
Final Report of the New York State Bar Association's Task Force on Wrongful Convictions

For the Consideration of the House of Delegates • April 4, 2009



Table of Contents

Executive Summary.....	4
<i>Work of Paramount Importance</i>	4
<i>The Formation of the Task Force</i>	4
<i>The First Meeting</i>	5
<i>Mission Statement (Box)</i>	5
<i>The Causes of Wrongful Convictions</i>	6
<i>Additional Information About Case Studies</i>	6
<i>Frequency of Specific Causes Linked to Wrongful Convictions (Chart)</i>	7
<i>The Formation of the Subcommittees</i>	8
<i>The Recommendations of the Subcommittees</i>	8
<i>The Vote of the Task Force</i>	8
<i>Proposals for the Consideration of the House of Delegates</i>	8
Proposals of the Government Practices Subcommittee.....	8
Proposals of the Identification Procedures Subcommittee.....	10
Proposals of the Forensic Evidence Subcommittee.....	12

Proposals of the False Confession Subcommittee.....	13
Proposals of the Jailhouse Informant Subcommittee.....	14
Proposals of the Defense Practices Subcommittee.....	14
Proposals of the Compensation Subcommittee.....	16
<i>Public Hearings by the Task Force</i>	17
<i>Special Thanks from the Task Force</i>	17
<i>Conclusion</i>	18
Final Report of the Government Practices Subcommittee.....	19
Final Report of the Identification Procedures Subcommittee.....	45
Final Report of the Forensic Evidence Subcommittee.....	90
Final Report of the False Confession Subcommittee.....	104
Final Report of the Jailhouse Informant Subcommittee.....	114
Final Report of the Defense Practices Subcommittee.....	121
Final Report of the Compensation Subcommittee.....	128
Appendix A.....	184
Appendix B.....	186
Appendix C.....	187

Executive Summary

A Review of the Task Force's Work



Some Faces of New Yorkers Wrongfully Convicted: Jeff Deskovic, Alan Newton, Anthony Capozzi, Scott Fappiano, and Douglas Warney.

Work of Paramount Importance

When Bernice Leber assumed the presidency of the New York State Bar Association on June 2, 2008, she immediately recognized the need to study the root causes of wrongful convictions in New York and to promulgate any changes necessary to make certain that only the guilty are convicted. She stated, “[f]or each wrongful conviction that surfaces, how many others are still unfairly resolved? Ensuring the fair administration of justice must be the number one priority in our criminal justice system. As leaders of the profession, we have a responsibility to do everything we can to protect the innocent and make sure men and women are not punished – not even for one day – for crimes they did not commit.” To that end, President Leber immediately announced the creation of a Task Force on Wrongful Convictions to carry out this cornerstone of her administration.

The Formation of the Task Force

The Honorable Barry Kamins, immediate past president of the New York City Bar Association and adjunct professor at Brooklyn and Fordham Law Schools, was asked to serve as Chair of the Task Force, and some of the state’s top judges, prosecutors, defense counsel, legal scholars and experts in the field of criminal justice agreed to serve as its Members. A complete roster of the Task Force appears as Appendix A.

MISSION STATEMENT

The number of exonerations in New York undermines the assumption that the criminal justice system sufficiently protects the innocent. Many of the exonerations do not involve DNA evidence. The consequences are far-reaching, considering, among other things, the lengthy incarcerations some defendants have experienced.

The Task Force is charged with identifying the causes for wrongful convictions, and to attempt to eliminate them.

The Task Force shall identify all of the causes of the wrongful convictions and isolate the systemic causes that produced these injustices.

The Task Force shall focus on current rules, procedures and statutes that were implicated in each case and propose solutions in the form of procedural changes and legislation.

The Task Force shall provide opportunities to educate the profession and the public on the causes of these erroneous convictions with the aim of ensuring that our laws, policies and practices are designed to reduce the risk of convicting the innocent and increasing the likelihood of convicting the guilty.

In addition, the Task Force shall review and report on the current remedies/compensation available to those wrongly convicted and propose reforms, where appropriate.

The Task Force shall also prepare a report recommending any appropriate reforms, both by statute, policy and practice, to the Executive Committee and the House of Delegates.

The First Meeting

The first meeting was convened on June 13, 2008, and the Task Force quickly adopted its mission statement (see box at left). In addition, the group defined what it meant by the term “wrongfully convicted.” That definition, which would determine the criteria of those cases which the Task Force would study, was determined to be only those individuals whose New York convictions were subsequently overturned by judicial/formal exoneration.¹

Judge Kamins assigned between 3 to 5 wrongfully convicted individuals to each Member of the Task Force. He asked the Members to carefully review the facts of each case and then draft a detailed report for each that could be reviewed by the entire Task Force. A total of 53 cases were selected, and each Member reviewed all documentation available about

their assigned cases, including but not limited to, court files and various media reports. In

¹ The Task Force does not express an opinion that all 53 exonerees were actually innocent. However, while some individuals may not have been, in fact, innocent, in all these cases the criminal justice system broke down to the degree that a conviction was wrongly obtained.

addition, many Task Force Members interviewed attorneys, law enforcement personnel and judges involved in both the original criminal case and the subsequent exoneration efforts. A list of the 53 wrongfully convicted New Yorkers the Task Force studied is attached as Appendix B.²

The Causes of Wrongful Convictions

As the 53 case studies were carefully reviewed, six root causes were readily identified as primary factors responsible for the wrongful convictions:

- Government Practices: one or more general errors by a government actor (a prosecutor, member of law enforcement, or judge).
- Identification Procedures: the misidentification of the accused by the victim and/or one or more eyewitnesses.
- Mishandling of Forensic Evidence: errors in the handling or preservation of key forensic evidence and/or the failure to use DNA testing.
- Use of False Confessions: the extraction and use of what turned out to be a false confession by the accused.
- Use of Jailhouse Informants: the admission and reliance by the jury on what later was determined to be false testimony by a jailhouse or other informant.
- Defense Practices: one or more errors by an attorney representing the falsely accused, usually a failure to fully investigate or to offer alternative theories and/or suspects.

Additional Information About Case Studies

The case studies also revealed some additional key information that was taken into account by the Task Force when determining what proposals to recommend:

1. Slightly *less* than half of the cases reviewed by the Task Force resulting in a wrongful conviction involved a DNA exoneration. This meant that while scientific advances have played an essential role in helping to prevent wrongful convictions, many other non-

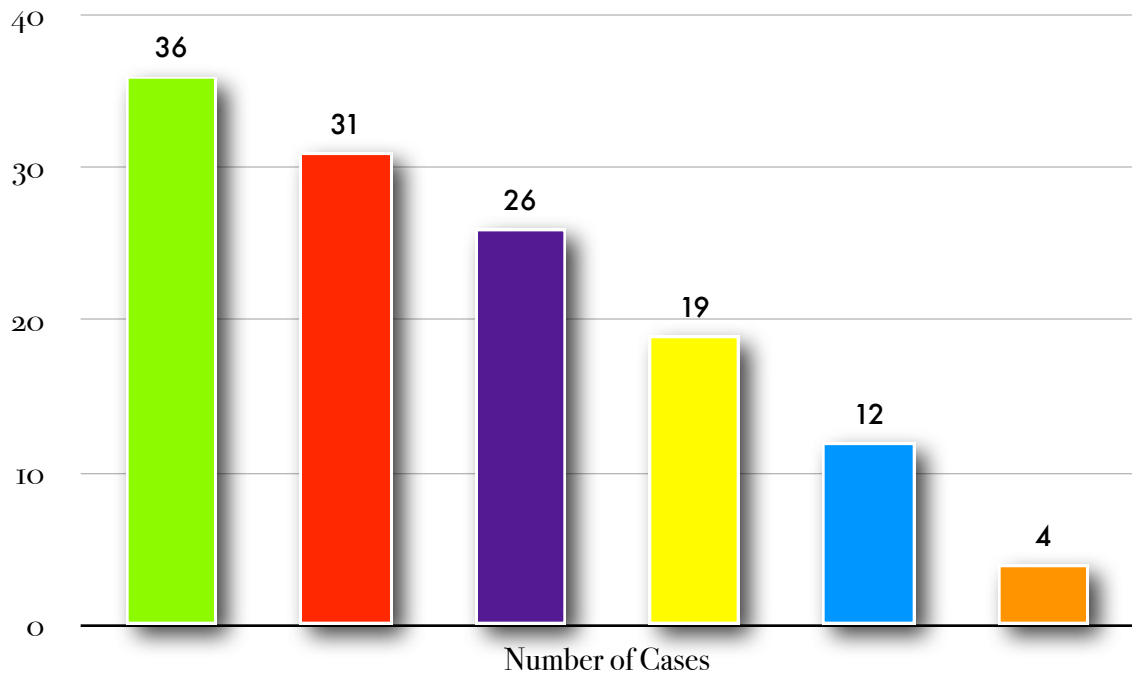
² The case reports detailing the facts of the 53 cases studied by the Task Force will be made a part of this final report as part of an additional appendix.

scientific factors have also been the cause of wrongful convictions and had to be carefully examined and considered.

- As demonstrated in the chart below, certain causes appeared more prevalent than others for causing a wrongful conviction in New York.³ Based on the Task Force’s findings, the top three were (a) misidentification of the accused; (b) general errors by a government actor; and (c) errors in the handling or preservation of key forensic evidence. It should also be noted, that it was extremely rare that only one factor caused a wrongful conviction. The Task Force observed that most wrongful conviction cases resulted from multiple causes.

Frequency of Specific Causes Linked to Wrongful Convictions

■ Identification Procedures ■ Government Practices ■ Forensic Evidence
■ Defense Practices ■ False Confessions ■ Jailhouse Informant



³ These causes were determined by the Task Force following its review of the 53 case studies as described above.

The Formation of Subcommittees

To further study these root causes and the adequacy of the current legal framework to compensate New Yorkers who are wrongfully convicted, the following seven subcommittees were formed on September 12, 2008: (a) Government Practices; (b) Identification Procedures; (c) Forensic Evidence; (d) Defense Practices; (e) False Confessions; (f) Jailhouse Informants; and (h) Compensation for the Wrongfully Convicted.

Each subcommittee was tasked with carefully reviewing (a) each case study; and (b) any current laws, protocols, training procedures, court practices, rules, etc. that were linked to the cause they were assigned to review. Following that, the subcommittees were requested to make specific recommendations of changes they thought appropriate and necessary to eliminate their specific cause of wrongful convictions.

The Recommendations of the Subcommittees

Each subcommittee drafted a report to the entire Task Force detailing its specific proposals and the corresponding reasoning for each. Those reports were circulated to the Task Force in advance of its meeting on November 11, 2008, and can be found at pages 19 - 183, *infra*.

The Vote of the Task Force

The Task Force met on November 11, 2008 and carefully reviewed and discussed each proposal submitted by the seven subcommittees. At the end of each discussion, a vote was taken of those present, and the following specific proposals were passed by a majority for the consideration of the House of Delegates at its meeting on April 4, 2009:

Government Practices

1. In the Event of a Late *Brady* Disclosure, Whether Before or During Trial, the Court Should Grant an Adjournment of Sufficient Length to Enable the Defense to Prepare, and, Where Appropriate, Preclude Evidence, Give an Appropriate Instruction to the Jury and Grant Such Other Relief As Is Appropriate
2. If *Brady* Information Relevant to the Defense Has Not Been Given to the Defense or Has Been Delivered in a Late Turnover, or If False Testimony Is Used at Trial, Relief on

Appeal or Collateral Challenge Should Be Granted Unless the State Shows There Was No Possibility the Information Would Have Affected the Decision

3. Where Procedures Do Not Currently Exist, Prosecutors Should Put in Place Appropriate Internal Procedures for Preventing *Brady* and Truthful Evidence Rule Violations and For Examining, Evaluating, and Determining Whether the Official Conduct of an Assistant Is Improper and Should Be Sanctioned, and If Appropriate Imposing Such Sanctions
4. Under the Rules of Professional Conduct (Superseding the Code of Professional Responsibility), A Statewide Procedure Should Be Established for Identifying and Reviewing Intentional or Reckless Violations of Both *Brady* and the Truthful Evidence Rule
5. A *Brady* Conference Should Be Held Before Trial to Resolve Issues of Turnover
6. Law Enforcement Officials Should Be Trained and Supervised In the Application of *Brady* and Truthful Evidence Rules
7. The Subcommittee on Government Procedures Jointly Recommends the Proposals Submitted by the Subcommittee on Forensic Evidence and Adds the Following:
 - a. First, a careful examination of the crime scene, so fundamental to prosecutions of violent crime, should be conducted.
 - b. Second, evidence should be maintained in a way that ensures its integrity and permits ready retrieval.
 - c. Third, before and after trial physical evidence of all types should be logged and stored to guarantee retrieval.
 - d. Fourth, evidence should not be discarded or destroyed except in conformity with established protocols.
 - e. Fifth, with proper safeguards, before and after trial the defense should enjoy access to physical evidence.

- f. Sixth, where either a prosecution test or a subsequent defense test of a limited sample may destroy the sample, and make future tests impossible, trained representatives of both sides should where practicable be permitted to select the testing procedure and observe the testing.
 - g. Seventh, police department and other prosecutorial agencies should establish, with the advise of biological scientists and other significant experts, a protocol for the testing of samples taken in all cases that meet certain established criteria and that each such case be monitored for compliance with the protocol.
 - h. Eighth, the failure to follow protocols should, where appropriate (as in cases in which public officials have failed to establish procedures or have systematically violated them or the state has acted intentionally to destroy the evidence), give to the defendant at a trial or post conviction procedure the benefit of a permissible presumption that any forensic result would be deemed favorable to the defendant's position.
8. Police Officers Should Be Trained to Investigate Alternate Theories for a Case at Least Until They Are Reasonably Satisfied That Those Theories Are Without Merit

Identification Procedures

- I. Change the Way in Which Identification Procedures (Including Lineups and Photo Arrays) Are Conducted to Enhance the Reliability of Eyewitness Identifications
 - a. *Double blind administration* - The administration of the identification procedure should be performed by persons who do not know the identity of the suspect.
 - b. *Cautionary instructions* - Eyewitnesses should be told that individuals administering the identification procedure do not know who the suspect is and told that the perpetrator may or may not be present.
 - c. *Effective use of fillers* - At least five fillers should be used. If practicable, fillers should be matched to the eyewitness' description of the suspect, but at the same time the suspect should not stand out as being different from the fillers.
 - d. *One suspect per lineup*.

- e. *Documentation of the procedure* - Where the identification procedure is a police-arranged procedure such as a lineup or photographic array, the entire identification procedure should be videotaped with enough cameras with audio to capture the witness, administrator and members of the lineup or photo array. The Task Force specifically believes that the eyewitness' confidence level immediately after identifying an individual should be documented before any feedback is given as to his or her selection. If such video documentation is not possible due to the location or circumstances of the procedure (e.g., the eyewitness is in the hospital), then the procedure should be documented with audio recording and detailed written notes.
 - f. *Sequential presentation of identification procedures* - There is evidence that sequential and double-blind identification procedures result in a reduction in "false positive" results, i.e., identifications of suspects who are in fact innocent of the crime, while other evidence exists which calls this conclusion into question. We propose that further research, including field studies, into the efficacy of sequential versus simultaneous procedures be conducted, and that further recommendations be made following this additional research.
- 2. Allow Expert Testimony on Eyewitness Identifications at Trial
 - An expert should be permitted to testify as to the scientific research surrounding identification procedures, including their administration, reliability and the nature of human memory, in any case where identification is an issue and where such testimony is relevant. In the event that prosecutors or defense attorneys lack the resources to hire an expert on eyewitness identifications, funds should be provided to both prosecutors and defense attorneys to permit the hiring of these kinds of experts.
 - 3. Provide Jury Instructions on Eyewitness Identifications
 - Jury instructions should be provided so that at the time of deliberations, the jury is aware of any potential unreliability in the eyewitness identification. Through jury instructions, jurors should be made aware of the factors to consider in evaluating the reliability of an eyewitness identification. Specifically, in any case where an eyewitness identification procedure is not conducted in accordance with the

improved procedures outlined here (i.e., double-blind; one suspect per procedure; cautionary instructions provided to the eyewitness; effective use of fillers; one suspect per procedure), jurors should be instructed that they may consider the failure to implement the procedure as a factor in accepting or rejecting the identification. Jurors should likewise be instructed that they may consider law enforcement's failure to properly document the identification procedure when deciding whether to accept or reject the in-court identification

4. Evidence of Photographic Identifications Should Be Admitted at Trial If They Are Properly Documented by Video Recording and If They Are Conducted in Accordance With the Proposed Improvements to Identification Procedure (i.e., Double-Blind; One Suspect Per Procedure; Cautionary Instructions Provided to the Eyewitness; Effective Use of Fillers; One Suspect Per Procedure)
5. Failure to Comply With the Proposed Reforms to Identification Procedures Should Be Considered By the Trial Court As a Factor in Determining Whether Evidence of the Eyewitness Identification Should Be Admitted at Trial
6. Police, Prosecutors, Defense Attorneys and Judges Should Be Trained in the Issues Related to Eyewitness Identifications and Should Be Made Aware of the Factors That Can Cause Erroneous Eyewitness Identifications and the Procedures That Can Minimize Them
7. Funding Should Be Made Available to Law Enforcement Agencies to Permit the Implementation of These Proposed Improvements to Eyewitness Identification Procedures

Forensic Evidence

1. Ensure Proper Preservation, Cataloguing and Retention of All Forensic Evidence
 - a. Enact legislation to expand the jurisdiction of the Forensic Science Commission to include responsibility to promulgate mandatory standards for the preservation, cataloguing and retention of all forensic evidence obtained at crime scenes or other locations relevant to the commission of a crime;

- b. Enact legislation to require that all existing forensic evidence, especially biological and fingerprint evidence, which currently exists in local or state warehouses and/or storage facilities, be catalogued using state-of-the-art technology, such as bar-coding;
 - c. Enact legislation to require that all forensic evidence obtained in connection with the commission of a crime be maintained for a minimum of ten years after a person convicted of such crime has been discharged from any post-incarceration period of supervision; in cases where no person has been accused of the crime, all forensic evidence shall be maintained until the expiration of all applicable statutes of limitations for prosecution of the crime.
 2. Expand the Jurisdiction of the Forensic Science Commission to Provide Independent Oversight of Forensic Disciplines
 3. Establish Authority for Judges to Order Comparison of Crime Scene Evidence to Available Forensic Databases Upon Request of an Accused or Convicted Person
 4. Permit Wrongfully Convicted Persons To Prove Their Innocence, Regardless of Whether the Conviction Was the Result of a Trial Verdict or a Guilty Plea
 5. Promulgate Standards and Best Practices To Guide All Law Enforcement Agencies in the Processing of Crime Scenes and the Collection, Processing, Evaluation and Storage of Forensic Evidence
 6. Provide Forensic Science Training for Prosecutors, Defense Lawyers and Judges
 7. Establish a Permanent Independent Commission to Minimize the Incidence of Wrongful Convictions

False Confessions

1. Custodial Interrogations of All Felony-Level Crime Suspects Should Be Electronically Recorded in Their Entirety
2. Specific Training About False Confessions Should be Given to Police, Prosecutors, Judges and Defense Attorneys

3. Further Study Should be Undertaken on the Impact of the Phenomenon of False Confessions on a Defendant's Willingness to Plead Guilty

Jailhouse Informants

1. Any Informant's Testimony Should Be Corroborated (The Corroboration Requirement for the Use of Accomplice Testimony Should Be Extended to Non-Accomplice Informants)
2. The Jury Should Be Instructed to Consider Several Factors Indicating the Extent to Which the Testimony is Credible, Including: (i) Any Explicit or Implied Inducements that the Informant May Have Received or Will Receive; (ii) the Prior Criminal History of the Informant; (iii) Evidence That He or She is a "Career Informant" Who Has Testified in Other Criminal Cases; and (iv) Any Other Factors That Might Tend to Render the Witnesses' Testimony Unreliable
3. The Court Should Conduct a Pre-Trial Reliability Hearing with Respect to the Testimony of Informants
4. When the Court Finds the Need to Protect the Identity of an Informant Compelling, It Should Conduct an In Camera Review of the Information Relating to the Informant's Credibility, and Provide the Defense With All Such Information As May be Provided Without Disclosing the Informant's Identity
5. A Videotape Recording, When Possible, Should be Made of Any Informant's Statement Given to Any Law Enforcement Agent or Prosecutor
6. The Prosecution Should Develop "Best Practices" That Check the Reliability of Informant Testimony

Defense Practices

1. The Task Force Generally Endorses the Specific Recommendations Made by the American Bar Association's Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process and Guideline 4.1 of The National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation

2. Those Standards Should be Widely Publicized by the New York State Bar Association and Distributed Extensively to the Criminal Defense Bar Through the Heads of All Defender Agencies, the Administrators of all Assigned Counsel Plans, and by Malpractice Insurance Providers to Those Attorneys Whom They Insure
3. The Administrators of Assigned Counsel Plans Must Scrutinize More Carefully the Qualifications of Attorneys Seeking Appointment Under the Plan to Represent Indigent Defendants
4. The Administrators of Assigned Counsel Plans Should be Provided with Adequate Resources to be Allocated for Staff to Enable Those Plans to Increase Their Ability to Monitor the Performance of Attorneys Assigned Under the Plan, and, If Possible, to Develop Within the Plan a Structure Which Offers Supervision and Legal Consultation to Plan Attorneys
5. Bar Associations Should Solicit Experienced Members of the Criminal Defense Bar to Make Themselves Available on a Designated Telephone Hotline or in a Specific Office to Fellow Attorneys Who Seek Advice and Counsel With Regard to Their Representation of a Criminal Defendant, and Bar Associations Should Give Formal Recognition in Some Fashion to Attorneys Who Provide Such Mentoring
6. The Rules Governing CLE Credits Should be Amended to Provide That Attorneys Who Undertake the Defense of Criminal Cases Must Certify That in Each Calendar Year They Have Taken a Specified Number of CLE Hours Devoted to Subjects Pertaining to the Representation of Criminal Defendants
7. Organizations Which Currently Operate a Resource Center for Public Defenders and Assigned Counsel Should be Given Additional Resources That Would Enable Them to Increase Their Ability to Provide Guidance and Counsel to Any Attorney, Assigned or Retained, Who Seeks Assistance
8. The Task Force endorses the recommendations of the Report of the Commission on the Future of Indigent Services, June 2006, specifically including the recommendation of an Independent Public Defense Commission to oversee the quality and delivery of public defense services.

Compensation for the Wrongfully Convicted

1. The Broad Definition of Eligibility in the *Court of Claims Act § 8-b Subdivision 2* Should Remain Unchanged to Offer the Opportunity for Legal Redress to All Individuals Who Have Been Imprisoned and Subsequently Found Innocent
2. The Provision Contained in *Subsection (c) of the Court of Claims Act § 8-b* Should Be Amended to Require the Claimant Only Prove That He or She Has Been Exonerated on Every Charge Submitted to the Fact-Finder
3. Contributing to the Conviction in Cases of Attorney Negligence or Coerced Confession Should Not Be a Factor in Determining Appropriate Compensation, and *Subsection (d) of the Court of Claims Act § 8-b* Should Be So Amended
4. A Fixed Minimum Guaranteed Amount Per Year of Incarceration Should Be Set with the Option to Seek More, Upon Satisfying the Requirements Outlined in the *Court of Claims Act § 8-b*. If the Claimant Opt to Seek Additional Compensation, He or She Forfeits the Guaranteed Amount
5. Many State Statutes Include a Provision Prohibiting the State from Offsetting the Total Compensation Awarded by any Expenses Incurred Related to Securing or Maintaining the Claimant's Custody or to Feed, Clothe or Provide Medical Services for the Claimant. It is our Recommendation that Such a Provision be Included in the New York State Statute (*Court of Claims Act § 8-b*)
6. *Subsection 7 of the Court of Claims Act § 8-b* Should Remain Unchanged
7. Based on Need, the Immediate Provision of Subsistence Funds and Access to Services to Assist in Reentry Should Be Provided to All Individuals Who Have Been Released from Prison After Exoneration. Such Services Should Include Assistance in Acquiring Affordable Housing, Job Training, Education, Health Care, and Child Custody Assistance
8. The Claimant Should Not Be Eligible for Compensation for Any Term of Incarceration that was Attributable to a Separate and Lawful Conviction Resulting in a Concurrent Term of Imprisonment

9. State Law Should Specify That Upon the Death of a Wrongfully Imprisoned Individual, Any Compensation Awarded Will Be Paid to His or Her Estate
10. The State Should Automatically Order the Expungement of All Criminal Records Related to the Wrongful Arrest, Conviction and Sentence at the Expense of the State Upon Exoneration. Such Records Shall Only Be Available to a Claimant and the State in an Unjust Conviction and Imprisonment Claim Upon Application to the Court

Public Hearings by the Task Force

The Task Force held two public hearings, the transcripts of which are attached as Appendix C. The first occurred on February 13, 2009 at the offices of the New York City Bar Association. The second hearing took place on February 24, 2009 at the New York State Bar Association in Albany.

Special Thanks from the Task Force

The Task Force is truly indebted to the many individuals and institutions that generously assisted it in completing its work. Specifically, the Task Force would like to thank:

- Arent Fox LLP - Darsche Turner, Aimee Hall, Shawanna Johnson and Tope Yusuf
- Fried, Frank, Harris, Shriver & Jacobson LLP – Jennifer Colyer, Steven Witzel, Holly Chen, Lauren Flicker, Amanuel Kiros, Charlotte Levy, Aleksandr Livshits, Maya Mitchell, Andrew Smith, Johnathan Smith and Scott Wells
- The Fortune Society - Harvey Weinig; and Daniel Spiegel and Ariel Ruiz (law students)
- The Innocence Project - Barry Scheck, Peter Neufeld, Madeline deLone, Rebecca Brown and Gabriel Oberfield
- The Law Offices of Robert C. Gottlieb – Celia A. Gordon, Jordan M. Dressler and Sarah E. Eagen
- Morrison & Foerster, LLP - Emily Hutters (Associate); Cindy Abramson, Amanda Bakale, Tim Cleary, Steve Koshgerian, Leda Moloff, Suhna Pierce, Sarah Prutzman, Ariel Ruiz, Ben Smiley and Katie Viggiani (Summer Associates 2008)

- National Association of Criminal Defense Lawyers - Quintin Chatman and Daniel Weir
- The New York State District Attorney's Association
- Jon Getz, Don Thompson, Gary Craig, Frank R. Dudis, Esq. and William Easton

Conclusion

As stated in the Task Force's Mission Statement, any wrongful conviction erodes the public's confidence in our state's criminal justice system. It is equally clear that these improper convictions destroy the lives of innocent men and women - both the falsely accused *and* the victims of the original crime. We have the ability to learn from our mistakes and avoid these miscarriages of justice. For these and for the multitude of other reasons presented in this report, the Task Force on Wrongful Convictions respectfully urges the House of Delegates to pass the specific proposals presented herein at its meeting on April 4, 2009.

Respectfully submitted,

Hon. Barry Kamins
Chair, Task Force on Wrongful Convictions

Richard Aborn, Esq.
Jack Auspitz, Esq.
Hon. Phylis Skloot Bamberger
Thomas Belfiore
David Louis Cohen, Esq.
Tracee Davis, Esq.
Hon. Janet DiFiore
Vincent E. Doyle, III, Esq.
Mark Dwyer, Esq.
Anthony Girese, Esq.
Robert C. Gottlieb, Esq.

Prof. William Hellerstein
Hon. Charles J. Hynes
Hon. Howard Levine
Hon. John Martin
JoAnne Page, Esq.
M. Scott Peeler, Esq.
Norman L. Reimer, Esq.
Prof. Laurie Shanks
Hon. George Bundy Smith
Lauren Wachtler, Esq.

Government Practices

SUBCOMMITTEE REPORT AND FINAL PROPOSALS

Introduction

The results of the Task Force’s case studies, in which 53 people were wrongfully convicted, reveal that government practices, by police or prosecutors, were possible causes of the wrongful convictions in over 50% of the cases. These practices include (1) the use of evidence that is false, including false testimony about police promises, threats and offers of benefit to a state witness, *see Shih Wei Su v. Fillion*, 335 F.3d 119 (2d Cir. 2003); (2) the failure of the prosecutor to deliver favorable information to the defense pursuant to the New York State and Federal constitutional due process principles as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and earlier New York authorities; (3) the failure of the police department to collect and transfer evidence in a manner that preserves its integrity, and to store, preserve, and safeguard physical evidence for testing or examination or retesting, especially for testing based on advancing scientific technologies, and the failure, to have physical objects tested for forensic evidence that might confirm or refute a person’s involvement in a crime; and (4) the early prosecutorial focus, especially by the police, on a particular individual as the person who committed the crime coupled with a refusal to investigate to determine if there is a basis to believe, based on available information, that someone else may have committed the crime.

Even if cases do not reveal an actually innocent person being wrongfully convicted, they nonetheless often reveal troubling due process violations that may result in a defendant being denied a fair trial. The analysis and recommendations presented in this report reflect concern for the application of due process principles in all cases - not just those that involve a wrongful conviction.

Use of Perjured and False Testimony or Evidence

“Since at least 1935 [in *Mooney v. Holohan*, 294 U.S. 103] it has been the established law of the United States that a conviction obtained through testimony the prosecutor knows to be false is repugnant to the Constitution....This is so because, in order to reduce the danger of false convictions, we rely on the prosecutor not to be simply a party in litigation whose sole object is the conviction of the defendant before him. The prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost.” *Shih Wei Su*, 335 F.3d at 126.

The same principle is part of New York based jurisprudence: “[t]he prosecutor should ... correct...[false] trial testimony given by [the witness] and the impression it created....[The] failure to do so constitutes ‘error so fundamental , so substantial’ that a verdict of guilt will not be permitted to stand....A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.” *People v. Savvides*, 1 N.Y.2d 554, 556-57 (1956).

Despite the age and clarity of the law, violations of these principles occur. In fact, two clear examples appeared in wrongful conviction cases studied by the Task Force:

In the case of James Walker, a prosecutor testified during pretrial proceedings that no lineup had been held when in fact a lineup had occurred and a filler-police officer, not Walker, was identified as the person who assaulted a victim in the crime. The detective in the case testified he did not recall a lineup.⁴

Similarly, in the case of Albert Ramos, the prosecutor appears to have either misled or falsely argued to the jury that it was the alleged sex act by the accused that enabled the child to explain what occurred during the crime. However, undisclosed files showed the child knew about sexual conduct before and acted it out before the alleged crime. Further, when the prosecution witnesses changed their stories, the prosecutor did not inform the defense of the change and the defense could not deal with the changes because the defense did not have the

⁴ The 1972 conviction of James Walker was not obtained during the tenure of the current District Attorney of Kings County. When Mr. Walker filed his 440 motion to vacate judgment in 1990, the current District Attorney had his office promptly investigate the allegations and then consented to the vacatur of the conviction and the dismissal of the indictment.

witnesses' prior statements. Finally, it was not disclosed to the defense that the child's own acts could have caused the injury she sustained.

Other cases are also instructive. In *People v. May*, 228 A.D.2d 523 (2d Dep't 1996), the conviction was reversed because the prosecutor did not reveal or correct false testimony about a promise regarding sentencing of a prosecution witness; and in *People v. Ross*, 43 A.D.3d 567(3d Dep't), *appeal denied* 9 N.Y.3d 964 (2007), false testimony was used, but no reversal was required because the trial judge established a curative procedure. *See also People v. Pressley*, 91 N.Y.2d 825 (1997), where uncorrected false testimony was used, although it was deemed not to be prejudicial.

Violation of the *Brady* Rule

All prosecutors in all cases have an obligation to deliver exculpatory and favorable information to the defense relevant to the issues of guilt and punishment. In *Brady v. Maryland*, where the evidence was relevant to the determining punishment, the U.S. Supreme Court held that the turnover of the information is a requirement of due process. 373 U.S. at 86-89.

New York State has set the rule with equal clarity. The Constitution's mandate is that evidence or information be given to the defense in a criminal case if it is favorable to the defense and it is either material to guilt or punishment or affects the credibility of prosecution witnesses whose testimony may be determinative of guilt or innocence. *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000), *cert. denied*, 532 U.S. 1008 (2001); *People v. Baxley*, 84 N.Y.2d 208, 212-14 (1994). "The concept of fairness embodied in the Due Process Clauses of the State and Federal Constitutions imposes upon the prosecution a duty to apprise the defense of evidence favorable to the accused. To give substance to this constitutional right, it is incumbent upon the prosecutor, who speaks for the government, to ensure that material evidence which is in its possession and is exculpatory in nature is turned over to the defendant. This duty of candor and disclosure is no less applicable when the evidence is relevant only to the issue of credibility." *People v. Novoa*, 70 N.Y.2d 490, 496 (1987) (citations omitted).

The significance to the New York justice system of the due process principle and the resulting prosecutor's obligation, now simply called "Brady," is manifested in the independent State constitutional grounds for the rule. "[The Court of Appeals] analysis of the prosecutor's duty to disclose exculpatory evidence is rooted in [state]cases dealing with the similar question of

knowing prosecutorial use of false and misleading testimony....[T]hese cases even predate the identified Federal progenitors of *Brady*, and were decided entirely without reference to Federal law, based on our own view of this State’s requirements of a fair trial... We have long emphasized that our view of due process in this area is, in large measure, predicated both upon ‘elemental fairness’ to the defendant, and upon concern that the prosecutor’s office discharge its ethical and professional obligations.” *People v. Vilardi*, 76 N.Y.2d 67, 75-76 (1990) (citations omitted). *Vilardi* makes clear that the New York rule has two due process purposes: inhibiting prosecutorial misconduct and providing a fair trial to a person charged with a crime.

The *Brady* rule has necessarily yielded principles to allow practical application by trial judges who must enforce it and prosecutors who must follow it:

1. *Brady* obligations apply whether there has been a defense request or not. *United States v. Agurs*, 427 U.S. 97 (1976).
2. The obligation of the prosecutor to turn over the information controls even if the prosecutor believes the information to be false.
3. The obligation of the prosecutor applies to information relevant to the credibility of witnesses as well as to information relating to other matters in the case. *People v. Hunter*, 11 N.Y.3d 1 (2008); *People v. Valentin*, 1 A.D.3d 982 (4th Dep’t 2003), *appeal denied*, 1 N.Y.3d 602 (2004).
4. The obligation of the prosecutor exists whether the failure to deliver favorable information is intentional or not, or in good faith or not. *People v. Hunter*, 11 N.Y.3d 1 (2008); *People v. Bryce*, 88 N.Y.2d 124 (1996); *People v. Baxley*, 84 N.Y.2d 208.
5. Even without personal knowledge of the favorable or exculpatory information, the prosecutor is charged with knowledge if a state official working on the case has the information. The prosecutor has a duty to learn of any favorable evidence known to others acting on the state’s behalf, including the police, and to disclose the information. *Youngblood v. West Virginia*, 547 U.S. 867 (2006); *Kyles v. Whitley*, 514 U.S. 419 (1995); *People v. Santorelli*, 95 N.Y.2d 412; *People v. Wright*, 86 N.Y.2d 591 (1995); *People v. Novoa*, 70 N.Y.2d 490; *People v. Harris*, 35 A.D.3d 1197 (4th Dep’t 2006); *People v. Valentin*, 1 A.D.3d 982.

6. Activities by those working on an investigation that result in a suppression of the information are attributed to the prosecutor. *People v. Steadman*, 82 N.Y.2d 1 (1993).
7. Late disclosure of favorable information during trial is satisfactory if the defense has the opportunity to investigate and integrate the information into the defense position. *See People v. Baba-Ali*, 179 A.D.2d 725 (2d Dep't 1992); *People v. Watson*, 17 A.D.3d 385 (2d Dep't 2005), *appeal denied*, 5 N.Y.3d 771.

In one situation the prosecutor is relieved of the obligation to turn over favorable information: if the defense knew or should have known the information. *People v. Doshi*, 93 N.Y.2d 499 (1999). *See, e.g., People v. McClain*, 53 A.D.3d 556 (2d Dep't), *appeal denied*, 11 N.Y.3d 791 (2008); *People v. Delarosa*, 48 A.D.3d 1098 (4th Dep't), *appeal denied*, 10 N.Y.3d 861 (2008)

All types of information fall within the types of evidence which must be disclosed to the defense: *e.g.*, (1) promises to a witness, actual or implied on any reading of the information (*People v. Steadman*, 82 N.Y.2d 1); (2) prior criminal record or bad acts of the witnesses; (3) prior inconsistent statements of a witness (*People v. Bond*, 95 N.Y.2d 840 (2000); *People v. Cantt*, 13 A.D.3d 204 (1st Dep't 2004), *appeal denied*, 4 N.Y.3d 798 (2005)); (4) information derived from any investigation made by an agency of the state working on the case including police reports and the results of interviews (*People v. Harris*, 35 A.D.3d 1197); (5) physical evidence including human body parts (*People v. Bryce*, 88 N.Y.2d 124) and body fluid samples; (6) evidence obtained through forensic testing; (7) photographs; (8) investigative communications with other branches of government (*People v. Cwikla*, 46 N.Y.2d 434 (1979)); (9) information about a motive to testify (*People v. Wright*, 86 N.Y.2d 591); (10) a failure to correct false testimony (*People v. Steadman*, 82 N.Y.2d 1; *People v. Novoa*, 70 N.Y.2d 490; *People v. Ross*, 43 A.D.3d 567 (3d Dep't 2007), *appeal denied*, 9 N.Y.3d 964 (2007)); (11) recantation of a statement by a witness (*see People v. Baxley*, 84 N.Y.2d 208); (12) a failure to

disclose the conduct of the complainant that would impeach credibility (*People v. Hunter*, 11 N.Y. 3d 1).⁵

The obligation of prompt turnover is a continuing one triggered by *Brady* material coming to the knowledge of anyone working on or associated with the investigation of the case. By statute, Criminal Procedure Law section 240.20, delivery is required once a pretrial defense motion is made and granted. Often *Brady* material is not delivered until just before the trial begins or during the trial even if the state is in possession of the information earlier. It has been held that the failure to give the defense exculpatory evidence, which the prosecutor had for several months, until the eve of trial was inexcusable. *People v. Baba-Ali*, 179 A.D.2d at 729-30.

Examples of several cases examined by the Task Force demonstrate the presence of this issue.

In the case of Lazaro Burt, a detective interviewed an eyewitness to a shooting six days after the crime. The eyewitness was in jail and accessible to the police. The eyewitness told the detective the name of the person who was the shooter, and that the person was not Mr. Burt. The statement was written down and placed in the file of the case. The defense made pretrial *Brady* motions and the prosecutor made no reference to the statement. The record of the trial shows that the defense did not receive a copy of the statement until the fifth day of the trial, 16 months after the shooting, when the witness could no longer be found. The jury never knew that a person other than Burt had been named as the shooter.

In the matter of Kerry Kotler, the complainant was raped. A few minutes later, another person was raped nearby. The perpetrator of the second rape matched the description given by the complainant. The second victim was shown Kotler's photo but did not identify him, thereby permitting the argument that someone other than the accused also committed the earlier crime. The defense was not told about the second rape and the failure of the second victim to identify

⁵ Certain members of the Task Force note that for decades the federal and state decisional law requires the non-disclosed information to affect guilt or innocence *materially* for a violation of the rule to have occurred. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 691 (2004) (suppressed evidence must be “material” to demonstrate one of the components for a Brady violation); *United States v. Agurs*, 427 U.S. 97, 112 n.20 (1976) (the materiality standard focuses on the impact of the undisclosed evidence on the “issue of guilt or innocence,” not on the “defendant’s ability to prepare for trial”) (citation omitted); *People v. Pressley*, 91 N.Y.2d 825 (1997) (false testimony of witness about criminal record does not require reversal when no prejudice demonstrated).

Kotler. Further, the defense was not told that when the complainant selected Kotler's photograph, she said only that he *looked* like the rapist. Finally, the lead detective on the case destroyed both his original notes about the second rape and the original of the police report. Kotler learned all of this after the conviction. While the *Brady* violation was not the sole cause of the wrongful conviction, it might have contributed to it.

In the case of James Walker, Mr. Walker was identified by a drug addict several months after the crime as the person who assaulted a guard at a check cashing store during a robbery in which another victim was killed. After the conviction of Walker for felony murder, Walker learned that the addict-informer had identified another person as one of the participants in the crime – which had to have been a lie because that other person was in jail at the time of the robbery. The defense was never told that the informer had wrongly accused someone else. Further, Walker was not told that the man whom he was accused of beating had not identified him in a lineup, but rather selected a filler who was a police officer.

In the Albert Ramos matter, Mr. Ramos was charged with sexual abuse of a child. Several exculpatory documents in the district attorney's file were never given to the defense. These documents cast doubt on the testimony of the prosecution witnesses including the child complainant, her mother, grandmother, and teacher, and supported the defense contention that no act of sexual abuse occurred. The documents showed that the child masturbated, watched sexually explicit movies, and placed dolls in sexual positions – all before the date of the alleged incident. The information rebutted the testimony about the knowledge of the child about sexual conduct and explained the presence of her symptoms.

In the matter of George Whitmore, the defense was not told that a button obtained by the victim from the coat of her attacker could not be scientifically shown to have come from Whitmore's coat.⁶

In the case of Lee Long, a detective confirmed Long's alibi at the time of Long's arrest but prepared no report with respect to the information obtained. The alibi witness did not

⁶ Eugene Gold, former District Attorney of Kings County, reviewed the circumstances of Mr. Whitmore's Brooklyn conviction (that arose out of an investigation in New York County and had been obtained by his predecessor). Based on that review, District Attorney Gold moved to set aside the conviction and asked the Court to dismiss the indictment.

remember the detective's name and had no way to support the challenge to the defense position. The *Brady* obligation was avoided by the detectives' failure to record the information.

And finally, in the Betty Tyson case, Ms. Tyson was charged with murder. A police report showing that a witness' claim that Tyson had been with the deceased on the night of the murder was fabricated was not given to the defense. (The original statement was false, having been obtained by the police by coercive conduct.)

The cases before the Task Force generally deal with convictions that are more than ten years old, raising the hope that times have changed and that violations will now be rare. However, despite the clarity and longevity of the *Brady* rule, a sampling of recent published or otherwise available decisions show such conduct still occurs. *See, e.g., People v. Hunter*, 11 N.Y.3d 1 (2008); *People v. Williams*, 7 N.Y.3d 15 (2006); *People v. Pressley*, 91 N.Y.2d 825 (1997); *People v. Thompson*, 54 A.D.3d 975 (2d Dep't 2008); *People v. Phillips*, 55 A.D.3d 1145 (3d Dep't 2008); *People v. Colon*, 865 N.Y.S.2d 601 (1st Dep't 2008); *People v. Williams*, 50 A.D.3d 1177 (3d Dep't 2008); *People v. Garcia*, 46 A.D.3d 461 (1st Dep't 2007); *People v. Harris*, 35 A.D.3d 1197 (4th Dept. 2006); *People v. Leon*, 23 A.D.3d 1110 (4th Dep't), *appeal denied*, 6 N.Y.3d 755 (2005); *People v. Gantt*, 13 A.D.3d 204 (1st Dep't 2004), *appeal denied*, 4 N.Y.3d 798 (2005); *People v. Hendricks*, 4 A.D.3d 798 (4th Dep't), *appeal denied*, 2 N.Y.3d 800 (2004); *People v. Knight*, 2007 WL 4896695 (Supreme Ct. Queens Cty. 2007). *See also* Elizabeth Napier Dewar, *A Fair Remedy for Brady Violations*, 115 Yale L.J. 1450, 1453-56 (2006) (hereinafter "Dewar"). Neither are the federal courts immune from *Brady* issues. *See, e.g., United States v. Theodore F. Stevens*, 1:08-CR-231 (D.D.C.) in which the prosecutor excised favorable material from a document given to the defense and questions arose as to whether the conduct was accidental and whether the sanction was adequate.

Subcommittee Recommendations

A. Remedies Relating to the Case

- I. In the Event of a Late *Brady* Disclosure, Whether Before or During Trial, the Court Should Grant an Adjournment of Sufficient Length to Enable the Defense to Prepare, and, Where Appropriate, Preclude Evidence, Give an Appropriate Instruction to the Jury and Grant Such Other Relief As Is Appropriate

Note

Pretrial and trial obligations of the prosecutor to disclose and turn over favorable, exculpatory, and truthful information relevant to the defense are not limited by the factors that a reviewing court would consider on appeal or collateral attack if there were an improper failure to turn over information. The obligation of prosecutors and other public officials arises when the investigation begins and continues throughout the proceeding. The prosecutor and the judge in the trial court deal with the issue of the prosecutor's responsibility: what the prosecutor actually knows, or is deemed to know, or is expected to learn, and what the prosecutor is expected to disclose to the defense.

When claims of violation of *Brady* or the use of false testimony arise before the trial ends, the judge determines the appropriate corrective action. *People v. Williams*, 7 N.Y.3d at 19-20. If the issue arises at pre-trial proceedings, the judge can order a new hearing or reopen the earlier one. *Id.* At trial, the judge can grant an adjournment to enable the defense to investigate and prepare; can preclude the presentation of evidence; or can give an instruction to the jury that is adverse to the prosecution. Dewar, 115 Yale L.J. at 1457-60.

The needs of the defense are critical to determining the length of an adjournment. Additional investigation, including researching government and public documents, finding witnesses whose whereabouts may be unknown, and conducting forensic tests on physical evidence may be required.

2. If *Brady* Information Relevant to the Defense Has Not Been Given to the Defense or Has Been Delivered in a Late Turnover, or If False Testimony Is Used at Trial, Relief on Appeal or Collateral Challenge Should be Granted Unless the State Shows There Was No Possibility the Information Would Have Affected the Decision

Note

Under New York law, if there is a conviction followed by appellate review or collateral challenge to the conviction, the rules of the game change for evaluating a *Brady* violation or the use of false testimony. On appellate review or in collateral proceedings, issues of prejudice and preservation are relevant to the granting of a remedy to the convicted person for improper prosecutorial conduct. *See People v. Ennis*, 2008 N.Y. Slip Op. 09007 (N.Y. Nov. 20, 2008).

The prosecutor's failure to deliver favorable information pursuant to a defense request results in a new trial or dismissal of the case if the defendant shows that the undelivered evidence had a reasonable possibility of affecting the verdict. If there was no specific defense request for *Brady* material, the defendant must show there was a reasonable probability that the undelivered information affected the outcome of the case. *People v. Vilardi*, 76 N.Y.2d 67.

By making it easier to overturn a conviction where the defense had made a specific request, the Court of Appeals intended to emphasize the seriousness of the State's failure to act knowing that the defense was interested in a particular piece of information. *Compare United States v. Bagley*, 473 U.S. 667 (1985) (which applies the same test for prejudice whether or not a request for information was made by the defense and rejected the two levels of prejudice previously set out in *United States v. Agurs*, 427 U.S. 97 (1976)). The *Vilardi* standard for relief is critical to the enforcement of the *Brady* and truthful evidence rules, for under current law it is the primary means for providing a remedy for the State's improper conduct.

Despite *Vilardi*, there have been a sufficient number of cases in which *Brady* has not been followed to warrant a change in the post-conviction test justifying a remedy for the defendant. Under the circumstances, it is appropriate to seek a change in the *Vilardi* test. The Subcommittee believes that the *Vilardi* test which provides a remedy for the failure to turn over information under *Brady* or for using false information should be revised to require that the State show there was no possibility of prejudice to the convicted person.⁷

B. Procedures Relating to the Prosecutor

In addition to remedies for the convicted defendant whose case involved improper State conduct, official conduct should be examined and evaluated to determine if sanctions are warranted.

⁷ Certain members of the Task Force do not approve of the second recommendation for the following two reasons. First, the recommendation appears to require reversal even when there is no "knowing" use of false testimony. Second, in determining when a reversal is appropriate, *Vilardi* strikes the appropriate balance among the significant interests implicated. The recommended rule could mean windfall reversals for guilty defendants, as it seems to require virtually automatic reversal for *any* violation (even in cases in which courts employed remedies), unless the prosecutor can demonstrate "no possibility" that the violation affected the verdict, a burden unclear and impossible to meet.

Research has not revealed public disciplinary steps against prosecutors. Private or sealed proceedings by prosecutors' offices or Appellate Division grievance committees are not available. Cases in the State Court of Claims for damages do not sanction prosecutors, but rather the State. Often, the name of the state official is not mentioned in any public document. There is little or no risk to the specific official involved resulting from a failure to follow the rule. Dewar , 115 Yale L.J. at 1456 n.26 and resource materials cited therein.

3. Where Procedures Do Not Currently Exist, Prosecutors Should Put in Place Appropriate Internal Procedures for Preventing *Brady* and Truthful Evidence Rule Violations and for Examining, Evaluating, and Determining Whether the Official Conduct of an Assistant Is Improper and Should be Sanctioned, and If Appropriate Imposing Such Sanctions

Note

After discussion with the Task Force, the Subcommittee on Government Practices sent to the District Attorneys of the State a questionnaire asking if the offices had internal procedures for dealing with *Brady* and truthful evidence rule violations; the nature of those procedures; what sanctions were available for misconduct; whether the sanctions had ever been imposed; and whether referrals to attorney disciplinary committees had ever been made. Responses were received from twenty offices and the New York State District Attorneys Association. One office declined to respond because of pending litigation. The Task Force deeply appreciates the time and interest of those who submitted answers to the inquiries.

Many of the questionnaire responders provided comments in addition to answers to the inquiries. The view of several was that the nature of the conduct was critical in deciding both whether there was a violation of the rules and whether a sanction should be imposed. One response listed the factors to be considered: (1) the nature of the conduct; (2) the explanation for the conduct; (3) the experience of the assistant; and (4) the performance record of the assistant.

Many urged that a distinction be made between intentional misconduct and negligent conduct or mistakes, with sanctions determined on a case-by-case basis. It was the widely expressed view that intentional violations of the rules should not be tolerated, and could result in a range of sanctions, including termination of employment. Mistakes or negligence should be

treated less severely, perhaps with a letter to the file, loss of accrued time, demotion, and the imposition of further training and supervision.

The questionnaire answers revealed that in some counties there was a procedure, either formal or informal, for handling misconduct or that the office had a small number of assistants so that the District Attorney either handled the cases or supervised the assistants personally. Some offices had no procedures. Generally, the available internal procedures were review of the questioned conduct by the District Attorney or the Chief Attorney with a report to the District Attorney. In one office, the Chief of Appeals was involved in the review process.

Although the questionnaire responses showed the imposition of one internal sanction and one referral to a disciplinary committee, the other responses indicated no other instances of either an internal sanction (including training or supervision) or referrals to the various disciplinary committees. Many of the responders to the questionnaire explained that there had been no need to impose a sanction or even to have a process for examining conduct because there had been no questionable conduct identified or found by a court. Others added that there had been none in many years.

Several of the questionnaire responses focused on efforts to prevent *Brady* and truthful evidence rule violations or the harm that might result from such violations. One tool is education and training, especially emphasized in the letter from the District Attorneys Association. The second is close supervision by a senior assistant or the District Attorney of all new Assistant District Attorneys. The third is open file discovery which reduces the chance that information will not be disclosed. The fourth is to elicit information about sentence and other promises from a prosecution witness on direct examination. And fifth is the revelation to the court and the defense of what has occurred along with the previously undisclosed information to avoid harm to the defense.

Barry Scheck, Director of the Innocence Project, testified at the New York City hearing that District Attorneys' Offices, 18(b) Panel Administrators, Public Defender Offices, and retained counsel (through bar associations) should have compliance officers who would receive confidential complaints from trial and appellate judges concerning possible attorney misconduct. This internal review system would deal with "obvious" misconduct, negligent conduct and "malperformance" unless it was determined that the case should be referred immediately for disciplinary procedures. NYC Hearing at 75-78.

Joel Rudin, a lawyer representing wrongfully convicted individuals in civil lawsuits, testified that through discovery in those civil matters, he obtained the personnel records of line prosecutors in several counties who had prosecuted approximately 200 cases between the late 1970's and 2003 where courts found (a) "misconduct" for Rosario or Brady violations; (b) use of misleading or false testimony; and (c) improper arguments in summation. Rudin further testified that he had found evidence of only two prosecutors involved with those cases who were formally disciplined by their offices. NYC Hearing at 143-145. Some Members of the Task Force asked Rudin to acknowledge that the term "prosecutorial misconduct" is broadly used and would include clear cases where discipline would not be appropriate. *Id.* at 151-157.

Where there is no effective procedure already in place for preventing, identifying and sanctioning misconduct, prosecutor's offices should establish such a procedure appropriate to its staffing. In cases in which a state or federal court has concluded that an Assistant District Attorney has violated the rules, the prosecutor's process should determine the appropriate sanction, including dismissal from employment. If the court has not made such a finding, where questions about an assistant's behavior are raised, the office should undertake an investigation of the conduct and determine if there has been unconstitutional conduct and, if so, the appropriate sanctions to be imposed.

4. Under the Rules of Professional Conduct (Superseding the Code of Professional Responsibility), A Statewide Procedure Should Be Established for Identifying and Reviewing Intentional or Reckless Violations of Both *Brady* and the Truthful Evidence Rule

Note

The case for the application of disciplinary rules to prosecutors whose conduct violates *Brady* and the truthful evidence rule was carefully and exhaustively made over twenty years ago. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693 (1987). After extensive research, it was reported in the article that a

system in which there are rules of conduct that apply generally to all lawyers and specifically to prosecutors provides a comprehensive network of prohibitions to *Brady*-type misconduct.⁸

To the extent that conduct must be evaluated to determine if *Brady* and truthful evidence rule violations occurred, the Rules of Professional Conduct define the behavior that is improper and the State’s disciplinary rules provide existing procedure for dealing with the issues.

The Rules of Professional Conduct contain one provision that specifically applies to prosecutors and several other provisions that are applicable to all attorneys. Rule 3.8(b) states “[a] prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.”

The language of Rule 3.8(b) expands the scope of what prosecutors were required to disclose under the former Code of Professional Responsibility DR7-103(B). Under the prior Code, prosecutors were mandated to disclose evidence while the language of Rule 3.8(b), requires disclosure of both evidence and information.

Other rules relate to the responsibilities and obligations of all lawyers, prosecutors, criminal defense lawyers, and lawyers in civil cases.

The language of Rule 3.3(a)(1) could be applied to making knowingly false statements to a court about *Brady* material: “[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”

⁸ There can be no thorough empirical study of how New York State’s disciplinary system has functioned in this regard due to the secrecy imposed by Judiciary Law Section 90. Moreover, it is obvious that not all violations of the *Brady* rule are appropriate bases for disciplinary sanctions. Some witnesses at the New York City public hearing, lawyers with knowledge of and involved in the litigation of cases involving wrongful convictions, stated that in their experience there is little use of disciplinary procedures when a *Brady* violation occurs. Some Task Force Members express the belief, like Rosen, that the disciplinary system frequently fails to investigate and bring charges when *Brady* violations occur. Other Members of the Task Force believe, based on their own experience, that investigations do occur in appropriate cases.

Rule 3.3 (a)(3) states “[a] lawyer shall not knowingly offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”

Rule 3.4(a) instructs that “[a] lawyer shall not (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce; . . . (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal; (4) knowingly use perjured testimony or false evidence.

Conduct within the language of these rules is the deliberate withholding of evidence that tends to exonerate the accused and is a “fraudulent act,” “conduct involving bad faith” as well as a “fraud on the court” which “undermines the integrity of the proceeding.” *Baba Ali v. State of New York*, 20 A.D.3d 376,377 (2d Dep’t 2005). The conduct that may be within the scope of the Rules and the conduct that might warrant a reversal or vacature of a judgment of conviction may not be identical or exactly overlapping, but a disciplinary process that is focused on intentional or reckless behavior is likely to adequately emphasize the importance of the rule.

There is of course a procedural mechanism in place for examining claimed intentional and reckless violations of the rules. Each of the Appellate Divisions has established a disciplinary committee with counsel and staff to investigate and prosecute matters involving alleged misconduct by attorneys and the procedures for doing so. 22 NYCRR Part 603 (First Department); 22 NYCRR Part 691 (Second Department); 22 NYCRR Part 806 (Third Department); 22 NYCRR Part 1022 (4th Department). Investigations are begun by the filing of a specific complaint or by the committee *sua sponte*. Section 603.4(c) (First Department); Section 691.4(c) (Second Department); Section 806.4 (Third Department); Section 1022.19 (Fourth Department).

It is during these investigations that the committee makes a determination as to whether the conduct of the lawyer is serious enough to commence a disciplinary proceeding before the court. The test is whether there has been, under Judiciary Law section 90(2), professional misconduct. Such conduct is defined as conduct in violation of the rules of the Appellate Division, the Code of Professional Responsibility and the Canons of Professional Responsibility,

or other rules setting out the standards for attorney conduct. Sections 603.2, 605.4 (First Department); Section 691.2 (Second Department); Section 806.2 (Third Department); Section 1022.17 (Fourth Department). The Judiciary Law section 90(2) also includes as sanctionable conduct fraud, deceit, and conduct prejudicial to the administration of justice.

When, after the investigation, the committee determines that no action is warranted, the complaint is dismissed, or, if the investigation was begun *sua sponte*, the investigation is closed. If after the investigation, the committee decides that the acts of misconduct have been established by clear and convincing evidence, but the conduct is not serious enough to warrant a disciplinary proceeding, the committee may issue lesser sanctions, including admonishing the attorney, cautioning the attorney, issuing a letter of education, or issuing an admonition or reprimand, depending on the Department's rules. Section 806.4(c) (Third Department); Sections 603.9, 605.2(a)(1),(22) (First Department); Section 691.4(e) (Second Department); Section 1022.19 (Fourth Department). Procedures are available to the attorney to explain or challenge the accusation.

If the conduct is more serious, the conduct may be brought before the court in a disciplinary proceeding. There is a formal hearing and only the court or its designated subcommittee has the power to censure, suspend, or remove the attorney from office. Judiciary Law section 90 (2); Sections 603.4(d), 605.2(a)(12), 605.5 (First Department); 691.4 (Second Department); Section 806.4(c) (Third Department).

Conversations with counsel for attorney disciplinary committees reveal that they learn of potential behavior subject to discipline through newspapers; other news sources; information from knowledge of committee members; word of mouth; the filing of a complaint by a party, a litigant, another attorney, or a member of the public; and judicial decisions and orders.

Although court decisions provide a source of information about *Brady* and truthful evidence issues, there is no standardized procedure for sending cases from the Appellate Divisions involving lawyer conduct to the committees. The Appellate Division clerks do not

forward to the disciplinary committees opinions of the courts dealing with prosecutorial misconduct.⁹

The Task Force recommends that cases in which a state court finds there has been intentional or reckless prosecutorial misconduct based on a *Brady* or truthful evidence rule violation be referred by the clerk of the court to the appropriate disciplinary committee for examination, investigation and further processing where appropriate. Where there are vacatures of convictions by federal courts, upon the remand to the state court, the state court clerk should likewise forward the case to the committee for consideration of sanctions.

There already exists under the Code of Judicial Conduct Rule 100.3(D)(2) authorization for a judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility to take appropriate action. The rule should be interpreted so that judges will learn of the scope of their responsibility. *See also* Rules of Professional Conduct Rule 8.3 (a) which instructs that a lawyer who knows that another lawyer has violated the Rules that raises a substantial question as to that lawyers honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered or other authority empowered to investigate or act upon such conduct.¹⁰

⁹ The Task Force received a letter from the Departmental Disciplinary Committee of the First Judicial Department confirming that “[i]f the Committee learns of a judicial decision criticizing a prosecutor for intentionally failing to provide the defense with exculpatory materials or a defendant’s attorney for gross ineffective assistance of counsel, the Committee might open an inquiry to determine whether discipline were appropriate. These decisions are made on a case-by-case basis.”

¹⁰ Certain members of the Task Force view this recommendation as unnecessary as they believe existing controls suffice to discourage and deter violations. They also believe that it is essential to strive to avoid such errors, but a statewide procedure that appears to result in a virtual automatic referral for disciplinary action could deter the vigorous advocacy necessary to the effective performance of the prosecution function. *Cf., e.g., Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976). The recommendation also appears to offer no guidance as to when the rule would apply, and what specific standard must be met before a referral occurs.

C. Court Procedures

5. *A Brady* Conference Should Be Held Before Trial to Resolve Issues of Turnover

Note

At a designated date before the first scheduled date for trial (assuming a possible adjournment), the judge should conduct a *Brady* proceeding with a certification that the police and prosecutor's files (as well as any related files), have been examined and all material delivered. Applications for delayed delivery can be made at that time.¹¹

Joel Rudin (see above) and Bruce Barkett, of the New York State Association of Criminal Defense Lawyers, testified that New York State discovery rules were restrictive. Rudin explained that in some counties, plea offers were made and withdrawn before discovery was given so that the accused did not know how to evaluate the circumstances of the case and the plea offer. NYC hearing at 141. Barkett testified that he may have to begin a trial without important information that should have been investigated prior to trial. NYC hearing at 168.

Barry Scheck testified stated there should be a rule requiring that at some time before the trial, perhaps a month or two, both the prosecutor and the defense examine their files to determine that the required documents have been delivered to the other party. This examination would be followed by a conference with the judge at which the parties would verify that appropriate turnover had been made. In the event there is a failure to turnover the required documents, the matter can be examined by a compliance officer (as noted earlier) to determine if there were systematic failures. NYC hearing at 79-80.

¹¹ Certain members of the Task Force do not approve of this recommendation and provide the following basis for their objections. The *Brady* obligation belongs solely to the prosecutor who, guided by ethical rules and the Constitution, and based on his or her experience, knowledge of the case, and consultation with superiors in his or her office, exercises the evidentiary determination to fulfill that obligation. *See, e.g., Drekte*, 540 U.S. at 696 (*Brady* rule highlights special role of prosecutor in American system of justice). Mandating a pre-trial conference in *every* case for judicial review of the prosecutor's file impermissibly allows the judicial branch to intrude into the exclusive domain of a member of the executive branch, the prosecutor, in the advocacy determination of what to disclose and when; weakens the adversary system and the vigorous performance of the prosecutor's function, *see, e.g., Pachtman*, 424 U.S. at 431 n.34; and unnecessarily expends scarce judicial resources and time in sifting through prosecutors' files that in some cases consists of thousands of pages. *But see, e.g., Agurs*, 427 U.S. at 106 (in a particular case prosecutor may submit a *Brady* problem to the trial judge).

D. Procedures Related to Law Enforcement

6. Law Enforcement Officials Should be Trained and Supervised in the Application of *Brady* and Truthful Evidence Rules

Note

The Task Force recommends that prosecutors conduct regular training programs for all Assistants to make sure that the relevant due process principles are fully internalized and become the starting point for all cases. To supplement and reinforce the training, trial assistants should be supervised by a senior assistant who will probe the circumstances in the cases to assure that the trial assistant has complied with the law.

District Attorney Daniel M. Donovan of Richmond County, representing the New York State District Attorney's Association, and District Attorney Richard A. Brown of Queens County testified about the extensive education programs conducted by the Association and in Queens County. Donovan explained that a number of prosecutors' offices have continuing legal education programs for training of assistants and that 12 are accredited CLE providers. The New York Prosecutors Training institute, with eight full-time attorneys and year round programming, offers prosecutors through out the state training in the issues raised by the Task Force. The District Attorneys Association also established the Committee on the Fair Administration of Justice and Ethical Standards that reviews important cases and rules relating to professional responsibility, prosecutorial misconduct and civil liability, and does training in ethics and responsibility. The Committee also has a "best practices component" that researches other areas in the law to develop new procedures and practices, especially concerned with scientific issues. The Committee will also aid prosecutors offices with small staffs to investigate credible claims of innocence. NYC hearing at 6-35.

District Attorney Brown testified that he takes every opportunity to send the clearest message to his assistants that their paramount responsibility is "to do justice." Training is the most important way of sending the unequivocal message. The Queens office has a full time director of training. Training is also conducted by by the District Attorneys Association and the prosecutors Training Institute. NYC hearing at 49-50.

The need for training also applies to police officers. "Prosecutors' access to exculpatory evidence known to the police depends ultimately on the willingness of the police to record,

preserve, and reveal such evidence. Despite pressures inclining the police against such practices, they also have an interest in cooperating with prosecutors to implement Brady.... [P]olice have an interest, especially in the early stages of investigation, in exonerating innocent suspects in order to refocus their efforts on finding the guilty. Training should stress the risk that suppression of exculpatory evidence will lead to conviction of the innocent. More particularly, it should...stress the potentially exonerative value of ‘negative information’ and ‘first descriptions’ from witnesses. Like much potentially exculpatory evidence, such information is ‘casually acquired’ by the police as a by-product of the search for incriminating evidence.” Stanley Z. Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 Fordham L. Rev. 1379, 1431 (2000)(citations omitted).

As with prosecutors, police officers must be trained about their *Brady* obligations and supervised as they carry out their work to be sure the rules are followed. The training and supervision are critical when police officers are involved in initial responses to a crime in progress or just completed and the situation is often chaotic.

The training should emphasize the importance of the *Brady* rule to the innocent accused and to the public when the actual perpetrator of the crime remains unpursued. The use of hypothetical situations, either on tape or orally presented, to discuss the nature of *Brady* material and what needs to be done with it should be used as a teaching tool.

Training has acquired heightened significance in the last fifteen years as the number of trials has decreased. With the absence of trials and police testimony about how investigations were conducted, police are not questioned by prosecutors in preparation for trial and by defense counsel in cross examination as to what steps were taken in the investigation and what evidence was found. The lack of this intense type of questioning is a lost opportunity to demonstrate to police officers the importance of learning about exculpatory (as well as inculpatory) evidence, the need to inform the prosecutor of the information, and the importance of preserving the information.

E. Procedures Related to the Testing and Preservation of Evidence

Physical evidence is often critical to the proper assessment of an accused person’s guilt. Likewise, physical evidence can be critical to the determination that a suspect is innocent. Law enforcement officials’ interest in helping arrive at a correct result provide the incentive to obtain,

maintain, test, and preserve relevant physical evidence, and no motive to withhold such evidence from the defense.

The Task Force's inquiries have shown that, whether due to insufficient resources, lack of effort, a failure to recognize the importance of testing and preservation of evidence, or even venality, physical evidence all too often is not collected although available, is not stored in a manner that prevents degradation or contamination, is lost, is not disclosed to the defense, or is not tracked by the police department. Those failures have, in many cases, contributed to the conviction of the innocent. The most frequent examples of the physical evidence that might produce relevant information if tested are body fluids especially blood, which can be examined for type and other characteristics. The Subcommittee was also surprised to find that vitullo or rape kits were also frequently untested.

The many cases examined by the Task Force show that testing, storage and preservation of evidence is a systemic mess. The tests relevant to case investigations are not conducted on a regular basis. The cases reveal that samples are lost or destroyed, that record keeping about the specimens does not accurately show where and how they are stored or if they have been destroyed. A sample of the cases reviewed by the Task Force show the dizzying efforts to find physical evidence that is reported lost, misfiled, or destroyed, with no record of the evidence. Many samples have been found only accidentally.

To note several examples:

In the case of Alan Newton, the accused was convicted in 1985 of a rape he did not commit and spent 21 years in prison. That injustice could have at least been reduced by emerging DNA technology, but the authorities took 11 years to find the rape kit after Newton requested testing in 1994. Ironically, the kit was ultimately found in the precise location in which it should have been, suggesting that the police property clerk had simply failed to look for it for over a decade. When the kit was finally turned over for testing, the DNA analysis proved that Newton was innocent.

In the Jeff Deskovic matter, the accused was convicted in 1990 of a rape and murder he did not commit. Semen was found in the young victim's body, and testing determined that it was not supplied by Deskovic. Deskovic was convicted anyway, on the theory that the victim had previously had consensual sex with another. When he continued to maintain his innocence after

conviction, the authorities simply refused to check the DNA profile against available state and national databases to determine who had supplied it. When a check was finally made in 2006, it was determined that the DNA was from a man who was convicted of another murder in 1994, and Deskovic was finally released.¹²

And in the case of Scott Fappiano, the accused spent 21 years in prison for a 1983 rape he did not commit.¹³ The rapist had smoked a cigarette. Cigarette butts were recovered at the crime scene; serology tests showed Fappiano was not the man who smoked them. However, because the crime scene unit had not immediately seized the cigarettes, and the scene was not properly safeguarded until they finally were, the prosecutor was able to argue that someone other than the rapist might have smoked the cigarettes after the crime. In addition, a bra that may have borne the criminal's saliva was not subjected to a test for saliva, although it was tested for sperm. Beginning in 1989, Fappiano asked that new DNA techniques be used to examine a small semen sample left by the rapist, but that sample could not be located until 2005. When it was then analyzed, it proved that Fappiano was innocent.

These are cases in which evidence was mishandled and in which the errors were belatedly rectified. It is likely there are more like them -- cases where exculpatory evidence was irretrievably lost or never gathered in the first place. Curing the problem simply requires good faith and common sense from law enforcement officials.

¹² The current District Attorney of Westchester County never refused to check Deskovic's DNA profile against state and national databases. When first asked, in 2006 by the Innocence Project, the current District Attorney of Westchester County consented immediately to the request that ultimately resulted in Deskovic's release.

¹³ The Fappiano case did not occur during the administration of the current District Attorney of Kings County. When the Innocence Project approached the current District Attorney with DNA evidence establishing Mr. Fappiano's innocence, his office promptly moved to set aside the conviction and dismiss the indictment.

7. The Subcommittee on Government Procedures Jointly Recommends the Proposals Submitted by the Subcommittee on Forensic Evidence

Note

The recommendations of the Subcommittee on Forensic Evidence relating to the treatment of forensic evidence are jointly recommended by the Subcommittee on Government Procedures. We add the following notes:

In 2007, the American Bar Association issued standards relating to “biological evidence” for the first time - in essence, to DNA evidence. DNA Evidence, *ABA Standards for Criminal Justice* (3d Ed. 2007) (hereafter, “ABA Standards”). Several of the standards are applicable to the recovery of physical evidence in general. Implementation of the recommended practices would prevent the chance that an incorrect verdict will result, and are therefore recommended:

First, a careful examination of the crime scene (so fundamental to prosecutions of violent crime) should be conducted. Whenever a serious crime appears to have been committed, a properly trained law enforcement officer or other official forensic investigator should be dispatched to the location and, following written guidelines, should identify, collect, and preserve evidence. When there is doubt as to whether material should be collected, the decision should be in favor of collection. As to biological evidence, the investigator should take due care to ensure that what is collected is representative of all materials that could yield evidence. Funding should be made available for such work. On request and absent good cause to the contrary, a defendant’s trained investigator should be provided access to the scene to conduct an examination for the defense. *See* ABA Standards, Standard 16-2.1.

Second, evidence should be maintained in a way that ensures its integrity and permits ready retrieval. Before trial, the focus should be on storing fragile evidence so as to preclude degradation and contamination. In particular, biological evidence is readily susceptible to spoliation. Proper safeguards are not expensive, when one considers the serious nature of the crimes in which biological evidence tends to be used. Every jurisdiction in New York should adopt protocols to ensure that investigators submit fragile evidence to storage facilities with the means to maintain it. *See* ABA Standards, Standard 16-2.5; Standard 16-2.6.

Third, before and after trial physical evidence of all types should be logged and stored to guarantee retrieval. Simple bar-coding and other computer tracking techniques are readily and cheaply available. Especially in large jurisdictions, evidence storage facilities should be run by trained personnel willing to, and competent to, utilize those techniques. Currently, evidence storage seems to be an extremely low priority for many police agencies, and retrieval failures – especially after a conviction – seem to be treated with little concern. Such conditions are unprofessional and inexcusable.

Fourth, evidence should not be discarded or destroyed except in conformity with established protocols. *See* ABA Standards, Standard 16-2.6. The best practice would be for prosecutor’s offices themselves to retain exhibits that are not contraband, dangerous, or fragile, and to monitor storage of exhibits that are contraband, dangerous, or fragile.

Fifth, with proper safeguards, before and after trial the defense should enjoy access to physical evidence. With only very rare exceptions, there is no cognizable disadvantage to law enforcement in permitting such access. The defense is entitled to test evidence before trial. Likewise, new scientific developments may make re-testing sensible after conviction. Under New York law, defendants frequently find it difficult to gain access to evidence that might exonerate the innocent. It is difficult to understand why limited access is the norm, and why some prosecutors have resisted re-testing, as in the *Deskovic* case.¹⁴ One is sometimes reminded of the church officials who refused to look through Galileo’s telescope. *See* ABA Standards, Standard 16-6.1. Concerns about physical evidence returned to the owner need to be addressed. Records of the return need to be maintained, but perhaps a substitute, such as a photograph, can also be kept if future need for the object arises.

Sixth, where either a prosecution test or a subsequent defense test of a limited sample may destroy the sample, and make future tests impossible, trained representatives of both sides should where practicable be permitted to select the testing procedure and observe the testing. *See* ABA Standards, Standard 16-3.4. It is possible that test questions may need be resolved by a court.

¹⁴ In sworn testimony given in connection with his civil claim, Deskovic stated that he wrote *once* to the previous District Attorney of Westchester County (Jeanine Pirro) in about 1997, requesting a test of semen from the victim and a prison interview with the then District Attorney. As previously noted, the current District Attorney of Westchester County consented to Deskovic’s request for re-testing.

Seventh, police department and other prosecutorial agencies should establish, with the advise of biological scientists and other significant experts, a protocol for the testing of samples taken in all cases that meet certain established criteria and each such case should be monitored for compliance with the protocol. As with the testing of evidence, a protocol should be established for storage and preservation, and the adherence to its strictures monitored.

Eighth, the failure to follow protocols should, where appropriate (as in cases in which public officials have failed to establish procedures or have systematically violated them or the state has acted intentionally to destroy the evidence), give to the defendant at a trial or post conviction procedure the benefit of a permissible presumption that any forensic result would be deemed favorable to the defendant's position.¹⁵

F. Procedures to Avoid Erroneous Early Focus

The American criminal justice system is an adversary system. In this context, there are occasions in which police or prosecution officials first decide that a suspect is guilty and then dismiss other indications to the contrary. The cases reviewed by the Task Force show this has happened in many of them. This focus arises early in the investigation, before the evidence has been examined, witnesses interviewed, and objects tested for forensic evidence. It is also claimed that alternative theories and possible other subjects are not examined and the case moves forward without a full examination.

An example of such a case is James Walker. After a man was killed in the course of a robbery, rewards were offered for information. A drug addict came forward and implicated Walker. Based on this testimony alone, Walker was convicted. The prosecutor and the lead detective suppressed the fact that the informer had implicated a second man, a friend of Walker who was in jail at the time of the crime, and that a surviving victim had seen Walker in a line-up but selected someone else. Walker was exonerated after serving 19 years in prison.

Another example is the case of George Whitmore, in which Whitmore implicated himself in a double homicide after coercive questioning. The actual perpetrator was discovered some years later.

¹⁵ Certain members of the Task Force did not approve of this recommendation, on the grounds that it is too broad and vague; and in cases of intentional destruction, the law already provides remedies, *see, e.g.*, CPL 240.70 (1).

In the case of Norman Carter, the police accepted at face value a witness' (the actual perpetrator) version of the events of the murder even though her recitation of the events changed and she did not accuse Carter until questioned over several days. Information given to the police was not given to the prosecutor or the defense. For example, the detective did not make a report of information that gave a description that did not match that of Carter. Another witness' information was viewed by the detective as not aiding the investigation.

Even as this report was being edited, cases were reported to have resulted in wrongful prosecutions and custody because of early focus by the police on a particular person. In one, a person was arrested, interrogated, detained for hours, and charged with harassment for sending abusive e-mails. A civil suit alleged that the police failed to investigate the source of abusive e-mails and wrongfully blamed the plaintiff. The complaint stated that the police ignored "a mountain of evidence" that proved the plaintiff did not send the e-mails. New York City settled the case by giving the plaintiff \$25,000. *See New York Times*, November 21, 2008, p.A28, col.3.

In another recently reported case, a person was arrested for murder. The accused explained to the New York City detective that he had an alibi and that his metro-card would prove that he could not have been at the scene of the crime at the time of the crime. The detective took the card and then returned it to the defendant with no further discussion. The defense pursued the investigation and confirmed the alibi with photos and MTA computer records. The defendant, being prosecuted in the federal court, was released from custody pending further study of the case by the prosecutor. *See id.*, November 19, 2008, p. A1, col. 3.

8. Police Officers Should Be Trained To Investigate Alternate Theories for a Case, At Least Until They Are Reasonably Satisfied That Those Theories Are Without Merit

Note

Prosecutors must be trained to recognize when witnesses' information and other evidence points to other possible suspects. The trial prosecutor and the supervising prosecutor should examine the entire police file and interview all investigation officers as well as witnesses in the case to determine that appropriate investigations were conducted. This review of the file should take place early in the process with the police officers or detectives so that the prosecutor can direct any further investigations. The actual as well as the legal responsibility for appraisal of the case should be that of the prosecutor and not of the police officer.

Identification Procedures

SUBCOMMITTEE REPORT AND FINAL PROPOSALS

The Problems with Witness Identification Procedures

Current Legal Mechanisms

In the comprehensive studies that have been done nationwide, and in the analysis of those cases identified by this Task Force, erroneous identifications were responsible for more wrongful convictions than any other single factor.¹⁶ Further, existing legal protections, such as cross-examination of witnesses and the presence of counsel at lineups target purposeful as well as unintentional misconduct and do not sufficiently protect against witnesses who mistakenly believe that they are making the correct identification. To address this problem, the guiding principle should be to reduce or eliminate the problem of erroneous eyewitness identifications early in the criminal justice process in order to ensure that reliable evidence is presented at trial and that verdicts are based on accurate information, and, to the extent possible, to ensure that innocent individuals do not even enter the criminal justice system, thus freeing law enforcement to devote resources to identifying and pursuing the guilty. Thus efforts should be made at the investigative level to enhance the accuracy of identification procedures, and at the trial level to ensure that juries are properly informed of the factors that may affect the reliability of the identification and, if appropriate, the limitations of such procedures.

¹⁶ An analysis undertaken by the Subcommittee of the wrongful conviction cases studied by the Task Force shows that of the 53 cases examined, 36 of them (68%) involved an erroneous identification by an eyewitness which caused or contributed to the conviction. *See also* Sam Gross's comprehensive survey of 328 exonerations from 1989 through 2003 covers the period during which DNA testing on forensic evidence became available, and concludes that roughly half of all exonerations were due to DNA testing. Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003* (2004), available at <http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf>. The study found "a steady increase in the number of DNA exonerations, from one or two a year in 1989 to 1991, to an average of 6 a year from 1992 through 1995, to an average of 21 a year since 2001."

The Burden of Proof at Wade Hearings

Under current New York law, Wade hearings, where the admissibility of pretrial identification procedures can be challenged on the grounds that they were unduly suggestive or conducted in violation of the right to counsel, provide one of the few opportunities for defendants to challenge pretrial identification procedures.¹⁷ Moreover, even though defendants need only meet a low threshold in order to be entitled to a Wade hearing,¹⁸ to ultimately prevail at a hearing, defendants must meet a much higher burden. For instance, while the prosecution, during Wade hearings, has the initial burden of establishing the reasonableness of the police conduct and the lack of suggestiveness in the identification procedure used, it is the defense that bears the burden of ultimately proving that the procedure was unduly suggestive.¹⁹ Insufficient or faulty police documentation of an identification procedure (e.g., a poor quality photograph of a lineup or a failure to report accurately the time or place of a show up or the individuals present there) may hamper the defense in meeting its burden, and, by extension, impede the hearing court (and, eventually, an appellate court) from making a fully informed decision regarding the constitutionality of the identification procedure.

Given the number of wrongful convictions, and the fact that wrongful convictions reversed after appellate review impose severe costs on innocent defendants – such as lengthy terms of incarceration – as well as costs to society – in that guilty offenders remain free to continue victimizing – Wade hearings and appellate review do not sufficiently address the problem of wrongful convictions based on mistaken eyewitness testimony.

The Narrow Scope of the Appeals Process

Convictions based upon erroneous eyewitness identifications are difficult to overturn on appeal under existing New York State law. First, although the state’s intermediate appellate

¹⁷ See *People v. Chipp*, 75 N.Y.2d 327, 335 (N.Y. 1990) (“It is firmly established in our jurisprudence that unduly suggestive pretrial identification procedures violate due process and therefore are not admissible to determine the guilt or innocence of an accused.” (citing *United States v. Wade*, 388 U.S. 218 (1967))).

¹⁸ See *People v. Ortiz*, 90 N.Y.2d 533, 538 (N.Y. 1997) (explaining that under N.Y. Criminal Procedure Law § 710.60(3)(b) a defendant does not need to “allege specific facts tending to show suggestiveness in order to be entitled to a Wade hearing.”)

¹⁹ *Chipp*, 75 N.Y.2d at 335.

courts have factual review power to determine both whether an identification procedure was non-suggestive and whether the jury's conclusion that the defendant was the perpetrator was against the weight of the evidence,²⁰ these courts give substantial deference to the triers of fact who saw and heard the witnesses firsthand.²¹

Second, the New York Court of Appeals, unlike the Appellate Division, has no factual review power, and the Court of Appeals will reverse a conviction on the grounds that identification testimony should have been suppressed only when the lower courts' findings of fact are clearly unsupported by the record and thus present a question of law for review.²²

Third, because an appellate court is limited to the facts appearing in the record, it may not have before it all the information relevant to determining whether an identification procedure was suggestive. Although New York Criminal Procedure Law section 440.10 provides a vehicle by which a defendant may bring matters *dehors* the record to the attention of a court and thereby seek reversal of a conviction, it is difficult for an incarcerated defendant to conduct any kind of

²⁰ See C.P.L. § 470.15(1), (5); *People v. Neely*, 219 A.D.2d 444, 447 (2d Dep't 1996) (Appellate Division may make factual determinations that reverse or modify the findings of hearing courts) (Rosenblatt, J.). See generally *People v. Romero*, 7 N.Y.3d 633 (2006); *People v. Bleakley*, 69 N.Y.2d 490 (1987) (both cases discussing the Appellate Division's weight of the evidence review power).

²¹ See *People v. Prochilo*, 41 N.Y.2d 759, 761 (1977) (deference accorded to hearing court); *Bleakley*, 69 N.Y.2d at 495 (deference to trier of fact at trial).

²² Compare *People v. Calabria*, 3 N.Y.3d 80, 83-84 (2004) (declining to reverse one-witness identification case and noting, "Although the Appellate Division is empowered to reverse a conviction because, in its view, the verdict is against the weight of the evidence, we are not") (citations omitted) with *People v. Foster*, 64 N.Y.2d 1144, 1146-48 (1985) (reversing conviction of codefendant Reed and dismissing the indictment because the testimony of the sole identification witness was incredible as a matter of law). See also *People v. Jackson*, 98 N.Y.2d 555, 559 (2002) (holding that Wade hearing dealing with the propriety of a lineup involved a mixed question of law and fact, and thus, the hearing court's determination, affirmed by the Appellate Division and supported by the record, was beyond Court of Appeals review).

investigation that might reveal the type of misconduct or impropriety (such as police coaching or coercing a witness at a lineup procedure) that would provide the basis for a 440 motion.²³

Fourth, exclusions of expert eyewitness testimony are reviewed on appeal under an abuse of discretion standard, which is a high standard to meet.²⁴ In addition, the discretion to admit or exclude experts (including psychological experts on eyewitness identifications) rests solely with the trial courts, and the appellate courts are deferential to the lower court decisions.²⁵

After trial, convictions based on erroneous eyewitness identifications are difficult to overturn because appellate and habeas corpus decisions are almost always predicated on

²³ While section 440.30(1-a) of the Criminal Procedure Law permits a defendant to seek testing on any evidence, secured in connection with the trial, that might contain DNA, there are many cases (e.g., gunpoint robberies) in which no such evidence containing DNA exists. DNA testing is a great tool to free the innocent as well as convict the guilty, especially in identification cases, but DNA evidence is not always available.

²⁴ See *United States v. Christophe*, 833 F.2d 1296, 1299 (9th Cir. 1987) (“On review, we reverse only if the district court abused its wide discretion or committed manifest error in excluding expert testimony.”) (internal citation omitted); *United States v. Villiard*, 186 F.3d 893, 895 (8th Cir. 1999) (“As to the district court’s refusal, after conducting a hearing under [*Daubert*] to admit expert testimony concerning the reliability of eyewitness identifications, we are especially hesitant to find an abuse of discretion [in denying expert eyewitness identification testimony] unless the government’s case against the defendant rested exclusively on uncorroborated eyewitness testimony.”) (internal quotation marks and citation omitted)).

²⁵ *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589-92 (U.S. 1993) (explaining that under Federal Rule of Evidence 702, the decision to admit expert scientific testimony is within the sound discretion and authority of the trial judge). See *Diefenbach v. Sheridan Transp.*, 229 F.3d 27, 30 (1st Cir. 2000) (“It is well-settled that trial judges have broad discretionary powers in determining the qualification, and thus, admissibility, of expert witnesses. It is settled law in this circuit that whether a witness is qualified to express an expert opinion is a matter left to the sound discretion of the trial judge. In the absence of clear error, as a matter of law, the trial judge’s decision will not be reversed.”) (internal quotation marks and citation omitted). *Goodwin v. MTD Prods.*, 232 F.3d 600, 606 (7th Cir. 2000) (“[I]t is well established that a trial judge has wide discretion in determining both the competency of an expert witness as well as the relevancy of the expert’s testimony on a particular subject. Consequently, a judge’s decision to limit an expert’s testimony will be overturned on appeal only if manifestly erroneous.”) (internal quotation marks and citation omitted); *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir. 1995) (“The decision to admit expert testimony is left to the broad discretion of the trial judge and will be overturned only when manifestly erroneous.”); *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993) (“The exclusion of expert testimony under Rule 702 [of the Federal Rules of Evidence] is within the sound discretion of the trial judge.”) (internal citation omitted).

questions of law, not questions of fact. This limited nature of appeals makes the reversal of erroneous verdicts almost impossible. In particular, mistakes resulting from juror error are difficult to correct. It is unlikely that a conviction due to a jury's mistaken application of law to facts will be reversed because current legal mechanisms are not conducive to examining and correcting mistakes of juror judgment. As a result, the justice system becomes frustrated, with innocent parties jailed and criminals freed.

In short, once a jury has returned a guilty verdict based on a mistaken eyewitness identification, it might be years before such error is corrected, if ever. During the interim between a wrongful conviction and a reversal of the conviction – if any – innocent defendants suffer the severe costs of incarceration, and society incurs the cost of guilty offenders remaining free to perpetrate crimes against other victims.

Suggestive Eyewitness Identification Procedures Admitted under Federal Standards of Review

Federal standards of review at both the trial and appellate level encourage courts reviewing eyewitness identification procedures to ignore infractions which often lead to erroneous verdicts and to determine whether the defendant is probably guilty based on other available evidence.²⁶ In federal courts, a due process right to be free from unduly suggestive procedures has been established.²⁷ Nonetheless, erroneous admissions of excludable identifications have been upheld on appeal under a harmless error standard of review. Moreover, the standard of review used by federal courts to review unduly suggestive procedures focuses on whether the defendant is probably guilty instead of whether procedures were suggestive. Both the reliability standard used at trial and pretrial Wade hearings and the harmless error standard used on appeal allow courts to search the record for corroborating evidence and determine what a reasonable jury would conclude.

When established, the due process right to be free from unduly suggestive procedures was strict, and unnecessarily suggestive procedures were to be excluded.²⁸ The remedy at trial

²⁶ See *Manson v. Brathwaite*, 432 U.S. at 128 (J. Marshall dissenting).

²⁷ See *Stovall v. Denno*, 388 U.S. 293, 295 (1967).

²⁸ See *Manson v. Brathwaite* note 8 at 114.

for a violation of this constitutional right is exclusion of the evidence or a curative instruction.²⁹ Federal trial courts now use a two-step test, asking first whether the procedure was unduly suggestive, and second whether it was reliable.³⁰ Here, reliability is ascertained from factors such as the witnesses' opportunity to view the suspect, the witnesses' level of certainty and the time that elapsed between the initial observation and the subsequent eyewitness identification procedure. As a result, courts have the discretion to search the record to find alternate or corroborating evidence that the defendant is most likely guilty, despite the existence of suggestive conduct that rises to the level of violating due process.

Similarly, on appeal, the harmless error standard³¹ allows courts to determine whether a suspect is guilty based on the totality of the evidence despite unconstitutional procedures. As originally contemplated, the harmless error standard was to be used by the appellate court to examine whether the constitutional violation contributed to the conviction. Originally, the burden of proving that the error was harmless beyond a reasonable doubt was not easily met, as the court focused on whether the violation occurred or whether the procedure was unduly suggestive. However, the standard has been reframed³² to whether "a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt."³³ As a result, instead of confining their focus to whether an error directly contributed to the jury's verdict, courts broadly search the record for independent evidence of guilt, which taken alone could support the conviction. This allows the state to side step false evidence.

Given that federal standards of review, as currently contemplated, allow suggestive eyewitness procedures to be admitted, we cannot expect to safeguard the innocent from wrongful convictions by means of trial or appellate remedies alone.

²⁹ *Watkins v. Sowders*, 449 U.S. 341, 346-47 (1981) (holding that, in the context of witness identifications, either curative instructions or a suppression hearing may remedy constitutional error).

³⁰ *See Manson v. Brathwaite*, note 10.

³¹ *See Chapman v. California*, 386 U.S. at 19-20, 23-24 (establishing the harmless error standard "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.")

³² *See Rose v. Clark*.

³³ *Id.*

Under current New York law, even if a court concludes that a pretrial identification procedure was unduly suggestive and rendered a witness' identification of a defendant unreliable, the error in admitting that testimony is still subject to harmless error analysis.³⁴ It should be noted that the standard of review for constitutional harmless error – “no reasonable possibility that the error might have contributed to the defendant’s conviction” – is stricter than the federal standard.

Objectives of Reform Proposals

In order to eliminate the problem of witness misidentifications as early in the criminal justice process as possible, the ideal solution is to:

- (1) make eyewitness identification evidence as reliable as it can be, and
- (2) educate juries through expert testimony or jury instructions as to
 - (a) the limitations of such evidence, and
 - (b) the circumstances they should consider in determining how much credence to give an eyewitness identification.

Regarding point (1) above, some methodological procedures of collecting witness identification evidence increase the frequency of identifications of suspects who are not the actual culprits.

The pretrial eyewitness identification procedure – be it a lineup or a photographic array identification – should be optimized to decrease the possibility of a false identification leading to a wrongful conviction and to make the identification more reliable.³⁵ Scientific research has

³⁴ See *People v. Johnson*, 345 N.Y.S.2d 1011 (stating that although evidence of prior identification of a defendant from a photograph is improper (see, e.g. *People v. Caserta*, 19 N.Y.2d 18, 277 N.Y.S.2d 647, 224 N.E.2d 82; *People v. Trowbridge*, 305 N.Y. 471, 113 N.E.2d 841), where the other proof of identification and of guilt is as clear and strong as in this case, the admission of such evidence may be regarded as harmless error). See *People v. Perez*, 785 N.Y.S.2d 218 (finding that any improper suggestiveness in photographic array from which murder defendant was identified was harmless error, where the identification was confirmatory since one identifying witness was a prior acquaintance of the defendant).

³⁵ Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22(6) Law and Human Behavior 603, [13-14] (1998) [hereinafter “Eyewitness ID Procedures”].

identified the following phenomena associated with current eyewitness identification procedures that can and should be controlled and corrected, which are dealt with in greater detail in the next section.

- Use of relative judgments by eyewitnesses rather than absolute judgments
- Malleable confidence levels of the witness in his or her identification
- Intentional or unintentional influence on the results of an eyewitness identification by the administrator of the procedure

Problems with Current Eyewitness Identification Procedures

Relative Judgments

Eyewitnesses tend to make relative judgments rather than absolute judgments during identification procedures.³⁶ This means that rather than identifying a member of the lineup or photo array based on an absolute determination, they often identify the one member of the lineup or photo array that looks more like the culprit than the others in the lineup, even if the actual culprit is not in the lineup. This is the result of a dual process theory of recognition memory, which explains how memory relates to the choices one makes when attempting to identify someone in a lineup.³⁷

In the first process, signal detection theory isolates two decisions made by the witness:

- *Discrimination Accuracy.* This is the ability of an individual to correctly detect a signal triggering one's memory vs. correctly reject the absence of such a signal. This is affected by factors that influence the quality of the memory representation, such as how well the witness was able to internalize a stimulus during the crime.

³⁶ A minority of the Task Force believes that, given the current state of uncertainty in the scientific community about the nature of identification decision-making processes, no single model (the "Relative Judgments" model or any other) should be highlighted as a definitive explanation.

³⁷ Christian A. Meissner, et al., *Eyewitness decisions in simultaneous and sequential lineups: A dual-process signal detection theory analysis*, 33 (5) *Memory & Cognition* 783 (2005).

- *Response Criterion.* This is the degree of evidence necessary for the witness to respond that a signal/stimulus (internalized at the time of the witnessing) has been presented in the lineup. This can be influenced by any number of social or instructional factors that may create a proclivity or bias to respond in one manner or another.³⁸

Second is a cognitive process that underlies the above decision-making process:

- *Recollection.* This is the retrieval of conscious-level conceptual information based on contextual details. Simply put, this is the ability to consciously recall information from memory.
- *Familiarity.* This is fluent, perceptually-based information that is believed to be encoded in an automatic, non-conscious manner. More simply, it is the feeling that something is familiar or known without context on a non-conscious level.³⁹

In this dual process of recognition memory, familiarity is directly influenced by response criterion, but recollection is not, meaning that the eyewitness identification process can directly influence how much weight a witness gives to non-conscious “feelings” that some stimulus is familiar to them. Recollection, the conscious recall of context-based information, is not affected by the eyewitness identification process.⁴⁰ Experiments show that these dual mental processes are consistent with the notion of relative judgments by a witness viewing a lineup. When presented with a lineup of similar-looking individuals, witnesses rely on familiarity-based memory processes to a greater extent than when they are presented with a single individual because the simultaneous presentation of the lineup provides a contextual basis for the application of familiarity.⁴¹ That is to say, in these circumstances eyewitnesses tend to think, “which one looks familiar to me” rather than “are there any context clues that make me think this particular person is the culprit.” This is a relative judgment rather than an absolute judgment.

³⁸ *Id.* at 784.

³⁹ *Id.*

⁴⁰ *Id.* at 784, 789.

⁴¹ *Id.* at 785-90.

These relative judgments manifest themselves in many ways. For instance, there is solid scientific evidence that people have more trouble identifying members of a race other than their own than members of their own race,⁴² making it more likely that when viewing a lineup full of members of another race, they will make relative judgments rather than absolute judgments.

Further, in an experiment in which half of the witnesses to a crime are given a lineup of six people, including the culprit and five fillers, and the other half are given a lineup of the same five fillers but no culprit, misidentifications of each of the five fillers by the witnesses are more frequent when the culprit is absent as opposed to when he is present.⁴³ This indicates that the witnesses are making a relative judgment rather than an absolute one. If the witnesses were making judgments based on true recognition (absolute judgment), then the same percentage that identified the culprit in the lineup in which he was present would instead choose “not present” in the lineup in which he was not present. Instead, those eyewitnesses viewing the lineup without the culprit for the most part spread their choices among the rest of the fillers—the ones that, absent the true culprit, looked the most like the actual culprit. This means that most of those that chose the actual culprit when he was in the lineup did not do so because of actual recognition, but because of relative similarity. These were relative judgments, not absolute ones.⁴⁴

This difference matters because research shows that eyewitnesses who described their identification decision-making process as one of elimination (i.e. relative judgments) were more likely to have made false identifications than those who reported that the face “just popped out at me.”⁴⁵

⁴² Wells, G. L. & Loftus, E. F., *Eyewitness Memory for People and Events*, in *Comprehensive Handbook of Psychology*, A. Goldstein, Ed., Volume 11, Forensic psychology (New York: John Wiley and Sons, 2003), citing Meissner, C.A. & Brigham, J.C. *Thirty years of investigating the own-race bias in memory for faces: A meta-analytic review*, 7 *Psychology, Public Policy and Law* 3 (2001).

⁴³ Eyewitness ID Procedures, *supra* note 17, citing Gary L. Wells, *What do we know about eyewitness identification?* 48 *American Psychologist* 553 (1993).

⁴⁴ *Id.*

⁴⁵ Dunning, D. & Stern, L.B., *Distinguishing Accurate from Inaccurate Identifications via Inquiries About Decision Processes*, 67 *Journal of Personality and Social Psychology* 818 (1994). *See also* R.C.L. Lindsay, et al., *Biased Lineups: Sequential Presentation Reduces the Problem*.

As will be discussed, in order to allow a judge and/or jury to evaluate for themselves the level of confidence of the witness, the entire identification procedure should be recorded on video.

Malleable Confidence Levels

Studies have long shown the possibility for witness malleability in the investigative process. For instance, witnesses who are questioned repeatedly grow more confident in the accuracy of details in their reports to police.⁴⁶ Likewise, the confidence level of an eyewitness in his or her identification, including confidence in the quality of his or her recollection of the perpetrator and confidence in the ease with which he or she identified the person in the lineup or photo array, is malleable and can be influenced by a number of factors both during and after the identification procedure.⁴⁷ This can result in the witness' in-court statement of confidence being an unintentional misrepresentation of the eyewitness' actual confidence in the certainty of his or her identification, which affects verdicts because juries give more consideration to a witness' confidence level in their evaluation of identification evidence than any other aspect of identification testimony.⁴⁸ This artificially inflated certainty by eyewitnesses in their identifications can be due to (1) any confirmatory feedback they may receive during or after an identification procedure, (2) the format of the identification procedure and any relative judgments the witnesses make in the process of identifying someone in a lineup or photo array, and (3) preparations of the witness for cross-examination.⁴⁹

Witnesses who receive feedback confirming or disconfirming that the identifications they made are somehow in line with other evidence have significantly higher or lower confidence levels, respectively, in their identifications than those receiving no feedback at all. For instance, in one experiment, eyewitnesses given feedback that a co-witness identified the same member of the lineup had significantly higher confidence levels in their identifications than those given no feedback, while those told that a co-witness identified a different member of the lineup had a

⁴⁶ Eyewitness ID Procedures, *supra* note 17 at 19.

⁴⁷ Wells, G.L. & Bradfield, A.L., "Good, You Identified the Suspect": Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience, 83(3) Journal of Applied Psychology 360, 374 (1998).

⁴⁸ Eyewitness ID Procedures, *supra* note 17 at 18-19.

⁴⁹ *Id.*

much lower confidence level than those given no feedback.⁵⁰ Even stronger effects on witness confidence levels occur when witnesses are told that they identified the suspect instead of being told nothing. Those receiving confirmatory feedback even exaggerate facts about the witnessing conditions such as the quality of their views of the suspect and how much time they spent observing the culprit's face.⁵¹

Experiments further show that relative judgments made by witnesses not only affect who is chosen, but the confidence of the witness in his or her choice. For instance, a witness' confidence in his or her selection of a member of the lineup or photo array varies depending on the extent to which the members of the lineup or photo array that were not chosen by the witness also fit the description the witness previously gave of the subject. Thus, relative judgments, in addition to causing witnesses to identify the person who looks most like the culprit, also cause witnesses to be more confident in that identification when the person they identified was the only person in the lineup or photo array to fit the description of the culprit, even if the one fitting that description wasn't the actual culprit.⁵²

Additionally, experiments have shown that briefing witnesses about the types of questions they will face on cross-examination increases the confidence they express in their identifications during cross-examination in relation to those who were not briefed. This "briefing effect" only occurred among witnesses making erroneous identifications—their confidence levels rose dramatically—but not among those making accurate identifications, whose confidence levels did not change.⁵³

Thus, relative judgments in identifications, feedback, and witness preparations for trial can all lead to artificially distorted witness confidence in trial testimony, either inflated or deflated. Because of the weight given by juries to eyewitness confidence levels, fluctuation in

⁵⁰ *Id.* at 19-20, *citing* Luus C.A.E. & Wells, G.L., *The Malleability of Eyewitness Confidence: Co-witness and Perseverance Effects*, 79 *Journal of Applied Psychology* 714 (1994).

⁵¹ *Id.* at 20, *citing* Wells & Bradfield, *supra* note 28.

⁵² *Id.* at 11-12, *citing* Wells, G.L., Rydell, S.M., & Seclau, E.P., *On the Selection of Distractors for Eyewitness Lineups*, 78 *Journal of Applied Psychology* 835 (1993).

⁵³ *Id.* at 19, *citing* Wells, G.L., Ferguson, T.J. & Lindsay, R.C.L., *The Tractability of Eyewitness Confidence and its Implication for Triers of Fact*, 66 *Journal of Applied Psychology* 688 (1981).

either direction can have a negative impact on the efforts of the criminal justice system to ensure that justice is achieved.

Administrator Influence on Identification

Officials in charge of administering the eyewitness identification procedure can intentionally or unintentionally influence the results through cueing of the witness towards the subject. In research on experiments generally, it has been shown that interpersonal interactions and processes can have powerful effects on the results of an experiment, particularly when close physical distance between the experimenter and experimentee permits eye contact, visible facial expressions, and verbal exchanges.⁵⁴ Relatedly, there is a danger that an investigating police officer who is administering the eyewitness identification procedure will unconsciously bias the evidence towards a confirmation of that answer, creating the phenomenon of the self-fulfilling prophecy.

Experiments show that photo spread administrators' nonverbal behavior, such as smiling and nonverbal reinforcement of a particular photograph, can lead eyewitnesses to falsely identify a certain person as the culprit.⁵⁵ Further, what an administrator of the identification procedure says to the eyewitness at the time of the lineup can both focus the eyewitness on the suspect and have strong effects on the confidence of the eyewitness, including boosting the confidence of tentative witnesses, even when the witness has misidentified an innocent suspect.⁵⁶ These cues can be intentional or unintentional on the part of the administering officer, but nevertheless have an effect on the result of the identification procedure.

⁵⁴ *Id.* at 21, *citing* Harris, M.J. & Rosenthal, R., *Mediation of Interpersonal Expectancy Effects: 31 Meta-Analyses*, 97 *Psychological Bulletin* 363 (1985).

⁵⁵ *Id.*, *citing* Fanselow, M.S. & Buckhout, R., *Nonverbal Cueing as a Source of Biasing Information in Eyewitness Identification Testing*, New York: Center for Responsive Psychology, Brooklyn College C.U.N.Y., 1976.

⁵⁶ *Id.*, *citing* Luus & Wells, *supra* note 31, Wells & Bradfield, *supra* note 28, Wells, G.L. & Seclau, E., *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 *Psychology, Public Policy, and Law* 765 (1995).

Proposed Solutions

To the extent that the above-listed problems can be corrected at the administration of the lineup, they should be. To the extent that these problems cannot be corrected at the administration of the lineup or can be corrected but are not, the jury should be educated as to the limitations of this eyewitness testimony so they can give it its proper weight in their deliberations. To that end, we propose the following solutions:

In the Administration of Eyewitness Identification Procedures

i. Change the way in which identification procedures (including lineups and photo arrays) are conducted to enhance the reliability of eyewitness identifications.

a. *Double blind administration*

The administration of the lineup or photo array should be performed by someone who does not know the identity of the suspect. Due to the problems outlined above in terms of the intentional or unintentional influence on the eyewitness' identification and confidence levels by an administrator, the removal of an individual who knows the identity of the suspect and can thereby influence the results of the procedure would eliminate the possibility of these problems affecting identifications. These same double blind procedures have long been used in behavioral and medical experiments to prevent unwanted influence on the results⁵⁷ and the rationale for conducting experiments in a double-blind manner applies equally well to lineups and photo arrays.⁵⁸

b. *Cautionary instructions*

Eyewitnesses should be told that the person administering the lineup does not know who the suspect is and that the perpetrator may or may not be in the lineup – in effect that “none of the above” is a valid answer. This lowers the rate of inaccurate eyewitness identifications without lowering the number of accurate identifications by focusing the witness on using absolute judgments rather than relative judgments. Additionally, eyewitnesses should perceive the

⁵⁷ Harris & Rosenthal, *supra* note 19.

⁵⁸ Eyewitness ID Procedures, *supra* note 17 at 21.

administrators of the procedure to be blind as to which person is the suspect in order to prevent witnesses from looking to the administrator for cues.⁵⁹

A survey of empirical data gathered over the course of years of scientific studies shows that a “might or might not be present” instruction given to eyewitnesses reduces misidentifications when the actual culprit is not in the lineup.⁶⁰ One study using this instruction saw a reduction in misidentifications when the culprit was not present from 78% to 33%, while still resulting in 87% identification of the culprit when the culprit was present.⁶¹

c. *Effective use of fillers*

Fillers should be chosen for their similarity to the witness’ description of the perpetrator, rather than for their similarity to the suspect. At the same time, the suspect should not differ from the fillers in a way that would make the suspect stand out, and there should be no other factors drawing attention to the suspect. In addition, no filler should so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from that filler. Choosing fillers in this manner avoids creating a lineup of clones of the suspect and does not make an innocent person stand out in the lineup.⁶²

Additionally, research has shown that the more fillers there are in a lineup or photo array, the less likely a witness is to misidentify an innocent suspect as the perpetrator.⁶³ The typical number of fillers in New York is five, and that number, which is acceptable, should be standard statewide.

⁵⁹ *Id.* at 23.

⁶⁰ Nancy Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 *Law and Human Behavior* 283 (1997).

⁶¹ Eyewitness ID Procedures, *supra* note 17 at 11, *citing* Malpass, R.S. & Devine, P.G., *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 *Journal of Applied Psychology* 482 (1981).

⁶² *Id.* at 25.

⁶³ *Id.* at 27.

d. *One suspect per lineup*

Placing multiple suspects – as opposed to one suspect – in a lineup reduces the reliability of the lineup by making it more likely that the eyewitness will pick a suspect out of the lineup with a very low certainty that it was the perpetrator. Statistically, this is the case because if five suspects are put in a lineup or photo array, whichever one the witness picks will likely have charges brought against him because the witness identified a suspect. However, if one suspect and five fillers are put in a lineup or photo array, and a filler is picked, the identification was obviously a mistake. Therefore, the more suspects there are per lineup, the more likely it is that a witness’ identification of one of those suspects is a mistake that could not be identified as such.⁶⁴

e. *Documentation of the procedure*

Every step of the identification procedure should be documented, especially the eyewitness’ confidence level immediately after identifying the person in the lineup he or she believes is the perpetrator and before any feedback on that choice is given. This documentation procedure should include the taking of an assessment of certainty from the identifying witness immediately after the identification is made describing the witness’ level of certainty in his or her selection. Likewise, law enforcement should be required to preserve all photographs, arrays and documents used in identification procedures, including the witness’ initial description of the perpetrator. This assessment of certainty of the eyewitness must be videotaped and audio recorded.⁶⁵ We propose that standards for how to conduct the certainty assessment be developed and promulgated to assist and direct law enforcement in this endeavor.

There are two reasons for such a requirement. First, documenting every step effectively allows the procedure to be “discoverable” and allows the jury to understand the reliability of the evidence being presented to it. This should include videotaping the eyewitness identification

⁶⁴ Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006(2) Wisc. L. Rev. 615, 623 (2006).

⁶⁵ A minority of Task Force Members voted against this recommendation on the grounds that requiring videotaping could impose significant financial costs on law enforcement agencies and discourage a number of witnesses from participating in identification procedures. Others voiced concerns that a video recording of a witness’ visible and audible reactions could constitute inadmissible evidence and would be of questionable value to the jury in assessing the witness’ confidence in the identification.

procedure with enough synchronized cameras with audio to capture at all times the witness, the administrator, and the members of the lineup or photo array.

The second reason for this documentation is to account for the problem discussed previously that an eyewitness' confidence level is malleable and can be influenced by information coming to light after the lineup identification is made. Recording the eyewitness' visible and audible reaction contemporaneously with the recording of the identification itself will assist the judge and/or jury in evaluating the witness' confidence level at the time of the identification.

We propose that a failure by law enforcement to implement these documentation procedures would be considered by the trial court as a factor in determining whether evidence of the eyewitness identification procedure could be introduced at trial. The trial court would be required to conduct a pre-trial hearing to determine whether documentation procedures have been followed, and, if not, preclusion of the evidence of the identification procedure could be ordered as a sanction.

f. *Sequential Presentation of Lineups/Photo Arrays*

Some researchers suggest that eyewitnesses should only be able to view one photo or lineup member at a time, should not know how many photos or lineup members will be presented or which one is the last one, and should give a "yes" or "no" response to each one before the next is presented. This process forces witnesses to make absolute judgments as to individuals rather than making relative judgments about a group of people. Sequential presentation is likely only effective when in combination with double blind administration because the intentional or unintentional cues given by an officer administering the lineup that knows the identity of the suspect will be more obvious when the witness is only viewing one member of the lineup at a time.

The sequential presentation procedure relies less on the "familiar" memory process and more on the "recollection" process (as described in the problems section above), meaning there is an absolute judgment taking place based on the witness' recollection of context-based information rather than a relative judgment based on non-contextual, non-conscious memory.⁶⁶

⁶⁶ Christian A. Meissner, et al., *Eyewitness decisions in simultaneous and sequential lineups: A dual-process signal detection theory analysis*, 33 (5) *Memory & Cognition* 783 (2005).

Lab studies confirm that the sequential presentation procedure results in far fewer witness misidentifications of non-culprits (false positives).⁶⁷

Recently, there has been some data to suggest that while sequential presentation does decrease false positives it also increases false negatives (not identifying the actual culprit when he was present). This research shows that sequential presentation reduces choosing of a lineup member by eyewitnesses when the witnesses are not positive they see the culprit in the lineup.⁶⁸ The data shows, however, that the ratio of accurate to mistaken identifications actually rises, meaning that the sequential presentation method improves the odds that a suspect, if identified, is the actual culprit.⁶⁹ Additionally, those that are more likely to produce false negatives are the ones whose memories are weaker.⁷⁰ This leads to the conclusion that the true effect of the sequential procedure on false negatives is that it lowers the possibility that a witness with poor recollection will use relative judgments to guess correctly. It does not affect those that are good identification witnesses and use absolute judgments.

Two field studies have taken place using actual implementation of double blind sequential procedures in police departments. The Illinois state police commissioned their own study headed by the general counsel to the Superintendent of the Chicago Police Department, Sheri Mecklenburg (the “Mecklenburg Report” or the “Chicago Study”). She found that, counter to all experimental evidence, the double blind sequential procedure had higher rates of filler picks and lower rates of suspect picks than traditional lineups.⁷¹ This field study has

⁶⁷ *Id.*; Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006(2) Wisc. L. Rev. 615, 625-26 (2006).

⁶⁸ Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006(2) Wisc. L. Rev. 615, 626-28 (2006), *citing* Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 Law & Human Behavior 459 (2001).

⁶⁹ *Id.*

⁷⁰ *Id.* at 628.

⁷¹ *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures*, prepared by Sheri H. Mecklenburg, Program Director, submitted March 17, 2006.

received much criticism, both in the academic community⁷² and in the press.⁷³ This field study was non peer-reviewed and the police department will not release the data so it can be analyzed by outside parties.⁷⁴ Further, the methodology of this study was roundly criticized by experts, including Daniel Wright (psychology professor at the University of Sussex in Brighton, UK), Gary Wells (psychology professor at Iowa State and an expert in the field), Daniel Schacter (psychology professor at Harvard) and Nobel laureate Daniel Kahneman (psychology professor at Princeton).⁷⁵ Mecklenburg failed to isolate certain variables in her field tests, causing “devastating consequences for assessing the real-world implications of this particular study.”⁷⁶

A second field study conducted in Hennepin County, Minnesota, which includes Minneapolis, supports the idea that this procedure eliminates relative judgments and makes identifications more reliable. Using many of the suggestions outlined above, including the double blind, sequential presentation of photos in a photo array, when compared to previous laboratory and field tests, the Hennepin County Attorney notes that witnesses dramatically less frequently chose a filler and instead more frequently identified either the suspect or made no choice at all.⁷⁷ This is consistent with a notion that witnesses make more absolute judgments and fewer relative judgments with this sequential procedure.⁷⁸

In summary, there is evidence that sequential and double-blind identification procedures result in a reduction in “false positive” results, i.e., identifications of suspects who are in fact innocent of the crime, while other evidence exists which calls this conclusion into question. We propose, therefore, that further research, including field studies, into the efficacy of sequential

⁷² Daniel L. Schacter, et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32(1) *Law of Human Behavior* 3 (2008); Gary L. Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, 32(1) *Law of Human Behavior* 6 (2008).

⁷³ Laura Spinney, *Line-ups on trial*, 453(22) *Nature* 442 (May 2008).

⁷⁴ *Id.*

⁷⁵ Schacter, *supra* note 56; Wells, *supra* note 56.

⁷⁶ Schacter, *supra* note 56.

⁷⁷ Amy Klobuchar and Hilary Lindell Caliguri, *Protecting the Innocent/Convicting the Guilty: Hennepin County’s pilot Project in Blind Sequential Eyewitness Identification*, 32 *Wm. Mitchell L. Rev.* 1, 23 (2005-2006).

⁷⁸ Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006(2) *Wisc. L. Rev.* 615, 627 (2006).

versus simultaneous procedures be conducted, and that further recommendations be made following this additional research.

At Trial

2. Allow expert testimony on eyewitness identifications at trial.

Expert testimony on eyewitness identifications that is supported by behavioral science helps the trier of fact to assess the reliability of eyewitness identification testimony, when used effectively. Judges have broad discretion to allow such demeanor-based expert testimony where the testimony concerns the underlying factors affecting an eyewitness' perception, making expert testimony a viable part of the solution to erroneous eyewitness identifications.

In New York State courts, the criteria for admitting expert testimony is governed by the standard set forth in *Frye v. United States*.⁷⁹ The *Frye* standard states that “expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has ‘gained general acceptance’ in its specified field.”⁸⁰ The Court of Appeals has acknowledged that *Frye* should not be interpreted as “setting an insurmountable standard”⁸¹ and to that end a scientific principle or procedure need not be “unanimously endorsed” by the scientific community in order to be admissible.⁸²

The New York Court of Appeals has acknowledged that expert testimony on eyewitness identifications may be of great assistance to jurors. That Court has recently written:

Thus, it is clear that expert testimony regarding the factors that affect the accuracy of eyewitness identifications, in the appropriate case, may be admissible in the exercise of the court's discretion. Moreover, there are cases in which it would be an abuse of a court's discretion to exclude expert testimony on the reliability of eyewitness identifications.⁸³

⁷⁹ 293 F. 1013 (D.C. Cir. 1923); *People v. Wesley*, 83 N.Y.2d 417, 422 (1994).

⁸⁰ *Id.* (Internal citations omitted).

⁸¹ *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006).

⁸² *Wesley, supra*, 83 N.Y.2d at 423 (internal citations omitted).

⁸³ *People v. LeGrand*, 8 N.Y.3d 449, 456 (2007).

While the New York Court of Appeals has, on a number of occasions, determined that trial judges did not abuse their discretion when they excluded expert testimony on eyewitness identification⁸⁴, in *LeGrand*, the Court held that “where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications”⁸⁵

Even though *LeGrand* arguably stands for the principle of increased reliance on eyewitness identification experts, a recent opinion from the First Department of the Appellate Division suggests that the applicability of the *LeGrand* holding is debatable. In *People v. Abney*,⁸⁶ a divided panel of the Court upheld the trial judge’s exclusion of expert testimony on the reliability of eyewitness identification. In support of its holding, the majority not only interpreted *LeGrand* narrowly, but it also attempted to distinguish it by explaining that the record in *Abney* included “sufficient corroborating evidence” of the defendant’s guilt.⁸⁷ However, the dissent vehemently disagreed, writing: “We should not limit *LeGrand* . . . to its facts, and thus effectively consign it to jurisprudential oblivion.”⁸⁸ The opinions in *Abney* only provide further support for the need for additional guidance regarding the use of expert testimony in the context of eyewitness identifications.

In the event that prosecutors or defense attorneys lack the resources to hire an expert on eyewitness identifications, funds should be provided to both prosecutors and defense attorneys to permit the hiring of these kinds of experts.

3. Provide jury instructions on eyewitness identifications.

To the extent that a local criminal justice system does not improve the reliability of its eyewitness testimony, the jury should be informed of the extent to which the evidence under its consideration is unreliable. Educating juries through jury instructions is an often cited remedy

⁸⁴ See, e.g., *People v. Young*, 7 N.Y.3d 40 (N.Y. 2006); *People v. Lee*, 96 N.Y.2d 157 (2001).

⁸⁵ 8 N.Y.3d at 452.

⁸⁶ *People v. Abney*, No. 3314-05, 2008 WL 4559965 (N.Y. App. Div. Oct. 14, 2008).

⁸⁷ *Id.* at *4.

⁸⁸ *Id.* at *10 (Moskowitz, J., dissenting).

to the problems inherent in eyewitness identifications. In cases where the primary evidence is eyewitness identifications, judges are permitted to caution the jury as to its potential unreliability.

Some state courts have adopted special instructions to handle inadequacies in eyewitness identification. For example, the New Jersey State Supreme Court in *State v. Cromedy* held that cross-racial identifications, which occur when an eyewitness is asked to identify a person of another race, require a special jury instruction.⁸⁹

However, there is a strong preference for expert testimony over jury instructions as a means to reach jurors. Psychological research indicates that traditional jury instructions on the weaknesses of eyewitness identification have virtually no impact on the jury's actual evaluation of problematic characteristics of an identification, whereas expert testimony has some appreciable effect in sensitizing jurors to the relevant issues.⁹⁰ In addition, the use of jury instructions (in lieu of providing expert testimony) has been criticized as inadequate to educate juries. Professor Guerra Thompson finds that the substance of jury instructions is beyond the common knowledge of jurors, and by imparting this critical information at the end of the trial, jury instructions come too late to help jurors evaluate eyewitness identification testimony.⁹¹ As a result, jury instructions alone appear to be insufficient as a remedy for mistaken eyewitness identifications.

We propose that the following jury instruction be given in cases involving eyewitness identification evidence:⁹²

NOTE – BRACKETED LANGUAGE SHOULD BE USED IF APPLICABLE

⁸⁹ *State v. Cromedy*, 727 A.2d 457, 458- 59 (N.J. 1999); see also *United States v. Telfaire*, 469 F.2d 552, 561 (D.C. Cir. 1972) (C.J.Bazelon, dissenting).

⁹⁰ Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 Psychol. Pub. Pol'y & L. 817, 834, 840-41 (1995).

⁹¹ Sandra Guerra Thompson, *Beyond A Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. Davis L. Rev. 1487.

⁹² A minority of the Subcommittee expressed concern that portions of this proposed jury instruction are not supported by scientific research and requested that this full report be forwarded to the Committee on Criminal Jury Instructions (CJI) with a recommendation that the Committee determine how jury instructions on eyewitness identification should be updated.

One of the most important questions [The only important question] in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt, not only that the crime was committed, but also that the defendant was the person who committed the crime. If, after considering the evidence you have heard from both sides, you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.⁹³

The identification testimony that you have heard was an expression of belief or impression by the witness. To find the defendant not guilty, you need not believe that the identification witness was insincere, but merely that the witness was mistaken in his [her] belief or impression.

Many factors affect the accuracy of identification. In considering whether the prosecution has proved beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following:

Did the witness have an adequate opportunity to observe the criminal actor?

In answering this question, you should consider:

1. What were the lighting conditions under which the witness made his/her observation?
2. What was the distance between the witness and the perpetrator?
3. Did the witness have an unobstructed view of the perpetrator?
4. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin color, and clothing of the perpetrator?
5. For what period of time did the witness actually observe the perpetrator? During that time, in what direction were the witness and

⁹³ This language has been cited approvingly by the Supreme Court of Utah (*State v. Long*, 721 P.2d 483,495 (Utah 1986), *citing* R. Sanders, *Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards*, 12 Am. J. Crim. L. 189, 222-24 (1984)).

the perpetrator facing, and where was the witness's attention directed?

6. Did the witness have a particular reason to look at and remember the perpetrator?
7. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?
8. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the defendant, as you find the defendant's appearance to have been on the day in question?
9. What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?
10. [Did the witness ever see the person identified prior to the day in question? If so, how many times did the witness see that person and under what circumstances? To what extent, if any, did those prior observations affect the witness's ability to accurately recognize and identify such person as the perpetrator?⁹⁴]
11. [You should also consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race. In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. Psychological studies support this impression. In addition, laboratory studies reveal that even people with no prejudice against other races

⁹⁴ These factors are drawn from the New York State Criminal Jury Instructions, 2nd on "Identification – One Witness" (January 2008).

and substantial contact with persons of other races still experience difficulty in accurately identifying members of a different race. Quite often people do not recognize this difficulty in themselves. You should consider these facts in evaluating the witness's testimony, but you must also consider whether there are other factors present in this case that overcome any such difficulty of identification.^{95]}

Was the witness sufficiently attentive to the criminal actor at the time of the crime?

In answering this question, you should consider whether the witness knew that a crime was taking place during the time he [she] observed the actor. Even if the witness had adequate opportunity and capacity to observe the criminal actor, he [she] may not have done so unless he [she] was aware that a crime was being committed.]

Was the witness' identification of the defendant completely the product of his [her] own memory?

In answering this question, you should consider:

1. The length of time that passed between the witness' original observation and his [her] identification of the defendant;
2. The witness' [mental] capacity and state of mind at the time of the identification;
3. The witness' exposure to opinions, descriptions or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his [her] identification;
4. [Any instances when the witness, or any eyewitness to the crime, failed to identify the defendant;]

⁹⁵ Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934, 977-79 (1984).

5. [Any instances when the witness, or any eyewitness to the crime, gave a description of the actor that is inconsistent with the defendant's appearance;]

You have heard testimony regarding an identification procedure in which the defendant was identified by the witness. You may consider the methods used in conducting this procedure and the circumstances under which the defendant was presented to the witness for identification. For example, you may consider that when an officer who is aware of the identity of the suspect presents a lineup to a witness, he may inadvertently cue the witness as to which of the individuals is the suspect. Similarly, a witness who is presented with six individuals in a lineup simultaneously may be more likely to select one of the individuals than a witness who is presented with the individuals sequentially, regardless of whether the perpetrator is included in the lineup.

You should also take into account the circumstances under which the witness first viewed and identified the defendant, the suggestibility, if any, of the procedure used in that viewing, any physical descriptions that the witness may have given to the police, and all the other factors which you find relating to reliability or lack of reliability of the identification of the defendant.

You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

You may take into account that an identification made by picking the defendant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented alone to the witness.

You may also take into account that identifications made from seeing the person are generally more reliable than identifications made from a photograph.

You may consider the instructions, or lack of instructions, given to the witness during the identification procedure. For example, you may consider that indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure may increase the likelihood that the witness will select one of the individuals in the procedure even when the perpetrator is not present. Thus, such action on the part of the officer may have increased the probability of a misidentification.⁹⁶

You may also consider the strength of the identification, including the witness' degree of certainty. Certainty, however, does not mean accuracy, and a witness may be sincere in his [her] belief but may still be mistaken in that belief.

I again emphasize that the burden of proving that the defendant is the person who committed the crime is on the prosecution. If, after considering the evidence you have heard from the prosecution and from the defense, and after evaluating the eyewitness testimony in light of the considerations listed above, you have a reasonable doubt about whether the defendant is the person who committed the crime, you must find him not guilty.

4. Evidence of photographic identifications should be admitted at trial if they are properly documented by video recording and if they are conducted in accordance with the proposed improvements to identification procedure.

New York is the only jurisdiction in which jurors are precluded from receiving evidence of photographic identifications. We propose that legislation be introduced to permit the introduction of evidence of photographic identifications, if such photographic identification procedures are properly documented in accordance with the proposed procedures (i.e., video recordings of the procedure and the eyewitness' assessment of certainty) and if the photographic procedure is conducted in accordance with our proposed improvements (i.e., double-blind; one

⁹⁶ Connecticut Criminal Jury Instructions § 2.6-4, *citing State v. Ledbetter*, 275 Conn. 534 (Conn. 2005).

suspect per procedure; cautionary instructions provided to the eyewitness; effective use of fillers).⁹⁷

5. Sanctions for failure to comply with mandated procedures.

We propose that legislation be adopted that would allow for preclusion of eyewitness identification testimony for failure to comply with proposed procedures. Specifically, we propose that a failure to implement the proposed improvements to eyewitness identification procedures be considered as a factor by the trial judge in deciding whether to admit evidence of the identification procedure at trial. The trial court would be required to conduct a pre-trial hearing to determine whether mandated procedures have been followed.

6. Specialized training of police, prosecutors, judges and defense attorneys.

It is clear that specialized training is necessary to educate those who work in the criminal justice system about the realities of eyewitness identifications – the reality that eyewitnesses can be certain and yet be wrong, and the problems with the conduct of these procedures which, if left unchanged, can lead to wrongful arrests, prosecutions and convictions. With this appreciation, each participant in the system must then understand and act on what he or she can do to prevent faulty eyewitness identification procedures or to expose them if they do occur.

Police should be educated about the dangers of eyewitness identification procedures and the science underlying eyewitness identifications. Their training should inform the police about the techniques associated with an increased risk of erroneous eyewitness identifications. They should likewise be trained to implement the procedural changes outlined in this report as well as the underlying reasons for these changes. The police should be trained in how to instruct and interact with an eyewitness during an identification procedure. Police should be specifically trained in the proper documentation of eyewitness identification procedures and in the need to preserve these records.

Of course, the responsibility to address the problem of erroneous identifications does not rest with the police alone. Therefore, the other participants in the criminal justice system

⁹⁷ A minority of the Task Force expressed the opinion that photographic identifications should be admissible as long as the procedure was conducted in compliance with constitutional requirements and without any linkage to video recording or other proposed improvements to identification procedures.

should also be trained. Specifically, prosecutors should be trained in the social science on the topic. As a preliminary matter, the prosecutors must reach a determination as to whether an identification is trustworthy. Prosecutors need to approach this decision with an awareness that erroneous eyewitness identifications do occur, and an understanding of the factors that are more likely to result in a faulty identification.

Defense attorneys also should be fully informed on the issues involving eyewitness identifications. Without this knowledge, a defense attorney may be reluctant to consider the possibility that the eyewitness identification of his or her client was mistaken and that the client is innocent. Such an attorney may fail to challenge the admissibility of the identification aggressively enough or may urge the client to accept a seemingly favorable plea. Defense attorneys also should be familiar with the latest research on the issues, and they should learn the most effective means to present that information to the fact-finder and to the court. Defense attorneys should be trained in the means to elicit testimony – from the police, the client and expert witnesses – to convey the process by which an erroneous identification could have occurred.

Finally, judges should also be educated about the reality of erroneous eyewitness identifications and the factors that can contribute to them to better inform the decisions they must make about the admissibility of an eyewitness identification and challenges that may be brought by the defense.

7. Funding for implementation of proposed procedures.

The Subcommittee is mindful of the financial and logistical impact that implementation of these proposal may have on law enforcement agencies throughout New York State, particularly in small localities. We understand that appropriate funding is a prerequisite in order to effectuate these important changes in eyewitness identification procedures as the Subcommittee has proposed. We therefore propose that sufficient resources be made available to New York State law enforcement agencies to permit them to implement these improvements to eyewitness identification procedures.

APPENDIX A

INTRODUCTION

In light of the litany of deficiencies in traditional eyewitness identification procedures, a number of jurisdictions have taken steps to reform eyewitness identification procedures. These reforms can be grouped into a number of broad categories, none of which are mutually exclusive. First, jurisdictions have developed task forces or similar commissions to conduct research and suggest recommendations on the topic of eyewitness identification procedures. Second, jurisdictions have created commissioned pilot studies to investigate how proposed eyewitness identification procedures would operate. Third, jurisdictions have created “best practices” manuals or guidelines, and have encouraged law enforcement officials to reform their practices, where appropriate, to those proposed in the best practices manuals. Fourth, some jurisdictions have adopted prescriptive, legislative reforms. Finally, in some instances the courts have modified the law and/or procedures surrounding eyewitness identification procedures either through litigation or their inherent, supervisory powers.

This appendix discusses the reform efforts that have occurred in jurisdictions across the country. It only briefly summarizes the reforms, but it provides insight into what has been done to combat the problems relating to traditional eyewitness identification methods.

REFORMS BY JURISDICTION

Federal

In light of the considerable number of mistaken eyewitness identifications, in 1999 the Department of Justice’s National Institute of Justice commissioned a best practices manual designed and approved by the Technical Working Group for Eyewitness Evidence.⁹⁸ The manual was designed to provide guidance and instruction to jurisdictions nationwide about ways in which they could consider reforming eyewitness identification procedures. Among other things, the report encourages law enforcement officials to: provide thorough cautionary instructions to witnesses, document eyewitness identification procedures, and record witness recollections.

⁹⁸ National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), <http://ojp.usdoj.gov/nij/pubs-sum/178240.htm>.

California

Starting in 2002, Santa Clara County started requiring the use of double-blind, sequential identification procedures whenever possible.⁹⁹ On April 13, 2006, the statewide Commission on the Fair Administration of Justice released a report entitled “Report and Recommendations Regarding Eyewitness Identification Procedures.”¹⁰⁰ The report, which based its findings on the reforms in Santa Clara and other jurisdictions throughout the country, offered the following recommendations and/or reforms: double-blind and sequential identification procedures; lineup procedures and photo displays should be videotaped or audiotaped wherever possible; cautionary instructions should be provided to witnesses; there should be a minimum of six photos presented in a photo spread as well as a minimum of six people in a lineup; the institution of training programs for law enforcement officials on recommended procedures for eyewitness IDs as well as training programs for judges, prosecutors, and defense lawyers on the risks inherent in cross-racial identifications and unreliable identification procedures; and the enactment of a task force which would include the California Attorney General to develop statewide policies and procedures. Recent efforts to implement legislative reforms have been vetoed by the governor.

Illinois

In 2000, then-Governor George Ryan established the Commission on Capital Punishment to study and review the administration of capital punishment in the State of Illinois. In its April 2002 report, the Commission recommended a number of reforms, some of which related to eyewitness identification procedures.¹⁰¹ Among other things, the Commission recommended, at least in some cases, double-blind, sequential eyewitness identification

⁹⁹ Santa Clara County Police Chiefs’ Association, Santa Clara County Line-up Protocol, http://www.innocenceproject.org/docs/Santa_Clara_eyewitness.pdf.

¹⁰⁰ California Commission on the Fair Administration of Justice, *Report and Recommendations Regarding Eyewitness Identification Procedures* (April 13, 2006), <http://ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf>.

¹⁰¹ Report of the Governor’s Commission on Capital Punishment (April 15 2002), <http://www.idoc.state.il.us/ccp/ccp/reports/index.html>.

procedures should be used. In 2003, when the Death Penalty Reform Bill¹⁰² was enacted, some, but not all, of the reforms regarding eyewitness identification procedures were included. Specifically, the bill provides that: lineups must be “photographed or otherwise recorded;” all photographs and photographic spreads must be disclosed to defense counsel; and that eyewitness viewing a lineup must sign a standardized form which informs them that the suspect may not be in lineup, they are not obligated to make an identification, and they cannot assume lineup administrator knows which person is the suspect. The bill also mandated the implementation of a pilot study to consider the effectiveness of sequential lineup procedures.

Maryland

On May 17, 2007, Governor Martin O’Malley signed a bill into law that required each law enforcement agency in the State to adopt written policies relating to eyewitness identification procedures that complied with the United States Department of Justice standards by December 1, 2007.¹⁰³

Massachusetts

While there have not yet been any statewide reforms in Massachusetts, a number of municipalities in the State have altered the manner in which they conduct eyewitness identification procedures. The Northhampton Police Department has mandated the following reforms: the use of double-blind and sequential identification procedures; cautionary instructions to witnesses; and the requirement of a minimum of five fillers for photographic identifications and four fillers for lineup identifications.¹⁰⁴ The city of Boston has implemented similar reforms.¹⁰⁵

¹⁰² 725 Ill. Comp. Stat. 5/107A-5 (2003). Relevant provisions of this bill are provided in Appendix B.

¹⁰³ MD. CODE ANN., PUB. SAFETY § 3-506 (2007). Relevant provisions of this bill are provided in Appendix B.

¹⁰⁴ Northhampton Police Department, Administration & Operations Manual O-408, “*Eyewitness Identification Procedures*,” http://www.innocenceproject.org/docs/Northampton_MA_ID_Protocols.pdf.

¹⁰⁵ The Justice Project, *Eyewitness Identification: A Policy Review* (2006), http://www.thejusticeproject.org/wp-content/uploads/polpack_eyewitnessid-fin21.pdf.

Minnesota

While Minnesota has not yet implemented any statewide reforms to the way eyewitness identification procedures are conducted in the State, a pilot program conducted in Hennepin County has garnered considerable national attention. In 2003, Hennepin County Attorney Amy Klobuchar spearheaded an effort to implement a sequential, double-blind pilot program in four police departments, including Minneapolis.¹⁰⁶ The reforms, which were implemented at minimum cost, led to a reduction in the number of filler identifications, and at the same time, they did not lead to any significant drop in suspect identifications. A subsequent study showed that sequential, double-blind procedures increased protections against misidentifications, benefited investigators, and resulted in higher quality eyewitness evidence. Due to these results, the Hennepin County Attorney has advocated for broad adoption of such reforms.

New Jersey

In 2001, Attorney General John Farmer Jr., in his capacity as overseer of the State's criminal justice system, instituted widespread reforms in the manner in which the State conducted eyewitness identification procedures.¹⁰⁷ Those reforms made New Jersey the first state to officially adopt the recommendations of the National Institute of Justice's 1999 report *Eyewitness Evidence: A Guide for Law Enforcement*. Due to the reforms implemented by the Attorney General, the State now mandates the use of double-blind, sequential lineups. Furthermore, police officers are required to issue cautionary instructions, ensure that lineups are constructed effectively and include an adequate number of appropriate fillers, and document identification procedures, including witnesses' statements of certainty. These reforms have been cited with approval, at least partially, by the New Jersey Supreme Court.¹⁰⁸

¹⁰⁶ Amy Klobuchar, Nancy M. Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 *Cardozo Pub. L. Pol'y & Ethics J.* 381 (2006).

¹⁰⁷ New Jersey Department of Law and Public Safety, Office of the Attorney General, *Memorandum Re: Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures to all County Prosecutors, Police Chiefs, and Law Enforcement Chief Executives* (April 18, 2001), <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

¹⁰⁸ See *State v. Delgado*, 188 N.J. 48 (2006) (unanimously holding that complete documentation of the identification procedure is a condition of admissibility for out-of-court identifications).

North Carolina

In November 2002, then-Chief Justice I. Beverly Lake of the North Carolina Supreme Court created the North Carolina Actual Innocence Commission to study and recommend potential strategies for lessening incidence of wrongful convictions. In its October 2003 report, the Commission recommended and endorsed the following eyewitness identification procedural reforms: the use of cautionary instructions with witnesses; documentation of a witness' confidence in the identification without any feedback given by the administrator; the effective use of fillers (a minimum of eight photos in a photo identification procedures and a minimum of six individuals in live identification procedures); and sequential double-blind procedures.¹⁰⁹ In 2007, North Carolina passed legislation that adopted many of the aforementioned reforms.¹¹⁰

Virginia

In 2004, the Virginia General Assembly passed a resolution directing the Virginia State Crime Commission to conduct a study on mistaken eyewitness identifications, lineup procedures, and the potential costs and benefits surrounding the implementation of the sequential method in eyewitness identification procedures. In January 2005, the Crime Commission released its study and made recommendations.¹¹¹ In response to the Commission's study, legislation was subsequently enacted that requires photographs of arrestees to be submitted to the Central Criminal Records Exchange, police departments to develop written policies and procedures for in-person and photo lineups, and for the Department of Criminal Justice Services and the Virginia Crime Commission to develop model lineup procedures and training requirements.¹¹²

¹⁰⁹ North Carolina Actual Innocence Commission, Recommendations for Eyewitness Identification (October 2003), <http://www.ncids.org/News%20&%20Updates/Eyewitness%20ID.pdf>.

¹¹⁰ Eyewitness Identification Reform Act. N.C. Gen. Stat. § 15A-284.52 (2007). Relevant provisions of this bill are provided in Appendix B.

¹¹¹ Virginia State Crime Commission, *Mistaken Eyewitness Identification: Report to the Governor and the General Assembly of Virginia* (January 2005), [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD402005/\\$file/HD40.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD402005/$file/HD40.pdf).

¹¹² Va. Code Ann. § 19.2-390 (2005); Va. Code Ann. § 19.2-390.02 (2005).

West Virginia

On March 10, 2007, the State enacted legislation, the Eyewitness Identification Act,¹¹³ which required law enforcement officials to conform with the Department of Justice’s guidelines on eyewitness identification procedures. Among other things, the Act requires that law enforcement officials provide witnesses with cautionary instructions before conducting a lineup as well as a detailed documentation of the lineup procedure. The Act also mandated the creation of a task force to study and identify best practices for eyewitness identifications.

Wisconsin

The Wisconsin Department of Justice, working with University of Wisconsin Law School, developed a comprehensive set of model eyewitness identification guidelines for law enforcement that was distributed in March 2005.¹¹⁴ The guidelines include recommendations on matters such as: the use of cautionary instructions to witnesses before, and the use of assessments of witness confidence immediately after, identifications procedures as well as the benefits of double-blind sequential presentation of lineups. While the model policy is only advisory, the Wisconsin Department of Justice has developed a training program for law enforcement officials across the state, and to date, over 800 investigators have been trained on these new procedures. Additionally, training has been incorporated into the curriculum for new investigators.¹¹⁵

In 2004, a Wisconsin state representative created a task force to study the case of mistaken witness identification in the Steven Avery case and to make recommendations on reforming eyewitness identification procedures. The following fall, the state enacted legislation that reformed the manner in which eyewitness identification procedures are conducted. Among the reforms, law enforcement officials were required to have written procedures “designed to

¹¹³ W. VA. CODE § 62-1E-2. Relevant provisions of this bill are provided in Appendix B.

¹¹⁴ State of Wisconsin, Office of the Attorney General, *Model Policy and Procedure for Eyewitness Identification* (2005), <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>.

¹¹⁵ The Justice Project, *Eyewitness Identification: A Policy Review* (2006), http://www.thejusticeproject.org/wp-content/uploads/polpack_eyewitnessid-fin21.pdf.

reduce the potential for erroneous identifications.”¹¹⁶ In creating those policies, not only were police departments instructed to consider model policies adopted by other jurisdictions, but the legislation also requires biennial review of policies. Furthermore, the law requires that “to the extent feasible,” blind administrators and the sequential procedures must be used.

¹¹⁶ WIS. STAT. § 175.50 (2005). Relevant provisions of this bill are provided in Appendix B.

APPENDIX B

INTRODUCTION

This Appendix contains provisions from various state legislative proposals on eyewitness identification procedure reforms that have been enacted into law.

STATE LEGISLATION

Illinois

Lineup and Photo Spread Procedure (2003)¹¹⁷

(a) All lineups shall be photographed or otherwise recorded. These photographs shall be disclosed to the accused and his or her defense counsel during discovery proceedings as provided in Illinois Supreme Court Rules. All photographs of suspects shown to an eyewitness during the photo spread shall be disclosed to the accused and his or her defense counsel during discovery proceedings as provided in Illinois Supreme Court Rules.

(b) Each eyewitness who views a lineup or photo spread shall sign a form containing the following information:

(1) The suspect might not be in the lineup or photo spread and the eyewitness is not obligated to make an identification.

(2) The eyewitness should not assume that the person administering the lineup or photo spread knows which person is the suspect in the case.

(c) Suspects in a lineup or photo spread should not appear to be substantially different from “fillers” or “distracters” in the lineup or photo spread, based on the eyewitness’ previous description of the perpetrator, or based on other factors that would draw attention to the suspect.

¹¹⁷ 725 ILL. COMP. STAT. 5/107A-5 (2003).

North Carolina

Eyewitness Identification Reform Act (Effective March 1, 2008)ⁿ⁸

Purpose

The purpose of this Article is to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects.

Eyewitness Identification Reform

(b) Eyewitness Identification Procedures. -- Lineups conducted by State, county, and other local law enforcement officers shall meet all of the following requirements:

- (1) A lineup shall be conducted by an independent administrator or by an alternative method as provided by subsection (c) of this section.
- (2) Individuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately, in a previously determined order, and removed after it is viewed before the next individual or photo is presented.
- (3) Before a lineup, the eyewitness shall be instructed that:
 - 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, and
 - e. The investigation will continue whether or not an identification is made.
 - f. The eyewitness shall acknowledge the receipt of the instructions in writing. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the acknowledgement and shall also sign the acknowledgement.

ⁿ⁸ N.C. GEN. STAT. §§ 15A-284.51-53 (2007).

(4) In a photo lineup, the photograph of the suspect shall be contemporary and, to the extent practicable, shall resemble the suspect's appearance at the time of the offense.

(5) The lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers. In addition:

a. All fillers selected shall resemble, as much as practicable, the eyewitness's description of the perpetrator in significant features, including any unique or unusual features.

b. At least five fillers shall be included in a photo lineup, in addition to the suspect.

c. At least five fillers shall be included in a live lineup, in addition to the suspect.

d. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect participates shall be different from the fillers used in any prior lineups.

(6) If there are multiple eyewitnesses, the suspect shall be placed in a different position in the lineup or photo array for each eyewitness.

(7) In a lineup, no writings or information concerning any previous arrest, indictment, or conviction of the suspect shall be visible or made known to the eyewitness.

(8) In a live lineup, any identifying actions, such as speech, gestures, or other movements, shall be performed by all lineup participants.

(9) In a live lineup, all lineup participants must be out of view of the eyewitness prior to the lineup.

(10) Only one suspect shall be included in a lineup.

(11) Nothing shall be said to the eyewitness regarding the suspect's position in the lineup or regarding anything that might influence the eyewitness's identification.

(12) The lineup administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given lineup is the perpetrator. The lineup

administrator shall separate all witnesses in order to discourage witnesses from conferring with one another before or during the procedure. Each witness shall be given instructions regarding the identification procedures without other witnesses present.

(13) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning the person before the lineup administrator obtains the eyewitness's confidence statement about the selection. There shall not be anyone present during the live lineup or photographic identification procedures who knows the suspect's identity, except the eyewitness and counsel as required by law.

(14) Unless it is not practical, a video record of live identification procedures shall be made. If a video record is not practical, the reasons shall be documented, and an audio record shall be made. If neither a video nor audio record are practical, the reasons shall be documented, and the lineup administrator shall make a written record of the lineup.

(15) Whether video, audio, or in writing, the record shall include all of the following information:

- a. All identification and non-identification results obtained during the identification procedure, signed by the eyewitness, including the eyewitness's confidence statement. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the results and shall also sign the notation.
- b. The names of all persons present at the lineup.
- c. The date, time, and location of the lineup.
- d. The words used by the eyewitness in any identification, including words that describe the eyewitness's certainty of identification.
- e. Whether it was a photo lineup or live lineup and how many photos or individuals were presented in the lineup.
- f. The sources of all photographs or persons used.
- g. In a photo lineup, the photographs themselves.

h. In a live lineup, a photo or other visual recording of the lineup that includes all persons who participated in the lineup.

(c) Alternative Methods for Identification if Independent Administrator Is Not Used. -- In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved by the North Carolina Criminal Justice Education and Training Standards Commission. Any alternative method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:

(1) Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed.

(2) A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.

(3) Any other procedures that achieve neutral administration.

(d) Remedies. -- All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section:

(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.

(2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.

(3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

Training of Law Enforcement Officers

Pursuant to its authority under G.S. 17C-6 and G.S. 17E-4, the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission, in consultation with the Department of Justice, shall create educational materials and conduct training programs on how to conduct lineups in compliance with this Article.

Maryland

Written Policies Regarding Eyewitness Identification (May 17, 2007)¹¹⁹

(a) Adoption. – On or before December 1, 2007, each law enforcement agency in the State shall adopt written policies relating to eyewitness identification that comply with the United States Department of Justice standards on obtaining accurate eyewitness identification.

(b) Filing with Department of State Police. – On or before January 1, 2008, each law enforcement agency in the State shall file a copy of the written policy relating to eyewitness identification with the Department of State Police.

(c) Compiling and public inspection. –

(1) On or before February 1, 2008, the Department of State Police shall compile the written policy relating to eyewitness identification of each law enforcement agency in the State.

(2) The Department of State Police shall allow public inspection of each policy compiled.

West Virginia

Eyewitness Identification Act (March 10, 2007)¹²⁰

Eyewitness Identification Procedures.

(a) Before a lineup, the eyewitness should be given the following three instructions:

(1) That the perpetrator might or might not be present in the lineup;

¹¹⁹ MD. CODE ANN., PUB. SAFETY § 3-506 (2007).

¹²⁰ W. VA. CODE §§ 62-1E-2, 3 (2007).

(2) That the eyewitness is not required to make an identification; and

(3) That it is as important to exclude innocent persons as it is to identify the perpetrator.

(b) Law-enforcement officers should make a written record of a lineup, including the following information:

(1) The date, time and location of the lineup.

(2) The names of every person in the lineup, if known, and all other persons present at the lineup.

(3) The words used by the eyewitness in any identification, including words that describe the eyewitness' certainty or uncertainty in the identification at the time the identification is made.

(4) Whether it was a photo lineup or live lineup.

(5) The number of photos or individuals that were presented in the lineup.

(6) Whether the lineup administrator knew which person in the lineup was the suspect.

(7) Whether, before the lineup, the eyewitness was instructed that the perpetrator might or might not be presented in the lineup.

(8) Whether the lineup was simultaneous or sequential.

(9) The signature, or initials, of the eyewitness, or notation if the eyewitness declines or is unable to sign.

(10) A video of the lineup and the eyewitness' response may be included.

(c) There is hereby created a task force to study and identify best practices for eyewitness identification...

(d) The task force, or their assigned designees, shall serve without compensation, and in consultation with eyewitness identification practitioners and experts, shall develop recommended guidelines for policies, procedures and training with respect to the collection and handling of eyewitness evidence in criminal investigations by law-enforcement agencies that are consistent with the reliable evidence supporting best practices. The purpose of the guidelines is

to provide law-enforcement agencies with information regarding eyewitness identification policies and procedures to increase the accuracy of the crime investigation process.

(e) Such guidelines shall include procedures for the administration of live and photographic lineups and instructions that will increase the accuracy of eyewitness identifications. The task force, in developing these guidelines, shall consider:

- (1) The use of blind administration of live and photo lineups;
- (2) The issuance of specific instructions to the eyewitness before and during the identification procedure;
- (3) The number and selection of fillers to be used in live and photo lineups;
- (4) Sequential versus simultaneous presentation of lineup members;
- (5) Whether only one suspect should be included in any live or photo lineup;
- (6) The timing of when the administrator should request and record the eyewitness's statement of his confidence in his selection;
- (7) Whether to refrain from providing of any confirmatory information to the eyewitness;
- (8) The visual recording of the lineup and its administration;
- (9) The video or audio recording of the lineup procedure;
- (10) Any other policies or procedures the task force determines to be relevant; and
- (11) What training, if any, should be made available to law-enforcement personnel in the use of these procedures....

Training of Law-Enforcement Officers.

The Superintendent of State Police may create educational materials and conduct training programs to instruct law-enforcement officers and recruits how to conduct lineups in compliance with this section.

Wisconsin

Eyewitness Identification Procedures.¹²¹

(2) Each law enforcement agency shall adopt written policies for using an eyewitness to identify a suspect upon viewing the suspect in person or upon viewing a representation of the suspect. The policies shall be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases.

(3) A law enforcement agency shall biennially review policies adopted under this section.

(4) In developing and revising policies under this section, a law enforcement agency shall consider model policies and policies adopted by other jurisdictions.

(5) A law enforcement agency shall consider including in policies adopted under this section practices to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications, including the following:

(a) To the extent feasible, having a person who does not know the identity of the suspect administer the eyewitness viewing of individuals or representations.

(b) To the extent feasible, showing individuals or representations sequentially rather than simultaneously to an eyewitness.

(c) Minimizing factors that influence an eyewitness to identify a suspect or overstate his or her confidence level in identifying a suspect, including verbal or nonverbal reactions of the person administering the eyewitness viewing of individuals or representations.

(d) Documenting the procedure by which the eyewitness views the suspect or a representation of the suspect and documenting the results or outcome of the procedure.

¹²¹ WIS. STAT. § 175.50 (2005).

Forensic Evidence

SUBCOMMITTEE REPORT AND FINAL PROPOSALS

Introduction

The review of numerous exonerations in New York State confirms that myriad failures related to the handling of forensic evidence and the conduct of crime scene investigations contribute significantly to wrongful conviction. While it is forensic evidence, principally DNA, that achieves the ultimate exoneration of the wrongfully condemned, recognition of the importance of this evidence and adoption of reforms may prevent wrongful conviction in the first instance. Eventual exonerations do not prove that the system works; rather they prove the existence of the problem and the need for reform. In cases where crucial evidence is not preserved, is preserved but is later lost, or where it is never properly analyzed, a wrongful conviction may never be uncovered.

In considering forensic science reform, it should be acknowledged that New York State was among the first states to take important strides in this area. In the 1990s, New York State established a Commission on Forensic Science and a DNA Subcommittee pursuant to Article 49-B of the Executive Law. The Commission was empowered to develop minimum standards and a program of accreditation for all public forensic science laboratories in New York State. Accreditation of forensic DNA laboratories is granted through the Commission. The DNA Subcommittee advises the Commission on Forensic Science on matters related to the implementation of scientific controls and quality assurance procedures for the performance of forensic DNA analysis. Forensic laboratories must demonstrate compliance with the standards of the American Society of Crime Lab Directors/Laboratory Accreditation Board (ASCLD/LAB), the American Board of Forensic Toxicology (ABFT), and/or the Quality Assurance Standards for the DNA Testing Laboratories published by the FBI.

In addition, New York State added a section to the Criminal Procedure Law (Section 440.30 1-a) to provide a mechanism by which a convicted defendant could seek post-conviction testing of biological evidence where there is a reasonable probability that DNA testing would have produced a more favorable verdict for the defendant.

While the Commission on Forensic Sciences and the post-conviction DNA testing are noteworthy advances, experience suggests the need for further reform. Indeed, the essential efficacy of the nation's forensic science disciplines is in question. The recent release of a congressionally authorized report for the National Research Council on behalf of the National Academies finds serious systemic deficiencies in forensic science and advocates for major reforms and new research. The report, "*Strengthening Forensic Science in the United States: A Path Forward*," released on February 18, 2009, finds that in the absence of mandatory standards and protocols, forensic evidence is often presented without scientific bases thereby leading to unreliable conclusions. This comprehensive study of forensic science proposes broad reforms, including mandatory certification and accreditation, extensive research to determine the scientific reliability of heretofore accepted disciplines, such as fingerprint and toolmark analysis, and the establishment of a National Institute of Forensic Science to lead research efforts, establish and enforce standards for forensic science professionals and laboratories and oversee education standards.

New York should follow the lead of this ground-breaking report by establishing the high standards and best practices necessary to ensure the reliability of all forensic evidence proffered in criminal prosecutions. (*See* recommendation 5, *infra*). But wholly apart from the fundamental flaws in forensic science exposed by the National Academies report, numerous exonerations in New York State demonstrate that fundamental systemic deficiencies in how and when forensic evidence is collected, stored and used are pervasive. The case synopses below summarize some of these failings. Based upon these cases, and after reviewing other reports, recommendations and proposed legislation, the subcommittee proposes a number of reform measures designed to minimize the role that the deficient use of forensic evidence plays in the criminal justice system.

Synopses of New York Cases: Forensic Evidence Failures

- **James O'Donnell** – In 1998, defendant was convicted of sodomy based upon misidentification; sentenced to 3 ½ to 7 years.
 - Failure to test biological evidence until two years after conviction.
- **Anthony Faison and Charles Shepard** – In May 1988, convicted of murder; sentenced to 20 years to life and 14 years to life respectively.
 - Failure by both prosecution and defense counsel to understand, appreciate or inform jury that crime scene forensic evidence was inconsistent with eyewitness account.
 - Failure to run latent fingerprints recovered at the scene with existing databases, which would have identified actual perpetrator.
- **Victor Ortiz** – In January 1983, convicted of rape and sodomy; sentenced to 12 ½ - 25 years.
 - Unavailability of DNA testing.
 - Failure to obtain biological samples from another potential source of sperm, despite inconsistent accounts by victim and other source.
- **Scott Fappiano** – In 1983, defendant was convicted of rape and sodomy based, in part, upon an eyewitness identification.
 - Failure to perform additional blood type testing during initial investigation may have deprived defendant of key exculpatory evidence.
 - People's consumption of specimen may have lessened the availability of blood samples for further post-conviction testing by the defense.
 - Improper cataloguing and retention of DNA and other forensic evidence lengthened period of wrongful incarceration.
 - More sophisticated DNA testing which would have eliminated defendant as a suspect was unavailable at the time of trial.

- **Hector Gonzalez** – In 1996, defendant was convicted of murder in the second degree based, in part, upon an eyewitness identification and forensic evidence (blood samples).
 - Failure of police, prosecutors and defense counsel to request DNA testing, which was available in 1996, rather than relying exclusively on serological testing which was inconclusive.

- **Anthony Capozzi** - In 1987, defendant was convicted of rape, sexual assault and sodomy based, in part, upon eye witnesses identification.
 - More sophisticated DNA testing was unavailable at the time of trial which would have eliminated defendant as a suspect.
 - Post-conviction requests for specimens from the local medical center went ignored because the requests had not been made pursuant to the established protocols.
 - Improper cataloguing may have led law enforcement to believe that slides from the rape kit were unavailable, further hampering defendant's efforts to conduct DNA testing.

- **Roy Brown** – In 1992, defendant was convicted of murder based upon, among other things, bite marks found on the victims body and testimony by defendant's wife and ex-wife of defendant's propensity to bite when angry.
 - Failure by prosecutors to disclose potentially exculpatory opinion of forensic odontologist.
 - More sophisticated DNA testing was unavailable at the time of trial.
 - People's consumption of saliva specimens may have lessened availability of samples for further post-conviction testing by the defense.

- **Marion Coakley** – In 1985, defendant was convicted of rape in the first degree based, in part, upon testimony of forensic blood type testing expert.
 - Failure by defense counsel and prosecution to conduct additional serological testing which would have confirmed exculpatory opinion of forensic expert.

- Court's refusal to grant the defense an adjournment in order to conduct further testing which would have confirmed exculpatory opinion of forensic expert.
- Forensic expert's lack of knowledge about the state of testing serological evidence which may have caused unwarranted uncertainty regarding his opinion.
- **Antron McCray** – In 1990, defendant was convicted of rape and robbery in the first degree in the Central Park Jogger case based upon incriminating statements and admissions made by defendant, and co-defendants who were allegedly involved in the crimes and the presence of certain forensic evidence (hair and semen).
 - Failure by police and prosecutors to further investigate the inconsistent and exculpatory DNA test results which failed to connect the hair and other DNA evidence and defendant(s) to the crime.
 - Police mishandling of forensic evidence which may have caused the hairs to be picked up at the precinct house, rather than during the crime.
- **Michael Mercer** – In 1992, defendant was found guilty of rape, sodomy and robbery based, in part, upon the eyewitness testimony of the victim.
 - More sophisticated DNA testing was unavailable at the time of trial.
- **Kevin Richardson** – In 1990, defendant was convicted of attempted murder, robbery, rape and sodomy in the Central Park Jogger case based upon incriminating statements and admissions made by defendant and co-defendants who were allegedly involved in the crimes and the presence of certain forensic evidence (hair and semen).
 - Failure by police and prosecutors to further investigate the inconsistent and exculpatory DNA test results which failed to connect the hair and other DNA evidence and defendant(s) to the crime.
 - Police mishandling of forensic evidence which may have caused the hairs to be picked up at the precinct house, rather than during the crime.
- **Yusef Salaam** – In 1990, defendant was convicted of robbery and rape in the Central Park Jogger case based, in part, upon alleged oral unsigned statements made by

defendant and co-defendants who were allegedly involved in the crimes and the presence of certain forensic evidence (hair and semen).

- Failure by police and prosecutors to further investigate the inconsistent and exculpatory DNA test results which failed to connect the hair and other DNA evidence and defendant(s) to the crime.
 - Police mishandling of forensic evidence which may have caused the hairs to be picked up at the precinct house, rather than during the crime.
- **Raymond Santana** – In 1990, defendant was convicted of robbery and rape in the Central Park Jogger case based, in part, upon incriminating statements and admissions made by defendant and co-defendants who were allegedly involved in the crimes and the presence of certain forensic evidence (hair and semen).
 - Failure by police and prosecutors to further investigate the inconsistent and exculpatory DNA test results which failed to connect the hair and other DNA evidence and defendant(s) to the crime.
 - Police mishandling of forensic evidence which may have caused the hairs to be picked up at the precinct house, rather than during the crime.
- **Kharey Wise** – In 1990, defendant was convicted of assault, sexual abuse and rioting in connection with the Central Park Jogger case based, in part, upon incriminating statements and admissions made by defendant and co-defendants who were allegedly involved in the crimes and the presence of certain forensic evidence (hair and semen).
 - Failure by police and prosecutors to further investigate the inconsistent and exculpatory DNA test results which failed to connect the hair and other DNA evidence and defendant(s) to the crime.
 - Police mishandling of forensic evidence which may have caused the hairs to be picked up at the precinct house, rather than during the crime.
- **Terry Chalmers** – In 1987, defendant was twice convicted of rape, sodomy, and grand larceny arising from two separate incidents based upon self-incriminating statements and inconclusive forensic testing.

- More sophisticated DNA testing was unavailable at the time of trial which later conclusively established that defendant had not committed the rapes.
- **Douglas Warney** – In 1997, defendant was convicted of murder based upon self-incriminating statements made by defendant, a mentally retarded man suffering from serious physical and mental disabilities at the time of his interrogation and arrest.
 - Failure by police and prosecutors to further investigate and analyze forensic evidence that was inconsistent with defendant’s alleged confession.
 - More sophisticated DNA testing was unavailable at the time of trial.
 - During the post-conviction phase, the prosecutors originally opposed and the court denied a defense motion for more advanced DNA testing. It is noteworthy that those very tests (conducted voluntarily by the District Attorney’s Office along with a post-conviction investigation) eventually led to the exoneration.

Proposals

- I. Ensure Proper Preservation, Cataloguing and Retention of All Forensic Evidence
 - a. Enact legislation to expand the jurisdiction of the Forensic Science Commission to include responsibility to promulgate mandatory standards for the preservation, cataloguing and retention of all forensic evidence obtained at crime scenes or other locations relevant to the commission of a crime;
 - b. Enact legislation to require that all existing forensic evidence, especially biological and fingerprint evidence, which currently exists in local or state warehouses and/or storage facilities, be catalogued using state-of-the-art technology, such as bar-coding;
 - c. Enact legislation to require that all forensic evidence obtained in connection with the commission of a crime be maintained for a minimum of ten years after a person convicted of such crime has been discharged from any post-incarceration period of supervision; in cases where no person has been accused of the crime, all forensic evidence shall be maintained until the expiration of all applicable statutes of limitations for prosecution of the crime.

Notes

As is evident from the examination of New York exonerations, many injustices never would have been corrected but for the availability of biological evidence many years after the prosecution. Recent experience has demonstrated that evolving technology makes possible exclusions and inclusions that were not feasible years ago. Ever smaller samples yield ever more conclusive results as more sophisticated testing methods emerge.

The loss or destruction of forensic evidence renders later testing impossible. According to The Justice Project, “[t]he loss or destruction of DNA evidence jeopardizes the integrity of the criminal justice system.” New York’s experience demonstrates that while biological evidence is the most common basis upon which innocence can be established, it is by no means the only crime scene evidence that can reverse an injustice. For example, despite new witnesses implicating another suspect and a recantation by a key witness, the prosecution and the court rejected Anthony Faison’s and Charles Shepard’s claims of innocence. Ultimately, the exoneration was achieved only when the match of a latent print implicated the new suspect. Thus, the critical importance of preserving both biological and other forensic evidence cannot be overstated.

Unfortunately, New York currently has a haphazard and careless approach to the preservation of evidence. Numerous cases have been documented in which requests for vital evidence, which could be subjected to biological or other testing, could not be accommodated because the evidence could not be found. On October 10, 2006, the New York State Assembly’s Standing Committee on Codes conducted a hearing on Storage and Accessibility of DNA Crime Scene Evidence in Criminal Investigations. Among the witnesses were Peter Neufeld, Esq., Co-Director, The Innocence Project and exonerees Alan Newton and Scott Fappiano. The testimony demonstrates the chronic need for a thorough inventorying of all available forensic evidence. In the cases of Newton and Fappiano, the evidence that would have spared them years of needless incarceration was available – it just could not be located.

Peter Neufeld testified in 2006 that, based upon a preliminary sample of cases, efforts to locate the biological evidence from 23 sexual assaults or homicides under investigation by The Innocence Project for possible wrongful conviction had been unsuccessful. Indeed, it was not that there was conclusive documentation that the evidence had been destroyed, but rather, the evidence simply could not be located. Mr. Neufeld indicated that The Innocence Project rate of

closing cases because of lost or destroyed evidence is 35 percent higher in New York State and 56 percent higher in New York City than in the rest of the country. *See also* Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 *New Eng. L. Rev.* 639, 641 (2001).

Plainly there is a need for reform in this area. Properly identifying, preserving and cataloguing forensic evidence will enable New York to make effective use of new testing technologies to exonerate the innocent and solve unsolved crimes. Presently 21 states (and the District of Columbia) require evidence preservation throughout the term of incarceration. (Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Texas, Virginia, Wisconsin and Washington, D.C., all have such statutes. A partial list of references is available at footnote 8 of *The Justice Project Report, supra*, and a continuously updated roster is available through The Innocence Project.)

New York's Forensic Science Commission is an appropriate entity to promulgate mandatory standards for the preservation, cataloguing and retention of forensic evidence. A potential model for enabling legislation is the Assembly Bill 8693 that was introduced in the 2007-2008 Regular Session. Additional legislation may be required to expand the jurisdiction of the Forensic Science Commission to ensure appropriate authority to issue standards applicable to all forensic evidence.

2. Expand the Jurisdiction of the Forensic Science Commission to Provide Independent Oversight of Forensic Disciplines

Notes

New York was a trailblazer in establishing the Commission on Forensic Science, as codified under N.Y. Exec. Law 49-B, Section 995 *et seq.* The Commission plays a major role in assuring the reliability and validity of forensic analyses that arise from the operations of crime laboratories and laboratory personnel. Its jurisdiction, however, does not extend to all forensic science providers. Some medical examiner offices and police departments employ forensic disciplines without the same oversight as would be in place if these operations were performed under the aegis of a crime lab. Many disciplines, including in some cases fingerprint and ballistics analyses, and in all cases forensic odontology, arson, and other forensic sciences, are not covered by the Commission. Of paramount importance, crime scene investigators are not

currently subject to Commission oversight. Yet evidence identification, collection and preservation at a crime scene are vitally important functions that directly affect the capacity to identify suspects and exonerate the innocent.

Procedural and methodological deficiencies in these disciplines contribute to wrongful conviction. For example, the failure to seek a match for the latent print in the Faison and Shepard case, and the discredited reliance upon odontology evidence in the Roy Brown case, might have been averted if the Commission had authority to promulgate standards for the qualification and training of those performing these vital services in the field. In light of the Commission's authority to ensure the integrity of forensic evidence, it should have adequate and explicit jurisdiction to fulfill that mission.

3. Establish Authority for Judges to Order Comparison of Crime Scene Evidence to Available Forensic Databases Upon Request of an Accused or Convicted Person

Notes

At present, no explicit authority exists for a court to compel that biological and/or fingerprint evidence obtained at crime scenes be compared with existing databases. That discretion is solely vested in the hands of law enforcement. As many of the New York exonerations confirm, comparing crime scene evidence to appropriate forensic databases can both exonerate the wrongfully convicted and provide the necessary evidence to prosecute the real perpetrator. Further, while prosecutors and law enforcement overwhelmingly discharge their awesome responsibilities with integrity and a firm commitment to justice, the exoneration case analyses confirm that post-conviction prosecutorial resistance to innocence claims is a barrier to exoneration.

Accordingly, courts must have the ultimate authority to direct that such comparisons must be made when there is any reasonable possibility that an innocent person is accused or wrongfully convicted. The proposed legislation introduced in the Assembly in the 2007 - 2008 Regular Session contains a provision that would add a new section 10 to Section 995-c of the Executive Law conferring this authority upon showing that such a request is reasonable and may be material to the defense.

4. Permit Wrongfully Convicted Persons To Prove Their Innocence, Regardless of Whether the Conviction Was the Result of a Trial Verdict or a Guilty Plea

Notes

Those who have studied exonerations nationally have concluded that post-conviction DNA testing must be available to those who may be wrongfully convicted, regardless of whether their conviction was the result of a trial verdict or a guilty plea, and notwithstanding a confession or a previous unfavorable test result. As The Justice Project has noted, “[e]xcluding defendants who confessed or pled guilty does not take into account evidence that many false confessions and even some plea bargains are obtained from innocent people.” “Nearly a dozen of the more than 200 DNA exonerees in the United States initially pled guilty, and 50 of the first 200 purportedly confessed to crimes that they did not commit.” As has now been well-established in various studies on the phenomenon of false confession, many people, particularly mentally and emotionally vulnerable populations, plead guilty even though they are innocent. Faced with a choice between a guilty plea or the prospect of a much higher sentence following a guilty verdict, and unaware of the possibility that scientific evidence can establish their innocence, they take what seems like the lesser of two bad alternatives.

Bad decisions should not irrevocably condemn those who are actually innocent. While New York’s statute does not specifically address the availability of post-conviction DNA testing for those who have pled guilty, New York appellate courts have construed the statute as foreclosing DNA testing after a guilty plea. *People v. Byrdsong*, 33 A.D.3d 175 (2d Dep’t 2006), *lv denied* 7 N.Y.3d 900 (2006); *People v. Lebron*, 44 A.D.3d 310 (1st Dept 2007), *lv denied* 9 N.Y.3d 1007 (2007); *People v. Allen*, 47 A.D. 3d 543 (1st Dep’t 2008). Such judicial interpretation should not be permitted. Accordingly, the law should be amended to ensure that such testing is available irrespective of whether the conviction was the result of a verdict or a plea.

5. Promulgate Standards and Best Practices To Guide All Law Enforcement Agencies in the Processing of Crime Scenes and the Collection, Processing, Evaluation and Storage of Forensic Evidence

Notes

The proposed legislation outlined in recommendations 1 and 2, which would vest the Commission on Forensic Science with full authority over forensic issues, is the best way to

achieve universal compliance with the highest standards and the best state-of-the-art methodologies. Experience teaches, however, that legislative action in New York can be an arduous and often futile route to reform. Accordingly, the New York State Bar Association should undertake a project to promulgate its own set of standards and best practices to maximize the tremendous potential to use forensic evidence to effectively prosecute the guilty, protect the wrongfully accused and exonerate the innocent.

There is precedent for such a project. In 2005, the State Bar empaneled a Special Committee to Enhance the Quality of Mandated Representation that promulgated statewide Standards for the Provision of Mandated Representation. The standards seek to elevate the quality of representation provided to the indigent accused. A similar project should be undertaken with respect to forensic science to develop comprehensive standards and best practices. The designated group should include the best minds in the respective sciences and leaders in law enforcement, and should provide appropriate representation for the judiciary and the prosecution and defense bars. While not having the force of law, such standards will tend to elevate practice and guide prosecutors, defense attorneys and judges as they discharge their responsibilities in the criminal justice system.

6. Provide Forensic Science Training for Prosecutors, Defense Lawyers and Judges

Notes

If the criminal justice system is to function effectively, each component must be equipped to understand, evaluate and, when necessary, challenge forensic evidence. Forensic evidence, which is often proffered as more reliable than testimonial evidence because it is not subject to inherent human limitations and potential unreliability resulting from bias, motive or interest, carries enormous weight with juries. The exonerations conclusively demonstrate, however, that when forensic evidence is misunderstood, misapplied or mishandled, it is just as capable of producing an erroneous result. Judges, prosecutors and defense attorneys cannot discharge their responsibility unless they are fully conversant with the nuances and emerging technologies in the forensic evidence fields. Sustained and focused training is essential.

The New York State Bar Association should urge the government to provide designated resources to promote such training.

In addition, NYSBA should assist by promulgating a statewide plan for cooperative training that would bring together the judiciary, the prosecution and defense bars with the science and technology communities to assess emerging issues and forge collaborative educational initiatives related to forensic science, technology and the law. The project should begin with a series of regional statewide training conferences and should eventually evolve into an ongoing training module that the State Bar and local bar associations can maintain on an ongoing basis. These cooperative ventures should seek a joint commitment for participation (and possibly the allocation of training funds) by the judiciary, the district attorneys and public defender entities and the private bar. The crucial need for fundamental training in the basics of emerging forensic science methodologies transcends the unique tactical considerations that may be more appropriately addressed in exclusive settings. Cooperative training in forensic science offers the potential for huge economies and will elevate the standards of practice, often obviating the need for wasteful litigation and minimizing the incidence of wrongful conviction.

7. Establish a Permanent, Independent Commission To Minimize the Incidence of Wrongful Convictions

Notes

The only reliable way to correct any flawed system is to study cases of failure to understand what went wrong and then propose remedies and reforms to prevent reoccurrence. The New York exonerations, as is evident in exonerations nationally, reveal recurring factors that are present in wrongful convictions. This is particularly so with respect to forensic science failures. There is no reason why the criminal justice system should not do what industry, the military and the transportation sector does when there is a major accident or failure: launch a thorough investigation, including the procurement of all relevant evidence and testimony to identify precisely how an innocent person came to be convicted of a crime. The conviction of an innocent person is the justice system's equivalent of factory catastrophe, a plane crash or the bombardment of the wrong target. It deserves to be investigated fully, forthrightly and publicly.

New York should establish a permanent, independent Commission to review any criminal or juvenile case involving a wrongful conviction. The Commission, which should include representation from the forensic science fields, law enforcement, the judiciary, the defense and prosecution bars, and victims' rights advocates, must be empowered to hold hearings, procure evidence and make findings of fact to determine the cause or causes of any

wrongful conviction and recommend reforms to lessen the likelihood of recurrence. The Commission should have the authority to subpoena witnesses, examine them under oath or affirmation, and compel the production of such records and data as may be necessary to carry out its mission. A model for the creation of such a “Commission for the Integrity of the Criminal Justice System” was contained in the proposed legislation introduced in the New York State Assembly in the 2007-2008 Regular Session (8693-A, Article 23).

Until legislation creating such a Commission is enacted, NYSBA should create its own permanent Task Force on Wrongful Conviction. Such a Task Force, modeled after the current Task Force, should be expanded to include representatives of the forensic science field, and should convene to thoroughly investigate any reported case of wrongful conviction in New York State. While lacking the power of compulsory process, such a Task Force can play an important salutary role in exposing the defects that perpetuate the tragedy of wrongful conviction.

False Confessions

SUBCOMMITTEE REPORT AND FINAL PROPOSALS

Introduction

In an alarming number of wrongful convictions, the accused makes a false confession or incriminatory statement. Indeed, in 23% (12 of 53) of the wrongful convictions analyzed by the Task Force, the accused had falsely confessed. As shocking as this figure may be, it is in fact consistent with national research indicating that false confessions contribute to almost 25% of the known cases of wrongful conviction.¹²² These findings demonstrate that false confessions occur and contribute to wrongful convictions more frequently than previously thought.

False confessions pose a particularly significant danger for wrongful conviction because confessions are such persuasive evidence. As characterized by the NYSBA's Criminal Justice Section, "[c]onfessions are powerful evidence."¹²³ Indeed, a confession is likely the most potent evidence of guilt, and often sufficient in and of itself to secure a conviction. As noted in one Law Review article:

Confessions are among the most powerful forms of evidence introduced in a court of law, even when they are contradicted by other case evidence and contain significant errors. This is because police, prosecutors, judges, jurors and the media all tend to view confessions as self-authenticating and see them as dispositive evidence of guilt. Juries tend

¹²² Jeremy W. Newton, *False Confession: Considerations for Modern Interrogation Techniques at Home and War*, 9 J.L. & Soc. Challenges 63 (2008); C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18(1)(ABA) Criminal Justice 15 (Spring 2003); The Innocence Project, *Understand the Causes* (available at <http://www.innocenceproject.org/understand/>).

¹²³ Report and Proposed Resolution of the Criminal Justice Section Concerning Electronic Recording of Custodial Interrogations (June 2004).

to discount the possibility of false confessions as unthinkable, if not impossible.¹²⁴

The law has developed a series of evolving rules designed to exclude the admission of unreliable confessions. For example, under both common law and constitutional law, courts exclude confessions that have been given involuntarily. The United States Supreme Court expanded the doctrine of voluntariness into the so-called *Miranda* rule¹²⁵ the requirement that police advise suspects of certain rights before any interrogation. In addition, both common law and statutory law in New York require that confessions be corroborated. Specifically, Criminal Procedure Law § 60.50 provides that “[a] person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed.” For years, the courts have relied upon the two rules of voluntariness and corroboration to exclude unreliable confessions and reduce the possibility of wrongful convictions based upon such confessions.

The prevalence of false confessions found by every study of the topic casts doubt on the adequacy of these rules either to prevent false confessions or to exclude their admission into evidence. Indeed, the false confessions in the cases studied by the Task Force were all deemed to be “voluntary” under current standards and were all corroborated by other evidence. Existing protections simply did not suffice to identify confessions that may have been voluntary under current constitutional analysis, but were factually false.

Any effort to address the problem of false confessions must begin by rejecting the commonly-held but incorrect belief that an innocent person would never confess to a crime he did not commit. Indeed, experiments demonstrate that innocent people under certain forms of

¹²⁴ Richard A. Leo, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479 (2006).

¹²⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

stress, including aggressive accusatory questioning, confess to things they did not do.¹²⁶ To explain this phenomenon, scholars invoke the “rational choice” theory of false confessions.¹²⁷ This theory posits that some suspects falsely confess because the process of interrogation convinces them that confessing is the most rational choice under the circumstances.¹²⁸ This can occur under various circumstances:

This can occur, for example, when an innocent suspect believes that the police have strong evidence against him/her and that confessing is the only way to avoid the most severe penalty. Or, it can occur if an innocent suspect, wanting to end a stressful interrogation, believes that she will be unable to convince the interrogator of her innocence and confesses out of the belief that she will be able to prove her innocence later in court.¹²⁹

Contrary to what some may suspect, most false confessions do not appear to be the product of deliberate police misconduct. Rather, honest investigators, using legitimate means in good faith, may unwittingly encourage false admissions. In fact, researchers have concluded that time-tested interrogation techniques, widely used by modern law enforcement agencies, increase the risk of false confessions from innocent suspects.¹³⁰ These techniques include confrontational

¹²⁶ See generally Sol M. Kassir and Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 *Psychol. Sci.* 125 (1996). In one experiment, students were given a purported test of their “reaction-time” by typing letters on a computer keyboard as the experimenter read them out loud. The subjects were admonished not to press the “ALT” key, because doing so would cause the computer to malfunction. In fact, the computer was programmed to shut down part way through the experiment, at which point the experimenter would accuse the subject of pressing the “ALT” key. Subjects were then interrogated. The techniques included aggressive questioning and the fabrication of alleged “eyewitness” testimony that the subject had pressed the key. Overall, 69% of all subjects signed a false confession to pressing the forbidden key. Equally amazingly, 28% of the subjects exhibited “internalization,” i.e. truly believed they had pressed the “ALT” key.

¹²⁷ See, e.g., Richard J. Ofshe and Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *Denv. U. L. Rev.* 979 (1997).

¹²⁸ Wisconsin Criminal Justice Study Commission, Position Paper on False Confessions.

¹²⁹ *Id.*

¹³⁰ See Paul M. Kassir, *On the Psychology False Confessions: Does Innocence Put Innocents at Risk*, 60 *American Psychologists* 215 (2005); Richard P. Conti, *The Psychology of False Confessions*, *The Journal of Credibility Assessment and Witness Psychology*, Vol. 2, No. 1 (1999).

interrogation, psychological coercion and outright deception, all of which are legally permissible. While these methods are used because they effectively elicit confessions from guilty subjects, they unfortunately also elicit false confessions as well.¹³¹ The failsafe is supposed to be the interrogator's ability to determine whether the subject is telling the truth, a skill experienced police officers often believe they have. Research demonstrates, however, that such investigators are no more accurate in detecting deception than the average person.¹³² At the same time, the more experienced an investigator, the more likely he or she is to disbelieve any suspect, and the more confident that investigator will be in his or her opinion.¹³³ The findings of this research are confirmed by the cases studied by the Task Force, where honest, well-intentioned investigators unwittingly induced false confessions that they firmly believed were true.

The analysis also suggests that false confessions are often extracted from the most vulnerable suspects. Juveniles, the mentally disabled and the mentally ill - all particularly susceptible to aggressive interrogation techniques - account for a high percentage of the documented cases of false confessions.¹³⁴ This was borne out in the cases studied by the Task Force, where eight out of the ten false confessions came from suspects who were juveniles and/or had mental disabilities or mental illnesses. Researchers also believe that members of minority groups and those from unusual cultural backgrounds are particularly vulnerable to psychological inducement, and therefore at increased risk to falsely confess.¹³⁵

¹³¹ Richard P. Conti, *The Psychology of False Confessions*, *The Journal of Credibility Assessment and Witness Psychology*, Vol. 2, No. 1 (1999).

¹³² Edward J. Sackman, *False Confessions: Rethinking a Contemporary Problem*, 16-WTR Kan. J.L. & Pub. Policy 208 (2006-2007).

¹³³ *Id.*

¹³⁴ Steven Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004).

¹³⁵ ABA Report; Cynthia K. Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York: New York University Press) (2003).

Recommendations

Recognizing these realities, the following recommendations are made to address the problem of false confessions.

I. Custodial Interrogations of all Felony-Level Crime Suspects Should Be Electronically Recorded in Their Entirety.

By far the most common reform recommended by those who study the phenomenon of false confessions is the electronic recording of custodial interrogations in their entirety.¹³⁶ Proponents of this reform assert that recording the entire interrogation provides the best means by which a finder of fact can evaluate whether the techniques employed produced a reliable statement from the accused.

Of course, other benefits will flow from a policy of electronic recording. Electronic recording ensures the integrity of the process by accurately recording the entire interrogation. Recording should therefore help resolve disputes regarding alleged statements. Recording should reduce later false denials that incriminating admissions were actually made. As a matter of judicial economy, recording would likely reduce the time necessary to resolve suppression issues. With an accurate record of the interrogation, courts should be better equipped to

¹³⁶ Indeed, this very recommendation was adopted by the New York State Bar Association's House of Delegates at its meeting in June 2004. The House, the policy-making body of the Association, adopted a resolution at that time providing:

Resolved, that the New York State Bar Association urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects in the most serious cases at police precincts, courthouses, detention centers, or other buildings where suspects are held for question; and be it

Further Resolved, that the New York State Bar Association urges the New York State Legislature to enact laws requiring the videotaping of the entirety of custodial interrogations of crime suspects in the most serious cases at police precincts, courthouses, detention centers, or other buildings where suspects are held for questioning, or, where videotaping is impractical, to require the audio taping of the entirety of such custodial interrogations, and to provide appropriate remedies for non-compliance, and to appropriate funds to implement this legislation.

determine whether constitutional and other procedural protections were honored. Recording is also likely to discourage the police from treating suspects inappropriately and from using interrogation methods likely to lead to untrustworthy confessions. On the other hand, recording will provide strong evidence to counter false complaints of physical or psychological abuse.

For the above reasons, a growing number of jurisdictions across the country require the electronic recording of interrogations. At present, 12 states and the District of Columbia require that interrogations be electronically recorded. Eight of those jurisdictions require recording by statute: Illinois, Maine, Nevada, New Mexico, North Carolina, Texas, Wisconsin, and the District of Columbia.¹³⁷ Five states require recording by judicial decree: Alaska, Massachusetts, Minnesota, New Hampshire, and New Jersey.¹³⁸ These jurisdictions impose different sanctions for noncompliance. Five states impose the penalty of suppression for a willful failure to record (Alaska, Minnesota, and New Hampshire by judicial decree, Illinois and Texas by statute). Three states impose the penalty of an adverse jury instruction (Massachusetts by judicial decree, Nevada and Wisconsin by statute). Two states defer to the trial court to impose a penalty, either suppression or adverse inference (New Jersey by judicial decree, North Carolina by statute). Three jurisdictions do not impose any penalty (Maine, New Mexico, and the District of Columbia). Five states require recording for all crimes (Alaska, Massachusetts, Minnesota, New Hampshire, and Texas). Two states require recording for any felony (New Mexico and Wisconsin). Five jurisdictions require recording only for homicides and other serious felonies (Illinois, Maine, Nevada, New Jersey, North Carolina, and the District of Columbia).

The growing trend in New York State is one of voluntarily implementing recording programs.¹³⁹ New York does not currently require electronic recording by statute, but 26 of the

¹³⁷ Illinois - 725 ILCS 5/103-2.1 (adults) and 705 ILCS 405/5-401.5 (juveniles); Maine 25 M.R.S. § 2803-B; Nevada Leg. Bill 179, 2008; New Mexico Chapter 252 of 2005; North Carolina Art. 8, § 15A-211 N.C. Gen Statute; Texas Crim. Proc. Article 38.22; Wisconsin Wis. Stat. § 968.073 (adults) and Wis. Stat. § 938.195 (juveniles); District of Columbia D.C. Code § 5116.01.

¹³⁸ Alaska: *Stephan v. State*, 711 P.2d 1156 (1985); Massachusetts: *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (2004); Minnesota: *State v. Scales*, 518 N.W.2d 587 (1994); New Hampshire: *State v. Barnett*, 789 A.2d 629 (2002); New Jersey: N.J. Court Rule 3:17.

¹³⁹ New York Prosecutors Training Institute, *Recording Interrogations in New York: Past, Present and Future*, July 25, 2008, pp. 1518.

62 counties in the state have voluntarily adopted some form of recording. The New York State Bar Association currently is monitoring pilot electronic recording programs in four counties (Broome, Greene, Schenectady and Westchester) through a grant of state-appropriated funding.

The trend toward recording interrogations is largely attributable to the willingness of prosecutors and police to embrace recording as a desirable goal. Indeed, prosecutors and police favor recording because recordings are powerful evidence of guilt to place before a jury. In fact, in this day of easy recording, juries will often ask why a confession was not electronically recorded. Thus, law enforcement appears to support a shift to electronic recording.

But even if all agree that confessions should be electronically recorded, there are ultimate issues about how to encourage and implement recording programs. Many in the law enforcement community fear that a law mandating immediate recording throughout the state is a “one-size-fits-all” approach that will be logistically prohibitive and costly. Additionally, some are concerned that suppression, a remedy traditionally reserved for violations of constitutional or other important rights, is an inappropriate remedy for the failure to record. And the suppression of a wholly reliable, properly-obtained confession simply because it was not recorded may not properly serve the important concern of public safety.

Additionally, although electronic recording may be beneficial in identifying false confessions, it may not be possible to know exactly how effective it will be. Certainly, electronic recording does little to address voluntary false confessions, perhaps resulting from the suspect’s mental illness or perverse desire for notoriety (for example, John Mark Karr who falsely confessed to the killing of Jon Benet Ramsey). As for those false confession cases that are the result of the use of coercive interrogation tactics, proponents of electronic recording assume that courts and juries will be able to judge the tactics used, the length of the interrogation, and the demeanor of the suspect and interrogator therefore evaluating the voluntariness and truthfulness of the confession. Some commentators have questioned this assumption.¹⁴⁰

After considering these issues, the Task Force concludes that the electronic recording of the entirety of all custodial interrogations in felony-level investigations would help prevent and identify false confessions, and therefore should be required. Indeed, the Task Force believes

¹⁴⁰ Kassin, Meissner, Norwick, “*I’d Know a False Confession if I Saw One*”: *A Comparative Study of College Students and Police Investigators*, *Law and Human Behavior*, Vol. 29, No. 2, April 2005.

that electronic recording of custodial interrogations in all criminal investigations should be pursued as an aspirational goal. Jurisdictions in New York and across the country that have implemented recording programs have reported that the experience is positive. At the same time, the Task Force recognizes that there are significant costs involving equipment, installation, maintenance, training, copying, storage, record-keeping, transcription and translation. Encouraging voluntary pilot programs will allow those involved to explore the variables unique to different regions that impact the cost, feasibility and best practices for the particular jurisdiction. By identifying potential obstacles up front, all will be in a better position to develop protocols and practices that effectively meet the special needs of individual counties as well as those that best guard the rights of those interrogated. We recommend that the New York State Bar Association urge the Legislature to continue funding pilot programs.

2. Specific Training About False Confessions Should be Given to Police, Prosecutors, Judges and Defense Attorneys.

It is clear that specialized training is necessary to educate those who work in the criminal justice system about the realities of false confessions. The problem simply cannot be addressed until all participants appreciate that false confessions do occur. With this appreciation, each participant must then understand what he or she can do to help prevent false confessions, or to expose them if they do occur.

Police should be educated about the dangers of false confessions. They should be trained to use appropriate interviewing skills to elicit truthful statements from suspects. The goal of their interrogation techniques should shift from eliciting confessions to eliciting truthful confessions. Their training should incorporate the most recent social science research on the topic. The training should inform police about the techniques associated with an increased risk of eliciting false confessions, such as the use of deception or fabricated claims of incriminating evidence.¹⁴¹ Special training also should be developed to educate police on the particular vulnerability of juveniles, the mentally disabled and the mentally ill.

Of course, the responsibility to address the problem of false confessions does not rest with the police alone. Therefore, the other participants in the criminal justice system also should

¹⁴¹ Sol M. Kassir, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk*, Am. Psychologist 60 215 (2005).

be trained. Once police have elicited a confession from a suspect, the decision whether to charge the suspect rests with the prosecution. As a preliminary matter, the prosecutors must reach a determination whether the confession is trustworthy. Prosecutors need to approach this decision with an awareness that false confessions do occur, and an understanding of the factors that are more likely to result in a false confession.

Defense attorneys also should be fully informed on the issues involving false confessions. Without this knowledge, a defense attorney may be reluctant to consider the possibility that a client's confession was false and that the client is innocent. Such an attorney may fail to challenge the admissibility of the confession aggressively enough or may urge the client to accept a seemingly favorable plea. Defense attorneys also should be familiar with the latest research on the psychology of false confessions, and they should learn the most effective means to present that information to the fact-finder and court.¹⁴² Defense attorneys should be trained in the means to elicit testimony from the police, the client and possibly expert witnesses to convey the process by which a false confession could have occurred.

Finally, judges should also be informed about the reality of false confessions and the factors that can contribute to them to better inform the decisions they must make about the admissibility of the confession and challenges that may be brought by the defense. Judicial training should specifically include information relevant to a court's decision whether to allow expert testimony on issues relating to false confessions in appropriate cases. In light of the lessons of wrongful conviction cases, there may be more reason for courts to be open to expert testimony on false confessions. And regardless of whether expert testimony is deemed admissible at trial, the defense may benefit from the assistance of an expert in challenging an alleged confession as false. Judges need to be educated about the availability of such expert assistance, so that applications from assigned counsel for court permission to hire such experts are properly considered.

All of the participants in the criminal justice system share the desire to prevent false confessions from leading to wrongful convictions. Both social science research and anecdotal evidence of wrongful convictions have demonstrated that false confessions do occur. Those who work within the system should be trained in this reality. They must learn the best methods to

¹⁴² Wisconsin Criminal Justice Study Commission, Position Paper on False Confessions.

prevent false confessions and to identify those that do occur, so that they will not contribute to wrongful convictions in the future.

3. Further Study Should be Undertaken on the Impact of the Phenomenon of False Confessions on a Defendant's Willingness to Plead Guilty.

Confessions and the circumstances under which they are obtained, are likely to have an impact on the entry of guilty pleas. The social science research reviewed by the Task Force suggests that some people, subjected to particular forms of interrogation, will not only falsely confess, they actually will come to believe that they are guilty.¹⁴³ Once charged, these people may feel morally compelled to plead guilty. Those who know their confession was false may nevertheless conclude reasonably that they have little chance of success against charges. In short, the existence of a confession places extreme pressure on a defendant to plead guilty. In light of what the Task Force has learned about the reality of false confessions, the Task Force believes that further study of this pressure is warranted. Therefore, the Task Force recommends that a qualified panel study this problem and make additional recommendations regarding what procedures are needed prior to an indictment, while a plea offer is pending, to provide the defense of any recording of the custodial interrogation and information about the circumstances under which it was conducted.

¹⁴³ See, e.g., Sol M. Kassin and Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol. Sci. 125 (1996).

Jailhouse Informants

SUBCOMMITTEE REPORT AND FINAL PROPOSALS

Introduction

A large percentage of cases in which wrongful convictions have been documented involve testimony from informants who are themselves in-custody or facing criminal prosecution or otherwise receiving incentives such as financial payments for their testimony. According to Northwestern University Law School Center on Wrongful Convictions, 45.9% of documented wrongful capital convictions have involved false informant testimony, making jailhouse informants a leading component of wrongful convictions in capital cases in this country. Most studies have found that nearly 50% of wrongful murder convictions involve perjury by someone such as a “jailhouse snitch” or a witness who stood to gain from giving false testimony. Given this background, this Subcommittee was asked to recommend procedures to improve the reliability of informant testimony used in criminal prosecutions.

At the outset, it is important to recognize that there are a wide variety of informants who may provide information to law enforcement. Every witness to a crime is in effect an informant whose motives may be pure or suspect. When law enforcement officials speak about informant testimony they are generally referring either to a participant in a crime who is willing to implicate others in return for a favorable disposition of the charges relating to his or her participation, or to an individual who was not a participant in the crime in question but who asserts that he or she has been told about the crime by one of the participants and who is willing to testify about those conversations in exchange for some benefit, usually a favorable disposition with respect to unrelated charges pending against the informant. For the purposes of this report, when we speak of informant testimony, we are talking about the latter case - someone, not an accomplice, who seeks to provide information in order to obtain a favorable disposition of pending charges or some other benefit.

Our research disclosed certain well-known cases involving informants who receive substantial benefits for providing false testimony in cases where the defendant was later exonerated. For example, one individual named Essam Magid, was able not only to avoid jail for many crimes which the prosecuting attorneys knew he committed, but earned hundreds of thousands of dollars by serving as an informant, framing dozens of innocent people before one person he targeted finally refused to plead guilty and revealed the arrangement. Another, Leslie White, a prototypical jailhouse snitch, sent dozens of suspects to prison by fabricating confessions and evidence reducing his own sentences by years.

The Subcommittee recognizes that there is a delicate balance between law enforcement's legitimate need for informant testimony, particularly in murder cases where there may be no eyewitnesses to the crime, and safeguarding the rights of those who stand to be convicted on the basis of informant testimony.

In connection with our task, the Subcommittee reviewed numerous articles written on the subject, which included the report of the ABA Criminal Justice Section's *Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process*, the report and recommendations of the California Commission on the Fair Administration of Justice, certain reported cases and briefs including informant testimony: *Florida Bar v. Allen I. Karten* (11th Circuit) and *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999), and *The Snitch System*, a study of convictions and case histories compiled by Northwestern University School of Law Center on Wrongful Convictions.

Subcommittee members spoke with and interviewed several prosecutors relating to the use of, and their practices regarding the use of, informant testimony.

Proposals

After review of the materials, the Subcommittee was able to identify six areas where the use of informant testimony has been addressed and certain safeguards implemented in various states which the Subcommittee recommends adopting.

1. Any Informant's Testimony Should Be Corroborated

As we noted above, one type of individual who provides testimony in a criminal case is an accomplice who participated in the crime at issue. Section 60.22 of the New York Criminal Procedure Law provides:

A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.

The Subcommittee recommends that, at a minimum, the corroboration requirement for the use of accomplice testimony should be extended to non-accomplice informants. As with accomplice testimony the existence of corroboration should be a threshold question for the trial judge and explained to the jury in the court's charge. We would go further and recommend that the extent of corroboration should be considered by the prosecutor in determining the charges against the defendant. Additionally, given that the overwhelming majority of cases are disposed of through the plea-bargaining process rather than at trial, we recommend that corroboration be a threshold requirement that must be found satisfied by the judge and prosecutor in accepting a plea. Our recommendation is in accord with the ABA resolution which provides: "No prosecution should occur based solely upon jailhouse informant testimony."

2. Jury Instructions

Our research indicated that a jury instruction appears to be the most common manner in which Courts treat informant testimony. In addition to telling the jury that the informant's testimony must be corroborated, at the request of a party, the judge will instruct the jury in any case in which an informant testifies that the testimony should be viewed with caution and close scrutiny, and that the jury should consider the extent to which that testimony may have been influenced by the expectation of any benefit or remuneration or promised favorable treatment in

connection with a pending criminal prosecution. A great variety of jury instructions appears to exist in differing states.¹⁴⁴

The Subcommittee believes that the jury should be instructed to take into account several factors indicating the extent to which the testimony is credible, including: (i) any explicit or implied inducements that the informant may have received or will receive; (ii) the prior criminal history of the informant; (iii) evidence that he or she is a “career informant” who has testified in other criminal cases; and (iv) any other factors that might tend to render the witnesses’ testimony unreliable.

3. A Pre-Trial Reliability Hearing

There has been recognition that often discovery, cross-examination, and even jury instructions do not guaranty a protection of the individual who is facing informant testimony in connection with a criminal trial. The Subcommittee recommends that the Court act as a preliminary “gatekeeper” much in the sense of the civil *Daubert v. Merrill* line of cases in which the Court engages in a reliability hearing with respect to testimony of expert witnesses. Where informant testimony is proffered, the Court would evaluate the reliability of the informant’s testimony before he or she is permitted to testify at trial. This would permit fuller disclosure of any promises made to the informant by the government, permit more thorough testing of the veracity of the informants’ testimony and reduce the opportunities for abuse.

Illinois is one state which has enacted a statute that provides a potential blueprint for the type of reliability inquiry that a trial court should conduct in evaluating informant testimony. The statute places the burden on the government to prove the reliability by a preponderance of the evidence and requires the Court to consider factors including (a) the criminal history of the informant; (b) any deals, promises, or inducements which may have been made; (c) statements made by the accused; (d) the time and place of the statements and how disclosure to law enforcement officials was made; (e) whether the informant recanted that testimony or statement

¹⁴⁴ The ABA Report points out that in Virginia, in the absence of corroboration, it is the duty of the Court to issue a cautionary instruction; in Mississippi, it is in the Court’s discretion to issue a cautionary instruction but an abuse of discretion may be found when the state’s evidence rests solely on accomplice testimony and there is a question as to the reasonableness and consistency of that testimony. In Utah, although it is within the discretion of judge whether to give a cautionary instruction, if the judge finds the testimony “contradictory, uncertain or improbable” the cautionary instruction becomes mandatory.

and if so, where and when the recantation took place; (f) other cases in which the informant testified; and (g) a catch-all factor to include any other relevant information relating to the informant's credibility.

These considerations permit the Court to examine all manner of the informant's testimony relating to its reliability, whether pre-plea or pre-trial, and to exclude testimony found to be unreliable.

4. Plea Bargains

Since the overwhelming majority of cases are disposed of by plea rather than by trial, the Subcommittee also focused on the risk that wrongful convictions based upon false informant testimony might occur through plea bargaining and thus be both less likely to be identified and remedied and more difficult to prevent. There is an inherent tension between the ability of a defendant to receive a reduced sentence by taking a plea early on in the development of a case, and the need to prevent wrongful convictions based upon false informant testimony that would not normally be revealed until later in pre-trial discovery or during trial.

The plea bargain process will often provide a strong inducement for a defendant to plead guilty. Even an innocent individual may decide to plead guilty when faced with a plea offer that substantially diminishes or even eliminates the prison term he or she would serve if convicted. A defense lawyer, who is told by a prosecutor that there is a witness who will testify that the defendant admitted committing the crime, may be skeptical of the client's protestations of innocence and strongly recommend that the client plead to a substantially reduced charge.

Given these concerns, it seems desirable that a defendant, who is offered a plea bargain, be given all the relevant information about any informant in the case before being required to accept the plea. We recognize, however, that there may be legitimate reasons why a prosecutor would be willing to offer a defendant a favorable plea disposition in order to avoid the disclosure of the informant's role in the case that our other recommendations would require, i.e. the informant is currently participating in an undercover investigation which would have to be terminated if the identity of the informant were disclosed. Where the prosecutor presents the judge with such circumstance, and the judge finds the need to protect the identity of the informant compelling, we recommend that the judge conduct an in camera review of the information relating to the informant's credibility, as detailed elsewhere in these

recommendations, and provide defendant with all such information as may be provided without disclosing the informant's identity. In order to balance these interests we recommend that when taking a plea in any case in which the prosecution would be required to provide the defendant with information about an informant, the judge should be required to find that the defendant is aware that if he were to proceed to trial he would have the right to obtain information about any informant whom the prosecution would call at the trial, and to cross-examine any such informant and that the defendant is knowingly waiving that right in order to obtain the agreed upon disposition.

5. Videotaping, If Possible, of the Informant's Statements Relating to the Accused.

We are mindful that recommendations relating to the videotaping of confessions have been made by the New York State Bar Association. The Subcommittee believes that videotaping, if possible, should also be made of any informant's statement given to any law enforcement agent or prosecutor. This would be an additional safeguard added to the reliability of the testimony and would be useful to the judge in the "gatekeeper" hearing in advance of determining the admissibility of the informant testimony in both the pre-trial or pre-plea disclosure which we are recommending.

6. Prosecutor's Best Practices

The Subcommittee also recommends as a "best practice" that the prosecution itself check on the reliability of the informant's testimony and that a "checklist" of factors that prosecutors should review be provided to them. These would include assessing:

- (i) the extent to which the statement is corroborated;
- (ii) the specificity of the alleged statement;
- (iii) the extent to which the statement contains details of evidence known only to the perpetrator;
- (iv) the extent to which the statement contains details which could reasonably be assessed by the in-custody informer, other than through inculpatory statements by the accused;

- (v) the informer's general character;
- (vi) any request the informer has made for benefits or special treatment;
- (vii) whether the informer has, in the past, given reliable information to the authorities;
- (viii) whether the informer has previously provided information which was shown to be unreliable;
- (ix) whether the informer has previously testified in any court proceeding;
- (x) whether the informer made some written or other record of the words spoken by the accused;
- (xi) circumstances under which the informer's report of the alleged statement was taken;
- (xii) the manner in which the report of the statement was taken by the police (written, interview, investigation of circumstances, etc.);
- (xiii) any other known evidence that may attest to or diminish the credibility of the informer; and
- (xiv) any relevant information contained in any available registry of informers.

These recommendations relating to prosecution screening appeared in the report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Insure the Integrity of the Criminal Process, and the Subcommittee believes that its recommendation should be adopted as part of the best practices to be adopted by government agencies and prosecutors.

Defense Practices

SUBCOMMITTEE REPORT AND FINAL PROPOSALS

The Nature of the Problem

The subcommittee reviewed 16 cases in which one of the factors identified by the reporter as leading to the wrongful conviction was the inadequate representation afforded the defendant by his attorney. Counsel's failures in these cases fall into two principal categories: inadequate pretrial investigation and preparation, and incompetence in the conduct of the trial.

Sixteen Case Studies

The cases in which there was inadequate pretrial investigation and preparation consisted of the following shortcomings:

- (1) a failure to examine or have analyzed the physical evidence (*People v. Newton, People v. Burt*);
- (2) a failure to investigate defendant's alibi or other exculpatory evidence (*People v. Rojas, People v. Garcia, People v. Stewart, People v. Coakley, People v. Ramos, People v. Carter, People v. Tyson, People v. Warney, People v. Martinez, People v. Deskovic, People v. Faison & Shepard*);
- (3) a failure to maintain meaningful contact with the client (*Rojas, Burt, Warney*);

The cases in which there was ineffective representation at trial consisted of

- (1) a lack of attentiveness to the facts of the case (*People v. Newton, People v. Rojas, People v. Warney, People v. Martinez*); and
- (2) a failure to utilize available evidence that would have cast doubt on the defendant's guilt (*People v. Rojas, People v. Garcia, People v. Burt, People v. Stewart, People v. Ramos*).

In all but two of the cases examined, counsel was either retained or assigned pursuant Article 18-b of the County Law (*Deskovic* and *Warney*).

The Kaye Commission

The structural defects in the delivery of indigent defense services in the State of New York have been most recently documented in the Final Report to the Chief Judge of New York by the Commission on the Future of Indigent Defense Services (“the Kaye Commission”), submitted to Chief Judge Kaye in June 2006. The representational deficiencies in the cases studied herein transcend structural defects. They predominate, not where large public defender agencies are involved, but with sole or very small firm practitioners. There is an existing issue in New York as to whether there is, in fact, any type of quality control as to the qualifications and performance of non-public defender assigned counsel. There is ample basis for concluding that current assigned counsel plans do not have such controls in place: this may be due both to a lack of due diligence by assigned counsel administrators in the initial appointment of private attorneys or in the lack of assessment in performance of assigned counsel with regard to retention on an 18-b panel.

Even if the current assigned counsel plans throughout the state appointed qualified counsel or purged incompetent counsel, there exists no mechanism for ensuring that retained counsel will provide quality representation, and there also appears to be a lack of support and resources within these plans, both in terms of legal oversight and consultation as well as investigative and case preparation services.

A Failure of Individual Attorneys

Insofar as the deficiencies in the cases examined emanated from the representation afforded by both assigned and retained counsel, they are primarily found in the failure of individual attorneys to comprehend and implement the essential requirements for quality representation in the defense of a criminal defendant. Consequently, the following recommendations are grounded in the necessity to ensure that all attorneys who undertake the defense of a person charged with a crime adhere to a well-defined and undisputed protocol for such representation.

Recommendations

A. Standards

There already exists an abundance of standards that are applicable to defense counsel's obligations when undertaking the defense of a criminal case. One can begin with the basic requirements of the Code of Professional Responsibility, and proceed to the American Bar Association's Standards for the Defense Function, the New York State Bar Association's Standards for the Provision of Mandated Representation, and the National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation.

In light of this heavily traveled ground, there is no reason to create an entirely new set of standards. Thus, we endorse the following recommendations made by the American Bar Association's Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process:

- That governing bodies ensure that defense counsel have adequate resources and training to fulfill their obligation to conduct thorough and independent investigation into their clients' guilt or innocence in every case, including heightened scrutiny into cases that rely on eye-witness identification, witnesses who receive any benefit in return for their testimony, and confession by youthful or mentally limited defendants;
- Require defense counsel to investigate circumstances indicating innocence regardless of the client's admissions or statements of facts constituting guilt or the client's stated desire to plead guilty or dispose of the case without trial;
- Require that defense counsel cooperate fully with successor counsel, including the preservation and transfer of all pertinent records and information;
- Require defense counsel in all cases, whether or not serious criminal cases, to meet the requirements enumerated in the ABA Standards for Criminal Justice Providing Defense Services.

Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process: ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 79, 80 (2006).

We also endorse Guideline 4.1 of The National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation which specifies that:

(a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The Investigation should be conducted as promptly as possible.

(b) Sources of investigative information may include the following:

(1) Charging documents

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offenses(s) with which the accused is charged;

(B) the defenses, ordinary and affirmative, that may be available;

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

(2) the accused

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct which affects the client's rights;

(B) explore the existence of other potential sources of information relating to the offense;

* * *

(3) potential witnesses

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) the police and prosecution

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

(5) physical evidence

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

(6) the scene

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g. weather, time of day, and lighting conditions).

(7) expert assistance

Counsel should secure the assistance of experts where it is necessary or appropriate to:

- (A) the preparation of the defense;
- (B) adequate understanding of the prosecution's case;
- (C) rebut the prosecution's case.

National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation*, 54, 55 (1994).

B. Action Proposals

To ensure that the above standards become an active part of our effort to interdict representation that puts innocent men and women at risk in a criminal prosecution, we make the following additional recommendations:

1. The Task Force should generally endorse the specific recommendations made by the American Bar Association's Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process and Guideline 4.1 of The National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation.
2. Those standards should be widely publicized by the New York State Bar Association and distributed extensively to the criminal defense bar through the heads of all defender agencies, the administrators of all assigned counsel plans, and by malpractice insurance providers to those attorneys whom they insure.
3. The administrators of assigned counsel plans must scrutinize more carefully the qualifications of attorneys seeking appointment under the plan to represent indigent defendants.
4. The administrators of assigned counsel plans should be provided with adequate resources to be allocated for staff to enable those plans to increase their ability to monitor the performance of attorneys assigned under the plan, and, if possible, to develop within the plan a structure which offers supervision and legal consultation to plan attorneys.
5. Bar associations should solicit experienced members of the criminal defense bar to make themselves available on a designated telephone hotline or in a specific office to fellow attorneys who seek advice and counsel with regard to their representation of a criminal defendant and bar associations should give formal recognition in some fashion to attorneys who provide such mentoring.

6. The rules governing CLE credits should be amended to provide that attorneys who undertake the defense of criminal cases must certify that in each calendar year that they have taken a specified number of CLE hours devoted to subjects pertaining to the representation of criminal defendants.
7. Organizations which currently operate a resource center for public defenders and assigned counsel should be given additional resources that would enable them to increase their ability to provide guidance and counsel to any attorney, assigned or retained, who seeks assistance.
8. The Task Force endorses the recommendations of the Report of the Commission on the Future of Indigent Services, June 2006, specifically including the recommendation of an Independent Public Defense Commission to oversee the quality and delivery of public defense services.

Compensation for the Wrongfully Convicted

SUBCOMMITTEE REPORT AND FINAL PROPOSALS

Introduction

Twenty-five states, Washington, DC and the federal government have enacted provisions to compensate the wrongfully convicted and imprisoned. New York currently allows claims for unjust conviction and imprisonment to be brought against the state in the Court of Claims under the *Court of Claims Act § 8-b*. Any individual who has been convicted and subsequently imprisoned for one or more felonies or misdemeanors which he or she did not commit may present a claim for damages against the state.

Public policy must strive to strike a balance between properly compensating those individuals who suffer the horror of being imprisoned even though they are factually innocent with the ability of law enforcement to discharge its responsibilities without fear of facing fiscal sanction for every misstep. Unlike in civil law where there is redress for negligent acts, the process for compensating innocent individuals who have been wrongfully convicted should not be turned into the equivalent of providing monetary compensation for any error of law enforcement, but should provide compensation for egregious acts. With this in mind, the Subcommittee on Compensation for the Wrongfully Convicted: (A) makes the following comments regarding the Court of Claims Act § 8-b; and (B) makes additional recommendations.

Following the recommendations, the Subcommittee provides an overview of how other states, Washington, DC, and the federal government have approached the issue of compensation for the wrongfully convicted and imprisoned.

A. Commentary on the Court of Claims Act § 8-b:

Eligibility (*Court of Claims Act § 8-b subdivision 2*)

The *Court of Claims Act § 8-b subdivision 2* provides that “[a]ny person convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit may...present a claim for damages against the state.”

Recommendation: This broad definition of eligibility should remain unchanged to offer the opportunity for legal redress to all individuals who have been imprisoned and subsequently found innocent.

Disqualifications (*Court of Claims Act § 8-b subdivision 5*)

The *Court of Claims Act § 8-b subdivision 5* requires the claimant to prove by clear and convincing evidence that:

“...(c) he did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state; and

(d) he did not by his own conduct cause or bring about his conviction.”

Under provision (c) the claimant must prove that he or she has been exonerated on every charge initially brought in the accusatory instrument, regardless of whether or not a charged offense was dismissed prior to submission to the fact-finder.

Recommendation: This provision should be amended to require that the claimant only prove that he or she has been exonerated on every charge submitted to the fact-finder.

In addition, under provision (d) any individual who has by his or her own conduct caused or brought about their conviction is disqualified from seeking redress. This section precludes any individual who pled guilty, failed to present evidence due to the negligence of his or her attorney or made a confession that was coerced from seeking compensation. The New York State Bar Association Task Force on Wrongful Conviction found negligent defense practices in 34% of cases reviewed and false confessions in 23% of the cases reviewed.

Recommendation: Contributing to the conviction in cases of attorney negligence or coerced confession should not be a factor in determining appropriate compensation. This provision should be amended. Entering a plea of guilty should not automatically deter an innocent individual from seeking compensation, if the claimant is able to prove the plea was entered due to negligence on the part of his or her attorney or was entered under duress. A finding of duress, however, shall not attach if the plea was entered in an effort to mitigate the risk of a longer sentence being imposed should the defendant choose to go to trial.

Compensation (*Court of Claims Act § 8-b subdivision 6*)

The *Court of Claims Act § 8-b subdivision 6* does not set a minimum or maximum amount of compensation to be provided. It states that the court “shall award damages in such sum of money as the court determines will fairly and reasonably compensate him.” Of cases that have been decided or settled, the compensation provided to wrongfully convicted individuals is disparate. In a decided case a claimant was awarded the total sum of \$500,000 for non-pecuniary losses, plus \$30,658.43 for past lost wages. Claimants in cases that have been settled have received up to \$3.5 million.

Recommendation: A fixed minimum guaranteed amount per year of incarceration should be set with the option to seek more, upon satisfying the requirements outlined in the Court of Claims Act § 8-b. If the claimant opts to seek additional compensation he or she forfeits the guaranteed amount.

Recommendation: Many state statutes include a provision prohibiting the state from offsetting the total compensation awarded by any expenses incurred related to securing or maintaining the claimant’s custody or to feed, clothe or provide medical services for the claimant, it is our recommendation that such a provision be included in the New York State statute.

Filing Term (*Court of Claims Act § 8-b subdivision 7*)

The *Court of Claims Act § 8-b subdivision 7* requires claims to be filed within two years after the pardon or dismissal of an accusatory instrument. The majority of states which stipulate a filing term for claims against the state to seek damages for wrongful conviction and imprisonment require the claim to be filed within two years of the individual’s exoneration.

Recommendation: This provision should remain unchanged.

B. Additional Recommendations:

The Subcommittee on Compensation for the Wrongfully Convicted recommends the following additions to the Court of Claims Act § 8-b:

Supplemental Awards

Innocent persons are often released from prison with no assistance. Ironically, this directly contrasts with convicted felons who receive a broad panoply of support services.

Recommendation: Based on need, the immediate provision of subsistence funds and access to services to assist in reentry should be provided to all individuals who have been released from prison after receiving a pardon on the grounds of innocence. Such services should include assistance in acquiring affordable housing, job training, education, health care, and child custody assistance. Innocent persons should at a minimum receive the same post-release services as a felon.

Disqualifications

Recommendation: The claimant should not be eligible for compensation for any term of incarceration that was attributable to a separate and lawful conviction resulting in a concurrent term of imprisonment.

Beneficiary Provisions

Recommendation: State law should specify that upon the death of a wrongfully imprisoned individual, any compensation awarded will be paid to his or her estate.

Records Expungement

Recommendation: The state should automatically order the expungement of all criminal records related to the wrongful arrest, conviction and sentence at the expense of the state upon exoneration. Such records shall only be available to a claimant and the State in an unjust conviction and imprisonment claim upon application to the court.

Legislative Provisions for the Compensation of the Wrongfully Convicted and Incarcerated

Twenty-five states, Washington, DC and the Federal Government have enacted provisions to compensate the wrongfully convicted and imprisoned.

Statutes include the following components:

- Eligibility requirements
 - Any person who has been wrongfully convicted of a felony and imprisoned
 - Any person convicted and imprisoned found to be innocent through DNA analysis
 - Persons imprisoned who receive a pardon from the governor on the ground of innocence of the crime
- Amount of monetary compensation per year or day of wrongful incarceration (minimum amount, maximum amount, period of payment)
 - \$50 per day (IA, MO)
 - \$50,000 per year (FL)
 - Not to exceed \$300,000 per year (ME)
 - Maximum of \$2 million including costs of supplemental awards (FL)
 - Sum of money the court determines will fairly and reasonably compensate him (NY, WV)
 - 90 percent of the state per capita personal income per year (VA)
 - Twice the amount of the claimant's income in the year prior to his incarceration (NJ)
 - Increased compensation if sentenced to death (US, TX)
 - Only educational aid (MT)
 - Provided up to 20 years (VA)

- How compensation is distributed
 - Lump sum or installments
 - Initial sum then installments
 - TN: “equal monthly installments calculated by dividing the non-commuted amount by the estimated number of months the claimant will live based on the claimant’s life expectancy”
- Available term after release to file for compensation
 - Within 6 months (CA)
 - Within 5 years (NC)
 - Majority of states requiring filing within 2 years of exoneration
- Jurisdiction for determining innocence and appropriate compensation
 - Claims Court (IL, NY, US)
 - State Board of Control (CA)
 - Board of Public Works (MD)
 - District Court (IA, LA, UT)
 - Superior Court (ME, MA, NJ)
 - Sentencing Court (MO)
 - Department of Legal Affairs (FL)
 - Comptroller (TX)
 - Industrial Commission (NC)
 - Court of Common Pleas (OH)
 - Board of Claims (TN, WI)
 - Committee on Compensation for Wrongful Incarceration (AL)

- Burden of proof that must be met to receive compensation
 - Preponderance of Evidence
 - Clear and Convincing Evidence
- Disqualifications
 - Person contributed to the bringing about of his arrest or conviction for the crime with which he was charged
 - Non-DNA exonerations
 - Subsequent felony conviction
 - Entered a guilty plea
 - Serving a concurrent sentence for an unrelated offense
- Supplemental awards
 - Tuition and fees
 - Medical or counseling services
 - Job or skill training
 - Compensation for child support payments
 - Attorney's fees
- Tax
 - Provision to exclude compensation from state income tax
- Records expungement provisions
 - Automatic order to expunge criminal records at expense of the state

- Allocation of state funds for compensation dollars
 - Legislature appropriations (AL, CA, TX)
 - Innocence Compensation Fund (LA)
 - General Emergency Fund (MD, NC)
 - Crime Victim Reparations Fund (UT)
- Eligibility for further civil redress
 - Provision to prohibit the wrongfully imprisoned individual from seeking further civil redress from the state or its employees and agencies
- Prohibition of offsetting reward for expenses incurred by the state
 - Provision to prohibit the state from offsetting the total compensation by any expenses incurred related to securing or maintaining the claimant's custody or to feed, clothe or provide medical services for the claimant
- Beneficiary provisions
 - Upon death of the wrongfully imprisoned individual compensation will cease or will be paid to surviving spouse and/or minor children
- Other issues to consider
 - Further supplemental awards
 - Family reunification assistance
 - Housing assistance
 - Benefits assistance – proof of identity, public assistance
 - Many reentry service providers are bound by contracts that restrict clientele to those who have been convicted, excluding exonerees from services

- Proffer a guaranteed minimum amount of compensation with the option to sue for more. If the claimant opts to sue for additional compensation he or she forfeits the guaranteed compensation.
- The wrongfully convicted individual shall receive the same post-release services as a released felon is provided
- Compensation Provided in NY
 - Victor Ortiz
 - Awarded the total sum of \$500,000 for non-pecuniary losses, plus \$30,658.43 for past lost wages
 - Most cases have been denied due to the inability to meet the burden of proof (clear and convincing evidence) or the “contribution” clause
 - Settlements
 - Shih-Wei Su: \$3.5 million – served 12 years of 16 to 50 year sentence for ordering a gang member to shoot a rival gang member, case was overturned by US Court of Appeals (Queens)
 - Vincent Jenkins: \$2 million – served 17 years for rape, exonerated by DNA (Buffalo)
 - Anthony Faison and Charles Shepherd: \$1.65 million each – served 14 years for shooting death of a cab driver, hired investigator found the actual perpetrator who later confessed and pleaded guilty (Kings)
- Lawyer Interviews (*the following comments were provided by attorneys who have represented claimants in Unjust Conviction and Imprisonment Act claims. Representatives from the Attorney General’s Office have been contacted and the Subcommittee is awaiting their comments*)
 - Should previous convictions be considered in compensation
 - Liability vs. damages issue – potential to bifurcate decisions

- Remove jurisdiction from Court of Claims because judges are appointed and have an interest in protecting the state. Compensation cases should be decided by a jury.
- Reform NYPD policies regarding destruction of evidence
 - 21 cases where NYPD has lost evidence
 - Set guidelines to control how long evidence is maintained
- The burden of proof is too high and unfair in some cases. Claimants should not have to prove they did nothing at all to contribute to their conviction if there was police or prosecutorial misconduct involved.
- Create a sliding scale of burden of proof in which the more there is misconduct by police or prosecution a lesser burden of proof be required by the claimant.
- Certain rules of evidence should be eliminated in Unjust Conviction and Incarceration claims. Hearsay and police reports should come in as the events generally took place so long ago that it is difficult to find witnesses or if memory of events is not always good.
- The common theme is that the procedural requirements of the statute are quite difficult to navigate and cause many litigants to be denied relief. The requirement that the claimant establish factual innocence is quite a high hurdle. It is difficult to establish unless the underlying case had such a concession at the time of dismissal (such as where the prosecution confirmed that the client was innocent).
- The lawyers also felt that the Court of Claims sometimes interpreted the exclusion that the claimant did not contribute to or bring about his own conviction in a very restrictive manner. This may be utilized to dismiss cases involving false confessions.

National Survey Comparison of the Minimum and Maximum Compensation Offered to the
Wrongfully Convicted and Imprisoned

State	Compensation per term of incarceration	Maximum Compensation
Alabama	Minimum of \$50,000 per year	No maximum; the Committee may recommend supplemental compensation to the Legislature in bill form
California		Maximum of \$100 per day
Connecticut	Discretion of the Claims Commissioner	
Florida	\$50,000 per year	\$2 million total including supplemental awards
Illinois		For imprisonment of 5 years or less: not more than \$15,000; for imprisonment 5-14 years: not more than \$30,000; for imprisonment of over 14 years: not more than \$35,000 - with a cost-of living adjusted increase for every year since 1945
Iowa	\$50 per day	
Louisiana	\$15,000 per year	\$150,000
Maine		\$300,000
Maryland	A reasonable amount for any financial or other appropriate counseling for the individual	
Massachusetts		\$500,000

State	Compensation per term of incarceration	Maximum Compensation
Missouri	\$50 per day for post-conviction incarceration	\$36,500 per year
Montana	No monetary compensation; Education aid only	
New Hampshire		\$20,000
New Jersey		Shall not exceed twice the amount of the claimant's income in the year prior to his incarceration or \$20,000 for each year of incarceration, whichever is greater
New York	Sum of money as the court determines will fairly and reasonably compensate him	
North Carolina	\$20,000 per year	\$500,000
Ohio	\$40,300 per year, or the adjusted amount determined by the auditor of state	
Oklahoma		\$175,000
Tennessee		\$1,000,000
Texas	\$50,000 per year; If sentenced to death \$100,00 per year	\$500,000 excluding child support payments and interest on child support arrearages

State	Compensation per term of incarceration	Maximum Compensation
Utah	The monetary equivalent of the average annual nonagricultural payroll in Utah at time of release per year	Compensation provided for a maximum of 15 years of incarceration
Vermont	Minimum of \$30,000 per year	Maximum of \$60,000 per year
Virginia	Amount equal to 90 percent of the Virginia per capita personal income as reported by the Bureau of Economic Analysis of the United States Department of Commerce for each year of incarceration	Compensation provided for up to 20 years of incarceration
West Virginia	Sum of money as the court determines will fairly and reasonably compensate him	
Wisconsin		Not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year of imprisonment
Washington, DC	No provision	No provision

State	Compensation per term of incarceration	Maximum Compensation
		<p>The amount of damages awarded shall not exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff.</p>

National Survey of Wrongful Conviction and Imprisonment Provisions

Alabama (2001 Alabama Laws Act 2001-659)

Eligibility	<ul style="list-style-type: none"> • Have been convicted by the State of one or more felony offenses, all of which the person was innocent, and have served time in prison as a result of the conviction(s). • Have been incarcerated pretrial on a state felony charge, for at least two years through no fault of his or her own, before having charges dismissed based on innocence.
Where Filed	Division of Risk Management of the Department of Finance
Who Decides	Committee on Compensation for Wrongful Incarceration
Compensation per term of incarceration	Minimum of \$50,000 per year
Maximum Compensation	No maximum; the Committee may recommend supplemental compensation to the Legislature in bill form.
Payment Form	Committee discretion: either lump sum or in installments
Filing Term After Exoneration	Within 2 years

Disqualifications	<ul style="list-style-type: none"> • A person serving a term of imprisonment for a crime other than a crime for which the person was wrongfully incarcerated. • If the sentence for the crime of which the person was mistakenly convicted was served concurrently with sentence for the conviction of another crime. • If convicted of any of the acts charged with in conjunction with the charge which resulted in the wrongful conviction or his or her acts or omissions constituted a felony or misdemeanor against the state. • Individual shall not have been the subject of an act of the Legislature that authorized an award of compensation for his or her wrongful conviction. • A person awarded compensation and subsequently convicted of a felony crime will not be eligible to receive any unpaid amounts from any compensation authorized.
Burden of Proof	Preponderance of evidence
Tax	No provision
Records of Expungement	No provision
Fund Allocations	Any available state funds or legislature appropriate distributed by the Comptroller
Definitions of Innocence	<ul style="list-style-type: none"> • The conviction vacated or reversed and the accusatory instrument dismissed on grounds of innocence; or • The accusatory instrument dismissed on a ground consistent with innocence.
Upon Death	The person's estate is eligible to receive any remaining compensation
Civil Redress against state	No provision

Deduction of award for state expenses	Prohibited
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California (Penal Code Section 4900 - 4906)

Eligibility	Any person who, having been convicted of any crime against the State amounting to a felony, and having been imprisoned therefore in a State prison granted a pardon by the Governor for the reason that the crime with which he was charged was either not committed at all or, if committed, was not committed by him, or who being innocent of the crime with which he was charged for either of the forgoing reasons, shall have served the term or any part thereof for which was imprisoned.
Where Filed	State Board of Control
Who Decides	Legislature
Compensation per term of incarceration	No provision
Maximum Compensation	Maximum of \$100 per day
Payment Form	No provision
Filing Term After Exoneration	Within 6 months
Disqualifications	By any act or omission on his part, either intentionally or negligently, contribute to the bringing about of his arrest or conviction for the crime with which he was charged.
Burden of Proof	Preponderance of evidence
Supplemental Awards	No provision
Tax	Not treated as gross income
Records Expungement	No provision
Fund Allocations	Legislature determines appropriations to be distributed by the Comptroller

Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Connecticut (Public Act No. 08-143)

Eligibility	<ul style="list-style-type: none"> • Such person has been convicted by this state of one or more crimes, of which the person was innocent, has been sentenced to a term of imprisonment for such crime or crimes and has served all or part of such sentence; and • Such person's conviction was vacated or reversed and the complaint or information dismissed on grounds of innocence or the complaint or information dismissed on a ground consistent with innocence.
Where Filed	Claims Commissioner
Who Decides	Claims Commissioner
Compensation per term of incarceration	Discretion of the Claims Commissioner
Maximum Compensation	No provision
Payment Form	No provision
Filing Term After Exoneration	Within 2 years
Disqualifications	No provision
Burden of Proof	Preponderance of evidence

Supplemental Awards	Payment for the expenses of employment training and counseling, tuition and fees at any constituent unit of the state system of higher education and any other services such person's reintegration into the community.
Tax	No provision
Records Expungement	No provision
Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	Permitted
Deduction of award for state expenses incurred	No provision

Florida (Laws of Florida Chapter 2008-39)

Eligibility	A person whose felony conviction and sentence have been vacated by a court of competent jurisdiction and the original sentencing court has issued its order finding that the person neither committed the act nor the offense that served as the basis for the conviction and incarceration and that the person did not aid, abet, or act as an accomplice or accessory to a person who committed the act or offense.
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Where Filed	<ul style="list-style-type: none"> • <i>Petition for determination of status of wrongfully incarcerated person and eligibility for compensation:</i> Original sentencing court. • <i>Application for compensation:</i> Department of Legal Affairs
Who Decides	Department of Legal Affairs
Compensation per term of incarceration	\$50,000 per year
Maximum Compensation	\$2 million total including supplemental awards
Payment Form	No provision
Filing Term After Exoneration	<ul style="list-style-type: none"> • <i>Petition for determination of status of wrongfully incarcerated person and eligibility for compensation:</i> Within 90 days of order vacating conviction and sentence. • <i>Application for compensation:</i> Within 2 years of original sentencing court order finding that the person meets the definition of wrongfully incarcerated and eligible for compensation.

<p>Disqualifications</p>	<ul style="list-style-type: none"> • Before the person’s wrongful conviction and incarceration, the person was convicted of, or pled guilty or nolo contendere to, regardless of adjudication, any felony offense, or a crime committed in another jurisdiction the elements of which would constitute a felony in this state, or a crime committed against the US which is designated a felony, excluding any delinquency disposition; • During the person’s wrongful incarceration, the person was convicted of, or pled guilty or nolo contendere to, regardless of adjudication, any felony offense; or • During the person’s wrongful incarceration, the person was also serving a concurrent sentence for another felony for which the person was not wrongfully convicted. • A wrongfully incarcerated person who commits a felony law violation that results in revocation of the parole or community supervision is ineligible for any compensation. • If the person has a lawsuit pending against the state or any agency, instrumentality, or any political subdivision thereof, in state or federal court requesting compensation arising out of the the facts in connection with the claimant’s conviction and incarceration. • If the person is the subject of a claim bill pending for claims subject out of the facts in connection with the claimant’s conviction and incarceration.
<p>Burden of Proof</p>	<p>Preponderance of evidence</p>

Supplemental Awards	<ul style="list-style-type: none"> • Waiver of tuition and fees for up to 120 hours of instruction at any career center, community college, or state university. • Amount of any fine, penalty or court costs imposed and paid by wrongfully incarcerated person. • The amount of any reasonable attorney's fees and expenses incurred and paid in connection with all criminal proceedings and appeals. • Waiver of fees associated with the expunction of the person's criminal record.
Tax	No provision
Records Expungement	Immediate administrative expunction of the person's criminal record resulting from his or her wrongful arrest; Administratively expunge the claimant's criminal record arising from his or her wrongful arrest, wrongful conviction and wrongful incarceration.
Fund Allocations	General Revenue Fund or another source designated by the Legislature in the form of an annuity is purchased by the Chief Financial Officer
Definition of Innocence	No provision
Upon Death	Beneficiary provisions to be drawn before annuity is purchased
Civil Redress against state	Prohibited
Deduction of award for state expenses incurred	No provision

Illinois (705 ILCS 505/8)

Eligibility	Persons imprisoned who receive a pardon from the governor on the ground of the crime.
Where Filed	Court of Claims
Who Decides	Court of Claims
Compensation per term of incarceration	<ul style="list-style-type: none"> • For imprisonment of 5 years or less: not more than \$15,000 • For imprisonment of 5 - 14 years: not more than \$30,000 • For imprisonment of over 14 years: not more than \$35,000 • With a cost-of living adjusted increase for every year since 1945
Maximum Compensation	<ul style="list-style-type: none"> • For imprisonment of 5 years or less: not more than \$15,000 • For imprisonment of 5 - 14 years: not more than \$30,000 • For imprisonment of over 14 years: not more than \$35,000 • With a cost-of living adjusted increase for every year since 1945
Payment Form	No provision
Filing Term After Exoneration	No provision
Disqualifications	No provision
Burden of Proof	No provision
Supplemental Awards	Attorney's fees not to exceed 25% of the award granted
Tax	No provision
Records Expungement	No provision

Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Iowa (ICA Section 663A.1)

Eligibility	<ul style="list-style-type: none"> • The individual charged by indictment or information with the commission of a public offense classified as an aggravated misdemeanor or felony. • The individual did not plead guilty to the public offense charged, or to any lesser included offense, but was convicted by the court or by a jury of an offense classified as an aggravated misdemeanor or felony. • The individual was sentenced to incarceration for a term of imprisonment not to exceed two years if the offense was an aggravated misdemeanor or to an indeterminate term of years under Ch 902 if the offense was a felony, as a result of the conviction. • The individual’s conviction was vacated or dismissed, or was reversed, and no further proceedings can be or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the conviction. • The individual was imprisoned solely on the basis of the conviction that was vacated, dismissed, or reversed and on which no further proceedings can be or will be had.
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Where Filed	District Court - civil
Who Decides	District Court
Compensation per term of incarceration	\$50 per day
Maximum Compensation	No provision
Payment Form	No provision
Filing Term After Exoneration	Within 2 years
Disqualifications	Plead guilty
Burden of Proof	Clear and convincing evidence
Supplemental Awards	<ul style="list-style-type: none"> • The amount of restitution for any fine, surcharge, other penalty, or court costs imposed and paid and any reasonable attorney's fees and expenses incurred in connection with all criminal proceedings and appeals regarding the wrongfully imposed judgment and sentence and such fees and expenses incurred in connection with any civil actions and proceedings for post-conviction relief. • The value of any lost wages, salary, or other earned income which directly resulted from the individual's conviction and imprisonment, up to \$25,000 per year.
Tax	No provision
Records Expungement	No provision
Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	Prohibited

Louisiana (LSA-RS 15:572.8)

Eligibility	If he has served in whole or in part a sentence of imprisonment under the laws of this state for a crime for which he was convicted and: (1) the conviction of the applicant has been reversed or vacated; and (2) the applicant has proved by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted.
Where Filed	Nineteenth Judicial District Court
Who Decides	Nineteenth Judicial District Court
Compensation per term of incarceration	\$15,000 per year
Maximum Compensation	Maximum total \$150,000
Payment Form	No provision
Filing Term After Exoneration	Within 2 years
Disqualifications	Any term served under a concurrent sentence.
Burden of Proof	Clear and convincing evidence
Supplemental Awards	<ul style="list-style-type: none"> • Costs of job-skills training for one year • Appropriate medically necessary medical and counseling services for three years • Tuition and fees at any community college or unit of the public university system of the state of Louisiana
Tax	No provision
Records Expungement	No provision
Fund Allocations	Innocence Compensation Fund

Definition of Innocence	Factual innocence - The application did not commit the crime for which he was convicted and incarcerated nor did he commit any crime based upon the same set of facts used in his original conviction.
Upon Death	If an annuity is purchased to provide compensation, the contract will provide for survivors benefits.
Civil Redress against state	No provision
Deduction of award for state expenses incurred	Prohibited

Maine (14 MRSA Section 824I)

Eligibility	<ul style="list-style-type: none"> • The person was convicted of a criminal offense; • As a result of that conviction, the person was sentenced to a period of incarceration and was actually incarcerated; • Subsequent to the conviction and as a condition precedent to suit, the person received a full and free pardon, which is accompanied by a written finding by the Governor who grants the pardon that the person is innocent of the crime for which that person was convicted; and • The court finds that the person is innocent of the crime for which the person was convicted.
Where Filed	Superior Court
Who Decides	Superior Court
Compensation per term of incarceration	No provision
Maximum Compensation	\$300,000

Payment Form	No provision
Filing Term After Exoneration	No provision
Disqualifications	No provision
Burden of Proof	Clear and convincing evidence
Supplemental Awards	Court costs, interest and “all other costs that a court may assess”
Tax	No provision
Records Expungement	No provision
Fund Allocations	General Fund
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Maryland (MD Code State Finance and Procurement Section 10-501)

Eligibility	If the individual has received from the Governor a full pardon stating that the individual’s conviction has been shown conclusively to be in error.
Where Filed	Board of Public Works
Who Decides	Board of Public Works
Compensation per term of incarceration	Reasonable amount for any financial or other appropriate counseling for the individual.
Maximum Compensation	No provision
Payment Form	Lump sum or installments
Filing Term After Exoneration	No provision

Disqualifications	No provision
Burden of Proof	No provision
Supplemental Awards	No provision
Tax	No provision
Records Expungement	No provision
Fund Allocations	General Emergency Fund or money that the Governor provides in the annual budget
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Massachusetts (MGLA 258D Section 1)

Eligibility	<ul style="list-style-type: none"> • Those that have been granted a full pardon, if the governor expressly states in writing his belief in the individual's innocence; or • Those who have been granted judicial relief by a state court of competent jurisdiction on grounds which tend to establish the innocence of the individual, and if (a) the judicial relief vacates or reverses the judgment of a felony conviction, and the felony indictment or complaint used to charge the individual or complaint used to charge the individual with such felony has been dismissed, or if a new trial was ordered, the individual was not retried and the felony indictment or complaint was dismissed or a nolle prosequi was entered, or if a new trial was ordered the individual was found not guilty at the new trial; and (b) at the time of the filing of an action under this chapter no criminal proceeding is pending or can be brought against the individual by a district attorney or the attorney general for any act associated with such felony conviction.
Where Filed	Superior Court
Who Decides	Superior Court
Compensation per term of incarceration	No provision
Maximum Compensation	\$500,000
Payment Form	Lump sum or installments
Filing Term After Exoneration	Within 2 years

Disqualifications	<ul style="list-style-type: none"> • Plead guilty to the offense charged, or to lesser included offense, unless such guilty plea was withdrawn, vacated or nullified by operation of law on a basis other than a claimed deficiency in the plea warnings. • Was sentenced to less than 1 year in state prison. • Any term served under a concurrent sentence.
Burden of Proof	Clear and convincing evidence
Supplemental Awards	<ul style="list-style-type: none"> • Physical or emotional evidence • 50 percent reduction of tuition and fees for education services from any state or community college
Tax	No provision
Records Expungement	Upon the entry of a judgment in favor of a claimant and following a separate hearing on the matter, the court shall enter an order either directing the expungement or sealing of those records of the claimant maintained by the criminal history systems board, the probation department, and the sex offender registry that directly pertain to the claimant's erroneous felony conviction case, including documents and other materials and any samples obtained from the claimant.
Fund Allocations	Funds appropriated by the general court
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision

Deduction of award for state expenses incurred	Prohibited
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Missouri (Missouri Statutes Title XL Section 650.058)

Eligibility	Any individual who was found guilty of a felony in a Missouri court and was later determined to be actually innocent of such crime solely as result of DNA Profiling analysis.
Where Filed	Sentencing Court
Who Decides	Sentencing Court
Compensation per term of incarceration	\$50 per day for post-conviction incarceration
Maximum Compensation	\$36,500 per year
Payment Form	Determined by the Department of Corrections
Filing Term After Exoneration	No provision
Disqualifications	If the individual was serving any term of a sentence for any other crime concurrently with the sentence for which he or she is determined to be actually innocent, unless such individual was serving another concurrent sentence because his or her parole was revoked by a court or the board of probation and parole in connection with the crime for which the person has been exonerated.
Burden of Proof	No provision
Supplemental Awards	No provision
Tax	No provision

Records Expungement	An individual who is determined to be actually innocent of a crime shall automatically be granted an order of expungement from the court in which he or she pled guilty or was sentenced to expunge from all official records all recordations of his or her arrest, plea, trial, or convictions.
Fund Allocations	Department of Corrections appropriations
Definition of Innocence	Actually innocent - (1) The individual was convicted of a felony for which a final order of release was entered by the court; (2) All appeals of the order of release have been exhausted; (3) The individual was not serving any term of a sentence for any other crime concurrently with the sentence for which he or she is determined to be actually innocent, unless such individual was serving another concurrent sentence because his or her parole was revoked by a court or the board of probation and parole in connection with the crime for which the person has been exonerated; and (4) Testing ordered demonstrates a person's innocence of the crime for which the person is in custody.
Upon Death	The state's obligation to pay restitution shall cease upon the individual's death.
Civil Redress against state	Prohibited
Deduction of award for state expenses incurred	No provision

Montana (MCA 53-1-214)

Eligibility	A person who was convicted in the state of a felony offense, who was incarcerated in a state prison for any period of time, and whose judgment was overturned by a court based on the results of postconviction forensic DNA testing that exonerates the person of the crime for which the person was convicted.
Where Filed	Department of Corrections
Who Decides	Department of Corrections
Compensation per term of incarceration	Only Education aid
Maximum Compensation	No provision
Payment Form	No provision
Filing Term After Exoneration	Within 10 years of release
Disqualifications	Non-DNA exoneration
Burden of Proof	DNA testing
Supplemental Awards	Educational aid including tuition, fees, books, board, and room at any: (a) Montana community college; (b) unit of the Montana university system; or (c) accredited Montana tribally controlled community college
Tax	No provision
Records Expungement	No provision
Fund Allocations	Legislature appropriations
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision

Deduction of award for state expenses incurred	No provision
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New Hampshire (NH Rev Stat Section 541-B:14)

Eligibility	A person found to be innocent of the crime for which he was convicted an unjustly served time in the state prison.
Where Filed	Board of Claims
Who Decides	Board of Claims
Compensation per term of incarceration	Up to \$20,000 for the entirety of the individual's wrongful imprisonment
Maximum Compensation	\$20,000
Payment Form	No provision
Filing Term After Exoneration	No provision
Disqualifications	No provision
Burden of Proof	No provision
Supplemental Awards	No provision
Tax	No provision
Records Expungement	No provision
Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

New Jersey (NJ ST 52:4c-1)

Eligibility	Innocent persons who can demonstrate by clear and convincing evidence that they were mistakenly convicted and imprisoned.
Where Filed	Superior Court against the Department of the Treasury
Who Decides	Superior Court
Compensation per term of incarceration	Not to exceed the amount of the claimant's income in the year prior to his incarceration of \$20,000 per year of incarceration, whichever is greater.
Maximum Compensation	Twice the amount of the claimant's income in the year prior to his incarceration or \$20,000 per year of incarceration, whichever is greater.
Payment Form	No provision
Filing Term After Exoneration	Within 2 years
Disqualifications	<ul style="list-style-type: none"> • By his own conduct cause or bring about his conviction; is serving a term of imprisonment for a crime other than a crime of which the person was mistakenly convicted. • If the sentence for the crime of which the person was mistakenly convicted was served concurrently with the sentence for the conviction of another crime.
Burden of Proof	Clear and convincing evidence
Supplemental Awards	Reasonable attorney fees
Tax	No provision
Records Expungement	No provision
Fund Allocations	No provision

Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

New York (Laws of New York Court of Claims Act Section 8-b)

Eligibility	Any person convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit.
Where Filed	Court of Claims
Who Decides	Court of Claims
Compensation per term of incarceration	Sum of money as the court determines will fairly and reasonably compensate him.
Maximum Compensation	No provision
Payment Form	No provision
Filing Term After Exoneration	Within 2 years
Disqualifications	By his own conduct cause or bring about his conviction.
Burden of Proof	Clear and convincing evidence
Supplemental Awards	No provision
Tax	No provision
Records Expungement	No provision
Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	No provision

Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

North Carolina (NC GS Article 8 Section 148-82-84)

Eligibility	Any person who, having been convicted of a felony and having been imprisoned therefore in a State prison of this State, and who has thereafter or who shall hereafter be granted a pardon of innocence by the Governor upon the grounds that the crime with which the person was charged either was not committed at all or was not committed by that person.
Where Filed	Industrial Commission
Who Decides	Industrial Commission
Compensation per term of incarceration	\$20,000 per year
Maximum Compensation	\$500,000
Payment Form	No provision
Filing Term After Exoneration	Within 5 years
Disqualifications	No provision
Burden of Proof	Preponderance of evidence
Supplemental Awards	No provision
Tax	No provision
Records Expungement	No provision
Fund Allocations	Contingency and Emergency Fund or out of any other available State funds distributed by the Director of the Budget
Definition of Innocence	No provision
Upon Death	No provision

Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Ohio (Ohio RC Section 2743.49)

<p>Eligibility</p>	<ul style="list-style-type: none"> • The individual was charged with a violation of a section of the Revised Code by an indictment or information and the violation charged was an aggravated felony or felony. • The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony. • The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty. • The individual’s conviction was vacated or was dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave or court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction. • Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual’s release or it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.
<p>Where Filed</p>	<p>Court of Claims</p>
<p>Who Decides</p>	<p>Court of Claims</p>

Compensation per term of incarceration	\$40,300 per year, or the adjusted amount determined by the auditor of state
Maximum Compensation	No provision
Payment Form	No provision
Filing Term After Exoneration	Within 2 years
Disqualifications	Plead guilty to the particular charge or a lesser-included offense
Burden of Proof	The claimant shall be irrebuttably presumed to be a wrongfully imprisoned individual.
Supplemental Awards	<ul style="list-style-type: none"> • Any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, and if applicable, in connection with obtaining the wrongfully imprisoned individual's discharge from confinement in the state correction institution. • Any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment. • Any user fee or copayment for services at a detention facility. • The cost of housing and feeding in a detention facility. • The cost of supervision. • The cost of any ancillary services provided to the wrongfully imprisoned individual.
Tax	No provision
Records Expungement	No provision

Fund Allocations	Contingency and Emergency Fund or out of any other available State funds distributed by the Director of the Budget
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	Permitted
Deduction of award for state expenses incurred	Prohibited

Oklahoma (51 Okla. St. Ann. Section 154)

Eligibility	Claimant has received a full pardon on the basis of a written finding by the Governor of actual innocence for the crime for which the claimant was sentenced or has been granted judicial relief absolving of guilt on the basis of actual innocence of the crime for which the claimant was sentenced.
Where Filed	No provision
Who Decides	No provision
Compensation per term of incarceration	No provision
Maximum Compensation	\$175,000
Payment Form	No provision
Filing Term After Exoneration	No provision
Disqualifications	<ul style="list-style-type: none"> • Plead guilty to the offense charged or to any lesser-included offense. • Any term of a sentence in prison during which the claimant was also serving a concurrent sentence.
Burden of Proof	No provision

Supplemental Awards	No provision
Tax	No provision
Records Expungement	No provision
Fund Allocations	No provision

Definition of Innocence	Actual innocence - (a) The individual was charged, by indictment or information, with the commission of a public offense classified as a felony; (b) the individual did not plead guilty to the offense charged, or to any lesser included offense, but was convicted of the offense; (c) The individual was sentenced to incarceration for a term of imprisonment as a result of the conviction; (d) The individual was imprisoned solely on the basis of the conviction for the offense; and (e) (1) In the case of a pardon, a determination was made by either the Pardon and Parole Board or the Governor that the offense for which the individual was convicted, sentenced and imprisoned, including any lesser offenses, was not committed by the individual, or (2) In the case of judicial relief, a court of competent jurisdiction found by clear and convincing evidence that the offense for which the individual was convicted, sentenced and imprisoned, including any lesser included offenses, was not committed by the individual and issued an order vacating, dismissing or reversing the conviction and sentence and providing that no further proceedings can be or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the conviction.
Upon Death	No provision
Civil Redress against state	No provision

Deduction of award for state expenses incurred	No provision
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Tennessee (TCA Section 9-8-108)

Eligibility	Persons wrongfully imprisoned and granted exoneration.
Where Filed	Board of Claims
Who Decides	Board of Claims
Compensation per term of incarceration	No provision
Maximum Compensation	\$1,000,000
Payment Form	Equal monthly installments calculated by dividing the non-commuted amount by the estimated number of months the claimant will live based on the claimant's life expectancy; or lump sum
Filing Term After Exoneration	Within 1 year
Disqualifications	No provision
Burden of Proof	No provision
Supplemental Awards	No provision
Tax	No provision
Records Expungement	No provision
Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	Any monthly installments left remaining shall be paid to the claimant's surviving spouse and surviving minor children until spouse dies or remarries and or children reach majority status or die.

Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Texas (Civil Practice and Remedies Code Title 5 Section 103)

Eligibility	<ul style="list-style-type: none"> The person has served in whole or in part a sentence in prison under the laws of this state; and The person: (A) has received a full pardon on the basis of innocence for the crime for which the person was sentenced; or (B) has been granted relief on the basis of actual innocence of the crime for which the person was sentenced.
Where Filed	Comptroller's judiciary section
Who Decides	Comptroller
Compensation per term of incarceration	\$50,000 per year. If sentenced to death \$100,000 per year
Maximum Compensation	\$500,000 excluding child support payments and interest on child support arrearages
Payment Form	Two equal annual installments
Filing Term After Exoneration	Within 3 years
Disqualifications	<ul style="list-style-type: none"> Any part of a sentence in prison during which the person was also serving a concurrent sentence. If convicted of a subsequent felony.
Burden of Proof	Preponderance of evidence

Supplemental Awards	<ul style="list-style-type: none"> • Compensation for child support payments owed by the person that became due and interest on child support arrearages that accrued during the time served in prison but were not paid. • Counseling for one year. • Expenses incurred in connection with all associated criminal proceedings and appeals including fine or court costs paid and reasonable attorney's fee. • Wages, salary or other earned income that was lost. • Medical and counseling expenses incurred by the petitioner as a direct result of the arrest, prosecution, conviction, or wrongful imprisonment.
Tax	No provision
Records Expungement	No provision
Fund Allocations	Appropriation by the legislature distributed by the comptroller
Definition of Innocence	No provision
Upon Death	Compensation is terminated
Civil Redress against state	Prohibited
Deduction of award for state expenses incurred	Prohibited

Utah (Section 78-35a)

Eligibility	A person who has been found factually innocent and has served a period of incarceration.
Where Filed	District Court
Who Decides	District Court

Compensation per term of incarceration	The monetary equivalent of the average annual nonagricultural payroll wage in Utah at time of release per year of imprisonment.
Maximum Compensation	Provided for a maximum of 15 years
Payment Form	Initial payment of 20% then quarterly installments paid within 10 years
Filing Term After Exoneration	Within 1 year
Disqualifications	<ul style="list-style-type: none"> • Term of incarceration that was attributable to a separate and lawful conviction. • If the person was already serving a prison sentence in another jurisdiction at the time of the conviction of the crime for which that person has been found factually innocent.
Burden of Proof	Clear and convincing evidence
Supplemental Awards	No provision
Tax	Not subject to any Utah state taxes
Records Expungement	If found factually innocent the court shall issue an order of expungement of the petitioner's criminal record for all acts in the charging document upon which the payment is based.
Fund Allocations	The Office of Crime Victim Reparation shall pay from the Crime Victim Reparations Fund an initial sum equal to either 20% of the total financial assistance payment or an amount equal to two years of incarceration; the Legislature shall appropriate from the General Fund a separate line item on the Commission on Criminal and Juvenile Justice the remainder.

Definition of Innocence	Factually innocent - A person did not (a) engage in the conduct for which the person was convicted; (b) engage in conduct relating to any lesser included offenses; or (c) commit any other felony arising out of or reasonably connected to the facts supporting the indictment or information upon which the person was convicted.
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	Prohibited

Vermont (13 VSA Section 5574)

Eligibility	<ul style="list-style-type: none"> • The complainant was convicted of a crime, was sentenced to a term of imprisonment, and served all or any part of the sentence. • As a result of DNA evidence: (A) The complainant's conviction was reversed or vacated, the complainant's information or indictment was dismissed, or the complainant was acquitted after a second or subsequent trial; or (B) The complainant was pardoned for the crime for which he or she was sentenced. • DNA evidence establishes that the complainant did not commit the crime for which he or she was sentenced. • The complainant did not fabricate evidence or commit or suborn perjury during any proceedings related to the crime with which he or she was charged.
Where Filed	Civil Court

Who Decides	Civil Court
Compensation per term of incarceration	Minimum of \$30,000 per year
Maximum Compensation	Maximum of \$60,000 per year
Payment Form	No provision
Filing Term After Exoneration	Within 3 years
Disqualifications	<ul style="list-style-type: none"> • If fabricated evidence or committed or suborned perjury during any proceedings related to the crime. • Any term served under another sentence.
Burden of Proof	Preponderance of evidence
Supplemental Awards	<ul style="list-style-type: none"> • Economic damages, including lost wages and costs incurred by the claimant for his or her criminal defense and for efforts to prove his or her innocence. • Up to ten years of eligibility for the Vermont Health Access Plan using state-only funds. • Compensation for any reasonable reintegrative services and mental and physical health care costs incurred by the claimant for the time period between his or her release from mistaken incarceration and the date of the award. • Reasonable attorney's fees and costs for the action seeking compensation.
Tax	Not subject to any state taxes, except for the portion of the judgment awarded as attorney's fees
Records Expungement	No provision
Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	No provision

Civil Redress against state	Prohibited
Deduction of award for state expenses incurred	Prohibited

Virginia (Tort Claims Act Section 8.01-195.10)

Eligibility	Incarceration for a felony conviction for which (i) the conviction has been vacated, (ii) the person incarcerated must have entered a final plea of not guilty, or regardless of the plea, any person sentenced to death, or convicted of a Class 1 felony, a Class 2 felony, or any felony for which the maximum penalty is imprisonment for life, and (iii) the person incarcerated did not by any act or omission on his part intentionally contribute to his conviction for the felony for which he was incarcerated.
Where Filed	Civil Court
Who Decides	Legislature
Compensation per term of incarceration	Amount equal to 90 percent of the Virginia per capita personal income as reported by the Bureau of Economic Analysis of the US Department of Commerce for each year, or portion thereof, of incarceration.
Maximum Compensation	Provided for up to 20 years of incarceration.
Payment Form	Initial lump sum equal to 20 percent of the compensation award with the remaining paid in equal monthly payments for a period certain of 25 years.
Filing Term After Exoneration	No provision

Disqualifications	<ul style="list-style-type: none"> • Any act or omission on his part that intentionally contributed to his conviction. • Any subsequent conviction of a felony.
Burden of Proof	No provision
Supplemental Awards	<ul style="list-style-type: none"> • \$15,000 (deducted from compensation award) transition assistance grant • Up to \$10,000 reimbursement for career and technical training within the Virginia community college system
Tax	No provision
Records Expungement	No provision
Fund Allocations	General Assembly appropriations distributed by the Comptroller
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	Waived
Deduction of award for state expenses incurred	No provision

West Virginia (W. Va. Code Section 14-2-13a)

Eligibility	Any person arrested or imprisoned or convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit.
Where Filed	Claims Court
Who Decides	Claims Court
Compensation per term of incarceration	Sum of money as the court determines will fairly and reasonably compensate him.

Maximum Compensation	No provision
Payment Form	No provision
Filing Term After Exoneration	Within 2 years
Disqualifications	By his own conduct cause or bring about his conviction.
Burden of Proof	Clear and convincing evidence
Supplemental Awards	No provision
Tax	No provision
Records Expungement	No provision
Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Wisconsin (WSA 775.05)

Eligibility	Any person who is imprisoned as the result of his or her conviction for a crime in any court of this state, of which crime the person claims to be innocent and is released from imprisonment.
Where Filed	Claims Board
Who Decides	Claims Board
Compensation per term of incarceration	Not greater than \$5,000 per year
Maximum Compensation	No provision
Payment Form	No provision

Filing Term After Exoneration	No provision
Disqualifications	No provision
Burden of Proof	Clear and convincing evidence
Supplemental Awards	Attorney's fees, costs and disbursements
Tax	No provision
Records Expungement	No provision
Fund Allocations	Legislature appropriations
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Washington, DC (DC ST Section 2-421)

Eligibility	Any person unjustly convicted of and subsequently imprisoned for a criminal offense.
Where Filed	Civil Court
Who Decides	Civil Court
Compensation per term of incarceration	No provision
Maximum Compensation	No provision
Payment Form	No provision
Filing Term After Exoneration	No provision
Disqualifications	Entered a plea of guilty
Burden of Proof	Clear and convincing evidence
Supplemental Awards	No provision
Tax	No provision

Records Expungement	No provision
Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Federal (28 USCS Section 2513)

Eligibility	<ul style="list-style-type: none"> • His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction; and • He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution
Where Filed	US Court of Federal Claims
Who Decides	US Court of Federal Claims

Compensation per term of incarceration	The amount of damages awarded shall not exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff.
Maximum Compensation	The amount of damages awarded shall not exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff.
Payment Form	No provision
Filing Term After Exoneration	No provision
Disqualifications	By misconduct or neglect cause or bring about his own prosecution
Burden of Proof	No provision
Supplemental Awards	No provision
Tax	No provision
Records Expungement	No provision
Fund Allocations	No provision
Definition of Innocence	No provision
Upon Death	No provision
Civil Redress against state	No provision
Deduction of award for state expenses incurred	No provision

Appendix A

Task Force Members

- **Richard Aborn, Esq.** – President, Constantine & Aborn Advisory Services LLC and President of the Citizen’s Crime Commission of New York City
- **Jack Auspitz, Esq.** – Morrison & Foerster LLP, New York City
- **Hon. Phylis Skloot Bamberger** – Retired Court of Claims Judge, New York City
- **Thomas Belfiore** – Commissioner-Sheriff, Westchester County Department of Public Safety, Hawthorne
- **David Louis Cohen, Esq.** – Law Office of David L. Cohen, Esq., Kew Gardens
- **Tracee Davis, Esq.** – Zeichner, Ellman & Krause LLP, New York City
- **Hon. Janet DiFiore** – Westchester County District Attorney, White Plains
- **Vincent E. Doyle, III, Esq.** – Connors & Vilaro LLP, Buffalo
- **Mark Dwyer, Esq.** – New York County District Attorney’s Office, Manhattan
- **Anthony Girese, Esq.** – Bronx County District’s Attorney Office, Bronx
- **Robert C. Gottlieb, Esq.** – Law Offices of Robert C. Gottlieb, New York
- **Prof. William Hellerstein** – Brooklyn Law School, Garrison
- **Hon. Charles J. Hynes** – Kings County District Attorney, Brooklyn
- **Hon. Barry Kamins** – Judge, Criminal Court, New York County and Chair of the Task Force on Wrongful Convictions
- **Hon. Howard Levine** – Retired Court of Appeals Judge, Whiteman Osterman & Hanna LLP, Albany

- **Hon. John Martin** – Former U.S. District Judge for the Southern District, Martin & Obermaier, New York City
- **JoAnne Page, Esq.** – President and Chief Executive Officer, the Fortune Society, New York City
- **Matthew Scott Peeler, Esq.** - Arent Fox LLP, New York City, and Secretary of the Task Force on Wrongful Convictions
- **Norman L. Reimer, Esq.** – Executive Director, National Association of Criminal Defense Lawyers, Washington, DC
- **Prof. Laurie Shanks** – Clinical Professor of Law, Albany Law School, Albany
- **Hon. George Bundy Smith** – Retired Court of Appeals Judge, Chadbourne & Parke LLP, New York City
- **Lauren Wachtler, Esq.** – Mitchell, Silberberg & Knupp LLP, New York City

Appendix B

Case Studies - Wrongful Convictions in New York

1. Jeffrey Blake (1991)	20. Dennis Halstead (1987)	39. Luis Rojas (1992)
2. Clarence Braunskill (1989)	21. Gerald Harris (1992)	40. Yusef Salaam (1990)
3. Roy Brown (1992)	22. John Kogut (1986)	41. Raymond Santana (1990)
4. Lazaro Burt (1992)	23. Kerry Kotler (1982)	42. Charles Shepherd (1988)
5. Leonard Callace (1987)	24. Dan Lackey (2004)	43. Arthur Stewart (1995)
6. Anthony Capozzi (1987)	25. Lee Long (1995)	44. Betty Tyson (1973)
7. Napoleon Cardenas (1999)	26. Angelo Martinez (1986)	45. John Vera (1995)
8. Nathaniel Carter (1982)	27. William Maynard (1971)	46. Habib Wahir Abdal (1983)
9. Terry Chalmers (1987)	28. Antron McCray (1990)	47. James Walker (1971)
10. Marion Coakley (1985)	29. Robert McLaughlin (1980)	48. Collin Warner (1980)
11. Timothy Crosby (1989)	30. Michael Mercer (1992)	49. Douglas Warney (1997)
12. Charles Dabbs (1984)	31. Ruben Montalvo (1989)	50. George Whitmore (1964)
13. Charles Daniels (1979)	32. Jose Morales (1989)	51. Korey Wise (1990)
14. Lynn DeJac (1994)	33. Alan Newton (1985)	52. David Wong (1987)
15. Jeff Deskovic (1990)	34. James O'Donnell (1998)	53. Collin Woodley (1990)
16. Anthony Faison (1988)	35. Victor Ortiz (1984)	
17. Scott Fappiano (1985)	36. Albert Ramos (1985)	
18. Jose Garcia (1992)	37. John Restivo (1987)	
19. Hector Gonzalez (1996)	38. Kevin Richardson (1990)	

* The year of conviction is noted in parenthesis next to each name.

Appendix C

Transcripts of Public Hearings

(A) New York State Bar Association Task Force on Wrongful Conviction Hearing

New York City Bar Association

February 13, 2009, 9:30 a.m.

(B) New York State Bar Association Task Force on Wrongful Conviction Hearing

New York State Bar Association, Albany

February 24, 2009, 10:00 a.m.