

# CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

July 30, 2007 [CORRECTED]

## RESPONSE TO “WHITE PAPER” OF THE LOS ANGELES COUNTY DISTRICT ATTORNEY’S OFFICE OPPOSING SB 511 AND SB 756.

### THE COMMISSION

In its “[White Paper](#)” released July 10, 2007, the Los Angeles District Attorney criticizes the California Commission on the Fair Administration of Justice for not limiting its study of wrongful convictions to California cases, and for not demonstrating “a broken system crying out for drastic modifications.” Using flawed statistical analysis, the White Paper claims that California has a conviction accuracy rate of 99.9999%, thus no reforms to improve the accuracy of the system are warranted.<sup>1</sup>

While the Commission is charged with making recommendations to ensure that the application and administration of criminal justice in California is just, fair and accurate, the Commission has been greatly assisted by research that has taken place throughout the United States. In fact, it was this research that led the California State Senate to create the Commission in the first place. Senate Resolution No. 44, adopted August 27, 2004, refers to the fact that 100 Americans sentenced to death have been exonerated, and to the “thorough, unbiased study and review in other states” that has resulted in recommendations for significant reforms to the criminal justice system. The suggestion that California is somehow immune from the problems that have plagued the criminal justice system throughout the United States, such as mistaken identification (particularly in cross-racial identifications) or

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<sup>1</sup> Frankly, it is surprising to see these objections emanate from the Office of the Los Angeles County District Attorney. The same arguments could have been advanced to oppose the reforms in the use of jail snitches enacted in the wake of the Leslie White scandal in 1989, or the reforms in Brady policy adopted after the Ramparts scandal of 2000. The Los Angeles District Attorney moved to set aside over 100 wrongful convictions based on tainted evidence after the Ramparts scandal. Those 100 cases were certainly less than .1% of convictions obtained during the same period. The Commission noted the significant reforms adopted by the Los Angeles County District Attorney’s Office after these scandals, and recommended many of them be adopted on a statewide level. To now suggest that a demonstration of a “broken system crying out for drastic modifications” should be a prerequisite to any criminal justice reform in California seems inconsistent with the long history of cooperative reform and improvement which has characterized the Los Angeles County District Attorney’s Office. It should be noted that the Los Angeles County District Attorney’s Office has endorsed SB 609, the Commission sponsored legislation to require the corroboration of jail snitch testimony. The Commission is grateful for that support.

false confessions produced by coercive interrogation techniques, is simply wrong.

The White Paper suggests that the entire universe of wrongful convictions in California consists of the nine California DNA exonerations included in the 200 exonerations achieved by the New York-based Innocence Project, then compares that to 7 ½ million defendants convicted over the past 20 years to conclude “the state has a conviction accuracy rate of 99.9999%.” Such a claim is ludicrous for three reasons. First, it suggests that we need not concern ourselves with the fairness of convictions where the defendant cannot conclusively establish his or her innocence via DNA testing. When a conviction is set aside because exculpatory evidence was withheld from the accused, or because an involuntary confession was admitted, it is a “wrongful conviction” whether the accused was guilty or not. A conviction based upon tainted evidence, prosecutorial misconduct, or defense lawyer incompetence is not an “accurate” conviction. Secondly, it dramatically understates the number of exonerations and wrongful convictions occurring in California. The [Commission’s Report of April 13, 2006](#) regarding eyewitness identification procedures noted that University of Michigan researchers identified 27 California cases in a 15 year period in which an official declaration of “not guilty” followed a prior conviction for murder or rape. The Commission noted that “unexposed mistaken identification could be present in other convictions that heavily rely upon eyewitness identifications, such as robbery cases where DNA evidence is not normally present.” Third, the appropriate measure of wrongful convictions is not to compare them to the total universe of all convictions, but to the universe of convictions where guilt was contested, or a guilty plea was coerced. The number of wrongful convictions obtained by pleas of guilty is unknown, although most of the convictions obtained in the Ramparts scandal were guilty pleas. In California, fewer than 3% of felony criminal cases are tried. The true measure of accuracy is the proportion of *these* cases that result in wrongful conviction.

Ultimately, however, the Commission has not set out to demonstrate a “broken system crying out for drastic modifications.” If that were the threshold standard to justify any changes in our criminal justice system, no reform would ever be achieved. For the Commission, the question is not whether the system is “broken;” the question is whether the system can be improved. In looking for improvement, we should not ignore the experience

of other states, or the credible research being conducted throughout the United States.

Every time the system makes a mistake by convicting the wrong person, it deprives an innocent person of liberty, it leaves the actual perpetrator free to commit other crimes, and it exposes the county to potential liability in multi-million dollar lawsuits. If these injustices can be avoided by modest reforms in how evidence is collected, it will be worth the cost. We should not wait to act until “a broken system cries out for drastic modifications.”

## THE AVAILABILITY OF DNA TESTING

The White Paper suggests that the current availability of DNA testing obviates the need for any improvements in the criminal justice system, because future defendants will be able to utilize this testing to establish their innocence. Thus, there is no reason to fear that the errors that led to these wrongful convictions will recur.

As the Commission’s May 8, 2007 [Report on Scientific Evidence](#) noted, testing of DNA evidence represents less than 5% of the investigative work of California crime labs. DNA testing to identify the perpetrator of a crime is available in a very small proportion of cases. To suggest that it can be relied upon to completely eliminate the problem of wrongful convictions is misleading.

Erroneous misidentification, false confessions, perjuring jail snitches, prosecutorial misconduct, defense lawyer incompetence and faulty forensic science are not limited to cases in which DNA testing is available. To say these problems have been exposed in cases where DNA exonerations have occurred, therefore these are the only cases where these problems are likely to occur, defies common sense. The cause of wrongful convictions is not the unavailability of DNA; it is the use of suggestive identification procedures, coercive interrogation techniques, reliance upon unreliable witnesses, withholding exculpatory evidence, incompetent defense lawyers and use of unreliable forensic evidence. DNA occasionally exposes these miscarriages of justice, but it does not prevent them where it is not available.

## ANALYSIS OF SB 511

The White Paper identifies twelve “objectionable features” of SB 511, the Commission-sponsored legislation to require audio recording of police interrogation in violent felony cases. Most of these so-called “objectionable features” are based upon a misreading of the proposed statute or a misunderstanding of its effect.

1. It is suggested there is no “manifest justification” for the bill because the Commission found no pattern of wrongful convictions traceable to unrecorded false confessions. This objection is merely semantic. The Commission identified eight California cases in which false confessions were extracted. The fact that charges were dismissed prior to conviction in these cases does not mean no injustice occurred. As the Commission noted, “even where charges do not result in conviction, the pendency of charges based upon false confessions can impose tremendous burdens upon the accused and their families, as well as the victims and their families. The accused is often in custody for months prior to being released.” [Report and Recommendations Regarding False Confessions](#), p.3. The Commission’s charge is not limited to addressing cases of wrongful conviction. It is broadly charged with examining “ways of providing safeguards and making improvements in the way the criminal justice system functions,” and making “any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate.”

2. The White Paper suggests the definition of “custodial interrogation” to include questioning after a suspect “is or should be” advised of his rights creates confusion because it makes no provision for situations in which one who is not in custody is advised of his rights, or the law permits questioning of one in custody without advice of rights. First, this ignores the statutory provision that recording is only required when the interrogation takes place in a fixed place of detention. Secondly, it is abundantly clear that if a Miranda warning is not required, such as in the case of the public safety exception, or questioning by an undercover officer, the recording requirement will not apply.

3. The White Paper argues that evidentiary hearings will be required to determine if a suspect “should have been” advised of his rights, multiplying litigation and creating delays in the resolution of cases.

The definition of “custodial interrogation” in SB 511 mirrors the definition utilized by the Courts in administering the requirement of *Miranda v. Arizona*. If *Miranda* requirements were not met, there is likely to be a suppression motion and evidentiary hearing whether the interrogation was recorded or not. Thus, it is difficult to imagine how the recording requirement would *increase* the need for evidentiary hearings. The existence of a tape recording would resolve any disputes as to whether an appropriate warning was given and a waiver took place, thus *reducing* the burdens of evidentiary hearings that are currently occurring.

4. The White Paper suggests that the requirement that officers record interrogation may subject them to criminal prosecution under Government Code Section 1222, or civil liability under *Carlo v. Chino*, if they do not, thus imposing increased expenses to defend lawsuits.

California Government Code Section 1222 provides:

*Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.*

It is unlikely that Section 1222 could be applied to the SB 511 requirement that an officer conducting a custodial interrogation make an electronic recording. Enforcement of this requirement is not contemplated by civil or criminal liability of the individual officer, but by a cautionary instruction to the jury in considering the results of an unrecorded interrogation. Even if an officer fails to make a recording and none of the exceptions apply, a subsequent statement remains admissible. The only consequence, and hence the only “mandate,” is that a cautionary instruction be given to the jury. An apt analogy would be the enforcement of *Miranda* or search and seizure requirements by means of the exclusionary rule. If an officer fails to give *Miranda* warnings, or fails to give notice of his authority and purpose prior to forcible entry to execute a search warrant, pursuant to Penal Code Section 1531, the evidence may be suppressed. But the Commission is unaware of any case in which an officer was criminally prosecuted for such failures.

Even if Section 1222 were applied to an officer’s failure to record a custodial interrogation, it would not apply to an officer who negligently

failed to record a custodial interrogation under S.B. 511. It would only apply to an officer who, knowing that the law requires recording, deliberately chose not to do so.

In *Carlo v. Chino*, 105 F.3d 493, 499-502 (9<sup>th</sup> Cir. 1997), the court upheld a trial court's finding that a law enforcement officer had violated the defendant's 14<sup>th</sup> amendment liberty interests by denying a statutorily required post booking telephone call, because incommunicado detention deprives one of a substantial liberty interest. It is highly unlikely that the rationale of *Carlo v. Chino* could be applied to SB 511, because the statute does not *mandate* the recording of interrogation; it merely mandates a cautionary instruction to the jury. Such a mandate would not directly affect a liberty interest. In subsequent cases, the Ninth Circuit Court of Appeals has limited the doctrine of *Carlo v. Chino* to statutes that mandate an explicit outcome, such as the requirement that arrestees be allowed to make three telephone calls within three hours of arrest. *Valdez v. Rosenbaum*, 302 F.3d 1039 (9<sup>th</sup> Cir. 2002).

5. SB 511 provides that the recording requirement will not apply if a suspect states he will only talk to police if the statement is *not* recorded. Noting that the Ninth Circuit has ruled that such a refusal constitutes a "selective invocation" of *Miranda* rights, the White Paper claims that SB 511 "builds in" a selective invocation.

This is nonsense. A willingness to talk but not to be recorded will trigger a "selective invocation" of *Miranda* rights with respect to recorded statements whether this statute is enacted or not. Nothing in the statute will encourage suspects to make such requests with greater frequency. In *Arnold v. Runnels*, 421 F.3d 859 (9<sup>th</sup> Cir. 2005), the Court simply held that a *tape recording* of the defendant saying "no comment" was not admissible after the defendant refused to be recorded, even though his unrecorded statements were admissible. If a recording is made despite the defendant's refusal to be recorded, nothing in SB 511 will affect the admissibility of that recording, although it's exclusion may be required by *Arnold v. Runnels*. The only effect of SB 511 will be to *allow* the admission of an *unrecorded* statement without a cautionary instruction if such a request is documented.

6. The White Paper suggests that by including all homicides, the statute would also apply to misdemeanor vehicular homicide, rendering the statute overbroad. The argument is made that there is no evidence an unreliable

confession has ever resulted in wrongful conviction in a misdemeanor manslaughter case.

There is no particular reason why misdemeanor manslaughter should be treated differently than other homicides. It is not the nature of the crime that determines whether there is a risk of unreliability. Ideally, interrogation with respect to all crimes would be recorded. Pragmatically, however, a line must be drawn, and the Commission concluded that the inclusion of all homicides and violent felonies would be an appropriate line to draw.

7. The White Paper argues that SB 511 will require litigation of what was said while a tape was being reloaded, or after the tape was turned off.

S.B. 511 requires the recording of any “custodial interrogation.” Custodial interrogation is carefully defined in Section 859.5(d)(1) to mean “express questioning or its functional equivalent that is conducted by a law enforcement officer from the time that the suspect is, or should be, informed of his or her rights to counsel and to remain silent, until the time that the questioning ends.” If an officer continues questioning after the tape is turned off, the interrogation is not over. If a suspect volunteers a statement that is not responsive to express questioning or its equivalent, the requirement of recording does not apply. Litigation will only be invited if officers continue custodial interrogation when the tape is not running. Officers will be trained to assure that off-tape interrogation does not occur.

8. The White Paper argues that the requirement to preserve tapes until habeas claims are exhausted will impose an enormous archiving burden upon law enforcement.

The current language of S.B. 511 anticipates this problem by permitting the interrogating entity to make copies of the electronic recording “in a different format.” This will permit the conversion of tapes to digital format, which takes up very little storage space. The Commission collected information on the [available technology of digital storage](#). Many law enforcement agencies already preserve police reports, scientific evidence and recordings indefinitely, to preserve their ability to respond to false claims of misconduct. California Penal Code Section 1417.9 currently requires preservation of biological material “for the period of time that any person remains incarcerated” in the case. Thus, the archiving problem is hardly

overwhelming, and in fact will become even easier with advancing technology.

9. The White Paper suggests preservation of tapes indefinitely for uncharged homicides would impose an undue burden on law enforcement.

The burden is not undue. The selective destruction of some tapes and not others would be fraught with peril, and result in very little savings in time or space. The prosecution of homicide cases twenty or thirty years after the initial investigation based on DNA “cold hits” has become a common occurrence in California. The destruction of recorded interrogations in such cases would seriously compromise the fairness of subsequent prosecutions.

10. The White Paper argues that police departments are left to guess whether they must preserve both the original as well as a copy in another format. The statute requires no guessing. It is abundantly clear that if the copy is true, accurate and complete, destruction of the original will not affect the admissibility of the copy without a cautionary instruction.

11. The White Paper argues that the provision that video tape, if used, must capture images of both the suspect and officers is vague, since it fails to specify what kind of images are required. This oversight has been addressed in an author’s amendment dated July 5, 2007. The statute now provides that “If videotaping is used, the camera shall be positioned to capture *facial* images of the suspect and the interrogators.”

12. The White Paper argues that the bill makes no provision for funding “massive costs” to implement its requirements.

The Fiscal Summary for S.B. 511 by the Senate Appropriations Committee acknowledges that the bill creates a state mandate, and law enforcement agency expenses in implementing it would be reimbursed by the State’s General Fund. Reimbursement as a state mandate will actually be a substantial benefit for the departments that are already recording police interrogation on a voluntary basis. The costs of implementing a recording requirement can hardly be described as “massive.” Audio tape recorders are readily available for less than \$30. Surely, it does not impose a massive burden on police departments to train officers how to turn a tape recorder on and off. The instructions can be readily added to current police training on how to comply with, or evade, the requirements of *Miranda v. Arizona*.

Many police departments in California report that they already record a majority of custodial interrogations. These departments include the County Sheriffs of Alameda, Butte, Contra Costa, El Dorado, Orange, Placer, Sacramento, San Bernardino, San Joaquin, Santa Clara (including all police agencies operating in Santa Clara County), Ventura and Yolo Counties, and municipal departments for Sacramento, San Diego, San Francisco and San Jose. All of these departments already have the equipment, and have already trained their officers. Implementation of recording police interrogation has not imposed “massive costs” upon these departments.

#### CONCLUSION RE: SB 511

S.B. 511 will actually benefit law enforcement, by providing new means to rebut false and spurious claims that interrogation was coercive or improperly conducted. As the Commission noted in its [Report and Recommendations Regarding False Confessions](#):

“There are a number of reasons why the taping of interrogations actually benefits the police departments that require it. First, taping creates an objective, comprehensive record of the interrogation. Second, taping leads to the improved quality of interrogation, with a higher level of scrutiny that will deter police misconduct and improve the quality of interrogation practices. Third, taping provides the police protection against false claims of police misconduct. Finally, with taping, detectives, police managers, prosecutors, defense attorneys and judges are able to more easily detect false confessions and more easily prevent their admission into evidence. Indeed, these reasons have convinced over 500 police departments throughout the country to require the taping of interrogations. Thomas Sullivan described for the Commission his efforts to document the police experience with recording custodial interrogations.<sup>2</sup> He informed the Commission that a substantial number of police departments in California already report that

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<sup>2</sup> See Sullivan, “Police Experiences with Recording Custodial Interrogations,” Special Report No. 1, Northwestern University School of Law Center on Wrongful Convictions (Summer, 2004); Sullivan, “Electronic Recording of Custodial Interrogations: Everybody Wins,” 95 Journal of Criminal Law and Criminology 1127 (2005); Sullivan, “Electronic Recordings of Custodial Interrogations,” XIX The Chief of Police, No. 6, p. 17 (Nov./Dec. 2005).

they currently record a majority of custodial interrogations.<sup>3</sup> Experienced detectives from these departments report great satisfaction with the results of recorded interrogations, which often lead to higher conviction rates, less time litigating unwarranted suppression motions, and fewer claims of police misconduct.”

## ANALYSIS OF SB 756

The White Paper identifies ten “objectionable features” of SB 756, the Commission-sponsored legislation to develop guidelines for policies and procedures with respect to the collection and handling of eyewitness evidence in criminal investigations. Most of these so-called “objectionable features” are addressed to the Commission’s recommendations in its [Report and Recommendations Regarding Eyewitness Identification Procedures](#), dated April 13, 2006, rather than to features of SB 756. Such objections miss the point of S.B. 756, which is to enlist broad participation in the process of *developing* guidelines. The bill does not mandate wholesale endorsement of the procedures recommended by the Commission, but merely requires that those recommendations be considered. S.B. 756 assures that local law enforcement agencies will be consulted by the Department of Justice in developing the guidelines, and requires legislative approval before the guidelines can be enforced. There is a great deal of credible and persuasive research available that addresses the risks of erroneous eyewitness identification and how those risks can be reduced. To stick our heads in the sand and refuse even to convene a consultative process to examine what best practices should be implemented in California would be to ignore the enormous risks of wrongful convictions.

1. Just as it does with SB 511, the White Paper suggests there is no “manifest justification” for SB 756 because the Commission found no pattern of wrongful California convictions traceable to improper police manipulation of ID procedures. This argument misconstrues the justification for guidelines to incorporate best practices. The concern is not “police manipulation.” The Commission does not suggest that identification procedures are being improperly manipulated. Best practices such as double blind administration and sequential presentation are designed to address the risks of unintended suggestiveness, as demonstrated by a substantial body of

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<sup>3</sup> These departments include the County Sheriffs of Alameda, Butte, Contra Costa, El Dorado, Orange, Placer, Sacramento, San Bernardino, San Joaquin, Santa Clara, Ventura and Yolo Counties, and the municipal police departments for Sacramento, San Diego, San Francisco, and San Jose.

credible research. Every study of the causes of wrongful convictions has concluded that mistaken eyewitness identifications, especially in cross-racial cases, is the leading cause of erroneous convictions. There is no reason to believe eyewitnesses or police officers in California are not subject to these influences.

In issuing its Training Key #600, the International Association of Chiefs of Police concluded:

*“Of all investigative procedures employed by police in criminal cases, probably none is less reliable than eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately.”*

The “proper precautions” suggested in the IACP Training Key are nearly identical to those recommended by the California Commission on the Fair Administration of Justice. For example, the IACP Training Key provides:

*“To prevent these suggestive techniques and avoid any tip-offs about the suspect’s identity, police lineups should be administered by an officer who does not know which person in the lineup is the actual suspect.”*

*“Therefore, studies suggest that sequential presentation of suspects in both photo arrays and lineups is the better approach because witnesses tend to make absolute rather than comparative judgments when viewing suspects individually.”*

2. The White Paper objects to the finding that the recommended procedures have proven effective in other jurisdictions. Citing one study in Illinois, and suggesting “a similar program in Minnesota came to the same conclusion,” the White Paper claims these procedures have been “discredited.”

There is well over twenty years of research and study on the double-blind, sequential line-up. There was a veritable ocean of research before the

Illinois study, and there has been research since. In all this research and study, all the results point to the same conclusion: the double-blind, sequential method is the most accurate. There is a single exception in all this research – the Illinois study. Accordingly, even if the Illinois study was beyond reproach, it remains a tiny, anomaly pitted against a vast compendium of independent research that unanimously supports the use of double-blind, sequential line-ups. There is probably not a single other criminal justice protocol that doesn't have some critic, or some potential disadvantage somewhere. For example, there are academics who believe fingerprints are invalid. Nonetheless, we use fingerprints because overwhelmingly the data supports their use. Based in part upon this reasoning, the Attorney General of the State of Wisconsin recently published [a paper considering the Illinois study and re-affirming their use of the double-blind, sequential method.](#)

While this is not the time to exhaustively discuss the limitations of the Illinois study, it must be noted that since 2004, the Illinois study has not fared well when reviewed by fellow scientists. In fact, the Illinois study was recently reviewed by seven prominent scientific scholars, including Nobel Laureates.<sup>4</sup> None of these scholars had any prior history with the issues relating to eyewitness identification, and consequently none of the scholars can be accused of having a pre-existing bias towards one procedure or another. These scientists were merely asked to evaluate the methodology of the Illinois study. They uniformly concluded that the Illinois study was centrally flawed and as a result “do not inform everyday practices in a useful matter.”

The White Paper description of the Minnesota program is inaccurate. Hennepin County in Minnesota, where this study was conducted, is still using double-blind sequential identification procedure with excellent results. See [“Protecting the Innocent / Convicting the Guilty: Hennepin County’s Pilot Project in Blind Sequential Eyewitness Identification,” 32 Wm. Mitchell Law Review 1 \(2005\)](#), which concludes:

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<sup>4</sup> Pre-publication copy, *Studying Eyewitness Investigations in the Field, Law and Human Behavior*, by Daniel Schacter, Harvard University; Robyn Dawes, Carnegie Mellon University, Larry Jacoby, Washington University, Daniel Kahneman, Woodrow Wilson School, Princeton University, Richear Lempert, University of Michigan Law School, Henry Roediger, Washington University, Robert Rosenthal, University of California-Riverside.

As a follow-up to . . . the success of the pilot project, the Hennepin County Attorney's Office plans to encourage voluntary adoption of the blind sequential protocol throughout the county, as well as in other jurisdictions within the state.

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Likewise, there is good reason to expect that new eyewitness identification procedures will help improve police investigations, strengthen prosecutions and better protect the rights of innocent people while convicting those who are guilty. The new lineup protocol will give everyone in the criminal justice process, not only police and prosecutors, but also judges and jurors, a clearer view of the truth of what the eyewitness observed. This leads to more confidence in the result, which is good for public trust and accountability in the criminal justice system.

In sum, if one only knew about the Illinois study, then this objection is understandable. However, the Illinois study is deeply flawed and has not stood up to peer review. Even without wading into the academic debate, it is beyond doubt that the vast weight of the evidence supports the use of the double-blind, sequential protocol.

Finally, of course, this is not an objection to SB 756, which does not require the adoption of the double-blind sequential method. The bill only requires the adoption of guidelines "consistent with the reliable evidence supporting best practices."

3. The White Paper asserts that smaller police departments will lack the personnel to implement a double-blind procedure in the administration of line-up or photo array identifications.

First, S.B. 756 does not mandate adoption of double-blind procedures. It merely requires that the recommendations of the Commission be considered. The Commission recommendation was that double-blind procedures be used "whenever practicable." In the consultative process which S.B. 756 establishes, the practical difficulties which individual departments might encounter can be addressed, and guidelines can be drafted which take those difficulties into consideration.

Second, this objection ignores the experience of many departments that have already adopted a policy requiring double-blind administration of identification

procedures. Santa Clara County, under the leadership of recently retired District Attorney George Kennedy, adopted [a lineup protocol](#) requiring double-blind and sequential identification procedures.<sup>5</sup> The Commission learned from Deputy District Attorney David Angel of the Santa Clara County District Attorneys Office that all law enforcement agencies in Santa Clara County agreed to the protocol without dissent, and the protocol has been successfully implemented for nearly four years without complaint. The entire State of New Jersey, much of Wisconsin and North Carolina, and a host of other jurisdictions have reformed their procedures to include blind administration, and have found ways to accommodate these logistical concerns.

Finally, the White Paper objection assumes that the administrator of identification procedures will be a sworn officer. That assumption is unwarranted. Police Departments will have great flexibility in implementing a double-blind procedure, if it is required, without burdening the demands on their sworn officers.

4. The White Paper suggests both the handling officer and the double-blind administrator would have to be subpoenaed to testify, increasing overtime costs.

Current experience suggests it would be a rare occurrence in which the testimony of the double-blind administrator regarding a prior out of court identification would be necessary. At the preliminary hearing stage, Penal Code Section 872(b) and Evidence Code Section 1203.1 would permit the handling officer to present hearsay evidence regarding the identification procedure.

5. Similar to Objection No. 3, the White Paper suggests committing additional officers to identification procedures impacts public safety by removing them from the streets. The response to Objection No. 3 addresses this concern.

6. The White Paper suggests that collective knowledge and experience of officers who work cooperatively will be impaired if there is fear of “tainting” a double-blind administrator with knowledge of the suspect’s identity.

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<sup>5</sup> Police Chiefs’ Association of Santa Clara County, *Line-up Protocol for Law Enforcement*, Sept. 12, 2002.

It is highly unlikely that officers will be inhibited in discussing cases or sharing information. No such result has been reported in any of the jurisdictions that have implemented double blind procedures. In some small jurisdictions where officers are more likely to be familiar with more cases, or where they have less manpower, assistance can be sought from neighboring departments. At least one department which has instituted this reform does this routinely at no extra cost. If this is not possible, there may be a small percentage of cases where double-blind administration is “not practicable,” and would not be required. However, the option of effecting blind administration through a folder shuffle method, emerging laptop technology, or through a dedicated administrator who need not be an officer can prevent this from being an issue. The collaborative process of developing guidelines with full participation by law enforcement can address unintended consequences, and ways to alleviate or prevent them.

7. The White Paper argues that the retraining of officers and prosecutors to implement any new procedures and meeting new objections of defense lawyers will increase the delays and expense of final adjudication.

Concerns about resources and expense are always legitimate in this time of scarcity. Nonetheless, the double-blind, sequential procedure has been implemented in many jurisdictions throughout the country. The training required is fairly minimal since the changes are relatively small. The benefit in preventing an innocent person from being convicted is almost beyond calculation. Finally, the double-blind, sequential procedure has not been successfully challenged in any jurisdiction. In Santa Clara County, not a single defense motion has even been made challenging the new procedure, in no small part because they are so widely considered fair and accurate.

8. The White Paper repeats Objection No. 1, asserting that the need for change has not been justified by a showing of widespread dishonesty or incompetence on the part of California police officers.

As previously noted, dishonesty or incompetence is not the issue. The problem is the susceptibility of eyewitnesses even to unintended suggestiveness. Law enforcement officers throughout the United States have responded to the need for greater accuracy in eyewitness identifications without defensive delusions that their personal integrity is being attacked, and it is unfortunate that the Los Angeles County District Attorney’s office seeks to promote such delusions.

In 1998, U.S. Attorney General Janet Reno assembled 34 professionals from throughout the United States and Canada to form a Technical Working Group for Eyewitness Evidence. Drawing upon the research of psychologists as well as the practical perspectives of prosecutors, defense lawyers and police investigators, the Working Group produced a comprehensive guide for law enforcement to increase the accuracy and reliability of eyewitness evidence and decrease the numbers of wrongful identifications.<sup>6</sup> Though the guidelines were not mandated, the Department of Justice recommendations have been very influential in other states. In the State of New Jersey, for example, Attorney General John J. Farmer promulgated Guidelines for identification procedures based upon the U.S. Department of Justice recommendations, for implementation by all law enforcement agencies in the state.<sup>7</sup>

Many of the Commissions established in other states to carry out a mission similar to our Commission, examining the causes of wrongful convictions and recommending reforms to avoid wrongful convictions in the future, have recommended the adoption of guidelines for the conduct of lineups, show-ups and photo spreads similar to the U.S. Department of Justice Guidelines. This includes the Governor's Commission on Capital Punishment established in Illinois,<sup>8</sup> the North Carolina Actual Innocence Commission,<sup>9</sup> the Innocence Commission for Virginia,<sup>10</sup> and the Wisconsin Innocence Task Force.<sup>11</sup> In addition, the American Bar Association adopted a Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures in August, 2004, and urged all state and local governments to adopt detailed guidelines for conducting lineups and photo spreads in a manner that maximizes their likely accuracy, and to provide periodic training to implement them.

9. The White Paper objects to the Commission recommendation that where single subject show-ups are used in the field, "where there are multiple witnesses they should be separated, and lineups or photo spreads should be

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<sup>6</sup> U.S. Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, NCJ 178240 (October, 1999).

<sup>7</sup> New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 18, 2001).

<sup>8</sup> Report of the Governor's Commission on Capital Punishment, State of Illinois, Recommendations 1-16 (April 2002). The Commission also considered Mecklenburg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* (March 7, 2006).

<sup>9</sup> North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification.

<sup>10</sup> Innocence Commission for Virginia, *A Vision for Justice*, pp. 25-42.

<sup>11</sup> Avery Task Force, *Eyewitness Identification Procedure Recommendations*.

used for remaining witnesses after an identification is obtained from one witness.” It is suggested that this “increases the chances that an innocent person might be wrongly arrested, because a mistaken identification by the first witness was not allowed to be promptly disclaimed by the other witnesses.”

Again, S.B. 756 does not mandate the adoption of this or any other procedure recommended by the Commission. It simply requires that these recommendations be “considered.”

The recommendation that a single witness make the initial identification only applies at “show-ups”. Everyone within the criminal justice system knows that “show-ups” are an essential tool for officer’s on the streets to quickly narrow down an investigation. However, everyone also knows that “show-ups” are problematic since they are so suggestive. When a procedure, such as a show-up, plays an important role but comes at a price, then a compromise is generally advisable. The Commission’s recommendation provides just such a compromise.

Furthermore, the Commission’s recommendation is that once a witness, or witnesses, have provided the police *with probable cause to make an arrest*, then the remaining witnesses, if any, are taken down to the station to view a line-up. Thus it is incorrect to state that the Commission’s recommendation mandates an arrest after a single identification. If the single witnesses identification is weak, law enforcement would remain empowered to run a second show-up. It is only once the investigation has crossed the probable cause threshold, that all further identifications are conducted with the full safeguards of a line-up.

This protocol protects both the innocent suspect and increases the likelihood of apprehending the true suspect. We all know that if a witness picks out the wrong person at a show-up, that witness is essentially useless at any subsequent line-up containing the true suspect.

The objection is correct in noting that in a small number of cases, an innocent suspect might be arrested only to be later cleared at the station. However, the Commission’s recommendation will significantly reduce the chance that an innocent person is actually convicted of crime for which he or she is innocent. Similarly, the Commission’s recommendation increases the chances of apprehending the true criminal. As with many aspects of

criminal justice, any policy must balance different concerns. While the concern expressed is valid, when it is weighed against the goal of preventing the conviction of the innocent and the conviction of the guilty, the recommendation makes sense.

10. The White Paper objects to delays in making identifications if witnesses are required to await a stationhouse lineup rather than making a “roll-by” identification.

There is clear evidence that show-ups, or “roll-by” identifications, are more likely to yield false identifications than properly conducted lineups. See Wells, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Human Behavior 603, 631 (1998). While it is true that delay increases the risk of inaccuracy, the solution is to reduce the delay, not to increase the use of prompt but suggestive procedures. Part of the solution to this problem may be supplied by emerging technology. New software programs usable on laptops combined with digital camera technology enable the prompt creation of on-the-scene video or photographic lineups by either sequential or simultaneous methods.

#### CONCLUSION RE: SB 756

S.B. 756 assures that local law enforcement agencies and other affected criminal justice agencies will be consulted by the Department of Justice in developing guidelines, and requires legislative approval before the guidelines can be implemented. There is a great deal of credible and persuasive research available that addresses the risks of erroneous eyewitness identification and how those risks can be reduced. To stick our heads in the sand and refuse even to convene a consultative process to examine what best practices should be implemented in California would be to ignore the enormous risks of wrongful convictions.