowingly fail to request in prior petition for relief, or requested test uses method that is substantially more probative; defendant had good cause for failure to test at trial; test is reasonable in scope and uses sound and accepted methods; defendant identifies defense consistent with affirmative defense presented at trial or would establish actual innocence; identity was at issue at trial.	End of sentence	Convicted of felony and sentenced to imprisonment or death	Prosecutors must preserve evidence in their custody pending completion of proceedings. Div. of Crim. Investigation performs test, unless court orders testing by another qualified lab.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
TN	Mandatory testing on reasonable probability that defendant would not have been prosecuted or convicted if exculpatory test results had been obtained. Discretionary testing on reasonable probability that the verdict or sentence would have been more favorable if results had been available before. Evidence not tested or was not tested under requested method that can resolve unresolved issue from prior analysis; petition not filed to delay.	None	Convicted of and sentenced for murder, rape, their attempts and any other offense as the court directs	Court may order defendant to pay if testing is ordered to reduce verdict or sentence. If payment is made by state, it is funded from appropriations for indigent defense. Evidence must be preserved pending the proceeding. Court selects lab that meet federal standards.
TX	Evidence not tested before because test was unavailable or not technologically capable of providing probative results or testing was not done through no fault of the defendant for reasons such that interests of justice demand testing; if tested before, reasonable probability of more accurate and probative result than prior test; preponderance of evidence that defendant would not have been convicted if exculpatory test results had been obtained; identity was at issue (even upon guilty or nolo contendere plea or an admission). Application is not filed to unreasonably delay.		Convicted of a crime	Except for good cause, state does not pay for test if tested by an accredited lab of the defendant's choosing (rather than by Dep't of Pub. Safety or a lab under contract with DPS).
UT	Preponderance that person is eligible for relief; theory of defense not inconsistent with those asserted at trial; evidence was not tested previously or new test can resolve unresolved issue; proposed testing is generally accepted as valid or is otherwise admissible and can produce new, noncumulative evidence of factual innocence. Relief denied if testing was available at time of trial and defendant did not request testing or present DNA evidence for tactical reasons.	None	Convicted of felony	By getting test, person waives statute of limitations in all jurisdictions to any felony offense identified by database comparison. State Crime Lab performs test unless it has a conflict or lacks capability. If defendant is in prison and indigent, state pays for test; court can order defendant to pay costs if results are unfavorable. Unfavorable (but not inconclusive) result is reported to Board of Pardons and Parole.
VT	Reasonable probability that defendant would not have been convicted or would have received lesser sentence if results of requested testing had been available at original prosecution; evidence was not tested before or was tested but additional test is reasonably likely to be significantly more probative. Test results can establish integrity of the evidence. Relief denied if record conclusively establishes that defendant is entitled to no relief or petition was not made to demonstrate innocence or appropriateness of lesser sentence and will unreasonably delay proceedings.	14 felonies: None. Other felonies: within 30 mos. after final conviction. May be extended for good cause or by consent of parties	Convicted of felony	Tested by facility agreed upon by the parties and approved by the court; or designated by the court if parties cannot agree. State pays for testing by the state crime lab or at a private lab if state lab lacks capability to perform the test, otherwise court can order either or both parties to pay for test by private lab.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
VA	Clear and convincing proof that: evidence was not known when conviction became final or was not tested because testing was unavailable at Dep't of Forensic Sci.; testing is materially relevant, noncumulative, necessary, and may prove actual innocence; testing involves scientific method employed by DFS; defendant has not unreasonably delayed filing the petition after evidence or test became available at DFS.	None	Convicted of felony	Dep't of Forensic Sci. performs test.
WA	Preponderance of evidence that evidence would demonstrate innocence; court ruling that testing did not meet acceptable scientific standards or testing technology of prior test was not sufficiently developed or requested testing would be significantly more accurate than prior testing or would provide significant new information; DNA evidence is material to identity of perpetrator or accomplice or to sentence enhancement.	None	Convicted of felony and serving term of imprisonment	Court may order preservation of evidence. State patrol crime lab performs test.
WV	Identity was or should have been significant issue; *prima facie* showing that evidence for testing is material to identity, crime, special circumstance, or sentence enhancement; testing results would raise reasonable probability that convicted person's verdict or sentence would have been more favorable had results had been available at time of conviction; evidence was not previously tested, or was tested previously, but requested DNA test is reasonably more discriminating and probative of identity or has reasonable probability of contradicting prior test results; testing method is generally accepted within scientific community; evidence or requested method of testing were unavailable to defendant at trial or court found ineffective assistance of counsel at trial; motion not made solely for delay. Test results can establish integrity of the evidence. Right to testing is not waivable.	None	Convicted of felony and serving term of imprisonment	Test performed by forensic lab in state. If testing requested by state or if defendant is indigent, state pays for the test
WI	Claim of innocence; no prior test or if tested, requested test uses scientific technique that was unavailable or was not used at time of prior testing and provides reasonable likelihood of more accurate and probative results. Mandatory testing on showing of reasonable probability that defendant would not have been found to have committed the crime. Discretionary testing on showing that outcome of the proceedings would have been more favorable, had exculpatory test results been available.	None	Convicted of crime, adjudicated delinquent or found not guilty by reason of mental disease or defect	Upon receipt of motion, prosecutor must ensure that the biological material is preserved pending completion of proceedings. Court may order state crime labs to test or send the material elsewhere. State lab may delegate testing to another facility upon approval of prosecutor and defendant. Court may order defendant or state crime labs to pay for testing, unless defendant is indigent.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
WY	*Prima facie* showing that evidence is material to identity, crime, sentence enhancement or aggravating factor in capital case; test employs scientific method sufficiently reliable to be admissible; defense theory can be presented consistent with that asserted at trial and supported by the DNA evidence; evidence was not tested before or test result was inconclusive, new test can resolve unresolved issue or is significantly more accurate and probative; testing can produce new, noncumulative evidence that will establish actual innocence, or in capital case, actual innocence of aggravating circumstance, or mitigating circumstance. For guilty or nolo contendere plea cases from Jan. 1, 2000, relief is denied if the defendant did not request testing or present DNA evidence for strategic or tactical reasons or as result of a lack of due diligence, unless failure to exercise due diligence is result of ineffective assistance of counsel. (For convictions before 2000, showing of due diligence is not required.). Right to testing is not waivable.		Convicted of felony	Upon filing of motion, court directed to order state to preserve evidence pending outcome. State crime lab tests unless it has a conflict of interest or lacks capability; if another lab tests, it must comply with federal standards and be accredited by ASCLD/LAB. Defendant pays for test unless he is imprisoned, needy, and the testing supports the motion.
US	Claim of actual innocence; evidence was admitted at federal death sentencing hearing and exoneration would entitle defendant to a reduced sentence or new sentencing hearing; for state conviction, no adequate remedy under state law to permit testing and defendant has exhausted all remedies under state law; evidence was not previously tested and defendant did not validly waive right to testing or knowingly fail to request testing, or evidence was tested but requested test uses new, substantially more probative method; requested test is reasonable in scope and uses sound and accepted forensic practice; theory of defense is identified that is not inconsistent with affirmative defense presented at trial and would establish actual innocence; identity was at issue at trial. Testing may produce new material evidence that would support the theory of defense and raise reasonable probability that the defendant did not commit the offense; motion is timely. Relief denied if motion has same factual basis as previously denied motion or clear and convincing evidence that motion is filed solely to delay or harass.	36 mos. after conviction (with exceptions)	Under sentence of imprisonment or death pursuant to conviction for federal offense	Court required to direct government to preserve specific evidence relating to motion and direct FBI or another qualified lab to perform test. Gov't pays for test of indigent defendant.

APPENDIX G

Jurisdictions with Statutes Requiring Preservation of Evidence

JURISDICTIONS WITH STATUTES REQUIRING PRESERVATION OF EVIDENCE

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
AK	Homicide, some 1st degree sex offenses (biological if convicted)	Obtained in investigation or prosecution (only prosecution if convicted)	Shorter of time to solve or 50 yrs.; if convicted, while in custody of Dep't of Corrections or registered as a sex offender	Don't need to preserve if physical character makes it impractical; yes, w/notice to convict, attorney of record, public defender agency, district attorney, no other law requires preservation & it doesn't have significant value for biological material	Dep't of Law, Dep't of Pub. Safety, court system or municipal law enforcement agency	Appropriate remedies ordered by court
AZ	Felony sex offense or homicide (all identified biological evidence	Secured in connection with a crime	Incarceration or completion of supervised release (55 yrs. for cold case)	Bulk evidence; w/approval from county attorney or attorney general & notice to victim; yes, w/agreement of county attorney or AG after direct appeal & 1st post conviction relief w/written notice to defendant, counsel of record & victim if no other law requires preservation	Appropriate governmental entity	None
AR	Sex or violent offense (physical evidence)	Conviction after trial	Permanent for violence, 25 yrs. for sex & 7 yrs. for felony collecting genetic profile	Yes, w/notice if no forensic value & must be returned to owner or is too big (also allowed if defendant preserves)	Law enforcement agency	Class A misdemeanor
CA	Crime (biological material) Att'y Gen. opinion exempts misdemeanor	When jailed	Incarceration	Yes, w/unwaivable (even as part of plea deal) notice to incarcerated felon, counsel of record, public defender, dist. att'y & Att'y Gen.	Appropriate governmental entity	None
CO	Class 1 felony or sex offense w/possible indeterminate sentence (reasonable & relevant evidence that may contain DNA)	Collected in relation to conviction (if no charges, collected for investigation during statute of limitations)	Life of defendant	Only need to save part if too big; yes, w/notice to district attorney & defendant's attorney of record	Accredited lab in Colo. or law enforcement agency that collected evidence	
CT	Capital felony, crime (biological evidence)	Conviction or court order	Incarceration	Yes, w/notice & hearing if Sup. Ct. decided appeal & defendant doesn't want it preserved or for good cause	Police, their agents & any person to whom biological evidence was transferred	None

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
DC	Crime of violence (biological material)	Conviction or adjudication as a delinquent	Longer of 5 yrs. or while in custody	Yes, after 5 yrs. if notice given to anyone still incarcerated & counsel of record or Pub. Defender Serv. (if it must be returned to owner, no need to preserve; if too big, keep enough to test)	Law enforcement agencies	Fine of $100,000, jail up to 5 yrs. or both
FL	Crime for which post-sentencing DNA test may be requested (physical evidence)	Collection	Non-death penalty: term of sentence expired & no other rule or law requires retention; death penalty: 60 days after execution	No	Governmental entities in possession	None
GA	Crime (physical evidence that contains biological material)	Collection	Death penalty: execution; serious violent felony & sex offenses: 10 yrs. after judgment; other felonies & misdemeanors: purge after trial	No, but direct biological evidence for drug & alcohol testing doesn't need preserved	Governmental entities in possession	None
HI	Any conviction (biological evidence that can be tested for DNA)	Conviction (attorney general must establish procedures & protocols to uniformly collect & preserve)	Later of exhausted appeals or completed sentence including parole & probation		Police, prosecutor, lab or court	None
IL	Sex, homicide & their attempts (physical evidence likely to be forensic)	Chain of custody (documents must be kept along w/evidence). Before or after trial in sex offenses; in prosecutions for homicides or attempts	Death: always; otherwise--complete sentence including supervised release or 7 yrs. for felony collecting genetic profile	Yes, w/notice if no forensic value, is too big or defendant died & no reasonable basis to save it; also if ct. orders & defendant preserves it	Law enforcement agency, its agent or clerk of cir. ct.	None
IA	Criminal actions (DNA samples & evidence that could be tested for DNA)		3 yrs. beyond limitations for commencement of criminal action		Criminal or juvenile justice agency	Doesn't create cause of action for damages or presumption of spoliation if evidence is unavailable to test

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
KY	Criminal case (any biological material)	When gathered	Incarceration	Pretrial: if prosecutor won't try defendant & moves to destroy & adversarial hearing results in court authorization; Post trial: DNA evidence was tested for trial & defendant was convicted, DNA wasn't tested for trial but conviction & trial court orders after adversarial hearing, acquittal or dismissal post jeopardy & trial court orders after adversarial hearing (movant to destroy has burden)	Appropriate governmental entity	Class D felony
LA	Death sentence & felonies (up to certain dates) [evidence containing biological material w/DNA]	Service of application for post-conviction DNA test for convictions by 15 Aug. 2001; all death sentences by 15 Aug. 2001	Until execution; other felonies until 31 Aug. 2014		All law enforcement agencies & clerks of court (may forward to lab accredited in forensic DNA analysis by Am. Soc'y of Crime Lab Dirs./Lab Accreditation Bd.)	No liability unless willful or wanton misconduct or gross negligence
ME	Crimes allowing one to move post-judgment for DNA analysis (biological evidence)	Upon motion for post-conviction testing & when identified during investigation	Incarceration		Investigating law enforcement agency	Appropriate sanctions
MD	Murder, manslaughter, rape & sex (scientific id. evidence w/DNA material)	When secured	Time of sentence	Yes (unless required by other law or court order) w/notice to incarcerated person, attorney of record, Pub. Defender's office; hearing if objection finding no forensic value/too big (objector can preserve small sample)	State	None
MI	Felony (biological material)	When identified during investigation	Incarceration		Investigating law enforcement agency	None
MN	Crime (biological evidence)	Used to secure conviction	Expiration of sentence	Yes, w/notice (to defendant & counsel) & ct. authorization	All appropriate governmental entities	Appropriate sanctions for intentional destruction after postconviction motion for testing is filed

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
MS	Crime (biological evidence)	Possessed during investigation and prosecution	During custody of all co-defendants	Yes, if no other law requires preservation, w/notice to those in custody & their attorneys of record, MS Office of Indigent Appeals, dist. att'y & Att'y Gen.; if impractical to retain - portion to test for DNA must be retained	State	Appropriate sanctions & remedies
MO	Felony or sex offense (evidence that can be tested for DNA)	Conviction			Investigating law enforcement agency	None
MT	Felony (evidence believed to contain DNA material)	When obtained	At least 3 yrs. after conviction is final; longer if court orders	Yes, w/notice (state has burden by preponderance to dispose; based on interests of justice & integrity of system)	State	None
NE	Crime (biological material)	When secured	Incarceration (for alcohol concentration in blood, Dep't of Health & Human Services keeps for 2 yrs. unless requested to keep longer for pending action)	Yes, w/notice (unless another law or court order requires preservation)	State agencies & political subdivisions	None
NV	Conviction for category A or B felony (biological evidence)	Secured in connection with investigation or prosecution	Expiration of sentence	Bulk evidence that doesn't affect suitability of probative samples from it for testing	Agency of criminal justice	
NH	Crim. or delinquency investigation (biological material)	When obtained	Longer of 5 yrs. after conviction or while in custody	For custody longer than 5 yrs., yes (after 5 yrs.) w/notice	Investigating agency	None
NM	Crim. investigation or prosecution (evidence that could be tested for DNA)	When secured	Incarceration	Yes, if another law, regulation or court order doesn't require preservation, it must be returned to owner, it's too big & state preserves part to permit future testing	State	None

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
NC	Criminal investigation or prosecution (physical evidence reasonably likely to contain biological evidence)	When collected; court instructs when physical evidence is offered in criminal proceeding	Until execution (for death sentence); until death for life sans parole; homicide, sex offense, assault, kidnapping, burglary, robbery, arson: incarceration & mandated supervised release including sex offender registration (unless guilty plea, then 3 yrs. from conviction or release)	Yes, w/notice; has no significant value for biological analysis or it does but physical characteristic makes it too impractical to retain (part of evidence likely to contain biological evidence should still be retained)	Custodial agency	Appropriate remedy; felony
OH	Murder, manslaughter, vehicular homicide, rape, sexual battery, gross sexual imposition (biological evidence)	When secured for investigation or prosecution	Murder: while unsolved; the rest for 30 yrs., if unsolved; for conviction: later of incarceration, probation, parole, judicial or supervised release, post-controlled release, during civil litigation; registered sexually oriented offenders: later of 30 yrs. or incarceration or death	Yes, if no other law requires preservation, notice is given & nobody requests continued retention; only keep part if too impractical to retain	Governmental evidence-retention entity	None
OK	Violent felony (biological evidence)	Possession	Incarceration	Yes, w/notice (unless another law requires preservation)	Criminal justice agency	None
OR	Murder, manslaughter, homicide, sex crime (biological evidence)	Collection during investigation or possession preconviction	Act is repealed on Jan. 2, 2012	only keep part if too impractical to retain	Law enforcement agency or public body (excludes court)	None
PA[1210]						
RI	Criminal investigation (biological evidence)	Possession	Incarceration	Yes, w/notice & hearing if Sup. Ct. decided appeal & defendant not seeking preservation	Police, their agents & any transferee	None

[1210] Only statutorily requires evid. to be preserved when biological material remains in its possession & a motion for postconviction DNA testing is pending. 42 Pa.C.S. § 9543.1(b)(2).

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
SC	Conviction for killing, criminal sex conduct & other specified offenses (physical evidence & biological material)	Conviction	Incarceration; if plea was guilty or *nolo contendere*, then the earlier of release, execution or 7 yrs.	Yes w/notice, if material must be returned to rightful owner, is impracticable to retain or is otherwise required to be disposed of by law or DNA evidence was introduced at trial, was inculpatory & all appeals & post-conviction procedures are exhausted	Agency or political subdivision of the state & person ordered to take custody	Misdemeanor; no claim for damages sans gross negligence or misconduct
TX	Crime (evidence containing biological material)	Conviction	Capital felony: until death or parole; otherwise: until death, parole or completed sentence	Yes, w/notice	Att'y representing state, clerk or any other possessing officer	None (unless bad faith)
VA	Death sentence; non-death penalty felony conviction: upon motion & court order (human biological evidence)	Capital conviction; otherwise, motion	Execution; otherwise, 15 yrs. or greater w/court order	Yes, upon motion or for good cause shown	Div. of Forensic Sci. (if sentence reduced from death, original investigating law-enforcement agency)	Expressly none
WA	Felony (biological material that court specifies)	Sentencing upon motion	Court specifies	No		None
WI	Criminal conviction, delinquency adjudication or commitment as sexually violent person or not guilty verdict due to mental disease or defect (physical evidence w/biological material)	Conviction, delinquency adjudication or commitment	Discharge from custody	Yes, w/notice (unless another law requires preservation)	Possessing law enforcement agency, lab or submitting agency, ct. or dist. att'y	None
US	Offense (biological evidence)	Prison sentence	Prison sentence	Yes, if defendant's request to test for DNA was denied w/no appeal; defendant waives in court right to request test; conviction is final w/no direct review available & no motion after notice, it must be returned to owner or is too big & government saves part to test; it was already tested & no other law, regulation or court order requires preservation	Government	Fine, imprisonment up to 5 yrs. or both

APPENDIX H

Statutory Compensation

STATUTORY COMPENSATION

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
AL	Convicted of 1 or > felonies & served time in prison/incarcerated pretrial for felony for at least 2 yrs. through no fault of own w/charges dismissed for innocence	Conviction vacated/ reversed & accusatory instrument dismissed on grounds of innocence *or* accusatory instrument dismissed on ground consistent w/innocence	Division of Risk Management; 2 yrs.	$50,000/yr. (pro rated for partial yr.) & supplemental amount if legislature enacts bill (contingent upon appropriation)	In prison for other crime; convicted of other acts along w/charge resultant in wrongful conviction; no prior award received; subsequent felony conviction forfeits unpaid award	Lump sum or installment; unpaid balance to estate; no offset for govt for expenses incurred in arrest, prosecution & imprisonment
CA	Convicted of felony & in state prison; pecuniary injury from erroneous conviction & imprisonment	Pardon for innocence or acquittal, discharge or release for innocence	Victim Compensation & Gov't Claims Board; 6 mos. after acquittal/pardon/ discharge/release; & at least 4 mos. prior to next mtg. of legislature	$100/day of incarceration post conviction	Contributed to arrest & conviction	Isn't treated as gross income
CT	Convicted of crime & served time in prison	Conviction vacated or reversed & the complaint/information dismissed on grounds of or consistent w/innocence; preponderance	Claims Commissioner; 2 yrs.	$ & expenses of employment training & counseling, tuition & fees at state system of higher education & any services needed to ease reintegration		Immediate
DC	Unjustly convicted of & imprisoned for criminal offense	Reversed/set aside on ground not guilty or at new trial/rehearing found not guilty/pardoned on stated ground of innocence & unjust conviction; clear & convincing		Damages (but not punitive)	Own misconduct brought prosecution; plea of guilty (*Alford* pleas are ok)	

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
FL	Felony conviction & sentence have been vacated & original sentencing court issued order finding that the person neither committed the offense nor was an accomplice	Verifiable & substantial evidence of actual innocence; no further criminal proceedings will be initiated & no questions of fact remain as to the petitioner's wrongful incarceration; clear & convincing if prosecutor certifies; preponderance if prosecutor contests	For status of eligibility to sentencing ct. w/in 90 days after order vacating conviction & sentence becomes final; w/in 2 yrs. of this finding to Dep't of Legal Affairs	$50,000/yr. (prorated & adjusted annually for inflation); max. $2,000,000; fine, penalty, or court costs paid; reasonable attorney's fees & expenses for all proceedings & appeals; 120 hours of waived tuition & fees at community college or state university	Another felony conviction	Immediate administrative expunction of criminal record; in form of unassignable annuity for at least 10 yrs.
IL	Pardon on ground of innocence or certificate of innocence from Circuit Court	Conviction reversed/ vacated & dismissed/ acquitted at new trial/ not retried & dismissed/ statute unconstitutional; didn't bring about own conviction	Court of claims; later of 2 yrs. from prison discharge or from grant of pardon	Imprisonment: up to 5 yrs, max. of $85,350; more than 5 yrs. up to 14 yrs, max. of $170,000; more than 14 yrs, max. of $199,150		Attorney's fees up to 25% of award; adjusted annually but can't increase more than 5% in any yr.
IA	Incarcerated up to 2 yrs. for aggravated misdemeanor or indeterminately for felony but conviction was vacated, dismissed or reversed & no further proceedings can or will be held	District court determines whether individual committed crime; clear & convincing	State appeal board or court; 2 yrs.	Fees & expenses incurred in civil actions for postconviction relief related to wrongful conviction; liquidated damages of $50/day; lost wages, salary or other earned income as a result of conviction up to $25,000/yr.	Guilty plea; imprisoned for other crime	Reasonable attorney fees w/this action; reasonable attorney fees & expenses for all criminal proceedings & appeals; an amount of restitution for fine, surcharge, other penalty, or court costs imposed & paid

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
LA	Imprisoned for conviction of crime, which was reversed or vacated	Clear & convincing; relevant evidence whether it was admissible in, or excluded from, the criminal trial	District court; 2 yrs.	$15,000/yr. to max. of $250,000; up to $40,000 for job-skills training for 1/yr., medical & counseling services for 3 yrs., expenses for tuition & fees for up to 5 yrs. at any community college or public university including assistance to meet admission standards up to 10 yrs. after release; (if conviction involved willful misconduct by state actors, court findings are inadmissible in any judicial proceeding & may not form basis for any cause of action)	Concurrent sentence for another crime	Court may not deduct expenses incurred by state/ local government; compensation > $100,000 may be paid over 5 yrs. via an unassignable annuity w/survivors' benefits
ME	Convicted of criminal offense; sentenced & incarcerated; pardon for innocence	Clear & convincing	Superior Court; 2 yrs.	Up to $300,000	Governor's failure to issue a written finding that the person is innocent	Includes court costs & interest but may not include exemplary damages
MD	Convicted sentenced & confined under State law for crime; full pardon for error	Conclusive error	Board of Public Works	Actual damages; reasonable amount for financial/other appropriate counseling		Lump sum/ installments; only pardoned individual can bepaid - can't pay anybody to collect the grant

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
MA	Felony conviction resultant in incarceration	Pardon for innocence; relief on grounds tending to establish innocence (vacated/ reversed & dismissed indictment/entry of *nolle prosequi* or acquitted at new trial & no criminal proceeding is/can be brought); clear & convincing	Superior Court; 2 yrs. (which can be extended by 1 yr.)	Up to $500,000; tuition & fees reduced by ½ at any state or community college; services necessary for physical & emotional condition	Guilty plea (unless w/drawn/vacated/ nullified on basis other than deficiency in plea warnings); sentenced to < 1 yr.; incarcerated for other conviction; revoked pardon	Lump sum or annuity; no offset for expenses incurred for custody or reduced tuition & fees; expunged/sealed records
MS	Imprisoned for felony	Documentary; pardon for innocence or on grounds not inconsistent w/innocence, conviction was vacated w/accusatory instrument dismissed or *nol prossed* or new trial & acquittal	Circuit court of county in which claimant was convicted; 3yrs.	$50,000/yr. up to $500,000 total (preindictment detention doesn't count)	Intentional waiver of appellate or other post-conviction remedy to benefit by this law; suborned or committed perjury, or fabricated evidence to bring about own conviction	Untaxed; unpaid balance to estate; reasonable attorney fees: 10% for prepping & filing claim, 20% if contested by Attorney General; 25% if appealed; plus expenses; fees not offset; counsel may not receive add'l payment
MO	Guilty of felony; appeals of final order of release exhausted	DNA profiling analysis	Sentencing court	$50/day of postconviction incarceration; limited to $36,500/fiscal yr. & no interest	Serving concurrent sentence for other crime (unless it is revoked parole for this exonerated crime)	If appropriation inadequate, payments *pro rated* yrly. until paid in full; no charges for cost of care; unassignable & payments cease upon death; automatic expungement
MT	Convicted of felony & incarcerated in state prison	Court overturned conviction due to postconviction forensic DNA testing	Dep't of Corrections; 10 yrs.	Lesser of 5 yrs. of educational aid or completion of degree; includes meeting admission standards	Unsatisfactory progress in program	

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
NE	Convicted of felony, sentenced & served at least part of term	Pardoned or court vacated conviction or reversed & remanded for new trial & no subsequent conviction was obtained; innocent of crime; clear & convincing	State Claims Bd.; 2yrs.	Up to $500,000/claimant per occurrence	No payment for period imprisoned concurrently for unrelated crime; committed/ suborned perjury, fabricated evidence, made false statements causing conviction (unless law enforcement coerced false guilty plea, confession, or admission)	Unassignable & extinguished at death; no offset for costs of imprisonment, value of any care/ education in prison; lien for costs of defense services extinguished; reasonable value of services treated as advance against award
NH	Unjustly served in state prison		Dep't of Corrections & Sec'y of State; 3 yrs.	Up to $20,000		Attorney fees must be approved by board of claims; simple interest rate at prevailing discount rate on 26-week U.S. Treasury bills + 2% rounded to nearest 10th
NJ	Convicted & subsequently imprisoned for crime which he didn't commit	Clear & convincing	Super. Ct.; 2 yrs.	Greater of twice the amount of claimant's income in yr. prior to incarceration or $20,000/yr. of incarceration	Own conduct brought about conviction; serving term of imprisonment for another crime	Also entitled to receive reasonable attorney fees
NY	Unjustly convicted of felony or misdemeanor & imprisoned	Pardoned as innocent or conviction reversed/ vacated & dismissed/ if new trial ordered, acquitted/ not retried & dismissed; clear & convincing	Court of claims; 2 yrs.	Fair & reasonable compensation	Own conduct brought about conviction	

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
NC	Convicted of felony & imprisoned in State prison	Pardon for innocence	Indus. Comm'n; 5 yrs.	$50,000/yr. prorated for partial yr.; max. of $750,000; job skills training for at least 1 yr. thru. a State program; 5 yrs. of tuition & fees at public community college or university (used w/in 10 yrs.); assistance in meeting admission standards	Concurrent sentence for conviction of another, unpardoned crime	Includes pretrial imprisonment
OH	Found guilty of but didn't plead guilty to felony & sentenced to imprisonment in state correctional institution	Certified copy of determination of court of common pleas of wrongful imprisonment; conviction was vacated/ dismissed/ reversed on appeal, prosecution can/will not seek further appeal; upon leave of court & no criminal proceeding is pending, can or will be brought for any act associated w/that conviction; court determines the offense wasn't committed by this person	Ct. of claims; 2 yrs.	$40,330/yr. or adjusted amount determined annually by state auditor ; *pro-rated*; loss of wages, salary or other earned income; cost of debts recovered while in custody or under supervision		Right to counsel of own choice; amt. of fine or court costs; reasonable atty. fees & other expenses incurred in proceedings & appeals, discharge from & during confinement; ½ of amt. receivable awarded as preliminary judgment w/in 60 days of determination of wrongful conviction

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
OK	Wrongful felony conviction resultant in imprisonment	Full pardon on written basis of actual innocence/ judicial relief – order states clear & convincing basis of actual innocence;vacated/dismissed or reversed & no more proceedings can or will be held	State or political subdivision: 1 yr. of pardon or judicial relief	Up to $175,000	Guilty plea; concurrent sentence for other crime	If state agency pays, can pay the following fiscal yr. or pay out over 3 fiscal yrs.; uninsured or underinsured municipalities pay out over 10 yrs. w/interest
TN	Exonerated by governor after exhausting all judicial appeals	Governor finds person didn't commit the crime	Board of claims; 1 yr.	Maximum aggregate total of $1,000,000		Monthly installments, (lump sum if special needs); payments continue to surviving spouse & minor kids; state can subrogate against those intentionally causing conviction
TX	Served sentence in prison	Full pardon for innocence; granted relief for actual innocence	Comptroller; 3 yrs. for payment; 7 yrs. for tuition up to 120 credit hours	$80,000/yr. in prison; $25,000 per yr. on parole/ registered as sex offender; max. $10,000 for living expenses at discharge (offset); accrued child support arrears; services for reentry/reintegration; help with medical, dental, MH treatment & support services	Concurrent for another crime; subsequent conviction for felony terminates compensation;	Paid in monthly installments for life at 5% annual interest; annuity payment is unassignable; annuity payments terminate at death & remaining payments don't pass to estate

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
UT	Court finds petitioner factually innocent of felony offense & petitioner served period of incarceration; lawfully in this country during incident giving rise to conviction	If there is biological evidence, petitioner must seek DNA testing; clear & convincing; newly, discovered material evidence; court may consider hearsay & evidence that was or would be suppressed	Dist. ct. in county in which person was convicted	Average annual nonagricultural payroll wage in state; up to 15 yrs.	Engaged in conduct relating to any lesser included offenses/committed any other felony arising out of the facts supporting the conviction; payments are tolled during incarceration for subsequent conviction of felony & resume upon release	Not subject to state taxes; no offset for expenses incurred by state; court orders expungement; initially paid greater of 20% of total or amount equal to 2 yrs. of incarceration, remainder paid quarterly (in full w/in 10 yrs.; incarceration due to separate & lawful conviction reduces payment
VT	Exonerated after conviction & imprisonment; conviction reversed/vacated, information/indictment was dismissed/ acquitted after subsequent trial/ pardoned	Postconviction DNA testing; preponderance	Washington Cnty. Super. Ct. (claim can be settled by Att'y Gen.); 3 yrs.	$30,000-60,000/yr.; economic damages; up to 10 yrs. of eligibility for Vt. Health Access Plan using state-only funds: reasonable reintegrative services & mental & physical health care costs incurred by claimant for period between release & date of the award	Fabricated evidence or committed or suborned perjury during any proceedings related to the crime; yrs. during which claimant was incarcerated for other sentence	Reasonable attorney fees & costs for the action to get compensation, award isn't subject any state taxes (except for the attorney fees) & aren't offset

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
VA	Claimant must be alive; wrongfully incarcerated for conviction of felony, person pled not guilty, or regardless of plea, was sentenced to death or convicted of a Class 1 or 2 felony or any felony w/maximum penalty of life imprisonment	Felony vacated via writ of actual innocence	Compensation must be approved by Gen. Assem.	90% of VA *per capita* personal income/yr. up to 20 yrs.; transition assistance grant of $15,000 (deducted from award); up to $10,000 for tuition for career & technical training w/in VA community college system upon successful completion	Intentionally contributed to own conviction; subsequent conviction immediately forfeits unpaid amounts	Initial lump sum of 20% of award; remainder paid monthly via annuity for 25 yrs. beginning no later than 1 yr. after appropriation; annuity can't be sold or used as security - contain beneficiary provisions
WV	Arrested or imprisoned for felony or convicted & imprisoned for felony or misdemeanor that he didn't commit	For arrest or imprisonment: documentary evidence another was convicted of same crime & charges dismissed; for conviction & imprisonment: pardoned on ground of innocence; conviction reversed/ vacated & dismissed; acquitted at new trial/ not retried & dismissed/ statute is unconstitutional	Ct. of claims; 2 yrs.	Fair & reasonable	Own conduct caused or brought about conviction; committed acts charged	
WI	Imprisoned as result of criminal conviction & released after Mar. 13, 1980	Clear & convincing evidence that petitioner was innocent	Claims bd.		Contributed to bring about own conviction & imprisonment	
US	Conviction reversed/ set aside because not guilty/ found not guiltyat new trial/rehearing or pardoned on stated ground of innocence & unjust conviction	Certificate of the court or pardon w/requisite recitals; for pardon, applicant must have exhausted all recourse to courts & time for court jurisdiction expired	Ct. of Fed. Claims	Up to $100,000/yr. for those sentenced to death; otherwise, up to $50,000/yr.	Committed charged acts; own misconduct or neglect caused prosecution	

APPENDIX I

Jurisdictions with Reform Commissions

JURISDICTIONS WITH REFORM COMMISSIONS

Juris.	Name	Type of cases reviewed	To examine	To propose	Appointed by	Funding source	Status
CA	Commission on the Fair Administration of Justice	Process resultant in wrongful convictions or executions of innocent people	Safeguards & improvements of criminal justice system	Just, fair & accurate administration of criminal justice	S. Comm. on Rules	Uncompensated but reimbursed for travel expense by private funding	Finished 2007
CT	Advisory Commission	Criminal or juvenile case involving wrongful conviction	Causes of wrongful conviction	Reforms to lessen likelihood of a similar wrongful conviction	Chief Ct. administrator		Convenes for an exoneration
FL	Innocence Commission	Officially acknowledged wrongful convictions (proven innocent)	Causes of wrongful conviction	Recommendations to prevent conviction of innocent; reform to address source of errors	Chief Justice of Supreme Court	Appropriation, grant; uncompensated but reimbursed for *per diem* & travel expense	Final rep. due June 30, 2012
IL	Justice Study Committee	Wrongful non-capital felony convictions resulting from DNA test, pardons for actual innocence, dismissals or acquittals from retrials on judicial relief	Any other relevant material; most common causes of wrongful non-capital felony convictions; laws, rules & procedures; solutions; reforms; cost of wrongful convictions	Procedure to address factual innocence claims prior to appellate review	Governor, legislature, state's attorneys & public defenders		Rep. due by end of 2010
NY	Justice Task Force	Wrongful convictions	Police procedures, court rules & other issues	Look at ways to minimize wrongful convictions	Chief judge of court of appeals		Permanent
NC	Innocence Inquiry Commission	Cases	Claims of factual innocence by living convicts	Investigate & determine credible claims of factual innocence	Chief Justice of Supreme Court & Chief Judge of Court of Appeals	Appropriation, grants, private gifts, donations, or bequests (unsalaried commissioners get necessary subsistence & travel expenses)	Permanent; annual report to J. Legis. Corrections, Crime Control, & Juvenile Just. Oversight Comm. & the State Judicial Council

Juris.	Name	Type of cases reviewed	To examine	To propose	Appointed by	Funding source	Status
PA	Joint State Government Commission Advisory Committee on wrongful convictions	Cases in which an innocent person was wrongfully convicted & exonerated, any other relevant materials	Underlying causes of wrongful convictions; laws, rules & procedures implicated in each type of causation; implementation plans	Solutions for elimination of each type of causation of wrongful convictions	J. State Gov't Comm'n	Appropriation	Temporary; report to the Senate Sept. 2011
TX	Timothy Cole Advisory panel[1211] on wrongful convictions	Causes of wrongful convictions	Procedures & programs to prevent future wrongful convictions; effects of state law on wrongful convictions	Whether creation of innocence commission to investigate wrongful convictions would be appropriate	Task force on Indigent Defense director, legislators, judge, one representative each of governor, public law schools, defense & prosecution counsel associations	It is assisting Task Force on Indigent Defense so that it is probably budgeted by the task force which is part of Texas Judicial Council budget	Rep. due not later than Jan. 1, 2011
VT		Fed. & state models and develop	Current statewide policies re eyewitness ID procedures & recording custodial interrogations; whether statewide policies should be adopted; current policies in local jurisdictions re eyewitness ID procedures & recording custodial interrogations; whether policies are consistent	Best practices for recording custodial interrogations of suspects during felony investigations & eyewitness ID	Police, executive, defense, prosecution, judicial & bar interests	Dep't of Pub. Safety provides professional & admin. support	Reported findings/ recommendations & ceased to exist in Dec. 2007

[1211] Separately, the Tex. Crim. Just. Integrity Unit, an *ad hoc* committee created by Judge Barbara Hervey of the Ct. of Crim. Appeals, is to review the strengths and weaknesses of the Tex.crim. just. sys. and to bring about meaningful reform through educ., training and legis. recommendations.

Juris.	Name	Type of cases reviewed	To examine	To propose	Appointed by	Funding source	Status
WI	Criminal Justice Reforms Task Force	Cases of exoneration	Recording police interrogations, eyewitness ID procedures, priority of DNA testing & preservation of biological evidence, statute of limitations	Reforms	Chairman of State Assem. Judiciary Comm. & included legislators, judges, academe, law enforcement, prosecutors & attorneys		2005 Wis. Act 60 enacted reforms

APPENDIX J

Comments of Law Enforcement and Victim Group Representatives on the Proposed Recommendations Before the Advisory Committee to Investigate Wrongful Convictions

Comments of Law Enforcement and Victim Group Representatives on the Proposed Recommendations Before the Advisory Committee to Investigate Wrongful Convictions

September 2011

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Hon. Stephen A. Zappala, Jr.
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In May 2010, we submitted a version of the comments that follow in response to a series of proposals being considered by the advisory committee on wrongful convictions. Unfortunately, our comments were largely ignored. Most, if not all, of our previously submitted concerns and proposals have not been included despite our repeated requests for the larger committee's consideration. We are therefore resubmitting our comments with the hope that this time they will be seriously and meaningfully considered for inclusion in the final report.

We continue to believe that in the interest of objectivity, fairness, transparency and good public policy, no proposals should be issued in the committee's name unless they have first been voted on and recorded by the committee, and that there be an unbiased discussion about the different opinions that were discussed. Tellingly, this reasonable process did not occur. We also continue to have serious concerns about how the committee operated and how these proposals were developed.

As we said before, the committee was charged with conducting an *independent* study to learn from Pennsylvania cases in which the truly innocent have been convicted, identifying any recurring problems that have caused such results, and then proposing workable solutions that will increase the reliability of future verdicts. At no point has the committee done this. Instead, it has pressed forward with the erroneous assertion that wrongful convictions are frequent in Pennsylvania. To make matters worse, the committee has put forth

a largely pre-ordained slate of proposals that may well make verdicts *less* accurate and create more innocent victims, by making proper convictions less likely.

Beyond these cautionary global points, we continue to have the following specific critiques of the proposals submitted to us:

A. Legal Representation Proposals.

1. Proposed Interrogation-Recording Statutes.

- The need for mandatory recording of interrogations has not been established. There is no evidence that the absence of such a law in Pennsylvania has led to wrongful convictions.

- There is broad consensus among those who have conducted interrogations that, even if recording is preferable and should be encouraged as a best practice, it should not be mandatory and there should be no sanction for the failure to record.

- The requirement that courts issue an adverse jury instruction as a "sanction" against the prosecution for failure to record violates the constitutional separation of powers since such procedural issues are for the judiciary, not the legislature.

2. Proposed Eyewitness Statutes

- There has been no study showing that the proposed eyewitness statutes would have prevented any wrongful convictions in Pennsylvania. Neither has there been a study of whether they would have prevented *proper* convictions by discouraging even accurate identifications, or by making juries less likely to credit even accurate identifications.

- The proposed requirement that, upon request by counsel, juries be instructed on the effect of the proposed statutory procedures on the reliability of eyewitness identifications violates the constitutional separation of powers. In addition, the proposed instruction would improperly undermine Supreme Court precedent prohibiting expert commentary on eyewitness reliability. Moreover, the statutory provision concerning the proposed instruction fails to explain what the alleged effect of compliance or non-compliance with the statutory procedures is.

- The proposal that non-compliance with the statutory procedures be considered at a suppression hearing likewise violates the constitutional separation of powers and contradicts Supreme Court precedent.

- The proposed requirement of a "confidence statement" by eyewitnesses at identification procedures would facilitate gamesmanship since defense counsel routinely claim that, according to the pertinent social science studies, there is no significant correlation between a witness's confidence in his identification and the accuracy of that identification.

- The proposed pre-lineup instructions are misleading, and would have the effect of making any identification -- even an accurate identification -- less likely.

- The requirement of "blind administration" could not be satisfied in many counties, particularly smaller counties, and has not been shown to be necessary. Moreover, the putative limitation to cases in which blind administration is "practicable" would be illusory, since, under the statute, counties that cannot comply will still face defense arguments (and jury instructions) in every case that the lack of blind administration makes any identification less reliable.

- The proposed requirements for "show-ups" are unrealistic, since officers on the scene cannot conduct the sort of detailed record-keeping that would be required of them, and there will never be a situation in which it is safe to leave the defendant unrestrained while he faces his accuser. Once again, the supposed limitation of such provisions to situations in which they are "practicable" would invite needless collateral litigation, disingenuous defense arguments, and misleading jury instructions in every case.

3. Proposed New Ethics Rules for Prosecutors.

- Prosecutors are held to the highest ethical standards. Prosecutors are required to take an oath in which they pledge to abide by the highest level of professional standards and ethics. Moreover, the National District Attorneys and the American Bar Associations have developed advisory codes of conduct. In addition, there are mandatory rules imposed by the Pennsylvania State Supreme Court and its Disciplinary Board, which set out specific ethical and professional requirements. In addition to oversight, these governing bodies also mandate annual continuing legal education requirements.

- Given that malfeasance or misfeasance by *defense counsel* is a much more frequent factor than prosecutorial misconduct in alleged wrongful convictions, it is inappropriate -- and reflective of an unbalanced

approach -- to propose new disciplinary rules only for prosecutors who engage in misconduct. A proposal that was serious about preventing unethical lawyering that leads to wrongful verdicts would also focus on the need for discipline when *defense attorneys* engage in misconduct. In particular, such a proposal would require the removal of defense lawyers from criminal appointment lists when they are found to have rendered ineffective assistance.

4. Proposed Statutes Concerning Informants.

- As with the other topics addressed in the proposed recommendations, there has been no study showing that the proposed informant statutes would have prevented any wrongful convictions in Pennsylvania. Neither has there been a study of whether they would have prevented *proper* convictions by discouraging juries from accepting even truthful testimony from incarcerated witnesses.

- The legislative requirement of a special cautionary instruction with respect to the testimony of informants violates the constitutional separation of powers.

- The proposed cautionary instruction reflects an unbalanced approach since it only applies to incarcerated witnesses for the Commonwealth. *Defense* witnesses incarcerated with the defendant have inherent incentives to help their fellow prisoner and inherent biases against police and prosecutors. Thus, if a legislatively-mandated cautionary instruction were necessary and appropriate for incarcerated prosecution witnesses, it would be equally necessary and appropriate for incarcerated defense witnesses. The failure to include such a recommendation is clear evidence of the report's bias.

- The proposed "reliability" hearing before informants may testify in capital cases has no legal precedent in Pennsylvania and is unnecessary, and we do not recall any significant support for it even among the subcommittee members who came from the criminal defense bar.

5. Proposed New Post-Conviction DNA Statute.

- The drafting of an entirely new statute was not shown to be necessary, and to our knowledge was not even considered by the subcommittee.

- The proposed new statute is so different in structure from existing law that it is impossible for us to be sure we have noticed all of the proposed changes, much less offer a detailed critique of what their practical effect would be.

- Any reasonable post-conviction testing statute should be focused on defendants who are actually innocent, and should have a gate-keeping mechanism that prevents defendants from filing petitions in cases in which they previously have made a strategic decision not to seek testing or have waited so long as to prejudice the Commonwealth's ability to retry them. Otherwise, the statute will encourage intentional gamesmanship.

B. Redress Proposals.

1. Proposed Compensation Statute.

- The proposed statute does not limit recovery to the actually innocent.

- The need for a compensation statute has not been established with evidence that wrongfully convicted defendants in Pennsylvania have been unable to recover adequate awards under existing laws.

- The financial awards mandated by the proposed statute are excessive.

- The proposed statute needlessly dispenses with standard rules of procedure and evidence by vaguely requiring judges to emphasize "the informality of the proceedings."

- The notice requirements, particularly those that call for the Supreme Court to identify all prior "wrongful convictions," are unrealistic.

- The proposal fails to recommend any compensation for those victims whose defendants were wrongfully acquitted or released.

2. Proposed Permanent Commission on "Conviction Integrity."

- The need for a permanent commission on "conviction integrity" has not been supported with any meaningful evidence, nor has the ability of such a commission to operate in an open and balanced manner been established.

- The proposal fails to define "wrongful convictions" even though the commission would only be authorized to study cases involving such outcomes.

- A commission that was truly dedicated to improving "conviction integrity" would study not only cases in which defendants have been wrongly convicted, but also cases in which defendants have been wrongly *acquitted*. Both classes of cases have innocent victims and undermine public confidence in the criminal justice system.

D. Science Proposals.

1. Proposed Forensic Advisory Board.

- If a forensic advisory board is necessary, the appointment process should not be centralized. The Pennsylvania Bar Association should appoint the member who is a privately-employed attorney, the Pennsylvania District Attorney's Association should appoint the member who is a District Attorney, the Pennsylvania Chiefs of Police Association should appoint the member who is a police chief, and the Commissioner of the Pennsylvania State Police should appoint an individual who is a member of the Pennsylvania State Police's Bureau of Forensic Services.

- The proposed appointment of a member who is a professor of criminal justice or forensic science would be redundant since there would already be criminal justice experts (a judge, two prosecutors, two defense attorneys, and a police chief) and forensic science experts (two police scientists, two scientists from private labs, director of a municipal lab, and a coroner).

- The proposed statutes impose needlessly rigid requirements for investigations that do not allow the board the ability to exercise appropriate discretion or flexibility on a case-by-case basis. If a forensic advisory board is proved necessary in Pennsylvania, a more reasonable model can be found at M.S.A. § 299C.156, Subd. 3 (Minn. Stat. 2006).

2. Proposed Statutes Concerning Preservation of Biological Evidence.

- The requirement that District Attorneys reserve funds from drug forfeitures to pay the costs of the statutes is unrealistic. Many District Attorney's Offices in Pennsylvania are already underfunded, and District Attorneys cannot predict future forfeiture funds. Moreover, where such funds are available, they are needed to pay basic operating costs, particularly the salaries of the police, detectives, and prosecutors who enforce the Controlled Substances Act.

- Under existing Supreme Court precedent, the destruction or loss of evidence does not provide a basis for relief in any criminal action unless the evidence was materially exculpatory and the prosecution destroyed it in bad faith. If a new evidence-preservation statute were proved necessary, it would have to expressly reaffirm that this remains the governing standard.

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