

# Innocence Protections Proposal

presented to the

Nevada State  
Advisory Commission on the Administration of Justice

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by the

Rocky Mountain Innocence Center  
Innocence Project

## **Introduction**

Protecting against wrongful convictions helps to ensure public safety, inspire confidence in the criminal justice system, and protect individual liberties. In Nevada nine wrongful convictions have been overturned since 1989, and two of these exonerations occurred last year, according to the National Registry of Exonerations.<sup>1</sup>

The Rocky Mountain Innocence Center (RMIC) investigates and litigates innocence cases in Nevada, Utah, and Wyoming, and the Innocence Project is a national organization that works to exonerate the wrongfully convicted using DNA evidence. Currently, RMIC is investigating 24 potential wrongful convictions and litigating three cases. Our organizations also work together to enact policies that redress the leading causes of wrongful convictions through evidence-based procedures.

In July 2014, we presented to the Advisory Commission on the Administration of Justice (“the Commission”) on eyewitness identification best practices. We would like to update the Commission on statewide eyewitness identification reform efforts and offer a broader “innocence protections” proposal that includes information on two additional leading causes of wrongful conviction—false confessions and informants.

## **I. Eyewitness Identification Reform**

### **Background**

Witness misidentification is the single greatest cause of wrongful convictions, playing a role in over 71 percent of the 337 DNA-based exonerations in the United States. In Nevada, NRS 171.1237 currently requires each law enforcement agency in the state to adopt policies and procedures governing the identification of a suspect by an eyewitness, however the law does not specify which procedures must be included.

On July 8, 2014 Rebecca Brown, Innocence Project Policy Director, presented to the Commission on the scientifically-supported best practices proven to enhance the accuracy of identifications including: 1) blind or blinded administration of a lineup (e.g. the officer conducting the lineup is unaware of the suspect’s identity or is prevented from seeing which lineup member is being viewed by the witness), 2) witness instructions that the perpetrator may or may not be present, 3) proper use of non-suspect fillers that do not make the suspect stand out, and 4) eliciting witness confidence statements at the time of the identification. Ms. Brown indicated that if there was substantial voluntary compliance with these best practices at the local law enforcement agency level, the need for legislation would be obviated.

### **UPDATE**

Following the presentation, RMIC and the Innocence Project worked collaboratively with law enforcement in both Clark and Washoe Counties on implementing eyewitness identification best

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<sup>1</sup> The National Registry of Exonerations

<http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=NV>

practices. We would like to share the good news that both Clark and Washoe Counties—which cover 80 percent of the state’s population—have adopted evidence-based policies (copies are attached). This means that statewide voluntary implementation by law enforcement was successful and there is no need for legislative action.

## **II. Electronic Recording of Custodial Interrogations**

### **Background**

Recording custodial interrogations in their entirety provides a safeguard against wrongful convictions stemming from false confessions, which played a role in 28 percent of DNA-based exonerations nationally. The practice protects the innocent by deterring against coercive or illegal interrogation techniques and alerting judges and juries to mental illness or other factors that make defendants more vulnerable to false confessions. It also benefits law enforcement by substantiating authentic confessions, protecting officers against frivolous claims of abuse or coercion, and reducing officer court time by eliminating disputes over what occurred during the interrogation.

Currently, 19 states and the District of Columbia mandate electronic recording of interrogations in their entirety either by statute or case law (AK, CT, IL, IN, MD, MA, ME, MI, MN, MO, MT, NE, NJ, NM, NC, OR, UT, VT & WI). Last year the U.S. Department of Justice issued a policy that federal law enforcement agencies including the FBI would record interrogations for all crimes. Most recently, in October 2015 the Utah Supreme Court issued a rule that non-recorded statements made by a defendant during an interrogation would be inadmissible in court.

- A. Nevada False Confession Cases: According to the National Registry of Exonerations, which tracks wrongful convictions overturned with both DNA and non-DNA evidence, three of the state’s nine exonerations involved the innocent person falsely confessing to a crime or being implicated in the confession of a co-defendant.<sup>2</sup>

Most recently, Cathy Woods was exonerated in 2015 after serving 35 years in prison, for a murder she did not commit. Woods suffers from schizophrenia and was a patient in a mental hospital when she told a staff member that she murdered Michelle Mitchell in Reno. During a police interrogation she confessed to the murder, but also made blatantly false statements that she was in the FBI and was being poisoned, and later recanted her confession. Although there was no physical evidence linking Ms. Woods to the murder, she was convicted based on her confession and sentenced to life in prison without parole. In 2014, DNA testing of a cigarette butt found at the crime scene matched the profile of Rodney Halbower, who had served time for attempted murder and rape, and has been charged with killing two women in California. Cathy Woods finally had her conviction vacated in 2015.<sup>3</sup>

- B. Current Recording Practices in Nevada: The Innocence Project surveyed public defender offices in Nevada about the recording practices at law enforcement agencies in their counties. The results showed that agencies covering a majority of the state’s population—including the Las Vegas Metropolitan Police Department, North Las Vegas Police Department, Washoe

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<sup>2</sup> The National Registry of Exoneration <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

<sup>3</sup> *Id.*s

County Sheriff, Reno Police Department, and Sparks Police Department—have recording equipment and record interrogations in some form. However, there is no consistent statewide practice, and recording is generally done at the discretion of officers.

Absent a uniform and mandatory recording policy, justice may be unevenly administered and dependent on where in the state an individual is interrogated. In addition, there is no penalty if an interrogation is not recorded, which leaves the courts with little recourse if the practice is not implemented. When the courts consider the voluntariness of a confession, if they are not explicitly directed to consider whether or not an interrogation was recorded it will not be part of their assessment.

### **Issues for Commission to Examine**

Given that the majority of agencies in Nevada possess equipment and already record interrogations in some form, we ask that the Commission examine ways to implement a uniform, statewide practice of recording interrogations. Consistent policies that require recording of interrogations for certain crimes, explain when recordings should begin and end, and articulate allowable exceptions to the practice will ensure the fair administration of justice throughout the state.

At this stage, because we would like to continue our collaborative work with law enforcement, we ask that the Commission simply help us to better understand the current status of practice across the state of Nevada by surveying agencies on their current practices, the availability of recording equipment, and their views on the challenges and benefits of requiring statewide electronic recording of interrogations in their entirety. Given that our survey of defender offices was anecdotal at best, it likely is not a complete representation of the landscape. Once the Commission surveys agencies, the results will provide a better understanding as to whether the Commission should take additional action.

## **III. Informants**

### **Background**

Jailhouse informants and other types of incentivized witnesses played a role in 16 percent of the nation's DNA-based exonerations. Informants increase the risk of wrongful convictions for several reasons. First, the actual or perceived promise of leniency, reduced sentences, or other benefits creates strong incentives for an informant to fabricate evidence. Second, because of the secrecy surrounding the use of incentivized witnesses, legal procedures such as cross-examination are ineffective at weeding out perjured informant testimony. Third, the use of informant testimony is largely unregulated by state legislatures or courts, despite many documented miscarriages of justice that have resulted from this type of evidence.

The Commission has examined the issue of regulating informants in the past. In 2008, a representative from the Nevada Attorneys for Criminal Justice testified that prosecutors had an affirmative obligation to maintain a recordkeeping system on promises made to witnesses that

could be accessed by all lawyers.<sup>4</sup> The criminal defense bar made the following recommendations:

1. Statutorily require prosecution offices to maintain an internal system to disseminate to fellow prosecutors and defendants information for impeaching informants required under *Brady*.
2. Statutorily require prosecution disclosure in advance of trial of any intent to use informants at trial for either the case-in-chief or rebuttal.
3. Statutorily require the corroboration of all informant witnesses.

In response, the Clark County District Attorney's Office testified that there was no need for legislation requiring prosecution offices to maintain internal systems to disseminate to fellow prosecutors information for impeaching informants because counties already had or were in the process of developing policies. At the time, the Clark County District Attorney's Office said it was in the process of developing an inducement database and case management system to track rewards offered to informants. The Clark County District Attorney's Office also testified that other items relative to an informant's testimony were disclosed in advance of any intent to use informants at trial.<sup>5</sup>

However, a recent article Las Vegas Review-Journal stated that Clark County's informant database had just 130 entries, while 330,000 criminal cases were prosecuted in the jurisdiction since 2008.<sup>6</sup> These numbers suggest that voluntary adoption of informant tracking within the office has not been effective.

### **Issues for Commission to Examine**

Given that statewide adoption of an informant tracking system has not been achieved voluntarily, and that defense attorneys cannot properly cross-examine informants without information on the promises made in exchange for their testimony, the Commission may consider the following:

- *Statutorily requiring prosecution offices to maintain an internal system* to disseminate to fellow prosecutors and defendants information for impeaching informants required under *Brady*.
- *Pre-trial reliability hearings*: Having judges act as gatekeepers to screen out unreliable informants would improve the quality of testimony that is heard by juries and reduce the risk of wrongful convictions. In *D'Agostino v. State* the Supreme Court of Nevada held that "that testimony in penalty hearing relating to supposed admissions by convict as to past homicidal criminal conduct may not be heard by the jury unless the trial judge first determines that

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<sup>4</sup> MINUTES OF THE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE June 9, 2008  
[https://www.leg.state.nv.us/Session/74th2007/Interim\\_Agendas\\_Minutes\\_Exhibits/Minutes/AdminJustice/IM-AdminJustice-060908-10118.pdf](https://www.leg.state.nv.us/Session/74th2007/Interim_Agendas_Minutes_Exhibits/Minutes/AdminJustice/IM-AdminJustice-060908-10118.pdf)

<sup>5</sup> MINUTES OF THE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE July 7, 2008  
<file:///S:/Policy%20Department/State%20Plans/PRIORITY%20STATES/Nevada/2008%20Prosecutor%20Testimony%20on%20Informants%20IM-AdminJustice-070708-10118.pdf>

<sup>6</sup> Barnes, Bethany. Las Vegas Review-Journal. DA criminal informant safeguard rarely used in Clark County, records suggest. March 12, 2016.

details of the admissions supply sufficient indicia of reliability or there is some credible evidence other than admission itself to justify conclusion that inmate committed crimes which are the subject of the admission.”<sup>7</sup> While this ruling requires pre-trial reliability hearings only in specific instances during the penalty phase of a trial, the Commission may consider requiring such hearings before the entire trial to avoid any contamination by unreliable informant testimony. This would help avoid wrongful convictions altogether, and inoculate the state from civil suits that flow from preventable wrongful convictions based on informant testimony.

- *Pre-trial discovery for informant testimony: Brady v. Maryland* provides a constitutional right for a defendant to access exculpatory information in the state’s possession. However, *Brady* is a limited tool for preventing wrongful convictions because a violation can only be filed after a conviction has already occurred and the prosecution is found to have withheld evidence that would have changed the outcome of the trial.<sup>8</sup> Florida, Illinois, Nebraska and Oklahoma require the state to disclose specific information relating to an informant’s credibility prior to trial such as criminal history, any incentives offered, and other cases in which the informant testified in exchange for benefits.
- *Jury instructions*: California, Colorado, Illinois, Montana, Oklahoma, Ohio, and Wisconsin require jury instructions for in-custody informant testimony.<sup>9</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> Timothy Cole Advisory Panel on Wrongful Convictions: Report to the Texas Task Force on Indigent Defense (2010).

<sup>9</sup> The Justice Project. “Jailhouse Snitch Testimony: A Policy Review” (2007).