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**Timothy Cole
Advisory Panel on
Wrongful Convictions**

Research Details

**Timothy Cole Advisory Panel on Wrongful Convictions: Research Details
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Timothy Cole Advisory Panel on Wrongful Convictions:

Research Details

Introduction

The Timothy Cole Advisory Panel on Wrongful Convictions was created by HB 498 during the 81st Legislature in 2009. Named after Timothy Cole, the first Texan to be posthumously exonerated of a crime through DNA testing, the Panel was directed to advise the Task Force on Indigent Defense in the preparation of a study regarding the causes of wrongful convictions; procedures and programs that may be implemented to prevent future wrongful convictions; the effects on wrongful convictions of state law regarding eyewitness identification procedures, the recording of custodial interrogations, post-conviction DNA testing, and writs of habeas corpus based on relevant scientific evidence; and whether the creation of an innocence commission to investigate wrongful convictions would be appropriate.¹

The Panel held its first organizational meeting on October 13, 2009, to set an agenda for the following year and divide into workgroups based on each content area directed by statute. In addition, the Panel expressed interest in discovery procedures and informant evidence, and workgroups were created for these areas. Workgroup meetings were held December 7 and 8, 2009, followed by a trip to Tarrant County by the full Panel to observe the county's electronic discovery system. Workgroup and full Panel meetings were held April 21 and 22, 2010, followed by the full Panel meeting on August 12, 2010. Numerous workgroup conference calls and meetings were held to draft the report and the final recommendations.

The Panel's report and the meetings that led to it were not meant to pin wrongful convictions on "bad apples," but rather to look for places in our system of criminal justice where

¹ Tex. H.B. 498, 81st Leg., R.S. (2009).

errors occur.² While the Panel was not created to do in-depth analysis of errors in individual cases (e.g., the important work pursued by the Harris County District Attorney Pat Lykos³ and the Dallas County Convictions Integrity Unit created by District Attorney Craig Watkins⁴), the Panel attempted to make recommendations that will impact multiple points of weakness in the system as a whole: investigations (eyewitness identification procedures and recording custodial interrogations), pre-trial and trial procedures (automatic discovery that permits electronic access to or photocopies of materials), and post-conviction procedures (DNA testing, writs of habeas corpus based on changing science, and creating a process for continued review of wrongful convictions). In this way, the Panel viewed its task as one of defining “organizational accidents,”⁵ or perhaps more appropriately “systemic accidents,” rather than one of placing blame on individual actors.

The Panel believes that this approach lends itself to the kind of justice Tim Cole’s family spoke of when they stated that “There is no ‘perfect system.’”⁶ Instead, the Cole-Session family said that the collaborative approach taken by the Panel indicated that “Texas is on the path toward the Zenith of Criminal Justice Reform. The Tim Cole Advisory Panel has brought together a collaborative consensus from all three Branches of our State Government.” Tim’s mother, Ruby Session, and brother, Cory Session, continued, “For our family’s great loss there

² See James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010).

³ See, e.g., OFFICE OF DISTRICT ATTORNEY PATRICIA R. LYKOS, RACHELL REPORT (2009), http://www.patlykos.com/linked_docs/rachell_report.pdf.

⁴ Conviction Integrity – Dallas County DA’s Office, <http://www.dallasda.com/conviction-integrity.html> (last visited Aug. 5, 2010).

⁵ James, *supra* note 2.

⁶ Email from Cory Session, to Jim Bethke, Director, Texas Task Force on Indigent Defense (Aug. 5, 2010) (on file with Texas Task Force on Indigent Defense).

are now great gains in the Justice System. We are pleased that the State of Texas is now in pursuit of Equal Justice Under Law for all.”⁷

The Panel submits to the Task Force the following materials: 1) a summary of the Panel’s recommendations, 2) the Panel’s report, and 3) a comprehensive report of the Panel’s research. In addition to the areas required by the statute, the Panel addressed discovery policies in its deliberations and recommendations, and Prof. Sandra Guerra Thompson submitted a report on informant evidence for inclusion in the Panel’s materials. To the extent possible, the report represents the consensus of the Panel. Although there are additional opportunities for reform in any system, the majority of the Panel believes that these recommendations represent an important step forward for the State of Texas in the effort to prevent wrongful convictions.

The Panel takes seriously its duty to learn from the mistakes, revealed through post-conviction DNA testing, that sent innocent Texans to prison for crimes committed by others. The first 39 of cases were documented in a report by The Justice Project and included in the table below. Since publication of that report, one additional man, Jerry Lee Evans, has been exonerated, and three others have been released on new DNA evidence and await full exoneration from the state.

⁷ *Id.*

The Justice Project: The Texas DNA Exonerated⁸

Last Name	First Name	Year Convicted	Year Exonerated	County	Crime	Mistaken Eyewitness Identification	Faulty Forensic Testimony	Unreliable or Limited Forensic Methods	Jailhouse Informant & Accomplice Testimony	False Confession or Plea	Suppression of Exculpatory Evidence or Other Misconduct	Approximate Years in Prison
Alejandro	Gilbert	1990	1994	Uvalde	rape	✓	✓					4
Blair	Michael Nawe	1994	2008	Collin	rape, murder	✓	✓	✓				14
Butler	A.B.	1983	2000	Smith	rape, kidnapping	✓						17
Byrd	Kevin	1985	1997	Harris	rape	✓		✓				12
Chatman	Charles	1981	2007	Dallas	rape	✓		✓				27
Cole*	Timothy Brian	1986	2008	Lubbock	rape	✓		✓			✓	13*
Criner	Roy	1990	2000	Montgomery	rape, murder				✓			10
Danziger	Richard	1990	2001	Travis	rape, murder			✓	✓	✓		12
Fountain	Wiley	1986	2003	Dallas	rape	✓						16
Fuller	Larry	1981	2006	Dallas	rape	✓	✓					20
Giles	James Curtis	1983	2007	Dallas	rape	✓					✓	10
Good	Donald	1984	2004	Dallas	rape	✓		✓			✓	10
Gossett	Andrew	2000	2007	Dallas	rape	✓						7
Henton	Eugene	1984	2006	Dallas	rape	✓				✓		2
Karage	Entre Nax	1997	2004	Dallas	murder							7
Lavernia	Carlos	1985	2000	Travis	rape	✓						16
Lindsey	Johnnie Earl	1983	2008	Dallas	rape	✓						26
McGowan	Thomas	1985	2008	Dallas	rape, burglary	✓						23
Miller	Billy Wayne	1984	2006	Dallas	rape	✓						22
Moon	Brandon	1988	2005	El Paso	rape	✓	✓				✓	17
Mumphrey	Arthur	1986	2006	Montgomery	rape				✓			18
Ochoa	Christopher	1989	2001	Travis	murder					✓		12
Phillips	Steven Charles	1983	2007	Dallas	rape, burglary	✓		✓		✓	✓	26
Pope	David Shawn	1986	2001	Dallas	rape	✓		✓				15
Rachell	Ricardo	2003	2008	Harris	child sex assault	✓					✓	6
Robinson	Anthony	1987	2000	Harris	rape	✓						10
Rodriguez	George	1987	2004	Harris	rape, kidnapping	✓	✓	✓	✓			17
Salazar	Ben	1992	1997	Travis	rape	✓		✓				5
Smith	Billy James	1987	2006	Dallas	rape	✓						19
Sutton	Josiah	1999	2004	Harris	rape	✓	✓					4
Taylor	Ronald	1995	2007	Harris	rape	✓	✓					14
Thomas	Victor Larue	1986	2002	Ellis	rape	✓						15
Turner	Keith E.	1983	2005	Dallas	rape	✓						4
Waller	James	1983	2007	Dallas	rape	✓						11
Waller	Patrick	1992	2008	Dallas	robbery, kidnapping	✓				✓		16
Wallis	Gregory	1989	2007	Dallas	rape	✓						18
Washington	Calvin	1987	2001	McLennan	rape, murder			✓	✓			13
Webb	Mark	1987	2001	Tarrant	rape	✓						13
Woodard	James Lee	1981	2008	Dallas	murder, rape	✓					✓	27
TOTALS						33	7	11	5	5	7	548

*Died in prison in 1999

⁸ THE JUSTICE PROJECT, CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM (2009), *reprinted with permission from The Justice Project.*

New and Pending DNA Exonerations⁹

Last Name	First Name	Year Convicted	Year Exonerated	County	Crime	Mistaken Eyewitness Identification	Faulty Forensic Testimony	Unreliable or Limited Forensic Methods	Jailhouse Informant & Accomplice Testimony	False Confession or Plea	Suppression of Exculpatory Evidence or Other Misconduct	Approximate Years in Prison
Evans	Jerry Lee	1986	2009	Dallas	rape	✓						23
Sonnier**	Ernest	1986		Harris	kidnapping	✓	✓					23
Porter**	Allen Wayne	1990		Harris	rape	✓						19
Green**	Michael A.	1983		Harris	rape	✓						27

***Released on new DNA evidence, awaiting final exoneration from the State of Texas*

⁹ THE JUSTICE PROJECT, CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: TEXAS DNA EXONERATION UPDATE (2010).

Chapter 1: Eyewitness Identification Procedures

What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of this type of testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.¹

Panel Recommendations

In a survey of 1,038 Texas law enforcement agencies, it was found that out of 750 responsive departments, only 88 (12%) had any written policies to guide investigators as they prepare and administer eyewitness identification procedures.² Based on the seriousness of eyewitness misidentification, the Timothy Cole Advisory Panel on Wrongful Convictions recommends that the state adopt the following reforms:

- 1. The State of Texas should require Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to work with scientific experts in eyewitness memory research and law enforcement agencies to develop, adopt, disseminate to all law enforcement agencies, and annually review a model policy and training materials regarding the administration of photo and live lineups. That model policy should comport with science in the areas of cautionary instructions, filler selection, double-blind administration, documentation of identification procedures, and other procedures or best practices supported by credible research.**

¹ Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC MAG., Mar. 1927, available at <http://www.theatlantic.com/magazine/archive/1969/12/the-case-of-sacco-and-vanzetti/6625/>.

² THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION PROCEDURES IN TEXAS 3 (2008), available at <http://www.thejusticeproject.org/wp-content/uploads/texas-eyewitness-report-final2.pdf>.

Because Texas statutes are currently silent on the subject of identification procedures, suspects of crimes may be subjected to a wide variety of identification procedures across the state. Surveys of current practices reveal that many of those procedures do not meet the recommendations set forth by science and criminal justice organizations to reduce the risk of erroneous identification, placing innocent suspects in jeopardy of wrongful conviction. By working with experts in the field of eyewitness memory and identification procedures, LEMIT can develop a standardized procedure that will guide the photo and live lineups conducted throughout the state. Annual review of this model policy will ensure that eyewitness identification procedures in Texas are guided by the most current science and best practices available in the areas reviewed below.

As the leading factor in wrongful convictions, it is apparent that eyewitness evidence must be collected and documented in ways that preserve the eyewitness' memory. Studies have indicated that cautionary instructions to the eyewitness that the culprit *may or may not* be included in the lineup and the selection of fillers who resemble the description of the perpetrator given by the eyewitness can help to ensure that lineup identifications are accurate.

Double-blind administration of lineups is equally important because it prevents (often unintentional) cueing of the eyewitness as to which member of the lineup is the police suspect. Blind administration also prevents confirming feedback that is sometimes given to eyewitnesses after they select the suspect from the lineup. Research demonstrates that feedback can artificially inflate eyewitness confidence levels—a phenomenon that can potentially reduce the dependence on confidence to judge accuracy.

The Panel understands that, especially in small departments, there may not be an officer who is unaware of which lineup member is the suspect. In those circumstances, the Panel

advocates the use of the “folder method” that has been adopted by other states. By randomly placing individual pictures of lineup members in manila folders, numbering those folders, and handing them to the eyewitness out of view of the officer, law enforcement can help to ward off expectancy effects and post-identification feedback.

The Panel recommends that the results of the identification procedure and any statements made by the eyewitness (including a contemporaneous confidence statement) must be documented and available for later review at trial. This policy provides insight into the procedure itself and can help to defend against confidence inflation between the time of the identification and the trial.

The State of Texas should provide adequate funding to support this initiative.

- 2. The State of Texas should require all law enforcement agencies to adopt eyewitness identification procedures that comply with the model policy promulgated by the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT).**

The Panel recommends that a model policy be developed and promulgated by LEMIT to make implementation easy for Texas law enforcement agencies. The creation of a model policy further allows LEMIT to be responsive to new science that may emerge in the field of eyewitness identification, adding both flexibility and stability to our statewide policies and procedures. Law enforcement agencies may choose to adopt that model policy or create their own policies that substantially conform with the model.

- 3. The State of Texas should integrate training on eyewitness identification procedures into the required curricula of the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) and the Texas Commission on Law Enforcement Standards and Education (TCLEOSE).**

An important component of any change in policy is training to facilitate the implementation of that policy. Training helps to ensure that policies are implemented and executed effectively. The Panel believes the law enforcement community can benefit from increased training on the science of eyewitness misidentification and how to prevent those errors through the policies advocated above. Although this training has been adopted into the basic course offered through TCLEOSE, the Panel encourages the Texas Legislature to expand the training curricula offered through both TCLEOSE and LEMIT to provide background on how errors can occur and scientifically-tested methods to prevent those errors. Conversations with the two organizations have been initiated by the Panel to detail the resources, materials, and procedure needed to adopt this recommendation. The Panel again recommends that the State provide adequate funding to support this initiative.

4. The State of Texas should permit evidence of compliance or noncompliance with the model policy to be admissible in court.

At this time, the Panel does not recommend that evidence of noncompliance bar the admission of eyewitness identification testimony into the courtroom; rather, the Panel suggests that because jurors must weigh the quality and value of the evidence that is presented to them in order to determine the guilt or innocence of a defendant, it is important for evidence of compliance or noncompliance with the model policy to be presented to them during a criminal trial. Without appropriate context for identification evidence, jurors may inadvertently rely on testimony resulting from a flawed procedure in their deliberations—especially if that testimony comes from a highly confident eyewitness. Fully vetting that evidence in the courtroom will give jurors full knowledge of the procedures that were used to obtain an eyewitness identification and whether those procedures were in line with those promulgated throughout the state.

5. The State of Texas should allow law enforcement agencies discretion on the adoption of sequential procedures.

Although several jurisdictions in Texas have included sequential presentation in their eyewitness identification standard operating procedures, the majority of the Panel believes that the science is not yet settled on whether sequential presentation is superior to simultaneous presentation. With experiments currently under way at Austin Police Department and several other jurisdictions around the nation, there may well be scientific evidence available to reconsider this stance in the future. Until that time, the Panel does not recommend a mandate that sequential procedures be adopted statewide. Leaders should continue to monitor this area of eyewitness science.

These Panel proposals are in line with the language in committee substitute to SB 117 during the 81st Legislature (*an analysis of that language can be found in Appendix A*). These consensus procedures were supported by a broad range of criminal justice stakeholders during the session and continue to be supported by a majority of this diverse Panel.

Panel Report

Introduction

Erroneous eyewitness identification has played a role in over 80% of Texas exonerations, making it is the most common factor that has contributed to wrongful convictions in Texas.³ In all, eyewitness error has contributed to 75% of the 255 DNA exonerations nationwide, with up to three or more witnesses incorrectly identifying each would-be exoneree during a criminal

³ THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION PROCEDURES IN TEXAS 1(2008), *available at* <http://www.thejusticeproject.org/wp-content/uploads/texas-eyewitness-report-final2.pdf>.

investigation or at trial.⁴ In Texas, ten separate victims identified Steven Phillips as the perpetrator of a series of crimes committed in Dallas. In another case, Thomas McGowan was included in a live lineup (along with two other suspects) and a photo lineup that were shown to the same eyewitness. McGowan was only chosen as the culprit after the second identification procedure. Finally, Billy Smith was identified as the attacker in a crime that occurred at his apartment complex after the apartment manager asked him to step onto his balcony. The manager, who was also the victim's boyfriend, did not see the attacker, but believed that Smith may have assaulted his girlfriend. The victim identified him on the balcony in a highly suggestive procedure that lacked police control and the fillers that are normally included in a live lineup.

These are just three of the cases that have led researchers, law enforcement, and criminal justice fact-finders to examine eyewitness identification procedures to determine how errors occur and how they can be prevented. For this chapter of the report, the Panel reviewed the existing laws that guide eyewitness identification procedures and evaluation, the science of eyewitness identification, and recommended procedures put forth by a variety of organizations to determine the best policy to prevent wrongful convictions in the State of Texas. The Panel recommends that standardized eyewitness identification procedures and training are needed in law enforcement agencies across the state to prevent wrongful conviction through erroneous identifications, in line with the recommendations proposed in CSSB 117 during the 81st Legislature. As thoroughly explored in the recommendations above, the legislation provides for model policies and training to facilitate the transition in eyewitness identification procedures.

⁴ The Innocence Project, Eyewitness Misidentification, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

Eyewitness Identification and Texas Law

Currently, there is no Texas statutory law governing eyewitness identification procedures, leaving methodology up to the discretion of local authorities. There is United States Supreme Court jurisprudence on this matter, and the Court has held that the burden is on the government to prove the procedure it used is not “unnecessarily suggestive and conducive to irreparable mistaken identification.”⁵ Without a clear picture of what constitutes “unduly suggestive procedures,” however, it is difficult for the Supreme Court holding to be an effective tool in the effort to prevent wrongful convictions.

In *Neil v. Biggers*, the United States Supreme Court identified five factors to be considered by the judge or jury in evaluating the likelihood of an eyewitness misidentification: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.⁶ In *Manson v. Brathwaite*, the Court refined the application of the *Biggers* criteria, holding that meeting these five measures implies an accurate identification, even if a highly suggestive procedure was used by authorities to obtain the identification.⁷ The State of Texas follows federal jurisprudence on this issue, utilizing the *Biggers* criteria as the standard for reviewing whether an in-court identification is admissible in light of an alleged impermissibly-suggestive pretrial photographic identification.⁸

⁵ Kirby v. Illinois, 406 U.S. 682, 691 (1971).

⁶ 409 U.S. 188, 199 (1972).

⁷ See 432 U.S. 98, 114 (1976).

⁸ See, e.g., Gamboa v. State, 296 S.W.3d 574 (Tex. Crim. App. 2009) (using *Biggers* criteria in review of trial court's ruling on the suggestiveness of pre-trial photo array); Ibarra v. State, 11 S.W.3d 189 (Tex. Crim. App. 1999) (weighing *Biggers* criteria against the corrupting effect of the suggestive pretrial identification procedure); Loserth v. State, 963 S.W.2d 770, 774 (Tex. Crim. App. 1998) (vacating and remanding an intermediate appellate court order because it erred in failing to consider the criteria in a review of identification procedures); Proctor v. State, No. 01-08-01041-CR, 2010 Tex. App. LEXIS 4832 (Tex. App. 2010).

Concern over the lineup procedure methodology used by an officer was expressed, however, in a concurring opinion by Judge Barbara Hervey in *Luna v. State*.⁹ Judge Hervey specifically noted trial testimony in which the officer who conducted a lineup first told the court he had instructed an eyewitness that there was a suspect in the lineup he was about to view. Upon further questioning, the officer stated that he must not have told the eyewitness that there was a suspect in the lineup because he always used the same script. That script stated that the person who committed the crime may or may not be included in the lineup. This conflicting testimony (as well as additional testimony and statements from the trial record) caused Judge Hervey to state her concerns about the identification and court procedures used.¹⁰

The Supreme Court laid out the *Biggers* criteria to help judge the value of eyewitness identification evidence, but these criteria may be insufficient to prevent wrongful convictions for two reasons. First, the criteria are applied only after potentially flawed eyewitness evidence is presented in court. Studies have indicated that jurors tend to believe that eyewitnesses who are confident are accurate beyond the eyewitness accuracy rates found in experimental analysis,¹¹ and when confronted with a confident eyewitness, jurors overlook the witnessing conditions themselves to judge the validity and reliability of an eyewitness identification.¹² This is problematic because it indicates that jurors tend to over-rely on eyewitness evidence¹³ when there is reason for them to discount that evidence, potentially rendering a *post hoc* evaluation

⁹ 268 S.W.3d 594 (Tex. Crim. App. 2008) (Hervey, J., concurring).

¹⁰ *Id.* at 610-15.

¹¹ See, e.g., John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19 (1983).

¹² Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 361 (1998).

¹³ See Steven Penrod & Brian Cutler, Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation, 1 PSYCHOL. PUB. POL’Y & L. 817 (1995).

ineffective. This pattern has been found to hold true even when expert testimony is permitted by a judge that demonstrates the pitfalls and weaknesses inherent to eyewitness identifications.¹⁴

The second reason that the Supreme Court criteria may be ineffective to prevent wrongful conviction is that science indicates that there are many facets of the identification procedure itself that can impact the outcome of the procedure. The composition of the lineup, the instructions given to the eyewitness, the lineup administrator, and the method of presentation may all play a role in: 1) whether an identification is made and 2) the lineup member who is identified. In order to effectively prevent wrongful conviction due to eyewitness error, jurors need the most reliable evidence possible. Thus, the errors in identification are best eliminated at the investigatory phase, rather than *post hoc* in the courtroom. The studies reviewed below provided the Panel with insight into how and under what conditions false identifications and conviction can occur.

The Science of Eyewitness Identification

Lineup Composition

One of the first considerations of an identification procedure is the selection of fillers for either a live or photographic lineup. Fillers (also known as “foils” or “distracters”) are people investigators believe to be innocent of a crime (*e.g.*, plain clothes officers or jail inmates, photos taken from a mug book or database) and are shown to an eyewitness witness along with the police suspect for a crime. The thought is that fillers provide a level of protection to innocent suspects and ensure that the “test” for the eyewitness is to determine whether a picture or person

¹⁴ See Brian L. Cutler, Steven D. Penrod & Hedy R. Dexter, *The Eyewitness, the Expert Psychologist, and the Jury*, 13 LAW & HUM. BEHAV. 311 (1989); Brian L. Cutler, Steven D. Penrod, & Hedy Red Dexter, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185 (1990); Steven G. Fox & H. A. Walters, *The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock Juror Judgment*, 10 LAW & HUM. BEHAV. 215 (1986).

is the culprit of the crime.¹⁵ Fillers also help to control for selection of the suspect by chance or by guessing. An additional check that is served by fillers is to “assure that the lineup constitutes a test of recognition memory rather than a test of recall.”¹⁶ This asks the eyewitness to not only be able to describe the culprit and details of the event (recall), but also to be able to identify him or her by sight (recognition).

The recall/recognition test is one that investigators and researchers have grappled with because studies have shown that the degree of similarity between the suspect and the fillers can impact the identification procedure. A photo lineup that contains only one person (the suspect) who resembles the description of the culprit may not be a true test of recognition. Conversely, a lineup that contains fillers that look too similar to the suspect may make the task unduly difficult. For these reasons, as explained below, research scientists have suggested that the initial description of the culprit be used as a guide to select lineup fillers.

There are several approaches an investigator may take when selecting fillers for a lineup (*See Table 1 below*). First, fillers may be chosen who do not match the eyewitness’ description of the perpetrator (*mismatch-description strategy*), but “there is no serious debate about the inadvisability of selecting distracters who fail to match the eyewitness’ pre-lineup description of the culprit.”¹⁷ Although this type of lineup may provide great returns when the police suspect is

¹⁵ Fillers as protection are also a main critique of the show-up procedure in which an eyewitness is shown only one person or photograph and asked if that person or photograph is the person who committed the crime. *See generally* THE JUSTICE PROJECT, SHOW-UPS IN TEXAS: A REVIEW OF SINGLE-SUSPECT EYEWITNESS IDENTIFICATION POLICIES (2009), available at <http://www.thejusticeproject.org/wp-content/uploads/tjp-show-ups-in-texas-final.pdf> (reviewing show-up practices in Texas compared to the recommendations made by the International Association of Chiefs of Police); Nancy Steblay, Jennifer Dysart, Solomon Fulero & R. C. L. Lindsay, *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 523 (2003).

¹⁶ C. A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification and the Selection of Distracters for Lineups*, 15 LAW & HUM. BEHAV. 43, 45 (1991).

¹⁷ Gary L. Wells, Sheila M. Rydell & Eric P. Seelau, *The Selection of Distracters for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL. 835, 835 (1993). *See generally* R. C. L. Lindsay & Gary L. Wells, *What Price justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy*, 4 LAW & HUM. BEHAV. 303, 308 (1980) (study finding that in culprit-absent lineups where fillers did not resemble the innocent suspect, participant eyewitnesses identified the innocent suspect as the perpetrator 70% of the time).

actually the culprit of the crime, it affords virtually no protection to suspects who are innocent.

There is consensus that the mismatch-descriptor strategy is ineffective for lineup filler selection, but there has been debate over two additional strategies: the *match- description* strategy and the *match-suspect* strategy, the goal being to “construct a lineup that reduces false-identification rates without producing comparable losses in accurate-identification rates.”¹⁸

Although the theory is that fillers should resemble the suspect in a lineup (*match-suspect*) so the suspect does not unduly stand, some argue that the resemble-suspect strategy “promotes

Table 1: Filler-Selection Strategies

<i>Filler-Selection Strategies</i>	
<i>Mismatch-Description</i>	<ul style="list-style-type: none"> • Fillers are chosen who do not match the witness’ description of the perpetrator • This strategy is not recommended by researchers • Will likely cause the police suspect to unduly stand out from fillers
<i>Resemble-Suspect</i>	<ul style="list-style-type: none"> • Fillers are chosen who match the appearance of the police suspect • May promote unnecessary similarities between the fillers and the suspect • May make the lineup task more difficult for an eyewitness
<i>Match-Description</i>	<ul style="list-style-type: none"> • Fillers are chosen who match the witness’ description of the perpetrator originally given to police • Must only match those elements described by the witness; other undescribed traits may vary • Promotes correct identifications while minimizing false identifications

unnecessary or gratuitous similarities between distracters and the suspect.”¹⁹ These researchers advocate the match-description strategy, arguing that as long as all fillers match the initial

¹⁸ *Id.* See generally Luus & Wells, *supra* note 16 (giving a detailed account of the theory behind the resemble-suspect and match-description strategies).

¹⁹ Wells et al., *supra* note 17, at 835; see also Luus & Wells, *supra* note 16 (suggesting that if the suspect does not match the eyewitness’ description of the perpetrator, a combination of the resemble-suspect and match-description tactics may be used. Also stating that fillers should be chosen who match the suspect on the features where there is a discrepancy (e.g., eyewitness described curly hair, but the suspect has straight hair; fillers should have straight hair), but they are free to vary on other features that were not described by the eyewitness.).

description of the culprit given by the eyewitness, the police suspect should be sufficiently hidden among the fillers to ensure that the procedure is a recognition test.

To test this theory, Wells, Rydell, and Seelau constructed a complex experiment in which participants were asked to describe the perpetrator of a theft they viewed. They found that eyewitnesses who saw a lineup created through the match-description strategy were better able to determine when the culprit was in the lineup than those who viewed a resemble-suspect lineup. The match-description group also made almost three times more correct identifications than the resemble-suspect group, demonstrating the superiority of the match-description strategy.

Cautionary Instructions

When an eyewitness is given the task of reviewing a lineup, a reasonable expectation may exist that the police would not make the effort to assemble a lineup and call upon the witness unless they felt they had a viable suspect who they believe committed the crime. This expectation can result in the witness feeling increased pressure to make a selection from the lineup.²⁰ If the eyewitness assumes that the perpetrator is in the lineup, then he or she is likely to simply select the subject who most closely resembles the perpetrator.²¹

To guard against this potential problem, it has been recommended that lineup administrators explicitly instruct the witness that the lineup *may or may not* contain the actual perpetrator and to give additional guidance that it is just as important to free innocent people from suspicion as it is to identify the guilty party.²² Such cautionary instructions are defined by

²⁰ Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 575, 575 (2005).

²¹ Gary L. Wells, Roy S. Malpass, R.C.L. Lindsay, Ronald P. Fisher, John W. Turtle & Solomon M. Fulero, *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 585 (2000).

²² Clark, *supra* note 20, at 575-76.

researchers as being unbiased, given that they take a neutral position regarding the presence of the perpetrator in the lineup.²³

The value of cautionary instructions has been established by a large number of studies that have examined the effects of unbiased and biased lineup instruction. These studies concluded that biased instructions produced an increase in the overall rate of identification,²⁴ defined as the proportion of witnesses who make *any* selection from the lineup,²⁵ and this biased instruction effect holds true for both culprit-present and culprit-absent lineups.²⁶ This is problematic because it reflects the construct of relative judgment, wherein an eyewitness chooses the lineup member who most resembles the culprit, rather than the actual culprit.²⁷ Proper cautionary instructions are one way to avoid identifications made through relative judgment.

Confidence, Accuracy, and Double-Blind Procedures

Although the Supreme Court set forth witness confidence as a factor to determine the reliability of eyewitness identification,²⁸ research into the confidence-accuracy relationship has raised questions about the value of this criterion because the relationship is inconsistent at best. Part of the difficulty in assessing the confidence-accuracy relationship is that confidence is malleable through both expectancy effects and post-identification feedback.

Expectancy effects exist when an administrator knows the identity of a suspect in an eyewitness lineup and gives (often unintentional) verbal and nonverbal cues that enhance the likelihood that the suspect will be chosen. Studies on this topic target one central concern: whether an administrator's expectation of the lineup outcome can affect the actual outcome.

²³ *Id.* at 576.

²⁴ *Id.* at 598.

²⁵ *Id.* at 581.

²⁶ *Id.* at 598.

²⁷ Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. APPLIED SOC. PSYCHOL. 89, 92 (1984).

²⁸ *Biggers*, 409 U.S. at 200.

This effect has been shown in medical trials and psychology experiments, causing scientists to adopt double-blind (in which neither the administrator nor the participant know which condition the participant is in) rather than single-blind (in which the administrator knows which condition the participant is in, though the participant does not) procedures as the standard for testing protocol. The same effects can be found in eyewitness identification procedures.²⁹

Several research studies have found that administrators who are not blind as to which lineup member is the suspect can influence the selection made by the eyewitness. For example, a test of non-blind participant-lineup administrators found that “in certain circumstances a photoarray administrator’s knowledge of which lineup member is the suspect can increase the likelihood that a witness will identify the suspect.”³⁰ Like other experiments, knowledge of the preferred outcome of the identification procedure can inadvertently influence the outcome of the procedure, cannot be guarded against (*i.e.*, increased training cannot eliminate them), and eyewitnesses have a hard time identifying them during a lineup procedure.³¹

Apart from expectancy effects, lineup administrators who know the identity of a police suspect in an eyewitness identification procedure may impact the confidence-accuracy relationship through post-identification feedback.³² This feedback occurs when police communicate to an eyewitness that he or she has identified the suspect through either verbal (“Good, you picked the suspect.”) or nonverbal (nodding, smiles, etc.) means, and studies have

²⁹ See Gary L. Wells & Elizabeth Luus, *Police Lineups as Experiments: Social Methodology as a Framework for Properly-Conducted Lineups*, 16 PSYCHOL. BULL. 106 (1990).

³⁰ Mark R. Phillips, Bradley D. McAuliff, Margaret Bull Kovera & Brian L. Cutler, *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 948 (1999); see also Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1110 (2004).

³¹ See Lynn Garrioch & C. A. Elizabeth Brimacombe (nee Luus), *Lineup Administrators’ Expectations: Their Impact on Eyewitness Confidence*, 25 LAW & HUM. BEHAV. 299 (2001) (reviewing literature on inability to guard against expectancy effects).

³² See Gary L. Wells, Amina Memon & Steven Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45 (2006) (reviewing the literature on confidence and accuracy).

shown that post-identification feedback given to a witness can artificially inflate an eyewitness' statement of confidence in that identification.³³

Due to the real and significant problems posed to eyewitness accuracy by expectancy effects and post-identification feedback, researchers have tested ways to prevent these impacts on the confidence-accuracy relationship. First, eyewitnesses may be asked for their confidence in their identifications before any feedback is provided to them. This is valuable because “the certainty of the witness at the time of the identification, uncontaminated by feedback, would then be available at trial through discovery motions.”³⁴ Research has at least partially supported this notion, but experts caution that “the effects of feedback are not entirely prevented by asking the eyewitnesses about their confidence prior to their being exposed to feedback.”³⁵

Second, scholars suggest that law enforcement can ensure that the person who conducts the lineup is unaware of which member is the police suspect.³⁶ As noted above, this is referred to as “double-blind” identification procedures (also commonly referred to as “blind administration” procedures in eyewitness literature) and follows the model established for experiments by science. Virtually all experiments related to post-identification feedback emphasize the need for blind lineup administrators in their findings.³⁷ Taken together,

³³ Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 59 J. APPLIED PSYCHOL. 334, 342 (2004); see also Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL., 112, 117 (2002); Wells & Bradfield, *supra* note 12, at 369.

³⁴ Bradfield et al., *supra* note 33, at 119.

³⁵ Wells & Bradfield, *supra* note 12, at 372.

³⁶ See generally Wells et al., *supra* note 21; Wells et al., *supra* note 32.

³⁷ See Bradfield et al., *supra* note 33, at 118; Amy Bradfield Douglass, Caroline Smith & Rebecca Fraser-Thill, *A Problem with Double-Blind Photospread Procedures: Photospread Administrators Use One Eyewitness's Confidence to Influence the Identification of Another Eyewitness*, 29 LAW & HUM. BEHAV. 543 (2005) (reviewing literature that demonstrates confidence is malleable); Garrioch & Brimacombe, *supra* note 31, at 313; Phillips et al., *supra* note 30, at 948.

researchers have found that these measures all but eliminate administrator influence from identification procedures.³⁸

Sequential Presentation

One of the hazards of lineup identification procedures is that the eyewitness may choose the member of the lineup who most resembles the perpetrator of the event they witnessed, relative to the other members of the lineup, even if that person is not the actual culprit. One way to mitigate this effect is through cautionary instructions, as reviewed above. Scholars argue that this method will not eliminate relative judgment, however, because it seems unlikely that “an actual witness [will] seriously believe that the police do not have a suspect in the lineup for whom there is already some incriminating evidence in the case.”³⁹

To further address the problem of relative judgment, scholars began to test a sequential, rather than simultaneous, method of lineup presentation. In the common simultaneous method, eyewitnesses are shown six photos at once (one of the police suspect and five fillers) and indicate to the administrator whether the culprit is in the lineup. By contrast, sequential presentation occurs when an eyewitness is shown lineup members individually and asked after each photo to determine if that photo is of the perpetrator. If the eyewitness indicates that it is, the lineup stops there. If the eyewitness responds that it is not a picture of the culprit, the eyewitness is shown the next photo and the process is repeated. Eyewitnesses in the experimental tests of sequential lineups have not been allowed to see the photos again, and they are not told how many photos they will view.⁴⁰ While this may not completely rid an eyewitness of the expectation that a police suspect will be included in the lineup, keeping the witness blind as to the number of photos they will view may help to minimize relative judgment.

³⁸ Semmler et al., *supra* note 33, at 335.

³⁹ Wells, *supra* note 27, at 94.

⁴⁰ See generally Wells et al., *supra* note 32, at 63-64.

Initial results using the sequential method seemed to find support for the superiority of the method in its ability to improve or increase correct identifications while decreasing the number of correct non-identifications when the culprit was not present in the lineup,⁴¹ especially when the lineup was conducted using double-blind procedures.⁴² These early findings were questioned, however, when a pilot study conducted with the Illinois State Police found that “the sequential, double-blind procedures resulted in an overall *higher* rate of known false identifications than did the simultaneous lineups.”⁴³

The Illinois pilot study subsequently received much criticism from researchers, largely in the areas of methodology and biased circumstances.⁴⁴ First, the study was criticized because all sequential lineups in the study were double-blind, whereas all simultaneous lineups were single-blind. Instead of testing four methodologies (double-blind/sequential; double-blind/simultaneous; single-blind/sequential; single-blind/simultaneous), only two were tested. This leaves the findings of the report ambiguous because one cannot determine whether the known false identification rates were due to the double-blind procedure, the sequential

⁴¹ See, e.g., Brian L. Cutler & Steven D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APPLIED PSYCHOL. 281 (1988); R. C. L. Lindsay, James A. Lea & Jennifer A. Fulford, *Sequential Lineup Presentations: Technique Matters*, 76 J. APPLIED PSYCHOL. 741 (1991); R. C. L. Lindsay, James A. Lea, Glenn J. Nosworthy, Jennifer A. Fulford, Julia Hector, Virginia LeVan & Carolyn Seabrook, *Biased Lineups: Sequential Presentation Reduces the Problem*, 76 J. APPLIED PSYCHOL. 796 (1991); R. C. L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556 (1985).

⁴² Phillips, et al., *supra* note 30, at 948; see also Haw & Fisher, *supra* note 30.

⁴³ SHERI H. MECKLENBURG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES iv (2006). Also, a pilot program conducted in Hennepin County, Minnesota, using double-blind sequential procedures notably reported results in line with research expectations. See Amy Klobuchar, Nancy K. Mehrkens Steblay & Hillary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381 (2006).

⁴⁴ See Zack L. Winzler, *Whoa, Whoa, Whoa. . . One At A Time: Examining the Responses to the Illinois Study on Double-Blind Sequential Lineup Procedures*, 4 UTAH L. REV. 1595 (2008) (summarizing the responses to the Illinois report); see also Roy S. Malpass, *Notes on the Illinois Pilot Program on Sequential Double-Blind Identification Procedures*, PUB. INT. L. REP., Summer 2006, at 5; State of Wisconsin Office of the Attorney General, *Response to Chicago Report on Eyewitness Identification Procedures* (2006), <http://www.doj.state.wi.us/dles/tns/ILRptResponse.pdf>; Nancy Steblay, *Observations on the Illinois Lineup Data* (2006), <http://web.augsburg.edu/~steblay/ObservationsOnTheIllinoisData.pdf>; Gary L. Wells, *Gary L. Wells' Comments on the Mecklenburg Report*, http://www.psychology.iastate.edu/~glwells/Illinois_Project_Wells_comments.pdf.

procedure, or the combination of the two.⁴⁵ Second, the Illinois study was criticized because rather than being conducted by the Illinois State Police, it was conducted by the Chicago Police Department who strongly opposed the double-blind sequential procedure, as survey results documented in Mecklenburg's report to the legislature revealed.⁴⁶ This left the study vulnerable to critiques that the officers who conducted the study were biased against the procedure and motivated to see that the study results did not favor sequential double-blind administration of eyewitness identification procedures.⁴⁷

Subsequent studies on the double-blind sequential procedure have not provided a definitive answer on the utility of sequential over simultaneous lineups, as results have shown that although sequential lineups may reduce false identifications, they may also reduce correct identifications.⁴⁸ Additionally, studies have indicated that the process of making an eyewitness identification may be much more complex than can be compensated for through sequential identification procedures.⁴⁹ In other words, although the methodology of lineup presentation may be important, it may not be the *most* important of the many factors that can influence the outcome of an identification procedure. Until these significant questions can be answered, there

⁴⁵ See David L. Schachter, Robyn Dawes, Larry L. Jacoby, Daniel Kahneman, Richard Lempert, Henry L. Roediger & Robert Rosenthal, *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3 (2008).

⁴⁶ See Timothy P. O'Toole, *What's the Matter With Illinois? How an Opportunity Was Squandered to Conduct an Important Study on Eyewitness Identification Procedures*, CHAMPION MAG., Aug. 2006, at 18.

⁴⁷ See Winzeler, *supra* note 44.

⁴⁸ See R. C. L. Lindsay, Jamal K. Mansour, Jennifer L. Beaudry, Amy-May Leach & Michelle I. Bertrand, *Sequential Lineup Presentation: Patterns and Policy*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 13 (2009); Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 PSYCHOL. PUB. POL'Y & L. 394 (2006); Roy S. Malpass, Colin G. Tredoux & Dawn McQuiston-Surret, *Public Policy and Sequential Lineups*, 14 LEGAL AND CRIMINOLOGICAL PSYCHOL. 1 (2009) [hereinafter *Public Policy and Sequential Lineups*]; Roy S. Malpass, Colin G. Tredoux & Dawn McQuiston-Surret, *Response to Lindsay, Mansour, Beaudry, Leach and Bertrand's Sequential Lineup Presentation: Patterns and Policy*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 25 (2009).

⁴⁹ See Wendy Kneller, Amina Memon & Sarah Stevenage, *Simultaneous and Sequential Lineups: Decision Processes of Accurate and Inaccurate Eyewitnesses*, 15 APPLIED COGNITIVE PSYCHOL. 659 (2001); R. C. L. Lindsay, James B. Pezzule, Wendy Craig, Kang Lee & Samantha Corber, *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUM. BEHAV. 391 (1997); Lindsay et al., *supra* note 48; *Public Policy and Sequential lineups*, *supra* note 48; Christian A. Meissner, Colin G. Tredoux, Janat F. Parker & Otto H. MacLin, *Eyewitness Decisions in Simultaneous and Sequential Lineups: A Dual-Process Signal Detection Theory Analysis*, 33 MEMORY & COGNITION 783 (2005).

will likely continue to be dissention in the field over the use of sequential versus simultaneous identification procedures.

Organizations' Recommended Practices

The studies summarized above have led researchers to develop a set of recommendations for the conduct of eyewitness identification lineups. Although there is some disagreement on the utility of sequential presentation, in general scientists agree that lineups should contain only one suspect, that the suspect should not unduly stand out from the fillers, appropriate cautionary instructions are needed, the administrator of the lineup should not know who is the police suspect (double-blind procedures), and the administrator should collect a confidence statement from the eyewitness at the time of the identification before any feedback is given.⁵⁰ As reviewed below, many of these recommendations have been adopted by a variety of criminal justice organizations. The recommendations made specifically by the Department of Justice, the American Bar Association, and the International Association of Chiefs of Police are summarized in Table 2 below.

Department of Justice

The U.S. Department of Justice (DOJ) initiated a study⁵¹ in 1998 with the purpose of recommending best practices and procedures for the criminal justice community to employ in investigations involving eyewitnesses. The National Institute of Justice established the Technical Working Group for Eyewitness Evidence to identify, define, and assemble a set of investigative tasks that should be performed in every investigation involving eyewitness

⁵⁰ See Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (2006); Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero & C. A. E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 1 (1998).

⁵¹ TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

Table 2: Summary Recommended Practices

	DOJ⁵²	ABA⁵³	IACP⁵⁴
Filler Selection	<ul style="list-style-type: none"> • One suspect per lineup • Fillers should match witness' description of perpetrator • Minimum of 5 fillers (4 for live lineups) 	<ul style="list-style-type: none"> • Fillers should match witness' description of perpetrator • Sufficient number of fillers needed 	<ul style="list-style-type: none"> • One suspect per lineup • Individuals of similar physical characteristics • Minimum of 5 fillers (4 for live lineups) • Photographs themselves should be similar
Cautionary Instructions	<ul style="list-style-type: none"> • "Just as important to clear innocent persons" • "Person who committed the crime may or may not be present" • "Regardless of whether an identification is made, police will continue to investigate" 	<ul style="list-style-type: none"> • "Perpetrator may or may not be in the lineup" • "Do not assume that the person administering lineup knows identity of suspect" • "Need not identify anyone" 	<ul style="list-style-type: none"> • "Just as important to clear innocent persons" • "Person who committed the crime may or may not be present" • "You do not have to identify anyone" • "Regardless of whether an identification is made, we will continue to investigate"
Lineup Administration	<ul style="list-style-type: none"> • Instructions for both simultaneous and sequential procedures • Blind administration not addressed 	<ul style="list-style-type: none"> • Blind administration whenever practicable 	<ul style="list-style-type: none"> • Blind administration whenever possible • Note that sequential procedures have been recommended by some
Documentation	<ul style="list-style-type: none"> • Ask witness to state, in her own words, how certain she is of any identification • Preserve photos and presentation order • Video or audio recommended for live lineups • Record identification and nonidentification results in writing 	<ul style="list-style-type: none"> • Ask witness to state, in her own words, how certain she is of any identification • Video record recommended of lineup procedure • Photos should be taken of lineup 	<ul style="list-style-type: none"> • Video or audio tape live lineup whenever possible • Preserve photo array for future reference
Other	<ul style="list-style-type: none"> • Recommendations for initial reports by first responders, mug books and composites, procedures for interviewing witness, show-ups 	<ul style="list-style-type: none"> • Training for police and prosecutors on how to implement recommendations, conduct non-suggestive lineups 	<ul style="list-style-type: none"> • Recommendations for multiple witnesses, blank lineups, right to counsel at eyewitness identifications

⁵² *Id.*

⁵³ ABA Criminal Justice Section, *Report to the House of Delegates: Recommendation of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (2004), available at <http://meetings.abanet.org/webupload/commupload/CR209700/relatedresources/ABAEyewitnessIDrecommendations.pdf>.

⁵⁴ INT'L ASS'N OF CHIEFS OF POLICE, TRAINING KEY NO. 600, EYEWITNESS IDENTIFICATION (2006).

evidence to best ensure the accuracy and reliability of this evidence.⁵⁵ While the report addresses a number of eyewitness issues, including answering 9-1-1 calls and conducting eyewitness interviews, the Panel focused the review on portions of the report pertaining to photo and live lineups.

Composition The DOJ's guiding policy for the composition of photo and live lineups is that the lineup should be composed in such a way that the suspect does not unduly stand out.⁵⁶ For photo lineups, this means selecting fillers who generally fit the witness' description of the perpetrator and creating a consistent appearance between the suspect and fillers with respect to any unique or unusual features. The DOJ also recommends including only one suspect in each photo lineup, using a minimum of five fillers per lineup, never reusing fillers in multiple lineups shown to the same witness, and preserving the presentation order and actual photos used in a photo lineup.⁵⁷ For live lineups, the report endorses the same composition standards as photo lineups, with the difference of recommending a minimum of four fillers instead of five.⁵⁸

Instructions The DOJ recommends that prior to presenting a lineup of any kind, the investigator should instruct the witness to ensure that he or she understands that the purpose of the lineup is to exculpate the innocent as well as to identify the actual perpetrator.⁵⁹ Specifically, the administrator should instruct the witness that the person who committed the crime may or may not be in the lineup. The witness should also be told that regardless of whether an identification is made or not, the police will continue to investigate the incident.⁶⁰

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 29.

⁵⁷ *Id.* at 29-30.

⁵⁸ *Id.* at 30.

⁵⁹ *Id.* at 31.

⁶⁰ *Id.* at 32.

Administering the Lineup The DOJ notes that the lineup should be conducted in a manner that promotes the reliability, fairness, and objectivity of the witness' identification.⁶¹ To do so, the administrator must conduct the lineup in a manner conducive to obtaining accurate identification or nonidentification decisions. The report recommends doing so by giving the cautionary instructions mentioned above, avoiding any statements that may influence the witness' selection, recording a confidence statement of the witness immediately after a selection is made, and avoiding reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' confidence statement.⁶²

Specifically for photo lineups, the report recommends that the administrator document in writing the photo lineup procedures, including: identification information and sources of all photos used; names of all persons present at the photo lineup; date and time of the lineup.⁶³ In the case of live lineups, the DOJ endorses measures that include: instructing all those present at the lineup not to make any statements that may influence the witness; ensuring that any identification actions (e.g., speaking, moving) are performed by all lineup subjects; documenting the lineup in writing, including identification information of lineup participants, names of all persons present at the lineup, and the date and time the lineup was conducted. It is also recommended that the lineup be recorded by photo or video.⁶⁴

Recording Results The DOJ recommends policies that ensure the record of the outcome of the lineup completely and accurately reflects the identification results obtained from the witness.⁶⁵ The report endorses the recording of both identification and nonidentification results in writing, including the witness' own words regarding confidence. These results should

⁶¹ *Id.* at 33.

⁶² *Id.*

⁶³ *Id.* at 34.

⁶⁴ *Id.* at 35-36.

⁶⁵ *Id.* at 38.

further be signed and dated by the witness. Finally, the report notes that no materials indicating previous identification results should be visible to the witness, and the witness should not be permitted to write or mark on any materials that will be used in other identification procedures.⁶⁶

American Bar Association

In 2004, the American Bar Association (ABA) released a report containing a statement of the organization's best practices aimed at increasing the accuracy of eyewitness identification procedures nationwide.⁶⁷ These practices address many causes of eyewitness error, including administration bias, lineup size, foil selection, collection of confidence judgments, and lineup method.⁶⁸ These issues and recommended practices are reviewed below.

Administration Bias The ABA recommends using double-blind procedures, where the person who conducts a lineup or photospread and all others present during the procedure should be unaware of which lineup member is the suspect.⁶⁹ ABA recommendations also state that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup, that they should not therefore feel that they must make an identification, and that they should not assume that the person administering the lineup knows the identity of the suspect.⁷⁰

Lineup Size Although the ABA does not recommend a specific number of fillers to include in a lineup, they urge the use of larger lineups whenever practicable, in order to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.⁷¹

⁶⁶ *Id.*

⁶⁷ ABA, *supra* note 55.

⁶⁸ *Id.* at 10-14.

⁶⁹ *Id.* at 3.

⁷⁰ *Id.* at 13.

⁷¹ *Id.* at 3.

Filler Selection The best practices endorsed by the ABA state that fillers should be chosen for their similarity to the witness' description of the perpetrator, rather than the foils' similarity to the appearance of the suspect.⁷² As reviewed in the studies above, the organization also recommends that the foils be presented in a manner to avoid the suspect's unduly standing out, through either suspect appearance or suspect presentation.⁷³ For example, photographic lineups should not include five mug shots and one snapshot of the suspect, a mix of black-and-white and color photos, etc. Such considerations are vitally important to prevent wrongful conviction, as evidenced by the case of Timothy Cole. We have learned since his wrongful conviction was revealed that in at least one of the lineups presented to a witness, Cole's was the only Polaroid in a six-pack that included five other mug shots.

Collecting Confidence Judgments The ABA endorses the practice of collecting a "clear statement... from the eyewitness at the time of the identification and before any feedback as to whether he or she identified the accurate culprit."⁷⁴ The eyewitness should also never be told whether he selected the suspect so that confidence is not artificially inflated.⁷⁵

Lineup Method The ABA has stated that the breadth of scientific evidence is insufficient to endorse one method over the other at this time.⁷⁶ The ABA thus recommends a conservative approach to utilizing sequential lineups, similar to that adopted by some states,⁷⁷ where select police departments utilize sequential lineups and research their effectiveness and practicability.

⁷² *Id.* at 12.

⁷³ *Id.* at 13.

⁷⁴ *Id.* (quoting Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. JUST. MAG., Spring 2003, at 37).

⁷⁵ *Id.* at 14.

⁷⁶ *Id.* at 12.

⁷⁷ *Id.* at 20. *See generally supra* pp. 16-18 and accompanying notes (detailing Illinois' conservative approach to implementing sequential lineup procedure).

International Association of Chiefs of Police

The International Association of Chiefs of Police (IACP) is the world's oldest and largest nonprofit membership organization of police executives, and the organization routinely publishes “training keys,” documents on the most current practices of policing and related science that can be used by members in departmental training. One such document details the IACP’s recommendations for the administration of eyewitness identification practices.⁷⁸ Many of the policies endorsed by the IACP align with the practices cited by various academic, legal and other stakeholder groups. These policies include: preference for live or photo lineups over show-ups; double-blind lineup administration; pre-lineup cautionary instructions stating that the perpetrator may or may not be present and that no selection is required; barring multiple witnesses from communicating until all have completed the identification process; sequential rather than simultaneous lineup administration; selecting lineup fillers who do not so closely resemble the suspect that correct identification is difficult; a lineup size of no less than five or six subjects; the suspect not appearing in multiple subsequent photo or live lineups; documenting the witness’ confidence immediately after a selection is made; video or audio recording of the lineup whenever possible; no congratulation or suggestive statements to the witness after an identification is made; photographs used in photo lineups should be similar in size, color and format; and preservation of the photo lineup used.⁷⁹

What distinguishes the IACP is first, the amount of detail that is included in each of the recommendations because, as a practical guide and training document for law enforcement, this maximizes its utility. Second, the IACP makes recommendations on additional facets of

⁷⁸ INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 56.

⁷⁹ *Id.* at 2-4.

eyewitness identification procedures that come from its unique law enforcement perspective. These recommendations are discussed below.

The IACP endorses in-person lineups as the generally preferable eyewitness identification procedure and recommends measures in addition to the commonly cited practices listed above.⁸⁰ Besides the normal statements included in pre-lineup cautionary instructions, the IACP recommends informing the witness that the individuals present in the lineup may not appear as they did on the date of the incident due to changes in features, such as head and facial hair or scars. Furthermore, it is advised that the witness be told that whether an identification is made, the police will continue with the investigation.⁸¹ It is also stated that some authorities caution against using plainclothes police officers as fillers in lineups because they do not naturally look or act like suspects, or may have been seen by the witness in the community or in other contexts.⁸²

The group makes a specific recommendation regarding the double-blind administration of lineups, stating that if possible, officers who are not assigned to the case at issue should administer the procedure. Doing so helps to minimize the possibility that the officers who are conducting the investigation will influence (inadvertently or otherwise) the witness as to which subject to pick, or put pressure on the witness to make a selection at all.⁸³

In preparation of the lineup, the IACP states that the witness should not be allowed to see photos of the suspect, nor see the suspect in person, such as in an office or holding cell.⁸⁴ If more than one witness is to view a lineup, it is noted that they should be kept separate prior to the lineup and should not be permitted to discuss the case or compare descriptions of the

⁸⁰ *Id.*

⁸¹ *Id.* at 3.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

perpetrator.⁸⁵ Similarly, the group condemns the practice of having a group of witnesses view a lineup simultaneously, instead advising that the lineup should be presented to one witness at a time. In extenuating circumstances where more than one witness must be present simultaneously, the witnesses should be required to make their identifications silently, in writing, and should not be permitted to discuss the identification aloud with each other or with the officers present.⁸⁶ It is also recommended that two or more lineups be conducted when possible, where one lineup includes the suspect and the others do not (“blank lineups”).⁸⁷

The IACP makes numerous recommendations to the administration of photo lineups, many of which mirror those made regarding live lineups. Specifically regarding photo lineups, it is stated that there should be at least six photographs; that mug shots and snapshots should not be mixed; that if mug shots are used, any identifying information regarding the subject of the photograph should be concealed; and the lineup should never include more than one photo of the same suspect.⁸⁸ Recommendations similar to those offered the DOJ, ABA, and IACP have also been offered by advocacy groups such as the Innocence Project⁸⁹ and The Justice Project.⁹⁰

Eyewitness Recommendations from Texas Organizations

Governor’s Criminal Justice Advisory Council On March 14, 2005, Governor Rick Perry announced the creation of the Governor’s Criminal Justice Advisory Council (CJAC) to advise him on the “adequacy of criminal procedures from the initial stage of investigation into a crime

⁸⁵ *Id.*

⁸⁶ *Id.* at 3-4.

⁸⁷ See Wells, *supra* note 27.

⁸⁸ INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 56, at 4.

⁸⁹ The Innocence Project, Eyewitness Identification Reform, (Oct. 2009) (on file with the Texas Task Force on Indigent Defense).

⁹⁰ THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION: A POLICY REVIEW, *available at* http://www.thejusticeproject.org/wp-content/uploads/polpack_eyewitnessid-fin21.pdf.

to appellate and post-conviction proceedings.”⁹¹ Made up of elected officials, judges, attorneys, and other stakeholders, CJAC recommended in its January 2006 report that “the state immediately undertake a pilot project [...] to test simultaneous and sequential identification procedures under the direction of an expert.”⁹² Although a study did not occur following the recommendation, a study is currently underway in the Austin Police Department that is lead by one of the top eyewitness identification research in the nation.

Texas Criminal Justice Integrity Unit The Texas Criminal Justice Integrity Unit (TCJIU) is an ad hoc committee created by Judge Barbara Hervey of the Texas Court of Criminal Appeals. The committee was established in June 2008 to review the strengths and weaknesses of the Texas criminal justice system and bring about meaningful reform through education, training, and legislative recommendations.

Eyewitness identification error is an ongoing area of consideration for TCJIU, and several subject matter experts were invited to address the Unit in 2008 on how Texas can best prevent wrongful conviction due to eyewitness error. Following presentations by Barry Scheck, Director of the Innocence Project; John Terzano, President of The Justice Project; the Richardson Police Department; and Dr. Gary Wells, Director of Social Sciences of the Institute of Forensic Science and Public Policy located at Iowa State University, TCJIU’s 2008 Annual Report of Activities concluded that “instituting reforms in the eyewitness identification procedures used by law enforcement agencies throughout Texas should have the highest priority of any efforts in the area of wrongful convictions.”⁹³

⁹¹ Rick Perry, Governor, State of Texas, Address to the Texas Daily Newspaper Association (March 14, 2005), available at <http://governor.state.tx.us/news/speech/9963/>.

⁹² GOVERNOR’S CRIMINAL JUSTICE ADVISORY COUNCIL, RECOMMENDATIONS TO GOVERNOR RICK PERRY 22-23 (2006).

⁹³ TEX. CRIMINAL JUSTICE INTEGRITY UNIT, 2008 ANNUAL REPORT OF ACTIVITIES 7 (2008), available at <http://www.cca.courts.state.tx.us/tcjiu/reports/TCJIU-2008-report.pdf>.

This concern was echoed in TCJIU’s 2009 report, in which the committee encouraged law enforcement entities in Texas to follow the lead of Richardson, Dallas, and other jurisdictions that have voluntarily reformed their eyewitness identification procedures.⁹⁴ Both Richardson and Dallas Police Departments have adopted the double-blind approach to lineup administration, along with other improvements to cautionary instructions, filler selection, and procedure documentation in their standard operating procedures. In 2009, TCJIU was able to report that the Texas Commission on Law Enforcement Officer Standards and Education had adopted an eyewitness identification procedure course into its Basic Peace Officer Course curriculum.⁹⁵ This achievement was the result of work initiated in 2008 to improve the training of all officers in the area of eyewitness identification procedures. The report also stated that the TCJIU is in the process of collaborating with other members of the criminal justice system to develop legislation that will address the issue of eyewitness identification procedure reform statewide.⁹⁶

Texas and State Practices

Practices Nationwide

Although the practices recommended by the Department of Justice and others have been available to law enforcement for over a decade, only a handful of states have adopted eyewitness reform. In Maryland, law enforcement agencies must adopt written policies that comply with the DOJ standards.⁹⁷ North Carolina passed a law in 2007 that requires double-blind administration, sequential presentation of lineup members, and appropriate cautionary instructions; guides filler selection and lineup construction; makes provisions for multiple witnesses; asks for a

⁹⁴ TEX. CRIMINAL JUSTICE INTEGRITY UNIT, 2009 ANNUAL REPORT OF ACTIVITIES 7 (2009), available at <http://www.cca.courts.state.tx.us/tcjiu/reports/TCJIU-2009-report.pdf>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ MD. CODE ANN., [Public Safety] § 3-506 (LexisNexis 2010).

contemporary confidence statement from the witness; and requires documentation of the procedure, including video for live lineups.⁹⁸ Wisconsin law requires law enforcement agencies to adopt written eyewitness policies and procedures that can prevent wrongful convictions, and the Attorney General makes model policies on blind administration, sequential presentation, cautionary instructions, filler selection, and confidence statements available.⁹⁹ The Attorney General also provides training to support implementation of these policies. Although not codified in statute, the Attorney General of New Jersey made the state the first in the nation to adopt DOJ recommendations.¹⁰⁰ Ohio mostly recently adopted reform that requires blind administration and documentation of the procedure.¹⁰¹

In statutes and best practices adopted by North Carolina, Wisconsin, and Ohio, provisions were made to allow for blind administration through the use of alternative methods. These methods may include administration on a computer or laptop, or blind administration may be achieved through the “folder method.” Although described briefly in the North Carolina Statute, the folder method received fuller treatment in both the Wisconsin and Ohio statutes. Law enforcement officers who use this procedure place a filler photo into a folder and mark that folder number one. Four additional filler photos and one suspect folder are placed in separate folders, shuffled so the officer does not know which folder contains the photo of the suspect, and numbered two through six. Two or more empty folders are added at the end and numbered consecutively from seven onward. In this way, an officer who is involved in the investigation of a crime may administer an identification procedure to an eyewitness and still reap the benefits of

⁹⁸ N.C. GEN. STAT. § 15A-284.52 (2010).

⁹⁹ WIS. STAT. § 175.50 (2008).

¹⁰⁰ Memorandum from John J. Farmer Jr., Attorney General of the State of N.J., to all county prosecutors, Col. Carson J. Dunbar, Jr., Superintendent, NJSP, all police chiefs, all law enforcement chief executives, Re: Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001), available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

¹⁰¹ OHIO REV. CODE ANN. § 2933.83 (West 2010).

blind administration. The folder method may prove especially useful rural jurisdictions with few or no officers available to administer a lineup who are unaware of the police suspect.

Texas Practices

Insight into Texas policies and procedures was revealed by a 2008 study conducted by The Justice Project.¹⁰² In a survey of 1,038 law enforcement agencies, it was found that out of 750 responsive departments, only 88 (12%) had any written policies to guide investigators as they prepare and administer eyewitness identification procedures. Even fewer of those procedures comported with recommended practices in the areas of cautionary instructions, composition fairness, blind administration, and comprehensive documentation. For example, only seven departments were found to use blind administration and only four require documentation of an identification procedure. The Justice Project concluded that the “lack of standardized protocol indicates that Texas is failing to reap the benefits of systematic scientific research on eyewitness error. . . .”¹⁰³

Since this research was conducted, a few large departments have revised their eyewitness identification procedures. For example, Dallas Police Department announced in January of 2009 that the department would adopt sequential double-blind procedures,¹⁰⁴ and Austin Police Department is currently participating in a study to evaluate simultaneous and sequential lineups that are administered by laptop.¹⁰⁵ There are still hundreds of departments, however, that may use unnecessarily suggestive procedures. The recommends proposed by the Panel will help to

¹⁰² See THE JUSTICE PROJECT, *supra* note 2.

¹⁰³ *Id* at 3.

¹⁰⁴ Jennifer Emily, *Dallas Police Drop Study, Plan Photo-Lineup Changes*, DALLAS MORNING NEWS, Jan. 16, 2009, at 1B, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/011609dnmetsequentialblind.4311ff6.html>.

¹⁰⁵ Press Release, Iowa State Univ., ISU psychologist Wells is conducting two new studies on eyewitness misidentifications, (Nov. 5, 2009), available at <http://www.news.iastate.edu/news/2009/nov/eyewitness>; see also MyFox Austin, *Crimewatch: APD Photo Lineups* (2010), <http://www.myfoxaustin.com/dpp/news/crimewatch/Crimewatch-APD-Photo-Lineups-20100712-ktbcw/>.

ensure that the best evidence possible is collected during criminal investigations and presented to judges and juries at trial.

Although the Panel agrees that the reforms listed above are necessary for the State of Texas, additional policy reforms and approaches have been suggested and may be considered by the Legislature, as outlined below in the concurring report.

Concurring Report to TCAP Eyewitness Identification Report

(Supplemental materials found in Appendix B)

By Prof. Sandra Guerra Thompson

University of Houston Law Center

1. **TCAP should make recommendations for the adoption of statutory rules to govern the use of single-suspect showups.**
 - a. The failure to address single-suspect showups is a major and unnecessary omission in the TCAP report. A large percentage of identifications are obtained by means of single-person “showups.” In Dallas, three of the first 19 DNA exonerations were due to erroneous identifications at showups. Twenty percent of the DNA exonerations nationwide are due to the use of this highly suggestive procedure. (see attachment)
 - b. The Department of Justice Report, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), requires administrators to (1) document a witness’s description of the suspect prior to a show-up and (2) separate witnesses during a showup. It recommends that if witness make a positive identifications, investigators should consider using other types of identification procedures for all subsequent confirmatory identifications, rather than this highly suggestive method. As with lineups and photo arrays, the DOJ report also requires investigators to give cautionary instructions to the witness that the person in the showup may or may not be the perpetrator, and it urges investigators to obtain a statement of the witness’s certainty following a positive identification and maintain written documentation of that statement. Specifically, the DOJ report requires written documentation of the time, place, and result of the showup. The Innocence Project further recommends that the showups occur in a neutral, non-law enforcement location, without handcuffs (when practicable), and with the suspect removed from the squad car. It also recommends that showups be videotaped whenever practicable.
 - c. Other states have adopted measures to limit and regulate the use of showups. The Wisconsin, New York, and Massachusetts high courts, for example, refuse to admit identification testimony if it is based on a showup, unless the showup was conducted in the immediate aftermath of the crime or other exigent circumstances necessitated it. Maryland requires its law enforcement agencies to adopt written policies on identification procedures that comply with the Department of Justice recommendations.

- d. The Dallas Police have good written guidelines for showups (see attached): only to be used when necessary and appropriate, not when probable cause to arrest exists, within a short window of time (30 minutes – 2hours), if suspect apprehended near the crime, if public safety concerns exist. Also requires police to instruct witness that the person may or may not be the perpetrator and that the investigation will continue regardless of whether an ID is obtained, if one witness makes an ID subsequent witnesses will be shown lineups, separate witnesses (one witness per showup, other witness cannot be present), avoid suggestive statements (use of the word “suspect”), document detailed description from witness beforehand, do not use showup if suspect does not match witness’s description, and documentation (completion of showup documentation form).
- e. Guidelines recommended by the IACP (International Association of Chiefs of Police) in their Training Key #600 are similar (see attached): no showup if probable cause to arrest, obtain complete description from witness before a showup, suspect should not be in a cell, handcuffed or in jail attire, separate witnesses and do not allow them to talk about the ID before or after, same suspect should not be shown to a witness more than once, suspect should not be required to wear perpetrators clothing or speak similar words, police should avoid suggestive statements about the suspect, witnesses should be warned the person they view may or may not be the perpetrator, and confidence statement should be obtained. However, these guidelines do not address any time limitations (2 hours after the crime, etc), when showups are appropriate, or that if one witness makes an ID subsequent witnesses should be shown a lineup instead.

2. **TCAP should recommend that all witnesses who make an identification be asked for a statement of certainty.**

There is robust scientific research demonstrating the confidence is malleable, and can be easily inflated by feedback received post-identification. Moreover, studies have found that jurors place great weight on the confidence of eyewitnesses at trial, irrespective of their accuracy. As long as witnesses are permitted to state their confidence in their identifications at trial, it is critical that their level of confidence be documented, in the witness’s own words, at the time of the out-of-court identification. While TCAP’s recommendation that the police document anything the witness says is a good one, it should recommend, specifically, that the witness’s confidence be documented, since there may be witnesses who make identifications but do not, on their own, express their degree of certainty.

3. **Regarding warnings to witnesses, while TCAP recommends the most critical warning (the perpetrator may or may not be present), it should be noted that other instructions could and should be given as well.**

A better and more comprehensive set of instructions can be found in legislation passed in North Carolina in 2008¹:

- a. The perpetrator might or might not be presented in the lineup,
- b. The lineup administrator does not know the suspect's identity,
- c. The eyewitness should not feel compelled to make an identification,
- d. It is as important to exclude innocent persons as it is to identify the perpetrator,
- e. The investigation will continue whether or not an identification is made.

4. **TCAP should recommend blind and sequential lineups and photo arrays.**

a. Research experiments have shown time and again how some practices are suggestive or conducive to erroneous identifications. Some law enforcement officials have taken the position that laboratory studies are not relevant to real police work, but the constant flow of DNA exonerations proves that the findings of those laboratory studies were right all along. Those studies have overwhelmingly demonstrated the problem of “relative judgment” that causes erroneous identifications and that sequential identification procedures can minimize this effect.

b. Researchers distinguish between identifications based on “relative judgment” (comparable to the use of a process of elimination) and “recognition memory.” The following is a discussion about relative judgment by Gary Wells, one of the top psychologists who has conducted decades of research on eyewitness identifications:

“[P]eople have a tendency to select the person who looks most like the offender relative to the other members of the lineup. At first glance, this relative-judgment process would seem to be nonproblematic. In fact, however, the relative-judgment process is extremely problematic. The problem is made apparent by considering the fact that there is always someone who looks more like the offender than the remaining members of the lineup, even when the lineup does not include the offender. In these cases, eyewitnesses have a tendency to select that innocent person and confuse this relative-judgment process with recognition memory.

The relative-judgment problem is well illustrated in an experiment in which a crime was staged 200 times for 200 separate witnesses. All of the witnesses were then shown one of two lineups. Every witness was warned that the offender might or might not be in the lineup. Half of the witnesses viewed a six-person lineup in which the offender was present. Of these 100 witnesses, 21% made no selection at all, 54% picked the offender, 13% picked particular filler, and the remaining witnesses spread their choices across the other lineup members. The other half of

¹ N.C. GEN. STAT. § 15A-284.52(b)(3) (2009).

the witnesses viewed a lineup in which the offender was removed and was not replaced. The critical question in this scenario is what happened to the 54% of witnesses who would have chosen the offender had he been present; did they shift to the no-choice category, thereby causing 75% to make no choice? No. Of these 100 witnesses, the no-choice rate increased to only 32% whereas the person who was previously picked only 13% of the time was now picked 38% of the time. In other words, even though all of the witnesses were warned that the offender might not be in the lineup, removing the offender from the lineup led witnesses to shift to the "next best choice," nearly tripling the jeopardy of that person. Controlled eyewitness experiments consistently show that the most difficult problem for eyewitnesses is recognizing the absence of the offender because, even when the offender is not in the lineup, there is still someone who looks most like the offender relative to other members of the lineup.

The majority of DNA exoneration cases represent instances in which the actual offender was not in the lineup. This is precisely what eyewitness researchers had predicted based on data from controlled experiments. Unfortunately, there are hundreds of circumstances under which police might unknowingly place an innocent suspect in a lineup. Sometimes police place an innocent suspect in a lineup because they received an anonymous but erroneous tip that the person was the offender; sometimes an innocent suspect is placed in a lineup merely because the person fits the general physical description and was in the vicinity of the crime; sometimes an innocent person came into possession of something linked to the crime; and sometimes one or more detectives places a suspect in a lineup based on a "hunch." Whatever the cause, it can never be presumed that the suspect is the offender; if police knew that, they would not need the lineup at all." (Wisconsin Law Review, 2006)

- c. A large body of peer-reviewed research conducted over the last 20 years demonstrates that sequential presentation, when coupled with a "blind" administrator, greatly minimizes the likelihood of incorrect identifications.
- d. The Illinois State Police study that created controversy over sequential lineups was worthless and should not impede important reform. This report has caused some law enforcement agencies to oppose sequential procedures, but others have rejected it.
- e. A distinguished panel of seven scientists outside the field of eyewitness identification studied the Illinois experiment and found that it had a fundamental confound in its comparison of double-blind sequential lineups with non-blind simultaneous lineups, a flaw that has "devastating consequences for assessing the real-world implications...[and] guaranteed that most outcomes would be difficult or impossible to interpret." In short, the study could not answer the research question as to whether sequential lineup procedures are superior to simultaneous, nor whether double-blind procedures are superior to non-blind. (2008)

Moreover, a recent journal article summarized the data from the Evanston police department, procured through a Freedom of Information Act lawsuit filed by the National Association of Criminal Defense Lawyers and the MacArthur Justice Center of the Bluhm Legal Clinic at Northwestern University School of Law, raises even more serious concerns about the validity of the Illinois study (Chicago and Joliet have not yet turned over their data), specifically about the lack of random assignment.² Random assignment is a fundamental requirement of sound scientific study. Underlying data Dr. Steblay's comparison of the data from the non-blind simultaneous lineups to data from the double-blind sequential lineups reveals not only that the study's cases were not randomly assigned to the two conditions, but that the cases more likely to result in suspect identifications were assigned to the non-blind simultaneous condition.

- f. TCAP is not the correct forum to make political compromises on account of law enforcement resistance to changes due to the confusion created by the Illinois study. The proper role of this panel is to advise the legislature on the best practices for reducing wrongful convictions.
- g. Other states have adopted sequential identification procedures, even after the Illinois study was reported. The Attorney General of Wisconsin rejected the conclusions on sequential procedures of the Illinois study and continued to require blind and sequential procedures. (2006) New Jersey's Attorney General had adopted blind and sequential lineups and photo arrays in 2001 and made no change in light of the Illinois study. The North Carolina legislature adopted sequential, double-blind for lineups. (2007). Ohio reformed its procedures to adopt a sequential "folder" method (2010).

5. TCAP should propose more active judicial oversight of eyewitness identification evidence.

Texas law should address the inherent weaknesses in eyewitness testimony with mandates to trial courts regarding reliability hearings, jury instructions, and expert testimony. This approach is reflected in the framework proposed by the Innocence Project and adopted by the Special Master in *State v. Henderson*. See. *State v. Henderson*, A-9 Sept. Term 2008, 2009 N.J. LEXIS 45 (N.J. Feb. 26, 2009). Specifically, reliability hearings should be conducted in every case to examine all relevant factors both event and procedure-related, affecting identification accuracy, including suggestion by non-state actors. In addition, remedial interventions such as jury instructions on the numerous variables shown by robust scientific studies (and, in particular, meta-analyses) to affect the reliability of identifications, admission of expert witnesses, requiring corroborating evidence, or exclusion to address the inherent weakness of some identifications. The lack of reliability of identifications may be the result of contamination of the witness's memory by other witnesses, family and friends, the media,

² Nancy K. Steblay, What We Know Now: The Evanston Illinois Field Lineups, *Law & Hum. Behav.* (forthcoming 2010).

or simply on account of factors inherent in the witness (including race³, stress, age, influence of alcohol) or factors inherent in the crime (including whether a weapon was present, the distance between the witness and the perpetrator, lighting conditions, etc.). The important thing to note here is that some identification testimony is too unreliable to admit or may require some remedial intervention, even though the police may fully comply with “best practice” procedures.

The TCAP proposals focus only on “system variables,” not “estimator variables.” System variables are those factors that the legal system can control, for example, by means of improved police procedures. Estimator variables are those qualities inherent in the eyewitness such as the witness’s age or race, the ability to observe the suspect, lighting conditions, etc.

In June of 2010, a Special Master appointed by New Jersey’s top court called for a major overhaul of the legal standards for the acceptance of eyewitness testimony in court, citing 33 years of robust scientific research on memory and interview techniques. The Special Master’s opinion was made public in a 64-page report following an unprecedented hearing on eyewitness identification science and law that began in September 2009.

The New Jersey court recommended that prosecutors – not defendants – should bear the burden of proof regarding the reliability of eyewitness testimony, and that juries as well as judges should be fully informed as to the factors proven by science to impact eyewitness identification reliability.

The court also found that not just law enforcement but “outside actors” (e.g., other witnesses or family members) can contaminate a witness’ memory, and courts should take this into account when reviewing the reliability of testimony.

In 2007 and 2009 respectively, the Tennessee and Utah Supreme Courts required that expert testimony be admitted when the requirements of Rule of Evidence 702 are met, removing the traditional discretion of trial courts to exclude the testimony.

6. **TCAP should not propose that the Bill Blackwood Law Enforcement Management Institute develop a model policy and that law enforcement agencies be required to adopt procedures that comply with the model policy.**

If TCAP chooses to propose that the legislature delegate rulemaking authority to the Bill Blackwood Institute, a number of procedural steps must be taken to properly implement the regulatory authority of the Institute. Otherwise, the Institute would only be making recommendations that would not be legally enforceable under the exclusionary rule of Article 38.23.

a. The purported advantages of delegation are said to be:

³ A major concern is the fact of reduced accuracy due to the witness being of a different race than the suspect. This factor is so thoroughly established in the research as to be beyond dispute. New Jersey Supreme Court has mandated jury instructions on cross-race identification when identification plays a key role and there is no corroborating evidence (1999).

- i. that it enables a timely response to updated research; greater flexibility than legislative rulemaking process;
 - ii. the Institute has experts available to draft procedures; and
 - iii. these same experts would provide police training.
- b. Countervailing Considerations:
- i. Best practices and scientific research have already become well-established. Major changes to best practices are highly unlikely. Only minor changes may be required, and the legislature can make these.
 - ii. If all departments are required to follow the procedures, it does not make sense to change the rules regularly. Changes would require re-training. There should be stability, and only important changes should be made. Legislative rulemaking process can address the few, important changes as needed.
 - iii. The Bill Blackwood Law Enforcement Institute is not a regulatory agency. The Institute describes itself as a law enforcement training program:

The Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) was created by the 70th Texas Legislature to develop the administrative, analytical, and executive skills of current and future law enforcement officials at no cost to either the participant or his/her agency. Public administration, management issues, the political, legal, and social environments of policing, and advanced technical issues are studied in detail. It is the largest and most sophisticated statewide preparation program for police management in the United States.

The Institute’s mission statement does not include acting as a regulatory agency, but only as an educational organization:

OUR MISSION

We are committed to serving the law enforcement profession through exceptional education, research, and training. Our aim is to inspire excellence in management and leadership through personal and professional development.
 - iv. Under the TCAP proposal, the Institute would de facto be vested with new rule-making authority since the proposed legislation would require all law enforcement agencies to comply with the “model policy” of the Institute. According to some members of TCAP, the “model policy” would have the effect of law for purposes of the exclusionary rule in Article 38.23. Thus, it is not accurate to call it a “model policy;” it would instead be a set of legally-required procedures. Alternatively, if it is merely a “model

policy,” then it is not subject to Article 38.23. The courts would not consider the police department’s guidelines based on the model policy to be legally required. In that case, the legislature would have succeeded in creating a wish list of procedures, but no actual enforceable rules.

- v. How will the individuals within the Institute who will have rule-making authority be appointed? The legislature will need to specify how individuals will be appointed to the new rule-making body within the Institute. The Institute is not a politically accountable body, so the legislature would need to implement the means for the participation of individuals representing a variety of viewpoints and areas of expertise so that the rulemaking process is not anti-democratic.
- vi. Will the legislature provide a time table for promulgating the rules?
- vii. Will the legislature provide the procedures by which the Institute will rule make? Typically, notice and comment procedures are required for administrative rulemaking. Notice and comment is standard in administrative rulemaking legislation to give the public the opportunity to take part in the rulemaking process. Is this contemplated, or will it be a closed-door process with no system for input from outside the Institute?
- viii. Since the Institute would be making legally enforceable rules for all Texas police departments, the rules the Institute promulgates should be readily available to the public by means of publication in the manner of statutes and administrative rules. Specifically, the public should have access to the rules online and in print form.

Chapter 2: Electronic Recording of Custodial Interrogations

“...[C]onfession evidence is inherently prejudicial and highly damaging to a defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is ultimately proven false beyond any reasonable doubt.”¹

Panel Recommendations

Although false confessions may never be completely eradicated from criminal investigations due to personal or situational factors, statewide policies can be adopted to guide law enforcement, judges, and juries on the best methods to document and preserve confessions in the context in which they were elicited. To help prevent wrongful conviction due to false confessions in Texas, the Panel recommends the following:

- 6. The State of Texas should adopt a mandatory electronic recording policy, from delivery of *Miranda* warnings to the end, for custodial interrogations in certain felony crimes.² The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.**

The Panel takes seriously the proposal that one way to prevent wrongful conviction due to false confessions is to create a complete, accurate, and reviewable document that captures the entirety of the custodial interrogation; thus, the Panel recommends that electronic recording be made mandatory in Texas for custodial interrogations in certain felony criminal cases.

Specifically the Panel recommends recording in cases of murder, capital murder, kidnapping,

¹ Steven A. Drizin & Richard A. Leo. *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 961 (2004).

² See Appendix C for compromise model bill language.

aggravated kidnapping, continuous sexual abuse of child, indecency with a child, sexual performance by a child, sexual assault, and aggravated sexual assault. Audiovisual recording of interrogations may be especially important in a multicultural state like Texas, where questions of translation of rights, waivers, questions, and answers may arise.³

The decision to limit the recommended recording requirement to these crimes in particular was made for several reasons. First, the list of crimes included under Sec. 3g of the Code of Criminal Procedures Chapter 42.12 is quite broad. By delineating specifically which crimes require recordation of custodial interrogations, the obligation is much clearer for the law enforcement officials who must conduct the recordings. Second, crimes are frequently added to or subtracted from Sec. 3g. Defining the recording requirement through a list of crimes rather than a statutory reference again provides clarity to those who must carry out the policy. The Panel believes this policy will offer the best protection to innocent defendants and to the officers who investigate crimes while taking into account the concerns about recording that have been raised by Texas jurisdictions.

The Panel further recommends that exceptions to electronic recording be allowed for good cause, such as equipment malfunction, uncooperative witnesses, spontaneous statements, public safety exigencies, or instances where the investigating officer was unaware that a crime that required recorded interrogations had been committed. This further takes into consideration

³ In an analysis of 560 separate warnings from more than 400 county and state jurisdictions across the United States, an empirical study conducted by a University of North Texas professor found more than 225 variations of the *Miranda* warnings. See Richard Rogers, et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177 (2007). Individual warnings varied from simple descriptions of 6-10 words to complex explanations that easily exceed 40 words. Some of the *Miranda* warnings required 2.8-grade level to understand, while others required a post-graduate education to understand the warning given. Another linguistic issue is the comprehensibility of the warning, while yet another is the fact that translation of the warning by a police officer (rather than a neutral third party interpreter) can serve as a form of linguistic duress that results in a wrongful waiver. See SUSAN BERK-SELIGSON, COERCED CONFESSIONS: THE DISCOURSE OF BILINGUAL POLICE INTERROGATIONS 41, 46 (Mouton 2009).

the contingencies that investigating officers may face when dealing with a witness or suspect in the field.

The final recommendation from the Panel is that in instances where the Court determines that unrecorded interrogations are not the result of good faith attempts to record or that none of the exceptions to recording apply, the Court may deliver an instruction to the jury that it is the policy of the State of Texas to record interrogations, and they may consider the absence of a recording in evaluating evidence that arose from the interrogation. The Panel believes that this three-tiered approach to electronic recording of custodial interrogations will best serve criminal justice stakeholders in our state without placing undue burden on any one party.

Panel Report

Introduction

One of the factors that has contributed to wrongful convictions in Texas is that of false confessions. Of the first 39 DNA exonerations documented by The Justice Project in 2009,⁴ five cases involved the false confession or plea of either the defendant or a co-defendant.⁵ For example, both Christopher Ochoa and Richard Danziger spent over 12 years in prison for murder and sexual assault due to a false confession that was secured after Ochoa's grueling two-day interrogation. In addition, both Steven Phillips and Patrick Waller pled guilty to additional crimes following an initial wrongful conviction by trial. In order to assess the adequacy of Texas statutes that govern statement evidence and to determine the best policy for Texas, the Timothy Cole Advisory Panel on Wrongful Convictions ("the Panel") conducted a wholesale examination

⁴ THE JUSTICE PROJECT. CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM (2009), *available at* <http://www.thejusticeproject.org/wp-content/uploads/convicting-the-innocent.pdf>.

⁵ *Id.* at 28. False confessions or pleas were made by Eugene Henson, Christopher Ochoa, Steven Phillips, and Patrick Waller. Ochoa's false confession was used to secure a guilty verdict in the trial of Richard Danziger. *Id.*

of the science behind false confessions, recommended practices promoted by a variety of criminal justice organizations, and the policies adopted by U.S. and Texas jurisdictions. Based on this examination, as is fully explored later in this document, the Panel recommends that Texas adopt a statewide police to record interrogations in certain classes of crimes.

Texas Statutes Regulating Statement Evidence

The definition and use of statement evidence in Texas courtrooms are regulated by Articles 38.21-.22 of the Texas Code of Criminal Procedures (CCP). The statute defines a statement as “a statement signed by the accused or a statement made by the accused in his own handwriting or, if the accused is unable to write, a statement bearing his mark, when the mark has been witnessed by a person other than a peace officer.”⁶ These statements may be used in court if they are “freely and voluntarily made without compulsion or persuasion”⁷ and follow the rules established in *Miranda v. Arizona*⁸ and subsequently expanded in Art. 38.22. These rules stipulate that the suspect must be informed that he has the right to remain silent, that any statement may be used in court, that he has the right to an attorney, and that he has the right to end an interview at any time. Suspects must knowingly and voluntarily waive these rights in order for an interview to commence.⁹

Texas statute further regulates the use of audiovisual recordings of statements in the case of oral and sign language statements. The statute specifically states that most oral and sign language statements may only be used against the suspect if “an electronic recording which may include motion picture, video tape, or other visual recording, is made of the statement.”¹⁰ The

⁶ TEX. CODE CRIM. PROC. ANN. art. 38.22 § 1 (Vernon 2010).

⁷ *Id.* art. 38.21.

⁸ 384 U.S. 436 (1966). *See also* *Montejo v. Louisiana*, 130 S. Ct. 23 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986), which sought to assure that the right to counsel is not lost during police interrogation); *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (ruling that a suspect must vocalize his or her wish to remain silent).

⁹ *Miranda*, 294 U.S. at 475.

¹⁰ TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3 (Vernon 2010).

suspect must also be read his or her rights on tape and voluntarily waive those rights, all voices on the recording must be identified, and the defendant’s attorney must be given a copy of the recording no later than 20 days before trial.¹¹

Although the Texas statute does provide that statements in certain situations be recorded through audiovisual means, the existing statute differs significantly with the interrogation recording practices voluntarily adopted by many jurisdictions within Texas and several other states. First, audio and/or video recording under the existing statute is only required for a statement—not a custodial interrogation. In other words, statutory obligations are satisfied when recordings capture the result of a custodial interrogation, but not the interrogation itself. Second, recording is only required in the case of oral or sign language statements, which are relatively rare. Law enforcement agencies overwhelmingly rely on the written statements that are described in CCP §38.22 Sec. 1.

To analyze whether current statutes are effective in preventing wrongful convictions, the Panel examined the research on interrogations, false confessions, and policies that have been implemented in other jurisdictions to address the problem of false confessions. As directed in HB 498, the Panel paid particular attention to the recording of custodial interrogations in its analysis of policy recommendations for Texas.

The Science of False Confessions

When asked if they would ever confess to something that they did not do, most people respond with a resounding “no.” In fact, in a survey of jury-eligible individuals in the United States, over 85% of respondents indicated that they would personally be very unlikely to confess

¹¹ *Id.*

to a crime that they did not commit.¹² We know through post-conviction DNA testing, however, that people do indeed confess to crimes that they did not commit. Although upon first blush this may seem unbelievable or reserved for those who are weak of mind, research has demonstrated that false confessions can and do occur, and exonerations in Texas and other states reinforce this finding. Even the respondents in the jury-eligible survey recognized that false confessions do occur, with over 35% in general agreement that suspects sometimes confess to crimes that they do not commit.¹³ This indicates that although eligible jurors are unlikely to believe that they themselves would falsely confess to a crime, they acknowledge that “others” may do so. Starting with a known phenomenon of false confessions, scientists have documented, elicited, and categorized the causes of false confessions.

Types of False Confessions

Researchers and theorists have classified the known cases of false confession into three types: voluntary, coerced-compliant, and coerced-internalized.¹⁴ In a voluntary false confession, an innocent person may offer a false confession without being questioned by investigators for a crime. In fact, those who offer voluntary false confessions may not even be a suspect at the time he or she makes the false confession. In 2006, for example, John Mark Karr made a false confession in the case of JonBenet Ramsey, a six-year-old girl who was killed in Colorado in 1996. After being apprehended in Thailand and flown back to Colorado to face prosecution,

¹² Linda A. Henkel, Kimberly A. J. Coffman & Elizabeth M. Dailey, *A Survey of People’s Attitudes and Beliefs About False Confessions*, 26 BEHAV. SCI. & L. 555, 571 (2008).

¹³ *Id.* at 564.

¹⁴ Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 49 (reviewing the types and theories of false confessions). No Texas DNA exoneration cases that involved false confessions were related to voluntary confessions; all were coerced, but the record does not indicate whether any of the false confessions were internalized. See THE JUSTICE PROJECT, *supra* note 2.

tests revealed that Karr’s DNA did not match the DNA taken from the crime scene and that Karr had made a voluntary false confession.¹⁵

The two types of coerced confessions, on the other hand, are elicited through the process of interrogation and have been further categorized into compliant and internalized false confessions. In coerced-compliant false confessions, the suspect “acquiesces to the demand for a confession for instrumental purposes: to escape an aversive situation, to avoid explicit or implied threat, or to gain a promise or implied reward.”¹⁶ Suspects facing multiple charges may decide to “go along with” an investigator’s theory of the crime and confess in order to avoid prolonged interrogation or confinement. Those who provide coerced-internalized false confessions, however, “come not only to capitulate in their behavior, but also to believe that they committed the crime in question, sometimes confabulating false memories in the process.”¹⁷ Suspects who have memory problems due to drug or alcohol use, sleep deprivation, or other psychological factors are at particular risk for this type of false confession.

The scientific research on coerced false confessions has spanned the entire timeline of interrogations, starting with a suspect’s decision to waive his or her *Miranda* rights, through the interrogation itself, to the internalization of the false confession. Researchers have also looked at the impact of false confessions on the courtroom, with studies on jurors’ attitudes toward confessions and false confessions. All of this research has led to the development of theories of why people confess to crimes they did not commit and is summarized below.

Miranda Waivers

Although some false confessions are voluntary, most begin with a police suspect who signs a *Miranda* waiver and agrees to be interviewed by investigators about a particular case

¹⁵ Kirk Johnson. *Ramsey Case Suspect Cleared after DNA Tests*, N.Y. TIMES, Aug. 29, 2006, at A1.

¹⁶ Kassin & Gudjonsson, *supra* note 12, at 49.

¹⁷ *Id.* at 50.

without the presence of an attorney. Following the Reid technique,¹⁸ at some point during the interview, the investigators become convinced of the person's guilt and switch from interview to interrogation, the hallmark feature of which is to refuse to accept a suspect's statement of innocence, instead continuing to pursue a confession until it is obtained.¹⁹ Although this may be effective and appropriate for those suspects who are truly guilty, it puts those who are factually innocent at risk of making a false confession. Investigators are no longer allowed to use "third degree" methods to secure confessions (i.e. physical abuse), but they are allowed to use psychological techniques to convince suspects that it is in their best interest to confess (see review of psychological techniques below and *supra* note 16).

The question, then, becomes why do people agree to waive their *Miranda* rights and potentially subject themselves to a psychological interrogation? An experiment conducted by Kassin and Norwick addressed this question in an experiment designed not only to test how investigative techniques affect the decision to waive one's rights, but also the impact of innocence on that decision.

Kassin and Norwick designed a study in which 72 psychology students were told either to take a \$100 bill from a drawer in a nearby classroom, or to simply open the drawer without taking the money. Each student was then confronted by a condition-blind investigator in a room

¹⁸ The Reid technique is a method of psychological interrogation that addresses both the setting and the content of a custodial interrogation. As summarized by Kassin, "Proponents of the Reid technique advise interrogators to conduct the questioning in a small, barely furnished, soundproof room" in order to isolate and produce anxiety in the suspect. Kassin continues, "To further heighten discomfort, the interrogator may seat the suspect in a hard, armless, straight-backed chair; keep light switches, thermostats and other control devices out of reach; and encroach on the suspect's person space over the course of the interrogation." Regarding strategies to elicit a confession, the "Reid operational nine-step process begins when an interrogator confronts the suspect with unwavering assertions of guilt (1); develops 'themes' that psychologically justify or excuse the crime (2); interrupts all efforts at denial and defense (3); overcomes the suspect's factual, moral and emotional objections (4); ensures that the passive suspect does not withdraw (5); shows sympathy and understanding and urges the suspect to cooperate (6); offers a face-saving alternative construal of the alleged guilty act (7); gets the suspect to recount the details of his or her crime (8); and converts the latter statement into full written or oral confession(9)." Saul M. Kassin, *True Crimes, False Confessions*, 16 *SCI. AM. MIND* 24, 24 (2005).

¹⁹ See Drizin & Leo, *supra* note 1, at 911 (reviewing texts on how to conduct an interrogation through the Reid technique, the most common form of interrogation in U.S. criminal investigations).

set up as instructed by the leading interrogation manual, *Criminal Interrogations and Confessions*.²⁰ The investigator approached the students in either a friendly, neutral or hostile manner and asked them to sign a *Miranda* waiver. The students had previously been instructed to “do whatever they see as necessary to protect themselves.”²¹

Kassin and Norwick found that overall, “42 out of 72 suspects (58%) signed the waiver option.”²² Of those who were innocent, however, 81% signed the waiver, compared to just 36% of the guilty students. When asked why they had waived their rights, 21 of the 29 innocent students who signed the waiver “explained that they waived their rights precisely because they were innocent—believing, apparently, in the power of this truth to prevail.”²³ The study concluded that innocent suspects may waive their right to an attorney because they believe that since they are innocent, they have nothing to hide, and therefore, have no need for an attorney. This belief is complicated by the concept of “investigator bias,” as explored below.

Investigator Bias and Ability to Detect Deception

One of the features of police interrogations under the Reid technique is that only those who are reasonably believed to be guilty are interrogated.²⁴ This is certainly an ideal scenario, but we know from cases of wrongful conviction in Texas and elsewhere, however, that innocent people are sometimes interrogated. For example, following the murder of a Pizza Hut manager in Austin, Texas, police interrogated Chris Ochoa, who eventually confessed that he and a co-

²⁰ Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, *CRIMINAL INTERROGATION AND CONFESSIONS* (4th ed.) (2001).

²¹ *Id.* at 213.

²² *Id.* at 215.

²³ *Id.* at 216.

²⁴ See Kassin, *supra* note 16, at 27. (“A 2004 conference on police interviewing attended by the two [authors] illustrates the problem of bias during questioning. Joseph Buckley—president of John E. Reid and Associates (which has trained tens of thousands of law-enforcement professionals) and co-author of the manual *Criminal Interrogation and Confessions* (citation omitted) —presented the influential Reid technique of interviewing and interrogation. Afterward, an audience member asked if the persuasive methods did not at times cause innocent people to confess. Buckley replied that they did not interrogate innocent people.”) *Id.* at 26.

worker, Richard Danziger, had assaulted and killed the woman. That confession was used to secure a guilty plea from Ochoa and was the key piece of evidence used to convict Danziger at trial. Years later it was revealed through DNA testing that both men were actually innocent of the crime.

In light of this case and many others around the nation, how are we to reconcile the desire to only interrogate the guilty with the fact that wrongful convictions have arisen from false confessions secured through interrogation of the innocent? One explanation is revealed by studies that demonstrate that investigators enter interviews with a bias that presumes the suspect's guilt. They are then more likely to interrogate suspects that are reasonably believed to be guilty, regardless of the suspect's actual guilt or innocence.

One such study was conducted by Kassin, Goldstein, and Savitsky, in which students played the role of an interrogator and were divided into groups so that they would interrogate either actually guilty or innocent suspects who were accused of stealing a \$100 bill.²⁵ Within each of these conditions, interrogators were primed to believe that suspects were generally guilty or innocent. To prime the guilt-presumptive interrogators, experimenters told the interrogators that "four out of every five suspects in the study (80%) actually commit the crime."²⁶ To prime the innocent expectation condition, the experimenter told the interrogators that only one out of five in the study (20%) were guilty. Additionally, the interrogators were given two goals: "(1) to secure a confession and (2) to make an accurate determination of the suspect's guilt or innocence."²⁷ They were also given time to prepare a strategy and a packet of materials, including an excerpt from the Reid technique training manual, and checklists from which they

²⁵ Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187 (2003).

²⁶ *Id.* at 191.

²⁷ *Id.*

selected questions and techniques they may decide to use during the interrogation, The questions checklist contained neutral (“Where were you during the past hour?”) and guilt-presumptive questions (“How did you find the key that was hidden behind the VCR?”) derived from the Reid technique manual, as well as from observational field studies of actual interrogation methods. The techniques checklist included such strategies as “making repeated accusations, exposing inconsistencies in the suspect’s story, threatening to involve others, [and] appealing to the suspect’s self interest” among others.²⁸

The study found that “interrogators with guilty expectations chose more guilt-presumptive questions than did those with innocent expectations.”²⁹ The guilt-presumptive investigators also used more techniques to elicit a confession than did the interrogators with innocent expectations. Overall, 30% of the interrogators judged their suspect to be guilty. There was, however, a significant difference between groups. As Kassin et al reported, “42% of those with guilty expectations judged the suspect guilty, compared to only 19% with innocent expectations.”³⁰ Actual guilt and innocence did not have an impact on their judgments, as half of all suspects were guilty. One of the most interesting findings of the study was that, regardless of guilt or innocence expectance, all interrogators “saw themselves as trying harder to get a confession when the suspect was innocent than when he or she was guilty. . . . They also said they had exerted more pressure on the suspect who was innocent than guilty.”³¹ As Kassin et al. concluded, “In short, interrogators saw themselves as the most aggressive when they interviewed suspects who—unbeknownst to them—were truly innocent.”³² These findings illustrate that an innocent suspect’s decision to waive *Miranda* rights may cause them to be subjected to a

²⁸ *Id.*

²⁹ *Id.* at 193.

³⁰ *Id.* at 194.

³¹ *Id.*

³² *Id.*

particularly stressful interrogation, placing them in further danger of providing investigators with a false confession.

Researchers have also tested our abilities to detect deception. In the Inbau et al. text, claims are made that investigators and interrogators can accurately detect deception by analyzing verbal and nonverbal cues from suspects. However, research indicates that people are poor judges of truth and deception in interrogations, at least in part because “people who stand falsely accused of lying often exhibit patterns of anxiety and behavior that are indistinguishable from those who are really lying.”³³ To study this phenomenon in an experimental setting, Kassin and Fong designed a study to “examine the extent to which people can distinguish between true and false denials made in the context of a criminal interrogation” and “to test the hypothesis that people can be trained in the use of verbal and nonverbal cues to increase the accuracy of these judgments.”³⁴ To test these concepts, students were recruited to commit (or not commit) mock crimes and be interrogated on videotape. In a second phase, observers were taught (or not taught) Reid interrogation techniques on how to use verbal and nonverbal cues to detect deception and asked to judge truth and deception in the videotaped interrogations. To conduct the experiment, observers (trained and untrained) were shown a video of eight interrogations generated during the first phase of the study and asked after each interrogation to judge whether the suspect was truthful or lying. Observers were finally asked to rate their confidence in their judgments.

The results of the study first revealed that the “naïve observers” (those who were not trained in the Reid techniques) were significantly better at detecting deception than those who had been trained (however, neither group performed significantly better or worse than chance).

³³ Saul M. Kassin & Christina T. Fong, “*I’m Innocent!*”: *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 501 (1999).

³⁴ *Id.*

Although the untrained observers performed better than the trained observers at identifying truthful or lying suspects, the trained observers were significantly more confident in their decision than were the naïve observers.³⁵

Because the results of Kassin and Fong's 1999 study were provocative, they were further extended and placed into greater "real world" context by additional studies. First, Meissner and Kassin replicated the study using trained police investigators from the U.S. and Canada to view the video tapes that were created in the Kassin and Fong study.³⁶ They found that compared to the college student participants in the previous study, the investigators demonstrated significantly more confidence without exhibiting any additional accuracy. Meissner and Kassin specifically examined "hits," the ability to detect a true confession, and "false alarms," indicating that a false confession is truthful, among the participants in their study and the 1999 study conducted by Kassin and Fong. They found that the trained investigators in the study did not produce significantly more hits than the untrained students in Kassin and Fong's study. The investigators did, however, generate significantly more false alarms than the naïve students in the previous study. According to Meissner and Kassin, these results indicate a significant investigator bias to not just see deception, but to see guilt where there is none.³⁷ In fact, they concluded that training does not improve one's ability to detect actual deception, but rather increases the likelihood that one will judge targets to be deceitful rather than truthful when proclaiming innocence.³⁸

The results of the Kassin/Fong and Meissner/Kassin studies were further tested by Kassin, Meissner, and Norwick in 2005.³⁹ In this study, Kassin et al. asked college students and

³⁵ *Id.*

³⁶ Christian A. Meissner & Saul M. Kassin, "He's Guilty!": Investigator Bias in Judgments of Truth and Deception, 26 LAW & HUM. BEHAV. 469 (2002).

³⁷ *Id.* at 476.

³⁸ *Id.* at 478.

³⁹ Saul M. Kassin, Christian A. Meissner & Rebecca J. Norwick, "I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators, 29 LAW & HUM. BEHAV. 211 (2005).

trained police investigators from Florida and Texas to judge the truthfulness or deception of true and false confessions obtained from seventeen prison inmates recruited by the researchers. To gain both true and false confessions, each inmate was asked to provide a true confession to the crime for which he was convicted; he was then provided with the facts of another recruited inmate's crime and asked to construct a false confession from those facts. Those confessions were used to create videotapes that consisted of ten segments, each containing five true confessions and five false confessions. College students and police investigators viewed the tapes and judged whether the person in each confession was guilty or innocent and to rate their confidence in their judgments.

Similar to the Kassin and Fong study, the untrained students in this study were more accurate in their judgments of guilt and innocence than were the police investigators. Specifically, “investigators generated significantly more false alarms” than students, indicating that the trained investigators erred on the assumption of guilt rather than innocence.⁴⁰ As Kassin et al. summarized, “Once again, investigators were not more accurate than students, only more confident and more biased.”⁴¹ More precisely, the investigators' error was to see guilt where there was none.

Kassin et al. conducted a second phase of the experiment to attempt to explain their results. First, they argued that the low accuracy displayed by the police in the study could be due to the fact that “law enforcement training and experience introduce systematic bias that reduces overall judgment accuracy.”⁴² Second, they argued that “investigators' judgment accuracy was compromised by [the researchers'] use of a paradigm in which half of the stimulus confessions were false, a percentage that is likely far higher than the real world base rate for false

⁴⁰ *Id.* at 217.

⁴¹ *Id.* at 218.

⁴² *Id.*

confessions.”⁴³ To test these hypotheses, the study was repeated with different students and investigators. In this phase, however, students and investigators were told that half of the confessions were true and half were false. Even with this instruction, students’ performance was slightly (but not significantly) better than investigators’ performance; however, neither group performed better than chance.⁴⁴ Similar to the results of the first study, investigators displayed significantly higher levels of confidence in their judgments than students, though “confidence levels were higher in the first experiment than in the second.”⁴⁵ In both experiments, Kassin et al. concluded that “relative to students, investigators erred by accepting false confessions, not by rejecting true confessions”—a pattern that continued even when guilt bias was removed from the study.⁴⁶

What these studies indicate is that special care must be taken by all parties involved in a criminal investigation and prosecution to compare statement evidence with known facts of the case. Although most often unintentional, bias can enter the interrogation room and cause investigators to see guilt where it does not exist. To help alert investigators, prosecutors, defense attorneys, and judges to situations in which bias may impact the outcome of interrogations, researchers have sought to identify specific individual traits and interrogation tactics that may lead innocent suspects to falsely confess. The findings of this research reinforce the notion that interrogations are complex social interactions in which many factors and forces are at play.

Traits, Techniques, and Theories of False Confessions

Once the decision has been made to interrogate an individual, there are a variety of factors that contribute to whether an innocent individual will make a false confession. These

⁴³ *Id.* at 218-19.

⁴⁴ *Id.* at 220.

⁴⁵ *Id.*

⁴⁶ *Id.* at 222.

include individual factors such as youth, low intelligence or developmental or intellectual disability,⁴⁷ and mental illness; psychological factors such as sleep deprivation and drug use or withdrawal; as well as personality variables such as antisocial tendencies, anxiety, depression, compliance, suggestibility, and low self esteem.⁴⁸ Many studies in particular have examined how witnesses and suspects with intellectual disabilities respond to *Miranda* warnings and interrogations, and the findings demonstrate that this population may require additional protection to guard against false confessions. Research performed on defendants confined to a state mental hospital in Texas showed that severely mentally disordered persons understand neither their *Miranda* rights nor the effect of waiving those rights.⁴⁹ Further, a 10th grade education was not predictive of *Miranda* understanding among the mentally disordered,⁵⁰ and research further shows that individuals with IQs as high as 88 also do not understand the *Miranda* warnings, nor the rights contained therein.⁵¹ As the researchers noted, “On average, defendants with the poorest understanding had completed the 10th grade and had 10 prior arrests.”⁵² *Id.* These findings are particularly important because recent studies show that between 6 and 20 percent of defendants in correctional settings have severe mental disorders.⁵³

⁴⁷ See generally Robert Perske, *False Confessions from 53 Persons with Intellectual Disabilities: the List Keeps Growing*, 46 INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 468 (2008) (discussing false confessions with those who have intellectual disabilities); Morgan Cloud, George B. Sheperd, Alison Nodvin Barkoff & Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002) (discussing problems associated with “knowing and intelligent” and “voluntary” waivers of *Miranda* rights by those with mental retardation).

⁴⁸ Jessica R. Klaver, Zina Lee & V. Gordon Rose, *Effects of Personality, Interrogation Techniques, and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 71, 72 (2008).

⁴⁹ Richard Rogers, Kimberly S. Harrison, Lisa L. Hazelwood & Kenneth W. Sewell, *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 LAW & HUM. BEHAV. 401, 416 (2007).

⁵⁰ *Id.*

⁵¹ Cloud et al., *supra* note 45, at 538.

⁵² Rogers et al, *supra* note 47, at 403.

⁵³ *Id.*

Researchers are just beginning to study the impact of gender and ethnicity⁵⁴ on false confessions and have taken a closer look at the variables of compliance⁵⁵ and suggestibility⁵⁶ in the context of false confessions. What this research indicates is that a myriad of individual differences each play a part in whether an innocent suspect will provide investigators with a false confession. Because these factors are complex, uncontrollable, and often not obvious in a suspect's physical appearance, special care must be taken to address those aspects of an interrogation that is within the control of investigators.

This research has helped to inform categories of theories that explain why people confess to crimes they did not commit. As Kassin and Gudjonsson summarized in a thorough review of false confession literature, the psychoanalytic perspective argues that people may have an “unconscious compulsion to confess in response to real or imagined transgressions.”⁵⁷ Catharsis is required to overcome the fear of losing loved ones and the fear of retaliation. By contrast, decision-making models assume that as suspects are subjected to interrogations, there are many decisions that they must make (e.g., whether to request an attorney, whether to tell the truth, etc). In this context, the decision to confess is just one more decision made during an interrogation. False confessions arise because “suspects are markedly influenced by threats and inducements, stated or implied,” and “interrogators impair a suspect's decision making by manipulating his or her subject assessments.”⁵⁸ The Reid techniques described above are designed to accomplish exactly those ends.

⁵⁴Klavner et al., *supra* note 46, at 75.

⁵⁵ See generally *id.* at 75-76 (reviewing Kassin and Kiechel paradigm and Gudjonsson Compliance Scale).

⁵⁶ See generally J.P. Blair, *The Roles of Interrogation, Perception, and Individual Differences in Producing Compliant False Confessions*, 13 PSYCHOL. CRIME & L. 173 (2007); Klaver, et al., *supra* note 46, at 76 (reviewing Gudjonsson Suggestibility Scale).

⁵⁷ Kassin & Gudjonsson, *supra* note 12, at 45.

⁵⁸ *Id.*

Additional theories of false confessions take a cognitive-behavior perspective and argue that “confessions arise from the suspect’s relationship to the environment and significant others in that environment.”⁵⁹ If a suspect believes that he or she will lose social contact or standing, experiences high level of anxiety or uncertainty, or has false notions of his or her rights, that suspect may falsely confess to prevent those negative consequences. The social-psychological perspective argues that “powerful, if not coercive, methods of social influence are used in police interrogations.”⁶⁰ This influence has effects on the suspects, such that “suspects may even come to believe their own police-induced false confessions through a subtle process of self-perception.”⁶¹ Cultural approaches recognized that those from collectivistic, high power cultures will have different attitudes and expectations for the interrogations process than will a person from an individualistic, low power culture like that of the United States.⁶² For example, people from collectivist cultures that place high value on the welfare of the group and deemphasize individual needs tend to waive their *Miranda* rights due to lack of familiarity with the American legal system and because their culture places high value on cooperating with police.⁶³

Regardless of which theoretical approach is taken, Kassin and Gudjonsson summarize that

[S]uspects confess when sufficiently motivated to do so; when they perceive, correctly or incorrectly, that the evidence against them is strong; when they need to relieve feelings of guilt or shame; when they have difficulties coping with the pressures of confinement and interrogation; when they are the targets of various social-psychological weapons of

⁵⁹ *Id.* at 46.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Richard A. Leo, Mark Costanzo & Netta Shaked-Schroer, *Chapter 2: Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision-Making*, in 2 *Psychological Expertise in Court: Psychology in the Courtroom 25* (Daniel A. Krauss & Joel D. Lieberman, eds., 2009).

⁶³ *Id.*

influence; and when they focus primarily on the immediate costs and benefits of their actions rather than long-term consequences.⁶⁴

Each of these individual and situational factors can lead to a false confession.

False Confessions and Wrongful Conviction

Regardless of the cause or type of false confessions, research indicates that false confessions—even those that are known to have been improperly secured—have an impact on jury verdicts and sentencing. For example, a study by Kassin and Neumann asked participants to read summaries of criminal trials for murder, rape, aggravated assault, and automobile theft, each containing circumstantial evidence and either a confession, an eyewitness identification, a character witness, or no additional information.⁶⁵ In all cases but the auto theft, participants were significantly more likely to vote guilty when the case contained a confession. The authors summarize that “confession evidence proved to be significantly more incriminating than an eyewitness identification or character testimony in three of the four cases.”⁶⁶ These findings held over two subsequent experiments, leading Kassin and Neumann to conclude: “Taken together, our findings demonstrate that confession evidence has a greater impact *on* jurors – and is seen as having a greater impact *by* jurors – than other types of evidence.”⁶⁷

Similar results were found and expanded upon by another study that examined the effect of admissible and inadmissible confessions obtained in low- and high-pressure interrogations.⁶⁸ Participants who read trial transcripts that contained confessions were influenced by the confession evidence, although not at statistically significant levels. Even so, the researchers

⁶⁴ Kassin & Gudjnsson, *supra* note 12, at 46.

⁶⁵ Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469 (1997).

⁶⁶ *Id.* at 476.

⁶⁷ *Id.* at 481.

⁶⁸ Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the ‘Harmless Error’ Rule*, 21 LAW & HUM. BEHAV. 27 (1997).

reported that “conviction rates were 29% in the low pressure-admissible group, 18% in the low pressure-inadmissible group, 24% in the high pressure-admissible group, 29% in the high pressure-inadmissible group, and only 6% in the no-confession group.”⁶⁹ The participants convicted at the same rate in the low pressure-admissible group and in the high pressure-inadmissible group. A second study was conducted to confirm the strength of these results, and significant differences in conviction rates were found between confession and no-confession groups, even if that confession was inadmissible, obtained through high-pressure interrogations, and participants stated in self-report measures that they discounted the inadmissible confession in their deliberations. As the authors concluded, “[M]ock jurors did not sufficiently discount a defendant’s confession in reaching a verdict—even when they saw the confession as coerced, even when the judge ruled the confession inadmissible, and even when participants said that it did not influence their decision-making.”⁷⁰

In addition to scientific studies of the impact of false confessions of jurors, wrongful conviction cases also reveal the strength of confession evidence. For example, Drizin and Leo compiled information on 125 cases of proven false confessions in the United States.⁷¹ Of those 125 confessions (including that of Christopher Ochoa), eight (6%) were proven false because it was found that no crime occurred (i.e., a suspect confessed to murder, but the “victim” in the case is later found alive). In 11 cases (9%), it was physically impossible for the suspect to have committed the crime (i.e., the suspect was in a hospital or jail at the time the crime was

⁶⁹ *Id.* at 35.

⁷⁰ *Id.* at 42 (arguing that these findings call into question the Supreme Court’s “harmless error” rule established in *Arizona v. Fulminante*, 499 U.S. 279 (1991), in which the Court held that admission of a coerced confession did not automatically require reversal of a conviction but was instead subject to harmless error analysis).

⁷¹ Drizin & Leo, *supra* note 1.

committed). Fifty-seven false confessions (46%) were revealed through scientific evidence (e.g. DNA), and 92 people (74%) were exonerated when the true perpetrator was identified.⁷²

Drizin and Leo's analysis revealed that 35% of the suspects who falsely confessed were under the age of 18 at the time of the confession, including two who were under the age of 10, and over half of the false confessors were under age 25.⁷³ Those who provided false confessions were also subjected to lengthy interrogations. Drizin and Leo report that more than 90% of normal interrogations last less than two hours, but the 44 studied cases in which information on length of interrogation could be found demonstrated that false confessors may be subjected to lengthier interrogations. 84% of the studied interrogations lasted more than six hours, with two interrogations lasting between 48 and 96 hours. The majority of the 44 interrogations (73%) lasted between six and twenty-four hours.⁷⁴

It is important to note that over half (59%) of these cases did not go to trial because the defendant was never charged (8%) or because the charges were dropped pre-trial (51%). Of the remaining 51 cases, only seven (6%) were acquitted, 14 pled guilty (11%), and 30 were convicted at trial (24%). When the authors looked specifically at those who confessed, recanted, and pled not guilty, they found that 81% were found guilty at trial.⁷⁵ This provides post-hoc evidence that jurors are unable to identify and/or discount false confessions in the trial phase. Of the 44 people who either pled guilty or were convicted at trial, 17 spent less than five years in prison and 27 spent more, including "nine convicted false confessors [who] served their

⁷² *Id.* at 953-54. The total number exceeds 125 because some cases may have more than one source of exoneration, i.e. the suspect was exonerated and the true perpetrator were identified through post-conviction DNA testing.

⁷³ *Id.* at 945.

⁷⁴ *Id.* at 947.

⁷⁵ *Id.* at 958; *see also* 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, 482 (1998) (finding that those false confessors who went to trial had a 73% chance of conviction).

sentences and were never officially exonerated, despite the fact that their factual innocence was subsequently proven.”⁷⁶

Juries sometimes do, however, react negatively to what are often particularly egregious examples of coerced confessions. Leo and Ofshe noted in a study of wrongful convictions related to false confessions that in the case of Betty Burns, a Minnesota jury not only acquitted Burns, “but took the additional unusual step of publishing a thirteen page letter denouncing the interrogation of Burns, expressing alarm that the true perpetrator remained at large, calling for reforms both in the police and prosecutors’ office, and requesting that Burns’ record be expunged and she be compensated for her ordeal.”⁷⁷ In Burns’ case, the victim and three eyewitnesses indicated Burns did not commit the violent stabbing to which she had confessed during the course of interrogation.

What each of these research and case studies demonstrates is that confession evidence is extremely powerful evidence that must be treated with care. With personal and situational factors and court procedures all at work, every member of the criminal justice system has a duty to study the confession presented and compare that to known facts of the case and theories of the crime. Below, the Panel reports on the practices promoted by a variety of organizations to help accomplish just that.

Organizations’ Recommended Practices

In light of the research that has been conducted on false confessions and the wrongful convictions that have resulted from them, legal scholars and associations, law enforcement organizations, and policy organizations have made recommendations on practices to reduce the likelihood that suspects will be falsely convicted of crimes to which they falsely confess. These

⁷⁶ Drizin & Leo, *supra* note 1, at 958.

⁷⁷ Leo & Ofshe, *supra* note 73, at 477.

recommendations range greatly and include a call to overturn *Miranda*,⁷⁸ to limit who may make confessions,⁷⁹ and to abandon the Reid technique and adopt of a new framework for the conduct of interrogations.⁸⁰ By far, however, the most common recommendation has been to record interrogations from the time a suspect is read his *Miranda* rights through the end.

Legal and false confession scholars have long called for complete documentation of interrogations⁸¹ through audio and/or video recording⁸¹ because, in the words of Drizin and Leo, “the recording of police interrogation is not an adversarial policy suggestion; it favors neither the defense nor the prosecution but only the pursuit of reliable and accurate fact-finding.”⁸²

Scholars specifically argue for audio-visual recording because it creates an objective record of the interrogation that can be reviewed to resolve or avoid the “swearing matches” that can occur between officers and defendants when interrogations are unrecorded.⁸³ Taping also lends transparency to the process which, in turn, leads to better practices in the interrogation room.⁸⁴

Finally, scholars argue that recorded interrogations allow factfinders such as judges and juries to

⁷⁸ See Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998). *Contra* Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 CRIM. L. & CRIMINOLOGY 557 (1998).

⁷⁹ New Mexico declared oral confessions from children under 13 inadmissible. Amy Bach, *True Crime, False Confession*, THE NATION, Feb. 8, 1999, 21-23.

⁸⁰ See Christian A. Meissner & Saul M. Kassir, “*You’re Guilty, So Just Confess!*”: *Cognitive and Behavioral Confirmation Biases in the Interrogation Room*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 85 (G. Daniel Lassiter ed., Kluwer Academic/Plenum Press 2004) (reviewing C. H. Van Meter, PRINCIPLES OF POLICE INTERROGATION (Thomas 1973)). Meissner and Kassir quote Van Meter as follows: “But you must remember that the person that you are talking to might *not* be guilty. . . Maintain an impartial attitude throughout the interrogation, and you will not be put in the position of having to make excuses. After all, the courts try the person; you are only an investigator for the court, not the person who has to make the decision of guilt or innocence.” The van Meter text instructs investigators to conduct the interrogation within an ethical framework “in which the interrogator’s primary objective was to obtain evidence from suspects through the use of techniques that were not overly obtrusive or aggressive.” *Id.* at 87. This approach is in contrast with the Reid technique, in which the ultimate goal of an interrogation is to secure a confession and full admission narrative. See also Drizin & Leo, *supra* note 1, at 1001-04.

⁸¹ For historical overviews of false confession research, case law, and calls for complete recording, see generally 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. 619 (2004); Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall & Amy Vatner, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479 (2006).

⁸² Drizin & Leo, *supra* note 1, at 995.

⁸³ *Id.* at 997; Leo & Ofshe, *supra* note 73, at 488.

⁸⁴ Drizin & Leo, *supra* note 1, at 997.

make better assessments of voluntariness and reliability of confession evidence. Drizin and Leo state that although recording will not prevent all false confessions, a videotaping requirement “allows jurors to make a more informed evaluation of the quality of the interrogation and the reliability of the defendant’s confession, and thus to make a more informed decision about what weight to place on confession evidence.”⁸⁵ This is important because early studies indicate that “seeing the interrogation may well lower the conviction rate among mock jurors who watch innocent false confessions, without lowering the conviction rate among those exposed to guilty true confessions.”⁸⁶

Both professional and policy organizations similarly recommend complete recording of interrogations. As early as 1975 the American Law Institute adopted a Model Code of Pre-Arrest Procedure⁸⁷ that advocates complete recording of interrogations to “help eliminate factual disputes concerning what was said to the arrested person and what prompted any incriminating statements”⁸⁸ and because “police should not be left in doubt as to what is expected of them.”⁸⁹ The New York County Lawyers’ Association and the American Bar Association Section of Criminal Justice⁹⁰ recommends that all law enforcement agencies “videotape the entirety of custodial interrogations of crime suspects at police precincts,

⁸⁵ *Id.*

⁸⁶ S. Kassin, R. Leo, C. Crocker & L. Holland, Videotaping Interrogations: Does It Enhance the Jury’s Ability to Distinguish True and False Confessions?, paper presented at the Psychology & Law International, Interdisciplinary Conference, Edinburgh, Scotland (July 2003), *quoted in* Meissner & Kassin, *supra* note 78, at 99; *see also* G. Daniel Lassiter, Lezlee J. Ware, Jennifer J. Ratcliff, & Clinton R. Irvon, *Evidence of the Camera Perspective Bias in Authentic Videotaped Interrogations: Implications for Emerging Reform in the Criminal Justice System*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 157 (2009) (discussing effects of camera angle bias).

⁸⁷ MODEL CODE OF PRE-ARREST PROCEDURE (1975), *available at* [http://www.nacdl.org/sl_docs.nsf/a1bf9dda21904164852566d50069b69c/e1a4d2c7cf86cbed852570820072a805/\\$FILE/ALI-Model_Recording_Code-1975.pdf](http://www.nacdl.org/sl_docs.nsf/a1bf9dda21904164852566d50069b69c/e1a4d2c7cf86cbed852570820072a805/$FILE/ALI-Model_Recording_Code-1975.pdf).

⁸⁸ *Id.* § 130.4 note on subsection (3).

⁸⁹ *Id.* §130.4 cmt.

⁹⁰ The N.Y. County Lawyers’ Ass’n & A.B.A. Section of Criminal Justice, *Report to the House of Delegates* 15, *available at* <http://www.abanet.org/crimjust/policy/revisedmy048a.pdf>.

courthouses, detention centers, or other places where suspects are held for questioning,”⁹¹ as does the National Association of Criminal Defense Lawyers⁹² and bar associations in Michigan⁹³ and New York.⁹⁴ If videotaping is not feasible, the associations suggest that investigators “audiotape the entirety of such custodial interrogations.”⁹⁵ The Justice Project⁹⁶ and the *Chicago Tribune*⁹⁷ have made similar recommendations for interrogations in felony cases.

Perhaps the most ringing endorsement for recording interrogations comes from the hundreds of jurisdictions around the country that routinely record complete interrogations. The National Institute of Justice estimated from a 1990 survey that almost 2400 police and sheriffs’ departments videotaped interrogations in at least some cases; 84% of survey respondents believed that videotaping improved the quality of police interrogations.⁹⁸ Following interviews with over 300 departments in 45 states that record interrogations, former U.S. Attorney Thomas Sullivan reported that “virtually every officer who has had experience with custodial recordings enthusiastically favors the practice.”⁹⁹ Sullivan’s findings also reveal similar benefits cited by many of the departments that record interrogations. First, the benefits of recording extend to many criminal justice stakeholders because a “permanent record is created of what was said and

⁹¹ *Id.* at 15.

⁹² Nat’l Ass’n of Criminal Def. Lawyers, *Resolution of the Board of Directors Supporting Mandatory Videotaping of Law Enforcement Interrogations* (May 4, 2002), available at <http://www.nacdl.org/public.nsf/resolutions/7cac8b149d7416a385256d97005>.

⁹³ State Bar of Michigan, *Revised Resolution* (September 21, 2005), available at <http://www.michbar.org/generalinfo/pdfs/9-22Custodial2.pdf>.

⁹⁴ New York State Bar Association, *Memorandum No. 11* (June 13, 2007), available at http://www.nysba.org/AM/Template.cfm?Section=Home§ion=Legislative_Memoranda_2007_2008&template=/CM/ContentDisplay.cfm&ContentFileID=2009.

⁹⁵ The N.Y. County Lawyers’ Ass’n & A.B.A. Section of Criminal Justice, *supra* note 88, at *i*.

⁹⁶ THE JUSTICE PROJECT, *ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW* (2009), available at http://www.thejusticeproject.org/wp-content/uploads/polpack_recording-fin2.pdf.

⁹⁷ Editorial, *No More Excuses. Go to the Tape*, CHI. TRIB., Apr. 21, 2002, at C6.

⁹⁸ William A. Geller, *Videotaping Interrogations and Confessions*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN BRIEF, March 1993.

⁹⁹ THOMAS SULLIVAN, *POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS* 6 (Nw. U. Sch. of L. Center on Wrongful Convictions 2005), available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/SullivanReport.pdf>.

done, how suspects acted, and how officers treated suspects.”¹⁰⁰ Second, defense motions to suppress are greatly reduced because “voluntary admissions and confessions are indisputable.”¹⁰¹ Officers also benefit from recordings because they do not have to take notes during the interrogation and “they no longer have to attempt to recall details about the interviews days and weeks later when recollections have faded.”¹⁰²

Although many departments that do not record worry that a suspect will “clam up” if recorded, Sullivan reports that “in most instances, the ability to obtain confessions and admissions is not affected by recording.”¹⁰³ Most jurisdictions that have mandated recording make provisions for those suspects who refuse to be recorded by simply recording the suspect’s refusal. Jurisdictions reported to Sullivan that they benefit from recorded interrogations because “later review of recordings affords officers the ability to retrieve leads and inconsistent statements overlooked during the interviews.”¹⁰⁴ In addition, recordings can be used to train other officers, and the public’s confidence in law enforcement is increased when interrogations are recorded.¹⁰⁵

Recording in the States and Texas

To date, 17 states and the District of Columbia record interrogations as either a result of statutory law¹⁰⁶ or court rulings.¹⁰⁷ In contrast to Texas statutes, each of these states requires

¹⁰⁰ Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1129 (2005).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1130; see also Brian Parsi Boetig, David M. Vinson & Brad R. Weidel, *Revealing Incommunicado: Electronic Recording of Police Interrogation*, FBI LAW ENFORCEMENT BULL., 1 (2006) (discussing additional benefits from a law enforcement perspective).

¹⁰⁶ D.C. CODE § 5-116.01 (2010) (District of Columbia); 725 ILL. COMP. STAT. 5/103-2.1 (2010) (Illinois); ME. REV. STAT. ANN. tit. 25, § 2803-B(I)(K) (2010) (Maine); MD. CODE ANN., [Crim. Proc.] § 2-401 (LexisNexis 2010) (Maryland); MO. REV. STAT. § 590.701 (2010) (Missouri); MONT. CODE ANN. § 46-4.4 (2010) (Montana); NEB. REV. STAT. § 29-4501 (2010) (Nebraska); N.M. STAT. ANN. § 29-1-16 (West 2010) (New Mexico); N.C. GEN. STAT.

video and/or audio recording of interrogations from the reading of *Miranda* rights through any confession that is given. In addition, some states have spelled out exceptions to recording in order to meet the needs of local jurisdictions and have had to decide on the remedy for cases of failure to comply.¹⁰⁸ These states have made policy changes of the type recommended by the Texas Criminal Justice Integrity Unit's annual reports in 2008 and 2009.¹⁰⁹ Both reports included calls for legislation and increased training on the issue of false confessions and documentation of interrogations.

Although not required by statute, many Texas jurisdictions record interrogations, at least in some classes of offenses, as indicated by a 2008 survey of 1,034 Texas law enforcement agencies conducted by The Justice Project, akin to the type of survey recommended by the Governor's Criminal Justice Advisory Council in their January 2006 report.¹¹⁰ The survey asked whether jurisdictions record interrogations and their reasons for doing so or not. Of the 441 responses received, 380 departments "indicated that they either routinely record custodial interrogations, record interrogations for certain classes of felonies, or record interrogations at the discretion of the lead investigator."¹¹¹ When asked why they record, jurisdictions reported the responses listed in Figure 1 below.¹¹² These jurisdictions have found that the practice of recording custodial interrogations lends a variety of benefits to the officers, the defendant, and the prosecution.

§ 15A-211 (2010) (North Carolina); OHIO REV. CODE ANN. § 2933.81 (LexisNexis 2010) (Ohio); OR. REV. STAT. § 419C.270 (2010) (Oregon); WIS. STAT. ANN. § 972.115 (West 2010) (Wisconsin).

¹⁰⁷ N.J. SUP. CT. RULE 3.17 (2005); *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985); *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006); *Commonwealth v. Digiambattista*, 442 Mass. 423 (2004); *State v. Scales*, 518 N.2d 587, 591 (Minn. 1994); *State v. Barnett*, 147 N.H. 334 (2001).

¹⁰⁸ See Appendix D for a list of exceptions to recording and remedies for failure to record.

¹⁰⁹ TEXAS CRIMINAL JUSTICE INTEGRITY UNIT, 2008 ANNUAL REPORT OF ACTIVITIES (2008); TEXAS CRIMINAL JUSTICE INTEGRITY UNIT, 2009 ANNUAL REPORT OF ACTIVITIES (2009).

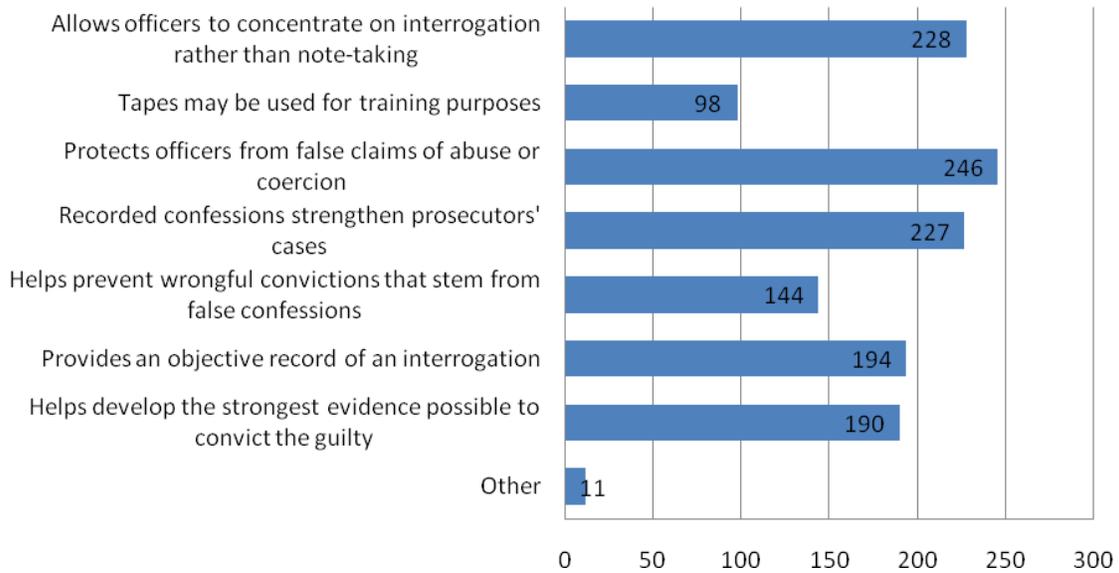
¹¹⁰ CRIMINAL JUSTICE ADVISORY COUNCIL, RECOMMENDATIONS TO GOVERNOR RICK PERRY (2006).

¹¹¹ THE JUSTICE PROJECT. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS IN TEXAS: A REVIEW OF CURRENT STATUTES, PRACTICES, AND POLICIES (2009), available at <http://www.thejusticeproject.org/wp-content/uploads/tx-recording-report-tjp-may-2009.pdf>.

¹¹² *Id.* at 3.

Figure 1

Why Many Texas Departments Record



Of the jurisdictions that reported that they did not record, the majority (57%) indicated that the cost of recording equipment was too expensive. Although several departments argued that juries may react negatively to the tactics they see in an interrogation (5%) or that suspects may refuse to speak if they know they are being recorded (1.6%), cost was by far the major prohibiting factor.

In addition, a Public Information Act request from The Justice Project for the recording policies of the largest counties and municipalities indicated that over half provided no written policies or procedures on electronic recording of custodial interrogations beyond statutory requirements for written or oral statements. By contrast, policies for departments in Amarillo, Austin, Corpus Christi, Dallas, El Paso, Houston, Irving, Pasadena, and San Antonio provide for more robust recording of interrogations. Because there is no uniform requirement to do so, each department has unique language and procedures that guide the conduct of electronic recording of

custodial interrogations. For example, Corpus Christi Police Department states that recorded interviews are preferred while San Antonio Police Department provides only for the recording of interrogations with juvenile suspects. Dallas County Sheriff's Department indicated that although they do not currently have a recording policy, money to purchase equipment had been budgeted and policies will be adopted this year.¹¹³

Communication with several departments in Texas indicates that the implementation of a recording policy need not be cost-prohibitive. Dallas Police Department installed a system that would record and store interviews for three months on a computer in five rooms for a total cost of \$12,000.¹¹⁴ Technology systems and storage costs have improved since the system was installed in 2005, and interrogation rooms could likely be constructed for less in 2010. Dallas police officers also make use of a system that burns interviews directly to DVD. The costs of a hidden camera, hidden microphone, DVD recorders, and required cable fall between \$500 and \$600 per room.

These costs are in line with recording equipment purchased by Alpine Police Department, a jurisdiction of about 6,300 people. Officers in Alpine make use of a standard, hand-held digital video recorder and tripod, available for purchase at most electronics retail stores for under \$500.¹¹⁵ In addition, the department purchased a small, pen-sized digital video recorder for audio-only recordings. Recordings are burned onto CD or DVD discs; one copy is saved in the department, the other is sent to the prosecutor. Total cost of the recording equipment and discs is well under \$1000, and indicate that recording interrogations need not be cost-prohibitive.

¹¹³ *Id.* at 5-7.

¹¹⁴ E-mail from Edwin Colfax, Texas Policy Director, The Justice Project, to Jennifer Willyard, Grant Program Specialist, Texas Task Force on Indigent Defense (Aug. 2, 2010) (on file with Texas Task Force on Indigent Defense).

¹¹⁵ E-mail from Edwin Colfax, Texas Policy Director, The Justice Project, to Lieutenant Losoya, Alpine, Texas Police Department (Aug. 2, 2010) (on file with Texas Task Force on Indigent Defense).

Chapter 3: Effective Assistance of Counsel through Criminal Discovery

Practices

In criminal cases, perhaps the most significant disparity between the government's capacity to prosecute and the defendant's capacity to defend derives from the government's vastly superior ability to discover information concerning the alleged crime. . . . It might be possible to reduce this disparity by providing public defender programs with the resources necessary to locate evidence favorable to the accused. A more efficient remedy, however, since it does not involve costly duplication of investigative efforts, is to place the results of the government investigations in the hands of the defense.¹

Panel Recommendation

- 7. The State of Texas should adopt a discovery policy that is mandatory, automatic, and reciprocal, and requires either electronic access to or photocopies of materials subject to discovery.**

Texas is in the distinct minority when it comes to limiting discovery in criminal cases; as explored below, many states and the federal courts currently operate under a system in which the prosecution and the defense must share information, reports, witness statements, witness lists, and more with the other party before trial. As such, the Panel agrees that Texas law should follow the prevailing trend in criminal discovery, as well as recommendations made by criminal justice organizations, and mandate reciprocal discovery in criminal cases, rather than leave the process up to well-intentioned prosecutors. The Panel further recommends that in accordance with policy that best prevents wrongful convictions, either photocopying of, or electronic access

¹ Victor Bass, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 112 (1972).

to, discoverable materials be required. Currently, Texas jurisdictions each have their own stance on whether photocopying or even note-taking is permitted, and uniformity in this area will greatly benefit the State.

We believe that these reforms will help to prevent wrongful conviction that results from intentional or unintentional suppression of information that is material, favorable, or exculpatory in nature. The Panel offers compromise legislative language in Appendix E and the report below for consideration.

Panel Report

Introduction

One of the most important ways that jurisdictions can provide for effective counsel is to adopt consistent discovery policies that allow the defense early and complete access to essential documents in the case against the defendant. Without access to offense and expert reports until the time of trial, the ability for defense counsel to provide a meaningful defense is diminished. Although discovery policies cannot completely guard against ineffective assistance of counsel claims, they set the foundation for a quality and meaningful defense.

Discovery as a component of effective counsel is especially important in helping to guard against wrongful convictions. A relationship between discovery and wrongful conviction is sometimes difficult to quantify solely from a trial transcript, but The Justice Project states, “The record of wrongful convictions has demonstrated that exculpatory evidence can be withheld for years, even decades, while an innocent person sits in prison.”² In fact, The Justice Project’s report indicates that seven of Texas’ first thirty-nine DNA exonerations involved suppression of exculpatory evidence or other prosecutorial misconduct. This statistic includes the case of

² THE JUSTICE PROJECT. CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM 11 (2009), *available at* <http://www.thejusticeproject.org/wp-content/uploads/convicting-the-innocent.pdf>.

Timothy Cole, whose defense counsel was never informed that only one victim chose Cole out of a photo lineup as the perpetrator of a rape on the Texas Tech campus.

Although the Supreme Court’s decision in *Brady v. Maryland*³ provides defendants with a constitutional right of access to exculpatory information held by the State and in the possession of law enforcement, it is an insufficient tool to prevent wrongful convictions because *Brady* complaints are made post-conviction. Since a wrongful conviction cannot be retroactively prevented once it has already occurred,⁴ other means of prevention must be explored. One way to reduce the potential for errors is to increase the scope of discovery, the process of pre-trial information exchange between prosecution and defense. As the Supreme Court commented, “The very integrity of the judicial system and public confidence in the system depends on full disclosure of all the facts, within the framework of the rules of evidence.”⁵ Legal scholars have noted that “such fact development cannot take place without investigation. In turn, adversarial balance cannot take place without investigation by both the prosecution and the defense.”⁶ In order for investigation to be meaningful, both sides in an adversarial system must have access to the facts of the case. In the report that follows, the Timothy Cole Advisory Panel reviews the

³ 373 U.S. 83 (1963). John Brady was charged with capital murder following a scheme hatched to rob a bank with his friend, Donald Boblit, The key question in the case was which man – Brady or Boblit – had actually committed the murder. Both men made several statements to the police following the crime in which Boblit confessed to the murder, but Brady’s defense attorney would not learn of this statement until after the trial. With the evidence presented to them at trial, the jury returned with a guilty verdict and capital punishment.

Following the trial, defense counsel learned of Boblit’s final statement in which he confessed to murder. Brady’s attorney filed a motion for a new trial due to the fact that he had requested to inspect all of Boblit’s extrajudicial statements pre-trial. All were turned over to him except for the final confession. The Supreme Court affirmed Brady’s motion for a new trial and stated that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. For holdings that helped to further define *Brady* obligations, see *United States v. Agurs*, 427 U.S. 97 (1976); *Moore v. Illinois* 408 U.S. 786 (1972); *Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967). See generally *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935).

⁴ See Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 *FORDHAM URB. L.J.* 1097 (2004).

⁵ *United States v. Nixon*, 418 U.S. 683, 709 (1974).

⁶ Roberts, *supra* note 4, at 1105.

discovery requirements of *Brady v. Maryland*, current Texas law, and recommended practices to guide discovery policies and their adoption in Texas and other states. The Panel concludes with recommendations to help Texas avoid wrongful convictions due to failures of our system of discovery.

***Brady* and Criminal Discovery Procedures in Texas**

The Supreme Court ruled in *Brady v. Maryland* that defendants have a constitutional right to any evidence the State may have in its possession that tends to exculpate the defendant. As noted above, however, *Brady* does precious little to prevent wrongful conviction of the innocent because the burden to determine what constitutes exculpatory information rests with prosecutors who do not construct theories of the case for the defense. Further, cases in which the State does not comply with this requirement are not revealed until after the defendant has already been convicted. This has led some observers to argue that *Brady* is incompatible with an adversarial system because prosecutors and defense attorneys have fundamentally adversarial positions, the *Brady* holding provides for only weak enforcement, it excludes incriminating evidence (which is much more common than exculpatory evidence), it is poorly suited to plea bargaining⁷ and informant testimony,⁸ and it requires misconduct on the part of the state rather than innocence of the defendant.⁹ If we ask the prosecutor to be responsible for making all

⁷ See Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gameship Toward the Search for Innocence?* in CRIMINAL PROCEDURE STORIES 129, 149 (Carol Steiker ed., 2005) (“Because defendants do not have this information in time for plea bargaining, they must bargain in the dark. Typically, guilty defendants know that they are guilty and have a rough idea of what witnesses and other proof might link them to the crime. But defendants who are innocent or were intoxicated or mentally ill at the time of the crime have little knowledge of the evidence against them. Defendants who may be the most sympathetic may thus be at the greatest disadvantage in plea bargaining. They may be the most susceptible to prosecutorial bluffing.”), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1085&context=upenn_wps; John D. Douglas, *Can Prosecutors Bluff? Brady v. Maryland and Plea Bargains*, 57 CASE W. RES. L. REV. 581 (2007); Lee Sheppard, *Disclosure to the Guilty Pleading Defendant: Brady v. Maryland and the Brady Trilogy*, 72 J. CRIM. L. & CRIMINOLOGY 165 (1981).

⁸ See Giglio, 405 U.S. 150 (1972); Note, *A Prosecutor’s Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887 (1981); Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619 (2007).

⁹ Bibas, *supra* note 7.

decisions regarding materiality, the exculpatory nature of evidence, favorability, and the like, we are asking her to “exercise this function from a defense perspective, and it may be unrealistic to suppose than an adversary can act with the objectivity this requires.”¹⁰ The conflict associated with reliance on prosecutorial discretion has been addressed by many in the *Brady* literature, as has the question of whether there should be additional formal rules to address discovery obligations. Many of these legal scholars and practitioners feel that there should be rules because “there is no way in a system with human beings that you can rely totally on subjective determinations.”¹¹

Even some prosecutors agree that the current discovery practices place them in a tenuous role. Debra Graves, a North Carolina prosecutor whose failure to turn over required evidence led to a wrongful conviction, stated, ““When you’re an advocate for one side, you’re truly an advocate for one side.””¹² This situation is avoidable, however, through open discovery practices that give the defense access to all unprivileged information possessed by the state. Bass concurs with Graves and argues, “Open files would, of course, remove the burden on the prosecutor of attempting to determine whether evidence is favorable and allow the defense attorney to decide what evidence will help his case. It would thus greatly simplify the prosecutor’s task.”¹³

Further, *Brady* is an inefficient tool to prevent wrongful conviction because *Brady* claims occur post-conviction. *Brady* motions are not raised until after a defendant has been convicted of a crime and some new evidence that was in the possession of the prosecution comes to light; therefore, by definition, it cannot prevent wrongful conviction before it happens. In addition, the

¹⁰ Bass, *supra* note 1, at 121.

¹¹ Steven M. Dettelbach, Commentary, *Brady from the Prosecutor’s Perspective*, 57 CASE W. RES. L. REV. 615, 617 (2007).

¹² Kenneth Jost, *Prosecutors and the Law: Is Prosecutorial Misconduct a Serious Problem?* 17 CQ RESEARCHER 937, 939 (2007).

¹³ Bass, *supra* note 1, at 112.

standards of review are complex, as a *Brady* claim requires judges to weigh *materiality* and *relevance*. As Bass noted, these factors are very difficult to measure separately, so judges attempt to answer the question of whether the “evidence in question [would] have changed the outcome of the trial.”¹⁴ The “difficulty in making this decision, which is in any case necessarily based on hindsight, is exacerbated by the fact that the trial may have been distorted by the defendant’s inability to use the suppressed evidence to prepare.”¹⁵ Based on the insufficiency of post-conviction remedies, we must look to the State of Texas to provide guidance on pre-trial discovery that will better prevent wrongful convictions from occurring.

Criminal Discovery Procedures in Texas

Texas discovery is controlled by Article 39.14 of the Texas Code of Criminal Procedure.¹⁶ Article 39.14 does not mandate automatic defense access to police reports and witness statements and there is no provision specifically allowing the defense to obtain copies of these items. Rather, defense counsel is required to file motions with the trial court to request access to basic case information, including offense reports and expert reports. In order to receive the requested access, the defense must make a showing of “good cause.”¹⁷ There is no certification process or specified timelines for either party, with the exception of the disclosure of expert witnesses. Additionally, in some parts of the state, “access” means that defense counsel may only make notes about items in the prosecution’s file. Furthermore, the prosecution does not have access to reciprocal discovery. Unlike many other states, Texas law provides no formal rules for case conferences, wherein the prosecution, defense, and judge meet to discuss the evidence that is available and will be presented at trial. In addition, Article 39.14 does not

¹⁴ Bass, *supra* note 1, at 126.

¹⁵ *Id.*

¹⁶ TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 2010).

¹⁷ *Id.*

define “exculpatory evidence” to guide the prosecution in what material is subject to discovery obligations. Therefore, although Texas does have a criminal discovery statute, policy groups and practitioners argue that the statutes are “so minimal that they fail to guarantee the opportunity for evidence to be fully investigated and meaningfully challenged.”¹⁸

Texas case law has further held that the trial court must allow discovery of evidence that is shown to be material to the defense of the accused,¹⁹ but no general right to discovery exists.²⁰ Instead, the decision as to what is discoverable rests with the discretion of the trial court.²¹ To determine materiality, the omission is evaluated in the context of the entire record, and constitutional error is found only if the omitted evidence creates a reasonable doubt that did not otherwise exist. As with other avenues reviewed in this section, existing Texas case law may not provide an effective means to prevent wrongful convictions of the innocent due to suppression of exculpatory evidence. The existing statute provides little direction to the courts, and statute has been interpreted to leave discretion with prosecutors and trial courts. The end result has been a wide range of discovery practices and policies across the state that may or may not provide meaningful protection to innocent suspects under investigation for crimes they did not commit.

For the purposes of making policy recommendations on discovery to ensure that Texas law is a more effective tool to prevent wrongful convictions, the Panel reviewed recommended practices available to guide jurisdictions in pre-trial discovery and rules and statutes adopted nationwide. These procedures were then used to evaluate the current practices in Texas jurisdictions. The policies outlined below are recommended to provide the information necessary for defense attorneys to prepare an appropriate defense, thereby reducing the chance for

¹⁸ THE JUSTICE PROJECT, *supra* note 2, at 11.

¹⁹ *See, e.g., Massey v. State*, 933 S.W.2d 141, 153 (Tex. Crim. App. 1996).

²⁰ *See, e.g., Kinnamon v. State*, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990); *Whitchurch v. State*, 650 S.W.2d 422, 425 (Tex. Crim. App. 1983).

²¹ *See Whitchurch*, 650 S.W.2d at 425.

wrongful convictions due to *Brady* violations or insufficient time to conduct thorough investigations. First, we turn to a discussion of recommended practices and standards.

Organizations' Recommended Practices

In 1996, the American Bar Association (ABA) released the third edition of the ABA Standards for Criminal Justice: Discovery and Trial by Jury.²² These best practices address the general principles of discovery, the obligations of the prosecution and defense, special procedures, timing and manner of disclosure, depositions, general provisions, and sanctions if discovery rules are not properly implemented. The areas of timing, obligations of the prosecution and defense, and sanctions are reviewed below.

Timing Although the ABA standards outline no specific time requirement within which discovery should be completed, the standards encourage discovery “as early as practicable in the process.”²³ The ABA recommends that each jurisdiction adopts time limits and notes that the prosecution should first disclose discoverable materials to the defense.²⁴ Under the ABA standards, parties operate under a “continuing obligation to produce discoverable materials to the other side.”²⁵

Obligations of the Prosecution and Defense The ABA standards specifically state that the prosecution should “permit inspection, copying, testing, and photographing” of any statement from the defendant or codefendant; names, addresses, and written statements of witnesses; any inducements for cooperation between the prosecution and the witness; written statements from experts; any tangible objects that pertain to the case (e.g., books, papers, documents, etc.); any record of previous criminal history; information related to any identification procedures

²² A.B.A. STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed., 1995), available at <http://www.abanet.org/crimjust/standards/discovery.pdf>.

²³ *Id.* § 11-4.1(a).

²⁴ *Id.* § 11-4.1(b).

²⁵ *Id.* § 11-4.1(c).

conducted in the investigation phase; and any material that tends to negate or mitigate the guilt of the defendant.²⁶ In addition, the defense should be informed of character evidence, evidence gathered through electronic surveillance, and information or documentation of the acquisition of evidence gathered through search and seizure.²⁷

The ABA standards promote reciprocal discovery and suggest a more limited list of defense materials to be shared with the prosecution. These include the names and addresses of all witnesses that will be called at trial; any expert reports or written statements; and any tangible objects that will be introduced as evidence at trial.²⁸ The standards also recommend discovery of character evidence not relating to the defendant and the names and addresses of witnesses who will be asked to support an alibi or insanity defense.²⁹

Additional Recommendations In addition to timing and discoverable objects or information, the ABA standards address where counsel must search for discoverable information. The standards state that the obligation of the prosecutor and defense attorney “extend to material and information in the possession or control of members of the attorney’s staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney’s office.”³⁰ This extends the discovery standards to not only prosecutors or defense attorneys, but also to investigators, previous attorneys, as well as other staff.

Sanctions Should one or more party fail to fulfill their discovery obligations, the ABA standards recommend one of the following actions on behalf of the court:

²⁶ *Id.* § 11-2(a).

²⁷ *Id.* § 11-2.1(b) to (d).

²⁸ *Id.* § 11-2.2(a).

²⁹ *Id.* § 11-2.2(b) to (c).

³⁰ *Id.* § 11-4.3(a).

- (i) order the noncomplying party to permit the discovery of the material and information not previously disclosed;
- (ii) grant a continuance;
- (iii) prohibit the party from calling a witness or introducing into evidence the material not disclosed, subject to the defendant’s right to present a defense and provided that the exclusion does not work an injustice either to the prosecution or the defense; and/or
- (iv) enter such other order as it deems just under the circumstances.³¹

The standards also recommend that the court may find counsel in contempt if it is revealed that she “willfully violated a discovery rule or order.”³²

Certification One area not included in the ABA standards is that of certification, an area that has been addressed by advocacy groups such as The Justice Project. The organization recommends that “a discovery certificate should be filed by the District Attorney’s office with the court during pretrial procedures, and should specify when evidence was exchanged and by what method of delivery.”³³ This type of certification creates a court record stating that both defense and prosecution have fulfilled their discovery responsibilities, provides documentation of information received from third parties, and makes it more difficult for evidence to be willfully suppressed.³⁴

Organizations’ Recommended Practices and the States

Only five states have discovery provisions that are equivalent in scope to the current ABA standards.³⁵ The ABA standards provide the broadest defense discovery, and, as LaFave et

³¹ *Id.* § 11-7.1(a).

³² *Id.* § 11-7.1(b).

³³ THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 6 (2007), available at http://www.thejusticeproject.org/wp-content/uploads/polpack_discovery-hirez-native-file.pdf.

³⁴ *Id.* at 3, 6.

³⁵ WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 20.2(b) & n.34 (3d ed. 2009) (Alaska, Florida, North Carolina, Minnesota, and New Jersey).

al. state, “[a] critical feature of defense discovery in all of these states is that it extends beyond prosecution witnesses to all persons who have relevant information (and their recorded statements).”³⁶ The majority of the remaining states have standards more in line with either Federal Rule 16³⁷ (providing the most limited discovery) or some area in between the two standards.³⁸ Current Texas law, however, is considerably more restrictive than Federal Rule 16. To provide a clearer point of comparison and analysis, the Panel looked to evaluate existing policies in light of the ABA recommended practices.

Analysis and Evaluation

The most comprehensive review of state discovery policies was conducted in 2004 by the Federal Judicial Center (FJC) for the Advisory Committee on Criminal Rules of the Judicial Conference of the United States.³⁹ The organization surveyed all fifty states and the District of Columbia and reported the governing rules, orders, and procedures; definition of *Brady* material; disclosure requirements; due diligence obligations, and sanctions for noncompliance. The study found a patchwork of different policies across the nation. The results are summarized below, although several states have reformed their procedures since this survey was originally

³⁶ *Id.* at n.34.

³⁷ Federal Rule 16 has required reciprocal discovery since 1974 and states that upon defendant request, the government must disclose the defendant’s written or recorded statement, the defendant’s prior criminal record, documents and objects that are material to preparing the defense or intended to be used by the government at trial, reports of examinations and tests, and a written summary of any testimony to be offered by a prosecution expert. The defense must permit review of documents and objects in possession of the defense and intended to be used at trial, reports of examinations and tests, a summary of any testimony to be offered by a defense expert, and the use of certain defenses such as alibi, insanity, or self-defense. Bibas, *supra* note 7, at 16 (reviewing FED R. CRIM. P. 12.1-2, 16(a)(1), 16(b), 16 advisory committee’s note). Although these requirements are included in the ABA discovery standards, the ABA standards go beyond Rule 16 to include witness information, identification procedures, and recommends adoption of a timeframe for discovery. *See supra* pp. 7-10.

³⁸ LaFave et al., *supra* note 35, § 20.2(b).

³⁹ LAURAL L. HOOPER, JENNIFER E. MARSH & BRIAN YEH, TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS’ RULES, ORDERS, AND POLICIES (Federal Judicial Center 2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/\\$file/BradyMat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/$file/BradyMat.pdf).

conducted. For example expanded discovery procedures came into effect in Ohio on July 1, 2010, as part of a package of reforms meant to decrease the likelihood of wrongful conviction.⁴⁰

FJC found that “all fifty states and the District of Columbia address the prosecutor’s obligation to disclose information favorable to the defendant,”⁴¹ but that is where the similarities end. The states differ in how *Brady* material is defined,⁴² whether discovery is mandatory,⁴³ the timing of discovery,⁴⁴ certification of complete discovery,⁴⁵ sanctions,⁴⁶ and whether suppression of exculpatory evidence constitutes a violation of due process.⁴⁷

Texas statutes consistently fall into the narrowest of categories with no discovery timeline or certification of discovery. Texas requires a written discovery motion, and the state is also one of ten that places additional conditions on discovery and requires the defendant to

⁴⁰ Janice Morse, *Ohio’s New Criminal Court Rules Kick In*, CINCINNATI.COM, June 30, 2010, <http://news.cincinnati.com/article/20100630/NEWS010702/7010328/1167/NEWS/Ohio-s-new-criminal-court-rules-kick-in>.

⁴¹ Hooper et al., *supra* note 39, at 17.

⁴² Twenty-three states, including Texas, have adopted language similar to the following: “any material or information which tends to negate the guilty of the accused as to the offense charged or would tend to reduce the accused’s punishment therefor[e].” *Id.* at 18-19 (quoting IDAHO CRIM. R. 16(a)). *Brady* material is addressed by ten other states that “expressly list exculpatory material as items of information that prosecutors are required to disclose.” *Id.* at 19. Several states include such items as recordings of conversations obtained through electronic surveillance; all inducements made to state witnesses who will testify at trial; and police, arrest, and offense reports among others, in their lists of discoverable material. *Id.* at 21.

⁴³ Thirteen states have mandatory disclosure requirements in place, requiring the prosecutor to disclose some information without a discovery request from the defense. Other states (including Texas) and the District of Columbia “require a defendant to request favorable information, sometimes in writing, before the prosecution’s obligation to disclose is triggered.” *Id.* at 23.

⁴⁴ Twenty-eight states include specific time mandates for disclosure of evidence favorable to the defendant by the prosecution. Ten states have established separate timelines—one that mandates when the defense must make a discovery request and one that addresses when the prosecution must respond. The FJC also reports that “for a small number of states, we were unable to determine a specific timetable for disclosure of *Brady* material.” *Id.* at 24. Eighteen states at least have descriptive indicators of when discovery must occur, such as “timely” or “in advance of the trial.” *Id.* at 26.

⁴⁵ Although all states impose a continuing duty to disclose upon prosecutors, the FJC found that only five states (Colorado, Florida, Idaho, Massachusetts, and New Mexico) require written certification that the prosecution has exercised due diligence in locating favorable information and that their disclosure is as complete as possible. *Id.* at 27.

⁴⁶ Eleven states include penalties beyond Federal Rule 16 that may be imposed upon those who willfully fail to comply with discovery obligations; these penalties include contempt proceedings or an assessment of costs when appropriate. In Idaho, failure to meet the time requirements for discovery may result in sanctions, and Connecticut, Maine, and North Carolina allow for dismissal of a case as a sanction for particularly egregious discovery violations. *Id.* at 27-28.

⁴⁷ The West Virginia Supreme Court held that suppression does constitute a due process violation and Nevada specifically articulates in their general statutes that it does not. *Id.* at 18.

demonstrate that the materials are necessary to the preparation of the defense or “show ‘good cause’ for discovery of such information.”⁴⁸ No provision in Texas’ current discovery statute mandates that the defense be permitted to obtain copies of items such as offense reports and witness statements. Further, Texas, Louisiana, and Pennsylvania are the only states that expressly limit the sanctions applied by the court to those other than dismissal.⁴⁹

Expanded discovery procedures are consistently recognized as an area of Texas law in which reform is needed.⁵⁰ Several Texas counties, however, are leading the way to modernize discovery procedures and broadening defense access to evidence; some point to Tarrant County's system as a model for the state.⁵¹ On January 28, 2010, the Advisory Committee travelled to Fort Worth so that members could see firsthand how the District Attorney’s office there utilizes computer technology to engage in electronic open-file discovery.

Tarrant County’s open file discovery process began with DA Tim Curry, whose philosophy, according to ADA Tiffany Burkes, was: “if we can’t win a case based upon what we

⁴⁸ TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 2010), *quoted in* Hooper et al., *supra* note 39, at 23.

⁴⁹ Hooper et al., *supra* note 39, at 28.

⁵⁰ *See* Tex. H.B. 301, 81st Leg., R.S. (2009); Tex. S.B. 1686, 81st Leg., R.S. (2009) (senate companion to HB301, complete overhaul including early access & duty to disclose); Tex. S.B. 643, 80th Leg., R.S. (2007) (seeking to implement timeline (30 days) and remove “good cause” requirement); Tex. H.B. 969, 79th Leg., R.S. (2005) (bill passed, mandating discovery (but still obligated to make showing of “good cause”)); Tex. S.B. 560, 79th Leg., R.S. (2005) (senate companion to HB969); Tex. H.B. 3151, 79th Leg., R.S. (2005) (seeking to require that agreements and communications about potential agreements between state and prosecution witnesses be made in writing); Tex. H.B. 77, 77th Leg., R.S. (2001) (seeking to create separate discovery sections for defense and state; timelines; enumeration of discoverable materials); Tex. H.B. 382, 77th Leg., R.S. (2001) (seeking to create dual discovery sections; timelines; enumerated discovery materials); Tex. S.B. 582, 77th Leg., R.S. (2001) (seeking to give trial court discretion to permit defense counsel to obtain copies of certain information); Tex. H.B. 2675, 76th Leg., R.S. (1999) (bill passed, giving trial court authority to disclose to the state, prior to trial, the names and addresses of defense’s expert witnesses); Tex. S.B. 557, 76th Leg., R.S. (1999) (senate companion to HB2675); Tex. H.B. 972, 74th Leg., R.S. (1995) (seeking to create separate discovery sections for state and defense; timelines; enumeration of discoverable materials); Tex. H.B. 2723, 74th Leg., R.S. (1995) (seeking to create reciprocal discovery; timelines; enumeration of discoverable materials); Tex. H.B. 378, 73rd Leg., R.S. (1993) (seeking to implement timelines; separate sections for state and defense; enumeration of discoverable materials).

⁵¹ Alex Branch, *Tarrant County’s Electronic Open-File System Seen as Gold Standard for Reducing Wrongful Convictions*, FORT WORTH STAR TELEGRAM, March 18, 2010 (“‘Tarrant County does seem to be the gold standard,’ said Barry Macha, a member of the Timothy Cole Advisory Committee and the elected district attorney of Wichita County. ‘It’s state-of-the-art; the best system I have seen.’”) *available at* <http://www.star-telegram.com/2010/03/18/2048153/tarrant-countys-electronic-open.html>.

have, we have no business trying it.” The discovery policy initially allowed defense attorneys to take notes from the DA’s paper files (with the exclusion of the work product file). Thereafter, defense attorneys were permitted to make photocopies of their clients’ files. Several years ago, the county implemented an electronic case filing system that now manages the discovery process. As ADA Burkes told the Panel, “Now we have advanced from just having a paper file to actually having all of our documents on a computer in electronic form.” She also told the Panel that they strive to “make sure that every defense attorney has access to every offense report, every witness statement, arrest warrant, crime scene photographs, anything and everything that they can use to properly defend their client.”

To the detriment of those who are charged with crimes, not all counties have made improvements in the discovery system as significant as those undertaken in Tarrant County. Warren St. John, president of the Tarrant County Criminal Attorney’s Association, remarked that he is extremely appreciative of the Tarrant County system because in other counties where he practices, the attitude toward discovery is significantly different. “Other counties,” he stated, are like “different worlds.” St. John told the Panel, “A lot of those counties will let you read stuff, but not let you have copies of stuff. . . . I tried a capital case in Stephenville, the DA in Stephenville will give you everything he has, but it’s not electronic. . . . And then you go to another jurisdiction, you can’t look at anything. It doesn’t make any sense.”

What St. John’s comments indicate is that Texas’ discretionary policy has left the state with a wide variance in discovery practices, where the quality of defense, investigation, and preparation is at least partially dependent upon geography. All other factors being equal, cases in two counties may have different outcomes due to the timing, manner, and nature of materials that are—or are not—exchanged through discovery. This result is contrary to the general

premise of discovery, which is to encourage case investigation and preparation, to support efficient resolution of cases where the facts are not disputed, and, where the facts are disputed, to ensure that those facts are fairly presented to the ultimate factfinder—the judge or jury. To achieve those goals, the defense should have the opportunity to review and test the evidence that the prosecution would use to convict and sentence, and the prosecution should have the opportunity to obtain certain information from the defense that will enable the prosecutor to carry out his or her duty “not to convict, but to see that justice is done.”⁵² Because Texas lacks such a system, the fairness and accuracy of its criminal justice system may be called into question, especially when compared to the majority of other jurisdictions that employ a system of reciprocal discovery. This is a strong motive behind many prosecutors’ and defense attorneys’ calls for broad reciprocal discovery. It similarly informs the Panel’s recommendations above.

⁵² TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 2010).

Chapter 4: Post-Conviction DNA Testing and Writs of Habeas Corpus Based on Changing Science

The results of DNA testing reconcile two competing goals The first goal is to prevent the conviction of an innocent person. The second goal is the finality of judgments. Admitting DNA evidence meets both goals. If the evidence exonerates the defendant, then the goal of not allowing an innocent person to stand convicted is served. If the evidence incriminates the defendant, then the goal of finality of judgments is met by adding certainty to the result.¹

Panel Recommendations

In the areas of post-conviction DNA testing and writs of habeas corpus based on changing science, the Timothy Cole Advisory Panel on Wrongful Convictions recommends the following:

- 8. The State of Texas should amend the Chapter 64 motion for post-conviction DNA testing to allow testing of any previously untested biological evidence, regardless of the reason the evidence was not previously tested, or previously tested using older, less accurate methods.²**

The Panel reached consensus that the language proposed in SB 1864 during the 81st Legislative Session would make needed adjustments and improvements to the existing statute.

- 9. The State of Texas should amend the Chapter 11 writs of habeas corpus to include a writ based on changing scientific evidence.³**

¹ *Davi v. Class*, 609 N.W.2d 107, 113 (S.D. 2000). *quoted in* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Post-Conviction Testing*, 151 U. PA. L. REV. 547, 609 (2002).

² See Appendix F for model bill language.

³ See Appendix G for model bill language.

The Panel agreed that a writ of the type proposed in SB 1976 during the 81st Legislative Session would provide meaningful access to the courts to those with claims of actual innocence following a conviction based on science that has since been falsified. Creation of a dedicated writ and procedure will allow those with claims to be heard without opening all convictions up to scrutiny. The Panel believes this is both valuable and important to the criminal justice system in Texas.

Panel Report

Introduction

To date in Texas, 41 people have been exonerated of crimes for which they were convicted after post-conviction DNA testing revealed that they were not the true perpetrators of those crimes. One of the lessons we can learn from the wrongful convictions revealed through DNA testing is that post-conviction access to DNA and other forensic tests are an important and meaningful way to ensure the integrity of our criminal justice system and to see that justice is done for victims of crime and the wrongfully convicted.

For this section of the report, the Panel chose to focus specifically on Texas statutes related to post-conviction claims of actual innocence, as directed by the Panel’s enabling legislation. We leave policy-making regarding federal criminal and civil avenues⁴ to the Supreme Court of the United States⁵ and policy-making related to laboratories and the science behind forensic science to the Texas Forensic Science Commission.⁶ The Forensic Science

⁴ For an overview of claims of actual innocence made through federal writs of habeas corpus and Section 1983, see Benjamin Vetter, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587 (2004).

⁵ See Kreimer & Rudovsky, *supra* note 1, for an overview of Supreme Court jurisprudence on cases of actual innocence. See also *Dist. Attorney’s Office v. Osborne* 129 S. Ct. 2308 (2009) (establishing that inmates do not have a constitutional right to DNA evidence for post-conviction testing).

⁶ According to the Forensic Science Commission, their mission is to: “strengthen the use of forensic science in criminal investigations and courts by: developing a process for reporting professional negligence or misconduct, investigating allegations of professional negligence or misconduct, promoting the development of professional

Commission has not only the directive to handle scientific issues, they also have the experts to answer questions about laboratory procedures, testing methods, and the like. Although the report that follows is narrow rather than broad, it afforded the Panel the opportunity to examine a particular facet of Texas law in detail and make appropriately focused recommendations for the State.

Texas Law

Post-conviction DNA testing is controlled by Chapter 64 of the Texas Code of Criminal Procedure, which was originally passed as SB 3 during the 77th Legislature in 2001.⁷ The statute allows those who have been convicted of crimes to petition the court for DNA tests to be performed on biological material that

was not previously subjected to DNA testing:

(A) because DNA testing was:

(i) not available; or

(ii) available, but not technologically capable of providing probative results; or

(B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing; or

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.⁸

standards and training, and recommending legislative improvements.” Texas Forensic Science Commission, <http://www.fsc.state.tx.us> (last visited July 19, 2010).

⁷ TEX. CODE CRIM. PROC. ANN. art. 64.01-05 (Vernon 2010).

⁸ *Id.* art. 64.01.

Once the convicting court receives the motion, a copy is forwarded to the prosecuting attorney in the case who must respond with the appropriate biological evidence or written notice of why the evidence cannot be produced.⁹ Assuming that evidence can be produced, the judge from the convicting court may order testing if it is found that the evidence still exists, has been subjected to a chain of custody, identity was at issue in the case, and the petitioner demonstrates that she would not have been convicted if exculpatory DNA evidence had been available at the time of the trial and that the motion is not being used to delay the execution of a sentence. Chapter 64 also specifies that identity may be at issue in a case even if a defendant pleaded guilty or *nolo contendere* to a charge. This was an important provision for several Texas exonerations, as four of the wrongfully convicted made false confessions or guilty pleas.¹⁰

Those who have claims of wrongful conviction based on other types of forensic error apart from DNA testing (e.g. bullet lead comparison, arson investigation, or dog scent evidence) may petition the court with a writ of habeas corpus as defined in Article 11.07 of the Code of Criminal Procedure for those who have not been sentenced to death, and Article 11.071 for those who have been sentenced to death. Specifically, 11.07 states that “it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement.”¹¹ If it is found that there are, “the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using

⁹ For an overview on reasons why prosecutors may object to post-conviction DNA testing, see Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004), arguing that factors such as institutional culture and political pressure exert considerable inertia on prosecutors to object to testing. See also Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009) (outlining the various approaches to the investigation of post-conviction claims of innocence and times when prosecutors should support or oppose post-conviction forensic testing).

¹⁰ See Chapter 2: Recording Custodial Interrogations for additional information.

¹¹ TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3(c) (Vernon 2010).

personal recollection”¹² to resolve those issues. Those convicted of crimes generally have one writ of habeas corpus available to them, although subsequent writs may be considered if

the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.¹³

This limitation on successive writs is certainly important and valuable from a court management perspective, but it also places an additional barrier to successful claims of actual innocence for those who were convicted of crimes using science that, years later, is found to be invalid. Such was the case for those who were convicted in part due to comparative bullet-lead analysis.

One of the methods previously used by the FBI to link a criminal to a crime scene was to match the composition of bullets found at the crime scene to bullets in possession of the suspect. The theory was that bullets that were manufactured together would match each other chemically, allowing investigators to conclude that a crime scene bullet could have come from a particular box of bullets. Questions were raised about this methodology, however, and in 2004 the National Academy of Sciences (NAS) released the results of a study on the technique.¹⁴ The results revealed that comparative bullet-lead analysis was shaky at best. The NAS stated, “In practice, the detailed process followed by each manufacturer varies, and the process can vary

¹² TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3(d) (Vernon 2010).

¹³ *Id.* § 4(a).

¹⁴ COMM. ON SCI. ASSESSMENT OF BULLET LEAD ELEMENTAL COMPOSITION COMPARISON, NAT’L ACAD. OF SCI., FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE (The National Academies Press 2004), *available at* http://www.nap.edu/openbook.php?record_id=10924&page=1.

even within a single manufacturer to meet demand.”¹⁵ They found that some manufacturers boxed bullets together, others only boxed bullets when an order was placed, and still others added lead to the melt throughout the manufacturing process. These practices lead to a variety of bullet compositions in each box of ammunition. The NAS stated, “In fact, the FBI’s own research has shown that a single box of ammunition can contain bullets from as many as 14 distinct compositional groups.”¹⁶ For these reasons, the NAS concluded that “the available data do not support any statement that a crime bullet came from a particular box of ammunition,” “Compositional analysis of bullet lead data alone also does not permit any definitive statement concerning the date of bullet manufacture,” and “detailed patterns of the distribution of ammunition are unknown, and as a result, experts should not testify as to the probability that the crime scene bullet came from the defendant.”¹⁷ Based on these findings, the convictions of hundreds of people who had comparative bullet-lead analysis evidence presented against them were called into question, including several cases in which convictions were overturned.¹⁸

Although the weaknesses of old methods of comparative bullet-lead analysis have been exposed, technology develops in ways such that new tests can often render older methods obsolete or even erroneous. To help address defendants who may be affected by scientific developments in the future, the Panel looked to the literature to identify recommended practices related to post-conviction forensic testing that may guide the discussion of reform to existing Texas law.

Recommended Practices

National Commission on the Future of DNA Evidence

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 7.

¹⁸ John Solomon, *FBI’s Forensic Test Full of Holes*, WASH. POST, Nov. 1 2007, at A01.

In 1999, under the leadership of Attorney General Janet Reno, the National Commission on the Future of DNA Evidence released its publication, *Postconviction DNA Testing: Recommendations for Handling Requests*. In it, the group outlined five categories of cases that contain claims of actual innocence and request DNA testing and suggested responses for each category. The categories are as follows:

- **Category 1.** These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results will exonerate the petitioner. In these cases, prosecutors and defense counsel should concur on the need for DNA testing.
- **Category 2.** These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results would support the petitioner's claim of innocence, but reasonable persons might disagree as to whether the results are exonerative. The prosecutor and defense counsel may not agree on whether an exclusion would amount to an exoneration or would merely constitute helpful evidence.
- **Category 3.** These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, favorable results will be inconclusive. Future developments may cause such a case to be reassigned to a different category.
- **Category 4.** These are cases in which biological evidence was never collected, or cannot be found despite all efforts, or was destroyed, or was preserved in such a way that it cannot be tested. In such a case, postconviction relief on the basis of DNA testing is not possible.

- **Category 5.** These are cases in which a request for DNA testing is frivolous. In these cases, prosecutors and defense counsel should generally agree that no testing is warranted.¹⁹

Although no states have specifically codified these categories into statute, they may well provide guidance to defense attorneys, innocence projects, prosecutors, and judges who receive letters from those who claim actual innocence.

One of the lessons governments have learned in the intervening decade is that one cannot always determine which category a case falls into until after the DNA testing has been completed. Motions for DNA testing that at one time were considered frivolous because of a confession or an eyewitness identification may actually fall into Category 1 cases. Not only has our knowledge and technology of DNA testing advanced, so has our knowledge of the vulnerabilities of other investigatory practices. For these reasons, the categories outline by the Commission may be considered as general, rather than specific, guidelines.

Regardless of whether the categories outlined by the Commission should be considered as “hard and fast” rules, the group offered additional recommendations for prosecutors, defense counsel, the judiciary, victim assistance, and lab personnel regarding post-conviction DNA testing. Although each party has its own interests in a claim of actual innocence, the Commission recommended that communication play a central role between all parties in claims of actual innocence. For instance, it is recommended that prosecutors “provide information to the requestor” and “consult and notify victim/witness specialists, forensic DNA experts, defense counsel, and prosecutors experienced in DNA technologies and postconviction relief.”²⁰

¹⁹ NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, U.S. DEP’T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS xiii-xiv (1999), *available at* <http://www.ncjrs.gov/pdffiles1/nij/177626.pdf>.

²⁰ *Id.* at xvi.

Defense counsel should “conduct an extensive search for evidence, consulting with prosecutors throughout the search,”²¹ and judges are encouraged to “set an informal conference with counsel to discuss issues such as they type of DNA analysis to be used, whether it will be necessary to test the victim’s relatives or third parties, and whether additional samples need to be obtained from the victim.”²² This communication can help facilitate what can sometimes be a contentious process for all stakeholders involved.

American Bar Association

Post-conviction DNA testing guidance is provided by the American Bar Association in two documents.²³ In Resolution No. 115, the ABA states that “all biological evidence should be made available to defendants and convicted person upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law.”²⁴ Standard 16-6.1 further states that those who have been convicted of serious crimes should be granted post-conviction DNA tests if testing that was unavailable at the time of the trial has become available or there is reason to believe that the testing conducted at trial is now unreliable.²⁵

Like Texas statute, the ABA suggests that those who have pleaded guilty to a crime should not be barred from post-conviction DNA testing. The ABA recommendations include an additional provision that “the application should be denied unless the person, after consultation with counsel, files a sworn statement declaring that he or she is innocent of the crime, did not

²¹ *Id.*

²² *Id.*

²³ For information on the ABA’s recommendations on post-conviction matters generally, see ABA STANDARDS FOR CRIMINAL JUSTICE, POSTCONVICTION REMEDIES (2d ed., 1978), available at http://www.abanet.org/crimjust/standards/postconviction_toc.html. See also ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE § 16-6.1 cmt. (3d ed., 2006) (quoting ABA House of Delegates Resolution No. 115 (August 2000)), available at <http://www.abanet.org/crimjust/standards/dnaevidence.pdf>

²⁴ ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE, *supra* note 23.

²⁵ *Id.* § 16-6.1(a)(i)

have the culpability necessary to be subjected to the death penalty, or did not engage in the aggravating conduct that caused a mandatory sentence or sentence enhancement.”²⁶ While Texas does not require this sworn statement, as described above, the judge in a Texas motion must make finding on whether there is evidence to be tested and whether that evidence would have sufficiently exonerated the defendant so that they would not have been convicted at trial if that evidence had been available to jurors. DNA will only be tested in cases that meet both these (and several other) criteria.

The American Bar Association made additional recommendations in Report to the House of Delegates 111B²⁷ that “training in forensic science for attorneys should be made available at minimal cost to ensure adequate representation for both the public and defendants.”²⁸ The Panel would like to commend the Texas Criminal Justice Integrity Unit, chaired by Panel member and Court of Criminal Appeals Judge Barbara Hervey, for leading efforts to train defense attorneys, prosecutors, and judges on this very issue. The Panel would like to encourage stakeholders in the criminal justice system to take full advantage of the training offered to them through the Criminal Justice Integrity Unit and other organizations.

Other Stakeholder Organizations

Policy and advocate organizations have also provided recommended practices related to post-conviction DNA testing. For example, The Justice Project says that “states should ensure that all inmates with a DNA-based innocence claim may petition for DNA testing at any time and without regard to plea, confession, self-implication, the nature of the crime, or previous

²⁶ *Id.* § 16-6.1(b)(2).

²⁷ A.B.A. Section of Criminal Justice, *Report to the House of Delegates No. 111B* (2004), available at <http://www.abanet.org/crimjust/policy/am04111b.doc>.

²⁸ *Id.* at 1.

unfavorable test results.”²⁹ The organization also calls for stronger rules for evidence preservation and standardized post-testing procedures, access to counsel and independent forensic labs, and a requirement for judges to grant motions when the results of DNA tests would provide exculpatory evidence or evidence of diminished culpability. The Innocence Project similarly argues, among other considerations, that petitioners should be allowed “access to post-conviction DNA testing wherever it can establish innocence, even if the petitioner is no longer incarcerated, and including cases where the petitioner pled guilty or provided a confession or admission to the crime.”³⁰ Each of these organizations provides recommendations that come from the “on the ground” work of providing representation to those who make innocence claims or the study of known cases of wrongful conviction.

Although the above recommended practices all relate specifically to post-conviction DNA testing, several states have incorporated broader provisions into statute that provide avenues for other types of post-conviction forensic tests. Idaho³¹ and Minnesota,³² for example, allow petitions for DNA or fingerprint testing on evidence that was not previously tested or tested with older methods. Illinois also permits Integrated Ballistic Identification System testing,³³ and Arkansas permits fingerprinting, DNA testing, or “other tests which may become available through advances in technology to demonstrate the person’s actual innocence.”³⁴

Recommended Practices Specific to Texas Law

During the last legislative session in 2009, two bills were introduced to increase post-conviction access to the courts. Since the original post-conviction DNA testing statute passed,

²⁹ THE JUSTICE PROJECT. IMPROVING ACCESS TO POST-CONVICTION DNA TESTING: A POLICY REVIEW 3 (2008), available at <http://www.thejusticeproject.org/wp-content/uploads/post-convictiondna-fin.pdf>.

³⁰ The Innocence Project. Access to Post-Conviction DNA Testing, <http://www.innocenceproject.org/Content/304.php#> (last visited July 20, 2010).

³¹ See IDAHO CODE ANN. § 19-4902 (2010).

³² See MINN. STAT. § 590.01 (2010).

³³ 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2010).

³⁴ ARK. CODE ANN. § 16-112-201 (West 2010).

Texas has learned a great deal about how the innocent are convicted of crimes they did not commit and the opportunities they need to prove their innocence. Dallas County has also provided insight into how the innocent can continue to slip through the cracks, even with a post-conviction statute, through the formation of a Conviction Integrity Unit in the district attorney's office that works in conjunction with the Innocence Project of Texas.³⁵ Created in 2007, the Unit's "charge is to examine more than 400 cases in which DNA testing was denied by a court."³⁶ The project is the first of its kind in the nation, and the collaboration has led to several DNA exonerations, as well as the state's first non-DNA actual innocence exonerations.³⁷ The two post-conviction reform bills that could have addressed some of our increased knowledge did not pass due to procedural time requirements at the end of the session, but the Panel agreed that both were important starting points for conversation on how Texas can best address and rectify wrongful convictions in the state.

The first bill, SB 1864,³⁸ went uncontested and was voted unanimously out of Senate and House committees. SB 1864 would have amended §64.01, the motion for post-conviction DNA testing, to provide "that a motion could be made for DNA testing if the material was not previously subjected to testing, no matter the reason testing was not done, if the other stated conditions were met."³⁹ Supporters of the bill argued that this change was necessary because although "current law provides that untested material can be tested if it is in the interests of justice. . . [,] an unsympathetic judge still could deny the motion, even where material went

³⁵ The Conviction Integrity Unit's webpage is available at <http://www.dallasda.com/conviction-integrity.html>.

³⁶ Green & Yaroshefsky, *supra* note 9, at 494.

³⁷ Christopher Scott and Claude Simmons were exonerated after a confession from the true perpetrator of the capital murder for which Scott and Simmons were convicted. *Ex parte Scott*, No. W97-02028-QH(A) (Dist. Ct. No. 1, Dallas County, Tex. Oct. 23, 2009).

³⁸ Tex. S.B. 1864, 81st Leg., R.S. (2009) (authored by Sen. Rodney Ellis and sponsored by Rep. Scott Hochberg).

³⁹ House Research Org., Bill Analysis, Tex. S.B. 1864, 81st Leg., R.S. at 2 (2009), *available at* <http://www.hro.house.state.tx.us/pdf/ba81r/sb1864.pdf#navpanes=0>.

untested due to failure on the part of the defense attorney rather than the defendant.”⁴⁰ Thus, although the bill would preserve the judicial authority to rule on whether to grant post-conviction DNA motions, the door would be opened wider to those who may apply for the testing.

One of the concerns prior to implementation of the original Chapter 64 language was a “floodgate” concern—that once the doors to the courts were open for post-conviction DNA testing, they would be flooded with requests for testing. While there has certainly been an increase in the number of requests for this type of testing, most counties have not seen any requests, much less an abundance of requests. A Chapter 64 survey of the state’s 154 felony offices conducted by the Task Force on Indigent Defense revealed that the 75 responsive departments received 1132 motions for post-conviction DNA testing between January 1, 2001 and April 2010.⁴¹ Urban counties (including Harris, Dallas, Tarrant, Bexar, and Travis) received almost 87 percent of those motions, while rural counties received just 5 percent. Further, only 125 of those motions were granted, meaning that tests were conducted in only one percent of the cases. Those tests lead to 23 exclusive findings and 18 exonerations.⁴²

Additional provisions in the bill would require unidentified DNA profiles revealed through post-conviction DNA testing to be compared with profiles stored in the Federal Bureau of Investigation’s Combined DNA Index System (CODIS) database. This would potentially allow the state to identify a true perpetrator in the case of a revealed wrongful conviction and reveal the threat to public safety that is posed by wrongful conviction. For example, of the 255 DNA exonerations across the country, 94 actual perpetrators have been identified in 111 cases. Forty-four of those actual perpetrators went on to commit 91 additional crimes—61 sexual

⁴⁰ *Id.*

⁴¹ Tex. Task Force on Indigent Def., Survey of Texas Felony Offices and Chapter 64 Motions [page #] (2010) (on file with Texas Task Force on Indigent Defense).

⁴² *Id.*

assaults, 21 murders, and 9 other violent crimes—while the innocent suspect was behind bars.⁴³ Identifying these culprits not only helps to prove the innocence of the wrongfully convicted, it also helps to bring justice to the victims of the crimes that originally resulted in the wrongful conviction.

A second bill from the 81st legislative session, SB 1976, would have addressed those who had been convicted of crimes using science that had since been discredited.⁴⁴ According to the House Research Organization, the bill “would authorize courts to grant relief on writs of habeas corpus that, subject to criteria in the bill, raised relevant scientific evidence that was not available at the time of a trial or that discredited scientific evidence relief on by the prosecution at a trial.”⁴⁵ The language also provided that petitioners could file this writ even if a previous writ of habeas corpus had been made. This provision is important because many writs of habeas corpus “are filed without an attorney or soon after a conviction.”⁴⁶ Without the ability to file a writ that is based on science, inmates may lose the opportunity to demonstrate that the science that convicted them previously has since been disproved.

Although some may argue that the writ is unnecessary because those who have been wrongfully convicted may take advantage of the procedures for writs of habeas corpus that already exist, supporters of the bill stated that “it is clear that the current procedure is

⁴³ E-mail from Nicole Harris, Policy Analyst, The Innocence Project, to Jennifer Willyard, Grant Program Specialist, Texas Task Force on Indigent Defense (July 6, 2010) (on file with Texas Task Force on Indigent Defense).

⁴⁴ See Tex. S.B. 1976, 81st Leg., R.S. (2009) (authored by Sen. John Whitmire and co-authored by Sen. Juan Hinojosa). See also Tex. H.B. 3579, 81st Leg., R.S. (2009) (companion bill, authored by Rep. Pete Gallego, who also sponsored the Senate bill). Although the bill received unanimous passage from both the Senate Criminal Justice and House Criminal Jurisprudence committees, there was one witness who testified against the bill (Harris County District Attorney’s Office) and one who registered against the bill (Lubbock County District Attorney’s Office) during the Senate committee hearing. Senate Comm. on Criminal Justice, Bill Analysis, Tex. S.B. 1976, 81st Leg., R.S. (2009). There was no opposition to the bill during the House committee hearing. . House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 3579, 81st Leg., R.S. (2009).

⁴⁵ House Research Org., Bill Analysis, Tex. S.B. 1976, 81st Leg., R.S. at 2 (2009), *available at* <http://www.hro.house.state.tx.us/pdf/ba81r/sb1976.pdf#navpanes=0>.

⁴⁶ *Id.* at 3.

inadequate.”⁴⁷ Examination of the rates of DNA exonerations before and after implementation of the motion for post-conviction DNA testing provides us with insight into the effectiveness of specific, rather than general, avenues to claim actual innocence in the Texas court system. In the decade between the admission of DNA evidence into Texas courts and the creation of the Chapter 64 motion, twelve wrongful convictions were revealed through post-conviction DNA testing. Twenty-nine DNA exonerations have occurred in the years since.⁴⁸ While some of this is certainly due to advances in technology, a standardized motion helps to facilitate the process through the courts. Other areas of forensic science, such as bullet lead comparison and arson investigations, have advanced, but those who may have been wrongfully convicted through old scientific methods do not currently have the same standardized method to access the courts.

Governor’s Criminal Justice Advisory Council

Comprised of elected officials, judges, attorneys, and other stakeholders, the Governor’s Criminal Justice Advisory Council (CJAC) was established in 2005 to advise the Governor on the adequacy of criminal procedures at all stages of the criminal justice system.⁴⁹ In January 2006, CJAC released a report of recommended reforms to Governor Rick Perry.⁵⁰ The Council’s report included two proposals on the subject of post-conviction writs and DNA testing.

The Council recommended that the legislature revise the Procedure After Conviction Without Death Penalty⁵¹ to include additional judicial discretion and additional forensic testing

⁴⁷ *Id.* at 3-4.

⁴⁸ See generally Daryl E. Harris, *By Any Means Necessary: Evaluating the Effectiveness of Texas’ DNA Testing Law in the Adjudication of Free-Standing Claims of Actual Innocence*, 6 SCHOLAR 121 (2003).

⁴⁹ Rick Perry, Governor, State of Texas, Address to the Texas Daily Newspaper Association (March 14, 2005), available at <http://governor.state.tx.us/news/speech/9963/>.

⁵⁰ GOVERNOR’S CRIMINAL JUSTICE ADVISORY COUNCIL, JANUARY 2006 REPORT (2006) (on file with the Texas Task Force on Indigent Defense).

⁵¹ TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 2010).

paid by the state or a defendant with retained counsel.⁵² The council also proposed in the report that the Motions for Forensic DNA Testing⁵³ be amended to include “good cause” for ordering and for State’s paying for DNA testing at laboratories other than the Texas Department of Public Safety (DPS).⁵⁴ Both of these recommendations were subsequently passed into law by the Texas Legislature in 2007.⁵⁵

Texas Criminal Justice Integrity Unit

The Texas Criminal Justice Integrity Unit (TCJIU) is an ad hoc committee created in 2008 by Judge Barbara Hervey of the Texas Court of Criminal Appeals. The committee was founded to review the Texas criminal justice system and produce significant reform through education, training, and legislative recommendations. The TCJIU has proposed policy reforms regarding crime laboratory reliability and the auditing of DPS labs in order to hold them accountable for compliance with professional standards.⁵⁶ The committee also supported a bill⁵⁷ that passed in 2009, establishing a system to enhance the preservation and storage of biological evidence.⁵⁸ At this time, the TCJIU has not made any specific policy recommendations regarding post-conviction writs and procedures for DNA testing.

⁵² GOVERNOR’S CRIMINAL JUSTICE ADVISORY COUNCIL, *supra* note 47, at 14.

⁵³ TEX. CODE CRIM. PROC. ANN. art. 64.03 (Vernon 2010).

⁵⁴ GOVERNOR’S CRIMINAL JUSTICE ADVISORY COUNCIL, *supra* note 47, at 15.

⁵⁵ *See* Tex. H.B. 681, 80th Leg., R.S. (2007).

⁵⁶ TEX. CRIMINAL JUSTICE INTEGRITY UNIT, 2008 ANNUAL REPORT OF ACTIVITIES 7 (2008), *available at* <http://www.cca.courts.state.tx.us/tcjiu/reports/TCJIU-2008-report.pdf>; TEX. CRIMINAL JUSTICE INTEGRITY UNIT, 2009 ANNUAL REPORT OF ACTIVITIES 7 (2009), *available at* <http://www.cca.courts.state.tx.us/tcjiu/reports/TCJIU-2009-report.pdf>.

⁵⁷ Tex. H.B. 3594, 81st Leg., R.S. (2009).

⁵⁸ TEX. CRIMINAL JUSTICE INTEGRITY UNIT, 2009 ANNUAL REPORT OF ACTIVITIES 7-8 (2009).

Chapter 5: The Feasibility of Establishing an Innocence Commission

*I knew I was innocent. Hardly anybody else did.*¹

Panel Recommendations

After meeting with representatives from the defense bar, judiciary, law enforcement agencies, prosecutor offices, and the innocence projects at the four state university law schools, the Timothy Cole Advisory Panel on Wrongful Convictions makes the following recommendations:

- 10. The State of Texas should formalize the current work of the innocence projects that receive state funding to provide further detail in the projects' annual reports and distribute those reports to the Governor, Lieutenant Governor, Speaker of the House, and Chairs of the Senate Jurisprudence, House Corrections, House Criminal Jurisprudence and Senate Criminal Justice Committees. Report input should be solicited from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations.**

In 2005, the Texas Legislature provided that funds are directed to the state's public law schools to support the work of the innocence projects. The Texas Task Force on Indigent Defense administers an \$800,000 biennial allocation to the Texas Tech University, the University of Houston, the University of Texas at Austin, and Texas Southern University. One accountability component of this funding provides that the innocence projects issue an annual

¹ Dave Montgomery, *Timothy Cole Panel Questions the Creation of a Texas Innocence Commission*, FT. WORTH STAR TELEGRAM, Apr. 23, 2010 (quoting Texas exoneree Stephen Phillips' remarks to the Timothy Cole Advisory Panel on Wrongful Convictions), available at <http://www.star-telegram.com/2010/04/22/2136725/timothy-cole-panel-questions-the.html>.

report to the Task Force that documents the number of students who participate in the program and the number of requests received, screened, investigated, litigated, or rejected. The Panel recommends that this report be filed jointly and amended to include analysis of the requests and cases received, investigated, and litigated to identify any systemic criminal justice issues that are revealed by claims of actual innocence. The Panel further recommends that this report be presented to the Governor, Lieutenant Governor, Speaker, Senate Jurisprudence, House Corrections, House Criminal Jurisprudence and Senate Criminal Justice Committees so that legislators may be advised of any criminal justice issues that may require reform through legislation. Input in those reports should further be solicited from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations, and may address topics such as showups and informant testimony.

Following a Panel workgroup meeting, the innocence projects began to take steps that would allow the projects to coordinate on their activities and would leave them well-situated to meet this requirement. In May, representatives from the projects met to discuss the creation of a coalition of innocence projects. They will begin monthly phone meetings and work to standardize their forms and policies and procedures, as well as to discuss areas of needed reform. These plans will allow the projects to present a united front on innocence-related reforms in Texas.²

11. The State of Texas should provide an FTE for the Task Force using the current appropriation or other grant funding to administer these responsibilities, and contracts between the innocence projects and the Task Force on Indigent Defense should be amended to reflect the new administrator and additional responsibilities.

² Email from Whitney Stark, Communications Director, Innocence Project of Texas, to Jennifer Willyard, Grant Program Specialist, Texas Task Force on Indigent Defense (June 2, 2010) (on file with Texas Task Force on Indigent Defense).

Because the innocence projects are located in geographically diverse areas and have many responsibilities to their students and the cases they investigate, the Panel recommends that a full-time employee position be created that is dedicated to the coordination and administration of the innocence projects. This FTE will further help the innocence projects meet the recommendations listed above and serve to organize and audit the funding received from the Task Force. The Panel recommends that the FTE be housed at the Task Force to encourage equal utilization by the four projects, as should be reflected in amended contracts between the projects and the Task Force.

Panel Report

Introduction

One of ways in which wrongful convictions can be prevented is for parties to study the causes of error in cases of wrongful conviction and use those findings to enact policy reform. These reforms will help to prevent those same errors from occurring in the future. The possibility of establishing an innocence commission in Texas has been under consideration for several years, with legislation filed in however many sessions. The debate was featured by the House Research Organization (HRO) in 2008, with arguments laid out both for and against.³ Questions have concerned how to establish a commission; the makeup of the commission and method of appointment; the duties, power, and independence of a commission; and the quantity and source of funding needed to create and sustain a commission. The HRO noted that the conversation in Texas has generally “revolved around creating a commission that would study cases after an exoneration, not one that would examine claims of innocence. . . .”⁴ Chief Justice of the Supreme Court of Texas, Wallace Jefferson, has supported this type of commission, while

³ *Innocence Commission Debated in Texas*, INTERIM NEWS (Tex. House Res. Org., Austin, Tex.), June 18, 2008 (No. 80-5), at 1, available at <http://www.hro.house.state.tx.us/interim/int80-5.pdf>.

⁴ *Id.* at 4.

Governor Rick Perry and Presiding Judge Sharon Keller of the Court of Criminal Appeals are interested in learning how wrongful convictions occur and prevent those errors before an innocent person is convicted.⁵

Several states have established innocence commissions under a variety of formats to achieve these ends. For example, study commissions like the Timothy Cole Advisory Panel on Wrongful Convictions have been created in California, Connecticut, Illinois, North Carolina, Pennsylvania and Wisconsin. North Carolina additionally created an innocence commission to investigate claims of wrongful conviction (similar to the Criminal Cases Review Commission in the United Kingdom), and an extra-governmental innocence commission made up of academic and non-profit groups has been established in Virginia. The New York State Bar Association has also taken on this responsibility through the creation of a task force. The Panel reviewed the approaches taken by other states and countries in order to determine if an innocence commission is feasible for the State of Texas. Following a workgroup meeting with representatives from the innocence projects, the Panel recommends formalization of the work already underway by innocence projects.

Study Commissions

Several states have passed legislation creating commissions to study the causes of wrongful conviction and recommend policies to prevent those errors in the future. For example, the study commission established in Illinois made 85 recommendations to ensure that the system of capital punishment was fair and just, but their recommendations on issues such as eyewitness identification procedures and recorded interrogations speak to the larger criminal justice system.⁶ The California Commission on the Fair Administration of Justice used a combination of

⁵ *Id.*

⁶ GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, REPORT (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf

meetings and public hearings to make recommendations on a variety of subjects including eyewitness identification, false confessions, informant testimony, problems with forensic science, and others. The Advisory Commission on Wrongful Convictions made similar recommendations for the state of Connecticut in the areas of false confessions and eyewitness identification procedures.

Study commissions generally do not investigate claims of actual innocence, but rather examine known (usually through post-conviction DNA results) cases of wrongful conviction. In addition, study commissions are sometimes created to expire at a time certain. For example, this Panel and the Task Force on Indigent Defense must deliver their final report to the Governor and Legislature on or before January 1, 2011. In contrast, the study commission authorized by the legislature in Pennsylvania in 2006 continues to conduct research has yet to issue a final report, although a report is expected in summer of 2010.⁷

One advantage of study commission is that, like innocence commissions, they are comprised of a wide variety of criminal justice stakeholders including judges, academic researchers, prosecutors and defense attorneys, law enforcement, spiritual and other community leaders, representatives for governors' and attorneys general offices, or state legislators. This helps to ensure that the recommendations are based on the broadest level of consensus possible and that those who have the power to implement or enact those changes are party to the research and recommendation process. Another benefit is that study commissions are inexpensive. As

⁷ Email from Marissa Boyers Bluestine, Legal Director, Innocence Project of Pennsylvania, to Jennifer Willyard, Grant Program Specialist, Texas Task Force on Indigent Defense (July 29, 2010) (on file with Texas Task Force on Indigent Defense).

the Innocence Project stated, participation in a study commission is often “consistent with most members’ existing work, and in many cases can simply be an extension of their existing jobs.”⁸

A disadvantage of the study commission method is that it is generally a one-shot approach to wrongful conviction reform. Newly discovered systemic or evidentiary errors that arise in the criminal justice system may require the creation of a new study commission if support for reform cannot be generated through the legislative process. A second disadvantage is that study commissions generally do not investigate claims of actual innocence; rather they study cases where errors have already been revealed in order to recommend ways to prevent those errors.

Innocence Commissions

In the United States, only North Carolina has established an operating innocence commission that actively investigates claims of wrongful conviction.⁹ The North Carolina Innocence Inquiry Commission (NCIIC) was signed into law in August of 2006 following recommendations by the North Carolina Chief Justice’s Criminal Justice Study Commission in 2002. Made up of eight members from the judiciary, law enforcement, prosecution, defense, the victims’ rights community, and the public, “the commission and its staff carefully review evidence and investigate cases in a non-advocatory, fact-finding manner.”¹⁰

Cases reviewed by the NCIIC follow a three-step process: review, investigation, and hearing. Upon receipt of a claim of innocence, it is evaluated to determine whether it meets the criteria set by the Commission, upon which time it enters the review process. During review,

⁸ The Innocence Project, Criminal Justice Reform Commissions, <http://www.innocenceproject.org/Content/248.php#> (last visited Aug. 2, 2010).

⁹ Although Connecticut passed a bill authorizing a similar commission, the members voted for a broader focus and instead issued the report noted above. The Innocence Project, Innocence Commissions in the U.S., <http://www.innocenceproject.org/Content/415.php> (last visited Aug. 2, 2010).

¹⁰ NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, REPORT TO THE 2009-2010 LONG SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 3 (2009), *available at* <http://www.innocencecommission-nc.gov/Report2009.htm>.

information about the facts of the case and the claim of innocence are gathered. If the claim still meets statutory requirements, it proceeds to the investigation phase. NCIIS states, “Investigation is a detailed and lengthy process that involves interviewing witnesses, obtaining affidavits, seeking court orders for evidence, testing of physical evidence, and compiling of documentation.”¹¹ The investigation may be stopped at any time if it is revealed that the claim no longer meets the statutory criteria. In the case of the NCIIS, all claims must involve felony cases; they must make claim of “complete factual innocence;”¹² and new, credible, and verifiable evidence of innocence must be available.

If the claim withstands these criteria, it will move to the first of two hearing phases. In the first, the claim and evidence of actual innocence are presented before all NCIIS members, and the Commissioners determine whether to send the claim to a three-judge panel for a final hearing. At that hearing, the panel decides whether to dismiss the conviction. The first three-panel hearing was held in 2008. Three total hearings have been held, with one ending in exoneration.

As of May 2010, the Commission reported the following number of cases in each phase:

NCIIS Case Statistics¹³

Number of General Information Requests	84
Number of Cases Currently in Review	128
Number of Cases Rejected	532
Number of Cases Currently in Investigation	4
Number of Cases Currently in Formal Inquiry	5
Number of Cases in Hearing	3 (two cases are now closed)
Exonerations	1
Total Number of Cases	756

¹¹ *Id.*

¹² *Id.*

¹³ North Carolina Innocence Inquiry Commission, Statistics, <http://www.innocencecommission-nc.gov/statistics.htm> (last visited Aug. 2, 2010).

NCIIS also reported that their Fiscal Year 2010 budget was \$372,879, and additional funds were received through a federal grant.¹⁴ This is comparable to the amount Texas pays to the four innocence projects located at state universities, as described below.

Innocence Projects

Innocence projects are non-profit organizations that often work in conjunction with law schools to investigate claims of actual innocence. Students from law schools, forensic science programs, or journalism schools may participate in clinics to review claims received from inmates; screen the claims and send questionnaires; conduct any necessary investigations; and prepare motions for DNA or other tests, petitions for clemency, and writs of habeas corpus.

In Texas, state funds are provided to four innocence projects located at the four state university law schools: 1) Innocence Project of Texas at Texas Tech University, 2) Texas Innocence Network at the University of Houston, 3) Texas Center for Actual Innocence at the University of Texas at Austin, and 4) the Thurgood Marshall Innocence Project at Texas Southern University. Each of the four innocence projects is eligible to receive reimbursement of expenditures up to \$100,000 per year. They secure additional funding for expenditures through grants and donations.

The most recent report shows that between September 1, 2004 and August 31, 2009, the four projects received innocence claims from over 12,000 cases that met the selection criteria. The offenses ranged from capital murder (473 cases) to sexual assault of a child (1,373 cases) to felony DWI (65 cases). As of August 31, 2009, the projects reported the following status of those cases:¹⁵

¹⁴ North Carolina Innocence Inquiry Commission, Reference Materials, <http://www.innocencecommission-nc.gov/reference%20materials.htm> (last visited Aug. 2, 2010)

¹⁵ Texas Task Force on Indigent Defense, Innocence Project, <http://innocence.tamu.edu/CaseEntry/SummaryReport.asp> (last visited Aug. 2, 2010).

Texas Innocence Projects' Case Statistics

Case Status	TSU	Tech	U of H	UT	Total
Case Open: Pending initial review	52	51	77	164	344
Case Open: Questionnaire Sent	9	3	78	502	592
Case Open: Initial review completed	18	396	1,191	226	1,831
Case Open: Under investigation	0	1,137	263	247	1,647
Case Open: In pursuit of legal remedy	0	9	2	2	13
Case Closed: Rejected	49	2,566	1,828	2,283	6,726
Case Closed: Rejected with Investigation	0	225	89	206	520
Case Closed: Referred to other institution	4	244	6	205	459
Case Open: Conviction overturned, pending result	0	0	0	0	0
Case Closed: Conviction Overturned	0	3	0	0	3
Case Closed: Conviction Sustained	0	0	0	4	4
Case Closed: Clemency	0	1	0	0	1

Although innocence projects rely greatly on students and have often lacked resources and funding,¹⁶ the projects in Texas have accomplished a great deal, including the posthumous exoneration of Timothy Cole.

Analysis

Although the predominant model of post-conviction investigation in the United States is the innocence project, the United Kingdom's adoption of the Criminal Cases Review Commission (CCRC) has provided scholars with a way to compare and contrast the two systems. Increased creation of innocence projects in the United Kingdom further augments the comparison.

The CCRC has developed a three-stage review process to evaluate claims it receives. Although commissions and innocence projects in the United States as a rule only accept claims

¹⁶ Stephanie Roberts & Lynn Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Project and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43 (2009).

of actual innocence, the CCRC also accepts claims and may reject “unsafe” convictions.¹⁷ In stage one, applications are reviewed for eligibility. Claimants who have not exhausted their appeals are ineligible for case review under the CCRC. A case manager and commissioner are assigned in stage two, and police are employed if an investigation is needed. Stage three of the CCRC process is the “real probability” test,¹⁸ in which the case manager and commissioner determine whether there is “more than an outside chance that the conviction will be found unsafe.”¹⁹ If the application fails to meet that test, the review is complete. If, however, the application does meet that test, it proceeds to a panel of three commissioners who must unanimously vote to send the case to the Court of Appeals. At that time, the CCRC’s involvement ends, and the case is turned over to attorneys who will handle the appeal.

Compared to the United States court system, the system in the United Kingdom is more liberal in adopting an inquisitorial process, accepting new evidence post-conviction, reviewing claims of unsafe convictions, and overturning jury verdicts. This difference is also reflected in how each system legally defines the task associated with wrongful convictions. Whereas the United Kingdom “defines the problem as righting miscarriages of justice,” the United States “defines it as correcting factually erroneous convictions.”²⁰ For these reasons, the United Kingdom’s definition “has necessarily led to some mechanisms that might not be appropriate under the narrower U.S. definition. . . .”²¹ Some have recommended a CCRC- or NCIIC-like body for all states, but these organizations have not been free from criticism. For example, the CCRC experienced significant delays in reviewing claims of innocence. The Chairman of the

¹⁷ *Id.*

¹⁸ Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 113 (2009).

¹⁹ *Id.*

²⁰ *Id.* at 150.

²¹ *Id.*

Commission reported in 2006 that it would take five years to relieve the backlog of cases in queue.²² The CCRC has also been criticized for its dependence on police to conduct its investigations,²³ in part because it requires officers to re-investigate old crimes and reduces their availability to investigate contemporary crimes. For these reasons (and perhaps others), innocence projects continue to serve a valuable role in both the United States and the United Kingdom.

Even with innocence commissions, innocence projects continue to play a vital role in legal education and policy reform. Students involved in the projects learn writing and critical thinking skills, how to conduct investigations and organize those findings into the law, and ethical considerations related to the wrongfully convicted and victims of crime.²⁴ Moreover, the work and research of the innocence projects is valuable information to policy makers and legislators in helping craft effective legislation. Various representatives of the innocence projects in Texas, for example, have served as a resource to the Texas Legislature and provided information to improve eyewitness identification procedures, exoneree compensation, post-conviction proceedings, and the bill that created the Timothy Cole Advisory Panel on Wrongful Convictions. The founders of the Innocence Project of New York, Barry Scheck and Peter Neufeld, do not discount the contributions made by their project and others, but they argue more needs to be done and have called for the creation of innocence commissions in the United States.²⁵

²² Roberts & Weathered, *supra* note 16.

²³ Griffin, *supra* note 18, at 113.

²⁴ Roberts & Weathered, *supra* note 16.

²⁵ Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98 (2002).

Innocence Commission Debate in Texas

To help further the conversation on innocence commissions in Texas, the Panel invited representatives from the innocence projects at the four state universities to join a Panel workgroup meeting on April 21, 2010. Together, the workgroup meeting participants suggested a unique approach for the State of Texas. Instead of creating an innocence commission to perpetuate the study of wrongful convictions, the Panel and innocence projects suggested an approach that would formalize the work currently underway by the innocence projects. Supporters of an innocence commission have suggested that innocence projects “focus on individual cases and should not be depended on to examine systemic issues,” but each of those cases provides insight into the systemic issues that may contribute to wrongful conviction. In addition, the innocence projects provide a report of their activities to the Task Force each year as part of the statute that provides state funding to the projects. By augmenting this report and holding formal interim hearings on their findings, the State can benefit from knowledge of both individual and systemic issues that require reform to prevent wrongful convictions. As non-profits, innocence projects can further inform policy makers on behalf of those initiatives, something that a governmental agency is limited in what it can do. Taken together, the Panel believes that these recommendations will provide a novel approach to the study of wrongful convictions that fits the unique association between the State of Texas and innocence projects.

Although the Panel did not take action on informant testimony recommendations, the Panel voted to incorporate the material below into the research document for future consideration by the innocence projects or other wrongful conviction study commissions.

Chapter 6: Jailhouse Informant Testimony

I. Introduction

Since the end of the moratorium on capital punishment in the 1970s, 111 death row inmates have been exonerated.¹ Accounting for 45.9 percent of those cases, jailhouse informant cases are the leading cause of wrongful convictions in U.S. capital cases.² Wrongful convictions based on jailhouse informant testimony occur for a number of reasons. First, because a jailhouse informant can receive compensation in the form of a reduced sentence or a preferable prison transfer, he has a strong incentive to come forward to authorities.³ This incentive is coupled with the small probability that the informant will be prosecuted for perjury if he is later found to have fabricated the confession. These factors create an atmosphere of unreliability surrounding the testimony of a jailhouse informant. Second, while cross-examination is thought to be fundamental to uncovering the truth in the American justice system, many times defense attorneys simply do not have the necessary pretrial information to conduct an effective cross-examination of a jailhouse informant. These pretrial disclosures can include such things as a jailhouse informants' criminal history, any prior inconsistent statements made to the authorities, any benefit the informant is receiving for his or her testimony, and whether or not he or she has ever testified as an informant in any other cases. Despite this, most states have failed to pass

¹NORTHWESTERN UNIVERSITY SCHOOL OF LAW CENTER ON WRONGFUL CONVICTIONS, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW* 3 (2004).

² *Id.*; see also Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543-44 (2005) (explaining that roughly 50 percent of wrongful murder convictions involved perjurious testimony, usually by jailhouse informants or other witnesses who received benefits for their testimony).

³ Because men make up approximately 93 percent of the prison population, this chapter uses the male pronoun when referring to jailhouse informants. BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2008* 2 (2009). That is not to say that every jailhouse informant is a man. See JOHN GRISHAM, *THE INNOCENT MAN* (2006) (in John Grisham's nonfiction book regarding a wrongful conviction in Oklahoma, the jailhouse informant was a woman).

comprehensive legislation regarding the use of jailhouse informants.⁴ Third, sometimes law enforcement suffers from the syndrome of “falling in love with their snitch.”⁵ This may subconsciously cause tunnel vision in police and prosecutors, and make them focus only on the defendant as the true perpetrator.⁶ Despite mitigating evidence or the obvious unreliability of an informant, police officers and prosecutors still might construe this information in a way that confirms their original decisions. This section will overview the research and best practices on the use of jailhouse informant testimony, examine the reforms adopted by other states and current practices in Texas, and make a recommendation on the best policy for our state.

II. Current Practice in Other States and the Federal Government

A. California

California, like the federal government, regulate jailhouse informant testimony through guidelines for prosecutors. A number of state and federal courts also have established rules to regulate the use of jailhouse informant testimony. In addition, many states have statutes regarding the use of accomplice testimony.

The California Department of Justice guidelines require prior approval by the senior assistant attorney general before jailhouse informant testimony is used and lists a number of factors that must be taken into consideration in making the decision. The guidelines require a written finding of approval for the use of the testimony. Even if the jailhouse informant is only intended to be used for investigative purposes, the California Department of Justice still requires prior approval

⁴ See CAL. PENAL CODE § 1127a (2009); 725 ILL. COMP. STAT. 5/115-21 (Supp. 2009); TEX. CODE CRIM. PROC. ANN. art. 38.075 (Vernon 2009).

⁵ See Alexandra Natapoff, *Beyond Unreliable: How Snitching Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 111-12 (2006).

⁶ See generally Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006).

based upon the reliability of the information in order to secure a warrant. One important factor that must be considered is whether corroborative evidence exists.

B. Illinois

The State of Illinois has already taken steps to require certain disclosure when prosecutors plan to use jailhouse informant testimony in capital cases.⁷ The Illinois statute requires that before the prosecution can use the testimony of a jailhouse informant in a capital case, they must first make a series of discovery disclosures to the defense.⁸ These disclosures include: (1) the complete criminal history of the informant; (2) any “deal, promise, inducement, or benefit” the prosecutor has made or will make with the informant; (3) the statements made by the accused; (4) the time and place of the statements, the time and place of their disclosure to law enforcement, and the names of all individuals present when the statements were made; (5) whether the informant has ever recanted and if so, the time and place of the recantation, the nature of the recantation, and the names of all people present at the recantation; (6) other cases the informant has testified in and any promises, or inducements he received for that testimony; and (7) any other information relevant to the informant’s credibility.⁹ On top of these pretrial disclosures, the prosecution must also disclose their intent to use the testimony of an informant.¹⁰ The Illinois statute also requires pretrial reliability hearings in front of the judge when a prosecutor plans to use jailhouse informant testimony in a capital murder case. In those instances, the prosecution must prove that the informant’s testimony is reliable by a preponderance of the evidence.

C. Oklahoma

⁷ See 725 ILCS 5/115-21 (Supp. 2009).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

In 2000, the Supreme Court of Oklahoma issued its opinion in *Dodd v. State*.¹¹ To ensure defense attorneys are prepared to cross-examine jailhouse informants, the court expressly required that prosecutors disclose certain information at least ten days before trial.¹² The State must disclose the following information: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make in the future to the informant; (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.¹³

D. Federal Government and the ABA

While the United States Attorney General's guidelines specifically deal with the use of confidential informants, the guidelines also provide that certain requirements be met before federal law enforcement agents can use a prisoner as a confidential informant. In addition, several federal Circuit Courts of Appeal have recognized the difficulty in using jailhouse informant testimony. As the Fifth Circuit said, "it is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."¹⁴ Allowing jailhouse informants to testify falsely undermines the purpose of our justice system.¹⁵ In order to combat this problem, some

¹¹ 993 P.2d 778 (2000).

¹² *Id.* at 784.

¹³ *Id.*

¹⁴ *U.S. v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987).

¹⁵ *See Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 115 (9th Cir. 2001). The mission of the justice system is "utterly derailed by unchecked lying witnesses, and by any law enforcement officer who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation." *Id.*

courts recognize the importance of broad disclosure when a jailhouse informant testifies.¹⁶ In cases with jailhouse informant testimony, trial judges must play a more integral role in scrutinizing the testimony.¹⁷ This is necessary because the jury does not possess the background knowledge to properly assess the testimony of a jailhouse informant.¹⁸

The American Bar Association has also made recommendations concerning the use of jailhouse informants. In its recommendation, the ABA urges law enforcement to not convict an individual based solely upon the uncorroborated testimony of a jailhouse informant. The report urges that prosecutors follow a checklist when deciding whether or not to use a jailhouse informant.

III. Current Practice in Texas

In Texas, the first law concerning the use of in-custody informants was passed during the 81st Legislative Session in 2009. Senate Bill 1681 bill, authored by Senator Hinojosa, amended Chapter 38 of the Code of Criminal Procedure by adding Article 38.075.¹⁹ The bill required independent corroboration of any testimony offered by a jailhouse informant. Thus, an individual can no longer be convicted based solely on the testimony of a jailhouse informant. This bill was filed without the Governor's signature and became effective September 1, 2009.²⁰

¹⁶ See *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (“Criminals who are rewarded by the government for their testimony are inherently untrustworthy, and their use triggers an obligation to disclose material information to protect the defendant from being the victim of a perfidious bargain between the state and its witness.”); see also *Lee v. U.S.*, 343 U.S. 747, 757 (1952) (“The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.”).

¹⁷ See *United States v. Swiderski*, 539 F.2d 854, 860 (2nd Cir. 1976); *D’Agostino v. State*, 823 P.2d 283, 284 (Nev. 1991).

¹⁸ See *D’Agostino*, 823 P.2d at 284 (“A legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to ‘cooperate’ with the state and to say anything that is ‘helpful’ to the state’s case.”).

¹⁹ *Id.*

²⁰ *Program Updates & Final Legislative Wrap-Up*, (Tex. Criminal Justice Coal., Austin, Tex.) 2009, at 4.

This new law is a step in the right direction; it places the same corroboration burden on the government as applicable to the use of accomplice testimony.²¹ Accomplice testimony and jailhouse informant testimony, however, are vastly different. When accomplices testify, they usually make self-incriminating statements placing themselves in risk of criminal prosecution. This creates an internal safeguard in assuring that the accomplice's testimony is reliable. When a jailhouse informant testifies, that safeguard no longer exists. Because the informant's testimony is independent from the underlying crime, he or she does not face the same self-incrimination risk as an accomplice. The importance of ensuring the reliability of a jailhouse informant's testimony is therefore greater.

IV. Policy Recommendations for Future Consideration

The innocence projects or other wrongful conviction study panels may consider the following policies relating to the use of jailhouse informants in the State of Texas:

First, at the investigative level, law enforcement should be required to adequately document all interactions with jailhouse informants.

Second, in order for defendants to adequately prepare to cross-examine a jailhouse informant, certain disclosures by the prosecution should first be made. Implicitly, this would impose an affirmative duty on prosecutors to gather the required information. Disclosed material should include such factors as statements made by the informant, rewards or benefits the informant has or will receive for his or her testimony, whether the informant has testified against other defendants, and any inconsistent statements made by the jailhouse informant.²² Because the

²¹ Article 38.14 of the Texas Criminal Code of Procedure requires the testimony of an accomplice to be corroborated by other independent evidence connecting the defendant to the crime. TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 2009).

²² See ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 192-94 (2009).

amount of information disclosed varies from prosecutor to prosecutor, detailed guidelines are necessary to ensure equal treatment.

Additionally, to further improve the process, courts should conduct pretrial reliability hearings when jailhouse informant testimony is used.²³ At this hearing, the judge would hear the jailhouse informant's testimony and be required to find that the testimony is sufficiently reliable before allowing the evidence to be presented to a jury. The judge would serve a gate-keeping function, increasing the chances that the jury would hear reliable informant testimony. Finally, in addition to the corroboration requirements in Article 38.075 of the Code of Criminal Procedure, Texas juries should be given cautionary instructions. These instructions would tell the jury to consider factors such as the informant's incentive to lie, whether the informant has testified at other trials, and any inconsistent statements the informant has provided. Currently California, Connecticut, Montana, and Oklahoma require jury instructions when a jailhouse informant testifies.²⁴

V. Conclusion

Texas has long been a leader in imposing swift and severe criminal punishment. The discovery of 43 DNA wrongful convictions in Texas, as well as hundreds nationwide, has led to a call for improved procedures to promote greater evidentiary reliability. Every wrongful conviction represents at least two tragedies—the wrongful punishment of an innocent person and the failure to apprehend the true culprit who instead remained free to further victimize society.

²³ See *Id.* at 194-95; THE JUSTICE PROJECT, IN-CUSTODY INFORMANT TESTIMONY: A POLICY REVIEW 3 (2007).

²⁴ See *State v. Patterson*, 886 A.2 777, 790 (Conn. 2005); *State v. Grimes*, 982 P.2d 1037, 1042 (Mont. 1999); *Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2000); CAL. PENAL CODE § 1127a (2009). It should be noted, however, that some of these states differ as to when the jury instruction is necessary. For example, Connecticut requires a jury instruction whenever a jailhouse informant testifies, while in Montana a jury instruction is only required when the informant testifies for personal gain rather than an “an independent law enforcement purpose.” Compare *Patterson*, 886 A.2d at 790 (requiring a jury instruction when a jailhouse informant testifies), with *Grimes*, 982 P.2d at 1042 (holding “that when a government informant motivated by personal gain rather than some independent law enforcement purpose provides testimony, a cautionary instruction is the more prudent course of action”).

In each case, moreover, the community was led to believe that the dangerous person had been convicted and incarcerated, giving the community a false sense of security.

The current criminal justice system does not possess the means to ferret out the truthful jailhouse informants from the untruthful informants. Only a handful of states have legislation concerning the use of jailhouse informant testimony. Even in those states, the laws do not comprehensively deal with the jailhouse informant problem. When a jailhouse informant testifies, Texas should implement law enforcement guidelines, an affirmative duty to gather information regarding the informant's history, pretrial disclosure of relevant information regarding the informant, pretrial reliability hearings, independent corroboration, and jury instructions.

APPENDIX A
Analysis of C.S.S.B. 117
81st Legislature

By: Ellis

S.B. No. 117

A BILL TO BE ENTITLED

AN ACT

relating to photograph and live lineup
identification procedures in criminal cases.

BE IT ENACTED BY THE LEGISLATURE OF THE
STATE OF TEXAS:

SECTION 1. Chapter 38, Code of
Criminal Procedure, is amended by adding
Article 38.20 to read as follows:

Art. 38.20. PHOTOGRAPH AND LIVE LINEUP

IDENTIFICATION PROCEDURES

Sec. 1. In this article, "institute"
means the Bill Blackwood Law Enforcement
Management Institute of Texas located at Sam
Houston State University.

Sec. 2. This article applies only to a
law enforcement agency of this state or of a
county, municipality, or other political
subdivision of this state that employs peace

*Bill Blackwood Law
Enforcement
Management Institute
of Texas (LEMIT)
works to develop the
administrative,
analytical, and
executive skills of
current and future law
enforcement officials.*

officers who conduct photograph or live lineup identification procedures in the routine performance of the officers' official duties.

Texas Statutes do not currently require law enforcement agencies to address photo or live lineups in their standard operating procedures.

Sec. 3. (a) Each law enforcement agency shall adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures in accordance with this article. A law enforcement agency may adopt:

(1) the model policy adopted under Subsection (b); or

(2) the agency's own policy that conforms to the requirements of the model policy adopted under Subsection (b).

Law enforcement agencies may choose to adopt a model policy developed by LEMIT, or a policy of the department's choosing that is in line with the model policy.

LEMIT will work with experts to develop an identification model policy and training materials for law enforcement agencies.

(b) The institute, with the advice and assistance of law enforcement agencies and scientific experts in eyewitness memory research, shall develop, adopt, and disseminate to all law enforcement agencies a model policy and associated training materials regarding the administration of photograph and live lineup identification

procedures.

(c) The model policy must:

(1) be based on:

(A) scientific research on eyewitness memory; and

(B) relevant policies and guidelines developed by the federal government, other states, and other law enforcement organizations and other relevant information as appropriate; and

(2) address the following topics:

(A) the selection of photograph and live lineup filler photographs or participants;

(B) instructions given to a witness before conducting a photograph or live lineup identification procedure;

(C) the documentation and preservation of results of a photograph or live lineup identification procedure, including the documentation of witness statements, regardless of the outcome of the procedure;

(D) procedures for

The model policy developed by LEMIT must be based on scientific research, best practices developed by the government and other organizations, and policies adopted by other states.

The model policy developed by LEMIT must address specific content areas:

- 1. filler selection*
- 2. cautionary instructions*
- 3. documentation (including the witness' confidence statement)*
- 4. how to administer the lineup to a witness who is illiterate or has limited English skills*
- 5. blind administration where the person who administers the lineup is unaware of which member is the police suspect*

administering a photograph or live lineup identification procedure to an illiterate person or a person with limited English language proficiency;

(E) procedures for assigning an administrator who, as applicable:

(i) is unaware of which member of the live lineup is the suspect in the case or, if that is not practicable, alternative procedures designed to prevent opportunities to influence the witness; and

(ii) is capable of administering a photograph array in a blind manner or, if that is not practicable, alternative procedures designed to prevent opportunities to influence the witness; and

(F) any other procedures or best practices supported by credible research or commonly accepted as a means to reduce erroneous identifications and enhance the objectivity and reliability of eyewitness identifications.

Sec. 4. The institute shall complete an annual review of the model policy and

Blind administration may be achieved through the use of an administrator who is unaware of which lineup member is the suspect, or through the use of an alternative method, such as the folder method.

LEMIT must review the model policy and associated training materials on an annual basis. The materials should be updated as needed.

training materials adopted under this article and shall modify the policy and materials as necessary.

Sec. 5. (a) Evidence of compliance or noncompliance with the model policy adopted under this article is relevant and admissible in a criminal case but is not a condition precedent to the admissibility of an out-of-court eyewitness identification.

(b) Notwithstanding Article 38.23, a failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy adopted under this article does not bar the admission of eyewitness identification testimony in the courts of this state.

Evidence that shows a law enforcement agency did or did not comply with the statute will be allowed in court; however, that evidence may not be used to keep identification evidence out of the courtroom.

SECTION 2. (a) Not later than June 1, 2010, the Bill Blackwood Law Enforcement Management Institute of Texas shall develop, adopt, and disseminate the model policy and associated training materials required under Article 38.20, Code of Criminal Procedure, as added by this Act.

(b) Not later than September 1, 2010,

each law enforcement agency to which Article 38.20, Code of Criminal Procedure, as added by this Act, applies shall adopt a policy as required by that article.

(c) The change in law made by Section 5, Article 38.20, Code of Criminal Procedure, as added by this Act, applies only to a photograph or live lineup identification procedure conducted on or after September 1, 2010, regardless of whether the offense to which the procedure is related occurred before, on, or after September 1, 2010.

SECTION 3. This Act takes effect September 1, 2009.

APPENDIX B

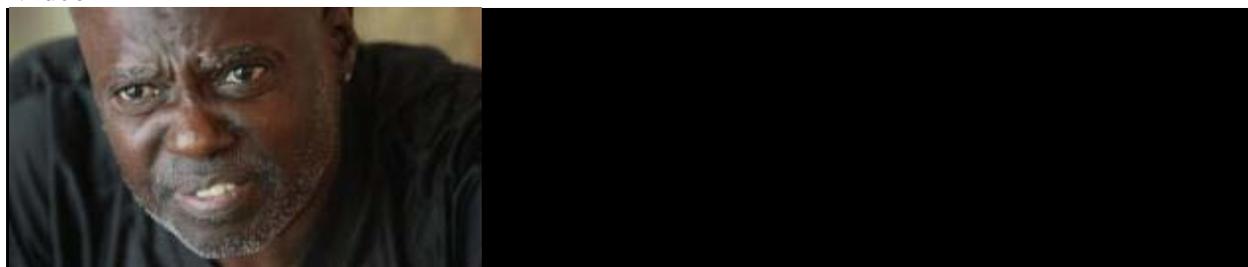
DNA exoneree fell victim to 'drive-by' identification

10:05 AM CDT on Monday, October 13, 2008

By STEVE MCGONIGLE and JENNIFER EMILY / The Dallas Morning News
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Billy Wayne Miller was asleep in a back bedroom of his father's modest [Oak Cliff](#) home when three [Dallas police](#) officers burst through the front door around 3 a.m., guns in hand, yelling another man's name.

Video



Still groggy and clad only in his underwear, Mr. Miller was taken to the front porch. There he spotted a woman in a squad car glance at him and nod to an officer seated beside her before the car drove away.

That split-second, one-man lineup cost Mr. Miller 22 years of his life on a rape conviction that DNA evidence later invalidated.

Almost a decade has elapsed since the [U.S. Justice Department](#) recommended stricter limits on the use of "showups," as the practice is known in police circles. More than 40 years ago, the [U.S. Supreme Court](#) deemed them dangerously suggestive and discouraged their use.

Yet showups have been cited as a critical flaw in at least 20 percent of the 220 DNA exonerations nationwide. Three of the 19 Dallas County wrongful convictions involved a showup, according to court records.

In each case, the suspect was brought before the victim under police escort. One man was displayed to the victim a day after the crime. He and the suspect in a second showup asked to be put in lineups but were refused.

"I may well have had a better chance if I'd had a lineup," said Billy [James Smith](#), who was also wrongly convicted of rape based on a showup. "With other black men, of course."

Showups are also known as "drive-by" identifications because witnesses are driven in a squad car past the suspect. In practice, they occur anywhere police choose: hospital rooms, police station hallways, courtrooms. They can also be done by showing a single photograph.

The idea is to identify a suspect while an eyewitness's memory is fresh and before the perpetrator can flee the area.

The danger, critics say, is that in the immediate aftermath of a crime police may stop someone on little more than a hunch, and witnesses may be too eager to please.

"I think it sends a clear message to the witness the police must have a reason to think this guy is a good suspect so he is probably the guy," said Jim McCloskey, executive director of Centurion Ministries Inc., a nonprofit prisoner advocacy group based in Princeton, N.J.

Mr. McCloskey's work has helped free more than 40 wrongly convicted people nationwide, several of them in Texas. He is investigating a robbery-murder in Dallas that rested on a showup.

"This is a clear case of slam-bam-thank-you-ma'am misidentification," he said.

Scant oversight

Showups continue in Dallas County and elsewhere because police value them, judges seldom suppress them and juries are swayed by the results.

They are done with few rules and scant oversight. Street cops with little formal guidance on identification procedures typically conduct them, and detectives trying to preserve a key part of their case defend them.

No one keeps statistics on their use.

To better understand the prevalence of showups in Dallas County, *The Dallas Morning News* reviewed more than 20 years of state appellate court opinions. *The News* found more than 100 felony trial convictions involving showups. Trials represent just a fraction of how charges are disposed; many result in plea agreements.

How often showups result in misidentifications remains a matter of scholarly debate. But it is a given that one-person showups can pose a higher risk of error than the standard six-person photo array or live lineup.

Each of the Dallas County exoneration cases with a showup involved a rape that occurred between 1982 and 1986, when genetic testing was unavailable. Police based the charges almost entirely on the victim's one-on-one identification.

Mr. Miller, who was freed in 2006, denounced showups as contrary to the due process rights that identification procedures are supposed to honor.

"You just can't walk up and point and say he did so and so to me, and they go and arrest him without anything other than 'I said.' "

And yet in his case, Mr. Miller said, "that's exactly what happened."

Police officials maintained the showups are both legal and an invaluable crime-solving tool when used properly.

Dallas Police Chief David Kunkle said he thought showups were suggestive, but added, "I don't feel comfortable banning showups right now. I don't think that would be in the interest of public safety and the criminal justice system."

Larry Zacharias, [Richardson's](#) police chief, said that his department would soon issue guidelines limiting the use of showups, but that it would be a disservice to crime victims not to afford them the chance to identify a culprit quickly.

"You also have to remember that not all of them are wrong," he said.

Long controversial

Showups have been a source of controversy for decades in America.

In 1927, [Harvard](#) law professor [Felix Frankfurter](#), later a U.S. Supreme Court justice, decried the showups used to identify anarchists Nicola Sacco and Bartolomeo Vanzetti in a prosecution many historians view as a mockery of American justice.

The two Italian immigrants were sentenced to death in 1921 and later executed for the robbery and murder of two clerks south of [Boston](#). Several witnesses identified the pair at a local police station while the accused men were directed by police to mimic actions of the robbers.

In 1967, in a decision that still controls the legal admissibility of showups, U.S. Supreme Court Justice William Brennan noted that "the practice of showing suspects singly to persons for the purpose of identification and not as part of a lineup has been widely condemned."

Reform advocates contend the danger of coercion warrants more education and restrictions on the use of showups.

Gary Wells, one of the nation's leading researchers on eyewitness identifications, was part of a U.S. Justice Department task force that urged stricter limits on showups.

In its 1999 report, the panel recommended that showups be conducted only when an officer lacked probable cause for an arrest and after admonishing the witness that the detainee might not be the actual perpetrator.

"They virtually never do that," said Dr. Wells, a psychology professor at Iowa State University. "They say, 'We got a guy, c'mon were going to show him to you.' And for all the witness knows, they've already MO'd [identified] this guy. They know he did it."

The panel also suggested that police agencies adopt written policies memorializing the appropriate way to conduct a showup. Few police agencies – in Dallas County or elsewhere – noticed.

Of more than two dozen law enforcement agencies in Dallas County, only two ([Duncanville](#) and Irving) responded that they had written policies governing showups, *The News* found.

Ron Waldrop, an assistant Dallas police chief, said he did not know what, if any, training patrol officers receive on showups. The department's policies on identifications do not mention showups, but new guidelines are being written.

In mid-September, after an innocent man was misidentified in a single-photo showup, the Dallas Police Department banned the practice except when a witness knows the suspect by name or face.

"It was inappropriate," Chief Waldrop said, "and we put an end to that."

On-scene identification

Mr. Miller was on parole for armed robbery when Dallas police arrested him Sept. 27, 1983, on the sexual assault charge. The showup, he said, sealed his fate.

Police did not conduct a live lineup or present a photo spread. The victim testified that the first time she saw Mr. Miller after the rape was in court five months later.

The 24-year-old woman, a beauty school student, said Mr. Miller was the man who offered her a ride home as she left a friend's apartment in South Dallas. But instead of taking her home, the woman said, Mr. Miller raped her in a vacant field near Hutchins and again at a house in Oak Cliff.

She described her attacker as a black man with a short Afro. He had a gun and told her he had just been released after 11 years in prison. He said his name was John. She gave a detailed description of the attacker's car, his clothing and the inside of his home.

After she persuaded the man to drop her off at a friend's apartment, the victim summoned police. Police said she led them to the house where Mr. Miller was staying with his father's girlfriend and her grandson.

A car matching the victim's description was parked outside the house. The license plate was one digit off of what the victim had said. A patrol officer testified he felt the car's hood, and it was still warm.

Once inside, police said they found Mr. Miller in a back bedroom. Clothes on the floor matched the victim's description. So did a .357 Magnum revolver found in the top drawer of a nearby desk. Even the Coors beer in the refrigerator matched what the victim had told them.

Her story tracked so closely with what police found that it prompted the lead prosecutor in the case recently to tell *The News* that he could now "imagine a scenario" where police fed her the details.

The arresting officer denied at trial that Mr. Miller was shown to the victim. But in two separate reports and a sworn affidavit, the case detective, Robert Gage, affirmed Mr. Miller's account of a showup.

"She identified him at the scene," his signed report stated.

Detective Gage – who is now retired and could not be reached for comment – did not testify at trial. He stated in a report that he had interviewed the victim, who identified Mr. Miller at the scene. The case was solved the day of Mr. Miller's arrest, the detective's report said.

The state's case at trial consisted of the victim, the arresting officer and the doctor who did the rape exam. There were no fingerprints and no biological evidence linking Mr. Miller to the crime.

"If you can't convict on this testimony, you might as well just shut the courthouse down," lead prosecutor Kevin Chapman told the jury.

Jurors needed only an hour to convict Mr. Miller and another to decide he deserved a life sentence.

Mr. Miller said he was stunned. He had rejected a probation deal, he said, and never expected the case to go to trial.

In prison, Mr. Miller said he worked to free himself, reading law books at night, scrawling legal motions with a pencil stub.

In October 2001, he filed a six-page, handwritten petition for a DNA test. It took almost four years for a Dallas judge to agree and another year to win his freedom.

Today, Mr. Miller lives in a one-story home in Oak Cliff that bears the trappings of newfound wealth. A large flat-screen TV and leather chair and sofa sit in an otherwise sparsely furnished living room.

He purchased the house – and an orange Corvette he calls "my dream come true" – with some of the \$500,000 he received from the state as compensation for his wrongful imprisonment.

Now 56, Mr. Miller is recovering from pancreatic cancer and claims to be so broke that he doesn't have enough money to buy gasoline for his lawnmower.

He described himself as a victim of circumstance, a "nobody on parole" whose claims of innocence were ignored.

He theorized that his accuser – who has since amassed multiple arrests for prostitution, arson, assault and drug use – identified him to please the police. She could not be located for comment.

"The whole thing was a complete wake-up for how easy it is for you to wind up with zero," Mr. Miller said, "your whole life gone."

Appendix C

Model Language Offered by Kathryn Kase and Chief James McLaughlin

SECTION 1. Chapter 2, Code of Criminal Procedure, is amended by adding Article 2.31 to read as follows:

Art. 2.31. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS.

(a) In this article:

- (1) “Electronic recording” means the use of digital or analog equipment for the purposes of creating contemporaneous documentation of sounds and/or images, and includes audio-video and audio-only recording technologies.
- (2) “Custodial interrogation” means investigative questioning by a peace officer of a person being held in custody in connection with a criminal investigation, and does not include routine questions associated with booking which would not be reasonably expected to elicit an incriminating response.
- (3) “Regular place of detention” means a building or a police station that is a regular place of operation for a municipal police department or county sheriff department or other law enforcement agency, at which persons are or may be held in detention in connection with criminal charges against those persons.
- (4) “The entirety” of a custodial interrogation begins with the admonition of rights and ends when questioning ceases and the suspect ceases communicating.

(b) Law enforcement officers shall electronically record in their entirety custodial interrogations conducted in a regular place of detention of persons suspected of committing an offence under any of the following sections of the Penal Code, unless good cause exists that electronic recording is not feasible:

- (1) Section 19.02, Penal Code (Murder);
- (2) Section 19.03, Penal Code (Capital Murder);
- (3) Section 20.02, Penal Code (Kidnapping);

- (4) Section 20.04, Penal Code (Aggravated Kidnapping);
- (5) Section 21.02, Penal Code (Continuous sexual abuse of child);
- (6) Section 21.11, Penal Code (Indecency with a child);
- (7) Section 43.25, Penal Code (Sexual performance by a child);
- (8) Section 22.011, Penal Code (Sexual assault);
- (9) Section 22.021, Penal Code (Aggravated sexual assault).

(c) Good cause that electronic recording was not feasible includes but is not limited to the following circumstances:

- (1) the peace officer or agent of the law enforcement agency conducting the interrogation attempted, in good faith, to record the custodial interrogation but the recording equipment did not function, the officer or agent inadvertently operated the equipment incorrectly, or the equipment malfunctioned or stopped operating without the knowledge of the officer or agent;
- (2) the suspect refused to respond or cooperate in an interrogation at which an electronic recording was made, provided that
 - (A) the suspect's refusal is electronically recorded, or;
 - (B) law enforcement personnel made a good faith effort to electronically record the suspect's refusal, and a suspect was unwilling to have the refusal recorded, and the officers contemporaneously documented the refusal in writing and the suspect's reasons for refusal, if any;
- (3) the statement was not made exclusively as the result of a custodial interrogation, including a statement that was made spontaneously by the accused and not in response to a question by a peace officer; or
- (4) exigent public safety concerns prevented or rendered infeasible the making of an audio or audio-visual recording of the statement; or
- (5) the peace officer or agent of the law enforcement agency conducting the interrogation reasonably believed at the time the interrogation commenced that the accused was not taken into

custody for or being interrogated concerning the commission of an offense enumerated above in CCP Article 2.31(b).

(d) Complete, accurate, unaltered copies of electronic recordings of any custodial interrogations of a defendant required by article 2.31(b) shall be:

(1) provided by the attorney for the state to the defendant in a timely manner, and not later than 60 days prior to trial; and

(2) preserved until the later of the date on which:

(A) any conviction for an offense that is the subject of the interrogation or that results from the interrogation is final, all direct appeals of the case are exhausted, and the time to file a petition for a writ of habeas corpus has expired; or

(B) the prosecution of the offense that is the subject of the interrogation or that arises from the interrogation is barred by law.

(e) A recording of a custodial interrogation is exempt from public disclosure under Section 552.108, Government Code.

SECTION 2. Chapter 38, Code of Criminal Procedure, is amended by adding Article 38.24 to read as follows:

Art. 38.24. CONSTRUCTION WITH CERTAIN OTHER LAW CONCERNING RECORDING OF INTERROGATIONS.

(a) Evidence of compliance or noncompliance with Article 2.31 regarding the electronic recording of custodial interrogations is relevant and admissible before the trier of fact.

(b) Non-compliance with Article 2.31 requiring the electronic recording of custodial interrogations is not a condition precedent to the admissibility of a defendant's statement under Article 38.23, another provision of this chapter, or another law.

(c) If the statement of an accused made during a custodial interrogation is admitted in evidence during the trial of an offense enumerated under Article 2.31(b), and if an electronic recording of the complete

interrogation required under Article 2.31 is not available, the court shall determine whether the peace officers acted in good faith with respect to the requirements of Article 2.31. If the court determines that the peace officers did not act in good faith regarding the requirements of Article 2.31, the Court:

(1) if the court is the trier of fact, should consider the absence of an electronic recording of a custodial interrogation in evaluating the evidence relating to and resulting from the interrogation; and

(2) if the jury is the trier of fact, may on request of the defendant instruct the jury that:

(A) it is the policy of the State of Texas to electronically record the custodial interrogations of persons suspected of having committed offenses enumerated in CCP Article 2.31(b); and

(B) the jury should consider the absence of an electronic recording of a custodial interrogation in evaluating the evidence relating to and resulting from the interrogation.

(d) The court shall not give the jury instruction described by Subsection (c)(2) if the court finds that the peace officers acted in good faith, or that one or more of the exceptions enumerated in Article 2.31(c) applies.

SECTION 3. Article 38.24, Code of Criminal Procedure, as added by this Act, applies to the use of a statement resulting from a custodial interrogation that occurs on or after September 1, 2012, regardless of whether the criminal offense giving rise to that interrogation is committed before, on, or after that date.

SECTION 5. This Act takes effect September 1, 2012.

Appendix D

TCAP: Recording Custodial Interrogations Remedy				
State	Mandatory	Lege or Court	Remedy	Exceptions
Alaska	Yes	Stephan v. State	Inadmissible; can be overcome if state proves by preponderance of the evidence that confession was knowing and voluntary and/or that recording was not feasible; failure to record part of interrogation does not bar introduction of recorded statements if unrecorded portion is innocuous	None except those listed in the remedy
Illinois	Yes (homicides)	725 ILCS 5/103-2.1	Presumption of inadmissibility; can be overcome if state proves by preponderance of the evidence that the statement was voluntary and reliable	Statement made in open court, before grand jury; recording not feasible; voluntary statement that has bearing on credibility of accused; spontaneous statement; statement made after routine questioning following an arrest; suspect who will not respond to questions if recorded; interrogations conducted out-of-state; statement given when investigator is unaware that a death has occurred; any other statement admissible under law; used only for impeachment
Iowa	No	State v. Hajtic		
Maine	No; All law enforcement adopt written policies regarding Digital, electronic, audio, video or other recording of interviews of suspects	Tit. 25, 2803-B(I)(K)	None	
Maryland	No; Law enforcement agencies should make a reasonable effort to record for certain felonies	2-401	None	

Massachusetts	No	DiGiambattista v. Commonwealth	The Court requires, upon a defendant's request, that the judge instruct the jury that the State's highest court has expressed a preference that custodial interrogations and interrogations conducted in a place of detention be electronically recorded whenever practicable.	
Minnesota	Yes (where feasible and at place of detention)	State v. Scales	Suppressed if violation of recording requirement is deemed substantial by the trial court	Determined on a case-by-case basis
Missouri	Yes (felonies spelled out in statute - audio or video)	590.701	None in court; governor may withhold any state funds appropriated to law enforcement agencies that do not comply but adopting a recording policy	Custodial interrogations only; does not include: a situation in which a person voluntarily agrees to speak meet with law enforcement; detention that has not risen to level of an arrest; questioning that is routinely asked during arrest; questioning related to alcohol influence report; questioning during transport
Montana	Yes	HB 534	Inadmissible; can be overcome by a preponderance of the evidence that the statement is voluntarily reliable or one of the exceptions applied. If defendant objects to non-conforming evidence court finds admissible, jury instruction will be delivered	Statement made as part of routine booking; suspect declared they would only respond to questions if not recorded; equipment failure where replacement was not practicable; exigent circumstances; statements surreptitiously recorded; statements made in another state; spontaneous statements
Nebraska	Yes (audio or video in place of detention in felony cases)	LB 179	Jury instruction; can be overcome by a preponderance of the evidence that the statement is a reasonable exception for recording; failure to comply does not bar the use of otherwise admissible evidence derived from statement; statements made in another state, in a federal investigation, and/or those that contain good-faith inaudible portions are admissible	Not practicable to record, equipment could not be reasonably obtained, person in custody refused to be recorded, equipment malfunctioned, officer conducting interrogation believed there was no felony
New Hampshire	Yes (exclusive of Miranda rights)	State v. Barnett	Inadmissible; evidence gathered during the interrogation may be admissible if interrogation is not recorded in entirety subject to usual rules of evidence	None

New Jersey	Yes (list of felonies in rule; those that occur in place of detention)	Supreme Court Rule 3:17	Jury instruction; can be overcome by a preponderance of the evidence that one of the exclusions applies; if state intends to introduce an unrecorded statement, defense must be notified, defense must also be notified of witnesses who can attest to one of the exclusions	Recording not feasible; spontaneous statements; statements made during routine processing; suspect indicated he/she would not respond if recorded; statements made out of state; statement is given when investigators are unaware that a felony has been committed
New Mexico	Yes (video or audio; felonies; when reasonably able to do so)	HJC/HB 382	None; cannot exclude otherwise admissible evidence	Recording equipment not available; recording equipment failed and obtaining replacements not feasible; individual refused to be recorded; statements made in open court; spontaneous statements; interrogations made out-of-state; statements used for impeachment purposes; statements made in a correctional facility
North Carolina	Yes (in places of detention for homicide cases)	HB 1626	Failure to comply considered in suppression hearing; failure to comply admissible in support of claims defendant's statement is involuntary/unreliable; jury instruction	Accused refused to be recorded; equipment failed and obtaining replacements was not feasible; statement made in open court; spontaneous statement; statement made during routine processing; statements made in another state; statement obtained by federal officer; statement made when investigators unaware of homicide; statement used for impeachment
Ohio	No; statute states that recorded statements in first- or second-degree felonies are presumed to be voluntary; failure to record will not be basis for exclusion or suppression	SB 77	None	Voluntary bill, but states that recordings made of custodial interrogations (defined in bill) in a place of detention (defined in bill) are presumed to be voluntary.

Oregon	Yes (in law enforcement facility for aggravated murder or other felonies)	SB 309	Jury instruction; can be overcome by a preponderance of the evidence that an exception applies; court may not exclude statement or drop charges based on this requirement	Statement made before grand jury; statement made in open court; interrogation conducted in another state; custodial interrogation conducted by federal investigator; spontaneous statement; statement made during arrest processing; law enforcement agency that employs five or fewer officers; individuals committed to or confined in a place of incarceration or detention; state demonstrates good cause for not recording
Washington, D.C.	Yes (violent crimes when conducted in interrogation room)	Electronic Recording Act of 2004 (Sec. 101 - 302)	Assumption of involuntariness; rebuttable by clear and convincing evidence that it is voluntary	Individual refuses to be recorded
Wisconsin	Yes (felony, audio or video)	972.115	Jury instruction; can be overcome for good cause; lack of recording does not affect admissibility of otherwise legal statements	Individual refuses to be recorded; statement made in response to routine processing; equipment malfunction; spontaneous statements; exigent public safety circumstances; officer believed interrogation was not in a felony case

TCAP: Recording Exceptions and Remedies by State																		
Exception to Recording	AK	IL	IA*	ME*	MD*	MA*	MN*	MO	MT	NE	NH	NJ	NM	NC	OH*	OR	DC	WI
Any other statement admissible under law		√																
Custodial interrogations only								√							√			
Detention that has not risen to level of arrest								√										
Equipment could not be obtained										√			√					
Equipment failure									√	√			√	√				√
Exigent circumstances									√									√
Investigator is unaware that class of crime that requires recording has occurred		√								√		√		√				√
Law enforcement agency that employs 5 or fewer officers																√		
Out-of-state interrogations		√										√	√	√		√		
Person voluntarily agrees to speak w/ law enforcement								√										
Questioning during transport								√										
Questioning related to alcohol influence report								√										
Recording not feasible		√								√		√						
Spontaneous statement		√							√			√	√	√		√		√
State demonstrates good cause for not recording																√		
Statement made before grand jury and/or in open court		√											√	√		√		
Statement made during routine arrest processing		√						√	√			√		√		√		√
Statement made in a correctional facility													√			√		
Statement obtained by federal officer														√		√		
Statement surreptitiously recorded									√									
Statement used for impeachment only		√											√	√				
Suspect will not respond if recorded		√							√	√		√	√	√			√	√
Voluntary statement that has bearing on credibility		√																
Remedy																		
Presumption of inadmissibility	√	√					√		√		√						√	
Jury instruction						√			√	√		√		√		√		√
* Recording not mandatory																		
* Exceptions reviewed on a case-by-case basis																		

Appendix E

By: Dutton

H.B. No. 301

Substitute the following for H.B. No. 301:

By: Miklos

C.S.H.B No. 301

A BILL TO BE ENTITLED

AN ACT

relating to discovery in a criminal case.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 39.14, Code of Criminal Procedure, is amended to read as follows:

Art. 39.14. DISCOVERY

Sec. 1. DISCLOSURE BY STATE. (a) As soon as practicable after receiving a timely request from the defendant, the attorney representing the state shall disclose to the defendant's counsel and permit inspection, photocopying, and photographing of the following materials and information in the possession, custody, or control of the state or any of its agencies:

- (1) any exculpatory impeachment evidence material to the defendant's guilt or punishment;
- (2) any written or recorded statements [(including electronically recorded statements)] that are made by the defendant or by any witness the attorney representing the state intends to call at trial and that are related to the case charged, including offense reports by law enforcement personnel, if any;
- (3) any written record containing the substance of any oral statement that is made by the defendant and that is related to the case charged, whether made before or after the defendant's arrest, in response to interrogation by any person whom the defendant believed to be a peace officer;
- (4) the defendant's prior criminal record;
- (5) any record of a criminal conviction admissible for impeachment under Rule 609, Texas Rules of Evidence, of a witness the attorney representing the state intends to call at the trial;

(6) any affidavit, warrant, or return pertaining to a search or seizure in connection with the case;

(7) any physical or documentary evidence that was obtained from or that belongs to the defendant or that the attorney representing the state intends to use at the trial and, on a showing of materiality by the defendant, the opportunity to test that evidence;

(8) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence, and the names of all other witnesses the attorney representing the state intends to call at the trial;

(9) any report produced by or for an expert witness the attorney representing the state intends to call at the trial; and

(10) any plea agreement, grant of immunity, or other agreement for testimony issued by the attorney representing the state in connection with the case. [Upon motion of the defendant showing good cause therefore and upon notice to the other parties, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence, provided, however, that the rights herein granted shall not extend to written communications between the State or any of its agents or representative or employees. Nothing in this Act shall authorize the removal of such evidence from the possession of the State, and any inspection shall be in the presence of a representative of the State.]

(b) If the defendant gives notice of a defense under Section 2(b), the attorney representing the state shall disclose to the defendant's counsel as soon as practicable the names of the witnesses of whom

the state has knowledge and whom the state intends to use to rebut the defense or the testimony of any of the defendant's witnesses called to establish that defense [On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins].

(c) This article does not authorize the removal of physical evidence from the possession of the state, and any inspection of physical evidence shall be conducted in the presence of a representative of the state.

Sec. 2. DISCLOSURE BY DEFENDANT. (a) As soon as practicable after receiving the initial disclosure under Section 1 from the attorney representing the state, the defendant shall disclose to the attorney representing the state and permit inspection, photocopying, and photographing of the following materials and information:

(1) any written or recorded statement by a witness, other than the defendant, that is related to the offense charged, if the defendant intends to call the witness at trial;

(2) any record of a criminal conviction admissible for impeachment under Rule 609, Texas Rules of Evidence, of a witness, other than the defendant, the defendant intends to call at the trial, if that information is known to the defendant;

(3) any physical or documentary evidence that the defendant intends to use at the trial and, on a showing of materiality by the attorney representing the state, the opportunity to test that evidence;

(4) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence, and the names of all other witnesses, other than the defendant, the defendant intends to call at the trial; and

(5) any report produced by or for an expert witness the defendant intends to call at the trial.

(b) On a request by the state, a defendant planning to offer evidence of one or more defenses listed in Chapter 8 or 9, Penal Code, or evidence of an alibi defense, shall file a good faith notice of intent to raise the defense with the court and the attorney representing the state not later than the 30th day before the date the trial begins or as soon as practicable after the date the defendant receives a disclosure under Section 1 to which the defense is responsive, whichever is later. If the defendant intends to raise an alibi defense, the notice must include the place at which the defendant claims to have been at the time of the alleged offense and the names of the witnesses the defendant intends to use to establish the alibi. Any notice provided under this subsection is for purposes of discovery only and is not admissible at trial unless the court finds the contents of the notice were not made in good faith.

(c) After the filing of the indictment or information, the court may require the defendant to submit nontestimonial evidence to the state. This subsection does not limit any law enforcement agency or prosecutor's office from seeking or obtaining nontestimonial evidence to the extent permitted by law.

Sec. 3. EXCEPTIONS TO DISCLOSURE. (a) Neither the attorney representing the state nor the defendant is required to disclose materials or information that is:

(1) recorded proceedings of a grand jury, except as provided by rule 615, Texas Rules of Evidence;

(2) a work product other than an offense report by law enforcement personnel, including a report, memorandum, or other internal document of the attorney representing the state, the attorney representing the defendant, or an investigator or other agent of the attorney representing the state or the attorney representing the defendant that is made in connection with the investigation, prosecution, or defense of the case; or

(3) privileged under a rule of evidence, an express statutory provision, the Texas Constitution, or the United States Constitution.

(b) This article does not authorize disclosure of the name, address, or telephone number of a victim in violation of Chapter 57.

(c) A victim impact statement is subject to disclosure before the testimony of the victim is taken only if the court determines that the statement contains exculpatory material.

Sec. 4. CONTINUING DUTY TO DISCLOSE. If, before a trial begins, but subsequent to compliance with this article or a relevant court order, a party discovers additional material or information subject to disclosure, the party shall immediately notify the other party's counsel of the existence of the additional material or information.

Sec. 5. EXCISION. (a) Except as provided by Subsection (b), if a portion of material or information is subject to discovery under this article and a portion is not subject to discovery, only the portion that is subject to discovery must be disclosed. The disclosing party shall inform the other party's counsel that the portion of material or information that is not subject to discovery has been excised or withheld. On request, the court shall conduct a hearing to determine whether the reasons for excision are justifiable. Material or information excised pursuant to judicial order shall be sealed and preserved in the records of the court and shall be made available to an appellate court in the event of an appeal.

(b) Excision of a witness statement produced in accordance with Rule 615, Texas Rules of Evidence, is governed by that rule.

(c) Notwithstanding any other provisions of this article, the attorney representing the state, without a protective court order or a hearing before the court, may excise from an offense report or other report any information related to the victim of an offense that is listed under:

(1) Section 3g, Article 42.12; or

(2) Article 62.001 (5)

Sec. 6. PROTECTIVE ORDERS. On a showing of good cause, the court may at any time enter an appropriate protective order that a specified disclosure be denied, restricted, or deferred. "Good cause," for purposes of this section, includes threats, harm, intimidation, or possible danger to the safety of a victim or witness, possible loss, destruction, or fabrication of evidence, or possible compromise of other investigations by law enforcement or a defense offered by a defendant.

Sec. 7. IN CAMERA PROCEEDINGS. On request, the court may permit to be made in camera an excision hearing under Section 5(a), a showing of good cause for denial or regulation of a disclosure under Section 6, or any portion of a proceeding. A verbatim record shall be made of a proceeding in camera. If the court excises a portion of the material or information or enters an order granting relief following a showing of good cause, the entire record shall be sealed and preserved in the records of the court and shall be made available to an appellate court in the event of an appeal

Sec. 8. CONFERENCE. On request of the attorney representing the state or the defendant, the court shall hold a discovery hearing under Section 1(8), Article 28.01, not later than the 10th day before the day before the trial begins to ensure that the parties are fully aware of their respective disclosure obligations and to verify compliance by each party with this article.

Sec. 9. COMPLIANCE; SANCTIONS. (a) The disclosures required under this article may be performed in any manner that is mutually agreeable to the attorney representing the state and the attorney representing the defendant or that is ordered by the court in accordance with this article. The order issued by the court may specify the time, place, and manner of making the required disclosures.

(b) On a showing that a party has not complied in good faith with this article or a relevant court order, the court may make any order the court finds necessary under the circumstances, including an order related to immediate disclosure, contempt proceedings, delay or prohibition of the use of a defense or the introduction of evidence, or continuance of the matter. The court may also inform the jury of any failure or refusal to disclose or any untimely disclosure under this article.

(c) The court may prohibit the use of a defense or the introduction of evidence under Subsection (b) only if all other sanctions have been exhausted or the discovery violation amounts to willful misconduct designed to obtain a tactical advantage that would minimize the effectiveness of cross-examination or the ability to adduce rebuttal evidence. The court may not dismiss a charge under Subsection (b) unless authorized or required to do so by other law.

(d) The failure of the attorney representing the state or the defendant to comply with this article is not a ground for a court to set aside the conviction or sentence of the defendant, unless the court's action is authorized or required by law.

Sec. 10. COSTS. (a) All reasonable and necessary costs related to a disclosure required under this article, including the photocopying of materials, shall be paid by the requesting party.

(b) The commissioners court of the county in which the indictment, information, or complaint is pending may not, as a result of any payment by the defendant of the costs required by this article, reduce the amount of money provided by the county to the office of the attorney representing the state.

Sec. 11. DISCLOSURE TO THIRD PARTIES. Before the date on which the trial begins, the attorney representing the state, the attorney representing the defendant, or an investigator, expert, or other agent for the attorney representing the state or the attorney representing the defendant may not disclose, without obtaining approval from the trial court, information or witness statements received from the opposing party to any third party, other than to an investigator, expert, or other agent for the attorney representing the state or the attorney representing the defendant, as applicable. Information or witness statements received under this article may not be made available to the public.

Sec. 12. PRO SE DEFENDANTS. This article, including the provisions regarding the nondisclosure of a witness statement or an offense by law enforcement personnel, applies to a defendant who has elected to proceed pro se only to the extent approved by the court.

Sec. 13. CONFLICT OF LAW. To the extent of any conflict, this article prevails over Chapter 552, Government Code.

SECTION 2. The change in law made by this Act applies to the prosecution of an offense committed on or after the effective date of this Act. The prosecution of an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

SECTION 3. This Act takes effect September 1, 2009.

Appendix F

By: Ellis

S.B. No. 1864

A BILL TO BE ENTITLED

AN ACT

relating to postconviction forensic DNA analysis.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (b), Article 64.01, Code of Criminal Procedure, is amended to read as follows:

(b) The motion may request forensic DNA testing only of evidence described by Subsection (a) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing[=

~~[(A) because DNA testing was:~~

~~[(i) not available; or~~

~~[(ii) available, but not technologically capable of providing probative results; or~~

~~[(B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing]; or~~

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

SECTION 2. Chapter 64, Code of Criminal Procedure, is amended by adding Article 64.035 to read as follows:

Art. 64.035. UNIDENTIFIED DNA PROFILES. On completion of the testing under Article 64.03, the convicting court shall order any unidentified DNA profile to be compared with the DNA profiles in the CODIS DNA database established by the Federal Bureau of Investigation.

SECTION 3. Article 64.04, Code of Criminal Procedure, is amended to read as follows:

Art. 64.04. FINDING. After examining the results of testing under Article 64.03 and any comparison of a DNA profile under Article 64.035, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.

SECTION 4. The change in law made by this Act applies to a motion for forensic DNA testing filed on or after the effective date of this Act. A motion for forensic DNA testing filed before the effective date of this Act is covered by the law in effect at the time the motion was filed, and the former law is continued in effect for that purpose.

SECTION 5. This Act takes effect September 1, 2009.

Appendix G

By: Whitmire, et al.

S.B. No. 1976

Substitute the following for S.B. No. 1976:

By: Gallego

C.S.S.B. No. 1976

A BILL TO BE ENTITLED

AN ACT

relating to procedures for applications for writs of habeas corpus based on relevant scientific evidence.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 11, Code of Criminal Procedure, is amended by adding Article 11.073 to read as follows:

Art. 11.073. PROCEDURES RELATED TO CERTAIN SCIENTIFIC EVIDENCE. (a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by the convicted person at the convicted person's trial;

or

(2) discredits scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing sufficient specific facts indicating that:

(1) relevant scientific evidence is available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial;

(2) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

(3) the court finds that, had the scientific evidence been presented at trial, it is reasonably probable that the person would not have been convicted.

(c) For purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.

(d) In determining whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the scientific knowledge or method on which the relevant scientific evidence is based has changed since:

(1) the applicable trial date or dates, for a determination made with respect to an original application; or

(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

SECTION 2. The change in law made by this Act applies only to an application for a writ of habeas corpus filed on or after the effective date of this Act. An application for a writ of habeas corpus filed before the effective date of this Act is governed by the law in effect at the time the application was filed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2009.