



Schwarzenegger Vetoes Justice

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By Radley Balko

In 2004, the California state senate created the California Commission on the Fair Administration of Justice, a panel of current and former judges, prosecutors, defense attorneys, and police officials.

The legislators were concerned about the recent spate of DNA exonerations and death row releases, including at least six cases in California since 1989 in which someone had been sentenced to death then exonerated or acquitted in a new a trial.

A 2004 report in San Francisco magazine identified 200 cases over 15 years in which someone in California had been unjustly convicted, then freed—more than the number of exonerations in the next two states combined. The magazine estimated somewhere between 150 and 1,500 innocent people may still be sitting in the state's prisons. The state senate charged the commission with recommending reasonable reforms to guard against wrongful convictions.

In 2006, the commission issued its recommendations. Three modest, sensible reforms made their way to the state legislature, and were passed by both the state's house and senate earlier this year. The reforms were backed by politicians from both parties. They were backed by both prosecutors and police officials who served on the commission. The reforms would added some formidable defenses against wrongful convictions in California. Naturally, they were opposed by the state's police organizations. And so last month, Gov. Arnold Schwarzenegger vetoed all three.

The first recommendation would have required that prosecutors who use jailhouse "snitches" corroborate snitch testimony with other evidence. Jailhouse snitches are themselves convicted felons. They aren't trustworthy people. What's more, they have a greater incentive to lie, and to lie to get someone convicted, than perhaps anyone else a prosecutor could possibly put on the stand: They want to get out of prison.

A 2004 study by Northwestern University of 111 death row exonerations since the death penalty was reinstated in 1973 found that the testimony of a jailhouse snitch played a role in 51 of the wrongful convictions.

Jailhouse snitch testimony becomes particularly invidious when pared with mandatory minimum sentences. The only way someone facing a mandatory minimum sentence can get out early is to provide information that helps prosecutors win more convictions. It's an unfortunate structure of incentives that encourages dishonesty from informants, and encourages prosecutors to suborn it.

The California commission's recommendation wouldn't have barred the use of jailhouse informants, as some activists have recommended. It would only have required that prosecutors corroborate such testimony with other sources before using it at trial.

Gov. Schwarzenegger vetoed the bill, arguing that, "When that kind of testimony is necessary, current criminal procedures provide adequate safeguards against misuse."

In just six years of operation, the Northern California Innocence Project has helped exonerate 20 people in Northern California alone who were convicted in whole or in part based on testimony from jailhouse snitches.

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The second reform would have required police to videotape interrogations in violent crime investigations. This too is a sensible, modest reform. Law enforcement advocates have opposed taping interrogations in the past by arguing that police officers sometimes use untoward or coercive tactics that while legal, might appear unseemly to jurors. (Suggesting that federal agents videotape interrogations was one reason the Justice Department says U.S. Attorney Paul Charlton was let go in the recent firings scandal).

If that's the case, then let prosecutors put on evidence explaining to jurors why such tactics are necessary, and why they won't lead to false confessions. Then let juries decide if such tactics are acceptable. A tamper-proof, thorough videotaping of all interrogations would not only discourage police misconduct while questioning witnesses, it would also cut down on *false* accusations of police misconduct.

Some may find it hard to believe, but overly coercive interrogation techniques can and have lead to false confessions over the years, particularly if the suspect is a juvenile or is mentally impaired—although even a normal adult can falsely confess if subjected to enough duress and abuse. In nearly a quarter of the DNA exonerations over the last 15 years, the wrongfully convicted suspect either incorrectly made incriminating statements to police, or out and out confessed to a crime he didn't commit.

Schwarzenegger vetoed this recommendation, too, with the cryptic explanation that video recordings would "deny law enforcement the flexibility necessary to interrogate suspects."

No. It would deny them the "flexibility" to extract confessions through improper coercion, at least without an impartial, documented record of the questioning; and it would allow a jury to properly weigh a confession against the environment in which it was given.

The commission's third recommendation was aimed at fixing the problem of false eyewitness testimony, which has contributed in part or in whole to more than three-quarters of known wrongful convictions. This recommendation should have been even less controversial than the other two. It would have established a task force to look into eyewitness testimony, and set up a series of voluntary guidelines for the state's police departments to follow to ensure that police lineups aren't overly suggestive.

One recommendation, for example, was that the police officers administering photo or in-person lineups be unaware of the actual identity of the suspect, to prevent them from giving an eyewitness subtle (or not-so-subtle) clues.

Schwarzenegger vetoed this one, too, arguing that even voluntary state guidelines would get in the way of police departments setting their own lineup policies based on their own "unique local conditions."

Gov. Schwarzenegger's stubborn refusal to adopt even these modest criminal justice reforms is perplexing, particularly given the spate of conscience-shocking exonerations and wrongful convictions in the news. There's really nothing we can say to someone who spent a decade in prison or was days from execution for a crime he didn't commit. "Sorry" isn't going to cut it. One would think that the least we could do is put in the proper safeguards to prevent it from happening again.

Former state Attorney General John Van de Kamp, who chaired the commission, told the San Francisco Chronicle that all three recommendations were "modest bills which were based on the best science and the best practices available."

He added, "once again the power of California's law enforcement agencies to block needed justice reform."

Our criminal justice system is in dire need of repair. The spate of DNA exonerations has at least opened many Americans' eyes to the very real possibility that we're sending innocent people to prison—and even to death row.

But the number of cases in which DNA was found at the scene of a crime was properly preserved, and where testing could establish guilt or innocence, is vanishingly small. DNA testing has exposed the flaws in our system, but those flaws don't exist only in cases where DNA was significant—they also exist in the overwhelming majority of cases where it isn't. That's why we need to apply the lessons we've learned from DNA exonerations to other cases.

And it's why Gov. Schwarzenegger's refusal to adopt even modest reforms is so regrettable.

Radley Balko is a senior editor with Reason magazine. He publishes the weblog, TheAgitator.com.

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