

**OKLAHOMA JUSTICE COMMISSION**

**REPORT**

**TO THE OKLAHOMA BAR**

**ASSOCIATION**

**FEBRUARY, 2013**

*“Human nature itself is evermore an advocate for liberty. There is also in human nature a resentment of injury, and indignation against wrong. A love of truth and veneration of virtue.”*

– John Adams

*“Law and order exist for the purpose of establishing justice, and when they fail in this purpose they become dangerously structured dams that block the flow of social progress.”*

– Dr. Martin Luther King, Jr.

*“...moderation in the pursuit of justice is no virtue.”* – Barry Goldwater

*“If we are to keep our democracy, there must be one commandment: ‘Thou shalt not ration justice.’”* – Sophocles

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## Oklahoma Justice Commission Recommendations

### Acknowledgements

On September 24, 2010, the Board of Governors of the Oklahoma Bar Association, by Resolution <sup>A</sup> established the Oklahoma Justice Commission; a “Commission dedicated to enhancing the reliability and accuracy of convictions.”

In the following months the President of the Bar designated former Attorney General Drew Edmondson as Chair, and the Chair invited participation of members pursuant to the guidelines of the Resolution. In February, 2011, the Commission held its first meeting. The Membership of the Commission is attached. <sup>B</sup>

The Commission wishes to thank the Board of Governors, President Alan Smallwood, President Deborah Reheard, President Cathy Christensen and President James Stuart for their leadership and support. The Commission also wishes to thank Executive Director John Morris Williams and the staff at the Oklahoma Bar Association for their support services.

The Commission would also like to recognize the Innocence Clinic at Oklahoma City University’s School of Law for their research and collaborative efforts on this project. We acknowledge and appreciate the efforts of former Dean Lawrence Hellman, current Dean Valerie Couch and Project Director Josh Snavely for their ongoing support and assistance.

Finally, the Commission wishes to dedicate this report and its recommendations to now deceased Professor J. William Conger, an original member of the Oklahoma Justice Commission.

### Course of Work

The Commission began its work and spent the first year studying cases in which the courts had determined that a person was “wrongfully convicted,” *i.e.*, that he or she was in all probability factually innocent of the crime. The first cases we reviewed in the course of our work are attached. <sup>C</sup> While not all of the cases we reviewed fit our criteria, most did, and all were informative.

The Commission’s review of cases established five broad areas of future inquiry:

1. False confessions, including interrogation techniques and protocols as well as requirements for electronic recording of suspect questioning;
2. Eyewitness identifications, including procedures for show-ups, line-ups, photo spread techniques and law enforcement assisted witness identifications;
3. The collection, identification and use of forensic evidence, including DNA access laws and preservation of evidence;

4. General criminal procedure, including use of informants, police or attorney misconduct, competence of counsel and jury instructions;

5. Victim and family rights, including compensation for victims subjected to a second or subsequent process and those who are proven to have been wrongfully convicted.

It should be noted that our conclusions as to causal factors in wrongful convictions tracked national results and previous studies in other states. The Commission felt, however, that it was important to review our own cases and reach our own conclusions rather than simply assuming that the factors would be the same in Oklahoma as in other states.

The Commission spent the next year exploring the factors contributing to wrongful convictions and discussing what changes might reduce the likelihood of error without adversely impacting effective investigation and prosecution of crime. Based on the areas of inquiry detailed above, the Commission established sub-committees in order to take a more in-depth approach to solving these issues. Each sub-committee met separately to conduct research and compile reports. The recommendations of each sub-committee were presented to the full Commission, amended and approved.

It should be clear from the list of Commission members that our views and perspectives were diverse. Discussions were animated and thorough. We were determined that our recommendations, if adopted, should not be an impediment to the very important work of law enforcement personnel and prosecutors. Rather, they should be improvements to the process, helpful to law enforcement and conducive to the ultimate goal of protecting the innocent by convicting only the guilty.

## FALSE CONFESSIONS INCLUDING INTERROGATION PROTOCOLS AND ELECTRONIC RECORDING LAWS

CHAIR: JUDGE RETA M. STRUBHAR, RETIRED

CO-CHAIR: MACK MARTIN, ESQ.

MEMBERS: JUDGE TOM ALFORD, CHIEF BILL CITY, JOHN CLARO, ESQ, ANDREA HAMOR EDMONDSON, M.A., CAPTAIN CHAD FARMER, DEAN LARRY HELLMAN, DISTRICT ATTORNEY DAVID PRATER, BOB RAVITZ, ESQ. AND JACQUELINE STEYN

### **THE NEED FOR REFORM AND ITS BENEFITS TO LAW ENFORCEMENT**

**Wrongful convictions occur in the American criminal justice system at an alarming rate, and a substantial percentage of the wrongful convictions are attributable, at least in part, to false confessions.** Between 1989 and November 2012, 301 people who had been convicted of serious crimes (e.g., murder, rape, sexual assault) in the United States were exonerated on the basis of DNA evidence that established their innocence. In almost half of the DNA-based exonerations, the DNA evidence that established the innocence of a wrongfully convicted person led to the identification, apprehension, and criminal punishment of the true perpetrators of the crimes. Perhaps surprising, fully 27% of these 301 wrongful convictions involved false confessions that were made by suspects during the investigation of the crimes.<sup>1</sup>

**Wrongful convictions attributable to false confessions are tragedies for the wrongfully convicted and for law enforcement.** The conviction of an innocent person on the basis of a false confession is a tragedy for that person, his or her family, and the crime victim and the victim's family. But such a conviction is also a tragedy for the criminal justice system. When a suspect falsely confesses to a crime, law enforcement personnel may prematurely conclude the investigation of that crime, resulting in a failure to apprehend and punish the true perpetrator. When this happens, the actual perpetrators remain at large, where they are capable of committing further serious crimes. In fact, there are over 100 documented cases of murder, rape, or sexual assault that were committed by perpetrators of earlier serious crimes who were at large while an innocent person was incarcerated for those perpetrators' earlier crimes.

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<sup>1</sup> During the same time period (1989 through November 2012), more than 700 additional individuals have been exonerated through means other than DNA evidence.

To protect the innocent from unjust incarceration and enhance the likelihood of apprehending and bringing to justice true perpetrators, our criminal justice system must acknowledge that false confessions do occur and adopt procedures designed to reduce their frequency.

**A few recurring factors have been found to account for most false confessions.** Careful review of a large number of wrongful convictions that involved a false confession has identified a few factors that frequently are associated with false confessions. After examining the records in 38 cases in which a false confession contributed to the conviction of an innocent person, University of Virginia law professor Brandon Garrett identified the following recurring factors:<sup>2</sup>

- A. Intense psychological pressure is applied by investigators during the course of an exceedingly lengthy (many hours, or even days) custodial interrogation. For example:
  - a. A suspect may be told that he or she is likely to be convicted and sentenced to death; but if he or she confesses to the crime, the prosecution will recommend a non-capital sentence.
  - b. A suspect may confess in order to bring a lengthy interrogation, conducted under harsh conditions, to an end.
  - c. An interrogator may falsely tell a suspect that the suspect has failed a polygraph test.
  - d. An interrogator may falsely tell a suspect that inculcating evidence has been found linking the suspect to the crime.
  - e. An interrogator may falsely tell a suspect that another suspect has confessed and implicated him or her.
  - f. A team of interrogators may employ strategies designed to lead a stressed or impaired suspect to accept the “help” of the “friendly” member of the team, who recommends that a confession is in the suspect’s best interest.
- B. Psychological pressure, combined with persistent repetition of facts by interrogators, can lead a suspect to become incorrectly convinced of his or her own guilt, producing a confession that regurgitates facts that have been told to the suspect over and over, perhaps even unintentionally.

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<sup>2</sup> Brandon L. Garrett, “The Substance of False Confessions,” 62 Stan. L. Rev. 1051, 1062-66 (2010).

- C. Juveniles and suspects who are mentally ill, mentally retarded, or borderline mentally retarded are especially vulnerable to the types of psychological pressure and intimidating interrogation techniques that lead to false confessions.
- D. There are reported cases in which verbal or even physical abuse of a suspect produced a false confession.
- E. Fatigue, substance abuse, language difficulties, and limited cognitive abilities sometimes contribute to false confessions.

**Video-recording interrogations can effectively reduce the injustices caused by false confessions.** Fortunately, a low-cost, simple method of conducting interrogations is available that can significantly improve the ability of judges and juries to recognize false confessions and limit the likelihood that they will lead to a wrongful conviction: requiring that custodial interrogations conducted in connection with the investigation of serious crimes be video-taped. Currently, 18 states<sup>3</sup> and the District of Columbia operate under legislation or state court orders that mandate digital recording of interrogations in certain defined circumstances. Significantly, while many law enforcement officers expressed resistance to the adoption of recording policies when they were under consideration in these jurisdictions, the experience of the law enforcement community with these policies has been uniformly positive. The feared difficulties have not arisen.<sup>4</sup> As a result, hundreds of government agencies across America, including four in Oklahoma,<sup>5</sup> have determined on their own to adopt recording requirements for interrogations conducted with respect to certain categories of crimes.

The availability of a video-recording of an interrogation greatly enhances the ability of fact finders to assess the voluntariness and reliability of a confession introduced at trial, reducing the likelihood

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<sup>3</sup> AK, CT, DC, IL, IN, ME, MD, MA, MN, MI, MO, MT, NE, NH, NJ, NC, OR, VT, WI.

<sup>4</sup> See, e.g., Thomas P. Sullivan, Esq., "COVER STORY: Electronic Recording of Custodial Interrogations," *The Chief of Police* (The Official Publication of the National Association of Chiefs of Police) (November/December 2005) at 17. Mr. Sullivan is a former U.S. Attorney for the N.D. IL. Among the feared difficulties that have not materialized are: (1) fear that recording will intimidate suspects and make them "clam up," (2) fear that effective (and constitutional) interrogation tactics (such as lying to a suspect) will become unavailable or counter-productive if viewed by jurors, (3) fear that a recording mandate will impose unacceptable costs on already-strained law enforcement budgets, (4) fear that human or mechanical errors will render a solid confession inadmissible. *Id.* at 19.

<sup>5</sup> Moore Police Department, Norman Police Department, Oklahoma County Sheriff's Office, Tecumseh Police Department.

that a false confession will be admitted into evidence or that a false confession will outweigh conflicting evidence supporting the innocence of an accused. However, *most of the benefits of video-recording are enjoyed by law enforcement personnel* (see below). Therefore, it is the recommendation of the Oklahoma Justice Commission that measures be put in place to make the benefits of video-recording of interrogations during the investigation of serious crimes available to all law enforcement agencies in Oklahoma.

**Recording interrogations promises major benefits to law enforcement.**

- A. Video-taped interrogations create a record of statements made by suspects that makes it difficult for a suspect to change an account of events originally provided to law enforcement or to dispute accounts given by interrogators.
- B. Video-taped interrogations capture and preserve subtle details in a suspect's behavior that may be lost if unrecorded. Such details of the suspect's behavior during an interrogation that may have been initially overlooked or deemed to be irrelevant are preserved for reassessment. Thus, recording assists law enforcement to better investigate crimes and helps prosecutors to better establish the credibility of a confession.
- C. Recording interrogations allows interrogators to concentrate on the interview, rather than being distracted by the need to take notes during interrogations.
- D. When an interrogation is video-recorded, there is a permanent record of original statements made by suspects. If a shift in the investigative focus occurs after an interrogation, law enforcement can easily review what the suspect said during that interrogation to evaluate the suspect's statements and behavior in the light of the new investigative focus.
- E. Recordings can be used at trial to corroborate the accuracy of the confession, thus bolstering the credibility of law enforcement personnel and prosecutors in the eyes of the fact finder.
- F. Video-taped interrogations facilitate training of junior law enforcement personnel and improvement in interrogation techniques on the part of experienced law enforcement personnel.
- G. The presence of a video-taped recording removes the potential for disputes or unjustified allegations concerning how an officer conducted himself or herself or treated a suspect during an interrogation.

- H. Recordings protect law enforcement personnel from being unfairly accused of coercing a confession. In the absence of a recording, the defense can create doubts about the reliability of a true confession.
- I. When a state adopts a policy mandating the recording of interrogations, public confidence in law enforcement is enhanced, while complaints against law enforcement personnel decline.

## RECOMMENDATIONS

1. The Commission urges the Legislature to enact a video-taping law modeled on laws in force in other states. The legislation should include the following provisions:

- **Scope.** The legislation should require law enforcement agencies to video-tape the entirety of custodial interrogations conducted at a place of detention in connection with the investigation of any crime which falls under 21 O.S. 13.1<sup>D</sup>

This proposal seeks to balance the cost of providing equipment to video-record interrogations with the desire to provide justice to individuals suspected of serious, violent felony crimes. Since small law enforcement agencies are unlikely to investigate many murders or sexual assaults, in those rare instances when they do, they can call upon the OSBI to appear at the local law enforcement agency with recording equipment to meet the mandate prescribed in the legislative proposal. In this way, the cost burden associated with this proposal will be negligible.

- **Rebuttable Presumption of Inadmissibility; Grounds for Rebutting the Presumption of Inadmissibility.** The legislation should provide that any confession in a case involving one of the enumerated crimes that is not video-recorded shall be presumed to be inadmissible at trial unless the court finds by a preponderance of the evidence that one of the following conditions justifies the failure of authorities to video-record the confession:
  - a. the suspect requested or demanded (in a video-recorded statement) that the interrogation not be recorded and it was not feasible to nevertheless surreptitiously record the interrogation
  - b. the law enforcement officer(s) conducting the interrogation reasonably believed that the crime for which the suspect was taken into custody was not (and was not likely to develop into) a crime for which this statute requires recording
  - c. the interrogation took place outside the State of Oklahoma in compliance with the laws of the other jurisdiction

- d. the interrogation was conducted by a federal law enforcement officer(s) in compliance with the laws of the United States
- e. the statement was made before a grand jury
- f. the statement was given at a time when the accused was not a suspect for the crime to which that statement relates while the accused was being interrogated for a different crime for which the statute does not require recording
- g. the interrogation was conducted by a law enforcement agency with five or fewer peace officers in circumstances where it was not possible for the interrogation to be conducted by the OSBI
- h. exigent public safety circumstances prevented recording
- i. the confession was contained in a voluntary, spontaneous statement or in response to routine questions that are asked during the processing of the arrest of a suspect
- j. the confession occurred in open court
- k. the recording equipment unforeseeably failed due to technical malfunction or excusable human error
- l. recording equipment was not available for good cause at the location where the interrogation took place
- m. other good cause prevented the video-recording of the interrogation that produced the statement in question
- n. considering the totality of the situation, the statement in question can, by a preponderance of the evidence, be shown to be voluntary and reliable

2. Pending passage of the proposed legislation, the Commission recommends that the Council on Law Enforcement Education and Training (CLEET) should immediately adopt the model policy, training, and monitoring called for below, and a mechanism should be put in place recommending voluntary adoption of the substance of the proposed legislation contained in Recommendation #1 by each state, county, and municipal law enforcement agency in Oklahoma.

A. **Model Policy.** The Commission recommends that CLEET (a) adopt and publish a model policy that implements all of the elements of the statute and (b) provide training for the implementation of the policy by state, county, and local law enforcement departments. The model policy shall include special protocols to be followed in order to guard against false

confessions from juveniles, suspects who exhibit indicators of mental or cognitive deficiency, and suspects for whom English is not their native language.

**B. Implementation and Monitoring.** The Commission recommends that each law enforcement agency within Oklahoma shall, by a date certain (e.g, within six months of enactment of the legislation), adopt a written policy (which may be the CLEET model policy or one otherwise fully compliant with the terms of the statute) for recording custodial interrogations of persons suspected of committing or attempting to commit one of the serious felonies covered by the statute.

## **EYEWITNESS IDENTIFICATION**

CHAIR: BOB RAVITZ, ESQ

MEMBERS: DEAN LARRY HELLMAN, REPRESENTATIVE LEE DENNEY, SENATOR CONSTANCE JOHNSON, JOHN CLARO, ESQ, ASSISTANT ATTORNEY GENERAL JENNIFER MILLER, SHERIFF SCOTT WALTON, CAPTAIN CHAD FARMER, DIRECTOR STEVE EMMONS, CHRISTY SHEPPARD, CAPTAIN TIM DORSEY

### **EXECUTIVE SUMMARY**

Eye witness identification has always been an important tool for investigating and prosecuting criminal cases. This investigative tool; however, has been cited by a number of sources as the leading cause of wrongful convictions.<sup>E</sup> Misidentification not only harms the wrongfully convicted, but also harms all members of the criminal justice system and greater society. The misidentification can hinder investigations when the wrong person is focused upon, harming police work. Even when a witness misidentifies someone and the investigation is ultimately re-focused, the ability of that witness to identify anyone might be brought into question, thereby harming prosecutions. Crime victims are also traumatized in the face of misidentification, sometimes experience guilt, not only for the wrongful conviction, but the fact that the real perpetrator has committed other crimes that might have been prevented had the right person been identified in the first place. Erroneous convictions as a result of misidentification adversely affect the credibility of the police in the community and erode the trust between the public and the judicial system. This report includes training and policy recommendations to stakeholders in the criminal justice system that attempt to maximize the reliability of the identification process and minimize the risk of erroneous identifications. These best practices are designed not only to reduce erroneous identifications but also to enhance the reliability and objectivity of eye witness identification testimony.

### **RECOMMENDATIONS**

1. All law enforcement should establish written procedures that require the photo array or lineup to be conducted by an independent administrator, officer, or investigator who should not be aware of which member of the photo spread, lineup, or any other type of identification procedure using multiple images is the suspect. These procedures should include:

- A. No-one in law enforcement who is aware of the suspect's identity should be present during the administration of the identification process.
  - B. If an independent administrator or investigator is not available to conduct the identification process, the following procedures should be followed:
    - 1. Place the suspect's and non-suspect filler photos in separate identical folders. Include four blank identical folders for a total of ten.
    - 2. Shuffle the folders, except for the last four which should be blank, before giving them to the witness.
    - 3. The officer administering the array should position himself or herself so that he or she cannot see inside the folders as they are viewed by the witnesses. This prevents the officer from unintentionally influencing the witnesses' selection.
    - 4. Show the photo array to one person at a time so that they will not be aware of the responses orally or inferentially of other witnesses.
    - 5. Avoid multiple identification procedures in which the same witness views the same suspect more than once.
2. Law enforcement shall establish written procedures that require, prior to the presentation of the photo array, an instruction be read aloud to the witness. This instruction should include the following:
- A. A series of photos will be shown.
  - B. The perpetrator may or may not be included in the series of photos shown and failure to make an identification will not end the investigation.
  - C. Individuals may not appear exactly as they did on the date of the incident and head and facial hair are subject to change.
  - D. Do not feel you must make an identification.
  - E. If you identify someone, you will be asked to describe in your own words how confident you are in the identification.
  - F. The photos are not in any order.
  - G. Take as much time as you need to look at these photos.

- H. Even if you make an identification, please look at all the remaining photos.
- I. Do not discuss these procedures or results to any witness or person other than law enforcement.

A specific instruction should go something like this: “You will be asked to view a series of photos of individuals. It is just as important to clear innocent persons from suspicion as to identify guilty parties. I don’t know whether the person being investigated is included in this series. Individuals present in this series may not appear exactly as they did on the date of the incident because features such as head hair and facial hair are subject to change. You should not feel that you have to make an identification. If you do identify someone, I will ask you to describe in your own words how certain you are. The photos will be shown to you one at a time and are not in any particular order. Take as much time as you need to examine each photo. If you made an identification, I will continue to show you the remaining photos in the series. Regardless of whether you make an identification, we will continue to investigate the incident. Since this is an on-going investigation, you should not discuss the identification procedures or results.” [International Association of Chiefs of Police National Law Enforcement Policy Center Witness Identification Model Policy, September 2010.]

3. Law enforcement should adopt written procedures that require the eye witness be shown one photograph at a time in a sequential manner. The eye witness views the pictures one at a time and is asked to make a decision on each one before being shown the next picture.

- A. When an independent administrator is conducting the identification process, the photo array should consist of a minimum of six persons, one of whom is the suspect. The persons should be placed in alphabetical order so no one can be accused of placing the suspect in a specific position in the process. When an independent administrator is not available, the shuffle method described in Recommendation 1B shall be utilized. All photos should be numbered on the back.
- B. Photos of the individuals should be contemporary. The suspect should not stand out in the identification process. The photos should be reasonably similar in age, height, weight and general appearance, same sex and race. Suspects should be wearing similar clothing and there should be no factors in the process that would

draw extra attention to the suspect. Do not mix color and black and white photos. Use photos of the same size and basic composition. Never mix mug shots with snapshots.

- C. Non-suspect fillers should be selected who resemble a description of the perpetrator provided by witness including witness's description of significant features (face, body build, etc.).
  - D. Cover any portion of mug shots or other photos that provide identifying information on the subject and similarly cover other photos used in the array the same way.
  - E. No more than one suspect should be placed in a given identification process.
  - F. Even when an identification is made, the administrator should continue to show the remaining photographs.
4. The use of show-ups should be avoided whenever possible. The use of a photo array or lineup is preferred. The single suspect show up should not be used if probable cause to arrest the suspect has already been established.
- A. Prior to any show-up, document witness's description of perpetrator.
  - B. Use show-up only when suspect is detained within a reasonably short time frame following the offense.
  - C. Bring the witness to the location of the suspect whenever possible, rather than bringing the suspect to the witness.
  - D. Do not conduct show-up when suspect is in patrol car and unless necessary to safety, avoid handcuffs or other physical restraints.
  - E. Do not call person "suspect" when you are conducting the show-up.
  - F. Separate multiple witnesses. Do not allow communications before or after conducting show-up. Instruct them not to talk to other witnesses regarding identification at any time.
  - G. If the witness identifies the suspect, proceed with other witnesses through photo array or lineup as probable cause already exists to arrest.
  - H Do not present the same suspect to the witness more than once.

- I. The suspect should not be required to put on any clothing worn by, speak words uttered by, or perform other activities of the perpetrator.
5. Law enforcement should adopt written procedures that preserve the identification procedure, including the photo array, together with full information about the identification process, and its outcome by recording the identification process and all results and statements made by the witness. The witness should sign identification procedures.
- A. Whenever possible, preserve the identification process by video and audio tape. If identification is a show-up, use in-car camera, camera, or other recording to preserve if possible.
  - B. Record or have the witness write down what factors caused him or her to identify the suspect.
  - C. Document exact words used by the witness without prompting the witness to elaborate. However, if the witness elaborates, write down exact words used by the witness.
  - D. Ensure a complete, written record of the identification process. Names of persons whose photos are used in the array should be numbered and a copy kept for preservation of the lineup and detailed notes should be taken with regards to the identification process, including date and time of identification process and any identification of one or more fillers in the process.
6. Adequate training on the process to obtain more reliable identification procedures should be mandated by all components of law enforcement.
- A. CLEET and all police departments that have an academy should require academy training on all issues of the identification process including all recommendations set out by the Commission.
    1. Academy training should include problems created by misidentification or breakdown of identification process.
    2. Examples like 60 Minutes' "Cotton video" titled "Eyewitness," produced in 2009 by CBS Broadcasting and aired March 8, 2009 by Leslie Stahl, should be utilized.

- B. Refresher courses should be taught through CLEET seminars or intra-department training on identification issues, especially those contained in this report.
- C. Training by the Bar Association, Judicial Conference, District Attorney Association, and defense organizations should also be required and provided for judges, prosecutors, and defense attorneys to acquaint them with the particular risks of unreliable identifications.
- D. Law Enforcement agencies should establish a written policy on procedures for eye witness identification including these recommendations.
- E. CLEET should contact all law enforcement agencies, explaining the importance of written policies and procedures dealing with eyewitness identifications and forward a copy of these recommendations or model policies to them when requested.

7. The Standard Jury Instructions utilized in eye witness identification cases should be revised. The new instructions should acquaint juries with significant factors contributing to unreliable identifications, such as stress, lighting, presence of a weapon at the scene, change in appearance, the amount of time the witness saw the suspect, intoxication of the witness, cross-racial identifications and age factors.<sup>F</sup>

## FORENSIC EVIDENCE INCLUDING DNA ACCESS LAWS AND PRESERVATION OF EVIDENCE

CHAIR: JUDGE CLANCY SMITH

MEMBERS: REPRESENTATIVE LEE DENNEY, ASSISTANT ATTORNEY GENERAL JENNIFER MILLER, LEE COHLMIA, ESQ, DR. DWIGHT ADAMS, BOB RAVITZ, ESQ, DIRECTOR STAN FLORENCE, ANDREA SWIECH, VONDA WILKINS, ESQ., SHERIFF JOHN WHETSEL, SUE WYCOFF, ESQ.

**Forensic Science is an important component of the criminal justice system. It is well known that forensic science, when properly applied and presented, can be critical to the outcome of a prosecution or exoneration.** However, there are known instances when forensic science has been abused or overstated and the consequences resulted in a wrongful conviction. Of the first 200 individuals in the United States identified by the Innocence Project as being wrongfully convicted, twenty-two - over 10% - were wrongfully convicted at least in part through faulty forensic science analysis and testimony.

For our purposes, the most important characteristic of these twenty-two wrongful convictions is that only **one** of them was the result of analysis from an **accredited** laboratory (see endnote E). This alone provides a clear message that accreditation, not certification, is paramount to quality forensic science. A brief explanation is in order to clarify the difference between accreditation and certification. First, individuals are certified and laboratories are accredited. But even an uncertified individual working in an accredited laboratory will be held to a higher standard than a certified person who works in a non-accredited lab. Thus, a latent print examiner (one who compares known prints to prints recovered from crime scenes in order to determine if they are identifiable to a particular individual) working as a member of an **accredited** laboratory is held to a higher standard, whether he is **certified** by the International Association for Identification (IAI) or not.

Accreditation provides standards against which the operations of the entire laboratory are directed and assessed. An accredited laboratory is required, at a minimum, to have programs in place to address each of the following standards for all examiners:

### A. Proficiency tests

- B. Written training programs for analysts as well as opportunities for continuing education
- C. Policies and procedures for evidence handling and security
- D. Standard operating procedures for all examinations and protocols directing the validation of new procedures prior to their use in casework
- E. Case work procedures to include note-taking requirements for all examinations
- F. Peer-review of examinations
- G. Administrative review of all reports and examinations
- H. Testimony review and audits

By contrast, certification applies only to the individual. A certified latent print examiner working independently or from a non-accredited laboratory is not required to adhere to any of the above standards. He or she is simply required to have 80 hours of approved training, a minimum of two years full time experience in comparisons and identifications, comparisons of 15 latent prints achieving 12 without an erroneous identification, and passing a test once every five years, with no accountability in the intervening years. On the other hand, a latent print examiner operating within an accredited laboratory has mechanisms in place to provide excellent quality control and quality assurance practices and procedures to minimize misidentifications.

Accreditation of the forensic science laboratory is not guaranteed to prevent wrongful convictions, but it greatly reduces the likelihood when the case involves forensic science. With this in mind, the following pre and post-conviction recommendations are made:

#### PRE-CONVICTION RECOMMENDATIONS

1. Current Oklahoma Law, 74 O.S. §150.37, which requires that all forensic laboratories as defined by the act and operating prior to July 1, 2005 be accredited, exempts “Latent print identification performed by an IAI certified latent print examiner”. The exception for latent fingerprint identifications is unwarranted and unwise. Latent fingerprint

identifications should be performed in an accredited laboratory, not simply by a certified individual.

Therefore, we recommend that the Legislature remove the exemption for latent fingerprint examination from the statute so the requirements for latent print examination match those for other forensic science disciplines. The work of the latent print examiner has the ability to identify one individual to the exclusion of all others. In order to prevent or limit the possibility of a wrongful conviction, this work must be performed by a qualified examiner from an accredited laboratory.

- a. We also recommend that the same standard be applied to Digital Forensics, such as the analysis of data on computers and other electronics, which is presently also exempted from the requirement that it be analyzed in an accredited laboratory. Law enforcement is experiencing an increase in the recovery and analysis of evidence containing digital information and the need for analysis of this evidence in an accredited laboratory with a sound quality assurance system in place is critical.
  - b. The Oklahoma Legislature should remove the exemptions for Latent Print Examiners and Digital Forensic Analysts from current Oklahoma Law, 74 O.S. §150.37. Latent print examinations and digital forensic examinations should be performed in an accredited laboratory. The OBA should work with the Oklahoma Legislature to remove the exemptions from current state law.
2. Further, we recommend that Crime Scene personnel be held to a high standard within the state of Oklahoma and that, at a minimum, all crime scene personnel should increase their level of training through CLEET or other appropriate training academy. Analysis of improperly collected evidence could result in a wrongful conviction even when the analysis was properly performed.

A committee consisting of representatives from CLEET, OSBI, Training Academies of the Oklahoma City, Tulsa, and Edmond Police Departments and the Forensic Science Institute (and possibly others) should meet to formulate a quality and enhanced training program for Crime Scene personnel. The program should be implemented in all Oklahoma police training academies.

3. We recommend support of the Office of the Chief Medical Examiner (OCME) in its attempt to regain national accreditation. We fully understand that accreditation was lost for two primary reasons: 1) Too few pathologists to conduct the required number of autopsies; and, 2) inadequate facilities. Therefore, we fully support the move of the OCME to the campus of the University of Central Oklahoma (UCO) in order for the OCME to take full advantage of the collaboration between the Forensic Science Institute at UCO, and the OSBI Forensic Science Center, also located near the UCO campus. Collaborations include student internships, national and regional training programs for OCME staff and pathologists, certification of death scene investigators, and consultation with experts in a wide range of forensic science disciplines.

The training programs for pathologists and death scene investigators will help to reduce the possibility of wrongful convictions. One recent example included training provided by the Forensic Science Institute to the OCME staff regarding infant death investigations. A leading national expert provided current information on a topic known for leading to wrongful convictions. Training programs like this and expert services of UCO faculty will enhance the overall quality of the services provided by the OCME. The move by the OCME to the UCO campus will make these training efforts and expert services available on a regular basis.

The Oklahoma Legislature should support the move of the Oklahoma Medical Examiner's Office to new facilities and secure additional pathologists in order for the Office to regain national accreditation. The OBA and District Attorneys Council should support these initiatives.

## POST-CONVICTION RECOMMENDATIONS

1. Oklahoma is currently the **only** state in the United States that does not have a Post-Conviction DNA Testing Law. We strongly recommend that the Oklahoma Legislature enact legislation creating such a law. Proposed legislation is provided<sup>G</sup>.

Oklahoma's post-conviction DNA legislation should overcome shortcomings identified by the Innocence Project and found in other state's DNA access laws to include:

- A. Some laws present insurmountable hurdles to the individual seeking access, putting the burden on the defense to effectively solve the crime and prove that the DNA evidence promises to implicate another individual.
- B. Despite the fact that 11 of the first 225 individuals proven innocent through DNA testing initially pled guilty, certain laws still do not permit access to DNA when the defendant originally pled guilty.
- C. Several laws do not allow individuals to appeal denied petitions for testing.
- D. A number of states fail to require full, fair and prompt proceedings once a DNA testing petition has been filed, allowing the possibly innocent to languish interminably in prison.

At a minimum, reasonable elements in a good DNA access law should:

- A. Include a reasonable standard to establish proof of innocence at the stage where an individual is petitioning for post-conviction DNA testing;
- B. Allow access to post-conviction DNA testing wherever it can establish innocence, even if the petitioner is no longer incarcerated, and including cases where the petitioner pled guilty or provided a confession or admission to the crime;
- C. Exclude "sunset provisions," or absolute deadlines, for when access to post-conviction DNA evidence will expire;
- D. Require criminal justice officials to account for evidence in their custody;

- E. Require criminal justice officials to properly preserve and catalogue biological evidence for as long as an individual is incarcerated or otherwise experiences any consequences of a possible wrongful conviction (e.g. probation, parole, civil commitment or mandatory registration as a sex offender);
- F. Disallow procedural hurdles that stymie DNA testing petitions and proceedings that govern other forms of post-conviction relief;
- G. Allow convicted persons to appeal from orders denying DNA testing;
- H. Require a full, fair and prompt response to DNA testing petitions, including the avoidance of debate around whether currently available DNA technology was available at the time of the trial;
- I. Avoid unfunded mandates by providing funding to DNA testing statutes; and
- J. Provide flexibility in where, and how, DNA testing is conducted.

The Oklahoma Legislature should adopt post-conviction DNA testing legislation. We recommend that the OBA work with members of the Oklahoma Legislature to provide Oklahoma with post-conviction DNA testing consistent with the attached draft legislation.

2. We also encourage support for legislation regarding the creation of the Oklahoma Innocence Collaboration Program consisting of the OSBI, Oklahoma City University (OCU) School of Law, and the UCO Forensic Science Institute, such as found in House Bill 2652<sup>H</sup>. Oklahoma may be the only state in the union without a current post-conviction DNA access law; however, Oklahoma can be at the forefront of providing the most innovative collaboration among academic, scientific and law enforcement entities within the state working to assure that wrongful convictions do not go uncorrected.

We recommend, with assistance from the OBA, that the Oklahoma Legislature adopt House Bill 2652 (or similar legislation) creating the Oklahoma Innocence Collaboration Program.

**CRIMINAL LAW AND PROCEDURES INCLUDING INFORMANTS,  
MISCONDUCT, COMPETENCY OF COUNSEL AND JURY INSTRUCTIONS**

CHAIR: ASSISTANT ATTORNEY GENERAL JENNIFER MILLER

MEMBERS: JUDGE RETA STRUBHAR, RETIRED, VONDA WILKINS, ESQ., SENATOR CONSTANCE JOHNSON, DIRECTOR STEVE EMMONS, BOB RAVITZ, ESQ., JUDGE TOM ALFORD, LEE COHLMIA, ESQ.

JAILHOUSE INFORMANT TESTIMONY

A jailhouse informant is an inmate who allegedly receives a statement from an accused while both are in custody, and the statement relates to a crime that occurred outside the institution walls. Usually these statements are then provided to the government in exchange for some benefit, such as sentence reductions, leniency or other personal advantage. Although jailhouse informants can be necessary for effective law enforcement, their motivation is highly suspect. The Innocence Project has found:

In more than 15% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial. Often, statements from people with incentives to testify – particularly incentives that are not disclosed to the jury – are the central evidence in convicting an innocent person.

<http://www.innocenceproject.org/understand/Snitches-Informants.php>.

Review of Oklahoma cases that resulted in exonerations revealed that jailhouse informant testimony was one form of evidence that must be given special consideration. The cases of Dennis Fritz and Ron Williamson, co-defendants, involved the admission of jailhouse informant testimony. Dennis Fritz received a sentence of life imprisonment for murder. Ron Williamson was convicted of capital murder. Jailhouse informant testimony was presented in both cases. *Fritz v. State*, 811 P.2d 1353 (Okla.Crim.App.1991); *Williamson v. State*, 812 P.2d 384 (Okla.Crim.App.1991), federal habeas corpus relief granted by *Williamson v. Reynolds*, 904 F.Supp. 1529 (E. D. Okla. 1995). In preparation for Mr. Williamson's retrial DNA testing was conducted. The DNA testing revealed that the DNA belonged to another individual, Glen Gore.

Mr. Gore was later convicted of the murder and is serving a life sentence. *Gore v. State*, 119 P.3d 1268 (Okla.Crim.App.2005). Mr. Fritz and Mr. Williamson were released from custody.

The Oklahoma Court of Criminal Appeals has recognized that certain precautions should be taken when jailhouse informant testimony is offered into evidence. In the capital case of *Dodd v. State*, 993 P.2d 778 (Okla.Crim.App.2000), Mr. Dodd received a new trial due to the admission of jailhouse informant testimony. In that case, the Oklahoma Court of Criminal Appeals examined the problems relating to jailhouse informant testimony and set forth the following procedure for trial courts to follow when the State seeks to admit such testimony:

At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant (emphasis added); (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.

*Dodd*, 993 P.2d at 784. In addition, the Court mandated that a uniform jury instruction that discussed the scrutiny that must be given to such testimony be given in all cases where a court admits jailhouse informant testimony. *Id.*

### **Recommendations:**

1. Review of numerous other states' jury instructions led the Commission to the conclusion that the jury instruction mandated by the Court in *Dodd* and adopted by the Uniform Jury Instruction Committee (OUJI-CR 9-43A) is sufficient to advise a jury of the consideration that must be given when faced with jailhouse

informant testimony. The Commission recommends, however, a minor addition to the instructions. A copy of the proposed modification is attached.<sup>I</sup>

2. The Commission recommends that the mandates within *Dodd* be codified and added to the Criminal Discovery Code found at Section 2002 of Title 22, Oklahoma Statutes, with the addition of the following language “If the informant’s testimony is discovered within ten days or during trial, the defendant should be allowed such time to review such information as the court deems necessary and reasonable.” It is also recommended that the mandates within *Dodd* be expanded to require the State, when providing any deal, promise, inducement, or benefit to a jailhouse informant, provide a written copy of such agreement to defense counsel. A copy of the proposed modification is attached<sup>J</sup>.
3. The Commission also recommends that a pre-trial hearing which would allow the trial court to determine the reliability of such evidence be required. The purpose of this pre-trial hearing shall be to determine the credibility of the informant, as well as to determine whether the discovery mandates have been met.
4. The Commission also recommends that training programs for prosecutors, defense counsel and trial judges address the use of jailhouse informant testimony.

## MISCONDUCT

### **(Prosecutors, Defense Counsel, Law Enforcement, Trial Courts)**

Review of Oklahoma cases that resulted in exonerations revealed that a contributing cause to the convictions was misconduct of the professionals involved in criminal convictions. In order to ensure that all professionals involved in criminal convictions are well trained, competent, and qualified to perform the necessary services, the Legislature must continue to adequately fund such services.

**Prosecutorial Misconduct.** A recent incident in which two assistant district attorneys were fired due to their action of withholding from defense counsel potentially exculpatory evidence in a murder trial reveals one area of prosecutorial conduct that must be addressed.<sup>6</sup> Although it is hoped that this was an isolated incident and recognizing that human error can happen, it emphasizes the need for all attorneys involved in the criminal justice system to be alert and ever vigilant in the ultimate goal, which is a determination of the truth.

A common issue raised in an appeal of a criminal conviction is prosecutorial misconduct. Such allegations include (1) withholding exculpatory evidence from the defense; (2) allowing witnesses to testify untruthfully; and (3) making misleading arguments in opening and closing statements. Many times these allegations are found to be baseless, but too many times error is found. Prosecutors must be educated on these issues to reduce such mistakes. Further, in cases where such misconduct is willful, deliberate and made in bad faith, notice should be filed with the Oklahoma Bar Association for appropriate disciplinary proceedings.

The Oklahoma Criminal Discovery Code, found at Title 22, Section 2002 of the Oklahoma Statutes, provides that any evidence favorable to the defendant must be provided to the defense. Thus, it does not appear that legislative action is required, with the exception of strengthening this duty with required written record retention. It appears the primary way to address this concern is to ensure that prosecutors are trained that when dealing with evidence which may be exculpatory or may lead to exculpatory evidence, the rule must be always to disclose such evidence to the defense.

**Defense Counsel/Ineffective Assistance.** Ineffective assistance of defense counsel is a major issue contributing to the wrongful conviction of many individuals. This may be in part due to overworked or underpaid attorneys. It may also be attributable to incompetence of counsel or to personal issues, such as addictions to drugs or alcohol. However, just as prosecutors must be ever vigilant in the ultimate goal, which is determination of the truth, so too must be defense counsel.

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<sup>6</sup>See <http://newsok.com/oklahoma-county-district-attorney-fires-two-assistants/article/3665479>.

Due to the seriousness and finality of capital cases, the Commission recommends guidelines, including qualifications and training of defense counsel, be codified and enforced. Rule 1.1 of the Oklahoma Rules of Professional Conduct, Okla. Stat. tit. 5, Ch. 1, App. 3-A mandates:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Accordingly, to meet the mandate of Rule 1.1, retained counsel should have the same qualifications and training of appointed counsel. These qualifications must be met as it is indisputable that when a defense attorney is not qualified and does not do his/her job, which is to effectively represent the client, it is the client who will suffer. This cannot be allowed.

### **Law Enforcement Officers.**

The police play a crucial part in the criminal justice system. They usually provide the evidence used by the prosecution to obtain a conviction. Thus, the police investigation can greatly affect the outcome of a trial. Consequently, we must ensure that all police officers are sufficiently trained and are worthy to wear the badge and uniform.

Clearly, police are interested in apprehending the right person. Law enforcement, like all professionals in the criminal justice system, do not desire to convict the innocent. The practices of law enforcement officers are addressed in several other Commission reports. The practice addressed in this report makes it the duty of law enforcement to promptly provide the appropriate prosecutorial agency with exculpatory or potentially exculpatory evidence.

## **Trial Judges.**

Just as prosecutors, defense attorneys and law enforcement must receive adequate training, so too must trial judges. Trial judges have the responsibility of ensuring that a defendant is not denied any constitutional or statutory right he is entitled to receive. Recommendations are made to ensure that trial judges have the necessary knowledge, skills and resources.

## **Recommendations:**

### **Prosecutors:**

1. The Commission recommends that prosecutors be required to maintain a record of all evidence disclosed to the defendant, with special emphasis on exculpatory or potentially exculpatory evidence. A copy of such record shall be provided to the defense. The Commission recommends that Title 22, Section 2002 of the Oklahoma Statutes be amended to include language mandating such record retention.
2. The Commission recommends that misconduct of a prosecutor that is willful, deliberate and made in bad faith or egregious be reported by the Court before which the violation occurred, and/or the Court of Criminal Appeals, and/or opposing counsel to the Oklahoma Bar Association for disciplinary proceedings, as required by Rule 8.3(a) of the Oklahoma Rules of Professional Conduct, Okla. Stat. tit. 5, Ch. 1, App. 3-A.
3. The Commission recommends that prosecutors receive training that includes the following topics:
  - a. The risks associated with false testimony by jailhouse informants.

- b. The risks associated with false testimony of accomplice witnesses.
- c. The risks associated with false confessions and the protocols available to minimize those risks.
- d. The risks associated with false identifications and the protocols available to minimize those risks.
- e. Police investigative and interrogation methods.
- f. Discovery practices/Brady requirements.
- g. Forensic evidence.
- h. Mental health evidence.
- i. Retention of evidence.
- j. Common areas of prosecutorial misconduct, including making misleading arguments that overstate the probative value of certain evidence.

**Defense Counsel:**

1. The Commission recommends that the Legislature continue to adequately fund indigent defense services in cases requiring appointment of counsel at a level that ensures that all indigent defendants receive effective and meaningful representation.
2. The Commission also recommends that legislation be passed mandating (1) that a capital defense team consist of no fewer than two attorneys; and (2) that certain qualifications for defense counsel in capital cases be met. A copy of the proposed legislation setting forth the proposed qualifications is attached<sup>K</sup>.
3. The Commission recommends that if it is obvious to the trial court that retained counsel does not have the knowledge and/or skill to competently represent a criminal client, as required by Rule 1.1 of the Oklahoma Rules of Professional Conduct, Okla. Stat. tit. 5, Ch. 1, App. 3-A, the trial court shall hold an *in camera* hearing as discussed by the Oklahoma Court of Criminal Appeals in *Wiley v. State*, 2008 OK CR 30, ¶ 8, 199 P.3d 877, 880.

4. The Commission further recommends that misconduct of a defense lawyer that is willful, deliberate and made in bad faith, or due to egregious incompetence of defense counsel, a complaint shall be filed with the Oklahoma Bar Association, as required by Rule 8.3(a) of the Oklahoma Rules of Professional Conduct, Okla. Stat. tit. 5, Ch. 1, App. 3-A. Such complaint shall be filed by the Oklahoma Court of Criminal Appeals, if that court made the ineffective determination. Otherwise, notice shall be filed by the Office of the Attorney General.
  
5. The Commission also recommends that the training or education programs mandated for defense counsel be obtained not only through the Oklahoma Indigent Defense and Public Defender Systems but also through Career Tech programs and the OSBI which provides training for forensic evidence. The required training should be on the following topics:
  - a. The risks associated with false testimony by jailhouse informants.
  - b. The risks associated with false testimony of accomplice witnesses.
  - c. The risks associated with false confessions and the protocols available to minimize those risks.
  - d. The risks associated with false identifications and the protocols available to minimize those risks.
  - e. Police investigative and interrogation methods.
  - f. Discovery practices/Brady requirements.
  - g. Forensic evidence.
  - h. Mental health evidence.
  - i. Investigative methods for obtaining mitigating evidence.

### **Law Enforcement Officers:**

1. The Commission recommends that all police and other investigative agencies receive training on the obligation to disclose exculpatory or potentially exculpatory evidence and to promptly deliver such evidence to the appropriate prosecutorial agency.
2. The Commission also recommends that all police and other investigative agencies receive training through the CLEET on the following topics:
  - a. The risks associated with false testimony by jailhouse informants.
  - b. The risks associated with false testimony of accomplice witnesses.
  - c. The risks associated with false confessions and the protocols available to minimize those risks.
  - d. The risks associated with false identifications and the protocols available to minimize those risks.
  - e. Police investigative and interrogation methods.
  - f. Discovery practices/Brady requirements.
  - g. Forensic evidence.
  - h. Mental health evidence.
  - i. Collection and retention of evidence.

### **Trial Judges:**

1. The Commission recommends that an Administrative Order from the Oklahoma Administrative Office of the Courts be implemented requiring not less than eight hours of training in capital litigation before a district court judge can preside over a capital murder trial. Such training shall include the following topics:
  - a. Jury selection in capital cases.
  - b. Proper opening and closing statements.

- c. Presentation of evidence in support of aggravating circumstances.
- d. Presentation of evidence in support of mitigation.

In addition, the Oklahoma Administrative Office of the Court should require not less than twelve hours of training, bi-annually, for all trial court judges. Such training shall include the following topics:

- a. The risks associated with false testimony by jailhouse informants.
- b. The risks associated with false testimony of accomplice witnesses.
- c. The risks associated with false confessions.
- d. The risks associated with false identifications.
- e. Police investigative and interrogation methods.
- f. Discovery practices/Brady requirements.
- g. Forensic evidence.
- h. Mental health evidence.
- i. Common areas of prosecutorial misconduct.
- j. Recognition of ineffective counsel and the procedures of an *in camera* hearing as discussed in *Wiley v. State*, 2008 OK CR 30, ¶ 8, 199 P.3d 877, 880.

- 2. The Commission recommends that the Oklahoma Supreme Court and the Judicial Conference determine the manner in which the above-mandated training is to be provided.
- 3. The Commission also recommends that the Oklahoma Administrative Office of the Courts update the Bench Books for the trial judges and ensure that all trial court judges have an updated copy of such book. The Commission recommends that the Bench Book be updated annually.

## VICTIM/FAMILY RIGHTS INCLUDING COMPENSATION FOR VICTIMS AND WRONGFULLY CONVICTED

CHAIR: ANDREA HAMOR EDMONDSON, M.A.

MEMBERS: JACQUELINE STEYN, CHRISTY SHEPPARD, STEWART MEYERS, DISTRICT ATTORNEY DENNIS SMITH, REPRESENTATIVE LEE DENNEY, SENATOR CONSTANCE JOHNSON

**Those proven to have been wrongfully convicted and subsequently incarcerated face great obstacles even after their convictions have been set aside.** Persons wrongfully convicted were incarcerated for an average of 13.5 years<sup>7</sup> and face significant challenges to reintegrating into society. While persons convicted of crimes have access to reintegration services to assist parolees, persons wrongfully convicted do not enter the parole system and do not have access to any reintegration services available such as assistance finding housing, work, and medical care through state or community-based services. A person who has been wrongfully convicted, even if found innocent, often finds it difficult or impossible to return to his previous life regardless of education or employment status and paradoxically is eligible for fewer, if any, services to return to society.

During their time in prison, much of the world exonerees knew has changed and moved on. Exonerees face “lost time” as a result of their years in prison. Many face challenges finding employment because they have not had the opportunity to develop common employment skills, are not familiar with the latest technology, and have long gaps in their employment history. This lost time also impacts the exonerees’ relationships and personal support systems. Within their families, children have grown, partners may have moved on, and family members may have passed away. These changes present significant emotional and psychological stress that has lasting effects.

While the world has changed, the exoneree is also changed by his incarceration. Institutionalization, adaptations to living while in prison, causes exonerees to develop different and often negative behaviors. Feeling emotional distance, aloofness, anxiety with forming relationships and other coping mechanisms for prison life are not helpful upon release. Other

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<sup>7</sup> National Innocence Project

psychological impact includes Post Traumatic Stress Disorder (PTSD) and many exonerees were victims of violence while in prison. Lack of medical care while incarcerated can also have a significant impact on exonerees with lasting physical effects.

Those found innocent of the crimes for which they were convicted were both wrongfully imprisoned and continue to face these challenges upon their release. Compensation for lost time can, in part, right the wrongs inflicted on the innocent. The Oklahoma Justice Commission makes the following recommendations to help wrongfully convicted persons successfully re-enter society and compensate those found innocent.

## RECOMMENDATIONS

1. The Commission recommends that all persons wrongfully convicted have access to any reintegration services available to parolees and, if necessary, additional immediate services. Upon release, they should be provided with subsistence and personal care services such as cash, clothing, housing, and transportation assistance. Appropriate assistance and case management should be provided by a state agency such as the Oklahoma Department of Human Services.
2. The Commission recommends that long-term reintegration services be provided to wrongfully convicted persons including education or job training, employment counseling, and a stipend for health insurance, counseling, and other services as necessary.
3. The Commission recommends that legislation be enacted to immediately update records, including to immediately expunge the conviction if the conviction is vacated, set aside, or overturned notwithstanding 22 OS § 18 and 19. A significant barrier to employment for persons wrongfully convicted is inaccurate criminal records.
4. The Commission recommends enactment of legislation to provide compensation indexed at the federal level currently \$50,000 per year of incarceration for a person who was wrongfully convicted and can prove his actual innocence, regardless of plea, and

eliminate the cap from a maximum of \$175,000 to be in alignment with the comparable federal statute (28 USC § 2513). Compensation should be exempt from state taxes.

While the focus of the work of the Oklahoma Justice Commission has been on improving the criminal justice system to reduce or eliminate wrongful convictions, it is important to note that wrongful conviction impacts crime victims and their families, as well. The exoneration process can inadvertently cause significant trauma, fear, and stress to crime victims. Except in cases of deliberate obstruction or perjury, crime victims are not responsible for mistakes or inadequacies in the criminal justice system and do not share any blame for wrongful convictions.

5. The Commission recommends that before action is taken to vacate a conviction, the attorney responsible should take reasonable steps to notify the crime victim or family of the victim.
6. The Commission also recommends enacting legislation to allow all services for crime victims available during the initial criminal proceedings to be reoffered in cases when a conviction is being reconsidered. Services should include access to information about the proceedings, counseling, and other services provided through the Crime Victims' Compensation Fund.

### **Additional Recommendation Regarding Prosecutorial or Investigatory Misconduct**

Recognizing that there are instances of prosecutorial or investigatory misconduct, the Commission recommends additional study to determine whether current laws and court rules are adequate to ensure that remedies are available and applied to effect the release of innocent persons.

The Commission is concerned that cases such as the Oklahoma City Police chemist and the Tulsa Police federal investigation, may affect many defendants who were convicted, in part, by perjured or inaccurate testimony from law enforcement personnel. The Commission wants to ensure that the remedies available in such instances are adequate.

Therefore, it is the additional Recommendation of the Commission that the Legislature initiate a study to determine, in such instances:

1. What remedies are currently available;
2. The adequacy of existing remedies;
3. What additional remedies may be warranted;
4. Whether current remedies may be improved; and
5. Whether the Court of Criminal Appeals should review and amend its rules on pro se arguments and briefs.

**A**

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**<sup>A</sup> OKLAHOMA BAR ASSOCIATION RESOLUTION ESTABLISHING  
THE OKLAHOMA JUSTICE COMMISSION: A Commission Dedicated  
to Enhancing the Reliability & Accuracy of Convictions**

WHEREAS, 258 individuals in the United States have been exonerated through post conviction DNA testing, 17 of whom were sentenced to death, and the average length of time served by these exonerees being 13 years;

WHEREAS, 10 individuals have been exonerated in Oklahoma through post-conviction DNA testing, four of whom were in prison for murder;

WHEREAS, criminologists have concluded that biological evidence is unavailable in the vast majority of criminal cases and that consequently wrongful convictions revealed by DNA testing represent a small proportion of wrongful convictions overall;

WHEREAS, the incarceration of an innocent person not only works an injustice against that individual, but also harms society in that the real perpetrator of a crime remains free and able to commit additional criminal acts;

WHEREAS, it is important for both the criminal justice stakeholders and the citizens of Oklahoma to understand why these individuals were wrongfully convicted and how wrongful convictions may be avoided in the future; and

WHEREAS, thorough, unbiased study and review in other states has resulted in recommendations for significant reforms to the criminal justice system in order to avoid wrongful convictions, and Oklahoma has not engaged in any such review of the state's criminal justice system; now, therefore, be it

RESOLVED, *by the Oklahoma Bar Association*, in recognition of the need to provide a continuing forum for education and dialogue regarding the causes of wrongful conviction of the innocent and, where appropriate, to recommend and assist in the implementation of justice system enhancements, which will increase the reliability of convictions in Oklahoma,

*The Oklahoma Bar Association hereby establishes the Oklahoma Justice Commission: A Commission Dedicated to Enhancing the Reliability & Accuracy of Convictions.*

**OKLAHOMA JUSTICE COMMISSION**

**SECTION 1: STRUCTURE AND COMPOSITION OF THE COMMISSION**

The structure and composition of the Commission shall be:

**Commission Membership and Officers:**

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The Commission shall consist of as many members as the Chair deems, necessary. The officers of the Commission shall include at least a Chair and a Secretary. The Chair of the Commission shall be the President of the OBA or his or her designee. The remaining officers shall be considered upon recommendation of the Chair and shall be elected by a majority of the Commission members.

**Selection and Term of Members:**

The Chair shall appoint the Commission's other members in his or her discretion, but representation shall include at least one member from each, of the following constituencies: (1) district attorneys (both a representative from urban and rural areas), (2) defense attorneys, (3) trial court judges, (4) appellate court judges, (5) police (both a representative from urban and rural areas), (6) sheriffs, (7) legal scholars, (8) legislators, (9) the office of the Attorney General, (10) the OSBI (11) victim advocates, (12) public defenders, (13) a CLEET (Council on Law Enforcement Education and Training) representative, (14) an expert or liaison from the innocence community, (15) a forensic science consultant or expert, and (16) a member of the general public. Additional members shall be appointed by the Chair as necessary, and at least one of the members on the Commission shall have litigation experience.

The members of the Commission shall serve a term of two years. Initial terms shall begin at the time the representatives are selected, which shall take place within six months of the resolution's passage.

**SECTION 2: RESPONSIBILITIES OF THE COMMISSION**

The Commission's major responsibilities shall include raising awareness of the issues surrounding wrongful convictions and studying and providing recommendations regarding the following:

**Causes of Conviction of the Innocent:**

The Commission shall seek to research and identify the common causes of conviction of the innocent, both nationally and in Oklahoma. These include, but are not limited to, (1) eyewitness misidentification, (2) un-validated or improper forensics, (3) false confessions or admissions, (4) forensic science misconduct, (5) government misconduct, (6) incentivized witnesses, and (7) inadequate or improper lawyering.

**Implicated Procedures:**

The Commission shall seek to identify law enforcement, forensic, trial and judicial procedures, and attorney techniques, which may cause or increase the likelihood of the conviction of the innocent.

**Remedial Strategies and Procedures:**

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The Commission shall work to create remedial strategies designed to reduce or lessen the possibility of conviction of the innocent, including, but not limited to, procedural and educational remedies, training of criminal justice practitioners, and the development of procedures to identify, expedite the release of, and rightfully compensate persons wrongly convicted.

**Implementation Plans:**

The Commission shall develop plans to implement remedial strategies, such plans to include, but not be limited to, analysis of implementation expenses, ongoing costs, possible savings and the impact on the criminal justice system for each potential solution; projected effectiveness of proposed plans, and any potential negative impact of proposed plans on the conviction of guilty persons.

The Commission shall also perform a cost analysis of wrongful convictions and their effect upon the State.

**SECTION 3: ADDITIONAL RESPONSIBILITIES OF THE COMMISSION**

The Commission shall provide periodic interim reports of its findings and recommendations as necessary and annual reports no later than 31 December each year to the Oklahoma Bar Association Board of Governors.

This Resolution shall be promulgated by publication in the *Oklahoma Bar Journal* and via OBA's website (<http://www.okbar.org>).

Adopted by the OBA Board of Governors this the 24th day of September, 2010.

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**<sup>B</sup> MEMBERSHIP OF THE OKLAHOMA JUSTICE COMMISSION**

<b>First Name</b>	<b>Last Name</b>	<b>Affiliation</b>
William A. Drew	Edmondson	Chair, Oklahoma Justice Commission, Oklahoma City
David	Prater	District Attorney, Oklahoma City
J. William	Conger (now deceased)	OCU School of Law
Larry	Hellman	OCU School of Law, Oklahoma City
Dennis	Smith	District Attorney, Arapaho
Mack	Martin	Defense Attorney, Oklahoma City
Thomas	Alford	Trial Court Judge, Muskogee
Vonda	Wilkins	Defense Attorney, Guymon
Clancy	Smith	Appellate Court Judge, Oklahoma City
Bill	Citty	Chief of Police, Oklahoma City
Chad	Farmer	Police, Muskogee
Scott	Walton	Sheriff, Claremore
John	Whetsel	Sheriff, Oklahoma City
John	Claro	Legal Scholar, Oklahoma City
Andrea	Hamor Edmondson	Victims Advocate, Oklahoma City
Bob	Ravitz	Public Defender, Oklahoma City
John	Yoeckel	Member of the Public, Oklahoma City
Dwight	Adams	Forensic Specialist, Edmond
Steve	Emmons	CLEET Representative, Ada
Stan	Florence	OSBI Director, Oklahoma City
Jackie	Steyn	Victims Advocate, Oklahoma City
Tim	Dorsey	Police, Edmond
Reta	Strubhar	Retired Appellate Court Judge, Yukon
Sue	Wycoff	Former Defense Attorney, Norman
Constance N.	Johnson	Senator, State of Oklahoma, Oklahoma City
Lee	Denney	Representative, State of Oklahoma, Cushing
Cathy	Christensen	2012 OBA President
Carrie	Bullard	Secretary, Oklahoma Justice Commission, OKC
Joshua	Snaveley	Member of the Public, Edmond
Stewart	Meyers	Member of the Public, Oklahoma City
Jennifer	Miller	Oklahoma Attorney General's Office, OKC
Lee	Cohlma	District Attorneys Council, Oklahoma City
Andrea	Swiech	OSBI, Oklahoma City

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**C**

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**<sup>c</sup> Cases of Interest to the Oklahoma Justice Commission**

*Miller v. State*, 92 F.3d 1196, (10<sup>th</sup> Cir. 1996)

*Pierce v. State*, 359 F.3d 1279 (10<sup>th</sup> Cir. 2004)

*Bryson v. Macy*, 611 F. Supp. 2d 1234 (W.D. Okla. 2009)

*McCarty v. Gilchrist*, 646 F.3d 1281 (W.D. Okla. 2011)

*Wilhoit v. State*, 816 P.2d 545 (Okla. Crim. App. 1991)

*Arvin Carsell McGee, Jr. v. State of Oklahoma*, Case No. CF-1988-886; District Court of Tulsa County, Oklahoma

*State of Oklahoma v. Calvin L. Scott*; Case No. CF-2000-352; District Court of Payne County, State of Oklahoma

*State of Oklahoma v. Ronald Keith Williamson and Dennis Leon Fritz*; Case No. CRF-87-90; District Court of Pontotoc County, State of Oklahoma

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**D**

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 **Oklahoma Statutes Citationized**  
 **Title 21. Crimes and Punishments**  
 **Chapter 1 - Preliminary Provisions**  
 **Section 13.1 - Minimum Sentences - Defined Crimes**

**§ 13.1. Minimum Sentences - Defined Crimes**

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Persons convicted of:

1. First degree murder as defined in Section 701.7 of this title;
2. Second degree murder as defined by Section 701.8 of this title;
3. Manslaughter in the first degree as defined by Section 711 of this title;
4. Poisoning with intent to kill as defined by Section 651 of this title;
5. Shooting with intent to kill, use of a vehicle to facilitate use of a firearm, crossbow or other weapon, assault, battery, or assault and battery with a deadly weapon or by other means likely to produce death or great bodily harm, as provided for in Section 652 of this title;
6. Assault with intent to kill as provided for in Section 653 of this title;
7. Conjoint robbery as defined by Section 800 of this title;
8. Robbery with a dangerous weapon as defined in Section 801 of this title;
9. First degree robbery as defined in Section 797 of this title;
10. First degree rape as provided for in Section 1115 of this title;
11. First degree arson as defined in Section 1401 of this title;
12. First degree burglary as provided for in Section 1436 of this title;
13. Bombing as defined in Section 1767.1 of this title;
14. Any crime against a child provided for in Section 843.5 of this title;
15. Forcible sodomy as defined in Section 888 of this title;
16. Child pornography as defined in Section 1021.2, 1021.3 or 1024.1 of this title;
17. Child prostitution as defined in Section 1030 of this title;
18. Lewd molestation of a child as defined in Section 1123 of this title;
19. Abuse of a vulnerable adult as defined in Section 10-103 of Title 43A of the Oklahoma Statutes who is a resident of a nursing facility;
20. Aggravated trafficking as provided for in subsection C of Section 2-415 of Title 63 of the Oklahoma Statutes; or
21. Aggravated assault and battery upon any person defending another person from assault and battery, shall be required to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the judicial system prior to becoming eligible for consideration for parole. Persons convicted of these offenses shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of the sentence to less than eighty-five percent (85%) of the sentence imposed.

***Historical Data***

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Added by Laws 1999, 1st Extr. Sess., HB 1008, c. 4, § 30, emerg. eff. July 1, 1999; Amended by Laws 2000, HB 2037, c. 291, § 2, eff. November 1, 2000 ([superseded document available](#)); Amended by Laws 2001, SB 803, c. 428, § 2, emerg. eff. June 5, 2001 (repealed by Laws 2002, HB 2924, c. 22, § 34, emerg. eff. March 8, 2002); Amended by Laws 2001, SB 397, c. 437, § 2, emerg. eff. July 1, 2001 ([superseded document available](#)); Amended by Laws 2002, HB 2924, c. 22, § 7, emerg. eff. March 8, 2002 ([superseded document available](#)); Amended by Laws 2007, SB 677, c. 199, § 1, eff. November 1, 2007 ([superseded document available](#)); Amended by Laws 2009, HB 2029, c. 234, § 117, emerg. eff. May 21, 2009 ([superseded document available](#)); Amended by Laws 2011, SB 952, c. 385, § 1, eff. November 1, 2011 ([superseded document available](#)).

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**E**

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<sup>E</sup> Crime Lab Report: Media and public-policy analysis for the forensic science community; July 16, 2008 **CRIME LAB REPORT**

*Media and public-policy analysis for the forensic science community*

### **The Wrongful Conviction of Forensic Science**

By: John Collins and Jay Jarvis **July 16,2008**

#### **EXECUTIVE SUMMARY**

*Crime Lab Report* is an independent research organization that examines media and public policy trends related to forensic science. Past research and commentary published by *Crime Lab Report* have been both supportive and critical of the forensic sciences. The purpose of this study, however, was to examine the accuracy of claims that forensic science is a leading cause of wrongful convictions. To accomplish this, *Crime Lab Report* reviewed public information pertaining to the first 200 DNA exonerations that occurred between 1989 and 2007. The frequencies of "probable systemic failures" extracted from case profiles published by the *Innocence Project* were tabulated and analyzed. As a result of this study, forensic science malpractice, whether fraudulent or not, was shown to be a comparatively small risk to the criminal justice system, When it does occur, however, the risks are best mitigated by competent and ethical trial lawyers dedicated to seeking the truth.

The following is a summary of *Crime Lab Report's* major findings. More specific data and comments are provided on the pages that follow this summary.

1. In the 200 convictions studied, 283 instances of probable systemic failure were identified and isolated from case profiles published by the *Innocence Project*. In many cases, these profiles were either corroborated or clarified by other sources, These failures are ranked as follows:

<b>Rank</b>	<b>Percent</b>	<b>Number</b>	<b>Description</b>
1	54%	153	Eyewitness misidentifications
2	15%	43	False confessions
<b>3</b>	<b>11%</b>	<b>32</b>	<b>Forensic science malpractice</b>
4	10%	27	Government misconduct
5	9%	25	Informant snitches
6	1%	3	Bad lawyering

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2. Of the 32 instances of forensic science malpractice shown above, only 1 was found to have occurred in an accredited laboratory. This error did not directly incriminate the defendant.
  3. In 36 of the 200 overturned convictions, the existence of forensic testing results favorable to the defendant was confirmed by various sources. This favorable forensic evidence has been largely ignored in public statements made by the *Innocence Project* likely because the results were either not presented at trial or otherwise failed to cause an acquittal.
  4. Bad lawyering was found to be a much more pervasive problem than what has been previously estimated by both the *Innocence Project* and a highly publicized study recently published in the *Columbia Law Review*.
  5. Forensic science malpractice was identified as the sole systemic failure in only two overturned convictions (1%). Both were associated with the work of Fred Zain.
  6. Claims that "faulty forensic science" is a leading cause of wrongful convictions were found to be based on careless and improper statistical expressions resulting from a misuse of available exoneration data.

## **INTRODUCTION**

The purpose of this study was to explore the basis and validity of claims being perpetuated in the public domain that faulty forensic science is a leading cause of wrongful convictions. Many wrongful convictions have been identified and remedied in recent years through post-conviction litigation and DNA testing. Post-conviction litigation is the specialty of an organization called the *Innocence Project* in New York. Its affiliates and supporters comprise what is known as the *Innocence Network* - organizations and advocates dedicated to supporting convicted offenders whose innocence can be proven using modern DNA technology.

The exoneration of truly innocent people is clearly an act of social justice; however, the work of the *Innocence Project* goes far beyond this. Passionately and convincingly they promote the establishment of state oversight commissions to "review the forensic methods that are accepted in state courtrooms and to investigate allegations of misconduct, negligence or error in labs."<sup>1</sup> Superficially, this might seem reasonable. But a rapidly growing number of forensic science

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laboratories in the United States already subject themselves to rigorous scrutiny through accreditation and other quality-control safeguards that have only recently demonstrated their full potential to monitor work practices and accuracy in the profession of forensic science. For each of these laboratories, the implications associated with being governed by a commission prone to political wrangling and bureaucratic inefficiencies are quite troublesome,

For years, the *Innocence Project* has publicly condemned what it claims to be the frequent use of erroneous, fraudulent, or unreliable forensic evidence against defendants in criminal trials. And until recently, no authoritative statistical studies had been completed to either support or refute this argument.

But all this changed with a groundbreaking study published in the January 2008 issue of the *Columbia Law Review*, titled "Judging Innocence." Its author, Brandon Garrett, is an associate professor at the University of Virginia School of Law. Garrett and his team carefully studied the first 200 DNA exonerations that occurred between 1989 and 2007, documenting the types of evidence originally used against the defendants during their trials. Based on his research, Garrett argued in support of special commissions to prevent wrongful convictions. "[R]esearch suggests that procedures such as...oversight of forensic crime laboratories, could have prevented many such costly miscarriages.. ."2

Professor Brandon Garrett is an experienced post-conviction litigator who once served as an associate at Cochran, Neufeld & Scheck LLP in New York City. Peter Neufeld and Barry Scheck are the cofounders of the *Innocence Project* located in Manhattan.<sup>3</sup>

*Crime Lab Report* editors became intrigued by the work of Professor Garrett when it was learned that his study was presented before a special committee convened by the National Academy of Sciences in Washington, D.C. News reports from various sources, including the *New York Times*, attempted to summarize Garrett's findings, which seemed to indicate that faulty forensic science may very well be a leading cause of wrongful convictions in the United States.

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Therefore, *Crime Lab Report* studied the work and findings of Professor Garrett and extracted pertinent data. This information was then cross-referenced with case profiles, media reports, and public comments pertaining to the first 200 convictions overturned by post-conviction litigators armed with modern DNA technology and other scientific evidence.

Based on this research, a very compelling and contextually honest case can be made for why the conviction of forensic science may be as erroneous as the 200 convictions summarized in this report. Hopefully, future studies seeking to explain the major causes of wrongful convictions may be conducted with more statistical and scientific accuracy.

### **THE CONVICTION OF FORENSIC SCIENCE**

The year 1989 marked the beginning of a long and arduous period in the history of America's criminal justice system. It was then that Gary Dotson and David Vasquez were exonerated and released from prison based on new DNA testing capabilities. Dotson served 10 years in prison for aggravated kidnapping and rape. Vasquez served four years in prison for second-degree murder and burglary. Both men were incriminated by forensic evidence during their original trials.<sup>4</sup>

In 1992, well-known criminal defense attorneys Barry Scheck and Peter Neufeld created the *Innocence Project*, "a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice."<sup>5</sup> As the *Innocence Project* expanded over the next sixteen years, the basic principles of its public policy agenda were advanced through well coordinated and carefully prepared statements that repeatedly called into question the reliability and professionalism of forensic scientists in the United States.

In a 1996 *USA Today* cover story written by Becky Beaupre and Peter Eisler, *Innocence Project* co-director Peter Neufeld was quoted as saying "There's absolutely no reason that crime laboratories, which routinely make decisions that have life and death consequences for an accused person, should be less regulated than a clinical laboratory utilizing similar tests."<sup>6</sup>

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Similar sentiments were expressed in astounding detail by an aggressive team of *Chicago Tribune* reporters who published a stinging series of investigative reports in 2004 that chronicled some of the cases being worked by the *Innocence Project*. The reports, which were released one after another over the course of a week, seemed to intentionally lure even the most educated and thoughtful readers into believing that forensic science laboratories were some of the most corrupt and incompetent organizations in the United States.

The *Tribune* set the stage for its attack on forensic science in the first article published on October 17, 2004. "At the center of this upheaval is the advent of DNA testing, which has injected a dose of truth serum into other forensic tools," argued *Tribune* reporters Flynn Roberts, Steve Mills, and Maurice Possley. "With its dramatic precision, DNA has helped reveal the shaky scientific foundations of everything from fingerprinting to firearm identification, from arson investigation to such exotic methods as bite-mark comparison."<sup>7</sup>

On January 13, 2005, CAW aired "Can Crime Labs Be Trusted," a probing investigative report that claimed to uncover profound weaknesses in how America's crime laboratories were being operated. Among the pertinent points delivered by CAW was the supposed lack of oversight and accountability to ensure that work is conducted properly. Peter Neufeld was interviewed in the documentary. "Forensic science has gotten a free ride for the last 50 years, primarily because they made this bogus argument that [they] don't need to be regulated,"<sup>8</sup>

Then, exactly three years after the *Chicago Tribune* series, the "shaky" scientific methods it brought to light became the subject of another television documentary, this time by *MSNBC*, titled "When Forensics Fail," which showcased the troubling stories of innocent persons convicted and imprisoned, of crimes that they likely did not commit.<sup>9</sup> One of the cases was that of Ray Krone, who was convicted in 1992 for murder, kidnapping, and sexual assault based largely on a forensic bite-mark identification. DNA collected from the bite-mark was eventually excluded as belonging to Krone.

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On October 1, 2007, not long before MSNBC aired its documentary, the *New York Times* published a powerful; front-page story about the public policy lessons of post-conviction litigation using DNA. In the article, Peter Neufeld argued that "The legislative reform movement as a result of these DNA exonerations is probably the single greatest criminal justice reform effort in the last 40 years."<sup>10</sup> But what quickly attracted the attention of some in the forensic science community was not the article itself, but the fact that it "coincidentally" appeared during the weeklong annual training symposium hosted by the American Society of Crime Laboratory Directors in Orlando, Florida.

Any suspicions that the timing of the aforementioned *Times* article might have been orchestrated by the *Innocence Project* and/or its supporters in the media were nearly confirmed on February 19, 2008 when a similar front-page story about post-conviction DNA exonerations appeared in *USA Today* during the annual meeting of the American Academy of Forensic Sciences, one of the largest annual forensic science conventions in the world. A provocative comment by Peter Neufeld was included in the story.<sup>11</sup>

So by the time Professor Brandon Garrett published the results of his research in "Judging Innocence," the profession of forensic science had been entirely and completely convicted of being responsible for the imprisonment of innocent citizens and a symbol of decline and incompetence within America's criminal justice system. News outlets across the country bought into what they perceived to be a compelling and disturbing story. Elected officials became more open to the idea that faulty forensic science was running rampant in U.S. courtrooms and might require legislative action to correct. Garrett's work simply provided what appeared to be a long-awaited statistical validation of the rhetoric being disseminated by the *Innocence Project* and its supporters.

In fact, both Brandon Garrett and Peter Neufeld presented the "Judging Innocence" findings on September 20, 2007 to a special committee convened by the National Academy of Sciences, which was charged with the task of identifying the needs of the forensic science community.

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*Crime Lab Report* obtained a copy of their presentation from the National Academy of Sciences public records office.<sup>12</sup>

### **Flawed Testimony**

Of the 200 exonerations that Professor Garrett examined, he identified 113 cases (57%) where forensic evidence was presented against the defendant during the original trial.<sup>13</sup> According to Garrett, the major problem in wrongful convictions seems to be "improper and misleading testimony regarding comparisons conducted."<sup>14</sup> Such testimony, he argues, tends to bolster questionable evidence that might otherwise have been dismissed as erroneous or unreliable in the eyes of the jury.

Garrett and Neufeld discussed the problem of misleading testimony during their presentation at the National Academy of Sciences in Washington, D.C. In the 113 cases involving the use of forensic evidence against a defendant, 57% of the cases in which trial transcripts were located involved what Garrett and Neufeld characterized as improper (but not intentionally so) scientific testimony. An additional seven cases were presented that they claimed to have been tainted by "known misconduct."<sup>15</sup>

Taken together, 42 cases or 69% of the trial transcripts reviewed were alleged by Garrett and Neufeld to have been tainted by faulty forensic science - a disturbing statistic if found to be true. They also went as far as to list the names of "offending" scientists and laboratories.

In January 2008, the Senate Judiciary Committee convened a hearing to investigate the alleged failure of the Justice Department to enforce forensic-related provisions contained in a bipartisan legislative effort known as the *Justice for All Act of 2004*. Peter Neufeld testified on behalf of the *Innocence Project*:

"Together, misapplication of forensics and misplaced reliance on unreliable or un-validated methodologies are the second greatest contributors to wrongful convictions. Despite these demonstrated problems, independent and appropriately conducted investigations - which should be conducted when serious forensic negligence or misconduct may have transpired - have been exceedingly rare."

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## **The Verdict**

The final verdict in the case against forensic science may have come from the United States Inspector General, Glenn A. Fine, during his own testimony before the Senate Judiciary Committee. In a statement as devastating as it was simple, Fine agreed that "Negligence and misconduct in forensic laboratories.... have led to wrongful convictions in several states."<sup>17</sup>

If the profession of forensic science is truly guilty of these charges, and if it can be shown that it has failed to establish the checks and balances necessary to prevent junk science and improper testimony from violating the rights of defendants, then the recommended "sentence" of being subjected to a politically charged, bureaucratic oversight commission would seem well deserved. But a more reliable and honest statistical analysis has now made a compelling case to the contrary.

## **THE CASE FOR EXONERATION**

Although they don't command much attention amidst the fervor surrounding the innocence movement, suspicions that DNA exonerations do not portray an accurate picture of the American criminal justice system have been communicated from various sources.

On April 26, 2007, an op-ed piece authored by Morris Hoffman, a Colorado district court judge and adjunct professor of law at the University of Colorado, was published in the *Wall Street Journal*. Hoffman argued that that innocence movement is prone to exaggeration and a tendency to "stretch their results beyond all statistical sense." The following quote from Hoffman seems to adequately summarize his position:

The mythmakers also directly conflate trial error rates with wrongful conviction rates. Studies showing astonishingly high error rates in capital trials have very little to do with the question of the rate at which innocent people are being convicted. I can't remember a single trial over which I have presided - including dozens of homicides - in which, looking back, I didn't make at least one error in ruling on objections. It is a giant leap from an erroneous trial ruling to reversible error, and another giant leap from reversible error to actual innocence."<sup>18</sup>

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As *Crime Lab Report* moved forward with its research into claims that faulty forensic science is a pervasive problem in the United States, Hoffman's observations began to take on new meaning. As will be shown in this report, even the most rudimentary analysis demonstrates that the public-policy rhetoric of the *Innocence Project* is being underwritten by statistical expressions and characterizations that collapse under the weight of intellectual scrutiny. While this does not devalue the work of representing convicted felons who have a strong case of innocence (even Judge Hoffman pointed out that such work "is incredibly important and should be celebrated..."), the weight assigned to any public policy or legislative recommendations based on such misrepresentations would seem to warrant either minimal consideration or maximum scrutiny.

### **Misinterpretation of Exoneration Data**

The statistical evidence used against forensic science was summarized in a *New York Times* editorial published on July 23, 2007. "The leading cause of wrongful convictions was erroneous identification by eyewitnesses, which occurred 79 percent of the time," wrote *Times* legal correspondent Adam Liptak. "Faulty forensic science was next, present in [57] percent of the cases."<sup>19</sup>

The eagerness of the media to harvest these troublesome figures was only magnified by the presentation that Brandon Garrett and Peter Neufeld gave to the National Academy of Sciences in September 2007. The slide show they presented was titled "Improper Use of Forensic Science in the First 200 Post-Conviction DNA Exonerations" and it relied heavily on the data generated by Garrett's research.

But even when summarizing his own research in "Judging Innocence," which was published only months after his appearance at the National Academy of Sciences, Professor Garrett clearly acknowledged that his study did not seek to quantify the *leading causes* of wrongful convictions. Instead, he simply sought to identify "the *leading types of evidence supporting* wrongful convictions [emphasis added]."<sup>20</sup> This clarification has fallen on deaf ears for reasons that have only been worsened by those in the innocence movement.

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Whatever those reasons are, suffice it to say that the public were strongly encouraged to believe that 57% of the 200 overturned convictions were caused by faulty forensic science. This is not even remotely accurate.

First, it is true that 113 or 57% of the 200 overturned convictions involved the presentation of forensic evidence against defendants during their original trials. But as will be demonstrated later, the fact that 57% of these convictions involved the use of forensic evidence does *not* mean that 57% of all wrongful convictions are caused by faulty forensic science. This erroneous interpretation seems to exemplify the kind of statistical carelessness that Judge Hoffman complained about in his *Wall Street Journal* editorial.

*Crime Lab Report* carefully studied the *Innocence Project's* case profiles for each of the first 200 DNA exonerations and tabulated the number of cases in which specific "causes" occurred. Because many of the cases have more than one cause associated with them, the combined percentages exceed 100%. The following is a breakdown of these causes ranked from highest to lowest.

CAUSES BY NUMBER AND PERCENT OF CASES Rank	% Cases	# Cases	Description
1	77%	153	Eyewitness misidentifications
2	36%	<b>71</b>	<b>Unreliable / limited science</b>
3	22%	43	False confessions
4	14%	27	Government misconduct
5	13%	<b>26</b>	<b>Forensic science misconduct</b>
6	13%	25	informant snitches
7	2%	3	Bad lawyering

These numbers come directly from the *Innocence Project's* published information on DNA exonerations, yet the only two causes pertaining to forensic science (unreliable/limited science and forensic science misconduct) account for 97 or 49% of the cases, somewhat lower than what was quoted by the *New York Times*, Brandon Garrett, and Peter Neufeld.

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The reason for this discrepancy is that 16 of the 113 cases involving forensic evidence were not labeled by Garrett and Neufeld as being problematic, suggesting that some kind of discriminating method was employed to distinguish legitimate forensic evidence from that which was actually faulty. But as *Crime Lab Report* uncovered, this was not the case. In fact, the number of cases involving actual instances of faulty forensic science is far less than the 97 cases tabulated above. And as will be demonstrated in the following section, the overall statistical weight that can be honestly assigned to faulty forensic science is very small.

### **Tabulation of Probable Systemic Failures**

Both Brandon Garret and the *Innocence Project* have incorrectly relied on counting the types of evidence used against defendants at trial and then expressing the numbers as a percentage of the total number of cases. The problem with this method is its failure to account for cases where multiple types of evidence were used against the defendant.

For example, in the case against Bruce Godschalk<sup>21</sup>, who was convicted of rape and burglary by a Pennsylvania jury in 1987, the *Innocence Project* identified five factors that contributed to the conviction:

1. false eyewitness identification
2. unreliable / limited science
3. false confession
4. government misconduct
5. bad informant/snitch

Admittedly, the serology evidence failed to exclude Godschalk, but it did not conclusively associate him either. By all accounts, the forensic testing was not faulty, just too nonspecific to support an acquittal. Any confusion that might have been introduced by this evidence, however, was dwarfed in significance and weight by the other four instances of failure that directly incriminated Godschalk.

Because five different factors are associated with the Godschalk case, proper statistical sampling does not allow for any one factor to be fully blamed for the conviction. Yet this is exactly what has happened.

*Crime Lab Report* began to correct this problem by tabulating the total number of *probable systemic failures* cited by the *Innocence Project*, which were then expressed as a percentage of the total number of instances. In doing so, a more valuable statistical model was created. The following table illustrates the resulting data:

PROBABLE SYSTEMIC FAILURES ACCORDING TO THE INNOCENCE PROJECT Rank	Percent	Number	Description
1	44%	153	Eyewitness misidentifications
2	20%	<b>71</b>	<b>Unreliable / limited science</b>
3	12%	43	False confessions
4	8%	27	Government misconduct
5	7%	<b>26</b>	<b>Forensic science misconduct</b>
6	7%	25	Informant snitches
7	1%	3	Bad lawyering
<b>348</b>			

When expressed as a percentage of the total number of instances, not cases, unreliable/limited science occurred 20% of the time while forensic science misconduct occurred only 7% of the time. Collectively, this demonstrates that even the most aggressive interpretation of the *Innocence Project's* own published data can only attribute 27% of all probable systemic failures to forensic science, a far reach from the 57% cited by the *New York Times*.

But as the research continued, the data became increasingly favorable to forensic science.

### Case Studies

*Crime Lab Report* randomly selected and examined the exonerations of Steven Avery, Kerry Kotler, Clyde Charles, William Gregory, and Bruce Godschalk. In each of these cases, forensic evidence was used by the prosecution to demonstrate guilt. As a result, they are included among the 113 cases (57%) cited by the *New York Times* as being caused by faulty forensic science. They also include the 97 (27%) instances of probable systemic failure tabulated by *Crime Lab Report*.

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But just how faulty was this evidence?

A review of each of the following cases revealed that the forensic evidence was very nonspecific and could not scientifically or exclusively justify the acquittal of the defendant; however, no indication could be found that the testimony or analyses were faulty. Brief descriptions of the scientific evidence in these cases have been quoted directly from authoritative sources.

**Steven Avery** - "He was charged with and convicted of [a] brutal attack on [a] beach in Manitowoc County, based almost entirely on eyewitness identification testimony of a single witness. The state also presented microscopic hair examination evidence indicating that a hair found on Avery was 'consistent' with the victim's hair. Avery was sentenced to 32 years in prison in March 1986."<sup>22</sup>

**Kerry Kotler** - "The prosecution based its case on several points:

- "The victim identified Kotler from a group of 500 photographs."
- "The victim identified Kotler by sight and voice from a police lineup."
- "County laboratory tests showed that Kotler had three non-DNA genetic markers (ABO, PGM, and GLO) that matched those of the semen stain left on the victim's underpants."<sup>23</sup>

**Clyde Charles** - "Clyde was tried by an all-white jury of 10 women and two men. The prosecution's evidence included the victim's identification and her testimony that the rapist called himself 'Clyde.' A criminalist testified that two Caucasian hairs on Clyde's shirt were microscopically similar (but not conclusively identical) to hair from the victim's head. The police officer testified that Clyde had been wearing a dark jogging jacket with white stripes when he saw him outside the bar, corroborating the victim's description of her assailant's dark jogging suit with stripes. The officer also testified that Clyde had been wearing a red cap and blue jacket tied around his neck when he saw him hitchhiking. A red baseball hat and blue jean jacket were found near the scene of the rape."<sup>24</sup>

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**William Gregory** - "William Gregory, an African-American, was arrested, charged, and sentenced for the attempted rape of a Caucasian woman in his apartment complex after the victim identified him in a suspect lineup. There was no other evidence in the case except for six "Negroid" head hairs discovered in pantyhose used as a mask at the crime scene. The pantyhose had been washed and hung in the victim's bathroom prior to the crime. At the 1993 trial a hair microscopist stated that the hairs could have come from Gregory, and this testimony was helpful to the prosecution."<sup>25</sup>

**Bruce Godschalk** - 'In May of 1987, Mr. Godschalk was convicted of [two] rapes and sentenced to 10 to 20 years in prison. The police had recovered semen samples from both rapes but, in 1987, did not have the DNA technology to test this evidence. Mr. Godschalk's conviction was affirmed on appeal."<sup>26</sup>

As mentioned previously, although extensive research revealed no indication that the forensic evidence in the above cases was anything but valid, each of them has been rhetorically and statistically attributed to faulty forensic science. In other words, because the evidence did not prevent the conviction, it was assumed to have been faulty.

In criminal trials, it is frequently necessary for prosecutors to present weak or limited forensic evidence against defendants. By default, physical evidence that cannot exclude a defendant as being associated with a crime is fair-game to be used as evidence of guilt, and the jury may benefit from hearing it. This demands ethical restraint and judicial vigilance to ensure that the evidence is not confused for being stronger than it actually is. Therefore, competent lawyering is a critical component in the justice system's efforts to protect the rights of defendants and the overall fairness of the adjudicative process.

### **Failure to Credit Evidence Favorable to the Defendant**

Perhaps the most startling data uncovered in *Crime Lab Report's* research was the fact that 36 out of 200 cases (18%) were identified as having forensic evidence that was actually favorable to the defendant. Various reasons account for why this evidence was either not presented at trial or

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failed to cause an acquittal, but the fact remains that these instances did not temper the *Innocence Project's* rhetoric blaming forensic science for wrongful convictions.

For example, in his research, Professor Garrett found two cases where fingerprint evidence was used against the defendants. But in a third case, the trial of Antonio Beaver, he failed to give credit to forensic scientists who, according to the *Innocence Project*, concluded that "fingerprints collected from the victim's car - including prints from the driver's side and the rearview mirror - did not match the victim or Beaver."<sup>27</sup>

To the credit of the *Innocence Project*, they do not associate Antonio Beaver's case with any questionable forensic evidence. The same, however, cannot be said for the convictions of James Ochoa, Drew Whitley, and Roy Brown. In each case, *Innocence Project* case profiles cite unreliable / limited science as being a factor contributing to the conviction despite the knowledge of exculpatory forensic results before trial.

James Ochoa, for example, was convicted of armed robbery and carjacking in 2005. Prosecutors were certain of his guilt even though DNA and fingerprint evidence excluded Ochoa prior to trial. Yet his conviction is blamed by the *Innocence Project* on unreliable / limited science and is included by Garrett and Neufeld as an example of faulty forensic science.

Drew Whitley<sup>29</sup> was convicted of murder in 1989. A laboratory technician testified that a saliva sample associated with the crime scene did not match Whitley. Yet his conviction is blamed on unreliable / limited science.

Roy Brown<sup>30</sup> was convicted of murder in 1992. A bite-mark expert retained by the defense testified during trial that six of seven bite-marks were not sufficient for analysis and that "the seventh excluded Brown because it had two more upper teeth than he had." Yet his conviction is blamed on unreliable / limited science.

Ironically, the number of such cases where forensic evidence was favorable to the defendant exceeds the total number of cases that *Crime Lab Report* found to be tainted by actual forensic science malpractice. The following section will explain how this was determined.

### Forensic Science Malpractice

As *Crime Lab Report's* research progressed into the summer of 2007, it became increasingly evident that there were significant problems with the *Innocence Project's* accounting and characterization of cases involving forensic evidence. Up to that point, the published case profiles and reports, such as the ones reviewed in the Bruce Godschalk case, revealed multiple contributing factors without appropriate weight being assigned to any of them.

Because *Crime Lab Report* was concerned only with the role of forensic science in the overturned convictions, a second review of all 200 case profiles, supplemented by news reports for many of those cases, was conducted with a focus only on the role of forensic science. As a result of this review, the 200 cases under consideration were broken down into the following categories, all specific to forensic science:

1. Conviction not supported by forensic evidence
2. Non-specific science failed to exclude the defendant
- 3. Forensic Science Malpractice**
4. Forensic evidence was favorable to the defendant

By evaluating the cases in this manner, the actual role of forensic evidence could be more clearly and constructively estimated. The following table shows how the cases ranked using this method.

THE ROLE OF FORENSIC SCIENCE - BY NUMBER AND PERCENT OF CASES	Percent	Cases	Description
Rank			
1	35%	69	Non-specific science failed to exclude the defendant
2	32%	63	Conviction was not supported by forensic evidence
3	18%	36	Forensic evidence was favorable to the defendant
<b>4</b>	<b>16%</b>	<b>32</b>	<b>Forensic science malpractice</b>
<b>200</b>			

Based upon this review, only 16% could be associated with probable instances of forensic science malpractice. But as mentioned earlier, there is a problem with this approach. Expressing systemic failures as a percentage of cases does not account for cases with multiple failures contributing to the convictions.

Therefore, *Crime Lab Report* extracted the above 32 instances of probable forensic-science malpractice and ranked them against other instances of failure identified by the *Innocence Project*. This time, the total number of failures dropped from 348 to 283 due to so many forensic-related cases having been questionably or improperly cited by the *Innocence Project* as being caused by faulty forensic evidence.

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PROBABLE SYSTEMIC FAILURES - BY NUMBER AND PERCENT Rank	Percent	Instances	Description
1	54%	153	Eyewitness misidentifications
2	15%	43	False confessions
<b>3</b>	<b>11%</b>	<b>32</b>	<b>Forensic Science Malpractice</b>
4	10%	27	Government misconduct
5	9%	25	Informant snitches
6	1%	3	Bad lawyering
<b>283</b>			

The above table provides some of the most compelling evidence that vindicates forensic science from the accusations of critics in the innocence movement. Only 11 % of all probable systemic failures identified by *Crime Lab Report* were attributed to forensic science malpractice using the available data.

For those who correctly argue that 11% is unacceptably high, the following section will demonstrate why the percentage continues to shrink in favor of forensic science.

### **Bad Lawyering and Government Misconduct**

As mentioned in the Executive Summary on the first page of this report, it was noted that the number of convictions attributed by the *Innocence Project* and Professor Garrett to bad lawyering was remarkably low, only 3 cases out of 200, or 1.1%. Government misconduct was blamed in 27 cases (14%). *Crime Lab Report's* study, however, suggests, at least preliminarily, that nearly all of the overturned convictions would have been prevented by more competent and ethical legal counsel on both sides. This finding seems to be intuitively reasonable mainly because lawyers are critical to ensuring that our criminal justice system is fair to all parties. It is also consistent with standards adopted by the American Bar Association.

Kelly Pyrek, author of [Forensic Science Under Siege](#), noted the following:

"The American Bar Association's (ABA) Model Rules of Professional Conduct outline a number of important tenets of responsibility and professional conduct for attorneys, including 'A lawyer shall provide competent representation to a client. Competent representation requires the legal

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knowledge, skill, thoroughness, and preparation reasonably necessary for the representation' and 'A lawyer shall act with reasonable diligence and promptness in representing a client.'"<sup>31</sup>

Considering the critical role that trial attorneys play before and during a criminal trial, one would expect the *Innocence Project* to identify more than three instances of bad lawyering in 200 overturned convictions.

This understatement, however, creates a massive statistical vacuum that has contributed heavily to the wrongful conviction of forensic science in the court of public opinion.

For example, if one were to estimate that 100 instances of bad lawyering are actually represented in the 200 convictions studied, it would raise the total number of systemic failures to 380 and lower the percent attributable to forensic malpractice to 8.4%.

On the other hand, if the most liberal (but not necessarily the most reasonable) interpretation is applied such that all 200 cases are assigned one instance of bad lawyering and one instance of government misconduct, it would raise the total number of systemic failures to 653 and lower the percent attributable to forensic science malpractice to only 4.9%.

These hypothetical estimates demonstrate how important it is to accurately and completely tabulate the causes of wrongful convictions before assigning a specific share of the blame to any of them. Because bad lawyering is so understated in the *Innocence Project's* data, the blame assigned to forensic science malpractice has become inflated beyond reason.

Future studies conducted with the assistance of reputable forensic science experts will hopefully look closer at the 200 overturned convictions to determine exactly how they happened and if, in fact, the 32 instances of forensic science malpractice can be fairly labeled as such. Preliminary information collected in this study strongly suggests that many are not. This includes the disturbing and tragic case against Ray Krone.

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## **The Conviction of Ray Krone**

According to *MSNBC*, it was the ultimate example of faulty forensic science - an erroneous identification reported by a prosecution expert who testified that Ray Krone, and only Ray Krone, was responsible for leaving a bite-mark on the breast of a dead woman found in a local tavern. She was a waitress and Ray Krone was a frequent patron.

With little other evidence to speak of, Krone was convicted of murder and sentenced to death by an Arizona jury. According to the *Innocence Project*, "At his 1992 trial, Krone maintained his innocence, claiming to be asleep in his bed at the time of the crime. Experts for the prosecution, however, testified that the bite-marks found on the victim's body matched the impression that Krone had made on [a Styrofoam cup] and a jury convicted him on the counts of murder and kidnapping."<sup>33</sup>

At first glance, Krone's conviction seems to be another glaring example of faulty forensic science.

Unfortunately, critical pieces of information were left out of the *Innocence Project's* case profile for Ray Krone. Prior to Krone's trial, a forensic bite-mark expert, Dr. Skip Sperber, was hired by the prosecution to examine the bite-mark evidence. Sperber concluded that Krone, in fact, did not leave the bite-mark found on the victim's breast and, according to *MSNBC*, advised prosecutors that the police "have the wrong guy."<sup>34</sup>

Apparently unhappy with Sperber's result, prosecutors took the evidence to an inexperienced local odontologist who conclusively identified Krone as leaving the bite-mark in question. The Krone case was his first, according to *MSNBC*.

As the attorney's continued to uncover problems with Krone's trial, it was learned that more conventional and scientifically respected evidence, including fingerprints and footwear impressions, had also been examined prior to trial and excluded Krone as being the contributor.

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Maricopa County Attorney Rick Romley eventually apologized for the obvious miscarriage of justice, but he conveniently passed blame for his own possible misconduct onto forensic science by suggesting that Krone's conviction was simply the result of inadequate science.

In a case that has been touted as the quintessential example of faulty forensic science, it was forensic science that got it right from the start.

It is true that bite-mark analysis is a discipline with little peer-oversight and no significant place in America's crime laboratories. But the inability of Krone's team to mount an adequate defense and the failure of prosecutors to act on the totality of forensic evidence pointing to another perpetrator should have raised the ire of the *Innocence Project* enough to convince them that bad lawyering and government misconduct were the primary causes of Krone's wrongful conviction. But for reasons that are difficult to understand, the *Innocence Project* case profile for Ray Krone<sup>35</sup> failed to emphasize government misconduct or bad lawyering as factors contributing to Krone's conviction.

### **Closing Arguments**

The leading causes of wrongful convictions are false eyewitness identifications exacerbated by bad lawyering, and in some cases, government misconduct. As a total percentage of all systemic failures contributing to wrongful convictions, faulty forensic science comprises a small percentage. But more importantly, this percentage decreases considerably as stricter and more controlled methods are employed to analyze the available exoneration data. More work should be done in this regard.

In the meantime, the compiled data and information studied by *Crime Lab Report* demonstrate faulty and incomplete statistics magnified by rhetorical misrepresentations on the part of innocence advocates and the media. These misrepresentations have come to bear heavily on the profession of forensic science, which is not accustomed to withstanding sustained attacks from well-funded activists. Forensic scientists are simply too busy. For this reason, the profession is vulnerable to being bullied.

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The case of Ray Krone is among the most disturbing in terms of the blame unfairly placed on forensic science and the turmoil that Krone endured as a result of government misconduct, bad lawyering, or possibly both. But the cases of Steven Avery, Antonio Beaver, Clyde Charles, William Gregory, Kerry Kotler, and Bruce Godschalk tell a story of their own, and they all raise very serious questions about the lengths to which the innocence movement is willing to go in carrying out its public policy and legislative efforts.

The authors hope that this report is subjected to fair and rigorous scrutiny. But whatever the outcome, all stakeholders should be reminded that any public policy agenda being advanced with exaggerations and mischaracterizations, whether intentionally fabricated or not, should be subjected to equally rigorous scrutiny or rejected entirely.

#### **AUTHORS' COMMENTS & PUBLIC POLICY CONSIDERATIONS**

While this study seems to defend the profession of forensic science, the authors recognize that it is very good practice for trial lawyers, judges, and juries to look cautiously, and sometimes skeptically, at the testimony of subject-matter experts. This means that expert conclusions and associated testimony should always be subjected to a level of scrutiny that is commensurate with the seriousness of the matter at hand. Consequently, the adversarial system of justice in the United States places a tremendous responsibility on lawyers and judges to be vigilant, honest, and fair.

It remains a mystery as to why the *Innocence Project* only identified 3 instances of bad lawyering in the 200 cases studied. Even a cursory review of the case profiles shows ample evidence to demonstrate how pervasive and obvious the problem actually was. Even the 27 cases cited as involving government misconduct was probably much too low. That the *Innocence Project's* public policy efforts focus so intently on forensic science would leave a reasonable person to suspect that forensic science is simply a more attractive target, not because it is justified, but because the fight attracts more attention.

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The *Innocence Project* needs attention and money to drive its public policy agenda. In the age of *CSI*, *New Detectives*, *Cold Case Files*, and *Crossing Jordan*, taking on crime laboratories will turn heads more quickly than esoteric procedural debates among litigators.

The major public policy question that this study hoped to answer was whether or not governmental oversight of crime laboratories is statistically and economically justified. The opinion held by many in the innocence movement is that such oversight is needed however, this opinion depends on two assumptions that were invalidated by this study:

1. That forensic science malpractice is a leading cause of wrongful convictions.
2. That crime laboratory accreditation fails on its own to provide the structure and accountability necessary to minimize the occurrences of forensic science malpractice.

*Crime Lab Report* found only one case involving forensic science malpractice in an accredited laboratory; however, it was a false exclusion of a rape victim's husband as being the contributor of semen found on a rape-kit swab and bedding from the victim's home. The error did not directly incriminate the defendant and appeared to be completely unintentional. Also, the incident occurred in 1988 when crime laboratory accreditation was in its infancy.<sup>36</sup>

In fact, 74% of the 200 overturned convictions occurred before 1990. Since then, accreditation has grown in scope and complexity. Of all laboratories currently accredited by the American Society of Crime Laboratory Directors / Laboratory Accreditation Board (ASCLD/LAB), 73% achieved accreditation for the first time after 1992.<sup>37</sup> While accreditation is not a promise of perfection, it enforces a kind of professional accountability and transparency that has benefited all stakeholders of forensic science for over 25 years.

Peter Marone is the Chairman of the *Consortium of Forensic Science Organizations (CFSO)*. On April 10, 2008, he testified before the United States House Subcommittee on Crime, Terrorism, and Homeland Security. In his comments, Marone warned of the problems that state oversight commissions can present;

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"Many laboratories, if asked, will state that their oversight is provided by the accrediting body under which they operate. Some people would say that this is the fox guarding the hen house and there is something inherently wrong with this process. However every other oversight board, whether it be commercial, medical, legislative or the legal, has oversight bodies which are comprised of the practitioners in that profession. It makes sense that the most knowledgeable individuals about a particular topic would come from that discipline. But that does not seem to meet the current needs. The key to appropriate and proper oversight is to have individuals representing the stakeholders, but that these individuals must be there for the right reason, to provide the best possible scientific analysis. There cannot be any room for preconceived positions and agenda driven positions. Unfortunately, we have seen this occur in some States."

Critics of accreditation, including Peter Neufeld, have argued that accreditation cannot be trusted because it calls for laboratories to be inspected by other forensic experts - a kind of self-regulation that supposedly fails to establish the oversight necessary to ensure that laboratories are held to account.

What these critics fail to recognize is what the authors term the "economy of accreditation," where a pool of specially trained and monitored assessors have a strong incentive to be brutally thorough and objective during their inspection of a laboratory. The very reputations of the assessors, the likelihood that they will be allowed to participate in future inspections, and the desire to make good use of their valuable time (usually requiring several days away from home and work) are all compromised by failing to conduct a comprehensive and rigorous inspection. It is this economy of incentives that ensures the effectiveness of professional peer-based accreditation, and is why it is used so frequently and successfully in other industries.

But peer-assessors also have another incentive to hold a laboratory accountable for compliance to accreditation standards. A laboratory that fails to do good work damages the reputation, fairly or not, of everyone who calls themselves a forensic scientist. No competent and thoughtful assessor is willing to tolerate that.

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## **ABOUT THE AUTHORS**

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For more information about data tabulated for this study, please visit the *Crime Lab Report* library at [www.crimelabreport.com](http://www.crimelabreport.com)

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<sup>F</sup> The Commission recommends that the Oklahoma Court of Criminal Appeals submit the following instruction to the Uniform Jury Instruction Committee for adoption.

## **SUGGESTED REPLACEMENT OF JURY INSTRUCTION OUJI-CR-9-19 EVIDENCE – EYEWITNESS IDENTIFICATIONS**

The State must prove the identity of the defendant as the person who committed the crime charged beyond a reasonable doubt. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime charged, you must find the defendant not guilty.

Identification testimony is, in essence, the expression of an opinion or a belief by the witness. In judging the identification testimony of any witness, you should carefully consider, at least, the following factors:

1. Whether the witness had the capacity and an adequate opportunity to observe the offender considering such things as how long or short a time was available, how far away or close the witness was, whether the offender used a disguise, how good were lighting conditions, the level of stress upon the witness, and whether the witness had previously seen or known the person;

2. Whether the identification made by the witness after the offense was based on his own recollection and whether the witness is positive in the identification; To answer this question, you may consider such things as his prior description of the offender and whether his description was specific or general in nature; You may also consider the circumstances surrounding the identification made by the witness such as, was it made by pointing out the defendant from a group of similar individuals or from a presentation of the defendant alone to the witness; You should also consider whether occurrences between the time of the offense and the identification made by the witness affected the witness's recollection of the offender and the witness's level of confidence in the identification;

3. Whether the witness has failed to identify the defendant on a prior opportunity or has the witness identified someone else as the person who committed the offense charged; and

4. Whether the witness's prior description of the person/thing was accurate.

Eyewitness identifications are to be scrutinized with extreme care. The possibility of human error or mistake and the probable likeness or similarity of objects and persons are circumstances that you must consider in weighing testimony as to identity. If, after examining all of the evidence, you have a reasonable doubt as to whether the defendant was the individual who committed the crime charged, you must find the defendant not guilty.

Authority:

OUJI-CR-9-19 with modifications;

Federal Jury Practice and Instructions, Criminal, Sixth Edition, O'Malley, Grenig, and Lee, Section 14.10, Eyewitness Identification of the Defendant, with modifications;

*Perry v. New Hampshire*, 132 S.Ct. 716, 729, 181 L.Ed.2d 694 (2012) (“Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence.”)

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*State of New Jersey v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011).

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**<sup>G</sup> PROPOSED DNA STATUTE**

**AN ACT CONCERNING ACCESS TO POST-CONVICTION DNA TESTING**

**Section 1. Title.**

This Act shall be known and may be cited as the Post-Conviction DNA Act.

**Section 2. Legislative Purpose.**

The Legislature finds that:

- (a) emerging DNA testing technologies can enhance the quality of justice;
- (b) the scientifically reliable results of DNA testing provide the certainty and finality that bolster the public's trust in Oklahoma's criminal justice system; and
- (c) in addition to the wrongfully convicted and their families, the victims of crime, law enforcement, prosecutors, courts and the public are harmed whenever individuals who are guilty of crimes elude justice while innocent individuals are imprisoned for crimes they did not commit.

THEREFORE, Oklahoma must enhance its procedures for considering post-conviction DNA testing so that all credible claims of innocence based on newly discovered evidence can be properly evaluated.

**Section 3. Definitions.**

As used in this Act:

- (a) "DNA" means deoxyribonucleic acid;
- (b) "biological material" means the contents of a sexual assault evidence collection kit as well as any item that contains or includes blood, semen, hair, saliva, skin tissue, fingernail scrapings or parings, bone, bodily fluids, or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense and that may be suitable for forensic DNA testing. This definition applies whether the material was catalogued separately (e.g. on a swab or slide) or is present on other evidence (e.g. on bedding or drinking cups); and
- (c) "document" or "documents" means any tangible thing upon which any expression, communication or representation has been recorded by any means, and includes any writing (including electronic), recording, drawing, map, graph or

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chart, photograph, and other data compilation in the actual or constructive possession, custody, care or control of the government, which pertains directly or indirectly to any matter relevant to the issues in this action.

- (d) “guardian of a convicted person” means a person who is the legal guardian of the convicted person, whether the legal relationship exists because of the age of the convicted person or because of the physical or mental incompetency of the convicted person.

#### **Section 4. Motion for Post-Conviction DNA Testing**

A. Notwithstanding any other provision of law concerning post-conviction relief, a person convicted of a crime who asserts he did not commit that crime may at any time file a motion in the sentencing court requesting forensic DNA testing of any biological material secured in the investigation or prosecution attendant to the challenged conviction. Persons eligible for testing shall include any and all of the following:

- (1) persons currently incarcerated; civilly committed; on parole or probation; or subject to sex offender registration;
- (2) persons convicted on a plea of not guilty, guilty or *nolo contendere*;
- (3) persons deemed to have provided a confession or admission related to the crime, either before or after conviction; and
- (4) persons who have discharged their sentences.

B. A convicted person may request forensic DNA testing of any biological material secured in the investigation or prosecution attendant to his conviction that:

- (1) was not previously subjected to DNA testing; or
- (2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

C. The motion shall be accompanied by an affidavit sworn to by the convicted person containing Statements of fact in support of the motion.

D. On receipt of the motion, the sentencing court shall provide the attorney representing the State with a copy of the motion and require the attorney representing the State to file a response within sixty (60) days of receipt of service, or longer upon good cause shown.

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The response shall include an inventory of all the evidence related to the case, including the custodian(s) of such evidence.

E. A guardian of a convicted person may submit motions for the convicted person under this act and is entitled to counsel otherwise provided to a convicted person under this act.

**Section 5. Counsel.**

A. The sentencing court may appoint counsel for an indigent convicted person at any time during proceedings under this Act.

B. The sentencing court, in its discretion, may refer *pro se* requests for DNA testing to qualified parties willing to accept the referrals for further review, without appointing the parties as counsel at that time. Such qualified parties may include, but shall not be limited to, indigent defense organizations or clinical legal education programs. If the results of the DNA testing are favorable to the convicted person, then the court shall appoint counsel.

**Section 6. Hearing on Motion.**

A. After the filing of the motion and the response, the sentencing court shall hold a hearing to determine whether DNA forensic testing will be ordered. A court may order DNA testing only if it finds:

- (1) a reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution; and
- (2) the application for testing is made to demonstrate the innocence of the convicted person and is not made to unreasonably delay the execution of sentence or the administration of justice; and
- (3) one or more of the item(s) of evidence the convicted person seeks to have tested still exists; and
- (4) the evidence to be tested was secured in relation to the challenged conviction and either was not previously subject to DNA testing or, if it was previously DNA tested, can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results; and
- (5) the chain of custody of the evidence to be tested is sufficient to establish that it has not been substituted, tampered with, replaced or altered in any material

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respect, or, if the chain of custody does not establish the integrity of the evidence, the testing itself has the potential to establish the integrity of the evidence. For the purposes of this Act, evidence that has been in the custody of law enforcement, other government officials or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement of this subsection, absent specific evidence of material tampering, replacement or alteration.

B. If, at the close of the hearing, the court orders DNA forensic testing to be conducted, the court by written Order shall require the attorney representing the State to effect the transfer of the item(s) of evidence to be tested along with any documents, logs or reports relating to all items of physical evidence collected in connection with the case to the designated laboratory or laboratories within thirty (30) days. In addition, the court shall require the attorney representing the State to assist the movant in locating any evidence the State contends was lost or destroyed or the State contends is in the possession of any other government entity or a public or private hospital, laboratory or other facility

C. If the prosecution or the movant previously conducted any DNA analysis or other biological-evidence testing without knowledge of the other party, such testing shall be revealed in the motion for testing or response.

D. The court may order DNA testing to be performed by the Oklahoma State Bureau of Investigation (OSBI), an accredited laboratory operating under contract with the OSBI, or another accredited laboratory, as defined in Section 150.37 of Title 74 of the Oklahoma Statutes. If the OSBI or an accredited laboratory under contract with the OSBI conducts the testing, the State shall bear the costs of the testing. If another laboratory conducts the testing because neither the OSBI nor an accredited laboratory under contract with the OSBI has the ability or the resources to conduct the type of DNA testing to be performed, or if an accredited laboratory that is neither the OSBI nor under contract with the OSBI is chosen for some other reason, then the court may require either the movant or the State to pay for the testing as the interests of justice require.

E. The results of any post-conviction DNA testing conducted under this Act, including any laboratory reports prepared in connection with that testing, and in the discretion of

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the court, the underlying data or other laboratory documents, shall be disclosed to the prosecution, the movant and the court.

F. If an accredited laboratory other than the OSBI or one under contract with the OSBI performs the DNA testing, the court shall impose reasonable conditions on the testing to protect the parties' interests in the integrity of the evidence and the testing process and to preserve the evidence to the greatest extent possible.

**Section 7. Procedure After Testing.**

A. If the results of the forensic DNA testing conducted under this act are favorable to the movant, the court shall schedule a hearing to determine the appropriate relief to be granted. Based on the results of the testing and any other evidence presented at the hearing, the court shall thereafter enter any order that serves the interests of justice, including any of the following:

- (1) an order setting aside or vacating the movant's judgment of conviction, judgment of not guilty by reason of mental disease or defect or adjudication of delinquency;
- (2) an order granting the movant a new trial or fact-finding hearing;
- (3) an order granting the movant a new commitment hearing or dispositional hearing;
- (4) an order discharging the movant from custody;
- (5) an order specifying the disposition of any evidence that remains after the completion of the testing;
- (6) an order granting the movant additional discovery on matters related to DNA test results on the conviction or sentence under attack, including but not limited to, documents pertaining to the original criminal investigation or the identities of other suspects; and
- (7) an order directing the State to place any unidentified DNA profile(s) obtained from post-conviction DNA testing into Oklahoma and/or federal databases as allowed within applicable State and federal laws.

B. If the results of the tests are not favorable to the movant, the court:

- (1) shall dismiss the Motion; and
- (2) may make such further orders as it deems appropriate, including those that:

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- (a) provide that the parole board or probation department be notified of the test results; and
  - (b) request that the movant's DNA profile be added to the Oklahoma convicted offender database as allowed by Oklahoma law.

**Section 8. Consent.**

A. Nothing in this act shall prohibit a convicted person and the State from consenting to and conducting post-conviction DNA testing by agreement of the parties, without filing a motion for post-conviction DNA testing under this act.

B. Notwithstanding any other provision of law governing post-conviction relief, if DNA test results are obtained under testing conducted upon consent of the parties that are favorable to the convicted person, the convicted person may file and the court shall adjudicate a motion for post-conviction relief based on the DNA test results under Section 7 of this act.

**Section 9. Appeal.**

An appeal under this Act may be taken in the same manner as any other appeal.

**Section 10. Effective Date.**

This Act shall take effect on \_\_\_\_\_, 2013.

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<sup>H</sup> **OKLAHOMA INNOCENCE COLLABORATION ACT**

ENGROSSED HOUSE  
BILL NO. 2652

By: Denney, Billy, McDaniel (Jeanie),  
Shelton and Nollan of the House

and

Halligan of the Senate

An Act relating to criminal procedure; providing short title; creating the Oklahoma Innocence Collaboration Program; stating duration of program; defining terms; creating program within the Oklahoma State Bureau of Investigation; authorizing Bureau to collaborate with public and private entities; stating purpose of program; authorizing Bureau to accept or decline requests for forensic testing; providing measures for testing physical evidence; directing law enforcement agencies to provide certain records; providing for the confidentiality of records; exempting records from the Oklahoma Open Records Act; providing compensation for the search and copy of records; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

**SECTION Main Document Only.. NEW LAW** A new section of law to be codified in the Oklahoma Statutes as Section 1373 of Title 22, unless there is created a duplication in numbering, reads as follows:

A. Sections 1 through 3 of this act shall be known and may be cited as the "Oklahoma Innocence Collaboration Act".

B. There is hereby created the Oklahoma Innocence Collaboration Program to continue until July 1, 2018.

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**SECTION Main Document Only.. NEW LAW** A new section of law to be codified in the Oklahoma Statutes as Section 1373.1 of Title 22, unless there is created a duplication in numbering, reads as follows:

As used in this section:

1. “Collaboration project participants” means a public or private higher education institution or agency within Oklahoma deemed appropriate by the Oklahoma State Bureau of Investigation to investigate, consult and screen scientific evidence that may conclusively prove that a person convicted of and presently incarcerated on a felony offense upon which the forensic testing is sought is factually innocent;

2. “Forensic laboratory” means a laboratory operated by the Oklahoma State Bureau of Investigation, the Federal Bureau of Investigation, or a privately owned laboratory whose experts perform forensic tests and provide expert opinion testimony in a court of law;

3. “Forensic testing” means a medical, chemical, toxicological, ballistics, or other expert examination or test performed on physical evidence, including deoxyribonucleic acid (DNA) evidence to determine the association of evidence to a crime;

4. “Physical evidence” means a tangible object or substance related to a crime; and

5. “Law enforcement agency” means a state, local or municipal agency that arrests, detains or investigates criminal cases.

**SECTION Main Document Only.. NEW LAW** A new section of law to be codified in the Oklahoma Statutes as Section 1373.2 of Title 22, unless there is created a duplication in numbering, reads as follows:

A. The Oklahoma Innocence Collaboration Program shall be created within the Oklahoma State Bureau of Investigation. The Bureau is hereby authorized to collaborate with appropriate

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public or private higher education institutions, law enforcement agencies, and forensic laboratories to investigate, consult and screen scientific evidence that may conclusively prove that a person convicted of and presently incarcerated on a felony offense upon which the forensic testing is sought is factually innocent. Factual innocence requires the defendant to establish that no reasonable jury would have found the defendant guilty in light of the results of the new evidence.

B. Upon request of a collaborative partner, the Oklahoma State Bureau of Investigation is authorized to perform the necessary forensic testing of physical and biological evidence requested by collaboration project participants to determine whether such evidence of factual innocence exists. The Bureau may decline for any reason, at the discretion of the Bureau, a request to perform the forensic testing.

C. Any type of forensic testing available to the Oklahoma State Bureau of Investigation may be used by the Oklahoma Innocence Collaboration Program to accomplish the purposes of this act. When forensic analysis will consume the physical evidence collected, the following measures shall be taken:

1. Samples must be of sufficient quantity to allow testing by both the prosecution and the defense;
2. Neither the prosecution nor defense shall consume the entire sample in testing in the absence of a court order or agreement by both parties allowing the sample to be entirely consumed in testing;
3. When permissible, deoxyribonucleic acid (DNA) profiles obtained as a result of testing performed pursuant to this act shall be entered into the OSBI Combined DNA Index System

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(CODIS) Database as established pursuant to the provisions of Section 150.27a of Title 74 of the Oklahoma Statutes; and

4. Nothing in this act shall require any person other than the person seeking assistance of the Oklahoma Innocence Collaboration Program to provide a sample from his or her body for purposes of forensic testing.

D. All municipal, county, and state law enforcement agencies or the Office of the Chief Medical Examiner shall provide copies to collaboration project participants of the Oklahoma Innocence Collaboration Program of forensic laboratory examination records or other law enforcement investigative records regarding cases accepted for investigation by the Oklahoma Innocence Collaboration Program. The records shall be confidential and shall not be subject to the provisions of the Oklahoma Open Records Act. The records shall be used only for investigating, screening, and presenting claims of factual innocence. The collaboration project participants of the Oklahoma Innocence Collaboration Program requesting such records shall compensate the agency that provides the records in accordance with the fees set forth in the Oklahoma Open Records Act for any search and copy costs.

**SECTION Main Document Only..** This act shall become effective November 1, 2012.

Passed the House of Representatives the 7th day of March, 2012.

Presiding Officer of the House of Representatives

Passed the Senate the \_\_\_\_ day of \_\_\_\_\_, 2012.

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Presiding Officer of the Senate



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<sup>1</sup> **PROPOSED AMENDMENT TO OUJI-CR 9-43A (amended language is in bold)**

1. EVIDENCE - JAILHOUSE INFORMANT TESTIMONY

The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider:

- (1) whether the witness has received, **been offered, or reasonably expects** anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony;
- (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement;
- (3) whether the informant has ever changed his or her testimony;
- (4) the criminal history of the informant; and
- (5) any other evidence relevant to the informer's credibility.

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<sup>J</sup> **PROPOSED STATUTORY LANGUAGE (proposed language is in bold):**

Title 22, Section 2002:

A. Disclosure of Evidence by the State.

1. Upon request of the defense, the state shall be required to disclose the following:

- a. the names and addresses of witnesses which the state intends to call at trial, together with their relevant, written or recorded statement, if any, or if none, significant summaries of any oral statement,
- b. law enforcement reports made in connection with the particular case,
- c. any written or recorded statements and the substance of any oral statements made by the accused or made by a codefendant,
- d. any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons,
- e. any books, papers, documents, photographs, tangible objects, buildings or places which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused,
- f. any record of prior criminal convictions of the defendant, or of any codefendant, and
- g. Oklahoma State Bureau of Investigation (OSBI) rap sheet/records check on any witness listed by the state or the defense as a witness who will testify at trial, as well as any convictions of any witness revealed through additional record checks if the defense has furnished social security numbers or date of birth for their witnesses, except OSBI rap sheet/record checks shall not provide date of birth, social security number, home phone number or address.

2. The state shall provide the defendant any evidence favorable **or potentially favorable** to the defendant if such evidence is material to either guilt or punishment. **A written record shall be kept by the state of all evidence favorable to the defendant which is provided.**

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3. The prosecuting attorney's obligations under this standard extend to:

- a. material and information in the possession or control of members of the prosecutor's staff,
- b. any information in the possession of law enforcement agencies that regularly report to the prosecutor of which the prosecutor should reasonably know, and
- c. any information in the possession of law enforcement agencies who have reported to the prosecutor with reference to the particular case of which the prosecutor should reasonably know.

**4. In the event the state intends to present testimony of a jailhouse informant, the state shall provide the defendant, in writing or recorded statement:**

- a. the complete criminal history of the informant;**
- b. any deal, promise, inducement, or benefit that the offering party has made or may make in the future to the informant;**
- c. the specific statements made by the defendant and the time, place, and manner of their disclosure;**
- d. all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement;**
- e. whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and**
- f. any other information relevant to the informant's credibility.**

**If the informant's testimony is discovered within ten days or during trial, defendant should be allowed such time to review such information as the court deems necessary and reasonable.**

B. Disclosure of Evidence by the Defendant.

1. Upon request of the state, the defense shall be required to disclose the following:

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- a. the names and addresses of witnesses which the defense intends to call at trial, together with their relevant, written or recorded statement, if any, or if none, significant summaries of any oral statement,
  - b. the name and address of any witness, other than the defendant, who will be called to show that the defendant was not present at the time and place specified in the information or indictment, together with the witness' statement to that fact,
  - c. the names and addresses of any witness the defendant will call, other than himself, for testimony relating to any mental disease, mental defect, or other condition bearing upon his mental state at the time the offense was allegedly committed, together with the witness' statement of that fact, if the statement is redacted by the court to preclude disclosure of privileged communication.

2. A statement filed under subparagraph a, b or c of paragraph 1 of subsection A or B of this section is not admissible in evidence at trial. Information obtained as a result of a statement filed under subsection A or B of this section is not admissible in evidence at trial except to refute the testimony of a witness whose identity subsection A of this section requires to be disclosed.

3. Upon the prosecuting attorney's request after the time set by the court, the defendant shall allow him access at any reasonable times and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made upon any book, paper, document, photograph, or tangible object which is within the defendant's possession or control and which:

- a. the defendant intends to offer in evidence, except to the extent that it contains any communication of the defendant, or
- b. is a report or statement as to a physical or mental examination or scientific test or experiment made in connection with the particular case prepared by and relating to the anticipated testimony of a person whom the defendant intends to call as a witness, provided the report or statement is redacted by the court to preclude disclosure of privileged communication.

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C. Continuing Duty to Disclose.

If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under the Oklahoma Criminal Discovery Code, such party shall promptly notify the other party, the attorney of the other party, or the court of the existence of the additional evidence or material.

D. Time of Discovery.

Motions for discovery may be made at the time of the district court arraignment or thereafter; provided that requests for police reports may be made subject to the provisions of Section 258 of this title. However, a request pursuant to Section 258 of this title shall be subject to the discretion of the district attorney. All issues relating to discovery, except as otherwise provided, will be completed at least ten (10) days prior to trial. The court may specify the time, place and manner of making the discovery and may prescribe such terms and conditions as are just.

E. Regulation of Discovery.

1. Protective and Modifying Orders. Upon motion of the state or defendant, the court may at any time order that specified disclosures be restricted, or make any other protective order. If the court enters an order restricting specified disclosures, the entire text of the material restricted shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

2. Failure to Comply with a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

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3. The discovery order shall not include discovery of legal work product of either attorney which is deemed to include legal research or those portions of records, correspondence, reports, or memoranda which are only the opinions, theories, or conclusions of the attorney or the attorney's legal staff.

F. Reasonable cost of copying, duplicating, videotaping, developing or any other cost associated with this Code for items requested shall be paid by the party so requesting; however, any item which was obtained from the defendant by the state of which copies are requested by the defendant shall be paid by the state. Provided, if the court determines the defendant is indigent and without funds to pay the cost of reproduction of the required items, the cost shall be paid by the Indigent Defender System, unless otherwise provided by law.

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<sup>K</sup> **PROPOSED STATUTORY LANGUAGE**

**Qualifications Required for Counsel for Defendants in Capital Cases**

- A. Generally.** Every attorney representing a defendant charged with crimes referenced in 21 O.S. § 13.1 shall provide competent representation as required by Rule 1.1 of the Oklahoma Rules of Professional Conduct. Every attorney representing a defendant charged with crimes referenced in 21 O.S. § 13.1 shall have the following:
1. Demonstrated commitment to providing high quality legal representation in the defense of crimes referenced in 21 O.S. § 13.1;
  2. Substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing crimes referenced in 21 O.S. § 13.1;
  3. Skill in the management and conduct of complex negotiations and litigation;
  4. Skill in legal research, analysis, and the drafting of litigation documents;
  5. Skill in oral advocacy;
  6. Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, arson, forensic pathology, and DNA evidence;
  7. Skill in the procedural requirements for the introduction of expert testimony and forensic evidence, including fingerprints, ballistics, arson, forensic pathology, and DNA;
  8. Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
  9. Skill in the investigation, preparation, and presentation of mitigating evidence; and
  10. Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

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**B. In addition,** every attorney representing a capital defendant shall have attended and successfully completed, within two years prior to the initial appointment, at least twelve hours of relevant training or educational programs in the area of capital defense litigation.

## MINORITY REPORT

The primary responsibility of any prosecutor or prosecutors' office is to seek justice. *See* Standard 1-1.1 of the National District Attorneys Association, *National Prosecution Standards* (3d ed. 2009). This duty includes ensuring the correct offender is convicted. To that end, the District Attorneys Council (DAC) and the Office of Attorney General (AG) wholly support the ultimate goal of the Justice Commission; however, we respectfully dissent to the Commission's recommendations with regard to False Confessions.

Although the DAC and the AG concur the best practice is that all custodial interrogations be videotaped, such agencies strongly object to creating a presumption of inadmissibility when such interrogations are not recorded. A presumption of inadmissibility is the equivalent of a presumption of coercion or involuntariness. The fact that the police did not record a confession does not mean that the confession was coerced. Such a presumption of coercion demonstrates a lack of respect and confidence in our State's hardworking and dedicated law enforcement officers.

Further, such a presumption of involuntariness is inconsistent with prevailing authority. Under existing law, a statement is voluntary "only when 'it is the product of an essentially free and unconstrained choice by its maker.'" *Young v. State*, 191 P.3d 601, 607 (Okla. Crim. App. 2008) (quoting *Young v. State*, 670 P.2d 591, 594 (Okla. Crim. App. 1983), citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)). Currently, when a statement is obtained during an interrogation the accused has the right to request a hearing, known as a *Jackson v. Denno* hearing, to determine the voluntariness and thus, the admissibility of such statement. The burden of proving that the statement is voluntary rests with the prosecution. The prosecution must prove, by a preponderance of the evidence, that the challenged statement was voluntary. *See Young v. State*, 191 P.3d 601, 607 (Okla. Crim. App. 2008); *Knighon v. State*, 912 P.2d 878, 887 (Okla. Crim. App. 1996); *Hawkins v. State*, 891 P.2d 586, 594 (Okla. Crim. App. 1994). In making its determination of admissibility, a trial court must base its conclusion upon the totality of the circumstances, without giving presumptive weight to any single factor, such as a failure to record.

Additionally, a *Jackson v. Denno* hearing is not required unless the voluntariness of the statement is challenged by the accused *Lambert v. State*, 984 P.2d 221, 238 (Okla. Crim. App. 1999). If a presumption of inadmissibility exists, a *Jackson v. Denno* hearing will need to be held in each and every case in which a statement from an accused is offered as evidence. Further, if a hearing is not held and the issue of admissibility/voluntariness is raised on appeal, the presumption will exist with no ability to overcome the presumption. This could result in the needless reversal of many just and proper convictions.

The better course of action is to remain consistent with current practice which places the burden on the prosecution to prove the admissibility of a statement, if challenged. A presumption of inadmissibility is simply disrespectful, inconsistent with prevailing authority, and unnecessary.

## **CHAIRMAN'S COMMENTS IN RESPONSE TO MINORITY REPORT**

There was considerable discussion in several Commission meetings about the language in this section. While there was unanimity or near unanimity that interrogations for serious offenses should be video recorded, there was a divergence of opinion as to what the remedy should be if they were not, and as to what exceptions there should be to the rule.

We discussed whether there should be a presumption of involuntariness if the statement is not video recorded, but that did not seem to cover the range of problems associated with false confessions. Ultimately a majority of the Commission opted for the language complained of in the Minority Report; that there should be a presumption of inadmissibility, with a range of factors that would rebut that presumption.

The majority felt that this should be no different than a failure to give a Miranda warning. Failure to "mirandize" a suspect typically renders any statement inadmissible. That presumption can be overcome by the prosecution by citing circumstances to negate that presumption: e.g., that the statement was spontaneous and not the product of questioning; that the suspect was not in custody. Prosecutors deal with the same situation when there are warrantless searches. The rule is that any evidence obtained would be inadmissible unless the prosecution can cite circumstances to negate the presumption: e.g., that the search was with consent; that there was an imminent threat of bodily harm; that evidence was being destroyed.

Perhaps the most common example that prosecutors deal with every day is hearsay. The rule says hearsay (a statement from someone other than the declarant, offered to prove the truth of the matter contained therein) is not admissible, but there are numerous exceptions to the rule and a simple matter to introduce the evidence if an exception can be shown.

It was the feeling of the Commission that the POTENTIAL for exclusion of the statements will provide a great impetus for the law enforcement community to adopt the recommendation. It was also the strong feeling of the Commission, shared even by the drafters of this Minority Report, that video recording was the better practice and would, if it became the general practice, reduce the number of false confessions. By accomplishing that, we increase the efficacy of law enforcement and the arrest and prosecution of the truly guilty.