

February 22, 2008

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE
REPORT AND RECOMMENDATIONS ON REMEDIES.

Introduction.

The California Commission on the Fair Administration of Justice was established by California State Senate Resolution No. 44 to carry out the following charges:

- (1) To study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons;
- (2) To examine ways of providing safeguards and making improvements in the way the criminal justice system functions;
- (3) To make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate.

This Report will address some of the obstacles faced by persons who have established their innocence after conviction of a crime, in gaining access to post conviction relief, achieving reintegration into society, and gaining compensation for their wrongful incarceration. It will also address the access and reintegration

problems encountered by those released after reversal or vacation of their convictions without a finding of innocence. Access to post conviction relief and reintegration into society should be a goal for all those whose convictions are subject to legal challenge. They often have distinct problems re-entering society, and have difficulty achieving legal redress due to a variety of substantive and technical obstacles in the law. Compensation, however, should be limited to those who have been found innocent of the crime or crimes for which they were convicted and imprisoned, not because of procedural errors in their trials. They have been deprived of their liberty based upon a failure in the criminal justice system. It should be the policy of the State of California to redress the injury inflicted upon the innocent as quickly as possible, to restore them to full participation in the life of the community, and to provide all of the services needed for the difficult transition from wrongful imprisonment to restoration of all the rights and liberties to which they are otherwise entitled.

The Commission conducted a public hearing addressing these issues at Santa Clara University on October 17, 2007. The Commission heard testimony from innocent persons who were erroneously convicted and the lawyers who have represented them that was remarkably consistent: they face many difficult obstacles to full restoration of their rights and liberties, and the compensation they receive for their losses is frequently inadequate. While organizations such as Life

After Exoneration seek to assist, they rely upon volunteers and charitable contributions. Last year, [Life After Exoneration](#) attempted to serve over 70 exonerees throughout the nation with a budget of \$100,000 and a staff of two social workers. Many of their needs are unmet. Such assistance should not be dependent upon charitable contributions. It is an obligation of the State, which bears responsibility for the wrongful deprivation of an innocent person's liberty, to provide assistance in the adequate restoration of that innocent life which was disrupted.

Compensation for the Innocent.

California has a statutory scheme for compensating claimants who can establish that the crime of which they were convicted was not committed or was not committed by them, that they did not contribute to the bringing about of their arrest or conviction, and that they sustained pecuniary injury. The statute was first enacted in 1941, with a compensation limit of \$5,000. In 1969, the maximum limit was raised to \$10,000. In 2000, the statute was amended to provide that if compensation is awarded, it is limited to \$100 per day of wrongful incarceration, or a maximum of \$36,500 per year of incarceration. The award must be subsequently approved by the legislature. The comparable federal statutory provisions for compensating innocent persons capped recovery at \$5,000 until the

2003 enactment of the Innocence Protection Act, which increased the limit to \$50,000 for each year of prison confinement, and \$100,000 for each year on death row. 28 U.S.C. §2513.

Since 1984, the California Victim Compensation & Government Claims Board has approved 15 claims from persons who established their innocence of the crimes of which they were convicted.¹ During the same period, the Board denied 25 claims, and dismissed another 19 because they were untimely, incomplete, or the claimant had not been released from prison. California Penal Code Sections 4900-4906; Letter to Commission from Karen McGagin, Executive Officer, California Victim Compensation & Government Claims Board. *See* www.vcgcb.ca.gov.

California Penal Code §4901 currently requires that a claim for compensation for wrongful imprisonment of an innocent person must be presented within a period of six months after judgment of acquittal or discharge given, or

¹ The following is a summary of approved claims during the past five years:

David Jones	March 15, 2007	74,600
John Stoll	May 18, 2007	704,400
Kenneth Marsh	Jan. 19, 2006	756,900
Pete Rose	Oct. 20, 2005	328,200
Kevin Baruxes	June 25, 2004	258,700
Quedellis Walker	Sept. 19, 2003	421,000
David Quindt	Feb. 28, 2003	17,000
Leonard McSherry	August 23, 2002	481,200
Frederick Daye	March 22, 2002	389,000

All of these claims were subsequently approved by the legislature with the exception of David Jones. His claim was included in S.B. 242 (Torlakson)(2007) as an appropriations measure. The bill failed on the Senate floor when an Urgency clause was defeated. It may be eligible for reconsideration in its second year, however.

after pardon granted, or after release from prison. The Commission recommends that the time limit for presentation of such claims be extended to two years. The difficult adjustment required after release from wrongful incarceration frequently renders the current deadline unreasonable. These claims should not be precluded by a delay of less than two years.

The Commission also recommends that a court granting judicial relief upon a claim of innocence be required to notify the petitioner of the availability of compensation pursuant to California Penal Code Section 4900, and the time limits for the filing of such claims.

California Penal Code §4904 requires a claimant for victim compensation to establish that the claimant did not, by any act or omission either intentionally or negligently, contribute to the bringing about of his or her arrest or conviction. The Commission is concerned lest this requirement be utilized to exclude innocent persons who were victims of false confessions or improperly induced guilty pleas from compensation for their wrongful convictions. The exception should not include those who were victims of false confessions or improperly induced guilty pleas. It should be limited to those who intentionally subverted the judicial process.

The current limitation of compensation to innocent persons who were wrongfully convicted to one hundred dollars per day of incarceration, or a

maximum of \$36,500 per year, should be increased. The Commission recommends that the level of statutory compensation be increased, at least to the level of comparable federal compensation (\$50,000 per year maximum). There should also be an adjustment to increase the award to reflect the annual rate of inflation subsequent to enactment of this level of compensation.

Providing Post-Release Assistance.

It is currently the declared policy of California to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge. California Penal Code §3074. SB 618, enacted in 2005, added Section 1203.8 to the Penal Code, to authorize Counties to develop a multiagency plan to prepare and enhance nonviolent felony offenders' successful reentry into the community. Ironically, even the limited resources made available to convicted felons who have served their sentences and are released from prison are not available to those whose convictions have been set aside. Parolees are released to the community in which they were arrested or convicted; services such as counseling and assistance in locating housing or jobs are limited to those who remain under parole supervision. But those who are being released because their conviction is set aside, including those who have been found innocent, receive none of these services. Those who have been released back into

the community after successfully challenging their convictions, whether innocent or not, face the same obstacles encountered by parolees, and more. Many are afflicted with post-traumatic stress disorder, or other psychological damage resulting from their wrongful incarceration over a long period of time. Of the States with compensation laws, only three – Massachusetts, Louisiana and Vermont – provide for the costs of medical and psychological care.

The *New York Times* recently gathered information on 137 of the 206 imprisoned individuals who have been found innocent by DNA testing from 1989 through 2007. The reporters also researched the compensation claims of all 206. They found that at least 79 of these persons (40%) received no compensation at all. More than half of those who did receive compensation waited two years or longer after exoneration for the first payment. Few received any government services after their release. They typically left prison with less help – prerelease counseling, job training, substance-abuse treatment, housing assistance and other services – than some states offer to paroled prisoners. Most found that authorities were slow to wipe the convictions from their records, if they did so at all. Even those who were well educated and fully employed at the time of their wrongful conviction had difficulty finding work after their release. Roberts & Stanton, *A Long Road Back After Exoneration, and Justice is Slow to Make Amends*, New York Times, Nov.

25, 2007; Santos & Roberts, *Putting a Price on a Wrongful Conviction*, New York Times, Dec. 2, 2007.

The Commission recommends that services to assist with reintegration into society be available to all those released from prison after their judgment of conviction has been reversed, vacated or set aside. This would include assistance in locating housing, a cash allowance, clothing, and employment counseling.

Claims Barred by Statute of Limitations.

Many of the exonerated have a valid cause of action for the wrongful acts or omissions of the lawyers who previously represented them which resulted in their erroneous conviction. If they delay filing a cause of action until they achieve exoneration, their claim will in most cases be barred by the Statute of Limitations. Yet proving their exoneration is an element they must establish to recover damages. It is a classic “Catch-22” created by California Civil Procedure Code §340.6(a), which provides:

An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the

wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.

California Civil Procedure Code §352.1(a) provides:

If a person entitled to bring an action . . . is, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years.

Normally, the facts constituting the wrongful act or omission (such as a failure to investigate or call available witnesses) will be known to the defendant at the time of his conviction. Even with the two year tolling, his cause of action would have to be filed within three years.

In *Coscia v. McKenna & Cuneo*, 25 Cal.4th 1194 (2001), the California Supreme Court held that a person alleging he was convicted through the wrongful acts or omissions of his lawyer must obtain post conviction relief in the form of a final judicial disposition of the underlying case, such as acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief, as a prerequisite to proving actual innocence in a malpractice action against his former criminal defense counsel. This requires an erroneously convicted innocent person

to file a malpractice claim within the period of the statute of limitations, even though he will not be able to pursue the claim until he achieves exoneration, perhaps many years later. It is unrealistic to expect a prisoner to file a lawsuit against his attorney before his efforts for post-conviction relief have succeeded. In many cases, post-conviction relief comes many years after conviction. If such a lawsuit were filed, it would have to be held in abeyance anyway, until post-conviction remedies have been exhausted.

The recent case of *Rose v. Hudson*, 153 Cal.App.4th 641 (2007) provides a good example. Pete Rose was convicted of the kidnap and rape of a 13 year old girl in November, 1995. His conviction was vacated in October, 2004 upon his exoneration.² He filed a complaint against his defense attorney, alleging that the attorney's negligence contributed to his wrongful conviction. His complaint was dismissed because it was not filed within the statute of limitations, even though the Court conceded that he could not have recovered on his claim until his conviction had been vacated. Thus, the only way one who maintains his innocence can obtain relief on a claim of attorney malpractice is to file the claim prior to achieving exoneration, and ask the court to stay the suit pending resolution of his post-conviction remedies.

² As noted in fn. 1, *supra*, Rose established his innocence and was awarded compensation by the California Victim Compensation & Government Claims Board in 2005.

The Commission recommends that the California Code of Civil Procedure be amended to provide that a two year Statue of Limitations for professional malpractice claims shall commence upon the granting of post conviction relief in the form of a final judicial disposition of the underlying case.

Access to Post-Conviction Relief.

The Commission also examined some of the obstacles which innocent persons may face in obtaining access to testing and a judicial hearing that could lead to exoneration. California Penal Code Section 1405 permits a prisoner to petition for performance of DNA analysis that might exonerate him, and upon the filing of a proper motion, an attorney will be appointed to assist him. Many prisoners seek the assistance of the Innocence Projects at Santa Clara University School of Law and California Western School of Law to evaluate their claims and file the necessary petition to make an adequate showing. More than 173,000 inmates are incarcerated in California prisons. California Western Law School and Santa Clara University have been working collaboratively over the past seven years to assist indigent California inmates raising innocence claims. Santa Clara's Northern California Innocence Project (NCIP) represents inmates convicted in Northern California courts and California Western's California Innocence Project (CIP) represents inmates convicted in Southern California courts. The Projects

operate with significant assistance from law students and their sponsoring educational institutions. Both projects are active founding members of the Innocence Network, an association of innocence projects working nationally to address problems of wrongful conviction.

In 2001, California mandated that all costs associated with representing inmates pursuant to Penal Code section 1405 to investigate and, if appropriate, file motions for DNA testing of biological evidence where such testing could prove innocence, be borne by the State. In that same year, California allocated \$1.6 million dollars over two years to provide counsel to assist inmates with innocence claims. For 2002 and 2003, the NCIP and CIP received state funding. That funding was discontinued as a result of state budget cuts in 2003.

If the innocence projects are forced to shut down or seriously cut back the work they do, California will be faced with adding to the burden of state offices which would be left to handle these cases without the particularized experience representing innocence claims post-conviction, and the resource of volunteer law students.

To date, the Innocence Projects have succeeded in helping to exonerate 11 people, two based on DNA evidence and nine on other grounds. Each exoneration has saved the state the cost of housing an

innocent person and has returned the exonerees to their families and communities. Moreover, as in the case of Kevin Green, whose exoneration in Orange County led to the conviction of the real murderer and rapist, the work of innocence projects also advances the interest of public safety.

With hundreds of law students assisting, and the support of Santa Clara University and California Western School of Law, the Projects are screening on average 3,200 claims each year. While most innocence claims come from guilty prisoners, every claim must be reviewed and evaluated in order to identify those prisoners who do have legitimate innocence claims.

Over the past seven years, the Projects have processed and reviewed 20,431 requests for assistance. Of those, 13,990 have been rejected and 288 are being actively investigated. There is a current backlog of 700 cases, which cannot be thoroughly reviewed because of the limited resources of the Projects. The remaining cases are in various stages of administrative review. It is remarkable – a testament to the efficiency and effectiveness of the Projects -- that the backlog is only 700 cases. However, that backlog is ever increasing and will only worsen at the current level of Project funding.

Other states provide state funding for the work of projects similar to the California Innocence Projects. The State of Connecticut, with a prison population that is 8.5 times *smaller* than California's, funds their Public

Defender's Office with more than \$500,000 per year to pay for four full-time Innocence Project positions. The new positions have no termination date and are expected to continue.

The Commission recommends that State funding for the Northern California Innocence Project and the California Innocence Project be restored.

Discovery of Information and Access to DNA Databases to Establish Innocence Claims.

The Commission is continuing its assessment and analysis of problems encountered by the Innocence Projects and defense counsel in gaining access to information and evidence from District Attorney's Offices regarding claims of innocence which they are investigating; gaining access to DNA databases to seek matches to DNA material that may assist in establishing a claim of innocence; and gaining discovery to support pending *habeas corpus* claims on behalf of those seeking exoneration on a claim of innocence. A separate report on these issues may be issued by the Commission prior to its expiration on June 30, 2008.

RECOMMENDATIONS

1. The California Commission on the Fair Administration of Justice recommends that services to assist with reintegration into society be available to all those released from custody. This would include assistance in locating housing, a cash allowance, clothing, and employment counseling.

2. California Penal Code §4901 currently requires that a claim for compensation for wrongful imprisonment of an innocent person must be presented within a period of six months after judgment of acquittal or discharge given, or after pardon granted, or after release from prison. The California Commission on the Fair Administration of Justice recommends that the time limit for presentation of such claims be extended to two years. While exonerees may wish to file these claims as quickly as possible, their claims should not be precluded by a delay of less than two years.

3. The California Commission on the Fair Administration of Justice recommends that a court granting judicial relief upon a claim of innocence be required to notify the petitioner of the availability of compensation pursuant to California Penal Code Section 4900, and the time limits for the filing of such claims.

4. California Penal Code §4904 requires a claimant for victim compensation to establish that the claimant did not, by any act or omission either intentionally or negligently, contribute to the bringing about of his or her arrest or conviction. This requirement should not be utilized to exclude innocent persons who were victims of false confessions or improperly induced guilty pleas from compensation for their wrongful convictions. The Commission recommends that this requirement be limited to a showing that the claimant did not intentionally subvert the judicial process.

5. California Penal Code §4904 currently limits compensation to innocent persons who were wrongfully convicted to one hundred dollars per day of incarceration, or a maximum of \$36,500 per year. The California Commission on the Fair Administration of Justice recommends that the level of statutory compensation be substantially increased, at least to the level available under the federal system of compensation. There should also be an adjustment to increase the award to reflect the annual rate of inflation subsequent to enactment of this level of compensation.

6. Currently, innocent persons who are released from prison are required to file a separate legal action for expungement of their conviction before they are fully restored to all the rights of citizenship and relieved of the disabilities imposed by a prior conviction. The California Commission on the Fair Administration of Justice recommends the enactment of legislation to provide for automatic expungement of the record of conviction whenever a final judgment of conviction is set aside or vacated and the Court makes a finding of the actual innocence of the defendant.

7. The California Commission on the Fair Administration of Justice recommends that the California Code of Civil Procedure be amended to provide that a two year Statue of Limitations for professional malpractice claims shall commence upon the granting of post conviction relief in the form of a final judicial disposition of the underlying case.

8. The California Commission on the Fair Administration of Justice recommends that State funding for the Northern California Innocence Project and the California Innocence Project be restored.

Respectfully submitted,

California Commission on the Fair Administration of Justice:

John K. Van de Kamp, Chair

Jon Streeter, Vice Chair

Diane Bellas, Alameda County Public Defender

Harold O. Boscovich, Jr., Danville

Chief William Bratton, Los Angeles Police Department (Gerald Chaleff)

Jerry Brown, California Attorney General (Janet Gaard)

Ron Cottingham, Peace Officers Research Association of California

Glen Craig, Sacramento

Chief Pete Dunbar, Pleasant Hill Police Department

Jim Fox, San Mateo County District Attorney

Rabbi Allen Freehling, Los Angeles

Michael Hersek, California State Public Defender

Sheriff Curtis Hill, San Benito County

Prof. Bill Hing, University of California at Davis

Michael P. Judge, Los Angeles County Public Defender

George Kennedy, Santa Clara County District Attorney

Michael Laurence, Habeas Corpus Resource Center

Alejandro Mayorkas, Los Angeles

Judge John Moulds, Sacramento

Prof. Cookie Ridolfi, Santa Clara University School of Law

Douglas Ring, Santa Monica

Greg Totten, Ventura County District Attorney

Gerald F. Uelmen, Executive Director

Chris Boscia, Executive Assistant

California Commission on the Fair Administration of Justice

900 Lafayette St., Suite 608, Santa Clara, California 95050

Telephone 408-554-5002; FAX 408-554-5026

Website: <http://www.ccfaj.org>.