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Testimony before the California Commission on the Fair Administration of Justice, Oct. 17, 2007

Thank you for inviting me to testify. I appreciate the important work that the Commission has already undertaken to strengthen the California criminal justice system and your commitment to this review. Eliminating wrongful convictions is a goal that unites the entire criminal justice community. The very integrity of the system is challenged by the growing number of wrongful convictions. Moreover, every wrongful conviction contains two tragedies: the first, a life lost to unjustified incarceration; the second, a public safety nightmare concerning a victim who incorrectly thinks she is safe and the rest of us subject to a dangerous perpetrator who remains at large to commit additional crimes.

You have a copy of the relevant ABA policies and reports of the Criminal Justice Section Committee that I co-chaired. I was the person primarily responsible for two of the issues that are being addressed today: compensation and the creation of systemic remedies. I want to make clear that I do not represent the ABA in my comments today, and some of my personal views go beyond the policies that the ABA adopted. My current remarks are tailored to the specifics of California legislation and practice. I know that others will also discuss a number of these issues, so I will try to be brief, though I would be happy to answer any questions.

Regarding compensation, California can pride itself as being in the minority of states that has recognized the importance of enacting a compensation statute for individuals who have been exonerated of crime. However, in answer to the Commission's question of whether exonerees are receiving adequate statutory compensation, my answer is a resounding no. I know some will say we already have a statute, and if it's not broken, it doesn't need fixing, but the California statutory scheme has substantial flaws when analyzed in light of the ABA policies and best practices.

The most obvious place to start is with the recovery that the statute provides. While a number of formulas could be adopted, I recognize that a dollar amount may be the easiest to compute, and provide more consistency to all awardees. One hundred dollars per day may have seemed generous compared with the limits imposed by other states when it was adopted. However, the Innocence Protection Act later passed by Congress provides \$50,000 a year for federal exonerees, and \$100,000 per year for those who served time on death row. Texas recently adopted a \$50,000 limit. While arguably even these sums are paltry for years of lost freedom in harsh surroundings, they are more financially realistic in today's economy than the \$36,500 California cap.

Penal Code sections 4900 and 4904 also refer to compensation for "pecuniary injury." Since the current compensation appears to be the same, regardless of the

individual circumstances of the exoneree, this reference seems superfluous. In other words, the theory underlying uniform recovery is that any wrongful incarceration is worthy of compensation, whether or not the exoneree is an unskilled, unemployed, single laborer, or a highly paid business executive with a family. However, because the statute uses the term “a sum equivalent to \$100 per day,” it could arguably authorize that amount only on a showing of pecuniary injury. Indeed, the Compensation form that must be submitted includes a Pecuniary Injury Statement requests “Facts showing the pecuniary injury (financial loss) sustained by claimant through his/her erroneous conviction and imprisonment.” Undoubtedly, this statement is mentioned in the Attorney General’s recommendation to the Compensation Board, although it is unclear if any claims have been disallowed for lack of financial loss.

One way to provide fairer compensation is to make the chosen amount a minimum that could be increased in exceptional circumstances, such as when there has been clear governmental misconduct or the conditions of confinement were particularly harsh. Further, the California statute does not provide for any attorneys fees, even though hearings before the Compensation Board may be contested, or the report to the Board may not be favorable to the claimant. Given the relatively low statutory recovery, this failure to provide for attorneys fees may hamper resort to the statutory scheme. Similarly, unlike the ABA policy, the statute does not provide for relief from any governmental obligations incurred as a result of trial.

On a related issue, neither California nor the ABA policy mentions the relationship between statutory compensation and other legal claims the exoneree may have. In my view, the main rationale for compensation legislation is to ensure that all exonerees can recover, because the problems associated with successful constitutional litigation are so great, although the financial rewards for those who win typically eclipse any statutory remuneration. Thus, I am personally uncomfortable with what might be viewed as double recovery. However, I do not believe that the exoneree should be forced to choose which redress to seek. In other words, if the statute is amended, it might be appropriate to require that any other monetary recovery arising from the wrongful conviction be deducted from the statutory remedy or later repaid.

Unlike compensation statutes that provide for an exclusive remedy, this would encourage lawyers to bring statutory claims, since the statutory compensation is likely to be decided well before the termination of litigation, and could provide an earlier source of money to exonerees who often depart prison with little or no financial resources and skills that are likely to be completely out of date. Indeed, another problem with the current legislation is the absence of any standard to provide emergency money and services to individuals who are likely to obtain a recovery.

More generally, the statute fails to provide for any services. The Criminal Justice community has recognized that many convicted individuals are unlikely to be able to succeed without reentry services. Fairness dictates that those whose only crime is being convicted should be treated as least as well. Moreover, beyond the basics of obtaining housing, vocational training or additional education, and jobs, the literature indicates that

many exonerees suffer from Post Traumatic Stress Disorder or have other emotional or mental health care needs from being assaulted by the system, often for decades, with no one validating their claims of innocence.

The ABA compensation policy specifically addresses services, though it does not take a position on how those services should be provided. Placement of services is not simple. Ultimately, given the small number of exonerees, it is not practical to set up a separate bureaucracy. Instead, the decision is whether to place services in the criminal or civil system. My own choice would be within the Health and Human Services Agency to avoid additional association with the criminal justice system.

Another problem with the present compensation statute is that California Penal Code § 4901 also has a very short 6 month statute of limitations. In fact, the Compensation Board recently reversed its precedent in order to allow some late claims when the individual is not given notice of the statutory remedy. The statute also has an incomprehensible timing requirement concerning the relationship of when the claim is filed to the start of the legislative session. In contrast, the ABA policy supports a one year statute if notice is given and two years if it is not.

Undoubtedly, the most difficult policy issue posed by PC § 4903 concerns its requirement that the claimant “did not, by **any act or omission** on his part, either **intentionally or negligently, contribute** to the bringing about of his arrest or conviction for the crime with which he was charged.” This requirement is much more difficult for an exoneree to satisfy than the suggested ABA standard, which is “The claimant’s own **misconduct** should not have **substantially** contributed to the conviction.”

Indeed, the California standard is so strict while a recent Attorney General’s report to the Compensation Board concerning James Ochoa noted the while the Attorney General did not intend to present evidence to oppose the claim at the hearing, the claimant’s voluntary plea rendered his claim “more problematic” under the statutory standard. Similarly, *Tennison v. California Victim Compensation and Government Claims Bd.*, 152 Cal.App.4th 1164, 62 Cal.Rptr.3d 88 (Cal.App. 1 Dist. Jun 28, 2007) (NO. A112313), review denied (Oct 17, 2007), recently found that an alibi not proffered by defense counsel could be sufficient to reject the claim. *Id.* at 1190.

Tennison also highlighted the difficulty of proving innocence when a reversal is not based on insufficient evidence, even if charges are dropped. The court held that a stipulation by a DA that a defendant was factually innocent under PC § 851.8, was not sufficient under the current compensation statute to demonstrate that the claimant was factually innocent. *Id.* at 1177. In the alternative, if the stipulation applied in the context of the compensation statute, collateral estoppel was not appropriate because the conviction was overturned on a *Brady* violation, not on insufficient evidence, even though the evidence may not have warranted a conviction at a new trial. *Id.* at 1178. The high bar posed by the finding of innocence is exacerbated when the claimant loses before the Compensation Board because *Tennison* held that the judicial review of the

administrative decision is based on whether the agency findings were supported by substantial evidence, viewing the disputed facts in favor of the decision. *Id.* at 1182.

Personally I believe that the only conduct that should bar recovery is intentional manipulation of the judicial process, such as if a person confesses or pleads guilty to protect someone else. In contrast, the current standard is a virtual landmine for any exoneree who has either pled guilty or falsely confessed. Nationally, false confessions have been cited as a factor in approximately 25% of wrongful convictions. The recent literature has recognized that youths and individuals with low mental abilities are particularly susceptible to falsely confessing given prevailing police questioning practices. In addition, defendants may be subjected to lengthy questioning by officers who are permitted to lie to them and use psychological tactics aimed at procuring confessions. Under current legal standards, many of these confessions are not considered involuntary. However, it is disingenuous to suggest that such questionably obtained confessions should defeat a later claim for compensation when the defendant is exonerated.

Similarly, given harsh penalties for repeat offenders, it is foreseeable that some offenders will view their best alternative is to plead guilty to a crime they did not commit when the prosecutor offers them a much lower sentence than they would otherwise receive. Compensation legislation that totally ignores the fact that the defendant pleaded guilty is unlikely to pass. However, the ABA policy, which received support spanning the entire criminal justice community, recommended that conduct by the defendant be considered on a case-by-case basis, and not act as a per se disqualification. The policy states “A false confession or guilty plea does not automatically bar recovery.” For example, exceptions could be made for pleas in cases involving police corruption, such as occurred as a result of the Rampart scandal; or where the judge or prosecutor has made public statements about imposition of severe penalties unless the defendant pleads guilty.

Other possibilities exist to ameliorate the harsh disqualification of the current statutory provision. The reference to “negligently” could be deleted from the statute. The statute could be worded to require misconduct, rather than any conduct. Like the ABA policy, the conduct could be required to be a substantial cause of the conviction. This entire issue could be made an affirmative defense, requiring the prosecution to raise and prove it. Similarly, it could be treated as a comparative negligence issue that would lower the recovery, but not completely disallow it.

Generally, I am concerned that the statutory scheme is not clearly drafted. A first reading could easily result in one assuming that a pardon is needed to obtain relief. I know that others will more directly discuss practice, but it appears that the provisions related to the Victim Compensation and Government Claims Board requires recoveries to come from the budget of the agency against which the claim is filed, and an additional 15% surcharge is assessed. It is unclear to me how this operates concerning wrongful convictions, since Penal Code § 4904 provides that the Board shall recommend to the Legislature that an appropriation be made. Depending on the financing, the AG’s office might be given an incentive to contest suits, given the substantial payouts that are likely

to occur to individuals who have been incarcerated for decades. Also, unlike a court or most ALJ decisions, the “prosecution” appears to get two bites of the apple in compensation hearings. In other words, before any contested hearing, the Attorney General’s office writes a memo detailing the eligibility of the claimant. Unlike the victim compensation process, there is also no internal appeal procedure for claimants alleging their innocence. Moreover, the Board’s website at www.boc.ca.gov is not user friendly concerning wrongful conviction claims for those exonerees who can access the internet. This type of claim is not listed on the home page. While the form is available on the website, none of the frequently asked questions or other information appears to address such claims.

In my remaining time, I would like to briefly discuss why I believe that California needs a process for permanently monitoring wrongful convictions. Wrongful convictions are not likely to go away without significant changes in criminal justice practice. Unfortunately, the recent veto of the three important bills originated by the Commission concerning eyewitness identification, videotaping of confessions and corroborating jailhouse informant testimony is a blow to all of us who believe that the way to strengthen the criminal justice system is to enact proactive policies that better ensure the conviction of the guilty and the acquittal of the innocent.

If the causes of wrongful convictions are not alleviated, it is unrealistic to assume that new technology will come to our rescue. Indeed, laboratory scandals in a number of jurisdictions indicate that forensic science can be the cause as well as the cure for wrongful convictions. Thus, in my view each state should have a permanent body to monitor the precise problems identified in the jurisdiction. As the ABA report suggests, this could be done in a variety of ways, including resort to criminal justice coordinating committees that include representation from the stakeholders in the system, such as the California Council on Criminal Justice.

I do not believe that this Commission’s work will be done by the time its authorization sunsets. Whether or not the Commission is reauthorized or this task is folded into an existing agency, it is critical that California continues to monitor wrongful convictions through the auspices of a group that is independent, well respected, and that has the authority to suggest both legislative and practice oriented solutions. Such a body could encourage local experiments concerning eyewitness or videotaping practices, whose success might then support more global legislative efforts.

Finally, the Commission specifically asked for views concerning the creation of an Inquiry Commission modeled on North Carolina. This model is meant to function similarly to the process adopted in Great Britain where individual cases are reviewed and can lead to questionable convictions being overturned. As the ABA report discusses, our system of justice is focused on ensuring fair trials. Neither direct appeal nor collateral review is designed to review whether the defendant actually is innocent. Therefore, creating an alternative procedure to protect factually innocent defendants whose convictions cannot be reversed on procedural grounds is definitely a valuable contribution to the criminal justice system.

Having said this, any Inquiry Commission must also be cost effective. In other words, the standard cannot be set so low that the staff would be inundated by requests that require extensive investigation, but cannot be set so high that few if any defendants can meet its initial requirements. North Carolina has dealt with this problem in part by requiring the Commission to consider claims of factual innocence that are credible, verifiable and never previously heard at trial or in a post-conviction review. Thus, the claims must be supported by new evidence. Practically, this means that most claims would now be barred in other proceedings, although the Inquiry is not intended as an exclusive remedy.

While this standard effectively limits potential claimants, the fact that California has a much larger prison population than North Carolina or for that matter Great Britain, is an issue that must be addressed. In 2006 we had more than 5 times the number of North Carolina prisoners (approximately 32,000 versus 175,000). As daunting as this number sounds, given the recent North Carolina experience, such a review may be feasible in California. First, recognizing that innocence claims involving defendants who pleaded guilty could both be numerous and controversial, North Carolina has delayed the acceptance of such claims until November, 2008. Those claims will also require unanimous agreement of the eight member Commission before they can be submitted to a panel of three Superior Court judges for a hearing.

North Carolina has also attempted to deal with limited funding for the Commission by relying on the North Carolina Center on Actual Innocence and law student volunteers to help with the initial screening of claims. California clearly has several Innocence Projects that could be employed, as well as a larger pool of law students. North Carolina also provides a disincentive for individuals who apply in that the defendant must agree that any evidence of other crimes that is discovered in the investigation will be referred to the prosecutor. The detailed rules and procedures for the North Carolina Commission can be accessed at <http://www.aoc.state.nc.us/www/ids/Other%20Manuals/Innocence%20Inquiry/innocence%20commission%20rules%20and%20procedures,%20rev.%2008-24-07.pdf>.

Since January 2007 the North Carolina Commission has received more than 300 claims, which have been initially reviewed, despite the fact that the staff was only finalized in April. Based on statistics from the NC Center on Actual Innocence at least 90% of Claims are rejected before investigation, many simply because they involve claims that do not arise in the state. At the investigative stage the Commission's staff becomes key in determining whether the innocence claim has been or can be satisfied. The staff has subpoena power and can order DNA testing. This stage is non-adversarial, and neither the claimant nor the state is represented. Currently about four cases are nearing completion, which may result in their being presented to the Commission. If five members of the Commission find that there is "sufficient evidence of factual innocence to merit judicial review," the claim is submitted to a three-judge panel. While the judicial stage is adversarial, it is likely that cases that have survived the process will be ones that

will not be opposed by the prosecution. The three judges must unanimously agree to dismiss the conviction based on clear and convincing evidence of factual innocence.

As in North Carolina, it would be prudent to provide that such an Inquiry Commission would sunset after several years unless it was reauthorized. The placement of the Commission must also be considered. In North Carolina, the Supreme Court initiated its original Innocence Commission, and was instrumental in supporting the Inquiry Commission, which was enacted legislatively, and signed into law by North Carolina's governor. Our model has not been judicially driven, and input from the judiciary could prove beneficial in the design of a California model. In my experience, the issue of subpoena power may be viewed as particularly controversial.

In conclusion, I believe it is crucial that convicted individuals be able to demonstrate their innocence and obtain their freedom when the judicial system fails them. However, I recognize that the devil is in the details, and the North Carolina process must be studied carefully to see how to best translate it to California. Similarly, the Commission might also consider drafting legislation that would create a claim for judicial review in California based on a credible and verifiable demonstration of factual innocence, whether or not the claim is otherwise barred by current habeas restrictions. This type of remedy would not provide for additional investigation of the claim by any specially constituted entity, and is not inconsistent with the adoption of an Inquiry Commission.

Thank you again for offering me the opportunity to address you.