



Timothy Cole Exoneration Review Commission

Report to:
Texas Governor Greg Abbott
Texas Legislature
Texas Judicial Council

December 2016

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COMMISSION RECOMMENDATIONS

The Timothy Cole Exoneration Review Commission recommends that the Legislature consider the following proposals:

ELECTRONIC RECORDING OF INTERROGATIONS

- I. Require either audio or audiovisual electronic recording of interrogations by law enforcement agencies when investigating all felony cases.
- II. Require recording to begin when the suspect enters the interrogation room.
- III. Enforce compliance with new recording requirements by permitting the admission of an unrecorded statement only if the judge finds good cause for the failure to electronically record the statement, and establishing a presumption that an unrecorded statement is inadmissible as evidence if the judge finds that no good cause exception applies.

FALSE ACCUSATION/INFORMANT REGULATION

- I. Require prosecutor offices to have written policies on tracking and disclosure of impeaching information on jailhouse informants.
- II. Permit the admissibility of jailhouse informants' complete criminal history, including criminal charges that were dismissed or reduced as part of a plea bargain.
- III. Require prosecutor offices to establish an internal system to track the use of jailhouse informants including, but not limited to, cases in which the jailhouse informant offered testimony and the benefits provided in those cases.

FAULTY EYEWITNESS IDENTIFICATION

- I. Require training for law enforcement officers on eyewitness identification procedures.
- II. Require making juries aware of prior identifications of the suspect by the witness when an in-court identification is made.
- III. Require law enforcement agencies to adopt the Bill Blackwood Law Enforcement Management Institute of Texas Model Policy.

FORENSIC SCIENCE PRACTICES

- I. Encourage the Texas Forensic Science Commission to investigate and consider promulgating policies regarding the use of drug field tests used by law enforcement agencies.
- II. Encourage the Texas Forensic Science Commission to investigate and consider promulgating policies regarding the process of crime scene investigations.
- III. Recommend that crime labs in all cases moving forward complete testing of substances in all drug cases regardless of the results of a drug field test, and that crime labs go back through previous cases in which the collected substance was not confirmed by lab testing.

LETTER FROM PRESIDING OFFICER

The Timothy Cole Exoneration Review Commission was created by the 84th Texas Legislature to review and consider various matters related to wrongful convictions within the Texas criminal justice system. The Legislation was authored by Representative Ruth Jones McClendon and sponsored by Senator Rodney Ellis, who were instrumental in its passage. Commission members and advisory members understand and appreciate the importance of this issue, and have tried to address the issue with the diligence it deserves. We have attempted to fulfill the responsibilities assigned to us by the Legislature. Pursuant to House Bill 48, we have compiled and now issue this report of our findings and recommendations.

Commission members and advisory members come from broad and diverse backgrounds. The expertise of each was instrumental in developing the findings and recommendations included in this report. Each member dedicated significant time and effort to complete the Commission's important assignment of identifying measures to prevent the causes and occurrence of wrongful convictions.

H.B. 48 requires concurrence of seven of the eleven members to issue a report. The Commission realized from the start that not every member would agree to every proposed finding or recommendation. In fact, few of the findings or recommendations included in this report are supported by all Commission members. However, because of the Commission's determination to submit a report in accordance with H.B. 48, Commission members wish to make clear that, by concurring in the whole of this report, they are not necessarily endorsing any specific finding or recommendation herein. Members have been provided the opportunity to include an explanatory, concurring, or dissenting statement regarding their individual positions on matters within the report.

ACKNOWLEDGEMENTS

The Commission acknowledges the work of Representative Ruth Jones McClendon and Senator Rodney Ellis in securing passage of H.B. 48 in the 84th Legislature.

Commission members express their appreciation to the staff members who made this endeavor possible – David Slayton, Wesley Shackelford, Alejandra I. Pena, and Terri Peirce. The Commission also acknowledges the important contributions from its advisory members. The Commission expresses gratitude to those men and women previously exonerated, who assisted the Commission by sharing their stories, together with their valuable insights into these critical issues. Finally, the Commission has valued the support and encouragement from the family of Timothy Cole.

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TIMOTHY COLE EXONERATION REVIEW COMMISSION

The Timothy Cole Exoneration Review Commission (Commission) was created in 2015 by the 84th Legislature with the passage of [House Bill 48](#). The Commission was created under, but independent from, the Texas Judicial Council and is administratively attached to the Office of Court Administration.

The Commission's charge is to (1) review cases in the State of Texas in which an innocent defendant was convicted of a crime and then, on or after January 1, 2010, was exonerated; (2) to consider potential implementation plans, costs, cost savings, and the impact on the criminal justice system for each potential solution identified through the work of the commission; and (3) to review and update the research, report, and recommendations of the Timothy Cole Advisory Panel (TCAP) on Wrongful Convictions established by the 81st Legislature in 2009.

The Commission's first public meeting was held on October 27, 2015. The Commission held six meetings, all with a quorum of members participating either in person or via teleconference.

TIMOTHY COLE

The Commission is named after Timothy Cole, the first Texan to be posthumously exonerated of a crime through DNA testing.

Timothy Cole was a U.S. Army veteran and student at Texas Tech University. At the age of 26, he was accused of a rape.

On March 24, 1985, a Texas Tech female student was abducted and raped by a perpetrator believed to have been the "Tech Rapist," an unknown serial rapist at that time. The victim reported the crime to the police and provided details about her perpetrator's appearance, which included the fact that he had smoked cigarettes throughout the attack.

Approximately two weeks later, Mr. Cole went to pick up a friend who worked at a pizza restaurant near the location of the victim's abduction. As he was leaving, Mr. Cole interacted with a female undercover officer and offered her a ride. The woman declined the ride and informed her superiors that Mr. Cole resembled the description the victim had provided.

The next day officers arrived at Mr. Cole's apartment and took a picture of him. His picture was provided in a photo lineup along with five others to the victim of the rape. Mr. Cole's photograph was the only Polaroid picture, the rest were mugshots; additionally, Mr. Cole was the only individual facing the camera while the others were facing the side. The victim identified Mr. Cole as her attacker.

Mr. Cole was arrested and tried by a jury in Lubbock. His defense team presented evidence of his severe asthma and the fact that he did not smoke. They also presented alibi evidence for the night of the crime tending to prove that Mr. Cole had been at home studying where his brother had been socializing with some friends. Similar criminal assaults continued to take place after Mr.

Cole's arrest. His attorneys attempted to present this evidence but were denied by the judge. Mr. Cole was ultimately convicted of the crime on September 17, 1986, and sentenced by the jury to 25 years in prison.

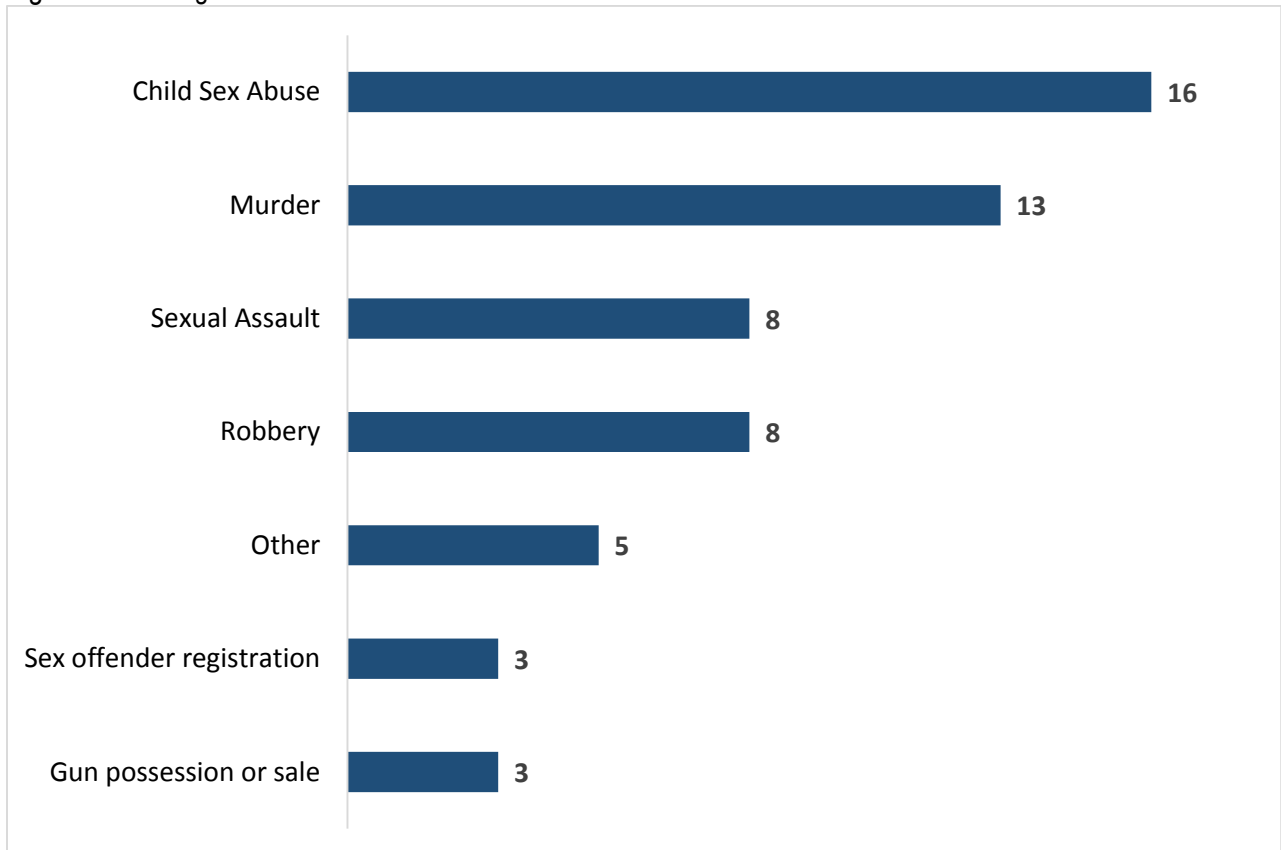
While in prison, Mr. Cole was offered parole if he would admit guilt, but he refused to confess to a crime he did not commit. In 1995, Texas prisoner Jerry Wayne Johnson had begun writing letters confessing to the crime for which Mr. Cole had been convicted. At the time, Mr. Johnson was serving life in prison for two other 1985 sexual assault charges. Mr. Cole passed away in 1999 of asthma complications while serving his sentence. In 2007, Mr. Johnson confessed again to the sexual assault. DNA testing of biological evidence collected from the crime scene implicated that Mr. Johnson was the actual perpetrator, and that Mr. Cole was, in fact, innocent.

On April 7, 2009, nearly 10 years after his death, Timothy Cole became the first posthumous DNA exoneration in Texas history. On March 1, 2010, Mr. Cole was pardoned by Texas Governor Rick Perry.

RESEARCH OVERVIEW

For purposes of this report, the Commission defines exoneration as a situation in which a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a decision by a prosecutor, a governor, or a court, after new evidence of his or her innocence was discovered.¹ The Commission gathered data and information on Texas exonerations from January 1, 2010, to December 1, 2016, in order to determine the areas within the criminal justice process that were in most need of further research and reform proposals. Through this analysis, the Commission found that Texas has had 204 exonerations during this timeframe. Of the exonerations reviewed, 148 were for drug-related offenses. Fifty-six were for non-drug related offenses. The non-drug related exoneration offenses are detailed by offense in **Figure 1**.

Figure 1 Non-drug related exoneration offenses

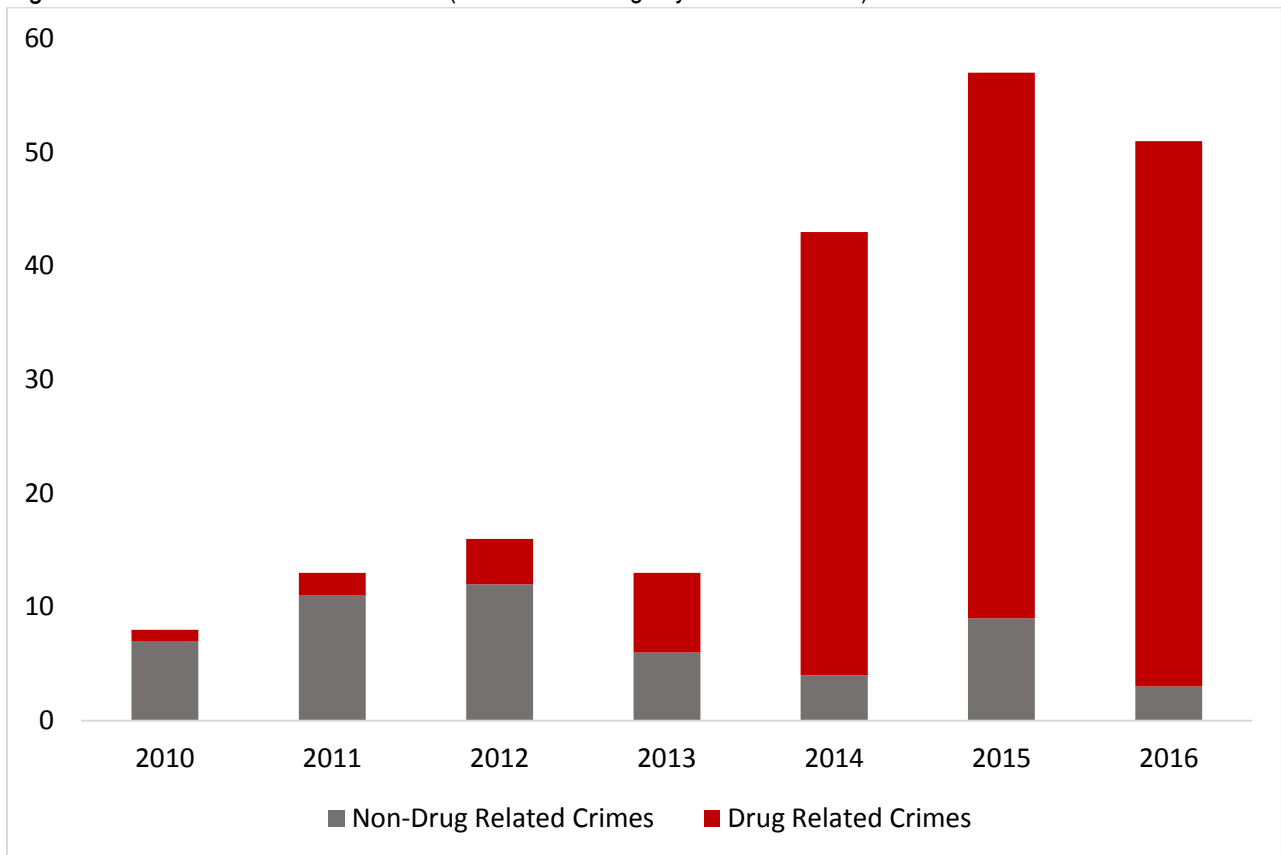


Following an initial review of exonerations since 2010, the Commission prioritized the review of non-drug related cases given the nature of the crimes and time served for these

¹ Gross and Shaffer, *Exonerations in the United States, 1989 – 2012*, The National Registry of Exonerations, June 2012, https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf

offenses, followed by drug-related cases which accounted for the majority of the exoneration as shown in **Figure 2**. The Commission identified the following five research topic areas: (1) electronic recording of interrogations, (2) false accusations, (3) jailhouse informant regulations, (4) faulty eyewitness identification, and (5) forensic practices. The Commission makes recommendations related to each area based on research performed and provided to the Commission. Recommendations that may result in additional costs are noted so that the 85th Legislature may take such costs into consideration.

Figure 2 Texas exonerations since 2010 (The National Registry of Exonerations)



TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS (2010)

Pursuant to H.B. 48, the Commission reviewed and updated the research, report, and recommendations of the Timothy Cole Advisory Panel (TCAP) on Wrongful Convictions established by the 81st Legislature in 2009. **Table 1** presents the recommendations from the 2010 TCAP report with their implementation status.

TABLE 1: Timothy Cole Advisory Panel Recommendations and Implementation Status	
Eyewitness Identification Procedures	
1. Require the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to work with scientific experts in eyewitness memory research and law enforcement agencies to develop, adopt, disseminate to all law enforcement agencies, and annually review a model policy and training materials regarding the administration of photo and live lineups. The model policy should comport with science in the areas of cautionary instructions, filler selection, double-blind administration, documentation of identification procedures, and other procedures or best practices.	Implemented during the 82 nd legislative session via HB 215 . The LEMIT model policy was released in December 2011.
2. Require all law enforcement agencies to adopt eyewitness identification procedures that comply with the model policy promulgated by LEMIT.	Implemented during the 82 nd legislative session via HB 215. Law enforcement agencies were required to either adopt the LEMIT model policy or one of their own that conformed to certain specified requirements of the bill no later than September 1, 2012.
3. Integrate training on eyewitness procedures into the required curricula of the LEMIT model policy and the Texas Commission on Law Enforcement Standards and Education.	Implemented via training curricula changes.
4. Permit evidence of compliance or noncompliance with the LEMIT model policy to be admissible in court.	Implemented during the 82 nd legislative session via HB 215.
5. Allow law enforcement agencies discretion on the adoption of sequential procedures.	Implemented during the 82 nd legislative session via HB 215. Sequential presentation is recommended in the model policy, but was not required in the statute.
Recording Custodial Interrogations	
6. Adopt a mandatory electronic recording policy, from delivery of <i>Miranda</i> warnings to the end of interrogations, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial	Not implemented.

discretion to issue a jury instruction in the case of an unexcused failure to record.	
Discovery Procedures	
7. Adopt a discovery policy that is mandatory, automatic, and reciprocal, and requires either electronic access to or photocopies of materials subject to discovery.	Partially implemented during the 83 rd Legislative session via SB 1611 , the Michael Morton Act. The Act requires prosecutors to produce for and permit photocopying by the defense of witness statements, offense reports, and other relevant evidence. Reciprocal discovery, however, was not included in the Act.
Post-Conviction Proceedings	
8. Amend the Chapter 64 motion for post-conviction DNA testing to allow testing of any previously untested biological evidence, regardless of the reason the evidence was not previously tested, or evidence previously using older, less accurate methods.	Implemented during the 82 nd Legislative session via SB 122 to modify the requirements for granting motions for post-conviction DNA testing by removing certain conditions regarding the reasons why biological evidence was not tested previously, so that testing of any previously untested biological evidence may be granted.
9. Amend the Chapter 11 writs of habeas corpus to include a writ based on changing scientific evidence.	Implemented during the 83 rd Legislative session via SB 344 to permit a convicted individual to file an application for a writ of habeas corpus to challenge a conviction based on scientific evidence that is now outdated or discredited by advances since the trial.
Innocence Commission	
10. Formalize the current work of the Innocence Projects that receive state funding to provide further detail in the project's annual reports and distribute those reports to the Governor, Lieutenant Governor, Speaker of the House, and Chairs of the Senate Jurisprudence, House Corrections, House Criminal Jurisprudence, and Senate Criminal Justice Committees. Report input should be solicited from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations.	Implemented during the 82 nd Legislative session via HB 1754 dealing with requiring exoneration reports.
11. Provide a full-time equivalent staff position for the Task Force using the current appropriation or other grant funding to administer these responsibilities; contracts between the innocence projects and the Task Force on Indigent Defense should be amended to reflect the new administrator and additional responsibilities.	Implemented in 2011 via the Texas Office of Court Administration/Texas Indigent Defense Commission budget rider.

ELECTRONIC RECORDING OF INTERROGATIONS

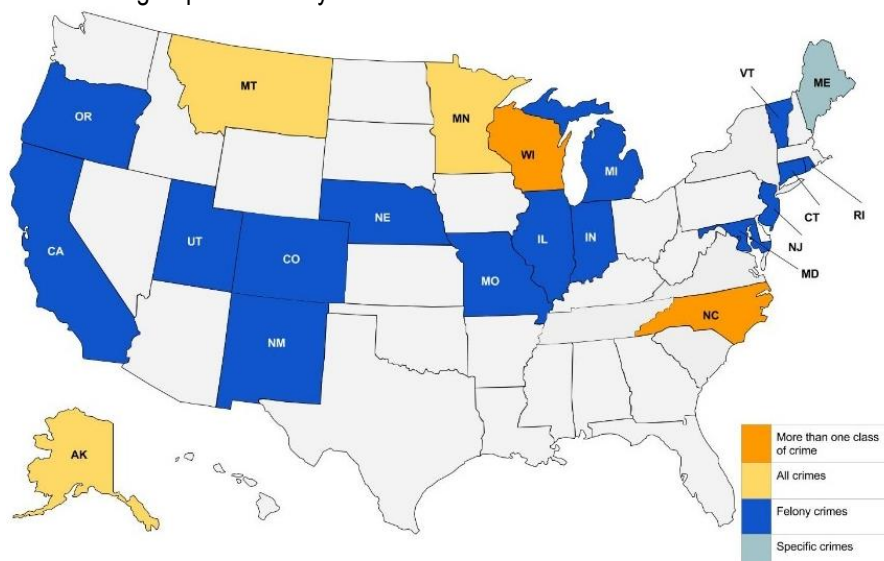
The sole recommendation of the 2010 Timothy Cole Advisory Panel (TCAP) that was not implemented was the adoption of a statewide policy to record interrogations. The Commission continued the analysis of contributing factors to wrongful convictions in cases where individuals have been exonerated since January 1, 2010. The Commission found that false confessions continue to contribute to wrongful convictions. In cases where false confessions have resulted in wrongful convictions, electronic recording of the interrogation process can assist all interested parties in determining whether or not the interrogation was carried out in an appropriate manner and if it resulted in an accurate statement.

Currently the Texas Code of Criminal Procedure allows written statements of an accused as a result of a custodial interrogation to be admitted as evidence, provided the written statement contains the statutory warnings listed in [Article 38.22](#). The statute also requires that oral and sign language statements be recorded in certain situations. However, audio and/or video recording under the existing statute is only required for a "statement" - not a custodial interrogation. No recording is required of interrogations where the suspect gives a written statement and Article 38.22, Section 3(c), dispenses with the recording requirement altogether if the oral or sign language "statement" contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused.

Research Highlights

Twenty-one states, plus the District of Columbia, have either a statute or rule requiring electronic recording of interrogations. Of the states with electronic recording requirements, 14 require recording for felony-related offenses. **Figure 3** shows electronic recording requirements in each state.

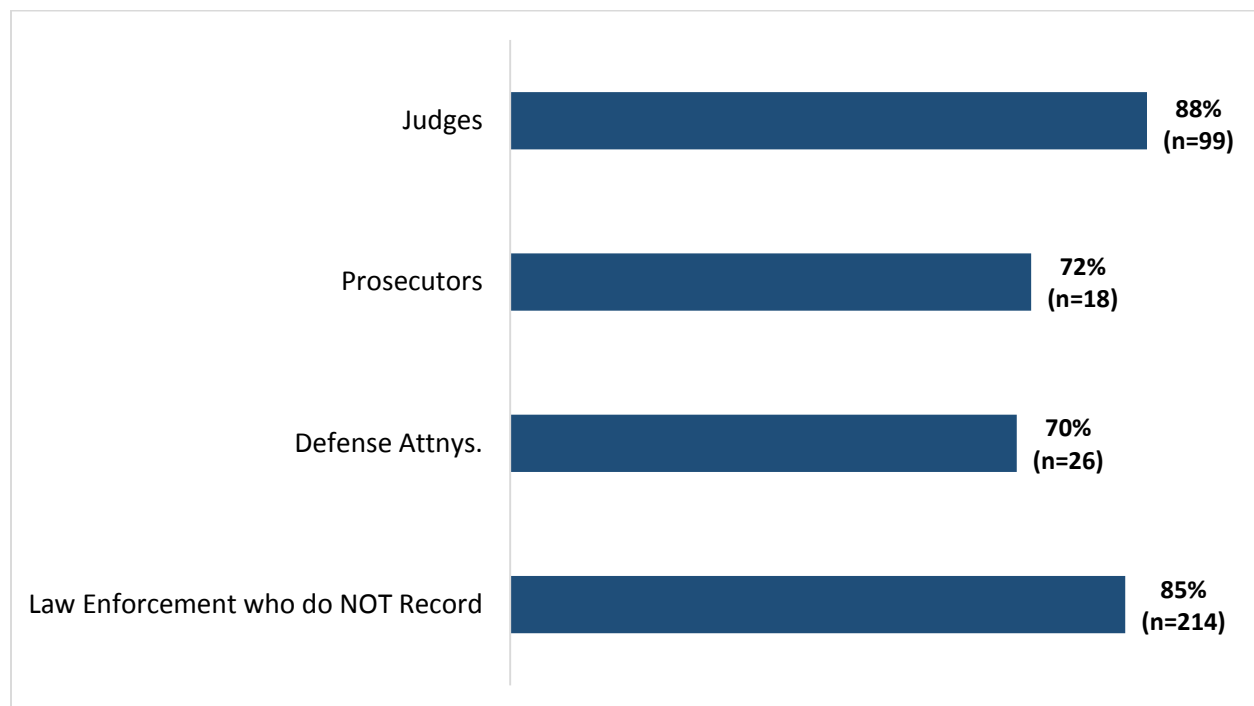
Figure 3: Electronic recording requirements by state.



Information on recording practices in Texas was collected through surveys of law enforcement agencies to collect law enforcement opinions and practices, criminal court judges, prosecutors, and defense attorneys to collect information on opinions and experience with cases in which an electronic recording of an interrogation was introduced as evidence. [Appendix 1](#) provides the surveys and responses.

The majority of survey respondents in all categories responded that electronic recording of interrogations reduces the risk of false confessions. The majority also responded that electronic recordings will lead to better practices by law enforcement departments and provide training opportunities. **Figure 4** shows the percentages and actual number (“n” value) of judges, prosecutors, defense attorneys, and law enforcement departments who do not currently record interrogations but responded that electronic recording is beneficial. Additionally, 92 percent of responding law enforcement departments who record reported that they already record interrogations for felony-related offenses.

Figure 4 Percentage of respondents who reported that electronic recording is beneficial.

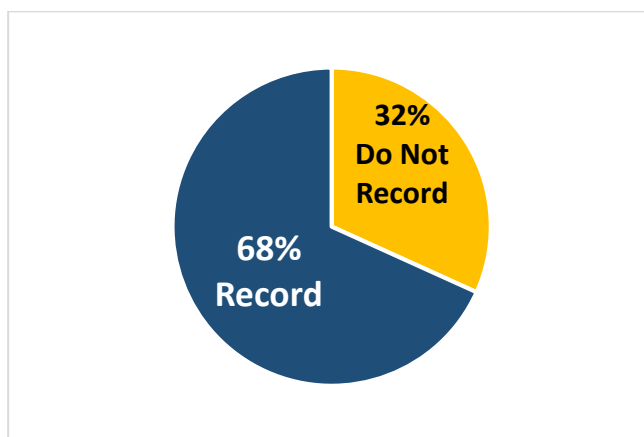


TCERC Electronic Recording Judicial and Law Enforcement Surveys

The majority of judges, prosecutors, and defense attorneys responded that electronic recording of interrogations allows the defense to provide better client representation, allows the prosecution to build stronger cases, and allows judges and juries to have a better understanding of statements that were made by the individual during the interrogation. Additionally, these respondents agreed that electronic recording can assist in determining if an individual’s statement was made freely and voluntarily.

As shown in **Figure 5**, sixty-eight percent (n=580) of the 850 law enforcement agencies responding to the survey reported that they electronically record interrogations in some capacity. Of the respondents who indicated that they record, 267 (46%) were from departments with 10 or fewer sworn officers, and 313 (54%) were from departments with 11 or more sworn officers. These survey findings indicate that recording practices are already implemented by many departments of varying sizes in the state.

Figure 5 Percentage of law enforcement respondents who electronically record.



TCERC Electronic Recording Law Enforcement Survey

The survey responses show that the cost for recording equipment was relatively inexpensive depending on the type of equipment used by the department. The median cost reported by the departments was \$5,000, and 79 percent of respondents reported that they were purchased using their department's general funds.

The majority of all respondents, including the departments who do not currently record, agreed that electronically recording custodial interrogations will increase the public's trust in the justice system. Recording interrogations allows for more transparent communication between law enforcement and the public. Furthermore, 64 percent of all respondents indicated they believe that electronically recording interrogations reduces the risk of false confessions and, ultimately, the number of convictions of innocent individuals.

Recommendations

The Commission recommends that the Legislature consider the following proposals regarding electronic recording of interrogations:

- I. Require either audio or audiovisual electronic recording of interrogations by law enforcement agencies when investigating all felony cases.
- II. Require recording to begin when the suspect enters the interrogation room.
- III. Enforce compliance with new recording requirements by permitting the admission of an unrecorded statement only if the judge finds good cause for the failure to electronically

record the statement, and establishing a presumption that an unrecorded statement is inadmissible as evidence if the judge finds that no good cause exception applies.

FALSE ACCUSATIONS AND JAILHOUSE INFORMANT REGULATION

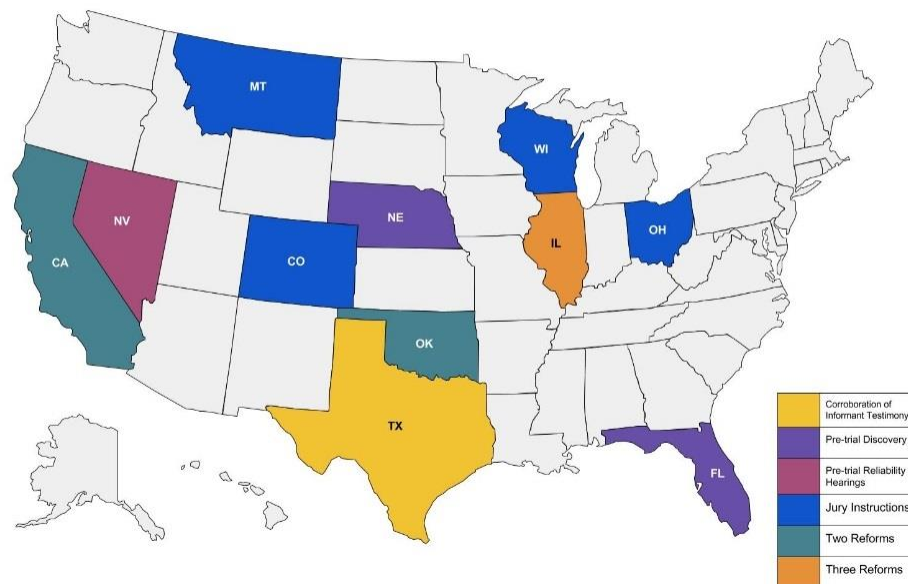
In its 2010 report, The Timothy Cole Advisory Panel (TCAP) did not make recommendations on the topic of false accusations; however, it did include specific recommendations for future research pertaining to jailhouse informant testimony. The TCAP emphasized the lack of safeguards for defendants when a jailhouse informant testifies against them. The TCAP also identified a need for more specific guidelines and policies.

Texas became one of the first states to regulate jailhouse informant testimony with the passage of [Senate Bill 1681](#), in 2009, which amended Chapter 38 of the Texas Code of Criminal Procedure. The law prohibits convicting a defendant based on testimony of an individual incarcerated in the same correctional facility with the defendant unless the testimony is corroborated by other evidence connecting the defendant to the offense. In the seven years that SB 1681 has been in effect, there have not been any reported cases of wrongful convictions based on false jailhouse informant testimony.

Research Highlights

The Commission found that 11 states, including Texas, have reforms in place regulating informant procedures. **Figure 6** shows informant regulation reforms by state.

Figure 6 Informant reforms by state.



Innocence Project: Informant regulation recommendations & National Landscape and Relevant State Statutes and Rules

Several states have taken action on pretrial discovery practices related to informants. In addition to the corroboration of an informant's testimony, the State Bar of Texas recently published "Texas Criminal Jury Charges," which is a resource that contains a form jury instruction on the corroboration requirement mandated by Article 38.075. The form jury instruction can be found under [Appendix 2](#). This form instruction tracks the statute by informing the jury that a defendant cannot be convicted solely on the testimony of an in-custody informant. To support a conviction, the jury is instructed that the in-custody informant's testimony must be corroborated with evidence that tends to connect the defendant with commission of the crime. While this instruction calls the jury's attention to the informant's testimony, it does not provide any specific information regarding the circumstances surrounding the informant's situation.

Illinois imposes a special disclosure procedure related to informants that includes: the complete criminal history of the informant; any promise, deal or benefit that has been offered and has been made or will be made in the future; other cases in which the informant has testified and the incentives he/she received in exchange for that testimony (if any); and any other information relevant to the informant's credibility. Oklahoma and Nebraska have enacted similar statutes.

Of the Texas exoneration cases reviewed by the Commission, 33 percent of the 51 non-drug related exonerations had false accusation as a contributing factor to the wrongful conviction of the individual. The majority of these exonerations were child sex abuse and murder cases. Two of the exoneration cases involved jailhouse informant testimony.

Dr. Alexandra Natapoff, Associate Dean for Research at Loyola Law School in Los Angeles, informed the Commission that it is her belief that jailhouse informants are incentivized witnesses, which she believes makes them potentially highly unreliable. To ensure that the judge, jury, and defense have an accurate representation of the jailhouse informant's situation and to properly weigh the credibility of their testimony, Dr. Natapoff stated that it is important for all relevant information pertaining to the informant be shared with the judge, jury, and defense.

Given the nature of jailhouse informants, the Commission finds it important that information about the informant be shared with the judge, jury, and defense, including his or her criminal history as well as criminal charges that were dismissed or reduced as part of a plea bargain. Currently, jurors are not required to be informed about the informant's previous charges that may have been dismissed or modified as part of a plea bargain in unrelated cases. Permitting the admissibility of the informant's complete history would not result in an expense to either party and would likely increase transparency.

[Jailhouse Informant Tracking Procedures](#)

According to Dr. Natapoff, the majority of jurisdictions do not have a process to track the number of informants used or the benefits that are offered in exchange for testimony.² She stated that this information is important to the proper evaluation of the validity of the testimony being

² Natapoff, A., *Snitching: Criminal Informants and the Erosion of the American Justice*, April 2011.

provided. A clear picture of an informant's testimony history would provide information to all parties in the case.

Two district attorney offices with written policies and procedures related to the tracking of jailhouse informant information have been identified: Los Angeles County District Attorney and Tarrant County Criminal District Attorney. The Los Angeles County District Attorney's Office has a legal policies manual that includes a chapter on jailhouse informant procedures, which explains the official process to request to use a jailhouse informant through a written application. See [Appendix 3](#) for the manual's chapter on jailhouse informant information tracking.

The Tarrant County Criminal District Attorney's (TCCDA) Office implemented a jailhouse informant procedure effective June 10, 2016. Tarrant County established a central index of jailhouse informants, which is regularly maintained and stored in an existing case management system. TCCDA's procedure outlines a list of items that the Assistant District Attorney (ADA) should consider as part of the determination of whether or not to use the informant. Disclosure requirements, such as requiring the prosecutor to make a written disclosure to the defense attorney if a jailhouse informant is to be used, are included. Specific disclosures the ADA is mandated to make to the defense include the informant's criminal history and proposed offers and benefits sought by the informant. If the jailhouse informant testifies, this information is to be sent to the ADA responsible for the maintenance of the Jailhouse Informant index and database. See [Appendix 4](#) for the complete TCCDA Jailhouse Informant Procedure.

While Tarrant County uses an existing case management system, an alternative could be the use of a spreadsheet as a tracking system. Depending on the resources available, the procedures and information tracking system used can vary to meet the needs of each prosecutor's office. Additional staff time would be required for the implementation and maintenance of a jailhouse informant database tracking system; however, no extensive cost has been identified to implement this procedure. The goal of implementing a jailhouse informant tracking system would be to provide transparency.

[Recommendations](#)

The Commission recommends that the Legislature consider the following proposals regarding false accusations and jailhouse informant regulation:

- I. Require prosecutor offices to have written policies on tracking and disclosure of impeaching information on jailhouse informants.
 - This requirement would clarify the types of information that must be disclosed under the *Michael Morton Act* including: benefits provided in exchange for jailhouse testimony, complete criminal history, other cases in which the jailhouse informant testified, the benefits provided in those cases, and other evidence related to credibility.

- II. Permit the admissibility of jailhouse informants' complete criminal history, including criminal charges that were dismissed or reduced as part of a plea bargain.
 - Currently, only final felony convictions or crimes of moral turpitude are admissible to impeach a jailhouse informant, and jurors do not hear about previous charges that may have been dismissed or modified in as part of a plea bargain.
- III. Require prosecutor offices to establish an internal system to track the use of jailhouse informants including, but not limited to, cases in which the jailhouse informant offered testimony and the benefits provided in those cases.

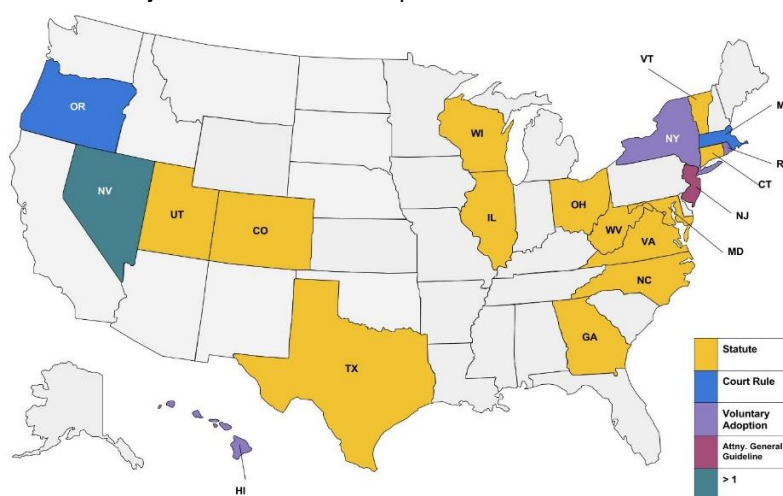
FAULTY EYEWITNESS IDENTIFICATION

The 2010 Timothy Cole Advisory Panel (TCAP) produced five recommendations directly related to eyewitness identification procedures. All five recommendations have since been adopted and implemented to some extent. (Please refer to the TCAP Review section of this report for more detail.) House Bill 215, 82nd Legislature, implemented four of the five recommendations by adding Article 38.20 to the Code of Criminal Procedure. Article 38.20 requires Texas law enforcement agencies to adopt written eyewitness identification policies based on best practices. A law enforcement agency may adopt the [model policy](#) developed by the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) which was released in December 2011. An overview of the LEMIT model policy can be found in [Appendix 5](#). Although the TCAP made progress in studying faulty eyewitness identification procedure reforms, the Commission believes that additional reforms are necessary.

Research Highlights

The Commission found that 19 states, including Texas, regulate eyewitness identification procedures in some capacity. **Figure 7** shows which states currently provide regulation of eyewitness identification procedures.

Figure 7 Regulating methods for eyewitness identification procedures



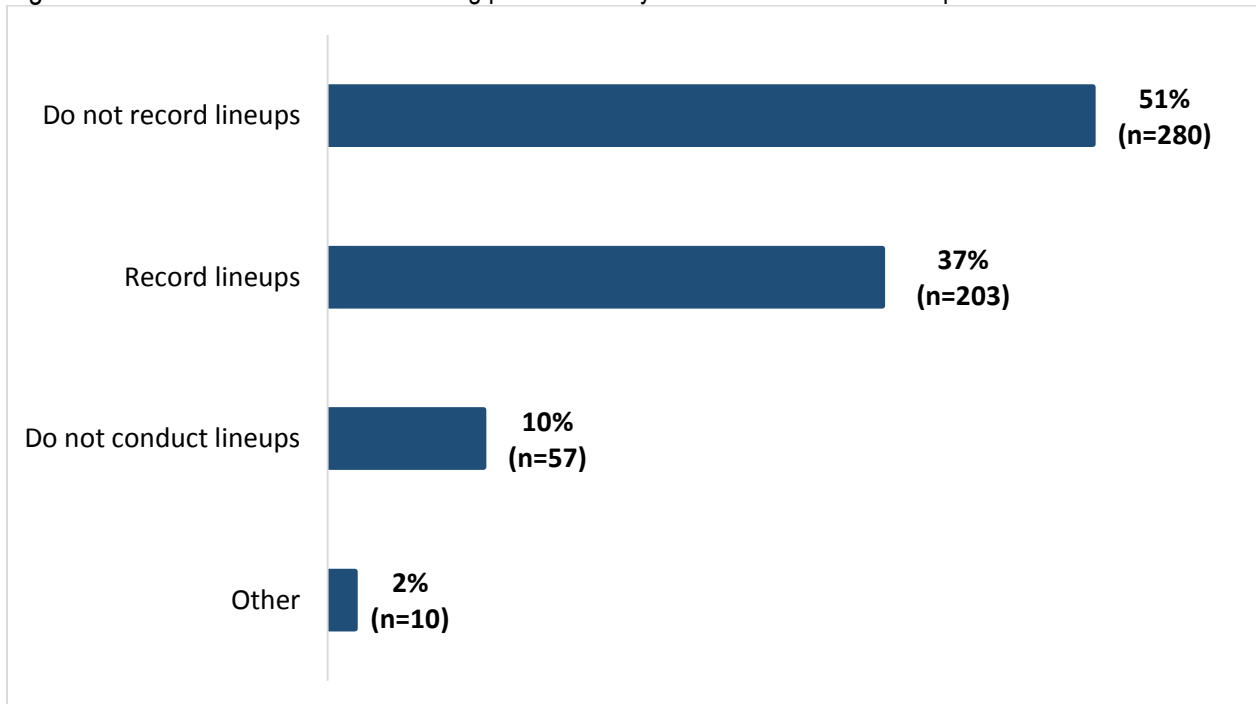
Innocence Project: States that Achieved Eyewitness Identification Reform, and Relevant State Statutes and Rules

The Commission’s review of Texas exoneration cases found that 39 percent of the 56 non-drug related cases had faulty eyewitness identification as a contributing factor, making it the leading contributing factor for wrongful convictions since January 1, 2010. Robbery and sexual assault are the top two offense types in the exoneration cases for which faulty eyewitness identification is a contributing factor.

Texas law enforcement agencies are required by statute to adopt either the LEMIT model policy or their own policy. The LEMIT model policy recommends that the identification procedure be documented in full. Video documentation is preferred; however, an audio recording is an alternative option. The LEMIT model policy has the benefit of being reviewed and potentially updated annually, which ensures that the policy and related training materials incorporate current best practices and research findings. The Commission does not anticipate that the LEMIT model policy would generate additional expenses to law enforcement and should contribute to the criminal justice system’s continuing efforts to provide relevant continuing education and enhanced best practices in the area of eyewitness identification.

The Commission polled Texas law enforcement agencies on their current recording practices of lineups for eyewitness identifications. Of the 550 respondents who record, 37 percent record the lineup identification process. **Figure 8** shows the survey responses on law enforcement practices for eyewitness identification lineups.

Figure 8 Law enforcement current recording practices for eyewitness identification lineups



TCERC Electronic Recording Law Enforcement Survey

The TCAP recommended that training on eyewitness procedures be integrated into the curricula of the LEMIT and the Texas Commission on Law Enforcement (TCOLE). After Texas' law was enacted in 2011, the National Academy of Sciences (NAS) completed a comprehensive review of eyewitness identification research and produced a list of recommendations on how courts and law enforcement can increase the accuracy and utility of eyewitness identifications. The first recommendation of the NAS report is to train all law enforcement officers in eyewitness identification. The recommendation suggests that all law enforcement agencies provide their officers with training that covers the variables that affect vision and memory, practices for minimizing contamination, and effective eyewitness identification protocols.

Given recent findings and the research that helped produce the NAS's report recommendations, the Commission strongly agrees that training for officers on eyewitness identification procedures should be required. Per Texas Occupations Code §1701.351, peace officers are required to complete at least 40 hours of continuing education every 24-month unit of a training cycle. Up to eight hours of continuing education under this section covers recent changes to laws of this state and the United States related to peace officers. Because of the existing training requirement for peace officers, the Commission does not anticipate a substantial cost to implement training for officers on eyewitness identification procedures. Educating officers will not only better prepare them to serve their community, but also positively impact the criminal justice system by continuously improving law enforcement practices.

The NAS report states that the level of confidence at the time the witness makes a selection may be more accurate than at the time the witness makes an identification at trial. The report also indicates that confidence levels articulated after an initial identification is made are subject to bias. Dr. Sandra Guerra Thompson, Alumnae College Professor of Law and Criminal Justice Institute Director at the University of Houston Law Center, informed the Commission of the importance of accurate and precise documentation of the identification of a suspect by the witness at the time the identification happens. This is referred to as the witness' confidence level. Dr. Thompson spoke about how an identification expressed at trial could appear to have been made at a stronger confidence level, because the witness had previously identified the suspect; however, this does not mean that the initial identification was made at a strong confidence level. Therefore, the judge and jury must be informed about the level at which the first identification was articulated.

Documenting a witness's initial confidence level and contemporaneous statements made at the time of the initial identification are already a part of the LEMIT model policy. The LEMIT model policy instructs the officer conducting the photograph or live lineup that if the witness responds that an individual is the person they saw, then the officer should immediately ask the witness to explain in their own words how certain they are.

The Commission agrees it is important to provide jurors with the details of prior identifications made of the suspect by the witness when an in-court identification is made. Jurors should be aware of the manner the procedure was conducted, as well as the witness' confidence level. Documenting this additional information and providing it at trial is not expected to result in

extensive additional costs. The disclosure of this information will not only allow for better judgment on the jurors' part, but provide law enforcement officials and our courts with more accurate information regarding eyewitness identification.

Recommendations

The Commission recommends that the Legislature consider the following proposals regarding faulty eyewitness identification:

- I. Require training for law enforcement officers on eyewitness identification procedures.
- II. Require making juries aware of prior identifications of the suspect by the witness when an in-court identification is made. This includes:
 - a. The manner in which the procedure was conducted; and
 - b. The witness' confidence level.
- III. Require law enforcement agencies to adopt the Bill Blackwood Law Enforcement Management Institute of Texas Model Policy.

FORENSIC SCIENCE PRACTICES

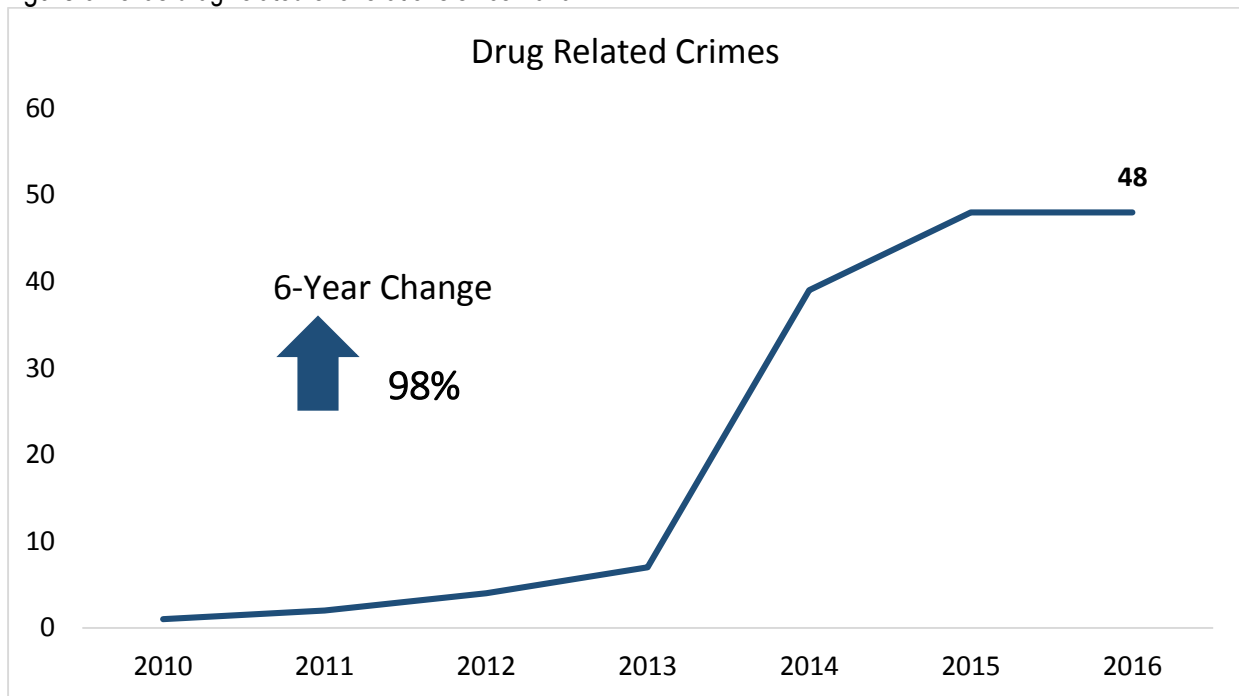
The Commission identified the significant increase in drug-related exonerations from 2014 to 2016 as a topic for research. The Commission worked with the Texas Forensic Science Commission (TFSC) to identify issues and develop recommendations in the area of forensic science practices.

The Texas Legislature created the Texas Forensic Science Commission in May 2005 through Article 38.01 of the Texas Code of Criminal Procedure to investigate professional negligence and misconduct that would affect the results of a forensic analysis completed by an accredited laboratory. In 2013, the 83rd Legislature clarified the scope of TFSC's jurisdiction by passing [Senate Bill 1238](#), which allowed the TFSC to investigate complaints regarding forensic disciplines that were not subject to accreditation under Texas law. In 2015, the 84th Legislature again expanded the scope of TFSC's responsibilities by transferring the Texas' Crime Laboratory Accreditation Program oversight from the Texas Department of Public Safety through [Senate Bill 1287](#).

Research Highlights

Figure 9 shows the increase in drug-related exonerations since 2010. Of the drug-related exonerations, 89 percent came from Harris County. The primary contributing factor to the wrongful convictions was false and/or misleading forensic evidence.

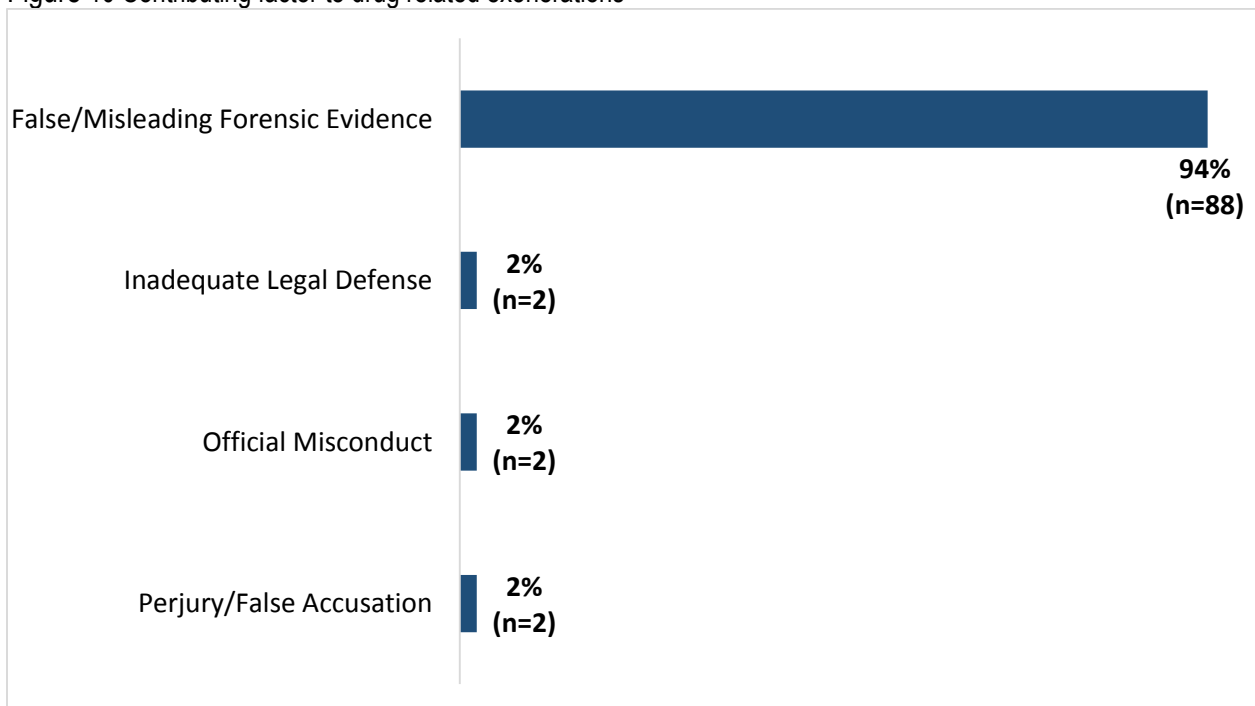
Figure 9 Texas drug-related exonerations since 2010



The National Registry of Exonerations

Figure 10 shows the contributing factors to the drug-related exonerations since 2010.

Figure 10 Contributing factor to drug related exonerations



The National Registry of Exonerations

In 2014, the Harris County District Attorney's Office's Conviction Integrity Unit identified a problem with drug-related cases. When an individual was detained and suspected of having an alleged illegal substance in their possession, officers would test the substance with a drug field test kit. If the result showed that a controlled substance was present, the suspect would be detained and taken into custody. This substance would be collected and handed over to the crime laboratory. Due to the length of time needed for the evidence to be processed, many individuals accepted plea bargains prior to testing of the substance by a crime laboratory. Testing in these cases was a lower priority for the laboratories and further delayed once a guilty plea had been made. Consequently, notifications regarding the inaccurate field test results were sent out after the individual had accepted a plea bargain—often after the sentence had been completed. After the problem was identified, these cases began to be reviewed by a contract attorney for the State, and the Harris County Public Defender's Office began to locate and inform individuals who had been convicted for an offense based on the incorrect field test.

One of the primary issues regarding forensic science practices identified in drug-related exonerations is the inaccuracy of drug field tests. Because of the questionable reliability of these kits and the arrests made based on their results, it is considered a best practice for crime labs to complete testing of substances in all drug cases, regardless of the field test results. Texas Department of Public Safety (DPS) crime laboratories report that they already test substances collected for all cases, including those in which the individual entered a plea before the laboratory results were available. The estimated cost of requiring all crime labs to test substances on pled cases is unknown; however, most laboratories reported that the jurisdictions for which they perform testing do not accept pleas for drug cases based on field tests administered by officers. A confirmatory laboratory report is needed. Despite potential additional costs in implementing this practice, requiring laboratory testing of all drug field tests will reduce the risk of wrongfully arresting and convicting an individual of being in possession of a controlled substance.

In addition to testing all substances that come from drug field tests, it is also necessary to determine the reliability of drug field tests. Additionally, any individual involved in the collection and processing of evidence should be properly trained. From law enforcement officers to crime scene investigators, proper collection and testing of evidence procedures should be followed. A review of these practices is needed to assure the reliability of the evidence used in our courts to prosecute individuals. Although the cost of determining the reliability of drug field tests and providing training to law enforcement officers and crime scene investigators is unknown, implementing these practice improvements would reduce the risk for error.

Recommendations

The Commission makes the following recommendations regarding forensic science practices:

- I. Encourage the Texas Forensic Science Commission to investigate and consider promulgating policies regarding the use of drug field tests used by law enforcement agencies. This includes the following:
 - a. Evaluate the kits' quality, accuracy and reliability.
 - b. Identify any problem with the kits.
 - c. Investigate if officers are trained on how to use and interpret the kits.
 - i. If officers are trained, determine the adequacy of the training.
 - ii. If officers are not trained, require training on how to use and interpret the kits.
- II. Encourage the Texas Forensic Science Commission to investigate and consider promulgating policies regarding the process of crime scene investigations. This includes the following:
 - a. Evaluate standard procedures followed when processing a scene.
 - b. Evaluate how crime scenes are processed and the quality of the work.
 - c. Investigate what training is provided to crime scene investigators.
 - d. Investigate if continuing education is required and/or provided and if so:
 - i. Evaluate the capacity of the training; and
 - ii. Evaluate the quality of the training.
- IV. Recommend that crime labs in all cases moving forward complete testing of substances in all drug cases regardless of the results of a drug field test, and that crime labs go back through previous cases in which the collected substance was not confirmed by lab testing.

CASE STUDY: Christopher Scott and Claude Simmons' Exoneration

The Crime

On the night of April 6, 1997, Alonzo Aguilar and his wife Celia Escobedo were at a duplex in Dallas, Texas. While at the duplex, Escobedo fell asleep watching television. In the early morning hours of April 7, 1997, Escobedo was awakened by a loud noise. When she woke up, Escobedo saw a male intruder she did not know standing in front of her, pointing a gun at her and demanding money. During this encounter, Escobedo moved a pager that was clipped to the collar of her T-shirt to her waistband. In response, the intruder reacted immediately by frisking Escobedo and grabbing her pager. The intruder then began searching other rooms in the duplex.

Meanwhile, another unknown armed man had also entered the duplex and demanded money from Aguilar. This second intruder searched Aguilar's pockets and stole an unknown amount of cash. Shortly thereafter, the first intruder shot and killed Aguilar. Although not originally reported

to the police during the initial investigation, Escobedo later claimed that Aguilar was shot and killed when the first intruder became startled while sexually assaulting her.

The Investigation

During the early stages of the investigation, law enforcement obtained descriptions of the suspects from Escobedo, then immediately broadcast the descriptions on the police radio. A short time later, a police officer driving in an unmarked car a couple of blocks away from the crime scene heard the broadcast. That officer then noticed a parked car with two black male occupants who fit the descriptions of the two suspects. The two suspects, later identified as Christopher Scott and Claude Simmons, got out of the car and entered a nearby house. The officer reported this sighting to other investigating officers and requested assistance.

Several backup officers arrived at the house and attempted to contact the people inside. Approximately 45 minutes later, Simmons opened the door and came outside. Eventually, everyone inside the house came out. Police questioned everyone including Scott. Scott and two other suspects were handcuffed and transported to the Dallas Police Department's Crimes Against Persons Division (CAPERS) for additional questioning.

Scott claims that once he was brought to CAPERS, he was told that an eyewitness to the Aguilar murder was being brought to the unit to look at him. Investigative reports conflict with this claim, instead describing the "Escobedo - Scott" encounter at CAPERS as a sheer coincidence. While Scott was sitting in the waiting room, Escobedo entered and immediately identified Scott as the person who shot Aguilar. However, Escobedo never identified Scott in a photo lineup.

Scott was arrested for an outstanding warrant and for the capital murder of Aguilar and transported to jail. On the way to the jail, Scott informed officers that he believed Don Michael Anderson had committed the murder and that he had heard that Anderson had robbed the same place two nights before the murder. This information was included in the officer's investigative report as an admission by Scott as to the identity of his accomplice.

During the arrest, Scott's clothes were confiscated as evidence and his hands were tested for gunshot residue. No blood was discovered and all testing conducted revealed negative results for gunshot residue.

During the three weeks following the murder, Simmons voluntarily went to the police department on three separate occasions and cooperated by answering questions. On his last visit, Simmons agreed to have his photograph taken for inclusion in a photo lineup. Escobedo was shown the photo lineup. When she examined the photo lineup, which included photos of both Simmons and Anderson, Escobedo spent approximately two hours looking at it before she concluded she was unable to identify either individual. Then, Escobedo met with a victim's liaison for approximately 15 minutes; shortly thereafter, she identified Simmons in the photos presented. It was at that time that Escobedo told police officers that Simmons was the man that sexually assaulted her during the murder. Simmons was then arrested.

During the investigation, several witnesses—including law enforcement agents—identified Anderson and another male, Alonzo Hardy, as the individuals who murdered Aguilar. Police officers attempted to interview Anderson several times. After Anderson refused to cooperate, he was no longer considered a suspect.

The Trial

Scott's jury trial was held first, followed by Simmons' jury trial a week later. The only substantive evidence presented at Scott's trial was Escobedo's eyewitness identification. No mention of Anderson and Hardy was made by the defense. Scott was convicted of capital murder and sentenced to life in prison.

During Simmons' jury trial, the defense requested a continuance based on a recently disclosed hand written note from a police officer that implicated Anderson and Hardy in the crime. The trial court judge—the same judge who presided over Scott's trial—denied the request and proceeded with trial. During the trial, Escobedo provided eyewitness testimony identifying Simmons as the person who sexually assaulted her and killed her husband.

The defense then sought to introduce evidence to prove Anderson and Hardy were the men who killed Aguilar. Among the evidence proffered was testimony from Anderson's ex-girlfriend, Ellen Ellison, regarding inculpatory statements Anderson made to her establishing that he shot and killed Aguilar. According to Ellison, Anderson had tears in his eyes when he confessed to her. He also told her that he never meant to do it—instead he only shot at Aguilar after Aguilar shot his accomplice Hardy in the arm and turned to shoot at Anderson. Finding Ellison's testimony to be inadmissible hearsay, the trial court refused to admit it before the jury. After six minutes of deliberation, the jury found Simmons guilty of capital murder. Since the State did not seek the death penalty, Simmons was sentenced to life in prison.

The Post-Conviction Innocence Investigation

Post-conviction innocence claims for both Simmons and Scott were investigated by students at The University of Texas at Arlington Innocence Network, students at The University of Texas School of Law Actual Innocence Clinic, the Dallas County District Attorney's Office Conviction Integrity Unit, the Dallas County Public Defender's Office, and the Dallas Police Department. While being interviewed by students and attorneys, Hardy confessed to his involvement in Aguilar's murder. Hardy also took a polygraph examination which showed no deception. During a deposition, Hardy corroborated his confession by providing information pertaining to physical evidence found at the crime scene. Meanwhile, both Scott and Simmons agreed to take polygraph examinations; neither result showed deception.

Additional witnesses that supported Scott's and Simmons' claims of innocence included Ellen Ellison, who the trial court judge did not allow to testify during Simmons' trial, and Blanchard (a/k/a "Blinky") Haggerty. Ellison stated that Anderson confessed to her what happened on the night of the murder. Specifically, Anderson told Ellison he went into the duplex and robbed a man and a

woman. Anderson also told her that he shot Aguilar with a pistol he had taken from under Escobedo's bed. Finally, Ellison confirmed what Scott originally told the police—that she was in the car with Anderson two nights before Aguilar's murder, when Anderson robbed the people in the duplex where the murder subsequently occurred. "Blinky" Haggerty independently corroborated Anderson's confession. When he was interviewed by Dallas Police detectives, Haggerty admitted that he drove the car for Anderson and Hardy on the night of Aguilar's murder.

On March 3, 2010, the Texas Court of Criminal Appeals granted relief to both Scott and Simmons on the grounds of actual innocence. On March 6, 2012, Anderson pled guilty and was sentenced to prison for his role in the crime.

CONCLUSION

Timothy Cole was one of many individuals who have served time in prison for crimes they did not commit. This Commission was comprised of experienced stakeholders devoted to preventing the incarceration of innocent people such as Mr. Cole. The time taken from innocent individuals and their families cannot be returned, but preventing such an event from happening to others is an important goal of our justice system. And it must be acknowledged that, if an innocent person is incarcerated, it means that the actual criminal remains at large, unpunished, and of continuing threat to society.

In this way, the incarceration of an innocent person deeply affects not only the individual, along with his or her family and loved ones, but also Texans and their communities as a whole. It is for this reason that the Timothy Cole Exoneration Review Commission submits these recommendations and urges their consideration by the 85th Legislature.

MEMBERS' ADDITIONAL STATEMENTS

Samuel Bassett

Electronic recording of interrogations

Recommendation II: Electronic recording should be required when investigating all felony cases.

- Dissenting statement:
 - o All criminal offenses, Class B Misdemeanor or above, should be recorded with audiovisual equipment absent a showing of good cause. The recommendation should not be limited to felonies as some misdemeanors have serious consequences (i.e. DWI, offenses involving findings of family violence).

Recommendation V: Recordings should be either audio or audiovisual formats.

- Dissenting statement:
 - o Technology has advanced to a point where the cost differential between audio recordings and audiovisual recordings is negligible; therefore, audiovisual recording equipment should be used when recording all interrogations.

False Accusations and Jailhouse Informant Regulation

Senate bill 1681 has been in effect for seven years. This law requires some corroboration to convict an individual based on the jailhouse informant testimony. Though there have not been any new reported cases of wrongful convictions based on false jailhouse informant testimony since its passage, it should be noted that it takes many years to legally identify and remedy wrongful convictions and that the absence of reported cases at this time is not indicative of whether article 38.075 has sufficiently safeguarded defendants from false testimony from jailhouse informants.

Regarding the recommendations under this section of the report; all recommendations listed should remain as they are. An additional recommendation should be included under this topic area as well.

Concurring statement:

- The testimony of an informant who provides evidence against a defendant must be examined and weighed by the juror with greater caution and care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for the juror to determine. Although Texas does not have uniform jury charges, the State Bar of Texas recently published "Texas Criminal Jury Charges," which is a resource that contains a form jury instruction on the corroboration requirement mandated by article 38.075. This instruction, however, does not provide any specific information regarding the circumstances surrounding the informant's situation nor does it provide information regarding how to properly weigh the credibility of the testimony.
- The suggested recommendation is as follows:

- The Commission recommends that all necessary information be provided in an instruction to the jury in order for them to consider the following: (1) whether the witness has received or hopes to receive anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) the extent to which the informant's testimony is corroborated by other evidence; (3) the extent to which the details of the testimony could be obtained from a source other than the defendant; (4) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (5) whether the informant has ever changed his or her testimony; (6) the criminal history of the informant; and (7) any other evidence relevant to the informant's credibility.³

³ *Dodd v. State*, 993 P.2d 778, 785 (Okla.Crim.App. 2000); see also *State v. Arroyo*, 292 Conn. 558, 569–71, 973 A.2d 1254 (2009).

Staley Heatly joined by Dr. Vincent DiMaio

Reciprocal discovery was not an issue considered by this Commission. However, reciprocal discovery can play an important role in preventing wrongful convictions. According to the Texas Defender Service, 98% of states and the federal government require some form of reciprocal discovery in criminal cases.⁴ In its 2010 report, the Timothy Cole Advisory Panel on Wrongful Convictions (TCAP) recommended that, “[t]he State of Texas should adopt a statewide discovery policy that is mandatory, automatic, and reciprocal, and requires either electronic access to or photocopies of materials subject to discovery.” This recommendation was partially implemented by the legislature in 2013 with the passage of SB 1611, the Michael Morton Act. The Act, which passed with the support of Texas prosecutors, creates one of the most progressive discovery regimes in the United States. The Act, however, did not mandate reciprocal discovery. Thus, Texas remains the only state in the United States of America without reciprocal discovery.

In 2013, Texas Appleseed and the Texas Defender Service issued a report entitled *Improving Discovery in Criminal Cases in Texas*. These two non-profit agencies, dedicated to increasing fairness in the Texas criminal justice system, recommended in their report that Texas implement a discovery regime that provides for “reciprocal or mutual discovery obligations for the defense, within the boundaries of the defendant’s constitutional rights.” The recommendations of TCAP, Texas Appleseed, and Texas Defender Service are in line with the American Bar Association’s Standards for Criminal Justice: Discovery and Trial by Jury, which also recommends reciprocal discovery.

Generally, through reciprocal discovery, a defendant is required to provide any books, papers, witness statements, or physical evidence in the defendant’s possession that he intends to introduce as evidence at trial. Most jurisdictions also require the defendant to provide a witness list and provide advance notice if the defendant plans to introduce an alibi defense. The significance of this kind of information is obvious. If a prosecutor can verify a defendant’s alibi or evidence prior to trial, there may be no need for a trial to take place. Under current Texas law, a defendant can spring evidence or an alibi defense in the middle of trial that the prosecution and law enforcement have no opportunity to verify. If the evidence or alibi is not believed by the jury, an innocent person could be convicted. For this very reason, reciprocal discovery is generally the law of the land throughout the United States.

The goal of the criminal justice system is to find the truth. By implementing a reciprocal discovery system and ending the current system of “trial by ambush,” Texas will take a big step forward in preventing wrongful convictions and ensuring justice for all.

⁴ <http://texasdefender.org/wp-content/uploads/criminal-discovery.pdf>

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HOUSE OF REPRESENTATIVES

December 1, 2016

Timothy Cole Exoneration Review Commission
Texas Judicial Council
205 W 14th St, Suite 600
Austin, TX 78711

Dear Commission Members,

Thank you to my fellow Timothy Cole Exoneration Review Commission members and staff for your hard work during the interim.

Because no innocent person should be incarcerated, the Commission's recommendations deserve further consideration during the 85th Legislative Session. Since it is imperative that we keep the process moving forward, I support the submission of these recommendations.

As the 85th Legislative Session approaches, I look forward to working with fellow legislators, the public and stakeholders to help end the incarceration of innocent people.

Sincerely,

A handwritten signature in cursive script that reads "Abel Herrero".

Abel Herrero
State Representative, District 34



DISTRICT 34 · NUECES (PART)

ABEL.HERRERO@HOUSE.STATE.TX.US

APPENDIX

1. TCERC Electronic Recording Judicial and Law Enforcement Surveys

Judicial Survey Results:

Please indicate your role.		
Answer Options	Response Percent	Response Count
Judge	56.2%	114
Appellate Judge	8.4%	17
Associate Judge	0.0%	0
Prosecutor	13.8%	28
Defense Attorney	21.7%	44
<i>answered question</i>		203
<i>skipped question</i>		0

Do you think entering an audio or video recording of an interrogation as evidence would be beneficial in any of the following cases?				
Answer Options	Yes	No	Not Sure	Response Count
Assault	134	6	17	157
Burglary	124	8	22	154
Criminal Homicide/ Attempted Murder	130	5	17	152
Drug Offense (Felony)	122	8	21	151
Rape	129	3	20	152
Robbery	126	6	19	151
Theft (Felony/>\$1500 taken)/ Motor Vehicle Theft	123	8	20	151
All Felonies	143	4	28	175
Other (please explain)				48
<i>answered question</i>				181
<i>skipped question</i>				22

Have you worked on or presided over cases in which an electronic recording of an interrogation was entered as evidence?

Answer Options	Response Percent	Response Count
Yes	81.4%	153
No	18.6%	35
<i>answered question</i>		188
<i>skipped question</i>		15

If your response to the previous was yes, in your opinion, was it helpful?

Answer Options	Response Percent	Response Count
Yes	95.1%	136
No	4.9%	7
Please explain why or why not.		78
<i>answered question</i>		143
<i>skipped question</i>		60

Please indicate if you agree or disagree with the following statements. Electronic recording of interrogations could:

Answer Options	Strongly Disagree	Disagree	Neither Agree nor Disagree	Agree	Strongly Agree	Response Count
Help determine whether or not the individual's statement was made freely and voluntarily.	4	5	11	80	75	175
Reduce the necessity of testimony by those involved in the interrogation.	35	52	37	30	21	175
Reduce court time for officers.	30	55	49	24	18	176
Result in less time spent reviewing and determining the facts concerning the interrogation.	28	35	33	55	25	176
Result in danger of losing cooperation/ confessions from the suspect due to their lack of willingness to be recorded.	26	60	58	22	10	176
Result in more confessions being ruled inadmissible due to a failure to follow new law requirements.	21	44	58	43	9	175
Result in the fiscal cost outweighing the value of the recorded confession.	53	56	49	10	8	176
Allow judges and juries to have a better understanding of the statements provided by those who were interrogated.	8	7	14	80	67	176
Allow the prosecution to build stronger case against those suspected of a crime.	6	8	53	73	36	176
Allow the defense to better represent clients being prosecuted for a crime.	8	9	46	77	36	176
Increase the public's trust in the justice system.	4	14	40	60	58	176
Enable better practices and learning opportunities related to electronic recording of interrogations.	3	14	41	76	41	175
Reduce the risk of false confessions and convictions of innocent persons.	8	16	36	66	49	175
Reduce the risk of civil suits and damage awards in favor of those wrongfully convicted individuals.	8	17	67	52	31	175
	<i>answered question</i>					176
	<i>skipped question</i>					27

Law Enforcement Survey Results:

Number of sworn officers:		
Answer Options	Response Percent	Response Count
0-5	39.7%	339
6-10	17.1%	146
11-25	21.5%	183
26-50	10.0%	85
51-200	8.1%	69
201-750	2.6%	22
>750	1.1%	9
<i>answered question</i>		853
<i>skipped question</i>		0

General question for all respondents

Does your department electronically record interrogations?		
Answer Options	Response Percent	Response Count
Yes	68.2%	580
No	31.8%	270
<i>answered question</i>		850
<i>skipped question</i>		3

Respondents who indicated they did NOT currently record interrogations

Why does your department not use audio or video to record interrogations? Please check all that apply.		
Answer Options	Response Percent	Response Count
Cost to implement	39.5%	101
Amount of training involved	10.2%	26
Will interfere with custodial interrogations	2.7%	7
Other (please explain)	72.3%	185
<i>answered question</i>		256
<i>skipped question</i>		597

Have you considered audio or video recording in the past?		
Answer Options	Response Percent	Response Count
Yes	53.9%	138
No	46.1%	118
<i>answered question</i>		256
<i>skipped question</i>		597

Do you think using audio or video recording would be beneficial in any of the following types of felony cases?				
Answer Options	Yes	No	Not Sure	Response Count
All felonies	214	10	27	251
Assault	204	7	27	238
Burglary	198	10	29	237
Criminal Homicide/ Attempted Murder	210	6	22	238
Drug Offense (Felony)	200	12	26	238
Rape	207	6	22	235
Robbery	203	7	24	234
Theft (Felony/>\$1500 taken)/ Motor Vehicle Theft	196	11	28	235
Other	121	6	51	178
<i>answered question</i>				252
<i>skipped question</i>				601

Please indicate if you agree or disagree with the following statements. Recording of interrogations could:

Answer Options	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Rating Average	Response Count
Permit the officers to concentrate on the suspect	13	7	64	105	62	3.78	251
Allow the officers who are not in the interrogation room	16	4	20	138	72	3.98	250
Reduce the risk of false confessions and convictions	14	14	58	100	62	3.73	248
Reduce court time for officers.	12	34	64	97	42	3.49	249
Result in less time spent reviewing and piecing notes	15	28	47	108	51	3.61	249
Result in danger of losing cooperation/ confessions	13	37	91	81	27	3.29	249
Reduce lawsuits from claims of officer misconduct	17	6	33	113	79	3.93	248
Assist officers in solving the crime in question as well	15	9	56	120	47	3.71	247
Increase the public's trust in the justice system.	12	9	57	116	55	3.78	249
Enable better practices and learning opportunities	14	3	43	131	57	3.86	248
	<i>answered question</i>						251
	<i>skipped question</i>						602

Respondents who indicated the currently record interrogations:

For what type of cases does your department electronically record? Please check all that apply.				
Answer Options	Yes	No	Not Sure	Response Count
All felonies	499	28	15	542
Assault	451	22	20	493
Burglary	451	20	20	491
Criminal Homicide/ Attempted Murder	455	17	21	493
Drug Offense (Felony)	422	34	33	489
Rape	457	14	20	491
Robbery	453	17	20	490
Theft (Felony/>\$1500 taken)/ Motor Vehicle Theft	445	26	22	493
Other	379	11	47	437
<i>answered question</i>				561
<i>skipped question</i>				292

What individuals are electronically recorded during questioning? Please check all that apply.		
Answer Options	Response Percent	Response Count
Suspect (custodial)	97.1%	540
Suspect (non-custodial)	88.8%	494
Witness	72.8%	405
Other (please explain)	25.0%	139
<i>answered question</i>		556
<i>skipped question</i>		297

Does your department electronically record line ups for eyewitness identification?		
Answer Options	Response Percent	Response Count
Yes	31.7%	177
No	47.5%	265
Other (please explain)	20.8%	116
<i>answered question</i>		558
<i>skipped question</i>		295

What type of settings are typically recorded (audio or visual) by your department? Please check all that apply.		
Answer Options	Response Percent	Response Count
Informal questioning inside an interrogation room.	84.5%	468
Informal questioning outside the interrogation room.	61.0%	338
Phone conversations.	42.2%	234
Arrests	73.8%	409
Other (please specify)	21.7%	120
<i>answered question</i>		554
<i>skipped question</i>		299

Does your department record audio and video or audio only?		
Answer Options	Response Percent	Response Count
Audio and video	92.1%	513
Audio only	7.9%	44
<i>answered question</i>		557
<i>skipped question</i>		296

What type of equipment does your department currently to record interrogations? Please check all that apply.		
Answer Options	Response Percent	Response Count
Closed circuit video recording system	6.8%	3
Computers	4.5%	2
Digital voice recorder	93.2%	41
Handheld digital camera	4.5%	2
Microphones	0.0%	0
Recording software	0.0%	0
Other (please specify)	18.2%	8
<i>answered question</i>		44
<i>skipped question</i>		809

Is the recording equipment displayed in an area visible to the suspect?		
Answer Options	Response Percent	Response Count
Yes	79.1%	34
No	20.9%	9
<i>answered question</i>		43
<i>skipped question</i>		810

What is your department's method of storing the recordings? Please check all that apply.

Answer Options	Response Percent	Response Count
Computer server	64.4%	29
DVD	44.4%	20
USB/ Flash drive	26.7%	12
Other (please specify)	13.3%	6
<i>answered question</i>		45
<i>skipped question</i>		808

If your department uses video equipment, which of the following best describes what the camera records?

Answer Options	Response Percent	Response Count
The camera records the suspect only	22.4%	121
The camera records the interviewing officer only	0.0%	0
The camera records both the interviewer and the	61.6%	333
Department does not use video equipment	3.0%	16
Other (please specify)	13.1%	71
<i>answered question</i>		541
<i>skipped question</i>		312

Does your department share recording and/or storage equipment with other agencies?

Answer Options	Response Percent	Response Count
Yes	38.4%	213
No	61.6%	341
<i>answered question</i>		554
<i>skipped question</i>		299

Are officers trained on the process and methods to operate the equipment? Please check all that apply.

Answer Options	Response Percent	Response Count
Formal in-house training session	30.1%	167
Informal training on equipment and/or procedure	68.1%	378
Trained by company (vendors)	16.2%	90
No training provided	5.2%	29
Other (please explain)	10.8%	60
<i>answered question</i>		555
<i>skipped question</i>		298

Does your department have a written policy on recording interrogations?		
Answer Options	Response Percent	Response Count
Yes	37.0%	203
No	63.0%	345
If yes, please provide your name and email address if your		69
<i>answered question</i>		548
<i>skipped question</i>		305

Does your department obtain the suspect's consent before recording a custodial interrogation?		
Answer Options	Response Percent	Response Count
Yes	27.5%	151
No	72.5%	399
<i>answered question</i>		550
<i>skipped question</i>		303

In your department, when does the officer begin and conclude the recording of an interrogation?		
Answer Options	Response Percent	Response Count
From the time the suspect is read his/her Miranda	60.7%	332
Only for the confession	0.2%	1
Officer has the discretion on when to begin and end	11.2%	61
Other (please explain)	28.0%	153
<i>answered question</i>		547
<i>skipped question</i>		306

Please check all of the applicable funding streams that were used to purchase and maintain the recording equipment.		
Answer Options	Response Percent	Response Count
Federal grants	7.1%	37
State grants	6.5%	34
Department general funds	78.7%	409
Donation/gift	7.5%	39
Unknown	10.0%	52
Other (please specify)	12.9%	67
<i>answered question</i>		520
<i>skipped question</i>		333

Please indicate if you agree or disagree with the following statements:Recording of interrogations has:

Answer Options	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Rating Average	Response Count
Permitted the officers to concentrate on the suspect	20	13	114	274	124	3.86	545
Allowed officers who are not in the interrogation room	28	30	85	236	163	3.88	542
Reduced the risk of false confessions and convictions	22	37	143	201	140	3.74	543
Reduced court time for officers.	22	53	136	221	112	3.64	544
Resulted in less time spent reviewing and piecing	24	71	118	233	96	3.56	542
Resulted in danger of losing cooperation/ confessions	46	176	216	83	24	2.75	545
Reduced lawsuits from claims of officer misconduct	20	22	171	193	138	3.75	544
Assisted officers in solving the crime in question as	18	16	121	289	101	3.81	545
Increased the public's trust in the justice system.	16	24	162	226	117	3.74	545
Enabled better practices and learning opportunities	17	9	100	299	119	3.91	544
					<i>answered question</i>		546
					<i>skipped question</i>		307

2. Sample Jury Charge on Jailhouse Informant Testimony

Sample Jury Charge on Jailhouse Informant Testimony Under Current Texas Law – Art. 38.075 Texas Code of Criminal Procedure

“Correctional facility” means a place designated by law for the confinement of a person arrested for, charged with, or convicted of a criminal offense. The term includes a municipal or county jail; a confinement facility operated by the Texas Department of Criminal Justice; a confinement facility operated under contract with any division of the Texas Department of Criminal Justice; and a community corrections facility operated by a community supervision and corrections department.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the Court which is herein given to you and be governed thereby.

You are instructed that under our law a conviction cannot be had upon the testimony of a witness to whom the defendant made a statement against the defendant’s interest during a time when the defendant was imprisoned or confined in the same correctional facility as the witness unless the jury first believes that the witness’s testimony is true and that it shows the defendant is guilty of the offense charged against him, and even then you cannot convict unless the witness’s testimony is corroborated by other evidence tending to connect the defendant with the offense charged, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission.

You are instructed that WITNESS A is a person who was imprisoned or confined in the same correctional facility as the defendant. With this in mind, you are further instructed that you cannot convict the Defendant upon the testimony of WITNESS A, unless you first believe that her testimony is true and shows the guilt of the Defendant as charged in the indictment, and then you cannot convict the Defendant unless WITNESS A’s testimony is corroborated by other evidence tending to connect the Defendant with the offense charged. The corroboration is not sufficient if it merely shows the commission of an offense, but it must tend to connect the Defendant with its commission, and then from all the evidence, you must believe beyond a reasonable doubt that the Defendant is guilty of the offense charged against him.

Now, if you find from the evidence that WITNESS A's testimony is true and shows the guilt of the Defendant as charged in the indictment, and that Witness A's testimony is not corroborated by other evidence tending to connect the Defendant with the offense charged, or that WITNESS A's testimony is untrue and does not show the guilt of the Defendant as charged in the indictment, and that Witness A's testimony is corroborated by other evidence tending to connect the Defendant with the offense charged, then in either case, or if you have a reasonable doubt thereof, you will acquit the Defendant.

You are instructed that one or more witnesses who were imprisoned or confined in the same correctional facility as the defendant cannot corroborate each other. Such corroborative evidence, if any, must be from some source other than said witnesses.

Los Angeles County
District Attorney's Office

Legal Policies Manual

Steve Cooley
District Attorney

April 2005



CHAPTER 19

JAILHOUSE INFORMANTS

19.01 INTRODUCTION

There is a critical need for consistency in the handling of jailhouse informants; the integrity of this office and the integrity of our system of justice depends upon it.

It is the policy of this office to strictly control the use of jailhouse informants as witnesses. Before a jailhouse informant may be used as a witness, strong corroborative evidence is required. This corroborating evidence must consist of more than the fact that the informant appears to know details about the crime thought to be known only to law enforcement.

Commentary

It has been the longstanding practice of the deputies in this office to view skeptically and with caution the proposed testimony of any county jail prisoner. No deputy has ever supposed that such testimony springs from the prisoner's sense of good citizenship or moral duty. On the contrary, a deputy district attorney is by virtue of training and experience altogether conscious of the self-interest of the jailhouse informant and actively mindful of the source, his background and his character. Further, since we are unalterably committed to obtaining the truth and seeking justice, the informant's information is viewed through the prism of our ethical mandate.

19.02 OFFICE POLICY

A jailhouse informant is a person in custody who receives a communication from another person in custody about a crime committed by the latter and who chooses to convey this information to authorities.

No jailhouse informant shall be called to testify to a defendant's oral statement, admission or confession unless strong evidence exists which corroborates the truthfulness of the informant.

A deputy wishing to use a jailhouse informant as a prosecution witness must obtain the prior approval of the Jailhouse Informant Committee. The Committee is comprised of the Chief Deputy, the Assistant District Attorneys and Bureau Directors. All requests to use a jailhouse informant must be submitted, in writing, to the Chief Deputy through the chain of command.

A written request to use a jailhouse informant must include:

- A brief description of the crime and the name and criminal history of the informant;

- The evidence being offered by the informant;
- A description of the corroborating evidence;
- An analysis of the strengths and weaknesses of the case if the informant is not used; and
- Any benefit promised to the informant by any member of law enforcement or any employee of the District Attorney's Office for the information offered on the pending case.

The Habeas Corpus Litigation Team maintains a Central Index of jailhouse informants who have offered to be, or who have been used as witnesses. The trial deputy must contact the Deputy-in-Charge of the Habeas Corpus Litigation Team (HABLIT) and determine whether the informant has offered to be a witness in the past or has testified in any prior case. The information shall be included in the deputy's written memorandum.

The Head Deputy will forward the memorandum with his/her recommendation to the appropriate Bureau Director. If the Bureau Director agrees with a recommendation to use a jailhouse informant as a witness, the Bureau Director will forward the request to the Chief Deputy for consideration by the Jailhouse Informant Committee. The trial deputy may be asked to appear before the committee to explain his/her reasons why the request should be approved.

19.02.01 Trial Deputy Responsibilities if Approval is Granted

If the Committee approves the use of a jailhouse informant, the trial deputy must comply with the requirements of Penal Code §§ 1127a, 1191.25, and 4001.1.

If the informant testifies, the trial deputy must notify HABLIT.

Although Penal Code § 4001.1, if strictly applied, pertains only to "in custody informants" held within a "correctional institution," it is office policy that its provisions apply to any custodial setting (i.e., jail or prison).

19.02.02 Prohibition of Monetary Payments

Penal Code § 4001.1 prohibits law enforcement from making monetary payments to in custody informants in excess of \$50 in exchange for testimony. This limitation does not apply to funds expended for witness protection, relocation, or travel expenses.

19.03 FABRICATION OF EVIDENCE BY JAILHOUSE INFORMANTS

Should any deputy acquire any information that a jailhouse informant is attempting to fabricate or has fabricated evidence, the deputy shall immediately forward a memorandum setting forth all pertinent details to HABLIT. E-mail or fax transmission is acceptable. This information will be included in the Central Index maintained by HABLIT. It is a continuing responsibility of all deputy district attorneys to ensure that any attempt to falsify evidence is readily known to any of our deputies considering the

use of the jailhouse informant involved.

19.04 CRIMINAL CASE INFORMATION SECURITY

The flow of confidential information is critical to operating successfully day to day. Any policy on the disclosure of information must balance the need for security and the need for the efficient exchange of information among the people in this office, from this office to other law enforcement agencies, and to the members of the public. To that end, information on criminal cases being handled by this office shall be disclosed, over the telephone, only as follows:

- If the caller is a deputy district attorney, member of law enforcement, or probation officer personally known to the employee possessing the requested information, and the caller has a need to know the information, the information should be disclosed;
- If the caller is not personally known to the employee possessing the requested information, and claims to be a deputy district attorney, member of law enforcement, or probation officer, the employee possessing the information must request and receive a call-back verification number from the caller. If the number is verified, and there is a need to know the information, the information should be disclosed;
- If the caller is seeking information which is generally available to the public (e.g., time and location of a court appearance), that information should be given;
- Under no circumstances should the names, addresses or telephone numbers of witnesses be disclosed over the telephone; and
- Detailed information or prosecution strategy on a case should never be discussed over the telephone. Only the bare minimum facts, on a verified need-to-know basis, should be disclosed telephonically.

19.04.01 File Notations

Any employee who, in compliance with these guidelines, telephonically discloses information of a non-public nature must make a notation of what was disclosed and to whom it was disclosed. This notation should be placed in the case file or, if the file is not accessible, sent in written form to the deputy district attorney handling the case.

If an employee has any doubt about the identity of the caller, the validity of the call-back number, or whether the caller has a need to know, the employee should immediately contact the Assistant Chief of the Bureau of Investigation.

Commentary

It is essential that we prevent breaches of office security through the inadvertent disclosure of confidential information to persons not authorized to receive such information. Strict compliance with this policy should ensure that such breaches do not occur.

19.05 PRESERVATION OF JAILHOUSE INFORMANT RECORDS

The following Superior Court order, issued on December 16, 1988, remains in effect:

TO [THE] DISTRICT ATTORNEY OF LOS ANGELES COUNTY:

You are hereby ordered to preserve all records of jailhouse informants who have been used or consulted by you or your agents while incarcerated from November 1, 1978 to the present until the further order of this court. This order includes, but is not limited to, all notes, memoranda, computer printouts, or any records of promises made, payments made, or rewards given to each such jailhouse informant. The order shall further include all records of the last known location of said informants, all records relating to the cell assignments of such informants within the Los Angeles County jail system and all memoranda describing in whole or in part such informants.

Dated: 12/16/88

Signed:
Judge of the Superior Court

4. Tarrant County Criminal District Attorney's Office Jailhouse Informant Procedures

Tarrant County Criminal District Attorney's Office Jailhouse Informant Procedure

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

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

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

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

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

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

Disclosure Requirements:

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

That disclosure should include:

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

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

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

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

Jl Index and Database

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

Best Practices

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

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

Model Policy on Eyewitness Identification

I. Purpose

The purpose of this model policy is to outline proper protocol for eyewitness identification procedures for photographic, show-up, and live lineup identifications which maximize the reliability of identifications, protect innocent persons, and establish evidence that is reliable and conforms to established legal requirements.

II. Policy

Eyewitness identifications are a significant component of many criminal investigations. The identification process must be carefully administered to minimize the likelihood of misidentifications. Moreover, constitutional safeguards must be observed in the process. The goal of reducing erroneous convictions can be furthered in many ways. Employing the most rigorous eyewitness identification methods is one way of doing this, but there are others. The eyewitness identification process is only one step in the criminal investigative process, albeit an important one. Corroborative evidence, for example, will lessen the impact of an erroneous eyewitness identification. The more other evidence that is available, the less risk there is of conviction based solely on erroneous eyewitness identification. There is no substitute for a competent and thorough criminal investigation.

This model policy was written to provide guidance on eyewitness identification procedures based on credible research on eyewitness memory and best practices designed not only to reduce erroneous eyewitness identification but also to enhance the reliability and objectivity of eyewitness identifications.

Evidence-based and best practices surrounding the collection and preservation of eyewitness evidence are addressed as are procedures to be employed where witnesses or victims are unable to read or write, are non-English speaking, or possess limited English language proficiency.

III. Procedural Guidelines

A. Definitions

1. **Blind Procedure** – A procedure wherein the person administering the live lineup or photo array does not know who the suspect is.
2. **Blinded Photo Array Procedure** – A procedure wherein the person who administers the photo array knows who the suspect is, but each photo is presented so that the administrator cannot see or track which photograph is being presented to the witness.

3. **Folder Shuffle Method** – A method of administering a photo array such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed. This method is employed when a blind procedure is not possible.
 4. **Fillers** – Non-suspect photographs or persons. Fillers are selected to both fit the description of the perpetrator provided by the witness and to ensure that no individual or photo stands out.
 5. **Illiterate Person** – An individual who speaks and understands English but cannot read and write in English.
 6. **Interpreter** – An interpreter is a person who is fluent in English and the language of the witness or victim and who facilitates communication between two parties in two different languages. The term includes persons who facilitate communication with persons who are deaf, hearing impaired, or speaking impaired.
 7. **Live lineup** – An identification procedure in which a group of persons is displayed to the witness or victim in order to identify or exclude the suspect.
 8. **Person with Limited English Proficiency** – An individual who is unable to communicate effectively in English with a level of fluency that is typical of native English speakers. Such a person may have difficulty speaking, reading, or writing in English and includes persons who can comprehend English, but are physically unable to talk or write.
 9. **Photo Array** – An identification procedure in which a series of photographs is displayed to the witness or victim in order to identify or exclude the suspect.
 10. **Sequential Live Lineup or Photo Array** – An identification procedure in which the persons in the live lineup or the photographs in the photo array are displayed one by one (sequentially).
 11. **Show-up** – An identification procedure in which a single suspect is shown to a victim or witness soon after the commission of a crime for the purpose of identifying or eliminating the suspect as the perpetrator.
 12. **Witness Certification Statement** – A written statement that is read out loud to the witness or victim describing the procedures of the identification process.
- B. **Selecting the Best Identification Method**
1. Photo arrays are preferred over other techniques because: (a) they can be controlled better, (b) nervousness can be minimized, and (c) they are easier to manage logistically.

2. Because they involve multiple persons under relatively controlled circumstances, a properly conducted live lineup, like a properly conducted photo array, is preferable to a show-up.
3. Because they are highly suggestive, show-ups are vulnerable to challenges to their validity. Consequently, a show-up should be employed only where other indicia of guilt are present (e.g., suspect located relatively close in time and place to the crime).
4. Because witnesses may be influenced, however unintentionally, by cues from the person administering the procedure, a blind administrator should be used. This can be achieved through the use of a blind procedure or a blinded photo array procedure (e.g. the folder shuffle method).
5. Because research shows the sequential presentation of live lineups and photo arrays is less likely to result in misidentification and carry very little risk of increasing the likelihood of failure to identify the suspect, a sequential presentation should be used.

C. Selecting Fillers

All persons in the photo array or live lineup should be of the same sex and race and should be reasonably similar in age, height, weight, and general appearance. Ideally, the characteristics of the filler should be consistent with the description of the perpetrator provided by the witness(es). Where there is a limited or inadequate description of the perpetrator provided by the witness(es), where the description of the perpetrator differs significantly from the appearance of the suspect, where a witness has provided a highly detailed description, or where the witness's description of the perpetrator or the suspect has a highly distinctive feature, fillers should be chosen so that no person stands out in the live lineup or photo array.

D. Explaining that the Perpetrator May or May Not Be Present

Because witnesses may be under pressure to identify a suspect, they should be informed that the suspect may or may not be present in a live lineup or photo array and that the person presented in a show-up may or may not be the perpetrator.

E. Explaining that the Investigation will Continue

The administrator should also explain to the witness that the investigation will continue, regardless of whether an identification is made, as another way of alleviating pressure on the witness to identify a suspect.

F. Witness Contamination

Precautions must be taken to ensure that witnesses do not encounter suspects or fillers at any time before or after the identification procedure. Avoid multiple identification procedures in which the same witness views the same suspect more than once. When showing a different suspect to the same witness, do not reuse the same fillers from a previous live lineup or photo array shown to that witness. Witnesses should not be allowed to confer with each other before, during, or after the identification procedure. Ensure that no one who knows the suspect's identity is present during live lineup or photo array procedure. In some live lineups, exceptions must be made to allow for the presence of defense counsel.

G. Documenting the Procedure

In order to strengthen the evidentiary value of the identification procedure, it should be documented in full. Video documentation is the preferred method. Audio recording is the preferred alternative. If neither method is employed, then the reason for not video or audio recording should be documented.

IV. Sample Standard Operating Procedures

The procedures which follow have been designed to: (a) reduce erroneous eyewitness identifications, (b) enhance the reliability and objectivity of eyewitness identifications, (c) collect and preserve eyewitness evidence properly, (d) respect the needs and wishes of victims and witnesses, and (d) address the needs of witnesses with limited English proficiency, where applicable.

In order to choose among the various identification methods, a brief description of each method follows in order of most preferred method to least preferred. Once the appropriate method is selected, the administrator should go directly to the Sample Standard Operating Procedures for that particular method. In any given situation only one set of Sample Standard Operating Procedures applies.

A. Descriptions of Eyewitness Identification Methods

1. Sequential, Blind Photo Array – photo arrays where the photographs are presented one at a time to the witness or victim by a person who does not know who the suspect is. This method requires a preparer who may be familiar with the case and an administrator who does not know the identity of the suspect.
2. Sequential, Blinded Photo Array – photo arrays where the photographs are presented one at a time to the witness or victim by a person who knows who the suspect is, but who takes steps (putting the photographs in folders and shuffling them) to avoid knowledge of which person the witness or victim is looking at. This method

typically involves an administrator who is familiar with the case and knows who the suspect is.

3. Sequential Live Lineup – live lineups where the persons in the live lineup are presented one at a time to the witness or victim. This method requires a preparer who may be familiar with the case and an administrator who does not know the identity of the suspect.
4. Show-up – procedure where the witness or victim is presented with a single suspect and asked to identify whether that suspect is the perpetrator. This procedure can be carried out by any officer.