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The Honorable Mark Ridley-Thomas
California State Senate
State Capitol, Room 4061
Sacramento, California 95814

SENATE BILL 756 (RIDLEY-THOMAS)
OPPOSE

Dear Senator Ridley-Thomas:

The Los Angeles District Attorney's Office is opposed to SB 756 for the reasons stated in the attached White Paper on the Recommendations of the California Commission on the Fair Administration of Justice.

I understand that John Van De Kamp, chair of the California Commission on the Fair Administration of Justice, will meet with District Attorney Steve Cooley in the near future. We look forward to further exploring the issues raised by Senate Bill 756 at that time.

Very truly yours,

STEVE COOLEY
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By

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Attachment

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"Good Intentions, Bad Laws"

**Critique of the Legislative Recommendations of the
"California Commission on the Fair Administration of Justice"**

WHITE PAPER

**COALITION OF CALIFORNIA LAW ENFORCEMENT
AND VICTIMS' PROTECTION GROUPS, including...**

THE COMMISSION

In response to the advent of DNA clearance of wrongfully convicted prisoners, Senate Resolution 44 in 2004 created the California Commission on the Fair Administration of Justice. The Commission was charged to study the criminal justice system "*in California*" to identify systemic failures that might cause wrongful convictions, and to recommend improvements.

As shown in greater detail in the attached summaries, the Commission proposes to mandate experimental eyewitness identification procedures that have already been shown to increase the risks of misidentification, and proposes minimizing the evidentiary use of confessions and increasing civil liability for police interrogators.

The Commission's recommendations on these subjects have generated pending legislation that will, if enacted, adversely affect public safety in California, while doing little to redress any identified shortcomings in California's criminal justice system.

"IF IT AIN'T BROKE..."

Although the Commission was instructed to study problems in *our* State's systems, most of the incidents of mistaken convictions relied on in the published recommendations purporting to identify *California* problems actually occurred in other states. The Commission concedes as much:

"The Commission began by reviewing the studies and reviews of wrongful convictions conducted in other states." (Report and Recommendations Regarding Eyewitness Identification Procedures, April 13, 2006.)

"None of the 111 cases [of false informant testimony] in the Center on Wrongful Convictions report took place in California." (Report and Recommendations Regarding Informant Testimony.)

"Of the eight California cases identified [in a national false-confession study of 125 cases], none of the defendants charged was convicted of the crimes to which they falsely confessed." (Report and Recommendations Regarding False Confessions, July 25, 2006.)

The New York-based "Innocence Project," which has used DNA analysis to exonerate 200 prisoners nationwide, reports that only 9 of those cases occurred in California (representing 4.5% of the total, from a state that has 10% of the country's population and 10% of its crime).

Over the past 20 years, approximately 7½ million defendants have been convicted of crimes in California. (DOJ Statistics.) That 9 cases of mistaken conviction have been identified indicates that the state has a conviction accuracy rate of 99.9999%.

During the same 20 years, California law enforcement officers have been held to clearance rates averaging 28% for the most serious crimes reported. (DOJ Statistics.) Existing restrictions imposed on law enforcement by constitutional, statutory and regulatory limitations reduce the risks of misidentifying a criminal suspect to the extent that serious and violent criminals are allowed to escape arrest and conviction in 72% of cases. This is already a very high social price to pay in order to minimize the risks of miscarriage of justice. The Commission has not shown factual support for its recommendations that would impose still further restrictions on the collection and evidentiary use of reliable evidence, and potentially allow even greater numbers of the guilty to continue to prey on the law-abiding.

The statistics cited above do not portray a broken system crying out for drastic modifications that would further impair the ability of law enforcement officers to solve crimes, inhibit ascertainment of the truth in criminal trials and ultimately threaten the public safety by allowing greater numbers of perpetrators to escape justice.

California cannot fix the problems in other states' criminal justice systems by tampering with our own laws. California cannot justify imposing unnecessary restrictions on the acquisition and use of evidence in *our* criminal cases by pointing to miscarriages of justice in other places.

No system that depends on human judgment will ever be infallible, and all prudent measures to make the system as accurate as is humanly possible are to be strongly supported. However, the Commission has not identified **systemic** failures that are currently presenting controllable risks of error in the California criminal justice system. There is no breakdown to be fixed.

IF IT'S ALREADY FIXED...

Twenty years ago, forensic DNA profiling was in its infancy, reportedly being used first in England in a 1988 murder case. Before it came into widespread use in California, 9 defendants were convicted of crimes of which they were later exonerated through DNA analysis. **But this technology is now available to prevent the same kind of miscarriage of justice from recurring, thanks to the leadership of California prosecutors, law enforcement and victims' rights groups in enacting Proposition 69.** The technology that cleared these 9 individuals is the same technology that will now keep investigators and juries from misidentifying future criminal perpetrators in the rare case in which that might otherwise have happened.

It is unnecessary to go back to "fix" yesterday's problems that can no longer occur precisely because of the same forensic advances that cleared the wrongly-convicted. A procedure by which convicted felons may obtain DNA testing is already in place, codified in Penal Code section 1405. Had the 9 defendants identified by the "Innocence Project" had access before

trial to the DNA profiling that eventually cleared them, they would not have been convicted. **Similarly-situated defendants now have such access;** therefore, there is no reason to fear that similar errors will recur, and no need to try to "fix" the historical limitations of a system that produced aberrant results in these 9 cases, *before* DNA evidence was routinely utilized.

OUTLOOK

The California Legislature has been very receptive to the Commission's recommendations. In 2006, the Legislature passed and sent to the Governor SB 171 (police interrogation restrictions) and SB 1544 (eyewitness identification restrictions). After law enforcement groups and officials pointed out the multiple problems with these bills from a public safety standpoint, Governor Schwarzenegger vetoed them both, declaring that the bills "circumvented the legislative process" and created "opportunities for those guilty of violent crimes to avoid punishment because of a technical loophole."

Replacement bills have been introduced and are making their way through the Legislature. They are SB 511 (interrogation) and SB 756 (identification). As demonstrated in the following summaries, these modified bills still represent **unjustifiable, unnecessary restrictions on police and prosecutors that will have far-reaching negative and dangerous impact on public safety**. Unless and until the objectionable features of these bills are removed, all Californians who are concerned with insuring public safety and maintaining the adversary system, in which judges make legal rulings and juries decide issues of credibility and guilt, should unite in opposition to these and any similar future bills.

SUMMARY OF PENDING BILLS

Analysis of SB 511 and Incorporated Commission Recommendations
(Latest text of bills: www.leginfo.ca.gov. Recommendations: www.ccfaj.org)

SUMMARY: *Absent exigency or technical malfunction, requires electronic recording of stationhouse and jailhouse custodial interrogations of juveniles and adults suspected of any homicide or any serious felony listed in PC § 667.5(c), unless the suspect refuses to talk on tape. If a court finds non-compliance, the jury must be instructed to "view with caution" an officer's testimony relating the suspect's statements.*

This bill has the following objectionable features:

1. The Commission found **no pattern of wrongful California convictions** traceable to unrecorded false confessions. **There is no manifest justification for this bill.**

2. "Custodial interrogation" is defined to mean questioning after a suspect "is or should be" informed of the rights to silence and counsel. But there are times when a suspect who is *not* in custody must nevertheless be so advised. *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822. And there are times when a person actually in custody may be interrogated by an undercover officer *without* giving an advice of rights. *Illinois v. Perkins* (1990) 496 US 292. What is the requirement in such instances? The bill makes no provision, which means **more guesswork and litigation** for police and prosecutors.

3. The question of whether or not a suspect "should" have been advised of his rights at a particular time will mean that **judges must hold hearings in every case** involving a suspect's statement, to determine whether a violation of this requirement occurred. Appeals and writs may then be based on the court's ruling. This will **multiply litigation** and cause **greater delays** in the resolution of cases.

4. Officers are "required" to comply with this statute. This may make them subject to criminal prosecution under GC § 1222 if they do not. They may be subject to **civil liability** under *Carlo v. Chino* (9th Cir. 1997) 105 F.3d 493, 499-502, for failing to comply with a state mandate that creates a liberty interest on the part of a prisoner. Cities, counties and officers will be forced to defend lawsuits and pay judgments, at **increased expense.**

5. The requirement of recording does not apply if the suspect says on tape or in writing that s/he doesn't want to talk on tape. The Ninth Circuit has held that such a refusal constitutes a "selective invocation" of *Miranda* right to silence. *Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 964. This statute **builds in a selective invocation** in those cases.

6. *All* homicides are included. This means recording in misdemeanor vehicular manslaughter cases, and archiving the tapes. There is no evidence that any unreliable confession has ever produced a single wrongful conviction in a misdemeanor manslaughter case. This provision is not only unjustifiable but also **overbroad**.

7. An interrogation is to be recorded "in its entirety." We will continue to **litigate issues** of what transpired off-tape and as tape was being turned over or reloaded. If the interrogation is over, the tape is turned off, and then the suspect or the officer says something else, is there a violation?

8. Tapes must be kept until habeas limits are exhausted, which is 15-20 years or never, if factual innocence is later claimed. This is an **enormous archiving project** for law enforcement agencies.

9. Tapes must be kept until the statute of limitation runs on uncharged crimes. Some crimes have no SOL. Even if the person was "suspected" but later cleared or the crime unfounded, the agency still has to **archive these tapes forever**.

10. The bill provides that the interrogating entity may make copies in other formats. And then what? Also keep the original? Destroy or recycle the original? The statute doesn't say, and police departments are left to **guess**.

11. Video tape, if used, must "capture images" of both suspect and officers. What kind of image? Visage? Profile? Is it enough if the tape shows everyone's back and the back of their heads? Vague and ambiguous, meaning **additional litigation**.

12. This bill makes no express provision for funding the **massive costs to cities and counties and to the state** to purchase recording/duplicating equipment and supplies, equip and wire interrogation rooms, hire and train recording technicians, acquire and maintain space for tape storage, and create and maintain retrieval systems. These significant added costs come at a time when limited law enforcement funds are badly needed to recruit and train more officers and to combat crime.

Analysis of SB 756 and Incorporated Commission Recommendations

SUMMARY: *As amended, SB 756 requires DOJ to "develop guidelines for policies and procedures" relating to eyewitness identifications, consistent with Commission recommendations. DOJ must then recommend legislation "to enforce the guidelines."*

Commission recommendations include "double-blind" and sequential procedures, where the officer conducting the ID does not know who the suspect is, and shows only one photo or person at a time, rather than in a group. Also, field "roll-by" showups are not to be used if police have PC to arrest. Multiple witnesses are not to be allowed at a "roll-by" showup once a witness has made an ID.

This bill has the following objectionable features:

1. The Commission found **no pattern of wrongful California convictions** traceable to improper police manipulation of ID procedures. **There is no manifest justification for this bill.**

2. SB 756 claims that the recommended procedures "have proven effective in other jurisdictions." In fact, **the opposite is true.** A year-long Illinois pilot project in 2004 in the police departments of Chicago, Joliet and Evanston demonstrated that **"the sequential double-blind method led to a lower rate of suspect identifications as well as a higher rate of known false errors."** (Report to the Legislature of the State of Illinois, Mecklenburg, March 17, 2006.) A similar program in Minnesota came to the same conclusion, and adoption of the "new" procedures was subsequently rejected on the basis of the demonstrated results. If California agencies were forced to adopt these discredited procedures, **clearance and conviction rates would decline**, with concomitant crime rate increases caused by those who escaped otherwise-lawful and accurate conviction.

3. The double-blind procedure recommended by the Commission (requiring that the officers showing photos or conducting a lineup not be the case investigators, but be additional officers who are **unaware** of the suspect's identity) creates numerous problems. This procedure assumes that every agency has the **personnel** to accommodate such a procedure. In fact, however, most police and sheriff's departments have between 5 and 15 sworn officers to cover the entire jurisdiction on all shifts and all days of the week. In these departments, every officer is likely to **know** who

the suspect in a given case is. Using a "double-blind administrator" to show pictures or to run a line would often mean calling in the next shift, or getting a deputy from a distant town to leave his or her post in order to assist with the ID. This would be **grossly inefficient and disruptive** in most jurisdictions. If, as often happens, multiple suspects commit a crime, the need for multiple blind administrators would multiply the problems.

4. Agencies must give comp time or overtime pay to officers who are subpoenaed or placed on-call as witnesses. If the prosecutor is forced to subpoena not only the handling officer but also one or more double-blind administrators, agency **overtime costs would predictably and greatly increase.**

5. Committing additional officers to identification procedures means pulling those officers away from other duties. This would impact public safety by putting **more officers in the station and fewer officers on the streets**, thereby lowering clearance rates and reducing public safety. Making witnesses wait for the arrival of another officer to conduct an ID procedure would be a source of frustration for the citizen-witness and adversely affect the working relationship between the officers and victims or witnesses. This was shown in the Illinois study.

6. Forbidding officers who routinely work cooperatively on cases from discussing their cases and suspects with each other for fear of "tainting" a double-blind administrator deprives the department of the **collective knowledge and experience** of all of its officers in solving crimes, and reduces the communication and collegiality among officers that are important to morale and operational efficiency.

7. Officers and prosecutors would have to be retrained on new procedures, and in meeting the new objections brought by defense attorneys who would inevitably question the reliability and fairness of "new" procedures (especially the more suggestive *sequential* presentation of photos and suspects) that have not received the time-tested courtroom validation that existing ID procedures already enjoy. This will mean **increased trial and appellate litigation** of these issues for years to come, greatly increasing the delays and expense of final adjudication.

8. The bottom line is that double-blind procedures are based on an **assumption that law enforcement officers** who are presently conducting thousands of identification procedures throughout California each year are **either dishonest or incompetent** in doing so. Whether the assumption is that officers are deliberately suggesting to the witness which of the

presented suspects or photos should be selected, or whether the assumption is that officers inadvertently influence identifications because they cannot handle the simple task of presenting photos or lineups in a fair and evenhanded manner, the assumption is not supported by factual findings. Moreover, either of these possibilities can be explored by defense counsel during cross-examination of the officer and the ID witness. There has been no showing that the adversary system has proven ineffective at identifying any unfairness that may have influenced an ID. And there certainly has been **no showing of widespread dishonesty or incompetence on the part of California peace officers** in this regard.

9. Another of the Commission's recommendations concerns the situation where two or more witnesses are available for a "roll-by" showup ID (where a possible suspect in a recent crime is detained in the field for prompt ID or elimination by drive-by viewing). The Commission recommends that once a single witness has made a tentative showup ID, the **other witnesses may not view the suspect** for confirmatory ID, but must await a lineup. This procedure would prevent officers from corroborating a single witness who might unforeseeably be unavailable to testify by the time of trial. Worse, this procedure would **increase the chances that an innocent person might be wrongly arrested**, because a mistaken ID by the first witness was not allowed to be promptly repudiated by the other witnesses. In such a case, the **wrong person might be taken into custody while the actual perpetrator escaped**.

10. The Commission also recommends that if police have PC to arrest a suspect detained in the vicinity of a recent crime, **no witnesses** be allowed to make a "roll-by" ID. Instead, eyewitness identification would have to await a later stationhouse lineup. In the meantime, the witnesses' memories fade, and if the wrong person was arrested, the **actual criminal escapes** because of the delay. In *Neil v. Biggers* (1972) 409 US 188, the Supreme Court said that the length of time between the incident and the opportunity to view the suspect is an important factor in assessing the accuracy and admissibility of a pretrial ID. The recommended procedure unnecessarily **diminishes the reliability** of the ID.

Given the number and magnitude of the problems adoption of these already-discredited procedures would cause, and in view of their inevitably-negative impact on public safety, there is no reason to codify a legislative preference for harmful, experimental changes to the time-tested, court-approved ID procedures now in use.