



White Paper on Conviction Integrity Proposals in Pennsylvania

INTRODUCTION

Over the past decade, eleven people convicted of serious crimes have been released from Pennsylvania prisons after DNA testing proved their innocence. Collectively, these men spent 139 years behind bars for crimes they did not commit. In two of these cases, using the DNA results, police have identified the true perpetrator of the crime. There have been 275 DNA exonerations across the nation. In 45% of these cases, the perpetrators of the crimes have been identified by the DNA evidence. Tragically, the perpetrators of these crimes committed many additional crimes (including more than 60 sex assaults and 24 murders) while the innocent languished behind bars. When we convict the wrong person, all of us are harmed.

The Pennsylvania Advisory Committee on Wrongful Convictions has issued a report calling for comprehensive reforms to the Pennsylvania criminal justice system with the goal of preventing wrongful convictions. The report provides an exhaustive view of the causes of wrongful convictions. In addition, the report contains legislative recommendations in a variety of areas based in large part on best practices already in use by law enforcement agencies across the United States. Many of these recommendations are grounded in more than a quarter century of scientific research.

Accompanying the Final Report, 14 members of the 52-member Advisory Committee submitted to the Senate Judiciary Committee an Independent Report, questioning the process by which the Advisory Committee conducted its business and whether the recommendations were truly based upon a “consensus” process or one “largely decided upon in advance, and ... designed solely to benefit criminal defendants.”¹ The Independent Report rejects the need for systemic changes to the Pennsylvania criminal justice system, but does acknowledge that some adjustments and improvements are possible.

The Pennsylvania Innocence Project was not part of the Advisory Committee process, but we are vitally concerned with the issues and recommendations of the Committee. State and local law enforcement agencies nationwide have found, without exception, that implementation of these reforms has substantially improved investigative practices.

The Pennsylvania Innocence Project supports the great majority of the Advisory Committee’s recommendations. However, in some areas, further reforms are necessary to ensure fair proceedings and to protect against wrongful convictions. Toward that end, the Project suggests additional proposals.

¹ *Independent Report of Law Enforcement and Victim Representative Members of the Advisory Committee on Wrongful Convictions*, at 2 (Hereinafter “Independent Report”).

In this Paper, the Project addresses and explains the recommendations of the Advisory Committee Report, responds to the concerns raised by the Independent Report, and makes specific suggestions to enhance the recommendations of the Committee. We believe that we can find common ground in advancing true justice and safety for all Commonwealth residents.

IMPROVEMENTS IN EYEWITNESS IDENTIFICATION PROCEDURES

Eyewitness Identification Improvement Act

Three-quarters of wrongful convictions involve mistaken identifications. Of course, this statistic should not be surprising given all the studies that have documented the causes of mistaken eyewitness testimony. Many wrongful conviction cases involve multiple misidentifications of the same suspect. Fortunately, many law enforcement agencies understand that the accuracy of eyewitness identifications can be improved with the adoption of field-tested and laboratory proven identification procedures. The proposals in the Advisory Committee report are similar to those in use in other jurisdictions and are specially tailored to the needs of Pennsylvania.

Advisory Committee Recommendation: Introduction of a comprehensive set of procedures requiring the best practices in use in the administration of photographic and live lineups:

- **that they be conducted by one who does not know either which one is suspected by investigators;**
 - **witnesses be required to give a description of the perpetrator before a lineup or array;**
 - **that witnesses be provided verbal warnings before viewing an array including that the perpetrator may or may not be present and that the investigation will continue regardless of whether an identification is made;**
 - **that witnesses be instructed to state in their own words how certain they are of the identification at the time the identification is made;**
 - **that the procedure be recorded.**
- **Independent Report:** The major area of dispute between the Advisory Committee and the Independent Report is whether these improvements should be mandated or voluntary.² The Independent Report proposes that law enforcement officers receive training in “non-suggestive identification procedures” as part of “ensuring that Pennsylvania has the best-trained law enforcement personnel in the country, and that our police officers are kept abreast of the latest research and techniques for identifying the guilty and clearing the innocent.”³ Without specifying the types of “non-suggestive

² The Independent Report, at 45-46, rejects the specifics of the proposed protocols and procedures. However, the Independent Report proposes training of officers in “non-suggestive” procedures. Since the recommendations in the Advisory Committee Report are backed by major law enforcement agencies such as the International Association of Chiefs of Police, the Commission on Accreditation of Law Enforcement Agencies and the National Institutes of Justice, presumably they are the same non-suggestive procedures referred to by the Independent Report.

³*Independent Report*, at 80-81.

identification procedures” to be used in training, the Independent Report calls upon MPOETC to incorporate such training in mandatory in-service training.⁴

- **Pennsylvania Innocence Project response:** The great majority of inaccurate eyewitness identifications are not the result of police misconduct or incompetence. Rather, misidentifications result from the use of out-dated and unreliable methods that may lead honest witnesses to make incorrect identifications. Nonetheless, using three decades of solid social science research, leading law enforcement agencies have recognized that eyewitness identification procedures can be improved and professionalized. Although the Independent Report refers to “defense-oriented identification procedures” which would “actually discourage *all* identifications (whether accurate or not),”⁵ the proposals made by the Advisory Committee report have been implemented with great success by law enforcement agencies across the country including by Attorney General order in New Jersey, by law and Attorney General policy in Wisconsin, and by legislation in Connecticut, Ohio, and North Carolina. Far from creating “roadblocks to justice,” law enforcement agencies report that the identifications derived from best practices shield them from defense challenges. In its implementation of a double-blind sequential administration of lineups and photo arrays, the Roanoke, Virginia police department noted that there had been “no known misidentifications,” that the process “has not been challenged in court,” and that the adoption “has not been a taxing burden to department resources, a concern raised by several studies.”⁶
 - The Pennsylvania Innocence Project **supports sequential showing of suspects or photographs**. A recent field study published by the American Judicature Society and conducted in the Charlotte-Mecklenburg (NC) Police Department, the Tucson (AZ) Police Department, the San Diego (CA) Police Department and the Austin (TX) Police Department provides solid evidence that sequential presentation is superior to the simultaneous showing of persons or photographs. The field study used actual eyewitnesses to crime, and showed that the sequential presentation of suspects to eyewitnesses yields fewer inaccurate identifications (that is, identifications of someone other than the intended suspect) without any loss of accurate identifications.⁷ This definitive scientifically robust field study supports more than 20 years of lab studies on the same topic. Based on this study, and the positive reaction to the procedure by police agencies, lineup protocols should require sequential presentation to assure the highest level of accurate identifications.
 - In addition, the Pennsylvania Innocence Project would require an additional requirement of arrays and lineups: that the **fillers be picked based upon the victim’s**

⁴*Independent Report*, at 81.

⁵*Independent Report*, at 46.

⁶ Phil Patrone, Accreditation Manager; Deputy Chief Chris Perkins; and Capt. Curtis Davis, Roanoke (VA) Police Department, *New Standards Limit Eyewitness Misidentification*, CALEA Update Magazine, Issue 102, February 2010, available at <http://www.calea.org/calea-update-magazine/issue-102/accreditation-works-case-78>.

⁷ Gary L. Wells, Nancy K. Steblay, and Jennifer E. Dysart, *A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies*, available at http://www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf. The study also showed a slight, although not statistically significant, increase in accurate identifications. *Id.*

description of the perpetrator, rather than similarity to the suspect.

- The Pennsylvania Innocence Project supports mandatory implementation by all law enforcement agencies in the Commonwealth. In this state there is no central office that can require local police officer departments to adopt known best practices, and therefore a statutory mandate is necessary to ensure state-wide application. . Once these practices are mandated, training will be available across the state. The Pennsylvania Innocence Project recognizes that the highest level of professional protocols are protective of all persons in the criminal justice system, including law enforcement.
- Although the Independent Report supports police training in non-suggestive eyewitness procedures, it fails to address the compelling need for mandatory procedures and exaggerates any possible problems with state-wide implementation. For example, far from hampering small agencies, as suggested by the Independent Report, blind administration is easily accomplished using modern techniques. Even agencies with one or two officers can conduct a photo array in a way that “blinds” the administrator to the suspect’s placement in the array and involves no added expense.⁸ Indeed, model protocols for small departments have been written into the law in Ohio and North Carolina.
- Providing warnings to witnesses is universally recognized as an appropriate and effective means of encouraging witnesses to focus on each individual photo rather than reviewing the array as a whole.⁹ The instructions should be given in *every* case to ensure that witnesses do not feel pressure to make an identification if they do not recognize the perpetrator and, again, to standardize the procedures so as to protect lineup administrators from unfair criticism.
- Asking a witness to express, in her own words, how confident she is in her identification is the only method of ensuring that witnesses’ memories are not tainted between the identification and any subsequent court proceedings.¹⁰

⁸ A demonstration of such a procedure was prepared by the Wellesley, Massachusetts police department with the New England Innocence Project. A video demonstration can be viewed at <http://blip.tv/file/3963518> .

⁹ The Independent Report contends that instructions could be “misleading,” particularly the instruction telling witnesses that investigations will continue whether an identification is made or not. *Independent Report*, at 49. Because law enforcement will accept evidence related to a crime even if they do not actively develop it, investigations continue beyond an identification.

¹⁰ See Gary L. Wells & Amy L. Bradfield, “*Good, You Identified the Suspect*”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360 (1998) (providing studies demonstrating confirming feedback given at the time of an initial identification made subjects significantly more confident of their identification of a suspect); Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112 (2002).

ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

A troubling number of DNA exonerations—16%—involve a defendant who “confessed” to a crime in which he had no involvement.¹¹ Of the 11 Pennsylvania DNA cases, 4 involve a false confession or statement.¹² There are common factors relating to these false confessions. Many involved prolonged interrogations. Further, many of these confessions resulted from an interrogation practice that “minimized” the suspect’s culpability, and encouraged admissions as the suspect’s best and only chance to limit his culpability and punishment. Several cases involved a “false evidence ploy” such as informing the suspect that fingerprints or DNA evidence confirmed their guilt.¹³ In most cases the interrogating officer suggested facts that were otherwise only known to the perpetrator and police. These methods—some of which stray from accepted police interrogation techniques—are usually not presented to the factfinder as there is no firm proof of their use in the interrogation, nor is the suspect’s demeanor, conduct, or awareness during the interrogation reviewable. Of course, if the interrogation was video recorded, there would be objective evidence of the true nature of the interrogation, thus protecting both suspects and the police from false claims.

Advisory Committee Recommendation: Introduction of a statute to require custodial interrogations to be electronically recorded in cases of criminal homicide, robbery, sexual assault, kidnapping, and arson, with a coextensive wiretap exception for law enforcement.

- **Independent Report:** The Independent Report acknowledges that recording of interrogations would be beneficial for law enforcement, but disagreed as to whether this practice should be mandatory. According to the Independent Report, victims, witnesses, and suspects might be less willing to talk with law enforcement officials if they know that they are being recorded.¹⁴ Further, the Independent Report speculates that recording interrogations could lead to “unconsidered answers that are less useful as evidence than thoughtful, written, responses, and are likewise easier for defense counsel to misinterpret or mischaracterize before the jury.” In this way, defense counsel would “exploit the fact that many ... interviews will include breaks for the comfort and convenience of the subject or ... interviewer.”¹⁵ Finally, the Independent Report asserts that interrogations

¹¹ Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, 8 (2011) (analyzing 250 DNA exonerations and finding forty (16%) involved a “false confession”).

¹² *Advisory Committee Report*, at 83; Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Nov. 1, 2011).

¹³ *Id.* at 22-23.

¹⁴ *Independent Report*, at 43. In support of this concern, the Independent Report refers to a 1993 comment written by a law student at the University of Albany Law School. *Independent Report*, at 43, n. 48. The comment’s author (now a noted bankruptcy lawyer in New York) informed us that he “definitely” took the position that interrogations should be videotaped, a position he holds today. In response to the concern regarding reluctance of witnesses to testify, a national survey conducted by former United States Attorney Thomas P. Sullivan details a universally positive experience and response to tape recording confessions and not a single case of a missed ‘proper’ arrest or conviction. Thomas P. Sullivan, Ctr. on Wrongful Convictions, *Police Experiences With Recording Custodial Interrogations*, 26-27 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> (collecting data from police departments that electronically record interrogations).

¹⁵ *Independent Report*, at 44.

that occur outside of a police station are not amenable to video taping.

- **Pennsylvania Innocence Project Response:** After consulting with many law enforcement agencies and experts, the Project believes that voluntary adoption of recording techniques would be inadequate to address the phenomenon of false confessions. There are over 1,200 law enforcement agencies in the Commonwealth of Pennsylvania and universal implementation of policies is not feasible without mandatory provisions. It should be noted that, far from creating an unwinnable atmosphere for law enforcement, those agencies which have adopted these procedures show a universally positive response.¹⁶
 - Further, it is critical that **the taping begin at the start of any interview with a suspect**. As we have learned from a number of exonerations involving false confessions, much of what is objectionable in terms of “persuading” an innocent person to confess is done before *Miranda* warnings are required (the point at which the Committee suggests that taping should start). Of course, honest officers do not intentionally “feed facts” to a suspect in order to obtain a false confession, and so are certainly hard-pressed to remember or know how the facts were transferred. Thus, for example, in the case of Bruce Godschalk, the police taped a confession after *Miranda* warnings, but failed to tape the questioning that preceded the warnings, at which time they disclosed details of the crime and suggested that only a full confession could help him. Retired District of Columbia detective James Trainum, who unknowingly took two false confessions during his career, recommends that taping should be universal and begin from the moment the suspect and officer begin their discussion (as is done in several jurisdictions including the District of Columbia).¹⁷ Pennsylvania Supreme Court Justice Seamus McCaffery, himself a former homicide detective in Philadelphia, agrees, saying that taping would provide a “dual benefit” and that “[f]ilming an interview could be a very positive thing for both defendants and law enforcement.”¹⁸ Far from creating an environment where suspects may be “unwilling” to participate, law enforcement in 18 states—over 850 independent agencies—report universally positive results.

POST-CONVICTION RELIEF

Post-conviction DNA testing

At the time it was enacted, Pennsylvania’s post-conviction DNA statute appeared to provide adequate access to testing in the post-conviction setting. However, the statute has been construed in an unfair and narrow manner by the courts, with the result that DNA testing in cases of strong claims of innocence has been barred.

¹⁶ See Sullivan article, *infra* note 5.

¹⁷ Jim Trainum, Editorial, *Get It on Tape; A False Confession to Murder Convinced a Cop That a Visual Record Can Help Ensure an Innocent Person Isn’t Convicted*, L.A. TIMES, Oct. 24, 2008, at A23.

¹⁸ Jeff Lyons, *10 Questions for Justice Seamus P. McCaffery*, The Philadelphia Lawyer, Fall 2011 at 14.

Advisory Committee Recommendation: Revising the current post-conviction DNA testing statute to provide for access to testing notwithstanding a guilty plea or confession, where testing can result in evidence that provides substantial grounds to question the guilt of the defendant. Further, to allow access to testing even where an inmate has completed probation, imprisonment or parole, but remains subject to registration as a sex offender. The proposal also allows submission of DNA samples to CODIS and/or Pennsylvania DNA database either before or after trial for comparison.

- **Independent Report:** The Independent Report agrees with the provision allowing for access to DNA testing by those who pled guilty or confessed,¹⁹ but opposes the “radical approach” suggested by the Advisory Committee.²⁰ The Independent Reports posits that defendants will wait “so long as to prejudice the Commonwealth’s ability to retry them” and that the proposed changes would “reward intentional delays and gamesmanship.”²¹ The Independent Report suggests that those who “waste the time and resource of the courts, prosecutors, and police by falsely asserting their factual innocence when requesting post-conviction DNA testing” should face consequences including perjury charges.²² The Independent Report further points to the “vague” approach to remedies allowed by the judiciary when exculpatory DNA is revealed.²³
- **Pennsylvania Innocence Project response:** Changes to the post-conviction DNA testing statute are long overdue. Many prosecutors readily agree to post-conviction testing as they want to be assured that the conviction was valid. But DNA exonorees waited an average of 13 years each to have their claims adjudicated. The only documented delay under the current post-conviction DNA testing law has been on the Commonwealth by wrongfully denying testing, or the courts in narrowly interpreting the statute. The revisions to this statute are necessary to overcome objections to testing where the testing can show innocence or demonstrate that there are substantial questions regarding the guilt of the defendant. The proposal also properly provides for uploading results to the state DNA database and to CODIS to determine whether a matching DNA profile exists to establish the perpetrator’s identity.
 - Where exculpatory DNA evidence is produced by testing, the statute allows the court to determine an appropriate disposition of the case, with the input of the prosecutor. Allowing the trial court to determine an inmate’s likely innocence and to order a discharge after DNA testing is perfectly appropriate, pending any new trial.
 - The Pennsylvania Innocence Project agrees that frivolous and time-wasting testing should be discouraged. So as to effectuate that goal, **the Project supports a requirement of affirmation under oath.** If it is determined that the applicant’s

¹⁹ The Independent Report states that “the existing statute contains no such bar,” *Independent Report*, at 61, citing *Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011). But *Wright* only ruled that a confession does not bar testing. Access to DNA testing may be barred in cases a plea of guilty or *nolo contendere*. See *Williams v. Erie County Dist. Atty’s Office*, 848 A.2d 967 (Pa. Super. Ct. 2004), *appeal denied* 864 A.2d 530 (Pa. 2004).

²⁰*Independent Report*, at 60.

²¹*Independent Report*, at 61-62.

²²*Independent Report*, at 63.

²³*Independent Report*, at 64.

assertion of actual innocence was intentionally false, an assessment against the applicant of the cost of any DNA testing can be required.

- Given the number of cases which have identified the true perpetrator through a CODIS or state-based DNA search, the Pennsylvania Innocence Project supports **court orders for a comparison against CODIS or the Pennsylvania-based database** where a DNA profile does not match the defendant. In some cases where DNA evidence excluded the convicted inmate, no database search has yet been conducted. A database search is a basic tool of law enforcement that continues to be relevant and critical even in the post-conviction process.²⁴
- The Pennsylvania Innocence Project works with the Office of the Victim’s Advocate to notify victims before filing requests for post-conviction DNA testing. The Project **supports victim assistance measures, including reactivation of victims’ services** in the event of the development of exculpatory DNA evidence.

Amendments to Pennsylvania’s PCRA Time Limitations

The Post Conviction Relief Act (“PCRA”) is the sole means of obtaining collateral relief for a criminal conviction. After an initial one-year period in which an inmate may file a PCRA petition raising issues that could not be litigated on the direct appeal (such as the ineffectiveness of counsel or newly discovered evidence), Pennsylvania inmates are generally prohibited from filing such a petition. Even where new evidence of innocence has been discovered, the inmate must file a petition within 60 days from when the new evidence or claim was actually discovered. Such a short deadline makes it virtually impossible for an unrepresented inmate to file such a claim on a timely basis. And there is no leeway: if an inmate fails to file within 60 days, the petition must be dismissed by the trial court as “untimely.”

Advisory Committee Recommendation: Amend the current PCRA to allow an inmate to file a petition for a new trial based upon allegations of “governmental interference” or previously unknown facts from 60 days to one year.

- **Independent Report:** The Independent Report does not offer any objection to this proposal.
- **Pennsylvania Innocence Project response:** The proposals of the Advisory Committee are **a step in the right direction, but are not sufficient** to achieve the desired goal. The current deadline of 60 days is among the shortest in the country, and often prevents presentation of valid claims. Many states do not impose time limits in these circumstances. Certainly, inmates with new evidence of innocence are likely to move quickly to get to court as each delay means more time in prison. In cases in which the inmate can show a substantial claim of innocence, there should be **no time limit** for a PCRA petition.

²⁴ It is through the use of post-conviction database searches that law enforcement has been able to identify the true perpetrator in 45% of 275 DNA exonerations.

LEGAL REPRESENTATION BY PROSECUTORS AND DEFENSE COUNSEL

Training Attorneys Relating to Eyewitness Identification and Confessions

Because defense counsel in known exoneration cases often failed to educate the factfinder about the known science regarding eyewitness memory, retention and recall, or the phenomenon of false confessions, the Advisory Committee proposes expanding areas for capital counsel training to include the eyewitness identifications and confessions.

Advisory Committee Recommendation: Amend Rule 801 to allow training for capital defense counsel relating to eyewitness identifications and confessions.

- **Independent Report:** The Independent Report does not address this recommendation.
- **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Project supports the proposal. We also support educational programs for the judiciary.

Adequacy of Legal Representation of Indigent Defendants

The Advisory Committee on Wrongful Convictions did not make proposals regarding adequacy of legal representation as another Joint State Committee was considering that issue. After the Advisory Committee's report was published, the other Committee issued a report calling for statewide funding of indigent defense systems in Pennsylvania.²⁵ We support that concept.²⁶

Prosecutorial Practices

Prosecutors' failure to disclose exculpatory evidence has played a role in many documented wrongful convictions. While intentional suppression of this evidence by prosecutors is rare it makes good sense to ensure that those who choose to serve the Commonwealth receive proper training.

Advisory Committee Recommendation: The Advisory Committee Report urges prosecutors to implement internal discipline promoting ethical conduct, develop mechanisms to provide oversight, and adopt guidelines and sanctions when misconduct is discovered, including the adoption of Rule of Professional Responsibility 3.8

²⁵ See, *A Constitutional Default: Services to Indigent Criminals in Pennsylvania; Report of the Task Force and Advisory Committee on Services to Indigent Criminal Defendants* (Dec. 2011); available at <http://jsg.legis.state.pa.us/resources/documents/ftp/documents/Indigent%20Defense.pdf>

²⁶ The Pennsylvania Innocence Project agrees that the problem of ineffective defense counsel is significant and defense lawyer's mistakes have contributed to wrongful convictions. The Project also rejects the common misconception that defense neglect or malfeasance is the sole province of the public defender as privately retained counsel have been ineffective in innocence cases. In many ways, this is a systemic problem that derives from a combination of very high case loads for public defenders and very low fees for court appointed counsel. Pennsylvania is the only state that does not provide resources for defenders and appointed counsel, thus leaving these obligations to the counties.

requiring prosecutors who learn of exculpatory information post-conviction to notify the court and counsel.

- **Independent Report:** The Independent Report takes issue with the lack of similar requirements for defense counsel, stating that the proposed recommendations “completely ignore the acknowledged failings of defense counsel,”²⁷ but does not offer any particular proposals to prevent or address defense counsel failings. The Independent Report further states that prosecutors are “*already* the attorneys most constrained by law.”²⁸
- **Pennsylvania Innocence Project response:** The proposals contained within the Advisory Committee report—specifically the adoption of the proposed Rule 3.8, relating to evidence of wrongful conviction obtained in the post-conviction context, and a call for prosecutorial offices to adopt clear guidelines—would be a significant improvement. There should be consideration of rules and proposals that will address the problem of ineffective defense counsel.
 - In order to promote transparency and ensure the production of exculpatory material, the Project supports the adoption of an **open file discovery policy** for the Commonwealth, a practice in other states and prosecutor offices.²⁹ “Open file” access to prosecutor and police files (which promotes the goal of disclosing all nonprivileged information and evidence gathered in a case to the defense as early as possible) would substantially reduce the chances of non-disclosure of exculpatory evidence and would also reduce litigation of this issue in the post-conviction context.

Government Informants and Jailhouse Witnesses

The use of government informants can be an effective tool for gathering information in a criminal investigation. However, the widespread and unregulated use of this testimony has led to wrongful convictions where the informant, who is almost always providing information to gain a substantial benefit with respect to charges pending against him, falsely implicates a defendant. Pennsylvania law provides no limits on the use of such evidence and fails to provide sufficient means to ensure that such testimony is reliable.

²⁷*Independent Report*, at 55.

²⁸*Independent Report*, at 55.

²⁹ According to a recent article by Ellen Yaroshefsky, Director of the Jacob Burns Center for Ethics in the Practice of Law at Hastings College of Law,

North Carolina was the first state to enact legislation for full open file discovery, requiring automatic disclosure of all nonprivileged information in the prosecution’s entire file. Recently, Ohio followed suit. Colorado, Florida, Arizona, North Carolina, and New Jersey all have broad discovery laws and rules, often based upon the ABA Criminal Justice Standards for Discovery and Trial by Jury. Similarly, local offices throughout the country—such as in Milwaukee, Wisconsin and Portland, Oregon—have full open-file discovery. Other cities and localities have more limited “open-file” discovery programs.

Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 *Hastings L.J.* 1321, 1331 (2011).

Advisory Committee Recommendation: Require a pre-trial reliability hearing for informant testimony in capital cases where the reliability of the testimony must be shown by a preponderance of the evidence, and require the prosecution to disclose the following whenever an informant is to be used:

- criminal history of informant,
 - any deal or inducement offered to the informant,
 - substance of testimony,
 - time and place of each statement,
 - time and place of disclosure and names of all officials and people who were present,
 - if the informant ever recanted testimony,
 - other cases where informant testified and whether he received anything in exchange.
- **Independent Report:** The Independent Report questions the need for these measures, and suggests similar safeguards when inmate testimony is presented by a defendant.
 - **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Project supports the recommendation regarding the regulation of government witnesses. The requirements for full disclosure are consistent with existing state and federal law regarding the release of information pre-trial. Moreover, the requirement of a reliability hearing is consistent with the requirement of hearings for other forms of evidence, including eyewitness identifications and confessions. The Project also supports a **stronger jury instruction** about the general unreliability of informant testimony and the specific factors that may have influenced the testimony in the present case.

ISSUES RELATED TO SCIENCE AND EVIDENCE

Preservation of Evidence

There is general agreement regarding the overriding need to properly collect, test, and preserve forensic evidence, and to ensure that it is available after the trial and appeals have concluded. Pennsylvania has no state-wide protocols for these functions and in some cases evidence has been lost, destroyed, or degraded due to the lack of sufficient safeguards. In addition, because Pennsylvania does not have a preservation framework, our state does not qualify for federal funds for case review, post-conviction DNA testing, county evidence re-inventory efforts, and other programs. A preservation law would remove that barrier and allow to Pennsylvania to apply for these funds.

Advisory Committee Recommendation: Biological evidence secured in the investigation or prosecution of a criminal homicide, sexual assault, kidnapping, or robbery, required to be preserved if the proceedings are pending or if the defendant is currently imprisoned for the offense.

- **Independent Report:** The Independent Report agrees in principle with the need to preserve evidence, but disagrees as funding sources and the consequences of non-compliance. The Independent Report believes that the funding source identified by the Advisory Committee Report--proceeds from forfeiture sales--is unrealistic as these funds are dedicated to pay for salaries of “police officers, detectives, and prosecutors who enforce the Commonwealth’s drug laws.”³⁰ Therefore, any costs associated with preservation would have to be appropriated by the General Assembly. The Independent Report further states that any preservation statute should provide that “non-compliance does not provide an independent ground for relief in any criminal case.”³¹
- **Pennsylvania Innocence Project response:** The statute is limited to a small number of crimes, unlike other states’ preservation statutes which require the preservation of evidence in all felonies. While the statute should be extended to include unsolved (“cold”) cases, this proposal balances fiscal concerns, practicability and justice.

Accreditation and Oversight of Forensic Laboratories

Improper forensic science techniques or poorly trained technicians contributed to nearly half of DNA exonerations nationally.³² In 2009 the National Academy of Sciences issued a comprehensive report, *Strengthening Forensic Science in the United States: A Path Forward*, that addresses all of the issues regarding forensics in criminal investigations. The Advisory Committee relied upon the NAS report in its examination of forensic sciences in the Commonwealth.

Advisory Committee Recommendation: Require all forensic laboratories to have a technical peer review system, proficiency testing program, and accreditation by nationally recognized board, and require independent government entity to investigate allegations of negligence or misconduct.

- **Independent Report:** The Independent Report does not oppose the proposal for forensic laboratory accreditation.
- **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Projects supports the proposal for mandatory accreditation.

Forensic Science Advisory Board

As a corollary to mandatory accreditation, the Advisory Committee also calls for the creation of a Forensic Science Advisory Board, the purpose of which would be to investigate reported professional negligence and misconduct in publicly operated forensic laboratories and provide

³⁰ *Independent Report*, at 59.

³¹ *Independent Report*, at 60.

³² Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Dec. 7, 2011).

corrective action. The Advisory Board would also set standards for the preservation of evidence and provide ongoing education on forensic science. The creation of an Advisory Board would eliminate a major barrier to federal funds for personnel, computerization, lab equipment, facilities and other administrative costs.

Advisory Committee Recommendation: Create a Forensic Science Advisory Board to review and make recommendations on how to configure, fund, and improve delivery of forensic laboratory services, and conduct investigations into allegations of negligence or misconduct.

- **Independent Report:** The Independent Report supports the “basic idea” of the creation of an Advisory Board. The Independent Report has differences with respect to the composition and the role of the Board. Investigative practices and powers, the Independent Report maintains, should be “more consistent with those of other state forensic advisory boards.”³³ The Independent Report also suggests “permissive” rather than “mandatory” investigative practices.³⁴
- **Pennsylvania Innocence Project response:** The Pennsylvania Innocence Project supports the formation of an Advisory Board. The Project also supports the inclusion of a faculty member of an accredited forensic science department to ensure that current scientific knowledge is fully available.

REDRESS FOR WRONGFUL CONVICTIONS

Creation of a State Compensation Fund for Exonerated Innocent People

Pennsylvania provides no compensation for an innocent person who has been exonerated. A civil rights suit is possible only upon strong proof of governmental misconduct, and even in those cases, there are legal and factual barriers to recovery.³⁵ Twenty-seven other states have adopted compensation statutes for those who were innocent, but served time in prison on a false conviction. Fairness dictates that one who is innocent yet subject to imprisonment receive some compensation for the years of incarceration.

Advisory Committee Recommendation: Create a state-funded compensation fund for those convicted of crimes they did not commit after a conviction is reversed or vacated by a court, or a Governor’s pardon as well as expungement of the underlying criminal record.

- **Independent Report:** The Independent Report opposes any compensation statute. First, the Independent Report objects to the definition of a person who was “wrongfully

³³*Independent Report*, at 73.

³⁴*Independent Report*, at 82.

³⁵ The wrongfully convicted plaintiff must prove that there was deliberate or reckless conduct on the part of officials. In many cases, qualified and absolute immunity doctrines shield official actors, such as police, crime lab personnel, and prosecutors from damages for constitutional misconduct.

convicted,” asserting that is too broad and could include a person who committed a crime, but whose conviction was overturned for reasons other than innocence. In addition, the Independent Report argues that the proposal is evidence of a “lack of regard for innocent victims.”³⁶ The Independent Report suggests that there should instead be compensation for “the system’s other innocent victims—the people who are raped, robbed, and murdered by defendants who were wrongly acquitted or wrongly released.” The Independent Report asserts that the proposed \$50,000 per year of wrongful incarceration is a number “picked at random,” and that the proposal is “entirely unacceptable because it is not limited to factually-innocent defendants, mandates excessive damage awards, and adopts unreasonable procedures.”³⁷

- **Pennsylvania Innocence Project response:** The Project supports the proposal and notes that the definition of the presentation of a claim for actual innocence as proposed by the Advisory Committee is consistent with definitions found in other states. However, in light of the objections of the Independent Report, the Pennsylvania Innocence Project would accept provisions requiring that the individual prove by the preponderance of the evidence that he did not commit the crime (or the crimes charged did not constitute a crime) and that he neither committed nor suborned perjury, or fabricated evidence to cause or bring about his conviction. Provided, however, that neither a confession or admission later found to be false, nor a plea of guilty or *nolo contendere*, would be considered bringing about his own conviction. It is a foundation of our values that when someone suffers a loss for which they bear no responsibility we make that person whole. We try to repair the damage. While nothing can give an exoneree back the years taken from him, or restore his broken family, compensation statutes go a long way toward those goals.
 - With respect to the needs of victims, the Pennsylvania Innocence Project argues that the recommendation **does not go far enough** as it does not address the victims’ perspective. We suggest that there be **reactivation of victims’ services** in the event of an exoneration. We also support a fair compensation system for victims of crimes.

Subsequent Reviews of Wrongful Convictions

Reviews of cases resulting in exonerations by prosecutors and other law enforcement officials have yielded information that can help prevent wrongful convictions in the future.³⁸ In treating the conviction of an innocent person as a failure of the *criminal justice* system that should be investigated with an eye toward structural improvements, the Advisory Committee proposes a Commission on Conviction Integrity.

³⁶ *Independent Report*, at 68.

³⁷ *Id.*

³⁸ See, e.g., report prepared by Andrews International, “Comprehensive Operational Assessment” at the request of the Will County, Illinois Sheriff’s Office, Criminal Investigative Unit in December, 2010. Available at <http://www.scribd.com/doc/47496706/Andrews-Report>.

Advisory Committee Recommendation: Create a Commission to convene periodically to review reforms adopted by other jurisdictions to ensure the integrity of their convictions, as well as any additional wrongful convictions in Pennsylvania based upon actual innocence after an exoneration to determine their causes and how to avoid their recurrence.

- **Independent Report:** The Independent Report raises two objections to this proposal. First, the Independent Report “doubts . . . the ability of such a commission to carry out its charge in an open, organized, and balanced manner.”³⁹ Second, the Independent Report avers that any such commission should study cases “where the system wrongly *acquits a guilty* defendant.”⁴⁰
- **Pennsylvania Innocence Project response:** The need for a review of cases where a factually innocent person was convicted of a crime is an essential element in any comprehensive scheme to prevent future false convictions. A dedicated governmental entity monitoring cases of wrongful conviction and developments across the country in these related areas will provide our state with a forward-looking approach rather than a reactive one to developments in criminal justice.

CONCLUSION

The Pennsylvania Innocence Project applauds the efforts of the Advisory Committee and the signers of the Independent Report in addressing issues related to the tragedy of wrongful convictions, and for their willingness to begin the discussion of updating our law enforcement practices to comport with rising professional standards.

Whenever an innocent person is convicted of a crime he did not commit, we are all affected. Whether it be the victim who can get no closure, or the public which must deal with other criminal acts from a true perpetrator who escaped justice, there are no winners. Convicting innocent people is not a new phenomenon to our society, but with efforts like those of all who have contributed to this discussion so far, it need not be a permanent reality.

³⁹*Independent Report*, at 72.

⁴⁰*Independent Report*, at 72 (emphasis in the original).