INNOCENCE PROJECT
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To: The Advisory Committee on the Federal Rules of Evidence
From: M. Chris Fabricant, Director, Strategic Litigation, The Innocence Project
Date: September 1, 2017
Re: Organizational Statement Against the Proposed Amendment to Federal Rule of Evidence 801(d)(1)(A) on Prior Inconsistent Statements by a Witness

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On behalf of the Innocence Project, I would like to thank the Advisory Committee for soliciting our input on the proposed amendment to Federal Rule of Evidence 801(d)(1)(A) ("proposed Rule"). After discussing the amendment internally and consulting with our sister organizations in the Innocence Network, we oppose the proposed Rule for its potential adverse impacts on individuals charged with or convicted of crimes they did not commit. While the proposed amendment is limited to the Federal Rules of Evidence, at least 38 states have adopted these rules and frequently amend their own rules when the Federal Rules are amended.[1] Because the overwhelming majority of criminal cases are litigated in state court, and the overwhelming majority of criminal prosecutions are resolved through plea bargaining, our opposition to the proposed Rule is focused primarily on its potential threat to the fair administration of justice in the plea context in state court criminal prosecutions, although we have similar concerns about the proposed Rule in the federal context.[2]

The Need for Data Prior to Adopting the Proposed Rule

As a threshold matter, the potential impact of the proposed Rule requires more research before an informed decision can be made. Although six states have already adopted a provision similar to the amendment before this Committee, the specific concerns about the proposed Rule discussed below are heightened by the dearth of data from those jurisdictions on the effects of the rule changes. While the research provided to the Committee from those states is useful anecdotal information, these data relate only to felony trials resulting in a guilty verdict, which were subsequently appealed, at least in part, on this specific issue. This provides no information related to cases resolved through plea bargaining, nor any data concerning the influence the proposed Rule will have in misdemeanor prosecutions. Put differently, there are no data concerning how the proposed Rule would influence the vast majority of criminal prosecutions. Consequently, the Innocence Project respectfully recommends that the Committee not move forward with the proposal unless and until more data are available in order to examine the impacts of analogous rule changes at the state level.

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[1] See https://www.law.cornell.edu/uniform/evidence.

[2] Although precise figures are not available, approximately 95% of state prosecutions are resolved through guilty pleas. Jed S. Rakoff, *Why Innocent People Plead Guilty*, NY TIMES REVIEW OF BOOKS, available at http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/. The numbers are similar in the federal system. As the Supreme Court has noted, at both the state and federal levels, the American Criminal Justice System is "for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

In order to make an accurate, evidence-based assessment of the potential impact of the proposal, the Committee should commission a pilot study in the applicable jurisdictions to determine, inter alia, the prevalence of recorded witness statements, the types of cases in which such recordings are made or introduced, and how those recordings have impacted plea bargaining and trial practices. Such a study should analyze the effect of the introduction of the proposed Rule in a single jurisdiction and also compare two similar jurisdictions, one with and one without the proposed Rule, which would give the Committee some empirical basis from which to make a judgment.

The Potential to Exacerbate the Problem of Innocent People Pleading Guilty

The Innocence Project has long advocated for law enforcement agents to record and disclose all witness statements made during the course of an investigation. However, the proposed Rule includes neither standards for when law enforcement agents would be required to record witness statements, nor a reliability inquiry for determining the admissibility of such statements. In the absence of such necessary guidance (or, in the alternative, a mandate that all witness statements be recorded), the Innocence Project is concerned that the proposed Rule would be invoked selectively, and particularly in cases primarily reliant on an inculpatory witness statement, where the risk of wrongful conviction is heightened. While the proposed Rule reflects a concern about so-called "wobblers"—i.e., witnesses whose initial, truthful statements change by the time of trial—it fails to account for cases in which a witness's initial statement is false. Because the proposed Rule facilitates the introduction of such false accusations, not just as impeachment evidence, but as direct evidence of guilt, the Innocence Project is concerned that the proposed Rule could be used to induce pleas in weak cases where there would otherwise be insufficient evidence of guilt, because a complaining witness at some point in time gave an inculpatory, unsworn statement.[3] Indeed, under the proposed Rule, a successful prosecution could be mounted where the only sworn trial testimony actually *exculpates* the defendant, simply because the complainant—some time prior to trial and pursuant to no rules or regulations to ensure reliability—implicated the defendant, and that statement is credited by the trier of fact over the testimony at trial. Under such a regime, an innocent defendant may make a rational decision to plead guilty, rather than risk trial. Indeed, 38 of the 351 people exonerated by post-conviction DNA exonerations pled guilty to crimes they did not commit.[4] Moreover, false witness statements or allegations contributed to over 50% of wrongful convictions nationwide.[5]

Moreover, the proposed Rule has the potential to delay and/or prevent justice even after a wrongful conviction has occurred. That is because a single, unsworn statement could provide the basis for upholding a conviction on appeal when a sufficiency of the evidence challenge is raised, or denying a defendant a new trial on post-conviction review, even where the complaining witness has recanted. The wrongful conviction of Gary Dotson, the very first individual exonerated through post-conviction DNA, is illustrative. Mr. Dotson was arrested after a woman reported being kidnapped and brutally raped as she walked home from work. At his 1979 trial in Illinois, Mr. Dotson was found guilty, based largely on the complaining

[3] Misdemeanor prosecution of domestic violence cases seems particularly likely to involve such a fact pattern.
[4] The phenomenon of innocent defendants pleading guilty is well documented: the Innocence Project has identified 38 individuals who were exonerated through post-conviction DNA testing after entering a guilty plea to a crime they did not commit. *See* The Innocence Project, *DNA Exonerations in the United States* (documenting 38 cases, or 11%, of the 351 DNA exonerations to date in which the exoneree pled guilty), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last checked August 22, 2017).
[5] *See* http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx.

witness's testimony and identification of Mr. Dotson as her assailant. However, that witness recanted her allegation six years later, explaining that she fabricated the rape to obscure a consensual sexual encounter with her boyfriend. Though Mr. Dotson received a gubernatorial commutation after six years of wrongful incarceration and was eventually cleared by DNA evidence, a post-conviction court initially denied his petition for a new trial because it found the complaining witness more credible in her initial testimony than in her recantation.[6] Finally, even if Dotson had received a new trial, the complaining witness's initial statement, which turned out to be false, would have been admissible at that re-trial – even if it had been unsworn – had Illinois adopted the proposed Rule at the time of Mr. Dotson's post-conviction proceedings. Due to our concern that the proposed Rule 801 would be applied selectively—and particularly in cases, like Mr. Dotson's, that rely heavily on a witness's inculpatory statement to compensate for a lack of other, reliable evidence—we believe the proposal creates a heightened risk of wrongful conviction.

Conclusion

In the face of such wide-ranging implications, the Innocence Project believes more data are necessary from the several states that currently allow the introduction of recorded prior inconsistent statements as substantive evidence of guilt. Additionally, in the absence of mandatory guidelines ensuring that witness statements are not selectively recorded, too much discretion is left to individual actors, which can incentivize recording of statements for use as substantive evidence in the weakest cases. This presents too great a threat of wrongful conviction for the Innocence Project to endorse the proposed Rule, particularly in the absence of data concerning the likely impact of the proposal.

[6] Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 51-52 (1996).