



ROCKY MOUNTAIN
INNOCENCE CENTER

Wrongful Conviction Reforms

Nevada 2017 Exonerations: Lessons Learned



DeMarlo Berry

Crime: 1994 murder, robbery.

Years Lost: 22 years in prison

Contributing Factors:

- Jailhouse informant
- Eyewitness Mis-ID

New Evidence of Innocence:

- Real perpetrator confessed 2013.
- Jailhouse informant recanted 2014.

Exoneration: June 28, 2017

Reforms Needed:

- Jailhouse informant reforms
- Removing time limit on new evidence.



Kirstin Lobato

Crime: 2001 Murder

Years Lost: 16 years in prison

Contributing Factors:

- False Confession.
- Junk Science
- Jailhouse Informant.

New Evidence of Innocence: Entomology

Exoneration: December 29, 2017

Reforms Needed:

- Recording interrogations law.
- Jailhouse informant reforms
- Removing time limit on new evidence.



Berry & Lobato Exonerations: Innocence Reforms Needed

1. Recording interrogations law.

2. Safeguards against false jailhouse informant testimony.

3. Removing 2-year time limit for new non-DNA evidence.

Why Require Recording Interrogations?

- False confessions contributed to 5 of 13 exonerations in Nevada.
- Kirstin Lobato's statements during interrogation partially recorded.

Benefits to the Innocent

- Deters illegal or coercive techniques.
- Ensures defendants' rights are protected.
- Alerts fact finders of mental limitations or other vulnerabilities.

Benefits to Law Enforcement.

- Strengthens cases/removes doubt about voluntariness.
- Reduces motions to suppress statements/confessions.
- Protects against allegations of officer misconduct.

Law ensures uniformity & enforcement.

24 states require recording by statute or high court action.

Federal law enforcement—FBI, DEA, ATF—must record all interrogations.

Kansas & Texas passed laws in 2017 with support of prosecutor & law enforcement associations.

Revising AB 414

Addressing Law Enforcement Concerns

1. Add 'good cause' exception for circumstances that court determines would make recording impractical.
2. Remove burden on prosecutor to prove good cause exception applies.
3. Remove preference for audiovisual recording.
4. More specific definition of 'place of detention.'

Jailhouse Informants: The Problem

Wrongful Convictions

- *Played a role in 3 of 13 exonerations in Nevada.*

Threat to Public Safety

Unreliable Witnesses: Benefits Incentivize Lying

Lack of Transparency/ Potential Constitutional Violations

Giglio v. United States (1972)

Prosecutors must disclose gov't witness impeachment evidence.

Obligation extends to all prosecutors in an office.

Anticipated creation of tracking & disclosure systems

“A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.”

Giglio v. United States, 405 U.S. 150 (1972)

Recommended Safeguards

1. Required Tracking & Disclosure Systems

2. Pre-trial Reliability Hearings

3. Jury Instructions

Tracking & Disclosure Requirements

Benefits

Court System:

- Creates uniform practices across the state.
- Reduces trial & post-conviction litigation.

Defendants:

- Ensures credibility issues can be raised.

Prosecutors:

- Access to info to assess using certain informants as witnesses.
- Ensures constitutional obligations are met.

Tracking & Disclosure Requirements: *Texas 2017 Law*

- **Based on Tarrant Co. District Attorney Policy.**
- **Supported by Texas District and County Attorneys**
Association & Texas Commission on Law Enforcement.
- **Tracking:** Benefits & use of jailhouse informant testimony.
- **Disclosure:**
 - Benefits such as leniency & special treatment
 - Complete criminal history
 - Previous informant activities & benefits.

Tracking & Disclosure Requirements: *Florida & Texas Court Actions*

Florida: 2014 State Supreme Court Rule

- Substance of statements.
- Criminal history.
- Time/place of defendant's statements.
- Benefits offered for testimony.
- Previous jailhouse informant activity.

Oklahoma: 2000 *Dodd v. State*

- 10 days before trial must disclose:
- Complete criminal history.
- Benefits offered for testimony.
- Whether informant ever changed statements.
- Previous jailhouse informant activities & benefits

Pre-trial Reliability Hearings *Benefits*

Judges understand incentivized informant system.

Jurors incorrectly believe state would only present truthful jailhouse informant witnesses.

Enforces disclosure requirements.

Pre-trial Reliability Hearings *National Picture*

Illinois Statute (2009/2018)

- Requires reliability hearings in death penalty cases.
- Legislation extends requirement to homicide and sexual assault cases.

Nevada Case Law: (1992)

- *D'Agostino v. State* (1992) Requires pre-trial reliability hearings during penalty phase of capital cases.

Jury Instructions

California, Connecticut, Oklahoma & Utah instruct jurors to:

- Give greater scrutiny to jailhouse witnesses.
- Assess specific reliability/credibility factors.
 - Benefits offered for testimony.
 - Criminal history
 - Previous jailhouse informant activities.
 - Whether jailhouse informant recanted or changed statements at any time.

The Problem

DNA only involved in 10% of criminal cases.

Nevada is 1 of 5 states w/absolute time limit for new, non-DNA evidence.

Nevada has two limited options for new non-DNA evidence:

- **Motions for New Trial Law** N.R.S 176.515
- **State Habeas** N.R.S, 34.726

Motions for New Trial Law

N.R.S 176.515

Problems:

- 2-year time limit after conviction for new non-DNA evidence.

New evidence standard:

- 1) Material to defense.
- 2) Could not have been discovered with due diligence.
- 3) Must not be cumulative.
- 4) Reasonable probability the defendant would be acquitted.
- 5) Must not simply be an attempt to discredit a former witness.
- 6) Must be best evidence the case admits.

State Habeas N.R.S 176.515

Problems:

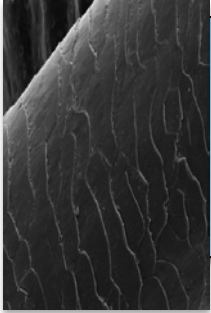
- Must be linked to constitutional claim.
- *No “freestanding claim of innocence.”*
- 1-year time limit after appeal.

New evidence standard:

- Exception to time/procedural bars if there is a ‘miscarriage of justice’ & ‘no reasonable juror’ would convict him.

New Evidence
Time Limit

Junk Science Convictions



Hair Microscopy: In 2015 FBI revealed experts incorrectly testified in 95% of cases.



Arson: National Fire Protection Association 1992 report discredited many so-called signs of arson.



Comparative Bullet Analysis: FBI discontinued in 2005.

Nevada is National Outlier

29 States

- No Time Limit

7 States

- Time Limit w/Due Diligence Exception.

9 States

- Time Limit from Discovery of New Evidence

5 States

- Absolute Time Limit
- (AR, CT, DE, ID, NV)

The Solution

Remove 2 -year time limit in 'motions for new trial law.

Clarify that 'junk science' should be considered newly discovered evidence

No Flood of Litigation

Motions for new trial statute has conservative 'new evidence' standard:

- 1) Material to defense.
- 2) Could not have been discovered with due diligence.
- 3) Must not be cumulative.
- 4) Reasonable probability the defendant would be acquitted.
- 5) Must not simply be an attempt to discredit a former witness.
- 6) Must be best evidence the case admits.

New Evidence
Time Limit

No Flood of Litigation

States Recently Removed Time Limit for New Non-DNA Evidence

Utah

Incarcerated
Population 13,810

2008 Law

13 Petitions Total

Maryland

Incarcerated
Population 33,374

2009 Law

27-28 Petitions
Annually

Virginia

Incarcerated
Population 63,406

2004 Law

18 Petitions
2004-2008

Texas & California 'Junk Science' Laws

'New evidence' includes relevant scientific evidence that:

- Was not available at trial, or
- Contradicts science relied on by the state at trial.

'Contradicting science:'

- Changes in scientific understanding.
- Expert recantation.
- Scientific method used to analyze the evidence.

Nation & World

New Wyoming law will help wrongfully convicted people



Originally published March 14, 2018 at 8:52 am

By [The Associated Press](#)

The Associated Press

CHEYENNE, Wyo. (AP) — Wyoming Gov. Matt Mead has signed a bill into law that expands the length of time wrongfully convicted people have to introduce exonerating evidence.

In Wyoming, people convicted of crimes had a two-year window in which they could present non-DNA evidence in an effort to have their conviction overturned.

The Casper Star-Tribune reports that after that time period, they could only introduce DNA evidence to fight their conviction.

The new law eliminates that two-year limit, allowing wrongfully convicted people to introduce non-DNA evidence at any point.

Nevada Innocence Reforms Needed

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