



White Paper on Conviction Integrity Proposals in Pennsylvania

INTRODUCTION

To date, 11 people have been released from Pennsylvania prisons when DNA testing proved their innocence. These men collectively spent 139 years behind bars for crimes they did not commit. In 2 of those cases, police have identified the true perpetrator of the crime; the remainder are unsolved. Of course wrongful convictions stop at no state borders. There are 275 DNA exonerations across the nation. In 45% of these cases, the process of settling the innocence claim resulted in the identification of the true perpetrator of those crimes. Tragically, the perpetrators of these heinous crimes committed many additional crimes while the innocent languished behind bars, including more than 60 sex assaults and 24 murders. This data probably only begins to tell the larger story of all of the crimes that were actually committed in that these were only known convictions. When we convict the wrong person, all of us are harmed.

In the fall of 2011, the Pennsylvania Advisory Committee on Wrongful Convictions issued its final report calling for major, comprehensive updates to the Pennsylvania criminal justice system with the goal of preventing wrongful convictions. The Advisory Committee was formed in 2006 and met for over 4 years to consider various proposals aimed at preventing innocent people from being convicted of crimes they did not commit. The final report takes an exhaustive view of the problems and causes of wrongful convictions. In addition, the report contains legislative recommendations in varying areas which draw on best practices already in use in law enforcement agencies across the United States. It is worth underlining this point: there is no new ground being broken here. Many of these recommendations are grounded in more than a quarter century of scientific research.

Accompanying the Final Report, 14 members of the Advisory Committee submitted to the Senate Judiciary Committee a separate Independent Report, questioning the process by which the Advisory Committee conducted its business and whether the recommendations were truly based upon a “consensus” process or one “largely decided upon in advance, and ... designed solely to benefit criminal defendants.”¹ As a result, the Independent Report takes issue with the necessity of any systemic changes to the Pennsylvania criminal justice system, but does acknowledge that adjustments and improvements can be made to benefit all citizens.

As the Pennsylvania Innocence Project was not part of the Advisory Committee meetings, and played no role in the production of the final report, we are unqualified to opine on the process that led to the report’s recommendations. Many states, localities, and law enforcement agencies across the country are adopting and encouraging the use of every proposal in the Committee

¹ Independent Report, page 2. The Independent Report was signed by committee members from law enforcement and victims’ rights groups.

Report. Surely if any law enforcement agency anywhere which has adopted blind administration of lineups or the recording of interrogations or any of the other pro-law enforcement measures had lost a single arrest or conviction, there would have been a vocal and sustained outcry. In fact, the opposite has occurred. All across the country, police agencies and prosecutor offices are looking at revamping the ways in which eyewitness identification procedures are run and how suspect interrogations are conducted in order to achieve the end that all citizens want: that the guilty are fairly prosecuted and the innocent are not implicated.

Generally, the Pennsylvania Innocence Project agrees with the Advisory Committee Report recommendations. However these proposals do not go far enough to ensure we are doing all we can do to prevent wrongful arrests and convictions. The Project is also concerned that rights and sensitivities of victims can be better protected. Toward that end, the Project has additional proposals to suggest, addressed below.

In the following pages, the Project lays out the recommendations of the Advisory Committee Report, the concerns raised by the Independent Report, and the suggestions of the Project. This White Paper is written in the strong hope that there is common ground among all of those who care about justice in our Commonwealth, and that these discussions can take place in a measured, professional way. We add our voice to the discussion in the hopes of advancing true justice and safety for all Commonwealth residents.

ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

A troubling number of DNA exonerations—16%—involve a defendant who “confessed” to a crime in which he had no involvement.² Of the 11 Pennsylvania DNA cases, 4 involve a false confession or statement.³ While mental stability and development play a role in many of these cases, it alone does not account for all. The confessions’ reliability at trial derived from the nonpublic facts contained in them, and were typically the focus of the government’s final arguments. In studying the confessions in depth and reviewing the actual statements, some commonalities have been developed. First, many of the false confessions involved long interviews lasting hours or even days. The recognized technique of “minimizing” actions is also prevalent in yielding false confessions. Several cases involved a “false evidence ploy” in obtaining confessions—even telling some that forensic evidence (fingerprints, DNA) confirmed their participation when in fact that was not true.⁴ These types of methods—some of which stray from accepted police interrogation techniques—often are not presented to the factfinder in a case because no recording of the interview exists. Having a recording available to show a judge or jury would present objective evidence of what happened in an interrogation room, and would protect both suspects and police against claims of abuse.

Advisory Committee Recommendation: Introduction of a statute to require custodial interrogations to be electronically recorded in cases of criminal homicide, robbery,

² Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, 8 (2011) (analyzing 250 DNA exonerations and finding forty (16%) involved a “false confession”).

³ Advisory Committee Report, 83; Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Nov. 1, 2011).

⁴ *Id.* at 22-23.

sexual assault, kidnapping, and arson, with a coextensive wiretap exception for law enforcement.

- **Independent Report:** The Independent Report acknowledges that recording of interrogations would be a beneficial practice for law enforcement. The issue raised by the members who signed the Independent Report is that the practice should not be required. The primary concern in this regard is that the signers are unaware whether victims, witnesses, and suspects will be less willing to participate if they know or believe they are being recorded.⁵ Another concern raised is that recording interrogations could lead to “unconsidered answers that are less useful as evidence than thoughtful, written, responses, and are likewise easier for defense counsel to misinterpret or mischaracterize before the jury” and that defense counsel would “exploit the fact that many ... interviews will include breaks for the comfort and convenience of the subject or ... interviewer.”⁶ Finally, the Independent Report points out that not all interrogations occur in a police station, but many are in public and private locations. This would add to the cost of training and equipment, which already would be burdensome.
- **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Project suggests that not only should recording interrogations be required, but that the **recommendations do not go far enough** to protect against factfinders believing a truly false confession to be accurate when it is not. After consulting with many law enforcement agencies and experts in Pennsylvania and throughout the country, the Project believes that voluntary adoption of recording techniques would be inadequate to address the phenomenon of false confessions as with over 1,200 law enforcement agencies in the Commonwealth of Pennsylvania and no oversight agency the universal implementation of policies is not feasible without mandating compliance. It should be noted that, far from creating an unwinnable atmosphere for law enforcement, those agencies which have adopted these procedures show a universally positive response.⁷ Moreover, a lack of uniform protocols would set the stage for uneven justice within the Commonwealth, and open law enforcement agencies to unfair cross examination and scrutiny.
 - Furthermore, the Pennsylvania Innocence Project supports **beginning the taping from the very start of any affected suspect interview**. Beginning at the issuing of *Miranda* warnings would do nothing to record the portion of the interrogation where

⁵ Independent Report, p. 43. In support of this concern, the Independent Report refers to a 1993 comment written by a law student at the University of Albany Law School. Independent Report, p. 43, n. 48. The Pennsylvania Innocence Project was unable to locate a copy of that comment due to its age. However, when reached by phone, the comment’s author (now a noted bankruptcy lawyer in New York) said although he did not remember details about arguments in the comment, he “definitely” took the position that interrogations should be videotaped, a position he holds today. In response to the concern regarding reluctance of witnesses to testify, the Project points to a recent national survey conducted by former United States Attorney Thomas P. Sullivan detailing a universally positive experience and response to tape recording confessions. Mr. Sullivan notes no negative responses by law enforcement, and not a single case of a missed ‘proper’ arrest or conviction. Thomas P. Sullivan, Ctr. on Wrongful Convictions, *Police Experiences With Recording Custodial Interrogations*, 26-27 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> (collecting data from police departments that electronically record interrogations). (“Sullivan article”)

⁶ Independent Report, p. 44

⁷ See Sullivan article, *infra* note 5.

an innocent defendant would learn the details of the crime: the “interview” portion. Since those who confess to a crime of which they are entirely ignorant get the information about the crime from the interrogating officer during the “interview” phase of an interrogation, failure to tape that portion of the interview would provide no help in determining which confessions are accurate and which are not. Of course, honest officers do not intentionally “feed facts” to a suspect in order to obtain a false confession, and so are certainly hard-pressed to remember or know how the facts were transferred. Retired District of Columbia detective James Trainum unknowingly took 2 false confessions during his career, and now advocates taping as a means of training officers how not to feed information inadvertently during an interview.⁸ As Detective Trainum recommends, taping should be universal and begin from the moment the suspect and officer begin their discussion, as is done in several jurisdictions including the District of Columbia.

IMPROVEMENTS IN EYEWITNESS IDENTIFICATION PROCEDURES

Eyewitness Identification Improvement Act

Virtually every study of the known arrests and convictions of innocent people concludes with the proposition that eyewitnesses to a crime can be, and often are, mistaken in their identifications of a stranger as the perpetrator of a crime. A staggeringly high percentage of wrongful convictions involve at least one mistaken identification. Many wrongful conviction cases involve multiple misidentifications of the same suspect. Law enforcement agencies across the country are coming to the realization that the accuracy of eyewitness identifications can be improved adopting new and field-tested identification procedures. The proposals in the Advisory Committee report are similar to those in use in other jurisdictions but tailored to the needs of Pennsylvania. Nationally there are many efforts to update the way eyewitness procedures are conducted to minimize the risk that a well-intentioned witness will inaccurately identify an innocent person as a criminal.

Advisory Committee Recommendation: Introduction of a comprehensive set of procedures requiring the best practices in use in the administration of photographic and live lineups:

- **that they be conducted by one who does not know either which one is suspected by investigators;**
- **witnesses be required to give a description of the perpetrator before a lineup or array;**
- **that witnesses be provided verbal warnings before viewing an array including that the perpetrator may or may not be present and that the investigation will continue regardless of whether an identification is made;**
- **that witnesses be instructed to state in their own words how certain they are of the identification at the time the identification is made;**
- **that the procedure be recorded.**

⁸ Jim Trainum, Editorial, *Get It on Tape; A False Confession to Murder Convinced a Cop That a Visual Record Can Help Ensure an Innocent Person Isn't Convicted*, L.A. TIMES, Oct. 24, 2008, at A23.

- **Independent Report:** The major area of dispute between the Advisory Committee and those members who signed the Independent Report is on the issue of whether these improvements should be mandated or voluntary.⁹ The Independent Report proposes that law enforcement receive training in “non-suggestive identification procedures” as part of “ensuring that Pennsylvania has the best-trained law enforcement personnel in the country, and that our police officers are kept abreast of the latest research and techniques for identifying the guilty and clearing the innocent.”¹⁰ Without specifying the types of “non-suggestive identification procedures” to be used in training, the Independent Report calls upon MPOETC to incorporate such training in the ongoing mandatory in-service training for all officers.¹¹

- **Pennsylvania Innocence Project response:** First, the Project points out that wrongful eyewitness identifications are not due to police misconduct or incompetence. The Project resoundly rejects any such suggestion. It’s not about people, but procedures. Misidentifications result from the use of out-dated and unreliable methods. Nonetheless, after three decades of research, leading law enforcement agencies recognize that eyewitness identification procedures can be improved and professionalized. At the heart of causes of innocent people being convicted of crimes they did not commit are wholly sincere but inaccurate eyewitness identifications. Although the Independent Report refers to “defense-oriented identification procedures” which would “actually discourage *all* identifications (whether accurate or not)”¹² the proposals contained in the Advisory Committee report are being used by countless law enforcement agencies across the country. They have been proposed and/or implemented by Attorneys General in Ohio, Wisconsin, and New Jersey. They have been made law in states from Connecticut to North Carolina. Indeed, despite the wide-ranging use of these practices (or more likely because of them), there has not been a single reported case of a missed accurate identification, or a proper arrest that was lost in jurisdictions who adhere to these protocols. Law enforcement agencies report that the identifications derived from best practices shield them from defense challenges, thereby helping them to buttress the evidence they offer in court. In voluntarily adopting double-blind sequential administration of lineups and photo arrays, the Roanoke, Virginia police department noted that there had been “no known misidentifications,” that the process “has not been challenged in court,” and that the adoption “has not been a taxing burden to department resources, a concern raised by several studies.”¹³
 - The Pennsylvania Innocence Project **disagrees** with the provision allowing lineups to

⁹ The Independent Report spends several pages denouncing the specifics of the proposed protocols and procedures, *see generally* Independent Report pp 46-54. However, the Independent Report also proposes training of officers in “non-suggestive” procedures. Since the recommendations in the Advisory Committee Report are backed by major law enforcement agencies such as the International Association of Chiefs of Police, the Commission on Accreditation of Law Enforcement Agencies and the National Institutes of Justice, presumably they are the same non-suggestive procedures referred to by the Independent Report.

¹⁰ Independent Report, p. 80-81.

¹¹ Independent Report, p. 81.

¹² Independent Report, p. 46.

¹³ Phil Patrone, Accreditation Manager; Deputy Chief Chris Perkins; and Capt. Curtis Davis, Roanoke (VA) Police Department, *New Standards Limit Eyewitness Misidentification*, CALEA Update Magazine, Issue 102, February 2010, available at <http://www.calea.org/calea-update-magazine/issue-102/accreditation-works-case-78>.

be presented either simultaneously or sequentially. A recent field study commissioned by the American Judicature Society and conducted in the Charlotte-Mecklenburg (NC) Police Department, the Tucson (AZ) Police Department, the San Diego (CA) Police Department and the Austin (TX) Police Department provides solid evidence that sequential presentation is the superior method. The field study used actual eyewitnesses to crime, and showed that the sequential presentation of suspects to eyewitnesses yields fewer inaccurate identifications (that is, identifications of someone other than the intended suspect) without any loss (and even a slight, although not statistically significant, increase) in accurate identifications.¹⁴ This study, the only field study agreed to be scientifically robust, supports more than 20 years of lab studies on the same topic. Based on this study, and the positive reaction to the procedure by police agencies, any lineup protocols adopted should require sequential presentation to assure the highest level of accurate identifications.

- In addition, the Pennsylvania Innocence Project would require an additional requirement of arrays and lineups: that the **fillers be picked based upon the victim's description** of the perpetrator, rather than similarity to the suspect. Where there is a great difference (in height, weight, presence of scars), two arrays should be run.
- The Pennsylvania Innocence Project supports mandating the proposals for the simple reason that there are over 1200 law enforcement agencies throughout the Commonwealth of Pennsylvania. Without any organization overseeing these agencies and ensuring that they are, indeed, adhering to known best practices, there is simply no way to reach every corner of our state. Nobody wants to promote inconsistent protocols and set up law enforcement for unfair court challenges. Training and mandating protocols go hand in hand. Moreover, providing training without requiring protocols and procedures that enforce that training would leave law enforcement open to unfair attacks at pre-trial procedures and trials: to wit, that they are aware of known best practices and available procedures that reduce inaccurate identifications but choose not to follow them. The Pennsylvania Innocence Project recognizes that the adoption of the highest level of professional protocols are protective of law enforcement.
- Although the Independent Report supports police training in non-suggestive eyewitness procedures, there are several concerns raised as to the proposed statute, so those are addressed here. Far from hampering small agencies, as suggested by the Independent Report, blind administration is easily accomplished using modern techniques. Even agencies with one or two officers can conduct a photo array in a way that “blinds” the administrator to the suspect’s placement in the array and involves no added expense.¹⁵ Indeed, this very method is included in both the Ohio and North Carolina laws.

¹⁴ Gary L. Wells, Nancy K. Steblay, and Jennifer E. Dysart, *A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies*, available at http://www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf .

¹⁵ A demonstration of such a procedure was prepared by the Wellesley, Massachusetts police department with the New England Innocence Project. A video demonstration can be viewed at <http://blip.tv/file/3963518> .

- Providing warnings to witnesses is universally recognized as an appropriate and effective means of encouraging witnesses to focus on each individual photo rather than reviewing the array as a whole.¹⁶ The instructions should be given in *every* case to ensure that witnesses do not feel pressure to make an identification if they do not recognize the perpetrator and, again, to standardize the procedures so as to protect lineup administrators from unfair criticism.
- Asking a witness to express, in her own words, how confident she is in her identification is the only method of ensuring that witnesses' memories are not tainted between the identification and any subsequent court proceedings.¹⁷

POSTCONVICTION RELIEF

Postconviction DNA testing

At the time it was written, Pennsylvania's post-conviction DNA statute may have been adequate to accomplish its goal of ensuring access to testing in the post-conviction setting. However, courts have construed the statute narrowly and restricted its applicability.

Advisory Committee Recommendation: Revising the current post-conviction DNA testing statute to provide for access to testing notwithstanding a guilty plea or confession, to allow access to testing even where an inmate has completed probation, imprisonment or parole but remains subject to registration as a sex offender, and allow for submission of DNA samples to CODIS and/or Pennsylvania DNA database either before or after trial for comparison.

- **Independent Report:** The signers of the Independent Report “vigorously oppose” the “radical approach” suggested by the Advisory Committee.¹⁸ The Independent Report agrees with the provision allowing for access to DNA testing by those who pled guilty or provided a confession.¹⁹ Moreover, the risk of defendants waiting “so long as to prejudice the Commonwealth’s ability to retry them” is raised as an objection to any

¹⁶ The Independent Report contends that instructions could be “misleading,” particularly the instruction telling witnesses that investigations will continue whether an identification is made or not. Independent Report, p. 49. Because law enforcement will always, one hopes, accept evidence related to a crime even if they do not actively develop it, investigations continue beyond an identification.

¹⁷ See 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 (1998) (providing studies demonstrating confirming feedback given at the time of an initial identification made subjects significantly more confident of their identification of a suspect); Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112 (2002).

¹⁸ Independent Report, p. 60.

¹⁹ The Independent Report, though, mistakenly states that “the existing statute contains no such bar.” Independent Report, p. 61. Indeed, the case referred to for this proposition merely held that a defendant’s confession alone could not act as a *pro se* bar to post-conviction testing. *Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011). The case had nothing to say with respect to guilty pleas. Under current caselaw, access to DNA testing is presumptively barred by those who entered into a plea of guilty or *nolo contendere*. See *Williams v. Erie County Dist. Atty’s Office*, 848 A.2d 967 (Pa. Super. Ct. 2004), *appeal denied* 864 A.2d 530 (Pa. 2004).

proposed changes as it would “reward intentional delays and gamesmanship.”²⁰ The Independent Report posits that those who “waste the time and resource of the courts, prosecutors, and police by falsely asserting their factual innocence when requesting post-conviction DNA testing” should face consequences including, at a minimum, possible perjury charges.²¹ The Independent Report points to the “vague” approach to remedies allowed by the judiciary when exculpatory DNA is revealed.²² Finally, the statute lacks an express right for the Commonwealth to appeal a granting of testing to a petitioner, or of the granting of a new trial.

- **Pennsylvania Innocence Project response:** Changes to the post-conviction DNA testing statute are long overdue. Perhaps the question most heard in relation to post-conviction DNA testing is why the prosecution won’t simply test whatever material is in its possession when asked; why do prosecutors fight against it? The answer from the Pennsylvania Innocence Project’s perspective is that not all prosecutors do fight testing. Many readily agree to testing as they, too, want to be assured in every way possible that the conviction is valid. The revisions to this statute are much closer to ensuring that those valid claims of innocence where testing is possible will see fewer obstacles than before: those who pled guilty will have access to testing; counsel will be appointed when a valid claim is raised; successive petitions are disallowed facially; the statute provides broader discretion to judges in determining whether to grant DNA testing; and comparisons would be allowed to the state DNA database and to CODIS to determine whether a matching DNA profile exists to establish the true perpetrator’s identity.
- On the issue of allowing DNA post-conviction for those who pled guilty, which the signers of the Independent Report agree is appropriate, some states are now revisiting laws that were previously enacted. There is an emerging trend seeking to ensure those who pled can seek testing. Just last session, both New Hampshire and Idaho revised their laws to explicitly permit those who pled.
- Critically, where exculpatory DNA evidence is produced by testing, the statute allows the judge to determine what appropriate orders, with the obvious input and participation by the Commonwealth, should be entered. Allowing the trial court the ability to determine an inmate innocent and order an immediate discharge means that there can be no improper delay in proceedings or in releasing the inmate proven innocent. Clearly this would be only in the most extraordinary circumstances with the clearest evidence of innocence; other cases would follow the current structure of a grant of a new trial.
- Many other states provide that an inmate who files for DNA testing must affirm his innocence and non-involvement under oath. Then, where inculpatory results are received, those proven guilty can be prosecuted for perjury in relation to their statements of innocence. The Pennsylvania Innocence Project agrees that frivolous and time-wasting testing should be discouraged. So as to effectuate that goal, **the Project supports a requirement of affirmation under threat of perjury**, a judicial

²⁰ Independent Report, pp. 61-62

²¹ Independent Report, p. 63.

²² Independent Report, p. 64.

determination as to whether the applicant's assertion of actual innocence was intentionally false, or an assessment against the applicant the cost of any DNA testing not already paid by the applicant.

- Given the number of cases which have identified the true perpetrator through a CODIS or state-based DNA search, the Pennsylvania Innocence Project echoes particularly the ability of a court to order a comparison against CODIS or the Pennsylvania-based database where a DNA profile does not match the inmate. In many cases where DNA testing reveals an unknown profile, the ability to discover the identity of the person who left behind the biological material not only supports the innocence claim, but more importantly serves the purpose of identifying the true perpetrator of a crime. In some cases where DNA evidence excluded the convicted inmate, no database search has yet been conducted. A database search is a basic tool of law enforcement that continues to be relevant and critical even in the post-conviction process.²³
- Finally, it is the practice of the Pennsylvania Innocence Project to work with the Office of the Victim's Advocate to notify victims before filing requests for post-conviction DNA testing to help victims deal with any re-traumatization that such litigation may cause. The Project suggests that **measures to reach out to victims** be included in the proposed post-conviction DNA testing statute as well as **reactivation of victims' services** particularly in the event of the development of exculpatory DNA evidence.

Amendments to Pennsylvania's PCRA Time Limitations

While not a direct cause of wrongful convictions, severe restrictions upon the time limits faced by inmates in seeking to prove their innocence in court are proving unworkable. The Post Conviction Relief Act ("PCRA") remains the "sole means of obtaining collateral relief" for a criminal conviction. After an initial one-year period in which an inmate may file an appeal challenging matters beyond legal issues that arose during the trial itself (such as the effectiveness of trial or appellate counsel), Pennsylvania inmates are prohibited from filing a second appeal unless new evidence arises that calls into question their conviction. In that case, the inmate must file a petition in his trial court asking for a new trial within 60 days from when the claim could have been brought. If an inmate fails to file within 60 days, the petition will be dismissed by the trial court for lack of jurisdiction as being "untimely."

Advisory Committee Recommendation: Amend the current PCRA to allow an inmate to file a petition for a new trial based upon allegations of "governmental interference" or previously unknown facts from 60 days to one year.

- **Independent Report:** The Independent Report does not offer any objection to this proposal.

²³ It is through the use of post-conviction database searches that law enforcement has been able to identify the true perpetrator in 45% of 275 DNA exonerations.

- **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Project supports amending the current PCRA time limitation, but again feels that the proposals of the Advisory Committee are **insufficient** to achieve the desired goal. The current deadline of 60 days is among the shortest in the country, and unworkable to achieve justice. Inmates without access to the internet, decent communications, sometimes even pen and paper should be given at least one year to present colorable claims of innocence based upon newly discovered evidence or the discovery or withheld information. The Project urges **no time limitation** for the presentation of such claims, as is the practice in many sister jurisdictions. Certainly where the inmate advances a colorable claim of innocence—a true manifest injustice—courts should, at a minimum, provide a review of the evidence presented vis a vis the evidence used to obtain the conviction. As the law is interpreted now, courts routinely reject claims with colorable, potentially viable, innocence claims with no review of the merits because the petition was filed “untimely.”

LEGAL REPRESENTATION BY PROSECUTORS AND DEFENSE COUNSEL

Training Attorneys Relating to Eyewitness Identification and Confessions

Because defense counsel in known exoneration cases often made little, if any, attempt to educate the factfinder about the known science regarding eyewitness memory, retention and recall, or the phenomenon of false confessions, the Advisory Committee proposes expanding areas for capital counsel training to include the eyewitness identifications and confessions.

Advisory Committee Recommendation: Amend Rule 801 to allow training for capital defense counsel relating to eyewitness identifications and confessions.

- **Independent Report:** The Independent Report does not address this recommendation.
- **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Project supports it. Ensuring that capital counsel receive training in an area so critical to wrongful convictions makes sense, and should be adopted.

Adequacy of Legal Representation of Indigent Defendants

The Advisory Committee on Wrongful Convictions did not take a particular stance upon the adequacy of legal representation as a means of preventing wrongful convictions since another Joint State Committee was still considering the topic under separate authorization. Since the Advisory Committee’s report was published, the commission has issued a draft report calling for statewide funding of indigent defense systems in Pennsylvania.

Prosecutorial Practice

Sadly, the element of misconduct by prosecutors in failing to disclose exculpatory information and other acts plays a role in many documented wrongful convictions. While there is no

indication that these are intentional acts by prosecutors, ensuring that those who choose to serve the Commonwealth receive proper training benefits all members of the criminal justice system.

Advisory Committee Recommendation: The Advisory Committee Report urges prosecutors to implement internal discipline promoting ethical conduct, develop mechanisms to provide oversight, and adopt guidelines and sanctions when misconduct is discovered including the adoption of Rule of Professional Responsibility 3.8 requiring prosecutors who learn of exculpatory information post-conviction to notify the court and counsel.

- **Independent Report:** The Independent Report takes issue with the lack of similar requirements on defense counsel, saying the proposed recommendations “completely ignore the acknowledged failings of defense counsel.”²⁴ Stating that prosecutors are “*already* the attorneys most constrained by law,”²⁵ the Independent Report does not offer any alternative proposals, or any particular proposals to prevent or address defense counsel failings.
- **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Project most certainly agrees that inadequate and ineffective defense counsel representation is an under-examined cause of wrongful convictions. Based simply upon our review of slews of cases of alleged wrongful conviction, there is little doubt that had counsel been better prepared, better trained, and more engaged in their work many of those whose cases we are reviewing would not have been convicted. The Project also rejects the common misconception that defense neglect or malfeasance is the sole province of the public defender. Indeed, many if not most of the Project’s current clients were represented by privately retained counsel at trial and on appeal. Nonetheless, the proposals contained within the Advisory Committee report—specifically the adoption of the proposed Rule 3.8, relating to evidence of wrongful conviction obtained in the post-conviction context, and a call for prosecutorial offices to adopt clear guidelines would benefit all of our citizens, and strengthen lay confidence in the system itself. The Project remains open to consideration of rules and proposals aimed specifically at defense counsel in order to address the lack of preparedness, training, skill, and other recurrent issues that plague our convicted innocent.
 - Another factor in the realm of government misconduct is the matter of withheld exculpatory evidence. While in no way accusing government officials of intentionally withholding known exculpatory evidence, the Project supports the adoption of an **open file discovery policy** for the Commonwealth. Like other states and prosecutor offices,²⁶ were Pennsylvania to allow “open file” access to prosecutor

²⁴ Independent Report, p. 55.

²⁵ Independent Report, p. 55.

²⁶ The Project does not know of an exact tally of agencies that have such disclosure requirements. According to a recent article by Ellen Yaroshefsky, Director of the Jacob Burns Center for Ethics in the Practice of Law at Hastings College of Law,

North Carolina was the first state to enact legislation for full open file discovery, requiring automatic disclosure of all nonprivileged information in the prosecution’s entire file. Recently, Ohio followed suit. Colorado, Florida, Arizona, North Carolina, and New Jersey all have broad discovery laws and rules, often based upon the ABA Criminal Justice Standards for Discovery and Trial by Jury. Similarly, local

and police files (which promotes the goal of disclosing all nonprivileged information and evidence gathered in a case to the defense as early as possible) the possibility of a prosecutor or detective being later accused of withholding information that should have been turned over becomes remote at best. In addition, open file discovery would eliminate or at least significantly reduce litigation in the post-conviction context. Transparency in the criminal justice system breeds confidence from our citizens.

Government Informants and Jailhouse Witnesses

The use of government informants is certainly a useful and effective tool for gathering information in a criminal investigation. However, there can be no doubt that the use of such evidence can infect a criminal trial with inaccurate information. Current Pennsylvania law provides no limits on the use of such evidence, or any mechanisms by which to determine the reliability of the information before it is presented to a jury.

Advisory Committee Recommendation: Require a pre-trial reliability hearing for informant testimony in capital cases where the reliability of the testimony must be shown by a preponderance of the evidence, and require the prosecution to disclose the following whenever an informant is to be used:

- **criminal history of informant,**
 - **any deal or inducement offered to the informant,**
 - **substance of testimony,**
 - **time and place of each statement,**
 - **time and place of disclosure and names of all officials and people who were present,**
 - **if the informant ever recanted testimony,**
 - **other cases where informant testified and whether he received anything in exchange.**
- **Independent Report:** The Independent Report questions the need for such measures, and posits that similar steps should be used when inmate testimony is presented by a defendant during trial. The signers of the Independent Report also question the need for a pre-trial reliability hearing calling such a requirement “baffling.”²⁷
 - **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Project supports the recommendation regarding the regulation of government witnesses. The requirements for full disclosure are consistent with existing state and federal law regarding the release of information pre-trial. Moreover the requirement of a reliability hearing is consistent with similar hearings for other forms of evidence, including eyewitness identifications and confessions. Far from unprecedented, many jurisdictions are moving toward similar hearings for the regulation of incentivized witnesses to

offices throughout the country—such as in Milwaukee, Wisconsin and Portland, Oregon—have full open-file discovery. Other cities and localities have more limited “open-file” discovery programs. Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 *Hastings L.J.* 1321, 1331 (2011).

²⁷ Whereas the Independent Report states that there was “no evidence presented to the subcommittee that such testimony has proven a common cause of wrongful convictions in Pennsylvania,” (Independent Report, p. 56) every case that the Project has accepted to this point involves at least one government informant.

promote transparency and reliability in the criminal justice system. However, the Project supports a **stronger jury instruction** than that proposed.

ISSUES RELATED TO SCIENCE AND EVIDENCE

Preservation of Evidence

Without the ability to test biological evidence left behind at a crime scene, those who have been convicted of crimes they did not commit are left with few if any avenues for potential exoneration in post-conviction. Since there is currently no requirement in the Commonwealth of Pennsylvania that evidence be preserved in any fashion and for any length of time, these proposals are necessary.

Advisory Committee Recommendation: Biological evidence secured in the investigation or prosecution of a criminal homicide, sexual assault, kidnapping, or robbery, required to be preserved if the proceedings are pending or if the defendant is currently imprisoned for the offense.

- **Independent Report:** The signers of the Independent Report agree, in principle, to the need to preserve evidence as proposed. The differences appear to be in the manner in which such efforts would be funded and the consequences of non-compliance. The funding source identified by the Advisory Committee Report, proceeds from forfeiture sales, would be an unrealistic proposal as such funds are dedicated to pay for essential operating costs, particularly the salaries of the police officers, detectives, and prosecutors who enforce the Commonwealth’s drug laws” as such there is no “extra’ forfeiture money available to fund new projects.”²⁸ Therefore, any costs associated with preservation would have to be appropriated by the General Assembly. Any preservation statute should include a caveat that “non-compliance does not provide an independent ground for relief in any criminal case.”²⁹
- **Pennsylvania Innocence Project response:** The failure to properly preserve biological material has already cost countless Pennsylvanians the opportunity to challenge their convictions in court. As crime investigation methods move toward more and more discerning methods of testing smaller and smaller quantities of biological material there is little doubt that all citizens of the Commonwealth benefit from the proper preservation of evidence. The statute is limited to only a small number of crimes, unlike other states’ preservation statutes which require the preservation of evidence in all felonies. This proposal balances fiscal concerns, practicability and justice. Insofar as these efforts are not specifically geared toward preserving evidence in **unsolved (“cold”) cases**, the Pennsylvania Innocence Project supports the inclusion.

²⁸ Independent Report, p. 59.

²⁹ Independent Report, p. 60.

Accreditation and Oversight of Forensic Laboratories

In keeping with recommendations from a 2009 National Academy of Sciences report, *Strengthening Forensic Science in the United States: A Path Forward*, the Advisory Committee examined the state of forensic sciences in the Commonwealth. Improper forensic science techniques or poorly trained technicians contributed to nearly half of DNA exonerations nationally. Accreditation can prevent such occurrences by providing lacking oversight and quality assurance. While the Commonwealth's current public facilities are accredited, the proposals to mandate accreditation would affect only smaller, privately run facilities.

Advisory Committee Recommendation: Require all forensic laboratories to have a technical peer review system, proficiency testing program, and accreditation by nationally recognized board, and require independent government entity to investigate allegations of negligence or misconduct.

- **Independent Report:** The Independent Report does not oppose the proposal for forensic laboratory accreditation.
- **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Projects supports the proposal for mandatory accreditation.

Forensic Science Advisory Board

As a corollary to mandatory accreditation, the Advisory Committee also calls for the creation of a Forensic Science Advisory Board, the purpose of which would be to investigate reported professional negligence and misconduct in publicly operated forensic laboratories and provide corrective action. Such an Advisory Board would also put together standards for the preservation of evidence and provide ongoing education on forensic science for all those involved in the criminal justice system. It is certainly worth noting that many localities within Pennsylvania are currently ineligible to receive certain federal funds related to wrongful convictions because there is no mechanism in place for dealing with charges related to forensic science negligence or misconduct. The creation of an Advisory Board would at least eliminate the major barrier to accessing these funding streams that could help pay for personnel, computerization, lab equipment, facilities and other administrative costs.

Advisory Committee Recommendation: Create a Forensic Science Advisory Board to review and make recommendations how to configure, fund, and improve delivery of forensic laboratory services, and conduct investigations into allegations of negligence or misconduct.

- **Independent Report:** The signers of the Independent Report support the “basic idea” of the creation of an Advisory Board. The differences lie in the selection of members of the board and granting the Advisory Board investigative practices and powers “more consistent with those of other state forensic advisory boards.”³⁰ Significantly, the

³⁰ Independent Report, p. 73.

Independent Report suggests that the inclusion on the Board of a professor of criminal justice or forensic science “superfluous” given the presence of others. The Independent Report also calls for “permissive” rather than “mandatory” investigative practices viewing mandatory investigations as “impractical.”³¹

- **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Project also supports the formation of an Advisory Board. As for membership, the Project has no particular preference for either proposed method, however strongly supports the inclusion of a faculty member of an accredited forensic science department to ensure the proper representation of those actively engaged in the field, as opposed to those who, like defense lawyers and prosecutors, are merely knowledgeable.

REDRESS FOR WRONGFUL CONVICTIONS

Creation of a State Compensation Fund for Exonerated Innocent People

When an innocent person is exonerated of a crime for which he was convicted, there are no avenues of support from either state or federal sources. Whereas individuals who commit crimes and are released from incarceration on parole have access to parole agents and supportive services, the exonerated has no such programs. The only current avenue for assistance and compensation for lost time and livelihood is the uncertain path of civil damages. Such suits are costly for all citizens to litigate much less settle, and particularly difficult for the innocent person, the victims, and the law enforcement agencies involved.³² Providing for a compensation scheme would be cost-saving in the long run, and is a way of compensating someone who committed no crime, yet was subjected to the full punishment of the Commonwealth wrongfully.

Advisory Committee Recommendation: Create a state-funded compensation fund for those convicted of crimes they did not commit after a conviction is reversed or vacated by a court, or a Governor’s pardon as well as expungement of the underlying criminal record.

- **Independent Report:** The Independent Report vehemently opposes any compensation statute or scheme. An initial objection is the proposed definition of a person who was “wrongfully convicted” and that it could include even those who, in fact committed a crime but whose conviction was nevertheless overturned or vacated. In addition, according to the Independent Report the proposal is evidence of a “lack of regard for innocent victims.”³³ As such, a statute should “compensate the system’s other innocent victims—the people who are raped, robbed, and murdered by defendants who were

³¹ Independent Report, p. 82.

³² Lawsuits brought under federal civil rights law (Pennsylvania has no law similar) are insufficient to restore the wrongly convicted to where he would have been had he not been mistakenly convicted. The wrongly convicted plaintiff must not only prove that mistakes were made, but that there was deliberate and reckless conduct on the part of officials. In most cases, qualified and absolute immunity doctrines shield official actors, such as police, crime lab personnel, and prosecutors from allegations of constitutional misconduct. Even if there is a successful suit, litigation takes years and there is still no guarantee that the wrongly convicted plaintiff will recover damages even if he prevails in the years after filing.

³³ Independent Report, p. 68.

wrongly acquitted or wrongly released.” Calling the proposed \$50,000 per year of wrongful incarceration “picked at random,” the Independent Report cites to other states with varying amounts of compensation for those wrongfully incarcerated. Finally, the proposal is deemed “entirely unacceptable because it is not limited to factually-innocent defendants, mandates excessive damage awards, and adopts unreasonable procedures.”

- **Pennsylvania Innocence Project response:** The definition of the presentation of a claim for actual innocence as presented by the Advisory Committee is consistent with the definition found in other states. Too often, in cases of true innocence, the prosecution clings to a conviction rather than admit that a true miscarriage of justice occurred. In too many cases, those who are actually innocent continue to be hounded and affected by a wrongful conviction even many years after their exoneration. Of course, the mere presentation of a claim of actual innocence is not the same thing as receiving a judgment or award for having been wrongfully convicted. However, in light of the objections of the Independent Report, the Pennsylvania Innocence Project would suggest including additional requirements for receipt of compensation: i.e., that the individual prove by the preponderance of the evidence that he did not commit the crime (or the crimes charged did not constitute a crime) and that he neither committed nor suborned perjury, or fabricated evidence to cause or bring about his conviction with the caveat that neither a confession or admission later found to be false, nor a plea of guilty or *nolo contendere*, would be considered bringing about his own conviction. It is a foundation of our values that when someone suffers a loss for which they bear no responsibility we make that person whole. We try to repair the damage. While nothing can give an exoneree back the years taken from him, or restore his broken family, compensation statutes go a long way toward those goals.
 - In respect to the needs of victims, the Pennsylvania Innocence Project argues that the recommendation **does not go far enough** as it does not address the victims’ perspective. Just as victims’ needs are considered at the time of trial, the Pennsylvania Innocence Project **supports the reactivation of victims’ services** in the event of an exoneration and a full compensation for victims of crimes insofar as the current system is inadequate to meet their needs.

Subsequent Reviews of Wrongful Convictions

In very few cases after an exoneration do jurisdictions undertake a review of the case to determine whether there are any “lessons to be learned.” Where those reviews have taken place, generally at the request of prosecutors or law enforcement, the reports have yielded information which has helped agencies revamp procedures and tighten protocols.³⁴ In treating the conviction of an innocent person as a failure of the criminal justice system that should be investigated with an eye toward structural improvements, the Advisory Committee proposes a free-standing Commission on Conviction Integrity.

³⁴ See, e.g., report prepared by Andrews International, “Comprehensive Operational Assessment” at the request of the Will County, Illinois Sheriff’s Office, Criminal Investigative Unit in December, 2010. Available at <http://www.scribd.com/doc/47496706/Andrews-Report>.

Advisory Committee Recommendation: Create a Commission to convene periodically to review reforms adopted by other jurisdictions to ensure the integrity of their convictions, as well as any additional wrongful convictions in Pennsylvania based upon actual innocence after an exoneration to determine their causes and how to avoid their recurrence.

- **Independent Report:** The signers of the Independent Report raise two principal objections to this proposal. First, given their concerns with the way the Advisory Committee itself operated internally, the signers have “serious doubts about the ability of such a commission to carry out its charge in an open, organized, and balanced manner.”³⁵ Second, the Independent Report avers that any such commission should study cases “where the system wrongly *acquits a guilty* defendant.”³⁶
- **Pennsylvania Innocence Project response:** The need for a deconstruction of any case where a factually innocent person was nonetheless convicted of a crime he did not commit is paramount to understanding both how such miscarriages of justice occur and ways in which we can possibly prevent them from happening in the future. Because the proposed commission’s role is merely one of reviewing an already determined case of innocence, the Project supports the creation of such a body. The benefit to our criminal justice system, as well as all of our citizens, from a dedicated governmental entity monitoring cases of wrongful conviction and developments across the country in these related areas is that it will provide our state with a forward-looking approach rather than a reactive one to developments in criminal justice.

CONCLUSION

Whenever an innocent person is convicted of a crime he did not commit, we are all affected. Whether it be the victim who can get no closure, or the public which must deal with other criminal acts from a true perpetrator who escaped justice, there are no winners. Indeed, the only person who benefits from a system that willfully ignores the implementation of practices known to reduce the likelihood of arresting someone who is innocent is the one who committed the crime.

The Pennsylvania Innocence Project applauds the efforts of the Advisory Committee and the signers of the Independent Report in addressing issues related to the tragedy of wrongful convictions, and for their willingness to begin the discussion of updating our law enforcement practices to comport with rising professional standards.

Convicting innocent people is not a new phenomenon to our society, but with efforts like those of all who have contributed to this discussion so far, it need not be a permanent reality.

³⁵ Independent Report, p. 72.

³⁶ Independent Report, p. 72 (emphasis in the original).