

• select Print from the File menu above

---

FOCUS & FORUM • Nov. 27, 2007

## Be Fair to Prosecutors

### FORUM COLUMN

By John Poyner

For three years, the California Commission on the Fair Administration of Justice has conducted hearings and carried out research toward the admirable goal of reducing the risk of wrongful convictions. To that end, the commission has sponsored five bills on three discrete topics before the California Legislature. All five of those bills have met the same fate: Gov. Arnold Schwarzenegger's veto pen. Some might ask, "If the governor and the opponents of the bills are not in favor of sending innocent people to prison, how could they oppose these measures?"

First, wrongful convictions jeopardize the integrity of the entire justice system. In light of this, acquitting the innocent is as important as convicting the guilty. There is no incentive to punish a person who did not commit a crime; in fact, the idea is an affront to those of us who hold our justice system in the highest regard.

A column that recently appeared in this publication criticized the opposition of the California District Attorneys Association's to one of the bills, Senate Bill 609, written by Sen. Gloria Romero, D-Los Angeles. SB 609 would have prohibited a jury or judge from convicting a defendant, finding a special circumstance true or using a fact in aggravation based on the uncorroborated testimony of an in-custody informant.

Contrary to the faulty characterization of the basis of our opposition that appeared in the column, the California District Attorneys Association opposed this broad exclusion of an entire class of evidence based on two basic premises: (1) a failure to demonstrate that false informant testimony is leading to wrongful convictions in California and (2) existing statutes and attendant court procedures in California adequately address the potential problems raised by using in-custody informant testimony.

The commission notes, in its own report, that false informant testimony is blamed for nearly half of the wrongful convictions examined by the Northwestern University School of Law Center. Some use this single finding to justify a blanket ban on informant testimony. Such a position would be further supported by the Commission's other data point, the 117 death-penalty appeals pending in the state public defender's office, one-fifth of which feature testimony by an informant who was incarcerated or in constructive custody.

Unfortunately for the proponents of SB 609, the commission report states that "none of the 111 cases in the [Northwestern University] report took place in California." Despite the fact that other states may have seen wrongful convictions based on false informant testimony, extrapolating such data to cases in California is not warranted. Additionally, the state public defender's comments on pending death-penalty appeals leave much to be desired, because they fail to include any discussion of whether the informant testimony was corroborated or whether other evidence was used to convict. Without those important considerations, the raw number of cases involving informant testimony means little.

But even if we in California have no examples to point to, shouldn't we worry about

preventing wrongful convictions? Absolutely. For that specific reason, we pointed out the following in our letter of opposition to SB 609: "Every jury confronted with the testimony of an in-custody informant is provided with the instruction found at CALCRIM 336, or something substantively similar, which reads: "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case."

California jury instructions specifically highlight the caution to be used when scrutinizing informant testimony. In order to remedy the perception of a potential problem in the small number of California criminal cases that rely solely on the uncorroborated testimony of an in-custody informant, SB 609 would have created a sweeping prohibition on the use of such evidence. Nothing is gained by limiting prosecutorial discretion in such cases.

Numerous considerations go into a prosecutor's decision to use informant testimony, not the least of which is the reliability of such evidence. A prosecutor knows the jury will hear an instruction similar to the one above, telling jurors to closely scrutinize an informant's testimony, given the fact that it may have been influenced artificially. For us, the bottom line is protecting the public safety, a task made difficult by the seemingly constant - and often baseless - attacks on prosecutorial discretion.

Thankfully, Governor Schwarzenegger's decision to veto SB 609 proves that he shares these concerns. The governor has endured cynical barbs and factually questionable nonsequiturs for his dedication. This bullying has no place in civilized debate, the source of good public policy. Instead of the treatment he has received from the proponents of these measures, the governor should be commended for considering all facets of some very thorny issues and making difficult choices.

**John Poyner** is the district attorney of Colusa County and president of the California District Attorneys Association.

\*\*\*\*\*

© 2007 Daily Journal Corporation. All rights reserved.