

POINT OF VIEW

The California Commission on the Fair Administration of Justice

by Gerald F. Uelmen, J.D.*

On March 1, 2006, I accepted the position as Executive Director of the California Commission on the Fair Administration of Justice. The Commission was established by the California State Senate over one year ago, but got off to a slow start. The Legislature appropriated no funds to support the Commission's work, leaving it up to the Commission itself to seek private funding from foundations. Thanks to the efforts of Vice Chair Jon Streeter of San Francisco, the Commission is now fully funded to support its ambitious agenda. Former California Attorney General John Van de Kamp agreed to chair the Commission, and recruited five new Commissioners to achieve greater balance in its composition.

The eighteen Commissioners now include the California Attorney General, the State Public Defender, three county District Attorneys, the Police Chief of the Los Angeles Police Department, the Sheriff of Los Angeles County, the Directors of the California Habeas Corpus Resource Center and the Northern California Innocence Project, the Los Angeles County Public Defender, and other experts and leaders of the California criminal justice system. The Commission's charge is to examine the causes of wrongful convictions, and recommend systemic changes to prevent wrongful convictions and promote greater fairness and accuracy in California's system of criminal justice. A permanent office for the Commission has been established in Santa Clara, across the street from the campus of Santa Clara University School of Law. I will be crossing that street a lot during the coming year!

While this is a new venture for California, a number of other states have established similar Commissions, and many of them have already issued reports which led to the adoption of major reforms. The Commissions in Illinois, North Carolina, Virginia, and Wisconsin are notable examples of catalysts for criminal justice reform. The American Bar Association's Criminal Justice Section also established an Ad Hoc Innocence Commission, which recently issued an

excellent report entitled *Achieving Justice: Freeing the Innocent, Convicting the Guilty* (see www.abanet.org/crimjust). All of this activity was inspired by the growing numbers of exonerations of defendants wrongfully convicted of serious criminal charges. 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 [Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. of Crim. Law & Criminology 523 (2005)]. 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 exonerations, 27 of which occurred in the State of California. Sixty percent of those exonerated had been convicted of murder, and 36 percent had been convicted of rape or sexual assault. They note two possible explanations for the high prevalence of murder cases: false convictions are more likely to be discovered in murder and death penalty cases, because of the intensive level of post-conviction review given to these cases, or false convictions are more likely to occur in murder and death penalty cases. There may be other explanations. We do not know whether wrongful convictions are much more common than realized throughout the system. What we do know is that as these cases come to light we must address their causes.

The California Commission has identified the leading causes of wrongful convictions, and will examine each of them before issuing its final report, due December 31, 2007. Beginning with the leading cause of wrongful convictions, mistaken eyewitness identification, the Commission will then move on to false confessions, the use of jail snitches and informants as witnesses, the mishandling of forensic evidence, the misconduct of prosecutors, and the incompetence of defense attorneys. Finally, the Commission will examine

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the administration of the death penalty in California. A public hearing on each of these issues is contemplated, and the Commission will also commission independent research by leading scholars in many of these areas. But rather than waiting until its expiration to issue a final report, the Commission has decided to issue interim reports as it concludes its examination of each of these issues. This will facilitate immediate reform measures, and allow the Commission to monitor the efforts to address the problems it identifies. The Commission has established a website at www.ccfaj.org, which will help California lawyers and judges stay abreast of the Commission's work. The website also provides links to the websites for other state commissions and the California innocence projects, which are spearheading many of the exonerations taking place in California.

The Commission's first interim report was issued April 13, 2006. It proposes twelve recommendations to address the problems surrounding mistaken eyewitness identification. With respect to ten of those recommendations, the Commission was unanimous. It recommends that police who conduct photo spread or lineup identification procedures should not be aware of the identity of the actual suspect. This is known as "double blind" administration, to prevent even unintentional cues to direct the attention of witnesses to a particular suspect. Numerous other procedural recommendations are made, all to be incorporated into statewide standards to be followed by all police agencies in California. The Commission has proposed legislation to require the state Attorney General to assemble a task force to formulate these standards. The Commission also recommends that the California Judicial Council reexamine the standard jury instructions regarding eyewitness identification, inviting particular attention to the instruction that the certainty expressed by eye-witnesses is relevant in assessing the accuracy of their identifications, and the significance of an identification being cross-racial. Criminal defense lawyers should not await action on these recommendations, however, to raise appropriate objections to the standard instructions now being given in California courts. The Commission's website can be a valuable research tool, to lead you to the leading cases that support such objections.

Mistaken eyewitness identification was involved in 88 percent of the rape and sexual assault cases identified in the University of Michigan study. This suggests 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. Among the 80 cases in which rape defendants were subsequently exonerated and the race of both parties was known,

39 of the cases involved black men who were wrongfully convicted of raping white women, and nearly all of these cases involved mistaken eyewitness identifications. Since less than 10 percent of all rapes in the United States involve white victims and black perpetrators, the fact that a disproportionate number of the rape exonerations involve white victims misidentifying black suspects suggests that the risk of error is greater in cross-racial identifications. Research has consistently confirmed that cross-racial identifications are not as reliable as within-race identifications.

The recommendation of the Commission that generated the greatest controversy was the suggestion that photos or suspects presented to eyewitnesses by police be presented sequentially, or one at a time, rather than simultaneously, at the same time. This recommendation was based upon twenty years of research suggesting that witnesses are more likely to make relative judgments when viewing an array of suspects at the same time, leading to identification of the person who most resembles the perpetrator, rather than an absolute judgment as to each person presented. A recent field study conducted in Illinois suggested that sequential procedures could actually produce a higher rate of mistaken identification when compared to simultaneous presentation. Relying upon this report, Attorney General Lockyer and District Attorneys Totten and Fox of the Commission dissented from this recommendation. The Illinois study has generated substantial controversy, however, and has been criticized for comparing sequential presentations which were double blind with simultaneous presentations that were not. Thus, it cannot be determined whether the higher rate of misidentification was attributable to sequential presentation or the absence of double blind presentation of the simultaneous presentations. This controversy is unlikely to be resolved without additional field studies, which are already being planned. Meanwhile, legislation is moving through the state Legislature which could bring significant reforms in eyewitness identification procedure to California. Clearly, double blind administration is the most significant of the Commission's recommendations, and we should not wait for resolution of the controversy over sequential administration before we embrace the requirement of double blind administration, which was unanimously embraced by the Commission.

The Commission is now ready to move on to the issue of false confessions, and consider whether the taping of police interrogation should be required of all police agencies in California in order to protect against false confessions. A public hearing on the issues surrounding false confessions will be held at Loyola Law School in Los Angeles on Wednesday, June 21, 2006. Stay tuned.