

# PREVENTING WRONGFUL CONVICTIONS

Regulating Suspect & Informant Evidence

ROCKY MOUNTAIN  
INNOCENCE CENTER

INNOCENCE PROJECT



# WRONGFUL CONVICTION

## Contributing Factors

Nationally there have been 341 DNA-based exonerations since 1989.

1. **Eyewitness misidentification**: 71%
2. **False confessions**: 28%
3. **In-custody informant testimony**: 16%

# EYEWITNESS MISIDENTIFICATION

NRS 171.1237 requires all Nevada agencies to have written policies on eyewitness identification, but does not require specific practices.

Best practices:

1. **Blind/blinded administration of lineups.**
2. **Instructions to the eyewitness.**
3. **Proper use of non-suspect “fillers.”**
4. **Confidence statements.**

# NEVADA'S SUCCESS

## Eyewitness Identification Reform

- Las Vegas Metro Police Department + Washoe County Sheriffs Office adopted best practices.
- 80% of Nevada's population covered by best practices.
- No legislation needed.

# FALSE CONFESSIONS

**Nationally:** 28% of DNA exonerations cases.

**Nevada:** 3 of 9 wrongful convictions involved a false confession.



## **Cathy Woods**

**Charge:** First-degree murder

**Jurisdiction:** Reno, Nevada

**Sentence:** Life without parole

**Exonerated:** 2015

**Time Served:** 35 years

# RECORDING CUSTODIAL INTERROGATIONS

## **Protects the Innocent**

- Deters against coercive or illegal interrogation tactics.
- Alerts fact finders to mental limitations or other vulnerabilities.
- Ensures defendants' rights are protected.

## **Benefits Law Enforcement**

- Builds stronger cases by substantiating authentic confessions.
- Protects officers against frivolous claims of misconduct.
- Makes it easier to prepare for trial.

# RECORDING CUSTODIAL INTERROGATIONS

## National Landscape

- ▶ Federal agencies record interrogations for all crimes.
- ▶ 20 states + District of Columbia mandate recording through statute or court action

Alaska, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Maryland, Maine, Michigan, Minnesota, Montana, Missouri, Nebraska, New York, New Mexico, North Carolina, Oregon, Utah, Vermont, Wisconsin.

# RECORDING INTERROGATIONS

Why is legislation necessary?

## **Eyewitness ID**

- ▶ Legal test for suppression is “reliability.”
- ▶ Built in mechanism to consider use of best practices.
- ▶ Strong incentive for law enforcement compliance.

## **Confessions**

- ▶ Legal test for suppression is “voluntariness.”
- ▶ No consideration for failure to record.
- ▶ No consequence for non-compliance.
- ▶ Courts need direction on how to handle unrecorded confessions.



# RECORDING INTERROGATIONS

## Nevada Agencies Recording Interrogations in Some Form:

- Boulder City PD
- Carlin PD
- Douglas County Sheriff
  - Elko PD
- Elko County Sheriff,
- Henderson Police Department
- Lander County Sheriff
- Las Vegas Metro Police Department
- Nevada Department of Public Safety
  - North Las Vegas PD
  - Reno PD
  - Sparks
- Washoe County Sheriff
  - Wells PD
  - Yerington PD

# RECORDING CUSTODIAL INTERROGATIONS

## Common Concerns about Legislation

1. Costs.
2. Guidelines are preferable to mandates.
3. Remedy could result in guilty people going free.

# COMMON CONCERNS ABOUT LEGISLATION

## Costs

### Small agency implementation:

- ▶ Innocence Project surveyed 100 agencies from MA & WI; 13% had 10 or fewer officers.
- ▶ Most used \$50 handheld digital recorders.
- ▶ Equipment-sharing agreements are an option for agencies that want hi-tech equipment.

### Long-term savings:

- ▶ **Greater court efficiency.** Fewer pretrial motions to suppress confessions and more guilty pleas.
- ▶ **Reduced court time for officers.**
- ▶ **Fewer frivolous lawsuits based on officer misconduct.**

# COMMON CONCERNS ABOUT LEGISLATION

## Guidelines Preferable to Mandate

### Guidelines

- ▶ Agencies & officers have total discretion.
- ▶ No consequence for failure to record.
- ▶ No uniform statewide practice.

### Utah: Rule 616 of Evidence (2015)

- ▶ Statements made by defendants during custodial interrogations are inadmissible unless specific good cause is demonstrated.
- ▶ If good cause is shown and statement is admitted, a jury instruction is provided.

# COMMON CONCERNS ABOUT LEGISLATION

## Remedy Could Help the Guilty

- ▶ To the contrary, remedies encourage law enforcement to record interrogations, which leads to better evidence.
- ▶ Removes doubt surrounding confessions for judges & juries.
- ▶ Remedies include possible inadmissibility, jury instructions or both.
- ▶ All states have good cause exceptions to mandate.

# IN-CUSTODY INFORMANTS

## Increased Risk of Wrongful Conviction

1. **Inherent credibility issues.**
2. **Benefits provide incentives to fabricate testimony.**
  - Leniency in charges or sentencing; non-prosecution agreements
  - Monetary payments
  - In-kind benefits: visiting privileges, better living conditions, food, etc.
3. **Traditional protections against false evidence are ineffective.**

# IN-CUSTODY INFORMANTS

## Brady Obligations

### *Brady vs. Maryland*

- ▶ Prosecutors must surrender to persons accused of crime all evidence in the prosecutor's possession or known to him that is **“favorable to an accused [and] material either to guilt or to punishment ....”**
- ▶ Evidence is “material” if there is a **reasonable probability that conviction or sentence would have been different** had these materials been disclosed.
- ▶ Prosecutors must determine before trial whether undisclosed information will be considered “material” by an appellate court many years later.

# IN-CUSTODY INFORMANTS

## State Regulations

1. Pre-trial disclosure requirements.
2. Pre-trial reliability hearings.
3. Jury instructions.
4. Corroboration requirements.
5. Prosecution tracking & oversight systems.



# IN-CUSTODY INFORMANTS

## Pre-trial Disclosure

**Florida, Illinois, Nebraska & Oklahoma** require timely disclosure of specific information related to an informant's credibility.

**Illinois (725 ILCS 5/115-21)** When in-custody informant testimony is offered in capital cases, the following must be disclosed to the defense

- ▶ Criminal history of the informant.
- ▶ Any deal, promise, inducement or benefit that the offering party has made or will make in the future.
- ▶ Statements made by the accused.
- ▶ Time and place of statements, their disclosure to law enforcement, and the names of all persons present.
- ▶ Whether at any time the informant recanted the testimony, the time, place and nature of the recantation and the names of the people who were present.
- ▶ Other cases in which the informant testified and whether he received any promise, inducement, or benefit offered in those cases.
- ▶ Any other information relevant to the informant's credibility.

# IN-CUSTODY INFORMANTS

## Pre-trial Reliability Hearing

**Illinois (725 ILCS 5/115-21)** When the state plans to introduce in-custody informant testimony in capital cases, the court must hold a pretrial hearing to determine the reliability of the testimony. The prosecution must show by a preponderance of the evidence that the testimony is reliable or it is inadmissible.

- ✓ Judges can act as gatekeepers.
- ✓ Ensures that discovery obligations are met.
- ✓ Improves reliability of evidence heard by jurors.

# IN-CUSTODY INFORMANTS

## Jury instructions

**California, Colorado, Illinois, Montana, Oklahoma, Ohio, and Wisconsin** require jury instructions.

*Dodd v. State*, 993 P.2d 778, 785 (Okla.Crim.App.2000)

The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.

# IN-CUSTODY INFORMANTS

## Corroboration Requirements

- ▶ **California & Texas** prohibit criminal convictions based solely on in-custody testimony; it must be corroborated by other evidence.
- ▶ Corroboration has to go beyond fact that the informant appears to know details about the crime.

# IN-CUSTODY INFORMANTS

## Prosecutor Tracking & Oversight

### **Los Angeles District Attorney: Central Index System**

- ▶ Central index of in-custody informants.
- ▶ Internal Jailhouse Informant Committee must approve informant use.

### **New York County District Attorney: Disclosure Checklist**

- ▶ Benefits
  - Reduced plea, immunity, reduced sentence, non-prosecution agreements.
  - Monetary benefits
  - Immigration assistance.
  - Housing or relocation.
  - Benefits to third party on behalf of witness.
- ▶ Criminal convictions & any known misconduct.
- ▶ Mental or physical health issues
- ▶ Motive or bias to fabricate

## IN-CUSTODY INFORMANTS

### Nevada Case Law on Informants

- ▶ ***Buckley v. State*** (1979) Cautionary jury instruction is **required** when an informant's testimony is uncorroborated and **favored** when the testimony is corroborated.
- ▶ ***D'Agostino v. State*** (1992) Supreme Court of Nevada recognized the inherent problems with informant testimony and ruled that **in specific instances during the penalty phase of a case, judges must hold reliability hearings** before informant testimony can be heard by a jury.

# IN-CUSTODY INFORMANTS

## Continuing Problems

LAS VEGAS  
REVIEW-JOURNAL

### **DA criminal informant safeguard rarely used in Clark County, records suggest**

By BETHANY BARNES LAS VEGAS REVIEW-JOURNAL March 12, 2016

The new inducement index, lawmakers were told in 2008, would prevent those problems without the need for new laws. After the district attorney's office pitched the concept of the inducement index to the Legislature's advisory commission on the administration of justice, the matter didn't come back up.

But the Legislature had reason to worry.

After six years of use, the inducement index has just 130 entries — a figure defense attorneys consider laughably low considering that roughly 330,000 criminal cases were prosecuted in Clark County over that time.

# IN-CUSTODY INFORMANTS

## Future Considerations

- 1. Statutorily require prosecutor offices to establish internal systems to track informant data and to disclose to the defense in a timely manner:**
  - ▶ Benefits received, promised or expected in exchange for testimony.
  - ▶ All cases in which informant offered testimony & benefits offered.
  - ▶ Criminal history.
  - ▶ Relationship with accused and statements made by the accused.
  - ▶ Whether informant recanted at any time and details of recantation.
  - ▶ Other information relevant to informant's credibility.
- 2. Requiring pre-trial reliability hearings.**
- 3. Requiring jury instructions.**