

## RESOLUTION ELF-03-2006

### Recommendations of the California Commission on the Fair Administration of Justice to Prevent Wrongful Convictions: Mistaken Eyewitness Identifications and False Confessions

#### TEXT OF RESOLUTION

RESOLVED that the Conference of the Delegates of California Bar Associations urges the California Senate and Assembly to pass again at the next legislative session both S.B. 1544 (relating to improved methods and procedures for the conducting eyewitness identifications) and S.B. 171 (relating to the electronic recording of custodial interrogations to minimize the risks of false confessions), or similar legislation to be reintroduced at the recommendation of the California Commission on the Fair Administration of Justice, and  
RESOLVED FURTHER that the Conference of Delegates of California Bar Associations further urges the Governor to sign such reform measures into law.

PROPOSERS: Charles A. Bird, James J. Brosnahan, Patrick H. Fabian, James P. Fox, Virginia George, Jeffrey B. Hayden, Alexander L. Landon, Frank Z. Leidman, Stephen F. Rohde, Matthew St. George, Jon B. Streeter, Gerald F. Uelmen, John Van De Kamp

#### STATEMENT OF REASONS

Existing Law: The California Commission on the Fair Administration of Justice ("Commission" or "CCFAJ") was established by California State Senate Resolution No. 44 "to study and review the administration of criminal justice in California, determine the extent to which that process has failed in the past," examine safeguards and improvements, and recommend proposals to ensure that the administration of criminal justice in California is just, fair and accurate. The Senate Resolution noted that study and review in other states has resulted in recommendations for reforms in order to avoid wrongful convictions and executions, and that California has not engaged in any such review of the state's criminal justice system.

The Commission began by reviewing the studies and reviews of wrongful convictions conducted in other states, and identifying the causal factors that most frequently recur in cases where the wrongfully convicted have been exonerated. The Commission has conducted hearings and identified causal factors in California, including misidentification by eyewitnesses and false confessions. In April 2006, the Commission released its report and recommendations regarding eyewitness identification procedures. In July 2006, the Commission released its report and recommendations regarding false confessions.

S.B. 1544, passed by the State Assembly and then the Senate on August 31, 2006, regarding eyewitness identification procedures and lineups, states that "[e]xisting law does not regulate how law enforcement officials prepare or conduct eyewitness photo or live lineup identifications," and therefore "declares legislative intent that law enforcement officials study and consider adoption of policies and procedures regulating eyewitness lineup identifications so as to ensure a decrease in the number of misidentifications." S.B. 1544 would enact Penal Code section 686.3 to require the Department of Justice and the Commission on Peace Officer Standards and Training ("POST Commission") to develop guidelines in consultation with local

law enforcement agencies, prosecutors, defense attorneys, and other legal experts to ensure the reliability of eyewitness photo and live identifications. Specific recommendations recommended by the CCFAJ, which the Department of Justice and the POST Commission might consider, include the use of "double blind" procedures in which the officer conducting the lineup or photo display is not aware of the identity of the suspect, and the presentation of subjects in random sequential order, rather than simultaneously. The guidelines to be developed regarding the collection and handling of eyewitness evidence would be adopted by all law enforcement agencies by December 31, 2007 and the guidelines would be "consistent with the reliable evidence supporting best practices, including consideration of the recommendations of the California Commission on the Fair Administration of Justice." The CCFAJ report and recommendations of April 13, 2006 specified twelve recommendations for the "best practices" embodied in the legislation. S.B. 1544 would also add Evidence Code section 806 to allow expert testimony regarding the reliability of eyewitness identifications. [Link to S.B. 1544: [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_1544&sess=CUR&house=B&author=migden](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_1544&sess=CUR&house=B&author=migden) ]

S.B. 171, also passed by the State Assembly and then the Senate on August 31, 2006, would mandate the electronic recording of all custodial interrogations relating to serious felonies by all police agencies in California. As noted in S.B. 171, "[e]xisting law provides that under specified conditions the statements of witnesses, victims, or perpetrators of specified crimes may be recorded and preserved by means of videotape. S.B. 171 expresses the intent of the Legislature "to require the creation of an electronic record of an entire custodial interrogation in order to eliminate disputes in court as to what actually occurred during the interrogation, thereby improving prosecution of the guilty while affording protection to the innocent." S.B. 171 would add Penal Code section 859.5 to mandate the electronic recording in their entirety of custodial interrogations of suspects in homicide and violent felony cases, with exceptions provided for persons who do not want such electronic recordings and for cases where officers can demonstrate by a preponderance of evidence was not feasible for reasons including lack of timely access to electronic recording equipment, the malfunction of equipment, or the fact that the interrogation occurred at a place other than a police or sheriff's station, a correctional facility or other similar law enforcement facility. S.B. 171 provides that the failure to make an electronic recording of a custodial interrogation as required will result in the jury being instructed to view the statements of the accused allegedly made in that custodial interrogation "with caution." [Link to S.B. 171:

[http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_171&sess=CUR&house=B&author=alquist](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_171&sess=CUR&house=B&author=alquist) ]

This Resolution: Recognizes that the California Commission on the Fair Administration of Justice is composed of prosecutors, defense lawyers, police representatives, a crime victim advocate and a judge, yet it has achieved near unanimity in the recommendations it has made thus far. Further, this Resolution recognizes that a consensus was achieved in the criminal justice community in support of the recommendations and the legislation written to implement those recommendations, with traditional opponents in the criminal justice system, including the California District Attorneys Association, on the one hand, and the California Public Defenders Association and the California Attorneys for Criminal Justice, on the other hand, supporting both bills. Moreover, the Legislature passed the bills with strong majorities. As former California Attorney General and Commission Chair John Van de Kamp noted, "[w]e are gratified by the strong legislative support for our recommendations, and are optimistic that the Governor will

sign both of these measures, since they are broadly supported by all segments of the criminal justice system." This Resolution would urge the Governor, who vetoed both the bills, to reconsider and sign such measures into law.

The Problem: Recent technological advances in forensic DNA techniques have revealed wrongful criminal convictions and resulted in exonerations of defendants who, though innocent, were convicted. In 1989 through 2003 alone, 340 cases of wrongful convictions were identified in one published study considered by the Commission. Sixty percent of these 340 wrongful convictions involved murder convictions, and thirty-six percent involved convictions for rape or sexual assault. We do not know whether wrongful convictions are much more common than realized throughout the criminal justice system, but we do know that as causes for wrongful convictions are identified, we must address them. This is a truth recognized by the California Senate in creating the California Commission on the Fair Administration of Justice, and by the Commission itself which has adopted a method of making interim recommendations as it considers the various causes for wrongful convictions, and is therefore well underway in bringing to light the causes of wrongful convictions and solutions.

The work of the California Commission on the Fair Administration of Justice is substantive and constructive, with specific recommendations made thus far to remedy two sources of wrongful convictions it has identified: misidentifications due to eyewitness identification procedures; and false confessions. Other issues which the Commission will examine in the coming year include jailhouse "snitches" and informant testimony, problems with forensic evidence known commonly as "junk science," prosecutorial misconduct, defense lawyer incompetence, and the administration of the death penalty.

The California lawyers who are the proponents of this Emergency Late Filed Resolution are submitting it to highlight the importance of the work being done by the Commission to repair a broken California criminal justice system, and the need for the Commission's work to be successful. The delegates on the floor of the Conference of Delegates of California Bar Associations, who, in turn, will consider this ELF, will be lawyers who are joining, prosecutors and defense counsel alike, criminal justice system attorneys and civil litigators alike, even "court" lawyers and "office" lawyers alike, to insist that the recommendations of the California Commission on the Fair Administration of Justice be enacted into legislation and, once passed, signed into law. The problem of wrongful convictions deserves the expertise that California lawyers bring to this arena. The willingness of traditional opponents to join together to support by consensus the suggested, and obviously needed, reforms, can not be ignored. The people of California are watching and California lawyers are acting admirably.

The Legislature is not stalemated. Both the Senate and Assembly have acted. We urge the Legislature to act again, when the recently vetoed bills are reintroduced at the next session. We urge the Governor to reconsider and, when the Legislature acts again, to sign the bills into law and implement the recommendations by the Commission.

The proponents of this Emergency Late Filed Resolution 03-2006 span the political spectrum and represent all of the State of California, from Northern California to the Valley to Southern California. This is not special interest legislation. The California criminal justice system is hugely important to all California lawyers. The California the criminal justice system

is being examined carefully by the California Commission for the Fair Administration of Justice, and the time for reform is now.

**IMPACT STATEMENT:** The enactment of S.B. 1544 would create a new Penal Code section 686.3 and a new Evidence Code section 806. The enactment of S.B. 171 would add a new Penal Code section 859.5. S.B. 1544 would require local law enforcement agencies to adopt new guidelines regarding eyewitness identifications and California Constitutional provisions would require reimbursements by the state for state-mandated local programs. S.B. 171 would similarly require local law enforcement agencies to adopt new methods for electronically recording custodial interrogations and California Constitutional provisions would require reimbursements by the state for such state-mandated local programs.

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**RESPONSIBLE FLOOR DELEGATE:** Frank Z. Leidman

**Arguments by Governor Schwarzenegger In Opposition to ELF Resolution 03-2006  
(Veto Messages to Senate Bill 1544 and Senate Bill 171)  
and Arguments In Reply to Governor Schwarzenegger by Commission Chair van de Kamp**

Governor's Veto Message to Senate Bill 1544

BILL NUMBER: SB 1544  
VETOED DATE: 09/30/2006

To the Members of the California State Senate:

I am returning Senate Bill 1544 without my signature.

Improving the reliability and accuracy of eyewitness identifications is a laudable goal; however, SB 1544 would go too far in attempting to address the problems of unreliable eyewitness identifications. This bill would require that the Department of Justice (DOJ) and Commission on Peace Officer Standards and Training (POST) consult with law enforcement agencies, prosecutors, public defenders, and other legal experts in order to develop mandatory guidelines and policies for the collection and handling of eyewitness evidence.

Eyewitness evidence is a critical part of the criminal justice process. Any changes to the procedures for criminal identification would have an undeniably significant impact to the manner in which our system operates. It is unthinkable that we would allow the DOJ and POST such unprecedented authority over a fundamental step in our criminal justice system. I cannot support a measure that circumvents the legislative process and denies the public and their elected representatives the chance to approve or deny a statewide policy that could have a life-altering impact on an individual participating in our justice system.

For these reasons I am unable to sign this bill.

Sincerely,

Arnold Schwarzenegger

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Governor's Veto Message to Senate Bill 171

BILL NUMBER: SB 171  
VETOED DATE: 09/30/2006

To the Members of the California State Senate:

I am returning Senate Bill 171 without my signature.

Ensuring that all criminal confessions are reliable is a laudable goal. I understand that some recent studies have shown that false confessions are a growing problem in the United States. However, the language contained in this bill is flawed, which could result in the erroneous release of criminals guilty of murder or other violent crimes due to technicalities.

This bill requires the electronic recording of all custodial interrogations of individuals that may have committed a homicide or violent felony. Yet the bill defines custodial interrogation differently than the definition used by the U.S. Supreme Court for giving Miranda rights and requires recording when someone is suspected of any one of the twenty-three violent crimes listed under Penal Code Section 667.5, but does not specify what suspected means. These drafting errors could lead to confusion for all involved parties and potential situations where law enforcement unknowingly fails to comply with the mandates of the bill. For example, at the time law enforcement is interrogating a suspect they may have good reason to think the suspect is guilty of a lesser crime not contained in Penal Code Section 667.5 and later after reviewing the evidence or hearing the individuals statements, the District Attorney may decide to charge the suspect with a violent felony.

Since public safety is my top priority I cannot sign this flawed bill. I support the concept of this bill and I would encourage the Legislature to work with law enforcement in order to send me a bill that helps ensure the reliability of confessions while not creating opportunities for those guilty of violent crimes to avoid punishment because of a technical loophole.

Sincerely,

Arnold Schwarzenegger

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California Commission on the Fair Administration of Justice Chair John Van De Kamp responds to Governor Schwarzenegger's Vetoes of S.B. 171 and S.B. 1544

In his message vetoing S.B. 1544, the Governor stated, "It is unthinkable that we would allow the DOJ and POST such unprecedented authority over a fundamental step in our criminal justice system. I cannot support a measure that circumvents the legislative process and denies the public and their elected representatives the chance to approve or deny a statewide policy that could have a life- altering impact on an individual participating in our justice system."

Chairman Van de Kamp responded, "The proposal was not intended to circumvent the legislative process, but at the urging of law enforcement, was drafted to assure full participation by affected criminal justice agencies in the formulation of guidelines. The legislature is always free, of course, to rescind or modify regulations to which it objects, but its delegation of authority to develop guidelines has never been viewed as a 'circumvention' of legislative authority. Failure to comply with the guidelines would not have resulted in the exclusion of any eyewitness identification, but simply an instruction to the jury to view it with caution. It is hard to imagine a more life-altering impact upon an individual than to be wrongfully convicted and sent to prison or executed on the basis of a mistaken eyewitness identification, while the actual perpetrator of a violent crime remains at liberty. Wrongful convictions also impose tremendous

costs on the taxpayers in the form of lawsuits and compensation to the wrongfully convicted.”

In his message vetoing S.B. 171, the Governor stated, “the bill defines ‘custodial interrogation’ differently than the definition used by the U.S. Supreme Court for giving ‘Miranda rights’ and requires recording when someone is ‘suspected’ of any one of the twenty-three violent crimes listed under Penal Code 667.5, but does not specify what ‘suspected’ means. These drafting errors could lead to confusion for all involved parties and potential situations where law enforcement unknowingly fails to comply with the mandates of the bill.” He encouraged the Legislature to “work with law enforcement to send me a bill that helps ensure the reliability of confessions while not creating opportunities for those guilty of violent crimes to avoid punishment because of a technical loophole.”

Chairman Van de Kamp responded, “The only difference between ‘custodial interrogation’ as defined in S.B. 171 and ‘custodial interrogation’ as defined by the U.S. Supreme Court in applying Miranda was that S.B. 171 was limited to interrogation ‘conducted at a place of detention,’ thus narrowing the applicability of the bill to exclude interrogations in squad cars or at the scene of a crime, where Miranda warnings would have to be given, but recording devices may not be readily available. The recording requirement created by S.B. 171 would not apply to an individual who was not suspected of a violent crime at the time of interrogation, regardless of what charges were subsequently filed. The proposal did not create a ‘loophole’ for those guilty of violent crimes to escape punishment. The existence of a tape recording of police interrogation would provide an objective and fair way to resolve claims that coercive interrogation techniques were used, ensuring the admission of confessions that were obtained in compliance with the law, and the exclusion of those that were not. It would be in the best interests of law enforcement and the taxpayers to resolve these claims without litigation. If a tape recording were not available, the jury would simply be instructed to consider the alleged confession with caution.”