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CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

REPORT AND RECOMMENDATIONS  
REGARDING EYE WITNESS IDENTIFICATION PROCEDURES

The California Commission on the Fair Administration of Justice was established by California State Senate Resolution No. 44 “to study and review the administration of criminal justice in California, determine the extent to which that process has failed in the past,” examine safeguards and improvements, and recommend proposals to ensure that the administration of criminal justice in California is just, fair and accurate. The Senate Resolution noted that study and review in other states has resulted in recommendations for reforms in order to avoid wrongful convictions and executions, and that California has not engaged in any such review of the state’s criminal justice system.

The Commission began by reviewing the studies and reviews of wrongful convictions conducted in other states, and identifying the causal factors that most frequently recur in cases where the wrongfully convicted have been exonerated. The Commission has assumed the accuracy of these studies without any independent efforts to verify them. The most frequently identified causal factors include misidentification by eyewitnesses, false confessions, perjured testimony, mishandling of forensic evidence, withholding exculpatory evidence, and the incompetence of defense lawyers. The Commission plans detailed inquiries into each of these causes of wrongful convictions before it issues its final report by December 31, 2007.

Meanwhile, the Commission has determined that there are reforms which can improve criminal investigation techniques and thus further the cause of justice in California. Our recommendation of these reforms need not await the issuance of our final report. One such set of reforms involves procedures to improve the reliability of eyewitness identifications.

A comprehensive compilation of all exonerations in the United States from 1989 through 2003 was recently published by a group of researchers at the

University of Michigan led by Professor Samuel R. Gross.<sup>1</sup> The researchers confined their study to cases in which there was an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted, such as a pardon based upon evidence of innocence, or a dismissal after new evidence of innocence emerged, such as DNA testing. They identified 340 such cases, 27 of which occurred in the State of California.

Of the 340 cases, sixty percent had been convicted of murder, and 36% had been convicted of rape or sexual assault. They note two possible explanations for the high prevalence of murder cases: false convictions are more likely to be discovered in murder and death penalty cases, because of the intensive level of post-conviction review given to these cases, or false convictions are more likely to *occur* in murder and death penalty cases. There may be other explanations. We do not know whether wrongful convictions are much more common than realized throughout the system. What we do know is that as these cases come to light we must address their causes.

One explanation for the high prevalence of rape and sexual assault cases among exonerations is recent improvements in DNA technology that can now be used not only to identify a perpetrator of rape at trial, but also to clear an individual of the crime both before and after conviction. Mistaken eyewitness identification was involved in 88% of the rape and sexual assault cases. This suggests that unexposed mistaken identification could be present in other convictions that heavily rely upon eyewitness identifications, such as robbery cases where DNA evidence is not normally present. Among the 80 cases in which rape defendants were subsequently exonerated and the race of both parties was known, 39 of the cases involved black men who were wrongfully convicted of raping white women, and nearly all of these cases involved mistaken eyewitness identifications. Since less than 10% of all rapes in the United States involve white victims and black perpetrators, the fact that a disproportionate number of the rape exonerations involve white victims misidentifying black suspects suggests that the risk of error is greater in cross-racial identifications. Research has consistently confirmed that cross-racial identifications are not as reliable as within-race identifications.<sup>2</sup>

The study by Professor Gross' researchers identified seven California exonerations involving mistaken eyewitness identifications during the fifteen year period ending in 2003. In four of those cases, exoneration came via subsequent

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<sup>1</sup> Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. of Crim. Law & Criminology 523 (2005).

<sup>2</sup> Symposium, *The Other Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making*, 7 Psychol., Pub. Pol'y & Law 3-262 (2001).

DNA testing. Additional claims of mistaken identifications leading to wrongful conviction were called to the attention of the Commission, but we undertook no independent investigation to verify these claims. The Commission is satisfied that the risk of wrongful conviction in eyewitness identification cases exists in California, as elsewhere in the country, and that reforms to reduce the risk of misidentification should be immediately implemented in California.

In 1998, U.S. Attorney General Janet Reno assembled 34 professionals from throughout the United States and Canada to form a Technical Working Group for Eyewitness Evidence. Drawing upon the research of psychologists as well as the practical perspectives of prosecutors, defense lawyers and police investigators, the Working Group produced a comprehensive guide for law enforcement to increase the accuracy and reliability of eyewitness evidence and decrease the numbers of wrongful identifications.<sup>3</sup> Though the guidelines were not mandated, the Department of Justice recommendations have been very influential in other states. In the State of New Jersey, for example, Attorney General John J. Farmer promulgated Guidelines for identification procedures based upon the U.S. Department of Justice recommendations, for implementation by all law enforcement agencies in the state.<sup>4</sup>

Many of the recommendations contained in the Department of Justice Guidelines are already being used in training by California law enforcement. For example, the Peace Officers Standards and Training Basic Academy Workbook chapter on identification procedures includes instruction to officers to obtain detailed descriptions from witnesses, to remain neutral in all identification procedures, to separate multiple witnesses, and to compose lineups with at least five fillers similar in appearance to the suspect.<sup>5</sup> One California County has adopted a lineup protocol requiring double-blind and sequential identification procedures.<sup>6</sup> The Commission learned from Deputy District Attorney David Angel of the Santa Clara County District Attorneys Office that under the leadership of District Attorney George Kennedy, all law enforcement agencies in Santa Clara County agreed to the protocol without dissent, and the protocol has been successfully implemented for nearly four years without complaint.

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<sup>3</sup> U.S. Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, NCJ 178240 (October, 1999).

<sup>4</sup> New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 18, 2001).

<sup>5</sup> *Basic Course Workbook Series, Student Materials, Learning Domain 16, Search and Seizure, Version Three, 2006, California Commission on Peace Officers Standards and Training, Ch.6.*

<sup>6</sup> Police Chiefs' Association of Santa Clara County, *Line-up Protocol for Law Enforcement*, Sept. 12, 2002.

Many of the Commissions established in other states to carry out a mission similar to our Commission, examining the causes of wrongful convictions and recommending reforms to avoid wrongful convictions in the future, have recommended the adoption of guidelines for the conduct of lineups, show-ups and photo spreads similar to the U.S. Department of Justice Guidelines. This includes the Governor's Commission on Capital Punishment established in Illinois,<sup>7</sup> the North Carolina Actual Innocence Commission,<sup>8</sup> the Innocence Commission for Virginia,<sup>9</sup> and the Wisconsin Innocence Task Force.<sup>10</sup> In addition, the American Bar Association adopted a Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures in August, 2004, and urged all state and local governments to adopt detailed guidelines for conducting lineups and photo spreads in a manner that maximizes their likely accuracy, and to provide periodic training to implement them.

The Commission studied the reports of all of the aforementioned bodies, and convened a public hearing in San Francisco on March 15, 2006 to hear the testimony of acknowledged experts,<sup>11</sup> representatives of police, prosecutor and criminal defense agencies, and concerned citizens regarding eyewitness evidence. Based upon its consideration of the available research, the testimony of experts, the experience of Santa Clara County, and the recommendations of other Commissions, Task Forces and similar bodies, the California Commission on the Fair Administration of Justice recommends the following guidelines and procedures:

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<sup>7</sup> Report of the Governor's Commission on Capital Punishment, State of Illinois, Recommendations 1-16 (April 2002). The Commission also considered Mecklenburg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* (March 7, 2006).

<sup>8</sup> North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification.

<sup>9</sup> Innocence Commission for Virginia, *A Vision for Justice*, pp. 25-42.

<sup>10</sup> Avery Task Force, *Eyewitness Identification Procedure Recommendations*.

<sup>11</sup> Professor Gary Wells, Ph.D., of Iowa State University, Professor Ebbe Ebbesen, Ph.D., of the University of California at San Diego, Ralph Norman Haber, Ph.D., and Lyn Haber, Ph.D., presented testimony before the Commission at the San Francisco hearing.

## RECOMMENDED PROCEDURES:

1. Double-blind identification procedures should be utilized whenever practicable, so the person displaying photos in a photo spread or operating a lineup is not aware of the identity of the actual suspect. When double-blind administration is not practicable, other double-blind alternatives should be considered.
2. When double-blind procedures are utilized, the use of sequential presentation of photos and lineup participants is preferred, so the witness is only presented with one person at a time. Photos or subjects should be presented in random order, and witnesses should be instructed to say yes, no or unsure as to each photo or participant. Sequential procedures should not be used where double-blind administration is not available.
3. A single subject show-up should not be used if there is probable cause to arrest the suspect. The suggestiveness of show-ups should be minimized by documenting a description of the perpetrator prior to the show-up, transporting the witness to the location of the suspect, and where there are multiple witnesses they should be separated, and lineups or photo spreads should be used for remaining witnesses after an identification is obtained from one witness.
4. All witnesses should be instructed that a suspect may or may not be in a photo spread, lineup or show-up, and they should be assured that an identification or failure to make an identification will not end the investigation.
5. Live lineup procedures and photo displays should be preserved on video tape, or audio tape when video is not practicable. When video taping is not practicable, a still photo should be taken of a live lineup. Police acquisition of necessary video equipment should be supported by legislative appropriations.
6. At the conclusion of a lineup, photo presentation, or show-up, a witness who has made an identification should describe his or her level of certainty, and that statement should be recorded or otherwise documented, and preserved. Witnesses should not be given feedback confirming the accuracy of their identification until a statement describing level of certainty has been documented.
7. A minimum of six photos should be presented in a photo spread, and a minimum of six persons should be presented in a lineup. The fillers or foils in photo spreads and lineups should resemble the description of the suspect given at

the time of the initial interview of the witness unless this method would result in an unreliable or suggestive presentation.

8. Photo spreads and lineups should be presented to only one witness at a time, or where separate presentation is not practicable, witnesses should be separated so they are not aware of the responses of other witnesses.

9. Training programs should be provided and required to train police in the use of recommended procedures for photo spread, show-ups and lineups. The legislature should provide adequate funding for any training necessitated by the recommendations of this Commission.

10. Training programs should be provided and required for judges, prosecutors and defense lawyers, to acquaint them with the particular risks of cross-racial identifications, as well as unreliable identification procedures, and the use of expert testimony to explain these risks to juries. The legislature should provide adequate funding for any training necessitated by the recommendations of this Commission.

11. The standardized jury instructions utilized in eye witness identification cases to acquaint juries with factors that may contribute to unreliable identifications should be evaluated in light of current scientific research regarding cross-racial identifications and the relevance of the degree of certainty expressed by witnesses in court.

12. The Commission recognizes that criminal justice procedures, including eyewitness identification protocols, greatly benefit from ongoing research and evaluation. Thus, the Commission recommends the continued study of the causes of mistaken eyewitness identification and the consideration of new or modified protocols.

In addition, the Commission recommends the enactment of legislation to require the Attorney General of California to convene a task force in conjunction with POST, local law enforcement agencies, prosecutors and defense attorneys, to develop Guidelines for policies, procedures and training with respect to the collection and handling of eyewitness evidence in criminal investigations by all law enforcement agencies operating in the State of California. The Guidelines should be consistent with the recommendations of this Commission, and should be promulgated to all law enforcement agencies operating in the State of California. The Task Force should report back to the legislature within one year

of the effective date of the legislation, describing the policies or procedures adopted and the training implemented.

Respectfully submitted,

California Commission on the Fair Administration of Justice:

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Jon Streeter, Vice Chair

Sheriff Lee Baca, Los Angeles County Sheriffs Dept.

Chief William Bratton, Los Angeles Police Department

Glen Craig, Sacramento

Jim Fox, San Mateo County District Attorney [Partial dissent]\*

Rabbi Allen Freehling, Los Angeles

Michael Hersek, California State Public Defender

Prof. Bill Hing, University of California at Davis

Michael P. Judge, Los Angeles County Public Defender

Bill Lockyer, California Attorney General [Partial dissent]\*

George Kennedy, Santa Clara County District Attorney

Michael Laurence, Habeas Corpus Resource Center

Alejandro Mayorkas, Los Angeles

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\* We respectfully dissent from this Commission's recommendations numbers two and eleven.

The debate over the effectiveness of sequential lineups is not yet settled. Many experts agree that this method produces fewer accurate identifications. Even more disturbing is new research out of Illinois which suggests that the sequential lineup procedures may result in more false identifications. The sequential method appears

to be particularly problematic in cases involving children and the elderly, cases involving cross racial identifications, cases involving multiple perpetrators, and cases where a suspect has altered his or her appearance. Given the uncertainty involving the sequential lineup method, we feel it is premature to recommend these procedures be adopted by California's law enforcement officers.

We further object to this Commission's recommendation calling for changes to the standard jury instructions. The drafting of criminal jury instructions has been delegated to the Judicial Council of California by the Chief Justice which developed the current instructions with input and review by all interested parties. Instructions should be neutral, favoring neither party, and the law requires trial courts to refuse an instruction that analyzes specific evidence on a disputed question of fact to the benefit of one party or another or one that informs jurors that particular evidence is in fact true – or untrue. Thus, we do not believe altering the standard instruction in order to deal with a special situation represents sound public policy. We have lodged a letter with this Commission which presents our objections in more detail.

Greg Totten, Ventura County District Attorney  
Jim Fox, San Mateo County District Attorney  
Bill Lockyer, California Attorney General

\*\* The Commission has taken into account the dissenters' objections. The majority has concluded that the best scientific evidence on hand today supports the double-blind sequential approach, noting it is the preferred choice. With respect to jury instructions, the Commission simply asks for a reevaluation of the jury instructions pertaining to eye witness identification in light of the best scientific evidence available.

John K. Van de Kamp, Chair