Testimony of

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Before the House Judiciary Committee
Regarding Best Practices for Law Enforcement

April 28, 2015
Montgomery County Community College
Blue Bell, PA

Good Morning Chairman Greenleaf and members of this Committee. My name is Risa Vetri Ferman, and I am the Vice President of the Pennsylvania District Attorneys Association and District Attorney of Montgomery County. I very much appreciate the opportunity to speak with you about conviction integrity and what we are doing as the PDAA to try to ensure that guilty defendants are convicted and that the innocent are not.

The nature of our criminal justice system is adversarial. As prosecutors, our role in this system is to hold offenders accountable for their criminal acts and to be a voice for victims. The attorney for the offender attempts to persuade the fact-finder that her client is not guilty or, in other circumstances, tries to secure the best deal for her client. Having duality of perspectives is what makes this system work, and it works well. But frankly, the reason we have the need for any system at all is because we have constituents that are being victimized. Nothing is more adversarial than when an individual becomes a victim of crime, often a violent crime, by another person.

In an adversarial system, defendants and their attorneys will often make claims that they did not commit the crime for which they were convicted, that they were set up, or that their rights were violated. When these claims are made on appeal, they are usually rejected. They are rejected because our system works well. The guilty are being convicted, and victims are getting the justice they deserve.

But the fact that our system works well does not mean it is perfect. No criminal justice system will ever be. But just because our system is not perfect does not mean that we should uproot it, or implement a new system that unintentionally rewards the guilty. It means we need to work carefully, thoughtfully, and with integrity. It means we need to continue to evaluate and seek research and scientific data that guides progress. We must not, however, forget the context of the system in which we operate.

We know that our criminal justice system has evolved, and will continue to evolve, as it should. We believe that attorneys and law enforcement must be on the front lines of technological and scientific advancements to ensure that we can identify and implement practices that will promote accuracy, reduce errors, reduce the number of cases where the guilty are not convicted, and achieve justice for all.

PDAA Best Practices Committee

So with all of that in mind, how do we, as prosecutors, work carefully to ensure that all of our priorities continue to evolve? My colleagues and I already spend a considerable amount of time discussing how to improve the criminal justice system, ensure that we've gotten the right person, and make the system more victim-friendly. As a result of these discussions, we decided last summer to take the next step by launching our own Best Practices Committee. The Committee will provide leadership in identifying best practices for our evolving criminal justice system and will encourage the sharing of new information between district attorneys and law enforcement.

The goal of this Committee is to enhance the quality, effectiveness, and application of tools available to attorneys and law enforcement officials as they navigate criminal cases.

The Committee will function in two primary roles: identify best practices and assist with their real-world implementation in the administration of justice; and provide networking and consultation for prosecutors, including opportunities to discuss and review cases with fellow law enforcement professionals. The Committee consists of district attorneys from across the Commonwealth, representing counties of every size, both urban and rural. This Committee formalizes much of what we have been doing informally for a significant period of time.

With an official Best Practices Committee, we are now able to continue the work we have been doing and in a more robust manner—review recommendations; evaluate research studies, reports, and metadata; consult with our colleagues across the nation; and look at any potential biases in the literature that may solely promote a particular conclusion.

What kind of recommendations will we review? Any that significantly affect the operations of the criminal justice system, such as lineups, identification, and the use of DNA to identify otherwise unidentified suspects. We will also evaluate recommendations for achieving greater social justice, like reducing witness intimidation and empowering victims of child abuse and sexual assault to come forward.

Why is it necessary to look carefully at the methodology, assumptions, and authors of particular recommendations? As stewards of the criminal justice system, we take very seriously the need to ensure its integrity. But at the same time, we look askance at those who dress up ways of making it even harder for us to convict the guilty and sustain their convictions on appeal as "best practices." For example, there is emerging data and research on topics related to conviction integrity; there is, however, posturing by those who equate conviction integrity with making our jobs harder for the sake of making our jobs harder.

For many years now, we have heard from different sources that the police should be moving from simultaneous lineups to sequential lineups. Yet in doing our research, we have learned that it is not so clear-cut that this recommendation is truly a best practice. There is contradicting research that shows no advantage to sequential line-ups, for instance, and that past methods used to compare simultaneous and sequential lineups were flawed. The National Academy of Sciences, in fact, recently was unable to conclude that sequential lineups were preferable and recommended more study on which method is actually preferable.

This example also serves to demonstrate why legislating "best practices" is not worthwhile. If sequential lineups became a mandated requirement based on flawed research, we might be tied up in the arduous process of deciding how to undo such a law. But at the same time it also demonstrates the value of us looking at these issues carefully. We were and are in a position to track and analyze the research and studies so that we know when a practice that may once have been a best practice may not be what we had collectively thought.

In discussing our Best Practices Committee with colleagues from other jurisdictions and states, I believe we must address each issue by asking important questions:

- What is the methodology of the studies at issue? Do they replicate practices in the field or are they mock simulations?

- Do the studies reflect what actually happens during an investigation and the courtroom, or was the analysis conducted in a vacuum?

- Are the studies biased? Who authored the studies and do they derive any benefit from reaching the conclusions they did?

- Should we rely on flawed studies just because they might represent the best data available at the present time? Or should we examine those studies and await future reports as well?

- Does the use of new technology potentially change the results in studies that were prepared before the advent or use of this newer technology?

Recall, Mr. Chairman, when the Joint State Government Commission released their report on wrongful convictions in 2011. The strength of this report was that it identified a number of emerging practices that were worthy of consideration. The Commission also brought together many individuals interested in these topics. I know that the professional relationship that Professor Rago and I have is, in part, the result of the work of the Commission.

The weakness of the report, to be sure, was that it sought to require jurisdictions to implement what members of the Commission and its staff concluded were "best practices." This recommendation was overzealous: it ignored that some jurisdictions were physically and/or financially limited in their ability to implement these new practices, and it was not definitively clear that these practices would actually achieve the goals of improving the criminal justice system. The report also recommended enactment of legislation to mandate so-called best practices.

As we discussed, Mr. Chairman, and as we detailed in our response to the report, putting these sorts of recommendations into statute would have been inappropriate. Again, our municipalities and counties are so incredibly different and have varying needs and challenges. What may work here in Montgomery County, for instance, may not be appropriate in Tioga County.

That being said, now that all the dust settled after the report was released, we have been able to discuss some of the recommendations in a far less contentious setting. This past October, we hosted prosecutors from eight different states and had many productive conversations about technological advances in criminal justice and how we can use those tools to maintain integrity and confidence in our work. Our Best Practices Committee provides a forum for more of these types of fruitful, fair-minded discussions.

Body Cameras

A critical issue is body cameras for the police. PDAA worked very hard in 2014 with the state FOP to help secure passage of Act 9, which permits the use of body cameras by police. We did so because body cameras have been shown to reduce instances of police misconduct, as well as the fact that the words and images from the body cameras are extremely probative and useful in our investigations. Prior to Act 9, body cameras that captured any audio recordings were forbidden under the Wiretap Act. We know that different jurisdictions are beginning to pilot body cameras, and we eagerly await the results.

That being said, law enforcement has already expressed one area of concern in the present statute. Specifically, current law does not permit the body camera to be used in a home or residence. We believe that restriction should be removed from law. This provision actually endangers police officers. If an officer has his camera on and is about to enter a home, the seconds that it takes to turn the camera off could distract him and put his safety in danger or the safety of any victims or potential victims inside. Additionally, by requiring cameras to be shut off in homes, we are shutting off the benefits that the cameras could provide, for example, in domestic violence situations. An officer who does not shut it off when he or she enters a home will be violating the Wiretap Act. So the officer is faced with this untenable predicament: shut the camera off and possibly endanger yourself or protect yourself by leaving it on and commit a felony. We would respectfully request consideration of legislation removing this prohibition.

Another critical issue has to do with public access to these videos, specifically whether they should be subject to the Right to Know Law. We believe strongly that videos from body cameras must be completely excluded from the Law. Without a complete exclusion, the practical realities of reviewing and cataloging each hour of video footage create an insurmountable burden for law enforcement.

Law enforcement will likely receive Right to Know requests for body camera videos over a certain period of time. There is no question that under the law, much information would have to be redacted – such as investigatory information (which would be precluded from being released under other areas of different laws as well). But the scope of such exceptions would undoubtedly be subject to lengthy litigation under current law. And in the meantime, someone would have to review every second of every video requested, in order to identify portions of the video which are exempt from disclosure. This is not a theoretical concern. Indeed, at a recent Best Practices conference in Washington, D.C., such concerns were echoed by law enforcement officials in other jurisdictions.

By way of example, consider the state of Washington, where one person requested every single body camera video, police dash camera video, and 911 calls. At the time of the request, Seattle had amassed an estimated 300,000 hours of body camera video footage alone. A small police force in Washington had approximately 1,000 hours of video at the time of the request and estimated that it would take one employee at least two years to review the footage, let alone redact it to protect the privacy of those individuals in the videos. Using the same calculation, it

would take sixty Seattle employees ten years each to do the same. Unless the General Assembly is willing to fund the costs of responding to the anticipated Right to Know requests, this burden would—inevitably—lead to the discontinuation of body cameras, which we can all agree is something we want to prevent.

I have no doubt that if we do not see a Right to Know exception to body cameras, many jurisdictions will not use the cameras, not because they do not want to, but because they cannot afford to.

Wiretap Act and DNA

Chairman Greenleaf, ensuring we convict the right people means more than making sure those who have been convicted are not "innocent." It also means we need to identify ways of ensuring that we reduce "wrongful acquittals"—in other words, instances in which guilty people are not convicted of the crimes they committed. We took an enormous step just a few years ago when we updated our state's Wiretap Act, allowing law enforcement to try to keep up with the technology that criminals employ and removing loopholes that actually made it illegal for a victim of a serious crime to record her perpetrator committing the act against her.

We also appreciate the Senate's leadership role in passing legislation that requires those individuals charged with certain crimes to have their DNA taken when they are booked, rather than post-conviction. The evidence from other jurisdictions that have similar laws demonstrates that such a law will help solve cold cases.

There is more to examine. But identifying ways to ensure that we convict more guilty people is extraordinarily important and good public policy.

With regard to recommendations for DNA evidence retention—an issue, Mr. Chairman, you have asked us to consider—we do not have, nor have we ever had, objections to the concept. Any requirement, however, for DNA evidence retention cannot be an unfunded mandate; the costs of storage and retention would have to be provided by the General Assembly. Moreover, any such law would have to be clear that noncompliance would not constitute grounds for relief in any criminal case, such as in a motion to suppress or in Post-Conviction Relief Act petitions.

Another area ripe for examination is the rampant and unethical abuse by the federal public defenders in capital cases. We strongly agree with our Supreme Court that the appellate process in capital cases has been abuse by federal defenders in a way that is harmful to victims and victims' families. Unfortunately, I have little confidence that the Joint State Government Committee on Capital Punishment will thoughtfully examine this issue. But Pennsylvanians should be outraged at the conduct of the public defenders in state court, just as our Supreme Court justices are outraged as well.

Thank you for the opportunity to share about the work PDAA is doing to uphold conviction integrity. And thank you for your continued efforts to make Pennsylvania safer.