New York State Bar Association

Report of
Task Force on Wrongful
Convictions

February 8, 2019

Opinions expressed are those of the Section/Committee preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Introduction

INTRODUCTION

A decade ago, Former President Bernice Leber established the Task Force on Wrongful Convictions which issued a ground-breaking report in 2009. In the report, the Task Force examined fifty-three cases of wrongful convictions in New York State and identified six causes that were primary factors responsible for wrongful convictions: identification procedures; mishandling of forensic evidence; use of false confessions; errors by law enforcement, including prosecutors; defense practices; and the use of jailhouse informants. Some of these recommendations resulted in legislation addressing the root causes of wrongful convictions.

In the ten years since the report was issued, much has changed in the criminal justice community and progress has been made with respect to wrongful convictions. In New York alone, the number of exonerations has doubled from 125 to 253 and nationally, the total number of exonerations has increased from 1,095 to 2,366. A decade ago, only seven states had instituted statewide reform in the area of wrongful convictions and that number has tripled over the last ten years. At the time the original task force report was written, no state in the country had created a statutory mechanism to allow defendants back into court to prove their innocence by scientific evidence. Today, five states have done so: California, Texas, Wyoming and Connecticut through legislation, and Michigan through a court rule.

There is no question that over the last decade, there had been an increased awareness of wrongful convictions. When the first task force report was issued there were thirty-four organization members of the Innocence Network. Today there are fifty-seven in the United States, including four in New York alone.

The progress in New York over the last decade has been mixed. Some legislation has been passed, most notably laws relating to video recording of custodial interrogations and blind lineups.

Recognizing that much more had to be accomplished in New York, State Bar President Michael Miller announced the formation of a second task force on wrongful convictions. The task force, chaired by former judges Barry Kamins and Robert S. Smith, was formed in June, 2018. Its mission was to review developments over the last ten years and to make recommendations.

The task force is comprised of three sitting District Attorneys, academics, criminal practitioners, representatives from the Legal Aid Society, defender offices, the Attorney General's office and a United States District Court Judge from the Southern District of New York.

The task force was divided into four subcommittees that addressed critical issues that have arisen since the first task force report: conviction integrity units; forensic issues; actual innocence; the implementation of new statewide legislation; and the use of jailhouse informants.

Each subcommittee drafted a report to the entire task force detailing its specific proposals and the corresponding reasoning for each. The Task Force met on January 24, 2019 and carefully reviewed and discussed each proposal submitted by the four subcommittees. At the end of each discussion, a vote was taken of those present and the following recommendations were passed for consideration of the House of Delegates at its meeting on April 13, 2019:

I. CONVICTION INTEGRITY UNITS

A. Summary of Recommendations

1. Each District Attorney's Office in the State of New York establish a Conviction Integrity Unit or, where not feasible, create a program for conviction review (such units and programs referred to as "CIUs" or "Units").

2. Each CIU should adopt and implement the best practices described in Section IB.

3. New York should help fund the creation and development of additional CIUs as described in Section IC.

4. New York should enact legislation granting to the judiciary the power to issue investigative subpoenas upon application by an established CIU in connection with any ongoing review. The legislation should contain privacy protections and notice to the convicted person.

B. Recommended Best Practices

1. <u>The CIU Should Be Independent and Qualified</u>

a. The CIU should be led by a prosecutor, preferably one with criminal defense experience, who is widely respected by attorneys throughout the jurisdiction's criminal justice community. In jurisdictions that do not have resources to establish units or programs, conviction reviews should be conducted under the supervision of a person who has firsthand prosecutorial or criminal defense experience and is widely respected by attorneys throughout the jurisdiction's criminal justice community.

b. The head of the CIU or, in jurisdictions without a formal unit, the person responsible for review of a conviction should report directly to the District Attorney or to a designee who bears no responsibility for other appellate or post-conviction review in the office.

c. The CIU should guard against cognitive or confirmatory biases and appear to be guarding against biases by attempting to include the perspective of at least one external criminal defense attorney in the process of the Unit's policy definition, case screening, case investigation, and recommendations for action.

d. Where feasible, the CIU should be comprised of attorneys, investigators and staff for whom CIU cases have clear priority above other office matters, with sufficient personnel and budget resources to enable timely investigations and thorough and thoughtful recommendations.

e. CIU personnel should be trained on an ongoing basis on the need to approach each review from the perspective that the petitioner in fact may be wrongfully convicted and on specific topics relevant to the work of the Unit. These topics include but are not limited to:

1) Errors in criminal justice known to be factors in inaccurate convictions;
2) "Human factors" and emerging issues in forensic science that may impact past convictions secured by the use of older scientific methods; and
3) Specific investigative techniques useful for "cold cases."

f. The CIU should exclude personnel who participated in an underlying case under review from the CIU's decision-making regarding the case, limiting participation in such cases to the provision of historical information; and

g. The CIU should establish a clear written policy on when and how to refer to appropriate authorities any credible allegations of official misconduct by prosecutors or law enforcement personnel identified in the course of a case review.

2. <u>The CIU Should Be Flexible</u>

a. The CIU should develop policies and procedures designed to ensure flexibility of operations and encourage the submission of petitions for review.

b. The CIU should accept for review any and all cases for which (i) the defendant has a facially plausible claim of factual innocence or (ii) there are other significant concerns about the integrity of the conviction, including but not limited to insufficient evidence of guilt beyond a reasonable doubt, or claims (ineffective assistance of counsel, newly discovered evidence, official misconduct, etc.) that taint the integrity of the fact-finding process.

c. The CIU should consider all petitions on their factual merits, including:

1) Petitions in which the Petitioner pled guilty to the charges;
2) Petitions where the sentence has been completed; and
3) Petitions based on a current understanding of the totality of the circumstances now known, rather than what could have been presented or known by defense counsel during the pendency of the

original case.

d. The CIU should allow for resubmission of a petition when additional credible evidence is brought to light.

e. The CIU should recommend vacating each conviction where there is clear and convincing evidence of actual innocence or the CIU otherwise no longer has confidence in the integrity of the verdict or plea. This may include recommending vacatur where the investigation reveals facts, circumstances and/or events which so grossly corrupted the fact-finding process as to deny the petitioner a fair adjudication of his/her guilt or innocence at trial, and/or, if the conviction was obtained by a guilty plea, prevented the petitioner from making a knowing and voluntary decision to plead guilty. Such facts, circumstances and events include, but are not limited to: police investigative error or misconduct, prosecutorial error or misconduct, ineffective performance and assistance of trial counsel for petitioner, forensic art or science analytical error, repudiation or modification of forensic art or science, judicial error or misconduct, juror misconduct, witness misconduct and witness error, whether occurring singly or in combination one with another. Such determinations may be made with deference, but not absolute deference, to previous adjudication(s) denying a petitioner's claim of a due process violation based upon the same or similar facts circumstances or events.

f. Following a CIU's decision to vacate on grounds other than established factual innocence, the CIU should recommend refiling charges only in cases where there remains substantial admissible evidence of guilt following the investigation of the petition.

3. <u>The CIU Should Be Transparent</u>

a. The CIU should make public:

1) How to submit a claim;
2) That claims may be filed by any person;
3) The types of cases accepted for review;
4) Its final decisions after case review and the supporting rationales for that decision; and
5) The ability of Petitioner to revisit the review process after any final decision.

b. The CIU should track and report publicly on its activity at least annually. Such reports should include at least the following categories of information:

1) The number of petitions received;

2) The number of petitions reviewed;
3) The number of petitions accepted for additional review;
4) The number of petitions as to which a final determination was reached following review;
5) The number of exonerations, and of convictions vacated on grounds other than established factual innocence;
6) The reasons for rejecting reviews; and
7) The types of issues confronted in the cases reviewed.

c. The CIU should minimize barriers to the participation of the Petitioner and Petitioner's counsel in the case review and should encourage an open exchange of information and ideas regarding the case review between the Petitioner and the CIU, including open file discovery and contemporaneous disclosure of information discovered in the CIU investigation (other than CIU work product information and information that could endanger third parties), as appropriate.

d. The CIU should communicate in an ongoing and timely fashion to Petitioner or Petitioner's counsel concerning case review, and it should explain the actions taken and conclusions drawn from the review.

e. The CIU should establish a clear policy regarding sharing evidence and other information with the Petitioner and Petitioner's counsel, including privilege waivers, as appropriate. The policy should include a requirement of reasonable justification for withholding relevant information from the Petitioner and Petitioner's counsel.

f. The CIU should make all physical evidence available for testing by either party, including re-testing of a previously tested object if the proposed method of testing can provide additional information.

g. The CIU should provide testing of evidence that may provide conclusive evidence of innocence at no cost to Petitioner.

4. <u>The CIU Should Encourage Measures to Prevent Future Wrongful Convictions</u>

a. The CIU should establish internal training sessions after each exoneration to discuss lessons learned.

b. The CIU should determine the effect of the error upon other convictions in that jurisdiction.

c. The CIU should identify improved policies and procedures that might prevent the recurrence of the error(s) that permitted the flawed conviction to occur; and

d. The CIU should construct a process to implement, publicize and evaluate those modifications throughout the jurisdiction.

C. **State Funding to Support the Creation and Development of Additional CIUs**

1. New York should establish a statewide fund to support conviction review programs (the "Conviction Review Fund").

2. District Attorney's Offices that require assistance with funding should be able to apply for state funding to establish a CIU or at least for state funding to review individual cases.

3. The Conviction Review Fund should require District Attorney's Offices to agree to abide by the best practices set forth in Section II above to the extent feasible as a condition for funding.

4. In districts where it is not feasible to create a CIU program, further study and analysis is essential to develop structures and program to accomplish the goals of a CIU program. Options may include the development of a process to conduct reviews by organizations such as the New York State District Attorneys Association or New York State and local bar associations; a pool of volunteer lawyers; or the establishment of a regional office. The reviewing attorneys would report directly to the local District Attorney, who would retain the power to accept or reject their recommendations.

D. Investigative Subpoena Authority for Ongoing CIU Review

New York should adopt statewide legislation to grant to the judiciary the power to issue investigative subpoenas upon application by an established CIU in connection with any ongoing review. The legislation should include privacy protections including notice to the convicted person and his or her counsel of the subpoena and should specify that the legislation does not extend to a subpoena of trial counsel's file or to compel testimony from the defendant or defense witnesses.

II. ACTUAL INNOCENCE

The Task Force recommends a statutory change to CPL § 440.10(1) to add a new section (h) that would permit a newly discovered evidence claim after a guilty plea. While current section (1)(g) (convictions after trial) requires a "**probability** that had such evidence been received at the trial the verdict would have been more favorable to the defendant," we recommend that where a defendant pled guilty, a newly discovered evidence claim requires "a **substantial** probability that **the defendant was actually innocent of the offense of which he or she was convicted.**"

III. FORENSIC ISSUES

The Task Force proposes legislation to improve the quality of forensic science admitted into evidence in New York State courts. The proposed statute would be applicable only in criminal case, and would leave the law of evidence unchanged as it applies to civil cases.

NEW CPL § 60.80: Rules of evidence; Testimony by Expert Witnesses

A. A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify at trial in the form of an opinion or otherwise if:

1. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

2. The testimony is based on sufficient facts or data, provided that such facts or data must be available to both parties as set forth in section 240.20(1)(c) of this chapter;

3. The testimony is the product of reliable principles and methods; and

4. The expert witness must reliably apply the principles and methods of the area of expertise to the facts of the case.

B. When testimony is offered as scientific, the witness' method, to be considered reliable, must be shown to be reproducible and accurate for its intended use, as shown by empirical studies conducted under conditions appropriate to the intended use.

IV. IMPROVING IMPLEMENTATION OF LAWS REGARDING EYE WITNESS IDENTIFICATION AND RECORDING OF INTERROGATIONS

The Task Force recommends further and more robust collection of data statewide to better understand matters critical to the faithful implementation of the new laws. It further recommends the creation of a diverse stakeholder advisory group, including representation from: Division of Criminal Justice Services (DCJS); the New York Police Chiefs Association; the New York State Sheriffs Association; the New York State Association of Criminal Defense Lawyers (NYSACDL); the New York State Defenders Association (NYSDA); the Innocence Project; affected people from both the innocence and victims community; the academic community with an expertise in both criminology and statistical analysis; and the District Attorneys Association of the State of New York (DAASNY), to be convened by NYSBA, and with resources available to enable this work, to get a deeper understanding of how implementation is working.

V. RECOMMENDATIONS REGARDING JAILHOUSE INFORMANTS

The Task Force recommends the implementation – at the county level – of the Model Policy for the county-based tracking and disclosure of jailhouse informant information and testimony, after the Subcommittee conducts further study to determine whether additional protections to ensure informant safety are needed. Further, the Task Force recommends further study by the New York State Bar Association before it makes final recommendations regarding the establishment of a statewide tracking system by an as-yet-to-be-determined centralized entity (e.g., DCJS, AG, OCA, etc.) to ensure that data collected in connection with jailhouse informants at the county level is available to district attorneys throughout New York State, and addresses the confidentiality and cost/resource issues raised during the deliberations of the 2019 Task Force discussion.

The Task Force is truly indebted to the many individuals and institutes that generously assisted it in completing its work. Specifically the Task Force would like to thank:

- Weil, Gotshal & Manges LLP – Benjamin Marks, Miriam Buhl, Taylor Doughtery, Jessica Djilani
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- New York State Association of Criminal Defense Lawyers – Andy Kossover
- New York State Defenders Association – Al O'Connor
- Legal Aid Society – Terri Rosenblatt
- New York City Police Department – Dr. Monica Brooker
- Morrison & Foerster, LLP – Monica Chan

CONCLUSION

Any wrongful conviction erodes the public's confidence in our state's criminal justice system. It is equally clear that improper convictions can destroy the lives of innocent men and women. We have the ability to learn from our mistakes and avoid these miscarriages of justice. For these and for the multitude of other reasons presented in this report, the Task Force on Wrongful

Convictions respectfully urges the House of Delegates to pass the specific proposals presented herein at its meeting on April 13, 2019.

Respectfully submitted,
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Report of Subcommittee on Conviction Integrity Units

NEW YORK STATE BAR ASSOCIATION
WRONGFUL CONVICTIONS TASK FORCE

FINAL REPORT OF THE SUBCOMMITTEE ON CONVICTION INTEGRITY UNITS

I. Introduction

The New York Rules of Professional Conduct recognize that "a prosecutor has the responsibility of a minister of justice and not simply that of an advocate." New York Rules of Prof'l Conduct R. 3.8 cmt. (2017). As part of this bedrock principle to seek justice, New York adopted post-conviction innocence rules. The New York Rules require that "[w]hen a prosecutor knows of clear and convincing evidence that a defendant was convicted, in a prosecution by the prosecutor's office, of a crime that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case." *Id.* at R. 3.8(d). In addition, "[w]hen a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted," the prosecutor has an ethical obligation "to undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside." *Id.* at R. 3.8(c). The American Bar Association's Model Rules of Professional Conduct recognize similar ethical obligations for a prosecutor to seek justice, and not just to convict. *See* American Bar Association Model Rules of Prof'l Conduct R. 3.8(g)-(h).

To ensure the integrity of convictions and to exonerate the wrongfully convicted when the interests of justice require, dozens of prosecutors' offices around the country, including those for most major metropolitan area, have established Conviction Integrity Units ("CIUs" or

"Units") over the past 12 years, including 7 CIUs in New York alone.[1] Over the past several years, the work of CIUs around the nation has led to hundreds of exonerations of wrongfully convicted individuals, and the number of exonerations is increasing each year as more and more jurisdictions create CIUs.

CIUs conduct extra-judicial, fact-based review of convictions to investigate plausible allegations of actual innocence or other circumstances indicative of a wrongful conviction. CIUs play a critical *complementary* role in promoting the interests of justice to the work done by appellate reviews and the exercise of prosecutorial discretion in the first instance. Because CIUs operate within a non-adversarial framework and, properly constructed, include fresh perspectives, they are uniquely suited to evaluate plausible claims of wrongful conviction and identify and correct historical errors when they occur and prevent future ones. District Attorney's Offices with CIUs acknowledge the importance of overcoming cognitive biases, motivated reasoning, and groupthink that can affect prosecutorial outcomes. By including the Petitioner or his or her representatives in the review process, CIUs help promote trust and confidence in the administration of justice.

CIUs are typically part of a local prosecutor's office and staffed by full-time employees of that office, although they need not necessarily be. While some small prosecutors' offices may lack the resources to create a formal, separately staffed CIU within the office, there are alternative means available to provide independent review of plausible claims of wrongful conviction, including shared resources across multiple offices and the use prosecutors and other attorneys as designated by the New York State District Attorneys Association, New York State or local bar associations or of ad hoc panels of local volunteer attorneys from outside the office.

[1] Bronx County, Erie County, Kings County, Nassau County, New York County, Oneida County, and Suffolk County have established CIUs.

The development of conviction review programs for offices where it is not feasible to establish a CIU needs further study.

To date, each jurisdiction in New York that has created a CIU has independently defined the scope and structure of its unit and the policies pursuant to which it will operate. There is, however, a consistent message emanating from offices with CIUs: the programs are valuable, they promote the interests of justice, and all prosecutors' office should implement at least some form of extrajudicial conviction review. As Barry Scheck, the co-founder of the Innocence Project, has observed: "the perception that prosecutors themselves are fair, trustworthy, and primarily interested in just outcomes is critical to the system being regarded as legitimate."[2]

Following extensive study of CIUs operating today, including interviews with the leaders of each of the CIUs operating in New York, the Subcommittee makes the following recommendations:

1. Each District Attorney's Office in the State of New York establish a CIU or, where not feasible, create a program for conviction review.

2. Given the wide variety in the size of District Attorney's Offices in New York and in the communities they represent, there is no one-size-fits-all solution to optimize conviction review. Affording District Attorneys some measure of flexibility in how they implement conviction review programs is likely to promote the interests of justice. However, best practices have emerged from the experience of existing CIUs, and the Subcommittee recommends that each CIU adopt the practices described in Section II.

[2] Barry C. Scheck, "Conviction Integrity Units Revisited," 14 Ohio St. J. Crim. Law. 705, 710 (2017).

3. A significant barrier to the creation and development of a CIU is some jurisdictions is the lack of available funds. The Subcommittee recommends that New York help fund the creation and development of additional CIUs as described in Section III.

4. CIUs do not currently have the ability to use subpoenas in connection with their post-conviction investigations, which may limit the efficacy of those investigations in some circumstances. To promote accurate fact-finding in conviction review, New York should enact legislation granting to the judiciary the power to issue subpoenas with specified protections for the convicted person upon application by a CIU in connection with an ongoing review as described in Section IV.

II. Recommended Best Practices

A. The CIU Should Be Independent and Qualified

Independence

While prosecutors' offices that have created CIUs typically reserve for the District Attorney the discretion to make final determinations on whether to vacate a conviction or afford other post-conviction relief, the CIU should be independent in the exercise of its investigative role and in making recommendations to the District Attorney. The leaders of existing CIUs report that the full support they have received from the District Attorneys for their respective offices for their mission of objective, independent, fact-based review is a critical factor in the operation of a successful Unit. Moreover, the CIU must operate in a manner consistent with the reality that mistakes may have been made and wrongful convictions may have been secured.

To ensure that the CIU is operating independently, District Attorneys should adopt the following measures whenever feasible:

- The head of the CIU should report directly to the District Attorney or a designee who bears no responsibility for other appellate or post-conviction review in the office;
- The CIU should exclude personnel who participated in an underlying case under review from the CIU's decision-making regarding the case, limiting participation in such cases to the provision of historical information;
- The CIU should guard against cognitive or confirmatory biases by including the perspective of at least one external criminal defense attorney in the process of the Unit's policy definition, case screening, case investigation, and recommendations for action;
- Where feasible, the CIU should be comprised of attorneys, investigators and staff for whom CIU cases have clear priority above other office matters, with sufficient personnel and budget resources to enable timely investigations and thorough and thoughtful recommendations; and
- The CIU should establish a clear written policy on when and how to refer to appropriate authorities any credible allegations of official misconduct by prosecutors or law enforcement personnel identified in the course of a case review.

Qualification

Also essential for the success of the CIU is that the members of the Unit be qualified for their role. Accordingly, the CIU should be led by a prosecutor, preferably with criminal defense experience, who is widely respected by attorneys throughout the jurisdiction's criminal justice community. Where it is not feasible to create a CIU, the attorney responsible for the conviction review should be an attorney who is widely respected in the criminal justice community. Where feasible, the CIU should be comprised of attorneys, investigators and staff for whom CIU cases have clear priority above other office matters, with sufficient personnel and budget

resources to enable timely investigations and thorough and thoughtful recommendations. The CIU personnel should not be those who work in any appellate or other post-conviction review in that office. And CIU personnel should be trained on an ongoing basis on specific topics relevant to the work of the Unit and the need to approach each review from the perspective that the petitioner in fact may be wrongfully convicted.[3] These include issues such as the types of errors in criminal justice known to be factors in inaccurate convictions; "human factors" and emerging issues in forensic science that may impact past convictions secured by the use of older scientific methods; and specific investigative techniques useful for "cold cases."

B. The CIU Should Be Flexible

CIUs that maximize their flexibility with respect to the types of cases eligible for review, the criteria used to determine which petitions for review will be accepted, the scope of investigation, the degree of external participation and cooperation with the petitioner and his or her representatives, and recommendations for relief are most likely to achieve the goal of identifying and redressing wrongful convictions. Accordingly, the CIU should develop policies and procedures designed to ensure flexibility of operations and encourage the submission of petitions for review.

Review should not be limited to particular categories of cases. Rather, the CIU should accept for review any and all cases for which the defendant has a plausible or colorable claim of factual innocence for the conviction obtained or for which there were other concerns about the

[3] CIUs should operate from a presumption of innocence, in contrast to the traditional post-conviction review conducted by appellate lawyers within a prosecutor's office, who operate from a presumption of guilt. Prosecutors who have worked in successful CIUs and have participated in many re-investigations that have led to exonerations, confirmations of guilt, and uncertain outcomes have developed a different perspective and different set of ingrained expectations than the ordinary line prosecutor or defense attorney. Barry C. Scheck, "Conviction Integrity Units Revisited," 14 Ohio St. J. Crim. Law. 705, 741 n.13 (2017).

integrity of the conviction, including but not limited to insufficient evidence of guilt beyond a reasonable doubt. Where feasible, the CIU should review all petitions on their factual merits, including:

- Reviewing petitions in which the Petitioner plead guilty to the charges;
- Reviewing petitions where the sentence has been completed;
- Evaluating claims based on a current understanding of the totality of the circumstances now known, rather than what could have been presented or known by defense counsel during the pendency of the original case; and
- Reviewing cases where due process claims (ineffective assistance of counsel, newly discovered evidence, official misconduct, etc.) affect the integrity of the fact-finding process.

Prior submission of a petition for review should not be a disqualifier; rather, the CIU should allow for resubmission of a petition whenever additional credible evidence is brought to light.

The CIU should have the flexibility to consider the totality of information and circumstances, whether newly discovered or not, and whether admissible as evidence in court or now. This aspect of CIU review is another distinguishing feature from the work of appellate prosecutors who are limited to the evidentiary and procedural record of the case.

For petitions accepted for review, following the conclusion of the investigation, the CIU should recommend vacating each conviction where there is clear and convincing evidence of actual innocence or the CIU otherwise no longer has confidence in the integrity of the verdict of guilt. This may include recommending vacatur of convictions where the investigation reveals facts, circumstances and/or events which so grossly corrupted the fact-finding process as to deny the petitioner a fair adjudication of his/her guilt or innocence at trial, and/or, if the conviction

was obtained by a guilty plea, prevented the petitioner from making a knowing and voluntary decision to plead guilty. Such facts, circumstances and events include, but are not limited to: police investigative error or misconduct, prosecutorial error or misconduct, ineffective performance and assistance of trial counsel for petitioner, forensic art or science analytical error, repudiation or modification of forensic art or science, judicial error or misconduct, juror misconduct, witness misconduct and witness error, whether occurring singly or in combination one with another. Such determination may be made with deference to, but notwithstanding a previous adjudication denying a petitioner's claim of a due process violation based upon the same or similar facts circumstances or events.

Following a CIU's decision to vacate on grounds other than established factual innocence, the CIU should recommend refiling charges only in cases where there is substantial evidence of guilt notwithstanding evidence gathered during the investigation of the petition.

C. The CIU Should Be Transparent

To facilitate the submission of petitions for review and to promote public confidence in the integrity of the post-conviction review process, the CIU should be transparent about their operations.

As an initial matter, to facilitate submissions, the CIU make public how to submit a petition for review, that petitions may be filed by any person, and the types of cases accepted for review.

If a petition is accepted for review, and unless disclosure would jeopardize the integrity of the investigation or endanger third parties, the CIU should be transparent during the investigation with the petitioner and his or her representatives about the progress of the case review. The CIU should minimize barriers to the participation of the Petitioner and Petitioner's

counsel in the review and should encourage an open exchange of information and ideas regarding the case review between the Petitioner and the CIU, including open file discovery and contemporaneous disclosure of information discovered in the CIU investigation (other than CIU work product information and information that could endanger third parties), as appropriate. The CIU should establish a clear policy regarding sharing evidence and other information with the Petitioner and Petitioner's counsel, including privilege waivers, as appropriate. The policy should include a requirement of reasonable justification for withholding relevant information from the Petitioner and Petitioner's counsel. The CIU should make all physical evidence available for testing by either party, including re-testing of a previously tested object if the proposed method of testing can provide additional information. The CIU should provide testing of evidence that may provide conclusive evidence of innocence at no cost to Petitioner.

In addition to communicating in an ongoing and timely fashion with Petitioner or Petitioner's counsel during case review, the CIU should explain the actions taken and conclusions drawn from the review. The CIU should also disclose any ability of the Petitioner to revisit the review process after any final decision.

To promote accountability and to inspire confidence in the integrity of any review, following any final determination by the District Attorney, the CIU should make public the District Attorney's decision and the supporting rationales for that decision. The CIU also should track and report publicly on the extent of its activities at least annually. Such reports should include at least the following categories of information:

- The number of petitions received;
- The number of petitions reviewed;
- The number of petitions accepted for additional review;
- The number of petitions as to which a final determination was reached following review;

- The number of exonerations;
- The reasons for rejecting reviews; and
- The types of issues confronted in the cases reviewed.

D. The CIU Should Encourage Measures to Prevent Future Wrongful Convictions

While some exonerations are the result of truly unique circumstances with little application to other cases, most create opportunities to consider measures that would assist in detecting additional wrongful convictions or preventing future wrongful convictions. For example, if a witness provided false testimony in one case that led to a wrongful conviction, he or she may have provided false testimony in other cases and may be considered an unreliable witness if future cases. If retesting of physical evidence reveals laboratory error led to a wrongful conviction, similar errors from the same laboratory may have affected other cases and there may be ways to prevent the recurrence of similar errors in the future.

Accordingly, after each exoneration, the CIU should establish internal training sessions to discuss lessons learned. As part of the review, the CIU should determine the effect of the error upon other convictions in that jurisdiction. As appropriate, the CIU should identify improved policies and procedures that might prevent the recurrence of the error or errors that permitted the flawed conviction to occur, and the CIU should recommend a process to implement, publicize and evaluate those modifications throughout the jurisdiction.

III. State Funding to Support the Creation and Development of Additional CIUs

The success of any conviction review process is dependent upon the support of the local District Attorney. District Attorneys, in turn, must be provided with sufficient resources to encourage the formation of and support for CIUs, including funding for personnel, investigation-related expenses, forensic testing, clerical support, and other assistance. The Subcommittee recognizes that not all jurisdictions have sufficient funds available at present to support and

sustain a CIU and recommends that New York establish a statewide fund to support the creation and development of additional CIUs in the State of New York (a "Conviction Review Fund").

District Attorney's Offices that require assistance with funding should be able to apply for state funding to establish a CIU or at least for state funding to review individual cases, provided, however, that the Conviction Review Fund should require District Attorney's Offices to agree to abide by the best practices set forth in Section II above to the extent feasible as a condition for funding.

Structures and personnel for post-conviction review of credible petitions in jurisdictions that do not have their own CIU require further study. Options for such programs may include the development of a process and of personnel to conduct that review from organizations such as the New York State District Attorneys Association, New York State and local bar associations, a panel of volunteer lawyers of distinguished attorneys or from the development of a regional office. The reviewing attorneys would report directly to the local District Attorney, who would retain the power to accept or reject their recommendations. The reviewing attorneys would report directly to the local District Attorney, who would retain the power to accept or reject their recommendations.

IV. Investigative Subpoena Authority for Ongoing CIU Review

The Subcommittee members recommend that New York adopt statewide legislation to grant to the judiciary the power to issue investigative subpoenas upon application by an established CIU in connection with any ongoing review. The legislation should include privacy protections including notice to the convicted person and his or her counsel of the subpoena and should specify that the legislation does not extend to a subpoena of trial counsel's file or to compel testimony from the defendant or defense witnesses.

Leaders of CIUs report that the present inability to use subpoenas to compel the disclosure of relevant documents and other information from third parties, including both public and private entities, is a significant obstacle in some instances in the search for truth. A process requiring judicial oversight of the subpoena power will help to ensure that the tool is used only in appropriate circumstances where less burdensome means of obtaining the information may be available. Specific privacy protections including notice to the convicted person and his or her counsel provides protection for the process and permits the convicted person to challenge the scope of investigative subpoenas. An effective process requires that the legislation protect trial counsel's files from investigative subpoena and prohibit compelled testimony from the defendant or defense witnesses.

State	County	Conviction Unit Name	Structure & Staffing	Claim Process	Review Criteria
California	Los Angeles	Conviction Review Unit (CRU)	CRU has its own team of attorneys and investigators who are assigned to investigate the claims received.	The person convicted of a crime (or his/her attorney), a family member, or Innocence project working on behalf of the convicted person can submit a claim. A CRU request form must be completed and submitted.	To qualify for review, the following criteria must be met: -The convicted person must still be in custody; -The crime must have been violent or serious felony, and -There must be new credible evidence of innocence.
California	San Diego	District Attorney Conviction Review Unit (CRU)		Applicants or their representatives must complete a submission form.	Defendants making a claim of innocence must meet the following prerequisites: -The conviction must have occurred in San Diego County Superior Court; -Applicant must still be in custody, serving time on the sentence for which he/she was convicted; -The conviction must be for a violent and/or serious felony; -The application for review must be based on credible and verifiable evidence of innocence; and -Applicant agrees to fully cooperate with the District Attorney's Office, which includes providing disclosure of all relevant information during the review process.
Florida	Fourth Judicial Circuit (Clay, Duval, and Nassau Counties)	Conviction Integrity Review Division (CIR)		To initiate a review, a petition must be completed. Once CIR receives a petition, it will communicate with the defendant to let him/her know that the submission has been received.	To have a case reviewed by the CIR: -Defendant must have been convicted of a felony in the Fourth Judicial Circuit; -Defendant must present a claim of actual innocence; -The claim must be supported by information or evidence not previously litigated before the original trier of fact (jury or bench trial); -The claim must be capable of being investigated and resolved, and if substantiated, would bear directly on the issue of innocence; and -The direct appeal has become final, the mandate has issued, and there is no pending litigation.
Illinois	Cook County	Conviction Integrity Unit (CIU)	CIU is an independent division within the State's Attorney's Office, and functions outside the Criminal Prosecutions Bureau. Recommendations of the CIU are brought directly to the Chief Ethics Officer at the State's Attorney's Office. CIU is staffed with Assistant State's Attorneys and investigators assigned to the CIU.	Claimants are encouraged to use the CIU form, or provide the data requested by the CIU form on a written document, although use of the form is not required. Upon receipt of a written claim, CIU conducts an initial screening process to determine if the claim is eligible for consideration. If this initial review shows that the claim is not eligible, the claimant is notified in writing of that determination. If the review shows the claim eligible for review, CIU will notify the claimant that it intends to investigate the factual merits of the claim. Claimants will be informed of conclusions reached by CIU about their claims. Claimants may request to meet with the Direct of the CIU to discuss its conclusions and the recommendations CIU intends to forward to the Chief Ethics Officer. There is no right to appeal the CIU's determinations. Anyone can file a claim with CIU, including the defendant (or his/her lawyer), family member or friend, as long as the defendant authorizes the filing.	CIU investigates claims that meet two essential criteria: -Claimant must assert "actual innocence," which means that there must be conclusive evidence available showing that the defendant was wrongfully convicted; and -The claim of actual innocence must be based on evidence that was no considered by the trier of fact during the proceedings that led to conviction. CIU may also investigate claims of actual innocence based on a showing that the investigative or fact-finding process that led to the conviction was so fundamentally flawed that the guilty verdict cannot reasonably be relied upon as accurate.
Illinois	Lake County	Case Review Panel and Prosecution Protocol and Conviction Review Unit	The CIU is comprised of the following sections: -Case Review Panel: comprised of volunteer attorneys, not employed by the Lake County State's Attorney's Office; -Conviction Review Panel -Conviction Review Unit (CRU): comprised of the Division Chief (responsible for overseeing the overall case process); a Record Supervisor, an Investigator, and three experienced Assistant State's Attorneys. The Division Chief reports directly to the State's Attorney.	Initial requests received by the Lake County State's Attorney's Office are forwarded to the Chief of the CRU, and an acknowledgement letter will be sent to the defendant with a recommendation to contact the Innocence Project (referrals and contact information are provided). If the defendant still wishes to contact the CRU directly, an application for review with a waiver and consent form are forwarded to the defendant for signature. If the CRU accepts an application for review, it is forwarded to the Conviction Review Panel, which will review concurrent with, but independent from, the continuing CRU evaluation. Requests and referrals for review can be made by the defendant (or his/her attorney), family member, or the Innocence Project.	The general accepted criteria in order to be accepted for review by the CIU: -The conviction must have originated from Lake County; -The offender must be a living person; -There must be a claim of actual innocence; -The claim must not be patently frivolous; -There must be new and credible evidence offered
Michigan	Wayne County	Conviction Integrity Unit (CIU)	Claims brought to the CIU are reviewed and investigated by Assistant Wayne County Prosecutors and investigators assigned to the Conviction Integrity Unit. Assistant Prosecutors and Investigators in the CIU work full-time in CIU and will not be involved in the investigation or prosecution of any pending criminal cases CIU is an independent division within the Prosecutor's office Recommendations from the CIU will be brought directly to the Prosecutor	Anyone associated with the convicted person or the case may petition for relief based on innocence from a case prosecuted by the Wayne County Prosecutor's Office, as long as the defendant authorizes the filing Although CIU will accept any writing that provides the necessary information, claimants are encouraged to use the CIU form, or to provide the data requested by the CIU form on a written document. CIU reviews a claim to confirm the person's eligibility for consideration. If the claim is not eligible for consideration, the claimant is notified in writing of that determination. If the review shows the claim is eligible for review, CIU will notify the claimant that it intends to investigate the factual merits of the claim. Claimants will be informed of the conclusions reached by CIU about their claim. Claimants may request to meet with the Director of the CIU to discuss its conclusions and the recommendations CIU intends to forward to the Prosecutor. There is no right to appeal the CIU's determinations.	CIU investigates claims that meet two essential criteria: -The claimant must assert "actual innocence" -For the CIU to recommend that the conviction be overturned, the investigation must lead to the discovery of new evidence that was not considered by the tier of fact during the proceedings that led to the conviction. -CIU may also, in its discretion, investigate other claims of actual innocence and/or wrongful conviction in extraordinary circumstances

State	County	Conviction Unit Name	Structure & Staffing	Claim Process	Review Criteria
New York	Eerie County	Conviction Integrity Unit (CIU)	Assistant District Attorney Sara Dee is the office's Conviction Integrity Officer.	When new evidence or information surfaces on a case, Ms. Dee will review the entire case, reevaluate its merits, and if necessary, take appropriate action.	
Ohio	Cuyahoga County	Conviction Integrity Unit (CIU)	CIU is composed of a Conviction Integrity Unit Chief, a Conviction Integrity Unit Coordinator, a Conviction Integrity Board, and an Independent Review Panel (IRP). The Chief and the Coordinator organize the work of the CIU and lead all case investigations that present a credible claim of actual innocence or claim that compelling evidence demands the CIU's review. The CIU Board consists of a combination of Assistant Prosecuting Attorneys and at least one outside volunteer attorney. The IRP is comprised of a minimum of four volunteer members who are completely independent of the Cuyahoga County Prosecutor's Office. The IRP members may include well respected volunteers from the community including, but not limited to, outside attorneys, community leaders, civic leaders, residents, business leaders, clergy, and/or legal scholars/experts	Requests for review must be submitted in writing to the CIU. Applicant may submit an application to the CIU on his/her own, or through his/her attorney. After receiving a written request, the Conviction Integrity Coordinator will preliminarily review the application and supporting documentation. If the prerequisites are not met, the applicant will be notified that no further action will be taken. If the prerequisites are met, the CRU Chief and/or the Conviction Integrity Coordinator will designate a CIU APA or another APA to review the innocence claim. The designated APA will prepare for the CIU, a memorandum outlining the merits of the claim and all other pertinent information. The CIU Chief and/or the CIB board will make a final recommendation to the Cuyahoga County Prosecutor. The IRP will conduct an independent review of the CIB's findings, and if the IRP deems it necessary, will remand the matter back to the CIB for further review or investigation. Following this procedure, the IRP will make a final recommendation to the Cuyahoga County Prosecutor.	In order for the Conviction Integrity Unit to conduct a preliminary review of a conviction, applicants making a claim of innocence or a compelling claim must meet the following prerequisites: -The conviction must have been in Cuyahoga County Common Pleas Court; -The applicant must currently be a living person presenting his or her claim of innocence or an otherwise compelling claim; -There must be a claim of actual innocence or otherwise compelling claim and not solely a legal issue (previously raised and/or could have been raised at trial on during the appellate process); -New and credible evidence of innocence must exist; -The claim must not be frivolous; and -The applicant must sign a written "limited" waiver of certain procedural safeguards and privileges, agrees to cooperate with the CIU, and agrees to provide full disclosure regarding all requirements of the Conviction Integrity Unit.
Pennsylvania	Philadelphia	Conviction Integrity Unit (CIU)	Staffed with dedicated Assistant District Attorneys, support staff and investigators.	Requests to the CIU must be submitted by the petitioner (or his/her attorney) using the CIU Submission Form. Requests will not be accepted by third-parties, including friends and family members. The CIU does not send confirmation upon receipt of submission forms.	The general review criteria in order to be accepted for review by the CIU: -The conviction must have been in the Philadelphia County Court of Common Pleas (First Judicial District); -There must be a claim of actual innocence or wrongful conviction; and -The claim must not be frivolous.
Tennessee	Davidson County	Conviction Review Unit (CRU)	CRU is part of the Davidson County District Attorney's Office, and consists of the following: -CRU Screening Leader, -the CRU Panel (which consists of members of Davidson County District Attorney's Office, and meets monthly to discuss pending CRU cases) -investigation teams (comprising of a CRU Assistant District Attorney General working with a District Attorney General's Office Investigator).	Claimant must submit a Conviction Review Request Form, or, if the claim is submitted by someone other than a convicted defendant, the defendant must provide written approval of the claim. Once a case is referred to the CRU, the CRU Screening Team Leader will review the request and either request additional information, determine that further review is needed, decline review if no new evidence is indicated, or refer the case to the CRU Panel to explore the option of a full investigation. If the case is referred to the CRU Panel, it will either proceed with a full investigation with a CRU Assistant District Attorney General working with a District Attorney General's Office Investigator to fully investigate the case, or determine that no further action is needed. The results of this investigation will be reported to the CRU Panel for a recommendation, which is then forwarded to the District Attorney General for a Review and decision. If the CRU Panel decides to proceed with a full investigation, the Office of the District Attorney General will notify the victims of the case. The CRU will maintain records of cases reviewed and the decision resulting from those reviews in CRU case management system, and	To be eligible for review, the following criteria must be met: -The conviction must have occurred in Davidson County -The application must be based on new credible and verifiable evidence of innocence -The applicant must agree to cooperate with the CRU.
Texas	Dallas County	Conviction Integrity Unit (CIU)	CIU is a special unit in the Dallas County District Attorney's Office. CIU has been led by Cynthia Garza, Chief/Special Fields Bureau Chief, since 2017. CIU is currently comprised of three Assistant District Attorneys, an administrative legal assistant, and a dedicated investigator. Chief / Special Fields Bureau Chief of the CIU reports directly to the District Attorney.	CIU is primarily dedicated to reviewing cases involving allegations of actual innocence, but it also reviews cases involving instances of wrongful conviction as a result of systematic errors. Claimant or his/her "loved one" may write a letter to the CIU request review of the case. Claimants will be notified of receipt of submission within 14 days of receiving it. All letters received by the CIU go through an initial screening process and are assigned to a CIU prosecutor for preliminary review. If the CIU makes a preliminary decision to re-open an investigation into the case, the request will be placed on a waiting-list in the order it was received. If the CIU is unable to reopen an investigation into the case, the claimant will be notified of alternative options.	CIU is primarily dedicated to reviewing cases involving allegations of actual innocence, but it also reviews cases involving instances of wrongful conviction as a result of systematic errors.

State	County	Conviction Unit Name	Structure & Staffing	Claim Process	Review Criteria
Texas	Tarrant County	Conviction Integrity Unit (CIU)	In order to be considered for submission, an intake form and associated documents, as well as a completed waiver must be submitted.		The CIU will review cases that meet the following criteria: -The conviction must arise from a Tarrant County court; -A claim must not be frivolous, but procedural bars will not prohibit review; -Records and evidence necessary for review must be available; -The applicant must present a new and credible claim of actual innocence; and -The applicant and convicted person must fully and openly cooperate with the unit.

Report of Subcommittee on Actual Innocence

ACTUAL INNOCENCE

I. OVERVIEW

The Task Force recommends an amendment to CPL Section 440.10(g) to permit claims of newly-discovered evidence by defendants who pleaded guilty. It is well-established that, unfortunately, innocent people sometimes plead guilty and that those defendants may have no legal remedy under New York law to challenge their convictions when material credible evidence comes to light that demonstrates actual innocence. Thus, it seems equitable, fair, and necessary to amend CPL Section 440.10(g) to allow those defendants convicted after pleading guilty to challenge their convictions based on newly-discovered evidence.

Moreover, Rule 3.8(c) of the New York Rules of Professional Conduct require that when a prosecutor is aware of new, credible, and material evidence that creates a likelihood that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) Disclose that evidence to an appropriate court or prosecutor's office; or

(2) If the conviction was obtained by that prosecutor's office,

(A) notify the appropriate court and the defendant that the prosecutor's office possess such evidence unless a court authorizes delay for good cause shown;

(B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and

(C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

Rule 3.8(c) of the New York Rules of Professional Conduct.[1] Given these ethical duties that apply to prosecutors, the lack of a procedural vehicle for a court to address and remedy a wrongful conviction in cases where a defendant entered a plea of guilty but there is newly

[1] An Ethics Opinion of the Association of the Bar of the City of New York, Formal Opinion 2018-2, interprets Rules 3.8(c) and (d) of the New York Rules of Professional Conduct and states that the terms "new" "material" and "evidence" should "have their ordinary, everyday meanings and were not meant to incorporate legal standards derived from procedural rules, statutes or constitutional decisions." Formal Opinion 2018-2 (available at https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-2-prosecutors-post-conviction-duties-regarding-potential-wrongf.). Under such an interpretation, "new" evidence may "include previously unknown evidence that might have been available to the defense at the time of trial if only defense counsel had exercised due diligence." Formal Opinion 2018-2 discusses other ways in which Rules 3.8(c) and (d) might be implicated including where the defendant pled guilty.

discovered evidence frustrates the intent of the ethical rule, which is not limited to convictions after trial.

While the Task Force considered whether to recommend an amendment to CPL Section 440.10 to permit a free-standing claim of actual innocence, it ultimately decided not to do so principally for three reasons set forth below:

1. All four Appellate Division departments have held that the current statute permits defendants who were convicted at trial to assert claims of actual innocence under 440.10(1)(h). These claims may be raised despite procedural bars and thus there is no statutory barrier that prevents defendants convicted at trial from raising an actual innocence claim.

2. There was no consensus as to whether CPL Section 440.10 should be amended to allow defendants who pleaded guilty to assert a free-standing actual innocence claim. In addition, there was no consensus as to whether there should be different burdens of proof based on the manner of conviction (trial or guilty plea) or as to the appropriate remedy (vacatur of the conviction or vacatur of the plea).

3. Recommending codification of a free-standing actual innocence claim likely would face substantial opposition from prosecutors and thus reduce the chance of any proposed legislative amendment being enacted.

II. BACKGROUND

A. Relevant Statutory Provision:

CPL § 440.10(1) provides ten specific grounds upon which a defendant may move to vacate a judgment of conviction. The relevant provisions state:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . .
>
> > (g) **New evidence has been discovered** since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or
> >
> > (g-1) **Forensic DNA testing** of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable

> probability that the verdict would have been more favorable to the defendant.
>
> (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

B. Legal Precedent

1. Freestanding Actual Innocence Claim and Hamilton

Subdivision (1)(h) of CPL § 440.10(1) is the statutory provision under which a defendant can assert that there was a constitutional deprivation in obtaining the conviction, such as ineffective assistance of counsel, Brady, and any other claim that would violate the due process rights of the defendant.

Subdivision (1)(h) of CPL § 440.10(1) also is the basis for "freestanding" actual innocence as recognized by the Second Department in People v. Hamilton, 115 A.D.3d 12 (2d Dep't 2014). In that decision, the Hamilton court specifically relied upon the New York State Constitution's due process clause and the prohibition against cruel and unusual punishment.

As explained in Hamilton,

> Since a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction or incarceration of a guiltless person, which deprives that person of freedom of movement and freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution . . .
>
> Moreover, because punishing an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment also violates the provision of the New York Constitution which prohibits cruel and unusual punishments

115 A.D.3d at 26.

The court concluded that "a freestanding claim of actual innocence may be addressed pursuant to CPL 440.10(1)(h), which provides for vacating a judgment which was obtained in violation of an accused's constitutional rights." Id. at 26.

Under CPL 440.30(6), the standard of proof imposed upon a defendant challenging a conviction is "proof by a preponderance of the evidence." With respect to a claim of actual innocence as a ground for vacating the conviction, as distinguished from a specific constitutional violation, however, vacatur would be required only if there is clear and convincing evidence that the defendant is innocent.

The remaining three Appellate Divisions all have adopted the Hamilton standard and have recognized a free-standing actual innocence claim in trial cases grounded in due process. See

People v. Jimenez, 142 A.D.3d 149 (1st Dep't 2016); People v. Mosley, 155 A.D.3d 1124 (3d Dep't 2017); People v. Pottinger, 156 A.D.3d 1379 (4th Dep't 2017).

III. SUPPORT FOR RECOMMENDATION

A. Barriers to Litigating 440 Motions Following Guilty Pleas

On its face, 440.10(g) is restricted to newly discovered evidence "after trial," thereby precluding a (1)(g) claim where a defendant has pled guilty. But not all provisions of the statute contain similar constraints. For example, the forensic testing provision under (1)(g-1) permits a claim after a guilty plea with a higher standard, namely, that a defendant must show a "substantial probability" of actual innocence, as opposed to a "reasonable probability" of actual innocence as is required for trial cases.

Despite the lack of any language in 440.10(1)(h) restricting it to trial cases, unlike subsection (1))(g) and (1-g), the Court of Appeals, in People v. Tiger, 32 N.Y.3d 91 (2018), found that a "freestanding" claim of actual innocence under 440.10(1)(h) was precluded by a guilty plea. In Tiger, the defendant moved pursuant to CPL 440.10(1)(h) to vacate the judgment alleging (1) that her guilty plea was unconstitutionally obtained due to ineffective assistance of counsel; and (2) a claim of actual innocence relying on Hamilton. Addressing the defendant's claim that "despite her guilty plea, . . . she is entitled to a hearing on the evidence of her guilt or innocence[,]" the Court held that "CPL 440.10(1)(h) does not provide for such relief." Id. at 98.

The Court in Tiger noted the language in CPL 440.10((1)(h) requiring a defendant to show "the judgment *was obtained* in violation of a defendant's state or federal constitutional right," while subdivision (1)(g) only applies to "*entry of a judgment based upon a verdict of guilty after trial*." Id. at 99 (emphasis in original). The Court also noted that the 2012 legislative carve-out in subdivision (1)(g-1) is the only provision that refers to actual innocence and contains a higher standard for convictions obtained after guilty pleas. Id. at 99-100. The Court found this "lends support to the conclusion that CPL 440.10 does not contemplate a separate constitutional claim to vacate a guilty plea based on new evidence as to guilt or innocence." Id. at 100. The Court further noted that the statutory framework evidenced a legislative purpose that the principle that "a voluntary and solemn admission of guilt in a judicial proceeding is not cast aside in a collateral motion for a new factual determination of the evidence of guilt." Id. Accordingly, the Court held, "a guilty plea entered in proceedings where the record demonstrates the conviction was constitutionally obtained will presumptively foreclose an independent actual innocence claim." Id. at 102.

The Tiger decision acknowledged that a defendant may raise a 440.10(1)(h) claim in a plea case based on ineffective assistance of counsel and ruled that the defendant's ineffective assistance of counsel claim should proceed to an evidentiary hearing. Id. at 99 ("Subdivision (1)(h) imposes no time limitation in bringing the motion and is applicable to judgments obtained both through guilty pleas and upon verdict in a trial"); id. at 102 ("Since the evidence put forth in support of defendant's actual innocence claim was discoverable before the guilty plea had her attorney pursued that course of investigation, defendant's challenge to her conviction falls squarely within CPL 440.10(1)(h) and will necessarily be addressed as part of her ongoing ineffective assistance of counsel claim.").

B. Need for Legislative Fix

Under the current legislative scheme and existing case law, a defendant who pleads guilty *cannot* raise a 440 claim under (1)(g) – based on the statutory language – or as a freestanding (Hamilton) claim under (1)(h) – based on Tiger. It is well-established that the vast majority of cases are resolved by guilty plea. "More than 90 percent of felony convictions in state courts across the U.S. are obtained by guilty plea." Innocence Project website (available at https://www.innocenceproject.org/an-end-to-plea-bargains/). Unfortunately, as also has been well established, individuals who actually are innocent sometimes plead guilty. Of the 363 wrongful convictions overturned in the United States by DNA testing, 41 defendants pleaded guilty to crimes they did not commit. See Innocence Project website (available at https://www.innocenceproject.org/all-cases/#exonerated-by-dna).

The forensic evidence provision in (1)(g-1) provides a method for raising actual innocence for those individuals who were convicted upon a guilty plea, but this provision limited to cases where DNA testing exonerates an individual. DNA exonerations are the basis of many, but not all, wrongful convictions. See University of Michigan Law School's National Registry of Exonerations (known to be the most comprehensive database in the country). The NRE defines an exoneration as "when a person who has been convicted of a crime is officially cleared based on new evidence of innocence." (The database is searchable by name, county, and other criteria. Available at http://www.law.umich.edu/special/exoneration/Pages/about .aspx (listing exonerations based on Perjury or False Accusation, Official Misconduct, Mistaken Witness Identification, False or Misleading Forensic Evidence, etc.).

Whether the result of a guilty plea or a trial, the criminal justice system should be equally concerned with wrongful convictions. Conviction Integrity Units at prosecutors' offices are a potential avenue for catching wrongful convictions, but as addressed herein, are not an error-proof method. Moreover, many prosecutors' offices throughout New York State do not have Conviction Integrity Units and defendants convicted in those jurisdictions should have a statutory means by which to assert their innocence.

Newly discovered evidence often is the key to unearthing a claim of actual innocence. For example, a defendant who entered a guilty plea might discover that a cooperator with another prosecution agency has identified someone other than the defendant as the actual perpetrator, (*see Man Convicted In Club Death is Acquitted at Second Trial*, New York Times, December 7, 2007, available at: https://www.nytimes.com/2007/12/07/nyregion/07palladium.html), that there were improprieties in the crime laboratory that tested the evidence (see *Nassau County Shuts*

Down Crime Lab, New York Times, February 19, 2011, available at: https://www.nytimes.com/2011/02/19/nyregion/19nassau.html0), or that advancements in science cast doubt on the theory upon which the crime was predicated (see People v. Bailey, 144 A.d.3d 1562 (4th Dep't 2016).

In none of these examples above would a defendant who entered a plea of guilty be able to challenge their conviction based on newly-discovered evidence. A subdivision (1)(h) ineffective assistance of counsel claim likely would not provide relief in these scenarios. Claims alleging a failure to investigate or a failure to challenge invalidated forensic science rarely succeed largely because a criminal defense lawyer need only provide "objectively reasonable" or "meaningful" representation. Nor would defense counsel be able to know that the real perpetrator has admitted guilt in a proffer session with a law enforcement agency.

Accordingly, there is a need for a legislative amendment to permit 440 claims based on newly discovered evidence following a guilty plea under subdivision (g). Yet, it makes sense to have a heightened standard for such claims as opposed to those that are the result of a trial verdict. As noted, the sole provision currently permitting a 440 claim after a guilty plea -- (g-1) -- includes a higher standard requiring a defendant to show a "substantial probability" of actual innocence, as opposed to a "reasonable probability that the verdict would have been more favorable to the defendant" as is required for trial cases. In Tiger, the Court of Appeals explained the legislative rationale for the inclusion of this higher standard in (g-1) as follows, "In recognition of the import of a guilty plea conviction that was constitutionally obtained, the legislature enacted different standards that must be satisfied as between a defendant who has pleaded guilty and one who has been convicted upon a verdict after trial." Tiger, 32 N.Y.3d at 99.

The Court in Tiger also explained that the historic importance of plea agreements and finality supported this higher standard: "The plea process is integral to the criminal justice system and we have observed that there are significant public policy reasons for upholding plea agreements, including conserving judicial resources and providing finality in criminal proceedings." Id. at 101 (citing People v Keizer, 100 NY2d 114, 118 (2003)). These same concerns apply to newly discovered evidence claims under subdivision (g) following a guilty plea and warrant a higher standard as well. A higher standard also would recognize the difficulty of prosecutors defending against 440 claims in plea cases where there has not been a fact finding proceeding (trial).

Finally, under the existing statutory scheme, CPL 440.30(2) and (4) provide that a court may summarily deny a motion without a hearing. The same provisions would apply to newly discovered evidence claims following a guilty plea under (g). It is not anticipated that there need be a hearing in every case where a motion is made as judges would retain the discretion to decide the motion on the papers. Where a hearing was granted, CPL 440.30(6), would impose the same standard of proof upon the defendant of proof by a preponderance of the evidence.

IV. RECOMMENDATION

A. Legislative Amendment to CPL § 440.10(1) to add § 440.10(1)(h)

The Task Force recommends a statutory change to CPL § 440.10(1) to add new section (h) that would permit a newly discovered evidence claim after a guilty plea. Whereas (1)(g) for

convictions after trial requires a "**probability** that had such evidence been received at the trial the verdict would have been more favorable to the defendant," the showing for guilty pleas is recommended to be "a **substantial** probability that **the defendant was actually innocent of the offense of which he or she was convicted**."

Current Language of CPL § 440.10(1)(g):

> (g) **New evidence has been discovered** since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

Recommended Amendment to CPL § 440.10(1) to add (1)(h):
(redlined to show difference from (1)(g))

> (h) **New evidence has been discovered** since the entry of a judgment based upon a ~~verdict of guilty after trial~~ **guilty plea**, which could not have been produced by the defendant at the ~~trial~~ **time of the plea**, even with due diligence on his part and which is of such character as to create a **substantial probability that the defendant was actually innocent of the offense of which he or she was convicted** ~~probability that had such evidence been received at the trial, the verdict have been more favorable to the defendant~~; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

B. Further Study of Possible Legislative Action to Create a Free-Standing Claim of Actual Innocence

The Task Force spent a substantial amount of time discussing whether or not to recommend legislation that would create a free standing claim of actual innocence thereby essentially codifying Hamilton as well as permitting such a claim for those who pled guilty thus creating a legislative fix for Tiger. Ultimately, the Task Force declined to make such recommendation for the reasons stated above but agreed that further study and a legislative drafting effort related to this issue are warranted. Such a study should include, at a minimum, what standard of proof would apply to such claims, what the remedy would be for a successful claim, *e.g.*, vacatur of the plea or dismissal, and whether "newly" discovered evidence should be interpreted consistently with "new" evidence in the Ethics Opinion referenced above in note 1.

Report of Subcommittee on Forensic Science

Proposal for Reform:

The Sub-Committee on Forensic Science proposes legislation to improve the quality of forensic science admitted into evidence in New York State courts. The proposed statute would be applicable only in criminal cases, and would leave the law of evidence unchanged as it applies to civil cases.

NEW CPL § 60.80: Rules of evidence; Testimony by Expert Witnesses

(1) A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify at trial in the form of an opinion or otherwise if:

a. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

b. the testimony is based on sufficient facts or data, provided that such facts or data must be available to both parties as set forth in section 240.20(1)(c) of this chapter;

c. the testimony is the product of reliable principles and methods; and

d. the expert witness must reliably apply the principles and methods of the area of expertise to the facts of the case.

(2) When testimony is offered as scientific, the witness' method, to be considered reliable, must be shown to be reproducible and accurate for its intended use, as shown by empirical studies conducted under conditions appropriate to the intended use.

PRACTICE COMMENTARY

Unreliable forensic evidence is one of the major causes of wrongful convictions. The Innocence Project reports that "misapplication of forensic science is the second most common contributing factor to wrongful convictions, found in nearly half (45%) of DNA exoneration cases." (www.innocenceproject.org/causes/misaplication-forensic-science/). Moreover, unreliable science can be admitted into evidence at trial in a variety of ways. The forensic scientists or technicians collecting, analyzing and testing crime scene evidence might use unreliable techniques, or misapply reliable techniques, or testify incorrectly about the significance of the evidence collected. For example, the FBI reported that in a remarkable 96% of cases reviewed, in which its experts offered opinions about "scientifically" matched hair samples at trial, the experts' opinions were either entirely or partly inaccurate.[1] Further, science which was once determined to be valid and reliable can be proved unreliable or even false by new scientific inquiry.

[1] *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review*, FBI.GOV, https://bit.ly/1NaXfmH (last visited Nov. 16, 2018).

All of these errors are often undetected by adversaries presenting and resisting introduction of scientific evidence. Courts making admissibility decisions can be impaired not only by inadequacy of counsels' arguments and the paucity of pre-trial discovery, but also through operation of precedent. However, "it is the Court's role to ensure that a given discipline does not falsely lay claim to the mantle of science, cloaking itself with the aura of unassailability that the imprimatur of 'science" confers and thereby distorting the truthfinding process. There have been too many pseudo-scientific disciplines that have since been exposed as profoundly flawed, unreliable, or baseless for any Court to take this role lightly." *Almeciga v Ctr for Investigative Reporting*, 185 F Supp 3d 401 (2016).

In New York, as in other states where the standard for admissibility of scientific evidence is or was governed by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), much evidence has been admitted into trial even though it does not comport with the scientific method and is often little better than guesswork.[2] See *Ex Parte Chaney*, 2018 WL 6710279 at 32 ("The body of scientific knowledge underlying the field of bitemark comparisons has evolved since his trial in a way that contradicts the scientific evidence relied on by the State at trial. New peer-reviewed studies discredit nearly all the testimony given by [forensic dentists] about the mark on [the victim's] left forearm and [Petitioner] being a "match.")

In New York State, the courts' interpretation of *Frye* is even more problematic because, unlike almost every other jurisdiction, New York has no codified rules for the introduction of scientific evidence. The absence of statutory guidance discourages independent judicial analysis and encourages reliance on precedent, where past judicial reliability determinations are not re-assessed by examining the current state of science, but simply quoted to re-affirm admissibility of scientific evidence. The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) encouraged trial court to rigorously examine proffered scientific evidence before admission of the evidence at trial to ensure it meets the criteria scientists themselves apply.

To encourage judicial scrutiny of proffered scientific evidence, this statute tracks Rule 702 of the Federal Rules of Evidence and comparable state rules and statutes. It is similar to statutes enacted by most states. The statutes also incorporate the lessons of the 2016 PCAST report on forensic feature-comparison methods.[3] As set forth in that report, there are two types of scientific validity: foundational validity and validity as applied.[4]

"Foundational validity" requires that the method relied upon by the expert has been subject to empirical testing by experts under conditions appropriate to its intended use. The empirical testing must demonstrate that the method is repeatable and reproducible, and the testing results must contain valid estimates of the method's positive and negative error rates.

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[2] Michael J. Saks, et. al., *Forensic Bitemark Identification: Weak Foundations, Exaggerated Claims*, JOURNAL OF LAW AND THE BIOSCIENCES (2016), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5570687/.

[3] President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016), https://tinyurl.com/j29c5ua.

[4] Id. at 43.

"Validity as applied" follows a two-part test. First, the examiner must demonstrate a capability for reliably applying the method and having done so in the past. Second, the examiner's assertions about the probative value of proposed evidence must report the overall false-positive rate and sensitivity established by the studies of foundational validity, and must establish that the samples used in the foundational studies are relevant to the facts of this particular case. This statute suggests the court look to both foundational validity and validity as applied in making admissibility determinations.

Generally, when determining whether any particular testimony is the product of reliable principles and methods (1)(c), a court should like to see if the principles are repeatable, reproducible and accurate. In the scientific literature, repeatable means that, with known probability, an examiner obtains the same result, when analyzing samples from the same sources. Reproducible means that, with known probability, different examiners obtain the same result, when analyzing the same samples. Accuracy means, that, with known probabilities, an examiner obtains correct results both (1) for samples from the same source and (2) for samples from different sources.

Furthermore, this statute anticipates that, in testimony, experts shall not be permitted to make claims or implications that go beyond the empirical evidence and the applications of valid statistical principles to that evidence. For example, where a witness provides testimony based on a forensic examination conducted to determine whether an evidentiary sample is similar or identical to a source sample, the witness must provide an explanation for the assertion of similarity, and support for the experts' use of any expression of confidence in the assertion of similarity.[5]

[5] See, Lander, Eric S., *Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts*, 86 Fordham L. Rev. 1661, 1677 (2018).

Survey of Other States Admissibility Standards for Scientific Evidence

Memorandum

October 8, 2018 Weil Draft

To	From	CC
NYSBA Wrongful Convictions Task Force, Subcommittee on Forensic Science	Benjamin E. Marks Jessica N. Djilani	

Re Survey of States' Admissibility Standard(s) for Scientific Evidence

In response to a request from Adele Bernhard and the NYSBA Wrongful Task Force Subcommittee on Forensic Science, this memorandum provides a summary of the admissibility standards and rules in all 50 states and case law interpreting such admissibility statutes. As requested, the Appendix contains a copy of the cases discussed herein.

* * *

I. Summary Table of the Admissibility Standards and State Rule of Evidence for Each State

Below is a summary table of each state's rule of evidence governing the admission of scientific evidence and the applicable standard for the admission of scientific evidence.

As shown in the table below, 38 states apply the admissibility standard set out in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) ("*Daubert*") or a very similar standard, and eight states (including New York) apply the standard set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) ("*Frye*"). The remaining four states apply a standard other than *Daubert* or *Frye*.

As also shown in the table below, 44 states have state rules of evidence that match, or are very similar to, the 1975, 2000, or current version of Federal Rule of Evidence 702, while six states (including New York) have a rule of evidence that materially differs from Rule 702.

The original version of Federal Rule of Evidence 702, enacted in 1975 ("1975 FRE 702") provided:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 702 (as amended in 2000) ("2000 FRE 702") provided:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
>
> (1) the testimony is based upon sufficient facts or data,
>
> (2) the testimony is the product of reliable principles and methods, and
>
> (3) the witness has applied the principles and methods reliably to the facts of the case.

The current version of Federal Rule of Evidence 702 (as amended in 2011) ("current FRE 702"), provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

No.	State	Standard[1]	State Rule of Evidence	Relationship to FRE 702
1	Alabama	*Daubert*	Alabama Code 12-21-60	Hybrid of 1975 FRE 702 and 2000 FRE 702
2	Alaska	*Daubert*	Alaska Rule of Evidence 702	Matches 1975 FRE 702
3	Arizona	*Daubert*	Arizona Rule of Evidence 702	Matches current FRE 702
4	Arkansas	*Daubert*	Arkansas Rule of Evidence 702	Matches 1975 FRE 702
5	California	*Frye**	California Evidence Code 702	Differs from FRE 702
6	Colorado	*Daubert*	Colorado Rule of Evidence 702	Matches 1975 FRE 702
7	Connecticut	*Daubert*	Connecticut Code of Evidence § 7-2	Hybrid of 1975 FRE 702 and current FRE 702

[1] The standard applicable in each state is organized into categories, which have the following explanations:

- ***Daubert***: States that have explicitly adopted the *Daubert* standard;
- ***Frye***: States that have explicitly adopted the *Frye* standard;
- ***Daubert****: States that apply the *Daubert* factors (or *Daubert*-like factors), but have not explicitly adopted *Daubert*;
- ***Frye****: States that apply the *Frye* factors (or *Frye*-like factors), but have not explicitly adopted *Frye*; and
- **Neither**: States that apply a unique standard (neither *Frye* nor *Daubert* nor any similar factors).

No.	State	Standard[1]	State Rule of Evidence	Relationship to FRE 702
8	Delaware	*Daubert**	Uniform Rule of Evidence 702	Matches 2000 FRE 702
9	Florida	*Frye*	Florida Statute § 90.702	Matches 2000 FRE 702
10	Georgia	*Daubert*	Georgia Code § 24 – 7 – 702	Contains 2000 FRE 702
11	Hawaii	*Daubert**	Hawaii Revised Statute § 33 – 626 – 702	Contains 1975 FRE 702
12	Idaho	*Daubert**	Idaho Rule of Evidence 702	Hybrid of 1975 FRE 702 and 2000 FRE 702
13	Illinois	*Frye*	Illinois Rule of Evidence 702	Contains 1975 FRE 702
14	Indiana	*Daubert**	Indiana Rule of Evidence 702	Hybrid of 1975 FRE 702 and 2000 FRE 702
15	Iowa	*Daubert*	Iowa Rule of Evidence 5.702	Matches 1975 FRE 702
16	Kansas	*Daubert*	Kansas Statutes Annotated 60 – 456 (b)	Matches 2000 FRE 702
17	Kentucky	*Daubert**	Kentucky Rule of Evidence 702	Matches 2000 FRE 702
18	Louisiana	*Daubert*	Louisiana Code of Evidence 702	Matches 1975 FRE 702
19	Maine	*Daubert**	Maine Rule of Evidence 702	Hybrid of 1975 FRE 702 and 2000 FRE 702
20	Maryland	*Frye*	Maryland Rule of Evidence 5 – 702	Differs from FRE 702
21	Massachusetts	*Daubert*	Massachusetts Rule of Evidence 702	Matches 2000 FRE 702
22	Michigan	*Daubert*	Michigan Rule of Evidence 702	Similar to 2000 FRE 702
23	Minnesota	*Frye**	Minnesota Rule of Evidence 702	Contains 1975 FRE 702
24	Mississippi	*Daubert*	Mississippi Rule of Evidence 702	Matches current FRE 702
25	Missouri	*Daubert**	Missouri Revised Statute § 490.065	Contains 1975 FRE 702
26	Montana	*Daubert**	Montana Rule of Evidence 702	Matches 1975 FRE 702
27	Nebraska	*Daubert**	Nebraska Revised Statute 27 – 702	Matches 1975 FRE 702
28	Nevada	*Daubert**	Nevada Revised Statute 50.275	Similar to 1975 FRE 702
29	New Hampshire	*Daubert*	New Hampshire Rule of Evidence 702	Matches current FRE 702
30	New Jersey	Neither, *Rubanick*	New Jersey Rule of Evidence 702	Matches 1975 FRE 702
31	New Mexico	*Daubert**	New Mexico Rule of Evidence 11 – 702	Hybrid of 1975 FRE 1975 and current FRE 702
32	New York	*Frye*	New York Civil Practice Law and Rules 4515	Differs from FRE 702
33	North Carolina	*Daubert*	North Carolina Rule of Evidence 702	Matches 2000 FRE 702
34	North Dakota	Neither, *Hernandez*	North Dakota Rule of Evidence 702	Hybrid of 1975 FRE 702 and current FRE 702
35	Ohio	*Daubert**	Ohio Rule of Evidence 702	Differs from FRE 702
36	Oklahoma	*Daubert*	Oklahoma Statute § 12 – 2702	Matches 2000 FRE 702

No.	State	Standard[1]	State Rule of Evidence	Relationship to FRE 702
37	Oregon	*Daubert**	Oregon Rule of Evidence 40.41 0 702	Matches 1975 FRE 702
38	Pennsylvania	*Frye*	Pennsylvania Rule of Evidence 702	Differs from FRE 702
39	Rhode Island	*Daubert*	Rhode Island Rule of Evidence 702	Similar to 1975 FRE 702
40	South Carolina	Neither, *Jones*	South Carolina Rule of Evidence 702	Matches 1975 FRE 702
41	South Dakota	*Daubert*	South Dakota Codified Law 19 – 19 – 702	Matches current FRE 702
42	Tennessee	*Daubert**	Tennessee Rule of Evidence 702	Matches 1975 FRE 702
43	Texas	*Daubert**	Texas Rule of Evidence 702	Hybrid of 1975 FRE 702 and 2000 FRE 702
44	Utah	Neither, *Rimmasch*	Utah Rule of Evidence 702	Differs from FRE 702
45	Vermont	*Daubert*	Vermont Rule of Evidence 702	Matches 2000 FRE 702
46	Virginia	*Daubert**	Virginia Rule of Evidence 702	Contains 1975 FRE 702
47	Washington	*Frye*	Washington Rule of Evidence 702	Matches 1975 FRE 702
48	West Virginia	*Daubert*	West Virginia Rule of Evidence 702	Contains 2000 FRE 702
49	Wisconsin	*Daubert*	Wisconsin Statute § 907.02	Contains 2000 FRE 702
50	Wyoming	*Daubert*	Wyoming Rule of Evidence 702	Matches 1975 FRE 702

II. State-By-State Analysis of Admissibility Standards for Scientific Evidence and Relevant Statutes

1 Alabama

The Alabama Legislature has expressly adopted the *Daubert* standard. *See Turner v. State*, 746 So.2d 355 (Ala. 1998). For a recent case discussing the application of the *Daubert* factors in Alabama, please see *Mazda Motor Corporation v. Hurst*, 2017 WL 2888857 (Jul. 7, 2017).

Alabama Code 12-21-160 provides:

> (a) *Generally*. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
> (b) *Scientific evidence*. In addition to requirements set forth in subsection (a), expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if:

> (1) The testimony is based on sufficient facts or data,
> (2) The testimony is the product of reliable principles and methods, and
> (3) The witness has applied the principles and methods reliably to the facts of the case.[2]

Paragraph (a) of this statute matches the 1975 version of FRE 702, while paragraph (b) sets out the factors enumerated in the 2000 version of FRE 702.

2 Alaska

In the case of *State v. Coon*, 974 P.2d 386 (Alaska 1999), the Alaska Supreme Court adopted the *Daubert* standard.

Alaska Rule of Evidence 702(a) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[3]

This statute matches the 1975 version of FRE 702.

3 Arizona

In 2010, the Arizona Legislative House Bill 492 changed the admissibility standard used for scientific evidence from the *Frye* standard to the *Daubert* standard, and Arizona courts now apply *Daubert*. *See State v. Salazar-Mercado*, 325 P.3d 996 (Ariz. 2014).

Arizona Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and

[2] http://judicial.alabama.gov/docs/library/rules/ev702.pdf

[3] https://public.courts.alaska.gov/web/rules/docs/ev.pdf

> (d) the expert has reliably applied the principles and methods to the facts of the case.[4]

This statute matches the current version of FRE 702.

4 Arkansas

The Arkansas Supreme Court adopted the *Daubert* standard in 2000. *See Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Foote*, 14 S.W. 3d 512 (Ark. 2000).

Arkansas Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[5]

This statute matches the 1975 version of FRE 702.

5 California

In *People v. Leahy*, 882 P.2d 321 (Cal. 1994), the California Supreme Court considered whether to modify the *Frye* standard adopted in *People v. Kelly*, 549 P.2d 1240 (Cal. 1976)in light of the *Daubert* decision by the Supreme Court of the United States. The court held that the *Kelly/Frye* formulation "should remain a prerequisite to the admission of expert testimony regarding new scientific methodology in the state." *Id*. at 591; *see also People v. Daveggio*, 415 P.3d 717 (Cal. 2018) (upholding the *Kelly/Frye* standard as applicable in California state courts). More recently, in *Sargon Enterprises, Inc. v. University of Southern California*, 288 P.3d 1237 (2012), the court recognized—citing *Daubert*—that a judge's role as a "gatekeeper" of the evidence is to focus "solely on principles and methodology, not the on the conclusions that they generate." However, the court explicitly declined to adopt *Daubert*, and stated that nothing in *Sargon* altered its analysis under *Leahy*. The court further observed that, in considering "scientific controversies," the court "conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.'" *Id*. at 633 (citations omitted).

California Evidence Code 702 provides:

> (a) Subject to 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter.

[4] https://govt.westlaw.com/azrules/Document/N88060EA0E7DA11E0B453835EEBAB0BCD?viewType=FullText&originationContext=documenttoc&transitionType=DocumentItem&contextData=(sc.Default)

[5] https://www.arcourts.gov/rules-and-administrative-orders/court-rules/rule-702-testimony-experts

> Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.
> (b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.[6]

This statute differs from all versions of FRE 702.

6 Colorado

The Colorado Supreme Court adopted the *Daubert* standard in *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001).

Colorado Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[7]

This statute matches the 1975 version of FRE 702.

7 Connecticut

The Connecticut Supreme Court adopted the *Daubert* standard in *State v. Porter*, 698 A.2d 739 (Conn. 1997).

Connecticut Code of Evidence § 7-2 provides:

> A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.[8]

This statute is a hybrid of the 1975 version and the current version of FRE 702.

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[6] http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=EVID&sectionNum=702

[7] http://www.xprolegal.com/rules/Rules_Colorado.pdf

[8] https://www.jud.ct.gov/Publications/PracticeBook/Code_of_Evidence_7927.pdf

8 Delaware

In *Nelson v. State*, 628 A.2d 69 (Del. 1993), the Delaware Supreme Court determined that the Delaware Rules of Evidence and decisions in Delaware's precedent cases were consistent with *Daubert*. The Delaware Uniform Rule of Evidence 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if
>
> (1) the testimony is based upon sufficient facts or data,
>
> (2) the testimony is the product of reliable principles and methods, and
>
> (3) the witness has applied the principles and methods reliably to the facts of the case.[9]

This statute matches the 2000 version of FRE 702.

9 Florida

In *Brim v. State*, 695 So.2d 268 (Fla. 1997), the Florida Supreme Court emphasized that the *Fyre* test is used in Florida, despite the federal adoption of *Daubert*. The *Frye* standard applies notwithstanding the *Daubert*-type language that appears in the relevant Florida state statute. However, the Supreme Court of Florida revisited the question of whether *Frye* or *Daubert* should govern the admissibility of scientific evidence in the case of *DeLisle v. Crane Company*, which was argued in the Florida Supreme Court in the summer of 2018. As of the date of this memorandum, a final decision had not yet been issued.

Florida Statute § 90.702 provides:

> *Testimony by experts.*—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.[10]

[9] https://courts.delaware.gov/forms/download.aspx?id=39388

[10] https://www.flsenate.gov/Laws/Statutes/2016/90.702

This statute matches the 2000 version of FRE 702.

10 Georgia

The relevant section of the Georgia code states that the courts of Georgia should not be viewed as "open to expert evidence that would not be admissible in other states," and therefore counsels that the *Daubert* standard should be applied as the evidentiary standard. The *Daubert* admissibility standard was applied by the Supreme Court of Georgia in the case of *HNTB Georgia, Inc. v. Hamilton-King*, 697 S.E.2d 770 (Ga. 2010).

Georgia Code § 24-7-702 provides, in relevant part:

> (a) Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all civil proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.
> (b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:
> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact . . .
> (f) It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.[11]

Subsection (b) of this statute contains the 2000 version of FRE 702.

[11] https://law.justia.com/codes/georgia/2014/title-24/chapter-7/section-24-7-702/

11 Hawaii

In *State v. Montalbo*, 828 P.2d 1274 (Haw. 1992), the Hawaii Supreme Court used a test of reliability factors very similar to that of *Daubert*, but it did not explicitly adopt the *Daubert* standard. The Supreme Court again declined to adopt the *Daubert* test in the case of *State v. Vliet*, 19 P.3d 42 (Haw. 2001).

Hawaii Revised Statute § 33 – 626 – 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.[12]

This statute contains the 1975 version of FRE 702.

12 Idaho

In *State v. Merwin*, 962 P.2d 1026 (Idaho 1998), the Idaho Supreme Court adopted parts of the *Daubert* standard. However, in more recent cases, such as *Weeks v. Eastern Idaho Health Services*, 153 P.3d 1180 (Idaho 2007), the Idaho Supreme Court has stated that it has "not adopted the *Daubert* standard for admissibility of an expert's testimony but has used some of *Daubert*'s standards in assessing whether the basis of an expert's opinion is scientifically valid." *Id*. at 1184 (citations omitted).

Idaho Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.[13]

This statute is a hybrid of the 1975 version and the current version of FRE 702.

13 Illinois

In *People v. McKown*, 924 N.E.2d 941 (Ill. 2010), the Illinois Supreme Court applied the *Frye* standard that "scientific evidence is admissible at trial only 'if the methodology or scientific principle upon which

[12] https://law.justia.com/codes/hawaii/2016/title-33/chapter-626/rule-702

[13] https://isc.idaho.gov/ire702

the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *Id*. at 283 (citations omitted).

Illinois Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.[14]

This statute contains the 1975 version of FRE 702.

14 Indiana

Although Indiana courts have not explicitly adopted *Daubert*, the Indiana Supreme Court noted in the case of *Turner v. State*, 953 N.E.2d 1039 (Ind. 2011) that the "concerns driving *Daubert* coincide with the express requirement" of the Indiana Rules of Evidence that the trial court be satisfied with the reliability of the scientific principles involved, and instructed that the courts could "consider the *Daubert* factors in determining reliability." *Id*. at 1050.

Indiana Rule of Evidence 702 provides:

> (a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
> (b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.[15]

Subsection (a) is a hybrid of the 1975 version and current version of FRE 702.

[14] http://www.illinoiscourts.gov/SupremeCourt/Evidence/Evidence.htm#702

[15] https://www.in.gov/judiciary/rules/evidence/

15 Iowa

The Iowa Supreme Court has explicitly abandoned the *Frye* test and adopted the *Daubert* test. *See Williams v. Hedican*, 561 N.W.2d 817 (Iowa 1997).

Iowa Rule of Evidence 5.702 provides:

> *Testimony by experts*. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.[16]

This statute matches the 1975 version of FRE 702.

16 Kansas

Kansas has adopted the *Daubert* standard and the Kansas statute governing admissibility of evidence has been amended to coincide with Federal Rule of Evidence 702. This amendment abrogated Kansas court's long-held reliance on the *Frye* test for scientific evidence. *See City of Topeka v. Lauck*, 401 P.3d 1064 (Kan. Ct. App. 2017).

Kansas Statues Annotated 60 – 456(b) provides:

> (b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if:
>
> (1) The testimony is based on sufficient facts or data;
>
> (2) the testimony is the product of reliable principles and methods; and
>
> (3) the witness has reliably applied the principles and methods to the facts of the case.[17]

This statute matches the 2000 version of FRE 702.

[16] https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.5.pdf

[17] http://rvpolicy.kdor.ks.gov/Pilots/Ntrntpil/IPILv1x0.NSF/ae2ee39f7748055f8625655b004e9335/145fefe6fe7d4de586257d90005a5e37?OpenDocument

17 Kentucky

In 2007, the Kentucky rules of evidence were amended to follow and adopt the language of Federal Rule of Evidence 702. Cases decided after 2007 instruct that a trial court *may* consider the *Daubert* factors in assessing the reliability of scientific evidence. *See Garrett v. Commonwealth*, 534 S.W.3d 217 (Ky. 2017).

Kentucky Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.[18]

This statute matches the 2000 version of FRE 702.

18 Louisiana

In *State v. Foret*, 628 So.2d 1116 (La. 1993), the Louisiana Supreme Court adopted the *Daubert* standard.

Louisiana Code of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[19]

This statute matches the 1975 version of FRE 702.

19 Maine

In *State v. Williams*, 388 A.2d 500 (Me. 1978), the Maine Supreme Judicial Court held that it would no longer accept the *Fyre* standard for admissibility of scientific evidence. In the 2005 case of *Searles v. Fleetwood Homes of Pennsylvania, Inc.*, 878 A.2d 509 (Me. 2005), the Supreme Judicial Court used the

[18] http://www.lrc.ky.gov/statutes/statute.aspx?id=20402

[19] https://law.justia.com/codes/louisiana/2009/ce/ce702.html

Daubert standard to determine the admissibility of scientific evidence, though it did not explicitly adopt *Daubert*.

Maine Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if such testimony will help the trier of fact to understand the evidence or to determine a fact in issue.[20]

This statute is a hybrid of the 1975 version and current version of FRE 702.

20 Maryland

In *Reed v. State*, 893 A.2d 1067 (Md. 1978), the Maryland Court of Appeals adopted the *Frye* test, but in the recent case of *Savage v. State*, 166 A.3d 183 (Md. 2017), the Court of Appeals noted that since adopting the *Frye* standard, Maryland courts have often elaborated on the development and application of such the standard. *See, e.g., Blackwell v. Wyeth*, 971 A.2d 235 (Md. 2009).

Maryland Rule of Evidence 5 – 702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
>
> (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
>
> (2) the appropriateness of the expert testimony on the particular subject, and
>
> (3) whether a sufficient factual basis exists to support the expert testimony.[21]

This statute differs from all versions of the FRE 702.

21 Massachusetts

In *Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994), the Massachusetts Supreme Judicial Court adopted the *Daubert* standard.

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[20] http://www.courts.maine.gov/rules_adminorders/rules/text/mr_evid_2015-9-1.pdf

[21] https://govt.westlaw.com/mdc/Document/N667CBCA09CEB11DB9BCF9DAC28345A2A?transitionType=Default&contextData=(sc.Default)

Massachusetts Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if
>
> (a) the testimony is based upon sufficient facts or data,
>
> (b) the testimony is the product of reliable principles and methods, and
>
> (c) the witness has applied the principles and methods reliably to the facts of the case.[22]

This statute matches the 2000 version of FRE 702.

22 Michigan

Recent decisions by the Michigan Supreme Court, including *Edry v. Adelman*, 786 N.W.2d 567 (Mich. 2010) and *Elher v. Misra*, 878 N.W.2d 790 (Mich. 2016), apply the *Daubert* standard.

Michigan Rule of Evidence 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if
>
> (1) the testimony is based on sufficient facts or data,
>
> (2) the testimony is the product of reliable principles and methods, and
>
> (3) the witness has applied the principles and methods reliably to the facts of the case.[23]

This statute matches the 2000 version of FRE 702 except for the phrase "If the court determines."

23 Minnesota

In *State v. Mack*, 292 N.W. 2d 764 (Minn. 1980), the Minnesota Supreme Court applied the *Frye* standard and held that the expert's technique must be based on a foundation that is "scientifically reliable." In the case of *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000), the Supreme Court

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22 http://masslitapp.com/html/Massachusetts_Guide_to_Evidence/022014/Massachusetts_Guide_to_Evidence_022014702._Testimony_by_Experts.html

23 http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Rules%20of%20Evidence.pdf

expressly reaffirmed its adherence to the *Fyre-Mack* standard and rejected *Daubert*. Therefore, when novel scientific evidence is offered, Minnesota state courts must determine whether it is generally accepted in the relevant scientific community and the scientific evidence must be shown to have a foundational reliability. The evidence must also satisfy the requirements of Minnesota Rule of Evidence 702. *Id*. at 814.

Minnesota Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.[24]

This statute contains the 1975 version of FRE 702.

24 Mississippi

In *Mississippi Transportation Commission v. McLemore*, 863 So.2d 231 (Miss. 2003), the Mississippi Supreme Court abandoned the *Frye* test and adopted the *Daubert* standard.

Mississippi Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[25]

This statute matches the current version of FRE 702.

[24] https://www.revisor.mn.gov/court_rules/ev/id/702/

[25] https://courts.ms.gov/research/rules/msrulesofcourt/Restyled%20Rules%20of%20Evidence.pdf

25 Missouri

In March 2017, the Missouri Governor signed House Bill 153 into law repealing Section 490.065 of the Missouri Revised Statute and replacing it with admissibility standards mirroring those of *Daubert*. There has not yet been a court case interpreting the new admissibility standard in Missouri.

Missouri Revised Statute § 490.065 provides

> 1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
> 2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.
> 4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.[26]

Subsection (a) of this statute matches the 1975 version of FRE 702.

26 Montana

Recent Supreme Court cases in Montana, such as *State v. Damon*, 119 P.3d 1194 (Mont. 2005), have applied the *Daubert* standard.

Montana Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.[27]

[26] https://law.justia.com/codes/missouri/2005/t33/4900000065.html

[27] https://leg.mt.gov/bills/mca/title_0260/chapter_0100/part_0070/section_0020/0260-0100-0070-0020.html

This statute matches the 1975 version of FRE 702.

27 Nebraska

In the case of *Schafersman v. Agland Coop*, 631 N.W. 2d 862 (Neb. 2001), the Supreme Court of Nebraska adopted the *Daubert* standard.

Nebraska Revised Statute 27 – 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[28]

This statute matches the 1975 version of FRE 702.

28 Nevada

In *Higgs v. State*, 222 P.3d 648 (Nev. 2010), the Nevada Supreme Court held that "to the extent that *Daubert* espouses a flexible approach to the admissibility of expert witness testimony, the court has held it persuasive." *Id*. at 657. The Supreme Court further stated that "to the extent that courts have construed *Daubert* as a standard that requires mechanical application of its factors, we decline to adopt it." *Id*. 657-58.

Nevada Revised statute 50.275 provides:

> *Testimony by experts*. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.[29]

This statute is similar to the 1975 version of FRE 702.

29 New Hampshire

In *Baker Valley Lumber, Inc. v. Ingersoll-Rand Company*, 813 A.2d 409 (N.H. 2002), the New Hampshire Supreme Court adopted *Daubert*.

[28] https://nebraskalegislature.gov/laws/statutes.php?statute=27-702

[29] https://www.leg.state.nv.us/NRS/NRS-050.html#NRS050Sec275

New Hampshire Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.[30]

This statute matches the current version of FRE 702.

30 New Jersey

The New Jersey Supreme Court has expressly stated that it has have shifted from "exclusive reliance on a 'general acceptance' [*Frye*] standard for testing the reliability of scientific expert testimony to a methodology-based approach." *In re Accutane Litig*. 2018 WL 3636867, at *1 (N.J. Aug. 1, 2018). Under this "methodology-based approach," the New Jersey Supreme Court has stated that a "theory of causation that had not yet reached general acceptance in the scientific community may be found to be sufficiently reliable if it is based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the field." *Kemp ex rel Wright v. State*, 809 A.2d 77, 85 (N.J. 2002) (citing *Rubanick v. Witco Chem. Corp.*, 593 A.2d 733 (N.J. 1991)). In toxic tort cases in particular, New Jersey courts will take "a more flexible approach to the admission of causation theories," due to the "extraordinary and unique burdens" toxic tort plaintiffs face when they try to prove medical causation in such cases. *Id*.

New Jersey Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.[31]

This statute matches the 1975 version of FRE 702.

[30] https://www.courts.state.nh.us/rules/evid/evid-702.htm

[31] https://www.njcourts.gov/attorneys/assets/evidence/evidence7.pdf?cacheID=EUULzK2

31 New Mexico

In *State v. Alberico*, 861 P.2d 192 (N.M. 1993), the New Mexico Supreme Court abandoned *Frye*, and applied the *Daubert* factors in assessing the validity of scientific evidence under New Mexico Rule of Evidence 11 – 702. However, in *Alberico*, and in subsequent cases such as *State v. Torres*, 976 P.2d 20 (N.M. 1999), the New Mexico Supreme Court continues to consider the *Frye* "general acceptance" factor in order to determine whether certain scientific evidence is admissible.

New Mexico Rule of Evidence 11 – 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.[32]

This statute is a hybrid of the 1975 version and current version of FRE 702.

32 New York

In *People v. Wesley*, 633 N.E.2d 451 (N.Y.1994) the New York Court of Appeals reinforced the *Frye* standard in New York, holding that, in determining whether scientific evidence is admissible, the "particular procedure need not be 'unanimously indorsed' by the scientific community but must be 'generally acceptable as reliable.'" *Id*. at 454 (citation omitted).

Civil Practice Law and Rules 4515 provides:

> *Form of expert opinion.* Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

This statute differs from all versions of FRE 702.

33 North Carolina

In *State v. McGrady*, 787 S.E.2d 1 (N.C. 2016), the North Carolina Court of Appeals stated that the 2011 amendment to the North Carolina rules of evidence "incorporates the standard from the *Daubert* line of cases." *Id*. at 5.

[32] http://swrtc.nmsu.edu/files/2014/12/New-Mexico-Rules-of-Evidence.pdf

North Carolina Rule of Evidence 702 provides, in relevant part:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.[33]

This statute matches the 2000 version of FRE 702.

34 North Dakota

In *State v. Hernandez*, 707 N.W. 2d 449 (N.D. 2005), the North Dakota Supreme Court stated that North Dakota courts never explicitly adopted *Daubert* or *Kumho Tire,* but that expert admissibility is, instead, governed by North Dakota Rule of Evidence 702. That rule allows "generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify." *Id*. at 453. The Supreme Court of North Dakota has stated that under North Dakota Rule of Evidence 702, "expert testimony is admissible whenever specialized knowledge will assist the trier of fact" and that this rule "envisions generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which she is to testify." *Gonzalez v. Tounjian*, 665 N.W.2d 705, 714 (N.D. 2003)

North Dakota Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.[34]

This statute is a hybrid of the 1975 version and current version of FRE 702.

35 Ohio

In *Miller v. Bike Athletic Company*, 687 N.E.2d 735 (Ohio 1998), the Supreme Court of Ohio cited *Daubert* in assessing the admissibility of scientific evidence. In particular, it noted that the "intent of *Daubert* [was to] make it easier to present legitimate conflicting views of experts for the jury's consideration," and therefore "a trial court's role in determining whether an expert's testimony is

[33] https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByChapter/Chapter_8C.pdf

[34] https://www.ndcourts.gov/court/rules/evidence/rule702.htm

admissible" under the Ohio Rule of Evidence 702 focuses on "whether the opinion is based upon scientifically valid principles." *Id*. at 614.

Ohio Rule of Evidence 702 provides:

> A witness may testify as an expert if all of the following apply:
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
> (2) The design of the procedure, test, or experiment reliably implements the theory;
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.[35]

This statute differs from all versions of FRE 702.

36 Oklahoma

The Oklahoma Supreme Court has determined that *Daubert* is the standard that applies to assess the admissibility of scientific evidence. *See Christian v. Gray*, 65 P.3d 591 (Okla. 2003).

Oklahoma Statute § 12 – 2702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise, if:
>
> 1. The testimony is based upon sufficient facts or data;
> 2. The testimony is the product of reliable principles and methods; and
> 3. The witness has applied the principles and methods reliably to the facts of the case.[36]

[35] http://www.supremecourt.ohio.gov/LegalResources/Rules/evidence/evidence.pdf

This statute matches the 2000 version of FRE 702.

37 Oregon

In *State v. O'Key*, 899 P.2d 663 (Or. 1995) the Oregon Supreme Court applied most of the *Daubert* factors to evaluate the admissibility of scientific evidence, and in *State v. Henley*, 422 P.3d 217 (Or. 2018), the Supreme Court of Oregon expressly declined to adopt the *Frye* test.

Oregon Rule of Evidence 40.41 0 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.[37]

This statute matches the 1975 version of FRE 702.

38 Pennsylvania

Pennsylvania state courts continue to follow *Frye*, after the Pennsylvania Supreme Court reasoned that *Frye*'s "general acceptance" test is a "proven and workable rule, which when faithfully followed, fairly serves its purpose of assisting the courts in determining when scientific evidence is reliable and should be admitted." *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003).

Pennsylvania Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
>
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
>
> (c) the expert's methodology is generally accepted in the relevant field.[38]

This statute differs from all versions of FRE 702.

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[36] https://law.justia.com/codes/oklahoma/2014/title-12/section-12-2702/

[37] https://www.oregonlaws.org/ors/40.410

[38] https://www.pacode.com/secure/data/225/chapter7/s702.html

39 Rhode Island

In *Raimbeault v. Takeuchi Manufacturing (U.S.) Ltd.*, 772 A.2d 1056 (R.I. 2001), the Rhode Island Supreme Court "recognized the applicability of *Daubert* to situations in which scientific testimony is proposed in Rhode Island state courts (that is, where Rule 702 of the Rhode Island Rules of Evidence comes into play)." *Id*. at 1061 (citing *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677 (R.I. 1999).

Rhode Island Rule of Evidence 702 provides:

> *Testimony by experts.* If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion.

This statute matches the 1975 version of FRE 702 except for the phrase "form of fact or opinion."

40 South Carolina

The South Carolina Supreme Court has explicitly stated that it has not adopted *Daubert*, and has stated that the proper analysis for determining admissibility of scientific evidence is under South Carolina Rule of Evidence 702, which states that the trial judge "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 515 S.E.2d 508, 518 (S.C. 1999). The South Carolina Supreme Court further instructs that trial courts should apply the factors set out in *State v. Jones* to determine reliability, which include "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (3) the consistency of the method with recognized scientific laws and procedures." *Id*. at 517; *see also State v. White*, 642 S.E.2d 607 (S.C. 2007).

South Carolina Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[39]

This statute matches the 1975 version of FRE 702.

[39] https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=702.0&subRuleID=&ruleType=EVD

41 South Dakota

In *State v. Hofer*, 512 N.W.2d 482 (S.D. 1994), the South Dakota Supreme Court adopted the *Daubert* standard. For a recent case applying these factors, please see *State v. Lemler*, 744 N.W.2d 272 (S.D. 2009).

South Dakota Codified Law 19 – 19 – 702:

> *Testimony by expert*. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case.[40]

This statute matches the current version of FRE 702.

42 Tennessee

In *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997), the Tennessee Supreme Court declined to expressly adopt *Daubert*, but instructed that the *Daubert* "non-exclusive list of factors to determine reliability are useful in applying" Tennessee Rule of Evidence 702. *Id*. at 266. The Supreme Court instructed, however, that a Tennessee court may still consider "whether, as formerly required by *Frye*, the evidence is generally accepted in the scientific community." *Id*.

Tennessee Rule of Evidence 702:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.[41]

This statute matches the 1975 version of FRE 702.

[40] https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=19-19-702

[41] http://tncourts.gov/rules/rules-evidence/702

43 Texas

In *E.I. du Pont de Nemours & Company v. Robinson*, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court cited the *Daubert* factors as being "persuasive." Texas state courts also cite to *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), which holds that scientific evidence offered pursuant to Rule 702 of the Texas Rules of Criminal Evidence must be relevant and reliable.

Texas Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.[42]

This statue is a hybrid of the 1975 version and current version of FRE 702.

44 Utah

In *State v. Rimmasch*, 775 P.2d 388 (Utah 1989), the Utah Supreme Court set out the standard for admitting scientific evidence under Utah Rule of Evidence 702. In *Rimmasch*, the Supreme Court abandoned exclusive reliance on the "general acceptance" test under *Frye* and adopted an "inherent reliability" standard. *State v. Crosby*, 927 P.2d 638, 640 (Utah 1996). The "inherent reliability" standard requires a showing of general acceptance of the principal or technique in the relevant scientific community, or a sufficient foundation to demonstrate the inherent reliability of under the underlying principles and techniques. *State v. Brown*, 948 P.2d 337, 340 (Utah 1997).

Utah Rule of Evidence 702 provides:

> (a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
> (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony
> (1) are reliable,
> (2) are based upon sufficient facts or data, and
> (3) have been reliably applied to the facts.
> (c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of

[42] http://www.txcourts.gov/media/921665/tx-rules-of-evidence.pdf

> facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.[43]

This statute differs from all versions of FRE 702.

45 Vermont

In *State v. Brooks*, 643 A.2d 226, 229 (Vt. 1993), the Vermont Supreme Court held that because Vermont's rule of evidence were "essentially identical" to the federal ones, it should therefore apply the federal principles of *Daubert* governing admissibility of expert testimony. For a recent case applying the *Daubert* standard, please see *985 Associates, Ltd. v. Daewoo Electronics America, Inc.*, 945 A.2d 208 (Vt. 2008)

Vermont Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
>
> (1) the testimony is based upon sufficient facts or data,
>
> (2) the testimony is the product of reliable principles and methods, and
>
> (3) the witness has applied the principles and methods reliably to the facts of the case.[44]

This statute matches the 2000 version of FRE 702.

46 Virginia

The Virginia Supreme Court has not expressly adopted the framework for admissibility of scientific evidence provided in *Daubert*. Rather, the Supreme Court has stated that "[w]hen scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system." *Dowdy v. Comm.*, 686 S.E.2d 710, 723 (Va. 2009). In addition, the Supreme Court counsels, "when the scientific method has been found reliable, either by familiarity or a specific finding, a trial court must then find that the expert testimony is based on adequate foundation." *Id*. (changes and citations omitted).

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[43] https://www.utcourts.gov/resources/rules/ure/0702.htm

[44] https://www.americanbar.org/content/dam/aba/publications/litigation_committees/trialevidence/vermont2014.authcheckdam.pdf

Virginia Rule of Evidence 702 provides:

> (a) *Use of Expert Testimony*.
>
> (i) In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> (ii) In a criminal proceeding, expert testimony is admissible if the standards set forth in subdivision (a)(i) of this Rule are met and, in addition, the court finds that the subject matter is beyond the knowledge and experience of ordinary persons, such that the jury needs expert opinion in order to comprehend the subject matter, form an intelligent opinion, and draw its conclusions.
>
> (b) *Form of opinion*. Expert testimony may include opinions of the witness established with a reasonable degree of probability, or it may address empirical data from which such probability may be established in the mind of the finder of fact. Testimony that is speculative, or which opines on the credibility of another witness, is not admissible.[45]

Subsection (a)(1) of this statute contains the 1975 version of FRE 702. .

47 Washington

Washington state courts use the *Frye* standard. The Supreme Court of Washington has observed that "*Daubert* has drawbacks which [the Court] declines to import into [Washington's] standards for admissibility." *State v. Copeland*, 922 P.2d 1304 (Wash. 1996).

Washington Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[46]

This statute matches the 1975 version of FRE 702.

[45] http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf

[46] https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=er&ruleid=gaer0702

48 West Virginia

The West Virginia Supreme Court of Appeals adopted *Daubert* in the case of *Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1994). The Supreme Court counseled that when scientific evidence is proffered, West Virginia state courts "must engage in a two-part analysis in regard to the expert testimony. First the . . . court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the . . . court must ensure that the scientific testimony is relevant to the task at hand." *Gentry v. Mangum*, 486 S.E.2d 171 (W. Va. 1995).

West Virginia Rule of Evidence 702 provides:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
> (b) In addition to the requirements in subsection (a), expert testimony based on a novel scientific theory, principle, methodology, or procedure is admissible only if:
> (1) the testimony is based on sufficient facts or data;
> (2) the testimony is the product of reliable principles and methods; and
> (3) the expert has reliably applied the principles and methods to the facts of the case.[47]

This statute contains the 2000 version of FRE 702.

49 Wisconsin

The Supreme Court of Wisconsin has instructed that the reliability standard of *Daubert* governs in Wisconsin. *See Seifert v. Balink*, 888 N.W.2d 816 (Wis. 2017).

Wisconsin Statute § 907.02 provides:

> (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

[47] http://www.courtswv.gov/legal-community/court-rules/evidence-rules/evidence-articles.html

> (2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.[48]

Subsection (1) of this statute contains the 2000 version of FRE 702.

50 Wyoming

In *Bunting v. Jamison*, 984 P.2d 467 (Wyo. 1999), the Wyoming Supreme Court adopted *Daubert*.

Wyoming Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[49]

This statute matches the 1975 version of FRE 702.

* * *

Please let us know if we can be of further assistance.

B.E.M./J.N.D.

[48] https://docs.legis.wisconsin.gov/statutes/statutes/907/02

[49] https://www.courts.state.wy.us/wp-content/uploads/2017/05/WYOMING_RULES_OF_EVIDENCE.pdf

Report of Subcommittee on Implementation

I. The Committee had two main charges:

1) To study implementation of the new laws regarding Eyewitness Identification and Recording of Interrogations and make recommendations to ensure complete implementation; and

2) To review the status of regulations/laws/rules regarding use of jailhouse informants and make recommendations for further reforms/steps that New York State might take to minimize the contribution of jailhouse informants to wrongful convictions in New York State.

A. Summary of Recommendations for Improving Implementation of Laws Regarding Eyewitness Identification and Recording of Interrogations, and For a Proposed Jailhouse Informant Tracking System.

Recommendations for Improving Implementation of Laws Regarding Eyewitness Identification and Recording of Interrogations

The Committee sought to examine three leading contributing factors to wrongful convictions: eyewitness misidentification; false confessions; and unreliable jailhouse informant testimony.

Laws became effective in 2017 and 2018, respectively, that were designed to improve the reliability of eyewitness identification testimony and to mandate the recording of custodial interrogations in specified crime categories in New York State. The Task Force was interested in gaining a better understanding of the laws' implementation to determine if additional training or resources are needed and to ascertain if these forms of evidence are being collected in a way that ensures that the intent of the laws is being realized.

It is the Committee's opinion that this critical information regarding the laws' implementation should be collected uniformly across the state using scientifically-supported best practices. Preliminary data and anecdotal interviews, which will be described in greater detail in the body of this report, do not allow us to conclude with confidence that the laws have been implemented as intended.

The Committee, therefore, recommends further and more robust collection of data statewide to better understand matters critical to the faithful implementation of the new laws. It further recommends the creation of a diverse stakeholder advisory group, including representation from: Division of Criminal Justice Services (DCJS); the New York Police Chiefs Association; the New York State Sheriffs Association; the New York State Association of Criminal Defense Lawyers (NYSACDL); the New York State Defenders Association (NYSDA); the Innocence Project; affected people from both the innocence and victims community; the academic community with an expertise in both criminology and

statistical analysis; and the District Attorneys Association of the State of New York (DAASNY), to be convened by NYSBA, and with resources available to enable this work, to get a deeper understanding of how implementation is working.

Review of such information should be used to: address obstacles to implementation through additional resources; identify those law enforcement agencies that require training, either because those agencies have yet to receive training or to supplement existing training; identify any existing obstacles in inter-agency protocols and/or practice (e.g. when small police agencies rely on or partner with larger agencies to meet the requirements of the laws); and to determine whether there is a failure to uniformly follow the intent of the laws because of how they were drafted or for other reasons. To the extent the stakeholder group determines that there is a failure to uniformly implement the laws because of how the laws are drafted, it is recommended that the New York State Bar Association re-convene these stakeholders to revisit the laws' provisions.

Recommendations Regarding Jailhouse Informants

The Committee contemplated implementation – at the county level – of a model policy that is attached in Appendix I for the county-based tracking and disclosure of jailhouse informant information and testimony. Further, the Committee considered the establishment of a statewide tracking system by an as-yet-to-be-determined centralized entity (e.g. DCJS, Office of the Attorney General, Office of Court Administration, etc.) to ensure that data collected in connection with jailhouse informants at the county level could be made available to district attorneys throughout New York State. However, some members of the Task Force expressed trepidation about maintaining the confidentiality of informants in the county and state-based tracking systems as well as resource and logistical concerns related to the maintenance of a statewide tracking system.

Therefore, the Committee recommends the implementation – at the county level – of the Model Policy for the county-based tracking and disclosure of jailhouse informant information and testimony, after the Subcommittee conducts further study to determine whether additional protections to ensure informant safety are needed. Further, the Committee recommends further study by the New York State Bar Association before it makes final recommendations regarding the establishment of a statewide tracking system by an as-yet-to-be-determined centralized entity (e.g. DCJS, AG, OCA, etc.) to ensure that data collected in connection with jailhouse informants at the county level is available to district attorneys throughout New York State, and addresses the confidentiality and cost/resource issues raised during the deliberations of the 2019 Task Force discussion.

II. Implementation of Eyewitness Identification and Recording of Interrogation Laws

A. Eyewitness Identification and False Confessions in New York State Exoneration Cases

Eyewitness misidentification and false confessions have proven to be leading contributing factors to wrongful conviction. According to the Innocence Project, which tracks wrongful convictions revealed through post-conviction DNA testing, 70% of the nation's more than 360 DNA-based exonerations involved at least one misidentification and 28% involved a false confession. In New York State specifically, of the thirty DNA-based exonerations, 16 (53%) cases involved at least one misidentification and 14 (47%) involved a false confession.

The National Registry of Exonerations tracks all wrongful convictions nationally, revealed by both DNA and non-DNA evidence, and identified 253 New York State-based exonerations in total. Of them, 88 cases (or 35%), involved a misidentification, and 39 cases (or 15%) involved a false confession. The 'Registry' figures are proportionally lower than the Innocence Project's DNA-based data because the non-DNA cases, in many instances, include crime categories that are not a serious and/or where eyewitness identification and confessions are not regularly evidence in the case.

B. New York State Laws Guiding Eyewitness Identification and Confession Evidence

Eyewitness Identification Statute

Eyewitness memory is often unreliable and can be contaminated by "estimator variables" at the crime scene that cannot be controlled such as lighting, distance and cross-racial factors. Memory can also be impacted by "system variables" that can be controlled, such as the way that lineup procedures are administered.

The 2017 law sought to modify police practice relating to system variables to ensure the adoption of evidence-based lineup procedures that have been proven to enhance the accuracy of witness identifications. The National Academy of Sciences, the nation's leading scientific entity, the International Association of Chiefs of Police, the American Bar Association and many other organizations have recommended these best practices, which include:

1. Blind or blinded administration, meaning that the officer conducting the lineup is unaware of the suspect's identity, or if that is not practical a "blinded" procedure is used to prevent the officer from seeing which lineup member is being viewed at a given time, removing the risk of suggestiveness.
2. Witness instructions that the perpetrator may or may not be present.
3. Proper use of non-suspect "fillers" that generally match the witness description of the perpetrator and do not make the suspect stand out.
4. Eliciting a witness confidence statement immediately after a selection is made in which the witness is asked to state, in his or her own words, the level of certainty in the identification.
5. Electronic recordation of the identification procedure.

Relevant portions of New York State's criminal procedure and family court laws were amended in 2017 to include the following key provisions:

- Permits admissibility of witness identifications resulting from an array of pictorial, photographic, electronic, filmed or video recorded" reproductions in addition to live lineups.
- Requires blind or blinded administration of photographic or video lineups.
- Articulates that a failure to use such procedures shall preclude testimony regarding an identification as evidence in chief, but shall not constitute a legal basis for a motion to suppress the identification or a subsequent identification.
- Requires the Division of Criminal Justice Services (DCJS) to promulgate policies and provide training to new and current police officers on topics including: selection of fillers, witness instructions, documentation and preservation of results of an identification procedure, eliciting and documenting witness confidence statements, and; procedures for administering an identification procedure in a manner designed to prevent opportunities to influence the witness.

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Text of Eyewitness Identification Statute

Section 60.25 of the criminal procedure law, subparagraph (ii) of paragraph (a) of subdivision 1 as amended by chapter 479 of the laws of 1977, is amended to read as follows:

§ 60.25 Rules of evidence; identification by means of previous recognition, in absence of present identification.

1. In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) Such witness testifies that:

(i) He or she observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and

(ii) On a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person or, where the observation is made pursuant to a blind or blinded procedure as defined in paragraph (c) of this subdivision, a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first or incriminating occasion; and

(iii) He or she is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.

(c) For purposes of this section, a "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances where, at the time the identification is made, the public servant administering such procedure:

(i) does not know which person in the array is the suspect, or

(ii) does not know where the suspect is in the array viewed by the witness. The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of section 710.20 of this chapter. This article neither limits nor expands subdivision six of section 710.20 of this chapter.

2. Under circumstances prescribed in subdivision one of this section, such witness may testify at the criminal proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence in chief.

Section 60.30 of the criminal procedure law, as amended by chapter 479 of the laws of 1977, is amended to read as follows:

§ 60.30 Rules of evidence; identification by means of previous recognition, in addition to present identification. In any criminal proceeding in which the defendant's commission of an offense is in issue, a witness who testifies that (a) he or she observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question and (c) on a subsequent occasion he or she observed the defendant, or where the observation is made pursuant to a blind or blinded procedure, as defined in paragraph (c) of subdivision one of section 60.25 of this article, a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, and then also recognized him or her or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he or she observed on the first or incriminating occasion, also describe his or her previous recognition of the defendant and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence in chief.

Subdivision 6 of section 710.20 of the criminal procedure law, as amended by chapter 8 of the laws of 1976 and as renumbered by chapter 481 of the laws of 1983, is amended to read as follows:

6. Consists of potential testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant or of a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant by the prospective witness. A claim that the previous identification of the defendant or of a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant by a prospective witness did not comply with paragraph (c) of subdivision one of section 60.25 of this chapter or with the protocol promulgated in accordance with subdivision twenty-one of section eight hundred thirty-seven of the executive law shall not constitute a legal basis to suppress evidence pursuant to this subdivision. A claim that a public servant failed to comply with paragraph (c) of subdivision one of section 60.25 of this chapter or of subdivision twenty-one of section eight hundred thirty-seven of the executive law shall neither expand nor limit the rights an accused person may derive under the constitution of this state or of the United States.

Subdivision 1 of section 710.30 of the criminal procedure law, as separately amended by chapters 8 and 194 of the laws of 1976, is amended to read as follows:

1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b)

testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him or her or a pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

Section 343.3 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

§ 343.3. Rules of evidence; identification by means of previous recognition in absence of present identification. 1. In any juvenile delinquency proceeding in which the respondent's commission of a crime is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) such witness testifies that:

(i) he or she observed the person claimed by the presentment agency to be the respondent either at the time and place of the commission of the crime or upon some other occasion relevant to the case; and

(ii) on a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person, or, where the observation is made pursuant to a blind or blinded procedure as defined herein, a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first incriminating occasion; and

(iii) he or she is unable at the proceeding to state, on the basis of present recollection, whether or not the respondent is the person in question; and

(b) it is established that the respondent is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.

(c) For purposes of this section, a "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances where, at the time the identification is made, the public servant administering such procedure:

(i) does not know which person in the array is the suspect, or

(ii) does not know where the suspect is in the array viewed by the witness. The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of

section 710.20 of the criminal procedure law. This article neither limits not expands subdivision six of section 710.20 of the criminal procedure law.

2. Under circumstances prescribed in subdivision one, such witness may testify at the proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such testimony, together with the evidence that the respondent is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence in chief.

§ 8. Section 343.4 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

§ 343.4. Rules of evidence; identification by means of previous recognition, in addition to present identification. In any juvenile delinquency proceeding in which the respondent's commission of a crime is in issue, a witness who testifies that:

(a) he or she observed the person claimed by the presentment agency to be the respondent either at the time and place of the commission of the crime or upon some other occasion relevant to the case, and

(b) on the basis of present recollection, the respondent is the person in question, and

(c) on a subsequent occasion he or she observed the respondent, or, where the observation is made pursuant to a blind or blinded procedure, a pictorial, photographic, electronic, filmed or video recorded reproduction of the respondent under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, and then also recognized him or her or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the respondent at the delinquency proceeding on the basis of present recollection as the person whom he or she observed on the first or incriminating occasion, also describe his or her previous recognition of the respondent and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence in chief. For purposes of this section, a "blind or blinded procedure" shall be as defined in paragraph 16 (c) of subdivision one of section 343.3 of this part.

Section 837 of the executive law is amended by adding a new subdivision 21 to read as follows:

Promulgate a standardized and detailed written protocol that is grounded in evidence-based principles for the administration of photo-graphic array and live lineup identification procedures

for police agencies and standardized forms for use by such agencies in the reporting and recording of such identification procedure. The protocol shall address the following topics:

(a) the selection of photographic array and live lineup filler photographs or participants;

(b) instructions given to a witness before conducting a photographic array or live lineup identification procedure;

(c) the documentation and preservation of results of a photographic array or live lineup identification procedure;

(d) procedures for eliciting and documenting the witness's confidence in his or her identification following a photographic array or live lineup identification procedure, in the event that an identification is made; and

(e) procedures for administering a photographic array or live lineup identification procedure in a manner designed to prevent opportunities to influence the witness.

Subdivision 4 of section 840 of the executive law is amended by adding a new paragraph (c) to read as follows:

(c) Disseminate the written policies and procedures promulgated in accordance with subdivision twenty-one of section eight hundred thirty-seven of this article to all police departments in this state and implement a training program for all current and new police officers regarding the policies and procedures established pursuant to such subdivision.

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The DCJS policy accompanied the law and is attached in Appendix II. The policy served as the basis for DCJS training for law enforcement officers in New York State and included recognition of the value of instructions and confidence statements (including the creation of forms that prompt law enforcement to read instructions and write down confidence statements provided by the eyewitness), filler selection, and recordation of the identification procedure, where practicable. The DCJS policy also includes a recommended prohibition on multiple identification procedures of the same suspect.

Recording of Interrogations Statute

Recording interrogations in their entirety sheds light on the circumstances that led up to a confession, which benefits the innocent, law enforcement and fact-finders. For the innocent, the practice can serve as a deterrent against coercive and illegal interrogation tactics. It also provides a full record of what transpired during the course of the interrogation or interview. For law enforcement, recordings substantiate authentic confessions, protect against frivolous claims of misconduct and reduce court time needed to testify on motions to suppress statements. It can also alert judges and juries if the

defendant has intellectual limitations or other vulnerabilities that increase the risk of false confessions

Relevant portions of New York State's criminal procedure and family court laws were amended in 2018 to require video recording of custodial interrogations by a public servant at a detention facility, including the giving of any required advice of the rights of the individual being questioned and the waiver of any rights by the individual, for certain enumerated offenses. Those offenses are Class A-1 felonies, except those defined in article 220 of the penal law; felony offenses defined in section 130.95 and 130.96 of the penal law; a felony offense defined in article 125 or 130 of such law that is defined as a class B violent felony offense in section 70.02 of the penal law.[1] The law also articulated that the court may consider failure to comply as a factor, but not the sole factor, in determining admissibility, and the court shall give a cautionary jury instruction.

The law also articulated a set of allowable exceptions to the recording requirement. Under the law, the custodial interrogation need not be recorded if the prosecutor shows "good cause," which includes, but is not limited to:

(i) If electronic recording equipment malfunctions.

(ii) If electronic recording equipment is not available because it was otherwise being used.

(iii) If statements are made in response to questions that are routinely asked during arrest processing.

(iv) If the statement is spontaneously made by the suspect and not in response to police questioning.

[1] **Class A-1 felony, except one defined in article 220 of the penal law**
- Aggravated enterprise corruption
- Aggravated murder
- Arson in the first degree
- Conspiracy in the first degree
- Crime of terrorism
- Criminal possession of a chemical weapon or biological weapon in the first degree
- Criminal use of a chemical weapon or biological weapon in the first degree
- Kidnapping in the first degree
- Murder in the first degree
- Murder in the second degree

- **Felony offenses defined in section 130.95 and 130.96 of the penal law; or**
  - Predatory Sexual Assault
  - Predatory Sexual Assault against a child
- **Felony offense defined in article 125 or 130 of such law that is defined as a class B violent felony offense in section 70.02 of the penal law.**
  - Attempted murder in the second degree
  - Manslaughter in the first degree
  - Aggravated manslaughter in the first degree
  - Rape in the first degree
  - Criminal sexual act in the first degree
  - Aggravated sexual abuse in the first degree
  - Course of sexual conduct against a child in the first degree

(v) If the statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred.

(vi) If the statement is made at a location other than the "interview room" because the suspect cannot be brought to such room, e.g., the suspect is in a hospital or the suspect is out of state and that state is not governed by a law requiring the recordation of an interrogation.

(vii) If the statement is made after a suspect has refused to participate in the interrogation if it is recorded, and appropriate effort to document such refusal is made.

(viii) If such statement is not recorded as a result of an inadvertent error or oversight, not the result of any intentional conduct by law enforcement personnel

(ix) If it is law enforcement's reasonable belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant.

(x) If such statement is made at a location not equipped with a video recording device and the reason for using that location is not to subvert the intent of the law.

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Text of Recording of Interrogations Statute

Section 60.45 of the criminal procedure law is amended by adding a new subdivision 3 to read as follows:

3.(a) Where a person is subject to custodial interrogation by a public servant at a detention facility, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by an appropriate video recording device if the interrogation involves a class A-1 felony, except one defined in article two hundred twenty of the penal law; felony offenses defined in section 130.95 and 130.96 of the penal law; or a felony offense defined in article one hundred twenty-five or one hundred thirty of such law that is defined as a class B violent felony offense in section 70.02 of the penal law. For purposes of this paragraph, the term "detention facility" shall mean a police station, correctional facility, holding facility for prisoners, prosecutor's office or other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them.

(b) No confession, admission or other statement shall be subject to a motion to suppress pursuant to subdivision three of section 710.20 of this chapter based solely upon the failure to video record such interrogation in a detention facility as defined in paragraph (a) of this subdivision. However, where the people offer into evidence a confession, admission or other statement made by a person in custody with respect to his or her participation or lack of participation in an offense

specified in paragraph (a) of this subdivision, that has not been video recorded, the court shall consider the failure to record as a factor, but not as the sole factor, in accordance with paragraph (c) of this subdivision in determining whether such confession, admission or other statement shall be admissible.

(c) Notwithstanding the requirement of paragraph (a) of this subdivision, upon a showing of good cause by the prosecutor, the custodial interrogation need not be recorded. Good cause shall include, but not be limited to:

(i) If electronic recording equipment malfunctions.

(ii) If electronic recording equipment is not available because it was otherwise being used.

(iii) If statements are made in response to questions that are routinely asked during arrest processing.

(iv) If the statement is spontaneously made by the suspect and not in response to police questioning.

(v) If the statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred.

(vi) If the statement is made at a location other than the "interview room" because the suspect cannot be brought to such room, e.g., the suspect is in a hospital or the suspect is out of state and that state is not governed by a law requiring the recordation of an interrogation.

(vii) If the statement is made after a suspect has refused to participate in the interrogation if it is recorded, and appropriate effort to document such refusal is made.

(viii) If such statement is not recorded as a result of an inadvertent error or oversight, not the result of any intentional conduct by law enforcement personnel.

(ix) If it is law enforcement's reasonable belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant.

(x) If such statement is made at a location not equipped with a video recording device and the reason for using that location is not to subvert the intent of the law. For purposes of this section, the term "location" shall include those locations specified in paragraph (b) of subdivision four of section 305.2 of the family court act.

(d) In the event the court finds that the people have not shown good cause for the non-recording of the confession, admission, or other statement, but determines that a non-recorded confession, admission or other statement is nevertheless admissible because it was voluntarily made then, upon request of the defendant, the court must instruct the jury that the people's failure to record the defendant's confession, admission or other statement as required by this section may be weighed as a factor, but not as the sole factor, in determining whether such confession, admission or other statement was voluntarily made, or was made at all.

(e) Video recording as required by this section shall be conducted in accordance with standards established by rule of the division of criminal justice services.

Subdivision 3 of section 344.2 of the family court act is renumbered subdivision 4 and a new subdivision 3 is added to read as follows:

3. Where a respondent is subject to custodial interrogation by a public servant at a facility specified in subdivision four of section 305.2 of this article, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded and governed in accordance with the provisions of paragraphs (a), (b), (c), (d) and (e) of subdivision three of section 60.45 of the criminal procedure law.

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C. **Determining Obstacles, if any, to Full Implementation of New Eyewitness Identification and Recording of Interrogation Procedures**

1. Survey of Law Enforcement Agencies[2]

The Committee reviewed the laws and model policies developed by DCJS. DCJS was also helpful with providing information on where to obtain public information on the number and size of police departments within the state of New York. The Committee then decided on a sampling methodology that includes NYPD and the New York State Police, along with small, medium-sized, and larger law enforcement agencies, in an effort to gain a better understanding of matters relating to the laws' implementation. The Committee collected information about the more than 500 law enforcement agencies throughout New York State and classified them by the number of employed officers, including the 79 smallest (<10 officers), 154 small (10-19 officers), 136 medium-sized (20-36 officers), and 131 large (>36 officers) agencies. We randomly selected 25 of the smallest and 25 of the small agencies, and 35 of the medium-sized and 35 of the large agencies, as well purposefully included the NYPD and the New York State Police. The total sample size, accordingly, was 122 law enforcement agencies. All agencies were assured that their responses could be submitted anonymously if they so chose, and all responding agencies elected to respond anonymously.

The survey included 50 questions. It sought information about training conducted on the Eyewitness Identification procedures, how the procedures are carried out, and how the

[2] Thank you to the NYPD Governance, Structure and Assessments Unit Executive Director, Dr. Monica Brooker, and her staff for their efforts to create, disseminate and compile data from the survey.

results are documented. It also sought information about training conducted on the law concerning the recording of interrogations and matters pertaining to the law's implementation. The survey is attached to this report as Appendix III.

After the initial requests to complete the survey were disseminated, we made follow-up requests to agencies that failed to respond. We ultimately received responses from 19 agencies, two of which indicated that they did not conduct eyewitness identifications or custodial interrogations, and nine others which did not respond to most questions about the requested policies and practices. We thus received complete responses from eight agencies, or 6.6% (8/122) of the sample.

Far too few law enforcement agencies responded to the surveys to amount to a representative sample or permit generalization from the results. Nevertheless, the limited responses we received suggest that important questions remain regarding the laws' implementation. For example, among other issues presented:

- 3 of 8 respondents indicated that "no training has been conducted" regarding eyewitness identification procedures, and 2 of 9 respondents indicated that "no training has been conducted" for the video-recording of interrogations.
- Some agencies do not uniformly employ the use of a blind or blinded administrator in their eyewitness identification procedures, which arguably is the single most important reform included in the statute (2 of 8 respondents indicated that a blind or blinded administrator is "never" used in connection with photo array identifications, while 1 indicated that a blind or blinded administrator is used "most of the time").
- All recommended instructions are not given to witnesses in connection with eyewitness identifications (7 of 8 respondents indicated that witnesses are instructed that "the true perpetrator may or may not be present"; 5 of 8 respondents indicated that witnesses are instructed that "they need not make an identification of anyone"; and 5 of 8 respondents indicated that witnesses are instructed that "the investigation will continue whether or not they identify someone").
- Exceptional circumstances are reported to preclude the recording of interrogations with somewhat surprising regularity, in particular, "suspect refused to participate if session was video-recorded," was indicated by 4 of 6 respondents; "equipment malfunctioned"—1 of 6 respondents; and "equipment was not available because it was otherwise being used"—1 of 6 respondents).

2. *Interviews with Representatives from the District Attorneys Association of the State of New York (DAASNY), the New York State Association of Criminal Defense Lawyers (NYSACDL) and the New York State Defenders Association (NYSDA)*

On December 11, 2018, members of the subcommittee interviewed by phone representatives from the New York State Association of Criminal Defense Lawyers and the New York State Defender Association. Our objective in the call was to solicit feedback from the defense community concerning the implementation of the New York State law as it pertains to eyewitness identifications and the recording of interrogations.

On both issues, the two attorneys indicated that they had fought against and were intensely disappointed in the laws that ultimately passed. While acknowledging that they did not actively solicit feedback from the defense community, and that it may be too early to tell, they reported hearing nothing to indicate that the situation had improved.

With regard to eyewitness identifications, both attorneys expressed disappointment in the limitations of the bill. Blinded procedures were already in practice in many large jurisdictions, so in their view they conceded the use of photo lineups without an exchange for the more meaningful reform they sought: the blind lineup. They were very disappointed that no requirement to record eyewitness identifications was adopted.

Both attorneys were also disappointed with the bill concerning the recording interrogations. In particular, they cited four limitations: (1) recording should be required of all felonies, not just murder cases and certain B felonies; (2) there are too many loopholes (e.g., "inadvertence") to excuse the failure to record even in situations in which it is otherwise required; (3) the full interrogation process should be recorded "from soup to nuts," including Miranda, not just "the custodial part" in which the confession is taken; and (4) lacking the remedy of exclusion for violations, the law will prove ineffective.

In response to the question of whether they had received feedback from others, both attorneys said they had not and repeated that there has not been enough time. Both expressed frustration that even if feedback were elicited, there did not appear to be an opportunity for change.

On December 12, 2018, members of the subcommittee interviewed by phone representatives from the District Attorney Association of the State of New York ("DAASNY"). Our objective on the call was to solicit feedback from the prosecutorial community concerning the implementation of the New York State law as it pertains to eyewitness identifications and the recording of interrogations.

On both issues, both representatives indicated that implementation is going well. Generally speaking, the attorneys interviewed indicated that the requirements of the new law were actually already regular practice for many prosecutors' offices prior to the passage of the law.

With respect to the eyewitness identification portion of the law, various types of in person and online trainings have been offered to police departments and prosecutors across the state. Further, DAASNY's Committee on Best Practices created a standardized checklist for officers overseeing an eyewitness identification so that officers can ensure they are complying with all requirements of the law.

On the interrogation recording front, the representatives felt similarly positive. Again, they made clear that many departments (particularly larger departments) had already been recording interrogations as required by the law prior to its passage. While early on they heard some issues with equipment malfunctions, those issues now seem to be largely resolved. DAASNY has also conducted surveys of police departments and have found that almost every single department of significant size has its own recording facility in-house. In the two representatives' experience, many officers are now using the recording equipment for interrogations of suspects accused of crimes beyond just those required by the new law.

Neither attorney had heard any complaints about the new law. Indeed, feedback on the law as well as commentary about the effectiveness of implementing the same is regularly solicited by DAASNY, and they have not received any complaints.

Conclusion: Based on the results of the surveys and outreach to the state's prosecutorial and defender associations, the Committee determined that more information is needed. While far too few law enforcement agencies responded to the surveys to amount to a representative sample or permit generalization from the results, some data suggest that training for all law enforcement agencies has not been accomplished; that some agencies do not uniformly employ the use of a blind or blinded administrator in their eyewitness identification procedures (which arguably is the single most important reform included in the statute); that all recommended instructions are not always given to witnesses in connection with eyewitness identifications; and that exceptional circumstances are reported to preclude the recording of interrogations with somewhat surprising regularity; among other questions raised. Additionally, information and impressions about the laws and their implementation that was provided by representatives from DAASNY and NYSACDL was extremely divergent. While DAASNY opined that both laws were working in practice, NYSACDL opined that the defense community believed that the new laws had set

back their practice. Further data must be collected to get an adequate understanding about matters important to the laws' implementation in New York State.

RECOMMENDATIONS:

Eyewitness misidentification and false confessions are two of the leading contributing factors to wrongful conviction. In the opinion of the Committee, the information needed to assess the laws' implementation should be collected uniformly across the state using scientifically-supported best practices. Focus group discussions involving interested and knowledgeable stakeholders should be conducted to complement the survey data. The currently available preliminary data and anecdotal interviews are inadequate to conclude with confidence that the laws have been implemented as intended.

The Committee, therefore, recommends further and scientifically rigorous collection of data to better understand matters critical to the faithful implementation of the new laws throughout the State. It further recommends the creation of a diverse stakeholder advisory group, including representation from Division of Criminal Justice Services (DCJS); the New York Police Chiefs Association; the New York State Sheriffs Association; the New York State Association of Criminal Defense Lawyers (NYSACDL); the New York State Defenders Association (NYSDA); the Innocence Project; affected people from both the innocence and victims community; the academic community with an expertise in both criminology and statistical analysis; and the District Attorneys Association of the State of New York (DAASNY), to be convened by NYSBA,, to get a deeper understanding of their experiences and impressions regarding the laws' implementation statewide.
Further, following the collection of this information, and to the extent there appears to be a failure to uniformly follow the intent of the laws because of how they were drafted, it is recommended that the New York State Bar Association re-convene these stakeholders to revisit the laws' provisions.

II. Jailhouse Informants

A. Data Relating to New York State Wrongful Convictions in Which Jailhouse Informants Were a Contributing Factor

A full one-fifth of New York State's thirty wrongful convictions proven through postconviction DNA testing involved the use of a jailhouse informant, from Rochester to Utica to Long Island. A deeper exploration of each case demonstrates the incentives baked into an unregulated and largely hidden jailhouse informant system, enabling leniency for the informant who provides unreliable testimony in exchange. In the case of wrongfully

convicted Utica man Steven Barnes, a jailhouse informant denied there was any leniency provided to him in exchange for his testimony, yet he served no prison time on a second felony offense he had been charged with. In a Nassau County wrongful conviction case, a DNA test that led to the exoneration of three men, John Restivo, John Kogut, and Dennis Halstead, ultimately also revealed that the jailhouse informant used by law enforcement in that case had provided untrue testimony. Indeed, the jailhouse informant also denied any deal, "No deal was made, sir," but he inculpated a co-defendant and pleaded guilty to lesser charges and received a lower sentence (4-8 years) than that originally sought (14 years). He said he had already obtained leniency for testifying against his co-defendant. However, he was in touch with police with this information before pleading guilty in his case. When jailhouse informants receive deals for lighter sentences, their victims may be deprived of justice, serving sometimes decades behind bars for crimes they did not commit. As well, each time a person is wrongfully convicted, the person who actually committed the crime eludes detection, thereby putting the public's safety in peril.

B. Approach Taken by Subcommittee in Developing Recommendations

The Committee researched and reviewed the legislative and legal precedent that has changed since the 2009 NYS Bar Task Force Report on the use of jailhouse informants. There were no substantive changes in law or policy. An in-depth memorandum outlining the research conducted and the findings therein is attached to this Report and Recommendation as Appendix IV.

There have been a limited number of cases involving the use of jailhouse informants in New York State since the issuance of the 2009 NYS Bar Task Force Report. In general, New York courts continue to abide by the standard for admissibility of jailhouse informant testimony as set forth by the New York Court of Appeals in *People v. Cardona*, 360 N.E.2d 1306 (N.Y. 1977). This allows for the admission of jailhouse informant testimony so long as the informant is not deemed an agent of the government. In the handful of cases dealing with this issue since 2009, every court found that the jailhouse informant in question was not an agent of the government, and thus admitted the jailhouse informant testimony.

On the legislative front, the Committee researched and reviewed a number of pieces of proposed legislation involving the use of jailhouse informants that have been proposed on numerous occasions since 2009 in both the State Assembly and the State Senate. Despite the proposal of numerous bills on the topic since the issuance of the 2009 report, no bill has made it past the committee stage. The legislation that has been proposed has been primarily two different bills, each of which has been reintroduced in substantially the same form a number of times. One bill sought to regulate the use of confidential informants by statutorily defining such informants and regulating the use of testimony from the same. The second bill proposed requiring prosecutors' offices to tack and submit an annual

report to the department of state with statistical information regarding the use of informants and informant testimony. The Committee also searched for and reviewed potential federal legislation on the topic.

Further, the Committee also reviewed select comprehensive law review articles that have been issued on the subject in the last 10 years. These articles generally focused on the understanding that jailhouse informant testimony is often inherently unreliable, and as a result is a significant contributing factor to wrongful convictions. These articles also propose methods to remedy the risk of wrongful convictions, particularly by proposing systems by which prosecutors' offices track and regulate the use of such informant testimony.

Finally, the Committee performed an analysis of other states' statutes and model policies guiding jailhouse informant practices. As New York has not passed significant legislation on the issue of jailhouse informants in the last 10 years, the Committee found the review of legislation in other U.S. jurisdictions insightful. Texas enacted legislation in 2017 regulating the use of jailhouse informants, particularly requiring prosecutors to maintain detailed records of the use of such testimony. The Committee also researched the policies implemented by various Texas prosecutor's offices in response to the new legislation. The Committee found particularly instructive the policy developed by the Tarrant County, Texas, Criminal District Attorney's Office on Jailhouse Informant Procedure, and it has relied substantially on that policy in making its own recommendations.

In addition, the Committee reviewed the Subcommittee Report and Final Proposals on Jailhouse Informants from the 2009 report, and proposed that the following recommendations from the 2009 report be considered for renewed recommendation:

i. Any Informant Testimony Should Be Corroborated – "at a minimum, the corroboration requirement for the use accomplice testimony should be extended to non-accomplice testimony."
ii. Jury instructions
iii. Plea bargains – "…it seems desirable that a defendant, who is offered a plea bargain, be given all the relevant information about any informant before being required to accept the plea (with in camera review when articulated and legitimate reasons are put forth by Prosecution that Defendant cannot/should not know).
iv. Videotaping jailhouse informants' statements to law enforcement
v. Prosecutors best practices
vi. Pre-trial reliability hearings

Given the limited timeframe, the Committee sought to identify a set of recommendations that both represented a consensus view of the Committee and that are viable with respect to implementation. Therefore, the Committee does not recommend a legislative proposal at this time. Since consideration of possible legal remedies for failure to properly regulate and disclose the use of jailhouse informants would require a change to existing law through either a legislative proposal or court rule, the Committee did not address previous recommendations put forward in the 2009 report related to a corroboration requirement for informant testimony, possible jury instructions or the use of pre-trial reliability hearings. The other recommendations from the 2009 report are included in the final recommendations of the Committee.

C. Other Reform Efforts from Across the Nation

The robust tracking and disclosure of jailhouse informant information and testimony is an area of wrongful conviction reform that is beginning, in recent times, to receive fuller attention by criminal justice stakeholders and policymakers.

Indeed, in May of 2018, the American Legislative Exchange Council (ALEC), a of conservative state legislators and private sector representatives who draft and share model state-level legislation for distribution among state governments in the United States, drafted a model bill for the tracking and disclosure of jailhouse informants.[3] ALEC provides a forum for state legislators and private sector members to collaborate on model bill and draft legislation that members may customize for their own state legislatures.

More than five states introduced legislation during the 2018 legislative sessions to begin to better regulate the use of and benefits provided to jailhouse informants and to disclose to the defense impeaching information on jailhouse witnesses including benefits provided, their criminal history and previous jailhouse informant activities. In November of 2018, Illinois lawmakers passed a legislative proposal to regulate the use of jailhouse informants. The new law is considered to be the strongest in the nation and will require prosecutors to disclose their planned use of jailhouse informant testimony at least 30 days before trial, thus enabling defense attorneys time to investigate the witness and their claims. The new law also requires prosecutors to disclose to defense lawyers the benefits they plan to provide to the informant in exchange for their testimony, along with the disclosure of other cases in which the witness testified. Finally, the new law requires pre-trial reliability hearings for the use of jailhouse informants in select crime categories. This will allow judges to exercise a gatekeeping function by excluding unreliable jailhouse informant testimony that may mislead juries.

The Illinois law came on the heels of a Texas law that passed the year before, which requires full disclosure of information related to the jailhouse informant, including specific

[3] See https://www.alec.org/model-policy/jailhouse-informant-regulations-2/

impeachment information on jailhouse informant witnesses such as: their complete criminal history, benefits offered or implied in exchange for testimony, history of jailhouse informant activities, and any other information related to credibility. Before passage of the law in Texas, some individual prosecutors' offices had already begun to tackle this issue and, indeed, a policy developed in Tarrant County, Texas, served as an excellent template for a recommended model policy put forward by this subcommittee.

D. Development of Statewide Model Policy to be Adopted at the County Level

While the Committee believes that prosecutors should be required to track and disclose the use of jailhouse informant testimony and any benefits provided to them, it also grappled with concerns about maintaining informant confidentiality. The Committee agrees that tracking informants will enhance transparency and help prosecutors and law enforcement to assess the reliability and credibility of a jailhouse informant before he or she is used as a witness. Tracking can assist law enforcement investigations by shedding light on the history and reliability of a potential informant. Similarly, prosecutors can more accurately assess the evidentiary strength of a potential informant by accessing promises or benefits for potential informants made by other prosecutors in the same office.

In addition, all agree that prosecutors should be required to disclose to the defense prior to a plea agreement or trial specific impeachment information on jailhouse informant witnesses including: their complete criminal history, benefits offered or implied in exchange for testimony, history of jailhouse informant activities, and any other information related to credibility.

In an effort to develop a proposal that would assure comprehensive tracking and disclosure of relevant jailhouse informant information and testimony, the subcommittee reviewed and slightly modified the Tarrant County District Attorney's Policy on Jailhouse Informants. That policy guided the development of a proposed Model Policy for adoption in county-based prosecutors' offices throughout the State of New York. The main modifications to the policy were: the removal of the use of the polygraph for the assessment of informant testimony; and the requirement that information that is tracked under the Model Policy be disclosed to the defense in advance of any plea agreement. The subcommittee also added a provision that each DA's office should consider recordation of interviews as part of the policy but consensus on this point could not be reached by the Committee. Section E below offers an argument in support recordation.

The Committee recommends that the subcommittee resolve the confidentiality concerns raised by the larger Committee relating to the adoption of the Model Policy in each of New York's 62 county prosecutors offices. For similar reasons, the Committee could not come to consensus regarding the development of a statewide tracking system. While the Committee agreed that a statewide tracking system that would incorporate key information about each

jailhouse informant that is captured at the county-level would hold great value in helping law enforcement to understand which informants are operating in more than one county and is made aware of the scope of their participation in other cases, it was determined by the Committee that the New York State Bar Association should further explore the privacy, resource and logistical concerns raised by the larger Committee. While the subcommittee did not identify a single entity that would develop a statewide tracking system, it considered several, including DCJS, the AG's Office, and the Office of Court Administration.

E. Further Consideration of Recordation of Informant Interviews

According to the Innocence Project, 17% of the 363 DNA exonerations in the U.S. contain jailhouse informants as a contributing factor (that number is 20% in the state of New York). Such testimony, not permitted in many countries, puts innocent people at risk for two reasons: (1) the informant is incentivized to lie, casting doubt as to the reliability of his or her testimony, and (2) it is difficult for judges, juries, and other fact finders to evaluate this testimony, fully formed, once presented.

In 2009, the New York State Task Force made a number of recommendations for reducing these risks, including "the videotaping jailhouse informants' statements to law enforcement." While many in the subcommittee agree this remains a practice that should be implemented by any actor employing the use of a jailhouse informant, the subcommittee could not reach consensus about its inclusion in the Model Policy but still reiterates the value of recordation of the informant statement. This is consistent with the rationale for the recordation of interrogations or interviews of suspects, namely that transparency enables more reliable evidence and more accurate fact finding.

Just as recording serves to deter the use of coercive tactics in suspect interrogations, it will deter the offer of strong contingencies, such as threats or promises of leniency and other benefits, explicit and implied, in law enforcement exchanges with in-custody informants. In so doing, recording will inhibit the kinds of exchanges most likely to elicit unreliable testimony. Just as problematic as the elicitation of unreliable testimony is that judges and juries are handicapped in their ability to evaluate that testimony. One limitation concerns their lack of first-hand exposure to the contingencies used to elicit an informant's testimony. A second limitation is that they are blinded as to the source of the details contained in that informant's testimony.

Within the population of those false confessions identified as false through postconviction DNA testing, an astonishing 94% contained details about the crime, often quite vivid, that were both accurate and not in the public domain—facts that led fact finders to misjudge these false statements as credible. In light of actual innocence, it is clear that these confessors could not have volunteered such details on their own. Rather, through a process of contamination, their statements contained facts that were disclosed by police, often

inadvertently, during the course of an *un*recorded interrogation. Exactly the same problem afflicts the factfinder seeking to assess the testimony of an incentivized informant whose prior conversations with law enforcement were not recorded. Just as recording suspect interrogations enables judges and juries to identify the source of details, the same remedy should apply to jailhouse informants. Therefore, while the subcommittee could not come to consensus about its inclusion in the Model Policy, the subcommittee still strongly urges consideration of the recordation of all informant statements by law enforcement.

RECOMMENDATIONS: *The Committee recommends the implementation – at the county level – of a Model Policy that is attached in Appendix I for the county-based tracking and disclosure of jailhouse informant information and testimony, after the Subcommittee conducts further study to determine whether additional protections to ensure informant safety are needed. (The recommended model policy attached is based in substantial part on the policy developed by the Tarrant County, Texas, Criminal District Attorney's Office on Jailhouse Informant Procedure.)*

Further, the Committee recommends further study by the NYSBA before it makes final recommendations regarding the establishment of a statewide tracking system by an as-yet-to-be-determined centralized entity (e.g. DCJS, AG, OCA, etc.) to ensure that data collected in connection with jailhouse informants at the county level is available to district attorneys throughout New York State, and addresses the confidentiality and cost/resource issues raised during the deliberations of the 2019 Task Force discussion.

Appendix I
New York State Model Policy
Jailhouse Informant Procedure

The New York State Bar Association recommends the implementation of this *Jailhouse Informant Procedure* and recommends that a centralized entity to be named establishes and maintains a central index of jailhouse informants for the State of New York to ensure that district attorneys across the state have access to information regarding all potential jailhouse informants. The central index will track jailhouse informant (JI) testimony as well as JI formal offers to give testimony or other information. The index will be maintained by the designated Informant DA who will be responsible for the JI database as well as any associated documents. This index/JI database is the confidential work product of the entity maintaining the database.

For purposes of this procedure, a JI is defined as an incarcerated witness who claims to have been the recipient of an admission made by another inmate and who agrees to testify against that inmate, usually, although not necessarily, in exchange for some benefit.

Prior to using a JI's testimony or information at any stage in a criminal prosecution and regardless of any consideration or lack of consideration given to that JI, a DA must 1) request all information known about the JI from the Informant DA and 2) consult with his or her court chief about the use of the JI. If a DA receives an "Inquiry" from a JI offering to provide testimony or information but the DA decides not to contact the JI, the DA is not required to investigate the JI as outlined below. The DA is, however, still required to report such offer to the Informant DA for tracking of such offers and to make any appropriate disclosures to the defense.

As part of the determination whether to use the JI, the DA should consider the following non-exhaustive list:

a. The facts of the case in which the testimony is being contemplated for use;

b. The JI's criminal history;
c. Relevant information regarding the JI's current case;
d. Any known, or readily available, information about the JI's past cooperation with law enforcement or previous testimony;
e. Any JI information conveyed and maintained by the designated DA;
f. Asking the JI detailed questions regarding his previous offers of cooperation or testimony. If the JI is represented by counsel, these inquiries should be made in the presence of JI's counsel, or with counsel's permission;
g. Any known, or readily available, information about the JI's mental health;
h. The specific evidence to be offered by the JI;
i. How evidence corroborates the JI's statement;
j. What verification exists that the JI and the defendant were housed in the same part of the jail, at the same time, or were otherwise capable of communicating with one another while in custody and how the JI came to be in the same location as the defendant and;
k. The strengths and weaknesses of the case if the informant is not used;
l. The proposed offer and benefit being sought by the JI; and
m. How the agreement impacts justice due the victim in the JI's case; and
n. Whether the details and information provided by the JI were or were not available in generally accessible publicized sources at the time that the JI provided details or information in connection with the case.

Recordation of Informant Statements:

It is also recommended that the DA consider recording all conversations with the JI and the final statement provided by the JI and include this in the DA policy.

Disclosure Requirements:

If the DA decides to use the JI, the DA must make a written disclosure to the defense attorney in the instant case and must also upload that information into the JI's pending case(s), if any. Disclosure to the defense is mandatory as soon as an agreement in principle is made with the JI.

That disclosure, prior to the conclusion of plea negotiations and/or entry of possible guilty plea, should include:

1. Any benefit, including what is anticipated or reasonably expected by the JI, that the JI is receiving, including plea deals, letters to parole, offers to contact other law enforcement agencies, and anything else that could conceivably be interpreted as a benefit or consideration, including benefits provided to third parties in consideration of the JI's cooperation;
2. A summary of the JI's expected testimony or, when available, a copy of the record/transcript made of any sworn proffers or statements;
3. A detailed summary of the JI's complete criminal history (as set forth in XXX);
4. The exact nature of any deal reached with the JI for his/her testimony or, if no benefit has been, or will be conveyed to the witness, a written recitation of that fact;
5. Information regarding any prior testimony given by the JI and any known prior offers to testify in compliance with XXX. If a confirmed case exists where the JI testified on behalf of the State, the DA

should also make reasonable efforts to obtain, and turn over to the defense, a copy of the relevant portion of that transcript;

6. Any discussions with federal or out-of-county prosecutors or the JI's defense attorney and relating to the agreement, when a JI's pending case originates from another county or the federal system.
7. Gang affiliation, if any;
8. Any information regarding the mental health status or history of the JI (only under a protective order);
9. All known information about the JI's current case, including offense reports, digital media, or anything else in the State's possession; and
10. A copy of the JI's County Sheriff's Office jail records.

All agreements shall be entered into prior to the JI's testimony. In the unusual event that it may become necessary to deviate from this policy, any agreement reached after the JI testimony must be approved by the Criminal Division Chief. Any post-testimony agreement or deviation must be provided to the defendant's attorney in writing when the agreement or benefit is reached.

If, at any time, the DA received information that the JI has or is attempting to fabricate any evidence, the DA must fulfill all ethical obligations regarding disclosure of these facts.

JI Index and Database

If the JI testifies, the fact of his testifying along with any other relevant information regarding that testimony should be forwarded to the Informant DA responsible for the JI index and database, along with a copy of the disclosure and supporting documents given to defense counsel. Formal offers to testify as well as "Inquiries" should also be forwarded to the Informant DA for inclusion in the database regardless of whether the JI ultimately testifies.

Best Practices

DA's are encouraged to use the "4 P's" which constitute the best practices in using jailhouse informant testimony:

- **Produce:** Give immediate disclosure of the agreement to the defense counsel.
- **Plea:** Dispose of the JI's case prior to his or her testimony at trial.
- **Proffer:** Have the JI make a recorded, sworn proffer at the time of the disposition of the JI's case.
- **Provide:** Forward the details of the plea and contents of the sworn proffer to defense counsel.

Appendix II

Identification Procedures: Photo Arrays and Line-ups

Municipal Police Training Council Model Policy

and

Identification Procedures Protocol and Forms

Promulgated by the
Division of Criminal Justice Services
Pursuant to Executive Law 837 (21)

June 2017

NEW YORK STATE | Division of Criminal Justice Services | Municipal Police Training Council

80 South Swan Street, Albany, New York 12210

www.criminaljustice.ny.gov

Identification Procedures: Photo Arrays and Line-ups Model Policy
and
Identification Procedures Protocol and Forms Promulgated by the Division Pursuant to Executive Law 837 (21)

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Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

The Identification Procedures: Photo Arrays and Line-ups Model Policy is intended to allow for the individual needs of each of the police departments in New York State regardless of size or resource limitations. This model policy has been promulgated as the protocol and forms by DCJS pursuant to subdivision 21 of section 837 of the Executive Law of New York.

The Municipal Police Training Council (MPTC) approved the model policy in June 2017.

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The District Attorney's Association of the State of New York "Photo Identification Guidelines", the District Attorney's Association of the State of New York "Line-up Procedure Guidelines", the International Association of Chiefs of Police "Eyewitness Identifications Model Policy", the National Academy of Sciences report titled: "Identifying the Culprit: Assessing Eyewitness Identification", and the recommendations made by the New York State Justice Task Force in their document titled: "Recommendations for Improving Eyewitness Identifications" served as a basis for this model policy.

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District Attorney's Association of the State of New York

New York State Association of Chiefs of Police

New York State Police

New York City Police Department

New York State Sheriff's Association

New York State Office of Victim Services

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

I Purpose

Executive Law §837 subdivision 21 directs the Division to establish a standardized protocol and forms for the administration of photo array and live lineup identification procedures, and this document was developed to meet that requirement. This protocol is grounded in evidence-based principles and is intended to meet the needs of all police departments in New York State regardless of size or resource limitations.

In 2017 New York State's Criminal Procedure Law (CPL) was amended to permit the admissibility of photo array evidence where the procedures were conducted with safeguards to ensure accuracy. As a result of these changes, the prosecution is permitted to introduce testimony in a direct case by the person who made a photo identification – **so long as the procedure is conducted in a blind or blinded manner.** The protocols outlined here were developed to further structure the administration in a method and manner designed to ensure fair and reliable eyewitness identification procedures.

The Municipal Police Training Council has not only endorsed this protocol and forms, but also has implemented an online training program for all current and new police officers pursuant to subdivision 4 of section 840 of the Executive Law. All police agencies should have written policies that guide the administration of eyewitness identification procedures that comply with the CPL sections discussed herein. Policies based on these protocols will meet this requirement.

II Definitions

A. **Photo array**: A collection of photographs that are shown to a witness to determine if the witness can recognize a person involved with the crime.

B. **Line-up**: A collection of individuals, organized in a row, who are shown to a witness to determine if the witness can recognize a person involved with the crime.

C. **Suspect**: Person the police believe has committed the crime.

D. **Filler:** A person, other than the suspect, who is used in either a live line-up or a photo array.

E. **Administrator:** The person who is conducting the identification procedure.

F. **Blind Procedure:** An identification procedure where the administrator does not know the identity of the suspect.

G. **Blinded Procedure:** An identification procedure where the administrator may know who the suspect is, but by virtue of the procedure's administration, the administrator does not know where the suspect is in the array viewed by the

witness. This procedure is designed to prevent the administrator from being able to inadvertently provide cues to the witness.

H. **Confidence Statement:** A statement from an eyewitness immediately following their identification regarding their confidence or certainty about their identification. The witness should be asked to provide their level of certainty in their own words as opposed to using a numerical scale.

III Photo Arrays

A. Selection of fillers

1. Fillers should be similar in appearance to the suspect in the array.

2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.

3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.

4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness.

5. There should be at least five fillers, in addition to the suspect.

6. Only one suspect should be in each array.

7. If there is more than one suspect, then different fillers should be used in separate arrays for each suspect.

8. Photo quality, color and size should be consistent. Administrators should ensure that the photos do not contain any stray markings or information about the subject. Color and black and white photos should not be mixed.

9. Any identifying information contained on any of the photos should be covered and those areas of the other photos used should be similarly covered.

B. Inviting the witness to view the array

1. When a suspect is known and the investigator calls a witness to arrange for the viewing of a photo array, the investigator should simply advise the witness that he/she intends to conduct an identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: “We’d like you to come in to view a photo array in connection with the crime committed on (*date and location*).”

2. The investigator should avoid addressing whether or not a person is in custody.

3. Investigators should give no opinion on their perception of the witness's ability to make an identification.

4. Investigators should not inform the witness about any supporting evidence such as confessions, other identifications, or physical evidence that may have been obtained.

5. Witnesses should be prevented from speaking to the victim and any other witnesses about the identification procedure when they arrive to view the array.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.

2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.

3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) the witness is being asked to view the photo array to see if the witness recognizes anyone involved with the crime.

4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:

   a. The perpetrator may or may not be pictured.

   b. Do not assume I know who the perpetrator is.

   c. I want you to focus on the photo array and not to ask me or anyone else in the room for guidance about making an identification during the procedure.

5. Instructions to the witness about the quality of the photographs.

a. Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.

b. Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.

c. Pay no attention to any markings that may appear on the photos, or any other differences in the type or style of the photographs.

6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.

7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.

8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.

a. The witness should sign the form indicating their consent or lack of consent.

b. If the witness does not consent, the officer should not record the procedure.

D. Administering the procedure

1. Photo arrays must always be conducted using either a “blind procedure” or “blinded procedure”. A “blind” procedure is preferable, where circumstances allow and it is practicable.

2. If the procedure is blinded, the administrator should handle and display the array so that the administrator does not know suspect’s position in the array until the procedure has completed.

3. Two methods that can be used to successfully accomplish a blinded procedure are:

a. "Two person shuffle" – the array is assembled by someone other than the administrator and then it is placed into an unmarked folder for the administrator.

b. "One person shuffle" – multiple arrays are created by the administrator and the suspect's position is different in each. Three sealed envelopes containing the arrays are provided to the witness who selects one to use. The envelopes should be identical and free of any markings. The witness should sign and date the two unused envelopes across the seal. These envelopes should also be preserved.

4. Regardless of the method of administration that is to be used, the administrator should be positioned in such a way so that they are not in the witness' line of sight during the viewing of the array. Where practicable, the administrator should still be able to view the witness and hear what they say.

5. If there are multiple witnesses viewing the array, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.

6. The witnesses must view the array separately. Multiple copies of the same array may be used for the same suspect for each new witness viewing the array.

7. To protect the integrity of the identification procedure, the administrator must remain neutral so as not to, even inadvertently, suggest a particular photograph to the witness.

8. Attention should be given to the location of the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.

9. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.

E. Post viewing questions

1. After viewing the array ask the witness the following questions:

a. Do you recognize anyone?

b. If so, what number photograph do you recognize?

c. From where do you recognize the person?

2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.

3. Confidence Statement

   a. Ask the witness to describe his/her certainty about any identification that is made.

   b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documentation

1. Document any changes made to any of the photographs used.

2. Document where the procedure took place, who was present, the date and time it was administered.

3. Preserve the photo array in the original form that was shown to each witness.

4. Each witness should complete a standardized form after viewing the array and the actual array used should be signed and dated by each witness.

5. Recording the Procedure

   a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.

   b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented on a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.

   c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:

      (i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;

(ii) recording equipment malfunctions;

(iii) recording equipment is not available because it was otherwise being used;

(iv) the identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy;

(v) inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or

(vi) a lack of consent from the witness.

6. Any physical or verbal reaction to the array should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.

7. The confidence statement should be documented verbatim.

8. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide this notice could prevent its use in court.

G. Speaking with the witness after the procedure

1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.

2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.

3. The administrator should not comment or make gestures on the identification itself by saying things such as: “Great job” or “We knew you would recognize him” or even nodding his/her head in agreement.

4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.

H. All members who will be involved in the administration of a photo array shall receive training on how to properly administer photo arrays.

IV Live Line-ups

A. Selection of fillers

1. Fillers should be similar in appearance to the suspect in the line-up.

2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.

3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.

4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness

5. Where practicable there should be five fillers, in addition to the suspect, but in no case, should there be less than four fillers used.

6. Only one suspect should appear per line-up.

7. If necessary, all members of the line-up should be seated to minimize any differences in height.

8. If there is more than one suspect, then different fillers should be used in separate line-ups for each suspect.

9. The suspect should be allowed to pick his position within the line-up. If a prior identification was made using a photo array that number should be avoided unless insisted upon by the suspect.

10. The fillers must be instructed not to speak with each other or make unnecessary gestures. All members of the line-up should be instructed to remain still, hold the placard, and look forward unless instructed otherwise by the security officer.

B. Inviting the witness to view the line-up

1. When an investigator calls a witness to arrange for the witness to view a line-up, the investigator should simply ask the witness to come in for the identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: “We’d like you to come in to view a line-up in connection with the crime you witnessed on (*date and location*).”

2. Investigators should give no opinion on their perception of the witness’ ability to make an identification.

3. The investigator should avoid addressing whether or not a person is in custody.

4. Investigators should not inform the witness about any supporting evidence such as confessions, other IDs, or physical evidence that may have been obtained.

5. Witnesses should be prevented from speaking to the victim or any other witnesses about the identification procedure when they arrive to view the line-up.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.

2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.

3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) the witness is being asked to view the line-up to see if the witness recognizes anyone involved with that crime

4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:

   a. The perpetrator may or may not be present.

   b. Do not assume I know who the perpetrator is.

   c. I want you to focus on the line-up and not to ask me or anyone else in the room for guidance about making an identification during the procedure.

   d. Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.

5. Instructions to the witness about line-up members moving, speaking, or changing clothing:

    a. Consideration should be given to telling the witness that the line-up members can be asked to speak, move or change clothing, if requested.

    b. If one line-up member is asked to speak, move, or change clothing then all the line-up members will be asked to do the same.

6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.

7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.

8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.

    a. The witness should sign the form indicating their consent or lack of consent.

    b. If the witness does not consent, the officer should not record the procedure.

D. Administering the procedure

1. Where practicable, taking into account resource limitations, a blind procedure should be used to conduct and administer a line-up, but is not required.

2. After the instructions are given, the administrator – whether the procedure is to be conducted blind or not – should stand away from the witness during the line-up, in a neutral manner, while still being in a position to observe the witness. The key is for the administrator to stand outside the witness' line of sight while the witness is viewing the line-up. This will reduce any inclination by the witness to look at the administrator for guidance.

3. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.

4. Witnesses must view the line-up separately.

5. If there are multiple witnesses viewing the line-up, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.

6. The position of the suspect should be moved each time the line-up is shown to a different witness, assuming the suspect and/or defense counsel agree.

7. Attention should be given to the selection of a neutral location for the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.

8. The security officer who is monitoring the suspect and fillers in the line-up room should remain out of view of the witness. This will eliminate the potential for any claims of inadvertent suggestions by the security officer and it also removes the potential for distracting the witness as the line-up is being viewed.

E. Post-viewing questions

1. After viewing the line-up the witness should be asked:

   a. Do you recognize anyone?

   b. If so, what is the number of the person that you recognize?

   c. From where do you recognize the person?

2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.

3. Confidence statement

   a. Ask the witness to describe his/her certainty about any identification that is made.

   b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documenting the procedure

1. Recording the Procedure

a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.

b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented by the use of a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.

c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:

(i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;

(ii) recording equipment malfunctions;

(iii) recording equipment is not available because it was otherwise being used;

(iv) the identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy.

(v) inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or

(vi) a lack of consent from the witness.

d. The line-up should be preserved by photograph. The witness should sign the photograph to verify that it is the line-up that he or she viewed.

2. Any physical or verbal reaction to the line-up should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.

3. The confidence statement should be documented verbatim.

4. Document where the procedure took place, who was present, the date and time it was administered.

5. Anything the line-up members are asked to do (e.g., speak, move, or change clothing) must be documented.

6. Document all people in the viewing room with the witness and the line-up room with the suspect.

7. Document the officer or person who escorts the witnesses to and from the line-up room.

8. Document requests made by the defense counsel and whether they were granted, and if not, why not. Reasonable requests from defense counsel should be honored and documented. Any defense request for a change in the line-up that is not, or cannot be, honored must also be documented.

9. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide notice of the identification could prevent its use in court.

G. Defendant's right to counsel

1. There are circumstances where during a line-up a suspect may have a defense attorney present.

2. Investigators should consult with their District Attorney's Office for guidance regarding a defendant's right to counsel.

3. When in attendance, the defense attorney must be instructed not to speak in the viewing room when the witness is present.

H. Speaking with the witness after the procedure

1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.

2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.

3. The administrator should not comment or make gestures on the identification itself by saying things such as: "Great job" or "We knew you would recognize him" or even nodding their head in agreement.

4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.

I. All members who will be involved in the administration of a live line-up shall receive training on how to properly administer line-ups.

LINE-UP FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS <u>PRIOR</u> TO SHOWING THE LINE-UP

- With your consent, the procedure may be recorded using video or audio.
- Do you consent to recording? Video and Audio Audio Only No Initial: _____
- As part of our on-going investigation into a crime that occurred at (*location*) on (*date*) you are about to view a line-up. (*Use similarly neutral language to invite witness to the identification procedure.*)
- You will look through a one-way mirror and see six people in the line-up. They will not be able to see you.
- There will be a number associated with each person on the other side of the mirror.
- Take whatever time you want to view the line-up.
- The perpetrator may or may not be present.
- Do not assume I know who the perpetrator is.
- I want you to focus on the lineup and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- Members of the line-up can be requested to speak, move, or change clothing.
- If one line-up member is asked to speak, move, or change clothing, then all the line-up members will be asked to do the same.
- If you do make an identification I will ask you to describe your level of confidence about that identification using your own words, without the use of numbers. This question is not intended to suggest how certain or uncertain you might be about an identification. Every witness who makes an identification is asked this question.
- After you have had an opportunity to view the line-up I will ask you the following questions:
    1. Do you recognize anyone?
    2. If you do, what is the number of the person you recognize?
    3. From where do you recognize the person?
    4. **ONLY IF AN ID IS MADE:** Without using numbers, how sure are you?
- I may ask follow up questions.
- The investigation will continue regardless of whether or not you make an identification.
- **<u>DO NOT</u> discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date:_____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

LINE-UP CASE INFORMATION SHEET

Complaint or Case Report #:_____ Crime Date & Location: _____

Line-up Date: _____Time: _____ Location: _____

Crime Committed: _____Witness' Name: _____

Was Witness Transported? Yes □ No □

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Line-up Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Security Officer: _____

Rank: _____ Command: _____ ID #: _____

Asst. District Attorney Present? Yes □ No □

Name of ADA: _____ Phone #: _____

Interpreter Present? Yes □ No □ Name: _____

Was the procedure video recorded? Video Only □ Audio & Video □ Audio Only □ No □

Line-up photograph taken? Yes □ No □ Witness initialed? Yes □ No □

Position	Name	Number Held	Age	Height	Weight
1					
2					
3					
4					
5					
6					

Suspect's name:_____ D.O.B. _____ Position:_____

Comments: _____

_____

Signature of Administrator: _____ Date: _____

LINE-UP FORM

RUNNING THE LINE-UP AND RESULTS

Witness:_____ Administrator: _____

Instructions to the administrator conducting the line-up:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure. When inviting the witness, avoid addressing whether or not a person is in custody.
- After instructing the witness, stand away and out of the witness' line of sight, while still being able to observe and hear the witness.
- Where practicable and where consent has been given, video or audio record the entire procedure.
- If video or audio recording obtain consent from the witness.
- A photo should be taken of the line-up and the witness should sign the photo to attest that it represents the line-up that they viewed.
- Introduce by name all individuals present in the viewing room to the witness.
- Tell the witness when the identification procedure will begin, (e.g. "You will now look through the one way mirror.")
- If there is a need to have a line-up member speak, move, change clothing, or some other activity, then all the line-up members must do the same activity.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE LINE-UP, ASK THE FOLLOWING QUESTIONS

☐ Did you recognize anyone in the line-up? _____

- **If the answer to the preceding question is negative, STOP and go to the signature line.**
- **If the answer is positive, proceed to the next question:**

☐ If so, what is the number of the person that you recognize? _____

☐ From where do you recognize that person? _____

Record the words and gestures of the witness: _____

_____

CONFIDENCE STATEMENT

Without using numbers, how sure are you? _____

_____

Date: _____ Time: _____ Witness Signature: _____

LINE-UP FORM

SUSPECT'S COUNSEL SHEET

Suspect's attorney present? Yes □ No □

Suspect's attorney: _____ Telephone: _____

The suspect's attorney was instructed ***not*** to speak while in the viewing room with the witness.

Yes □ No □

If suspect's attorney makes requests about the line-up, record the request and whether the request was agreed to or refused:

1. Request: _____

   Agreed □ Refused □

   Reason for refusal? _____

   _____

2. Request: _____

   Agreed □ Refused □

   Reason for refusal? _____

   _____

3. Request: _____

   Agreed □ Refused □

   Reason for refusal? _____

   _____

PHOTO ARRAY FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS <u>PRIOR</u> TO SHOWING THE PHOTO ARRAY

- With your consent, the procedure may be recorded using video or audio.
- Do you consent to recording? Video and Audio Audio Only No Initial: _____
- As part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) you will view a photo array. (*Use similarly neutral language to invite witness to the identification procedure.*)
- It consists of six photographs of individuals. Each photograph has a number underneath the photograph.
- Take whatever time you want to view the photo array.
- The perpetrator may or may not be pictured.
- Do not assume that I know who the perpetrator is.
- I want you to focus on the photo array and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.
- Pay no attention to any markings that may appear on the photos, or any other difference in the type or style of the photographs.
- If you do make an identification I will ask you to describe your level of confidence about that identification using your own words. This question is not intended to suggest how certain or uncertain you might be about an identification. Every witness who makes an identification is asked this question.
- After you have had an opportunity to view the photo array I will ask you the following questions:
    1. Do you recognize anyone?
    2. If you do, what is the number of the photograph you recognize?
    3. From where do you recognize the person?
    4. **ONLY IF AN ID IS MADE:** Without using numbers, how sure are you?
- I may ask follow up questions.
- The investigation will continue regardless of whether or not you make an identification.
- **<u>DO NOT</u> discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date:_____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

PHOTO ARRAY CASE INFORMATION SHEET

Complaint or Case Report #:_____ Crime Date & Location: _____

Photo Array Date: _____Time: _____ Location: _____

Crime Committed: _____Witness' Name: _____

Was Witness Transported? Yes □ No □

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Photo Array Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Interpreter Present? Yes □ No □ Name: _____

Was the procedure video recorded? Video Only □ Audio & Video □ Audio Only □ No □

The original photo array MUST be preserved.
Attach a copy of the photo array to this form and provide the information below, if available.

Position	Name	NYSID (where applicable)	Date of Photo
1			
2			
3			
4			
5			
6			

Suspect's name:_____ D.O.B. _____ Position: _____

Was any photo altered? Yes □ No □

If yes, which? _____

Describe the alteration: _____

Comments: _____

Signature of Administrator: _____ Date: _____

PHOTO ARRAY FORM

SHOWING THE PHOTO ARRAY

Witness:_____ Administrator: _____

Procedure conducted: □ blind □ blinded

If blinded, indicate method: □ One-person shuffle □ Two-person shuffle □ Other: _____

Instructions to the administrator showing the photo array:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure. When inviting the witness, avoid addressing whether or not a person is in custody.
- Provide the photo array(s) in an envelope or folder (or in three sealed envelopes if using the "one person shuffle" method) when handing it to the witness.
- Stand out of the witness' line of sight, where practical, but still observe the witness as the witness views the photo array.
- Where practicable and where consent has been given, video or audio record the entire procedure.
- If video or audio recording, obtain consent from the witness.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE ARRAY, ASK THE FOLLOWING QUESTIONS

□ Did you recognize anyone in the photo array? _____

- **If the answer to the preceding question is negative, STOP and go to the signature line.**
- **If the answer is positive, proceed to the next question:**

□ If so, what is the number of the photograph that you recognize? _____

□ From where do you recognize that person? _____

Record the words and gestures of the witness: _____

_____

_____

CONFIDENCE STATEMENT

Without using numbers, how sure are you? _____

_____

_____

Date: _____ Time: _____ Witness Signature: _____

Appendix III

A part of the Task Force's charge is to gather information about how law enforcement officers throughout New York: (1) conduct eyewitness identifications; and (2) video-record the interrogation of suspects. In this regard, we would greatly appreciate your help in responding to this survey, which should not take more than 10-15 minutes. Unless you tell us differently (see the conclusion of the survey), your responses will remain anonymous; neither the New York State Bar Association Task Force on Wrongful Convictions nor anyone else will be able to identify your law enforcement agency or that your survey responses came from your agency. In addition to your completing the following questions, we would value any related suggestions, concerns, or general observations you would be willing to share with us.

If you have any questions about the work of the Task Force, please do not hesitate to contact Dr. Tracie L. Keesee 646-610-8139.

Please answer the following questions as they relate to your current practice:

1. Approximately how many law enforcement officers are employed in your agency?

- ◯ Less than 5 ___
- ◯ 5-10 ___
- ◯ 11-25 ___
- ◯ 26-50 ___
- ◯ 51-100 ___
- ◯ More than 100 ___

Eyewitness Identification Procedures

2. Does your agency conduct eyewitness identification procedures in any crimes?

- ◯ Yes
- ◯ No (**PLEASE PROCEED TO QUESTION 27**)

Since the law guiding eyewitness identification became effective (July 1, 2017), please estimate as best you can the percentage of cases in your agency that involve eyewitness identifications obtained in the following ways:

3. Show-ups (witness is shown a single photo or a single individual), if applicable, provide percentage (numeric)

0% 100%

4. Photo arrays (e.g. involving multiple pictures, including suspect and fillers) ___%

0% 100%

5. Live lineups (display of multiple individuals, including the suspect and fillers) ___%

0% 100%

6. Mug shot searches (witness looks through multiple photos of known offenders in an attempt to identify a suspect) ___%

0% 100%

For training regarding eyewitness identification procedures for officers/detectives in your agency:

7. Since the passage of the law, training was conducted (please indicate all that apply):

- [ ] In person
- [ ] Written materials
- [ ] By video or computer presentation
- [ ] No training has been conducted
- [ ] Other (please specify)

8. Training materials were provided by

- [ ] DCJS
- [ ] Other (please specify)

9. Which types of law enforcement officers received the training (please indicate all that apply, including estimated number trained, if available)

- [ ] Supervisors
- [ ] Detectives
- [ ] Patrol officers
- [ ] Other (please specify)

Photo, Other Pictorial (e.g., Computer-Based) Arrays, Lineups: Identification Procedures

10. How many photos/pictures/live members (include both suspect + fillers) are typically shown to witnesses?

- [ ] 1
- [ ] 2
- [ ] 3-5
- [ ] 6
- [ ] 7 or more

11. The “fillers” used in photo/pictorial arrays and live lineups are selected (check all that apply):

- [ ] To resemble the suspect
- [ ] To resemble the witness’s verbal description of the perpetrator
- [ ] To ensure that no member of the array stands out
- [ ] Other (please specify)

12. For live lineups, when does a “blind” administrator conduct the lineup (a blind administrator is a person who does not know the suspect’s identity)?

- [ ] Always
- [ ] Never
- [ ] Most of the time
- [ ] Not Applicable
- [ ] Sometimes but not most of the time
- [ ] If you note “never” and would like to explain, please elaborate:

13. For photo arrays, when a "blind or "blinded" administrator is used (a blind administrator does not know the identity of the suspect; a blinded administrator knows the identity of the suspect but cannot see which photos are being viewed by the eyewitness):

- [ ] Always
- [ ] Never
- [ ] Most of the time
- [ ] Not Applicable (none conducted)
- [ ] Sometimes but not most of the time
- [ ] If you note “never” and would like to explain, please elaborate:

14. What instructions, if any, are witnesses given prior to viewing the photos or lineup (please check all that apply)?

- [ ] The true perpetrator may or may not be present
- [ ] They need not make an identification of anyone
- [ ] The investigation will continue whether or not they identify someone
- [ ] Other (Please Specify)

15. After an identification procedure (or after a witness declines to make an identification), is that witness given any information or feedback as to whether he or she identified the suspect?

- [ ] Yes
- [ ] No
- [ ] if you answered yes, can you please describe what feedback is given:

16. If an identification was made, is the eyewitness asked to describe in his or her own words how certain or confident they are in their choice?

- [ ] Yes
- [ ] No

17. If a statement of confidence is taken, is the statement of confidence documented?

- [ ] Yes
- [ ] No
- [ ] N/A

18. When witnesses do not make an identification, how often are they subsequently re-presented with the same suspect in a new photo array or lineup containing different fillers? (Please check all that apply)

- ◯ Always
- ◯ Sometimes
- ◯ Never

19. When two or more witnesses are asked to make an identification in cases involving the same suspect, what percentage of the time do they:

0 100

20. How are photo and lineup identifications documented, if at all? (please indicate all that apply):

- [ ] By video-recording
- [ ] By audio-recording
- [ ] By cell phone photo
- [ ] By written documentation only
- [ ] Only when an identification is made
- [ ] In all cases, even when no identification is made
- [ ] No documentation is made of identification procedures

21. Are the photos/pictures used in identification procedures preserved?

- [ ] Yes
- [ ] No

Written Policies

22. Has your agency issued its own written policies pertaining to eyewitness identifications (for purposes of this question, do not include reference to the DCJS model policy on eyewitness identifications)?

- [ ] Yes
- [ ] No

23. Has your agency adopted the DCJS model policy pertaining to eyewitness identifications?

- ◯ Yes
- ◯ No

24. If your agency has adopted the DCJS model policy, is a reference to it included in your agency's patrol guide?

- ◯ Yes
- ◯ No

Other Comments/Suggestions/Concerns

25. Has your agency ever requested the assistance of another law enforcement agency to conduct an identification procedure?

- ◯ Yes
- ◯ No
- ◯ If yes, what other agency or agencies were requested to provide assistance?

26. We are interested in any comments, suggestions, or concerns that you would like to call to our attention regarding eyewitness identification procedures. If there are any obstacles you are facing to implementation, please note them here. If there are any additional resources or training that would be helpful to your successful implementation of those eyewitness identification procedures, please note that as well.

Video-Recording of Interrogations

Video-Recording of Interrogations: Training. For training covering the video-recording of interrogations provided for officers in your agency:

27. Does your agency video-record custodial interrogations in any crimes?

- ◯ Yes
- ◯ No

28. Training materials were provided by

- ☐ DCJS
- ☐ Other (please specify)

29. Which types of law enforcement officers received the training (please indicate all that apply, including estimated number trained, if available)

- ☐ Supervisors
- ☐ Detectives
- ☐ Patrol officers
- ☐ Other (please specify)

Video-Recording of Interrogations: Policies and Procedures

30. Training was conducted (please indicate all that apply)

- ☐ In person
- ☐ With written materials
- ☐ By video or computer presentation
- ☐ No training has been conducted

31. In the past year (or since your agency first began video-recording if less than a year ago), in cases where officers were required by law to have interrogation sessions recorded, please estimate the percentage of interrogation sessions recorded from start to finish

0 100

32. For what types of offenses does your agency video-record the interrogation of suspects (please indicate all that apply)?

- [ ] All offenses
- [ ] Offenses required by NYS law but for no other offenses
- [ ] Offenses required by NYS law and other offenses on a case-by-case basis
- [ ] No interrogation sessions are video-recorded
- [ ] Other (please specify)

33. Please provide the date your agency first began video-recording interrogations

Date / Time

MM/DD/YYYY

34. New York law recognizes various exceptions concerning when interrogations may not be video-recorded, including those listed below. With respect to cases in which video-recording ordinarily is required, please estimate the percentage of interrogation sessions that were NOT video-recorded because:

Equipment malfunctioned	
Equipment was not available because it was otherwise being used	
Suspect refused to participate if session was video-recorded	
Other (please specify) recorded:	

35. In your estimate, what percentage of suspects are advised that the interrogation session will be video-recorded?

0% 100%

36. In your estimate, what percentage of suspects are asked to consent to video-recording prior to the interrogation?

0% 100%

37. In your estimate, what percentage of suspects, when asked for consent, actually give consent?

0% 100%

38. Where does video-recording take place (please indicate all that apply)?

- [ ] In police station
- [ ] In place of detention other than police station (please specify)
- [ ] In squad car or other law enforcement vehicle
- [ ] In field

39. When does video-recording begin during interrogation sessions? Please check all that apply.

- [ ] Prior to administration of rights
- [ ] When rights are administered
- [ ] After rights are administered but before questioning
- [ ] When suspect gives statement

40. When an interrogation session is video-recorded in a police station or other place of detention, the camera is positioned:

- [ ] So the face of the suspect, but not the officer(s) is visible
- [ ] So the face of the suspect as well as the officer(s) are visible

41. What percentage of the time is information that is relevant to the investigation captured by video (e.g. through a body worn camera or otherwise) that is not captured through the formal interrogation process in a fixed location? Please roughly estimate the percentage of the time this is the case:

0% 100%

42. The recordings of interrogation sessions are preserved (please indicate all that apply):

- [ ] On the recording device
- [ ] On a DVD
- [ ] On a computer/server
- [ ] Other (please specify)

43. How long are the recordings of interrogation sessions retained when NO charges are brought?

- [ ] Not retained
- [ ] Retained for (please indicate how many months, if known)

44. How long are the recordings of interrogation sessions retained when charges ARE brought?

- [ ] Retained until case is disposed of via dismissal, guilty plea, or trial
- [ ] Retained until appeals are finalized
- [ ] Recordings are preserved indefinitely
- [ ] Other (please specify)

45. Has your agency ever requested the assistance of another law enforcement agency to video-record an interrogation session?

- ( ) Yes
- ( ) No
- ( ) If yes, please specify what agency:

46. If yes, what other agency or agencies were requested to provide assistance?

- [ ] New York State Police
- [ ] Other (please specify)

Written Policies

47. Have any written policies pertaining to the video-recording of interrogation sessions been issued by or adopted by your agency?

- ( ) Yes
- ( ) No

Other Comments/Suggestions/Concerns

48. We are interested in any comments, suggestions, or concerns that you would like to call to our attention regarding the video-recording of interrogation sessions. If there are any obstacles you are facing to implementation, please note them here. If there are any additional resources or training that would be helpful to your successful implementation of recording of interrogations, please note that as well.

Anonymity and Submitting Your Survey Responses

Your responses will remain anonymous (that is, neither the New York State Bar Association Task Force on Wrongful Convictions nor anyone else will be able to identify the law enforcement agency or personnel who completed this survey) unless you authorize differently, below.

49. Do you choose to have your survey responses remain anonymous?

- ◯ Yes
- ◯ No

50. If you answered No, please provide the following information:

Name of Department or Agency

Name and contact information (title, phone, email address, postal address) for who we can contact if we have follow-up questions:

In order to meet our timeline we would very much appreciate it if you would submit your survey responses not later than December 07, 2018. Thank you very much for your help

Weil

Memorandum

August 15, 2018

To
NYSBA Task Force on Wrongful Convictions
Subcommittee on Implementation of New Procedures

From
Benjamin E. Marks
Taylor B. Dougherty

Re Use of Jailhouse Informants

This memorandum summarizes our research on developments in New York law concerning the use of jailhouse informants since the previous NYSBA Task Force on Wrongful Convictions issued its Report and Recommendations in 2009 (the "2009 Report"). New York law on the use of jailhouse informants remains largely unchanged. Courts continue to apply the standard for admissibility set forth by the New York Court of Appeals in *People v. Cardona*, 360 N.E.2d 1306 (N.Y. 1977), and while legislation that would regulate the use of jailhouse information has been introduced numerous times since 2009, none has been passed. In Section I below, we summarize our case law research. In Section II, we discuss the proposed legislation in New York and also discuss legislative developments in several other jurisdictions as a point of comparison. In Section III, we summarize several of the leading recent scholarly articles addressing the use of jailhouse informants. Copies of the cited cases, bills, and law review articles may be found in the attached compendium.

I. Case Law

In *Cardona*, the New York Court of Appeals clarified the standard for admissibility of jailhouse informant testimony set forth in *Massiah v. United States*, 377 U.S. 201 (1964), in which the United States Supreme Court held that once a defendant's Sixth Amendment right to counsel attaches, the government may not deliberately elicit inculpatory information in the absence of counsel, including through the use of informants. *See* 360 N.E.2d 1306 (citing *Massiah*). Although the Court of Appeals acknowledged that the prosecution had "walked a thin line" and "the facts would certainly support an inference" that the informant was working as an agent of the government, the Court declined to overturn a conviction because the inference of agency was not the exclusive inference that could be drawn from the factual record. *See id*. at 1307. At the hearing to suppress the informant testimony, the trial court had found "that the inmate-witness had not solicited the statements, that the statements had been freely volunteered by the defendant, that the prosecution had not promised any benefit in return for the information that he provided, and that the inmate had contacted the District Attorney's office on his own initiative." *Id.* at 1306-07. That the jailhouse informant had provided information on other defendants

on several occasions and that this cooperation apparently had led to a more lenient sentence than might otherwise have been obtained was held to be insufficient to warrant reversal. As the Court observed, "[t]hat the informer has a self-interest in obtaining better treatment from the government does not thereby automatically make the informer an agent of the government." *Id.* at 1307. The Court cautioned that of the government "affirmatively plays on [the informer's] motivation [to inform] or "harkens the informer to his self-interest, it thereby runs the risk of being responsible and accountable for the informer's action." *Id.* Mere acceptance of proffered information, however, was not enough to establish agency. Accordingly, the Court held that "where an informer works independently of the prosecution, provides information on his own initiative, and the government's role is limited to the passive receipt of such information, the informer is not, as a matter of law, an agent of the government." *Id.* at 1307.

New York courts continue to apply the *Cardona* standard and find jailhouse informant testimony when the informant works independently from the government, and the government is a passive recipient of the information. *See, e.g.*, *People v. Newbeck*, 157 A.D.3d 908, 909 (N.Y. App. Div. 2018); *People v. Reardon*, 124 A.D.3d 681, 685 (N.Y. App. Div. 2015). New York courts have continued to admit testimony under this standard, even in cases where the informant had a prior cooperation agreement with the prosecution and had provided information in other cases, as long as the informant acted independently and on his or her own initiative. *See, e.g.*, *People v. Corse*, 73 A.D.3d 1208, 1209 (N.Y. App. Div. 2010). For example, in *Gonzalez v Brandt*, the U.S. District Court for the Western District of New York dismissed a petition for habeas corpus that was based in part on the state court's admission of testimony from a jailhouse informant, even though the informant had previously provided information about another homicide to obtain beneficial treatment and the police had asked him to contact them if he had information about other homicides as well. *See* No. 6:13-CV-6574, 2014 WL 1355448, at *4-6 (W.D.N.Y. Apr. 7, 2014). The court found the informant's statements to police admissible since "there was no evidence that any promise was made to Garcia by the police in exchange for any information he supplied; he did freely volunteered the information to the police; Garcia contacted the district attorney's office regarding Petitioner's case on his own initiative; [and] Garcia was not instructed or coached by the police or prosecutors to seek out any information from Petitioner." *Id.* at *6. The general request made to the informant to provide information about other homicides prior to his hearing the defendant's statements was deemed insufficient to render the witness an agent of the government, and thus his testimony was determined to be admissible. *Id.*

We did not identify reported decisions in New York since the 2009 Report in which a *Cardona*-hearing determination that jailhouse informant testimony was admissible was reversed on appeal.

II. Legislative Initiatives

The New York State Legislature has not enacted any new legislation on the use of confidential informants since the publication of the 2009 Report. Legislation has been proposed on numerous occasions since 2009 in both the State Assembly and the State Senate, but no bill has made it past the committee stage. There have been no hearings or other public testimony on these bills.

Two different bills have been reintroduced in substantially the same form multiple times over the past nine years. The legislation that has been proposed has been primarily two different bills, each of which has been reintroduced in substantially the same form a number of times. The first bill would amend the law concerning confidential informants by defining what constitutes a confidential information, imposing restrictions on who and who may not be a confidential informant, and by regulating the use of confidential informants. A pending version of this bill is NYS Senate Bill S5901 ("S5901"), which is currently in the Senate Codes Committee. Past versions of this bill, all of which had identical text to S5901 and died in committee, include S3876, A1072, S5732A, and A1816A. A257 is the companion version of S5901 and has been proposed in the New York State Assembly.

The second bill is NYS Assembly Bill A4264 ("A4264"), which is currently in the Assembly Committee. A4264 would regulate the use of confidential informants by prosecutors and law enforcement personnel by requiring law enforcement personnel to submit an annual report to the department of state with statistical information relating to their use of informants. Past versions of this bill, all of which had identical text and died in committee, include A2906, A3097, A437, and A3712.

At the federal level, legislation repeatedly has been introduced in the United States House of Representatives to require all law enforcement agencies to annually report the following information about any confidential or jailhouse informants used by the agency during the previous year: (1) all serious crimes, authorized and unauthorized, committed by informants maintained by the law enforcement agency; (2) the amounts expended by the law enforcement agency on payments to such informants; and (3) the amounts received by the law enforcement agency through the information from or cooperation by the informant. *See, e.g.*, H.R. 1857 Confidential Informant Accountability Act of 2017.

While New York has not successfully passed legislation regulating the use of jailhouse informants, Texas has. Texas enacted legislation in 2017 that requires prosecutors to keep detailed records of all jailhouse informants and requires that information to be disclosed to defense attorneys who may use it to challenge informant's reliability and honesty. *See* Texas H.B. 34. The bill requires prosecutors to disclose to the defense any of the following information regarding a jailhouse informant:

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

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.

Texas H.B. 34. In addition, in 2014, Texas also adopted the American Bar Association's resolution to adopt the policy that no prosecution occur based solely upon uncorroborated jailhouse informant testimony, resulting in all jailhouse informants' testimony being corroborated before being admitted in Texas. Illinois, Oklahoma, and Nebraska have all also adopted similar pre-trial disclosure of the prosecution's plan to use jailhouse informant testimony.

III. Legal Scholarship

There has been considerable scholarship on the use of jailhouse informants since 2009 as well. While a comprehensive review of that scholarship is beyond the scope of this memorandum, we provide herewith two particularly noteworthy articles for the Subcommittee's consideration. *See* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 American Criminal Law Review 737 (2016); Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 20 Wake Forest L. Rev. 101 (2014). In *Informant Witnesses and the Risk of Wrongful Convictions*, Professor Roth lays out the most prominent reform strategies with respect to the treatment of jailhouse informants, including:

1) Expanding prosecutors' disclosure requirements about their use of jailhouse informants;

2) Requiring pre-trial judicial review of informants before a judge;

3) Creating more robust corroboration requirements;

4) Improving the substance and timing of jury instructions regarding jailhouse informants;

5) Requiring that individual prosecution offices adopt formal policies and trainings regarding appropriate use of jailhouse informants.

See 53 American Criminal Law Review 737 (2016).[1] Professor Roth recommends these reforms because of the inherent unreliability of testimony being offered almost solely to receive a personal benefit (often a reduction in sentence). *Id.* at 765-66. Many of the proposals the article puts forth as potential methods to regulate the use of jailhouse informants seeks to evaluate and establish the reliability (or unreliability) of jailhouse informant testimony prior to it being admitted at trial. This ensures that the potentially false or misleading testimony is not admitted into the record, ringing a bell that can never truly be un-rung.

In *Abolishing Jailhouse Snitch Testimony*, Professor Covey argues that the current system of cross-examining jailhouse informants and allowing for post-conviction review of false jailhouse informant testimony is insufficient, and that the only type of reform that will truly remedy the issues plaguing the use of jailhouse informant testimony is complete abolition of the practice altogether. *See* 20 Wake Forest L. Rev. 101 (2014). Recognizing that a complete abolition of jailhouse informant testimony is

[1] In the 2009 Report, the subcommittee on jailhouse informants of the previous task force recommended many of these same proposals. *See* 2009 Report at 14, 114-20.

unlikely, Professor Covey suggests that the next best reform strategy is to allow use of jailhouse informant testimony only if the alleged confession has been recorded electronically. *See id.* Professor Covey also discusses other remedies (such as pre-trial hearings to evaluate the reliability of a proposed jailhouse informant's testimony) that help mitigate the risk of wrongful conviction. *See id.*

* * *

B.E.M./T.B.D.