TEXAS JUDICIAL COUNCIL

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VICE CHAIR:
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Presiding Judge, Court of Criminal Appeals

EXECUTIVE DIRECTOR:
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TIMOTHY COLE EXONERATION REVIEW COMMISSION
AGENDA
June 28, 2016 - 1:00-4:00 P.M.
Supreme Court of Texas Courtroom
201 West 14th Street, Austin, Texas 78701

Action and Discussion Items:

I. Commencement of Meeting – *Representative John Smithee, Presiding Officer*

II. Attendance of Members – *Wesley Shackelford*

III. Approval of Minutes from March 22, 2016

IV. Opening Remarks

V. Electronic Recording of Interrogations

a. Review member survey results – *David Slayton*

b. Consider adoption of policy recommendations – *Representative John Smithee*

VI. Informants and False Accusations

a. Introduction of Professor Alexandra Natapoff – *Wesley Shackelford*

b. Report on role of informants in wrongful convictions and potential reforms – *Professor Alexandra Natapoff, Loyola Law School*

c. Overview of Texas Exonerations – *Terri Peirce*

d. Discuss potential reforms

VII. Faulty Eyewitness Identifications

a. Overview of Texas Exonerations – *Alejandra Peña*

b. Discuss potential reforms

VIII. Next Topic for Review - Forensic evidence

IX. Review Timeline for Commission Activities – *Wesley Shackelford*

X. Public Comment

XI. Other Business

XII. Next Meeting

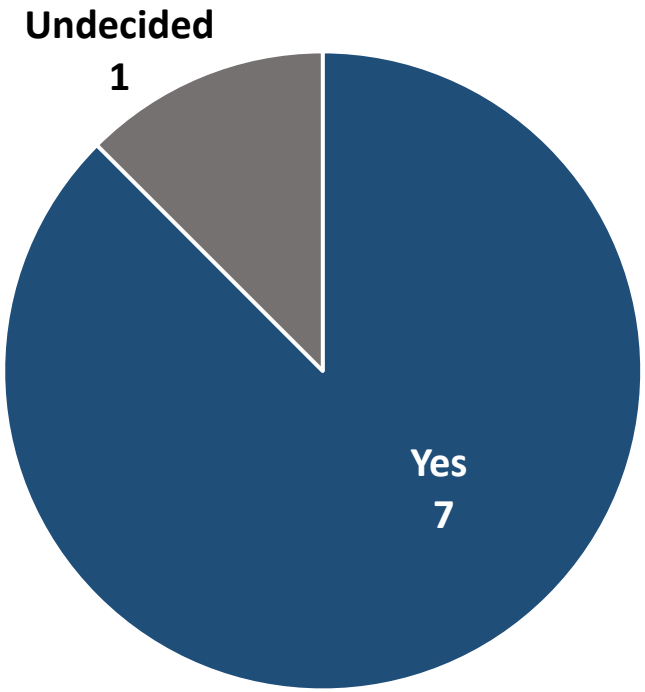
XIII. Adjournment

Timothy Cole Exoneration Review Commission

Electronic Recording of Interrogations

Should the Commission

Recommend mandatory electronic recording of interrogations by law enforcement agencies in any cases?



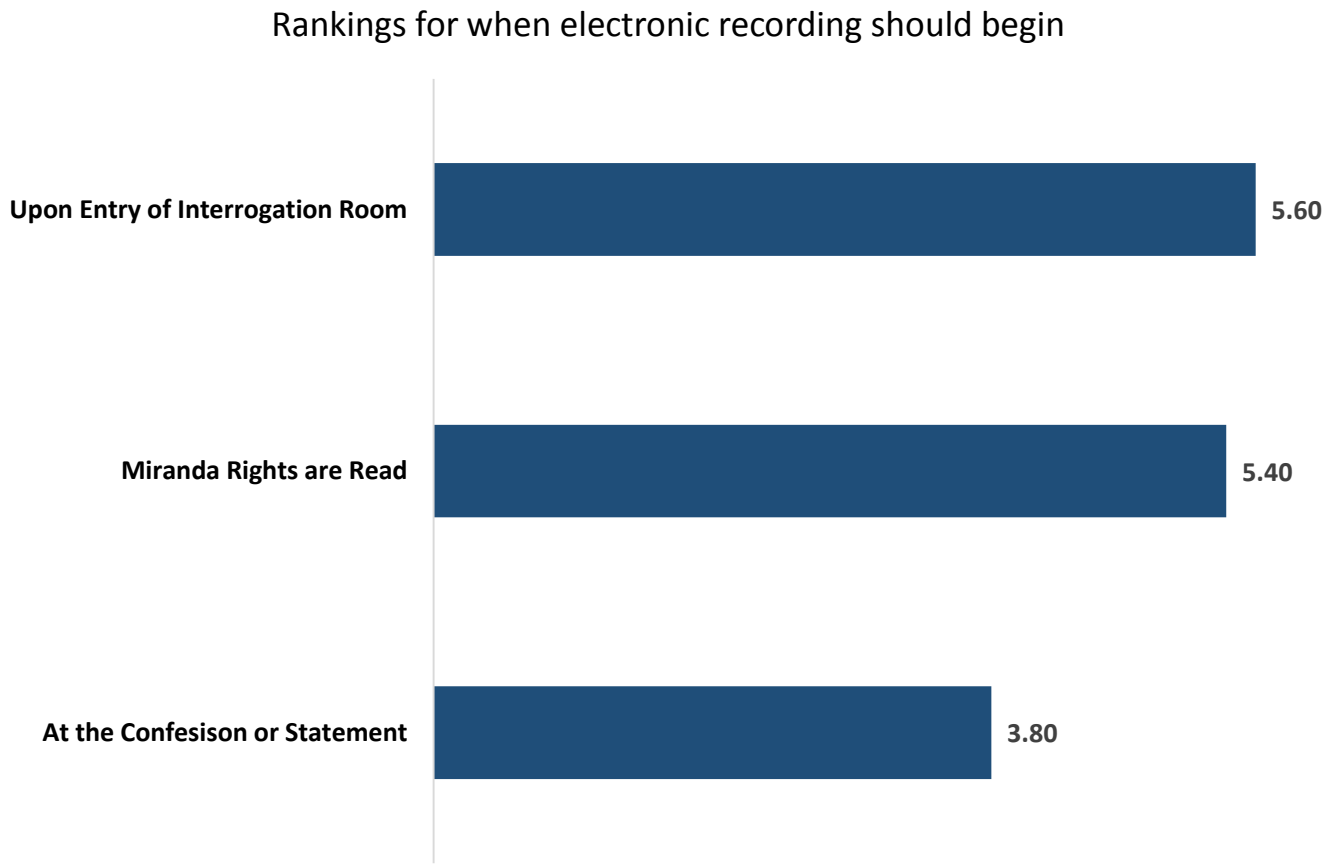
Which category of cases should be recorded?

Member Poll Responses

1. All Felonies
2. All Jailable Offenses
3. All Criminal Offenses
4. All TCAP Offences
5. Certain Felony Offenses
6. Other

Electronic recording of interviews should begin when…

Member Poll Responses



Law Enforcement survey results

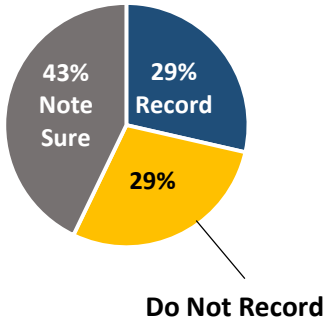
- 27% reported starting at another time, the majority begin recording upon entry of the interrogation room;
- 63% begin recording when *Miranda* rights are read
- 8 states require recording to begin at *Miranda* rights
- 11% officer discretion

Which individuals should be electronically recorded?

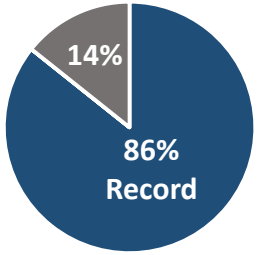
Member Poll Responses

Suspects (Custodial)

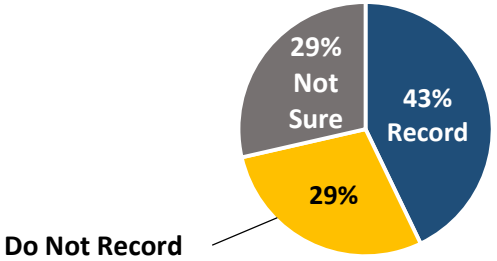
Complainant/Victim



Suspects (Non-Custodial)

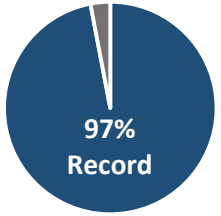


Witnesses

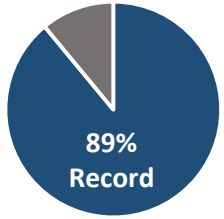


Law Enforcement Survey

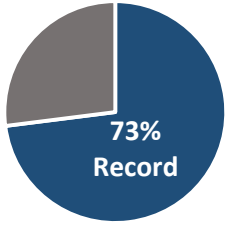
Suspects (Custodial)



Suspects (Non-Custodial)



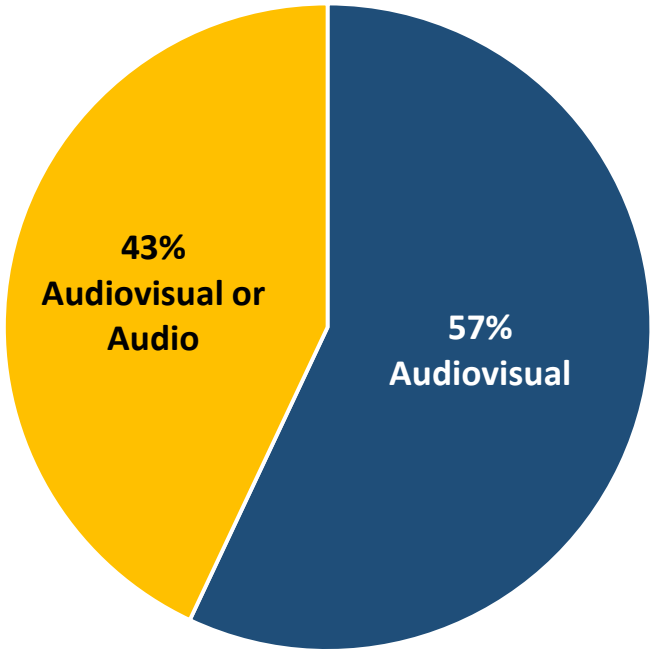
Witnesses



Require departments to make an audio/video or audio only electronic recording of interview?

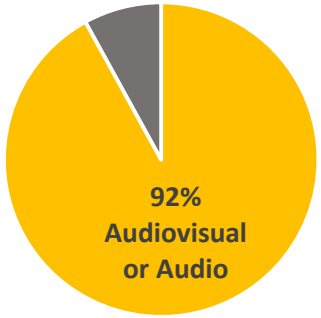
Options

Member Poll Responses

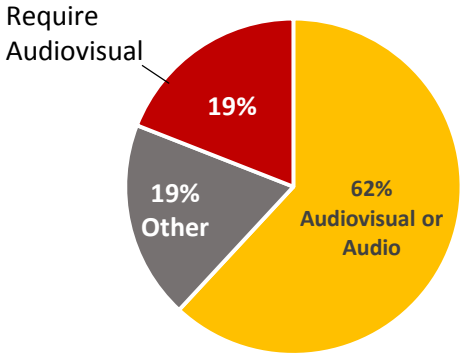


Facts

The majority of the Law Enforcement survey respondents record both audio and video



Of the 21 State that require recording the majority record both audio and video



Should there be a recommendation on how or whether to enforce any newly adopted recording requirements?

1. Permit unrecorded statements with “good cause”
   a. And presume an unrecorded statement should be inadmissible as evidence if the judge finds that no good cause exception applies.
   b. TCAP Report Recommendation from 2010 and SB 181 (84th Legislature/2015)
2. Admit Statements /argue to jury
   a. Permit statements into evidence that were not electronically recorded. The attorneys in the case could then present testimony and arguments to the jury about the reliability of such statements in light of the failure of the law enforcement agency to electronically record the statement.
3. Permit unrecorded statements with jury instructions
   a. Stating that it is the policy of the state to record such statements and that unrecorded statements should be viewed with caution.

Questions?

Electronic Recording of Interrogations
Potential Recommendations

The electronic recording of interrogations by law enforcement officers in certain felony cases is the final recommendation from the Timothy Cole Advisory Panel on Wrongful Convictions (TCAP) that has yet to be implemented. The 2010 TCAP report included extensive discussions about false confessions in the context of making this recommendation. In addition to helping detect false confessions, the recording of interrogations has the potential to impact wrongful convictions in cases where a third party suspect makes a false accusation, as well as cases of official misconduct.

The Advisory Board to the Timothy Cole Exoneration Review Commission (TCERC) notes that among the cases within TCERC's purview, approximately 10% entail instances where an innocent individual either falsely confessed to a crime he/she did not commit or was implicated in the course of a police interrogation of a third party suspect. In each of these cases, a full recording of the interviewee's discussions with law enforcement would have enabled the subsequent investigators to detect issues that bear upon the accuracy of the individual's account.

There are a number of policy choices for TCERC to consider in potentially making a recommendation related to electronic recording of interrogations. The choices framed below are based on the survey of law enforcement, judges, and attorneys, as well as practices in Texas and other jurisdictions.

Policy Choices related to Electronic Recording of Interrogations

1) Recommend mandatory electronic recording of interrogations by law enforcement agencies in any cases? If yes, then:
2) Which Categories of cases:
    a. All Offenses (Class C misdemeanors and up)?
        - 3 (of 21) states record interrogations in all offenses
    b. All Jailable Offenses (Class B and up)?
    c. All Felonies?
        - 13 (of 21) states record in all or most felony-related offenses
        - 92% of Law Enforcement Survey Respondents record interrogations in all felony offenses. Survey responses included more specific breakdowns:
            - Assault: 91%
            - Burglary: 92%
            - Criminal Homicide/ Manslaughter: 92%
            - Felony drug offense: 86%
            - Rape: 93%
            - Robbery: 92%
            - Theft (felony): 90%
            - Other: 87%
    d. Limited Subset of Offenses?
        - TCAP report from 2010 recommended requiring recording 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.

- HB 541/SB 181 from 84th Legislature required recording in all TCAP-recommended offenses above *plus* trafficking of persons, continuous trafficking of persons, and improper relationship between educator and student.

3) Electronic recording of interviews should begin when:
   a. Individual enters the interrogation room (no specific survey question on this category, however 27% reported they started at another time with most of these saying the begin recording before or when the person enters room; many also said recording continues until person leaves room)
   b. *Miranda* rights are read
      - 63% of survey respondents said that recording begins here
      - 8 states specify that recording shall begin when the *Miranda* rights are read
   c. Confession or statement of individual begins (Less than 1% of survey respondents begin here)
      - 11% of survey respondents say the officer has discretion on when to begin recording
4) Which Individuals should be electronically recorded?
   a. Suspects
      - Custodial interviews (97% record suspects / custodial interviews, of those that record)
      - Non-Custodial interviews (89% record suspects / non-custodial interviews, of those that record)
   b. Witnesses (73% record witness interviews, of those that record)

c. Complainant/Victim (no specific survey question on this category, however 24% reported recording "Others" and often said victims and persons filing complaints were recorded)

5) Require departments to make an Audio/Video or Audio only electronic recording of interview?
   - 92% record both Audio & Video (of those that record)
   - Of 21 states that require recording:
     - 13 allow both audio and audiovisual
     - 4 require audiovisual/ video
     - Others did not specify

6) Should there be a recommendation on how or whether to enforce any newly adopted recording requirements.

   a. Exclude Statements. Recommend listing "good cause" exceptions to the electronic recording requirement and presume an unrecorded statement should be inadmissible as evidence if the judge finds that no good cause exception applies. This is what TCAP report from 2010 and SB 181 (84th Legislature/2015) recommended and included five specific good cause exceptions to electronic recording requirement:

      1. Equipment malfunction;
      2. Uncooperative witnesses;
      3. Spontaneous statements;
      4. Public safety exigencies; or
      5. Instances where the investigating officer was unaware that a crime that required recorded interrogations had been committed.

- Exceptions intended to take into consideration the contingencies that investigating officers may face when dealing with a witness or suspect in the field. Some other states included an exception if the statement was obtained in a different state.

OR

b. Jury Instruction. Recommend listing "good cause" exceptions but nonetheless permit unrecorded statements not meeting a good cause exception to be admitted into evidence with a jury instruction that it is the policy of the state to record such statements and that unrecorded statements should be viewed with caution.

OR

c. Admit Statements / Argue to Jury. Recommend permitting statements into evidence that were not electronically recorded. The attorneys in the case could then present testimony and arguments to the jury about the reliability of such statements in light of the failure of the law enforcement agency to electronically record the statement.

- CSSB 969 (83rd Legislature/2013) includes this approach to the issue. It is similar to existing statutes related to admitting an out-of-court eyewitness identification that does not follow the state's model policy or agency specific policy establishing criteria for conducting such identifications.

Other states vary in terms of remedies available when no electronic recording is made of an interrogation and when the circumstances do not fall within reasonable exceptions.

- Alaska and Minnesota supreme courts ruled that such statements should be excluded at trial. (Option A above)
- Illinois statute contains a similar provision, creating a "presumption of inadmissibility," which can be overcome by a preponderance of the evidence that the statement was made voluntarily.
- Massachusetts and New Jersey provide for a jury instruction noting the need to view an unrecorded statement with caution. (Option B above)

Have the Number of Wrongful Convictions Involving False Confessions Decreased in States that Require Recording of Interrogations?

Nationally, 20 states require recording of custodial interrogations through statute or case law. The chart below compares the number of wrongful convictions involving false confessions in which the conviction occurred prior to the effective date of the state's recording requirement vs. after the effective date. The data is from the National Registry of Exonerations, which tracks wrongful convictions overturned with both DNA and non-DNA evidence since 1989.

Based on this data, the number of wrongful convictions involving false confessions decreased in every state since the implementation of the requirement, except for Oregon where the number remained consistent (one conviction occurred prior to the effective date of the law, and one after the effective date).

It should be noted that 13 states implemented mandatory recording of interrogations in recent years, which makes it difficult to draw conclusions about whether the practice has reduced the number of false confession cases. However, states that have required recording for at least a decade have experienced a significant decrease in wrongful convictions involving false confessions since the mandate became effective. For example Illinois experienced a 97 percent decrease in wrongful convictions stemming from false confessions since enacting a mandatory recording of interrogations law in 2003 and Wisconsin experienced a 83 percent decrease since its statute was enacted in 2005.

It should also be noted that the numbers likely represents "the tip of the iceberg" of wrongful convictions involving false confessions, since it is extremely difficult to get back into court and prove a wrongful conviction in most states.

State	Year Recording Requirement Effective	Total # of WC Involving False Confessions	# FC WC before Recording Requirement	# FC WC After Recording Requirement	% Change WC FC Cases Before/After Requirement Effective
Alaska	**1985**	2	N/A Court ruling occurred before WC tracking		
California	**2014**	*Law requires recording of interrogations of juveniles suspected of murder. In CA there were no wrongful convictions in which juveniles convicted of murder falsely confessed.			
Connecticut	**2014**	4	4	0	100%
Illinois	**2003**	62	60	2	97%
Indiana	**2011**	4	4	0	100%
Massachusetts	**2004**	3	3	0	100%
Maryland	**2008**	2	2	0	100%
Maine	**2013**	0	0	0	0%
Michigan	**2013**	6	6	0	100%
Minnesota	**1994**	0	0	0	0%
Missouri	**2009**	4	4	0	100%
Montana	**2009**	0	0	0	0%
North Carolina	**2008**	9	9	0	100%
Nebraska	**2008**	6	6	0	100%
New Jersey	**2006**	1	1	0	100%
New Mexico	**2006**	0	0	0	0%

Oregon	**2010**	2	1	1	0%
Utah	**2016**	1	1	0	100%
Vermont	**2015**	0	0	0	0%
Wisconsin	**2005**	7	6	1	83%

April 25, 2016

Dear Commissioners,

As the Timothy Cole Exoneration Review Commission considers proposals for electronic recording of custodial interrogations, we thought it would be helpful to address some of the questions and concerns that were raised during the March 22nd meeting. We hope that this information will assist you in developing recommendations on the topic.

1. Texas law enforcement experiences with recording interrogations.

During the meeting, Commission members referred to a recent article in *The Houston Chronicle* in which Ray Hunt, president of the Houston Police Officers' Union, expressed concerns about a mandate for statewide recording of interrogations. Mr. Hunt said that such a requirement could be detrimental to police work if it is applied to questioning that occurs in patrol cars or at the crime scene. He also stated "I would not want a person reviewing all our interrogations and writing a how-to book to never get arrested."

All existing state laws or court rulings that require recording apply only to custodial interrogations of suspects that occur in a "fixed location," such as a police station or jail, and not to field interviews. Furthermore, Texas law enforcement agencies have uniformly found the practice to be beneficial to their work. Former United States Attorney Thomas Sullivan and his legal associates have surveyed hundreds of police and sheriffs' departments nationally about their experiences with recording interrogations, including 43 in Texas. Officers across the state, including the Houston Police Department, reported that the practice strengthened investigations, improved training, and protected against defense challenges in court.

For instance, a detective with the Travis County Sheriff's Office said that recorded interrogations "have afforded me the opportunity to review the interviews and observe signs missed during the interviews." Smaller Texas agencies concur; an Alamo Heights officer said: "prosecutors prefer video confessions. After review of video we can improve our questioning." These comments are consistent with positive feedback from law enforcement throughout the country, which is why the International Association of Chiefs of Police, the National District Attorneys Association, the American Bar Association, and many others endorse recording interrogations in their entirety.

2. Existing protections against wrongful convictions involving false confessions or statements.

Articles 38.21-22 of Texas Code of Criminal Procedure govern when statements may be used against the accused. Together, these statutes provide that a statement cannot be used against a defendant in a criminal proceeding unless "if appears to have been made voluntarily, without compulsion or persuasion," and that a written statement resulting from a custodial interrogation is inadmissible unless the prosecution establishes that the accused received *Miranda* warnings, and knowingly, intelligently and voluntarily waived his or her rights prior to making the statement. In addition, oral and sign language statements resulting from a custodial interrogation are inadmissible unless they are electronically recorded.

The current law offers limited protections against wrongful convictions stemming from false confessions because it only requires that investigators capture the result of the interrogation—*i.e.* the suspect's statement—but not the interrogation itself, and does not require any recording where the accused's statement is memorialized in writing. These gaps within the interrogation record leave judges, juries, and investigators without the necessary information to assess the voluntariness and reliability of a confession.

Further, the law does not contain safeguards for instances where the interviewee implicates a third party. In these instances, the defense is entitled to any written summary or other recording of the witness's statement

under the Michael Morton Act, but no recording is necessary. This gap in the law leaves both law enforcement and defense teams without access to important information regarding a suspect's account. For example, Anthony Graves was wrongfully convicted of a brutal multiple murder in Somerville, Texas after he was implicated by Robert Carter during a marathon interview. Skeptical that a single individual could have committed the crime, interrogators pressed Carter for information regarding co-perpetrators and he eventually stated that Graves had been involved in the crime. Carter later recanted and made several statements professing Graves's innocence before and after his trial. Had Carter's interrogation been recorded, the undue influences upon him would have been quickly detected, enabling law enforcement to focus on the true perpetrators. In addition, Graves's defense team could have integrated the circumstances under which Carter implicated Graves's into its cross-examination of Carter and overall trial strategy (if necessary).

According to the National Registry of Exonerations, which tracks wrongful convictions overturned since 1989, nearly every state that mandates recording of interrogations in their entirety has experienced a decrease in wrongful convictions involving false confessions since the requirement took effect.[1] For example, Illinois experienced a 97 percent decrease in erroneous convictions stemming from false confessions since its law took effect in 2003, and Wisconsin experienced a decrease of 83 percent since its statute was enacted in 2005. These numbers likely represent "the tip of the iceberg" since it is extremely difficult to get back into court to overturn a wrongful conviction in most states.

3. Costs and implementation at smaller departments.

Small law enforcement departments across the country have found affordable ways to successfully implement electronic recording of interrogations. Last year the Innocence Project surveyed and received over 100 responses from agencies in Massachusetts and Wisconsin, which have mandated recording for over a decade. Approximately 13 percent of respondents employed 10 or fewer officers, and the majority of these agencies reported using handheld digital recorders that can cost as little as $50.

Departments with limited resources can also consider equipment-sharing agreements to access more high-tech systems; 22 percent of survey respondents said they had such arrangements with local, state and federal agencies. Several agencies reported using body cameras to record interrogations, which should be a more widely available option in Texas following the approval of $10 million in state grants to purchase this equipment.

The survey also found that storage and installation costs were minimal. Nearly 70 percent of respondents said that recordings were stored on existing computer servers or DVDs, meaning that storage was not an additional expense. The majority of agencies said that installation was included with equipment purchase or was done in-house.

Overall, the costs are minimal when compared to long-term savings such as greater court efficiency with fewer pretrial motions to suppress confessions or statements, reduced court time for officers to appear at suppression hearings, and fewer frivolous lawsuits claiming officer misconduct during the interrogation. Recording interrogations also protects taxpayers who are ultimately on the line for civil payouts in false confession cases. For instance Chris Ochoa settled with the city of Austin for $5.3 million.

***

Given the benefits and affordability of electronically recording interrogations, it is not surprising that a recent poll conducted by the Commission found that two-thirds of Texas law enforcement agencies have already implemented the practice. However, individual agencies and officers have discretion about which instances

[1] Of the 20 states that mandate recording interrogations in their entirety, only OR has not experienced a decrease.: one wrongful conviction involving a false confession occurred before the statute became effective in 2010, and one occurred after.

warrant recording and when the tape may begin and end. A uniform statewide requirement to record certain interrogations is necessary to ensure the fair administration of justice throughout the state.

We hope you find this information useful, and please feel free to contact us with any questions or concerns.

Sincerely,

Mike Ware
Executive Director, Innocence Project of Texas

Amanda Marzullo
Policy Director, Texas Defender Services

Michelle Feldman
Policy Advocate, The Innocence Project

Considerations for Recording of Interrogations Laws

Nationally, 20 states require recording of certain custodial interrogations in their entirety (AK, CA, CT, IL, IN, MD, MA, ME, MI, MO, MN, MT, NE, NJ, NM, NC, OR, VT, UT, WI). This memo describes the elements of state statutes and case law that may be considered as the Timothy Cole Exoneration Review Commission issues recommendations for recording of custodial interrogations.

1. **Crime Categories**

States require recording of interrogations for individuals suspected of committing the following crimes:

- All crimes: 3 states (AK, MA, MN)
- Specified felonies: 11 states (CT, IL, MD, ME, MI, MO, NE, NJ, NC, OR, VT)
- All felonies: 5 states (IN, MT, NM, UT, WI)
- Juveniles murder cases: 1 state (CA)

2. **Circumstances that trigger recording requirement**

All 20 state statutes and case law specify that "custodial" interrogations must be recorded, which is typically defined as an interrogation during which (1) a reasonable person would consider that person to be in custody in view of the circumstances, and (2) the person is asked a question by a law enforcement officer that is likely to elicit an incriminating response. In addition, all states specify that the requirements apply to a "place of detention" which is typically defined as a fixed location owned or operated by a law enforcement agency, including a police station or jail, at which persons may be held in detention in connection with criminal charges.

3. **Specifying that interrogations must be recorded in their entirety.**

The majority of states specify that interrogations must be recorded in their entirety. Capturing the whole interrogation and not only the confession helps to substantiate authentic admissions, ensure that defendants' rights are protected, and protect officers against frivolous claims of misconduct. Videotaping an interrogation from the reading of *Miranda* rights to the end of questioning is also recommended by the International Association of Chiefs of Police.

4. **Exceptions to Recording Requirements**.

The chart below denotes the articulated exceptions to recording of interrogation requirements in each statute and case law.

Articulated Exceptions to Recording Requirement	AK	CA	CT	IL	IN	MA	MN	ME	MD	MI	MO	MT	NE	NJ	NM	NC	OR	UT	VT	WI
Equipment could not be obtained/unavailable											√		√		√					
Equipment/operator failure	√	√			√			√			√	√	√		√	√	√	√	√	√
Exigent circumstances		√			√						√	√					√	√	√	
Inadvertent error or oversight that is not the result of intentional conduct																	√			

Investigator is unaware that suspect is involved in a crime class for which recording is required.		√		√	√			√					√	√	√	√	√	√	√	√
Interrogation occurred out of state		√	√	√	√						√	√	√	√	√	√	√	√	√	
Person voluntarily agrees to speak w/ law enforcement											√				√					
Questioning during transport											√									
Questioning related to alcohol influence report											√									
Recording not feasible	√		√	√			√	√					√	√						
Suspect refuses to respond if recorded	√	√	√	√	√			√			√	√	√	√	√	√	√	√	√	√
Safety of individual or protection of identity		√															√		√	√
Spontaneous statement			√	√	√			√			√	√		√	√	√	√	√		√
Statement made before grand jury and/or in open court			√	√											√	√	√			
Statement made during routine arrest/processing		√	√	√	√			√			√	√		√		√	√	√		√
Statement made in a correctional facility															√		√			
Statement obtained by federal officer													√			√	√			
Statement surreptitiously recorded												√								
Detention that has not risen to level of arrest											√									
Court finds statement trustworthy and that admission is in best interest of justice																		√		
Exclusions determined on case-by-case basis	√						√													
No articulated exceptions to recording requirement.						√			√											

5. **Remedies for Failure to Comply**

Courts assess the voluntariness of a confession or statement when determining admissibility. Failure to record an interrogation alone does not prove that a confession or statement was made involuntarily. That is why remedies for noncompliance are critical to providing courts with direction on how to handle unrecorded statements and confessions. In addition, remedies act as enforcement mechanisms that help ensure uniformity in recording practices throughout the state. States that require recording of certain interrogations have included the following remedies for noncompliance:

Presumption of Inadmissibility

Unrecorded statements are presumed to be inadmissible in court (6 states).

AK: "We hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible." *(Stephan v. State, 711 P.2d 1156 (AK. 1985))*

CT: If the court finds by a preponderance of the evidence that the person was subjected to a custodial interrogation in violation of this section, then any statements made by the person during or following that nonrecorded custodial interrogation, even if otherwise in compliance with this section, are presumed to be inadmissible in any criminal proceeding against the person except for the purposes of impeachment. *(C.G.S.A. § 54-1, Effective 2014)*

IL: "If the court finds, by a preponderance of the evidence, that the defendant was subjected to a custodial interrogation in violation of this Section, then any statements made by the defendant during or following that non-recorded custodial interrogation, even if otherwise in compliance with this Section, are presumed to be inadmissible in any criminal proceeding against the defendant except for the purposes of impeachment." *(725 ILCS 5/103-2.1 2005, Effective 2014)*

IN: "In a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof of any one of the following…" *(Indiana Rules of Evidence 617; Effective 2011)*

MN "Suppression will be required of any statements obtained from defendant in violation of recording requirement if violation is deemed "substantial," which determination is to be made by trial court after considering all relevant circumstances bearing on substantiality; if court finds violation not to be substantial, it must set forth its reason for such finding. *(State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994))*

UT: "Except as otherwise provided in Subsection (c) of this rule, evidence of a statement made by the defendant during a custodial interrogation in a place of detention shall not be admitted against the defendant in a felony criminal prosecution unless an electronic recording of the statement was made and is available at trial. This requirement is in addition to, and does not diminish, any other requirement regarding the admissibility of a person's statements.

If the court admits into evidence a statement made during a custodial interrogation that was not electronically recorded under an exception described in Subsection (c)(4) through (9) of this Rule, the court, upon request of the defendant, may give cautionary instructions to the jury concerning the unrecorded statement." *(Utah Rule of Evidence 616; Effective 2016)*

Possible Inadmissibility; Jury Instruction

Court may consider failure to record in determining admissibility of statements. The jury will receive a cautionary instruction (3 states).

CA: "(e) Unless the court finds that an exception in subdivision (b) applies, all of the following remedies shall be granted as relief for

noncompliance:
(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress a statement of a defendant made during or after a custodial interrogation.
(2) Failure to comply with any of the requirements of this section shall be admissible in support of claims that a defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible.
(3) If the court finds that a defendant was subject to a custodial interrogation in violation of subdivision (a), the court shall provide the jury with an instruction, to be developed by the Judicial Council, that advises the jury to view with caution the statements made in that custodial interrogation." *(CA. Penal 859.5; Effective 2014)*

NC: "The court may suppress unrecorded statements; if unrecorded statements are admitted, the jury is instructed to consider the failure to record when determining the voluntariness and reliability of the statements.
A failure to comply with recording requirements:
-Shall be considered by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation.
-Shall be admissible in support of claims that the defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible.
-When evidence of compliance or noncompliance has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable. *(N.C. Stat. § 15A-211; Effective 2008)*

NJ: "The failure to electronically record a defendant's custodial interrogation in a place of detention shall be a factor for consideration by the trial court in determining the admissibility of a statement, and by the jury in determining whether the statement was made, and if so, what weight, if any, to give to the statement. In the absence of an electronic recordation required under paragraph (a), the court shall, upon request of the defendant, provide the jury with a cautionary instruction." *(New Jersey Rules of Evidence 3.7; Effective 2006)*

<u>Jury Instruction</u>

Jury receives a cautionary instruction if the interrogation is unrecorded in violation of the law (7 states)

MA: "Thus, when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an inter- rogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defend- ant is entitled (on request) to a jury instruction ad- vising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be ad- vised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt." *(Com. v. DiGiambattista, 813 N.E.2d 516, 534 (Mass. 2004)).*

MI "Any failure to record a statement as required under section 8 of this chapter1 or to preserve a recorded statement does not prevent any law enforcement official present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determines that the statement is otherwise admissible. However, unless the individual objected to having the interrogation recorded and that objection was properly documented under section 8(3), the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in

evaluating the evidence relating to the individual's statement." (*M.C.L.A. 763.7, Effective 2013).*

MT: "If the defendant objects to the introduction of evidence under 46-4-408 and the court finds by a preponderance of the evidence that the statements are admissible, the judge shall, upon motion of the defendant, provide the jury with a cautionary instruction." *(MT ST § 46-4-407; Effective 2009)*

NE: "Except as otherwise provided in sections 29-4505 to 29-4507, if a law enforcement officer fails to comply with section 29-4503, a court shall instruct the jury that they may draw an adverse inference for the law enforcement officer's failure to comply with such section." *(Neb. Stat §29-4501, Effective 2008)*

OR: "If the state offers an unrecorded statement made under the circumstances described in subsection (1) of this section in a criminal proceeding alleging the commission of aggravated murder or a crime listed in ORS 137.700 or 137.707 and the state is unable to demonstrate, by a preponderance of the evidence, that an exception described in subsection (2) of this section applies, upon the request of the defendant, the court shall instruct the jury regarding the legal requirement described in subsection (1) of this section and the superior reliability of electronic recordings when compared with testimony about what was said and done." *(O.R.S. § 133.400; Effective 2010)*

VT: "If law enforcement does not make an electronic recording of a custodial interrogation as required by this section, the prosecution shall prove by a preponderance of the evidence that one of the exceptions identified in subdivision (1) of this subsection applies. If the prosecution does not meet the burden of proof, the evidence is still admissible, but the Court shall provide cautionary instructions to the jury regarding the failure to record the interrogation." *(13 V.S.A. § 5581; Effective 2015)*

WI: "Unless the state asserts and the court finds that one of the following conditions applies or that good cause exists for not providing an instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case." *(W.S.A. 972.115; Effective 2005)*

Possible Withholding of State Funds

State funds may be withheld if agencies do not attempt to comply with recording requirements. (1 state)

MO: "If a law enforcement agency fails to comply with the provisions, the governor may withhold any state funds appropriated to the noncompliant L/E agency if the governor finds the agency did not act in good faith in attempting to comply with the provisions of this section." *(V.A.M.S. § 590.700 Effective 2009)*

6. Burden of Proof to Overcome Remedy

In some states, the prosecution can avoid a remedy by proving the following:

- Preponderance of evidence that recording was not feasible (AK)
- Preponderance of evidence that the statements were voluntary and reliable (IL, NC)
- Clear and convincing evidence that exception applies. (CA, IN, MT)
- Preponderance of evidence that exception applies. (CT, NE, NJ, OR)

- Court determines that violation is not “substantial” (MN)

7. Recording Retention Requirements

Six states specify that electronic recordings of custodial interrogations must be retained until final appeals and habeas are exhausted (CA, CT, IL, MN, NC, OR).

Professor Alexandra Natapoff is an award-winning legal scholar and a nationally recognized expert on criminal informants. Her book, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (NYU Press, 2009), won the 2010 ABA Silver Gavel Award Honorable Mention for Books. She is Professor of Law and the Associate Dean for Research at Loyola Law School, Los Angeles, a 2016 Guggenheim Fellow, a graduate of Yale and Stanford, and a member of the American Law Institute. Professor Natapoff has testified before the U.S. Congress and assisted numerous jurisdictions in drafting informant-related legislation. She is widely quoted in the national media and runs the educational website *www.Snitching.org* which provides information about informant law and policy to lawyers, legislators, journalists and families.

TESTIMONY BEFORE THE TIMOTHY COLE EXONERATION REVIEW COMMISSION
REGULATING JAILHOUSE INFORMANTS TO PREVENT WRONGFUL CONVICTION

PROFESSOR ALEXANDRA NATAPOFF
JUNE 28, 2016

Thank you for permitting me to submit testimony on this important matter.

I. OVERVIEW

Criminal informants, and jailhouse informants in particular, have become widely recognized as a major source of wrongful conviction in the United States. The Center on Wrongful Conviction at Northwestern University School of Law issued a study finding that over 45 percent of all wrongful capital convictions are due to lying criminal informants, making "snitching the leading cause of wrongful convictions in U.S. capital cases."[1] The Innocence Project has concluded that 15 percent of DNA-based exonerations alone involve a lying informant.[2] In Hearne, Texas, the government relied on the misrepresentations of a drug snitch to wrongfully prosecute dozens of low-income African Americans.[3] Overreliance on jailhouse snitches in both Los Angeles and Orange County, California, has led to massive investigations, the overturning of numerous convictions, and widespread disruptions to the criminal justice establishment.

At the same time, the use of criminal informants remains an important and pervasive aspect of U.S. law enforcement. Police and prosecutors routinely rely on information from compensated criminal witnesses in order to pursue investigations and resolve cases. The informant deal is an integral part of the plea bargaining system, a way of negotiating and resolving cases as well as producing evidence. This is a significant, underregulated aspect of the justice system.

Unlike lay witnesses or whistleblowers, criminal informants offer information in exchange for the hope or promise of a benefit. The most common benefit is leniency for their own crimes, although benefits can include money, leniency for a family member, immigration status, and many other rewards. It is this key characteristic—that informants are being compensated and therefore have incentives to cultivate relationships with the government and to fabricate evidence—that distorts their reliability as well as their relationship to the state and the adversarial process. It also makes them challenging to regulate. Because informant deals are often informal and undocumented, they pose special difficulties for accountability and oversight.

The reform challenge is thus to strengthen the regulation and accountability mechanisms of informant use so as to reduce the well-known threat of wrongful conviction, while preserving the government's ability to collect evidence and prosecute crime. In the past decade, we have seen numerous states, innocence commissions, and researchers propose and adopt such reforms.

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[1] THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW, Center on Wrongful Convictions, Northwestern University School of Law (2004), available at https://www.aclu.org/center-wrongful-convictions-snitch-system.

[2] The Innocence Project, http://www.innocenceproject.org/causes/incentivized-informants/.

[3] *Frontline: Erma Faye Stewart and Regina Kelly*, http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/stewart.html

There are new best practices available to legislatures and law enforcement officials that can improve the accuracy of informant use and strengthen the accountability and integrity of this important aspect of the criminal system.

II. JAILHOUSE INFORMANTS

Jailhouse informants are a particularly unreliable and risky category of criminal informant. As do all informants, they provide evidence to the government in the hope of receiving a benefit. But they have additional characteristics that make them especially dangerous witnesses. Because they are incarcerated, they are surrounded by a large supply of ready-made targets who, by definition, are already suspected of criminal conduct. The jail experience itself educates inmates on the tactics of how to gather and fabricate information, for example by gathering news reports, stealing other inmates' papers, recruiting family members on the outside to do research, or colluding with other inmates.

The jail experience also teaches inmates that benefits will often be conferred in exchange for information even if they are not expressly promised. In Los Angeles, for example, the Grand Jury investigation into jailhouse informant abuses found that inmates would offer information to the government in anticipation of receiving benefits down the road, putting cooperation "in the bank."[4] Inmates also learn that their testimony will be more valuable to the government if they can state they have not received or been promised a benefit, and that therefore it is in their interest to invent pretextual reasons for their cooperation, for example moral concerns. Inmates also learn the benefits of being entrepreneurial, going after targets without express government direction. The Los Angeles Grand Jury, for example, found that informant inmates understood being placed in a cell next to a high profile defendant as an implicit instruction from the government to elicit information from that defendant, even if no governmental actor expressly said so.

As a result of this jail culture, government actors will often not need to ask informants expressly to collect or fabricate evidence: the jailhouse culture will already have performed that function. The legal consequences are substantial and constitutionally troubling. Many jailhouse informant witnesses can truthfully state to the jury that they have not received or been promised any benefit, even though realistically they expect to and will in fact be compensated for their testimony. In addition, many informants can truthfully state that no government actor instructed them to collect information about a target defendant, even though in fact they received implicit encouragement to do so and therefore act in violation of the constitutional rule of Massiah v. United States, 377 U.S. 201 (1964), that prohibits government-incentivized actors from deliberately eliciting incriminating information from defendants.

Finally, because jailhouse informants are incarcerated and at the mercy of jail officials, there are a wide array of benefits and incentives other than leniency for which they can exchange information. Jailhouse informants trade information for food, cigarettes, visiting privileges, phone access, and cell assignments, benefits that can be difficult to identify and track but nevertheless strongly incentivize informants to collect and fabricate information.

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[4] FINAL REPORT OF THE 1989-1990 LOS ANGELES COUNTY GRAND JURY, available at http://grandjury.co.la.ca.us/pdf/1989-90_Final.pdf.

Many of these problems arise due to the very structure of the jailhouse informant culture and the criminal market for informant deals. But we have also seen troubling examples of overt government malfeasance with respect to jailhouse informants, supported in large part by the secrecy and informality of the practice. Orange County, California, for example, is currently reeling from an enormous and debilitating jailhouse snitch scandal. For decades, sheriffs and district attorneys unconstitutionally used informants to extract information from inmates in violation of Massiah, and failed to disclose those practices to defendants and to the courts in violation of Brady v. Maryland, 373 U.S. 83 (1963). As a result, numerous homicide and gang cases throughout the county have now crumbled; a judge has kicked the prosecutors' office off a high profile capital case; and the former Attorney General of California has called for a federal investigation.[5] Such scandals weaken the strength and legitimacy of the criminal system and threaten the finality of serious cases.

Existing protections against jailhouse informant fabrication are weak. Disclosure rules are often too narrow, or come too late, to provide defendants with sufficient information to combat lying informants, while the adversarial process incentivizes prosecutors to withhold and hide that information rather than make it available for proper scrutiny. Judges lack information about informant witnesses that could empower courts to act as better gatekeepers. Jurors lack information about informant culture and the sophisticated incentive structures that produce fabrications, and therefore jurors tend to give more credence to informant witnesses than they should. Such weaknesses have made informant use one of the leading causes of wrongful conviction in the United States, and a source of scandal, instability, and public outrage against the criminal system.

III. REFORMS

The following reforms represent a sample of best practices and established remedies for some of the risks of informant use. While each reform is appropriate for criminal informants in general, these particular versions focus on jailhouse snitches—that is, informants who are incarcerated at the time they produce or offer information to the government. There are many additional potential reforms which I would be happy to discuss with the Commission—these four represent some of the most established and easily implemented.

A. Pre-Trial Reliability Hearings

Courts should hold pre-trial hearings to evaluate the reliability and admissibility of jailhouse informant witnesses. This mechanism has numerous strengths and benefits. First, such hearings are already well within the authority and expertise of trial judges who routinely perform a screening function for witnesses and evidence in trials. Judges who understand the criminal process are far better positioned than jurors to evaluate whether a particular informant, their criminal history, and the benefits they may hope to obtain make them a reliable witness or not. Pre-trial hearings are also an excellent mechanism to support and enforce existing disclosure

[5] Letter to U.S. Attorney General Loretta Lynch from Dean Erwin Chemerinsky and former California Attorney General John Van de Kamp, et al., *Request for Federal Investigation in Orange County, California* (Nov. 17, 2015), available at http://big.assets.huffingtonpost.com/RequestforFederalInvestigationOC.pdf.

requirements. Because the government will be required to disclose detailed background and impeachment information to the court prior to trial, it provides a vehicle for resolving all discovery and disclosure disputes early in the process.

Illinois already mandates reliability hearings for jailhouse informants in capital cases.[6] The State of Washington recently introduced legislation that would require them as well.[7] The Washington legislation is attached to this testimony as Appendix A.

B. Jailhouse Informant Tracking and Accountability Systems

In the wake of the Los Angeles jailhouse informant scandal, the Los Angeles County District Attorney's Office instituted a jailhouse informant registry and supervisory system to mitigate the risks of wrongful conviction and unconstitutional practices. This system provides a strong model for all prosecutorial offices; as part of its response to its own scandal, the Orange County County District Attorney has promised to institute a comparable system. Tarrant County, Texas, has recently instituted an excellent model which is attached to this testimony as Appendix B.

The system involves tracking salient information about informants who offer evidence or who may be used in investigations and cases, including their criminal history, track record of reliability, lying and recantations, and all benefits promised or given. Before a prosecutor can use such a witness at trial, he or she must provide this information to an internal Jailhouse Informant Supervisory Committee, as well as "strong corroboration" for the informant's proffered evidence. This mechanism creates a database of relevant information for prosecutors who can then properly evaluate the reliability of their own witnesses and avoid wrongful conviction.

Such a tracking system also promotes the kind of thorough disclosure necessary to comply with legislative and constitutional disclosure rules. Numerous states specify that the government must disclose not only general impeachment material regarding informants, but details regarding the alleged evidence proffered by the informant, the informant's prior statements, criminal history, benefits received or promised, testimony in prior cases, and recantations.[8] As the attached Tarrant County model illustrates, an internal tracking system supports compliance with these state and constitutional obligations.

C. Educating Juries: Instructions and Experts

Jurors are often unable to discern when an informant is telling the truth. For example, the dozens of informant-generated wrongful convictions documented in the Northwestern University report were overwhelmingly the result of trials. In each case, jurors believed a lying criminal informant.

This occurs for numerous reasons. Because informants' liberty is at stake, they are highly motivated to create plausible testimonies; ironically their criminal background often makes them

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[6] 725 ILCS 5/115-21 (2009).

[7] HB 2654, 64th Leg. (Wash. 2016).

[8] *See, e.g.,* Florida Rule Crim. P. 3.220.

appear knowledgeable and persuasive to lay jurors.[9] In addition, jurors often wrongly assume that because the government is offering the informant as a witness, the government has additional information about the reliability of the informant and is certain that the informant is not lying. This phenomenon is sometime referred to as implicit "vouching." Psychological research has also found that jurors do not fully understand the influence of compensation on an informant's testimony.[10]

There are two leading remedies for lack of juror understanding: jury instructions and expert testimony.

A. Jury Instructions

Numerous states as well as many federal jurisdictions require the court to instruct jurors regarding the special unreliability of compensated criminal witnesses. The standard language of such instructions is as follows:

> The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.[11]

B. Experts

Expert testimony regarding the special risks of jailhouse informants can also assist jurors in making more informed credibility determinations. The facts discussed above regarding the jailhouse culture and expectations of benefits are not within the ken of the average juror: there is no reason that an average person would understand the sophisticated tools available to informants, or the ways that benefits are actually expected, deferred and conferred. Accordingly, courts should admit expert testimony at trial, as well as at reliability hearings, to assist the finder of fact. Such experts do not testify regarding the reliability of any particular informant—that task is for the jury. Rather, the expert educates the factfinder as to the standard practices and

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[9] George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000).

[10] *E.g.*, Jeffrey S. Neuschatz, Deah S. Lawson, Jessica K. Swanner, Christian A. Meissner & Joseph S. Neuschatz, *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137-149 (2008).

[11] *Dodd v. State*, 993 P.2d 778, 785 (Okla.Crim.App. 2000); *see also State v. Arroyo*, 292 Conn. 558, 569–71, 973 A.2d 1254 (2009).

understandings that informants, jail officials, and prosecutors all share so that the factfinder can make a fully informed evaluation.

A Connecticut appellate court recently explained why the use of such experts is appropriate. First, the Court acknowledged "the growing recognition by the legal community that jailhouse informant testimony is inherently unreliable and is a major contributor to wrongful convictions throughout this country."[12] The Court went on to say that "jurors [are] not fully aware of the dangers in relying on informant testimony and that expert testimony could assist jurors in properly evaluating an informant's credibility."

I hope this information is helpful to your deliberations. Thank you again for the opportunity to submit testimony.

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Loyola Law School, Los Angeles

[12] *State v. Leniart*, Case No. 36358 (Ct. App. Ct. June 14, 2016).

APPENDIX A

Washington State Pre-Trial Reliability Legislation

H-3592.1

HOUSE BILL 2654

State of Washington 64th Legislature 2016 Regular Session

By Representatives Orwall, Shea, Walkinshaw, Zeiger, Springer, Moscoso, Farrell, Muri, Riccelli, Goodman, Kagi, Stokesbary, Haler, Kilduff, and Appleton

Read first time 01/18/16. Referred to Committee on Judiciary.

AN ACT Relating to the reliability of incentivized evidence and testimony; adding new sections to chapter 10.58 RCW; adding a new section to chapter 10.73 RCW; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that evidence and testimony from accomplices and criminal informants are inherently suspect because a system in which accomplices and criminal informants are rewarded by the state produces dangerous incentives to manufacture or fabricate evidence. The purpose of this act is to prevent unreliable accomplice and informant testimony from being admitted as evidence in the courts of our state by informing the court, to the maximum extent possible, of the circumstances surrounding such evidence and testimony before the court determines its admissibility.

NEW SECTION. **Sec. 2.** A new section is added to chapter 10.58 RCW to read as follows:

For the purposes of this section and sections 3 and 4 of this act, the following definitions apply:

(1) "Benefit" means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to an informant in exchange for his or her testimony.

(2) "Informant" means any criminal suspect or suspected accomplice, whether or not he or she is detained or incarcerated, who provides information or testimony in exchange for, or in expectation of, a benefit. An informant does not include an expert or a victim of the crime being prosecuted.

(3) "Statement" means an oral, written, or nonverbal communication related to the crime charged.

NEW SECTION. **Sec. 3.** A new section is added to chapter 10.58 RCW to read as follows:

(1) Unless waived by the defense, before the state may introduce any live or prior testimony of an informant in a trial or other criminal proceeding, the court must assess the informant's statement to determine whether the time and place, substance, and circumstances provide sufficient indicia of reliability to be considered by the jury. The court must make this determination outside the presence of the jury by considering the following nonexclusive factors:

(a) The complete criminal history of the informant, including any pending criminal charges or investigations in which the informant is a suspect;

(b) Any benefit the state has provided or may provide in the future to the informant;

(c) The substance of any statement allegedly given by the defendant to the informant and the substance of any informant statement to law enforcement implicating the defendant in the crime charged;

(d) The time and place of the statement allegedly given by the defendant to the informant, the time and place of the disclosure of the informant's statement to law enforcement officials, and the names of all persons present when the statement was allegedly given by the defendant to the informant;

(e) Whether at any time the informant modified or recanted his or her testimony or statement and, if so, the time and place of the modification or recantation, the nature of the modification or recantation, and the names of the persons who were present at the modification or recantation;

(f) Other cases in which the informant offered to provide information to or testify for the state in exchange for a benefit, whether or not a benefit was received;

(g) Other cases in which the informant testified, including those in which the informant received any benefit in exchange for or as a result of that testimony;

(h) If known, the relationship between the defendant and the informant, including the amount of time they were incarcerated in the same custodial section of the jail or prison;

(i) Whether the informant's statement or prior testimony is corroborated by other evidence not offered by an informant tending to connect the defendant with the crime charged; and

(j) Any other information the court considers relevant to the reliability of the informant or the informant's testimony.

(2) After considering the factors set forth in subsection (1) of this section, the court shall exclude the informant's testimony unless the court finds sufficient indicia of its reliability. The court shall state on the record the basis for its decision.

NEW SECTION. **Sec. 4.** A new section is added to chapter 10.73 RCW to read as follows:

If the trial court did not make a reliability determination required in section 3 of this act and the defendant shows by newly discovered evidence that an informant's trial testimony included a false material statement that potentially affected the outcome of the trial, the court shall make an assessment based on the factors provided in section 3(1) of this act. If the court determines that the trial testimony of the informant was unreliable, the court shall order a new trial.

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APPENDIX B

Tarrant County District Attorney's Office Policy

Tarrant County Criminal District Attorney's Office
Jailhouse Informant Procedure

Effective June 10, 2016, the Tarrant County Criminal District Attorney's Office implements this *Jailhouse Informant Procedure.* As part of this procedure, the TCCDA will establish and maintain a central index of jailhouse informants. The central index will track jailhouse informant (JI) testimony as well as JI formal offers to give testimony or other information. The index will be maintained by the designated Informant ACDA who will be responsible for the JI database as well as any associated documents. This index/JI database is the confidential work product of the TCCDA.

For purposes of this procedure, a JI is defined as an incarcerated witness who claims to have been the recipient of an admission made by another inmate and who agrees to testify against that inmate, usually, although not necessarily, in exchange for some benefit.

Prior to using a JI's testimony or information at any stage in a criminal prosecution and regardless of any consideration or lack of consideration given to that JI, an ACDA must 1) request all information known about the JI from the designated ACDA and 2) consult with his or her court chief about the use of the JI.

As part of the determination whether to use the JI, the ACDA should consider the following non-exhaustive list:

a. The facts of the case in which the testimony is being contemplated for use;
b. The JI's criminal history;
c. Relevant information regarding the JI's current case;
d. Any known, or readily available, information about the JI's past cooperation with law enforcement or previous testimony;
e. Any JI information conveyed and maintained by the designated ACDA;
f. Asking the JI detailed questions regarding his previous offers of cooperation or testimony. If the JI is represented by counsel,

these inquiries should be made in the presence of JI's counsel, or with counsel's permission;

g. Any known, or readily available, information about the JI's mental health;
h. The specific evidence to be offered by the JI;
i. How evidence corroborates the JI's statement;
j. What verification exists that the JI and the defendant were housed in the same part of the jail, at the same time, or were otherwise capable of communicating with one another while in custody and how the JI came to be in the same location as the defendant and;
k. The strengths and weaknesses of the case if the informant is not used;
l. The proposed offer and benefit being sought by the JI; and
m. How the agreement impacts justice due the victim in the JI's case;
n. Results of any polygraph examination about the JI's statement(s).

Disclosure Requirements:

If the ACDA decides to use the JI, the ACDA must make a written disclosure to the defense attorney in the instant case and must also upload that information into the JI's pending case(s), if any. Disclosure to the defense is mandatory as soon as an agreement in principle is made with the JI.

That disclosure should include:

1. Any benefit the JI is receiving, including plea deals, letters to parole, offers to contact other law enforcement agencies, and anything else that could conceivably be interpreted as a benefit or consideration, including benefits provided to third parties in consideration of the JI's cooperation;
2. A summary of the JI's expected testimony or, when available, a copy of the record/transcript made of any sworn proffers or statements;

3. A detailed summary of the JI's criminal history, or a copy of the informant's TCIC/NCIC* (*if disclosed pursuant to a protective order);
4. The exact nature of any deal reached with the JI for his/her testimony or, if no benefit has been, or will be conveyed to the witness, a written recitation of that fact;
5. Information regarding any prior testimony given by the JI on behalf of law enforcement and/or any known prior offers to testify on behalf of law enforcement. If a confirmed Tarrant County case exists where the JI testified on behalf of the State, the ACDA should also make reasonable efforts to obtain, and turn over to the defense, a copy of the relevant portion of that transcript;
6. Any discussions with federal or out-of-county prosecutors or the JI's defense attorney and relating to the agreement, when a JI's pending case originates from another county or the federal system.
7. Gang affiliation, if any;
8. Any information regarding the mental health status or history of the JI (only under a protective order);
9. All known information about the JI's current case, including offense reports, digital media, or anything else in the State's possession; and
10. A copy of the JI's Tarrant County Sheriff's Office jail records.

All agreements shall be entered into prior to the JI's testimony. In the unusual event that it may become necessary to deviate from this policy, any agreement reached after the JI testimony must be approved by the Criminal Division Chief. Any post-testimony agreement or deviation must be provided to the defendant's attorney in writing when the agreement or benefit is reached.

If, at any time, the ACDA received information that the JI has or is attempting to fabricate any evidence, the ACDA must fulfill all ethical obligations regarding disclosure of these facts.

JI Index and Database

If the JI testifies, the fact of his testifying along with any other relevant information regarding that testimony should be forwarded to the Informant ACDA responsible for the JI index and database, along with a copy of the disclosure and supporting documents given to defense counsel. Formal offers to testify should also be forwarded to the Informant ACDA for inclusion in the database regardless of whether the JI ultimately testifies.

Best Practices

ACDA's are encouraged to use the "5 P's" which constitute the best practices in using jailhouse informant testimony:

- **Polygraph:** Prior to entering into any agreement with a JI have him/her submit to a polygraph examination.
- **Produce:** Give immediate disclosure of the agreement to the defense counsel.
- **Plea:** Dispose of the JI's case prior to his or her testimony at trial.
- **Proffer:** Have the JI make a recorded, sworn proffer at the time of the disposition of the JI's case.
- **Provide:** Forward the details of the plea and contents of the sworn proffer to defense counsel.

Timothy Cole Exoneration Review Commission

New Topics for Consideration

Informants and False Accusations

- Expert testimony on informants
- Overview of Texas exonerations
- Discussion of potential reforms

Faulty Eyewitness Identifications

- Overview of Texas exonerations
- Discussion of potential reforms

Testimony by:

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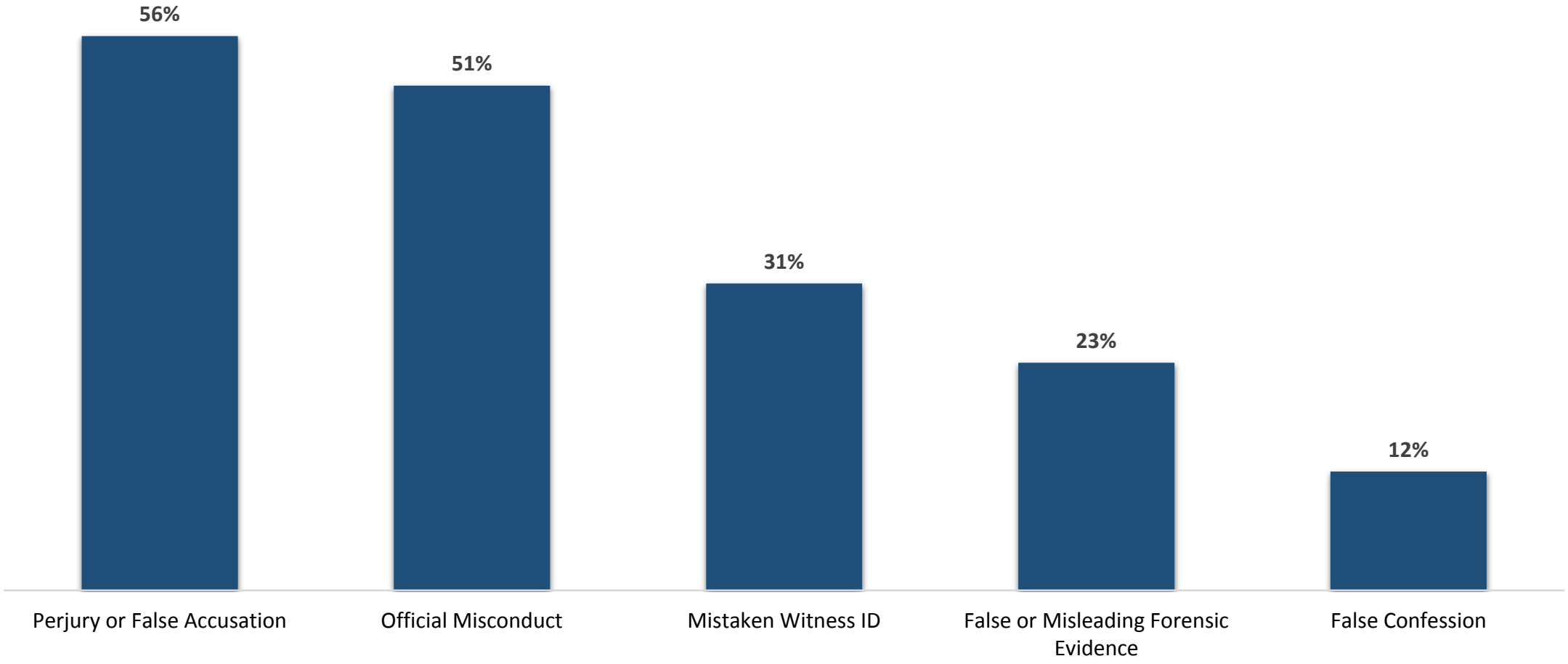
Loyola Law School

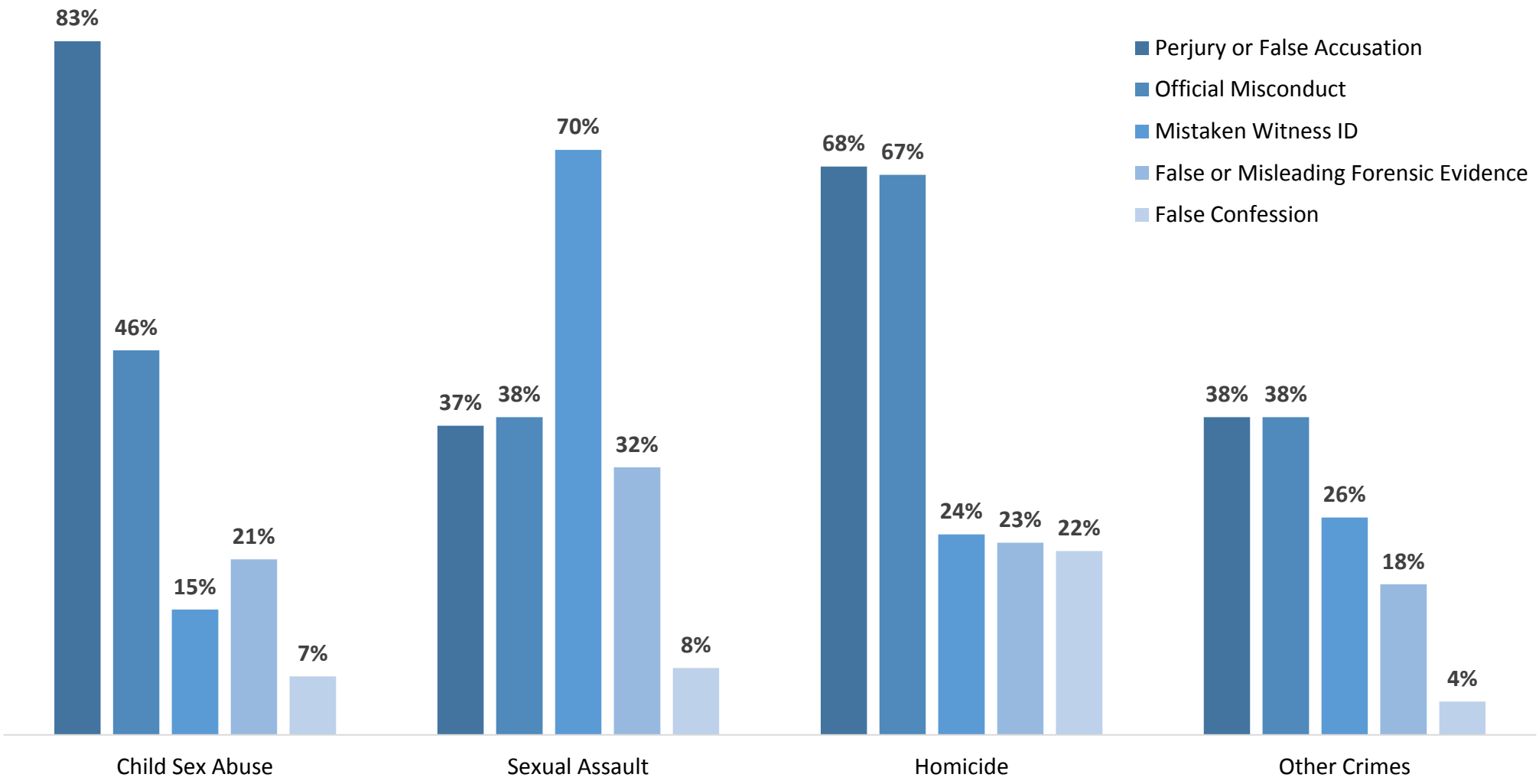
Los Angeles, California

Exonerations by Contributing Factor



National Registry of Exonerations
as of 6/20/2016 Total=1,819

Exonerations by Type of Crime and Contributing Factor



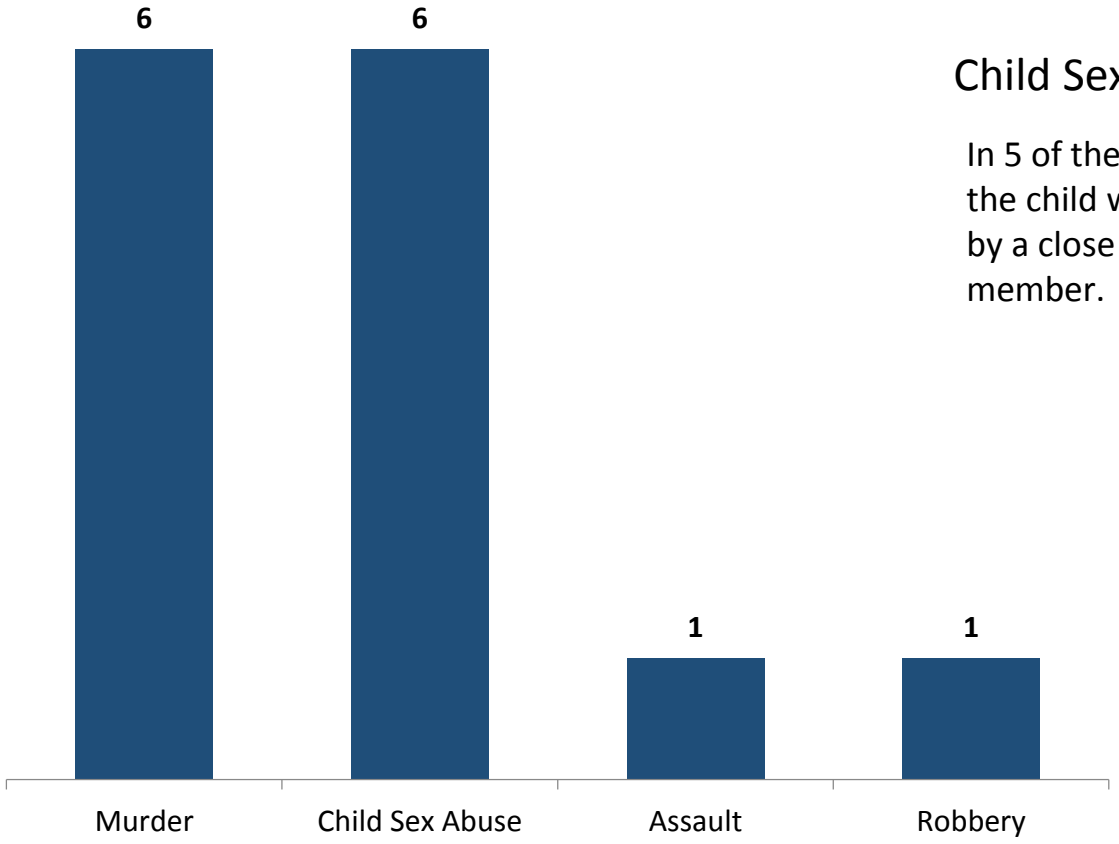
National Registry of Exonerations
as of 6/20/2016 Total =1,819

Informants and False Accusations

False accusation was a contributing factor in 31% of the 45 non-drug related exonerations in Texas since 2010

Murder

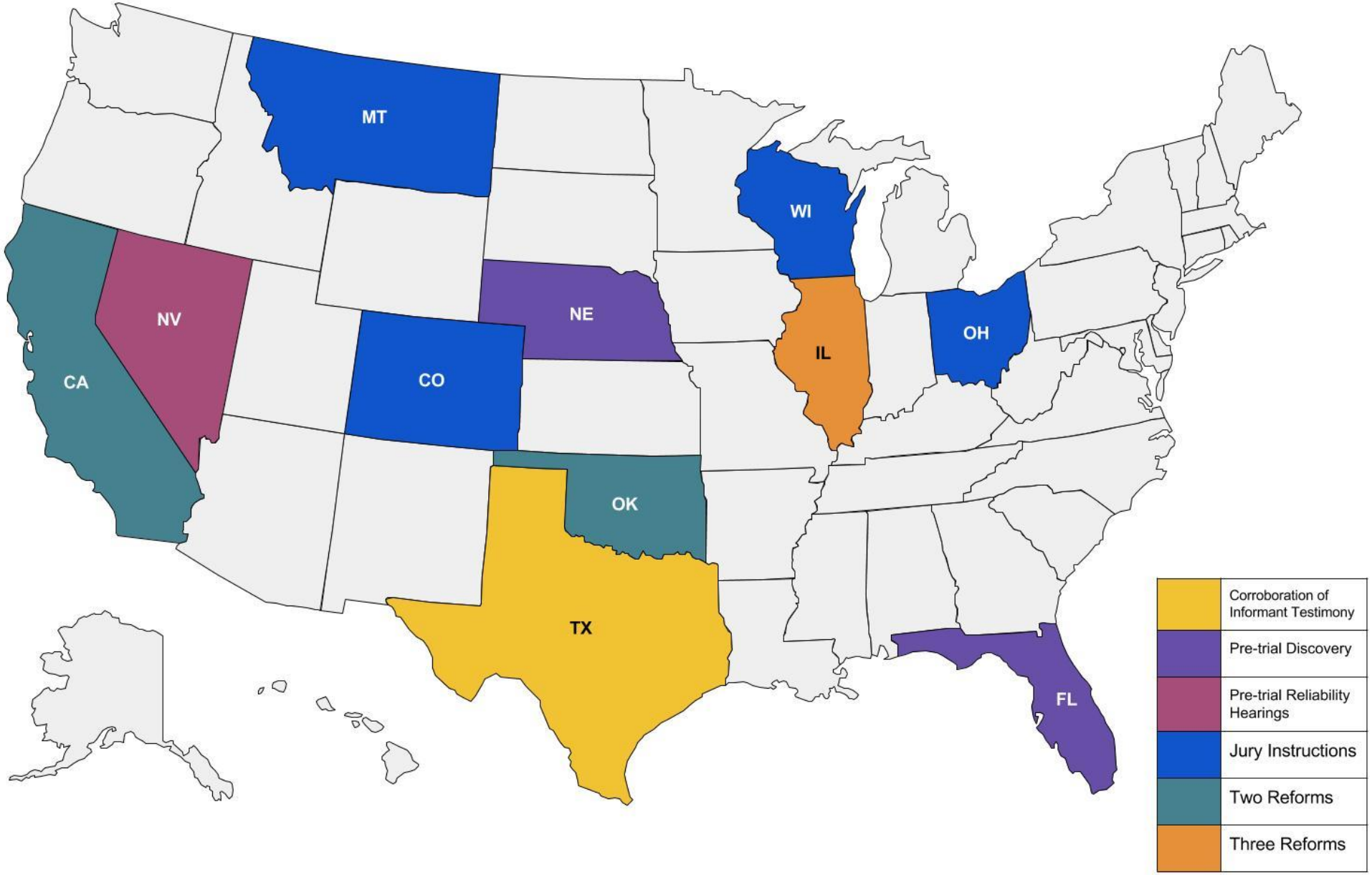
- Official misconduct – threats (3)
- Improper photo lineup procedures (1)
- Implicated by co-conspirator in another crime (1)
- Jailhouse informants (2)



Child Sex Abuse

In 5 of the 6 cases, the child was coached by a close family member.

States Regulating Informant Procedures



Current Law Related to Informant Testimony

Title 1. Texas Code of Criminal Procedure

Art. 38.075. CORROBORATION OF CERTAIN TESTIMONY REQUIRED. (a) A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. In this subsection, "correctional facility" has the meaning assigned by Section 1.07, Penal Code.

(b) Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed.

Informant and False Accusations

Potential Policy Recommendations

Strengthen Pre-trial Discovery

- For in-custody informant testimony
- Require prosecutor to disclose information to defense before trial such as:
    - Statements by informant & any inconsistent statements
    - Benefits informant has or may be offered
    - Complete criminal history
    - Other cases where informant testified or offered statements and benefits received

Discussion/Next Step

Require Courts to Hold Pre-trial Reliability Hearings

- Judge makes a determination of whether to admit jailhouse informant testimony
- Similar to *Daubert* hearings to screen expert testimony

Discussion/Next Step

Access to Counsel

- Provide access to counsel for accusers and grand jury witnesses
  - Potentially reduce the opportunity for official misconduct whereby witness is pressured by police or prosecutors to become an informant
  - 14 states and federal government allow counsel to be present when giving grand jury testimony

Discussion/Next Step

Jury Instruction

- Establish model policy for delivering jury instruction on special reliability issues of incentivized testimony
- Jurors instructed to weigh:
  - Any incentives offered or promised for testimony
  - Prior inconsistent statements
  - Prior trial testimony / Offered statements & any benefit received/offered
  - Criminal history of informant
- 7 states already require special jury instructions for informant testimony

Discussion/Next Step

Local Informant Tracking Systems

- Prosecutors create systems to track the use of jailhouse informants as a best practice
  - Create a registry to track the use of informants, informant reliability, and provide supervisory review of informants in local cases

Discussion/Next Step

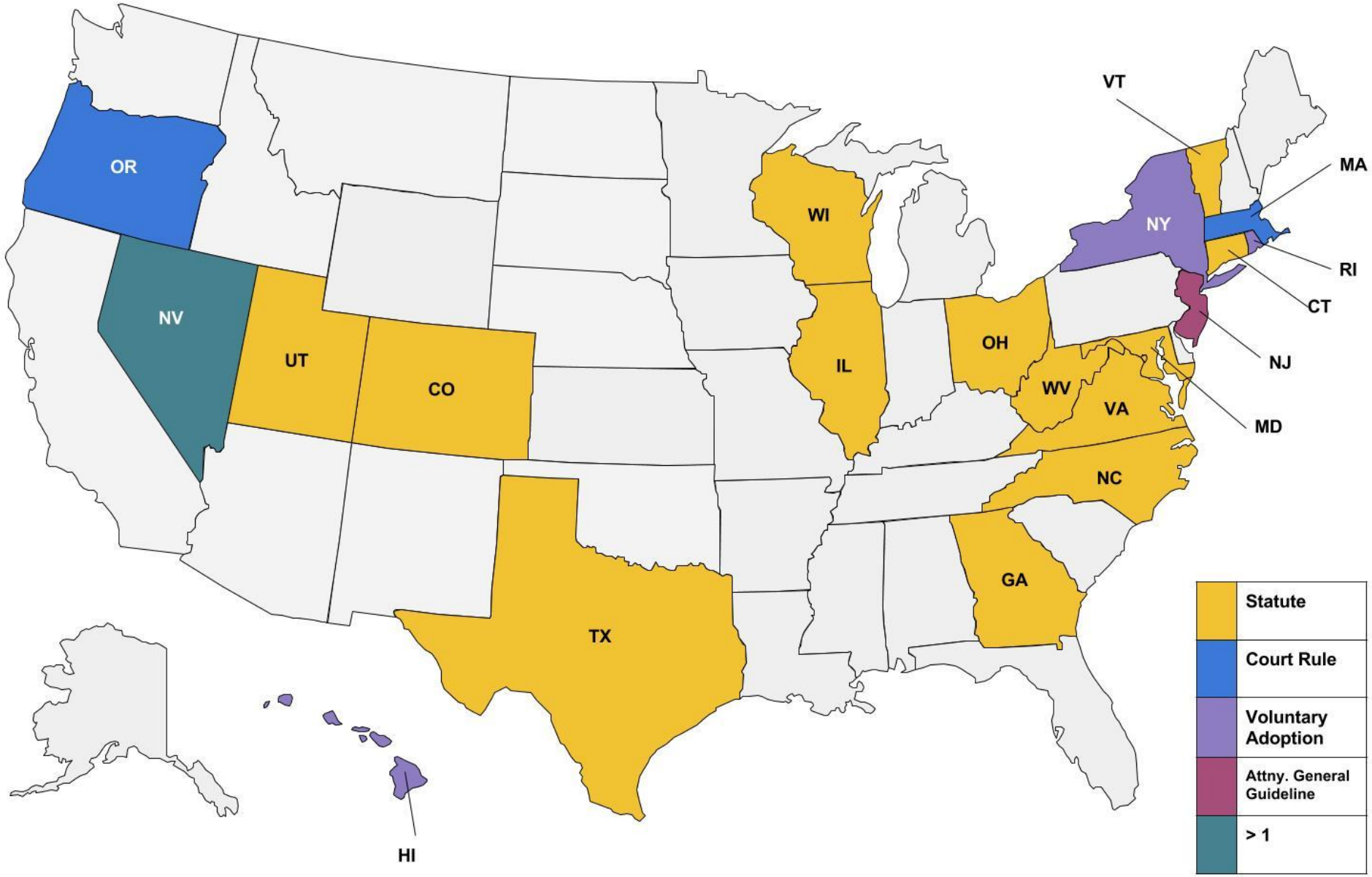
Statewide Informant Tracking System

- Collect aggregate data on informant use
  - Prevents over reliance on informants
  - Ensures consistency in the use of and incentives provided to the informant

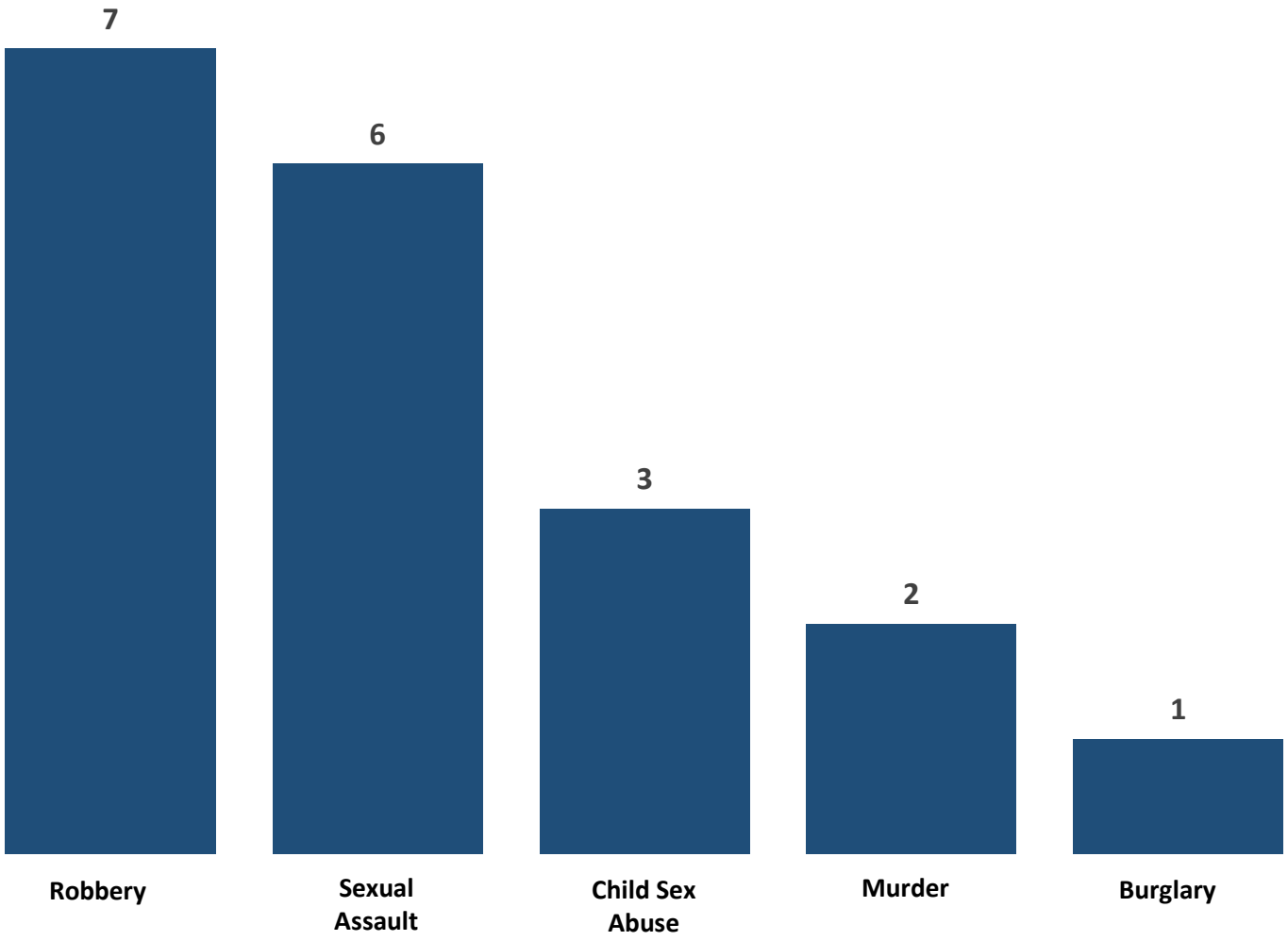
Discussion/Next Step

Faulty Eyewitness Identification

States Regulating Eyewitness Identification Procedures



- Mistaken eyewitness identification (MWID) was a contributing factor in 42% of the 45 non-drug related exonerations in Texas since 2010.
- MWID was most common in robbery and sexual assault cases.



Current Law related to Eyewitness Identification Procedures

Texas Code of Criminal Procedure Art. 38.20
Photograph and Live Lineup Identification Procedures (HB 215, 2011)

Addresses:

- Selection of photograph and live lineup filler photographs or participants
- Instructions given to a witness prior to identification procedure
- Documentation and preservation of results of photo or live lineup identification procedure
- Procedures for administering identification procedure to an illiterate person or person with limited English proficiency
- Procedure for assigning an administrator who is capable of administering the procedure in a blind manner or manner, which can prevent the opportunities to influence the witness
- Other procedures/best practices supported by credible research

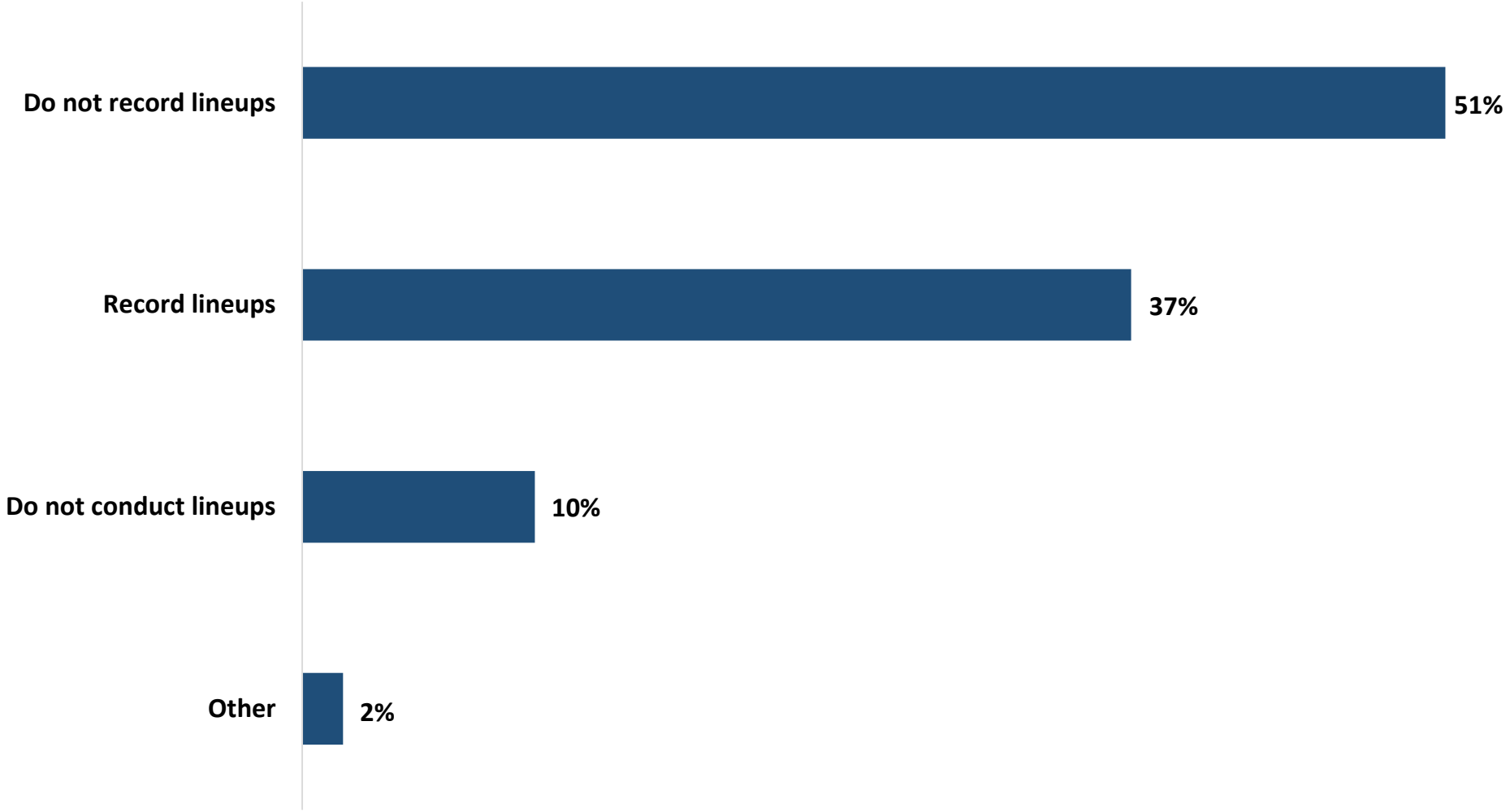
Art. 38.20 Photograph and Live Lineup Identification Procedures

Sec. 5 (b)

Notwithstanding Article 38.23 (Suppression of Evidence by Juries in Texas) as that article relates to a violation of a state statute, a failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy or any other policy adopted under this article or with minimum requirements of this article **does not** bar the admission of eyewitness identification testimony in the courts of this state.

From TCERC Law Enforcement Survey:

Half of law enforcement survey respondents indicated they do not record lineups for eyewitness identification, while close to 40% responded that they do record this procedure.



National Academy of Sciences (NAS) Report Recommendations on Assessing Eyewitness Identification

Train Officers on Eyewitness Identification Procedures

- Provide officers with training on vision and memory and the variables that affect them
- Provide officers periodic refresher trainings
- Provide in-depth instructions to officers assigned to investigative units

Discussion/Next Step

Conduct Pre-trial Judicial Inquiry

- As appropriate, a judge should make basic inquiries when eyewitness identification evidence is offered
- A judge should conduct a pre-trial hearing to review the reliability and admissibility of the evidence
- A judge should ensure that the jury is provided with a scientific framework to evaluate the evidence

Discussion/Next Step

Make Juries Aware of Prior Identifications of the Suspect by the Witness

- Judges should ensure that juries are aware of prior identifications;
- Manner in which the procedure was conducted; and
- Confidence level expressed by witness at that time

Discussion/Next Step

Use Scientific Framework Expert Testimony

- Judges should have the discretion to allow expert testimony on eyewitness identification best practices
- Local jurisdictions should ensure that defendants receive funding to obtain experts, if necessary

Discussion/Next Step

Use Jury Instructions as an Alternative Means to Convey Information

- Instructions should explain relevant best practice principles related to eyewitness identification

Discussion/Next Step

Questions?

Informant Regulation: Recommendations & National Landscape

Jailhouse informants and other types of incentivized witnesses played a role in 16 percent of the nation's DNA-based exonerations.[1] Informants increase the risk of wrongful convictions for several reasons. First, the actual or perceived promise of leniency, reduced sentences, or other benefits creates strong incentives for an informant to fabricate evidence. Perjured informant testimony can taint every stage of a criminal case from an initial investigation to a conviction.

Second, because of the secrecy surrounding the use of incentivized witnesses, legal procedures such as cross-examination are ineffective at weeding out perjured informant testimony.[2] In her book *Snitching: Criminal Informants and the Erosion of American Justice*, Loyola Law School Professor Alexandra Natapoff writes that informant deals "evade the traditional checks and balances of judicial and public scrutiny, even as it determines the outcomes of millions of investigations and cases."[3] Third, the use of informant testimony is largely unregulated by state legislatures or courts, despite many documented miscarriages of justice that have resulted from this type of evidence.[4]

This document outlines describes state efforts to regulate informant testimony through statute or court action.

1. **Corroboration of Informant Testimony**: Given the inherent unreliability of jailhouse informants, California and Texas have enacted statutes which provide that defendants cannot be convicted based on jailhouse informant testimony unless it is corroborated with other evidence.

   National Landscape:

   California (Cal. Penal Code 1111.5 (2011)) "The testimony of an in-custody informant shall be corroborated by other evidence that connects the defendant with the commission of the offense, the special circumstance, or the evidence offered in aggravation to which the in-custody informant testifies. Corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance or the circumstance in aggravation. Corroboration of an in-custody informant shall not be provided by the testimony of another in-custody informant unless the party calling the in-custody informant as a witness establishes by a preponderance of the evidence that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony."

   Texas (Tex. Code Crim. Pro. art. 38-075 (2009)) "A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed."

2. **Pre-trial discovery for in-custody informant testimony.** Robust discovery practices can prevent wrongful convictions by allowing the defense to obtain and present facts that point to their client's innocence, and to properly refute facts that indicate guilt. *Brady v. Maryland*, provides a constitutional right for a defendant to access exculpatory information in the state's possession. However, *Brady* is a limited tool for preventing

[1] www.innocenceproject.org
[2] Jailhouse Snitch Testimony: A Policy Review," The Justice Project (Washington DC, 2007).
[3] Natapoff, Alexandra. Snitching: Criminal Informants and the Erosion of the American Justice (2009).
[4] "Jailhouse Snitch Testimony: A Policy Review," The Justice Project (Washington DC, 2007).

wrongful convictions because a violation can only be filed after a conviction has already occurred and the prosecution is found to have withheld evidence that would have changed the outcome of the trial.[5]

National Landscape

Florida (Rule of Criminal Procedure 3.220) Based on the recommendations issued by the Florida Innocence Commission, the Florida Supreme Court amended the Florida Rule of Criminal Procedure 3.220, governing discovery obligations, to include and apply to certain information obtained from informant witnesses, including those in custody. Specifically, they amended: 3.220(b)(1)(A)(i) to include informant witnesses, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried, in the category of witnesses the prosecution must disclose to the defense and added a new subdivision, (b)(1)(M) to specify which types of material or information relating to the informant must be disclosed,[6]

Illinois (725 ILCS 5/115-21 (2009)) Upon the recommendation of the Illinois Commission on Capital Punishment, the legislature enacted a statute imposing special disclosure requirements for capital cases including: 1) the complete criminal history of the informant; any deal, promise, inducement or benefit that the offering party has made or will make in the future to the informant; 2) the statements made by the accused; 3) the time and place of the statements and their disclosure to law enforcement, and the names of all individuals present when the statements were made; 4) whether the informant recanted statements; 5) other cases the informant has testified in and any incentives he received for that testimony; and 6) any other information relevant to the informant's credibility.[7]

Nebraska (LB 465 (2008)) A statute was enacted requiring that before jailhouse informant testimony is admissible in court, prosecutors must disclose certain information to the defense at least 10 days before trial such as the informant's criminal history, any benefit that has or may be offered, any other cases where the informant testified or offered statements, and any benefits received in those cases.[8]

Oklahoma (*Dodd v. State* (2000)): In *Dodd v. State*, the Oklahoma Criminal Court of Criminal Appeals ruled that before jailhouse informant testimony is admissible in court, prosecutors must disclose certain information to the defense at least 10 days before trial such as the informant's criminal history, any benefit that has or may be offered, any other cases where the informant testified or offered statements, and any benefits received in those cases.[9]

3. **<u>Pre-trial reliability hearings for informants</u>.** Having judges act as gatekeepers to screen out unreliable informants would improve the quality of testimony that is heard by juries and reduce the risk of wrongful convictions.[10] Courts have recognized that juries have limited knowledge of the types of pressures and inducements that inmates are under to provide information that is helpful to the state's case.[11] Judges are better positioned to assess an informant's reliability because they understand the incentivized structures of the criminal justice system.[12]

National Landscape:

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[5] Timothy Cole Advisory Panel on Wrongful Convictions: Report to the Texas Task Force on Indigent Defense (2010).
[6] *In Re: Amendments to Florida Rule of Criminal Procedure 3.220., No. SC13_1541* (May 29, 2014).
[7] 725 ILCS 5/115-21 (2009).
[8] *Dodd v. State,* 993 P.2d 778, 785 (Okla.Crim.App.2000). L.B. 465, 100th Leg., Sess. (Neb. 2008).
[9] *Dodd v. State,* 993 P.2d 778, 785 (Okla.Crim.App.2000). L.B. 465, 100th Leg., Sess. (Neb. 2008).
[10] Natapoff, Alexandra. Snitching: Criminal Informants and the Erosion of the American Justice (2009).
[11] See D'Agostino, 823 P.2d at 284 ("A legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to 'cooperate' with the state and to say anything that is 'helpful' to the state's case.").
[12] Natapoff, Alexandra. Snitching: Criminal Informants and the Erosion of the American Justice (2009).

Illinois *(*725 ILCS 5/115-21 (2009)) Upon the recommendation of the Illinois Commission on Capital Punishment, the legislature enacted a law that requires pre-trial reliability hearings when informants are used in capital murder cases.[13] The statute states "the court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial." The statute directs the court to consider any factors relating to reliability.

Nevada (*D'Agostino v. State (1992))* In *D'Agostino v. State* the Supreme Court of Nevada recognized the inherent problems with informant testimony and ruled that in specific instances during the penalty phase of a case, judges must hold reliability hearings before informant testimony can be heard by a jury. "We now hold that testimony in a penalty hearing relating to supposed admissions by the convict as to past homicidal criminal conduct may not be heard by the jury unless the trial judge first determines that the details of the admissions supply a sufficient indicia of reliability or there is some credible evidence other than the admission itself to justify the conclusion that the convict committed the crimes which are the subject of the admission."[14]

4. **Jury instructions** While jury instructions are critical tools for shaping verdicts, they are insufficient alone to safeguard against lying informants. Natapoff notes that research shows that jurors often find jury instructions confusing or counterintuitive, and that jurors often do not understand how to apply instructions properly.[15] Therefore, it is important to have carefully tailored instructions on how jurors should evaluate informant testimony.

   National Landscape*:* California, Colorado, Illinois, Montana, Oklahoma, Ohio, and Wisconsin require jury instructions for in-custody informant testimony.[16] Below is the jury instruction mandated in Oklahoma by *Dodd v. State*.

   > The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.[17]

5. **Collecting Aggregate Data on Informant Use**: Currently, most jurisdictions lack any mechanism for keeping track of the number of informants used or their benefits to crime fighting.[18] Law enforcement agencies should track and report aggregate data on the number and demographics of the informants they use, crimes those informants help to solve, benefits conferred to those informants, and crimes they've

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[13] 725 ILCS 5/115-21 (2009)
[14] D'Agostino v. State, 823 P.2d 283, 285 (Nev. 1992)
[15] Marder, Nancy S. "Bringing Jury Instructions into the 21st Century," 81 Notre Dame Law Rev. 449, 454-55 (2006).
[16] The Justice Project. "Jailhouse Snitch Testimony: A Policy Review" (2007).
[17] *Dodd v. State,* 993 P.2d 778, 785 (Okla.Crim.App.2000);
[18] Natapoff, Alexandra. Snitching: Criminal Informants and the Erosion of the American Justice (2009).

committed. Like public tax data, aggregate informant data would not include information that could be used to identify individuals.

Law enforcement agencies are already required to provide the FBI with a wide array of crime statistics, and aggregate informant-related information should also be tracked. In addition, the FBI monitors the overall productivity of its own informants and is required to report the total number of times each field office authorizes an informant to engage in otherwise illegal activity.[19] Collecting aggregate data on informants would enable legislators and law enforcement officials to more accurately assess whether informants are making communities safer and to create more effective public policy about their use.

National Landscape: Has not been adopted in any state or at the federal level.

[19] *Id.*

Eyewitness Misidentification: Current Texas Law and Additional Considerations

Witness misidentification is the leading contributing factor in Texas exonerations that have occurred since 2010, playing a role in 45 percent of cases.[1] Nationally, witness misidentification is the leading contributing factor in the nation's 341 wrongful convictions overturned with DNA evidence, playing a role in over 70 percent of these cases.[2]

Decades of research has demonstrated that witness memory is often unreliable and can be influenced by "estimator" variables which cannot be controlled by law enforcement such as lighting, distance from the crime scene, presence of a weapon, stress and own-race bias (e.g. the tendency of people to have difficulty identifying members of races other than their own). Witness memory can also be impacted by "system variables," which are factors that law enforcement can control such as the way that lineups are conducted.

Texas has taken steps to address eyewitness misidentification by enacting a statute that requires law enforcement to use evidence-based identification procedures. However, current law provides neither a remedy for situations where law enforcement deviates from established policies,[3] or procedures to ensure that triers of fact understand the factors bear upon the accuracy of an identification. Going forward, the Timothy Cole Exoneration Review Commission (TCERC) may wish to consider further reforms that would equip judges and juries to properly evaluate witness identifications in court.

Current Texas Law Regarding Eyewitness Identification Procedures

In 2011 Texas codified Article 38.20 of the Texas Code of Criminal Procedure, which directs the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to develop a state model policy on eyewitness identification and requires that agencies either adopt the model policy, or develop their own policy using credible research and relevant policies, guidelines and best practices designed to reduce the risk of misidentification and to enhance the reliability and objectivity of identifications. The policies must address the following topics: 1) the selection of photograph and live lineup fillers, 2) instructions given to a witness before conducting a photographic or live lineup procedure, 3) documentation and preservation of results of the identification procedure, including the documentation of witness statements, 4) procedures for administering an identification procedure to an illiterate person or a person with limited English language proficiency, and 5) procedures for assigning an administrator who is unaware of which member of the lineup is the suspect, or alternative procedures designed to prevent opportunities to influence the witness.

Subsequently, LEMIT issued a model policy that included the following evidence-based procedures: blind or blinded administration of the lineup (e.g. the administrator is unaware of the suspect's identity, or an alternative procedure is used to prevent the administrator from seeing which lineup member is being viewed by the witness at a given time); instructing the witness that the perpetrator may or may not be present; using non-suspect fillers that generally match the witness's description of the perpetrator and do not make the suspect stand out and; eliciting a witness statement of confidence immediately after a selection is made.

Since this law was enacted the National Academy of Sciences, the nation's leading independent scientific entity, conducted the first-ever comprehensive review of eyewitness identification research and recommended

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[1] National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited May 10, 2016).
[2] The Innocence Project. Eye Witness Misidentification, www.innocenceproject.org (last visited May 10, 2016).
[3] *See* Tex. Code Crim. Proc., art. 38.20, § 5(b) (Vernon's 2015) ("failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy or any other policy adopted under this article or the minimum requirements of this article does not bar admission of eyewitness identification testimony"); *see also Guardado v. State*, 08-14-00083-CR, 2015 WL 7281704, at *2 (Tex. App.—El Paso Nov. 18, 2015, no pet.) ("a police officer's failure to conduct a photograph identification procedure in compliance with department policy or Article 38.20 is not a basis for suppressing pretrial identifications.")

practices included in the LEMIT model policy.[4] In addition, the International Association of Chiefs of Police issued a model policy that includes these evidence-based procedures and today 15 states have uniformly implemented key eyewitness identification reforms.

However, Texas law does not contain safeguards to ensure that peace officers conform to the written procedures adopted pursuant to this enactment or a legal framework for evaluating pretrial contamination to a witness's identification. In fact, the Code of Criminal Procedure explicitly states that compliance with written lineup policies is not a condition precedent to an out-of-court eyewitness identification's admission into evidence, and that "failure to conduct a photograph or live lineup identification procedure in substantial compliance with" these policies does not bar admission of eyewitness identification testimony."[5] Thus, judges and juries often hear eyewitness testimony even where the initial identification occurred in a prejudicial setting, but lack guidance to accurately assess and assign weight to this evidence.

Future Considerations

In addition to the use of evidence-based lineups, there are ways to strengthen the value of eyewitness identification evidence in court. The National Academy of Sciences report notes that many scientifically established aspects of eyewitness identification memory are counterintuitive and jurors will likely need assistance in understanding the factors that may affect the accuracy of an identification.[6] The report makes the following recommendations to ensure that witness identifications are properly evaluated by triers of fact:

- Conducting pretrial judicial inquires: *United States v. Wade*, 388 U.S. 218 (1967) requires a pretrial suppression hearing to determine the admissibility of any extra-judicial identification. This procedure allows courts to ensure that identification procedures were constitutional and yielded evidence that is reliable and not suggestive. Such a hearing permits judges to inquire into prior lineups conducted in the case, information and instructions given to the witness before the lineup, whether the lineup had been conducted blindly, reports of the witness' confidence, procedures the agency had in place and to what extent they were followed. A pretrial suppression hearing also enables the judge to determine the reliability and admissibility of the identification evidence and how it will be handled at trial if found admissible.
- Using scientific framework expert testimony: Expert witnesses can provide the jury with an explanation of scientific research on variables that may influence a witness' visual experience of an event and factors that underlie the formation, storage and recall of memory.
- Using jury instructions: Using clear and concise jury instructions can convey information regarding the factors that the jury should consider regarding witness identification.

In Texas, only one of these recommendations, the use of expert testimony, is in use.[7] However, defense access to funding for experts often differs dramatically across the state, which raises troubling questions regarding access to justice and equal protection. A more uniform procedure for obtaining funding for such experts is advisable.

Although section (1)(6) of Article 28.01 of the Texas Code of Criminal Procedure allows judges to hold pretrial suppression hearings, and this includes hearings inquiring into the suppression of eyewitness identifications, too often trial judges do not hold these hearings before empaneling a jury. Instead, the judge continues the hearing until after the jury is empaneled, at which time the suppression hearing is held without jurors present. As a

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[4] National Research Council, Identifying the Culprit: Assessing Eyewitness Identification (2014), *available at* http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.
[5] Tex. Code Crim. Proc. art. 38.20 § 5(a)&(b) (Vernon's 2015).
[6] *Id.*
[7] *Tillman v. State*, 354 S.W.3d 425 (Tex. Crim. App. 2011) (holding that expert testimony relating to the reliability of eyewitness identification procedures is admissible).

result, prosecutors and defense lawyers go to trial without knowing whether eyewitness identification will be part of the merits case, nor whether prospective jurors can properly weigh the case in the presence (or absence) of an identification. Given the complexities of eyewitness evidence and the outsize role it plays in wrongful convictions, a pretrial suppression hearing that occurs before jury empanelment is warranted.

Texas jury instructions also do not assist jurors in assessing eyewitness identification evidence. Currently, no instruction advises jurors that, in weighing its consideration of an eyewitness identification, it may take into account a police agency's failure to follow its internal guidelines for such evidence. Nor are jurors told that, in weighing that evidence, they can consider the many variables that research studies have shown affect the reliability of eyewitness identifications. For example, jurors are not instructed that the reliability of an identification may be affected by contamination of the witness's memory by other witnesses, family and friends, the media, factors inherent in the witness (including race, 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.).

Several states have already implemented these recommendations. Massachusetts, New Jersey, North Carolina and Ohio require jury instructions when there is evidence of suggestive identification practices or mandated procedures are not followed. Jury instructions in Massachusetts and New Jersey direct jurors to consider both system and estimator variables when evaluating witness identification. North Carolina and Ohio laws state that evidence of noncompliance with required procedures can be used to adjudicate motions to suppress an identification. The Supreme Courts of both New Jersey and Oregon require, when there is evidence of suggestiveness, pre-trial reliability hearings that examine both system and estimator variables.

TCERC Eyewitness Identification Reform Questions

o Requiring special procedures where a prospective witness searches social media to identify a suspect
 This suggestion came from practices in the UK. Do you know if any of our states have something in place for this? Or do you all have policy recommendations for this topic? UK policy is attached.

o Adoption of a jury charge that would guide the jury in assessing an identification in light of other evidence at issue in a case. Have any states adopted such a charge? If so, which ones?

New Jersey and Massachusetts have adopted eyewitness identification jury instructions that direct jurors to consider both system variables (e.g. factors under the state's control such as lineup procedures) and estimator variables (e.g. factors that cannot be controlled such as lighting, distance from the crime scene, presence of a weapon).

- **New Jersey:** In *State v. Henderson* (2011) the New Jersey Supreme Court revised the legal framework for evaluating eyewitness identification evidence by: 1) allowing relevant system and estimator variables to be explored and weighed at pretrial hearings if there is evidence of suggestiveness, and 2) developing enhanced jury charges to help jurors evaluate eyewitness identification evidence.[8] In 2012 the New Jersey Supreme Court released a final version of the expanded jury instructions, which caution that certain factors about an eyewitness's circumstances at time of the offense could render the testimony less reliable. Those factors include the stress the eyewitness was under, the duration of the event, lighting, distance, the eyewitness's focus on a weapon, and cross-racial identification. Other factors include the procedures used by law enforcement during the actual identification process. The instructions require jurors to consider the composition of a lineup or photo array and whether any spoken word or gesture by the police could have suggested a specific defendant.[9]

[8] State v. Henderson, 27 A.3d 872, 918–19 (N.J. 2011).
[9] http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.html

- **Massachusetts:** In *Commonwealth v. Gomes* the Massachusetts Supreme Judicial Court (SJC) concluded that juries should be instructed on five increasingly accepted scientific principles regarding eyewitness identification and human memory, most importantly that (1) human memory does not operate like a video recording that a person can replay to recall what happened; (2) a witness's level of confidence in an identification may not indicate its accuracy; (3) high levels of stress can reduce the likelihood of making an accurate identification; (4) information from other witnesses or outside sources can affect the reliability of an identification and inflate an eyewitness's confidence in the identification; and (5) viewing the same person in multiple identification procedures may increase the risk of misidentification.[10] The SJC issued a final version of the jury instruction in November 2015. The instructions are given in any case in which the jury heard eyewitness evidence that positively identified the defendant and in which the identification of the defendant as the person who committed or participated in the alleged crime(s) is contested.

Below are other notable court actions and statutes involving jury instructions or possible suppression of an identification by a judge:

- **Oregon**: In *State v. Lawson*, the Oregon Supreme Court established a new legal framework that requires Oregon courts to consider all of the factors that may affect an identification's reliability (e.g. both system and estimator variables) and instructs courts, where appropriate, to employ remedies, such as limiting the witness's testimony and permitting expert testimony to explain the scientific research on memory and identification. The test shifts the burden to the state to establish that the evidence is admissible. If the state satisfies its initial burden, the court charges that judges may still need to impose remedies, including suppressing the evidence in some circumstances, to prevent injustice if the defendant establishes that he or she would be unfairly prejudiced by the evidence.[11]
- **North Carolina:** The state enacted a statute in 2007 requiring law enforcement agencies to use specific eyewitness identification procedures including blind administration, sequential presentation, specific instructions to the witness, appropriate filler photo usage, obtaining a confidence statement and recording the procedure when practicable. All of the following remedies are available as consequences of noncompliance: (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification. (2) Failure to comply with any of the requirements shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible, and (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.[12]
- **Ohio:** Ohio passed a statute in 2010 requiring blind administration, specific instructions to the witness, appropriate filler selection, acquisition of confidence statements and the recording of the procedure when practicable. Evidence of failure to comply shall be considered by trial courts in adjudicating motions to suppress identifications, and shall be admissible in support of any claim of eyewitness misidentification resulting from or related to the lineup as long as that evidence otherwise is admissible. When evidence of failure to comply is presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.[13]

Do you all have a policy sample/recommendation in this topic? MA & NJ jury instructions are attached.

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[10] *Commonwealth v. Gomes*, 470 Mass. 352 (2015)
[11] http://www.innocenceproject.org/oregon-supreme-court-issues-landmark-decision-mandating-major-changes-in-the-way-courts-handle-identification-procedures/
[12] N.C. Gen Stat. § 15A-284.52, Enacted 2007
[13] OHIO ST. J. CRIM. L. 603, 623-31 (2010)

- We discussed (in TX) something similar to Jury Charge 38.23

o Providing juries with necessary information and guidance to properly gauge the accuracy of any pretrial/trial identification of the defendant (i.e. New Jersey and Massachusetts jury instruction on estimator variable)

In addition to jury instructions, the National Academy of Sciences recommends the use of expert witnesses that can explain the scientific framework surrounding witness identification to jurors. In the 2011 *State v. Tillman* case, the Texas Court of Criminal Appeals recognized the benefits of using eyewitness identification experts, ruling that a judge abused his discretion by excluding expert testimony "that would 'assist the trier of fact' by increasing the jurors' awareness of biasing factors in eyewitness identification."[14] TCERC may consider ways to improve access for defense counsel to eyewitness identification and other experts.

[14] Tillman v. State. 354 S.W.3d 425 (2011).

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Identifying the Culprit

Assessing Eyewitness Identification

Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts

Committee on Science, Technology, and Law

Policy and Global Affairs

Committee on Law and Justice

Division of Behavioral and Social Sciences and Education

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6

Findings and Recommendations

Eyewitnesses make mistakes. Our understanding of how to improve the accuracy of eyewitness identifications is imperfect and evolving. In the previous chapters, we described law enforcement procedures to elicit accurate eyewitness identifications; the courts' handling of eyewitness identification evidence; the science of visual perception and memory as it applies to eyewitness identifications; and the contributions of scientific research to our understanding of the variables that affect the accuracy of identifications. On the basis of its review, the committee offers its findings and recommendations for

- identifying and facilitating best practices in eyewitness procedures for the law enforcement community;
- strengthening the value of eyewitness identification evidence in court; and
- improving the scientific foundation underpinning eyewitness identification.

OVERARCHING FINDINGS

The committee is confident that the law enforcement community, while operating under considerable pressure and resource constraints, is working to improve the accuracy of eyewitness identifications. These efforts, however, have not been uniform and often fall short as a result of insufficient training, the absence of standard operating procedures, and the continuing presence of actions and statements at the crime scene and elsewhere that may intentionally or unintentionally influence eyewitness' identifications.

Basic scientific research on human visual perception and memory has provided an increasingly sophisticated understanding of how these systems work and how they place principled limits on the accuracy of eyewitness identification (see Chapter 4).[1] Basic research alone is insufficient for understanding conditions in the field, and thus has been augmented by studies applied to the specific practical problem of eyewitness identification (see Chapter 5). Applied research has identified key variables that affect the accuracy and reliability of eyewitness identifications and has been instrumental in informing law enforcement, the bar, and the judiciary of the frailties of eyewitness identification testimony.

A range of best practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures. A number of law enforcement agencies have, in fact, adopted research-based best practices. This report makes actionable recommendations on, for example, the importance of adopting "blinded" eyewitness identification procedures. It further recommends that standardized and easily understood instructions be provided to eyewitnesses and calls for the careful documentation of eyewitness' confidence statements. Such improvements may be broadly implemented by law enforcement now. It is important to recognize, however, that, in certain cases, the state of scientific research on eyewitness identification is unsettled.

[1]Basic research on vision and memory seeks a comprehensive understanding of how these systems are organized and how they operate generally. The understanding derived from basic research includes principles that enable one to predict how a system (such as vision or memory) might behave under specific conditions (such as those associated with witnessing a crime), and to identify the conditions under which it will operate most effectively and those under which it will fail. Applied research, by contrast, empirically evaluates specific hypotheses about how a system will behave under a particular set of real-world conditions.

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For example, the relative superiority of competing identification procedures (i.e., simultaneous versus sequential lineups) is unresolved.

The field would benefit from collaborative research among scientists and law enforcement personnel in the identification and validation of new best practices that can improve eyewitness identification procedures. Such a foundation can be solidified through the use of more effective research designs (for example, those that consider more than one variable at a time, and in different study populations to ensure reproducibility and generalizability), more informative statistical measures and analyses (i.e., methods from statistical machine learning and signal detection theory to evaluate the performance of binary classification tasks), more probing analyses of research findings (such as analyses of consequences of data uncertainties), and more sophisticated systematic reviews and meta-analyses (that take account of current guidelines, including transparency and reproducibility of methods).

In view of the complexity of the effects of both system and estimator variables and their interactions on eyewitness identification accuracy, better experimental designs that incorporate selected combinations of these variables (e.g., presence or absence of a weapon, lighting conditions, etc.) will elucidate those variables with meaningful influence on eyewitness performance, which can, in turn, inform law enforcement practice of eyewitness identification procedures. To date, the eyewitness literature has evaluated procedures mostly in terms of a single diagnosticity ratio or an ROC (Receiver Operating Characteristic) curve; even if uncertainty is incorporated into the analysis, many other powerful tools for evaluating a "binary classifier" are available and worthy of consideration.[2] Finally, syntheses of eyewitness research has been limited to meta-analyses that have not been conducted in the context of systematic reviews. Systematic reviews of stronger research studies need to conform to current standards and be translated into terms that are useful for decision makers.

The committee offers the following recommendations to strengthen the effectiveness of policies and procedures used to obtain accurate eyewitness identifications.

RECOMMENDATIONS TO ESTABLISH BEST PRACTICES FOR THE LAW ENFORCEMENT COMMUNITY

The committee's review of law enforcement practices and procedures, coupled with its consideration of the scientific literature, has identified a number of areas where eyewitness identification procedures could be strengthened. The practices and procedures considered here involve acquisition of data that reflect a witness' identification and the contextual factors that bear on that identification. A recurrent theme underlying the committee's recommendations is development of, and adherence to, guidelines that are consistent with scientific standards for data collection and reporting.

Recommendation #1: Train All Law Enforcement Officers in Eyewitness Identification

The resolution and accuracy of visual perceptual experience, as well as the fidelity of our memories to events perceived, may be compromised by many factors at all stages of processing (see Chapter 4). Unknown to the individual, perceptual experiences are limited by uncertainties and biased by expectations. Memories are forgotten, reconstructed, updated, and distorted. An eyewitness's memory can be contaminated by a wide variety of influences, including interaction with the police.

The committee **recommends** that all law enforcement agencies provide their officers and agents with training on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols. In addition to instruction at the police academy, officers should receive periodic refresher training, and officers assigned to investigative units should receive in-depth instruction. Dispatchers should be trained not to "leak" information from one caller to the next and to ask for information in a non-leading way. Police officers should be trained to ask

[2]T. Hastie, R. Tibshirani, and J.H. Friedman, *The Elements of Statistical Learning: Data Mining, Inference, and Prediction* (New York: Springer, 2009).

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open ended questions, avoid suggestiveness, and efficiently manage scenes with multiple witnesses (e.g., minimize interactions among witnesses).

Recommendation #2: Implement Double-Blind Lineup and Photo Array Procedures

Decades of scientific evidence demonstrate that expectations can bias perception and judgment and that expectations can be inadvertently communicated.[3] Even when lineup administrators scrupulously avoid comments that could identify which person is the suspect, unintended body gestures, facial expressions, or other nonverbal cues have the potential to inform the witness of his or her location in the lineup or photo array.

Double-blinding is central to the scientific method because it minimizes the risk that experimenters might inadvertently bias the outcome of their research, finding only what they expected to find. For example, in medical clinical trials, double-blind designs are crucial to account for experimenter biases, interpersonal influences, and placebo effects.

To minimize inadvertent bias, double-blinding procedures are sometimes used in which the test administrator does not know the composition of the photo array or lineup. If administrators are not involved with construction of the lineup and are unaware of the placement of the potential suspect in the sequence, they cannot influence the witness.

Some in the law enforcement community have responded to calls for double-blind lineup administration with concern, citing the potential for increased financial costs and human resource demands. The committee believes there are ways to reduce these costs and **recommends** that police departments consider procedures and new technologies that increase efficiency of data acquisition under double-blind procedures or those procedures that closely approximate double-blind procedures. If an administrator who does not know the identity of the suspect cannot be assigned to the task, a non-blind administrator (one knowing the status of the individuals in the lineup) might use a computer-automated presentation of lineup photos. If computer-based presentation technology is unavailable, the administrator could place photos in numbered folders that are then shuffled, as is current practice in some jurisdictions.

The committee **recommends** blind (double-blind or blinded) administration of both photo arrays and live lineups and the adoption of clear, written policies and training on photo array and live lineup administration. Police should use blind procedures to avoid the unintentional or intentional exchange of information that might bias an eyewitness. The "blinded" procedure minimizes the possibility of either intentional or inadvertent suggestiveness and thus enhances the fairness of the criminal justice system. Suggestiveness during an identification procedure can result in suppression of both out-of-court and in-court identifications and thereby seriously impair the prosecutions's ability to prove its case beyond a reasonable doubt. The use of double-blind procedures will eliminate a line of cross-examination of officers in court.

Recommendation #3: Develop and Use Standardized Witness Instructions

The committee **recommends** the development of a standard set of easily understood instructions to use when engaging a witness in an identification procedure.

Witnesses should be instructed that the perpetrator may or may not be in the photo array or lineup and that the criminal investigation will continue regardless of whether the witness selects a suspect. Administrators should use witness instructions consistently in all photo arrays or lineups, and can use pre-recorded instructions or read instructions aloud, in the manner of the mandatory reading of Miranda Rights. Accommodations should be made when questioning non-English speakers or those with restricted linguistic ability. Additionally, the committee **recommends** the development and use of a standard set of instructions for use with a witness in a showup.

[3]See Box 2-1.

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Recommendation #4: Document Witness Confidence Judgments

Evidence indicates that self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy.[4] The relationship between the witness' stated confidence and accuracy of identifications may be greater at the moment of initial identification than at the time of trial. However, the strength of the confidence-accuracy relationship varies, as it depends on complex interactions among such factors as environmental conditions, persons involved, individual emotional states, and more.[5] Expressions of confidence in the courtroom often deviate substantially from a witness' initial confidence judgment, and confidence levels reported long after the initial identification can be inflated by factors other than the memory of the suspect. Thus, the committee **recommends** that law enforcement document the witness' level of confidence verbatim at the time when she or he first identifies a suspect, as confidence levels expressed at later times are subject to recall bias, enhancements stemming from opinions voiced by law enforcement, counsel and the press, and to a host of other factors that render confidence statements less reliable. During the period between the commission of a crime and the formal identification procedure, officers should avoid communications that might affect a witness' confidence level. In addition, to avoid increasing a witness' confidence, the administrator of an identification procedure should not provide feedback to a witness. Following a formal identification, the administrator should obtain level of confidence by witness' self-report (this report should be given in the witness' own words) and document this confidence statement verbatim. Accommodations should be made for non-English speakers or those with restricted linguistic ability.

Recommendation #5: Videotape the Witness Identification Process

The committee **recommends** that the video recording of eyewitness identification procedures become standard practice.

Although videotaping does have drawbacks (e.g., costs, witness advocates opposing videotaping of witnesses' faces, and witnesses not wanting to be videotaped), it is necessary to obtain and preserve a permanent record of the conditions associated with the initial identification. When necessary, efforts should be made to obtain non-intrusive recordings of the initial identification process and to accommodate non-English speakers or those with restricted linguistic ability. Measures should also be taken to protect the identity of eyewitnesses who may be at risk of harm because they make an identification.

RECOMMENDATIONS TO STRENGTHEN THE VALUE OF EYEWITNESS IDENTIFICATION EVIDENCE IN COURT

The best guidance for legal regulation of eyewitness identification evidence comes not from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision-makers. The *Manson v. Brathwaite* test under the Due Process Clause of the U.S. Constitution for assessing eyewitness identification evidence was established in 1977, before much

[4]See, e.g., C. M. Allwood, J. Knutsson, and P. A. Granhag, "Eyewitnesses under influence: How feedback affects the realism in confidence judgements," *Psychology, Crime, and Law* 12(1): 25–38 (2006); B. H. Bornstein and D. J. Zickafoose, "'I know I know it, I know I saw it': The stability of the confidence-accuracy relationship across domain," *Journal of Experimental Psychology-Applied* 5(1): 76–88 (1999); P. A. Granhag, L. A. Stromwall, and C. M. Allwood, "Effects of reiteration, hindsight bias, and memory on realism in eyewitness confidence," *Applied Cognitive Psychology* 14(5): 397–420 (2000); H. L. Roediger, III, J. T. Wixted, and K. A. DeSoto, "The Curious Complexity between Confidence and Accuracy in Reports from Memory" in *Memory and Law*, ed. L. Nadel and W. P. Sinnott-Armstrong (Oxford: Oxford University Press, 2012).

[5]See, e.g., J. M. Talarico and D. C. Rubin, "Confidence, Not Consistency, Characterizes Flashbulb Memories," *Psychological Science* 14(5): 455–461 (September 2003).

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applied research on eyewitness identification had been conducted. That test evaluates the "reliability" of eyewitness identifications using factors derived from prior rulings and not from empirically validated sources. As critics have pointed out, the *Manson v. Brathwaite* test includes factors that are not diagnostic of reliability. Moreover, the test treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors. While some states have made minor changes to the due process framework, (e.g., by altering the list of acceptable "reliability" factors; see Chapter 3), wholesale reconsideration of this framework is only a recent development (e.g., the recent decisions by state supreme courts in New Jersey and Oregon; see Chapter 3).

Recommendation #6: Conduct Pretrial Judicial Inquiry

Eyewitness testimony is a type of evidence where (as with forms of forensic trace evidence) contamination may occur pre-trial. Judges rarely make pre-trial inquiries about evidence in criminal cases without one of the parties first raising an objection. In cases involving eyewitness evidence, however, parties may not be sufficiently knowledgeable about the relevant scientific research to raise concerns.

Judges have an affirmative obligation to insure the reliability of evidence presented at trial. To meet this obligation, the committee **recommends** that, as appropriate, a judge make basic inquiries when eyewitness identification evidence is offered. While the contours of such an inquiry would need to be established on a case-by-case basis, at a minimum, the judge could inquire about prior lineups, what information had been given to the eyewitness before the lineup, what instructions had been given to the eyewitness in connection with administering the lineup, and whether the lineup had been administered "blindly." The judge could also entertain requests from the parties for additional discovery, and could ask the parties to brief any issues raised by these inquiries. A judge also could review reports of the eyewitness' confidence and any recordings of the identification procedures. When assessing the reliability of an identification, a judge could also inquire as to what eyewitness identification procedures the agency had in place and the degree to which they were followed. Both pre-trial judicial inquiries and any subsequent judicial review would create an incentive for agencies to adopt written eyewitness identification procedures and to document the identifications themselves.

If these initial inquiries raise issues with the identification process, a judge could conduct a pre-trial hearing to review the reliability and admissibility of eyewitness identification evidence and to assess how it should be treated at trial if found admissible. If indicia of unreliable eyewitness identifications are present, the judge should apply applicable law in deciding whether to exclude the identifications or whether some lesser sanction is appropriate. As discussed in the sections that follow, a judge may limit portions of the testimony of the eyewitness. A judge can also ensure that the jury is provided with a scientific framework within which to evaluate the evidence.

Recommendation #7: Make Juries Aware of Prior Identifications

The accepted practice of in-court eyewitness identifications can influence juries in ways that cross-examination, expert testimony, or jury instructions are unable to counter effectively. Moreover, as research suggests (see Chapters 4 and 5), the passage of time since the initial identification may mean that a courtroom identification is a less accurate reflection of an eyewitness' memory. In-court confidence statements may also be less reliable than confidence judgments made at the time of an initial out-of-court identification; as memory fails and/or confidence grows disproportionately. The confidence of an eyewitness may increase by the time of the trial as a result of learning more information about the case, participating in trial preparation, and experiencing the pressures of being placed on the stand.

An identification of the kind dealt with in this report typically should not occur for the first time in the courtroom. If no identification procedure was conducted during the investigation, a judge should consider ordering that an identification procedure be conducted before trial. In any case, whenever the

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eyewitness identifies a suspect in the courtroom, it is important for jurors to hear detailed information about any earlier identification, including the procedures used and the confidence expressed by the witness at that time. The descriptions of prior identifications and confidence at the time of those earlier out-of-court identifications provide more useful information to the fact-finders and decision-makers. Accordingly, the committee **recommend**s that judges take all necessary steps to make juries aware of prior identifications, the manner and time frame in which they were conducted, and the confidence level expressed by the eyewitness at the time.

Recommendation #8: Use Scientific Framework Expert Testimony

The committee finds that a scientific framework describing what factors may influence a witness' visual experience of an event and the resolution and fidelity of that experience, as well as factors that underlie and influence subsequent encoding, storage, and recall of memories of an event, can inform the fact-finder in a criminal case. As discussed throughout this report, many scientifically established aspects of eyewitness memory are counterintuitive and may defy expectations. Jurors will likely need assistance in understanding the factors that may affect the accuracy of an identification. In many cases this information can be most effectively conveyed by expert testimony.

Contrary to the suggestion of some courts, the committee **recommends** that judges have the discretion to allow expert testimony on relevant precepts of eyewitness memory and identifications. Expert witnesses can explain scientific research in detail, capturing the nuances of the research, and focusing their testimony on the most relevant research. Expert witnesses can convey current information based on the state of the research at the time of a trial. Expert witnesses can also be cross-examined, and limitations of the research can be expressed to the jury.

Certainly, qualified experts will not be easy to locate in a given jurisdiction; and indigent defendants may not be able to afford experts absent court funds. Moreover, once the defense secures an expert, the prosecution may retain a rebuttal expert, adding complexity to the litigation. Further investigation may explore the effectiveness of expert witness presentation of relevant scientific findings compared with jury instructions. Until we have a clearer understanding of the strengths and weaknesses of this technique, the committee views expert testimony as an appropriate and effective means of providing the jury with information to assess the strength of the eyewitness identification.

Expert witnesses should not be permitted to testify without limits. An expert explaining the relevant scientific framework can describe the state of the research and focus on the factors that are particularly relevant in a given case. However, an expert must not be allowed to testify beyond the limits of his or her expertise. Although current scientific knowledge would allow an expert to inform the jury of factors bearing on their evaluation of an eyewitness' identification, the committee has seen no evidence that the scientific research has reached the point that would properly permit an expert to opine, directly or through an equivalent hypothetical question, on the accuracy of an identification by an eyewitness in a specific case.

In many jurisdictions, expert witnesses who can testify regarding eyewitness identification evidence may be unavailable. In state courts, funding for expert witnesses may be far more limited than funding in federal courts. The committee **recommends** that local jurisdictions make efforts to ensure that defendants receive funding to obtain access to qualified experts.

Recommendation #9: Use Jury Instructions as an Alternative Means to Convey Information

The committee **recommends** the use of clear and concise jury instructions as an alternative means of conveying information regarding the factors that the jury should consider.

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Jury instructions should explain, in clear language, the relevant principles. Like the New Jersey instructions,[6] the instructions should allow judges to focus on factors relevant to the specific case, since not all cases implicate the same factors. Jury instructions do not need to be as detailed as the New Jersey model instructions and do not need to omit all reference to underlying research. With the exception of the New Jersey instructions, jury instructions have tended to address only certain subjects, or to repeat the problematic *Manson v. Brathwaite* language, which was not intended as instructions for jurors.

Appropriate legal organizations, together with law enforcement, prosecutors, defense counsel, and judges, should convene a body to establish model jury instructions regarding eyewitness identifications.

RECOMMENDATIONS TO IMPROVE THE SCIENTIFIC FOUNDATION UNDERPINNING EYEWITNESS IDENTIFICATION RESEARCH

Basic scientific research on visual perception and memory provides important insight into the factors that can limit the fidelity of eyewitness identification (see Chapter 4). Research targeting the specific problem of eyewitness identification (see Chapter 5) complements basic scientific research. However, this strong scientific foundation remains insufficient for understanding the strengths and limitations of eyewitness identification procedures in the field. Many of the applied studies on key factors that directly affect eyewitness performance in the laboratory are not readily applicable to actual practice and policy. Applied research falls short because of a lack of reliable or standardized data from the field, a failure to include a range of practitioners in the establishment of research agendas, the use of disparate research methodologies, failure to use transparent and reproducible research procedures, and inadequate reporting of research data. The task of guiding eyewitness identification research toward the goal of evidence-based policy and practice will require collaboration in the setting of research agendas and agreement on methods for acquiring, handling, and sharing of data.

Recommendation #10: Establish a National Research Initiative on Eyewitness Identification

To further our understanding of eyewitness identification, the committee **recommends** the establishment of a National Research Initiative on Eyewitness Identification (hereinafter, the Initiative). The Initiative should involve the academic research community, law enforcement community, the federal government, and philanthropic organizations. The Initiative should (1) establish a research agenda to guide research for the next decade; (2) formulate practice- and policy-relevant research questions; (3) identify opportunities for additional data collection; (4) systematically review research to examine emerging findings on the impact of system and estimator variables; (5) translate research findings into policies and procedures that are both practical and appropriate for law enforcement; and (6) set priorities and timelines for issues to be addressed, the conduct of research, the development of best practices, and formal assessments.

The committee notes that there appear to be few existing partnerships between the scientific community and law enforcement organizations and therefore **recommends** that The National Science Foundation (NSF) and the National Institute of Standards and Technology (NIST) take a leadership role working with other federal agencies, such as the National Institute of Justice (NIJ), the Bureau of Justice Statistics (BJS), and the Federal Bureau of Investigation (FBI), to support such collaborations.

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[6]New Jersey Criminal Model Jury Instructions, *Identification* (July 19, 2012), available at: http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf; New Jersey Court Rule 3:11, *Record of an Out-of-Court Identification Procedure* (July 19, 2012), available at: http://www.judiciary.state.nj.us/pressrel/2012/new_rule.pdf, New Jersey Court Rule 3:13-3, *Discovery and Inspection* (July 19, 2012), available at: http://www.judiciary.state.nj.us/pressrel/2012/rev_rule.pdf.

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The impact on society of innocents being incarcerated while perpetrators remain free, in conjunction with limited federal resources, highlights the need for both public and private support for this Initiative.

To enhance the scientific foundation of eyewitness identification research and practice, the Initiative should commit to the following:

a. Include a practice- and data-informed research agenda that incorporates input from law enforcement and the courts and establishes methodological and reporting standards for research to assess the fundamental performance of various aspects of eyewitness identification procedures as well as synthesize research findings across studies.

b. Develop protocols and policies for the collection, preservation, and exchange of field data that can be used jointly by the scientific and law enforcement communities. Data collection procedures used in the field should be developed to ensure the relevance of the collected data, to facilitate analysis of the data, and to minimize potential bias and loss of data through incomplete recording strategies.

Law enforcement agencies should take the lead in collecting, maintaining, and sharing relevant data from the field. Much of the data that would be useful for the evaluation of eyewitness identification procedures have been collected in the form of administrative records and may be readily adapted for use in research. Comprehensive data should be collected on lineup composition and witness selections (i.e., fillers, non-identifications, and position of suspect in lineup).

c. Develop and adopt guidelines for the conduct and reporting of applied scientific research on eyewitness identification that conform to the highest scientific standards. All eyewitness research, including field-based studies, laboratory-based studies, and research synthesis, should use rigorous research methods and provide detailed reporting of both methods and results, including (1) pre-registration of all study protocols; (2) investigation of research questions and hypotheses informed by the needs of practice and policy; (3) adoption of strict operationalization of key measures and objective data collection; (4) development of experimental designs informed by analytical concerns; (5) use of proper statistical procedures that account for the often non-traditional nature of data in this field (e.g., estimates of effects with appropriate statements of uncertainty, multiple responses from different scenarios from the same individuals, effects of order and time of presentation when important, treatment of extreme observations or outliers); (6) reporting of participant recruitment and selection and assignment to conditions; (7) complete reporting of findings including effect sizes and associated confidence intervals for both significant and non-significant effects; and (8) derivation of conclusions that are grounded firmly in the findings of the study, are framed in the context of the strengths and limitations of study methodology, and clearly state their implications for practice and policy decisions.

Strict adherence to guidelines for eyewitness identification research will result in more credible research findings that can guide policy and practice. Research that conforms to guidelines will withstand rigorous scrutiny by peers, will be verifiable through replication, and will permit inclusion in systematic reviews, leading to greater confidence in the validity and generalizability of findings.

d. Adopt rigorous standards for systematic reviews and meta-analytic studies. Meta-analyses of primary studies should be conducted only in the context of systematic reviews that locate and critically appraise *all* research findings, including those from unpublished studies. Analyses should consistently appraise and account for possible biases in the included research. Studies that do not adequately conduct or report research methods, such as randomization, should be identified in the findings. Sensitivity analyses considering impacts of lower quality or inadequately reported studies on pooled effect estimates should be conducted and reported. When attempting to draw conclusions

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from studies with missing data, reviewers should first attempt to contact the authors of the research for additional information. When missing data cannot be retrieved from researchers, imputation methods should, if used, be specific, transparent, and reproducible. Statistical methods for meta-analysis should conform to current best practice, using models appropriate to the level of heterogeneity of results across studies, computing both point estimates and confidence intervals around effect sizes, and translating the results of meta-analyses into terms that are both understandable and useful to practice and policy decision-makers.

e. Provide basic instruction for police, prosecutors, defense counsel, and judges on aspects of the scientific method relevant to eyewitness identifications procedures (e.g., the rationale for blinded administration), including principles of research design and the uncertainties associated with data analysis. Training should cover the importance of data collection and interpretation, including the role of standardized eyewitness identification procedures and documentation of witness statements of confidence. Competencies acquired through such training (quantitative reasoning, understanding principles of research design, and recognition of data uncertainties) are likely to apply to issues beyond eyewitness identification. For example, the knowledge and skills from training can be applied to other issues that personnel face, either in forensic science technologies or in process administration, evaluation, and quality improvement. Similarly, scientists will benefit from a greater knowledge of legal issues, standards, and procedures related to the problem of eyewitness identification. Training of both communities (law and science) will enhance communication and lead to productive collaborations.

The collaborative research initiative between researchers and law enforcement communities will be challenging as it will necessitate (1) standardized police procedures;[7] (2) systematic valid evidence collection and data entry and analysis; and (3) education and training for both researchers and law enforcement professionals on the differences between these two communities in their use of terms and considerations of standards of evidence and uncertainties in data. These three elements of a collaborative initiative are critical to advancing the science related to eyewitness identifications, as each bears directly on the integrity of the foundation upon which the efficacy and validity of current and future practices will be judged. Without such a foundation, practical advances in our scientific understanding are unlikely to occur.

The committee further **recommends** that the Initiative support research to better understand the following: (1) the variables that affect the accuracy, precision, and reliability of eyewitness identifications, and how those variables interact and vary in practice; (2) the (possibly joint) impact of estimator and system variables on both identification accuracy and response bias; (3) best practices for probing witness memory with the least potential for bias or contamination; (4) best strategies to assess witnesses' confidence levels when making an identification; and (5) appropriate types of instructions for police, witnesses, and juries to best inform and facilitate the collection and interpretation of eyewitness identifications; (6) photo array composition and procedures; (7) identification procedures in the field (showups); (8) innovative technologies that might increase the reliability of eyewitness testimony (e.g., algorithm-based computer face recognition software, computer administered photo arrays, and mobile technologies with photo identification programs); and (9) the most effective means of informing jurors how to consider the factors that affect the strengths and weaknesses of eyewitness identification evidence.

[7]The term *standardized procedures* refers to the notion that professionals reliably follow the same set of steps or procedures. Such standardization ensures that data across cases can be considered comparable and, to a greater extent, more reliable. Although reliability is not equivalent to validity, it is essential before researchers can assess questions of validity. Without standardized procedures, valid comparisons between departments and regions of the country cannot be achieved.

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Recommendation #11: Conduct Additional Research on System and Estimator Variables

Among the many variables that can affect eyewitness identification, the procedures for constructing a lineup have received the greatest attention in recent years. As discussed in Chapter 5, the question as to whether a simultaneous or sequential lineup is preferred is a specific case of the more general question of what conditions might improve the performance of an eyewitness. The answer to that question depends upon the criteria used to evaluate performance, and much of the debate has thus focused on the analysis tools for evaluation. These tools have improved significantly over the years, beginning with the use of a diagnosticity ratio, which uses the likelihood that the person identified is actually guilty as an evaluation criterion. More recently, the diagnosticity ratio approach has been augmented by analysis of Receiver Operating Characteristics (ROC analysis), which uses a measure of discriminability (i.e. a measure of how well the witness can discriminate between different possible matches to his/her memory of the face of the culprit) as an evaluation criterion. In principle, ROC analysis is a positive step, if only because it incorporates more information (i.e. the earlier diagnosticity ratio is one component of the ROC analysis). But a more complex question concerns how policy-makers and practitioners should weigh the two evaluation criteria that have been considered thus far – likelihood of guilt and discriminability – when making a decision about which lineup procedures to adopt. The answer is particularly nuanced because the two criteria do not always lead to the same conclusion; one lineup procedure may yield poorer discriminability while at the same time increasing the likelihood that the identified person is actually guilty.

The committee concludes that there should be no debate about the value of greater discriminability – to promote a lineup procedure that yields less discriminability would be akin to advocating that the lineup be performed in dim instead of bright light. For this reason, the committee **recommends** broad use of statistical tools that can render a discriminability measure to evaluate eyewitness performance. But a lineup procedure that improves discriminability can yield greater or lesser likelihood of correct identification, depending on how the procedure is applied (see Chapter 5). For lineup procedures that yield greater discriminability, greater likelihood of correct identification would appear preferable and can be achieved by methods that elicit a more conservative response bias, such as a sequential (relative to simultaneous) lineup procedure.[8] The committee thus **recommends** a rigorous exploration of methods that can lead to more conservative responding (such as witness instructions) but do not compromise discriminability.

In view of these considerations of performance criteria and recommendations about analysis tools, can we draw definitive conclusions about which lineup procedure (sequential or simultaneous) is preferable? At this point, the answer is no. Using discriminability as a criterion, there is, as yet, not enough evidence for the advantage of one procedure over another. The committee thus **recommends** that caution and care be used when considering changes to any existing lineup procedure, until such time as there is clear evidence for the advantages of doing so. From a larger perspective, the identification of factors (such as specific lineup procedures or states of other system variables) that can objectively improve eyewitness identification performance must be among the top priorities for this field. This leads us to three additional recommendations.

a. The committee **recommends** a broad exploration of the merits of different statistical tools for use in the evaluation of eyewitness performance. ROC analysis represents an improvement over a single diagnosticity ratio, yet there are well-documented quantitative shortcomings to the ROC approach. But are there alternatives? As noted in Chapter 5, the task facing an eyewitness is a binary classification task and there exist many powerful statistical tools for evaluation of binary classification performance that are widely used, for example, in the field of machine learning. While

[8]The committee stresses, however, that adoption of a more conservative response bias necessitates a compromise by which fewer lineup "picks" are made overall and thus fewer guilty suspects are identified (see Chapter 5).

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none of these tools has been vetted for application to the problem of eyewitness identification, they offer a potentially rich resource for future investigation in this field.

b. The alternative (sequential) lineup procedure was introduced as part of an effort to improve eyewitness performance. While, as noted above, it remains unclear whether the procedure has improved eyewitness performance, that goal is still primary. In an effort to achieve that goal, many studies over the past three decades have explored the possibility that other factors may also affect performance, but until recently these investigations have not evaluated performance using a discriminability measure. The committee therefore **recommends** a broad exploration of the effects of different system variables (e.g. additional variants on lineup procedures, witness lineup instructions) and estimator variables (e.g. presence or absence of weapon, elapsed time between incident and identification task, levels of stress), and – importantly –interactions between these variables, using either the ROC approach or other tools for evaluation of binary classifiers that can be shown to have advantages over existing analytical methods.

c. Building upon the committee's call for a practice- and data-informed research agenda that incorporates input from law enforcement and the courts and establishes methodological and reporting standards for research, the committee **recommends** that the scientific community engaged in studies of eyewitness identification performance work closely with law enforcement to identify other system and estimator variables that might influence performance and practical issues that might preclude certain strategies for influencing performance. In addition, the committee **recommends** that policy decisions regarding changes in procedure should be made on the basis of evidence of superiority and should be made in consultation with police departments to determine which procedure yields the best combination of performance and practicality.

CONCLUSION

Eyewitness identification can be a powerful tool. As this report indicates, however, the malleable nature of human visual perception, memory, and confidence; the imperfect ability to recognize individuals; and policies governing law enforcement procedures can result in mistaken identifications with significant consequences. New law enforcement training protocols, standardized procedures for administering lineups, improvements in the handling of eyewitness identification in court, and better data collection and research on eyewitness identification, can improve the accuracy of eyewitness identifications.

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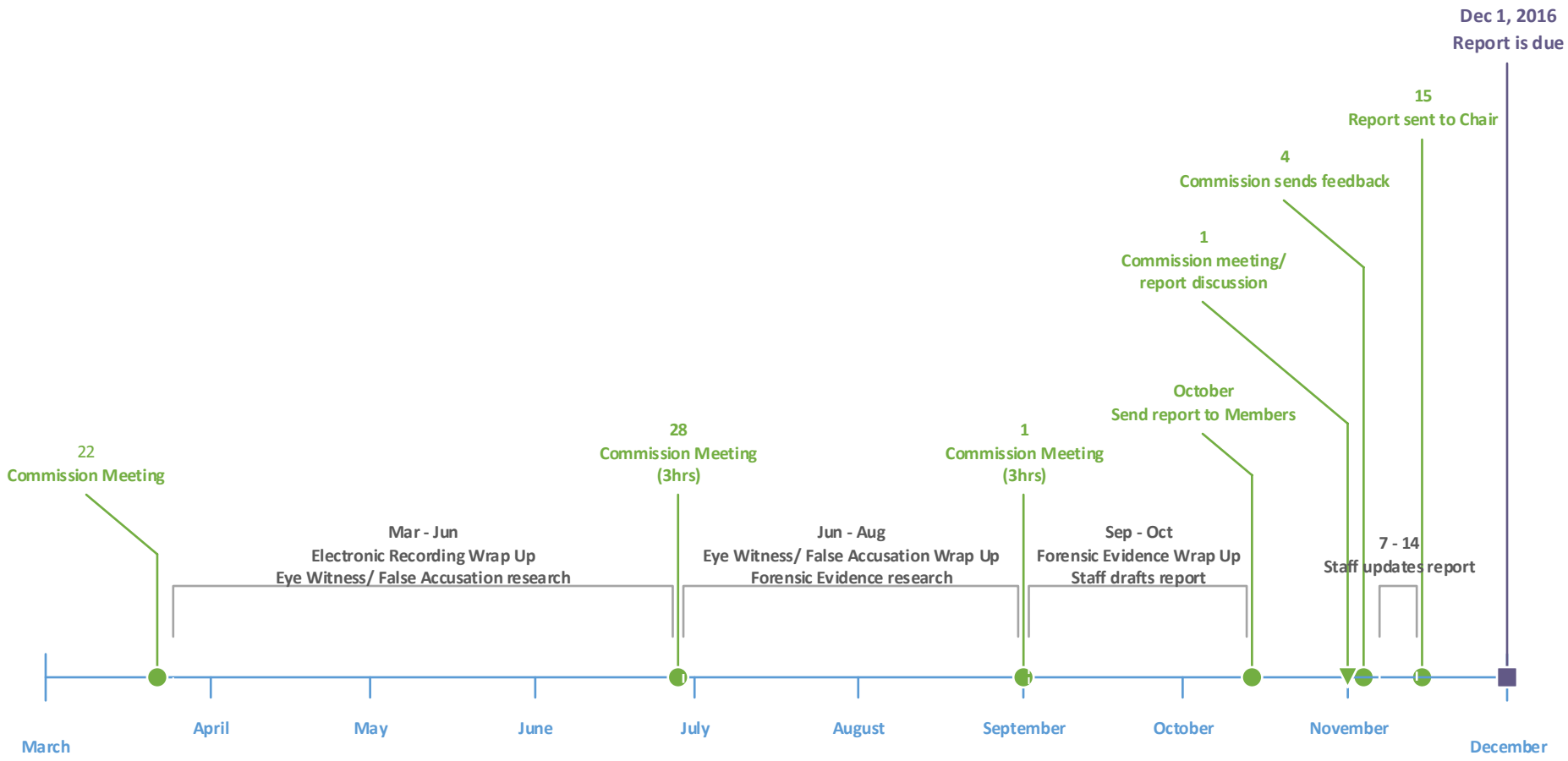
Potential Timeline for
Timothy Cole Exoneration Review Commission



The Senate of The State of Texas

SENATOR RODNEY ELLIS
District 13

PRESIDENT PRO TEMPORE
1999 - 2000

COMMITTEES:

Vice-Chair, State Affairs
Business & Commerce
Transportation

May 12, 2016

The Honorable John Smithee
State Representative
Texas Capitol, Room 1W.10
Austin, Texas 78701

Re: Alfred Dewayne Brown Request for Wrongful Incarceration Compensation

Dear Representative Smithee:

I write to you regarding the case of *State of Texas v. Alfred Dewayne Brown* in your role as Presiding Officer of the Timothy Cole Exoneration Review Commission. As you are likely aware, Mr. Dewayne Brown was exonerated in June 2015 after serving 12 years and 62 days in prison – nearly ten of which were on Death Row – for a crime he did not commit. Mr. Brown was exonerated after completely exculpatory documents, specifically land-line telephone records, were discovered in the home garage of the investigating detective from the Houston Police Department. The phone records demonstrated that Mr. Brown was at his girlfriend's residence at the time of the murder, exactly as both he and his girlfriend had said that he was. The phone records were in the possession of the Harris County District Attorney's Office at the time of Mr. Brown's trial in October 2005 but were not turned over to defense counsel, a violation of *Brady v. Maryland,* the United States Supreme Court case that compels the government to provide exculpatory information to the defendant in a criminal case. *Brady v. Maryland*, 373 U.S. 83 (1963). After the Texas Court of Criminal Appeals reversed Mr. Brown's conviction, Harris County District Attorney Devon Anderson dismissed the charges on June 8, 2015, acknowledging that she had no basis on which to re-try Mr. Brown.

Mr. Brown submitted a request for wrongful incarceration compensation to the Texas Comptroller of Public Accounts on February 22, 2016, pursuant to Chapter 103 of the Texas Civil Practice & Remedies Code (the "Tim Cole Act"). In the request, Mr. Brown cited the Texas Supreme Court's explanation in *In re Allen*, 366 S.W.3d 696 (Tex. 2012) of who is entitled to compensation under the Tim Cole Act. Specifically, the Court held in *Allen* that compensation is owed not just to former inmates who succeeded on a "*Herrera*" claim (a claim of innocence based solely on newly discovered evidence, not a constitutional violation at trial), but also to former inmates who made successful "*Schlup*-type" claims (a claim of innocence based on the presence of a constitutional violation at trial). In *Allen*, the Court found that Mr. Allen fell into the latter category and ordered that he be compensated in that case. Mr. Brown also falls into that category, and he should compensated as well.

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I supported Mr. Brown's request when it was filed earlier this year. As I said at a media conference:

> "I am proud to stand with Dewayne Brown as he seeks the compensation he is rightfully owed under the law. Let's face it: there is no amount of money that can repay someone for being on death row for nine years for a crime they did not commit. But the provisions of the Tim Cole Act, which I passed in 2001, exist to try to remedy the injustice that Dewayne suffered. It is days like today that make me so proud that I led legislative efforts to increase compensation for the wrongfully imprisoned. Since I changed the law in 2001, the state has paid more than $92 million in compensation to wrongfully convicted Texans. Why? Because these men and women deserve some semblance of justice. After all, Texas leads the nation in the shameful category of proven wrongful convictions."

Despite the clear constitutional violation in Mr. Brown's case and the holding by the Texas Supreme Court in *Allen*, the Comptroller denied Mr. Brown's request on April 7, 2016. Mr. Brown's criminal case involved the withholding of clearly exculpatory evidence that would have proven his alibi at trial, and after wrongly imprisoning him for more than 12 years, the State now refuses to pay him the compensation authorized by Texas law.

In light of this issue, I urge the Commission to consider using Mr. Brown's case as a basis for evaluating what is not working properly in our system of Tim Cole Act compensation, analyzing how the State might better provide justice to exonerees, and determining whether further statutory clarity is needed in order to properly recognize the Texas Supreme Court holding in *Allen* and prevent exonerees from being denied compensation that they are rightfully owed under Texas law.

Thank you for your consideration of this important issue.

Sincerely,

Rodney Ellis

Cc: Members of the Timothy Cole Exoneration Review Commission