Innocence Canada

SUBMISSIONS OF INNOCENCE CANADA ON CRIMINAL JUSTICE REFORM: **SUMMARY OF RECOMMENDATIONS**[1]

[1] This document is a list of recommendations that are meant to be read in conjunction with Innocence Canada's full submission. The full submission provides detailed rationale for each recommendation.

Statements of Defendants

Recommendation 1: The *Canada Evidence Act* should be amended to provide that when the prosecution alleges that the defendant made an admission against penal interest to a witness, a *voir dire* must be held, upon request by the defence, to determine whether the alleged admission should be received in evidence. On the *voir dire*, the Crown should bear the onus of establishing the admissibility of the evidence beyond a reasonable doubt.

Recommendation 2: The *Canada Evidence Act* should be amended to provide that any alleged admission against interest by a defendant should be received in evidence only upon proof by the Crown that the probative value of the evidence outweighs the prejudice associated with its reception. The *Act* should provide a non-exhaustive list of factors to be considered in weighing the reliability of an admission which include considerations outside the traditional voluntariness inquiry, such as the interaction and relationship between the defendant and the interlocutor, the psychological makeup and vulnerabilities of the defendant, and the effect of evidence tending to demonstrate the truth or falsity of the admission.

Recommendation 3: The *Canada Evidence Act* should be amended to provide that at a *voir dire* on the admissibility of an admission against interest, and at a trial where the Crown adduces evidence of such an admission, the opinion of an expert should be received if it is relevant to the traits or state of mind of the defendant; to the psychological effect of a particular interrogation or investigative technique; or to reasons why the admission of a defendant would be reliable or unreliable.

Recommendation 4: At a *voir dire* to consider the admissibility of evidence of an admission against interest by a defendant who was in the custody of the police at the time of the alleged admission, such evidence should be presumptively inadmissible where the admission is not recorded on videotape. The presumption of inadmissibility should be sufficiently firm that it can be overcome only by:

- Evidence explaining to the court's satisfaction the failure of the police to possess and employ the necessary videotaping equipment, whether on their person, in police vehicles, or at the police station;
- Where a person in custody is alleged to have declined to speak on videotape, evidence that he or she was told that videotaping is required by law;
- Where an admission is made in circumstances that prevented its recording on videotape, evidence that attempts were made as soon as practicable thereafter to have the admission recorded and the circumstances at which it was originally provided explained on videotape, with the person in custody provided an opportunity to recount the events related to the unrecorded statement.

Recommendation 5: A defendant who has given a statement to the police prior to, or coincidental with, the laying of a charge regarding the subject matter of the charge should be permitted to tender that statement in evidence at trial where he or she elects to give evidence at the trial.

A defendant who has given a statement to the police prior to, or coincidental with, the laying of a charge should be permitted to tender that statement in evidence at trial where he or she elects not to give evidence at trial upon application to the trial judge who should grant leave to adduce the statement where its probative value exceeds its prejudicial effect.

Guilty Pleas of Innocent Defendants

Recommendation 6: Legislation should be enacted to govern in greater detail the process through which findings of guilt are made based on pleas of guilty. The *Criminal Code* should provide courts with information to assess the voluntariness of a guilty plea, the defendant's awareness of its consequences, and the factual footing on which it rests. It should also provide the court with tools to ensure that it does not rely on false guilty pleas. In particular:

- The *Criminal Code* should be amended to parallel s.36 of the *Youth Criminal Justice Act* requiring the trial judge to determine that there is a factual basis for a guilty plea.
- Section 606(1.1)(b)(ii) should be amended to include reference to "*all reasonably foreseeable consequences of the plea including collateral consequences*."

- Section 606 should be amended to alert judges, other justice system participants and the public to the indicia of wrongful convictions and to those groups of people, including Indigenous people, who may be particularly vulnerable to wrongful convictions, including wrongful convictions based on guilty pleas.
- The *Code* should allow a trial judge to appoint *amicus curiae* and interpreters to assist in determining whether the requirements for a valid guilty plea in s.606(1.1) are satisfied, including the new requirements of a factual basis for the plea and awareness by the defendant of all reasonably foreseeable consequences of the plea, including collateral consequences.
- Section 606(1.2), which provides that the failure to observe the requirements in s.606 (1.1) does not affect the validity of a guilty plea, should be repealed to ensure that the existing and new requirements for a valid plea are observed and enforced.

Eyewitness Identification

Recommendation 7: Legislation should expressly require adherence by police investigators to best practices in the conduct of eyewitness identification testing procedures. The best practices should be particularized to include:

(i) The use of ten or more high quality photographs of similar format resembling the description of the suspect.

(ii) The presentation of the photographs to the witness separately, sequentially and in random order.

(iii) The conduct of the testing procedure by a person with no knowledge of which photograph is the person of interest to police investigators.

(iv) Instruction to the witness in advance of the testing to confirm that the officer presenting the photographs has no knowledge of the suspect and that the person seen by the witness may or may not appear in the photographs to be shown.

(v) Videotaping of the entire testing procedure, such that the photograph being viewed is visible, the face of the witness is visible, and the comments of the witness and the officer presenting the photos are audible.

(vi) No communication to the witness by the officer conducting the lineup or the investigators on the case regarding their view of the result of the lineup, either on the occasion of its occurrence or on any subsequent occasion before the appearance of the witness to testify at trial.

Recommendation 8: The *Criminal Code* should be amended to provide that in cases where the Crown seeks to adduce the evidence of an eyewitness who inculpates the defendant and whose identification is in question, it must establish that the identification was tested according to the standards in Recommendation 7.

If the evidence was not tested in accordance with these standards, its admissibility should be subject to a *voir dire* in which the Crown bears the onus of establishing that the evidence is sufficiently reliable that its probative value substantially outweighs its prejudicial effect.

In determining the admissibility of the identification evidence under these standards, the court should have regard to all relevant factors including:

- The seriousness of the departure from the statutory standards.
- The reason for the departure from statutory standards.
- The detail of the eyewitness's description of the perpetrator of the offence and the extent to which it corresponds to the appearance of the defendant.
- The objective level of confidence of the witness at the time of the procedure.
- The availability and probative value of confirmatory evidence of the guilt of the defendant or the accuracy of the identification.
- The capacity of other measures to address the flaws in the identification process.

At the conclusion of the *voir dire*, the trial judge may make rulings related to the admissibility of the identification evidence, the manner in which it may be presented to the trier of fact, and other related matters.

Recommendation 9: Parliament should enact legislation which provides that the evidence of an expert should be admitted where it will assist the court on a *voir dire* and the trier of fact in understanding the process of identification, the value of procedures for testing identification, and the significance of the failure to employ optimal methods.

The legislation should specify that a witness may be qualified to give opinion evidence in this area based on systematic, peer-reviewed study of the subject matter.

Recommendation 10: Prosecutors should be prohibited by legislation from asking questions of eyewitnesses in court intended to elicit an in-dock identification of the defendant.

The Appellate Role in Correcting Wrongful Convictions

Recommendation 11: Section 686(1)(a)(i) of the *Criminal Code* should be amended to provide that a verdict may be set aside where it is unreasonable, where it is not supported by the evidence, or where it is unsafe or unsatisfactory.

Section 686 (2) should be amended to provide expressly that where a conviction is quashed under s. 686 (1)(a)(i), the court may enter an acquittal or order a new trial.

Recommendation 12: Section 683 of the *Criminal Code* should be amended to provide that when new evidence is tendered on appeal by a person who has been convicted of a crime, its admission will be in the interests of justice where the evidence is sufficiently credible and cogent that it could lead a reasonable trier of fact to return a verdict of acquittal on the matter under appeal.

The Failure of the Defendant to Testify

Recommendation 13: The *Canada Evidence Act* should be amended to provide that, upon request by the defendant, a jury must be instructed that no inference is to be drawn by the jury against the defendant from the fact that the defendant did not give evidence at the trial.

It follows that s. 4(6) of the *Evidence Act* should be amended to provide that the fact that the defendant did not testify should not be the subject of *adverse* comment by the judge or prosecutor.