Independent Report of Law Enforcement and Victim Representative Members of the Advisory Committee on Wrongful Convictions

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Richard J. Brady
Chief of Police,
Montgomery Township Police Dep't

Hon. Risa Vetri Ferman
District Attorney,
Montgomery County

John A. Fioril,
Legislative Representative,
Fraternal Order of Police

Margaret D. Gusz
Executive Director,
The Crime Victims' Center of
Chester County, Inc.

Carol Lavery
Victim Advocate,
Office of the Victim Advocate

Charles W. Moffatt
Superintendent,
Allegheny County Police

Hon. R. Seth Williams
District Attorney,
Philadelphia County

Hon. Bruce L. Castor, Jr.
County Commissioner,
Montgomery County

Frank G. Fina
Chief Deputy Attorney General,
Office of the Attorney General
of Pennsylvania

Syndi L. Guido
Director, Policy Office,
Pennsylvania State Police

Brooke Hedderick
Programs Supervisor,
The Crime Victims' Center of
Chester County, Inc.

Hon. Edward M. Marsico, Jr.
District Attorney,
Dauphin County

Hon. Francis J. Schultz
District Attorney,
Crawford County

Hon. Stephen A. Zappala, Jr.
District Attorney,
Allegheny County

CONTENTS

I. INTRODUCTION AND OVERVIEW

The citizens of Pennsylvania can rightly take pride in the fact that, as the principal report of the Advisory Committee on Wrongful Convictions says,[1] their criminal justice system "is finely tuned and balanced and almost always delivers reliable results." From 1970 through 2008, there were 5.1 million prosecutions in the state.[2] Of those, only a very few -- the principal report generally puts the number between eight and eleven -- are alleged to have resulted in a documented wrongful conviction. And, as we will show, even the principal reports' estimates are overstated, since true factual "innocence" is far from certain in most of the cases cited in that report, and the evidence of guilt in several of those cases remains compelling.

Yet, as the principal report also says, pride in a well-functioning system is no reason for complacency. To the extent that specific reforms would better protect victims and serve the community by ensuring that the guilty are convicted, no one could be more supportive of such measures than police, prosecutors, and victims' rights representatives.

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[1] For the sake of clarity, we call the report issued by the advisory committee chairperson "the principal report" and our own report "the independent report." As explained below, there is no true "committee report," since no report or proposal was ever put to a vote and endorsed by a majority of the committee.

[2] Meeting Summary, Legal Representation Subcommittee, Jul. 7, 2008, at p.3.

The devil, of course, is in the details. The principal report at times admits that there were sharp divisions among committee members as to how best to approach many or all of the issues we examined. But it rarely acknowledges what those divisions were, and, more troublingly, it often claims that a "consensus" was reached even though no such agreement was reflected in a vote.

We, the committee members most experienced in law enforcement and victim representation, have a very different sense of whether any consensus was actually reached within the committee, and what the consensus would have been had the committee truly represented and considered in a balanced manner the views of all participants in the criminal justice system. We therefore present this independent report to explain our experiences with the committee, our views on its methodologies and conclusions, and our own proposals for ensuring reliable verdicts.

The committee's flawed procedures and flawed conception of "innocence"

The unfortunate reality is that the advisory committee not only failed to reach a true consensus on how to improve the accuracy of verdicts in Pennsylvania, it never even really tried. The committee was originally formed in response to a law review article claiming that at least eight "wrongfully convicted" individuals in Pennsylvania had been "exonerated" through DNA evidence, and that a new, pre-determined set of pro-criminal-defendant laws was needed in response to those cases. Since the outcome of the committee process had been largely decided upon in

advance, and was designed solely to benefit criminal defendants, only the slightest token effort at balance was made when selecting the members. Police, prosecutors, and victim-advocates were severely underrepresented, while criminal defense attorneys and law professors who also maintained criminal defense practices were commensurately overrepresented.

Though outnumbered, we attempted to at least make our views as advocates for victims and public safety known at committee and sub-committee meetings. But not everyone was willing to listen to the concerns of victims and law enforcement, much less address those issues and attempt to forge a true consensus. As a result, the committee and its subcommittees entirely stopped meeting for the last few years, during which time the proposals set forth in the principal report were drafted anonymously and in secret, with members given no chance to vote on the recommendations to be issued in their name.

Similarly, the committee never studied any of the cases of alleged "wrongful convictions" in Pennsylvania even though that was supposed to be one of its most important tasks. Instead, committee members were expected to take at face value exaggerated claims of "wrongful convictions" in Pennsylvania, accept a definition of "actual innocence" that does not mean factual innocence which includes notorious murderers like Jay C. Smith and Timothy Hennis, and go along with proposals to make the conviction of people like Smith and Hennis more difficult.

The principal report

That brings us to the principal report. We must confess at the outset to being perplexed by the nature and structure of that report. It begins, quite promisingly, with a number of fair-minded observations on the generally reliable nature of Pennsylvania's criminal justices system, the shared commitment of the committee members to making verdicts even more reliable, and the "sharply divided" status of the members on how to achieve that goal.

The principal report then gradually morphs into a lengthy summary of law review articles, particularly those in which professors have studied how well their students performed as eyewitnesses when actors or their classmates playacted crimes in front of them. While the principal report frequently uses the word "science" to describe the results of such exercises, the articles it summarizes do not reflect true science with consistent, objective methodology and reliably quantifiable results. Nor do they in any meaningful way replicate what it is like, and how the mind operates, when an innocent victim is attacked in real life.

Instead, the only practical effect of that portion of the principal report is likely to be the perpetuation of a defense myth that ordinary jurors cannot be trusted to judge for themselves which witnesses are credible and which are not. We very strongly disagree with this worldview, and would much sooner place our trust in the collective wisdom, experience, and common sense of twelve ordinary jurors, than in any committee of law professors, defense attorneys, and defense experts.

Even that, however, ultimately proves to be merely tangential to the principal report's aims, for the specific proposals with which that report concludes have little or nothing to do with its summary of law review articles. Rather, all of the appeals to public-spiritedness and academic study at the forefront of the principal report turn out to be a Trojan horse carrying a long-awaited slate of new laws to help the criminal defense bar, whose job it is to zealously advocate for *all* of their clients, whether guilty or innocent. But making the conviction of *all* defendants more difficult does not make verdicts more reliable. It just makes Pennsylvania less safe.

The principal report's proposals

While the principal report claims that "none of the recommendations in this report present an outlier position" nationally, the reality is otherwise. For example, when the legal redress subcommittee last met – four years ago – its chairperson, whose recommendations are forwarded as proposals in the principal report, frankly admitted that those recommendations would make Pennsylvania the first state in the nation to enact a compensation statute that applies "to all wrongfully convicted individuals, not just those determined to be innocent."[3] The recommendations on post-conviction DNA testing take a similarly radical approach, proposing to eviscerate an effective, bipartisan DNA-testing statute, and replace it with an unprecedented new law that would ignore the question of "actual innocence" in

[3] Legal Redress Subcommittee Meeting Summary, Dec. 11, 2007, at p. 1.

favor of defense gamesmanship. And the proposal for electronic recording of interrogations contains mechanisms to discourage juries from considering unrecorded confessions even though the witnesses before the committee consistently agreed that this would do nothing to prevent wrongful – as opposed to accurate – convictions.

More broadly, the principal report's proposals, which we discuss below on a point-by-point basis, reflect the flawed, backroom process through which they were created. That process, again, was not designed to produce recommendations that would actually lead to greater verdict integrity, *i.e.*, the conviction of more guilty defendants and even fewer wrongful convictions. Instead, it was designed to make the conviction of *all* defendants more difficult, a result that would primarily benefit the guilty and deny justice to victims.

Our alternative approach

While we cannot agree with the principal report's exclusively pro-criminal-defense agenda, we also could not be satisfied with an outcome that did nothing to improve the accuracy of verdicts in Pennsylvania. As we said, the fact that our state has an excellent track record in that regard is no reason it cannot be made even better. To that end, we offer a series of proposals to:

- Reform existing DNA laws to enable more DNA testing and more DNA-related investigations prior to trial.
- Reform the Wiretap Act to allow for the admission of more electronically-recorded evidence.

- Begin a pilot program to study whether and how statewide electronic recording of interrogations should be implemented.
- Expand police training on non-suggestive identification procedures.
- Establish a properly-funded system for preserving biological evidence.
- Establish an independent forensic advisory board with appropriate investigative protocols.

These proposals would allow us to even further reduce the number of wrongful convictions, while also providing justice to victims and protecting the community by ensuring the conviction of the guilty. And we are confident that they can achieve broad support among all parties sincerely interested in improving the reliability and accuracy of verdicts in Pennsylvania. Accordingly, these measures, unlike the flawed and one-sided proposals in the principal report, can fulfill the proper mission of the advisory committee.

II. THE PRINCIPAL REPORT'S PROPOSALS CANNOT ACCURATELY BE ATTRIBUTED TO THE ADVISORY COMMITTEE OR ANY SUBCOMMITTEE.

While the authors of the principal report are certainly entitled to make whatever recommendations they see fit, it must be made clear that their proposals have never been voted on by the members of the advisory committee, are not the product of any independent study of "wrongful convictions" in Pennsylvania, and consistently disregard the views of law enforcement and victim-advocates. As such, they should not be attributed to the advisory committee, and no claim should be made that they are tailored to correct specifically identified problems in Pennsylvania's criminal justice system.

As the principal report implies, the creation of the advisory committee was largely a consequence of a law review article published by the committee's chairperson claiming that at least eight "wrongfully convicted" individuals in Pennsylvania had been "exonerated," and that an "innocence commission" was needed to enact a pre-determined slate of restrictions on police and prosecutors with respect to confessions, eyewitness identifications, informants, and scientific evidence.[4] While all of us have a sincere personal respect for the committee chairperson, that article was a one-sided document. The chairperson's evidence of

[4] John T. Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform From the Pennsylvania Eight* (hereafter "*Chaos*), 12 Widener L. Rev. 359 (2006).

even eight demonstrated "wrongful convictions" (in 5.1 million prosecutions) depended on uncritically accepting second-hand reports and the accounts of the defendants' own lawyers. The chairperson's proposals came exclusively from criminal defense attorneys and their paid experts. And the chairperson considered no reforms that would lead to more frequent *conviction of the guilty*, which of course is the surest means of protecting all innocent persons, including innocent victims of crime.

Perhaps recognizing the unreliability of such an approach, the General Assembly did not grant the request for a permanent "innocence commission." Instead, the Senate passed only a non-binding resolution -- which the House of Representatives did not join -- calling for a temporary advisory committee to study the causes of "wrongful convictions" and "report to the Senate with its findings and recommendations no later than November 30, 2008," a deadline that has long since passed.[5]

When the advisory committee was first created, it was staffed overwhelmingly with criminal defense attorneys and others whose positions were similarly set, with only a relative handful who could be expected to speak up for any contrary views. Of the original thirty-seven members of the committee, just four were prosecutors and none were local victims' services representatives. Eventually,

[5] 2006 Senate Resolution No. 381, Pr.'s No. 2254.

it was brought to the public's notice how one-sided the committee's membership was, and more prosecutors, police, and victims' advocates were permitted to join -- though never in numbers that achieved a fair balance.[6]

Even with the membership thus stacked, the committee was never given a chance to study and discuss the alleged cases of wrongful convictions in Pennsylvania. Instead, that task was assigned to the chairperson's own law students, who, like the authors of the principal report, accepted at face value the claim that those "innocent" Pennsylvania defendants were "wrongly convicted" before DNA evidence conclusively "exonerated" them.[7] Yet, as we discuss below, in most cases, it is far from clear that the defendants identified by the chairperson and the principal report were "innocent" and "wrongly convicted." What is clear is that the committee never properly defined what a "wrongful conviction" is, much less conducted a fair study of alleged wrongful convictions in this state.

Neither did the authors of the principal report ever put any of their proposals to the test of a vote, though we repeatedly requested one. In the legal representation and investigation subcommittees, pre-determined recommendations

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[6] *See*, *e.g.*, *Nancy Eshelman, Prosecutors Blast Study Panel As Skewed*, The Patriot-News, Mar. 29, 2007.

[7] Meeting Summary, Legal Representation Subcommittee, Nov. 15, 2007, at 1.

were forwarded even in the face of opposition.[8] In the science subcommittee, pro-defense members simply asserted a "consensus" (among themselves), and refused to hold votes when requested to do so by members. And in the redress subcommittee, there was no danger of such disagreement because no specific proposals were ever circulated -- much less debated -- at the meetings.

Under the circumstances, it is not clear who among the committee supported any given proposal in the principal report, much less that the supporters ultimately constituted a majority. The subcommittees have not met for two to four years, and whatever work has been done during that time has taken place in secret, with no input from members who might offer a competing position.[9]

As a product of this deeply flawed process, the principal report cannot be accepted as neutral and reliable, nor can it rightly be described as a report of the committee. Indeed, it is not clear, even to us as committee members, whose report it is.

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[8] *See* Meeting Summary, Legal Representation Subcommittee, Jan. 29, 2009, at 3 (stating, in context of debate among subcommittee members concerning advisability of legislative mandate for electronic recording, "The taping issue will be presented to the full advisory committee in the manner determined by John Rago [who was not a member of that subcommittee]").

[9] The redress subcommittee last met on December 11, 2007, the legal representation subcommittee on March 27, 2009, and the investigations subcommittee on May 4, 2009. The science subcommittee did not have *any* formal meetings with recorded minutes.

III. THE PRINCIPAL REPORT'S PROPOSED RECOMMENDATIONS ARE BASED ON A FUNDAMENTAL MISUNDERSTANDING OF WHAT "ACTUAL INNOCENCE" MEANS.

The advisory committee's task was clear. It was to "review cases in which an innocent person was wrongfully convicted and subsequently exonerated," and, based on that study, to offer "recommendations to reduce the possibility that in the future innocent persons will be wrongfully convicted."[10] But as we said, it did no such thing. At no point did the advisory committee engage in any serious examination of cases in which "innocent" persons were "wrongfully convicted" and subsequently "exonerated." In fact, the principal report's proposals do not display even a basic understanding of what those terms -- "innocent," "wrongfully convicted," and "exonerated" -- mean.

This failure is an extraordinary break from the letter and spirit of the advisory committee's responsibilities, and has significant consequences. Since the principal report does not first correctly identify what "innocent" persons have been "wrongfully convicted" in Pennsylvania, its proposals are apt to cause real harm to the criminal justice system if adopted. That is, since the principal report mistakenly defines the "innocent" to include even the plainly guilty, and then offers recommendations designed to make such convictions less likely in the future, what it actually does is propose rules and legislation that would protect the *guilty* and make their conviction more difficult.

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[10] 2006 Senate Resolution No. 381, Pr.'s No. 2254.

A. The principal report mis-defines "actual innocence."

The principal report states that "actual innocence" is established in either of two relevant situations.[11] First, the principal report defines as "actually innocent" any defendant whose conviction is overturned "on grounds consistent with innocence" -- a standard so broad as to cover nearly *all* appellate reversals, since a ruling in favor of a criminal defendant can hardly expected to be *in*consistent with innocence.[12] In addition, it defines as "actually innocent" any defendant who is found not guilty at a re-trial or has the charges against him dismissed.[13] But in all respects, existing law, common sense, and experience are to the contrary.

Under existing law, a person is not "wrongfully convicted" unless he did not, in fact, commit the charged acts or the charged acts were not crimes, and he did not by misconduct or neglect cause his own prosecution.[14] In other words, the term "actual innocence" means exactly what it says, and what any reasonable person would take it to mean: true factual innocence.

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[11] We agree that a person is likely to be innocent under the principal report's other alternative definition of "actual innocence," which covers the rare situation in which an individual has been "pardoned by the Governor for the crime or crimes … on the grounds that the crime or crimes was either not committed at all or, if committed, was not committed by the defendant[.]" Proposed 42 Pa.C.S. § 8582(a)(2)(i).

[12] Proposed 42 Pa.C.S. § 8582(a)(2)(ii).

[13] Proposed 42 Pa.C.S. § 8582(a)(2)(iii).

[14] 28 U.S.C. § 2513(a)(2).

Actual innocence thus involves far more than the bare fact that a conviction was overturned "on grounds consistent with innocence," or that a defendant was found not guilty after a re-trial, or that the charges ultimately were dismissed. Consider that, to have obtained a conviction in the first place, the prosecution must have presented so much evidence of the defendant's guilt as to convince a judge or jury beyond a reasonable doubt. And it often must have done so even though damning evidence of guilt was suppressed as a result of procedural rulings, or witnesses with compelling evidence of guilt refused to cooperate or could not be located.

If an appeals court reverses under such circumstances, its grounds invariably will be some species of perceived legal error, not a conclusion that the defendant is "actually innocent." And if the second jury (or judge or prosecutor) reaches a different decision than the first one, its decision will usually reflect no more than a belief that the admissible evidence does not establish his guilt *beyond all reasonable doubt*. The Supreme Court has specifically explained that, contrary to the principal report's belief, even an acquittal "does not prove that the defendant is innocent,"[15]

[15] *Dowling v. United States*, 493 U.S. 342, 349 (1990) (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984)).

since a jury must acquit "someone who is probably guilty but whose guilt has not been established beyond a reasonable doubt."[16]

Given this reality, it cannot seriously be argued that the principal report's recommendations are based on an accurate understanding of what it means for a defendant to be "actually innocent" or "wrongfully convicted." Consider for example, how the definition in the principal report would have applied to the case of Timothy Hennis, an Army sergeant who initially was convicted in a civilian court of raping and murdering Kathryn Eastburn and killing her two young daughters. In 1988, a North Carolina appeals court reversed his convictions after concluding that improper evidence was admitted against him and that the remaining evidence of guilt was less than "overwhelming."[17] And, after a re-trial the following year, a second civilian jury found him not guilty.[18]

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[16] *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring). Moreover, even if the second jury's finding on this point is wrong -- that is, even if the admissible evidence, viewed objectively, establishes the defendant's guilt beyond a reasonable doubt -- the prosecution has no recourse because the double-jeopardy bar will prevent an appeal or re-trial. *See Jackson v. Virginia*, 443 U.S. 307, 317 fn. 10 (1979) ("To be sure, the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty.' This is the logical corollary of the rule that there can be no appeal from a judgment of acquittal, even if the evidence of guilt is overwhelming").

[17] *State v. Hennis*, 372 S.E.2d 523 (N.C. 1988).

[18] Myron B. Pitts, *Evidence Adds up in Support of Verdict*, The Fayette Observer, Apr. 18, 2010.

Hennis' case satisfied both of the alternative understandings of "actual innocence" reflected in the principal report: his original convictions were reversed on grounds broadly "consistent with innocence," and he was found not guilty at a subsequent re-trial. As a result, he long has found a place on prominent lists of innocent persons who were "wrongly convicted."[19] His conviction was, in short, precisely the sort the principal report seeks to learn from and prevent.

But there is a problem: notwithstanding the appeals court's decision and the second jury's verdict, Hennis did indeed rape and murder Ms. Eastburn and kill her two young daughters, as the world now knows. In the years after Hennis' supposed "exoneration," compelling new evidence of his guilt, including DNA evidence that was not available at the time of his original trial, was obtained. Moreover, because of his military affiliation, his was a rare case in which an actually-guilty defendant could be brought to justice despite a wrongful acquittal. In April 2010, a military court convicted Hennis and sentenced him to death.[20]

As should go without saying, the principal report is deeply flawed to the extent it would label people like Hennis "innocent" or "wrongfully convicted," and seek to compensate them or make their conviction less likely in the future. Any

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[19] *See* John Scwartz, *In 3rd Trial, Conviction for Murders from 1985*, New York Times, Apr. 9, 2010, at A13. ("Hennis had long appeared on the 'innocence list' maintained by the Death Penalty Information Center").

[20] Associated Press, North Carolina: *Tried 3 Times, Soldier Faces Death*, New York Times, Apr. 16, 2010, at A17.

sincere effort to improve fairness and accuracy in criminal verdicts must begin with a much more reasonable standard for determining who is -- and is not -- innocent, and thus whose cases we should learn from and what those lessons should be.

Again, a reasonable definition of "actual innocence" would deem a defendant "wrongfully convicted" only if he did not, in fact, commit the charged acts or the charged acts were not crimes.[21] As the Supreme Court has explained, "[a]ctual innocence means factual innocence, not mere legal insufficiency," and considers relevant evidence of guilt that was either excluded or unavailable at trial.[22] Moreover, any showing of actual innocence must be "extraordinarily high" or "truly persuasive."[23]

The principal report's failure to reasonably define "actual innocence" has serious consequences. In the first place, since the ostensible point of the principal report's recommendations is to make convictions of the innocent less likely, the mis-definition of "innocent" persons to include scores of guilty defendants means that the "reforms" based on that mis-definition are likely to reward the *guilty* and make their convictions less likely in the future. Further, by encouraging a misperception that "innocent" persons are convicted with much greater frequency than is actually the case, the principal report is likely to undermine in the public's eye both its own

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[21] 28 U.S.C. § 2513(a)(2).

[22] *Bousley v. United States*, 523 U.S. 614 (1998); *Schlup v. Delo*, 513 U.S. 298 (1995).

[23] *Herrera v. Collins*, 506 U.S. 390 (1993).

legitimacy and that of the criminal justice system as a whole. As has been well stated by Joshua Marquis, a district attorney in Oregon, "Words like 'innocence' convey enormous moral authority and are intended to drive the public debate by appealing to a deep and universal revulsion at the idea that someone who is genuinely blameless could wrongly suffer for a crime in which he had no involvement. … To call someone 'innocent' when all they managed to do was wriggle through some procedural cracks in the justice system cheapens the word and impeaches the moral authority of those who claim that a person has been 'exonerated.'"[24]

[24] Joshua Marquis, *Innocence in Capital Sentencing: The Myth of Innocence*, 95 J. Crim. L. & Criminology 501, 508 (Winter 2005).

B. Many of the alleged "wrongful convictions" in the principal report do not involve verifiable claims of "actual innocence" as that term is commonly and properly understood.

As we have explained, since the committee conducted no review of Pennsylvania cases in which defendants may have been wrongfully convicted, the principal report simply accepts without reservation that between eight and eleven individuals in Pennsylvania have been "exonerated" by DNA evidence after being "wrongfully convicted" of charges of which they were "actually innocent." Despite professing to understand the difficulty in accurately identifying and quantifying wrongful convictions, the principal report suggests that our criminal justice system "routinely accept[s] the conviction of an innocent person," and repeatedly asserts without qualification that Pennsylvania has seen as many as eleven "innocent" and "wrongly convicted" convicts "exonerated" through DNA evidence. But these assertions, like the principal report's recommendations, are not based on a reasonable understanding of the term "actual innocence."

In the committee chairperson's law review article, which the principal report used as the primary basis for its claims of DNA "exonerations" in Pennsylvania, he revealed that his research into the cases of the individuals he dubbed the "Pennsylvania Eight" primarily consisted of reading newspaper articles and talking to the defendants and their lawyers. In some cases, he even accepted at face value the self-serving claims that the defendants made in their civil complaints, when they were trying to obtain millions of dollars in damages.

Yet the committee never went beyond this limited research by speaking with the actual victims or other witnesses of the "Pennsylvania Eight's" alleged offenses, let alone the prosecutors of those crimes. This failure was simply unacceptable in a committee whose interest should have been a balanced search for the truth. While DNA can provide incontrovertible evidence, its findings can also be subject to debate and interpretation, and must be examined in light of *all* of the evidence in a given case.[25] This is particularly true for DNA evidence that was collected before the early 1990's, *i.e.*, before DNA was on the radar screen of prosecutors, police, and defense counsels. Original collection methods, cross-contamination, time, and storage are common issues in post-conviction DNA testing.

In order to correct the deficiencies in the committee's approach, we have taken it upon ourselves to do what the committee did not, and give prosecutors, detectives, and victims from those cases a chance to tell their side of the story. What we learned does not inspire confidence in the principal report or its recommendations. In one of the "Pennsylvania Eight" cases, it is clear that an individual was wrongly convicted. But in the other seven, true "innocence" is far less certain and the evidence of guilt in several of the cases remains compelling.

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[25] *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308, 2316 (2009) ("DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent"). *See also id.* at 2326-29 (Alito, J., concurring) (explaining how "DNA testing - even when performed with modern STR technology, and even when performed in perfect accordance with protocols - often fails to provide 'absolute proof' of anything").

This reality may surprise some, since the same people who find themselves on the principal report's list of alleged wrongful convictions in Pennsylvania are also on other prominent lists of the same sort, such as those published by the Innocence Project, the Center on Wrongful Convictions at Northwestern University School of Law, and the Death Penalty Information Center ("DPIC"). But if we cannot confidently rely on such lists when they discuss Pennsylvania cases -- and we submit it is abundantly clear that we cannot -- we also cannot rely on those lists when they discuss alleged wrongful convictions from other jurisdictions. Neither can we blindly accept claims based on those lists, such as assertions about alleged error rates with confessions, eyewitness identifications, and informants.

There is no need to take our word for this; it has been proven time and time again by independent studies. For example, Paul Cassell, a law professor who has also served with distinction as a federal judge, conducted his own investigation of cases nationwide in which false confessions allegedly led to wrongful convictions. What he found nationally, based on a dispassionate review of the entire records in randomly-selected cases, was consistent with what we found in Pennsylvania: "A detailed examination of the alleged miscarriages … reveals that a significant fraction of the 'innocent' were, in fact, guilty criminals. The miscategorization of these cases stemmed primarily from reliance on inaccurate second-hand media

reports…."[26] Similarly, the Florida Commission on Capital Cases, which -- unlike this committee -- conducted its own study of cases of alleged exonerations in its state, concluded that innocence was clear in no more than four of the twenty-two Florida cases commonly cited as wrongful convictions.[27] And an exhaustive study by a member of the California Attorney General's Office showed that a clear *majority* of the cases on the DPIC list of "wrongful convictions" do not present even *arguable* claims of "actual innocence," as that phrase is commonly and properly understood[28]

Below, we provide details that the principal report overlooked in its case summaries of the so-called "Pennsylvania Eight," as well as two other individuals who have frequently appeared on lists of the "wrongfully convicted." If anything, what these cases prove as a whole is that the criminal justice system in Pennsylvania works very well in that it frees those for whom there is any reasonable doubt concerning guilt -- a standard that, again, cannot be equated with "actual innocence."

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[26] Paul G. Cassell, *The Guilty And The "Innocent": An Examination Of Alleged Cases Of Wrongful Conviction From False Confessions*, 22 Har. J.L. & Pub Pol'y 523, 602-03 (Spring 1999).

[27] Florida Commission on Capital Cases, Case Histories: *A Review of 24 Individuals Released from Death Row* (Sept. 10, 2002), *available at* http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf.

[28] Ward A. Campbell, *Critique of DPIC List*, *available at* http://www.prodeathpenalty.com/dpic.htm.

Jay C. Smith

Any discussion of alleged instances of wrongful convictions in Pennsylvania should begin with the infamous case of Jay C. Smith, a school principal who was convicted of murdering a teacher and her two young children. The principal report lists Smith in appendices titled "Pennsylvania Exonerations 1989-2003 By Year of Exoneration" and "Pennsylvania Exonerees Identified By Center on Wrongful Convictions at Northwestern University School of Law." In addition, the committee chairperson has cited Smith's case as an example of "an exoneration[ ] … which pre-dated the advent of DNA as an information science."[29] But in fact, Smith was clearly guilty of those murders, and his example shows just how misguided, misleading and manipulative the principal report's claims of "exonerations" often are.

The reason that Smith finds himself on the principal report's lists of supposed exonerees is that, after being convicted based on an extensive web of evidence proving his guilt, he obtained his release and an order barring his re-trial because the prosecutor did not provide him with evidence -- literally, a few grains of sand -- that could have been used to bolster a far-fetched defense theory. Of course, as we have already discussed, such an outcome is not a judicial determination of "innocence." But upon receiving this remarkable procedural ruling, "Smith could

[29] *Chaos*, *supra*, 12 Widener L. Rev. at 373 n.41.

not leave well enough alone. He had the gall to sue … for false imprisonment."[30] Not surprisingly, a jury rejected that claim, as did the United States Court of Appeals for the Third Circuit, which firmly declared, "[*O*]*ur confidence in Smith's convictions is not diminished in the least. We remain firmly convinced of the integrity of those guilty verdicts*."'[31]

Thus, Smith not only failed to earn his place on wrongful-conviction lists with a judicial determination of innocence, *he has since received judicial recognition of guilt*. Nevertheless, the principal report and the committee chairperson indefensibly characterize him as the sort of "exoneree" whose conviction we should seek to prevent in the future.

Roger Coleman

The committee chairperson has also expressed outrage over the case of Roger Coleman of Virginia, who was executed for a crime that death-penalty opponents long insisted he did not commit. In the other of the two law review articles the chairperson has published, he wrote, "[I]t is paradoxical that habeas corpus, the basis of all our freedoms, could not save the life of a man who discovered new and powerful evidence of his factual innocence … evidence so powerful and disturbing

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[30] *Kansas v. Marsh*, 548 U.S. 163, 195 (2006) (Scalia, J., concurring).

[31] *Id.*, *quoting Smith v. Holtz*, 210 F.3d 186, 189 (3d Cir. 2000).

that Time magazine featured it as a cover story."[32] But what Coleman's case really shows is that one cannot determine the rate and causes of wrongful convictions simply by looking at the cover of Time magazine and the specious lists of alleged "exonerations" found on anti-death penalty websites.

"Coleman was convicted of the gruesome rape and murder of his sister-in-law, but he persuaded many that he was actually innocent and became the posterchild for the abolitionist lobby."[33] That trust in his innocence proved badly misplaced. After Coleman's execution, the governor of Virginia ordered posthumous DNA testing, which confirmed Coleman's guilt.[34] Yet his case has not caused those who produce inflated lists of "wrongful convictions" to change their methodology at all. As we will show when discussing the so-called "Pennsylvania Eight," any evidence of innocence is still considered incontrovertible, while any evidence of guilt is not considered at all.

Dale Brison

Relying largely on allegations that Dale Brison made in a civil lawsuit where he was seeking millions of dollars, the committee chairperson has proclaimed with

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[32] John T. Rago, *"Truth or Consequences" and Post-Conviction DNA Testing: Have You Reached Your Verdict?*, 107 Dick. L. Rev. 845, 873 & n. 220 (Spring 2003).

[33] *Kansas v. Marsh*, 548 U.S. at 188 (Scalia, J., concurring).

[34] *Id.*

certainty that Brison was incarcerated "for a [rape] he did not commit."[35] Likewise, the principal report lists him among its examples of DNA exonerations in Pennsylvania. But in doing so, the principal report makes the mistake we discussed above of confusing a decision not to re-prosecute a defendant with a determination that the defendant was "innocent." In fact, a balanced examination shows that there is no question that Brison is a dangerous rapist, and there remains evidence -- namely, the victim's account and Brison's *modus operandi* -- that his crimes included the one for which he supposedly was "exonerated."

Dale Brison was a defendant in two rape cases, not one. The first involved the rape of a woman who lived a few blocks from him in Oxford, Pennsylvania. The victim in that case was walking down the street when a man grabbed her and dragged into a briar bush area, where he stabbed and repeatedly raped her. She described her attacker as having worn black pants, a gray jacket, and a gold necklace -- a description that matched clothing that Brison had been seen wearing on the street a few days before the attack.

At a 1991 trial, the victim was adamant that Brison was the rapist, and a jury who heard her testimony firsthand agreed. Subsequently, however, the case was reversed by the Superior Court because there had been no DNA testing of the victim's underwear. After the case was remanded, such testing was conducted, and it excluded Brison as the source of semen recovered from the victim's underwear.

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[35] *Chaos*, *supra* 12 Widener L. Rev. at 412.

Although it is always possible in such cases that the biological material came from an unrelated sexual encounter rather than the rape, or that the sample was too degraded for accurate testing, prosecutors no longer believed that they could prove Brison's guilt beyond a reasonable doubt in light of the DNA results, and he was released.

Three months after Brison's release for the original rape, he committed another. In the second attack, which also took place in Oxford, Brison repeatedly raped the 14-year-old girl daughter of a female Chester County Prison Guard. During the vicious attack, Brison told the young victim that her "mother didn't do me good" while he was in prison.

Brison originally denied the second rape as well, once again claiming mistaken identification, but this time DNA tests confirmed that he was the rapist. After learning of those results, Brison ultimately pled guilty to rape and received a prison sentence of 25 years to life. That sentence is being served consecutively with a six- to twelve-year sentence he had received for four drug delivery crimes that he also committed while out of jail.

The victim in the first rape continues to maintain that Brison is guilty, and, according to the prosecutor in the second rape case, the facts of that rape were similar to those of the first.

Thomas Doswell

The case of Thomas Doswell is another in which the committee chairperson is confident that the defendant was convicted of "a [rape] he did not commit,"[36] as is the principal report, which uses the same phrase. But an impartial person in a much better position to know -- the victim -- disagrees with the principal report's claim.

There, a woman who was raped in her workplace identified the attacker as Doswell, as did a co-worker who intervened and chased the perpetrator away. Both witnesses' pre-trial identifications likely would have been suppressed under modern case law because they occurred during photo arrays in which Doswell's picture alone was marked with the letter "R." But in September 1987, Doswell was convicted based on the eyewitness evidence.

In 2005, the prosecution agreed to post-conviction DNA testing, which excluded him as the source of biological material recovered from the scene. Because of those results, he was released and prosecutors declined to retry him. Despite the DNA results, the rape victim remains steadfast that Doswell is the man who raped her.

A year after Doswell's release, he was arrested again in separate incidents for keeping a seventeen-year-old girl in his car against his will, and for conspiring to

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[36] *Chaos*, *supra*, 12 Widener L. Rev. at 377.

kidnap or kill his estranged girlfriend. He ultimately pleaded guilty to reckless endangerment and unlawful restraint in the case of the seventeen-year-old girl. Charges were dropped in the conspiracy case involving his former girlfriend when the witnesses failed to appear in court.

Finally -- and of particular greater relevance to the commission -- Doswell's case does not show any current, systemic problems in Pennsylvania. Even if the principal report is right and the victim is wrong about whether Doswell was convicted of "a crime he did not commit" in the rape case, the law already provides a remedy to prevent the sort of suggestive photo array that led to Doswell's alleged "misidentification." Regardless of whether there was any doubt a quarter-century ago, Pennsylvania courts now make clear that pre-trial identification evidence is inadmissible when it is based on a suggestive photo arrays that created a likelihood of misidentification.[37]

Bruce Godschalk

The committee chairperson has portrayed the alleged innocence of Bruce Godschalk in even more dramatic terms, asserting not only that Godschalk was "exonerated" after being convicted of "a crime he did not commit," but that an eyewitness against him "simply got it wrong."[38] So, too, the principal report lists

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[37] *Commonwealth v. Kubis*, 978 A.2d 391 (Pa. Super. 2009).

[38] *Chaos*, *supra*, 12 Widener L. Rev. at 379.

him among its examples of DNA "exonerations" in Pennsylvania. Once again, however, the true picture is not so clear.

Godschalk was convicted of raping two women in the same Montgomery County apartment complex in 1986. At trial, the prosecution presented overwhelming evidence, including the victims' testimony and a voluntary, taped confession in which Godschalk provided specific and accurate details about the crimes that were not publicly known. But in 2002, he was released after post-conviction DNA testing of biological materials recovered from the crime scene excluded Godschalk as a source.

While the test results in Godschalk's cases created a reasonable doubt about his guilt, the principal report asserts far more than that when it lists him as having been exonerated. When judging that characterization, it is important to consider that:

- The biological materials that ultimately were subjected to DNA testing were found on sources outside the victims' bodies, and consequently may not have been related to the crime. For example, there is no way to determine if a semen sample taken from the carpet was a semen sample from the perpetrator of the crime.

- Godschalk's conviction was based in significant part on a taped, voluntary confession that he gave to police. The judge in his case found no evidence of threats, coercion, or any other improper influence by the police. Nor did Godschalk ever testify that he was forced, threatened, coerced, intimidated, pressured, or improperly influenced in any way.

- In the confession, Godschalk provided specific, accurate details about committing the rapes and gave accurate details of the

indecent exposure. None of the details had previously been released by the police.

- Godschalk so closely resembled a composite sketch of the rapist that his own sister turned him in to police after seeing the picture on television.

Barry Laughman

We agree with the committee chairperson and the principal report that Barry Laughman is likely innocent. It is important to note, however, that the principal report's recommendations would not have prevented Laughman's conviction, and therefore are not justified by his rare and tragic example.

In 1987, Laughman, who was mildly retarded, gave a tape-recorded interview in which, responding to leading questions from a detective, he confessed to the rape and murder of his 82-year-old neighbor. Semen samples were obtained during the autopsy of the victim, but DNA technology at the time was inadequate to compare the samples with Laughman's DNA.

In 2003, the semen samples were subjected to post-conviction DNA testing, which excluded Laughman as a source. Those results were particularly significant because the semen was recovered from the victim rather than an external source, her age made it unlikely that she had had a consensual sexual encounter before the murder, and there was no evidence to suggest the involvement of multiple assailants. Consequently, the Adams County District Attorney's Office concluded that Laughman was innocent, and re-opened its investigation, which remains ongoing.

Fortunately, a wrongful conviction in such a case is already much less likely because there would be no need to wait until after the trial to conduct DNA testing. But the proposed recommendations would not themselves have done anything to prevent Laughman's conviction, since his confession was recorded and yet nevertheless was both false and believed by a jury.[39]

Vincent Moto

The committee chairperson has described the conviction of Vincent Moto for rape as a "sad" event, and stated unequivocally that his conviction was for "a crime he did not commit."[40] Similarly, the principal report lists him as a wrongfully convicted Pennsylvanian who supposedly has been exonerated through DNA evidence. But the reality of his case is also very different. The evidence of Moto's guilt has always been strong. He is on the street today not because DNA evidence showed that he "did not commit" the crime for which he initially was convicted, but because prosecutors could no longer locate the victim to testify against him again when a new trial was granted ten years later.

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[39] The principal report's recommendations do not seek to change the settled rule that limited intelligence does not necessarily bar a voluntary confession, and do not attempt to impose courtroom rules regarding leading (or misleading) questions to the interrogation context, nor should they. The United States Supreme Court and Pennsylvania Supreme Court have consistently rejected such rules, and they would lead to the loss of an unknowable number of truthful confessions. *See*, *e.g.*, *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Commonwealth v. Hughes*, 555 A.2d 1264, 1275 (Pa. 1989).

[40] *Chaos*, *supra*, 12 Widener L. Rev. at 409.

The evidence at Moto's 1987 trial showed that he and another man picked out a complete stranger, dragged her off the street, and raped her. The victim was able to create an excellent composite drawing of Moto that proved to be a remarkable match. After his arrest, the victim made a positive identification. Before trial, a man pulled up in a car next to the victim and threatened to shoot her if she testified against Moto. The victim refused to be intimidated and testified at trial -- where Moto presented an alibi that the jury rejected. The jury found beyond a reasonable doubt that Moto was guilty of rape.

A decade later, DNA testing of the victim's underwear showed traces of DNA from three different men, but Moto's cells could not be found. Upon receiving those results, the judge did not make any finding that Moto was "innocent," but instead merely granted him a new trial in order to present the evidence.[41] Prosecutors were more than willing to meet the challenge. Unfortunately, however, they were unable to locate the victim -- again showing how lengthy delays in DNA testing undermine the search for the truth.

Had there been a new trial, the jury would have learned what few people presently understand: DNA can remain in minute quantities on clothing or bedding for weeks or months, even after repeated washings. Thus, the presence of other

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[41] *See Commonwealth v. Moto*, 23 A.3d 989, 991 n.2 (Pa. 2011) ("[I]t is important to emphasize that the PCRA court did **not** hold or conclude that the DNA results exonerated Appellee. Rather, the PCRA court found that the DNA results raised a jury question that should have been considered along with the other relevant evidence, and so the court granted Appellee a new trial") (emphasis in original).

men's DNA on the underwear proved nothing; it could have represented any combination of cells from the other perpetrator and prior sexual partners. There are also instances in sexual assault when DNA samples are not left behind because the perpetrator did not ejaculate, and if he did it may have been on a surface that was not preserved intact.

On March 23, 2011, the Pennsylvania Supreme Court affirmed the decision of the trial judge refusing to expunge Moto's arrest record. According to the Supreme Court, the trial judge properly considered "the strength of the Commonwealth's case against Appellee; the credibility of its witnesses; the fact that Appellee had not been found not guilty; and the public's interest in retaining the arrest record of an individual convicted of a serious crime, such as rape, who is subsequently granted a new trial due to DNA evidence" when refusing to grant expungement.[42]

Bruce Nelson

The case of Bruce Nelson is another in which the committee chairperson has overstated the evidence of a "wrongful conviction" by declaring without reservation that Nelson was convicted of "a crime he did not commit."[43] Similarly, the principal report goes too far when it states without qualification that Nelson has been "exonerated." Once again, the true picture is less clear.

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[42] *Moto*, 23 A.3d at 992, 995-96. The principal report is mistaken when it states that the expungement issue is still on appeal.

[43] *Chaos*, *supra*, 12 Widener L. Rev. at 409.

In 1982, Bruce Nelson and Terrance Moore were convicted of the brutal rape and murder of Corrine Donovan in an Oakland, Pennsylvania parking garage. Nelson's conviction was based largely on two things: the testimony of Moore that he and Nelson committed the crime together, and a staged prison confrontation in which Nelson made an inculpatory statement.

In 1990, a federal court reviewing Nelson's habeas corpus petition ordered a new trial after concluding that his prison statement should have been suppressed. Prior to the re-trial, the prosecution conducted DNA testing of cigarette butts and hairs recovered from crime scene. The results of the DNA testing confirmed Moore's presence during the crime, but they did not affirmatively connect Nelson to the crime scene.

Regardless of whether Nelson was a source of any of the biological materials on the cigarette butts and other items found at the crime scene, his case was not one in which DNA testing could have conclusively "exonerated" him, since the items that were not linked to either of the defendants did not necessarily come from the perpetrators. Nevertheless, for a number of reasons, including the suppression of Nelson's inculpatory statement and evidence that Moore had fabricated additional evidence (a jailhouse letter purportedly written by Nelson), the prosecution chose not to re-try Nelson.

But whether Nelson's inculpatory prison statement was procedurally admissible at trial, it supported the original jury's conclusion that he was involved

in the crime. Further, while Moore's credibility would have been subject to impeachment, he remains adamant to this day that he and Nelson committed the crime together. Thus, while DNA testing may have created a reasonable doubt about Nelson's guilt, it did not conclusively establish that he was "actually innocent" as that phrase is commonly understood, *i.e.*, that he did not participate in the crime.

Willie Nesmith

Although the principal report claims that Willie "Champ" Nesmith suffered a "wrongful 1982 rape conviction," he was never exonerated in any meaningful sense by DNA testing or other evidence of innocence, and the evidence of his guilt remains compelling.

Nesmith, a competitive boxer, was convicted by a jury of rape and aggravated assault in 1982, and sentenced to nine to twenty-five years in prison based on compelling evidence that sexually assaulted a Dickinson College student and, in the words of the prosecutor, "beat[ ] [her] within an inch of her life." The victim specifically identified Nesmith by name as "Champ"; and he blurted out his guilt to police, tearfully telling an officer that he "messed up real bad."

Eventually, Nesmith was paroled and returned to Carlisle, where he violated the terms of his parole by committing a felony drug offense (to which he would ultimately plead guilty). It was while serving the remainder of his rape sentence because of the parole violation that Nesmith filed a post-conviction petition

requesting DNA testing of the victim's underwear, which had not been possible at the time of trial.

The post-conviction testing did not produce a DNA match for Nesmith *or the victim*. Thus, it is reasonable to conclude that the testing, rather than exonerating Nesmith, showed a lab error, such as an inadvertent switching of evidence. Nevertheless the Cumberland County District Attorney's office neither opposed Nesmith's release nor re-tried him because, by that point, he had already served almost the entirety of his sentence and the victim did not want to relive what had happened to her some 20 years earlier.

This is just one of the ways in which lengthy delays, including delays in DNA testing, work to the benefit of criminal defendants. Because prosecutors did not want to unduly burden the victim, they were unable to proceed, and Nesmith was freed despite the significant evidence of his guilt.

Since his release, Nesmith has been convicted of at least three more felony drug charges and an assault, and has been implicated in a sexual assault in which he and another man allegedly provided a young girl with crack cocaine and alcohol, and sexually assaulted her. Because of the victim's lack of a specific recollection of the incident, he managed to escape criminal charges in that case.

Nicholas Yarris

In the final case of the Pennsylvania Eight, the committee chairperson offered his by now familiar assurance that Nicholas Yarris was convicted of "a crime

he did not commit." Likewise, the principal report lists him as having been wrongly convicted. But as with almost all of the principal report's examples, things are not nearly as conclusive as it portrays them.

Before she was brutally raped and murdered, the victim in Yarris' case worked at a sales booth in a shopping mall. The trial evidence showed that, in the weeks leading up to the crime, a coworker noticed that Yarris would consistently linger by the booth and behave suspiciously by, for example, repeatedly approaching the victim to ask the price of the same merchandise. The victim also complained to her husband that a man was stalking her at work, and pointed out Yarris to the vendor in an adjoining booth as a man who had been staring strangely at her and scaring her.

In the days after the killing, Yarris demonstrated a suspiciously detailed knowledge of the crime when he visited the sales booth where the victim had been employed, asked a worker whether she had been "grabbed from the parking lot," and stated, "I heard that she was raped." At that time, details of the crime had not been released to the public, and the fact that the victim had been abducted and raped was not public knowledge.

In the following months, while awaiting trial on unrelated charges, Yarris offered a series of confessions in which he contradicted himself about whether he committed the crime alone or with another man. First, he told police that he "took the guy there who did it," but identified as the primary perpetrator a man whom

subsequent investigation would show could not have been involved. When confronted with the results of the police investigation, Yarris changed his story and claimed to have committed the crime alone. Subsequently, however, he changed his account yet again, telling police that he and a "buddy" (whom he would not identify) committed the crime together, and that he had previously lied about committing the crime alone to protect his friend. Finally, he had a number of conversations with a fellow inmate in which he solicited legal advice and admitted his guilt.

In 1983, a jury found beyond a reasonable doubt that Yarris was guilty of rape and murder. In 1985, he escaped from prison and fled to Florida, where he committed several new crimes, including armed robbery and false imprisonment, to which he ultimately would plead guilty.

In 2003, post-conviction DNA testing excluded Yarris as the source of biological material recovered from the victim's fingernails and underwear, and from gloves found at the crime scene. In each instance, the testing showed that the material came from the same unknown person.

These results did not conclusively prove Yarris' "innocence" since, even in his own accounts, he often claimed to have committed the crime with another man. But on the other hand, they were sufficiently incompatible with the prosecution's original theory of the case, which portrayed Yarris as the sole perpetrator, that the Delaware County District Attorney's Office has elected not to re-try him unless it obtains new evidence of his guilt in the future.

In short, Yarris' case is yet another in which, even with DNA evidence, there is no way to know for sure whether he was convicted "of a crime he did not commit." A balanced examination of Yarris's case, like those of the rest of the so-called "Pennsylvania Eight" does not show that the "actually innocent" in Pennsylvania are convicted at even the very low rate suggested in the principal report. Rather, it shows that the system is operating as it is designed to in that individuals are freed even when there is a reasonable doubt about their guilt.

IV. AS A PRODUCT OF THIS FLAWED APPROACH, THE PRINCIPAL REPORT'S RECOMMENDATIONS CANNOT BE TRUSTED TO SAFELY IMPROVE VERDICT INTEGRITY AND RELIABILITY IN PENNSYLVANIA.

As we said at the outset, the failure to properly define "innocence" and study possible "wrongful convictions" prevented the committee from drawing reliable lessons about what causes wrongful convictions of the innocent and what should be done to prevent such occurrences. If the principal report itself cannot distinguish between the innocent and the guilty, there is no reason to believe that its recommendations can do so either. But even beyond that fundamental point, we have the following concerns with the principal report's proposals:

A. Proposed statute requiring electronic recording of interrogations.

The principal report proposes a statute that would require the mandatory, state-wide electronic recording of "custodial interrogations," and would call for instructions encouraging juries to disregard confessions that are not recorded. As

we discuss below in our own recommendations for ensuring verdict integrity, we would welcome a pilot program in Pennsylvania to study whether and how electronic recording of interrogations can be implemented in a fair, reliable, and cost-effective manner. But the principal report's recommendation of immediate and mandatory state-wide recording, with an adverse jury instruction in cases where the interrogation is not recorded, is a perfect example of a law that would simply reduce the total number of convictions *without respect to "wrongfulness"* while doing nothing to improve the accuracy of verdicts.

The evidence before the committee. Every witness at the meetings of the investigation and legal representation subcommittees with experience conducting interrogations agreed that, even if recording of interrogations is preferable and should be encouraged as a best practice, it should *not* be mandatory and there should be no sanction for the failure to record. For example, Lieutenant Jonathan Priest of the Colorado Police Department explained that his jurisdiction's experience with recording of interrogations left him with a favorable impression of the procedure, but also led him to believe that a legislative "mandate takes away from the flexibility needed to respond to local issues"; each police department should be able to develop its own protocols.[44] That was also the position of Pennsylvania experts, including Charles W. Moffatt, Superintendent of the

[44] Summary of Proceedings, Investigation and Legal Representation Subcommittees, Aug. 5, 2008, at 18.

Allegheny County Police Department; Cpt. Bret K. Waggoner and Sgt. Raymond C. Guth of the Pennsylvania State Police; and all of the current and former Pennsylvania District Attorneys represented at the meetings.[45]

Moreover, this view was *consistent* with key aspects of the accounts from two witnesses hand-picked by the committee chairperson to support his recording proposal: Thomas Sullivan, a civil attorney from Illinois, and Saul Kassin, Ph.D., a psychologist from New York who frequently testifies on behalf of criminal defendants who have confessed. Mr. Sullivan informed the subcommittee that other jurisdictions, such as New Mexico and Maine, have been able to establish reasonable policies for recording interrogations without imposing any sanction for the failure to record.[46] And Dr. Kassin advised the subcommittee that, in practice, mandatory video recording has not been shown to reduce the rate of false confessions.[47] Thus, even the experiences that Mr. Sullivan and Dr. Kassin

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[45] *See*, *e.g.*, *id*. at 3-12.

[46] *See* Summary of Proceedings, Investigation and Legal Representation Subcommittees, Aug. 5, 2008, at 3 ("[Mr. Sullivan] pointed out that in New Mexico and Maine, there are no adverse consequences for failing to record, yet police are recording interrogations in those states").

[47] *See id*. at 15 ("Saul Kassin stated that in Great Britain, mandatory video recording of interrogations began in 1986. The current policy and practice has greatly limited the interrogation techniques that may be used, but *the false confession rate has not changed*") (emphasis added). *See also id*. at 10 ("Saul Kassin asserted that scientific research regarding lie detection has taken place for over 50 years, and in over a range of studies, researchers concluded that people on average are 54% accurate in recognizing lying. He added that odds are that any individual (continued. . .

described, like the experiences of actual practitioners, contained significant support for the position that a mandatory sanction for failing to record interviews was unnecessary and even ineffectual.

In short, if there was any "consensus" among the advisory committee, it was that recording of interrogations should *not* be mandatory and there should *not* be a judicial sanction in cases in which the police do not electronically record the confession. The principal report's recommendation of an approach rejected by the committee's own experts is difficult to understand, except as a product of the unreliable, backroom procedures we discussed at the beginning of this report.

Practical concerns. Another problem with proceeding with immediate and mandatory state-wide recording, rather than a pilot program, is that it would deny the Commonwealth the opportunity to study and address practical concerns, such as whether victims, witnesses, and suspects will be less willing to participate if they know or believe they are being recorded.[48] Moreover, even the fear of such reluctance could put subtle pressure on police to shift from formal interrogation to

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will accurately detect a lie 50% of the time, so that this accuracy level is barely statistically significant").

[48] Heath S. Berger, Comment, *Let's Go To The Videotape: A Proposal To Legislate Videotaping of Confessions*, 3 Alb. L.J. Sci. & Tech. 165, 180 (1993).

informal interviews, thereby increasing the danger to the officers by placing them in less controlled environments when dealing with potentially dangerous suspects.[49]

In addition, electronically recording interrogations potentially removes the subject's opportunity to review the content of his or her statement for accuracy and completeness. It thus may 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.

Along the same lines, defense counsel are sure to attempt to exploit the fact that many electronically-recorded interviews will include breaks for the comfort and convenience of the subject or the interviewer, or because the interviewer needs to attempt to verify a statement by the subject or change the recording media. Although such gaps are essentially unavoidable when electronically recording lengthy interviews, they could easily become a source of jury confusion and unfounded and potentially damaging defense claims of misconduct.

There is also, of course, the question of what electronic recording will cost and who must bear the expense. The principal report suggests that compliance with the statute would require nothing more than a single reconditioned video-camera and a few blank DVDs, while one of the few published estimates puts the cost at closer to

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[49] *See* Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons From Australia*, 25 AMJCRL 493, 537 (Summer, 1998) ("There is evidence, for example, that when electronic recording of interrogations is required, police may shift their practice from formal interrogation to informal exchange.").

$25,000 per investigative unit.[50] The only thing that is clear on this point is that matters are not as simple as the principal report portrays, since "custodial interrogations" do not just occur in police interview rooms.

In Pennsylvania, confessions have been given in supermarkets,[51] prison cells,[52] and in private homes.[53] Since any location can be the site of a custodial interrogation, a statute mandating electronic recording would, in practice, require that every single police officer in the state be trained in how to electronically record interrogations, and that every officer also be outfitted at all times with a video camera and recording media. The costs and other practical difficulties of such an arrangement cannot be known unless they are studied in a pilot program, but they are sure to be far more substantial than the principal report suggests.

Injury to Separation of Powers. Our final concern with the principal report's proposal on electronic recording of confessions is that the legislative mandate of a punitive jury instruction in cases in which a confession is not recorded would violate the constitutional separation of powers. Under Article V, § 10(c) of the Pennsylvania Constitution, the Supreme Court has exclusive power "to

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[50] Heath S. Berger, Comment, *Let's Go To The Videotape: A Proposal To Legislate Videotaping of Confessions*, 3 Alb. L.J. Sci. & Tech. 165, 179 (1993).

[51] *See*, *e.g.*, *Commonwealth v. Eichinger*, 915 A.2d 1122, 1131 (Pa. 2007).

[52] *See*, *e.g.*, Commonwealth v. Rizzuto, 777 A.2d 1069, 1084 (Pa. 2001).

[53] *See*, *e.g.*, *Commonwealth v. Odrick,* 599 A.2d 974 (Pa. Super. 1991).

prescribe general rules governing practice, procedure and the conduct of all the courts ..." Thus, while the General Assembly can enact substantive law, only the Pennsylvania Supreme Court can promulgate court procedural rules.

A jury instruction, explicitly designated as an enforcement mechanism for a statute governing interrogation procedures, is as clear-cut an example as one could find of a law that is procedural rather than substantive.[54] The legislative requirement of such an instruction would thus violate the constitutional separation of powers.

B. Proposed statute regarding eyewitness identifications.

The principal report next proposes an eyewitness identification statute that would mandate various defense-oriented identification procedures. Unfortunately, rather than improve eyewitness identification procedures, many of these proposals would actually discourage *all* identifications (whether accurate or not). These proposals would also exclude or encourage juries to disregard identifications not made pursuant to those procedures. Consequently, this proposal is unnecessary, impractical, and misguided.

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[54] *See Commonwealth v. McMullen*, 961 A.2d 842, 847 (Pa. 2008) (substantive law creates, defines, and regulates rights; procedural law addresses the method by which those rights are enforced). *See generally* Leo Levin and Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1 (1958).

Blind administration. The proposed statute begins with a seemingly benign requirement of "blind administration" of identification procedures, *i.e.*, a requirement that the police officer conducting a photo array, lineup, or the like not know himself who the suspect is. As an initial matter, this aspect of the proposal offensively and baselessly presumes that police investigators in Pennsylvania have been obtaining identifications by suggesting to witnesses, either intentionally or through incompetence, which members of lineups and photo arrays are the suspects. We believe it much more likely that, if officers who have investigated a case tend to be more successful than outside officers at obtaining identifications, it is for the entirely legitimate reason that the investigating officer has time to develop a relationship with frightened and reluctant witnesses, making the witnesses feel safe and invested in the identification process. This is the sort of real-world consideration that the academic studies whose results are reported in the principal report cannot measure, and do not even consider.

But even if the principal report were right about the supposed untrustworthiness of our police, its proposed solution would be unrealistic since the evidence before the committee showed that blind administration is logistically impossible in small- and medium-sized police departments, where all of the officers

are familiar with each investigation and know who the suspect is.[55] Thus, by proposing this requirement, the principal report intentionally recommends a law that would make *all* identifications in the typical Pennsylvania county's police department presumptively unreliable in the eyes of juries unless the county hires an additional officer just to conduct lineups and photo arrays. And, of course, the principal report does not propose any appropriation to enable cash-strapped counties to hire such extra officers to conduct the "blind" identification procedures.

The inclusion of a statutory caveat that blind administration procedures must only be employed "when practicable" would not allow counties to avoid the consequences of this unfunded and unnecessary mandate, but instead would merely create a new issue for defense attorneys to raise before the trial judge and on appeal, and argue to the jury, in each case. Defense counsel can hardly be expected to concede that blind administration is "impractical" in the Chester County Police Department or any other police department in which all officers are familiar with each investigation; rather, they are sure to present the unfounded -- but potentially successful -- argument that *all* identifications in counties that lack the resources for blind administration are suspect.[56]

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[55] *See*, *e.g.*, Conference Call Summary, Legal Representation Subcommittee, May 4, 2009, at p. 2 (blind administration would be impractical in Chester County because everyone in the police department knows who the suspect is in each investigation).

[56] Neither does the impractical option of electronically recording all identifications solve the problem created by the proposed statute. Instead, it simply raises the (continued. . .

Misleading instructions. The proposed statute further requires police at any identification procedure to issue misleading instructions to the witness. In particular, police would have to tell the witness that the perpetrator may or may not be among the people he will see, he should not feel compelled to make an identification, and the investigation will continue regardless of whether an identification is made.[57] These instructions would be required even in cases in which the witness indicates that no one has pressured her to make an identification or suggested to her that the perpetrator is present, and that no one has "compelled" her to make an identification. Even more tellingly, these instructions would be required even in cases in which they are *untrue*, such as cases in which there will be no further investigation.

If the goal is to enhance the accuracy of identification procedures -- and not simply to reduce the total number of identifications -- any instructions should be issued only when they are truthful and supported by the circumstances of the case. For example, under the Philadelphia Police Department's lineup procedures, the detective asks the witness whether anyone has told him that the suspect will be in

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same issues discussed above with respect to the electronic recording of interrogations.

[57] Proposed 44 Pa.C.S. §§ 8314(d), (h)(2).

the lineup, and gives a cautionary instruction if the witness answers yes.[58] In contrast to the proposed recommendation, that approach strikes an appropriate balance, discouraging only *suggestive* identifications, not *all* identifications.

Confidence statement. Defense attorneys routinely seek to inform juries that the sort of academic studies discussed in the principal report suggest that there is only a weak correlation between a witness's confidence in his identification and the reliability of that identification.[59] In these studies, professors measured how reliably their students performed as eyewitnesses by having them playact crimes in front of the class, Nevertheless, the principal report's recommendation would require that any eyewitness be asked to make an immediate statement, "in his own words, [of] how certain he is of the identification."[60]

The only explanation for this contradiction is that the proposed requirement of a "confidence statement" is designed to facilitate gamesmanship at trial. If the witness reports a high level of confidence, defense counsel will argue that the confidence statement is meaningless. And if the witness reports low or moderate

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[58] Summary of Proceedings, Investigation and Legal Representation Subcommittees, Mar. 5, 2008, at 4-5.

[59] *See*, *e.g.*, *Commonwealth v. Bormack*, 827 A.2d 503, 508 (Pa. Super. 2003) (addressing proposed defense expert testimony addressing the "'relationship between confidence and accuracy,' which attributes only a 'modest' connection between the confidence a witness exhibits in the identification he has made and the accuracy of that identification").

[60] Proposed 44 Pa.C.S. §§ 8314(d)(4); 8314(i).

confidence, defense counsel will make the opposite argument that the confidence statement is very significant, and itself a basis on which to acquit. Proposals that encourage such disingenuous tactics only further undermine the overall legitimacy and neutrality of the principal report's recommendations.

"Show-up" procedures. The proposed identification statute also would impose unrealistic requirements for "show-ups," *i.e.*, identifications made at the crime scene. For example, the statute would require that police make a written or recorded account of the witness' verbatim account of every detail of the crime and perpetrator before allowing an identification to take place, and that police attempt to remove the suspects' handcuffs and take him away from the squad car before the identification.[61] As was explained to the committee even by Jules Epstein, a longtime defense attorney who sill practices criminal defense work part-time while employed as a full-time law professor at Widener University, these procedures do not reflect the reality of "show-up" procedures.[62] Police on the scene cannot be expected to engage in such detailed recordkeeping, and there will rarely be a case in

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[61] Proposed 44 Pa.C.S. §§ 8313, 8314(b), (h).

[62] *See* Conference Call Summary, Legal Representation Subcommittee, May 4, 2009, at 2 ("Jules Epstein stated that in the showup context, the draft may not accurately reflect the reality of the situation of an officer on the street. He noted that § 3(9) requires the same level of detailed recordkeeping before and after the showup as required in the station house for a lineup or photo array and that it is difficult to do in exigent circumstances").

which it is safe and non-threatening to have the defendant unrestrained while the witness identifies him.

Again, the inclusion of caveats like "when practicable" in the statutory language does not solve the problem. Rather, it creates collateral issues that will have to be litigated before the trial judge and on appeal, and argued to the jury, in every case. While there will rarely, if ever, be a situation in which it is safe and "practicable" to leave the defendant unrestrained at the crime scene while he is facing his victim, that will not stop defense counsel from routinely arguing -- based on the statute -- that the failure to follow such procedures made the identification less reliable. As we have said before, it is not the proper role of the principal report to propose legislation that in practice will primarily serve as a basis for disingenuous arguments that undermine *all* identification evidence.

Separation of powers. Even if the proposed statute were otherwise fair and necessary, the provision recommending jury instructions "as to the requirements of this subchapter and how compliance or failure to comply with those requirements may affect the reliability of the identification" would be unconstitutional.[63] As we explained when addressing the proposed jury instruction in the draft statutes on electronic recording, the content, form, and necessity of jury instructions are matters for the judiciary, not the legislature. Pursuant to the constitutional

[63] Proposed 44 Pa.C.S. § 8315(c)(2).

separation of powers, it is not for the legislature to dictate what instructions the courts may or may not give.

Moreover, it cannot escape note that the proposal does not even attempt to explain in what manner and to what extent compliance with its requirements supposedly "may affect the reliability of the identification," nor is the matter in any way obvious. As we discussed above, key aspects of the proposed statutes have no proven connection to the reliability of eyewitness identifications. This leads us to conclude that such proposals have been included simply to discourage identifications from being made in the first place and to provide fodder for defense counsel's cross-examination. Yet we find it difficult to imagine that is what the principal report wants the judge to instruct the jury.

Similarly, the proposed statute's (unexplained) provision that "[t]he trial court may consider evidence of failure to comply with this chapter in adjudicating a motion to suppress an eyewitness identification" violates the constitutional separation of powers.[64] The conditions under which identifications are subject to suppression is another purely procedural issue, and thus is within the exclusive province of the Supreme Court, whose rules do not deem the complete failure to conduct a lineup, much less the failure to conduct a lineup according to particular

[64] Proposed 44 Pa.C.S. § 8315(a).

procedures, a basis for suppression.[65] Once again, the proposed statute would be unconstitutional to the extent it attempts to legislatively dictate how the courts construe and apply their procedural rules. Indeed, even Mr. Epstein argued to the subcommittee that the inclusion of a reference to suppression was inappropriate in light of the Supreme Court's contrary case law.[66]

C. Proposed rules for prosecutorial practice.

Perhaps no proposal better exemplifies the biased and one-sided nature of the principal report's recommendations than the proposal that prosecutors – and *only* prosecutors, not defense counsel – face formal and informal discipline when they commit "misconduct." At the subcommittee meetings, there was broad consensus that prosecutorial misconduct is *not* a common cause of wrongful convictions in Pennsylvania, and that mishandling of cases by defense counsel is a much more significant problem.[67] Thus, if the principal report's recommendations fairly

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[65] *Commonwealth v. Sexton*, 400 A.2d 1289, 1293 (Pa. 1979).

[66] In fairness, Mr. Epstein also recommended jury instructions on the issue -- a point with which we have already expressed our disagreement. The Supreme Court's decision in *Sexton*, *supra*, does not authorize jury instructions unless a lineup was bypassed entirely. *Cf.* Conference Call Summary, Legal Representation Subcommittee, May 4, 2009, at p. 4 ("Jules Epstein recommended that the reference to suppression in Section 4(1) (remedies) should be deleted. He noted that [in] the *Sexton* case, that with regard to lineup errors, the remedy is informing the jury that a procedure was skipped").

[67] *See*, *e.g.*, Meeting Summary, Legal Representation Subcommittee, Jul. 7, 2008, at p.3 (since 1970, there have been 5.1 million prosecutions in Pennsylvania, but only (continued. . .

reflected the evidence presented to the committee, they either would focus on rules that discipline *defense attorneys* who engage in misconduct, or would encourage the adoption of ethical rules that apply to both prosecutors *and* defense lawyers.

Unfortunately, once again, the principal report's recommendations are neither fair nor evidence-based. Thus, it should come as no surprise that the recommendations completely ignore the acknowledged failings of defense counsel, and instead urge the adoption of special new ethical rules requiring internal policies and sanctions only for "misconduct" by prosecutors. Of all the provisions contained in the principal report, this provision most clearly exposes the principal report's pre-determined agenda crafted on behalf of the defense bar, rather than the product of any evidence presented to the committee.

The reality is that prosecutors are *already* held to the highest professional and ethical standards of any attorneys under the mandatory rules imposed by the Pennsylvania State Supreme Court and its Disciplinary Board, as well the advisory codes of conduct promulgated by the National District Attorneys Association and the American Bar Association. Prosecutors are *already* the attorneys most constrained by the law. And there are *already* multiple rounds of judicial review to ensure that prosecutors have not obtained a conviction through "misconduct."

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founded cases of prosecutorial misconduct, all of which resulted in appropriate disciplinary penalties).

It thus should come as no surprise that the committee found no evidence that prosecutors are a common cause of wrongful convictions in Pennsylvania. The principal report's decision to nevertheless suggest that the existing professional and ethical constraints on prosecutors are somehow inadequate, while ignoring the professional lapses by *defense counsel* that can cause wrongful convictions, confirms what we said at the beginning: the principal report's recommendations reflect a pre-determined set of rules favored by the criminal defense bar, not a balanced, evidence-based attempt to improve the reliability of verdicts in Pennsylvania.

D. Proposed statute and jury instruction governing informant testimony.

The principal report also attempts to make it more difficult for the prosecution to use testimony from jailhouse witnesses, whom it repeatedly and offensively refers to as "snitches" – a term taken straight out of the infamous "stop snitching" campaign. To that end, the report's recommendations contain several proposals to exclude, or encourage juries to ignore testimony from witnesses who obtain information while incarcerated with the defendant. Once again, there was no evidence presented to the subcommittee that such testimony has proven a common cause of wrongful convictions in Pennsylvania, or that new laws are needed to discourage its use or acceptance in the future. Rather, the principal report simply accepts at face value even the most dubious of the claims of "wrongful convictions" we discussed above. Moreover, the specific proposals for incarcerated witnesses contain serious flaws, which we discuss below.

Applicability. Once again reflecting a one-sided agenda, the proposed recommendations would only apply to jailhouse witnesses *for the prosecution*. But if the defendant's cellmates are categorically suspect whenever they are called by the prosecution, then surely they are just as suspect when called by the *defense*, since inmates have inherent incentives to help their fellow prisoners and inherent biases against police and prosecutors. Thus, if there were evidence that new statutes and rules for jailhouse witnesses were necessary to ensure reliable verdicts, the appropriate course would be to apply the same laws to both sides.

"Reliability" hearing. The proposed recommendations for jailhouse witnesses also contain a baffling requirement that, in capital cases, the judge first conduct a hearing to determine if the jailhouse witness' testimony is reliable before allowing it to be presented. We describe this proposal as "baffling" because it has no precedent, is entirely unnecessary (as the principal report effectively admits by omitting it in non-capital cases), and received no significant support from *anyone* within the committee.[68] Once again, the principal report's inclusion of recommendations that are directly contrary to the expressed views of the committee members belie its unsupported claims of "consensus" and call into question the basis and legitimacy of the entire document.

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[68] *See*, *e.g.*, Meeting Summary, Legal Representation Subcommittee, Jan. 29, 2009, at 5 ("[Subcommittee chair, the Honorable] Bill Carpenter[,] noted that nobody seemed to strongly favor a preliminary hearing [specific to informants]").

Separation of powers. A final problem with the principal report's proposals with respect to jailhouse witnesses is that they frequently recommend legislative intrusions in procedural matters, such as jury instructions and pre-trial discovery, that are exclusively for the courts. As we discussed when addressing the proposed jury instructions in the draft statutes on electronic recording and eyewitness identifications, court procedural rules are the exclusive domain of the judiciary, not the legislature, according the Pennsylvania Constitution. Pursuant to that constitutional separation of powers, it is not for the legislature to dictate procedural matters to the courts.

E. Proposed statute requiring the preservation of biological evidence.

The principal report next proposes a series of statutes that would govern the preservation of biological evidence. We are receptive to this idea as a general matter, but take strong issue with some of the specific aspects of the principal report's draft. In particular, our support is contingent on the existence of a more realistic funding source and the addition of an explicit statutory provision stating that non-compliance with the proposed statutes does not provide an independent ground for relief.

Funding. The principal report's proposal would require that district attorneys use the proceeds of drug forfeitures to comply with the recommendation's enhanced requirements for the preservation of biological evidence. But this is completely unrealistic, and renders the entire proposal an unfunded mandate.

Contrary to popular myth, there is no magic pot of forfeiture money into which prosecutors can dip whenever there is a problem of underfunding in the criminal justice system. Most district attorneys' offices in Pennsylvania are themselves severely underfunded, and no district attorney can anticipate in advance how much money (if any) his or her office will recover through drug forfeitures. Moreover, in counties in which such funds are more frequently recovered, forfeiture funds are often dedicated to pay for essential operating costs, particularly the salaries of the police officers, detectives, and prosecutors who enforce the Commonwealth's drug laws. There is, therefore, no "extra" forfeiture money available to fund new projects. The cost of the proposed rules for preserving biological evidence, like all of the proposed recommendations, would have to be paid for through an appropriation from the General Assembly.

Consequences of non-compliance. Under existing Supreme Court precedent, the destruction or loss of evidence does not provide a basis for relief in any criminal action unless the evidence was materially exculpatory and the prosecution destroyed it in bad faith.[69] There is nothing in the proposed statute that would change this standard. However, if the statute is adopted, defense counsel can be expected to attempt to rely on it -- potentially with success -- as a basis for motions to suppress, motions to dismiss prosecutions, or petitions for post-

[69] *Illinois v. Fisher*, 540 U.S. 544 (2004); *Commonwealth v. Snyder*, 963 A.2d 396 (Pa. 2009).

conviction relief. We therefore could not support such a statute unless it made clear, in the statutory text, that -- as is already the law -- non-compliance does not provide an independent ground for relief in any criminal case.

F. Proposed new statute on post-conviction DNA testing.

In 2002, Pennsylvania passed a post-conviction DNA statute that struck a fair balance among the interests of defendants, victims, and law enforcement; and was endorsed by groups ranging from American Civil Liberties Union to the Pennsylvania District Attorneys Association.[70] Yet the principal report includes a proposal to repeal the current law and replace it with a new proposed law that was created in secret by an unknown author and never shared with or considered by the committee. We vigorously oppose this radical approach. Instead, any proposed changes to the PCRA provision should have been considered in detail by the committee, and made within the framework of the existing statute.

Lack of consideration by the committee. At the subcommittee meetings, only one specific amendment to the post-conviction DNA-testing statute received significant discussion: some members proposed that a guilty plea or confession should not be an absolute bar to DNA testing under the PCRA.[71] We were receptive to an amendment on that point, but the issue was rendered moot by a Pennsylvania

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[70] 42 Pa.C.S.A. § 9543.1.

[71] Meeting Summary, Legal Representation Subcommittee, Dec. 14, 2007, at p. 2.

Supreme Court decision clarifying that, as the Philadelphia District Attorney's Office expressly agreed, the existing statute contains no such bar.[72] Nevertheless, the principal report goes well beyond this narrow issue, and proposes an entirely new post-conviction DNA statute that is so radically different from the existing PCRA statute or any prior proposal that one must often guess how the statute would operate in practice and why the unknown author has made the changes he did.

Potential to reward guilty defendants for intentional delay. Rather than attempt to piece together the unnecessary jigsaw puzzle that is the principal report's recommendation, we will focus on a straightforward example of how the proposed statute would make proceedings *less* fair and reliable, not more so. As our discussion of the cases of Willie Nesmith and Vincent Moto showed, extreme delays in DNA testing inherently work to the benefit of all defendants, including the guilty, by increasing the chances of unreliable results and making re-prosecution much more difficult. Thus, any reasonable post-conviction testing statute must have a gate-keeping mechanism that prevents defendants from filing petitions in cases in which they previously have made a strategic decision not to seek testing or have waited so long as to prejudice the Commonwealth's ability to retry them. But the proposed recommendation would instead reward intentional delays and

[72] *Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011).

gamesmanship by repealing all statutes of limitations and procedural bars for such claims.[73]

Accordingly, the proposed DNA statute, like the proposed recommendations as a whole, would potentially reward the guilty, and would do so needlessly and without any consideration by the advisory committee. Again, we were receptive to genuine reforms that have been proved necessary, such as the limited amendment discussed above to clarify that defendants who have confessed or even pleaded guilty may nevertheless seek post-conviction DNA testing. What we oppose is the secretive and one-sided nature in which these unnecessary proposals and changes were developed and that they would put proper convictions of the guilty-- and hence the citizens of Pennsylvania -- at risk.

Unanswered questions. Since the principal report's proposed post-conviction DNA testing statute was never considered by the advisory committee or any of its subcommittees, there are many unanswered questions. Among them are:

- What is wrong with the existing post-conviction DNA testing statute, and what problems is the proposed new statute attempting to remedy? Even as basic and fundamental as these questions are, the principal report leaves them unanswered.

- Why is there no requirement that favorable results would demonstrate "actual innocence" before testing will be granted and substantive relief will be awarded? While the proposed statue requires a petitioner to *plead* his factual innocence, it does not require that the results of DNA testing *prove* his factual innocence, even under an evidentiary standard well

[73] Proposed 42 Pa.C.S. § 9545(b)(5); Proposed 42 Pa.C.S. § 9583.

below proof beyond a reasonable doubt, before he is released from custody or granted a new trial. The failure to limit relief to cases involving true "wrongful convictions," *i.e.*, cases in which factually-innocent persons have been convicted of crimes they did not commit, is yet another troubling break from the ostensible purpose of the advisory committee.

- Why would testing be allowed even where the petitioner intentionally delayed his request so as to prevent the Commonwealth from re-trying him? Again, as our discussion of Vincent Moto's and Willie Nesmith's cases shows, it is not uncommon for a prisoner to wait so long to request DNA testing that the Commonwealth's witnesses are unavailable or uncooperative by the time the results are obtained. Where the petitioner has delayed his request so as to prejudice the Commonwealth's ability to retry him, it would be a perversion of justice and grossly unfair to the victim to reward that improper tactic.

- Why is there no meaningful consequence for petitioners who waste the time and resources of the courts, prosecutors, and police by falsely asserting their factual innocence when requesting post-conviction DNA testing? Once a prisoner has been sentenced for his crime and has exhausted normal avenues for appeal, the proposed statute would do nothing to discourage him from requesting testing even where he knows he is guilty. To the contrary, guilty defendants whose cases involved biological evidence would have every incentive to request DNA testing and then hope for lab error.[74] To discourage such abusive filings, the statute should have meaningful consequences for false claims. In cases where the post-conviction DNA testing confirms the petitioner's guilt, he should face new charges for lying, or if such charges would have no practical meaning because he has been sentenced to life imprisonment or death, he should face institutional discipline within his prison.

- Why is there no burden on the defense to examine its own files? The proposed statute places the entire burden of locating evidence and prior DNA results on the Commonwealth, even to the point of forcing the prosecutor to help defense counsel track down evidence in the hands of

[74] While the proposed statute would allow the Commonwealth to compare the defendant's DNA to a national database to see if he has committed any other crimes, there is nothing to prevent the Commonwealth from doing that even without the statute. Moreover, it will only be a small subset of even guilty defendants who have left biological evidence at the scene of other, unsolved crimes.

third parties, without any requirement that the defense first examine its own files to see what evidence and results it already has. This provision seems designed to invite lengthy collateral litigation and intrusive discovery requests with respect to the often privileged contents of the Commonwealth's files.

- Why are there no standards for when judges may release petitioners or grant new trials based on the results of DNA evidence? The statute proposes to grant judges sweeping new powers to issue "any order that serves the interest of justice," including discharging the petitioner from custody, without any standards governing the circumstances under which a judge may issue such an order. This approach is so vague as to be reckless. A judge should not have the power to dismiss charges altogether. And the judge should only have the authority to grant a new trial where the new DNA results satisfied the PCRA's after-discovered evidence standard.[75]

- Why is the Commonwealth not granted an express right of appeal? The proposed statute expressly grants petitioners the right to appeal any order denying a petition, but it never mentions any right of the Commonwealth to appeal a potentially-erroneous order granting the petitioner a new trial or discharging him. In all likelihood, the courts would hold, even in the absence of an express statutory provision, that both the petitioner and the Commonwealth possess such appellate rights, but the principal report's decision to acknowledge the defendant's appeal rights while ignoring the Commonwealth's appeal rights once again shows how one-sided its approach is. At no point does the principal report give more than lip service to the interests of law enforcement and victims, and, after the first few pages of the principal report, it does not even do that much.

G. Proposed "wrongful conviction" compensation statute.

The principal report next recommends a statute that would label defendants like Jay Smith and Timothy Hennis "actually innocent," and mandate that they receive enormous financial awards whenever they overturn their convictions on

[75] "The 'preponderance of the evidence' is the lowest burden of proof in the administration of justice, and it is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly in one's favor." *Commonwealth v. Ortega*, 995 A.2d 879, 886 n.3 (Pa. Super. 2010).

appeal, avoid re-prosecution, or prevail at a new trial. This proposed statute is nothing short of preposterous, and outrageously contradicts the principal report's claim that "none of the recommendations in this report present an outlier position."

Necessity. At the outset, the committee was presented with no evidence that legislation opening up a new avenue for lawsuits by criminal defendants claiming to have been "wrongfully convicted" is needed in Pennsylvania. Under existing laws authorizing civil lawsuits by wrongfully prosecuted individuals, Barry Laughman, the only person among the "Pennsylvania Eight" who can be described beyond a reasonable doubt as "actually innocent" received a settlement of $2.1 million dollars in his civil case.[76] And even individuals on the principal report's lists of "wrongful convictions" for whom the evidence of innocence is less clear have been amply compensated under existing law. For example, Bruce Godschalk received a settlement of $2.34 million,[77] and Nicholas Yarris received $4 million.[78]

On the other side of the ledger, the principal report has identified *no* cases in Pennsylvania in which defendants who truly were "exculpated" nevertheless were ineligible for compensation under existing law. As the Attorney General's Office

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[76] Debra Erdley, *Lawsuit Awards Against Pennsylvania State Police Costly to State*, Pittsburgh Tribune Review, Jul. 27, 2009.

[77] *Cleared Man and Township Settle*, The Philadelphia Inquirer, Mar. 22, 2004, at B1.

[78] Stephanie Farr & William Bender, Freed by DNA, Paid by Delco, The Philadelphia Daily News, Jan. 10, 2008, at p.3.

has put it, the proposed compensation statute is simply "a solution in search of a problem."[79]

Compensation of guilty defendants. Even if the principal report had demonstrated a need for a new legislation on this issue, its specific proposal would still be outrageous and indefensible, as it is designed to force taxpayers to "compensate" even clearly guilty defendants like Jay Smith who manage to overturn their convictions on procedural grounds. That is not simply our characterization. Again, the chairperson of the legal redress subcommittee frankly admitted that her goal was to make Pennsylvania the first state in the nation to enact "a statute … [that applies] to all wrongfully convicted individuals, not just those determined to be innocent,"[80] and that is precisely what the principal report would do.

As we have explained above, the proposed compensation statute mis-defines "actual innocence" in such a way as to require payment to any defendant who manages to get his original conviction overturned on grounds that can broadly be

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[79] *See* Brad Bumstead, Bill Would Compensate the Wrongly Convicted, Pittsburgh Tribune Review, Apr. 22, 2005 ("Attorney General Tom Corbett says such cases are rare in Pennsylvania and remedies are available through lawsuits. 'Overall, we are not supportive of this legislation,' Corbett spokesman Kevin Harley said. 'It's a solution in search of a problem'").

[80] *See* Legal Redress Subcommittee Meeting Summary, Dec. 11, 2007, at p. 1 ("[Ms. Kohart] said that a statute should apply to all wrongfully convicted individuals, not just those determined to be innocent. She noted that there is not another state that does it this way….").

described as "consistent with innocence" or who simply escapes re-conviction after a successful appeal. Again, that definition of "actual innocence" is so overbroad that it would force taxpayers to "compensate" not only defendants like Willie Nesmith and Vincent Moto for whom there remains strong evidence of guilt, but also defendants like Jay Smith and Timothy Hennis for whom there is no doubt of guilt.

The difference between the proposed recommendation and serious attempts to draft compensation statutes in other jurisdictions is striking. For example, the most obvious model for such a law, the federal statute authorizing compensation for unjust conviction and imprisonment, requires the person bringing suit to prove that:

> (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction **and**
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> (2) **He did not commit any of the acts charged or his acts, deeds, or omissions** in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

28 U.S.C. § 2513(a) (emphasis added).

By rejecting this sort of common-sense approach, and omitting any requirement that the defendant establish that he did not commit the charged criminal acts, the principal report would open the floodgates -- intentionally, according to the comments of the subcommittee chairperson -- to scores of guilty

defendants. This is flatly unacceptable to us, as it should be to anyone concerned with both protecting the innocent *and* holding the guilty accountable. Even if we believed that a new compensation statute had been proven necessary, we could not in good conscience endorse a proposal that would force victims, their families, and other taxpayers to pay vicious criminals like Jay Smith for the all-too-short time they spent in prison.

Lack of equal treatment for innocent victims. The proposed compensation statute also reflects the unfair imbalance of the entire report in its lack of regard for innocent victims. Wrongful convictions are not by any stretch of the imagination the only form of "wrongful" outcome in the criminal justice system. Experience shows that it is far more common for defendants who actually committed the crimes with which they were charged to be wrongfully acquitted or wrongfully released. Thus, if we should reward wrongfully convicted defendants on the theory that they were "victims" of the criminal justice, then surely we should also compensate the system's other innocent victims – the people who are raped, robbed, and murdered by defendants who were wrongly acquitted or wrongly released. Yet, as is true of the principal report as a whole, the proposed compensation statute shows no concern for that time of wrongful outcome or that class of innocent person.

Excessive financial awards. Another remarkable feature of the principal report's recommendation is its unprecedented generosity with the taxpayers' money.

The draft compensation statute would establish an initial minimum, tax-free payment of $50,000 per year of incarceration, plus attorney fees, and would increase the minimum payment every year based on inflation. Moreover, the proposed statute would set no cap whatsoever on the potential size of the award, subjecting the Commonwealth to potential bankruptcy at the hands of a runaway jury.

As best we can tell, the $50,000-minimum was picked at random, as it has no connection to real-world factors like the defendant's earning potential or any conduct on his part that contributed to his conviction. Further, it far exceeds the state's median per capita income of $38,788, which does not necessarily increase with inflation.[81]

Other jurisdictions do not offer such windfall judgments. To the extent that other states have compensation statutes for wrongful convictions, they typically establish either a maximum award or a flat compensation rate, and do so at amounts below the *minimum* compensation mandated by this draft statute. For example, Illinois sets a maximum compensation rate of less than $20,000 per year;[82] New Jersey establishes a maximum award of twice the amount of the defendant's income in the year prior to his incarceration or $20,000 for each year of

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[81] http://www.census.gov/statab/ranks/rank29.html.

[82] *See* 705 Ill. Stat. § 505/8(c) ("[T]he court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $85,350; for imprisonment of 14 years or less but over 5 years, not more than $170,000; for imprisonment of over 14 years, not more than $199,150").

incarceration, whichever is greater;[83] and California sets a flat compensation rate of $100 per day.[84] Even the federal government, which has far more resources than this Commonwealth, sets a *maximum* payment of $50,000 per year for most defendants and $100,000 per year for defendants on death row.[85]

Procedural mischief. A final problem with the principal report's proposed compensation statute is that is not a carefully drafted document, and, as a result, would establish troubling procedures if it were somehow enacted. For example, while one might expect litigants in a multi-million dollar lawsuit to abide by standard rules of evidence and civil procedure, the proposed recommendation states that the court hearing the claim "shall emphasize, to the greatest extent possible, informality of the proceedings."[86] Not only is this provision unwarranted, since there are allowances for attorneys fees and thus no need for unsophisticated claimants to represent themselves, it is hopelessly vague and thus sure to lead to collateral litigation and appellate claims with respect to procedural rulings that would be uncontroversial in a normal case.

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[83] N.J. Stat. § 52:4C-5(a).

[84] Cal. Penal Code § 4904.

[85] 28 U.S.C. § 2513(e).

[86] Proposed 42 Pa.C.S. § 8583.

Moreover, the proposed recommendation applies to all defendants (or their dependent heirs) who have ever been convicted in Pennsylvania, gives them two years from the effective date of the law to bring suit, and requires the Pennsylvania Supreme Court to somehow notify them of their eligibility for relief.[87] Thus, the Supreme Court apparently is expected to research every case over the past several decades (or longer, since heirs can also bring suit), determine whether the defendant might conceivably meet the (extraordinarily overbroad) definition of "actual innocence," and track him down to provide notice of the new law. And of course when the Supreme Court fails in this impossible task, as it inevitably will, claimants will be able to argue that the statute of limitations is indefinitely tolled.

Simply stated, the proposed compensation statute is so deeply flawed that it cannot be taken seriously, much less supported. The committee was presented with no evidence of the need for such a law; and even if one were necessary, this proposal would be entirely unacceptable because it is not limited to factually-innocent defendants, mandates excessive damage awards, and adopts unreasonable procedures.

H. Proposed "Commission on Conviction Integrity."

The principal report also proposes the creation of a permanent "Pennsylvania Commission on Conviction Integrity," which would conduct secret meetings

[87] Proposed 42 Pa.C.S. §§ 8587, 8588.

"[w]henever the Board of Pardons or a court releases a person based upon a finding of actual innocence."[88] We have two fundamental objections this proposal. First, the problems we have already discussed with the procedures of the existing wrongful conviction committee, which essentially has served as a multi-year test program for such a commission, have left us with serious doubts about the ability of such a commission to carry out its charge in an open, organized, and balanced manner.

Second, a commission truly concerned with "conviction integrity" would not limit its study to cases in which defendants were "wrongly convicted." Whenever the system wrongly *acquits* a *guilty* defendant, it not only fails to achieve justice for the innocent person he has already victimized, it leaves countless more innocent persons at risk of being killed, raped, or robbed. Yet the proposed commission would be given no authority to study cases with that sort of innocent victim, or to propose measures to ensure the "integrity" of the outcome in those cases. Instead, it would be required to take the same misguided approach that dominated this committee, treating increased acquittals as the only form of increased justice.

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[88] Remarkably, the phrase "actual innocence" is not defined in this proposal. Under the plain meaning of the phrase, the proposed commission would rarely meet, since it is almost unheard of for an inmate to obtain his release "based upon a finding of actual innocence" by a court or the Board of Pardons. For example, none of the "Pennsylvania Eight" had that happen in their cases. On the other hand, if "actual innocence" were mis-defined in the manner of the proposed compensation statute, the commission would be charged with conducting a secret hearing almost every time a criminal defendant wins an appeal.

I. Proposed forensic advisory board

The final proposal in the principal report is the creation of a state forensic advisory board, which would recommend ways to improve procedures at forensic laboratories operated by the Commonwealth and municipalities, and investigate allegations of negligence or misconduct at such facilities. We support the basic idea of this proposal, but our ultimate support would require changes to the proposed statute making the selection of members of the board less centralized, and establishing investigative practices more consistent with those of other state forensic advisory boards.

Membership. Under the proposed recommendations, the forensic advisory board would be comprised of thirteen members, ten of whom would be appointed by the governor.[89] While we have no objection to the governor having significant appointment powers with respect to the board, we believe that the overall membership of the board should reflect a greater diversity of views than would likely be the case if one person were selecting three-quarters of the members. Thus, we submit that the member of the board who is a district attorney should be appointed by the Pennsylvania District Attorneys Association; the member who is a chief of police should be appointed by the Pennsylvania Chiefs of Police Association; the member who is a privately-employed attorney should be appointed by the Pennsylvania Bar Association; and the member who is a forensic scientist employed

[89] Proposed 61 Pa.C.S. § 6501(c).

by the Pennsylvania State Police's Bureau of Forensic Services should be appointed by the Commissioner of the State Police.

Further, the proposed position for a professor of criminal justice or forensic science strikes us as superfluous, since the board will already include a balanced composition of experts in criminal justice (two prosecutors, two defense attorneys, a police chief, and a judge) and experts in forensic science (two state forensic scientists, two privately-employed forensic scientists, a municipal forensic scientist, and a pathologist).

Investigative practices. The principal report's proposed statute would also establish mandatory, rather than permissive, investigative practices for the forensic advisory board, and thus would not allow for any flexibility on a case-by-case basis.[90] We consider this approach impractical and unnecessary. The legislature could both avoid artificial requirements and empower the board to conduct precisely the sort of investigation contemplated by the principal report's proposed statute if it instead adopted the following language, which is typical of those governing state forensic advisory boards:[91]

> An investigation … [by the board]:
>
> (1) may include the preparation of a written report that identifies and describes the methods and procedures used to identify;

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[90] Proposed 61 Pa.C.S. § 9505.

[91] *See*, *e.g.*, M.S.A. § 299C.156, Subd. 3 (Minn. Stat. 2006).

(i) the alleged negligence or misconduct;

(ii) whether negligence or misconduct occurred; and

(iii) any corrective action required of the laboratory, facility, or entity; and

(2) may include one or more:

(i) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and

(ii) follow-up evaluations of the laboratory, facility, or entity to review:

(A) the implementation of any corrective action…; or

(B) the conclusion of any retrospective reexamination.

Again, we are willing to work with the Legislature to explore the possibility of creating a forensic advisory board, but we object to some of the details concerning the principal report's proposed membership and investigative practices.

V. OUR PROPOSALS FOR ENSURING RELIABLE AND ACCURATE VERDICTS.

Although the principal report does not consider or represent in any meaningful fashion the views of victims and law enforcement, we have our own plan to further mitigate the risk of wrongful convictions, while also providing justice to victims and protecting the community by ensuring the conviction of the guilty. As we said at the outset, we believe that these measures can achieve broad support among all parties sincerely interested in improving the reliability of verdicts in Pennsylvania, and can thus fulfill the mission of the advisory commission in a way that the flawed proposals in the principal report do not.

A. Reform existing DNA laws to facilitate more DNA testing and more DNA-related investigations prior to trial.

The expanded use of modern DNA evidence is perhaps the best way to avoid wrongful convictions and ensure proper convictions, particularly when DNA evidence is collected and analyzed well *before* the conviction stage so that the true perpetrator is quickly identified and brought to justice. To that end, we strongly support the enactment of Senate Bill 775, which would reform and modernize Pennsylvania's existing DNA laws[92] to better assist police in excluding innocent individuals who are the subject of criminal investigations or prosecutions, identifying the true perpetrator, and preventing that individual from committing further crimes.

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[92] 44 Pa.C.S. § 2301, *et seq*.

In particular, Senate Bill 775 would allow police to take DNA samples at arrest for all felonies and other serious violent crimes, as they do with fingerprints, so that more DNA profiles are available for comparison with evidence found at crime scenes. Such comparisons have already been critical to identifying and apprehending dangerous offenders in Pennsylvania and nationally, which is why twenty-four states already require the taking of DNA samples upon arrest for certain offenses. Increasing the number of DNA profiles available for comparison in state and national databases will lead to even more cases being solved – and more innocent suspects being cleared – through the most accurate evidence possible.

In addition, Senate Bill 775 would authorize state police to use modified DNA searches in certain cases where crime-scene DNA could belong to a close relative of an offender whose profile is already in the national DNA database. As was shown last year when a familial DNA search allowed the Los Angeles Police Department to finally identify and apprehend the "Grim Sleeper" — a serial killer who had terrorized South Los Angeles for two decades — this technique, too, can lead to successful investigations and accurate convictions that never before would have been possible. Identifying the true perpetrator is the surest means of exonerating the innocent suspect or wrongfully convicted prisoner.

Importantly, Senate Bill 775 would achieve these goals while at the same time addressing legitimate privacy and reliability concerns. The bill would require the automatic purging of DNA records for exonerated individuals, and prohibit the

use of records in the state DNA database for research into genetic markers. And it would also require both that Pennsylvania's forensic DNA testing laboratories be accredited in compliance with national standards, and that the personnel at those laboratories undergo mandatory continuing education.

B. Reform the Wiretap Act to allow for the admission of more electronically-recorded evidence.

The use of electronically-recorded communications, such as audio or video recordings, can also be helpful in ensuring proper convictions, but Pennsylvania's Wiretap Act[93] generally prohibits the use of such evidence unless both parties agreed to have their communication recorded. The principal report recognizes this dilemma, and therefore recommends that the Wiretap Act be amended to allow the admission of electronically-recorded interrogations or informant statements where only one party consented to the recording. But limiting the amendment of the Wiretap Act to those two isolated situations would be inconsistent with the principal report's claim that recorded evidence is inherently superior to mere testimony from witnesses.

Instead, *all* electronically-recorded communications should be admissible at criminal trials where one party consented to the recording, as should all civilian wiretaps. The infamous case of the Kathleen Weinstein, a New Jersey teacher and mother who secretly made an audio recording of her own abduction, dramatically

[93] 18 Pa.C.S. § 5701, *et seq*.

illustrates the need for this change. When a gun-wielding 17-year old carjacker forced his way into Ms. Weinstein's vehicle and made her drive to a desolate location, she activated a small recorder that she kept in her purse for classroom use, and audio-taped the hellish 24-minute ordeal that culminated in her own brutal murder. This recording, which was admissible in New Jersey as it would have been a majority of other states, led to the swift identification and conviction of her murderer. In Pennsylvania, however, law enforcement could not have used Ms. Weinstein's tape. It would have been illegal and inadmissible under the Wiretap Act, and the investigation and prosecution of this violent criminal would have been severely hampered, if not made impossible.

To be clear, we do *not* propose that it be made legal for civilians to tape each other without consent. The prohibition and penalties for illegal wiretapping by civilians should be left intact by this amendment. What should be permitted is the *use* of such recordings by law enforcement to identify and convict the guilty, and thus clear the innocent.

C. Begin a pilot program to study whether and how to implement electronic recording of interrogations.

We are receptive to the idea that the expanded use of electronically-recorded communications should include the expanded use of electronically-recorded police interrogations. But, as we said above (*supra* at 40-46), we have serious reservations about the way the principal report would achieve this goal. While the principal report proposes an immediate and mandatory state-wide recording requirement,

with an adverse jury instruction in cases where the interrogation is not recorded, this approach would ignore the consensus of the committee and create the serious practical and legal problems we discussed above.

Instead, we would recommend that the Pennsylvania Commission on Crime and Delinquency (PCCD) fund a pilot program to study whether and how the electronic recording of interrogations can be implemented in a fair, reliable, and cost-effective manner. This approach would allow the PCCD to study and report whether victims, witnesses, and suspects are as willing to participate in police interviews if they know or believe they are being recorded; whether and how recording does or should change police practices; how such evidence is used and considered by lawyers, judges, and juries; what additional training and equipment is required for police; and what the statewide cost and impact on verdicts would likely be. Only when these critical questions have been answered can we know whether statewide recording is the right solution for Pennsylvania, or whether each local police department should retain the flexibility to use its own judgment on this issue.

D. Expand police training on non-suggestive identification procedures.

As we said above (*supra* at 46-48), we do not agree with the principal report's unsupported belief that police investigators in Pennsylvania have been obtaining identifications by suggesting to witnesses, either intentionally or through incompetence, which members of lineups and photo arrays are the suspects. We

believe it much more likely that, if officers who have investigated a case tend to be more successful than outside officers at obtaining identifications, it is for the entirely legitimate reason that the investigating officer has time to develop a relationship with frightened and reluctant witnesses, making the witnesses feel safe and invested in the identification process.

Nevertheless, we are committed to 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. To that end, we recommend that the Municipal Police Officers' Education & Training Commission (MPOETC) make instruction on non-suggestive identification procedures a component of the annual in-service training curriculum it provides to all certified police officers.

E. Establish a properly-funded system for preserving biological evidence.

As we explained above (*supra* at 58-60), we support the principal report's goal of enacting a new law to ensure the preservation of biological evidence, but we take issue with the principal report's specific proposals in two respects. First, contrary to the principal report's suggestion, it would not be possible to fund this new law through forfeiture money, and the cost of the proposed rules for preserving biological evidence, like all of the proposed recommendations, therefore would have to be paid for through an appropriation from the General Assembly. Second, the

statute should expressly state that -- as is already the law -- non-compliance does not provide an independent ground for relief in any criminal case.

F. Establish an independent forensic advisory board with appropriate investigative protocols.

As is also explained above (*supra* at 73-75), we are open to the creation of a state forensic advisory board as well, though we again disagree with the principal report on some of the technical points. In particular, we believe that the selection of members of the board should less centralized than would be the case under the principal report's proposal, and that the board should not be subject to some of the impractical requirements and restraints on its investigations that the principal report would impose. With those modest changes, which we have set forth in more detail above, we believe the creation of a forensic advisory board could be a worthwhile initiative.

VI. CONCLUSION.

As we said at the outset, we would have welcomed any process that involved a balanced and open-minded attempt to make Pennsylvania's criminal justice system even more fair and reliable than it already is. But that is not how the advisory committee was conducted, nor is it what the principal report's recommendations represent.

The committee consistently engaged in one-sided procedures designed to force through a pre-determined agenda to benefit the criminal defense bar, conducted no independent study of alleged wrongful convictions in Pennsylvania, and failed to tailor its recommendations to any demonstrated problems that have caused such convictions. As a direct consequence of those structural and procedural flaws, the principal report offers a series of proposals that, for the most part, would only serve to *reduce* the fairness and accuracy of verdicts in Pennsylvania.

We submit that our own proposals are better tailored to improve the reliability of verdicts in Pennsylvania by both reducing the risk of wrongful convictions *and* increasing the likelihood of *proper* convictions. Accordingly, we urge the General Assembly, PCCD, and MPOETC to adopt the measures recommended in this independent report.