

**AMERICAN BAR ASSOCIATION  
CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1           RESOLVED, That the American Bar Association urges federal, state, and  
2 territorial governments to identify and attempt to eliminate the causes of erroneous  
3 convictions.

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5           FURTHER RESOLVED, That the American Bar Association urges state and  
6 local bar associations to assist in the effort to identify and attempt to eliminate the causes  
7 of erroneous convictions.

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## REPORT

### **Introduction**

The United States has developed an exemplary system for seeing that defendants get due process at trial. We have also developed appellate review of trials to assure that the government complied with due process in obtaining convictions. Although restricted somewhat in recent years, the federal judiciary, through the application of the writ of habeas corpus, reviews state convictions as a further guarantee of fairness. But post-trial appellate remedies at their best are not designed to correct wrongful convictions or prevent them from happening. There are currently 159 DNA exonerations<sup>1</sup>, which have effectively questioned the assumption that the system our nation has so proudly developed protects the innocent sufficiently. Other high profile exonerations, such as those resulting from the Rampart police scandal in Los Angeles California, have not involved scientific evidence. While no criminal justice system can expect to be perfect, it is important that jurisdictions ensure that their laws, policies and practices are designed to reduce the risk of convicting the innocent, and increase the likelihood of convicting the guilty. Some perceive a need to go beyond individual exonerations and establish a permanent complementary institutional procedure for those who claim factual innocence after a trial has come to the contrary conclusion.<sup>2</sup>

The CJS Innocence Committee studied ways of providing relief for individuals claiming innocence. However, because the practical difficulties of screening claims would be significant, the current resolution is tailored to avoid imposing any burdensome screening obligation on the judicial system. For example, one suggested reform, which, to date, has not yet come into existence anywhere, is to set up an Inspector General or ombudsmen with extraordinary powers to investigate and recommend the release of those discovered to have been wrongly convicted or factually innocent. Without an existing model, it is difficult to envisage precisely how this official would function; nevertheless, the concept has some strong and respected adherents, including former Dean of the

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<sup>1</sup> See [www.innocenceproject.org](http://www.innocenceproject.org).

<sup>2</sup> This draft relies heavily on the following articles: Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 Cal. W.L. Rev. 333 (2002); Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 Am. U. Int'l L. Rev. 1241 (2001); David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. Ill U. L. Rev. 91 (2000); C. R. Huff et. al., *Convicted but Innocent: Wrongful Conviction and Public Policy* (Sage Publications, 1996); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 Neb. L. Rev. 1097 (2002); Michael Saks et. al., *Model Prevention and Remedy of Erroneous Convictions Act*, 33 Ariz. St. L.J. 665 (2001); Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted*, (2000); Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commission" in America*, 86 Judicature 98 (Sept.-Oct. 2002) (hereinafter Scheck, *Innocence Commission*.").

University of Chicago Law School, Norval Morris, and Barry Scheck, the Director of the Innocence Project at The Benjamin Cardozo School of Law.

Similarly, British post-conviction practice provides a model and experience that deserves critical study. However, the British system of Criminal Case Review Commissions requires significant resources that make sense in the absence of direct appellate review, but would be unduly costly appended to our existing system of judicial review. Britain does not provide universal rights of appeal or any post-conviction remedies. Nevertheless, in 1995, Great Britain created the Criminal Case Review Commission (CCRC) and set up a formal process for investigating and settling allegations of innocence.<sup>3</sup> The CCRC is accountable to the Home Secretary and has fourteen members, including the chair. Two-thirds must be lay persons and one-third lawyers. At least two-thirds must be criminal justice experts. In essence, what the CCRC provides is a combination of appellate review, post-conviction relief, and executive clemency in cases in which convictions are deemed unsafe.

The process begins when those claiming they were wrongly convicted apply either with or without counsel to the CCRC. Next, the staff reviews the application and determines eligibility. If the regular appellate process is still ongoing, the staff simply rejects the application. If, however, the application is in order and the claim, if substantiated, is likely to succeed, the staff undertakes to acquire the necessary documents, takes steps to preserve the record, and passes the case on to a second stage review. This results in the assignment of the application to a caseworker and also to a member of the CCRC. Together they make an assessment of the case and develop an action plan. Those cases in which the caseworker concludes there is no real possibility of quashing the conviction result in a “short form” letter informing the applicant and explaining the reason why. The applicant has 28 days to respond, which could result in further consideration. The conclusion “not minded to refer” rests with one commissioner, but those cases in which the conclusion is that there exists a real possibility of a wrongful conviction, the case goes to three commissioners, who decide whether to refer the case to the Court of Appeal. After the referral, the CCRC withdraws from the case and Legal Aid takes over. If there appears a need for further investigation, the commission has the power to do so, but in practice seldom does. There exists no regular appeal from decisions of the CCRC, except through the rare use of the mandamus power where the court makes a determination of whether the decision was “perverse or absurd.”

When the Court of Appeal considers the referred cases, the standards for review differ considerably from those in the United States. For instance, the court may consider new evidence whenever it considers it prudent to do so and whenever there is any reasonable explanation for not having offered it at the trial. And the evidence need not rise to the level of probably changing the result of the trial, the familiar *Strickland* standard in the United States.

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<sup>3</sup> The following description is based on Horan, *supra* note 2; Griffin, *supra* note 2.

The CCRC takes about 800 to 900 applications a year for review and, then, after the screening and investigation, it refers fewer than 5% for appellate review. Of those, however, the Court of Appeal quashes the conviction in close to 70% of the cases that meet the criteria of “a real possibility that the conviction, verdict, finding or sentence would be likely to be found infirm.” In essence, what the CCRC provides is a combination of appellate review, post-conviction relief, and executive clemency in cases in which the convictions are deemed unsafe.

After much consideration, it was decided that no particular type of entity or procedure be recommended to address innocence issues, instead each jurisdiction is given total control of how to identify and attempt to eliminate the causes of erroneous convictions. However, the resolution favors an approach that lends itself to a systemic review of policies and practices that affect erroneous convictions. In other words, the unique combination of practices and procedures present in each jurisdiction will define how to best ensure the elimination of erroneous convictions. Thus, a jurisdiction may find that in addition to the 8 specific issues that recent ABA policy has identified as affecting erroneous convictions, other jurisdiction specific issues must also be considered.

### **Identifying and Attempting to Eliminate Causes of Erroneous Convictions**

Over half of the states have experienced exonerations as a result of DNA testing. Prompted by the discovery of those wrongful convictions, several states have undertaken study commissions or authorized studies to report on the causes of the miscarriages. The most notable, of course, is the Illinois study that first led to a moratorium and eventually to the commutation of the death sentence of all the condemned on death row.<sup>4</sup> The Illinois death penalty study commission issued a lengthy report with eighty-five recommendations for reforms that were intended to correct the failings identified by a blue ribbon panel. In Maryland, the governor, at the urging of some members of the General Assembly, commissioned a study by a professor at the University of Maryland to look into the fairness of the exercising of discretion in imposing the death penalty. North Carolina, under the aegis of the North Carolina Supreme Court, has established an Actual Innocence Commission to develop procedures to decrease the possibility of conviction of the innocent.

There have also been a number of unofficial studies that do not have the imprimatur of the government. A few will serve as examples. First, the Constitution Project at Georgetown University is a committee of thirty former judges, prosecutors, defense attorneys, journalists, scholars, and others assembled to study and recommend reforms to the death penalty system. In its initial draft report, the Project proposed eighteen reforms of the capital punishment system, addressing issues such as the provision of adequate counsel, the scope of the death penalty, reducing racial disparity, protecting against wrongful conviction and sentencing, and increasing discovery in capital cases. Similarly, the Innocence Commission for Virginia (ICVA), a joint project of the Mid-Atlantic Innocence Project, the Administration Justice Program at George

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<sup>4</sup> The following description is based on Findley, *supra* note 2.

Mason University, and the Constitution Project, recently issued a report examining eleven exonerations in Virginia and recommended reforms for preventing future wrongful convictions.

Another study resulted from a seminar taught by Professor Michael Saks at the University of Arizona. He and his students set out to use the DNA exonerations “to identify the systemic flaws in the criminal justice system that produce errors and work to cure those flaws” and to produce a “Model Act with a comprehensive set of criminal justice system reforms,” all aimed at reducing “the probability of an erroneous conviction, without reducing the probability of a correct conviction.”<sup>5</sup>

A state can undertake an inquiry in many ways. The governors and attorneys general have the power to appoint panels. State supreme courts can establish commissions by using their supervisory authority over criminal procedure. And, as in Maryland, the General Assembly can create a commission with a broad mandate to report back on flaws that lead to the conviction of the innocent. To date, however, the majority of the investigations into criminal justice flaws and miscarriages appear to be the result of non-governmental groups.

No particular structure is suggested in order to provide the maximum flexibility and minimum cost. If a separate entity is created, it should include the major stakeholders in the criminal justice system to identify and suggest policy in problem areas. In other words, why wait until after the fire, if an early warning system could have prevented the conflagration? This approach has been used successfully in the sentencing arena with the assistance of the National Institute of Corrections. Representatives from local government, the public defender, state’s attorney, sheriff, judges, probation officers and service providers were included in an effort to improve policy and services concerning female offenders. Both prosecutors and defense counsel have found the process helpful.<sup>6</sup> Many of the same governmental offices would be represented in a committee focusing on issues of criminal justice integrity and fairness. Law enforcement, forensic labs, the jury commissioner and a public representative would also be included in a more global criminal justice committee.

Such a review could address general as well as specific issues. For example, if public defenders were hearing complaints that seemed to focus on particular individuals, these could be given to the appropriate representative for their own investigation or serve as a general impetus for better training in particular areas. Similarly, complaints about slowness of forensic results might reveal priority questions regarding processing of different categories of cases. Given a world of limited resources, if all of the major stakeholders agreed that more resources were necessary for a particular purpose or agency, this cross-agency collaboration of unlikely allies might prove more credible in efforts to obtain the necessary resources.

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<sup>5</sup> Saks, *supra* note 2, at 671.

<sup>6</sup> See, e.g., Lauren B. Simon and Mary Katherine Moore, *Intermediate Sanctions for Women Offenders Project*, 16 *Criminal Justice* 54 (Spring, 2001).

Some jurisdictions have established specific bodies to better study criminal justice issues. For example, Georgia's Criminal Justice Coordinating Council defines its mission "to serve as a statewide body providing leadership to coordinate, intensify and make more effective the components of the criminal justice system at all levels of government."<sup>7</sup> The New Mexico Criminal and Juvenile Justice Coordinating Council's mission is to provide information, analysis, recommendations and assistance from a coordinated cross-agency perspective to the three branches of government and interested citizens so they have the resources they need to make policy decisions that benefit the criminal and juvenile justice systems.<sup>8</sup> The mission of the District of Columbia's Criminal Justice Coordinating Council (CJCC) is:

to serve as the forum for identifying issues and their solutions, proposing actions, and facilitating cooperation that will improve public safety and the related criminal and juvenile justice services for District of Columbia residents, visitors, victims, and offenders. The CJCC draws upon local and federal agencies and individuals to develop recommendations and strategies for accomplishing this mission. Our guiding principles are creative collaboration, community involvement, and effective resource utilization. We are committed to developing targeted funding strategies and comprehensive management information through integrated information technology systems and social science research in order to achieve our goal.<sup>9</sup>

This concept could also be considered in major urban localities. Such coordinating councils could be one way to study innocence issues. However, in the case of existing bodies, the innocence function should clearly be a specific mission.

A natural place for jurisdictions to begin to review local laws and procedures is by comparing them to newly adopted ABA innocence policies. Such review would undoubtedly also look at suggestions by other public and private bodies that have studied these issues. A number of ABA resolutions now focus on strengthening the criminal justice system in light of the growing number of exonerations of individuals convicted of crimes they did not commit. They include policy concerning videotaping of confessions, eyewitness testimony, law enforcement training and procedures, scientific evidence, jailhouse informants, prosecutorial and defense best practices, and compensation of exonerees. Given the number of related policy concerns and the likelihood these issues appear in a wide range of statutes, cases, practices and policies within any jurisdiction, a wide reaching review is desirable to ensure compliance with best practices.

In addition to studying existing law, policies and practices, any local case in which an individual has been exonerated also provides key information about why the system produced an erroneous conviction. Currently, when an individual is exonerated in

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<sup>7</sup> See [www.state.ga.us/cjcc](http://www.state.ga.us/cjcc).

<sup>8</sup> See [www.cjjcc.org](http://www.cjjcc.org).

<sup>9</sup> See <http://ccjc.dc.gov/cjcc/mission-statement.html>.

the United States, there is no review of what led to the improper conviction. This recommendation takes no position concerning the extent or nature of such a review. Jurisdictions might view a paper review of the record resulting in the exoneration, or analysis provided by the media as sufficient. Other more detailed approaches have been suggested. Professors Scheck and Neufeld have argued for the creation of Innocence Commissions, modeled on the National Transportation Safety Board (NTSB).<sup>10</sup> They call for an agency with subpoena power, expertise, and independence to determine what went wrong and how to correct any systemic failure. In contrast, Professor Saks suggests placing the power in the Supreme Court, to appoint one or more people to conduct an inquiry into the causes of the erroneous conviction and issue a written report with findings and recommendations based on its investigation.<sup>11</sup>

Canada has longstanding legislation authorizing independent non-governmental investigations called Public Inquiry Commissions.<sup>12</sup> This procedure has been used to produce thorough reviews in two recent DNA exonerations, trying to find out why they occurred and, then, taking action to correct the flaws in the system that brought them about.<sup>13</sup> One of the more notable Canadian wrongful convictions was that of Guy Paul Morin for the murder of a nine-year-old. Morin's first trial ended with an acquittal, but with no double jeopardy protection in Canada, after a reversal of the verdict, he was then convicted in the second trial and exonerated later when DNA proved he could not have committed the crime. The Province of Ontario ordered "an unprecedented top-to-bottom examination of its criminal justice system" to (a) determine why the case resulted in conviction of an innocent person; (b) make recommendations for change intended to prevent future miscarriages of justice; and (c) educate the community about the administration of justice, generally, and the criminal proceedings against Guy Paul Morin, in particular.

The Commission produced a 1400-page report, after 146 days of hearings, with 119 specific recommendations for improving the criminal justice system. Those recommendations addressed problems with forensic science, the use of informant testimony, police investigation procedures, the performance and training of prosecutors and defense counsel, jury instructions, and the rules governing post-conviction and appellate review. Among the specific recommendations for limiting the use of informants was the requirements for screening and securing authorization by superiors before a prosecutor can use an informant, limiting the inducements offered to informants, and requiring full disclosure to the defense of the informants' backgrounds and any deals with them.

A case in another province produced another inquiry and another set of reports. In Manitoba, Thomas Sophonow underwent three trials and an eventual conviction for the strangulation murder of a sixteen-year-old girl. The Court of Appeal reversed his

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<sup>10</sup> See Scheck, *Innocence Commission*, *supra* note 2.

<sup>11</sup> See Saks, *supra* note 2.

<sup>12</sup> See Scheck, *Innocence Commission*, *supra* note 2, at 100.

<sup>13</sup> See generally Findley, *supra* note 2.

conviction, but Sophonow had to wait thirteen more years until, in June of 2000, the Police Service identified the true perpetrator. In addition to apologizing publicly, the Manitoba government created a “Commission of Inquiry” that set about an exploration of the justice system and produced a report, detailing the errors that led to the wrongful conviction and making recommendations for reform of the system. The report included recommendations for rules requiring the videotaping of all police interrogations of suspects to guard against coerced or disputed confessions and improved eyewitness identification procedures along with jury instructions on the frailty of eyewitness identification evidence, as well as severe restrictions on the use of jailhouse informants. There have been other Canadian inquiries following other acknowledged convictions of innocent defendants that have produced similar recommendations. These commissions, however, all ceased to exist after making their recommendations and do not function as permanent boards to monitor the administration of justice or process complaints of convicted defendants who claim factual innocence.

While the differences in the Canadian and United States criminal justice systems may account for the adoption of such commissions in Canada, they provide an alternative model for a jurisdiction to address innocence issues.

### **The Role of State and Local Bar Associations**

It is clear that the leadership of state and local bar associations is critical to furthering the goal of strengthening the criminal justice system to avoid convicting innocent individuals. Not only can they assist in obtaining a specific exoneration, but they can also work with the appropriate governmental bodies to ensure the adoption of best practices that protect the public, while lowering the possibility that innocents are convicted of crime. In addition, they can provide local speakers on these issues in the community and at law schools, and encourage the inclusion of innocence issues in Continuing Legal Education.

The ABA would hope to act as a resource to such bar associations. As previously mentioned, ABA resolutions have now been passed concerning forensic evidence, confessions, eyewitness testimony, jailhouse informants, best practices for law enforcement, prosecution and defense, and compensation of exonorees. These specific ABA policies would be the natural place for bar associations to begin their efforts. Other related topics could also be identified which would be conducive to checklists that red flag issues that arise frequently in wrongful convictions. For example, ABA policy now urges “no prosecution should occur based solely upon uncorroborated jailhouse informant testimony.” However, even if other evidence exists, the testimony of individuals who have or are likely to receive a benefit for their testimony is frequently present in cases involving wrongful convictions. Several official studies have documented the problems associated with the use of jailhouse informants. These include a grand jury report<sup>14</sup> and

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<sup>14</sup> REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 6 (June 26, 1990). *See also* Robert Reinhold, *California Shaken Over an Informer*, N.Y. TIMES, Feb. 17, 1989, at A1 (“Defense lawyers have compiled a list of 225 people convicted of murder and other felonies, some sentenced to



two Canadian judicial inquiries.<sup>15</sup> In addition, numerous books,<sup>16</sup> articles,<sup>17</sup> and news reports<sup>18</sup> have confirmed these problems.

Thus, providing checklists for the type of information that defense counsel should request can be an important aid, whether or not prosecutors are constitutionally required to disclose all such information under *Brady v. Maryland*.<sup>19</sup> In *Giglio v. United States*,<sup>20</sup> the Supreme Court held: “When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this [*Brady*] rule.” Indeed, the Court’s most recent *Brady* case, *Banks v. Dretke*,<sup>21</sup> involved the failure to disclose that a prosecution witness was a paid informant.

The prosecution is responsible for *Brady* material in the possession of the police. As the Supreme Court has commented: “[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”<sup>22</sup> The Court elaborated: “Since . . . the prosecutor has the

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death, in cases in which Mr. White and other jailhouse informers testified over the last 10 years in Los Angeles County.”).

<sup>15</sup> HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (Ontario Ministry of the Attorney General 1998); MANITOBA JUSTICE, THE INQUIRY REGARDING THOMAS SOPHONOW (2001). See also Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 761 (2002); Richard J. Wolson & Aaron M. London, *The Structure, Operation, and Impact of Wrongful Conviction Inquiries: The Sophonow Inquiry as an Example of the Canadian Experience*, 52 DRAKE L. REV. 677, 682 (2004).

<sup>16</sup> JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000) (“Snitches or informants were involved in 21 percent of the cases.”); ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 65 (2002).

<sup>17</sup> Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 847 (2002) (“The cooperating witness is probably the most dangerous prosecution witness of all. No other witness has such an extraordinary incentive to lie. Furthermore, no other witness has the capacity to manipulate, mislead, and deceive his investigative and prosecutorial handlers. For the prosecutor, the cooperating witness provides the most damaging evidence against a defendant, is capable of lying convincingly, and typically is believed by the jury.”); Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996) (“The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him.”); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 953 (1999).

<sup>18</sup> See John M. Broder, *Starting Over, 24 Years After a Wrongful Conviction*, N.Y. TIMES, June 21, 2004, at A14 (“Mr. Goldstein was able to establish conclusively that Mr. Fink, a habitual criminal, heroin addict and serial liar, had fabricated his account of Mr. Goldstein’s confession to him when they were together briefly in a Long Beach police holding pen.”).

<sup>19</sup> 373 U.S. 83 (1963).

<sup>20</sup> 405 U.S. 150, 154-55 (1972) (“[T]he Government’s case depended almost entirely on Taliento’s testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento’s credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.”).

<sup>21</sup> 124 S. Ct. 1256, 1279 (2004) (“[A]s to the suppression of Farr’s informant status and its bearing on ‘the reliability of the jury’s verdict regarding punishment,’ all three elements of a *Brady* claim are satisfied.”) (citations omitted).

<sup>22</sup> *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."<sup>23</sup>

One set of checklists is suggested by *Dodd v. State*,<sup>24</sup> in which the Oklahoma Court of Criminal Appeals noted that "[c]ourts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony."<sup>25</sup> Illinois subsequently codified this approach in death penalty cases involving jailhouse informants, making the following information discoverable:

- (1) the complete criminal history of the informant;
- (2) any deal, promise, inducement, or benefit that the offering party has made or will make in the future to the informant;
- (3) the statements made by the accused;
- (4) the time and place of the statements, the time and place of their disclosure to law enforcement officials, and the names of all persons who were present when the statements were made;
- (5) whether at any time the informant recanted that testimony or statement and, if so, the time and place of the recantation, the nature of the recantation, and the names of the persons who were present at the recantation;
- (6) other cases in which the informant testified, provided that the existence of such testimony can be ascertained through reasonable inquiry and whether the informant received any promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; and
- (7) any other information relevant to the informant's credibility.<sup>26</sup>

The Kaufman Report went somewhat further, recommending disclosure of:

- (1) The criminal record of the in-custody informer including, where accessible to the police or Crown, the synopses relating to any convictions.
- (2) Any information in the prosecutors' possession or control respecting the circumstances in which the informer may have previously testified for the Crown as an informer, including, at a minimum, the date, location and court where the previous testimony was given. (The police, in taking the informer's statement, should inquire into any prior experiences testifying for either the provincial or federal Crown as an informer or as a witness generally.).
- (3) Any offers or promises made by police, corrections authorities, Crown

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<sup>23</sup> *Id.* at 438. See also 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(b), at 485 (2d ed. 1999) ("Lower courts have regularly held that the prosecution's obligation under *Brady* extends to the files of police agencies that were responsible for the primary investigation of the case."); Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lesson from England*, 68 FORDHAM L. REV. 1379, 1382 (2000).

<sup>24</sup> 993 P.3d 778 (Okla. Crim. App. 2000).

<sup>25</sup> *Id.* at 783.

<sup>26</sup> 725 ILL. COMP. STAT. ANN. § 5/115-21(c) (West 2004).

counsel, or a witness protection program to the informer or person associated with the informer in consideration for the information in the present case.

(4) Any benefit given to the informer, members of the informer's family or any other person associated with the informer, or any benefits sought by such persons, as consideration for their co-operation with authorities, including but not limited to those kinds of benefits already listed in the Crown Policy Manual.

(5) As noted earlier, any arrangements providing for a benefit (as set out above) should, absent exceptional circumstances, be reduced to writing and signed and/or be recorded on videotape. Such arrangements should be approved by a Director of Crown Operations or the In-Custody Informer Committee and disclosed to the defence prior to receiving the testimony of the witness (or earlier . . .).

(6) Copies of the notes of all police officers, corrections authorities or Crown counsel who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by, an in custody informer. There may be additional notes of officers or corrections authorities which may also be relevant to the in-custody informer's testimony at trial.

(7) The circumstances under which the in-custody informer and his or her information came to the attention of the authorities.

(8) If the informer will not be called as a Crown witness, a disclosure obligation still exists, subject to the informer's privilege.<sup>27</sup>

Even if not constitutionally or statutorily required, when appropriate, defense counsel should request such information. In many cases, prosecutors will supply some or all of the information, that they are not required to disclose. Similarly, the need for cautionary jury instructions was recently emphasized in *Banks v. Dretke*,<sup>28</sup> where Justice Ginsburg, speaking for seven Justices, observed:

The jury, moreover, did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants. This Court has long recognized the "serious questions of credibility" informants pose. *On Lee v. United States*, 343 U.S. 747, 757 (1952). See also Trotter, Words of Warning for Prosecutors Using Criminals as Witnesses, 47 Hastings L. J. 1381, 1385 (1996) ("Jurors suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable . . ."). We have therefore allowed defendants "broad latitude to probe [informants'] credibility by cross-examination" and have counseled submission of the credibility issue to the jury "with careful instructions." *On Lee*, 343 U.S., at 757; accord, *Hoffa v. United States*, 385 U.S. 293, 311-312 (1966). See also 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 15.02 (5th ed. 2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on special caution appropriate in assessing informant testimony).

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<sup>27</sup> Kaufman Report, *supra* note 2, Recommendation 47.

<sup>28</sup> 124 S. Ct. 1256, 1278 (2004).

There is, however, great variability regarding special jury instructions.<sup>29</sup> In some jurisdictions, a cautionary instruction is not required where there is corroboration of accomplice testimony. For example, in Virginia, in the absence of corroboration, it is the duty of the court to issue a cautionary instruction.<sup>30</sup> In Mississippi, cautionary instructions are discretionary, but that discretion can be abused where the state's evidence rests solely on accomplice testimony and there is some question as to the reasonableness and consistency of that testimony.<sup>31</sup> In Utah, giving a cautionary instruction generally falls within the discretion of the court, but it must be given if the judge finds the testimony "self-contradictory, uncertain or improbable."<sup>32</sup> Federal cases set forth various versions of such instructions, some using the language "particular caution" and others employing phrases such as "great caution" or "great caution and care."<sup>33</sup>

A Bar Association could be instrumental in drafting a cautionary instruction tailored to the case law in its own jurisdiction. For example, Oklahoma has an instruction specific to jailhouse informants.<sup>34</sup> Bar Associations are also aware of the unique issues that arise in their own jurisdictions. Moreover, they may be able to locate counsel to assist in obtaining the exoneration of a particular individual who has been erroneously convicted of a crime.

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<sup>29</sup> See *State v. May*, 339 So. 2d 764, 775 (La. 1976) ("As a general principle of Louisiana law, a conviction can be sustained on the uncorroborated testimony of a purported accomplice, although the jury should be instructed to treat such testimony with great caution.").

<sup>30</sup> See *Smith v. Commonwealth*, 237 S.E.2d 776, 777 (Va. 1977) ("[T]he accomplice's testimony was not sufficiently corroborated, and it was error to refuse a cautionary instruction.").

<sup>31</sup> See *Slaughter v. State*, 815 So. 2d 1122, 1134 (Miss. 2002).

<sup>32</sup> UTAH CODE ANN. § 77-17-7 (2004).

<sup>33</sup> See, e.g., *United States v. Gardner*, 244 F.3d 784, 789 (10<sup>th</sup> Cir. 2001) ("weighed with great care, and received with caution"); *United States v. Prawl*, 168 F.3d 622, 629 (2d Cir. 1999) ("weighed by you with great care"); *United States v. Abrego*, 141 F.3d 142, 153 (5<sup>th</sup> Cir. 1998) ("greater caution than other testimony"); *United States v. Yarborough*, 852 F.2d 1522, 1538 (9<sup>th</sup> Cir. 1988) ("great caution and care").

<sup>34</sup> *Dodd v. State*, 993 P.2d 778, 784 (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.

Respectfully submitted,

Catherine Anderson  
Chair, Criminal Justice Section  
August 2005

## GENERAL INFORMATION FORM

1. **Summary of Recommendation.**

**This recommendation urges that jurisdictions identify and attempt to eliminate the causes of erroneous convictions and that bar associations assist in these efforts.**

2. **Approved by Submitting Entity.**

This recommendation was approved by the Criminal Justice Section Council at its May 14-15, 2005 meeting.

3. **Similar Recommendations Submitted Previously.**

This recommendation has not previously been submitted to the House of Delegates or the Board of Governors.

4. **Relevant Existing ABA Policies and Affect on These Policies.**

The ABA has adopted a number of recommendations addressing specific problems associated with erroneous convictions. This resolution urges jurisdictions to more generally identify and attempt to eliminate the causes of erroneous convictions, and urges bar associations to assist in this effort.

5. **Urgency Requiring Action at this Meeting.**

**In light of the increasing number of exonerations of individuals convicted of crime, it is important for jurisdictions to study the causes of erroneous convictions and attempt to eliminate them in order to maintain the confidence of the public in the criminal justice system. State and local bar associations are identified as a significant resource in this effort.**

6. **Status of Congressional Legislation (If applicable).**

N/A

7. **Cost to the Association.**

No known cost

8. **Disclosure of Interest (If Applicable).**

No known conflict of interest exists.

**9. Referrals.**

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the August 2005 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:  
All Sections and Divisions

**10. Contact Person (Prior to 2005 Annual Meeting).**

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