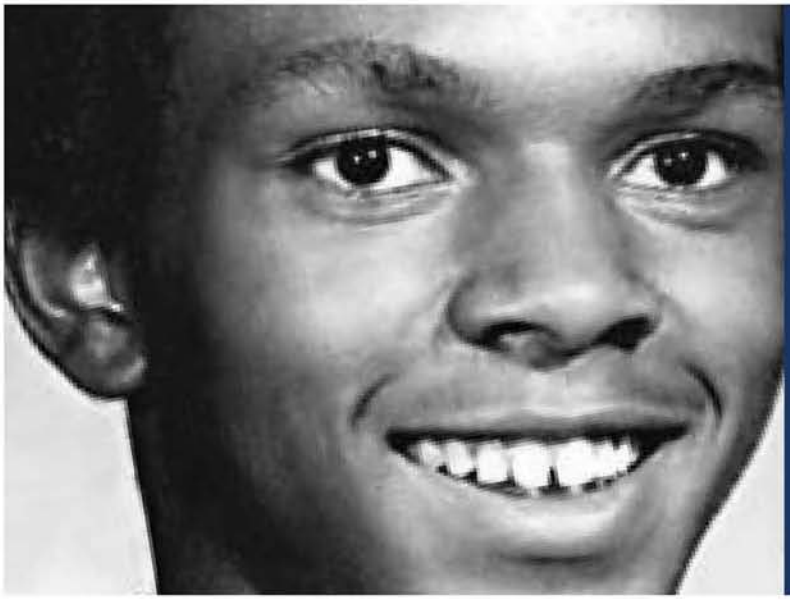

AUGUST 2010

Timothy Cole Advisory Panel on Wrongful Convictions

Report to the Texas Task Force on Indigent Defense

Timothy Cole Advisory Panel on Wrongful Convictions

Membership

The Honorable John Whitmire
Chair, Criminal Justice Committee

The Honorable Jeff Wentworth
Chair, Jurisprudence Committee

The Honorable Jim McReynolds
Chair, Corrections Committee

The Honorable Pete Gallego
Chair, Criminal Jurisprudence

Ms. Kathryn M. Kase
Texas Criminal Defense Lawyers Association

The Honorable Barry Macha
President, Texas District and County
Attorneys Association

The Honorable Barbara Hervey
Judge, Court of Criminal Appeals

Prof. Sandra Guerra Thompson
University of Houston Law Center

Ms. Mary Anne Wiley
Deputy General Counsel
Office of the Governor

Mr. James D. Bethke
Director, Task Force on Indigent Defense

Chief James McLaughlin
Executive Director and General Counsel
Texas Police Chiefs Association

Timothy Cole Advisory Panel on Wrongful Convictions
Summary Panel Recommendation

The Panel recommends that the State of Texas should:

Eyewitness Identification Procedures:

1. Require Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to work with scientific experts in eyewitness memory research and law enforcement agencies to develop, adopt, disseminate to all law enforcement agencies, and annually review a model policy and training materials regarding the administration of photo and live lineups. That model policy should comport with science in the areas of cautionary instructions, filler selection, double-blind administration, documentation of identification procedures, and other procedures or best practices supported by credible research.
2. Require all law enforcement agencies to adopt eyewitness identification procedures that comply with the model policy promulgated by LEMIT.
3. Integrate training on eyewitness identification procedures into the required curricula of the LEMIT and the Texas Commission on Law Enforcement Standards and Education (TCLEOSE).
4. Permit evidence of compliance or noncompliance with the model policy to be admissible in court.
5. Allow law enforcement agencies discretion on the adoption of sequential procedures.

Recording Custodial Interrogations:

6. Adopt a mandatory electronic recording policy, from delivery of *Miranda* warnings to the end, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.

Discovery Procedures:

7. Adopt a discovery policy that is mandatory, automatic, and reciprocal, and requires either electronic access to or photocopies of materials subject to discovery.

Post-Conviction Proceedings:

8. Amend the Chapter 64 motion for post-conviction DNA testing to allow testing of any previously untested biological evidence, regardless of the reason the evidence was not previously tested, or evidence previously tested using older, less accurate methods.
9. Amend the Chapter 11 writs of habeas corpus to include a writ based on changing scientific evidence.

Innocence Commission:

10. Formalize the current work of the innocence projects that receive state funding to provide further detail in the projects' annual reports and distribute those reports to the Governor, Lieutenant Governor, Speaker of the House, and Chairs of the Senate Jurisprudence, House Corrections, House Criminal Jurisprudence and Senate Criminal Justice Committees. Report input should be solicited from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations.
11. Provide an FTE for the Task Force using the current appropriation or other grant funding to administer these responsibilities, and contracts between the innocence projects and the Task Force on Indigent Defense should be amended to reflect the new administrator and additional responsibilities.

Acknowledgements

The Timothy Cole Advisory Panel on Wrongful Convictions expresses sincere thanks and gratitude to the members of the Cole family, in particular Ms. Ruby Cole Session and Mr. Cory Session, for their grace, courage, and dedication to a cause for which they did not volunteer.

The Panel also thanks Mr. Steven Phillips and Mr. Christopher Scott for sharing the stories of their wrongful convictions and exonerations with the membership. Like Tim, your stories help to remind everyone that wrongful conviction is not a faceless injustice.

Gratitude on behalf of the Panel is extended to Governor Rick Perry for signing HB 498 into law. Additional thanks to the House authors, Representatives Ruth Jones McClendon, Senfronia Thompson, Pete Gallego, Terri Hodge, and Paula Pierson; House co-authors, Representatives Carol Alvarado, Lon Burnam, Norma Chávez, Roland Gutierrez, Carol Kent, Eddie Lucio III, and Armando Walle. Special thanks are offered to Senate sponsor Rodney Ellis, Chief of Staff Brandon Dudley, and Senior Policy Advisor Scott Ehlers for their continued commitment to the issue of wrongful convictions in Texas and their support of the Panel's process.

To just say thanks to Dr. Jennifer Willyard, who served as lead staff to all committees and took the lead on drafting this publication, would not be just. Her incredible talents are reflected throughout both volumes of this work, and the panel respectively acknowledges and appreciates the quality of her contribution to this effort.

The Panel also acknowledges the following for their invaluable contributions:

Adrianna Bernal, former General Counsel to House Committee on Criminal Jurisprudence
Kaylyn Betts, Program Supervisor, Texas Court of Criminal Appeals
Jeff Blackburn, Chief Counsel, Innocence Project of Texas
Miles Brissette, Tarrant County ADA
Tiffany Burkes, Tarrant County ADA
Andrew Cates, Chief of Staff to Rep. Pete Gallego
Center for American and International Law
Larance Coleman, Policy Director to Senator John Whitmire
Edwin Colfax, Texas Policy Director, The Justice Project
Tiffany Dowling, Staff Attorney, Texas Center for Actual Innocence
Shannon Edmonds, Director of Governmental Relations, Texas District and County Attorneys Association
Heather Fleming, Chief of Staff to Rep. Jim McReynolds
Bob Gill, Tarrant County ADA
John Gould, Director, Center for Justice, Law & Society, George Mason University
Sarah Guidry, Director, Thurgood Marshall Innocence Project
Nicole Harris, Innocence Project of New York
Anthony Haughton, Thurgood Marshall Innocence Project
Katie Henry, General Counsel to Sen. Jeff Wentworth
Dannye Holley, Interim Dean, Texas Southern University Thurgood Marshall School of Law
Timothy Hooper, TFID Legal Intern
Walter Huffman, Dean Emeritus, Texas Tech University School of Law
The Innocence Project of Texas
Cassandra Jeu, Deputy Director, Texas Innocence Network
Kelly Josh, Texas Defender Service
Michael Marchand, President, Center for American and International Law
Michelle Moore, Dallas County Public Defender
Raymond Nimmer, Dean, University of Houston Law Center
Katie Ogden, General Counsel to Senate Jurisprudence Committee
Michael Pacheco, Legislative Director to Rep. Pete Gallego
Leah Pinney, Texas Criminal Justice Coalition
Natalie Plunk, Administrative Assistant to Judge Whitley, Tarrant County
Carl Reynolds, Administrative Director, Office of Court Administration
Natalie Roetzel, The Innocence Project of Texas
Larry Sager, Dean, University of Texas at Austin School of Law
Austin Shell, TFID Legal Intern
Mark Smith, Vice President, Center for American and International Law
Warren St. John, President, Tarrant County Criminal Defense Lawyers Association
Whitney Stark, Innocence Project of Texas
Task Force on Indigent Defense Staff
Texas Association of Counties
Texas Center for Actual Innocence
Texas Criminal Defense Lawyers Association
Texas Criminal Justice Integrity Unit
Texas District and County Attorneys Association
Texas Innocence Network
Thurgood Marshall Innocence Project
Jessica Tyler, Office of Court Administration
Judge B. Glen Whitley, Presiding Officer of the Tarrant County Commissioners Court
Ana Yáñez-Correa, Executive Director, Texas Criminal Justice Coalition

Timothy Cole Advisory Panel on Wrongful Convictions
Report and Recommendations

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Timothy Cole Advisory Panel on Wrongful Convictions

Report and Recommendations

Introduction

The Timothy Cole Advisory Panel on Wrongful Convictions was created by HB 498 during the 81st Legislature in 2009. Named after Timothy Cole, the first Texan to be posthumously exonerated of a crime through DNA testing, the Panel was directed to advise the Task Force on Indigent Defense in the preparation of a study regarding the causes of wrongful convictions; procedures and programs that may be implemented to prevent future wrongful convictions; the effects on wrongful convictions of state law regarding eyewitness identification procedures, the recording of custodial interrogations, post-conviction DNA testing, and writs of habeas corpus based on relevant scientific evidence; and whether the creation of an innocence commission to investigate wrongful convictions would be appropriate.[1]

The Panel held its first organizational meeting on October 13, 2009, to set an agenda for the following year and divide into workgroups based on each content area directed by statute. In addition, the Panel expressed interest in discovery procedures and informant evidence, and workgroups were created for these areas. Workgroup meetings were held December 7 and 8, 2009, followed by a trip to Tarrant County by the full Panel to observe the county's electronic discovery system. Workgroup and full Panel meetings were held April 21 and 22, 2010, followed by the full Panel meeting on August 12, 2010. Numerous workgroup conference calls and meetings were held to draft the report and the final recommendations.

The Panel's report and the meetings that led to it were not meant to pin wrongful convictions on "bad apples," but rather to look for junctures in our system of criminal justice where errors occur.[2] While the Panel was not created to do in-depth analysis of errors in individual cases (*e.g.*, the important work pursued by the Harris County District Attorney Pat Lykos[3] and the Dallas County Convictions Integrity Unit created by District Attorney Craig Watkins[4]), the Panel attempted to make recommendations that will impact multiple points of weakness in the system as a whole: investigations (eyewitness identification procedures and recording custodial interrogations), pre-trial and trial procedures (automatic discovery that permits electronic access to or photocopies of materials), and post-conviction procedures (DNA testing, writs of habeas corpus based on changing science, and creating a process for continued review of wrongful convictions). In this way, the Panel viewed its task as one of defining "organizational accidents,"[5] or perhaps more appropriately "systemic accidents," rather than one of placing blame on individual actors.

[1] Tex. H.B. 498, 81st Leg., R.S. (2009).
[2] *See* James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010).
[3] *See, e.g.*, OFFICE OF DISTRICT ATTORNEY PATRICIA R. LYKOS, RACHELL REPORT (2009), http://www.patlykos.com/linked_docs/rachell_report.pdf.
[4] Conviction Integrity – Dallas County DA's Office, http://www.dallasda.com/conviction-integrity.html (last visited Aug. 5, 2010).
[5] Doyle, *supra* note 2.

The Panel believes that this approach lends itself to the kind of justice Tim Cole's family spoke of when they stated that "There is no 'perfect system.'"[6] Instead, the Cole-Session family said that the collaborative approach taken by the Panel indicated that "Texas is on the path toward the Zenith of Criminal Justice Reform. The Tim Cole Advisory Panel has brought together a collaborative consensus from all three Branches of our State Government." Tim's mother, Ruby Cole Session, and brother, Cory Session, continued, "For our family's great loss there are now great gains in the Justice System. We are pleased that the State of Texas is now in pursuit of Equal Justice Under Law for all."[7]

The Panel submits to the Task Force the following materials: 1) a summary of the Panel's recommendations, 2) the Panel's summary report, and 3) a comprehensive report of the Panel's research that analyzes in further detail the content areas introduced in the summary report. In addition to the areas required by the statute, the Panel addressed discovery policies in its deliberations and recommendations, and Prof. Sandra Guerra Thompson submitted a report on informant evidence for inclusion in the Panel's research materials. To the extent possible, the report represents the consensus of the Panel. Although there are additional opportunities for reform in any system, the Panel believes that adopting represent would represent an important step forward for the State of Texas in the effort to prevent wrongful convictions.

The Panel takes seriously its duty to learn from the mistakes, revealed through post-conviction DNA testing, that sent innocent Texans to prison for crimes committed by others. The first 39 of cases were documented in a report by The Justice Project and included in the table below. Since publication of that report, one additional man, Jerry Lee Evans, has been exonerated, and three others have been released on new DNA evidence and await full exoneration from the state.

[6] Email from Cory Session, to Jim Bethke, Director, Texas Task Force on Indigent Defense (Aug. 5, 2010) (on file with Texas Task Force on Indigent Defense).
[7] *Id.*

New and Pending DNA Exonerations[9]

Last Name	First Name	Year Convicted	Year Exonerated	County	Crime	Mistaken Eyewitness Identification	Faulty Forensic Testimony	Unreliable or Limited Forensic Methods	Jailhouse Informant & Accomplice Testimony	False Confession or Plea	Suppression of Exculpatory Evidence or Other Misconduct	Approximate Years in Prison
Evans	Jerry Lee	1986	2009	Dallas	rape	✓						23
Sonnier**	Ernest	1986		Harris	kidnapping	✓	✓					23
Porter**	Allen Wayne	1990		Harris	rape	✓						19
Green**	Michael A.	1983		Harris	rape	✓						27

***Released on new DNA evidence, awaiting final exoneration from the State of Texas*

[9] THE JUSTICE PROJECT, CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: TEXAS DNA EXONERATION UPDATE (2010).

Chapter 1: Eyewitness Identification Procedures

Panel Recommendations

In a survey of 1,038 Texas law enforcement agencies, 750 responded and only 88 (12%) had any written policies to guide investigators as they prepare and administer eyewitness identification procedures.[1] Based on the seriousness of eyewitness misidentification, the Panel makes the following recommendations. These proposals are in line with the language in the House committee substitute to SB 117 during the 81st Legislature (*see Appendix A of the Research Details*). These consensus procedures were supported by a broad range of criminal justice stakeholders during the session and continue to be supported by this diverse Panel:

1. **The State of Texas should require Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to work with scientific experts in eyewitness memory research and law enforcement agencies to develop, adopt, disseminate to all law enforcement agencies, and annually review a model policy and training materials regarding the administration of photo and live lineups. That model policy should comport with science in the areas of cautionary instructions, filler selection, double-blind administration, documentation of identification procedures, and other procedures or best practices supported by credible research.**

By working with experts in the field of eyewitness memory and identification procedures, LEMIT can develop a standardized procedure that will guide the photo and live lineups conducted throughout the state. Annual review of this model policy will ensure that eyewitness identification procedures in Texas are guided by the most current science and best practices available.

2. **The State of Texas should require all law enforcement agencies to adopt eyewitness identification procedures that comply with a model policy promulgated by the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT).**

The Panel recommends that a model policy be developed and promulgated by LEMIT to make implementation easy for Texas law enforcement agencies.

3. **The State of Texas should integrate training on eyewitness identification procedures into the required curricula of the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) and the Texas Commission on Law Enforcement Standards and Education (TCLEOSE).**

The Panel believes the law enforcement community can benefit from increased training on the science of eyewitness misidentification and how to prevent those errors through the policies advocated above.

4. **The State of Texas should permit evidence of compliance or noncompliance with the model policy to be admissible in court.**

Because jurors must weigh the quality and value of the evidence that is presented to them in order to determine the guilt or innocence of a defendant, it is important for evidence of

[1] THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION PROCEDURES IN TEXAS 3 (2008), *available at* http://www.thejusticeproject.org/wp-content/uploads/texas-eyewitness-report-final2.pdf.

compliance or noncompliance with the model policy to be presented to them during a criminal trial. Without appropriate context for identification evidence, jurors may inadvertently rely on testimony resulting from a flawed procedure in their deliberations.

5. **The State of Texas should allow law enforcement agencies discretion on the adoption of sequential procedures.**

Although several jurisdictions in Texas have included sequential presentation in their eyewitness identification standard operating procedures, the majority of the Panel believes that the science is not yet settled on whether sequential presentation is superior to simultaneous presentation.

Panel Report

Introduction

Erroneous eyewitness identification has played a role in over 80 percent of Texas exonerations, making it is the most common factor that has contributed to wrongful convictions in Texas.[2] To guide policy discussions on this important subject, the Panel reviewed the existing laws relating to eyewitness identification procedures and evaluation, and the science of eyewitness identification. The Panel recommends that standardized eyewitness identification procedures and training are needed in law enforcement agencies across the state to prevent wrongful conviction through mistaken identifications, in line with the recommendations proposed in CSSB 117 during the 81st Legislature.

Texas Case and Statutory Law

Currently, there is no Texas statutory law governing eyewitness identification procedures, leaving methodology up to the discretion of local authorities. Although the Texas Court of Criminal Appeals and the United States Supreme Court have addressed problems of eyewitness error in their opinions, courtroom remedies alone may not be the most effective method available to prevent wrongful convictions. First, judicial remedies are applied only after potentially flawed eyewitness evidence is presented in court, and jurors may find it difficult to discount eyewitness testimony once presented. Second, science indicates that there are many facets of the identification procedure itself that can impact the outcome of the procedure. The composition of the lineup, the instructions given to the eyewitness, the lineup administrator, and the method of presentation may all play a role in: 1) whether an identification is made and 2) the lineup member who is identified. In order to effectively prevent wrongful conviction due to eyewitness error, those errors must be eliminated at the investigatory phase.

The Science of Eyewitness Identification

Filler Selection

One of the first considerations of an identification procedure is the selection of fillers for either a live or photographic lineup. Fillers (also known as "foils" or "distracters") are people investigators believe to be innocent of a crime (*e.g.*, plain clothes officers or jail inmates, photos taken from a mug book or database) and are shown to an eyewitness witness along with the police suspect for a crime. When composing a lineup, fillers may be chosen using two common methods: those who resemble the suspect (*resemble-suspect*), or those who match the description

[2] *Id.* at 1.

of the perpetrator (*match-description*). Although the theory is that fillers should resemble the suspect in a lineup (*resemble-suspect*) so the suspect does not unduly stand out, some argue that the strategy "promotes unnecessary or gratuitous similarities between distracters and the suspect."[3] These researchers advocate the match-description strategy, arguing that as long as all fillers match the initial description of the culprit given by the eyewitness, the police suspect should be sufficiently hidden among the fillers to ensure that the procedure is a recognition test.

Cautionary Instructions and Sequential Presentation

When an eyewitness is given the task of reviewing a lineup, a reasonable expectation may exist that the police would not make the effort to assemble a lineup unless they felt they had a viable suspect for the crime. If the eyewitness assumes that the perpetrator is in the lineup, then he or she is likely to simply select the subject who most closely resembles the perpetrator.[4] To guard against this potential problem, lineup administrators should explicitly instruct the witness that the lineup *may or may not* contain the actual perpetrator and to give additional guidance that it is just as important to free innocent people from suspicion as it is to identify the guilty party.[5] Such cautionary instructions are unbiased and may reduce the pressure on an eyewitness to make an identification.[6]

To further reduce this pressure, scholars have tested a method of sequential presentation. With sequential presentation, an eyewitness is shown lineup members individually and asked after each photo to determine if that photo is of the perpetrator. Initial results using the sequential method seemed to support the superiority of the method,[7] but subsequent studies on the procedure have not provided a definitive answer on the utility of sequential over simultaneous lineups. Results have shown that although sequential lineups may reduce false identifications, they may also reduce correct identifications.[8]

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[3] Gary L. Wells, Sheila M. Rydell & Eric P. Seelau, *The Selection of Distractors for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL. 835, 835 (1993) The authors suggest that if the suspect does not match the eyewitness' description, fillers should be chosen who match on the features where there is a discrepancy (*e.g.*, eyewitness described curly hair, but the suspect has straight hair; fillers should have straight hair), but they are free to vary on other features. *Id.*

[4] Gary L. Wells, Roy S. Malpass, R.C.L. Lindsay, Ronald P. Fisher, John W. Turtle & Solomon M. Fulero, *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 585 (2000).

[5] *Id.* at 575-76.

[6] *Id.* at 576.

[7] *See* Brian L. Cutler & Steven D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APPLIED PSYCHOL. 281 (1988); R. C. L. Lindsay, James A. Lea & Jennifer A. Fulford, *Sequential Lineup Presentations: Technique Matters*, 76 J. APPLIED PSYCHOL. 741 (1991); R. C. L. Lindsay, James A. Lea, Glenn J. Nosworthy. Jennifer A. Fulford, Julia Hector, Virginia LeVan & Carolyn Seabrook, *Biased Lineups: Sequential Presentation Reduces the Problem*, 76 J. APPLIED PSYCHOL. 796 (1991); R. C. L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556 (1985).

[8] *See* R. C. L. Lindsay, Jamal K. Mansour, Jennifer L. Beaudry, Amy-May Leach & Michelle I. Bertrand, *Sequential Lineup Presentation: Patterns and Policy*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 13 (2009); Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 PSYCHOL. PUB. POL'Y & L. 394 (2006); Roy S. Malpass, Colin G. Tredoux & Dawn McQuiston-Surret, *Public Policy and Sequential Lineups*, 14 LEGAL AND CRIMINOLOGICAL PSYCHOL. 1 (2009); Roy S. Malpass, Colin G. Tredoux & Dawn McQuiston-Surret, *Response to Lindsay, Mansour, Beaudry, Leach and Bertrand's Sequential Lineup Presentation: Patterns and Policy*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 25 (2009).

Confidence, Accuracy, and Double-Blind Procedures

Research into the relationship between eyewitness confidence and accuracy has demonstrated that the relationship is inconsistent at best, most likely because the confidence-accuracy relationship is malleable through both expectancy effects and post-identification feedback. Expectancy effects exist when an administrator knows the identity of a suspect in an eyewitness lineup and gives (often unintentional) verbal and nonverbal cues that enhance the likelihood that the suspect will be chosen. Research has found that administrators who know the identity of the suspect can influence the selection made by the eyewitness. In addition, administrators who know the identity of a police suspect may impact the confidence-accuracy relationship through post-identification feedback.[9] This feedback occurs when police communicate to an eyewitness that he or she has identified the suspect through either verbal ("Good, you picked the suspect.") or nonverbal (nodding, smiles, etc.) means, and studies have shown that feedback can artificially inflate an eyewitness' confidence in that identification.[10]

Researchers have tested ways to prevent these impacts on the confidence-accuracy relationship. First, eyewitnesses may be asked for their confidence in their identifications before any feedback is provided to them. This is valuable because "the certainty of the witness at the time of the identification, uncontaminated by feedback, would then be available at trial through discovery motions."[11] Second, scholars suggest that law enforcement can ensure that the person who conducts the lineup is unaware of which member is the police suspect.[12] Researchers have found that these measures all but eliminate administrator influence from the procedures.[13]

Organizations' Recommended Practices

The studies summarized above have led researchers to develop a set of recommendations for the conduct of eyewitness identification lineups. Scientists generally agree that lineups should contain only one suspect, the suspect should not unduly stand out from the fillers, appropriate cautionary instructions are needed, the administrator of the lineup should not know who is the police suspect (double-blind procedures), and the administrator should collect a confidence statement from the eyewitness at the time of the identification before any feedback is given.[14] Many of these recommendations have been adopted by organizations such as the Department of Justice, the American Bar Association, and the International Association of Chiefs of Police (*see table below*). In Texas, the Governor's Criminal Justice Advisory Council and the Texas Criminal Justice Integrity Unit have both called for additional study and reform of eyewitness identification procedures.

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[9] *See* Gary L. Wells, Amina Memon & Steven Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45 (2006) (reviewing the literature on confidence and accuracy).
[10] Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 59 J. APPLIED PSYCHOL. 334, 342 (2004).
[11] Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. OF APPLIED PSYCHOL. 112, 119 (2002).
[12] *See generally* Wells et al., *supra* note 3.
[13] Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 59 J. APPLIED PSYCHOL. 334, 335 (2004).
[14] *See* Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (2006); Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero & C. A. E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 1 (1998).

Summary of Organizations' Recommended Practices

	DOJ[15]	ABA[16]	IACP[17]
Filler Selection	• One suspect per lineup • Fillers should match witness' description of perpetrator • Minimum of 5 fillers (4 for live lineups)	• Fillers should match witness' description of perpetrator • Sufficient number of fillers needed	• One suspect per lineup • Individuals of similar physical characteristics • Minimum of 5 fillers (4 for live lineups) • Photographs themselves should be similar
Cautionary Instructions	• "Just as important to clear innocent persons" • "Person who committed the crime may or may not be present" • "Regardless of whether an identification is made, police will continue to investigate"	• "Perpetrator may or may not be in the lineup" • "Do not assume that the person administering lineup knows identity of suspect" • "Need not identify anyone"	• "Just as important to clear innocent persons" • "Person who committed the crime may or may not be present" • "You do not have to identify anyone" • "Regardless of whether an identification is made, we will continue to investigate"
Lineup Administration	• Instructions for both simultaneous and sequential procedures • Blind administration not addressed	• Blind administration whenever practicable	• Blind administration whenever possible • Note that sequential procedures have been recommended by some
Documentation	• Ask witness to state, in her own words, how certain she is of any identification • Preserve photos and presentation order • Video or audio recommended for live lineups • Record identification and nonidentification results in writing	• Ask witness to state, in her own words, how certain she is of any identification • Video record recommended of lineup procedure • Photos should be taken of lineup	• Video or audio tape live lineup whenever possible • Preserve photo array for future reference
Other	• Recommendations for initial reports by first responders, mug books and composites, procedures for interviewing witness, show-ups	• Training for police and prosecutors on how to implement recommendations, conduct non-suggestive lineups	• Recommendations for multiple witnesses, blank lineups, right to counsel at eyewitness identifications

[15] TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, U.S. DEP'T OF JUSTICE, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf.
[16] ABA CRIMINAL JUSTICE SECTION, *Report to the House of Delegates: Recommendation of Best Practices for Promoting the Accuracy of Eyewitness identification Procedures* (2004), *available at* http://meetings.abanet.org/webupload/commupload/CR209700/relatedresources/ABAEyewitnessID recommendations.pdf
[17] INT'L ASS'N OF CHIEFS OF POLICE, *Training Key No. 600, Eyewitness Identification* (2006).

Although the Panel agrees that the reforms listed above are necessary for the State of Texas, additional policy reforms and approaches have been suggested and may be considered by the Legislature, as outlined below in the concurring report.

Concurring Report to TCAP Eyewitness Identification Report

(See Appendix B in Research Detail for Supplemental Information)

Submitted by Prof. Sandra Guerra Thompson

University of Houston Law Center

1. **TCAP should make recommendations for the adoption of statutory rules to govern the use of single-suspect showups.**

   a. The failure to address single-suspect showups is a major and unnecessary omission in the TCAP report. A large percentage of identifications are obtained by means of single-person "showups." In Dallas, three of the first 19 DNA exonerations were due to erroneous identifications at showups. Twenty percent of the DNA exonerations nationwide are due to the use of this highly suggestive procedure. (see attachment)

   b. The Department of Justice Report, Eyewitness Evidence: A Guide for Law Enforcement (1999), requires administrators to (1) document a witness's description of the suspect prior to a show-up and (2) separate witnesses during a showup. It recommends that if a witness make a positive identifications, investigators should consider using other types of identification procedures for all subsequent confirmatory identifications, rather than this highly suggestive method. As with lineups and photo arrays, the DOJ report also requires investigators to give cautionary instructions to the witness that the person in the showup may or may not be the perpetrator, and it urges investigators to obtain a statement of the witness's certainty following a positive identification and maintain written documentation of that statement. Specifically, the DOJ report requires written documentation of the time, place, and result of the showup. The Innocence Project further recommends that the showups occur in a neutral, non-law enforcement location, without handcuffs (when practicable), and with the suspect removed from the squad car. It also recommends that showups be videotaped whenever practicable.

   c. Other states have adopted measures to limit and regulate the use of showups. The Wisconsin, New York, and Massachusetts high courts, for example, refuse to admit identification testimony if it is based on a showup, unless the showup was conducted in the immediate aftermath of the crime or other exigent circumstances necessitated it. Maryland requires its law enforcement agencies to adopt written policies on identification procedures that comply with the Department of Justice recommendations.

d. The Dallas Police have good written guidelines for showups (see attached): only to be used when necessary and appropriate, not when probable cause to arrest exists, within a short window of time (30 minutes – 2hours), if suspect apprehended near the crime, if public safety concerns exist. Also requires police to instruct witness that the person may or may not be the perpetrator and that the investigation will continue regardless of whether an ID is obtained, if one witness makes an ID subsequent witnesses will be shown lineups, separate witnesses (one witness per showup, other witness cannot be present), avoid suggestive statements (use of the word "suspect"), document detailed description from witness beforehand, do not use showup if suspect does not match witness's description, and documentation (completion of showup documentation form).

e. Guidelines recommended by the IACP (International Association of Chiefs of Police) in their Traning Key #600 are similar (see attached): no showup if probable cause to arrest, obtain complete description from witness before a showup, suspect should not be in a cell, handcuffed or in jail attire, separate witnesses and do not allow them to talk about the ID before or after, same suspect should not be shown to a witness more than once, suspect should not be required to wear perpetrators clothing or speak similar words, police should avoid suggestive statements about the suspect, witnesses should be warned the person they view may or may not be the perpetrator, and confidence statement should be obtained. However, these guidelines do not address any time limitations (2 hours after the crime, etc), when showups are appropriate, or that if one witness makes an ID subsequent witnesses should be shown a lineup instead.

2. **TCAP should recommend that all witnesses who make an identification be asked for a statement of certainty.**

   There is robust scientific research demonstrating the confidence is malleable, and can be easily inflated by feedback received post-identification. Moreover, studies have found that jurors place great weight on the confidence of eyewitnesses at trial, irrespective of their accuracy. As long as witnesses are permitted to state their confidence in their identifications at trial, it is critical that their level of confidence be documented, in the witness's own words, at the time of the out-of-court identification. While TCAP's recommendation that the police document anything the witness says is a good one, it should recommend, specifically, that the witness's confidence be documented, since there may be witnesses who make identifications but do not, on their own, express their degree of certainty.

3. **Regarding warnings to witnesses, while TCAP recommends the most critical warning (the perpetrator may or may not be present), it should be noted that other instructions could and should be given as well.**

   A better and more comprehensive set of instructions can be found in legislation passed in North Carolina in 2008[1]:

   a. The perpetrator might or might not be presented in the lineup,

[1] N.C. GEN. STAT. § 15A-284.52(b)(3) (2009).

b. The lineup administrator does not know the suspect's identity,

c. The eyewitness should not feel compelled to make an identification,

d. It is as important to exclude innocent persons as it is to identify the perpetrator,

e. The investigation will continue whether or not an identification is made.

4. **TCAP should recommend blind and sequential lineups and photo arrays.**

a. Research experiments have shown time and again how some practices are suggestive or conducive to erroneous identifications. Some law enforcement officials have taken the position that laboratory studies are not relevant to real police work, but the constant flow of DNA exonerations proves that the findings of those laboratory studies were right all along. Those studies have overwhelmingly demonstrated the problem of "relative judgment" that causes erroneous identifications and that sequential identification procedures can minimize this effect.

b. Researchers distinguish between identifications based on "relative judgment" (comparable to the use of a process of elimination) and "recognition memory." The following is a discussion about relative judgment by Gary Wells, one of the top psychologists who has conducted decades of research on eyewitness identifications:

"[P]eople have a tendency to select the person who looks most like the offender relative to the other members of the lineup. At first glance, this relative-judgment process would seem to be nonproblematic. In fact, however, the relative-judgment process is extremely problematic. The problem is made apparent by considering the fact that there is always someone who looks more like the offender than the remaining members of the lineup, even when the lineup does not include the offender. In these cases, eyewitnesses have a tendency to select that innocent person and confuse this relative-judgment process with recognition memory.

The relative-judgment problem is well illustrated in an experiment in which a crime was staged 200 times for 200 separate witnesses. All of the witnesses were then shown one of two lineups. Every witness was warned that the offender might or might not be in the lineup. Half of the witnesses viewed a six-person lineup in which the offender was present. Of these 100 witnesses, 21% made no selection at all, 54% picked the offender, 13% picked particular filler, and the remaining witnesses spread their choices across the other lineup members. The other half of the witnesses viewed a lineup in which the offender was removed and was not replaced. The critical question in this scenario is what happened to the 54% of witnesses who would have chosen the offender had he been present; did they shift to the no-choice category, thereby causing 75% to make no choice? No. Of these 100 witnesses, the no-choice rate increased to only 32% whereas the person who was previously picked only 13% of the time was now picked 38% of the time. In other words, even though all of the witnesses were warned that the offender might not be in the lineup, removing the offender from the lineup led witnesses to shift to the "next best choice," nearly tripling the jeopardy of that person. Controlled

eyewitness experiments consistently show that the most difficult problem for eyewitnesses is recognizing the absence of the offender because, even when the offender is not in the lineup, there is still someone who looks most like the offender relative to other members of the lineup.

The majority of DNA exoneration cases represent instances in which the actual offender was not in the lineup. This is precisely what eyewitness researchers had predicted based on data from controlled experiments. Unfortunately, there are hundreds of circumstances under which police might unknowingly place an innocent suspect in a lineup. Sometimes police place an innocent suspect in a lineup because they received an anonymous but erroneous tip that the person was the offender; sometimes an innocent suspect is placed in a lineup merely because the person fits the general physical description and was in the vicinity of the crime; sometimes an innocent person came into possession of something linked to the crime; and sometimes one or more detectives places a suspect in a lineup based on a "hunch." Whatever the cause, it can never be presumed that the suspect is the offender; if police knew that, they would not need the lineup at all." (Wisconsin Law Review, 2006)

c. A large body of peer-reviewed research conducted over the last 20 years demonstrates that sequential presentation, when coupled with a "blind" administrator, greatly minimizes the likelihood of incorrect identifications.

d. The Illinois State Police study that created controversy over sequential lineups was worthless and should not impede important reform. This report has caused some law enforcement agencies to oppose sequential procedures, but others have rejected it.

e. A distinguished panel of seven scientists outside the field of eyewitness identification studied the Illinois experiment and found that it had a fundamental confound in its comparison of double-blind sequential lineups with non-blind simultaneous lineups, a flaw that has "devastating consequences for assessing the real-world implications…[and] guaranteed that most outcomes would be difficult or impossible to interpret." In short, the study could not answer the research question as to whether sequential lineup procedures are superior to simultaneous, nor whether double-blind procedures are superior to non-blind. (2008)

Moreover, a recent journal article summarized the data from the Evanston police department, procured through a Freedom of Information Act lawsuit filed by the National Association of Criminal Defense Lawyers and the MacArthur Justice Center of the Bluhm Legal Clinic at Northwestern University School of Law, raises even more serious concerns about the validity of the Illinois study (Chicago and Joliet have not yet turned over their data), specifically about the lack of random assignment.[2] Random assignment is a fundamental requirement of sound scientific study. Underlying data Dr. Steblay's comparison of the data from the non-blind simultaneous lineups to data from the double-blind sequential lineups

[2] Nancy K. Steblay, What We Know Now: The Evanston Illinois Field Lineups, Law & Hum. Behav. (forthcoming 2010).

reveals not only that the study's cases were not randomly assigned to the two conditions, but that the cases more likely to result in suspect identifications were assigned to the non-blind simultaneous condition.

f. TCAP is not the correct forum to make political compromises on account of law enforcement resistance to changes due to the confusion created by the Illinois study. The proper role of this panel is to advise the legislature on the best practices for reducing wrongful convictions.

g. Other states have adopted sequential identification procedures, even after the Illinois study was reported. The Attorney General of Wisconsin rejected the conclusions on sequential procedures of the Illinois study and continued to require blind and sequential procedures. (2006) New Jersey's Attorney General had adopted blind and sequential lineups and photo arrays in 2001 and made no change in light of the Illinois study. The North Carolina legislature adopted sequential, double-blind for lineups. (2007). Ohio reformed its procedures to adopt a sequential "folder" method (2010).

5. **TCAP should propose more active judicial oversight of eyewitness identification evidence.**

Texas law should address the inherent weaknesses in eyewitness testimony with mandates to trial courts regarding reliability hearings, jury instructions, and expert testimony. This approach is reflected in the framework proposed by the Innocence Project and adopted by the Special Master in State v. Henderson. See. State v. Henderson, A-9 Sept. Term 2008, 2009 N.J. LEXIS 45 (N.J. Feb. 26, 2009). Specifically, reliability hearings should be conducted in every case to examine all relevant factors both event and procedure-related, affecting identification accuracy, including suggestion by non-state actors. In addition, remedial interventions such as jury instructions on the numerous variables shown by robust scientific studies (and, in particular, meta-analyses) to affect the reliability of identifications, admission of expert witnesses, requiring corroborating evidence, or exclusion to address the inherent weakness of some identifications. The lack of reliability of identifications may be the result of contamination of the witness's memory by other witnesses, family and friends, the media, or simply on account of factors inherent in the witness (including race[3], stress, age, influence of alcohol) or factors inherent in the crime (including whether a weapon was present, the distance between the witness and the perpetrator, lighting conditions, etc.). The important thing to note here is that some identification testimony is too unreliable to admit or may require some remedial intervention, even though the police may fully comply with "best practice" procedures.

The TCAP proposals focus only on "system variables," not "estimator variables." System variables are those factors that the legal system can control, for example, by means of improved police procedures. Estimator variables are those qualities inherent in

[3] A major concern is the fact of reduced accuracy due to the witness being of a different race than the suspect. This factor is so thoroughly established in the research as to be beyond dispute. New Jersey Supreme Court has mandated jury instructions on cross-race identification when identification plays a key role and there is no corroborating evidence (1999).

the eyewitness such as the witness's age or race, the ability to observe the suspect, lighting conditions, etc.

In June of 2010, a Special Master appointed by New Jersey's top court called for a major overhaul of the legal standards for the acceptance of eyewitness testimony in court, citing 33 years of robust scientific research on memory and interview techniques. The Special Master's opinion was made public in a 64-page report following an unprecedented hearing on eyewitness identification science and law that began in September 2009.

The New Jersey court recommended that prosecutors – not defendants – should bear the burden of proof regarding the reliability of eyewitness testimony, and that juries as well as judges should be fully informed as to the factors proven by science to impact eyewitness identification reliability.

The court also found that not just law enforcement but "outside actors" (*e.g.*, other witnesses or family members) can contaminate a witness' memory, and courts should take this into account when reviewing the reliability of testimony.

In 2007 and 2009 respectively, the Tennessee and Utah Supreme Courts required that expert testimony be admitted when the requirements of Rule of Evidence 702 are met, removing the traditional discretion of trial courts to exclude the testimony.

6. **TCAP should not propose that the Bill Blackwood Law Enforcement Management Institute develop a model policy and that law enforcement agencies be required to adopt procedures that comply with the model policy.**

   If TCAP chooses to propose that the legislature delegate rulemaking authority to the Bill Blackwood Institute, a number of procedural steps must be taken to properly implement the regulatory authority of the Institute. Otherwise, the Institute would only be making recommendations that would not be legally enforceable under the exclusionary rule of Article 38.23.

   a. The purported advantages of delegation are said to be:

      i. that it enables a timely response to updated research; greater flexibility than legislative rulemaking process;

      ii. the Institute has experts available to draft procedures; and

      iii. these same experts would provide police training.

   b. Countervailing Considerations:

      i. Best practices and scientific research have already become well-established. Major changes to best practices are highly unlikely. Only minor changes may be required, and the legislature can make these.

      ii. If all departments are required to follow the procedures, it does not make sense to change the rules regularly. Changes would require re-training. There should be stability, and only important changes should be made. Legislative rulemaking process can address the few, important changes as needed.

iii. The Bill Blackwood Law Enforcement Institute is not a regulatory agency. The Institute describes itself as a law enforcement training program:

> The Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) was created by the 70th Texas Legislature to develop the administrative, analytical, and executive skills of current and future law enforcement officials at no cost to either the participant or his/her agency. Public administration, management issues, the political, legal, and social environments of policing, and advanced technical issues are studied in detail. It is the largest and most sophisticated statewide preparation program for police management in the United States.

The Institute's mission statement does not include acting as a regulatory agency, but only as an educational organization:

> OUR MISSION
>
> We are committed to serving the law enforcement profession through exceptional education, research, and training. Our aim is to inspire excellence in management and leadership through personal and professional development.

iv. Under the TCAP proposal, the Institute would de facto be vested with new rule-making authority since the proposed legislation would require all law enforcement agencies to comply with the "model policy" of the Institute. According to some members of TCAP, the "model policy" would have the effect of law for purposes of the exclusionary rule in Article 38.23. Thus, it is not accurate to call it a "model policy;" it would instead be a set of legally-required procedures. Alternatively, if it is merely a "model policy," then it is not subject to Article 38.23. The courts would not consider the police department's guidelines based on the model policy to be legally required. In that case, the legislature would have succeeded in creating a wish list of procedures, but no actual enforceable rules.

v. How will the individuals within the Institute who will have rule-making authority be appointed? The legislature will need to specify how individuals will be appointed to the new rule-making body within the Institute. The Institute is not a politically accountable body, so the legislature would need to implement the means for the participation of individuals representing a variety of viewpoints and areas of expertise so that the rulemaking process is not anti-democratic.

vi. Will the legislature provide a time table for promulgating the rules?

vii. Will the legislature provide the procedures by which the Institute will rule make? Typically, notice and comment procedures are required for administrative rulemaking. Notice and comment is standard in administrative rulemaking legislation to give the public the opportunity to take part in the rulemaking process. Is this contemplated, or will it be a closed-door process with no system for input from outside the Institute?

viii. Since the Institute would be making legally enforceable rules for all Texas police departments, the rules the Institute promulgates should be readily available to the public by means of publication in the manner of statutes and administrative rules. Specifically, the public should have access to the rules online and in print form.

Chapter 2: Recording Custodial Interrogations

Panel Recommendation

6. The State of Texas should adopt a mandatory electronic recording policy, from delivery of *Miranda* warnings to the end, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.

Creating a complete, accurate, and reviewable document that captures the entirety of a custodial interrogation will help prevent wrongful convictions. The Panel therefore recommends that electronic recording be made mandatory in Texas for custodial interrogations in cases of murder, capital murder, kidnapping, aggravated kidnapping, continuous sexual abuse of a child, indecency with a child, sexual performance by a child, sexual assault, and aggravated sexual assault.

The Panel also recommends that exceptions to electronic recording be allowed for good cause, such as equipment malfunction, uncooperative witnesses, spontaneous statements, public safety exigencies, or instances where the investigating officer was unaware that a crime that required recorded interrogations had been committed. This takes into consideration the contingencies that investigating officers may face when dealing with a witness or suspect in the field.

The final recommendation from the Panel is that in instances where the Court determines that unrecorded interrogations are not the result of good faith attempts to record or that none of the exceptions to recording apply, the Court may deliver an instruction to the jury that it is the policy of the State of Texas to record interrogations, and they may consider the absence of a recording when evaluating evidence that arose from the interrogation.

Panel Report

Introduction

False confessions have contributed to wrongful convictions in Texas.[1] In order to assess the adequacy of Texas statutes that govern statement evidence and to determine the best policy, the Timothy Cole Advisory Panel on Wrongful Convictions examined the science behind false confessions, recommended practices endorsed by a variety of criminal justice organizations, and the policies adopted by U.S. and Texas jurisdictions. Based on this study, the Panel recommends that Texas adopt a statewide policy to record interrogations in certain classes of crimes.

Texas Law

Statement evidence in Texas is regulated by Articles 38.21-.22 of the Texas Code of Criminal Procedure. Statements may be used in court if they are "freely and voluntarily made without compulsion or persuasion"[2] and follow the rules established in *Miranda v. Arizona*[3] and

[1] *See* THE JUSTICE PROJECT. CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM (2009), *available at* http://www.thejusticeproject.org/wp-content/uploads/convicting-the-innocent.pdf.

[2] TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 2010).

Art. 38.22. These rules require that the suspect be informed that he has the right to remain silent, that any statement may be used in court, that he has the right to an attorney, and that he has the right to end an interview at any time. Suspects must knowingly and voluntarily waive these rights in order for an interview to commence.[4]

Although the existing statutes provide that statements in certain situations be recorded, the provisions differ significantly from the practices voluntarily adopted by many jurisdictions within Texas and other states. First, audio and/or video recording under the existing statute is only required for a statement—not a custodial interrogation. Second, recording is only required in the case of oral or sign language statements, which are relatively rare. Law enforcement agencies overwhelmingly rely on the written statements that are described in Art. 38.22 Sec. 1.

The Science of False Confessions

Post-conviction DNA testing has proven that people at times confess to crimes that they did not commit. Scientists studying this phenomenon have documented, elicited, and categorized the causes of false confessions.

Types of False Confessions

Researchers and theorists have classified the known cases of false confessions into three types: voluntary, coerced-compliant, and coerced-internalized.[5] In a voluntary false confession, an innocent person may offer a false confession without being questioned by investigators. The two types of coerced confessions are elicited through the process of interrogation. In coerced-compliant false confessions, the suspect confesses for a functional purpose, such as to escape a situation or avoid a threat.[6] Those who give coerced-internalized false confessions, however, "come not only to capitulate in their behavior, but also to believe that they committed the crime in question."[7]

Miranda *Waivers*

Most false confessions begin with a suspect who signs a *Miranda* waiver and agrees to be interviewed by investigators without an attorney present. At some point during the interview the investigators, convinced of the person's guilt, switch to interrogation, refuse to accept a statement of innocence, and instead pursue a confession until it is obtained.[8] Researchers have concluded that innocent suspects may waive their right to counsel because they believe that since they are innocent, they have nothing to hide.

Investigator Bias and Ability to Detect Deception

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[3] 384 U.S. 436 (1966). *See also* Montejo v. Louisiana, 130 S. Ct. 23 (2009) (overruling *Michigan v. Jackson,* 475 U.S. 625 (1986), which sought to assure that the right to counsel is not lost during police interrogation); Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (ruling that a suspect must vocalize his or her wish to remain silent).

[4] *Miranda*, 294 U.S. at 475.

[5] Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 49 (reviewing the types and theories of false confessions). No Texas DNA exoneration cases that involved false confessions were related to voluntary confessions; all were coerced, but the record does not indicate whether any of the false confessions were internalized. *See* THE JUSTICE PROJECT, *supra* note 3.

[6] Kassin & Gudjonsson, *supra* note 6, at 49.

[7] *Id.* at 50.

[8] *See* Steven A. Drizin & Richard A. Leo. *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 911 (2004).

Numerous studies demonstrate that investigators enter interviews with a presumption of the suspect's guilt.[9] One such study concluded that "interrogators saw themselves as the most aggressive when they interviewed suspects who—unbeknownst to them—were truly innocent."[10] These findings illustrate that an innocent suspect's decision to waive *Miranda* rights may result in a particularly aggressive interrogation, increasing the likelihood of a false confession.

Studies have also tested the ability to detect deception. Research indicates that people are poor judges of deception, in part because "people who stand falsely accused of lying often exhibit patterns of anxiety and behavior that are indistinguishable from those who are really lying."[11] Studies have also shown trained investigators are no more accurate in judging the veracity of confessions than untrained college students, yet act with significantly more confidence.[12]

Traits, Techniques, and Theories of False Confessions

There are a variety of factors that contribute to whether or not an innocent individual will make a false confession. These include youth, low intelligence or developmental or intellectual disability, and mental illness; psychological factors such as sleep deprivation and drug use or withdrawal; as well as personality variables such as antisocial tendencies, anxiety, depression, compliance, suggestibility, and low self esteem.[13] In addition to personal traits and interrogations techniques, theories of false confession indicate that the psychoanalytic perspective,[14] the decision-making model,[15] the cognitive-behavior perspective,[16] and cultural considerations[17] each may contribute to false confessions.

False Confessions and Wrongful Conviction

A large proportion of documented false confessions from across the nation have come from suspects who were young, including 35 percent under age 18 and more than half under age 25.[18] Those who provided false confessions were also subjected to lengthy interrogations. More than 90 percent of normal interrogations last less than two hours, but in 44 studied cases of false confessions, 84 percent lasted more than six hours, with two lasting between 48 and 96 hours. Further, confessions have a significant impact on jury verdicts and sentencing. Studies have

[9] *See, e.g.*, Saul M. Kassin, et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187 (2003).
[10] *Id.* at 194.
[11] Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 501 (1999).
[12] Saul M. Kassin, et al., *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211 (2005); Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469 (2002).
[13] Jessica R. Klaver, et al., *Effects of Personality, Interrogation Techniques, and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 71, 72 (2008).
[14] Kassin & Gudjonsson, *supra* note 6, at 45.
[15] *Id.*
[16] *Id.* at 46.
[17] *See* Richard A. Leo, et al., *Chapter 2: Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision-Making*, *in* 2 PSYCHOLOGICAL EXPERTISE IN COURT: PSYCHOLOGY IN THE COURTROOM 25 (Daniel A. Krauss & Joel D. Lieberman, eds., 2009).
[18] Drizin & Leo, *supra* note 8, at 945.

found that confession evidence has a greater impact *on* jurors and is seen as having a greater impact *by* jurors than any other type of evidence.[19]

Organizations' Recommended Practices

Based on the body of research that has been done, legal scholars and associations, law enforcement organizations, and policy organizations have made recommendations to reduce the likelihood that suspects will be wrongfully convicted of crimes to which they falsely confess. By far, the most common recommendation has been to record interrogations from the time a suspect is read his *Miranda* rights through the end.

Legal scholars have long called for complete documentation of interrogations through audio and/or video recording because "it favors neither the defense nor the prosecution but only the pursuit of reliable and accurate fact-finding."[20] Taping also lends transparency to the process, which leads to better interrogation practices.[21] Finally, scholars argue that recorded interrogations allow judges and juries to better gauge the reliability of confession evidence.

Both professional and policy organizations also recommend complete recording of interrogations. Among these organizations are the American Law Institute,[22] the New York County Lawyers' Association,[23] the American Bar Association Section of Criminal Justice,[24] the National Association of Criminal Defense Lawyers,[25] state bar associations in Michigan[26] and New York ,[27] The Justice Project,[28] and the *Chicago Tribune*.[29]

Perhaps the most ringing endorsement for recording interrogations comes from the hundreds of jurisdictions around the country that already record complete interrogations. A survey found that almost 2400 police and sheriffs' departments videotaped interrogations in at least some cases, with 84 percent believing that videotaping improved the quality of police interrogations.[30] A study of the law enforcement perspective on the practice found that

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[19] Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 481 (1997).
[20] *Id.* at 995.
[21] *Id.* at 997.
[22] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975), *available at* http://www.nacdl.org/sl_docs.nsf/a1bf9dda21904164852566d50069b69c/e1a4d2c7cf86cbed852570820072a805/$FILE/ALI-Model_Recording_Code-1975.pdf.
[23] The N.Y. County Lawyers' Ass'n & A.B.A. Section of Criminal Justice, *Report to the House of Delegates* 15, *available at* http://www.abanet.org/crimjust/policy/revisedmy048a.pdf.
[24] *Id.*
[25] Nat'l Ass'n of Criminal Def. Lawyers, *Resolution of the Board of Directors Supporting Mandatory Videotaping of Law Enforcement Interrogations* (May 4, 2002), *available at* http://www.nacdl.org/public.nsf/resolutions/7cac8b149d7416a385256d97005.
[26] State Bar of Michigan. *Revised Resolution* (September 21, 2005), *available at* http://www.michbar.org/generalinfo/pdfs/ 9-22Custodial2.pdf.
[27] New York State Bar Association. *Memorandum No. 11* (June 13, 2007), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&section=Legislative_Memoranda_2007_2008&template=/CM/ContentDisplay.cfm&ContentFileID=2009.
[28] THE JUSTICE PROJECT. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW (2009), *available at* http://www.thejusticeproject.org/wp-content/uploads/polpack_recording-fin2.pdf.
[29] Editorial, *No More Excuses. Go to the Tape*, CHI. TRIB., Apr. 21, 2002, at C6.
[30] William A. Geller, *Videotaping Interrogations and Confessions*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN BRIEF, March 1993.

"virtually every officer who has had experience with custodial recordings enthusiastically favors the practice."[31]

Recording in the States and Texas

To date, 17 states and the District of Columbia record interrogations as either a result of statutory law[32] or court rulings.[33] In contrast to Texas, each of these states requires audio and/or video recording of interrogations from the reading of *Miranda* rights through any confession that is given. In addition, some states have spelled out exceptions to recording in order to meet the needs of local authorities and provide remedies when there is a failure to comply.

Although not required by statute, many Texas jurisdictions record interrogations, at least in some classes of offenses. Three hundred and eighty of 441 departments who participated in a survey "indicated that they either routinely record custodial interrogations, record interrogations for certain classes of felonies, or record interrogations at the discretion of the lead investigator."[34] These jurisdictions have found that the practice of recording custodial interrogations lends a variety of benefits to the officers, the defendant, and the prosecution, and it has not been cost-prohibitive for these departments. Communication with Dallas and Alpine Police Departments, for example, indicate that rooms may be outfitted for recording interrogations at a cost of $500 to $600 per room.[35]

In addition, a review of the recording policies of the largest counties and municipalities indicated that over half provided no written policies or procedures on electronic recording of custodial interrogations beyond statutory requirements. By contrast, policies for departments in Amarillo, Austin, Corpus Christi, Dallas, El Paso, Houston, Irving, Pasadena, and San Antonio provide for more robust recording of interrogations. Although false confessions may never be completely eradicated from criminal investigations due to personal or situational factors, statewide policies can be adopted to guide law enforcement, judges, and juries on the best methods to document and preserve confessions in the context in which they were elicited.

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[31] THOMAS SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6 (Nw. U. Sch. of L. Center on Wrongful Convictions 2005), *available at* http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/SullivanReport.pdf.

[32] D.C. CODE § 5-116.01 (2010) (District of Columbia); 725 ILL. COMP. STAT. 5/103-2.1 (2010) (Illinois); ME. REV. STAT. ANN. tit. 25, § 2803-B(I)(K) (2010) (Maine); MD. CODE ANN., [Crim. Proc.] § 2-401 (LexisNexis 2010) (Maryland); MO. REV. STAT. § 590.701 (2010) (Missouri); MONT. CODE ANN. § 46-4.4 (2010) (Montana); NEB. REV. STAT. § 29-4501 (2010) (Nebraska); N.M. STAT. ANN. § 29-1-16 (West 2010) (New Mexico); N.C. GEN. STAT. § 15A-211 (2010) (North Carolina); OHIO REV. CODE ANN. § 2933.81 (LexisNexis 2010) (Ohio); OR. REV. STAT. § 419C.270 (2010) (Oregon); WIS. STAT. ANN. § 972.115 (West 2010) (Wisconsin).

[33] N.J. SUP. CT. RULE 3.17 (2005); Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985); State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006); Commonwealth v. Digiambattista, 442 Mass. 423 (2004); State v. Scales, 518 N.2d 587, 591 (Minn. 1994); State v. Barnett, 147 N.H. 334 (2001).

[34] THE JUSTICE PROJECT. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS IN TEXAS: A REVIEW OF CURRENT STATUTES, PRACTICES, AND POLICIES (2009), *available at* http://www.thejusticeproject.org/wp-content/uploads/tx-recording-report-tjp-may-2009.pdf.

[35] E-mail from Edwin Colfax, Texas Policy Director, The Justice Project, to Lieutenant Losoya, Alpine, Texas Police Department (Aug. 2, 2010) (on file with Texas Task Force on Indigent Defense). E-mail from Edwin Colfax, Texas Policy Director, The Justice Project, to Jennifer Willyard, Grant Program Specialist, Texas Task Force on Indigent Defense (Aug. 2, 2010) (on file with Texas Task Force on Indigent Defense).

Chapter 3: Discovery Procedures

Panel Recommendation

Texas' discretionary discovery policy has left the state with a wide variance in practices, where the quality of defense, investigation, and preparation is at least partially dependent upon geography. All other factors being equal, cases in two counties may have different outcomes due to the timing, manner, and nature of materials that are—or are not—exchanged through discovery. This result is contrary to the general premise of discovery, which is to encourage case investigation and preparation, to support efficient resolution of cases where the facts are not disputed, and, where the facts are disputed, to ensure that those facts are fairly presented to the ultimate factfinder—the judge or jury. To achieve those goals, the defense should have the opportunity to review and test the evidence that the prosecution would use to convict and sentence, and the prosecution should have the opportunity to obtain certain information from the defense that will enable the prosecutor to carry out his or her duty "not to convict, but to see that justice is done."[1]

7. The State of Texas should adopt a statewide discovery policy that is mandatory, automatic, and reciprocal, and requires either electronic access to or photocopies of materials subject to discovery.

Texas is in the distinct minority when it comes to limiting discovery in criminal cases; as explored below, many states and the federal courts currently operate under a system in which the prosecution and the defense must share information, reports, witness statements, witness lists, and more with the other party before trial. As such, the Panel agrees that Texas law should align with the prevailing trend in criminal discovery by mandating reciprocal discovery in criminal cases. The Panel further recommends that in accordance with policy that best prevents wrongful convictions, either photocopying of, or electronic access to, discoverable materials be required.

Panel Report

Introduction

One of the most important ways that jurisdictions can provide for effective counsel is to adopt discovery policies that allow the defense early and complete access to essential documents in the case against the defendant. Without access to offense and expert reports until the time of trial, the ability for defense counsel to provide a meaningful defense is diminished. Although discovery policies cannot completely guard against ineffective assistance of counsel claims, they set the foundation for a quality and meaningful defense.

Discovery as a component of effective counsel is especially important in helping to guard against wrongful convictions. A relationship between discovery and wrongful conviction is sometimes difficult to ascertain at first glance, but "[t]he record of wrongful convictions has demonstrated that exculpatory evidence can be withheld for years, even decades, while an innocent person sits in prison."[2] In fact, seven of Texas' first thirty-nine DNA exonerations

[1] TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 2010).
[2] THE JUSTICE PROJECT. CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM 11 (2009), *available at* http://www.thejusticeproject.org/wp-content/ uploads/ convicting-the-innocent.pdf.

involved suppression of exculpatory evidence or other prosecutorial misconduct.[3] This statistic includes the case of Timothy Cole, whose defense counsel was never informed that only one victim chose Cole out of a photo lineup as the perpetrator of a rape on the Texas Tech campus.

Although the Supreme Court's decision in *Brady v. Maryland*[4] provides defendants with a constitutional right of access to exculpatory information held by the State and in the possession of law enforcement, it is an insufficient tool to prevent wrongful convictions because *Brady* complaints are made post-conviction. Since a wrongful conviction cannot be retroactively prevented once it has already occurred,[5] other means of prevention must be explored. One way to reduce the potential for errors is to increase the scope of discovery, the process of pre-trial information exchange between prosecution and defense.

Brady and Criminal Discovery Procedures in Texas

The Supreme Court ruled in *Brady v. Maryland* that defendants have a constitutional right to any evidence the State may have in its possession that tends to exculpate the defendant. *Brady*, however, does little to prevent wrongful conviction of the innocent because the burden to determine what constitutes exculpatory information rests with prosecutors, who do not construct theories of the case for the defense. This has led some observers to argue that *Brady* is incompatible with an adversarial system because prosecutors and defense attorneys have fundamentally opposing positions, the *Brady* holding provides for only weak enforcement, it excludes incriminating evidence (which is much more common that exculpatory evidence), it is poorly suited to plea bargaining[6] and informant testimony,[7] and it requires misconduct on the part of the state rather than innocence of the defendant.[8]

As mentioned above, *Brady* is an inefficient tool to prevent wrongful conviction because *Brady* motions are not raised until after a defendant has been convicted of a crime and new evidence that was in the possession of the prosecution comes to light. Therefore, by definition, it cannot prevent wrongful conviction before it happens. Additionally, the standards of review are complex, as a *Brady* claim requires judges to weigh *materiality* and *relevance*. These factors are difficult to measure separately, so judges often attempt to address whether the "evidence in question [would] have changed the outcome of the trial."[9] The difficulty in making this decision

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[3] *Id.*
[4] 373 U.S. 83 (1963). For holdings that helped to further define *Brady* obligations, see United States v. Agurs, 427 U.S. 97 (1976); Moore v. Illinois 408 U.S. 786 (1972); Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967).
[5] *See* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097 (2004).
[6] *See* Stephanos Bibas, *The Story of* Brady v. Maryland*: From Adversarial Gameship Toward the Search for Innocence? in* CRIMINAL PROCEDURE STORIES 129, 149 (Carol Steiker ed., 2005); John D. Douglas, *Can Prosecutors Bluff?* Brady v. Maryland *and Plea Bargains*, 57 CASE W. RES. L. REV. 581 (2007); Lee Sheppard, *Disclosure to the Guilty Pleading Defendant:* Brady v. Maryland *and the* Brady *Trilogy*, 72 J. CRIM. L. & CRIMINOLOGY 165 (1981).
[7] *See Giglio*, 405 U.S. 150 (1972); Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887 (1981); Peter A. Joy, Brady *and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619 (2007).
[8] Bibas, *supra* note 6.
[9] Victor Bass, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 126 (1972).

"is exacerbated by the fact that the trial may have been distorted by the defendant's inability to use the suppressed evidence to prepare."[10]

Criminal Discovery Procedures in Texas

Texas discovery is controlled by Article 39.14 of the Texas Code of Criminal Procedure.[11] Article 39.14 does not mandate automatic defense access to police reports and witness statements, and there is no provision specifically allowing the defense to obtain copies of these items. Rather, defense counsel is required to file motions to request access to basic case information, including offense reports and expert reports. In order to receive the requested access, the defense must make a showing of "good cause." [12]

There is no certification process or specified timelines for either party, with the exception of the disclosure of expert witnesses. In some local jurisdictions, defense counsel is only permitted to make notes about items in the prosecution's file. In addition, the prosecution does not have access to reciprocal discovery. Unlike many other states, Texas law provides no formal rules for case conferences, wherein the prosecution, defense, and judge meet to discuss the evidence that is available and will be presented at trial. Article 39.14 does not define "exculpatory evidence" to guide the prosecution in what material is subject to discovery obligations. Therefore, although Texas does have a criminal discovery statute, policy groups and practitioners argue that the statutes are "so minimal that they fail to guarantee the opportunity for evidence to be fully investigated and meaningfully challenged."[13]

Texas case law has further held that the trial court must allow discovery of evidence that is shown to be material to the defense of the accused,[14] but no general right to discovery exists.[15] Instead, the decision as to what is discoverable rests with the discretion of the trial court.[16] To determine materiality, the omission is evaluated in the context of the entire record, and error is found only if the omitted evidence creates a reasonable doubt that did not otherwise exist. As with other avenues reviewed in this section, existing Texas case law may not provide an effective means to prevent wrongful convictions of the innocent due to suppression of exculpatory evidence. The existing statute provides little direction to the courts and has been interpreted to leave discretion with prosecutors and trial courts. The end result has been a wide range of discovery practices and policies across the state that may or may not provide meaningful protection to innocent suspects under investigation for crimes they did not commit.

Organizations' Recommended Practices

The American Bar Association's (ABA) Standards for Criminal Justice: Discovery and Trial by Jury address the general principles of discovery, the obligations of the prosecution and

[10] *Id.*
[11] TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 2010).
[12] *Id.*
[13] THE JUSTICE PROJECT, *supra* note 1, at 11.
[14] *See, e.g.*, Massey v. State, 933 S.W.2d 141, 153 (Tex. Crim. App. 1996).
[15] *See, e.g.*, Kinnamon v. State, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990); Whitchurch v. State, 650 S.W.2d 422, 425 (Tex. Crim. App. 1983).
[16] *See Whitchurch*, 650 S.W.2d at 425.

defense, special procedures, timing and manner of disclosure, depositions, general provisions, and sanctions if discovery rules are not properly implemented.[17]

Timing Although the ABA standards outline no specific time requirement within which discovery should be completed, the standards encourage discovery "as early as practicable in the process."[18] The ABA recommends that each jurisdiction adopt time limits and notes that the prosecution should first disclose discoverable materials.[19] Under the ABA standards, parties operate under a "continuing obligation to produce discoverable materials to the other side."[20]

Obligations of the Prosecution and Defense The ABA standards specifically state that the prosecution should "permit inspection, copying, testing, and photographing" of any statement from the defendant or codefendant; names, addresses, and written statements of witnesses; any inducements for cooperation between the prosecution and the witness; written statements from experts; any tangible objects that pertain to the case; any record of previous criminal history; information related to any identification procedures conducted; and any material that tends to negate or mitigate the guilt of the defendant.[21] In addition, the defense should be informed of character evidence, evidence gathered through electronic surveillance, and information or documentation of the acquisition of evidence gathered through search and seizure.[22]

The ABA standards promote reciprocal discovery and suggest a more limited list of defense materials to be shared with the prosecution. These include the names and addresses of all witnesses that will be called at trial; any expert reports or written statements; and any tangible objects that will be introduced as evidence at trial.[23] The standards also recommend discovery of character evidence not relating to the defendant and the names and addresses of witnesses who will be asked to support an alibi or insanity defense.[24]

Additional Recommendations The ABA standards also address where counsel must search for discoverable information. The standards extend the obligation of the prosecutor and defense attorney "to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office."[25] This applies the standards to not only prosecutors and defense attorneys, but also to investigators, previous attorneys, and other staff.

Sanctions Should a party fail to fulfill discovery obligations, the ABA recommends one of the following actions on behalf of the court: order the noncomplying party to permit the discovery of the material and information not previously disclosed; grant a continuance; prohibit the party from calling a witness or introducing into evidence the material not disclosed, subject to the defendant's right to present a defense and provided that the exclusion does not work an injustice either to the prosecution or the defense; and/or enter such other order as it deems just

[17] A.B.A. STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed., 1995).
[18] *Id.* § 11-4.1(a).
[19] *Id.* § 11-4.1(b).
[20] *Id.* § 11-4.1(c).
[21] *Id.* § 11-2(a).
[22] *Id.* § 11-2.1(b) to (d).
[23] *Id.* § 11-2.2(a).
[24] *Id.* § 11-2.2(b) to (c).
[25] *Id.* § 11-4.3(a).

under the circumstances.[26] The standards also recommend that the court may find counsel in contempt if it is revealed that she "willfully violated a discovery rule or order."[27]

While not included in the ABA standards, the subject of certification has been addressed by advocacy groups such as The Justice Project. The organization recommends that "a discovery certificate should be filed by the District Attorney's office with the court during pretrial procedures, and should specify when evidence was exchanged and by what method of delivery."[28] This type of certification creates a court record stating that both defense and prosecution have fulfilled their discovery responsibilities, provides documentation of information received from third parties, and makes it more difficult for evidence to be willfully suppressed.[29]

Recommended Practices and the States

Only five states have discovery provisions that are equivalent in scope to the current ABA standards.[30] The majority of the remaining states have standards more in line with either Federal Rule 16[31] (providing the most limited discovery) or some area in between the two standards.[32] Current Texas law, however, is considerably more restrictive than Federal Rule 16.

Analysis and Evaluation

A comprehensive review of state discovery policies was conducted in 2004 by the Federal Judicial Center (FJC).[33] The organization surveyed all fifty states and the District of Columbia and found a patchwork of different policies across the nation.

FJC found that "all fifty states and the District of Columbia address the prosecutor's obligation to disclose information favorable to the defendant,"[34] but that is where the similarities end. The states differ in how *Brady* material is defined,[35] whether discovery is mandatory,[36] the timing of discovery,[37] certification of complete discovery,[38] sanctions,[39] and whether suppression of exculpatory evidence constitutes a violation of due process.[40]

Texas consistently falls into the narrowest category of discovery policies. Texas requires a written discovery motion, and is also one of only ten states that places additional conditions on discovery and requires the defendant to demonstrate that the materials are necessary to the preparation of the defense or "show 'good cause.'"[41]

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[26] *Id.* § 11-7.1(a).
[27] *Id.* § 11-7.1(b).
[28] THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 6 (2007).
[29] *Id.* at 3, 6.
[30] WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 20.2(b) & n.34 (3d ed. 2009).
[31] Bibas, *supra* note 6, at 16 (reviewing FED R. CRIM. P. 12.1-2, 16(a)(1), 16(b), 16 advisory committee's note).
[32] LaFave et al., *supra* note 30, § 20.2(b).
[33] LAURAL L. HOOPER, ET AL., TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES (Federal Judicial Center 2004).
[34] *Id.* at 17.
[35] *Id.* at 18-19
[36] *Id.* at 23.
[37] *Id.* at 26.
[38] *Id.* at 27.
[39] *Id.* at 27-28.
[40] *Id.* at 18.
[41] TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 2010), *quoted in id.* at 23.

Expanded discovery procedures are consistently recognized as an area of Texas law in which reform is needed. Several Texas counties, however, are leading the way to modernize discovery procedures and broadening defense access to evidence; some point to Tarrant County's system as a model for the state.[42] Tarrant County's open file discovery utilizes an electronic case filing system to manage the discovery process.

[42]Alex Branch, *Tarrant County's Electronic Open-File System Seen as Gold Standard for Reducing Wrongful Convictions*, FORT WORTH STAR TELEGRAM, March 18, 2010.

Chapter 4: Post-Conviction DNA Testing and Writs of Habeas Corpus Based On Changing Science

Panel Recommendations

In the areas of post-conviction DNA testing and writs of habeas corpus based on changing science, the Timothy Cole Advisory Panel on Wrongful Convictions recommends the following:

8. **The State of Texas should amend the Chapter 64 motion for post-conviction DNA testing to allow testing of any previously untested biological evidence, regardless of the reason the evidence was not previously tested, or evidence previously tested using older, less accurate methods.**

The Panel reached consensus that the language proposed in SB 1864 during the 81st Legislative Session would make needed adjustments and improvements to the existing statute (*see Appendix F in Research Details*).

9. **The State of Texas should amend the Chapter 11 writs of habeas corpus to include a writ based on changing scientific evidence.**

The Panel agreed that a writ of the type proposed in SB 1976 during the 81st Legislative Session would provide meaningful access to the courts to those with claims of actual innocence following a conviction based on science that has since been falsified (*see Appendix G in Research Details*). Creation of a dedicated writ and procedure will allow those with claims to be heard without opening all convictions up to scrutiny. The Panel believes this is a valuable reform for the criminal justice system in Texas.

Panel Report

Introduction

To date in Texas, 41 people have been exonerated of crimes for which they were convicted after post-conviction DNA testing revealed that they were not the true perpetrators of those crimes. One of the lessons we can learn from the wrongful convictions revealed through DNA testing is that post-conviction access to DNA and other forensic tests are an important and meaningful way to ensure the integrity of our criminal justice system and to see that justice is done for victims of crime and the wrongfully convicted.

Texas Law

Post-conviction DNA testing is controlled by Chapter 64 of the Texas Code of Criminal Procedure. The statute allows those who have been convicted of crimes to petition the court for DNA tests to be performed on biological material that was not previously subjected to DNA testing through no fault of the convicted person because DNA testing 1) was not available, 2) was available but not technologically capable of providing probative results, or 3) has improved so that material can be tested using more accurate and probative testing methods.[1]

Those who have claims of wrongful conviction based on other types of forensic error apart from DNA testing (e.g. bullet lead comparison, arson investigation, or dog scent evidence)

[1] TEX. CODE CRIM. PROC. ANN. art. 64.01 (Vernon 2010).

may petition the court with a writ of habeas corpus as defined in Article 11.07 of the Code of Criminal Procedure for those who have not been sentenced to death, and Article 11.071 for those who have been sentenced to death. Specifically, 11.07 states that "it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement."[2] If it is found that there are, "the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection"[3] to resolve those issues.

Organizations' Recommended Practices

In 1999, under the leadership of Attorney General Janet Reno, the National Commission on the Future of DNA Evidence released its publication, *Postconviction DNA Testing: Recommendations for Handling Requests*. In it, the group outlined five categories of cases that contain claims of actual innocence and request DNA testing and suggested responses for each category. The group's range of recommendations included granting tests in cases where DNA was collected, still exists, and will provide exclusionary results, to rejecting requests when frivolous. Regardless of whether the categories should be considered as "hard and fast" rules, the group offered additional recommendations for prosecutors, defense counsel, the judiciary, victim assistance, and lab personnel regarding post-conviction DNA testing that emphasized communication between all parties.

Post-conviction DNA testing guidance is provided by the American Bar Association in two documents.[4] In Resolution No. 115, the ABA states that "all biological evidence should be made available to defendants and convicted person upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law."[5] Standard 16-6.1 further states that those who have been convicted of serious crimes should be granted post-conviction DNA tests if testing that was unavailable at the time of the trial has become available or there is reason to believe that the testing conducted at trial is now unreliable.[6]

Recommended Practices Specific to Texas Law

During the last legislative session in 2009, two bills were introduced to increase post-conviction access to the courts. The first bill, SB 1864,[7] would have amended §64.01, the motion for post-conviction DNA testing, to provide "that a motion could be made for DNA testing if the material was not previously subjected to testing, no matter the reason testing was not done, if the other stated conditions were met."[8] Supporters of the bill argued that this change was necessary because although "current law provides that untested material can be tested if it is

[2] TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3(c) (Vernon 2010).
[3] *Id.* § 3(d).
[4] For information on the ABA's recommendations on post-conviction matters, see ABA STANDARDS FOR CRIMINAL JUSTICE, POSTCONVICTION REMEDIES (2d ed., 1978), *available at* http://www.abanet.org/crimjust/standards/postconviction_toc.html; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE § 16-6.1 cmt. (3d ed., 2006) (quoting ABA House of Delegates Resolution No. 115 (August 2000)), *available at* http://www.abanet.org/crimjust/standards/ dnaevidence.pdf.
[5] ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE, *supra* note 6.
[6] *Id.* § 16-6.1(a)(i)
[7] Tex. S.B. 1864, 81st Leg., R.S. (2009) (authored by Sen. Rodney Ellis and sponsored by Rep. Scott Hochberg).
[8] House Research Org., Bill Analysis, Tex. S.B. 1864, 81st Leg., R.S. at 2 (2009), *available at* http://www.hro.house.state.tx.us/pdf/ba81r/sb1864.pdf#navpanes=0.

in the interests of justice. . . [,] an unsympathetic judge still could deny the motion, even where material went untested due to failure on the part of the defense attorney rather than the defendant."[9]

A second bill from the 81st legislative session, SB 1976, would have addressed those who had been convicted of crimes using science that had since been discredited.[10] According to the House Research Organization, the bill "would authorize courts to grant relief on writs of habeas corpus that, subject to criteria in the bill, raised relevant scientific evidence that was not available at the time of a trial or that discredited scientific evidence relief on by the prosecution at a trial."[11] The language also provided that petitioners could file this writ even if a previous writ of habeas corpus had been made. This provision is important because many writs of habeas corpus "are filed without an attorney or soon after a conviction."[12] Without the ability to file a writ that is based on science, inmates may lose the opportunity to demonstrate that the science that convicted them previously has since been disproved.

After reviewing the recommendations from national and state leaders, the Panel agreed that the provisions laid out in the 81st Legislature represent sound post-conviction policy for the State of Texas.

[9] *Id.*
[10] *See* Tex. S.B. 1976, 81st Leg., R.S. (2009) (authored by Sen. John Whitmire and co-authored by Sen. Juan Hinojosa). *See also* Tex. H.B. 3579, 81st Leg., R.S. (2009) (companion bill, authored by Rep. Pete Gallego, who also sponsored the Senate bill). Although the bill received unanimous passage from both the Senate Criminal Justice and House Criminal Jurisprudence committees, there was one witness who testified against the bill (Harris County District Attorney's Office) and one who registered against the bill (Lubbock County District Attorney's Office) during the Senate committee hearing. Senate Comm. on Criminal Justice, Bill Analysis, Tex. S.B. 1976, 81st Leg., R.S. (2009). There was no opposition to the bill during the House committee hearing. . House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 3579, 81st Leg., R.S. (2009).
[11] House Research Org., Bill Analysis, Tex. S.B. 1976, 81st Leg., R.S. at 2 (2009), *available at* http://www.hro.house.state.tx.us/pdf/ba81r/sb1976.pdf#navpanes=0.
[12] *Id.* at 3.

Chapter 5: Feasibility of Establishing an Innocence Commission

Panel Recommendations

10. **The State of Texas should formalize the current work of the innocence projects that receive state funding to provide further detail in the projects' annual reports and distribute those reports to the Governor, Lieutenant Governor, Speaker of the House, and Chairs of the Senate Jurisprudence, House Corrections, House Criminal Jurisprudence and Senate Criminal Justice Committees. Report input should be solicited from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations.**

The Panel recommends that the annual reports currently filed with the Task Force on Indigent Defense by each innocence project be filed jointly and amended to include analysis of the requests and cases received, investigated, and litigated to identify any systemic criminal justice issues that are revealed by claims of actual innocence. The Panel further recommends that this report be presented to the Governor, Lieutenant Governor, Speaker, and committees, along with input from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations. The report may address such topics as showups and informant testimony.

11. **The State of Texas should provide an FTE for the Task Force using the current appropriation or other grant funding to administer these responsibilities, and contracts between the innocence projects and the Task Force on Indigent Defense should be amended to reflect the new administrator and additional responsibilities.**

Because the innocence projects are located in geographically diverse areas and have many responsibilities to their students and the cases they investigate, the Panel recommends that a full-time employee position be created that is dedicated to the coordination and administration of the innocence projects. This FTE will further help the innocence projects meet the recommendations listed above and serve to organize and audit the funding received from the Task Force.

Panel Report

Introduction

The possibility of establishing an innocence commission in Texas has been under consideration for several years, with legislation filed in however many sessions. Questions have concerned how to establish a commission; the makeup of the commission and method of appointment; the duties, power, and independence of a commission; and the quantity and source of funding needed to create and sustain a commission. Several states have established innocence commissions under a variety of formats to achieve these ends. For example, study commissions like the Timothy Cole Advisory Panel on Wrongful Convictions have been created in California, Connecticut, Illinois, North Carolina, Pennsylvania and Wisconsin. North Carolina additionally created an innocence commission to investigate claims of wrongful conviction. The Panel reviewed the approaches taken by other states and countries in order to determine if an innocence commission is feasible for the State of Texas. Following a workgroup meeting with representatives from the innocence projects, the Panel recommends formalization of the work already underway by innocence projects.

Study Commissions

As noted above, several states have passed legislation creating commissions to study the causes of wrongful conviction and recommend policies to prevent those errors in the future. One advantage of study commission is that, like innocence commissions, they are comprised of a wide variety of criminal justice stakeholders including judges, academic researchers, prosecutors and defense attorneys, law enforcement, spiritual and other community leaders, representatives for governors' and attorneys general offices, or state legislators. This helps to ensure that the recommendations are based on the broadest level of consensus possible and that those who have the power to implement those changes are party to the research and recommendation process. Another benefit is that study commissions are inexpensive. As the Innocence Project stated, participation in a study commission is often "consistent with most members' existing work, and in many cases can simply be an extension of their existing jobs."[1]

A disadvantage of the study commission method is that it is generally a one-shot approach to wrongful conviction reform because study commissions are sometimes created to expire at a time certain. Second, study commissions generally do not investigate claims of actual innocence, but rather examine known (usually through post-conviction DNA results) cases of wrongful conviction. While their recommendations will benefit future innocent suspects of crime, they do not necessarily provide relief to specific individuals who have claims of actual innocence for review.

Innocence Commissions

In the United States, only North Carolina has established an operating innocence commission that actively investigates claims of wrongful conviction.[2] The North Carolina Innocence Inquiry Commission (NCIIC) was signed into law in August of 2006. Made up of eight members from the judiciary, law enforcement, prosecution, defense, the victims' rights community, and the public, "the commission and its staff carefully review evidence and investigate cases in a non-advocatory, fact-finding manner."[3]

Cases reviewed by the NCIIC follow a three-step process: review, investigation, and hearing. Upon receipt of a claim of innocence, it is evaluated to determine whether it meets the criteria set by the Commission, upon which time it enters the review process. During review, information about the facts of the case and the claim of innocence are gathered. If the claim still meets statutory requirements, it proceeds to the investigation phase. The investigation may be stopped at any time if it is revealed that the claim no longer meets the statutory criteria. If the claim withstands these criteria, it will move to the first of two hearing phases. In the first, the claim and evidence of actual innocence are presented before all NCIIS members, and the Commissioners determine whether to send the claim to a three-judge panel for a final hearing. At that hearing, the panel decides whether to dismiss the conviction. Three total hearings have been held, with one ending in exoneration.

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[1] The Innocence Project, Criminal Justice Reform Commissions, http://www.innocenceproject.org/Content/248.php# (last visited Aug. 2, 2010).

[2] Although Connecticut passed a bill authorizing a similar commission, the members voted for a broader focus and instead issued the report noted above. The Innocence Project, Innocence Commissions in the U.S., http://www.innocenceproject.org/Content/415.php (last visited Aug. 2, 2010).

[3] NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, REPORT TO THE 2009-2010 LONG SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 3 (2009), *available at* http://www.innocencecommission-nc.gov/Report2009.htm.

Innocence Projects

Innocence projects are non-profit organizations that often work in conjunction with law schools to investigate claims of actual innocence. In Texas, state funds are provided to four innocence projects located at the four state university law schools: 1) Innocence Project of Texas at Texas Tech University, 2) Texas Innocence Network at the University of Houston, 3) Texas Center for Actual Innocence at the University of Texas at Austin, and 4) the Thurgood Marshall Innocence Project at Texas Southern University. Each of the four innocence projects is eligible to receive reimbursement of expenditures up to $100,000 per year. They secure additional funding through grants and donations.

The most recent report shows that between September 1, 2004 and August 31, 2009, the four projects received innocence claims from over 12,000 cases that met the selection criteria. The offenses ranged from capital murder (473 cases) to sexual assault of a child (1,373 cases) to felony DWI (65 cases). Although innocence projects rely greatly on students and have often lacked resources and funding,[4] the projects in Texas have accomplished a great deal, including the posthumous exoneration of Timothy Cole.

Analysis

Although the predominant model of post-conviction investigation in the United States is the innocence project, the United Kingdom's adoption of the Criminal Cases Review Commission (CCRC) provides scholars with a way to compare and contrast the two systems. Increased creation of innocence projects in the United Kingdom further augments the comparison.

The CCRC has developed a three-stage review process to evaluate claims it receives. In stage one, applications are reviewed for eligibility. A case manager and commissioner are assigned in stage two, and police are employed if an investigation is needed. Stage three of the CCRC process is the "real probability" test,[5] in which the case manager and commissioner determine whether there is "'more than an outside chance that the conviction will be found unsafe."[6] If the application meets that test, it proceeds to a panel of three commissioners who must unanimously vote to send the case to the Court of Appeals. At that time, the CCRC's involvement ends, and the case is turned over to attorneys who will handle the appeal.

Even with innocence commissions, innocence projects continue to play a vital role in legal education and policy reform. Students involved in the projects learn writing and critical thinking skills, how to conduct investigations and organize those findings into the law, and ethical considerations related to the wrongfully convicted and victims of crime.[7] Moreover, the work and research of the innocence projects provides valuable information to policy makers and legislators as they craft effective legislation. Even with these contributions, the founders of the

[4] Stephanie Roberts & Lynn Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Project and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43 (2009).
[5] Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 113 (2009).
[6] *Id*.
[7] Roberts & Weathered, *supra* note 4.

Innocence Project of New York, Barry Scheck and Peter Neufeld, have called for the creation of innocence commissions in the United States.[8]

Innocence Commission Debate in Texas

To help further the conversation on innocence commissions in Texas, the Panel invited representatives from the innocence projects at the four state universities to join a Panel workgroup meeting on April 21, 2010. Together, the workgroup meeting participants suggested a unique approach for the State of Texas. Instead of creating an innocence commission to perpetuate the study of wrongful convictions, the Panel and innocence projects suggested an approach that would formalize the work currently underway by the innocence projects. The innocence projects provide a report of their activities to the Task Force each year as part of the statute that provides state funding to the projects. By augmenting this report and distributing their findings to the Governor, Lieutenant Governor, Speaker, and chairs of relevant committees, the State can benefit from knowledge of both individual and systemic issues that require reform to prevent wrongful convictions. As non-profits, innocence projects can further inform policy makers on behalf of those initiatives, an area in which governmental agencies are limited. Taken together, the Panel believes that these recommendations will provide a novel approach to the study of wrongful convictions that fits the unique association between the State of Texas and innocence projects.

[8] Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98 (2002).