

# CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

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## Response to Opposition Letters to S.B. 609 (Romero), Corroboration of In-Custody Informants.

The opposition letters filed by the California District Attorneys Association [CDAA] and the Peace Officers Research Association of California [PORAC] raise four fundamental objections to the S.B. 609 requirement of corroboration of the testimony of in-custody informants.

First, the objection is made that the broad, sweeping language of S.B. 609 will prevent convictions in numerous serious criminal cases. CDAA: "By broadly prohibiting an entire class of evidence, SB 609 will make it more difficult to prosecute offenders, especially those who commit crimes while incarcerated." However, a survey conducted by the Commission in September, 2006, strongly suggests that California prosecutors would very rarely rely on the uncorroborated testimony of an in-custody informant to secure a criminal conviction. The Commission's Report and Recommendations Regarding Informant Testimony<sup>1</sup> notes that the policy of the Los Angeles County District Attorney's Office requires "strong corroborative evidence" before the testimony of an in-custody informant may be used. The Report concludes that the use of in-custody informant testimony is "rarely approved by any of the responding offices" in the survey conducted by the Commission. Thus, there appears to be no reason to believe that S.B. 609 will broadly affect the ability of prosecutors to secure convictions in serious criminal cases.

Second, particular concern is raised with respect to the effect of the corroboration requirement upon crimes committed within jails and prisons, where many of the witnesses will themselves be in custody. PORAC: "Custodial and correctional officers may be especially affected by this provision, because when one prisoner rapes/assaults/kills another prisoner or attacks a correctional officer, many of the potential witnesses will be "in-custody informants" because they're all in custody." However, Section (b) of the statutory language of S.B. 609 defines an "in-custody informant" as a person *other than ... a percipient witness*. The corroboration requirement would not apply to jail or prison inmates who are percipient witnesses to crimes committed within correctional facilities. Only witnesses "whose testimony is based on statements allegedly made by the defendant while both the defendant and the informant

<sup>1</sup> <http://www.ccfaj.org/rr-use-official.html>

## CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

were held” in a correction facility would be included. Under these circumstances, the risk of false testimony is just as great, or greater, for crimes committed within correctional facilities as for any other crimes. Thus, the concern that S.B. 609 would hamper prosecutions for crimes committed within correctional facilities is not justified.

Third, the objection is made that S.B. 609 undercuts the “common law tradition” of letting judges and juries determine the credibility of witnesses. CDAA: “The requirement of corroboration flies in the face of common law tradition, which has always accepted the sufficiency of the testimony of a single, uncorroborated witness with a few well-defined constitutional or statutory exceptions.”<sup>2</sup> Actually, the requirement of corroboration of witnesses whose credibility is inherently suspect is a fundamental precept of the common law tradition traceable to Mosaic and biblical roots. [“One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.” *Deuteronomy* 19:15; “If thy brother shall trespass against thee, go and tell him his fault between thee and him alone. . . . But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established.” *Matthew* 18:15-16]. The requirement of corroboration of accomplices was incorporated into California Penal Law by the very first legislature. Stats. 1850 ch. 119. § 405. The requirements of S.B. 609 are closely modeled upon the accomplice corroboration requirements of Penal Code § 1111, which has been part of California law for 157 years. Thus, the corroboration requirement for in-custody informants will be familiar to and easily implemented by California lawyers and judges.

Fourth, concern is expressed that the prohibition of corroboration of one in-custody informant by another in-custody informant “could prevent convicting murderers, child molesters and rapists, for example, when there was no reason to distrust the testimony of two or more in-custody informants.” The previous language prohibiting the corroboration of one informant by another was borrowed directly from the requirement in current California law that corroboration of an accomplice cannot be provided by another accomplice. CALCRIM No. 335. This concern has been addressed by language amending S.B. 609 to permit one in-custody informant to corroborate another if it is established “by a preponderance of the evidence that the informants have not communicated with each other on the subject of their testimony.” Thus, one in-custody informant will be permitted to corroborate another in-custody informant under S.B. 609, giving even narrower protection than the corroboration requirement for accomplices.

<sup>2</sup> CDAA notes only three such exceptions, for treason, perjury and accomplice testimony. This is not a complete list of all of the situations in which California law requires corroboration. See, e.g., California Evidence Code Section 1350(a)(6), requiring corroboration before the hearsay testimony of an unavailable witness can be admitted.

## CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

In conclusion, S.B. 609, by requiring the corroboration of the testimony of in-custody informants, addresses one of the leading causes of wrongful convictions. A report by the Northwestern University School of Law Center on Wrongful Convictions identified the use of such informants as among the three most prevalent factors in the wrongful convictions of death row inmates. After a review of the cases of 111 persons released from the nation's death rows after they were exonerated, from 1973 through 2004, the Center found use of false testimony from informants in 45.9% of the cases. That made false informant testimony the leading cause of wrongful convictions in U.S. capital cases – followed by erroneous eyewitness identifications (25.2% of the cases), and false confessions (14.4% of the cases). Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System*, p. 3 (2005). The suggestion that enactment of S.B. 609 might have a negative effect on the conviction rates for murder and rape [PORAC] must be tempered by the realization that these are precisely the kinds of cases where the risk of wrongful conviction of the innocent is most prevalent.

A comprehensive compilation of all exonerations in the United States from 1989 through 2003 was recently published by a group of researchers at the University of Michigan led by Professor Samuel R. Gross.<sup>3</sup> The researchers confined their study to cases in which there was an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted, such as a pardon based upon evidence of innocence, or a dismissal after new evidence of innocence emerged, such as DNA testing. They identified 340 such cases, 27 of which occurred in the State of California. Of the 340 cases, sixty percent had been convicted of murder, and 36% had been convicted of rape or sexual assault.

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<sup>3</sup> Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. of Crim. Law & Criminology 523 (2005).