

Ad Hoc Committee: Findings and Recommendations

February 12, 2013

September 8, 2011, Meeting

False Confessions (Vote – Unanimous):

The Ad Hoc Committee has considered whether false confessions present an area of concern in this jurisdiction such that further investigation by the Committee or recommendation for reform is necessary. It concluded that they do not. The committee viewed the enactment in the District of Columbia of the Electronic Procedures Act, D.C. Code § 5-116.01, as such a positive step as to make further reform unnecessary at this time. Although no statute can entirely prevent false confessions, this legislation gives litigants access to evidence needed to litigate a claim that a confession is false.

Pre- and Post-Conviction Access to DNA Testing (Vote – Unanimous):

The Ad Hoc Committee has considered whether access to DNA testing, both pre-conviction and post-conviction, is an area of concern in this jurisdiction such that further investigation by the Committee or recommendation for reform is necessary. It concluded that it is not. The Committee believed that the pre-conviction and post-conviction DNA testing provisions of the Innocence Protection Act, D.C. Code § 22-4132 (pre-conviction) and § 22-4133 (post-conviction), provide defendants with an opportunity to seek DNA testing of biological materials at both the pre-conviction and post-conviction stages of a criminal case such that further reform is not needed at this time.

Access to Post-Conviction Representation (Vote – Unanimous):

The Ad Hoc Committee has considered whether access to post-conviction legal representation is an area of concern in this jurisdiction such that further investigation by the Committee or recommendation for reform is necessary. It concluded that it is not. The Committee believed that the appointment of counsel provisions contained in the Innocence Protection Act, D.C. Code § 22-4135(e)(2), and in Rules 4 and 8 of the Rules Governing Proceedings Under D.C. Code § 23-110, which authorize the appointment of counsel when the interest of justice so requires, and mandate the appointment of counsel when an evidentiary hearing is required, provide defendants with sufficient access to post-conviction legal representation such that further reform is not needed at this time.

Evidence Preservation (Vote – Unanimous):

The Ad Hoc Committee has considered whether the preservation of evidence is an area of concern in this jurisdiction such that further investigation by the Committee or recommendation for reform is necessary. It concluded that it is not. The provisions of the Innocence Protection Act, concerning the preservation of evidence, D.C. Code § 22-4134, and of the Millicent Allewelt Amendment Act of 2004, D.C. Code § 5-113.32, concerning the preservation of evidence, and the construction of the new Metropolitan Police Department Evidence Control Division Warehouse for housing evidence, make further reform in this area unnecessary at this time.

October 5, 2011, Meeting

Resources of the Defense Bar (Vote – Unanimous):

The Ad Hoc Committee has considered whether the adequacy of resources available to the defense bar is an area of concern in this jurisdiction such that further investigation by the Committee or recommendation for reform is necessary. It concluded that it is not. The Public Defender Service of the District of Columbia is a nationally-renowned, well-funded and well-staffed public defender agency. In addition, D.C. provides funding for all reasonable and necessary expenses and fees for criminal defense attorneys through the Criminal Justice Act, D.C. Code §11-2601. Furthermore, under the Innocence Protection Act, D.C. Code § 22-4133(e)(1), the cost of post-conviction DNA testing shall be paid for by the District of Columbia, if it is found that the defendant is unable to pay for testing. The Ad Hoc Committee notes with concern, however, that Congress has not increased the payment schedule for defense investigators for almost a decade.

November 15, 2011, Meeting

Eyewitness Identification Procedure – Preamble:

(First Vote – 4 Yes - 9 No) (Recommendation Not Approved)

The Ad Hoc Committee has considered whether the procedures used by law enforcement in the District of Columbia to collect eyewitness identification evidence are an area of concern in this jurisdiction such that further investigation by the committee or recommendation for reform is necessary. Based on a review of scientific studies, case law, and the experience of other jurisdictions that have reformed their procedures, the Committee has identified a number of potentially beneficial practices in collecting eyewitness identification evidence in cases involving identifications by strangers.

(Second Vote – Unanimous)

The Ad Hoc Committee has considered whether the procedures used by law enforcement in the District of Columbia to collect eyewitness identification evidence are an area of concern in this jurisdiction such that further investigation by the committee or recommendation for reform is necessary. Based on a review of scientific studies, case law, and the experience of other jurisdictions that have reformed their procedures, the Committee has identified a number of beneficial practices in collecting eyewitness identification evidence in cases involving identifications by strangers.

Eyewitness Identification Procedure – Computer Use (Vote – Unanimous):

Law enforcement should use computers (laptops) to administer and record photographic identifications wherever practicable, and appropriate hardware and software should be developed and funded.

Eyewitness Identification Procedure – Contemporary Statements of Confidence (Vote – 7 Yes - 7 No) (Recommendation Not Approved):

The District of Columbia should, in every case, employ the practice of eliciting and recording subsequent statements of confidence immediately after the initial identification.

December 14, 2011, Meeting

Eyewitness Identification Procedure – Blind Administration (Vote – Unanimous):

Law enforcement should employ blind administration when practicable; that is, identification procedures should be conducted in a manner in which the administrator does not know the identity of the suspect or cannot discern which photo the witness is looking at when attempting to make an identification.

Eyewitness Identification Procedure – Sequential Administration (Vote – 4 Yes - 8 No) (Recommendation Not Approved):

Law enforcement should employ sequential presentation; that is, individuals presented to a witness in a photo array or live lineup should be displayed one-by-one, rather than presented to the witness simultaneously.

February 7, 2012, Meeting

Eyewitness Identification Procedure – Sequential Versus Simultaneous Presentation (Vote – Unanimous):

A majority of the Committee concluded that there is an open question whether sequential presentation is preferable to simultaneous presentation and therefore the Committee determined that there was insufficient evidence to require law enforcement to use sequential presentation instead of simultaneous presentation, although a majority of the Committee recommended further study of this issue. The Committee also notes that the Metropolitan Police Department currently permits photo arrays to be displayed either sequentially or simultaneously. See MPD General Order 304.7 at F.1.

September 6, 2012 Meeting:

Statement on Informants (Vote – Unanimous):

The Ad Hoc Committee has considered whether testimony by “informants” (that is, persons who are seeking or have been provided with a benefit in the criminal justice system, other than statutory witness fees or placement in a witness security program) presents an area of concern in this jurisdiction such that further investigation by the Committee or recommendation for reform is necessary. The Committee believes that the government’s policies and practices and the relevant jury instructions currently in place generally provide defendants with sufficient information about informants. Nevertheless, the Committee has concluded that reform is necessary with respect to the timing of the disclosure of impeachment material concerning informants, and supports the initiative set forth below. The Committee believes further study and evaluation are necessary to determine, among other issues and in the light of experience, whether the innovation is effective.

The Committee is in favor of the disclosure of impeachment material for informant witnesses no later than the trial readiness conference, generally scheduled by the court in adult felony cases approximately two weeks in advance of trial, as long as disclosure does not compromise the witnesses’ safety. At that time, the government should be prepared to (1) respond, on the record, to the court’s inquiries regarding whether the government has gathered impeachment material for each of its informant witnesses; and (2) discuss when, and under what protections (if any are deemed necessary), such impeachment material can be disclosed to defense counsel in light of any countervailing considerations. The following are examples of the “impeachment material” about which the government should be prepared to respond:

- the name and criminal history of the informant;

- any agreement pursuant to which the informant has provided assistance in the pending case;
- the informant's prior cooperation history in this jurisdiction or in any other jurisdiction of which the prosecutor is aware (including as a paid informant, or pursuant to an agreement, in a prior criminal case); and
- any benefit that the informant expects or has been provided (that has not already been disclosed in response to these other inquiries).

November 19, 2012 Meeting:

Forensic Evidence (Vote – Unanimous):

The Ad Hoc Committee has considered whether the state of forensic evidence in the District of Columbia is an area of concern in this jurisdiction such that further reform is necessary. For the reasons set forth below, the Committee has concluded that further reform is not required at this time.

First, the government currently uses a variety of forensic tools that have enhanced the reliability of criminal prosecutions. In the area of forensic DNA, the government presents newly discovered PCR-STR methodologies to overcome inhibition (i.e., Identifiler Plus), methodologies to target degraded DNA (i.e., Mini-Filers), methodologies to target extremely low levels of male DNA (i.e., Y-Filer), and methodologies to extract DNA from hair (i.e., mitochondrial DNA). The government also presents a variety of pattern matching methodologies that continue to enjoy general acceptance within the scientific community and are routinely used in Superior Court (i.e., firearms and toolmark identification, latent fingerprint identification, and handwriting analysis).

Second, the D.C. Council passed the Department of Forensic Sciences Act of 2011, which established the Department of Forensic Sciences (DFS) as an independent agency in the executive branch of the government of the District of Columbia. In accord with that legislative mandate, on October 1, 2012, functions previously carried out by the Forensic Science Divisions of the Metropolitan Police Department (MPD) were transferred to DFS. These functions include: (1) serology and DNA analysis; (2) trace evidence; firearms and toolmark identification; (3) latent fingerprint identification; (4) crime scene investigations; and (5) evidence intake and control. The serology, DNA and trace evidence components of DFS hold accreditation through the International Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). Such accreditation requires, *inter alia*, an ongoing quality assurance program that includes internal and external audits, documented proficiency testing that is geared to the forensic discipline of the analyst, and strict adherence to the standards and supplemental guidelines of ASCLD/LAB. DFS is in the process of implementing operational procedures for the Fingerprint Unit and Firearms Unit based on the accreditation standards, which are necessary to bring these units into compliance with all accreditation requirements by October 2013.

The DFS is validating new DNA testing methodologies so that fewer cases need to be outsourced to private laboratories. In addition, in the ensuing months, the DFS plans to fold the Crime Scene Investigation Division of MPD into the DFS operational structure and staff the unit with civilian employees. The DFS also plans to expand into other areas such as the analysis of controlled substances, residues, and questioned documents; digital/computer forensics; and forensic photography.

- With the establishment of the DFS, the District has an independent agency driven by national accreditation standards that is committed to the best practices across all components of the DFS laboratory. While those improvements by themselves do not ensure that the new lab will be free from the problems that a small number of other similarly accredited labs have suffered from, these improvements are a substantial step in the right direction. The organizations participating in the Ad Hoc Committee will monitor the implementation of the new operating procedures at DFS' divisions and the work they produce. However, because the Committee does not have sufficient information on the operations of DFS at this point, the Ad Hoc Committee believes that there is no need to suggest further reform now.

Resources and Remedies for Wrongfully Convicted Persons (Vote – Unanimous):

The ad hoc committee has considered whether the adequacy of resources and remedies available to wrongfully convicted persons is an area of concern in this jurisdiction such that further investigation by the committee or recommendation for reform is necessary. It concluded that it is not, because wrongfully convicted persons have: (1) well-established statutory remedies to obtain post-conviction DNA testing and to vacate their convictions on grounds of new evidence of actual innocence, at any time; and (2) two statutory remedies to obtain compensation for their unjust imprisonment.

First, the Innocence Protection Act (IPA) authorizes a defendant to file a motion to vacate his conviction at any time based on new evidence of actual innocence. D.C. Code § 22-4135. In addition, the IPA authorizes a defendant serving a sentence for a crime of violence to file a motion for post-conviction DNA testing at any time, D.C. Code § 22-4133(a), and requires the Court to order such testing if there is a reasonable probability that the testing would produce non-cumulative evidence that would help establish the defendant's innocence, and the defendant meets the other requirements of the section, D.C. Code § 22-4133(d). Furthermore, the cost of post-conviction DNA testing must be paid by the District of Columbia if the defendant is financially unable to pay for the testing, D.C. Code § 22-4133(e)(1), and the court may appoint counsel to assist the defendant if he is financially unable to obtain adequate representation. D.C. Code § 22-4133(e)(2).

Second, if a wrongfully convicted person is exonerated, he can seek compensation for his wrongful imprisonment under both federal and District of Columbia law. More specifically, an exoneree can seek compensation of up to \$50,000 per year for each year of his incarceration pursuant to 28 U.S.C. § 2513 if the exoneree establishes that

his conviction was set aside on the grounds of actual innocence, that he did not commit any of the acts charged, and that he did not, by his own misconduct or neglect, bring about his own prosecution. Likewise, an exoneree can seek unlimited compensation for his imprisonment under D.C. Code § 2-421 et seq., if the exoneree establishes that his conviction was set aside on grounds of actual innocence and if he also establishes, by clear and convincing evidence, that “he did not commit any of the acts charged or his acts or omissions in connection with such charge constituted no offense against the United States or the District of Columbia the maximum penalty for which would equal or exceed the imprisonment served and he did not, by his misconduct, cause or bring about his own prosecution.” D.C. Code § 2-422.