

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

Minutes of Commission Public Hearing on Remedies for Wrongful Conviction October 17, 2007

Submitted by Chris Boscia.

Commission Chair John Van de Kamp convened the hearing at 9:30 a.m. at the Kennedy Commons at Santa Clara University.

Those present included Executive Director Gerald F. Uelmen, Vice-Chair Jon Streeter, and Commissioners Diane Bellas, Harold "Bosco" Boscovich, Janet Gaard (representing Attorney General Jerry Brown), Chief Pete Dunbar, Jim Fox, Michael Hersek, Sheriff Curtis Hill, George Kennedy, Michael Laurence, Judge John Moulds, Cookie Ridolfi, Greg Totten, and Ron Cottingham.

Commissioners not present were Gerry Chaleff (representing Chief William Bratton), Glen Craig, Rabbi Allen Freehling, Bill Hing, Michael Judge, Alejandro Mayorkas, and Doug Ring.

- I. Introductory Comments by John Van De Kamp (JVD)
 - A. Comments on Gubernatorial Veto: general disappointment among Commissioners; vetoes not rational; good policy recommendations to improve the quality of policing, safety, prosecution, and to prevent wrongful convictions.
 - B. Governor has stated that at the State level, he does not care about this reform. He will allow the local law enforcement agencies the opportunity to do what they will. CPOA issued a statement obfuscating the purpose of these bills.
 - C. For now, reform is at the local level. We recommend that local law enforcement read the bills, the recommendations, and implement the reform. It's in their best interest. Otherwise, the Courts could step into the void and fill the policy vacuum.
 - D. Today, we are here to talk about the Remedies for Wrongful Conviction.
 1. What can we do that's better?
 2. What can we do to make sure that people who believe they are wrongfully convicted have access to testing and redress?
 3. How do we make them whole for the mistakes that have been committed?

II. [Testimony of Prof. Myrna Raeder](#), Southwestern University School of Law, Los Angeles; American Bar Association Criminal Justice Section Ad Hoc Innocence Committee

A. Two tragedies

1. Life lost to unjustified incarceration
2. Public safety nightmare
 - i. Victim wrongfully believes she's safe
 - ii. The general public is subjected to perpetrator at large

B. Introductory comments: Prof. Raeder co-chaired Committee of ABA committee and issued report and 9 policies. Prof. Raeder primarily responsible for compensation and systemic remedies. She does not represent the ABA and her personal views go beyond the ABA recommendations.

C. Compensation

1. CA has a compensation scheme. Is it adequate? No. There are some substantial flaws.
2. Flaws:
 - i. Dollar recovery amount
 - a. \$36,500 (\$100 a day). When enacted, this was probably very generous. But the Innocence Protection Act at the Federal level passed a \$50,000 limit and \$100,000 for those subjected to the death penalty. TX recently followed suit and legislated \$50,000
 - b. Chosen amount could be a minimum which would be increased in exceptional circumstances, e.g. gov't misconduct or particularly difficult confinement situation
 - ii. Attorneys' Fees
 - a. CA does not cover these fees
 - b. May be a disincentive for attorneys to take these cases
 - c. ABA doesn't mention the connection between compensation statute and other civil claims. Constitutional litigation and other civil litigation is very difficult. Those who succeed get multi-millions.
 - d. Uncomfortable with the idea of double-recovery, but the exoneree ought not be

forced to choose which recovery to seek. Possibly the recovery should be deducted from the statutory recovery or paid back. This would provide motivation for lawyers to bring the statutory claims.

- iii. Post-release services
 - a. The statute doesn't currently mention any services, but the criminal justice community recognizes that parolees and probationers need services upon re-entry. Exonerees do not have those services.
 - b. Question: JVD—what services would you put in that category? Hard to say; others will testify to this. Certainly the following: emergency money, housing, education. Also will need to look at Post-traumatic stress disorder, mental/emotional problems when people come out of prison. There is deep psychological damage done to a person wrongfully incarcerated over a long period of time.
- iv. Statute of Limitations for bringing a claim
 - a. Six month statute of limitations is a very difficult mark
 - b. When individuals are not given notice, there is some leeway
 - c. ABA recommends one year; two year if no notice is given.
 - d. Exonerees need time to figure out whether they are entitled and then the opportunity to put together a case
- v. Burden under the Statute: §4903—"claimant did not by any act or omission by his part...negligently...contribute to the conviction"
 - a. §4903 is a much higher than the ABA standard, which is that claimants own conduct should not have substantially contributed to conviction
 - b. AG's report said the statutory standard rendered very problematic; *Tenneson* case

highlighted difficulty of proving innocence when reversal is not based on insufficient evidence.

- c. Question: Uelmen—aware of any cases where a false confession was treated as a negligent contribution to conviction? That's a landmine issue. ABA says neither false confessions nor guilty plea should be a bar to recovery. In Prof. Raeder's opinion, intentional subversion of judicial process, e.g. testifying against someone falsely, should be the only thing that would bar recovery.
- d. Plea issue—exceptions made for pleas involving cases of police corruption, severe penalties unless the accused pleads guilty. CA could require only misconduct, substantial cause instead of just any contribution; could be an affirmative defense; or could be treated as a comparative negligence issue which would lower the recovery

D. Statute leaves much to be desired

- 1. Recoveries come from the budget of the agency against which there is a charge, plus a 15% charge. This may provide an incentive to AG's office to contest suits.
- 2. Question: JVD—once a decision is made by compensation board, they report that to Legislature to appropriate for cost. How many claims have gone to Legislature? Uelmen: Karen McGagin submitted a written report which listed all the awards which were made by the compensation board and the number of cases that were denied claims.
 - i. Raeder: There will be denials b/c you need to have credible information bolstering the innocence claim. Without DNA, it's very difficult to prove since recantations can be seen in different lights.
 - ii. With compensation board, AG's office makes a recommendation and then presents information at the hearing itself. Clearly more input from the

prosecutor at the investigation and hearing stage.
No appeal procedure; goes directly to court
procedure

E. Suggestions:

1. Should be a permanent structure by which wrongful convictions are monitored in the State.
 - i. Disappointed by veto of three bills.
 - ii. We can't assume that technology will save us. Lab scandals tell us that forensic science can be the cause and the cure.
 - iii. Work will not be done by the time the Commission issues its final report.
2. Hope that Commission recommends some type of agency in government to take over process of monitoring innocence/wrongful conviction issue.
 - i. Such a body could encourage local experimentation with eyewitness or videotaping practices, which could then spur more global efforts.
 - ii. At the ABA level, prosecutors said that videotaping really helped them.
3. As to North Carolina Innocence Commission, providing an alternative when the system as a whole has failed is important.
 - i. Note of caution: NC scheme was well thought out. Standard is not too high or too low.
 - ii. They have a mechanism for keeping the claims down. CA has five times the number of prisoners that NC has. The initial process would be much more daunting here than in NC. It may be feasible to do this here.
 - iii. In NC, since 2007, the Commission has received over 300 claims. 10% have gone through the process and are in the investigative stage (after initial review). Investigation is done by Innocence projects and law students.
 - iv. The subpoena power raises a number of concerns on the part of law enforcement.
 - v. Process is meant to be non-adversarial and that should be considered.

F. Questions:

1. JVD: CCFAJ set to expire this year, but we have a six month extension to June 2008. Not a dollar of taxpayer money goes into this Commission. This was established by Senate Rules Committee, not by Governor or both houses of Legislature. It is privately funded. We've not had any outside influence. The people around the table make the policy decisions. Staff does the implementation work.
2. Interesting to see what happens in North Carolina, in the wake of the Duke Lacrosse scandal.
3. Raeder: State Supreme Court in NC took the lead in the original commission as well as the inquiry commission. Input from the judiciary is very important to consider.
4. JVD: but NC established the Commission through the Legislature and the Governor signed that bill, correct? Yes.

G. NB: Gaard—Chamberlain will testify about DNA, but not about other issues presented by Prof. Raeder.

III. Michael Chamberlain, Deputy Attorney General

A. In 2001, AG Lockyer chaired a Commission and issued a report on post-conviction DNA testing. [Click here to view the report on-line](#). It addresses the technical issues on how evidence should be preserved.

B. Post-conviction to State DNA databank

1. DOJ is committed to on-going search for truth both before and after conviction. Character and integrity needs to be considered. Trial is watershed event and burden shifts after trials.
2. DNA databank exists for one purpose. The DNA databank is not an appropriate tool to use for wholesale investigation in a closed case to find 3rd party people or new witnesses. This is not just a statutory mandate, but is mandated through the Federal gov't as well.
3. Condition for CODIS database license from FBI to State restricts disclosure limitations. AG cannot disclose to non-law enforcement officials when not in pursuance of claim.
4. CA has provided Penal Code Section §1405—borrows standard of materiality from pre-trial procedure;

provides counsel; no statute of limitations attached; US Congress has used CA model to enact a similar Fed statute

5. Even though after conviction a defendant is not presumed innocent, testing can be performed if the petitioner meets the 1405 standard. Testing can be on the DNA or state fingerprint database.
6. If the claim of innocence depends on the hypothesis that a 3rd party DNA could be matched in the database, but that would not exonerate but only provide a new witnesses, this is more in line with the “reasonably possible” than “reasonably probable” standard that exists.
7. There have been fewer than 10 DNA related exonerations out of the 172,000 inmates incarcerated in CA.
8. The database is designed, even after conviction, for finding out who the perpetrator is. Other post-conviction discovery mechanisms exist, Penal Code §1054.9 provides for non-DNA evidence discovery. It’s a broad standard. Trial court can order any type of discovery.

C. Questions:

1. Laurence—does 1054.9 apply in only capital? No, it’s all post-conviction.
2. Hersek: does it apply only to DNA? No, it includes everything but DNA
3. Kevin Cooper case—would not make sense to expand scope of 1405 beyond what it currently is, given the other mechanisms.
 - i. These issues are being considered by the 9th circuit.
 - ii. §1405 is effective at allowing discovery and ferreting out specious claims. DNA does have its limitations. Both CA and Fed have enacted thoughtful, generous mechanism for convicted offenders to use in CA
4. JVD: testing, if granted, is done by State, not by defense lawyers? Not necessarily. If DOJ is in possession of evidence, then they will test. If it’s in the

possession of law enforcement agency or requires special testing, it can go to gov't lab or private lab. Ordinarily, parties will stipulate.

5. JVD: what are the time frames to get DNA attempted match? Is it still at 6-8 months? The DOJ has worked through offender samples. We're exceeding statutory expectations. Every Friday the database is searched for unsolved crime scenes. The other consideration is the state-run crime labs. They have difficulties trying to process all the local samples being demanded of them. There must be a crime scene sample to upload to CODIS.
6. JVD: what can we do to speed that process up? Resources, money, personnel, expectations of prosecutors about what evidence is most probative vs. typing every piece of evidence. There should be closer collaboration between prosecutors and crime labs to type the most probative evidence. Chief of Forensic Services Bureaus is actually investigating this issue.
7. JVD: we are talking about DNA database and how it could be used better for public safety purposes, before arrest and conviction.
8. Chamberlain: we will see another spike in 2009 when more samples are uploaded
9. Streeter: statistics on the number of 1405 requests per year? Innocence Projects may be better able to answer, since they serve as gatekeepers. Early estimates were at the thousands. As to actual numbers, the DOJ doesn't see all of them and is not able to accurately count them. Chamberlain doesn't see more than a few per month, but he doesn't see all of the petitions in CA.
10. Ridolfi: if there is a fingerprint request in the AFIS database as part of 1054.9, would that be appropriate for fingerprint evidence found at the crime scene? Judge would have to consider statutory privacy issues that restrict access to AFIS, Penal Code §13000, 11086, 11086.1 This is personal identification information that has been entrusted to law enforcement for public safety purposes. There will have to be some restrictions to prevent wholesale access to either database. A judge

can consider a request for searches for fingerprint evidence. In an unsolved case, law enforcement has an interest. But in solved cases, there is not the same interest.

11. Uelmen: is there a federal constitutional right to post-conviction testing? *Osborne v. Anchorage* and *Moore v. Brown* argue that there are free-standing rights to post-conviction access. It's uncertain, but the DOJ opposes a broader standard post-conviction. It could clog up the system. Also see *Herrera v. Collins*.
12. Ridolfi: Who is the DNA database search available to? It is exclusively for the purposes of search for truth that is feasible and effective. Is there a requirement to test based on the statutes? The DOJ doesn't test every crime scene sample. The DNA database would not be serving its function if the crime scene profiles uploaded were not attributed to the person who committed the crime. The purpose of database is to match one offender to one crime.
 - i. Hypo: multiple samples of DNA found that could be incriminating where there are multiple defendants. Would there be a requirement to test? There is always an expectation that law enforcement solves crimes. No legal requirement to search in CA.
 - ii. Setting aside law, what makes sense to do? If there is clearly incriminating evidence that exists, why restrict access? What if there is semen DNA in a rape-murder case, is it required to test? Samples from crime scene have to be attributed to perpetrator.
 - iii. Hypo: Gang rape situation with four DNA samples. Two people are arrested and not the source of DNA. If a person brings an innocence claim, should that other DNA be tested? Discretionary on the part of law enforcement. DOJ can't independently overrule the local law enforcement agency.
13. Laurence: 1054.9 is the way that defendants can get access to the raw materials to make a 1405 claim, such

as police reports, etc? DOJ advises crime labs to comply with requests of Innocence Project. 1054.9 only applies to capital cases and LWOP.

D. Gaard: CCFAJ supported AB 1079 which Governor signed last week. Effective immediately, a new taskforce will be started to examine questions about ways to enhance State's ability to attract and train people to deal with DNA backlog.

IV. Testimony of Prof. Jan Stiglitz, Cal Western School of Law, San Diego; Executive Director, California Innocence Project

A. Obstacles to exoneration

1. Access to evidence and information—statutory right to discovery is a surprise. We have to rely on voluntary cooperation with law enforcement agencies.
 - i. Once we go outside of San Diego, cooperation seems to disappear.
 - ii. Law enforcement says “get a subpoena or we won't cooperate.”
 - iii. Ex. Client convicted of armed robbery. Innocence Project wants to look at tape of robbery from convenience store camera. Videotape would show that client not the perpetrator. Request to law enforcement to get tape is denied. No way to get access to that tape. This is not consistent with fair administration of justice.
2. In 1405 cases, there has not always been voluntary cooperation. Ex. Hesperia case in brutal murder. Client convicted after 3rd trial. Innocence Project wants to do DNA testing on fingernails and brick used to commit murder. No stipulation from DA. Motion filed and oral argument. Now that testing has been ordered, there is a problem getting the test results.
3. Problem of delay
 - i. Catch-22 situation: law says that post-conviction habeas claim must be brought without undue delay. Delay is enough to bar petition.
 - ii. When there is some evidence to suggest innocence, then there is encouragement to file. But as a practical matter, to file a petition that is not ironclad, then petition will be denied. Pro per

petitions are almost always summarily denied. At that point, it's too late for Innocence Project.

4. Recommend to CCFAJ to have statute which says delay in the absence of prejudice would not bar claim

B. Funding Problem

1. Work is expensive and resources are limited.
2. Students raised \$3,500 at an event that took numerous hours to plan and organize—a real success! A day later we received the bill for one expert in one of our cases—\$4,000.
3. Financial assistance is important.

C. Questions

1. JVD: where do you go for funding? How much do you need? What are the limits? Governor is facing budget deficits.
 - i. There has been public funding in the past. The rock band, the Eagles, gave \$100,000. Since these projects are run as clinics, schools kick-in.
 - ii. Annual out-of-pocket costs is \$50,000-100,000.
2. Fox: what level of cooperation does Innocence Project receive from defense attorney at trial? Depends on claim, etc. When wrongful conviction is attributable to incompetent attorney, those are the people it's very difficult to get information from.
3. Totten: what is the official relationship between the client and the Innocence Project?
 - i. We believe that the minute we are asked for legal representation and that IP looks into case, then a attorney-client relationship is established. What we don't promise the people who apply is that we will necessarily take their case until they are exonerated. There are different levels of relationship.
 - ii. Totten: does defense counsel and court recognize the relationship as truly attorney-client? Never had a problem, but sometimes there is a request for a waiver.
4. Fox: is there a difference between public defender offices and private attorneys to compel cooperation?

- i. Typical IAC is a low-budget solo practitioner practicing criminal defense.
 - ii. Cases involving public defenders are usually a resource problem. But those are easier, you can usually call up the head of the unit.
- V. Prof. Cookie Ridolfi, Santa Clara University School of Law;
Director, Northern California Innocence Project
 - A. Response to Chamberlain testimony
 - 1. Reasons why IPs should be refused access to DNA database
 - i. 295(b)(1)—database should be for exonerating the innocent
 - ii. 2955(i)(3)—it is not a violation for law enforcement agencies to publicly disclose identity of person for DNA match...
 - iii. With regard to sanctions, they apply only for disclosures for criminal purposes.
 - iv. It would be a violation of federal law to restrict access to CODIS. 42 USC 140132(b)(3)—allows for disclosure...both IL and NC have statutes which expressly permit searches to DNA database. Those state statutes authorize access to the database, provided the requestor complies with federal law.
 - 2. Invasion of privacy interest for felons in database—a person convicted of a felony forfeits right to privacy in that database, see *Alfara v. Terhoun* (sp?)
 - 3. To allow access to DNA database would open all types of doors to violation of privacy rights?
 - i. That's not what IP is asking for; that would not be a good thing.
 - ii. Proposed Penal Code §1406 would require access to DNA and AFIS database after a showing similar to 1405, where identity was or should have been an issue in the case. Reasonable probability that result of testing would have made a difference in the outcome of the case. Limited access, should not go further in agreement with Mr. Chamberlain.

- B. DNA Exonerations—in many cases, actual perpetrators were found by running the sample against the database. CA has hideous examples: Kevin Green (the bedroom basher).
- C. Disconcerting when IP work is referred to as frivolous or a DA's office takes the position that they never agree to work with IP. There needs to be oversight in these situations.
- D. Stoll case—he received \$700,000 in compensation from State and \$4 million in compensation.
- E. Funding:
 - 1. In 2000, CA funded IP work at \$800,000 per year. In 2001, allocation went to two IPs in CA. \$480,000 was allocated to IPs and the rest was divided equally between SF and LA Public Defenders' offices.
 - 2. IPs then created a stringent review process. In 2002, funds given to IPs alone
 - 3. In 2003, IPs were cut to \$0 because of the budget crisis at the time.
 - 4. Currently, the IP work is supported by Santa Clara Law School and Cal Western, outside donors, students, etc. Despite this generosity, there is still not enough money to fund this work. Case backlog requires 3 year wait for case to be considered.
- F. Process of review
 - 1. 6100 requests for assistance
 - 2. When a letter arrives, it must meet three basic criteria?
 - i. First, is the case in Northern California?
 - ii. Second, does the case involve a long sentence? If there is only a short incarceration time left, NCIP doesn't take because there are too few resources and the time to investigate can overlap with release, rendering the situation even more difficult.
 - iii. Third, was there a factual claim of innocence? If not, we do not take the case.
 - 3. Many cases are eliminated after first review. After the initial review, there can be over 3600 left.
 - 4. Questionnaires are then distributed with more detailed information about the case. Review of the results of those answers reduce the caseload down to 2100 cases.
 - 5. Briefs are then requested on the remainder.

6. Cases are then screened, which takes up the most resources of the NCIP.
 - i. Most of the people who write to NCIP are guilty and that only comes out clearly after some investigation.
 - ii. Greater chance that defendant will go away after IP rejection than from DA rejection.
7. Investigation continues...
 - i. 50 cases open a month.
 - ii. There are 700 cases waiting.
 - iii. 250 cases closed per year.
 - iv. There are 100 active cases.
 - v. There are more cases coming in than can be disposed of in a given year.
8. In terms of taking up time of courts and resources of system, there have been 6 exonerations.

G. Questions:

1. JVD: what should be the cost of a decent statewide innocence project? \$1 million divided equally between two CA projects. That's barely what one exoneree would get after exoneration.
2. Hill: \$1 million to each innocence project!
3. JVD: What does that buy in terms of attorneys? Ridolfi will prepare a memo for the Commission.
4. Moulds: Is there a statutory, or otherwise, option to allow for recovery of attorneys' fees? That would help. What takes so much time is screening of cases. There is a cost-savings to state if IPs handle all cases.

VI. Linda Starr—obstacles to investigation:

A. Unnecessary resistance/downright hostility/scorn—confronted by IP during investigation.

1. Reflexive reaction to any request for testing, information—too often the response is that there is no right to this information and there is no interest in cooperating.
2. Typical response: the evidence doesn't exist, but the agency has made no physical effort to verify, only a computer search
3. Even if there is evidence of innocence, there is no entitlement to relief b/c of statute of limitations

4. Statute is narrowly construed to resist access to testing. Testing should be the default and then consideration of its importance to the scene.
 5. Why not just test the samples and get the answer? Our statute does provide for reasonable probability. Justice Fletcher suggested that maybe reasonable possibility is a better standard than reasonable probability.
 6. There have been great collaborative relationships with many offices of DAs and law enforcement agencies. There are examples of both collaboration and hostility.
 7. CCFAJ has demonstrated how all sides can work together.
 8. IPs should be recognized as allies in the efforts
- B. Access to Information, both post-conviction discovery and access to evidence for DNA testing
1. Limitation of statute to capital cases and LWOP and petition for Writ of HC when motion to vacate has already been filed. Cases of IP are when they need access to evidence list, coroner report, etc. to determine whether a claim ought to be made.
 2. When access is limited post-conviction, no judgment can be made whether to pursue claim.
 3. Cases will be distributed in binders that illustrate difficulties.
 4. Without post-conviction discovery, there is nothing else that IP can do. Requests can be made, but since there is no right to post-conviction discovery, then it's difficult. Since Mr. Chamberlain thought that 1054.9 was available to all cases, maybe we ought to amend statute in that way.
 5. Statute could be expanded. Or we could establish an Innocence Inquiry Commission modeled after NC. There are tremendous resources here to assist CA in this work
- C. Legal impediments
1. Denial of access to evidence
 - i. agency or court is called for evidence and request is denied.
 - ii. Motion to destroy has been sought and therefore the evidence does not exist. Frequently, there is no

- effort to see whether the evidence exists. In one case, it took 2 years to get an answer.
- iii. In the Pete Rose case, there were people searching for evidence to be tested, but we were told that all the evidence had been destroyed. Finally, students located evidence which had not been destroyed. Evidence was tested and Rose was released.
 - iv. This evidence should not be subject to serendipitous discovery. There should be more accountability for this evidence.
 - v. Most Courts and agencies aren't aware of 1417.9 requirement to keep evidence. It took five years before Sacramento County knew that they had obligations under this statute.
 - vi. Expectations need to be changed. Evidence should be retained according to the statute. People should have to get up and look to see whether evidence exists. There needs to be expectation of precise trail of evidence. That information should be shared with the IP.
 - vii. In addition to necessary training, there should be a form to be filled out by people who should be aware of requirements of 1417.9.
2. Penal Code §1405—tremendous litigation happening right now
- i. It's being interpreted very narrowly.
 - ii. Case of Kevin M—rape and robbery of woman.
 - a. Defendant asked for biological evidence testing. Court denied testing. Defendant tried to access testing through Federal Court. Federal District Court appointed NCIP as counsel.
 - b. Although matter had been prosecuted by Alameda County, the rape had been processed in Santa Clara. NCIP contacted Santa Clara to get testing done. Alameda County DA objected to testing which caused Santa Clara to decline testing.

- c. Defendant had to use tremendous resources to litigate matter in federal court. This is a waste of resources.
 - 3. Restrictions on right to proceed on Habeas Corpus
 - i. Habeas can be brought by anyone restrained of their liberty. It's been narrowly construed using Federal cases. Federal statute requires actual/constructive custody, not restraint of liberty in any way whatsoever.
 - ii. See Edward E. case in binder.
 - iii. Statute should be modified to include situations like Edward E. case where person is not incarcerated.
 - 4. Services for exonerees
 - i. Exonerees are mentally and physically scarred. There aren't any resources available.
 - ii. John Stoll case. When Stoll exited prison, he had a brown paper bag full of everything he owned.
 - iii. Head of NCIP took John Stoll home for one year. NCIP got volunteer services from doctors, dentists, financial advisers, etc.
 - iv. We ought to do better to set up adequate systemic services.
- VII. Mark Windham, Head Deputy, Los Angeles County Public Defender's Office; Representative of California Public Defenders Association
- A. Bio
 - 1. Head of unit in LA Public Defenders' office that litigates DNA cases.
 - 2. There is a staff of 12 attorneys, largest in the country, that work on these issues.
 - B. New paradigm: DNA testing is now more common in criminal cases, wherever possible.
 - 1. Old paradigm was to gather other evidence and to confirm it with DNA evidence.
 - 2. New Paradigm: testing of crime scene samples right away for DNA.
 - 3. Wrongful convictions based on DNA evidence will occur and will be more difficult to detect, see case of Josiah Sutton in Texas. There is a risk that when DNA

evidence is involved, more credence will be given to the conviction because it was used, even though other faulty work could lead to a wrongful conviction.

C. Three areas to consider:

1. When DNA is silver bullet, we have to consider who is pulling the trigger. There are limits to the uses of DNA evidence; not to discount the power of DNA evidence.
2. Electronic Data—rarely re-testing biological samples. It's possible that wrong samples were tested, etc. Testing that is done is typically very probative and very well done. It's subject to error of interpretation. The way to check this is to see the lab and bench notes and to see the record produced by machine. Those records are easy to preserve, but statues do not require its preservation.
3. Database access—it's important to get discovery to the DNA database. There is a risk of coincidental matches. For example in Arizona, there were 122 pairs of individuals who matched at 9 loci and 10 matched at 10 loci. That may create problems. People who are not related were turning up as matches/relations. When a crime scene sample is taken, it may be exposed to the elements, and in such case the degraded sample may yield results at fewer loci, increasing the risk of a coincidental match. The chance of coincidental match is quite high at 5-6 if the offender database is not operating as it should. There is a Hobson's choice faced by the defense when the defense says there was a 3rd party. It's said that this should not be allowed, but in every exoneration a 3rd party was responsible for the crime.

D. Recommendations

1. Preserve electronic data
2. Allow access by court order to State database, notwithstanding fed and state law, but because due process in some cases demands it.
3. Open discovery at outset in trial court. Compliment Steve Cooley and Barry Fisher about being open with discovery.

4. Access to experts—easy in LA, but more difficult in other areas
5. Increase level of training—both for prosecutors, defense, and bar to know what DNA means.

E. Questions

1. Moulds: how hard would it be to farm out the access to experts? It's done on a county by county basis.

VIII. Jon Eldan, Attorney at Law, Coblenz, Patch, Duffy & Bass LLP

A. Bio

1. Commercial, Civil Litigator
2. Volunteer Legal Coordinator for Life After Exoneration for a few years—organization advocates for legal reform

B. Issues

1. The numbers will always be small, in terms of exonerees. But we need to make sure that people are cared for when a mistake is made.
2. Pro Bono work is focused on helping exonerees find pro bono legal assistance with problems upon release. Some of those problems include:
 - i. Financial/Bankruptcy
 - ii. Loss of custody of a child
 - iii. Expungment—major impediment to employer or landlord
 - iv. Psychological toll of wrongful conviction—not all exonerees can testify like Herman did; most don't own a suit.

C. The Language of Exonerated vs. Exonerees

1. What does this term mean?
 - i. Dictionary: “free from blame or guilt.”
 - ii. Does that fit everyone who has their conviction vacated? When guilty finding is canceled, vacated, or removed, do they return to “innocent?”
2. We are trying to get at actually innocent people, but it's difficult to find out innocence b/c of process.
 - i. When someone gets out, they have had their conviction vacated. The appellate court's role is not find innocence, but to determine whether conviction should be overturned.

- ii. What about notice? The only thing we can do is give notice to everyone.

D. Recommendations for Reform

1. Increase six month deadline for statute of limitations—read §4901. Administrative agency is expressly denied right to make exceptions. That should be fixed. 19 of 22 states which have compensation statutes have 2-3 years. We should do the same.
2. There should be a set-off with civil case. But people who have missed the deadline should have a couple of years of retroactivity. There hasn't been a flood in other States.
3. CA has civil board for Victims Compensation. There should be a nexus between Victims Compensation Board and what the Courts are doing.
4. Statute requires that AG be given 15 days notice of hearing and to present evidence. When Board receives claim and forwards to AG, is that an ex parte communication?
5. Services—they should be enumerated and determined through a delivery mechanism. Nuts and bolts of holistic services, beyond money, needs to be determined.
6. People of CA deserve an analysis of what happens at Victims Compensation Board.

IX. Richard Schoenberger, Attorney for Exoneree Rick Walker, and Rick Walker, Exoneree

- A. Cautionary Tale about consequences of Walker exoneration: it is rare that cases end up going as far as his did. Legal obstacles are almost insurmountable.
- B. Are there inappropriate obstacles to asserting civil claims against the perpetrators of the injustices that led to their wrongful conviction?
 1. Immunities provided to prosecutors are absolute; qualified immunities offered to investigators
 2. Civil lawsuit against a public entity for civil rights violation, particularly in murder conviction where someone intentionally made this happen, is very difficult.

3. Scorched earth defense that Walker faced was fair. Federal Law is very protective and makes the defense case very difficult. As a result, defense attorneys threw the kitchen sink to the Fed Court and the issues were narrowed.
 4. Their goal was to get in front of a jury so that people could recognize who Rick Walker was.
- C. Be careful before we assume there is always a civil remedy out there.
1. It's not easy to get a civil judgment in these matters.
 2. Try not to use the Walker case as an example of what can be done. It's doable, but relatively rare. Front-end load the fairness.
 3. CA Statute of Limitations for personal injury is now 2 years, not 1 year. Increasing the Statute can be done.
- D. Questions
1. Streeter: 1983 case, how long from filing to disposition? 3.5 years. No appeals in the interim.
- E. Testimony of Rick Walker
1. Been out since June 9, 2003—now a technician for an automotive services.
 2. System should not be based on wins and losses, but fairness.
 3. Expunging record is very important. Rick Walker was not allowed to visit other inmates because he is still listed as having been convicted. Now he is fighting to get back into prison...
 4. There should be immediate relief in terms of services.
- X. Mark Merin, Attorney for Exoneree Pete Rose
- A. Bio:
1. Civil Rights attorney in Sacramento
 2. Background: Prof. Susan Rutberg and Janis Brinkley called him after they had obtained the exoneration of Pete Rose. Merin was asked to look into civil rights action.
- B. Rose case
1. 2-3 causes of action against San Joaquin, City of Lodi, and State of CA, and Harry Hudson, trial attorney of Mr. Rose. Of all those, the most responsible was his trial attorney.

2. *Coscia v. McKenna & Cuneo*, 25 Cal4th 1194 (2001)— statute of limitations on legal malpractice starts to run on conviction. That made the trial attorney out of reach.

C. Recommendation:

1. No bar in statute; Supreme Court evaluation reversed *Wiley v. County of San Diego*. Element of claim against defense attorney is that inmate establish wrongful conviction/factual innocence and then statute would run. Rule was revised by *Coscia*.
2. We need a clarification on when the statute begins to run for defense attorney malpractice. Upon declaration of factual innocence or conviction?

D. Question

1. Streeter: what about tolling? That argument was rejected by 3rd District Court of Appeal. That only applies to specified disabilities in statute. Imprisonment is not one of those disabilities.
2. Moulds: problem in federal court was that he was held not to be a federal actor, the defense attorney. Was the State lawyer appointed? Yes. The law says you can't sue the county, but the county bar association which prepares the list.
3. Totten: was complaint filed to state bar against Hudson? Unsure. Merin didn't file complaint.

XI. Herman Atkins, Exoneree

A. Appearing on behalf of California Wrongfully Convicted Council and all exonerees across nation

B. Obstacles to getting claims of innocence heard

1. Not enough lawyers to help people with innocence claims, DNA and non-DNA.
2. Who does get exonerated?
 - i. Convicts who can get attention of IPs
 - ii. Families with resources to obtain attorneys
 - iii. When the inmate acts as his own attorney.
3. Who doesn't get help?
 - i. Usually the uneducated, the poor, or people who can't write convincing letters to IPs or defense lawyers.

- ii. The exonerees can write sufficient letters to grab attention of certain individuals.
 - 4. Solution: create a panel with volunteer attorneys to aid and assist in these claims as well as expungments of those who have been wrongfully convicted. Records are not automatically expunged.
- C. Adequate compensation to people wrongfully convicted
- 1. Guilty get more help than the person who is wrongfully convicted.
 - 2. How is it that an actual perpetrator can get state-funded resources to reacclimatize to society as opposed to the wrongfully convicted people who get no resources? Atkins petitioned to Dept. of Rehabilitation for funding for education. His father was a highway patrolmen who knew someone in that organization.
 - 3. Exonerees don't have:
 - i. Identification
 - ii. Place to live
 - iii. Job training
 - iv. Counseling
- D. Are there too many legal obstacles to compensation?
- 1. The current system has not worked. The law has changed from \$10,000 to \$100 per day. He was denied b/c of statute of limitations.
 - 2. Six months is very limited.
 - i. Most wrongfully convicted are trying to get back on their feet at that time.
 - ii. Unless the lawyer who fights for the exoneration also counsels the exoneree post-exoneration, he can be left to miss the Statute of Limitations.
 - 3. His civil case allowed him to get basic services. Had he not won the judgment, he would be in the same predicament that most exonerees in CA. The burden is on the exonerees. In the *Tennison* and *Goff* cases, they had proof of factual innocence but were still denied.
 - 4. Solution: how to make a person whole? Lessen the restrictions that do more harm than good for exonerees.
- E. Atkins requests to be part of the Commission.
- F. Question:

1. Ridolfi: amount of civil judgment in your case? \$2 million.
2. JVD: You were denied State Compensation of \$100 per day b/c you missed on the Statute of Limitations? Yes.
3. Ridolfi: how many years in prison did you spend? 12 years.
4. JVD: how many people on the Council? 18. But there are a total of 22 exonerees in CA. The Director could give more statistics if contacted.
5. JVD: When you contacted the NY Innocence Project to help in your claim, they did not know about CA compensation statute? Correct. Johnny Cochrane's assistant was supposed to help with that. Recommended to extend to two years.
6. Ridolfi: IPs do handle compensation claims.

XII. Jeff Rawitz, Partner at Jones Day and Attorney for Exoneree Dwayne McKinney—no comments.

XIII. Public Comment

A. [David Lockmiller](#)—protestor at Thomas Thompson execution in California at San Quentin. Explains history of Thompson case.

1. Recommendation that 42 USC 1983 be amended to include prosecutors and also included in law as CA law.
2. Wants a lift on absolute immunity for prosecutors.

B. Rev. Howard Dotson, California People of Faith Against the Death Penalty

1. Is there a need for a permanent Innocence Commission? Definitely yes
2. 3rd point of Charge: to insure fair, just, and accurate administration of justice.
3. Beware of the Prison Industrial Complex—we need to be sure that the financial influences of the prison industry do not encroach on the fair administration of justice.
4. JVD Response: This Commission has a more narrow focus, not on sentencing reform or 3 strikes law.

C. Heather Weigand—director of Life after Exoneration

1. Worked with over 70 exonerees.

2. Lack of funding for social services for exonerees. She is a formerly incarcerated person, let out in 2000. She has committed her life to helping the innocent.
3. In 2005-2006, Life after Exoneration had a \$100,000 budget and two social workers, serving over 70 exonerees.
4. Stages of Life after exoneration were documented. Debilitating fear of getting caught by gov't again.
5. Recommendation for Services:
 - i. Safe Community Re-entry Council in SF
 - ii. SB 618—to provide funding for specific population, violent felons, upon their re-entry. The least we can do is provide that for exonerees.
 - iii. [Model bill based on SB 618](#)—appropriates funds for the Dept. of Corrections to give money to service providers to give immediate relief to exonerees.