Proposed Wrongful Conviction Reforms for Advisory Commission on the Administration of Justice

The Rocky Mountain Innocence Center (RMIC) is dedicated to overturning wrongful convictions in Nevada, Utah and Wyoming. Most recently, RMIC represented DeMarlo Berry, who was exonerated on June 28th, 2017 after spending 22 years in prison for a Las Vegas murder he did not commit.

Mr. Berry's case highlights two areas in need of reform to prevent and address wrongful convictions in Nevada: 1) removing the two-year time limit on introducing newly discovered non-DNA evidence of innocence, and 2) regulating the use of jailhouse informants. RMIC encourages the Advisory Commission on the Administration of Justice to examine these issues during the interim session. In addition, RMIC encourages the Advisory Commission to revisit the issue of requiring recording of certain custodial interrogations to safeguard against wrongful convictions, which RMIC advocated for during the 2017 legislative session.

I. Removing the 2-year time limit on introducing new non-DNA evidence. Under Nevada statute N.R.S. 176.515, a defendant has only two years after his or her conviction to file a motion for a new trial based on new evidence, regardless of when the new evidence was discovered. In DeMarlo Berry's case, the real perpetrator Steven Jackson confessed to the crime and had gone on to commit another murder. Berry was barred from introducing Jackson's confession under Nevada's newly discovered evidence statute because the two-year time limit had passed. Instead his lawyers had to initiate a federal claim, which would have meant many additional years of litigation had the Clark County District Attorney's office not agreed to dismiss the case. This would have kept Berry in prison longer and cost the court additional resources. The law should provide a direct avenue for people like Berry to get relief when new evidence of innocence becomes available.

II. Regulating the use of jailhouse informants: DeMarlo Berry's wrongful conviction was based on the testimony of a jailhouse informant named Richard Iden, a nine-time convicted felon who served as a jailhouse informant in multiple cases. Iden told jurors that he received nothing from the state in exchange for testifying that Berry admitted to the crime while they were incarcerated together. In reality, Iden had been offered leniency for pending charges and received free meals, hotels and airfare from the state, which had not been disclosed to the defense.

In 2008 the Clark County District Attorney's Office told the Advisory Commission on the Administration of Justice that a law requiring prosecutors to maintain an internal informant tracking and disclosure system was not necessary because the office had already voluntarily set up such a system. However, the *Las Vegas Review-Journal* reported in a 2016 article that the Clark County District Attorney's informant database had just 130 entries, although it prosecuted 330,000 criminal cases since 2008.[1] Mr. Berry's exoneration provides an opportunity for the Advisory Commission to revisit this issue.

III. Recording interrogations. Last year Assembly Bill 414 was introduced by the Assembly Judiciary Committee to require electronic recording of custodial interrogations of individuals suspected of homicide or sexual assault with a remedy of a jury instruction for noncompliance. The bill passed the Assembly but failed in the Senate. The Advisory Commission should work with law enforcement to assess whether agencies have voluntarily adopted policies to record interrogations for at least the most serious crimes.

[1] Barnes, Bethany. Las Vegas Review-Journal. DA criminal informant safeguard rarely used in Clark County, records suggest. March 12, 2016.

I. Removing Nevada's Two-Year Time Limit on Introducing New Evidence of Innocence

In the vast majority of wrongful conviction cases, people prove their innocence with non-DNA evidence. However, Nevada's current law allows only two years from the date of a guilty verdict for a person to file a motion for a new trial based on newly discovered, non-DNA evidence.[2]

A majority of states do not place a time limit from the time of conviction for introducing new evidence of innocence. The two-year time limit has made it almost impossible for the Rocky Mountain Innocence Center to help wrongfully convicted Nevadans because it takes an average of 10 years to investigate an innocence claim, track down witnesses and evidence, and file necessary legal documents. In addition, the time limit is problematic when the newly discovered evidence involves scientific advancements that undermine forensic analysis or testimony used to convict someone at trial, since these shifts in science typically occur over decades.

RMIC proposes eliminating the two-year time limit for introducing newly discovered evidence of innocence. In addition, legislation should clarify that 'newly discovered evidence' may include forensic evidence that was used to convict someone and has since been undermined by changes in the field of science, a testifying analyst's opinion, or a scientific technique upon which the relevant scientific evidence is based. Similar laws have recently been enacted in both California and Texas.

Forensic Disciplines Where 'Shifts' in Science Have Undermined Convictions

- Hair comparisons: In 2015 the FBI announced that its hair microscopy experts overstated the probability of a match between hair evidence and the defendant's hair in 95 percent of the cases it reviewed.[3]
- Arson: The National Fire Protection Association published a report in 1992 (known as NFPA 921) which noted that many of the physical signs that had been used by fire investigators to determine that a fire was intentionally set—such as "alligatoring" of wood, crazed glass, and sagged furniture springs—could actually occur in accidental fires. It took decades for the new NFPA standards to be used in fire investigations.
- Comparative Bullet Lead Analysis (CBLA): Since the early 1980s the FBI conducted comparative bullet lead analysis in over 2,500 cases—a technique that was thought to be able to link crime scene bullets with ones in the possession of a suspect based on the assumption that each batch of lead used for bullet manufacturing has a unique makeup. The FBI stopped using CLBA after a 2002 National Academy of Sciences (NAS) report found problems with interpretations of the results of these analyses.[4]

DeMarlo Berry, Las Vegas

On June 28, 2017 the Clark County District Attorney's office agreed to dismiss DeMarlo Berry's murder conviction after he had spent 22 years in prison. The real perpetrator Steven Jackson confessed to the crime and had gone on to commit another murder. Berry was barred from introducing Jackson's confession under Nevada's newly discovered evidence statute because the two-year time limit had passed. Instead his lawyers had to initiate a federal claim, which would have meant many additional years of litigation had the Clark County District Attorney's office not agree to dismiss the case. This would have kept Berry in prison for much longer and cost the court additional resources.

[2] N.R.S. 176.515
[3] Hsu, Spencer C. Washington Post. FBI admits flaws in hair analysis over decades. 4/18/2015.
[4] FBI Laboratory Announces Discontinuation of Bullet Lead Examinations. September 1, 2005.

II. Safeguarding Against Unreliable Jailhouse Informant Testimony

What is the Problem?

- **Inherently unreliable evidence**: Jailhouse informants receive benefits including leniency, money, and special privileges in exchange for their testimony about a defendant—usually about the defendant confessing to them. The idea that people regularly confess to committing serious crimes to someone they just met in a jail cell is already unlikely and the potential of receiving benefits for informing creates a strong incentive for people to lie.

- **Lack of transparency:** Defense attorneys are often unable to effectively utilize our legal system's tools for weeding out perjured testimony, such as filing motions to suppress unreliable jailhouse informant statements and cross-examination of jailhouse witnesses, because the state fails to fully disclose impeaching information on jailhouse informants.

- **Potential for constitutional violations**: The U.S. Supreme Court ruled in the 1972 *Giglio* decision that due process requires the state to disclose any promise or expectation of leniency offered to a witness made by any prosecutor in a district or county attorney's office.[5] The decision anticipated that prosecutor offices would create systems to track and disclose such information.[6] However, in many wrongful conviction cases the prosecution failed to meet their constitutional obligations under *Giglio*.

- **Threat to public safety:** When jailhouse informants receive leniency or non-prosecution agreements in exchange for their testimony, victims of the jailhouse informant's crimes do not get the justice they deserve. Public safety may be threatened when these potentially violent offenders are released.

DeMarlo Berry, Las Vegas

On June 28, 2017 DeMarlo Berry was exonerated of a Las Vegas murder after the real perpetrator Steven Jackson confessed to the crime. Berry spent 22 years in prison for a crime he did not commit largely based on the testimony Richard Iden, a nine-time convicted felon who served as a jailhouse informant in multiple cases.

Iden told jurors that he received nothing from the state in exchange for testifying that Berry admitted the crime to him while they were incarcerated together. In reality, Iden had been offered leniency for pending charges in Clark and Washoe Counties in exchange for his testimony, which was not disclosed to the defense. In addition the prosecution failed to disclose that the state paid for meals, hotels and airfare for Iden to visit his dying father in Ohio while preparing for trial. Had jurors been aware of this information it would likely have affected their judgment of his testimony.

What is the Solution?

- **Require prosecutors to track and disclose jailhouse informant information:** In 2008 the Clark County District Attorney's Office told the Advisory Commission on the Administration of Justice that a law requiring prosecutors to maintain an internal informant tracking and disclosure system was not necessary

[5] *Giglio v. United States*, 405 U.S. 150 (1972)
[6] Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972)

because the office had already voluntarily set up such a system. [7] However, in 2016 the *Las Vegas Review-Journal* reported that the Clark County District Attorney's informant database had just 130 entries, although it had prosecuted 330,000 criminal cases since 2008.[8]

In 2017 Texas passed the first comprehensive law requiring prosecutors to track and disclose benefits provided or offered to jailhouse informants, their complete criminal history, previous cases in which the informant testified and incentives offered in those cases, and other information related to credibility.[9]

Nevada would benefit from a similar statute because it would ensure that defendants' constitutional rights are protected and reduce court resources spent litigating claims of *Brady* violations in appeals. A tracking system will also allow prosecutors to access information that can better inform their decisions to use certain jailhouse informants as witnesses based on their past reliability.

- **Require pre-trial reliability hearings**: Judges are better positioned than jurors to assess an informant's reliability because they understand the incentivized structures of the criminal justice system. Pretrial hearings would allow judges to exercise a gatekeeping function by excluding unreliable testimony that may mislead juries.[10] In Nevada, judges must already hold reliability hearings before informant testimony can be heard by a jury in certain instances during the penalty phase of a case."[11]

- **Jury instructions**: Jury instructions are important tools in helping jurors evaluate witness credibility. However, decades of research show that jurors often do not understand or apply instructions properly.[12] While jury instructions alone do not sufficiently protect against perjured testimony, when combined with other safeguards they can assist jurors in assessing jailhouse informant statements. Jurors should be instructed to give closer scrutiny to jailhouse informant testimony and to consider specific factors such as benefits offered or provided to the informant, their criminal history, previous informant activity and previous recantations.

Texas Jailhouse Informant Law

In June 2017, with bipartisan support the Texas legislature passed and the governor signed House Bill 34, an omnibus innocence reform law that includes requirements for prosecutors to establish systems to track the use of and benefits offered to jailhouse informants, and to disclose impeaching information on jailhouse informants to the defense.

The law was recommended by the Timothy Cole Exoneration Review Commission, a group of criminal justice stakeholders convened by the legislature that included the Texas District and County Attorneys Association, Texas Commission on Law Enforcement, Texas Criminal Defense Lawyers Association, judges and lawmakers.

Texas House Bill 34

AN ACT
relating to measures to prevent wrongful convictions.

[7] MINUTES OF THE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE July 7, 2008.
[8] Barnes, Bethany. Las Vegas Review-Journal. DA criminal informant safeguard rarely used in Clark County, records suggest. March 12, 2016.
[9] Texas House Bill 34 http://www.legis.state.tx.us/tlodocs/85R/billtext/html/HB00034F.htm
[10] NAPATOFF, *supra* n. 31 at _.
[11] D'Agostino v. State, 823 P.2d 283, 285 (Nev. 1992)
[12] Natapoff, Alexandra A. Snitching: Criminal Informants and the Erosion of American Justice. New York: New York University Press, 2011.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 2, Code of Criminal Procedure, is amended by adding Articles 2.023 and 2.32 to read as follows:

Art. 2.023. TRACKING USE OF CERTAIN TESTIMONY. (a) In this article:

(1) "Attorney representing the state" means a district attorney, a criminal district attorney, or a county attorney with criminal jurisdiction.

(2) "Correctional facility" has the meaning assigned by Section 1.07, Penal Code.

(b) An attorney representing the state shall track:

(1) the use of testimony of a person to whom a defendant made a statement against the defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant, if known by the attorney representing the state, regardless of whether the testimony is presented at trial; and

(2) any benefits offered or provided to a person in

(h-1) In this subsection, "correctional facility" has the meaning assigned by Section 1.07, Penal Code. Notwithstanding any other provision of this article, if the state intends to use at a defendant's trial testimony of a person to whom the defendant made a statement against the defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant, the state shall disclose to the defendant any information in the possession, custody, or control of the state that is relevant to the person's credibility, including:

(1) the person's complete criminal history, including any charges that were dismissed or reduced as part of a plea bargain;

(2) any grant, promise, or offer of immunity from prosecution, reduction of sentence, or other leniency or special treatment, given by the state in exchange for the person's testimony; and

(3) information concerning other criminal cases in which the person has testified, or offered to testify, against a defendant with whom the person was imprisoned or confined, including any grant, promise, or offer as described by Subdivision (2) given by the state in exchange for the testimony.

The New York Times

SundayReview | EDITORIAL

Texas Cracks Down on the Market for Jailhouse Snitches

By THE EDITORIAL BOARD

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Prosecutors love jailhouse informants who can provide damning testimony that a cellmate privately confessed to a crime. Jailhouse informants, in turn, love the perks they get in exchange for snitching, like shortened sentences, immunity from prosecution or a wad of cash.

As you might imagine, though, in a market driven by such questionable motives, the testimony these informants provide is often unreliable. Even worse, it can be deadly. False testimony from jailhouse informants has been the single biggest reason for death-row exonerations in the modern death-penalty era, according to a 2005 survey by the Center on Wrongful Convictions. They accounted for 50 of the 111 exonerations to that point, and there have been 48 more exonerations since then.

Last month, Texas, which has been a minefield of wrongful convictions — more than 300 in the last 30 years alone — passed the most comprehensive effort yet to rein in the dangers of transactional snitching. Texas has become a national leader in criminal-justice reforms, after having long accommodated some of the worst practices and abuses in the nation. The state, particularly in light of past abuses, deserves credit for seeking innovative solutions to problems that have long proved resistant to change.

The new law requires prosecutors to keep thorough records of all jailhouse informants they use — the nature of their testimony, the benefits they received and their criminal history. This information must be disclosed to defense lawyers, who may use it in court to challenge the informant's reliability or honesty, particularly if the informant has testified in other cases.

The law was recommended by a state commission established in 2015 to examine exonerations and reduce the chances of wrongful convictions. The commission also persuaded lawmakers to require procedures to reduce the number of mistaken eyewitness identifications and to require that police interrogations be recorded — smart steps toward a fairer and more accurate justice system.

But the new procedures on jailhouse informants shouldn't have been necessary in the first place. Under longstanding Supreme Court rulings, prosecutors are required to turn over any evidence that might call an informant's credibility into question — such as conflicting stories or compensation they get in exchange for their testimony. Yet far too many fail to do so.

A better solution would be to bar the use of compensated informants outright, or at least in cases involving capital crimes, as one Texas bill has proposed. Studies have shown that even when a defense lawyer is able to make the case that an informant has an incentive to lie, juries are just as likely to convict. And that's assuming a defense lawyer uses such evidence — not always a safe assumption given the wide range of quality in the defense bar.

Also, making evidence admissible at trial only goes so far. The vast majority of convictions are the result of guilty pleas, which means a defendant may not even find out that an informant was paid to incriminate him before having to decide whether to accept a plea offer.

Some states have begun to require that judges hold hearings to test an informant's reliability, much as they would test an expert witness's knowledge — before the jury can hear from him. But the deeper fix that's needed is a cultural one. Many prosecutors are far too willing to present testimony from people they would never trust under ordinary circumstances. Until prosecutors are more concerned with doing justice than with winning convictions, even the most well-intentioned laws will fall short.

III. Electronic Recording of Interrogations

Electronic recording of custodial interrogations in their entirety provides a complete and irrefutable account of what transpired during closed-door sessions, which enhances accuracy and confidence in the criminal justice system. It safeguards against wrongful convictions stemming from **false confessions, which contributed to two of nine exonerations in Nevada.**

National Picture

Nationally, 24 states require recording certain custodial interrogations of suspects.[13] The U.S. Department of Justice has a policy that all federal law enforcement agencies must record interrogations for all crimes.

Current Practices in Nevada

- Former U.S. Attorney Thomas Sullivan and his associates at Jenner and Block surveyed law enforcement agencies in Nevada about their recording of interrogations practices and received responses from 26 of the 39 agencies that were contacted (67% response rate). All respondents reported recording interrogations in some form. However, there was no uniform practice. Only five agencies reported having written policies, the crimes categories that warranted recording varied across agencies, and some agencies allowed recording at the discretion of the officer.
- In 2016 the Advisory Commission on the Administration of Justice recommended further study by the Nevada Supreme Court's Commission on Statewide Rules of Criminal Procedure which opted not to examine the issue because legislation was being introduced during the 2017 session.
- In 2017 Assembly Bill 414 was introduced by the Assembly Judiciary Committee to require law enforcement to record custodial interrogations for suspects in homicide and felony sexual assault cases. Unless a good cause exception is proven, failing to comply would result in a cautionary jury instruction. The bill passed the Assembly but failed in the Senate.

The Advisory Commission should consider working with law enforcement to survey agency policies and assess whether there is consistent adoption across the state of written policies that require recording of custodial interrogations for at least the most serious crimes.

CASE IN POINT: Fred Steese

Fred Steese spent 21 years in prison after he was wrongfully convicted of a 1992 murder in Las Vegas based on a false confession during an unrecorded police interrogation. Mr. Steese is intellectually disabled and was interrogated for 5 hours without any sleep until he finally signed a confession. Had the judge and jury been able to listen to the interrogation on tape, they would have heard detectives feed Mr. Steese details of the crime, which he then repeated back. In 2012, a Nevada Eighth Judicial District Court judge issued a rare Order of Actual Innocence, the first of its kind in that court, essentially declaring that Steese didn't kill anyone. In November 2017 he was pardoned by the Nevada Board of Pardons.

[13] AK, CA, CO, CT, IL, IN, MA, ME, MN, MD, MI, MO, MT, NE, NM, NJ, NYNC, OR, VT, UT, WI