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Wrongful Convictions and the Accuracy of the Criminal Justice System

H. Patrick Furman

University of Colorado Law School

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Wrongful Convictions and the Accuracy Of the Criminal Justice System

by H. Patrick Furman

Editor's Note: In a future issue of *The Colorado Lawyer*, a member of the Colorado District Attorneys Council ("CDAC") intends to provide a different perspective on the issue of wrongful convictions.

The wrongful conviction of an innocent person is the worst nightmare to anyone who cares about justice. Eighty years ago, Judge Learned Hand said, "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream."¹ The good judge was, as events of the last decade have conclusively proved, simply wrong. Although the criminal justice system has a number of safeguards designed to ensure that wrongful convictions are avoided, and the overwhelming majority of convictions are accurate determinations of fact, it is clear that wrongful convictions do occur.

For decades, public attention focused on the danger of a guilty person going free. Some people question, for example, whether the trade-off created by the exclusionary rule between the loss of probative evidence and the need to regulate police conduct is appropriate.² Others argue that the courts are too stingy in admitting evidence of other misconduct by a criminal defendant.³ Although these issues can affect the accuracy of factual determinations by the criminal justice system, this article focuses on the other side of the accuracy issue: the danger of convicting a factually innocent person.⁴ Recent advances in DNA technology and other forensic sciences, along with hard work by lawyers and non-lawyers alike, have focused attention on the danger and reality of convicting an innocent person.⁵

CONCERN ABOUT WRONGFUL CONVICTIONS

Wrongful convictions are a concern of prosecutors and defense lawyers, liberals and conservatives, lawyers and non-lawyers. The issue involves the accuracy in the justice system, and accuracy is a goal that is shared by everyone. It concerns anyone who cares about law enforcement and public safety. For every innocent person wrongfully convicted, a guilty person roams free. Indeed, because the justice system is one of the cornerstones of democracy, it is not an overstatement to say that wrongful convictions concern anyone who cares about a democratic society.

A criminal justice system should be fair to all: wealth, race, and social status should not affect the administration of justice. American constitutional history is replete with cases addressing this promise. For example, *Gideon v. Wainwright* estab-

lished the right to counsel, regardless of ability to pay;⁶ *Tumey v. Ohio* established the right of a defendant to a judge free of personal interest in the case;⁷ *Brady v. Maryland* established the right of a defendant to exculpatory information in the hands of the prosecution;⁸ and *Batson v. Kentucky* barred the improper use of race in jury selection.⁹ Decisions like these breathe life into the principle that no one shall be denied life or liberty without due process of law and that all persons are entitled to the equal protection of the law.

Even more fundamental is the principle that no justice system can operate fairly unless it can accurately determine guilt and innocence. The accuracy of the criminal justice system has been called into question in recent years by revelations, often generated by new DNA investigative techniques, of innocent people across the country in prisons and even on death rows.

THE FREQUENCY OF WRONGFUL CONVICTIONS

It is impossible, given the state of current knowledge, to determine precisely how many innocent people have been wrongfully convicted. A Harris Poll of Americans taken in 2000 revealed that 94 percent of those surveyed believed that innocent people are sometimes convicted of murder, and estimated that this happens 13 percent of the time.¹⁰ Results of surveys of participants in the Ohio criminal justice system and of attorneys general across the United States were reported in a 1996 book in which the authors concluded that the best estimate of wrongful convictions from these respondents was 0.5 percent.¹¹ In January 2003, it was reported that at least 13 of the 167 inmates on death row in Illinois (approximately 8 percent) were innocent. This first led to a moratorium on the death penalty,



H. Patrick Furman is a Clinical Professor of Law in the Legal Aid & Defender Program and the Director of Clinical Programs at the University of Colorado ("CU") School of Law. The author thanks third-year CU law student Joshua Nelson for his research assistance.

next to a major study of capital punishment in Illinois, and then to the commutation of all remaining death sentences to life imprisonment.¹²

The question of wrongful convictions in capital cases has been studied more than the question of wrongful convictions generally. Error rates in capital cases may be higher or lower than error rates in other cases, but there is no obvious reason to assume that the error rates are significantly different. A 1987 study of potentially capital cases—cases in which the death penalty was, or could have been, sought—attempted to determine the reasons for such errors. This study found 350 cases of wrongful convictions in America between 1900 and 1984.¹³ Research into the appellate treatment of death penalty cases has indicated that as many as two-thirds of the death sentences imposed in American trial courts have been reversed by appellate courts, although only a fraction of these reversals was based on findings of actual innocence.¹⁴

If the general public's estimate of a 13 percent error rate in murder convictions is applied to the total number of serious crimes (the FBI's so-called "index crimes") for which there is a conviction, the number of wrongful convictions is more than 200,000. Even if the most conservative estimate, that 99.5 percent of convictions are valid, 7,700 innocent people were convicted of serious crimes in the year 2000.¹⁵ Applying the Illinois death row error rate of 8 percent yields more than 123,000 wrongful convictions.

Clearly, no system will ever be perfect, and a 99.5 percent accuracy rate would be an admirable achievement. Some commentators have argued that errors are inevitable and, even in capital cases, acceptable.¹⁶ Others would argue that the wrongful conviction of 7,700 people—much less, 123,000 people—is simply unacceptable. Still others question the accuracy of any of these error rates. However, regardless of how the accuracy rate is viewed, or how the trade-offs between the need to convict the guilty and the need to exonerate the innocent are balanced, most would agree that reasonable steps can be taken to improve accuracy in the criminal justice system.

SOME CAUSES OF WRONGFUL CONVICTIONS

There is a better understanding of the reasons why erroneous convictions occur than there is of the overall error rate. In cases where error has been established, it is becoming increasingly clear that mistaken identification is the leading cause of erroneous convictions.¹⁷ The other common causes of wrongful convictions are: ineffective representation by defense counsel; police and prosecutorial misconduct; perjured testimony, particularly by government informants; and the corruption of scientific evidence.¹⁸ Each of these is discussed in this section. First, a general description of wrongful conviction statistics and what they mean is in order.

The seminal study of the causes of wrongful convictions was conducted by Yale Law Professor Edwin Borchard and published in 1932.¹⁹ The study reviewed 62 convictions from 27 American jurisdictions and 3 convictions from England, all culled from a larger group of possible wrongful conviction cases that Borchard evaluated.²⁰ This study concluded that the most common cause of wrongful convictions was mistaken identification, the primary cause of 29 of the 65 wrongful convictions.²¹ Perjurious witnesses, over-reliance on circumstantial evidence, and overzealous prosecution were deemed the other most frequent

causes of wrongful convictions.²² Borchard also noted that false confessions were a recurring cause of wrongful convictions.²³

Some things have not changed much since then. In a book published in 2001, the most common causes of wrongful convictions were determined to be mistaken identifications, police and prosecutorial mistakes and misconduct, false confessions, and the misuse of informants.²⁴ Two major Canadian studies have highlighted the existence of the same types of deficiencies in Canadian procedures.²⁵ What has changed from Borchard's 1932 study is that ineffective assistance of defense counsel is now recognized as a significant contributing factor to many wrongful convictions.²⁶ This may be a reflection of the increasingly important role played by defense counsel in criminal cases during that interval (and the increasing scrutiny to which that role has been subjected), rather than a reflection of a decline in the quality of representation.

Data concerning the causes of wrongful convictions are becoming both more plentiful and precise. Improvements in the use of DNA as a forensic tool continue to help improve the accuracy of the fact-finding process. Although DNA evidence is not available to prove the innocence of a wrongfully convicted person in most cases, the cases in which it has been used to help demonstrate innocence have received a great deal of press attention and have helped spark more public attention and research into the causes of wrongful convictions.

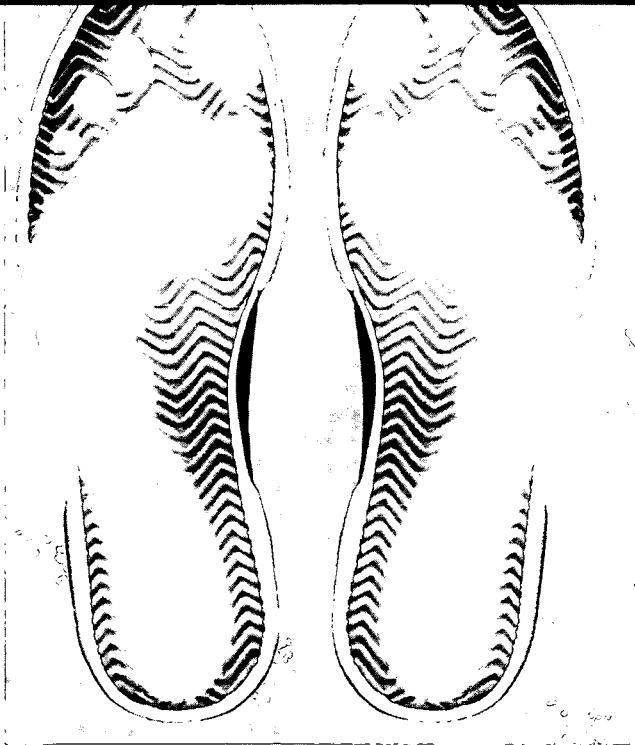
As discussed below, sometimes, as in the overwhelming number of mistaken identifications, the mistake is an "honest" one; that is, there is no intentional corruption of the system. Some of the mistakes and misconduct of defense counsel, prosecutors, or police also fit this description. However, other errors are the result of intentional misconduct by one or more actors in the system. To reduce the incidence of mistakes, proposals for improving the accuracy of the system must distinguish between the different types of errors and the reasons those errors occur.

Wrongful convictions that have been exposed through the use of DNA evidence have received a disproportionate share of publicity, perhaps because of the newness of the technology or because of the often-incontrovertible nature of the exculpatory evidence. However, most cases are not susceptible to re-evaluation with DNA technologies for many reasons, such as because there is no biological material capable of being tested or re-testing does not answer the relevant questions.²⁷ Issues concerning the accuracy of the criminal justice system grow even more troubling when race is considered. Any criminal justice system needs to periodically examine itself to determine whether race (or gender, wealth, ethnicity, or any other offender or victim characteristic) is improperly entering into the determination of guilt and innocence or into sentencing decisions. There has been a fair amount of research and scholarship into this question in the limited context of capital punishment, the general context of the criminal justice system, and the context of wrongful convictions.²⁸

At least four significant studies have been conducted on the impact of race on wrongful convictions. A 1987 study of 350 cases of wrongful convictions in sexual assault and homicide cases led to the conclusion that "the risk of a miscarriage of justice falls disproportionately on blacks when compared to their representation in the population, but not in comparison to their arrest rates."²⁹ In other words, any miscarriage of justice that exists lies in the arrest rate, not in the error rate after arrest. A 1996 study of 205 wrongful felony convictions concluded that "a disproportionate number are black or Hispanic."³⁰ Another

Are footprints as foolproof as fingerprints?

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The Mealey's E-Mail News Report notified the defense attorney of a recent court decision from the highest court in a neighboring state. He was surprised to find the prosecution's expert witness had also testified in that case. But the court held that footprints from inside a shoe were not a recognized area for expert testimony under the Daubert standard. As the defense attorney continued his search of analytical sources from Matthew Bender[®], including *Moore's Federal Practice*[®] on the LexisNexis[™] services, he quickly found further supportive commentary and analysis. When you need to go a step beyond cases and codes in your research, use the LexisNexis[™] Total Research System—It's how you know.



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1996 study of 87 persons released from death rows in America found that 54.4 percent of those released were members of a minority group.³¹ Finally, a 2000 study that focused on cases in which the wrongfulness of the conviction was established by DNA evidence concluded that at least 57 percent of the wrongful convictions involved a defendant who was a member of a minority group.³²

One of the facts that those concerned about the criminal justice system find troubling where wrongful convictions have been uncovered is that, in many cases, the criminal justice system was not the vehicle by which the error was discovered. Some have argued that revelations about wrongful convictions are proof that the system "works," but often it is not the system, but volunteer students, a persistent family member, a *pro bono* lawyer, or simple serendipity that uncovers the wrong.³³ Regardless of how the error is discovered, accuracy is critical to the proper functioning of the criminal justice system and it, in turn, is critical to the proper functioning of society. Reasonable efforts should be made to ensure the integrity of that system. An understanding of the causes of wrongful convictions may help in this process.

Mistaken Identification

There seems to be a consensus that the single most common factor contributing to wrongful convictions is mistaken identification. A study of 500 wrongful convictions that also reviewed earlier studies reached this conclusion in 1987.³⁴ A more recent study of 70 cases in which DNA evidence provided evidence that an innocent person had been wrongfully convicted concluded that mistaken identification was a factor in 87 percent of the cases studied.³⁵

Academic research on the topic has resulted in some unsettling statistics as well. Four crime-simulation studies of 294 people who attempted a total of 536 identifications in simulated robberies found that only 42 percent of the "eyewitnesses" correctly picked out the perpetrator.³⁶ Many (perhaps most) cases of wrongful conviction are the result of more than one factor, but these studies clearly indicate that improving the accuracy of the identification of the defendant as the perpetrator of the offense is the single most important improvement the justice system could make to address the overall problem of wrongful convictions. In almost all mistaken identification cases, the mistakes are genuine; that is, it is unusual to find a case in which a witness has purposefully identified the wrong person as the perpetrator.³⁷ Thus, witness misconduct is generally not an issue in these cases. However, all mistakes, whether honest or not, undercut the integrity of the fact-finding process.

These mistakes are exacerbated by the fact that the typical juror commonly places great confidence in identifications by eyewitnesses, particularly when those eyewitnesses testify with confidence. Studies have shown that (1) the confidence of an eyewitness in the accuracy of his or her identification is not related to the actual accuracy of that identification; but (2) the confidence exhibited by the witness is a "crucial determinant of believability" by jurors.³⁸ Other studies have demonstrated that jurors place more confidence in eyewitness identification testimony than in other types of testimony.³⁹ Further, the average person possesses a host of other misconceptions regarding the reliability of eyewitness identification testimony.⁴⁰

Psychologists and other social scientists have studied and reported on the reasons witnesses might initially be inaccurate in their selection of a perpetrator, but such findings are beyond

the scope of this article.⁴¹ Studies more relevant to this article focus on what the police can do to best preserve identification evidence⁴² and on whether line-up procedures used by law enforcement personnel exacerbate the dangers of mistaken identification.⁴³ These studies look at both actual cases in which some identification procedure was conducted and mock identification procedures.⁴⁴

Those who have addressed what the police can do to best preserve identification evidence recommend straightforward measures, such as the following. First, law enforcement should get as detailed and thorough a description of the perpetrator of an offense as quickly as possible. This is based on findings that a person's memory of an event is best immediately after the event, that memory then tends to fade quickly for a relatively brief period of time, and that the rate of decline in retention then levels off.⁴⁵ Additionally, every effort must be made to ensure that law enforcement personnel do nothing during the course of an investigation that might affect the ability of an eyewitness to make an independent identification.

Line-up Procedures

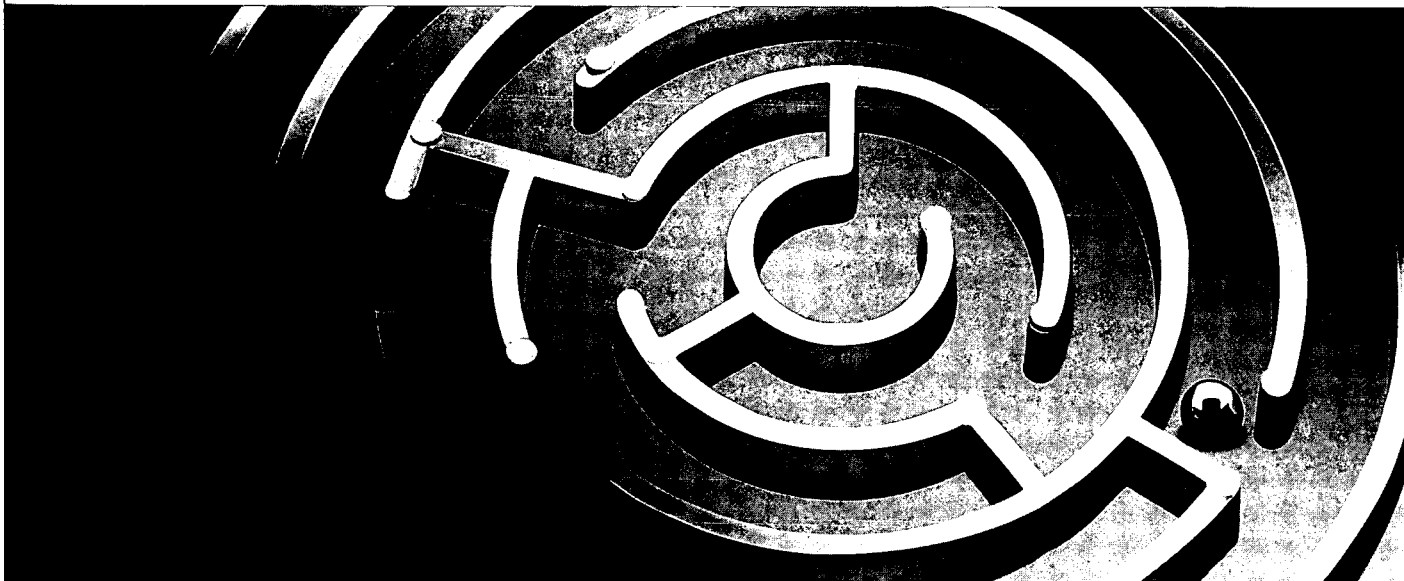
Line-up procedures have been the focus of much analysis. A 2001 study of identification practices in Sacramento, California, analyzed 284 photographic line-ups and 58 live line-ups conducted by law enforcement personnel.⁴⁶ In the 284 photo line-ups, the witness picked the suspect 48 percent of the time (the remaining 52 percent yielded either no identification or an incorrect identification).⁴⁷ In the 58 live line-ups, 50 percent of the witnesses selected the suspect, 24 percent selected a known innocent who was part of the line-up, and 26 percent made no selection at all.⁴⁸ A British study conducted in 1994 found that eyewitnesses selected a known innocent from the line-up in 22.5 percent of the cases.⁴⁹ Error rates in the range of 22 and 24 percent are clearly unacceptable.

Luckily, data are also accumulating suggesting that relatively modest changes in the traditional process of conducting photographic and live line-ups can significantly decrease the incidence of misidentification.⁵⁰ Most of these changes cost little, if any, money after some fairly straightforward re-training of personnel and re-writing of procedures is conducted. Here are a few of these procedures.

1. An eyewitness who is being shown photographs or live suspects should be shown those photographs or live suspects sequentially, rather than in a group.⁵¹ Traditionally, photographs or live suspects were shown to the eyewitness in a group. Research indicates that sequential, rather than group, viewing reduces the danger that the eyewitness will simply pick the photograph or person that most closely resembles the perpetrator based on the common and understandable belief of the eyewitness that the perpetrator is in the line-up.⁵² For the same reason, a request to look at a particular photograph or person should be met by having the eyewitness review all of the people or all of the photographs, not merely the requested one.

2. Another way of addressing the danger that a witness may try too hard to identify someone, despite instructions that the perpetrator may or may not actually be in the line-up, is to use a line-up that does not contain the suspect.⁵³ Although this carries a number of risks, both substantive (a valuable witness may be discredited beyond repair) and practical (it takes twice as long and twice as many photographs or live alternates), it can significantly boost the justifiable confidence in an identification that is made in a second or subsequent line-up.

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3. Line-ups could be increased in size.⁵⁴ American line-ups, both photographic and live, traditionally number five or six. Britain, by contrast, typically uses nine. A larger line-up size may increase the ratio of correct to incorrect identifications in the following fashion. In a larger line-up, an eyewitness who is making his or her best guess, rather than truly identifying the perpetrator, has more innocent "foils" from which to choose and is therefore more likely to choose a known innocent rather than inaccurately choose an innocent suspect.⁵⁵ Colorado courts have implicitly recognized this issue by holding that "the fewer the pictures, the closer the array must be scrutinized for impermissibly suggestive irregularities."⁵⁶

4. To avoid either intentionally or unintentionally giving clues to the witness, line-up procedures should be conducted by a person who does not know the identity of the actual suspect. Traditionally, the person conducting the line-up procedure knows the identity of the suspect.⁵⁷ It appears that clues that a witness is looking at or has selected the "right" person or photograph often are given by the person conducting the line-up procedure.⁵⁸ Because these clues are usually unintentional and often subtle, the only way to avoid the danger is to keep the person conducting the line-up procedure in the dark as to the identity of the person who is suspected by the police (a so-called "double-blind" line-up procedure).⁵⁹

5. Taking greater care and considering more variables in selecting the "foils" may help reduce mistaken identifications. Traditionally, foils are selected based on their resemblance to the suspect, and arguments about the fairness of the selections often have centered on whether the foils resembled the suspect.⁶⁰ Some research suggests that foils should be selected with greater consideration given to the eyewitness's description of the perpetrator rather than to the appearance of the suspect.⁶¹

Regarding the selection of foils, one of the factors that courts consider when evaluating the fairness of a photographic line-up procedure is "the details of the photographs themselves."⁶² Courts have required that the "photos [be] matched by race, approximate age, facial hair, and a number of other characteristics."⁶³ This command often is interpreted to mean that the photos should match the suspect, not the description of the suspect. It is hoped that the suspect matches the initial description so that this issue does not even arise. However, when there are differences between the description and the suspect, consideration should be given to including foils that match the description.

Witness Confidence and Expert Testimony

A clear statement of the confidence level of the eyewitness at the time the identification procedure is conducted can help avoid problems associated with the loss of memory over time.⁶⁴ A witness may grow less confident in his or her identification simply because of the passage of time between the identification and the hearing or trial. Similarly, after seeing the suspect in court, or learning about other incriminating evidence, the confidence of an eyewitness may increase without any real justification. A clear expression of the confidence level, ideally one that is memorialized on tape, can help avoid this problem.

In Colorado, expert testimony on eyewitness identification is limited by the decision of the Colorado Supreme Court in *Campbell v. People*,⁶⁵ which rejected *per se* rules allowing or rejecting such testimony and opting for a case-by-case analysis of the need for this kind of testimony.⁶⁶ After reviewing the rationales

offered for admitting and excluding this testimony, the Court held that Rules 702 and 403 of the Colorado Rules of Evidence establish the test for admissibility, and that trial judges should make an initial determination of admissibility before allowing such testimony to be presented to a jury.⁶⁷

On remand for reconsideration of the proffered expert testimony on identification in *Campbell*, one of the defendant's convictions was affirmed by the trial court on the ground that the proffered testimony was inadmissible under the Supreme Court's standard.⁶⁸ The proffered testimony related to the fact that studies have shown that there is not a strong correlation between the confidence of a witness in his or her identification of a person and the accuracy of that identification.⁶⁹ That determination was reversed by the Court of Appeals, which held that in the factual context of the case, expert testimony "regarding studies showing a weak correlation between witness confidence and reliability of identification" should have been admitted.⁷⁰

The case law thus gives counsel an opportunity to argue that expert testimony on the issue of identification is admissible. Testimony that addresses the confidence level of the witness (as that offered in *Campbell*) or other issues surrounding identification, such as cross-racial identification⁷¹ and the line-up procedures, should be offered in an attempt to ensure that juries are fully informed about the strengths and weaknesses of eyewitness identifications.

The need for a specific jury instruction on eyewitness identification has been considered by a number of courts. Such an instruction was approved by the Court of Appeals for the District of Columbia in 1972.⁷² However, the need for a specific instruction has been rejected in Colorado on the ground that the basic instruction pertaining to the credibility of witnesses is adequate.⁷³ Recent studies on the frequency and causes of mistaken identification may justify re-opening this issue.

A Study on Eyewitness Evidence

In October 1999, following an eighteen-month study, the U.S. Department of Justice ("DOJ") issued a report entitled "Eyewitness Evidence: A Guide For Law Enforcement" ("DOJ Report").⁷⁴ Most of the recommendations described in the section on line-up procedures described above are endorsed by the DOJ Report.⁷⁵ The Report also contains guidelines for dispatch and on-scene law enforcement personnel to help them obtain and document information regarding identification,⁷⁶ suggestions for the creation and use of "mug books" and composite drawings,⁷⁷ and information on the use of on-scene "show-ups."⁷⁸ The DOJ Report acknowledges its debt to social sciences research and urges those who administer the criminal justice system to stay abreast of continuing research in this area.⁷⁹

The DOJ Report's recommendations are only recommendations. It acknowledges that every case may present different issues and constraints and that some law enforcement agencies may be better able to implement the recommendations than others.⁸⁰ Nonetheless, it seems clear that the Report constitutes the "state of the art" in eyewitness identification procedures. As such, law enforcement may wish to implement the DOJ recommendations whenever possible.

Moreover, the DOJ Report's suggestions concerning investigative techniques are grounded in scientific study. There is a clear consensus that the changes suggested for line-up procedures will reduce the number of mistaken identifications. Some

of these guidelines have been adopted by federal and state law enforcement agencies. For example, the Attorney General of New Jersey officially adopted the guidelines in April 2001 for use in all adult and juvenile criminal cases.⁸¹ Colorado may wish to consider taking steps to follow suit.

The suggestions in the DOJ Report concerning the manner in which the courts treat eyewitness identification cases are based on a growing understanding of the scope and nature of the problem. It seems that some of the common beliefs about eyewitnesses (such as, the more certain an eyewitness is, the more accurate the identification) are simply incorrect.⁸² Reliance on jurors' common-sense "experience" with identification issues may well be misplaced. Therefore, to improve accuracy of identification, prosecutors might insist that the highest possible standards are being met, defense lawyers should be vigilant in pointing out weaknesses in existing procedures, and the courts may wish to continue to consider whether constitutional guarantees of due process require that some or all of the procedures suggested by the DOJ Report be employed in any given case.

Ineffective Assistance Of Counsel

The Sixth Amendment to the U.S. Constitution guarantees counsel to a person accused of a serious crime.⁸³ This guarantee extends to state prosecutions,⁸⁴ which also are governed by the similar guarantee of counsel found in Article II, § 16, of the Colorado Constitution. The right to counsel has been interpreted to mean that a criminal defendant is entitled to "effective" as-

sistance.⁸⁵ However, it is an unfortunate reality that defense counsel who are charged with safeguarding the rights of persons accused of crimes sometimes do not always perform their jobs effectively.

Colorado has a strong and nationally respected criminal defense system and seems to have a lower incidence of ineffective assistance than many jurisdictions.⁸⁶ Nevertheless, the problem exists in Colorado, as in other jurisdictions. Just because counsel was ineffective does not establish that the defendant was innocent, but ineffective assistance is clearly a major contributing factor in cases in which there was a wrongful conviction, as described below.

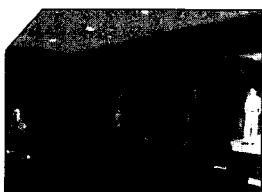
In studies of wrongful convictions, ineffective assistance of defense counsel has been cited as a significant contributing factor in anywhere from 5 to 28 percent of the cases.⁸⁷ It is not clear whether this figure is higher or lower in non-capital cases. It is hoped that only experienced and fully qualified lawyers are representing capital defendants, and that the rate of ineffectiveness is therefore lower. On the other hand, it is not always true that experienced and qualified lawyers are handling these extraordinarily difficult cases. Further, there are many more ways for a lawyer to be ineffective in a capital case than in a non-capital case—capital cases involve more procedural and factual issues than other criminal cases. Finally, convictions in capital cases are usually reviewed more thoroughly than non-capital convictions and, therefore, instances of ineffectiveness are more likely to be uncovered in capital cases.⁸⁸ In any event, there may be steps that the justice system can take to

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address the effectiveness of defense counsel. Identifying the reasons why counsel is sometimes ineffective is the first step in this process.

Sometimes, the ineffectiveness stems from the fact that a lawyer is unprepared, unskilled, or inexperienced. Even in well-funded public defender offices, the caseloads are high and, in some jurisdictions, public defenders are overloaded or overwhelmed. In jurisdictions that do not regulate the appointment of lawyers as carefully as Colorado, the lawyers simply may be lazy or unwilling to do the job right. Many have heard the story of the Texas lawyer who slept through portions of his client's capital sentencing hearing and assume that incident is apocryphal or ancient. It is neither: the trial of Calvin Burdine occurred in 1984. In 1995, the highest criminal appeals court in Texas held that the fact that trial counsel slept through portions of the proceeding did not constitute ineffective assistance of counsel.⁸⁹ Eventually, the federal courts vacated the death sentence.⁹⁰ However, it is well documented that hundreds of less egregious cases of ineffective assistance occur each year.⁹¹

The Colorado Criminal Defense System

As noted, Colorado has a strong tradition of a vigorous and effective defense bar, including the Office of Public Defender and the Office of Alternate Defense Counsel ("ADC"), which provide counsel for indigent defendants, and the private bar, which provides counsel for those who can afford to hire counsel.⁹² However, public defenders and private lawyers who contract to represent indigent criminal defendants continue to do so at a considerable financial sacrifice. Salaries for public defenders are lower than those offered in private practice, and hourly rates for appointed counsel also are lower than what lawyers normally charge.⁹³ The ADC pays private lawyers, who contract to accept cases when the Office of Public Defender has a conflict of interest, far less than the hourly rate these attorneys charge on the open market.⁹⁴ Clearly, the Colorado system needs to better support lawyers who engage in criminal defense work to continue to attract and retain top-notch talent.

Although Colorado is currently faced with difficult budget issues and seems likely to be facing them for several years down the road, maintaining the criminal justice system is at the very core of government and deserves special protection from the ravages of the economy. Colorado courts need to make certain that the promise of effective counsel is being fulfilled.

Along with salaries, the system needs to ensure that there is adequate funding for support services, such as staff and investigators, as well as funding for enough positions, so that the caseloads faced by the lawyers and staff are of a reasonable size. Additionally, money needs to be provided for adequate training. The basic standard for evaluating whether counsel has been ineffective has long been a two-part test: whether counsel's performance fell below an objectively reasonable standard and, if so, whether the deficient performance prejudiced the defendant.⁹⁵

There is a justified reluctance on the part of the courts and counsel to second-guess trial counsel, as well as a common-sense and legal recognition of the fact that a defendant is not entitled to "perfect" representation.⁹⁶ Nevertheless, courts need to be vigilant in ensuring that the promise of effective assistance is fulfilled. Doing so may not only redress any error in the case at hand, but also may make clear to the practicing bar the quality that is demanded of lawyers who handle criminal cases.

Police and Prosecutorial Misconduct

Police and prosecutorial misconduct, as used in this article, includes not only malicious misconduct (such as perjury and intentional destruction or withholding of evidence), but also conduct that is not based on an evil or corrupt motive (such as failure to follow leads and inadequate investigation of witnesses). Both types of conduct may contribute to a wrongful conviction, but the remedies for the two problems are quite different.

Corrupt misconduct is rare in Colorado. The overwhelming majority of law enforcement personnel and prosecutors are honest and hard-working public servants. However, in one of the DNA innocence studies of capital cases, police misconduct was found to be a factor in 38 percent of the wrongful convictions, and prosecutorial misconduct was found to be a factor in 34 percent of the cases.⁹⁷ Again, it is difficult to know whether this sort of misbehavior occurs with equal frequency in non-capital cases. It is hoped that police and prosecutors take extra care in capital cases, but it is also true that the pressure to solve and prosecute these cases, and thus the temptation to bend the rules, is greater (particularly when an officer or prosecutor believes the actual perpetrator is in hand).

A recent study examined 11,452 cases nationwide in which claims of prosecutorial misconduct were made in state court appeals since 1970.⁹⁸ Appellate courts cited prosecutorial misconduct as a reason for reversing a conviction or reducing a sentence in more than 2,000 of these cases.⁹⁹ The appellate courts found any error to have been harmless in 8,709 cases, and did not address the issue (presumably because there was no misconduct) in 731 cases.¹⁰⁰ These numbers must be put in the context of the hundreds of thousands of cases that were tried and the millions of cases that were prosecuted in state courts during that period.¹⁰¹ This same study revealed 21 Colorado cases in which a conviction or sentence was reversed due to prosecutorial misconduct.¹⁰²

As far as wrongful convictions, the study concluded that 28 of the total convictions involving 32 separate defendants were wrongful convictions. None of the wrongful conviction cases cited occurred in Colorado, which is a tribute to this state's system. The numbers nonetheless make it clear that there needs to be continued efforts nationwide to reduce prosecutorial misconduct.

Police Misconduct

One example of malicious police misconduct is the agent who, due to misguided zeal, a desire for glory, or some other reason, offers inaccurate testimony. One of the most egregious recent examples was an undercover agent in Texas whose testimony resulted in thirty-eight drug convictions that were subsequently challenged, and then investigated by the Justice Department, the Attorney General of Texas, and the NAACP. A retired state judge who was ordered by the Texas Court of Criminal Appeals to review the matter found, with the agreement of all parties, that the witness was "simply not a credible witness under oath."¹⁰³ A state grand jury subsequently indicted the agent on three counts of aggravated perjury for allegedly lying to the grand jury; prosecutors noted that the statute of limitations had expired with regard to any possible perjury during the hearings and trials.¹⁰⁴ In Colorado also, there are occasionally cases of police misbehavior.¹⁰⁵

Police misconduct that is not dishonest, but is the result of the all-too-frequent situation of caseloads that are far too high,

can be traced to an obvious source: money. There is simply no getting around the fact that it costs money for better training and increasing the number of police officers on the street, technicians in the lab, and prosecutors in the courtroom.

Another possible solution to the caseload problem is to rethink this country's whole approach toward crime. Some possible solutions may be politically controversial: Is too much money being spent on detecting and prosecuting drug cases?¹⁰⁶ Are mandatory sentences really worth their costs?¹⁰⁷ Have alternatives to prison been adequately explored? Serious debate on these questions often is shoved aside by political posturing aimed at getting votes rather than addressing issues.

Prosecutorial Misconduct

Colorado's experience with wrongful convictions due to prosecutorial misconduct also is quite limited. Colorado has a tradition of honest and well-qualified prosecutors. While they, like everyone else, do make honest mistakes, intentional misbehavior appears to be uncommon. Even when the misconduct is significant enough to justify a new trial, however, it is not evidence that the defendant was innocent.

Claims of prosecutorial misconduct often are raised in connection with closing argument¹⁰⁸ or other trial behavior.¹⁰⁹ When a contemporaneous objection to a prosecutor's conduct is made, before reversing a conviction, a reviewing court still must find that the defendant suffered prejudice,¹¹⁰ a defendant is no more entitled to a perfect prosecutor than he or she is entitled to a perfect defense lawyer. If no contemporaneous objection is made,

a reviewing court uses a plain error standard and will not reverse unless the prosecutorial misconduct is "flagrantly, glaringly, or tremendously improper"¹¹¹ and "so undermine[s] the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction."¹¹²

This is a difficult standard to meet, and the net result is that the danger of prosecutorial misconduct is greater when the defendant has an ineffective lawyer who fails to make timely objections. Other claims of prosecutorial misconduct arise in the context of discovery disputes. A prosecutor may believe that he or she is entitled to withhold information from the defendant that a court later determines should have been revealed.¹¹³ In this connection, the prosecution has a duty to help ensure that evidence is properly preserved.¹¹⁴

The Colorado Supreme Court has repeatedly made it clear that it holds prosecutors to a higher standard of ethical conduct than other lawyers.¹¹⁵ This higher standard is premised on the following: prosecutors are charged with enforcing the law as agents of the state;¹¹⁶ they have far more power than the typical lawyer;¹¹⁷ and their duty is not to win, but to promote justice.¹¹⁸ This high standard needs to be maintained and encouraged.

Just as with the police and with defense counsel, salary is an important issue with regard to prosecutors. To continue to attract and retain top-notch talent as prosecuting attorneys, Colorado must pay for that talent accordingly. The salary issue may be even more acute for prosecutors than for public defenders and attorneys who work for the Office of Public Defender and

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ADC. Salaries of prosecutors vary from jurisdiction to jurisdiction because part of the salary is paid by the judicial district, rather than by the state.¹¹⁹ Federal prosecutors are paid more than their state counterparts.¹²⁰ Also, while salaries in the larger jurisdictions have generally kept pace with the salaries for state public defenders, those in smaller and more rural jurisdictions vary significantly from jurisdiction to jurisdiction, generally lagging behind salaries in more populous parts of the state.¹²¹

Most prosecutors choose public service knowing that they will not be financially compensated as well as most of their brethren in private practice, and accept that fact. On the other hand, public service should not require a vow of poverty. The legal profession needs to take a positive role in helping support state prosecutors. This support could include higher salaries and a loan forgiveness program for attorneys who take public service jobs, such as that of a state court prosecutor.

False Confessions

The idea that a person would confess to a crime that he or she did not commit may seem preposterous. In the absence of torture or other coercion, what could possibly induce a person to confess? Psychological and sociological study, however, has revealed that the phenomenon is very real.¹²² The Actual Innocence study of wrongfully convicted persons found that 16 of the 74 cases studied included reports from the police that the person wrongfully convicted confessed to the crime.¹²³ Although physical coercion is largely a thing of the past, the interrogation techniques used by law enforcement today sometimes result in false confessions.

Entire books have been written on the subject of extracting information from people who do not volunteer to provide it.¹²⁴ Law enforcement personnel are instructed about such techniques, as well as the law relating to the use of statements in court.¹²⁵ These interrogation techniques are powerful tools. Unfortunately, the same tools that persuade reluctant criminals to confess to a crime they committed sometimes may persuade innocent suspects to confess to a crime they did not commit. In addition, some suspects have psychological or other issues that may make them more likely to confess falsely.

As a general proposition, interrogations use a combination of the following carrot and stick approach to persuade a person to confess to a crime when the person is not inclined to do so voluntarily.¹²⁶ The stick includes attempting to persuade the suspect that his or her position is hopeless. This is done by clearly and repeatedly expressing a belief in the person's guilt, cutting off any effort by the person to assert innocence or a defense, and confronting the person with evidence (sometimes exaggerated or fictitious) of guilt. The carrot consists of inducements to the suspect to confess. These inducements can be appeals to morality ("it is the right thing to do"), psychology ("you will feel better if you get it off your chest"), sympathy ("the victim somehow deserved it"), or basic self-interest ("we will tell the prosecutors you cooperated").

Once a confession is obtained, the criminal justice system treats the defendant quite differently.¹²⁷ The obvious and understandable assumption of the actors in the justice system is that the confession is valid and that the suspect is guilty. Thus, even while the presumption of innocence remains legally in place, at all stages of the proceeding, from the filing of charges and setting of bond through the conclusion of the case, the con-

fessing suspect is often presumed guilty by the actors in the criminal justice system—judges, defense counsel, and prosecutors alike.¹²⁸

This different treatment accorded the suspect works entirely to his or her detriment. Judges will consider the apparent strength of a confession case when setting bond,¹²⁹ defense counsel, particularly those with an overwhelming caseload, may choose to spend fewer resources on a confession case; police may be less likely to continue an investigation; and prosecutors may be less likely to demand more proof from investigators. Thus, one error that may lead to a wrongful conviction is compounded by other choices and decisions that are based, at least in part, on the initial error.

What can be done to reduce the incidence of false confessions? First, improved training of the interrogators may be in order to ensure that they are fully cognizant that the powerful tools they employ in obtaining valid confessions sometimes can result in false confessions as well. Second, the majority of statements by suspects can be taped or even recorded on video. Although the Colorado Court of Appeals has held that due process does not require that taping procedures be employed,¹³⁰ some states have found such a requirement in their constitutions.¹³¹ Additionally, a number of studies have made this recommendation.¹³² Continued examination of such studies may lead the courts to a new conception of the requirements of due process or of the "voluntariness" of a confession.

There are times when tape recording is not possible: it may be that a hurried interview at the scene of a crime when an investigation is "hot" cannot wait for someone to show up with a tape recorder, much less wait for a return to the stationhouse. However, when a statement can be taped, there are strong arguments that it should be taped. Taping of statements appears to benefit the police, the defendant, the system, and the truth-seeking function. Police who conduct interviews properly and professionally may be much less subject to challenge by defendants because the proof of what was said will be more accurately preserved. Defendants who have been subjected to improper pressures or procedures by the police likewise will have their proof in hand. The number of suppression motions, or at least the time taken to resolve such motions, should decrease. Appellate review of suppression rulings should be facilitated.¹³³ The truth—elusive as that concept sometimes is—may be more likely to emerge.¹³⁴

Every police department has the ability to tape statements, and many already tape when they see fit to do so. The additional cost and burden of always turning on the tape machine and saving the tape until the case is concluded is minimal. A statute requiring such a procedure could contain language exempting from its coverage those situations in which taping was not feasible or in which no tape was produced through no fault of the authorities. Taping statements might help reduce the incidence of false confessions because taping should give experts, as well as lawyers, judges, and jurors, a far more accurate view of what really transpired in the interview room.

The Use of Informants

Law enforcement sometimes relies on informants to investigate and prosecute criminal cases. However, witnesses who testify in exchange for some type of consideration from the government should be viewed with greater circumspection than witnesses who testify without such inducements. This is because

those given inducements might have an incentive to "bend" their testimony to please those who hold power over them. This is not true for the "average" witness. The study of wrongful convictions in capital cases found that inaccurate testimony by informants was a contributing factor in 16 percent of the cases.¹³⁵

After the wrongful conviction of Thomas Sophonow in Manitoba, Canada, the Manitoba DOJ undertook a study to determine what went wrong in the case. The inquiry came to the following conclusion about jailhouse informants:

Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. . . . They rush to testify like vultures to rotting flesh or sharks to blood. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. . . . Usually, their presence as witnesses signals the end of any hope of providing a fair trial.¹³⁶

This is harsh, and perhaps hyperbolic, language, but it is clear that some witnesses who testify on behalf of the government in exchange for some consideration may not be trustworthy. Determining whether such witnesses are, on the whole, less trustworthy than the "average" witness is difficult, but the added incentive that may motivate these witnesses certainly would seem to justify greater scrutiny.

There are several variations of inaccurate testimony by informants. Like any other witness, an informant can be mistaken; an informant may "shade" his or her testimony in an effort to please authorities; an informant may lie to deflect suspicion from himself or others, or for some other reason; or an informant could be acting with the knowledge, or even at the behest, of unethical authorities.

An egregious example of dishonest informants and governmental misconduct in recent years involved the Federal Bureau of Investigation ("FBI"). A small-time New Jersey numbers runner named Peter Limone spent thirty-three years in prison, four of them on death row, for a murder he did not commit. He, along with three others, two of whom died in prison and one whose sentence was commuted in 1997, was convicted on the perjured testimony of a government informant. The FBI agents working with this informant did not tell the prosecutors or anyone else about inducements offered to the informant nor did they tell anyone that they had received information, prior to the murder, that the murder was going to occur and the identity of the person who was going to commit it. To protect their own informant, they said nothing, even after the conviction and sentencing of innocent men.¹³⁷

It is sometimes difficult to balance the need of law enforcement to persuade witnesses to cooperate with the danger that too much persuasion, or too much inducement, is an invitation to lie. However, the balance is clearly out of whack when an innocent man is convicted of murder and sentenced to die while government agents intentionally help the actual murderer escape justice.

Given the percentage of wrongful convictions that were attributable, at least in part, to inaccurate testimony by cooperating witnesses, some commentators have argued that special precautions should be taken to ensure that the integrity of these witnesses (and the reliability of their testimony) is examined adequately.¹³⁸ Prosecutors may wish to review the use of informants more thoroughly. Also, discovery rules might provide necessary background on these witnesses, cross-examination limits might be re-examined, and both jury instructions and legislation could address the issue.¹³⁹

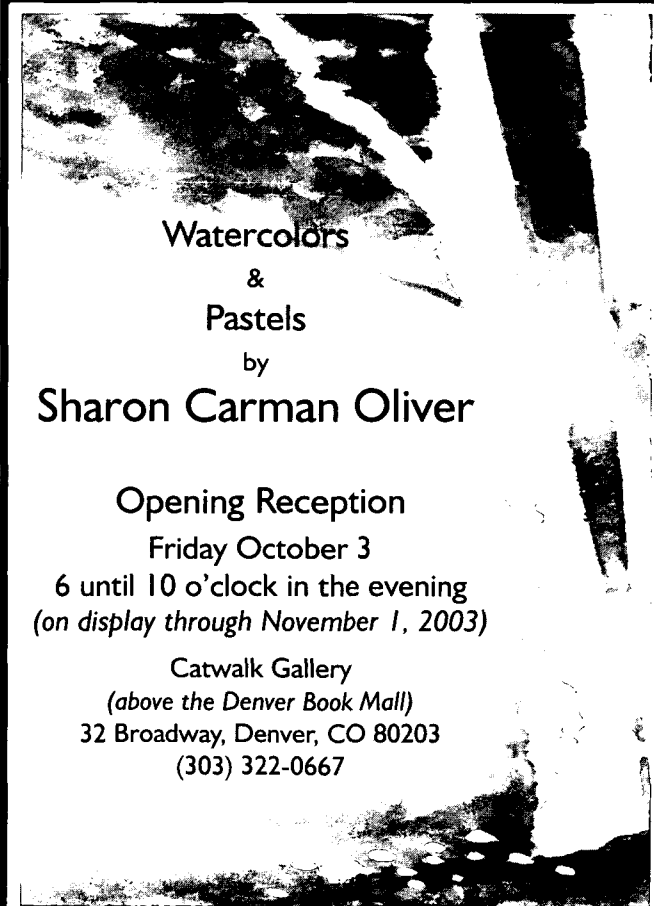
In-House Reform

One suggestion for "in-house" reform is to alter policies in the offices of prosecutors that regulate the use of informants.¹⁴⁰ An office could establish prerequisites to the use of a cooperating witness. For example, a prosecutor's office could require an investigation into the background of the cooperating witness that is much more intensive than that usually conducted. Cooperating witnesses often have histories of testifying for the prosecution. Thus, every instance of prior testimony by the cooperating witness could be examined to determine whether the witness appears to be a genuine fact witness or a professional "snitch."

Corroboration could be required for everything, or everything important, the cooperating witness has to say. A senior deputy who is not involved in the prosecution of the case could review the case and the history of the witness to help ensure that the use of the witness is appropriate.

Amend Discovery and Evidence Rules

Discovery and evidence rules could be amended to ensure that an adequate pre-trial investigation of a cooperating witness can be conducted by the defense. An informant does not lose all privacy rights simply by virtue of becoming an informant, but it may be reasonable to allow the defense to subject such a person to greater scrutiny than a witness who is testifying free of any such motive.¹⁴¹ At least one state legislature has recognized this concern.¹⁴²



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Review of Cross-Examination Limits and Jury Instructions

A review of both the limits on cross-examination and the jury instructions relating to witnesses also may be in order. The right to cross-examine is of constitutional magnitude, but is not unlimited.¹⁴³ The privacy rights of witnesses, the danger of unfair prejudice to the opposing party, and the interests of judicial economy may justify certain limits on cross-examination.¹⁴⁴ However, the courts may want to re-examine the boundaries of cross-examination when the witness is cooperating with the government in the expectation of some type of benefit. The inherent untrustworthiness of such witnesses, as compared to the true "volunteer" witness, may well justify the creation of a different set of cross-examination boundaries.

By way of example, Colorado courts have limited the boundaries of cross-examination in ways that may not be appropriate when the witness who is being cross-examined is an informant. Colorado courts have held that it is not error for a trial court to:

- deny a defendant the right to cross-examine a prosecution witness about his or her felony convictions when the prosecution elicited that information in direct examination¹⁴⁵
- elicit the fact that a witness was convicted of the misdemeanor offense of false reporting, although the defendant is allowed to elicit the lies that were the basis of that conviction¹⁴⁶
- inquire into the fact that bond-jumping charges could be filed against a witness by the prosecution¹⁴⁷
- cross-examine a witness on the fact that the witness was currently on probation for a misdemeanor offense or a federal offense¹⁴⁸
- inquire as to whether a cooperating witness knew the penalty for first-degree murder after eliciting information that the witness had a first-degree murder charge reduced to manslaughter by the prosecution¹⁴⁹
- elicit the fact that the witness was currently in custody on a probation violation complaint, as well as new charges¹⁵⁰
- cross-examine a witness on the penalty the witness was facing for pending charges.¹⁵¹

Some of these limits could be re-examined in light of what is now known about the effect of inaccurate testimony by cooperating witnesses on wrongful convictions.

With regard to jury instructions, Colorado already has instructions relating to: (1) the general credibility of witnesses;¹⁵² (2) the fact that the mere number of witnesses is not dispositive of credibility issues;¹⁵³ (3) the fact that a felony conviction may be used to assess credibility;¹⁵⁴ and (4) the use of evidence of a witness's character for truthfulness.¹⁵⁵ Colorado has no instruction that specifically addresses the credibility of a cooperating witness, although counsel can certainly use the general credibility instruction to attack or support the testimony of a cooperating witness. The federal system has such instructions.¹⁵⁶ A Colorado jury instruction could be fashioned that draws the attention of the jury to the special problems inherent in the use of cooperating witnesses without unfairly penalizing the prosecution for the use of such witnesses.

New Legislation

Legislation might be a last resort, but it is not unprecedented for the legislature to establish rules relating to the quality or quantity of evidence that must be presented in a criminal prosecution. In prosecutions for treason, the Colorado statutes re-

quire that a conviction may not occur unless "upon the testimony of two witnesses to the same overt act or upon confession in open court."¹⁵⁷ New legislation could require corroboration of the testimony of a cooperating witness as a precondition of conviction. It also could expend the limits that now exist on the ability of counsel to cross-examine cooperating witnesses about their agreements with the prosecution and police.

The legislature may be reluctant to intrude into relevancy questions that typically are left to the courts. However, the use of cooperating witnesses implicates the prosecution function as much as the judicial function, and carries the danger of undermining the truth-seeking function and the integrity of the criminal justice system. Therefore, it may be appropriate for the legislature to act if the courts do not.

Corruption of Forensic Evidence

Police, prosecutors, defense lawyers, and jurors increasingly rely on expert witnesses. To a large extent, this reliance is justified. Scientific advances in a variety of fields have resulted in the creation and application of forensic techniques that generate powerful evidence. DNA comparison is the most widely hailed of these new forensic tools. The law of evidence has attempted to keep pace with these advances.¹⁵⁸

Even science is not perfect, however. Close examinations of forensic science techniques have uncovered previously unrecognized variability in these methods. In a 1978 Laboratory Proficiency Testing Program sponsored by the Law Enforcement Assistance Administration, hair analysis was found to be one of the most troubling techniques, with unacceptable response rates from laboratories in the range of 27 to 67 percent, depending on the hair samples analyzed.¹⁵⁹

In a 1996 DOJ/National Institute of Justice report, approximately two-thirds of erroneous convictions involved evidence based on traditional forensic techniques, such as hair analysis, that were proven erroneous by DNA typing.¹⁶⁰ Participants in the criminal justice system need to continuously re-evaluate the methods by which evidence is generated and tested and take advantage of improvements as they occur.

Even though scientific advances demonstrate that reliance on science in the past was sometimes misplaced, most of the increased reliance on scientific evidence appears to have been justified.¹⁶¹ Also, as noted above, erroneous or false testimony by an expert witness does not establish that the defendant was, in fact, innocent. However, there have been unsettling incidents in which the scientific testing, or the testimony about the test results, was corrupted by either institutional or individual problems. Some of this corruption clearly has led to wrongful convictions. For example, the innocence study of wrongful convictions in capital cases found that inaccurate or fraudulent scientific testimony was a factor in 26 of the 70 cases studied.¹⁶²

At the institutional level, it is clear that some laboratories are not as good as they should be to accomplish the job. Even the FBI, which is viewed as having the nation's pre-eminent forensic laboratory, has been shown to have significant weaknesses. An eighteen-month investigation of the FBI lab, conducted by the Office of the Inspector General of the DOJ and with the cooperation of the FBI, concluded in 1997 that the FBI lab needed to take significant steps to establish proper quality control of its testing and of the testimony of the witnesses it offered.¹⁶³ The report includes the following recommendations:

- 1) steps should be taken "to provide personnel with the appropriate training, background, and commitment to quality that is required in a first-class forensic laboratory";
- 2) the lab should seek and obtain accreditation by the American Society of Crime Laboratory Directors;¹⁶⁴
- 3) each examiner who evaluates evidence should prepare and sign a report concerning that evidence;
- 4) all analytical reports should be peer-reviewed;
- 5) a structured training and retraining program should be established;
- 6) better record creation and retention policies should be adopted;
- 7) written protocols should be developed and followed for all testing procedures; and
- 8) various internal reorganizations should be implemented.¹⁶⁵

A review of the FBI's response conducted in the year following the report (1998) found that, in general, "the FBI has done a sound and responsible job of implementing the OIG recommendations"¹⁶⁶ and recommended regular follow-up evaluations to ensure that the improvements were continuing to occur. The follow-ups do occur and continue to uncover problems with both institutional controls and individual misbehavior. In 2003, the DOJ's Office of the Inspector General concluded that a DNA technician in the FBI lab failed to follow required testing protocol and that the internal checks of the lab did not uncover the problem.¹⁶⁷ Clearly, continued vigilance is in order.

These problems are not limited to the FBI labs. In Texas, the crime labs in both Houston and Fort Worth have been the subjects of scrutiny. An audit of the Houston lab by the Internal Affairs Division of the police department "uncovered shoddy science [and] undertrained employees" and a facility that was so overwhelmed and underfunded that its director conceded that the facility could not "conduct the needed analysis on every case that should be looked at."¹⁶⁸ Reviews of the DNA work conducted by the Fort Worth police department concluded that there were "serious concerns" about the training, knowledge, and practices of a senior lab technician who was responsible for evaluation and testimony in DNA cases.¹⁶⁹ As further described below, a lack of institutional checks, balances, and controls may fail to uncover and root out individuals whose scientific or testimonial reliability is less than it should be.

At the institutional level, scientific labs and the scientists who work there are not immune to outside pressures. Another finding of the DOJ report on the FBI lab was that examiners sometimes testified "to matters beyond their expertise or in ways that were unprofessional. . . ."¹⁷⁰ This improper testimony invariably helped the prosecution. Explanations for this phenomenon include an inadequate degree of separation between the lab and the police and prosecutors, and an insufficient degree of independence of the lab from those entities. The FBI responded to this criticism by promising to appoint directors based on "an outstanding academic and practical background in forensic science and a reputation for excellence in the forensic community" rather than on any law enforcement connection.¹⁷¹ Some argue that forensic labs should be entirely independent of the police and prosecutors and that this would be the true "scientific" model. This would entail creation of a lab that is beholden to no one and uses established and unbiased procedures to evaluate evidence and report on the results, regardless of how those reports help or hurt one side or the other.

At the individual level, there have been a number of instances of false testimony by lab technicians and other experts. The

chief of the Serology Division of the state police lab in West Virginia was charged with perjury, evidence tampering, and fraud in both Texas and West Virginia, after it was established that he gave false testimony in a number of cases.¹⁷² A civil investigation into his testimony resulted in a finding that he had "faked data in virtually every case for which there was sufficient evidence to review."¹⁷³ Civil suits filed against him made clear that a number of people were involved in a cover-up of his behavior. West Virginia paid millions of dollars to several of the innocent individuals who were convicted on the basis of a victim's false testimony.¹⁷⁴ Other persons were granted new trials.¹⁷⁵

As far back as 1998, the competence of an Oklahoma City Police Department forensic scientist who had testified in hundreds of trials over the course of thirteen years, including twenty-three cases in which the death penalty was handed down, was called into question. In that Oklahoma City case, an appellate court reversed a murder conviction due to the expert's lack of diligence in examining hairs and fibers, a report that "was at best incomplete, and at worst inaccurate and misleading," and testimony that included an "improper" opinion about the defendant's presence that "the expert "was not qualified to give."¹⁷⁶ Subsequently, the same expert was found to have given testimony that "was misleading, if not false," after DNA tests proved that her testimony was wrong in the case of a man who had served fifteen years of a sixty-five year sentence for rape.¹⁷⁷ These two cases were not the only ones in which problems arose around the forensic scientist's testimony.¹⁷⁸

There are other examples of unprofessional conduct by lab technicians and scientists.¹⁷⁹ Many of these are undoubtedly

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honest mistakes; others are the result of overworked employees and understaffed labs that are not getting adequate funding from the government. Some are clearly the result of lazy or dishonest people who testify falsely.¹⁸⁰ As a result, every governmental crime lab needs to consider engaging in an evaluation and continued review similar to that implemented in the FBI lab.

The Colorado Bureau Of Investigation

In Colorado, the Colorado Bureau of Investigation ("CBI") was created in 1967 and is now part of the Colorado Department of Public Safety ("CDPS").¹⁸¹ Laboratories exist in Denver, Pueblo, Montrose, and Durango. Legislation governing the CBI provides that the function of the CBI is to assist "law enforcement authority in the investigation and detection of crime and in the enforcement of the criminal laws of the state" and to assist prosecutors in similar fashion.¹⁸² The CBI laboratory describes as its mission: "to provide highly specialized analytical support to all law enforcement agencies within Colorado. . . ."¹⁸³

Clearly, the Colorado model is that the CBI is an arm-of-law enforcement, as opposed to an independent laboratory open to all players in the criminal justice system. It is not immediately clear why this is so. There appears to be no inherent reason why a forensic laboratory could not be open to both prosecutors and defense lawyers. When the defense is being provided at state expense, as is the situation in the overwhelming majority of criminal cases in Colorado,¹⁸⁴ such an arrangement might be more cost-effective.

Prosecutors and defense lawyers argue that each side needs its own experts. Presumably, each acknowledges that the science is the same, while admitting that there is room for disagreement among experts. More important, the argument is that each side needs to work closely with its own experts about case strategy and options, in addition to simply receiving scientific results. Assuming that this argument justifies the role of the CBI as an arm of law enforcement, it is still an open question whether the CBI's governance structure is adequately independent.

The CBI and its labs were originally placed under the authority of the Attorney General; control was transferred to the Department of Local Affairs and then, in 1984, to the CDPS.¹⁸⁵ The CDPS manages, in addition to the CBI, the Colorado State Patrol, Division of Criminal Justice, Division of Fire Safety, and the Office of Preparedness and Security. Clearly, the CDPS has a law enforcement bent.

Some of the dangers that were noted in the DOJ Report on the management independence of the FBI laboratories seem to be present in the administration of the CBI laboratories. For example, the DOJ Report urged the FBI to seek accreditation from the American Society of Crime Lab Directors. As of this writing, the only lab so accredited in Colorado is the Greeley Police/Weld County Sheriff's Laboratory.¹⁸⁶ It would be beneficial for the CBI to seek and obtain this accreditation, as should the crime labs of the other major metropolitan law enforcement agencies. Accreditation would ensure that the CBI lab was in conformity with agreed-upon standards and would also require regular reviews of accreditations, processes, and controls in the lab. An FBI review of the CBI labs and certain CBI procedures is now under consideration in at least one Colorado district court case.¹⁸⁷

The criminal justice system needs to apply the highest possible standards to forensic laboratories, hire and support the

most qualified personnel, and create a control structure that is truly grounded in science. Only then will it ensure that the forensic sciences help make more accurate determinations of both guilt and innocence.

PROPOSALS TO HELP DECREASE WRONGFUL CONVICTIONS

Recognizing that no system created and run by humans will ever be free of error, it is nonetheless imperative to continually search for improvements in the accuracy of the criminal justice system. Following are several proposals to do just that. Some of these proposals have been implemented in other jurisdictions. Most can be implemented without much, if any, additional cost. All will help improve the accuracy of our criminal justice system.

Ensure Adequate Funding

Colorado is in serious economic distress. All aspects of the state government are being affected by this downturn, and every government agency is advancing some argument as to why it should be spared, or at least sheltered, from cuts in funding. Such economic problems seem likely to extend into the next several years; even after the economy improves, there will be a significant recovery period during which state government tries to restore what has been lost during the present difficulties. Nevertheless, there are powerful and important arguments that certain core functions deserve more protection from budget cuts than other functions of state government. Public safety is clearly a core function of state government. The justice system—judges, prosecutors, and defense lawyers—is just as important to this core function as are police and jails.

On a practical level, the costs of the criminal justice system simply cannot be deferred as easily as can many other costs. First, the system has little control over the volume of persons using the system. Unless the state were to de-criminalize a number of offenses¹⁸⁸ or police and prosecutors were to stop enforcing existing laws, both unlikely prospects, the number of criminal filings likely will increase. Even if the crime rate holds steady, the increases in population alone will mean that more people are brought in front of the criminal justice system. Such criminal cases must be addressed; they cannot be deferred or postponed. There are statutory and constitutional requirements that these cases be handled expeditiously.¹⁸⁹ In any case, allowing people to languish in jails without a trial is antithetical to the core values of the criminal justice system. Allocating scarce resources involves tough decisions about which government functions are most important.

This funding issue is relevant here because a funding deficiency in the criminal justice system could easily result in an increase in the number of wrongful convictions. Proper investigation, prosecution, and defense require adequate funding. Investigative efforts curtailed due to lack of funds could increase the danger that exculpatory evidence is not gathered or evaluated. Prosecutors who do not have the time to review cases properly are more likely to make mistakes. Defense lawyers whose caseloads are crushing may not be able to provide adequate defense investigation and presentation. Members of the legal profession and the public as a whole need to make sure Colorado legislators know how important it is to adequately fund all of the players in the criminal justice system.

Other Proposals

Other proposals may be considered that could improve accuracy of the criminal justice system. Some have been mentioned briefly above, but may bear repeating.

1. *New Legislation to Gain Access to DNA Evidence:* In 2002, the Colorado legislature passed legislation that improved the access of convicted prisoners with colorable claims of innocence to gain access to DNA evidence that might establish their innocence.¹⁹⁰ This legislation will help ensure that the most modern investigative techniques are brought to bear on cases in which the techniques might provide definitive evidence of innocence. The fact that Colorado prosecutors and defense lawyers reached agreement on creating and passing this legislation is evidence that all parties have a stake in the accuracy of the criminal justice system and that there are areas of mutual interest in which all can concur.

Lawyers, courts, and legislators need to keep abreast of developments in the forensic sciences. There is every reason to believe that further refinements in existing technologies and breakthroughs in new techniques will continue to occur. While the system cannot re-examine every case in light of each improvement in knowledge, the system can, and must, remain open to re-examining the accuracy of previous procedures.

2. *Record Statements of Suspects:* Some commentators propose the state should require that the statements of suspects be tape-recorded whenever feasible. Illinois has just passed a law requiring that custodial interrogations of murder suspects in murder cases be electronically recorded.¹⁹¹ The Alaska Supreme Court found a taping requirement in the Alaska due process clause, and the Minnesota Supreme Court imposed such a requirement as part of the Court's inherent supervisory powers.¹⁹² This article previously pointed to reasons why taping of statements may benefit the police, the defendant, the system, and the truth-seeking function. A requirement that custodial interrogations be electronically recorded whenever feasible could be imposed by the court or enacted by the legislature.

3. *Improve Line-up Procedures:* The criminal justice system could take advantage of social sciences research and implement procedures that improve the accuracy of identifications through the implementation of relatively minor changes in the procedures employed in line-ups. The DOJ guidelines¹⁹³ are a good place to start. Such requirements could be imposed by law enforcement agencies themselves, as in New Jersey,¹⁹⁴ or by court rule or legislation.

4. *Monitor the Use of Informants:* Whether they are called "cooperating witnesses" or "snitches," it is clear that informants raise particular and additional trustworthiness concerns. Law enforcement should be more suspicious of informants; prosecutors should demand more complete investigations of informants; defense counsel should diligently investigate informants. The courts, through discovery, motions, expert testimony or jury instructions, should make sure that all issues relating to the trustworthiness of informants are properly presented to jurors.

5. *Evaluate and Review Crime Labs:* The potential problems with crime labs and the testimony of crime lab technicians and scientists are described above. Every governmental crime lab needs to undergo the type of evaluation and continued review that has been implemented by the DOJ in the case of the FBI lab. Colorado should fund and monitor the CBI labs to make sure that educated and trained scientists are conducting scientifically valid tests under appropriate conditions and in an atmosphere that demands intellectual and scientific rigor.

6. *Support Innocence Projects:* Concerns about wrongful convictions have led to the creation of a number of innocence projects around the country. Some focus on capital cases; others only on cases that involve DNA.¹⁹⁵ The Colorado Innocence Project, generously supported by the law firm of Arnold & Porter, accepts referrals in cases where inmates who have been convicted and sentenced to significant prison terms in Colorado have run out of traditional appellate options, but are still seeking to challenge their convictions on grounds that they are actually innocent. All innocence projects rely significantly on the volunteer efforts of lawyers of all types, investigators, experts, and others. Lawyers have a special ability—and obligation—to support such projects.

7. *Continue This Discussion:* Some of these proposals may be unworkable. Other possibilities have undoubtedly been overlooked. Everyone in the criminal justice system needs to engage in a vigorous and honest debate about ways to reduce the incidence of wrongful convictions.

CONCLUSION

Lawyers and non-lawyers alike have an important stake in the health of the criminal justice system. In 1789, the first year of constitutional governance of this country, George Washington wrote that he was convinced "the due administration of justice is the firmest pillar of good government."¹⁹⁶ If people lose faith in the criminal justice system, society is greatly weakened. There may be no greater threat to faith in the justice system than the threat presented by wrongful convictions.

Grievance Problems?

F. Michael Ludwig

fmludwig@wrhlaw.com

*Over 25 years of experience
representing lawyers in
professional malpractice claims
including grievance matters*

*accepting new cases and
requests for co-counsel*

WOOD, RIS & HAMES, P.C.

1775 Sherman Street, Suite 1600
Denver, CO 80203-4313
(303) 863-7700
FAX: (303) 830-8772

All reasonable steps should be taken to improve the accuracy of the criminal justice system. A criminal justice system must be developed in which (1) the quality of justice a person receives does not depend on the size of one's wallet, (2) is color-blind, and (3) provides a fair trial even to the most unsympathetic of defendants accused of the most vicious and heinous crimes. These fundamental and crucial goals and principles rest on the assumption that the system can, in fact, determine guilt or innocence with accuracy. The criminal justice system must make all reasonable efforts to improve that accuracy.

Lawyers have special rights and powers in connection with the justice system, and a better understanding than the general public of its needs. Therefore, lawyers have a responsibility to that system. As individuals, as a profession, and as actors in the justice system, lawyers can lobby the government for money and better support, demand the highest possible level of excellence from everyone involved in the system, and volunteer their time to investigate claims of wrongful convictions. Lawyers have the power to improve what is arguably the most accurate justice system on earth. They should seize every opportunity to do so.

NOTES

1. *U.S. v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).
2. Stuntz, "The Virtues and Vices of the Exclusionary Rule," 20 *Harv. J. L. & Pub. Pol'y* 443 (Winter 1997).
3. Uviller, "Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Courtroom," 130 *U. Pa. L.Rev.* 845, 890 (1982); Melilli, "The Character Evidence Rule Revisited," 1998 *B.Y.U. L.Rev.* 1547, 1620.
4. This topic was the subject of an entire issue of two publications: *Judicature*, Vol. 86, No. 2 (Sept.-Oct. 2002) and *Criminal Justice*, Vol. 18, No. 1 (Spring 2003).
5. Scheck, Neufeld, and Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* (New York, NY: Doubleday, 2000; New York, NY: Signet, 2001) (*hereafter*, "Actual Innocence").
6. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
7. *Tumey v. Ohio*, 273 U.S. 510 (1927).
8. *Brady v. Maryland*, 373 U.S. 83 (1963).
9. *Batson v. Kentucky*, 476 U.S. 79 (1986).
10. The Harris Poll, #41 (Aug. 2, 2000). See http://www.harrisinteractive.com/harris_poll/index.asp?PID=101. For 2001 Harris Poll results, see http://www.harrisinteractive.com/harris_poll/index.asp?PID=252 (very similar).
11. Huff, Ratner, and Sagarin, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, CA: Sage Pubs., 1996) at 53-61.
12. Illinois Commission on Capital Punishment, <http://www.idoc.state.il.us/ccp/ccp/reports/index.html> (*hereafter*, "Illinois Report"). Many disagreed with the governor's commutation order, but few disagreed with the report itself.
13. Bedau and Radelet, "Miscarriages of Justice in Potentially Capital Cases," 40 *Stanford L.Rev.* 21 (1987) (*hereafter*, "Miscarriages").
14. Liebman, Fagan, and West, *A Broken System: Error Rates in Capital Cases, 1973-1995* (Wash., DC: The Justice Project, 2000) (documenting overall error rate in either the guilt or sentencing phases in capital punishment system as 68 percent; that 82 of all capital judgments reversed on appeal were replaced on retrial with a sentence less than death or no sentence at all; and that 7 percent of the reversals resulted in acquittals).
15. There were 2.2 million arrests for "index crimes" in 2000. Approximately 70 percent, or 1.54 million cases resulted in guilty pleas or verdicts, resulting in 7,700 wrongful convictions if the error rate is 0.5 percent. Huff *et al.*, *supra*, note 11.
16. See Van den Haag, "The Ultimate Punishment: A Defense," 99 *Harv. L.Rev.* 1662, 1664 (1986) (arguing that inevitable wrongful convictions that will occur in capital cases are outweighed by the value of capital punishment).
17. "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial" (NIJ Research Report for DOJ, 1996) at 13-14; ncjrs.org/txtfiles/dnaevid.txt (*hereafter*, "Convicted by Juries") (23 of 28 wrongful convictions based on eyewitness identification testimony); see also Saks and Constan-tine, "Model Prevention and Remedy of Erroneous Convictions Act," 33 *Ariz. St. L.J.* 665, 674 (2001) (estimating eyewitness errors "implicated in 74% of erroneous convictions").
18. *Actual Innocence*, *supra*, note 5 (articulating the following reasons for wrongful convictions in order of prominence: erroneous eye-witness testimony, improper police officer conduct, prosecutorial misconduct, incompetent defense lawyers, shaded or lazy forensic science, racism or bigotry, and inadequate funding of defense activities).
19. Borchard, *Convicting the Innocent: Errors of Criminal Justice* (New Haven, CT: Yale Univ. Press, 1932).
20. *Id.* at vii-ix.
21. *Id.* at xiii.
22. *Id.* at xiii-xxiv.
23. *Id.* at i-xxiv.
24. Westervelt and Humphrey, eds., *Wrongly Convicted: Perspectives on Failed Justice* (Piscataway, NJ: Rutgers Univ. Press, 2001 (*hereafter*, "Perspectives").
25. See "Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin": <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin> (*hereafter*, "Morin Report"); "The Inquiry Regarding Thomas Sophonow": <http://www.gov.mb.ca/justice/sophonow/intro/index.html> (*hereafter*, "Sophonow Report").
26. *Perspectives*, *supra*, note 24 at 5.
27. *Id.* at Chap. 14; Marshall, "Do Exonerations Prove That 'The System Works?'" Vol. 86, No. 2, *Judicature* 83 (Sept.-Oct. 2002).
28. Morin Report and Sophonow Report, *supra*, note 25.
29. Rattner, "Convicted But Innocent: Wrongful Conviction and the Criminal Justice System," 12 *L. & Hum. Behav.* 283-98 (Sept. 1988); *Perspectives*, *supra*, note 24 at Chap. 6; "Miscarriages," *supra*, note 13 at 39.
30. *Perspectives*, *supra*, note 24 at 117.
31. *Id.*; Radelet, Lofquist, and Bedau, "Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt," 13 *Thomas M. Cooley L.Rev.* 907-66 (Michaelmas Term, 1996).
32. *Perspectives*, *supra* note 24 at 118; *Actual Innocence*, *supra*, note 5.
33. *Id.* at Chap. 14; Marshall, *supra*, note 27.
34. Huff, "Wrongful Conviction: Societal Tolerance of Injustice," 4 *Res. in Soc. Probs. & Pub. Pol'y* 99, 103 (1987) (eyewitness error involved in nearly 60 percent of wrongful convictions in the database).
35. See Innocence Project: Causes and Remedies of Wrongful Convictions (the Innocence Project at the Benjamin N. Cardozo School of Law was created in 1992): <http://www.innocenceproject.org/causes/index.php> (last visited April 17, 2003) (*hereafter*, "Innocence Study").
36. Cutler and Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* (Cambridge, UK: Cambridge Univ. Press, 1995).
37. Huff *et al.*, *supra*, note 11 at 111 ("[I]t is clear that unintentional errors far outnumber intentional misconduct.").
38. See Loftus and Doyle, *Eyewitness Testimony: Civil and Criminal*, 3rd ed. (Dayton, OH: LEXIS Law Pub., 1997) at §§ 1-1 to 1-4.
39. *Id.* at § 1-5.
40. *Id.* at §§ 1-6 and 10-1 (including misconceptions that violent events are more memorable, estimates of duration are as likely to be overestimated as underestimated, and a general "nearly religious faith in the accuracy of eyewitness accounts" is justified).
41. See *id.* at §§ 2-1 to 4-13 for more discussion of this topic.
42. Deffenbacher, Carr, and Leu, "Memory for Words, Pictures and Faces: Retroactive Interference, Forgetting and Reminiscence," 7 *J. Exper. Psych., Hum. Learning & Memory* 299-305 (July 1981); Egan,

- Pittner, and Goldstein, "Eyewitness Identification: Photographs vs. Live Models," Vol. 1, No. 2, *L. & Hum. Behav.* 199-206 (1977); Malpass and Devine, "Eyewitness Identification: Lineup Instructions and the Absence of the Offender," 66 *J. App. Psych.* 482-489 (Aug. 1981); Malpass and Devine, "Guided Memory in Eyewitness Identification," 66 *J. App. Psych.*, 343-350 (June 1981); Shepherd and Ellis, "The Effect of Attractiveness on Recognition Memory for Faces," 86 *Am. J. Psych.* 627-633 (Sept. 1973).
43. Malpass and Devine, "Measuring the Fairness of Eyewitness Identification Lineups," in Lloyd-Bostock and Clifford, eds., *Evaluating Witness Evidence* (London: John Wiley & Sons, 1983) at 81-102.
44. See Penrod, "Eyewitness Identification Evidence: How Well are Witnesses and Police Performing?" 18 *Criminal Justice* 37, 45 (2003).
45. Cutler, *Eyewitness Testimony* (Notre Dame, IN: National Institute for Trial Advocacy, 2002) at 20; Loftus and Doyle, *supra*, note 38 at § 3-2(a); Bahrnick, "Memory for People," in Harris ed., *Everyday Memory, Actions and Absent Mindedness* (San Diego, CA: Academic Press, 1983).
46. Behrman and Davie, "Eyewitness Identification in Actual Criminal Cases: An Archival Analysis," 25 *L. & Hum. Behav.* 475 (Oct. 2001).
47. *Id.* at 481.
48. *Id.* at 482.
49. Slater, "Identification Parades: A Scientific Evaluation," reported in Valentine and Heaton, "An Evaluation of the Fairness of Police Line-Ups and Video Identifications," 13 *Applied Cognitive Psych.* 59 (1999).
50. See, e.g., Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," 22 *L. & Hum. Behav.* 608 (Dec. 1998).
51. Penrod, *supra*, note 44 at 46. See also Lindsay and Wells, "Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation," 70 *J. Applied Psych.* 556-64 (Aug. 1985); Lindsay et al., "Simultaneous Lineups, Sequential Line-ups and Show-ups: Eyewitness Identification Decisions of Adults and Children," 21 *L. & Hum. Behav.* 391 (Aug. 1997).
52. Loftus and Doyle, *supra*, note 38 at § 4-7 (study found, "there were 81% false positives in the simultaneous lineup but only 25% false positives in the sequential lineup," citing Melara et al., "Enhancing Lineup Accuracy: Two Codes are Better than One," 74 *J. Applied Psych.* 706 (Oct. 1989).
53. Loftus and Doyle, *supra*, note 38 at § 4-7, citing Lindsay and Wells, *supra*, note 51.
54. Levi and Lindsay, "Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations," 7 *Psych. Pub. Pol'y & L.* 776, 787 (Dec. 2001) ("Lineup size . . . cannot fail to improve outcomes if properly applied. An increase from 6 . . . to 12-person lineups potentially could reduce false identification rates to 50% percent of current levels in the United States," *id.* at 780); see also Malpass, "Effective Size and Defendant Bias in Eyewitness Identification Lineups," Vol. 5, No. 4, *L. & Hum. Behav.* 299 (1981).
55. Penrod, *supra*, note 44 at 45.
56. *People v. Borghesi*, 66 P.3d 93, 104 (Colo.App. 2003), citing *U.S. v. Sanchez*, 24 F.3d 1259, 1262 (10th Cir. 1994).
57. Most persons conducting lineups have been taught to avoid giving any clues as to the "correct" answer. See, e.g., Keatley, *Colorado Peace Officer's Handbook* (Littleton, CO: DataLegal Pub., 2001/2002), Part VII at §§ 4-100 et seq.
58. See, e.g., Cutler and Penrod, "Improving the Reliability of Eyewitness Identifications: Lineup Construction and Presentation," 73 *J. Applied Psych.* 281 (May 1988); Wells and Luus, "Police Lineups as Experiments: Social Methodology as a Framework for Properly Conducted Lineups," 16 *Personality & Social Psych. Bull.* 106 (March 1990).
59. Loftus and Doyle, *supra*, note 38 at § 4-7.
60. *Bernal v. People*, 44 P.3d 184, 191 (Colo. 2002); *People v. Stevens*, 642 P.2d 39, 40 (Colo.App. 1981).
61. Loftus and Wells, "Eyewitness Identification and the Selection of Distractors for Lineups," 15 *L. & Hum. Behav.* 43, 55 (Feb. 1991).
62. *Bernal*, *supra*, note 60 at 190-91, citing *U.S. v. Wiseman*, 172 F.3d 1196, 1208 (10th Cir.1999).
63. *Id.* at 191-92; *People v. Borrego*, 668 P.2d 21, 23 (Colo.App. 1983).
64. Penrod, *supra*, note 44 at 46. Although, as discussed elsewhere in this section, there may not be a relation between the confidence level of the witness and the accuracy of the identification, it is still important accurately to record the initial confidence level.
65. *Campbell v. People*, 814 P.2d 1 (Colo. 1991); see also *People v. Shreck*, 22 P.3d 68 (Colo. 2001) (establishing new standards for the use of scientific testimony).
66. *Campbell*, *supra*, note 65 at 8.
67. *Id.*
68. *People v. Campbell*, 847 P.2d 228, 230 (Colo.App. 1992).
69. *Id.* at 229.
70. *Id.* at 233.
71. Malpass and Kravitz, "Recognition for Faces of Own and Other Race," 13 *J. Personality & Soc. Psych.* 330-34 (Dec. 1969).
72. *U.S. v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).
73. *People v. Loyd*, 751 P.2d 1015, 1019 (Colo.App. 1988).
74. The DOJ Report can be accessed at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf>.
75. *Id.* The DOJ Report supports, but does not mandate, sequential and "double blind" line-ups.
76. *Id.* at 13-16.
77. *Id.* at 17-19.
78. *Id.* at 27-29. A "show-up" is a one-on-one identification procedure conducted at or near the scene and the time of the crime while the investigation is still in its initial phases.
79. *Supra*, note 74 at 1-2.
80. *Id.* at iii-iv and 2.
81. New Jersey: "Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures": see <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.
82. Penrod and Cutler, "Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation," 1 *Psych. Pub. Pol'y. & L.* 817 (Dec. 1995).
83. U.S. Const. Amend. VI; *Gideon*, *supra*, note 6.
84. *Gideon*, *supra*, note 6.
85. *People v. Norman*, 703 P.2d 1261, 1272 (Colo. 1985).
86. "Miscarriages," *supra*, note 13, at 36 n.17 and Table 3 (of 350 erroneous capital convictions studied nationally, none was found in Colorado).
87. "Miscarriages," *supra*, note 13 at 57 (5 percent); Saks and Constantine, "Model Prevention and Remedy of Erroneous Convictions Act," 33 *Ariz. St. L.J.* 665, 674 (Fall 2001) (28 percent); *Actual Innocence*, *supra*, note 5 (27 percent); *Innocence Study*, *supra*, note 35 (23 percent).
88. Coyle, Strasser, and Lavelle, "Fatal Defense," 12 *Nat. L.J.* 30, 44 (June 11, 1990) (capital-defense attorneys were disciplined at rates from 3 to 46 times higher than other attorneys).
89. *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim.App., 1995).
90. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).
91. Voigts, "Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel," 99 *Colum. L.Rev.* 1103, 1118 and n.88 (May 1999).
92. "United States: Too Poor to be Defended," Vol. 347, No. 8063, *The Economist* (April 11, 1998).
93. See Office of Public Defender Web page: http://www.state.co.us/gov_dir/pdef_dir/pd.htm.
94. See ADC Web page: <http://coloradoadc.com>.
95. *People v. Naranjo*, 840 P.2d 319, 323-25 (Colo. 1992); *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984).
96. *Valarde v. People*, 399 P.2d 245, 247 (Colo. 1965) (" . . . so long as court appointed counsel has competently prepared the defense and ably conducted it, the constitutional requirement of assistance of counsel for indigent accused persons is met."); *People v. Velasquez*, 641 P.2d 943, 951 (Colo. 1982) ("A defendant is not constitutionally entitled to errorless counsel but rather to reasonably effective assistance of counsel.").
97. *Innocence Study*, *supra*, note 35.

98. The Center for Public Integrity, "Harmful Error: Investigating America's Local Prosecutors," <http://www.publicintegrity.org/pm/default.aspx?sid=sidebars&aid=40>.

99. *Id.* at <http://www.publicintegrity.org/pm/search.aspx?act=nat&hid=y>.

100. *Id.*

101. These estimates are based on filing data from the National Center for State Courts, http://www.ncsconline.org/D_Research/CSP/2000_Total_Caseloads.html, and on the estimate that only about 5 percent of filings go to trial.

102. *Supra*, note 98 at <http://www.publicintegrity.org/pm/states.aspx>.

103. *State of Texas v. Coleman*, Docket No. A3778-03-04 (64th Dist. Ct., Tulia, Swisher Cty., TX, 2003).

104. *Id.*

105. See *People v. Bueno*, 646 P.2d 931, 937 (Colo. 1982) (trial court found Denver detective not to be credible witness and noted "the lack of credibility that he has with judges of the State of Colorado, both federal and state. . ."); *People v. Pitts*, 13 P.3d 1218, 1222 (Colo. 2003) (police officer testimony "was not credible"); *People v. Altman*, 938 P.2d 142, 146 (Colo. 1997) (trooper's testimony was "not credible"); *People v. Fortune*, 930 P.2d 1341, 1348 (Colo. 1997) (officer "intentionally omitted relevant information" from an affidavit, making it "substantially misleading").

106. S. B. 03-318, amending CRS §§ 18-18-404 and 405, and reducing penalties for certain drug offenses (effective June 7, 2003).

107. See, e.g., Cloherty and Perlman, "Powder vs. Crack: 100 to 1 Current Quantity Ratio Under Attack," 50 *APR FedLaw* 50 (March/April 2003); Weinstein, "Standing Down From the War on Drugs," 75 *NY St. Bar J.* 55 (Feb. 2003); Oberdorfer, "Mandatory Sentencing: One Judge's Perspective—2002," 40 *Am. Crim. L.Rev.* 11, 18 (Winter 2003); Weinstein, "Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing," 40 *Am. Crim. L.Rev.* 87 (Winter 2003).

108. Furman, "Avoiding Error in Closing Argument," 24 *The Colorado Lawyer* 33 (Jan. 1995).

109. *People v. Wiley*, 51 P.3d 361 (Colo.App. 2001) (prosecutor improperly asked judge, in front of jury, to take judicial notice that defendant's motion to suppress was denied; error found harmless).

110. *People v. Jensen*, 55 P. 3d 135 (Colo.App. 2001).

111. *People v. Avila*, 944 P.2d 673, 676 (Colo.App. 1997), citing *People v. Vialpando*, 804 P.2d 219, 224 (Colo.App. 1990).

112. *People v. Eckert*, 919 P.2d 962, 967 (Colo.App. 1996), citing *Wilson v. People*, 743 P.2d 415 (Colo. 1987).

113. *People v. Mucklow*, 35 P.3d 527 (Colo. O.P.D.J. 2000).

114. *People v. Sheppard*, 701 P.2d 49 (Colo. 1985) (dismissal of vehicular homicide charges appropriate sanction where car destroyed by towing company after defendant requested it be preserved).

115. *People v. Buckley*, 848 P.2d 353, 354 (Colo. 1993) (district attorney publicly censured after shoplifting); *People v. Robinson*, 839 P.2d 4, 6 (Colo. 1992) (deputy district attorney suspended for one year for conduct involving use of cocaine); *People v. Larsen*, 808 P.2d 1265, 1267 (Colo. 1991) (district attorney suspended for three years for convictions for purchasing marijuana and official misconduct); *People v. Sharpe*, 781 P.2d 659, 660-61 (Colo. 1989) (deputy district attorney publicly censured for use of racial epithet); *People v. Brown*, 726 P.2d 638, 640-41 (Colo. 1986) (district attorney disbarred for abuse of power and office, and misuse of position, as reflected in felony and misdemeanor convictions); *People v. Tucker*, 676 P.2d 680, 681 (Colo. 1983) (district attorney suspended for improper billing of counties for expenses and efforts to prevent material witness from testifying at trial); *People v. Unruh*, 621 P.2d 948, 948-49 (Colo.1980) (deputy district attorney disbarred for using illegal drugs, conspiring to smuggle narcotics into United States, and attempting to obstruct administration of justice).

116. *Robinson*, *supra*, note 115 ("All attorneys must abstain from criminal conduct. The respondent, however, undertook an even higher responsibility to the public with respect to this obligation by virtue of his public office as an attorney engaged in law enforcement."), citing *Larsen*, *supra*, note 115; *Sharpe*, *supra*, note 115 at 660-61.

117. *Brown*, *supra*, note 115 ("[A] lawyer who holds the position of district attorney, with the substantial powers of that office, assumes responsibilities beyond those of other lawyers and must be held to the highest standard of conduct.").

118. *Harris v. People*, 888 P.2d 259 (Colo. 1995); see also *Berger v. U.S.*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

119. CRS § 20-1-306.

120. Entry-level pay for the U.S. Attorney's Office in Colorado is \$49,324, compared to entry-level pay in the Denver District Attorney's Office of \$43,032 (year 2000); data from http://www.law.com/special/professionals/nj/earn/earns_4.html.

121. Conversation with Pete Weir (June 10, 2003), Executive Director of the Colorado District Attorneys Council; as recently as 2001, some starting salaries were as low as \$27,000.

122. Leo, "From Coercion to Deception: The Changing Nature of Police Interrogation in America," 18 *Crime, Law and Social Change* 35-59 (Sept. 1992).

123. *Actual Innocence*, *supra*, note 5 at 361.

124. Inbau and Reid, *Criminal Interrogation and Confessions*, 3d ed. (Phila., PA: Williams and Wilkins, 1986); Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (Hoboken, NJ: John Wiley & Sons, 1992).

125. See, e.g., *Colorado Peace Officer's Handbook*, *supra*, note 57 at §§ 5-100 *et seq.*

126. *Perspectives*, *supra*, note 24 at Chap. 2; Inbau and Reid, *supra*, note 124.

127. Ofshe and Leo, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," 88 *J. of Crim. Law and Criminology* 429-96 (Winter 1998).

128. *Perspectives*, *supra*, note 24 at 44-47; Johnson, "False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations," 6 *Boston Univ. Public Interest L.J.* 719-51 (Spring 1997).

129. CRS § 16-4-105(1)(h) allows a court to consider the "apparent probability of conviction."

130. *People v. Raibon*, 843 P.2d 46 (Colo.App. 1992).

131. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985) (due process clause of Alaska Constitution requires police to electronically record custodial interrogation in place of detention); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994) (supervisory power of court justifies requirement that custodial interrogations in place of detention be electronically recorded whenever feasible).

132. Illinois Report, *supra*, note 12; Sophonow Report, *supra*, note 25; Johnson, *supra*, note 128 at 719.

133. See, e.g., *People v. Wickham*, 53 P.3d 691 (Colo.App. 2001).

134. Lassiter, "Sometimes the Camera Lies," *Nat. Law J.* (June 9, 2003) at 42, making the following argument: The camera can "lie," so videotaping procedures must be properly developed and implemented. For example, psychological research indicates that there is a "point-of-view" bias; that is, a bias that occurs when the camera focuses only on the suspect. "Equal focus" videotaping focuses equally on the suspect and the interrogator does not demonstrate such bias. New Zealand now requires equal focus videotaping of police interrogations. *Id.*

135. *Innocence Study*, *supra*, note 35.

136. "Jailhouse Informants, Their Unreliability, and the Importance of Complete Crown Disclosure Pertaining to Them," in Sophonow Report, *supra*, note 25 at 1.

137. *Commonwealth v. Limone*, Docket Nos. 32367, 32369, 32370, 2001 WL 30494 (Mass.Super. 2001).

138. *Perspectives*, *supra*, note 24 at Chap. 3; Sophonow Report, *supra*, note 25.

139. *Perspectives*, *supra*, note 24 at Chap. 10, entitled "Back from the Courthouse: Corrective Measures to Address the Role of Informants in Wrongful Convictions."

140. *Perspectives, supra*, note 24 at 210-15; Sophonow Report, *supra*, note 25 at App. F.

141. *But see People v. Overton*, 759 P.2d 772 (Colo.App. 1988) (physician-patient privilege of paid government informant trumps discovery right of defendant to records of drug treatment informant was receiving while working on defendant's case).

142. See Senate Resolution 0021 of the 93rd Session of the Illinois General Assembly (2003), urging the Illinois Supreme Court to adopt the recommendation of the Governor's Commission on Capital Punishment to improve the discovery of information about informants.

143. *People v. Huehn*, 53 P.3d 733, 739 (Colo.App. 2002).

144. *Id.*, citing *People v. Thurman*, 787 P.2d 646 (Colo. 1990) and *People v. Collins*, 730 P.2d 293 (Colo. 1986).

145. *People v. Hendrickson*, 45 P.3d 786 (Colo.App. 2001), *cert. denied* (April 22, 2002).

146. *People v. Gilbert*, 12 P.3d 331 (Colo.App. 2000). This ruling works both ways. See *People v. Gillis*, 883 P.2d 554 (Colo.App. 1994).

147. *People v. Martinez*, 987 P.2d 884 (Colo.App. 1999).

148. *People v. Jones*, 971 P.2d 243 (Colo. 1998); *People v. Melanson*, 937 P.2d 826 (Colo.App. 1996).

149. *People v. Montoya*, 942 P.2d 1287 (Colo.App. 1996).

150. *People v. Griffin*, 867 P.2d 27 (Colo.App. 1993).

151. *People v. Leonard*, 644 P.2d 85 (Colo.App. 1982).

152. COLJI:Crim 3:06.

153. COLJI:Crim 3:05.

154. COLJI:Crim 4:07.

155. COLJI:Crim 4:08.

156. *U.S. v. Garcia Abrego*, 141 F.3d 142, 152 (5th Cir. 1998).

157. CRS § 18-11-101.

158. *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001) (establishing new method of evaluating scientific testimony in state court); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (establishing federal court procedures).

159. Peterson, Fabricant, and Field, *Crime Laboratory Proficiency Testing Research Program* (Wash., DC: L.E.A.A., Oct. 1978).

160. "Convicted by Juries," *supra*, note 17 (on average, these 28 individuals served 7 years in prison before being exonerated).

161. For example, despite concerns about individual tests, reliance on genetic theory, fingerprints, and blood typing, for example, has not been seriously challenged.

162. Innocence Study, *supra*, note 35.

163. See "The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosive-Related and Other Cases" (USDOJ/OIG Special Reports, April 15, 1997): <http://www.usdoj.gov/oig/special/97-04a/index.htm> (*hereafter*, "FBI Lab Report").

164. The Crime Laboratory Accreditation Program, established by the American Society of Crime Laboratory Directors, is a voluntary accreditation program. Accreditation is based on the management, operations, personnel, procedures, equipment, physical plant, security, and health and safety procedures of a particular lab. Labs can be accredited in one or more of several disciplines. More detail may be found at <http://www.ascl-d-lab.org/aslab07.htm>.

165. FBI Lab Report, *supra*, note 163 at 25-29 (Executive Summary).

166. USDOJ/OIG Special Report: "The FBI Laboratory One Year Later: A Follow-Up to the Inspector General's April 1997 Report on FBI Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases" (June 1998): <http://www.usdoj.gov/oig/special/98-06.htm>.

167. *Id.*

168. "Crime Lab Chief Reveals Failings," *Houston Chronicle* (April 2, 2003): <http://www.houstonchronicle.com/cs/CDA/story.htm/special/>

[crimelab/1847854](http://www.houstonchronicle.com/cs/CDA/story.htm/special/crimelab/1847854). This article quotes a report by the Internal Affairs Division of the Houston Police Department.

169. Boyd, "Experts Cite Problems with Police Crime Lab," *Fort Worth Star-Telegram* (April 18, 2003): <http://www.dfw.com/ml/dfw/news/5663681.htm>.

170. FBI Lab Report, *supra*, note 163 at 28.

171. FBI Lab Report, *supra*, note 163 at 25-28 (Recommendation XII).

172. *State v. Zain*, 528 S.E.2d 748 (W.Va. 1999); *Ex Parte Zain*, 940 S.W.2d 253 (Tex.App. 1997).

173. *Matter of Investigation of West Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d 501 (W.Va. 1993).

174. "Fallout From Zain Mess Worsens," *Charleston Gazette and Daily Mail* (Feb. 22, 2002): http://www.law-forensic.com/zain_1.htm.

175. See, e.g., *State ex rel. McLaurin v. Trent*, 523 S.E.2d 547 (W.Va. 1998).

176. *McCarty v. State*, 765 P.2d 1215, 1215-18 (Okla. Crim.App. 1988). McCarty was convicted again in his re-trial: *McCarty v. State*, 904 P.2d 110 (Okla. Crim.App. 1995).

177. *Mitchell v. Gibson*, 262 F.3d 1036 (10th Cir. 2001).

178. See Franken, "FBI Reviewing Cases Forensic Expert Handled" (CNN Washington Bureau, May 1, 2001): <http://www.cnn.com/2001/LAW/05/01/oklahoma.evidence/index.html>.

179. See Center for Forensic Reform: http://www.law-forensic.com/center_for_forensic_reform.htm.

180. Montana is reviewing all of the work performed by a former forensic science lab employee who conducted hair comparisons after DNA work demonstrated that his comparisons were simply wrong in at least two cases. Press Release of Montana Attorney General Mike McGrath: <http://www.doj.state.mt.us/news/releases2003/05012003.asp>.

181. CRS §§ 24-33.5-401 *et seq.*; CBI Web page: http://cbi.state.co.us/about_cbi.asp.

182. CRS § 24-33.5-412(a) and (b).

183. CBI Web page, *supra*, note 181.

184. In fiscal year 2001, the Office of Public Defender defended approximately 79 percent of the felonies filed in Colorado, according to Rob Calkins, Chief Administrative Officer, in a conversation on May 29, 2003.

185. See CBI Web page, *supra*, note 181 at History.

186. The complete list of accredited laboratories may be found at <http://www.ascl-d-lab.org/aslab06.html>, part of the website of the American Society of Crime Lab Directors.

187. *People v. Legg*, Docket No. 01-CR-1228, Weld County Dist. Ct.

188. S.B. 03-318, effective July 1, 2003, reduces the penalties for certain drug possession offenses and diverts the money saved to drug education and treatment programs.

189. Colo. Const. Art. II § 16; CRS § 18-1-405.

190. S.B. 03-164, creating CRS §§ 18-1-411 *et seq.*, became law on March 28, 2003. The bill was drafted with input from prosecutors, defense lawyers, the Colorado Innocence Project, and the Wrongful Convictions Clinic at the University of Colorado School of Law.

191. Illinois House Bill 0223, signed into law on July 17, 2003.

192. See *Stephan, supra*, note 131; *Scales, supra*, note 131.

193. See DOJ, "Eyewitness Evidence: A Guide for Law Enforcement": <http://www.ncjrs.org/pdffiles1/nij/178240.pdf>.

194. *Supra*, note 81.

195. A listing of various innocence projects can be found at <http://www.innocenceproject.org>.

196. Letter to Edmund Randolph, *quoted in The Oxford Dictionary of American Legal Quotations* (Oxford, UK: Oxford Univ. Press, 1993) at 214. ■

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