

## **RESOLUTION 03-16-2007**

### **DIGEST**

#### Criminal Procedure: Eyewitness Identification and False Confessions

Urges the Legislature to pass measures for improved eyewitness identification and electronic recording of custodial interrogations.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

**APPROVE IN PRINCIPLE**

#### History:

Similar to Resolution ELF-03-2006, which was approved, and substantially related to Resolution 04-10-2007.

#### Reasons:

This resolution urges the Legislature to pass measures for improved eyewitness identification and electronic recording of custodial interrogations. This resolution should be approved in principle because it is narrowly tailored to ensure the fair administration of justice without placing unreasonable burdens upon prosecution or police agencies.

The California Commission on the Fair Administration of Justice (“Commission” or “CCFAJ”) was established by Senate Resolution No. 44 (2003-2004 Reg. Sess.) to study and review the administration of criminal justice in California, determine the extent to which that process has failed in the past, examine safeguards and improvements, and recommend proposals to ensure that the administration of criminal justice in California is just, fair and accurate. The Commission has conducted hearings and identified causal factors in California, including misidentification by eyewitnesses and false confessions. In April 2006, the Commission released its report and recommendations regarding eyewitness identification procedures. In July 2006, the Commission released its report and recommendations regarding false confessions.

In 2006, the Senate and Assembly passed Senate Bill No. 1544 (2005-2006 Reg. Sess.), which would require the Department of Justice and the Commission on Peace Officer Standards and Training to develop guidelines for eyewitness identification procedures. Also in 2006, the Senate and Assembly passed Senate Bill No. 171 (2005-2006 Reg. Sess.), which would mandate the electronic recording of custodial interrogation in serious felony cases. The governor vetoed both pieces of legislation due to technicalities.

Introduced earlier this year, Senate Bill No. 756 (2007-2008 Reg. Sess.) is substantially similar to the previous legislation. This resolution is consistent with the Conference’s previous action, and again urges both houses of the Legislature to pass both pieces of legislation and further urges the governor to sign them into law.

### **TEXT OF RESOLUTION**

RESOLVED that the Conference of Delegates of California Bar Associations urges the California Senate and Assembly to pass S.B. 756 [Ridley-Thomas] (relating to improved methods and procedures for the conducting of eyewitness identifications), which incorporates

into legislation the reform measures recommended by the California Commission on the Fair Administration of Justice (“CCFAJ”) regarding eyewitness identifications issued April 13, 2006, <http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf> , and provides as follows:

The people of the State of California do enact as follows:

SECTION 1. Section 806 is added to the Evidence Code, to read:

806. Consistent with existing law, expert testimony may be admitted regarding factors that affect the reliability of eyewitness identification if the proponent of the evidence establishes relevancy and proper qualifications of the witness.

SEC. 2. Section 686.3 is added to the Penal Code, to read:

686.3. (a) The goal of a law enforcement criminal investigation is to find and apprehend the person or persons responsible for committing a crime.

(b) A comprehensive body of peer-reviewed studies of eyewitness identification procedures indicate that the criminal justice system can improve the accuracy of eyewitness identifications by implementing changes to identification procedures.

(c) Improving the accuracy of eyewitness identifications will increase public trust in the criminal justice system.

(d) Policies and procedures such as those recommended by the National Institute of Justice and the California Commission on the Fair Administration of Justice are readily available and have proven effective in other jurisdictions.

(e) It is the intent of the Legislature that law enforcement officials study and consider adoption of new policies and procedures similar to those recommended by the National Institute of Justice and the California Commission on the Fair Administration of Justice in order to ensure that eyewitness identification procedures in California minimize the chance of misidentification of a suspect.

RESOLVED FURTHER that the Conference of Delegates of California Bar Associations urges the California Senate and Assembly to pass S.B. 511 [Alquist] (relating to the electronic recording of custodial interrogations to minimize the risks of false confessions), which incorporates into legislation the reform measures recommended by the California Commission on the Fair Administration of Justice (“CCFAJ”) regarding false confessions, <http://www.ccfaj.org/documents/reports/false/official/falconfrep.pdf>, and provides as follows:

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature in enacting this act to require the creation of an electronic record of an entire custodial interrogation in order to eliminate disputes in court as to what actually occurred during the interrogation, thereby improving prosecution of the guilty while affording protection to the innocent.

SEC. 2. Section 859.5 is added to the Penal Code, to read:

859.5. (a) (1) Any custodial interrogation of an individual suspected of committing or accused of a homicide, as defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1, or a violent felony, as defined in subdivision (c) of Section 667.5, shall be electronically recorded in its entirety. This provision applies to both adult and juvenile proceedings.

(2) The requirement for the electronic recordation of a custodial interrogation pursuant to this section shall not apply if the person to be interrogated provides an electronically recorded statement expressing that he or she will speak to the law enforcement officer or officers only if the interrogation is not electronically recorded. Where electronic recording of that statement is refused by the person to be interrogated, then that refusal may be documented in writing.

(3) The interrogating entity shall not destroy or alter any electronic recording made of a custodial interrogation of a defendant until the time that a defendant's conviction for any offense relating to the interrogation is final and all direct and habeas corpus appeals are exhausted or the prosecution of the defendant for that offense is barred by law. The interrogating entity may make one or more true, accurate, and complete copies of the electronic recording in a different format.

(b) Any law enforcement officer who conducts a custodial interrogation of an individual described in subdivision (a) shall be required to make an electronic recording of the interrogation pursuant to subdivision (a), unless the law enforcement officer can demonstrate, by a preponderance of the evidence, that the electronic recording of the custodial interrogation was not feasible for a specified reason, including, but not limited to, either of the following:

(1) Access to equipment required to electronically record an interrogation could not be obtained during the period of time that the defendant could be lawfully detained.

(2) The failure to create an electronic recording of the entire custodial interrogation was the result of a malfunction of the recording device and obtaining a replacement device was not feasible.

(c) If a court finds that a defendant was subjected to a custodial interrogation in violation of subdivision (a), the court shall, at the request of the defendant, provide the jury with a, instruction, to be developed by the Judicial Council that advises the jury to view the statements made in that custodial interrogation with caution.

(d) For the purposes of this section, the following terms have the following meanings:

(1) "Custodial interrogation" means any interrogation that is conducted at a place of detention during which a law enforcement officer is required to advise a person of his or her Miranda rights, from the beginning of questioning until the interview is complete, involving questioning that a law enforcement officer should know is reasonably likely to elicit an incriminating response from the defendant, under circumstances in which a reasonable person in the defendant's position would believe that he or she is in custody.

(2) "Electronic recording" means an analog or digital recording that includes the audio representations of any interrogator and individual involved in a custodial interrogation, provided however, that a motion picture, videotape, analog, or digital recording that includes both audio and visual representations of any interrogator and individual involved in a custodial interrogation is also permitted. If videotaping is used, the camera shall be positioned to capture images of the suspect and the interrogators. Law enforcement officers are encouraged to videotape the custodial interrogation of individuals suspected or accused of committing a homicide.

(3) "Law enforcement officer" means any officer of the police, sheriff, highway patrol, or district attorney, and any peace officer included in Chapter 4.5 (commencing with Section 830).

(4) "Place of detention" means a police station, sheriff's station, correctional facility, holding facility for prisoners, or any other law enforcement facility in which a person may be held in detention in connection with any criminal charge that has been, or may be, filed against the person. Place of detention does not include a law enforcement vehicle.

SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

RESOLVED FURTHER that the Conference of Delegates of California Bar Associations urges the Governor to sign such legislation into law.

PROPONENT: Bar Association of San Francisco

## STATEMENT OF REASONS

Existing Law: Existing law does not regulate how law enforcement officials prepare or conduct eyewitness photo or live lineup identifications. Nor does existing law require that the interrogations of perpetrators of the most serious crimes be recorded and preserved by means of an electronic recording. The California Commission on the Fair Administration of Justice (“CCFAJ”) has identified many causal factors in California for wrongful convictions, including misidentification by eyewitnesses and false confessions. In 2006, the CCFAJ released reports and recommendations regarding eyewitness identification procedures and false confessions. It is the consensus opinion of the CCFAJ that California criminal justice system participants should study and consider adoption of policies and procedures regulating eyewitness lineup identifications so as to ensure a decrease in the number of misidentifications, and that it is appropriate to require the creation of an electronic record of an entire custodial interrogation during the investigation of the most serious crimes in order to eliminate disputes in court as to what actually occurred during the interrogation.

S.B. 1544 (addressing eyewitness identification procedures and lineups) and S.B. 171 (mandating electronic recording of all custodial interrogations relating to violent felonies by all police agencies in California) were both passed by the Legislature and then vetoed by the Governor. At the 2006 Conference of the CDCBA, the Conference passed unanimously Resolution ELF-3-2006, urging reintroduction of legislation similar to both S.B. 1544 and S.B. 171. Both bills have been reintroduced: S.B. 756 [Ridley-Thomas] requires the appointment of a task force to draft mandatory guidelines for the conduct of police line-ups and photo arrays to increase the accuracy of eye-witness identifications; S.B. 511 [Alquist] requires the electronic recording of police interrogations in cases involving homicides and other serious felonies. Both of the reintroduced bills directly address the Governor’s concerns in his veto messages with amendments as recommended by the CCFAJ.

This Resolution: Recognizes that the CCFAJ is composed of prosecutors, defense lawyers, police representatives, a crime victim advocate and a judge, yet it has achieved unanimity in its recommendations as to these bills. Commission Chair John Van de Kamp stated, “These measures all gained the unanimous support of a Commission which represents the full spectrum of involvement in the criminal justice system, after extensive study and public hearings.”

The Problem: Technological advances in forensic DNA techniques have revealed wrongful criminal convictions and resulted in exonerations of defendants who, though innocent, were convicted. The problem of wrongful convictions deserves the expertise of California lawyers. The willingness of traditional opponents to join together to support the suggested, and obviously needed, reforms, can not be ignored.

## IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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