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POST-CONVICTION DNA TESTING: WHEN IS JUSTICE SERVED?

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POST-CONVICTION DNA TESTING: WHEN IS JUSTICE SERVED?

TUESDAY, JUNE 13, 2000

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Thurmond, Grassley, Sessions, Leahy, Biden, Feinstein, Feingold, and Schumer.

OPENING STATEMENT OF HON. ORRIN HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. Let's begin. This is a very important hearing. I want to welcome you all to the Senate Judiciary Committee's hearing on the important issue of post-conviction DNA testing, entitled "Post-Conviction DNA Testing: When Is Justice Served?"

No one here today will quarrel with the assertion that post-conviction DNA testing should be made available when it serves the ends of justice. Reaching agreement on a practical definition for justice, however, is a difficult and different matter. After all, justice does mean different things to different people.

For the survivors of brutal crimes, justice may mean the carrying out of a court-imposed sentence without prolonged appeals. For others, especially those who are morally and vehemently opposed to capital punishment, justice may mean the indefinite delay of constitutionally-imposed death sentences.

As Members of Congress, we do not have the luxury of choosing one side or the other. As the elected representatives of the people and as guardians of the Constitution, we have an obligation to balance the adequacy of procedural protections afforded to defendants against the need for integrity and finality of decisions in State and Federal courts. It is my hope that in holding this hearing, we can take a first step toward reaching consensus on how best to strike this balance in the area of post-conviction DNA testing, and in doing so serving, of course, the cause of justice.

Speaking of doing what is just, it is only right that at the outset of this hearing I thank Senator Leahy for his interest and leadership in this important topic. Those who know Senator Leahy as I do appreciate his knowledge of the law, his passion for the Constitution, and his willingness to take principled positions.

He was among the first Members of Congress to become involved in this issue, and he came to me several weeks ago and urged this

committee to undertake an examination of this issue. His bill, the Innocence Protection Act, has appropriately sparked a discussion over several important issues associated with capital punishment, and I think we should all be thankful for his initiative and his leadership.

In the last decade, DNA testing has evolved as the most reliable forensic technique for identifying criminals when biological evidence is recovered. While DNA testing is standard in pre-trial investigations today, the issue of post-conviction DNA testing has emerged in recent years as the technology for testing has improved.

In the last month, two prominent Governors, George W. Bush of Texas and James Gilmore of Virginia, ordered DNA testing for defendants on death row. The Governor of Illinois put a moratorium on death sentences being carried out. I might say while the exact number is subject to dispute, post-conviction DNA testing has exonerated prisoners who were convicted of crimes committed before DNA technology existed. In some of these cases, the post-conviction DNA testing that exonerated a wrongfully convicted person provided evidence that led to the apprehension of the actual criminal.

Advanced DNA testing improves the just and fair implementation of the death penalty. While reasonable people can differ about capital punishment, it is indisputable that advanced DNA testing lends support and credibility to the accuracy and integrity of capital verdicts. In short, we are in a better position than ever before to ensure that only the guilty are executed. All Americans, supporters and opponents of the death penalty alike, should recognize that DNA testing provides a powerful safeguard in capital cases. We should be thankful for this amazing technological development.

I believe that post-conviction DNA testing should be allowed in any case in which the testing has the potential to exonerate the defendant of the crime. To ensure that post-conviction DNA testing is available in appropriate cases, I, along with 13 other Senators, plan to introduce the Criminal Justice Integrity and Law Enforcement Assistance Act. This legislation will authorize post-conviction testing in Federal cases and encourage the States through a new DNA grant program to authorize post-conviction testing in State cases. In addition this legislation will provide needed resources to help States analyze DNA evidence from crime scenes and convicted offenders, and conduct post-conviction testing.

The legal problem of post-conviction testing is fairly straightforward. Under current Federal and State law, it is difficult to obtain post-conviction DNA testing, and new trials based on the results of such testing, because of time limits on introducing newly discovered evidence. These time limits are based on the fact that evidence becomes less reliable due to the passage of time.

I believe that time limits on introducing newly discovered evidence should not bar post-conviction DNA testing in appropriate cases because DNA testing can produce accurate results on biological evidence that is more than a decade old. Under my legislation, these time limits will not prevent post-conviction DNA testing, and motions for a new trial based on such testing, in cases where testing has the potential to prove innocence.

Furthermore, once post-conviction DNA testing is performed, the results of such testing should be considered as newly discovered

evidence under established precedents and procedures. If post-conviction testing produces exculpatory evidence, the defendant should be allowed to move for a new trial, notwithstanding the time limits on such motions applicable to other forms of newly discovered evidence. Courts should weigh a motion for a new trial based on post-conviction DNA testing results under the established precedents for motions for a new trial based on newly discovered evidence. In short, there is no need to create an additional legal procedure to consider this evidence, provided the time limits are waived in this narrow context.

In the last 30 years, America's criminal justice system has experienced the crippling impact of seemingly endless habeas corpus appeals and frivolous prison litigation. In recent years, Congress passed and President Clinton signed into law legislation to reform habeas corpus and prison litigation procedures. I am proud to have authored these landmark statutes. America is safer and our criminal justice system is stronger because of these reforms. I am convinced that a properly drafted post-conviction testing statute will provide testing in appropriate cases and will not undermine these recent reforms.

But for some critics of our criminal justice system, post-conviction DNA testing and the resulting exoneration of some wrongfully convicted persons serves as a spyhole through which one can observe a quote, "system of law that has become far too complacent about its fairness and accuracy." We must remain vigilant in our efforts to ensure integrity and fairness at all levels of the system.

Yet, for some, DNA testing serves as the foot in the door through which more aggressive, and I believe unwarranted reforms can follow, including a moratorium on the death penalty, an effective repeal of the habeas death row appeals reform of 1996, onerous Federal regulations for counsel in State capital cases, and more.

Opponents of the death penalty believe the death penalty is on the defensive. They are promoting the tired arguments of the past and outdated and recycled studies in a coordinated effort to put capital punishment on trial. As Newsweek's Jonathan Alter recently opined in what the editors of the magazine called a Special Report, "* * * assembly-line executions are making even supporters of the death penalty increasingly uneasy."

Well, assembly-line executions? That is pretty much trumpery as far as I am concerned. According to the Death Penalty Information Center, there are more than 3,670 convicted killers on death row in America. Since enactment of the 1996 habeas death penalty appeals reform, 315 convicted murderers have been executed. Less than 10 percent of the people on death row have had their sentences carried out. There will likely be fewer executions this year than last year. Indeed, there were fewer executions in 1998 than there were in 1997. In the meantime, no one can point to a modern case where an innocent person has been executed.

Now, I support capital punishment, but I believe it should be used only when, there is conclusive proof of guilt; the crime itself is so heinous or depraved that it warrants the ultimate sanction; and, there is no credible and appreciable evidence of discrimination.

It is important to remember that 99.9 percent of capital cases are State crimes, not Federal crimes. In our Federal Republic, the issue of the death penalty in State cases is properly considered and determined by State governments. No prosecutor, attorney general, or governor wants to be responsible for the execution or imprisonment of an innocent person. We will hear testimony today about the steps our States are taking to address this issue, and as we hear the testimony, let's not forget the past.

For decades, convicted prisoners, with the help of some of today's witnesses, abused the habeas corpus system in order to delay the imposition of just punishment. In my home State of Utah, for example, convicted murderer William Andrews delayed the imposition of a constitutionally imposed death sentence for more than 18 years. His guilt was never in question; he was not an innocent person seeking freedom from an unjust punishment. Rather, he committed a particularly heinous crime, a series of murders, and simply wanted to frustrate the demands of justice.

What were the goals of Andrews' lawyers? I submit that his lawyers, and many lawyers who have represented death row inmates, saw their mission as making death penalty litigation so costly and protracted a prospect for the States that it would be effectively abolished. These ardent opponents of the death penalty, whose principled views and legal skills I respect, used capital resource centers and our Federal courts to effectively suspend the imposition of constitutionally and factually sound State death sentences. I am loathe to once again federally empower this type of activity.

Manufactured delays breed contempt for the law and have a profound effect on the victims of violent crime. For the families of murder victims, each delay exacerbates the pain of losing their loved one. They are reminded that their son, daughter, spouse, or parent will never come home again. No birthdays, no holidays to celebrate, only the dreaded anniversary of a murder. So as we debate the future of capital punishment, we should also remember the past.

I respect the views of the witnesses that we have today and look forward to hearing their testimony.

So I will turn to the statement for the minority by Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. This hearing today I hope is going to be the first of a series of hearings that might help focus the Congress' attention on steps we can take to help solve the national crisis in the administration of capital punishment. The hearing is really a first step, but an important first step, not just for capital cases but for public confidence in the fairness and integrity of our criminal justice system as a whole. In a democracy, if you do not have confidence in the integrity of a criminal justice system, it cannot operate.

As the Columbia University study published this week showed, State and Federal judges have found over the past 25 years that about two-thirds of death penalty trials nationwide have been rendered unreliable by serious constitutional errors, and about 5 per-

cent of the cases in which defendants were originally sentenced to death have ended in verdicts of not guilty on re-trial.

Now, I say that if we had a hospital where two-thirds of the surgeries were botched, that hospital wouldn't stay open very long. That is basically what has happened in this part of our criminal justice system, and that is what worries a lot of people because it attacks the very credibility of our criminal justice system.

The system that the study reveals is one that routinely makes grave errors and then hopes haphazardly and belatedly to correct them years later by a mixture of State court review or Federal court review and a large dose of luck. As prosecutors, defense lawyers, a judge, and a victim of the system will testify today, we have cast-iron scientific proof that a significant number of people sentenced to death in America in the late 20th century had been absolutely, undeniably innocent.

A system that works in one case out of three is simply not good enough. And while we do not know whether it has happened yet, a system that sentences a significant number of entirely innocent people to death is bound to execute one of them sooner or later. Certainly, many have wrongfully suffered, and many continue to endure years and decades in prison for crimes they did not commit.

Now, the American people know this. They understand the power of modern science in the form of DNA evidence to help prosecutors and innocent defendants alike to establish the truth about guilt and innocence and to save innocent lives.

In a recent poll, more than 90 percent of Americans agreed with leaders like President Clinton, Governor Ryan of Illinois, Governor Glendening of Maryland, and Governor Bush of Texas, and with conservative columnist George Will, with former Reagan administration Department of Justice official Bruce Fein, and with the American Association of Public Health Physicians. They agree that DNA testing should be available to defendants and inmates in all cases in which it has the potential to establish guilt or innocence. The American people also know that while Illinois and New York have made DNA testing available in appropriate cases, most of the States that have the death penalty have not met that standard.

DNA testing has opened a window to give us a disturbing view of the defects of the capital punishment system nationwide. Just as fingerprints, when available, were a major part of evidence in the 20th century, in the 21st century DNA is the fingerprint. If it is available, then it should be available in the same way in the last century we made fingerprints available.

Mounting evidence suggests that the cases in which DNA evidence has proved death row inmates innocent are just the tip of an iceberg of constitutional violations and wrongful convictions in death penalty cases—the tip of the iceberg, but DNA is a good starting point.

For more than a year, I have been working on these issues with prosecutors and judges and defense counsel, with both supporters and opponents of the death penalty, and with Democrats and Republicans. At the beginning of the year, I spoke to the Senate about the breakdown in administration of capital punishment across the country and I suggested some solutions. I noted then that for every seven people executed, one death row inmate has been shown

sometime after conviction to be innocent of a crime. Since then, many more fundamental problems have come to light. I want to emphasize that DNA is not the magic answer by itself.

This is not simply a case of whether DNA should be available. There is a lot more to it than that—more court-appointed defense lawyers who slept through trials in which their clients have been convicted and sentenced to death. In fact, 43 of the last 131 executions in Texas, according to an investigation by the Chicago Tribune, had lawyers who were disbarred, suspended, or otherwise being disciplined for ethical violations. These are the people who have been appointed to represent people on trial for their lives.

We have cases in which prosecutors have called for the death penalty based on the race of the victim, and cases in which potentially dispositive evidence has been destroyed or withheld from death row inmates for years. And the irony is, as every prosecutor knows, if you handle the case so poorly to begin with and it is sent up and then remanded for a new trial 5 or 6 years later, it is almost impossible to try the case again in the same way. How much better—and as a former prosecutor I know this—how much better it is to do it right the first time.

We have heard from the National Committee to Prevent Wrongful Executions, a blue ribbon panel comprised of supporters of the death penalty as well as opponents, Democrats and Republicans, including six former State and Federal judges, a former U.S. attorney, two former State attorneys general, and a former Director of the FBI. That diverse group of experts has expressed itself to be, "united in its profound concern that in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been significantly diminished."

For months, I have worked with Senators on both sides of the aisle and experts from all parts of the capital punishment system to bring about some basic, common-sense reform. The two most basic provisions of our bill would encourage governments to at least make DNA testing available in the kind of case in which it can determine guilt or innocence, and at least to provide basic minimum standards for defense counsel so that capital trials have a chance of showing innocence if it is there by means of an adversarial testing of evidence. That should be the hallmark of the criminal justice system in any event.

Our bill will not free the system of all human error. Nothing can do that, but it will do much to eliminate errors caused by the willful blindness of the truth that our capital punishment system has exhibited all too often. That is the least we should demand of a justice system that puts people's lives at stake. If it puts people's lives at stake, we should seek as close to zero tolerance for mistakes as possible.

I am greatly encouraged that Senators Gordon Smith and Susan Collins and Russ Feingold and Jim Jeffords and others here in the Senate, and Representatives Ray LaHood and William Delahunt and 45 other members of both parties in the House have joined me in sponsoring the Innocent Protection Act of 2000.

Last year, I began urging Chairman Hatch to join us in examining these critical issues. I regret that he has thus far chosen not

to join in our bipartisan bill, but I am grateful that he has agreed to hold this first hearing. I am hopeful that we can work together, as we have on other issues, to get common-sense legislation enacted. So let me just respond briefly to a couple of things he said.

I agree with Chairman Hatch that reforms need to be carefully measured. As I have argued on many occasions in the Senate, federalism is an important value in the criminal justice system. As a former prosecutor and as a former vice president of the National District Attorneys Association, I am always eager to consult with prosecutors at the State and local level to let the States develop their own solutions to problems, and to help provide the assistance and resources and training needed to make improvements.

That is why we crafted the DNA provisions of the Innocence Protection Act with great care and with very close attention to the experiences of Illinois and New York, the two States that have led the way in DNA testing. That is why both the DNA and competent counsel provisions of the Innocence Protection Act work by encouraging States to meet minimum standards, and by giving latitude to improve on those standards, not by imposing inflexible Federal mandates.

On the other hand, I am also concerned to ensure that we enact reforms that are real and effective. We don't impose technical and legalistic barriers to DNA. Our bill does not require defendants to prove their innocence before they can obtain the access to DNA evidence that might prove their innocence. Our bill goes beyond DNA evidence to address the more fundamental issue of ensuring that defendants have minimally competent counsel at trial.

I have been greatly heartened by the response of experts on federalism and criminal justice across the political spectrum. If I might read just partly from a letter from Bruce Fein, who is a leading constitutional expert, a former Deputy Attorney General in the Reagan administration—he has been quoted often by Chairman Hatch and others on this panel, and so while I will submit his whole letter for the record, here is what he says.

"In my view, the proposed legislation," referring to ours, "raises no serious constitutional problems, respects our traditions of federalism in the field of criminal justice, and represents a measured and fact-bound response to the documented truth-finding deficiencies in death penalty and sister prosecutions, especially where DNA evidence might be conclusive on the question of innocence." I appreciate Mr. Fein's excellent letter.

[The letter referred to follows:]

MCCLEAN, VA,
June 12, 2000.

Hon. PATRICK LEAHY,
U.S. Senate,
Washington, DC.

DEAR MR. SENATOR: In response to certain detractors of the proposed Innocence Protection Act of 2000 (S. 2690), I am submitting the following observations to assist the Congress and the public in appraising the wisdom and constitutionality of the bill.

In my view, the proposed legislation raises no serious constitutional problems, respects our traditions of federalism in the field of criminal justice, and represents a measured and fact-bound response to the documented truth-finding deficiencies in death penalty and sister prosecutions, especially where DNA evidence might be conclusive on the question of innocence.

Too often forgotten in our uniquely admired system of justice is the understanding that in criminal prosecutions the government's duty is not necessarily to win convictions but to see that justice is done. That is the unmistakable teaching of the United States Supreme Court in Berger v. United States (1935). Moreover, our criminal justice system is informed by the venerated theory that it is better that some of the guilty go free than that an innocent be wrongly convicted. That precept, for example, explains why proof of guilt beyond a reasonable doubt is required, not simply by a preponderance or clear and convincing evidence. Justice John Harlan sermonized in In re Winship (1970): "I view the requirement of proof beyond a reasonable doubt in a criminal case bottomed on a fundamental value determination in our society that it is far worse to convict an innocent man than to let a guilty man go free."

Of course, some tiny risk of convicting an innocent person is inherent in any system of criminal justice because re-creating past events and motivations inescapably falls short of mathematical certitudes. But taking reasonable measures to shrink that inherent risk, as does S. 2690, not only celebrates our cherished respect for individual liberty but also the overarching government interest in seeing that justice is done, which is not synonymous with winning cases.

Federalism is also a cornerstone of criminal justice. Most crimes are state or local, as are most law enforcement resources. Generally speaking, a respect for state autonomy and self-government counsel strongly against congressional forays that would disturb state law enforcement schemes and practices. But that time-honored principle is not absolute, and should be applied with prudence, without which wit is ridiculous, knowledge useless, and genius contemptible, to paraphrase philosopher Sam Johnson. Generations of Jim Crow in the South required federal criminal civil rights statutes to defend our black citizens from the predations of the KKK, the White Citizens Council, and their non-member soulmates. More recently, Congress has encroached on customary state prerogatives either directly or through the spending power because disgruntled with lenient sentencing, repeat offenders, laxness in protecting access to abortion clinics, the reliability of DNA testing protocols, or otherwise. Moreover, the entire scheme of federal habeas corpus law is built on the premise that states may run afoul of the Constitution or federal statutes in the administration of criminal justice, and that a second layer of federal protection for the convicted state criminal is thus justified. That premise is buttressed by yesterday's Columbia University death penalty study showing a 21% reversal rate in habeas corpus capital cases concerning either the verdict or sentence.

In sum, federalism bespeaks a persuasive but not insurmountable presumption against congressional intrusion on state criminal justice; intervention is justified when the congressional objective is both factually credible and reasonably furthers a strong and legitimate constitutional mandate, such as diminishing the probability of convicting the innocent.

Section 103 of S. 2690 would condition federal DNA grants on a certification that a recipient state has taken reasonable steps to both preserve biological material relevant to a criminal case and to enable inmates to obtain non-cumulative DNA testing that might cast reasonable doubt on their guilt. These twin federal grant conditions seem thoroughly warranted and constitutional. As in the federal unemployment compensation law and the opt-in scheme of the 1996 Anti-Terrorism and Effective Death Penalty Act, no state is coerced but only encouraged. Further, the bill finds that DNA testing has repeatedly exonerated the innocent, a virtual constitutional imperative under the United States Supreme Court ruling in Herrera v. Collins, and an urgent government objective in the administration of criminal justice generally. Section 103 is thus reasonably related to forestalling and curing violations of the due process clause of the Fourteenth Amendment, and thus easily passes constitutional muster as grant-in-aid provisions.

Separate from the constitutional question is the prudential issue of whether the administrative vexations in implementing the DNA testing conditions are not worth the candle of exonerating an occasional innocent inmate. To answer "yes" seems against the spirit of liberty that infuses criminal justice; it is also undercut by the practice in both New York and Illinois to offer post-conviction DNA testing opportunities, which have yielded 7 and 14 exonerations, respectively. The government burden imposed by section 103, however, smack more of the featherweight than the heavyweight. No gathering of new DNA evidence is required; no perpetual preservation of stale evidence for the likes of archeologists is mandated; and, no new testing is stipulated if the results are unlikely to yield noncumulative exculpatory evidence.

Section 104 is a direct federal post-conviction DNA testing opportunity mandate to states bottomed on the power of Congress under section 5 of the Fourteenth Amendment to remedy or to forestall constitutional violations, which include punishing the innocent. That danger has been amply demonstrated in the absence of

DNA post-conviction testing opportunities. As the bill finds: "In the past decade, there have been more than 65 post-conviction exonerations in the United States and Canada based upon DNA testing. At least 8 individuals sentenced to death have been exonerated through post-conviction DNA testing, some of whom came within days of being executed."

Section 104 is undisturbing to legitimate federalism concerns. At present, States resort to DNA testing to solve long unsolved crimes to convict the guilty, an impeccable objective. But States are equally enjoined under the Constitution and a cherished principle of criminal justice to exonerate the innocent. Section 104 would advance, not subvert, that state criminal justice goal. States have no greater interest in incarcerating the innocent than in stooping to racial discrimination in jury selection or prosecutorial discretion.

Section 201 addresses the worrisome documented deficiencies in defense counsel in capital cases, including non-cerebral slumber, through a federal grant-in-aid incentive. It would condition certain federal law enforcement funds on the adoption by recipient States of a system of defense counsel selection for the indigent in death penalty prosecutions that the Administrative Office of U.S. courts certifies as insuring effective legal representation. That condition seems irreproachable. As the United States Supreme Court lectured in Powell v. Alabama (1932), talented defense counsel is necessary not only for fair play during trials, but to prevent conviction of the innocent, an objective exceptionally compelling in capital cases where punishment is beyond belated rectification. What is done cannot be undone, to borrow from Macbeth.

Section 201 should not be burdensome to participating States because capital prosecutions constitute but a tiny fraction of all criminal prosecutions. The number of reasonably gifted defense counsel required should thus be correspondingly untroublesome. The required defense counsel standard is not Clarence Darrow, but the far more numerous uncoronated lawyers. Finally, section 201 bolsters federalism interests by slashing the probability of executing an individual who is later and conclusively proven innocent. Such a travesty in any single State would invariably arouse invincible political sentiments against capital punishment in all States, thus ending a constitutionally legitimate sentencing option. I support the death penalty in exceptionally egregious cases, and am convinced that as a political reality section 201 works to safeguard that sentencing prerogative.

Section 202 is complementary. It would encourage States to upgrade death penalty counsel for indigents (and thus the reliability of capital verdicts) by strengthening federal court habeas corpus constitutional scrutiny of death sentence verdicts in the absence of a system of selecting defense attorneys certified as adequate by the Administrative Office of U.S. Courts. Since executing the innocent is a Fourteenth Amendment violation, and the Sixth Amendment requires provision of competent counsel, section 202 is reasonably related to avoiding chilling constitutional injustices; that high goal overwhelms its trivial intrusion on federalism where federal habeas corpus already exposes States to second-guessing by federal courts to insure constitutional rights are scrupulously honored.

Section 401 wins a federalism blue ribbon. It would instruct the Attorney General of the United States to decline seeking the death penalty for federal crimes that are carbon copies of state prohibitions where the state prohibits capital punishment and has accepted jurisdiction to prosecute the case under state law. In such cases, the federal interest in persisting in a death sentence over the objection of state sentiments seems anemic and unpersuasive, subject to the "one-size-fits-all" reproach.

Section 403 would establish another federal grant-in-aid condition that should command the applause of all who believe in more rather than less truthful information in sentencing proceedings. It would encourage States in capital cases to inform sentencing juries of all legally permitted options, including parole eligibility rules and terms, if death is not selected. It seems difficult to concoct any credible reason for a State to oppose fully informed sentencing juries in capital cases, except to tip the scales of justice in favor of execution, which would not be constitutional if practiced overtly under Witherspoon v. Illinois (1968). Only last week, the Virginia Supreme Court held that judges must inform sentencing juries that the state has abolished parole, extending to all criminal defendants a right previously confined to those facing potential execution. Federalism is not intended as a shield for illegitimate sentencing procedures that favor the merciless over the merciful.

Section 405 deserves at least a federalism honorable mention. It would reduce cluttering state supreme courts with unwanted discretionary criminal appeals of identified claims by preventing their waiver in federal habeas corpus proceedings if that state desire is honored. What is the valid congressional interest in forcing state

inmates to raise discretionary claims in state supreme courts that the latter expressly discourage? Doesn't that turn federalism on its head?

Sincerely,

BRUCE FEIN,
Former Associate Deputy Attorney General, 1981–1982.

BIOGRAPHICAL SKETCH OF BRUCE FEIN

Education: Swarthmore College, University of California, Harvard Law School. Graduated with Honors.

Journalism: Weekly columnist for The Washington Times. Guest columnist for USA Today.

International Affairs: Adjunct Scholar with the Assembly of Turkish American Associations.

Law: Solo Practitioner specializing in international and constitutional law.

Government Experience: Associate Deputy Attorney General, General Counsel to the Federal Communications Commission, Counsel to the Congressional Iran-contra committee.

Think Tank Associations: Visiting Scholar with the Heritage Foundations, Adjunct Scholar with the American Enterprise Institute.

Congressional Experience: Testified as an expert witness before congressional committees on more than 50 occasions.

Additional Expertise and Qualifications:

Impeachment. At the Department of Justice under Attorneys General Elliot Richardson and William Saxbe, meticulously examined and advised on presidential impeachment issues raised by President Nixon's complicity in the Watergate scandal and Vice President Agnew's complicity in bribery. Testified before a congressional commission exploring problems with impeaching federal judges. Published scores of newspaper columns and held two nationally televised press conferences addressing Monicagate and potential indictment or impeachment of President Clinton.

Constitutional law. Featured on the cover of the American Bar Association Journal for article expounding on the proper role of the United States Supreme Court in constitutional interpretation. Authored a monograph on the Federalist Papers and importance in contemporary constitutional thinking. Testified on scores of occasions before the House and Senate Judiciary Committees on pending resolutions and bills that raise constitutional issues, including constitutional amendments. Testified before the Senate Judiciary Committee in support of the Supreme Court nominations of Chief Justice William Rehnquist and Associate Justice Antonin Scalia. Private legal practice pivots on constitutional law. Supervised constitutional litigation at the Department of Justice and claims of executive privilege.

Criminal Law. Supervised the Criminal Division's litigation at the Department of Justice and use of the Foreign Intelligence Surveillance Act and the Classified Information Procedures Act.

Civil Rights Law. Supervised civil rights affirmative action litigation and legislation at the Department of Justice, especially the issues of racial and gender preferences and workplace liability. Similar issues were handled regarding race and gender preferences as General Counsel of the Federal Communications Commission.

International Law. Have advised numerous foreign countries in the drafting of constitutions. Prepared commentaries on the proposed international criminal court and the teachings of the Nuremberg and Tokyo war crimes tribunal. Testified before the Senate Foreign Relations Committee on various treaty issues, including the constitutionality of the World Trade Organization Act and the Helms-Burton law.

Appointment of Federal Judges. Was a central figure in the appointment of federal judges at the Department of Justice, including the nomination of Supreme Court Justices. Authored a Harvard Law Review article on the proper role of the Senate in the confirmation process.

Coordinating Congressional Investigations with Parallel Grand Jury Inquiries. At the Justice Department during the Watergate investigation and as Research Director of the congressional Iran-contra joint congressional committee during the Iran-contra investigation, aided the coordination of the parallel criminal and legislative proceedings to avoid conflicts or interference in achieving the competing objectives to the two branches.

Media prominence. According to National Law Journal, he is one of the six most quoted attorneys in the mass media. He has more than 500 television and radio appearances to his credit.

Senator LEAHY. I look forward to working with everybody else here, but I also want to thank you again, Mr. Chairman, for pro-

ceeding with the hearing. I want to thank Senator Smith, who is here, and Congressman LaHood and Congressman Delahunt. I commend Senator Feingold for his leadership on these issues, and Senators Kohl, Feinstein, and Schumer, and you, Mr. Chairman, for your interest.

I have other matters I would put in the record, including a portion of Professor Liebman's report, portions of two reports by the National Institute of Justice relating to post-conviction DNA testing, a letter to me from Professor Larry Yackle, of the Boston University Law School, and a letter that you and I have received from former FBI Director William Sessions.

[The information referred to is located in the appendix.]

Senator LEAHY. I would ask that we might keep the record open for statements from others for maybe a few days, if we might, Mr. Chairman.

The CHAIRMAN. Without objection, we will do that.

Senator LEAHY. And, last, I would just leave everybody with this thought. Don't think that DNA is going to be the magic bullet because there are a lot of cases that every prosecutor and every defense attorney—and I see a lot of heads shaking yes; they know what I am going to say. A lot of prosecutors and a lot of defense attorneys in this room know that there are a lot of cases where there is no DNA evidence, just like there are a lot of cases where there is no fingerprint evidence or there is no blood sample. There are none of the things that you might see in a television show.

But we should at least guarantee that if it is available, it is available to both sides and, secondly, that there be competent counsel on both sides. When we hear some of these horror stories, we should ask ourselves would any one of us, if we were charged with a serious traffic case, to say nothing about something where we might get the death penalty—but even with a serious traffic case, would we accept as lawyers some of the incompetent lawyers that have defended people who have ended up on death row.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

At this point, I would like to enter into the record a prepared statement of Senator DeWine.

[The prepared statement of Senator DeWine follows:]

PREPARED STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Mr. Chairman, thank you very much for holding this important hearing on post-conviction DNA. Existing anti-crime technology can allow us to solve many violent crimes that occur in our communities, as well as clear those who have been wrongfully accused of a crime.

I have been a long-time advocate for use of the Combined DNA Indexing System (CODIS), a national DNA database, to profile convicted offender DNA. In fact, during consideration of the Anti-Terrorism Act of 1996, I proposed a provision under which federally convicted offenders' DNA would be included in CODIS. Unfortunately, the Department of Justice never implemented this law, though currently all 50 states collect DNA from convicted offenders.

Also, in 1998, I sponsored the Crime Identification Technology Act, which was enacted into law. This Act authorizes $250 million for crime identification technology, and sets aside at least 20 percent to improve state and local crime laboratories which perform DNA testing. In FY00, $35 million was appropriated for assistance to state and local DNA laboratories under this Act to begin addressing the serious backlog of state cases awaiting DNA analysis, as well as convicted offender DNA testing.

This Congress, I introduced the "Violent Offender DNA Identification Act of 1999," with my colleague Senator Herb Kohl. One of the purposes of that legislation is to expressly require the collection of DNA samples from federally convicted felons and military personnel convicted of similar offenses. Collection of convicted offender DNA is crucial to solving many of the crimes occurring in our communities. This bill also would provide about $30 million, over four years, to help state and local crime laboratories address their convicted offender backlogs.

I believe any effort to encourage post-conviction testing will be successful only if we are able to substantially eliminate the DNA analysis backlog in our state and local laboratories. The FBI estimates that there are about 450,000 convicted offender samples in state and local laboratories awaiting analysis. Increasing demand for DNA analysis in active cases, and limited resources, are reducing the ability of state and local crime laboratories to analyze their convicted offender backlogs.

I look forward to hearing the testimony of our distinguished panels. In particular, I appreciate the attendance of James Wooley, who is a former Assistant United States attorney in Cleveland, and now a partner in the law firm of Baker & Hostetler. Thank you, Mr. Chairman.

The CHAIRMAN. We will start with Senator Smith as our first witness and then we will go through the rest of the panel.

Senator Smith.

STATEMENT OF HON. GORDON H. SMITH, A U.S. SENATOR FROM THE STATE OF OREGON

Senator SMITH. Good morning, Mr. Chairman. I thank you and this committee for holding this hearing on the important issue of DNA testing in our criminal justice system.

I am sure you have all noticed the many and prominent news stories about this issue and the attention it has received in recent days from presidential candidates. Clearly, post-conviction DNA testing is an idea whose time has come.

Last week, Senator Leahy and I introduced a bill that would do a number of things to improve our criminal justice system. The Leahy-Smith bill would allow prisoners in this country to have access to post-conviction DNA testing so innocent lives are not spent behind bars or waiting for execution.

The bill would require competent counsel at every stage of a capital case, eliminating the possibility that defendants on trial for their lives would be represented by counsel that is unqualified, underpaid, and overworked. Furthermore, to avert a double wrong, the Leahy-Smith bill would provide fair compensation for people who have been wrongfully convicted.

I understand, Mr. Chairman, that you will introduce a bill in the next few weeks that would also allow for post-conviction DNA testing in certain circumstances. As I understand the title of your bill, the Criminal Justice Integrity and Law Enforcement Act, your bill, sir, would also provide funds for States to reduce the backlog of DNA tests and develop and maintain a record of DNA of convicted offenders.

Obviously, Senator Leahy, Senator Hatch and myself, among others, share a common motive of making a good system better. We should also share a common goal, producing the best legislation for our country. Both of these bills propose using modern genetic technology to improve our criminal justice system to protect the truly innocent.

Senator Hatch's legislation goes beyond the Leahy-Smith bill to address the important issue of the current backlog of unanalyzed DNA samples. However, Leahy-Smith goes further than the Hatch

bill to address other rare but real issues faced by the wrongfully accused; competent counsel and fair compensation for unjust incarceration.

Today, you will hear from several prosecutors, including one from my own State of Oregon, Josh Marquis who is the Oregon State Director of the National District Attorneys Association and the Vice President of the Oregon District Attorneys Association. I welcome their participation and their unique perspective in this discussion.

Some express concern that the Leahy-Smith legislation would impose burdensome obligations upon the States. They believe that the States should be counted upon to continue setting responsible standards for the definition of crime, punishment, and procedures to be followed in their courts. In the overwhelming majority of cases, the States do things very, very well. Oregon, for instance, spends more on defense attorneys than it does on prosecution. Officers of America's courts and law enforcement work extremely hard to ensure that true perpetrators of heinous crimes are caught and convicted.

However, there have been instances where defendants have been represented by incompetent counsel. There are also a number of prisoners on death row who have never had access to DNA testing during trial simply because it did not exist at that time.

My view, Mr. Chairman, is this: if you support the death penalty, you should also support every measure to make sure that the guilty and not the innocent are executed. It is that simple. When life is at stake, no step should be considered too protracted or too onerous. Setting Federal standards on access to post-conviction DNA and competent counsel are very reasonable steps to make sure that our system of criminal justice operates fairly, regardless of where you live in the 50 States.

If we are to have a system that is just, transparent and defensible, we must make absolutely certain that every person who is behind bars deserves to be there. One of the best ways to do this is to make sure that the fingerprint of the 21st century is unmistakably stamped on our judicial system. We must have confidence in the integrity of justice, that it will both protect the innocent and punish the guilty. For these reasons, I urge members of the Senate Judiciary Committee, both Republican and Democrat, to work with us to produce the best possible legislation that will provide true protections to the innocent.

I thank you, Mr. Chairman and members of the committee.

The CHAIRMAN. Thank you, Senator Smith. We know that you have a busy day ahead of you and so we won't require you to stay.

Senator SMITH. Thank you, sir.

The CHAIRMAN. But we appreciate your testimony and take due notice of it.

Senator LEAHY. Mr. Chairman, I also want to thank Senator Smith. The Leahy-Smith-LaHood-Delahunt legislation is good bipartisan legislation. I appreciate that.

I would also ask consent that a statement by Senator Levin of Michigan, be entered in the record.

The CHAIRMAN. Without objection, we will put it in the record.

Senator LEAHY. Thank you.

[The prepared statement of Senator Levin follows:]

PREPARED STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

A Michigan murder case clearly demonstrates the need for a law, such as proposed by Senator Leahy, myself and others, which would prevent the destruction by the government of DNA evidence crucial to establishing innocence or guilt.

The bill, the Innocence Protection Act, would require the government to preserve "biological material secured in connection with a criminal case" as long as a person is in prison in connection with that case, except that the government may destroy such material after it gives notice to the person and a court doesn't intervene to prohibit the destruction.

Why should such a requirement even be necessary?

A nearly 20 year old Michigan case provides a compelling answer.

A young woman, Patricia Rosansky, disappeared in February 1983 in Battle Creek (Calhoun County) Michigan. Her body was found in April 1983 and an autopsy disclosed she had been brutally raped and murdered.

A number of human hairs were found in her hand and semen was found nearby.

Thomas David Cress was arrested about a year later and was convicted of her murder, following an almost month-long jury trial.

An expert testified that Cress's hair was not similar to the hair found in Ms. Rosansky's hand. DNA tests were not available at the time of the trial to test either the hair or the semen against the defendant's hair and semen.

Defendand Cress denied committing the crime and there were no eye witnesses. Cress provided alibi evidence.

A number of witnesses testified (the "testifying witnesses") that Cress told them he had committed the crime. As stated by the Trial Court, "There was absolutely no physical evidence linking the Defendant, Mr. Cress, to this crime. The only evidence connecting him to the crime was the testimony of several witnesses . . . all of whom testified that Mr. Cress had admitted to each of them his involvement in Ms. Rosansky's murder."

The Jury convicted Mr. Cress and his conviction was affirmed in 1988.

Four years later, in January 1992, Battle Creek police detective Dennis Mullen, a homicide detective with almost three decades' experience, who had been investigating the August 1982 murder in Battle Creek of Maggie Hume, interviewed a man named Michael Ronning in an Arkansas prison where Ronning was serving time for murder.

Ronning would later confess to Detective Mullen that he killed Maggie Hume and had also killed Ms. Rosansky and a woman named Carrie Evans, all in the same Battle Creek area, in late 1982 and 1983.

There was no acquaintanceship or connection of any kind between Ronning and Cress.

When Detective Mullen returned from his interview in Arkansas with Ronning in January 1992, he was convinced that Ronning was the murderer of Patricia Rosansky because of his confession, because of his knowledge of facts of the scene at the crime that hadn't been made public, because of the pattern of the three rape-murders and because he lived near the three victims he confessed to have raped and murdered. Detective Mullen informed Calhoun County Prosecutor Jon Sahli promptly, both in writing and in person, that he had a confession in the Rosansky murder and that Thomas Cress was innocent of her murder.

On repeated occasions during January-April of 1992, Detective Mullen, his Commander and his Police Chief all pressed Prosecutor Sahli to act on the information they had provided.

Instead of calling on an expert to compare the hair samples in Ms. Rosansky's hand to Michael Ronning's hair, the prosecutor destroyed the evidence.

Instead of using DNA tests, now available, to test those hair samples and the semen found near the body to the hair and semen of the man confessing to the murder (Mr. Ronning) and the man proclaiming his innocence (Mr. Cress), the prosecutor burned the evidence.

On May 14, 1992, without any notice to the Detective or his Commander or the Police Chief, all of whom had repeatedly urged him to act on Ronning's confession and who had been repeatedly assured by him that the matter was being investigated, Prosecutor Sahli signed the authorization to destroy the hairs and the semen on the following ground: "Closed no appeal."

There is much in this case that is important that I won't comment on because it is not directly relevant to my point: we need a law such as proposed by Senator Leahy, myself and others, to prevent the destruction of DNA material relating to the trial of a person in prison, without first notifying that person and giving him a chance to seek a protective court order.

For instance, among other things, this case involves the recantation of testimony, claims that testimony of the testifying witnesses had been prompted by reward money, a videotape of Michael Ronning's confession to the Rosansky murder, testimony of other witnesses challenging the credibility of that confession, an order for a new trial by the Trial Court, a change of mind and reversal of that order for a new trial by the same Trial Court, a refusal of the Trial Court to consider, for the purpose of the new trial motion, certain polygraph exams *passed* by Mr. Cress *denying* the murder and *passed* by Mr. Ronning *admitting* to the murder of Ms. Rosansky, and much else.

The Trial Court ruled that the destruction of the physical evidence (the hair and the semen) by the prosecutor was irrelevant despite the police officers' repeated assertions to the prosecutor of Mr. Cress's innocence and Mr. Ronning's guilt.

It would not be appropriate for me to comment here on whether the prosecutor's actions violated Mr. Cress's constitutional rights—that is an issue currently being litigated.

Nor would it be appropriate for me to state an opinion on the guilt or innocence of Mr. Cress or Mr. Ronning.

But in arguing for why we need a bill such as that introduced by Senator Leahy, myself and others, it strikes me as most appropriate to say that it seems to me that it is an egregious violation of fundamental fairness for a prosecutor, when told by experienced detectives that a man is in prison who they believe is innocent of a crime another man has confessed to, to destroy physical evidence instead of preserving it or DNA testing it.

It strikes me as an egregious violation of fundamental fairness for a prosecutor, when told by experienced detectives that a man is in prison who they believe is innocent of a crime another man has confessed to, and that justice requires a new trial at which physical evidence under the prosecutor's control would be highly relevant, to willfully and purposefully burn that evidence.

Prosecutor Sahli, by the way, kept the fact that he authorized the destruction of that evidence a secret from the Battle Creek Police Department for four years.

The common sense requirement in the Leahy et al Bill is based on elemental fairness. It shouldn't be needed.

But it is, and hopefully this Committee will promptly report a bill containing such a common sense protection of elemental fairness to the full Senate for our consideration.

The CHAIRMAN. Thank you, Senator Smith.

Senator THURMOND. Thank you, Senator, for your statement.

Senator SMITH. Thank you, Senator Thurmond.

[The prepared statement of Senator Smith follows:]

PREPARED STATEMENT OF HON. GORDON H. SMITH, A U.S. SENATOR FROM THE STATE OF OREGON

Good morning. I would like to thank Chairman Hatch and the Judiciary Committee for holding this hearing on the important issue of DNA testing in our criminal justice system. I'm sure you have all noticed the many and prominent news stories about this issue and the attention to it in recent days by presidential candidates. Clearly, post-conviction DNA testing is an idea whose time has come.

Last week, Senator Leahy and I introduced a bill that would do a number of things to improve our criminal justice system. The Leahy-Smith bill would allow prisoners in this country to have access to post-conviction DNA testing so innocent lives are not spent behind bars or waiting for execution. The bill would require competent legal counsel at every stage of a capital case, eliminating the possibility that defendants on trial for their lives would be represented by counsel that was unqualified, underpaid, and overworked. Furthermore, to avert a double wrong, Leahy-Smith would also provide fair compensation for people who have been wrongfully convicted.

Today, Senator Hatch is introducing a bill that would allow for post-conviction DNA testing in certain circumstances, the Criminal Justice Integrity and Law Enforcement Assistance Act. His, too, would also provide funds for the states to reduce the backlog of DNA tests, and develop and maintain a record of DNA of convicted offenders.

Obviously, Senators Leahy, Hatch, and I, among others, share a common motive: making a good system better. We should also share a common goal: producing the best legislation for the country. Both of these bills propose using modern genetic technology to improve our criminal justice system to protect the truly innocent. Senator Hatch's legislation goes beyond Leahy-Smith to address the important issue of

the current backlog of unanalyzed DNA samples; however, Leahy-Smith goes further than the Hatch bill to address other rare but real issues faced by the wrongfully accused: competent counsel and fair compensation for unjust incarceration.

Today, you will hear from a several prosecutors, including Joshua Marquis from my home state who is the Oregon State Director of the National District Attorney's Association, and the Vice-President of the Oregon District Attorney's Association. I welcome their participation and their unique perspective in this discussion. Some express concern that the Leahy-Smith legislation would impose burdensome obligations on the states. They believe that states should be counted upon to continue setting responsible standards for the definition of crime, punishment, and procedures to be followed in their courts.

In the overwhelming majority of cases, the states do these things very, very well. Oregon, for instance, spends more on defense attorneys than it does on prosecution. Officers of America's courts and law enforcement work extremely hard to ensure that the true perpetrators of heinous crimes are caught and convicted. However, there have been instances where defendants have been represented by incompetent counsel. There are also a number of prisoners on death row who never had access to DNA testing during trial simply because it did not exist at that time.

My view is this: if you support the death penalty, you should also support every measure to make sure that the guilty and not the innocent are executed. It's that simple. When life is at stake, no step should be considered too protracted or too onerous. Setting federal standards on access to post-conviction DNA and competent counsel are very reasonable steps to make sure that our system of criminal justice operates fairly regardless of where you live.

If we are to have a system that is just, transparent, and defensible, we must make absolutely certain that every person who is behind bars deserves to be there. One of the best ways to do this is to make sure that the fingerprint of the 21st century is unmistakably stamped on our judicial system. We must have confidence in the integrity of justice, that it will both protect the innocent and punish the guilty.

For these reasons, I urge members of the Senate Judiciary Committee, both Republican and Democrat, to work with us to produce the best possible legislation that will provide true protections to the innocent.

The CHAIRMAN. Let me introduce the first panel of witnesses. First, we will have the Hon. Drew Edmondson, the attorney general of Oklahoma. He has served as attorney general of Oklahoma since 1994. We have been with you before and we appreciate you coming and making yourself available.

Our next witness is the Hon. Eliot Spitzer.

I am pronouncing that right, aren't I?

Mr. SPITZER. You are indeed.

The CHAIRMAN. OK; that is the way I have always pronounced it. I just wanted to make sure.

Eliot is the attorney general of New York. He has served as a former prosecutor and is now New York State's chief law enforcement officer. We are very grateful that you are here today.

We are pleased to welcome Enid Camps, the deputy attorney general of California, who is the legal adviser of the California Department of Justice DNA laboratory. So we are honored to have you here as well.

The Hon. Charles F. Baird is joining us as a former judge on the Texas Court of Criminal Appeals, and he is currently serving as Co-Chair of the Constitution Project's National Committee to Prevent Wrongful Executions. We are delighted to have you as well, and honored.

Finally, we welcome Josh Marquis.

Am I pronouncing your name right, Marquis?

Mr. MARQUIS. Yes, sir.

The CHAIRMAN. The district attorney of Clatsop County, OR, and member of the National District Attorneys Association, from Astoria, OR.

Good morning to each of you and welcome to the hearing on post-conviction DNA testing. We are just delighted to have all of you here, as well as the second panel which we will introduce after you.

General Edmondson.

PANEL CONSISTING OF HON. W.A. DREW EDMONDSON, ATTORNEY GENERAL, STATE OF OKLAHOMA, OKLAHOMA CITY, OK; HON. ELIOT SPITZER, ATTORNEY GENERAL, STATE OF NEW YORK, NEW YORK, NY; ENID CAMPS, DEPUTY ATTORNEY GENERAL, STATE OF CALIFORNIA, SACRAMENTO, CA; HON. CHARLES F. BAIRD, FORMER JUDGE, TEXAS COURT OF CRIMINAL APPEALS, AND CO-CHAIR, NATIONAL COMMITTEE TO PREVENT WRONGFUL EXECUTIONS, AUSTIN, TX; AND JOSHUA K. MARQUIS, DISTRICT ATTORNEY, CLATSOP COUNTY, OR, AND MEMBER, BOARD OF DIRECTORS, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, ASTORIA, OR

STATEMENT OF HON. W.A. DREW EDMONDSON

Mr. EDMONDSON. Thank you, Mr. Chairman, members of the committee. I appreciate the opportunity you have given me to present testimony here today. As Oklahoma's attorney general and a former prosecutor, I had the honor of working with Chairman Hatch and with other members of this committee on the habeas corpus reforms included in the 1996 Antiterrorism and Effective Death Penalty Act.

Some of you may recall victims and family members of victims of the Murrah Building bombing who came to Washington wearing buttons with the number 17 on them and the international "no" symbol, signifying the 17 years of appeals for Roger Dale Stafford, a notorious Oklahoma murderer, and their hope that the process would not be that lengthy for whoever might be convicted of the act which so devastated Oklahoma City on April 19, 1995. You responded to their pleas in 1996, but now I fear, only 4 years later, you are considering legislation which might well erase those gains and throw additional, unnecessary road blocks into our judicial process.

Since the death penalty was reenacted in 1976, Oklahoma has executed 27 convicted murderers, 24 since I took office in 1995. DNA testing was not an issue in any of those cases, either because there were no samples from the perpetrator left at the scene of the crime for testing or because guilt was admitted and testing unnecessary, or identity of the perpetrator was not at issue, or DNA testing was never requested.

There is nothing magic about DNA. DNA identifies only its donor, not the perpetrator of the crime. DNA does not tell us when it arrived at the scene of the crime. DNA does not tell us how it arrived at the scene of the crime. DNA does not tell us who else might have been present when the crime was committed.

Robert Frost said that before he would build a wall, he would ask what it is he is walling in or walling out. Before we mandate a DNA test in an individual case or by legislation, we should ask ourselves what exactly do we hope to prove or disprove. The essential question should be, if this test turns out exactly the way the applicant turns out, will it show the applicant to be innocent?

In the best of cases, DNA can provide compelling evidence. In most cases, however, including most murder cases, DNA testing is inapplicable because there are no samples connected to the suspect for testing, or irrelevant because the identity of the suspect is not an issue.

What Congress may do, if it does not proceed with caution, is establish an ineffective death penalty act that awards new avenues of appeal for convicted murderers, years of additional anguish for the families of their victims, and an attack on State sovereignty that is breathtaking in its scope.

Under S. 2073, the State of Oklahoma, even if it opts out of the Federal grant programs, can still be forced to adopt new hearing procedures, new avenues of appeal, new standards for representation and compensation, new jury instructions in capital cases, new requirements for preservation of evidence, and new methods for convicted murderers to sue State officials, including judges.

Oklahoma enacted a DNA testing bill in this past session of the legislature. It was signed into law by Governor Keating on June 1. It gives our indigent defense system sole discretion to determine which cases to authorize for testing and priority to cases presenting the opportunity for conclusive or near conclusive proof that a person is factually innocent by reason of scientific evidence.

Oklahoma recently saw a case delayed over DNA evidence. With the execution date approaching, defense attorneys alleged in pleadings that the test results would produce substantial evidence of innocence. After being denied access to the evidence by both State and Federal courts, the tenth circuit issued a stay without affording the State an opportunity to respond and the case is now on hold.

The defendant in that case admitted to his participation in the kidnaping, beating, burning, and murder of an 84-year-old woman. His confession was corroborated by witness testimony, the fact that after the killing he went to a strip joint smelling of gasoline and gave a stripper the woman's wedding ring, and the statement he gave another witness that he set the woman on fire and, "watched her jump like a june bug on a hot sidewalk." This scenario of justice delayed could be repeated over and over again with the mandates and lax standards of S. 2073.

If the Federal Government moves in the direction to affect forensic testing in State courts, I would urge the committee to adopt the approach being suggested by Chairman Hatch. Establish policy to encourage the States to proceed in that direction. Rather than authorizing tests whenever the results might be relevant to a theory of innocence, require a prima facie showing that identity was an issue at the original trial and that the DNA test, if the results were favorable, would establish innocence sufficiently that a reasonable jury would not convict.

Rather than threatening loss of funds that are providing vital law enforcement needs and victims services, establish a new funding source to assist States in implementing these new initiatives. No attorney general I know, not a single prosecutor I have ever known, and certainly no judge or jury, wants to be responsible for the incarceration, much less the execution, of an innocent person.

However, I urge the committee not to succumb to the mantra and drum beat of DNA by passing legislation that tramples State sovereignty, shatters the promise of the Effective Death Penalty Act, erases the progress we have made on behalf of victims, adds little to the rights of the truly innocent, but adds years of appeals of the very guilty.

Thank you very much.

The Chairman. Thank you, General. We appreciate it.

[The prepared statement and attachments of Mr. Edmondson follow:]

PREPARED STATEMENT OF W.A. DREW EDMONDSON

Thank you Mr. Chairman, Members of the Committee. I appreciate the opportunity you have given me to present testimony today on the very important issue of DNA testing.

By way of brief background, I was elected Attorney General of Oklahoma in 1994 and was re-elected in 1998. Prior to this office, I served as an elected District Attorney for ten years and was in the private practice of law for two periods, during which I had an active criminal defense caseload which included homicide cases. I was serving in the Oklahoma Legislature in 1976 when our death penalty statute was re-enacted and voted for its passage.

I also had the honor of working with Senator Hatch and others on the habeas corpus reforms included in the 1996 Anti-Terrorism and Effective Death Penalty Act. Some of you may recall the victims and family members of victims of the Murrah Building bombing who came to Washington wearing buttons with the number 17 and the international "no" symbol on them, signifying the 17 years of appeals for Roger Dale Stafford, a notorious Oklahoma murderer, and their hope that the process would not be that lengthy for whoever might be convicted of the act which so devastated Oklahoma City on April 19, 1995.

You responded to their pleas in 1996, but now, I fear, only four years later, you are considering legislation which might well erase those gains and throw additional, unnecessary roadblocks into our judicial process.

Since the death penalty was re-enacted in 1976 Oklahoma has executed 27 convicted murderers, with all but three taking place during my five and one-half years as Attorney General. I have attached a very brief description of each of those cases to my written testimony to note the fact that DNA testing was not an issue in any of those cases, either because there were no samples from the perpetrator left at the scene of the crime for testing or because guilt was admitted and testing unnecessary or identity of the perpetrator was not at issue.

There is nothing magic about DNA.

The Innocence Protection Act of 2000 calls DNA., ". . . the most reliable forensic technique for identifying criminals when biological material is left at a crime scene." That is accurate but misleading at the same time.

1. DNA identifies the donor, not necessarily the perpetrator.

2. DNA does not tell us when it arrived at the scene of the crime, only that it is there.

3. DNA does not tell us how it arrived at the scene of the crime.

4. DNA does not tell us who else might have been present when the DNA arrived at the scene or when the crime was committed.

Robert Frost said that before he would build a wall he would ask himself what it is he is wanting to wall in or to wall out. Before we mandate a DNA test in an individual case or by legislation we should ask ourselves what, exactly, do we hope to prove or disprove. The essential question should be: If this test turns out exactly the way the applicant hopes it turns out will it show the applicant is innocent?

Contrary to the expression of fact in the Innocence Protection Act, that DNA ". . . . can, in some cases, conclusively establish the guilt or innocence of a criminal defendant," the truth is that in the best of cases a DNA test can only provide compelling evidence of either guilt or innocence. In most cases, including most murder cases, DNA testing is inapplicable because there are no samples connected to the suspect for testing or irrelevant because the identity of the perpetrator is not at issue.

What Congress may do, in responding to a "hot button" problem which may not exist by passing a law that may not be needed, is establish an "Ineffective Death Penalty Act" that awards new avenues of appeal for convicted murders, years of ad-

ditional anguish for the families of their victims, and an attack on state sovereignty that is breathtaking in its scope.

Under S2073, the State of Oklahoma, even if it opts out of federal grant programs, can still be forced to adopt new hearing procedures, new avenues of appeal, new standards for representation and compensation, new jury instructions in capital cases, new requirements for preservation of evidence and new methods for convicted murderers to sue state officials including judges.

Oklahoma enacted a DNA testing bill in this past session of the Legislature. It was signed into law by Governor Keating on June 1. While it gives our indigent defense system sole discretion to determine which cases to authorize for testing, the Act requires priority be given to cases presenting the "opportunity for conclusive or near conclusive proof that the person is factually innocent by reason of scientific evidence." The Act applies to both capital and noncapital cases and is attached to this testimony.

Prior to enactment of the testing bill, the Attorney General's office established a procedure for DNA review of all death penalty cases nearing the end of their appeals to determine whether there remained an issue of actual innocence which could be resolved by forensic testing. If such a case presented itself, the testing would be accomplished by agreement prior to an execution date being requested. No such case has arisen.

Oklahoma, along with other states, is awaiting the product of the National Commission on the Future of DNA Evidence, which we anticipate will be a model law styled the Uniform Statute for obtaining Postconviction DNA Testing. While we have not yet seen that statute. I joined with 29 other state Attorney Generals to urge this committee and the Congress to be cautious about enacting new and onerous provisions in this area, at least until the model statute has been presented and reviewed. I have appended that letter to my testimony.

Last Sunday's Tulsa World had a review of the book Actual Innocence which included a lengthy reference to the Oklahoma case of Ronald Keith Williamson, declared by the authors to have been proven innocent beyond a doubt after having been within days of being executed. It is a fact that Williamson was released on the strength of DNA testing, which showed that samples taken from the victim belonged to a third individual and not to Williamson or his co-defendant Dennis Fritz, who was also released from a life sentence. It is not true that Williamson was within days of being executed and it is arguable whether he is innocent.

Oklahoma requested an execution date for Williamson in August 1994 because his most recent appeal had been denied and his next appeal had not been filed. An execution date of September 27, 1994 was set with all parties understanding that it would be stayed when the defense filed its petition for writ of habeas corpus, the next step in the process. The habeas petition was filed on September 22, 1994 and we filed a response agreeing to a stay of execution, which was granted September 23, 1994. The threat of his execution on September 27 was so remote as to be nonexistent.

Williamson was not convicted "on the strength of a jailhouse snitch" as reported. Among the direct and circumstantial evidence of his guilt was a statement he gave to the Oklahoma State Bureau of Investigation describing a "dream" in which he had committed the murder. Williamson said, "I was on her, had a cord around her neck, stabbed her frequently, pulled the rope tight around her neck." He paused and then stated that he was worried about what this would do to his family.

When asked if Fritz was there, Williamson said, "yes."

When asked if he went there with the intention of killing her, Williamson said "probably."

In response to the question of why he killed her, Williamson said, "she made me mad."

The Pontotoc County prosecutor had a tough decision to make on a re-prosecution of Williamson and Fritz and concluded that conviction was highly unlikely in the wake of the DNA evidence, even though the note left at the scene said "Don't look fore *us* or ealse," indicating multiple perpetrators.

Scheck, Neufeld and Dwyer can claim Williamson as poster material for Actual Innocence, but I would look further before creating federal legislation based upon his case.

Oklahoma also saw the case of Loyd Winford Lafevers delayed over DNA evidence. With the execution date approaching, defense attorneys alleged in pleadings that test results could produce substantial evidence of innocence. After being denied access to the evidence by both state and federal courts, the 10th Circuit issued a stay, without affording the state an opportunity to respond, and the case is now on hold at least until July and probably longer.

Lafevers and co-defendant Cannon burglarized, beat, kidnaped and ultimately doused with gasoline and set on fire, an 84 year old woman in Oklahoma City. They were tried together, convicted and sentenced to death. The appeals court reversed and ordered they be tried separately, which was done in 1993. Separately they were convicted and sentenced to death.

Each co-defendant confessed to participant. Two pair of pants were seized from Cannon's residence and were tested. They both had blood type A on them, which was the blood type for both Cannon and the victim. In *argument*, the state submitted that one pair of pants could belong to Lafevers and the blood could be the victim's from the beating. Lafevers denied ownership of either pair of pants, saying he washed his pants at his mother's house.

Having exhausted all state and federal appeals, to file a successive one in either courthouse would require a showing of (1) new evidence of (2) actual innocence. This evidence is neither. It is not new because the defense could have run DNA tests for the retrial in 1993 and chose not to. It is not evidence of actual innocence because *regardless* whose blood is on those pants the evidence would not negate or even minimize the guilt of Lafevers.

The tests determined the blood to be Cannon's. The defense is now testing, over the state's objection, hairs from the victim's clothing at the scene of the immolation. Again, not new and no potential for exoneration of Lafevers, and the victim's family is suffering through more delays and wondering what has happened to our criminal justice system.

Fafevers not only admitted to his participation in the murder of this 84 year old woman, his confession was corroborated by witness testimony, the fact that after the killing he went to a strip joint smelling of gasoline and gave a stripper the victim's wedding ring, and a statement he gave another witness that he set the woman on fire and "watched her jump like a junebug on a hot sidewalk."

This scenario of justice delayed would be repeated over and over again with the mandates and lax standards of S2073.

We are told there are people on death row or serving lengthy terms of imprisonment who are actually innocent and could be proven so by DNA testing. The executive director of our indigent defense system cited statistics from the Innocence Project that they had heard from 70 to 100 Oklahoma inmates so situated. I asked for names and offered to review files and, if merited, to pay for testing out of the budget of the Attorney General's Office. I have attacked exhibits verifying that offer.

Four months later those prisoners continue to languish and I have yet to be provided with a single name of a single prisoner who is arguably innocent and could be freed with a DNA test in Oklahoma.

If the federal government moves in a direction to affect forensic testing in state courts, I would urge the committee to adopt the approach being suggested by Senator Hatch. Establish policies that encourage the states to proceed in this direction. Rather than authorizing tests whenever the results might be "relevant" to a theory of innocence, require a prima facie showing that identity was an issue at the original trial and that the DNA test, if the results were favorable, would establish innocence sufficiently that a reasonable jury would not convict.

Rather than threatening loss of funds that are providing vital law enforcement needs and victim services, establish a new funding source to assist states in implementing these new initiatives.

No Attorney General I know, not a single prosecutor I have ever known, and certainly no judge or jury, wants to be responsible for the incarceration, much less the execution, of an innocent person. If the legislature of Oklahoma can pass, and a conservative governor with a law enforcement background can sign, a state law facilitating forensic testing to aid the appeals of incarcerated individuals, then any state can.

I urge the committee not to succumb to the mantra and drumbeat of DNA by passing legislation that tramples state sovereignty, shatters the promise of the Effective Death Penalty Act, erases the progress we have made in behalf of victims, adds little to the rights of the truly innocent but adds years to the appeals of the very guilty.

Thank you.

EXECUTIONS IN OKLAHOMA SINCE RE-ENACTMENT OF THE DEATH PENALTY IN 1976

Inmate	Date of execution	Facts pertinent to DNA
Charles Troy Coleman	09/10/90	Shotgun slaying of elderly couple; only samples were of victims

EXECUTIONS IN OKLAHOMA SINCE RE-ENACTMENT OF THE DEATH PENALTY IN 1976—Continued

Inmate	Date of execution	Facts pertinent to DNA
Robyn Leroy Parks	03/10/92	Shot gas station attendant; only samples were of victim; defendant confessed
Olan Randle Robison	03/13/92	Three victims shot to death; only samples were from victims
Thomas J. Grasso	03/20/95	Confessed, waived appeals
Roger Dale Stafford	07/01/95	Shot a mother, father and son; only samples were from victims. Also did Sirloin Stockade murders, execution of witnesses to armed robbery
Robert A. Brecheen	08/11/96	Surviving victim shot defendant; arrested at scene, no identity issue
Benjamin Brewer	04/26/96	Confessed; no DNA issues
Steven Keith Hatch	08/09/96	Shot a mother, father, son and daughter—son and daughter lived and testified; only samples from victims
Scott D. Carpenter	05/08/97	Pled ''no contest'', waived final appeals; only samples from victim
Michael Edward Long	02/20/98	Stabbed and shot 23 year old mother and five year old son—caught in backyard with knife in possession; waived final appeals
Stephen Edward Wood	08/05/98	While serving two consecutive life without parole sentences for murders, stabbed another inmate; waived final appeals
Tuan Nguyen	12/10/98	Killed wife and two cousins aged 6 and 3; only samples from victims
John Wayne Duvall	12/17/98	Confessed; no DNA issues
John W. Castro	01/07/99	Murdered two women, confessed; no DNA issues
Sean Sellers	02/04/99	Murdered convenience store clerk, then his parents; defense of satan worship; no DNA issues
Scotty Lee Moore	06/03/99	Murdered former employer, female companion witnessed; no DNA issues
Norman Newsted	07/08/99	Shot cab driver two times in back of head; only samples from victim
Cornel Cooks	12/02/99	Confessed; no DNA issues
Bobby Ross	12/09/99	Shot police officer three times in back of head after armed robbery interrupted; only samples from victim
Malcolm Rent Johnson	01/06/00	Semen, blood and hair at scene consistent with defendant; DNA never requested
Gary Alan Walker	01/13/00	Serial killer, confessed to three for life sentences, convicted of one for life without parole, convicted of instant case for death; only samples from victim
Michael Roberts	02/10/00	Killed 80 year old woman with knife; blood on defendant's tennis shoes; DNA never requested; defendant confessed
Kelly Lamont Rogers	03/23/00	Confessed; DNA done and matched
Ronald Keith Boyd	04/27/00	Shot police officer at convenience store; only samples from victim
Charles Adrian Foster	05/25/00	Killed elderly grocer with baseball bat and knife, fled scene for weeks; only samples from victim
James Robedeaux	06/01/00	Killed and dismembered live-in girlfriend; only samples from victim
Robert J. Berget	06/08/00	Shot school teacher with shotgun, confessed; no DNA issues

EXHIBIT 2

An Act

ENROLLED SENATE
BILL NO. 1381

By: Wilkerson of the Senate

and

Askins and Toure of the House

An Act relating to criminal procedure; creating the DNA Forensic Testing Act; providing short title; creating the DNA Forensic Testing Program; stating purposes; mandating standard of evidence; providing procedures; placing certain decisions within discretion of Oklahoma Indigent Defense System; providing for employment of personnel; providing for priority of claims; authorizing the Oklahoma Indigent Defense System to investigate cases and arrange for forensic testing; providing that persons who are not incarcerated do not have to provide samples; authorizing certain persons to request services; providing for codification; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1371 of Title 22, unless there is created a duplication in numbering, reads as follows:

A. Sections 1 through 3 of this act shall be known and may be cited as the "DNA Forensic Testing Act".

B. There is hereby created the Oklahoma Indigent Defense System DNA Forensic Testing Program to continue until July 1, 2005.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1371.1 of Title 22, unless there is created a duplication in numbering, reads as follows:

A. A DNA Forensic Testing Program shall be created within the Oklahoma Indigent Defense System to investigate, screen, and present to the appropriate prosecutorial agency claims that scientific evidence will demonstrate indigent persons convicted of, and presently incarcerated on, any felony offense upon which the testing is sought are factually innocent. Factual innocence requires the defendant to establish by clear and convincing evidence that no reasonable jury would have found the defendant guilty beyond a reasonable doubt in light of the new evidence. The System's services shall be available only upon the submission of an affidavit of indigency to the System signed by an incarcerated person convicted of a felony and upon a preliminary determination by the

System that the claim has a reasonable basis in fact. Determinations of indigency shall be made at the sole discretion of the System based on rules for determining indigency promulgated by the Court of Criminal Appeals pursuant to the Indigent Defense Act. Determinations of reasonableness and acceptance of cases for which DNA testing will be performed shall be within the sole discretion of the System and shall not be subject to judicial review.

B. The System shall employ such attorneys, investigators, and other employees as may be necessary to process and present claims of factual innocence to the appropriate prosecuting agency in an efficient manner.

C. The System shall give priority to claims based on certain factors, including but not limited to:

1. The opportunity for conclusive or near conclusive proof that the person is factually innocent by reason of scientific evidence; and

2. A lengthy sentence of imprisonment or a death sentence.

D. The System is authorized to investigate cases and arrange for the forensic testing of evidence to determine whether evidence of factual innocence exists. Samples must be of sufficient quantity to allow testing by both the prosecution and the defense. Neither the prosecution nor defense shall consume the entire sample in testing in the absence of a court order allowing the sample to be entirely consumed in testing. The System shall request the Oklahoma State Bureau of Investigation or the city in which the offense upon which the testing is sought was committed to perform the testing. The Bureau or the city may decline for any reason at their discretion in writing within thirty (30) days of receipt of the request. In those cases where the Bureau or city declines or fails to respond within thirty (30) days, or cannot perform the testing within a reasonable time, the System may request the professional services of experts under contract with the System as necessary for testing and presentation of such claims to the appropriate prosecuting agency.

E. Nothing in the DNA Forensic Testing Act shall require any person other than an incarcerate to provide a sample from their body for purposes of testing.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1371.2 of Title 22, unless there is created a duplication in numbering, reads as follows:

An indigent person convicted of, and presently incarcerated on, any felony offense upon which the testing is sought, who alleges a claim of entitlement to forensic testing for purposes of demonstrating factual innocence may request the services of the Oklahoma Indigent Defense System DNA Forensic Testing Program pursuant to the DNA Forensic Testing Act.

SECTION 4. This act shall become effective July 1, 2000.

SECTION 5. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the Senate the 24th day of May, 2000.

ACTING President of the Senate

Passed the House of Representatives the 25th day of May, 2000.

ACTING Speaker of the House of Representatives

OFFICE OF THE GOVERNOR

Received by the Governor this 26th day of May, 2000, at 11:05 o'clock A M.

By: Melinda Dean

Approved by the Governor of the State of Oklahoma the 15 day of June, 2000, at 11:15 o'clock A M.

Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Secretary of State this 1st day of June, 2000, at 2:07 o'clock P M.

By:

EXHIBIT 3

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
750 FIRST STREET NE SUITE 1100
WASHINGTON, DC 20002
(202) 326-6000 • (202) 408-7014 FAX
www.naag.org

CHRISTINE T. MILLIKEN
Executive Director
General Counsel

PRESIDENT
CHRISTINE O. GREGOIRE
Attorney General of Washington

PRESIDENT-ELECT
ANDREW KETTERER
Attorney General of Maine

VICE PRESIDENT
CARLA STOVALL
Attorney General of Kansas

IMMEDIATE PAST PRESIDENT
MIKE MOORE
Attorney General of Mississippi

June 8, 2000

Honorable Orrin J. Hatch
Chairman, Senate Judiciary Committee
131 Senate Russell Building
Washington, D.C. 20510

Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
433 Senate Russell Building
Washington, D.C. 20510

Dear Chairman Hatch and Senator Leahy:

As Attorneys General of our respective states, we urge you to be cautious in enacting federal legislation to address the use of DNA identification technology in state proceedings. In our role as prosecutors and appellate advocates, we believe in our ethical obligation to ensure no person is ever unjustly charged, convicted, or condemned. DNA identification technology is an invaluable tool for fulfilling this obligation and we support a thoughtful effort in the states to refine actions already taken or to take appropriate action to sensibly and fairly utilize the opportunity for justice presented in those cases where DNA evidence is available, and relevant to guilt or innocence. We ask that Congress not preemptively short-circuit this process with legislation that imposes mandatory obligations on the states.

DNA testing issues are at the forefront of many legislative initiatives in the states. Several states have already adopted their own DNA testing laws. In the near future, the National Commission on the Future of DNA Evidence will release its model law for the states: the Uniform Statute for Obtaining Postconviction DNA Testing. While Attorneys General were not participants in the Commission, we intend to review this proposed model legislation with each other and, of course, with the appropriate political officials in our own states.

We have serious concerns about federalism, and concerns about Congress prematurely intruding into and trying to displace an ongoing process in our states through enactment of S. 2073, the "Innocence Protection Act of 2000." While we have reservations about certain specific features of the bill *(see attached)*, our overarching concern is the extent to which this bill intrudes on the responsibility of the states to define crimes, their punishment and the procedures to be followed in their courts. At the same time, the proposed legislation fails to provide what the states most need to ensure the protection of innocent people -- support for laboratory and prosecutorial resources dedicated to DNA testing.

Thus, we ask that you act cautiously in this endeavor, providing an opportunity for the state legislatures to seek a resolution to these issues and pursuing meaningful discussions with those of us who represent the state's interest in these cases. We would strongly oppose any efforts that circumvent this process.

Sincerely,

Bill Pryor
Attorney General of Alabama

Janet Napolitano
Attorney General of Arizona

Mark Pryor
Attorney General of Arkansas

Bill Lockyer
Attorney General of California

Ken Salazar
Attorney General of Colorado

M. Jane Brady
Attorney General of Delaware

Robert A. Butterworth
Attorney General of Florida

Thurbert E. Baker
Attorney General of Georgia

Earl Anzi
Acting Attorney General of Hawaii

Alan G. Lance
Attorney General of Idaho

Karen Freeman-Wilson
Attorney General of Indiana

Carla J. Stovall
Attorney General of Kansas

J. Joseph Curran, Jr.
Attorney General of Maryland

Mike Moore
Attorney General of Mississippi

Jeremiah W. Nixon
Attorney General of Missouri

Joseph P. Mazurek
Attorney General of Montana

Don Stenberg
Attorney General of Nebraska

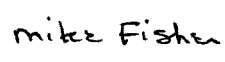
Frankie Sue Del Papa
Attorney General of Nevada

Heidi Heitkamp
Attorney General of North Dakota

Betty D. Montgomery
Attorney General of Ohio

W. A. Drew Edmondson
Attorney General of Oklahoma

Hardy Myers
Attorney General of Oregon



D. Michael Fisher
Attorney General of Pennsylvania

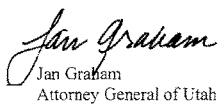
Sheldon Whitehouse
Attorney General of Rhode Island

Charlie Condon
Attorney General of South Carolina

Mark Barnett
Attorney General of South Dakota

Paul Summers
Attorney General of Tennessee

John Cornyn
Attorney General of Texas



Jan Graham
Attorney General of Utah

Gay Woodhouse
Attorney General of Wyoming

cc: The Honorable Trent Lott, Senate Majority Leader
The Honorable Tom Daschle, Senate Minority Leader
Members of the Senate Committee on the Judiciary
The Honorable Henry Hyde, Chair, House Committee on the Judiciary
The Honorable John Conyers, Ranking Minority Member, House Committee on the Judiciary

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Attorney General of Mississippi

June 8, 2000

Specific Comments Regarding Provisions of S. 2073
The Innocence Protection Act of 2000
(Attachment to Sign-On Letter)

Concerning the DNA provisions, though biological material subject to DNA testing may be gathered in many cases, from a convicted prisoner's perspective it is only relevant where identity of the perpetrator is truly an issue. Under the bill as drafted, this evidence will nonetheless have to be retained at least until the appropriate State official follows the notification process set forth in section 102 of the bill. This would apparently even be required if the material and its existence was disclosed to a criminal defendant before trial in discovery as is required in several States. Moreover, even if a State for some reason decided to forego its legitimate share of federal assistance dollars, the State would still have to honor requests for DNA testing through the Fourteenth Amendment enforcement mechanism found in section 104 of the bill. At a minimum, it would take a judicial determination that DNA "testing could not produce noncumulative evidence establishing a reasonable probability that the person [requesting the testing] was wrongly convicted or sentenced." The State will have to muster its limited prosecutorial and judicial resources in this regard even in the clearest of cases where testing would be of no value. The bill contains no limit on the number of times biological material may be retested, save only a defendant's release from incarceration, essentially inviting a battle of so-called "experts" over whether "new DNA techniques . . . provide a reasonable likelihood of more accurate and probative results."

In addition, the bill contains onerous legal representation requirements in capital cases. These go well beyond the requirement that defendants in all criminal cases receive the effective assistance of counsel, a requirement regularly enforced in the State and federal courts. We recognize that Byrne Formula Grants will not be affected by this provision until an additional $50,000,000 is made available to carry out part E of Title I of the Omnibus Crime Control and Safe Streets Act of 1968. Nevertheless, failure to provide the counsel and the "effective system" for providing the legal services, including investigative, expert and administrative support envisioned in the regulations to be issued by the Director of the Administrative Office of United States Courts, will result in prolonged and unnecessary federal litigation in capital cases in contravention of what was envisioned with the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996. A State's failure to meet these new, federally-mandated standards would cause the State to lose the benefit of the

presumption of correctness and procedural bar rules if a federal judge considering a habeas corpus petition determined that the State's system did not measure up.

The presumption of correctness and procedural default rules have developed over the years to effectuate the concepts of comity, finality and federalism. They would be stripped under the bill because of extra-constitutional concerns having no demonstrable bearing on the adequacy of the representation the habeas petitioner received in State proceedings, including State proceedings at which there is no constitutional right to counsel, such as State post-conviction proceedings.

Elimination of the presumption of correctness and procedural bar rules will only prolong these cases which already take too long to get through the State and federal judicial systems. Federal judges will be required to hold evidentiary hearings even though State judges have already done so and made factual findings supported by the State court record which would clearly defeat the convict's federal claim. Federal judges will rule on claims that the State judges refused to consider because the legitimate, neutral State procedural rules were not followed. Both of these results are a great affront to the States and constitute punishment for a non-existent problem.

The bill also intrudes on the States' responsibility to define crimes, their punishments and the procedures to be followed in their courts by requiring specific jury instructions in capital cases on "all statutorily authorized sentencing options." The bill goes far beyond that which the Constitution as interpreted by the Supreme Court in *Simmons v. South Carolina*, 512 U.S. 154 (1994), requires. It conditions grants under the Violent Crime Control and Law Enforcement Act of 1994 on assurances that an instruction not required under the Constitution is given in all capital cases. This is an affront to State sovereignty in that it requires that proceedings in State court be conducted in conformity with a congressional mandate.

Lastly, the bill waters down the requirement of the federal habeas corpus statute that before a federal constitutional claim be presented by a State prisoner to a federal court the prisoner must first exhaust all available State court remedies. Presently, one of those remedies is the seeking of discretionary review in the highest court of the State. Such was the holding of *O'Sullivan v. Boerckel*, 119 S.Ct. 1728 (1999).

It is for the States to determine what procedures they will make available for the vindication of federal constitutional rights. The exhaustion doctrine is intended to give the State courts the first opportunity to address constitutional claims arising in proceedings before them. This provision would strip that ability from the highest courts of the States, many of which hear appeals as a matter of discretion. If the States want to relinquish that ability and allow such claims to be presented in the federal courts without full exhaustion, they may do so. For Congress to do so is an affront to comity and federalism.

A decade ago, the National Association of Attorneys General, without dissent, resolved to oppose any legislation that would, among other things, "undermine or weaken the procedural default doctrine or broaden any exception to that doctrine," that would "create new requirements concerning the experience, competency, or performance of counsel beyond those required by the United States Constitution, as interpreted in *Strickland v. Washington*, 466 U.S. 668 (1984)," or that would "expand the grounds on which federal habeas corpus relief may be granted." At the same time, our Association "strongly support[ed] legislation which would . . . ensure finality of state court judgments and the reduction of federal post-conviction litigation of state court convictions."

We now join with our predecessors in office on each of these sound points. S.2073 will undermine procedural default and eliminate the presumption of correctness accorded to State court fact-finding. It imposes on the States requirements for counsel far beyond what the Constitution requires. It will expand habeas corpus relief by allowing new claims, by reducing exhaustion and by allowing litigation of claims procedurally barred in State court and relitigation of claims already decided on the facts in State court where the federal court decides that the State system of defense services is deficient when measured against the requirements established by the Director of the Office of United States Courts. These provisions will render nugatory finality of State court judgments and will drastically increase federal post-conviction litigation of State court convictions.

EXHIBIT 4

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

February 24, 2000

Mr. James D Bednar
Executive Director
Indigent Defense System
1660 Cross Center Drive
Norman, OK 73019

Dear Mr. Bednar:

In discussion with me and in the public media you have stated that there are 70 to 100 cases of prisoners currently serving terms whose allegations of actual innocence could be resolved by new DNA or other forensic testing. I share your commitment and belief that no person actually innocent should be incarcerated, particularly if the ability is at hand to resolve the guilt or innocence issue.

While I am aware that legislation is pending, I believe it is imperative that we begin looking at those cases as expeditiously as possible. To that end, I am formally requesting that you tender to this office the names and case numbers of all inmates you believe fall within the description above referenced. Our office, to the extent our resources allow, will begin reviewing files as soon as those names are provided and will contact you if our review indicates that an injustice might have been done.

I look forward to your early reply.

Sincerely,

W. A. DREW EDMONDSON
ATTORNEY GENERAL

WAE:st

2300 N. LINCOLN BLVD., SUITE 112, OKLAHOMA CITY, OK 73105-4894 (405) 521-3921 • FAX: (405) 521-6246

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

March 20, 2000

Mr. James D. Bednar
Executive Director
Indigent Defense System
1660 Cross Center Drive
Norman, OK 73019

Dear Mr. Bednar:

Thank you for your letter of March 8, 2000 in response to mine of February 24, 2000 on the subject of DNA or other forensic testing. While I am certain it was not the intention of either of us, our exchange of letters was characterized by one newspaper article as an attempt on my part to block DNA testing legislation. I have expressed before and express again here that I support the concept of taking all necessary steps to be certain innocent people do not remain incarcerated. While I have problems with some of the language in your bill I express my continued desire to work with you to achieve that goal.

In that line, I again express my willingness to work with you, even the absence of legislation, to determine whether innocent individuals are incarcerated and if so to free them.

While I appreciate the obstacles presented, your letter of March 8, 2000 is unnecessarily pessimistic and poses artificial obstructions to achieving these ends. I fully understand the attorney-client privilege and am fully aware that it can be waived by the client. What that would require is the simple step by OIDS or by the Innocence Project at the Benjamin N. Cardozo School of Law to contact the incarcerant and ask them whether they would like the Attorney General in cooperation with any counsel of their choosing to pursue the issue of new DNA or other forensic testing. Even without such consultation it would also seem imminently ethical to supply this office with the name of any such incarcerant, even if details can not ethically be supplied without the incarcerant's consent. Indeed, it would seem to me unethical for your agency or the Project to allow such individuals to remain incarcerated without pursuing all possible avenues to judicial release.

2300 N. LINCOLN BLVD., SUITE 112, OKLAHOMA CITY, OK 73105-4894 (405) 521-3921 • FAX: (405) 521-6246

Based on that, I again ask you to take such reasonable steps as a review of your files, conversation with your staff attorneys and communication with the Innocence Project to identify Oklahoma incarcerants who may be actually innocent and whose innocence may be determinable by DNA or other testing. Upon the receipt of that list or a single name I will repeat my commitment to pursue that same analysis and to fully cooperate in DNA or other forensic testing if such testing is available and would resolve the issue.

Sincerely,

W. A. DREW EDMONDSON
ATTORNEY GENERAL

WAE:st

The CHAIRMAN. Mr. Spitzer.

STATEMENT OF ELIOT SPITZER

Mr. SPITZER. Chairman Hatch, Senator Leahy, other members of the Senate Judiciary Committee, thank you for inviting me here today to address the issue of post-conviction DNA testing and how we should incorporate DNA testing more fully into the American criminal justice system.

DNA testing represents an extraordinary enhancement in our ability to solve crimes. With DNA testing, we can determine whether a particular patch of blood, a hair, or a semen sample belongs to a specific individual. This evidence can exonerate individuals or it can inculpate them. An innocent person can be freed, a guilty perpetrator found. This is an extremely powerful tool, once that can bring greater guarantees of fairness to our judicial system. As a result, it is the responsibility of all involved—legislators, prosecutors, defense counsel, judges—to work together to determine the appropriate and just use of this investigative device.

We as a society have made a profound commitment to avoid punishing the innocent. This is especially important to those of us who support the death penalty in appropriate circumstances. We have determined that there are instances when the crimes are so egregious that society's ultimate punishment, the death penalty, may be appropriate. But the imposition of this punishment can be justified only if we make full use of all available tools to aid in the determination of guilt or innocence. This commitment must be reflected in the choices we make about post-conviction DNA testing. It is not something to be feared, but rather to be accepted and incorporated into our criminal justice procedures and practices.

Some opponents of post-conviction DNA testing have argued that it cannot conclusively prove guilt or innocence in many cases, and therefore we should not burden ourselves with stringent requirements to provide such testing. That position ignores the remarkable power of DNA testing in those cases where identification is at issue.

DNA testing can provide evidence which is probative of guilt or innocence in many cases, and therefore can determine that individuals who have been incarcerated for years or even are awaiting the death penalty may be innocent of the crimes for which they have been convicted. Thus, any marginal burdens are far outweighed by the ability to prevent the punishment of the innocent.

New York State has been a leader in this area, having passed legislation granting a statutory right to post-conviction DNA testing almost 6 years ago. Our experience demonstrates that post-conviction DNA testing can bolster the integrity of our judicial system without unduly burdening our criminal justice resources.

In 1994, the New York Legislature amended New York Criminal Procedure Law Section 440.30 to authorize trial courts to order post-conviction DNA testing in certain circumstances. This statute requires a court to grant a defendant's request for post-conviction forensic DNA testing where a court makes two determinations; first, that the specified evidence containing DNA was secured in connection with the trial resulting in the judgment; second, that if a DNA test had been conducted on such evidence and the results

had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

Although New York does not have a complete accounting of every instance in which a defendant has requested DNA testing and the outcome, our preliminary indications demonstrate that a statutory right to post-conviction DNA testing, coupled with an appropriate standard, can produce results both just and practical. In New York, the existence of DNA evidence has led to post-conviction exonerations in at least seven cases.

I want to reassure this committee and my State colleagues that the existence of a statutory right to post-conviction DNA testing does not mean that there will be an avalanche of testing at great cost to a State. With an appropriate standard, not all requests will be granted.

In New York, for example, a request for DNA testing can only be granted if a court determines that there exists a reasonable probability that had the results presumably favorable to the defendant been admitted at trial, the verdict would have been more favorable to the defendant. For example, in one rape case a court ordered testing where the victim had testified that she had not had sex with anyone but the rapist on the night of the crime.

On the other hand, courts have rejected requests for testing where they have determined that there was not a reasonable probability that the verdict would have been more favorable to the defendant even with the results of the DNA test. For example, in 1996 a court rejected a testing request in a rape case where the defendant had conceded at trial that he had sex with the victim, but claimed that it had been consensual. The results of DNA testing would not have altered the verdict in any way.

Thus, our experience in New York demonstrates that a statutory right to post-conviction DNA testing can result in innocent individuals being exonerated and released. And our experience in New York demonstrates that a statutory right to post-conviction DNA testing can be workable.

Although New York has been a leader in this area and is one of only several States which have created a statutory right to post-conviction testing, our statute still could be improved. For example, CPL Section 440.30(1–a) applies only to defendants convicted before January 1, 1996. Clearly, this does not make sense.

In addition, New York State does not require the reporting of all requests for such testing, and therefore cannot fully evaluate whether we are adequately addressing the concerns of prosecutors, judges, victims, as well as those convicted of crimes. Also, more guidance can be provided on the practical aspects of post-conviction testing, such as the collection, storage and retention of crime scene evidence and related training, as well as the mechanics of the testing.

If we study cases in which convictions have been vacated as a result of post-conviction analysis of DNA evidence, we may learn of additional ways to improve policies or practices relating to the operation of the criminal justice system. Notwithstanding that there are areas warranting some improvement, the New York experience demonstrates the wisdom of a statutory right to post-conviction

testing. Such testing offers an invaluable tool to protect the integrity and ultimately the public's confidence in our criminal justice system.

While I appreciate and respect the federalism concerns raised by my colleagues in State government, DNA testing is simply too important to allow some States to offer no remedy to those incarcerated who may be innocent of the crimes for which they have been convicted. That is why I support a Federal statute which requires States to adopt post-conviction testing procedures.

While any such Federal statute should be flexible enough to allow States to craft provisions tailored to their particular criminal and appellate procedures, it nevertheless should require that all State provisions contain some fundamental principles.

First, every State should be required to provide for post-conviction DNA testing in all cases in which such evidence would be probative of guilt or innocence. Second, before testing is done, defendants should be required to make a showing similar to New York's that the result of the DNA tests could provide favorable evidence related to the verdict; e.g. that if the results of the tests had been admitted at trial, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

Third, States should make such testing available at State expense to indigent defendants. Fourth, States should have reasonable time limits for defendants to request testing. Fifth, States should set forth standards to assure the preservation of potentially testable evidence. Finally, States should make sure that the above rights are made meaningful, which means the availability of counsel either through public defenders, appointed counsel programs, or funding for programs which represent indigent prisoners seeking post-conviction DNA testing.

Although ideally every State already would have established a right to post-conviction DNA testing, unfortunately that is not the case. Where, as here, fundamental human rights are at issue, an unjust punishment has been imposed, and sufficient time has passed without comprehensive State action, it is certainly appropriate for the Congress to step in and establish minimum protections that all States must adopt.

Our history is replete with instances of such necessary and appropriate Federal action. Congress did so in the 1960's when it passed civil rights laws abolishing discriminatory practices throughout the country, and it should do so again here. I can think of no cause more worthy of your attention and action.

Thank you very much.

The CHAIRMAN. Thank you, General.

[The prepared statement of Mr. Spitzer follows:]

PREPARED STATEMENT OF ELIOT SPITZER

Chairman Hatch and members of the Senate Judiciary Committee, thank you for inviting me here today to address the issue of post-conviction DNA testing and how we should incorporate DNA testing more fully into the American criminal justice system.

DNA testing represents an extraordinary enhancement in our ability to solve crimes. With DNA testing, we can determine whether a particular patch of blood, a hair, or a semen sample belongs to a specific individual. The potential significance of using DNA testing in the criminal justice system is enormous and fundamental.

This evidence can exonerate individuals or it can inculpate them; an innocent person can be freed; a guilty perpetrator found.

This is an extremely powerful took, one that can bring greater guarantees of fairness to our judicial system. As a result, it is the responsibility of all involved—legislators, prosecutors, defense counsel, judges—to work together to determine the appropriate and just use of this investigative device. DNA testing will never replace the fact finding of our juries, the legal determinations of our judges, or the constitutional protections afforded our citizens. Yet, our commitment to the fundamental principles of justice and liberty will be reflected by the decisions we make about how we use this new scientific tool.

Like every American, I treasure the constitutional protections that are the underpinnings of our criminal justice system, and that are the envy of the world's citizenry. As a former prosecutor and now New York State's chief law enforcement officer, I have seen first hand the importance of these protections. The fundamental premise of American justice is the presumption of innocence. Our basic legal principles are intended to ensure, to the extent possible, that fact finding is performed fairly, efficiently and justly to exonerate the innocent, punish the guilty, and protect our citizens.

Our federal and state constitutions are replete with rights we afford the accused—the right to notice of charges, the right to a speedy and public trial, the right to confront witnesses, the right to counsel, the right against self-incrimination. We as a society have made a profound commitment to avoid punishing the innocent.

This is particularly important to those of use who support the death penalty in appropriate circumstances. We have determined that there are instances when the crimes are so egregious that society's ultimate punishment—the death penalty—may be appropriate. But the imposition of this punishment can be justified only if we make full use of all available tools to aid in the determination of guilt or innocence.

This commitment must be reflected in the choices we make about post-conviction DNA testing. It is not something to be feared, but rather to be accepted and incorporated into our criminal justice procedures and practices.

Some opponents of post-conviction DNA testing have argued that it cannot conclusively prove guilt or innocence in many cases, and therefore we should not burden ourselves with stringent requirements to provide such testing. That position ignores the remarkable power of DNA testing in those cases where identification *is* at issue—remember that this is the tool which answered the centuries-old question whether Thomas Jefferson and Sally Hemings produced offspring together.

DNA testing can provide evidence which is probative of guilt or innocence in many cases, and therefore can determine that individuals who have been incarcerated for years—or even are awaiting the death penalty—may be innocent of the crimes for which they were convicted. The United States always has demonstrated its basic commitment to fairness to the accused, and therefore any marginal burdens are far outweighed by the ability to prevent the punishment of the innocent.

New York State is a leader in this area, having passed legislation granting a statutory right to post-conviction DNA testing almost six years ago. Our experience demonstrates that post-conviction DNA testing can bolster the integrity of our judicial system without unduly burdening our criminal justice resources.

As early as 1988, Governor Mario Cuomo established a Panel on Genetic Fingerprinting to review this new technology. Two years later, the state Division of Criminal Justice Services established the New York State DNA Advisory Committee; and the New York State DNA Scientific Review Board was formed in 1991. In 1994, the New York Court of Appeals, the highest court of our state, held that DNA evidence generally was accepted as reliable by the relevant scientific community and that results of DNA profiling tests could be admitted into evidence at a defendant's trial.[1]

Later that year, the New York Legislature amended New York Criminal Procedure Law § 440.30 to authorize trial courts to order post-convention DNA testing in certain circumstances. This statute requires a court to grant a defendant's request for post-conviction forensic DNA testing where a court makes two determinations:

- first, that the specified evidence containing DNA was secured in connection with the trial resulting in the judgment;
- second, that if a DNA test had been conducted on such evidence and the results had been admitted in the trial resulting in the judgment, "there exists a reasonable probability that the verdict would have been more favorable to the defendant."

[1] *People* v. *Wesley,* 83 NY2d 417 (1994).

As a preliminary matter, New York's law enforcement community has been quite supportive of the immense value of DNA testing. For example, New York City Police Commissioner Howard Safir has written, with reference to post-conviction DNA testing, that he has "seen the immense value of DNA evidence as both an inculpatory and exculpatory tool for law enforcement," and that the "existence of a statutory requirement makes a significant difference in the pursuit of justice."[2]

Although New York does not have a complete accounting of every instance in which a defendant has requested DNA testing and the outcome, our preliminary indications demonstrate that a statutory right to post-conviction DNA testing, coupled with a appropriate standard, can produced results both just and practical. In New York, the existence of DNA evidence has led to post-conviction exonerations in at least seven cases.[3] Thus, seven innocent individuals have been released thanks to this science and to our statutory guidelines.

I want to reassure this Committee and my state colleagues that the existence of a statutory right to post-conviction DNA testing does not mean that there will be an avalanche of testing at great cost to a state. With an appropriate standard, not all requests will be granted. In New York for example, a request for DNA testing can only be granted if a court determines that there exists a reasonable probability that had the results—presumably favorable to defendant—been admitted at trial the verdict would have been more favorable to the defendant. For example, in one rape case, a court ordered testing where the victim had testified that she had not had sex with anyone but the rapist on the night of the crime. *Matter of Washpon,* 164 Misc.2d 991 (Kings County 1995).

On the other hand, courts have rejected requests for testing where they have determined that there was not a reasonable probability that the verdict would have been more favorable to the defendant even with the results of a DNA test. For example, in 1996, a court rejected a testing request in a rape case, where the defendant had conceded at trial that he had sex with the victim but claimed that it had been consensual. *People* v. *Kellar*, 218 A.D.2d 406 (3d Dept 1996).[4] The results of DNA testing would not have altered the verdict in any way.

Thus, our experience in New York demonstrates that a statutory right to post-conviction DNA testing can result in innocent individuals being exonerated and released. And our experience in New York demonstrates that a statutory right to post-conviction DNA testing can be workable.

Although New York has been a leader in this area, and is one of only three states which have created a statutory right to post-conviction testing, our statute still could be improved. For example, CPL § 440.30(1–a) applies only to defendants convicted before January 1, 1996. This time limitation appears to represent a legislative judgment that before that date, DNA evidence could not always have been produced by a defendant at trial even with due diligence and thus DNA results presumptively constitute newly discovered evidence.

Although this may represent a rational judgment made by the legislature, the result is that for defendants convicted in New York after January 1, 1996, there is no statutory procedure authorizing post-conviction DNA testing. To the extent that those defendants may have had an opportunity to request such testing at trial but chose not to, there may be a lesser need for post-conviction testing. But some defendants may have been denied pretrial testing and should have an opportunity for post-conviction testing if their situation meets the statutory requirements. This problem could be solved either by establishing statutory standards for pretrial testing, or by extending the post-conviction DNA testing procedure set forth in CPL § 440.30(1–a) to all defendants, regardless of when they were convicted.

Other steps also can be taken to improve post-conviction DNA testing in New York. We do not require the reporting of all requests for such testing and therefore cannot fully evaluate whether we are adequately addressing the concerns of prosecutors, judges, victims as well as those convicted of crimes. Also, more guidance can be provided on the practical aspects of post-conviction DNA testing such as the collection, storage and retention of crime scene evidence and related training as well as the mechanics of the testing. If we study cases in which convictions have been vacated as a result of post-conviction analysis of DNA evidence, we may learn of

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[2] Letter from Police Commissioner Howard Safir to Congressman Henry J. Hyde, January 14, 2000.

[3] *Id.*

[4] See also *People* v. *DeOliveira*, 223 A.D.2d 766 (3d Dep't 1996) (denial of application for testing in murder case where evidence that victim had sexual intercourse with another man prior to her death would not have proved that defendant was not the murderer); *People* v. *Smith*, 245 A.D.2d 79 (1st Dep't 1997) (fact that defendant was not the source of semen recovered from victim's body was consistent with the victim's testimony).

additional ways to improve policies or practices relating to the operation of the criminal justice system. New York Governor George Pataki has proposed the creation of a DNA Review Subcommittee to address these issues, and I look forward to working with him in this endeavor.

Notwithstanding that there are areas warranting some improvement, the New York experience demonstrates the wisdom of a statutory right to post-conviction DNA testing. Such testing offers an invaluable tool to protect the integrity of—and ultimately the public's confidence in—our criminal justice system.

While I appreciate and respect the federalism concerns raised by my colleagues in state government, DNA testing is too important to allow some states to offer no remedy to those incarcerated who may be innocent of the crimes for which they were convicted. That is why I support a federal statute which requires states to adopt post-conviction DNA testing procedures. While any such federal statute should be flexible enough to allow states to craft provisions tailored to their particular criminal and appellate procedures, it nevertheless should require that all state provisions contain some fundamental principles:

- first, every state should be required to provide for post-conviction DNA testing in all cases in which such evidence would be probative of guilt or innocence;
- second, before testing is done, defendants should be required to make a showing—similar to New York's—that the result of the DNA tests could provide favorable evidence related to the verdict, e.g., that if the results of the tests had been admitted at trial, there exists a "reasonable probability that the verdict would have been more favorable to the defendant";
- third, states should make such testing available at state expense to indigent defendants;
- fourth, states should have reasonable time limits for defendants to request testing;
- fifth, states should set forth standards to assure the preservation of potentially testable evidence;
- finally, states should make sure that the above rights are made meaningful, which means the availability of counsel, either through public defenders, appointed counsel programs, or funding for programs which represent indigent prisoners seeking post-conviction DNA testing.

All of us know that, right now, there are individuals sitting in prisons throughout the country who are innocent of the crimes for which they were convicted. Each such case represents a fundamental failure of our criminal justice system, and as the elected representatives of the people, it is incumbent upon us to make every effort to ensure that these wrongs are corrected.

Although ideally every state already would have established a right to post-conviction DNA testing, unfortunately that is not the case. Where, as here, fundamental human rights are at issue, an unjust punishment has been imposed, and sufficient time has passed without comprehensive state action, it is certainly appropriate for the Congress to step in and establish minimum protections that all states must adopt. Our history is replete with instances of such necessary and appropriate federal action. Congress did so in the 1960s when it passed civil rights laws abolishing discriminatory practices throughout the country, and it should do so again here.

Our criminal justice system must strive toward ever greater degrees of exactitude. The public's confidence in our judicial system depends upon the fairness of the results it produces, and that fairness depends not just on the due process protections provided to defendants, but also on our willingness to correct any errors that occur despite those protections. Thus, if we fail to utilize the best scientific tools at our disposal—or if we refuse to make those tools available to those who may have been wrongly convicted—then we do a grave disservice to the public. On the other hand, if we choose to expand our use of this new technology, we will boost the public's confidence in our courts and their respect for the law.

For these reasons, Congress should pass legislation ensuring that every state permits post-conviction DNA testing in appropriate circumstances. By doing so, Congress will ensure that innocent people will be released from prison. I can think of no cause more worthy of your attention and action.

Thank you once again for inviting me to appear here today, and I would be pleased to answer any questions that you have.

The CHAIRMAN. Ms. Camps, we will turn to you.

STATEMENT OF ENID CAMPS

Ms. CAMPS. Thank you. Mr. Chairman, Senator Hatch, Senator Leahy, members of the committee, and a special greeting to Sen-

ator Feinstein from our home State, my name is Enid Camps and I am a deputy attorney general for the State of California and an office coordinator on DNA issues. It is my honor to be here today on behalf of Attorney General Bill Lockyear.

California law enforcement has long recognized the importance of DNA evidence in solving the most serious sex and violent crimes where the victims are disproportionately women and children. Clearly, post-conviction DNA testing is an important forensic tool as well.

Today, attention has focused on the concept of post-conviction DNA testing and the need for it. But as you know, this is only part of the equation. We believe the national dialogue should now move on to include the specifics of cost, of implementation, and a practical assessment of how this can best be accomplished.

Fair and reasonable access to post-conviction DNA testing must be established in a manner that does not compromise the integrity of our criminal justice system or undermine it financially. We thank you for the opportunity to further the national discussion on this complex subject. We are vitally interested in the DNA testing bills before you. We have just cause for concern.

The impact of any new remedy for inmates falls disproportionately upon our State. We have the largest number of prisoners in the United States, and our State lab resources are overburdened particularly with our DNA backlog of 115,000 samples, second largest in the Nation.

Attorney General Lockyear and his staff have reviewed Senator Leahy's bill, and look forward to studying Senator Hatch's bill. We appreciate that both bills seek to enhance the accuracy and confidence in the administration of our laws. This is a very important goal.

Our concern about the Leahy bill, however, is because it has no meaningful filter for distinguishing baseless from potentially meritorious claims. It reads more like a discovery statute for a case that has never been to trial. Conspicuously absent is any plain language that DNA evidence would be dispositive of a material question of identity or demonstrate actual innocence.

Another problem is a broad provision allowing a trial court to resentence even a guilty defendant in any manner based simply upon favorable results. Defense counsel typically argue that an inconclusive result is significant or favorable to the case. Under the Leahy bill, we see a rush therefore not to prove actual innocence, but to establish the inconclusive result which is arguably enough to open the door to a trial court's discretionary reevaluation of the defendant's entire cause.

Other issues raised by the Leahy bill include what is the impact of the defendant's own failure to test the available DNA evidence, split prior to trial, or reveal the results of his own confirmatory testing by various techniques, and should a defendant be permitted to re-test with each different technology even if that test does not have a significantly better power of discrimination. Moreover, I cannot imagine having to explain to the many victims of serial crime in my cases that their assailants will have yet another day in court.

In *People* v. *Wallace,* the defendant, known as the "flex-tie" rapist for the way he bound his victims, was convicted of 48 felony counts for a series of rape and kidnapping crimes committed against 11 victims from July 1988 through April 18, 1989. DNA RFLP testing performed in 1990 linked the defendant to some of these crimes which the appellate court were undeniably perpetrated by the same person. In addition, several victims identified the defendant. He was found in possession of the same brand of flex-ties as recovered from the victims, as well as duct tape and lubricant used in his crimes, and he confessed.

With respect to the DNA RFLP evidence, the prosecution expert, a member of both the NRC I and II committees, found a match between the crime scene samples and defendant samples, even though the FBI lab which analyzed the evidence testified to an inconclusive result. The expert explained the FBI has a very broad inconclusive category, and the extra bands on the case autorads were technical artifacts which were extraneous to the genetic typing result.

The court of appeals specifically found, even excluding the DNA analysis, the evidence of defendant's guilt was overwhelming. It is possible under the Leahy bill that this defendant could obtain post-conviction testing by new DNA techniques even though the DNA evidence would not undermine confidence in the verdict. In our opinion, that is too low a threshold.

We also respectfully find the Leahy cost estimates to be vastly understated. The bill sets forth the cost of testing samples as about $2,000 to $5,000 per case. In reality, the total costs will be much greater. In addition to the cost of testing possibly thousands of samples each year in California, other costs to consider include leasing additional storage space for case evidence, even bulky items such cars, blankets and bath robes, and building freezer space to preserve the evidence.

Though it is difficult to make cost projections, we conservatively estimate the price of building and maintaining freezer space to preserve evidence for 100,000 cases would be at least $7.2 million to build new facilities, with yearly energy costs of about $1.2 million to sustain the facilities, plus the cost of leasing the space.

In our opinion, the huge resource allocation that Senator Leahy's bill would require at the post-conviction phase is the wrong way to go. A fair and reasonable DNA testing program will permit our emphasis where it should be, getting convictions right in the first place. For this reason, expanding the national databank program and funding to eliminate the DNA databank backlog is critical, and we appreciate the Hatch bill attention to these matters.

Further delay in our criminal case work caused by a broad mandate to re-test evidence not only undermines our ability to complete pending case work, but it also imperils the rights of persons wrongly accused of crimes, like Mr. Raul Zamudio, who had his house burned down by community members who thought he was responsible for a series of sexual assaults and murders in their small town and who spent over 75 days in jail until DNA revealed his innocence and identified Mr. Marlow as the perpetrator.

Finally, in our opinion, the broad access to post-conviction DNA testing provided in the Leahy bill does not best serve the rights of

the wrongfully convicted persons the bill is designed to protect. If the Leahy bill passes, the truly innocent will find their claims further frustrated as they face courts clogged with meritless claims. In our opinion, the best approach would provide fair access to testing for the wrongfully convicted while respecting the finality of convictions and the basic tenets of our criminal justice system.

Thank you.

The CHAIRMAN. Thank you so much.

[The prepared statement of Ms. Camps follows:]

PREPARED STATEMENT OF ENID A. CAMPS

Mr. Chairman, Senator Hatch, Ranking Minority Member Leabh, and Members of the Committee, my name is Enid Camps, and I am a Deputy Attorney General for the State of California. It is my honor to be here today on behalf of Bill Lockyer, the Attorney General of our State.

I am an office coordinator on DNA issues, and I am the assigned legal advisor to the California Department of Justice DNA Laboratory. I primarily handle DNA cases at the appellate level. My cases have helped define the development of law on DNA admissibility in our State. On behalf of the Attorney General's office I drafted, in conjunction with the State's DOJ DNA Lab, the "DNA and Forensic Identification Data Base and Data Bank Act of 1998," a comprehensive chapter of laws defining and governing the operation of our State's DNA Data Bank program.

DNA Data Banks are the most significant crime-fighting tool since fingerprints because they enable us to solve otherwise suspectless crime by comparing the DNA from biological evidence left at crime scenes with blood collected from an enumerated class of convicted felony six and violent offenders.

California law enforcement has long-recognized the importance of DNA evidence in solving the most serious sex and violent crimes, where the victims are disproportionately women and children.

In 1984, we first began data-banking blood samples from convicted sex offenders.

Clearly, post-conviction DNA testing is an important forensic tool, as well. To date, attention has been focused on the concept of post-conviction DNA testing and the need for it. But as you know, this is only part of the equation. We believe the national dialogue now should move on to include the specifics of cost, of implementation, and a practical assessment of how this can best be accomplished. Fair and reasonable access to post-conviction DNA testing must be established in a manner that does not compromise the integrity of the criminal justice system, or undermine it financially.

We thank you for the opportunity to further the national discussion on this complex matter. California law enforcement is vitally interested in the post-conviction DNA testing bills now before you.

We have just cause for concern. The impact of any new post-conviction remedy (independent of new trial motions and habeas corpus) for inmates falls disproportionately upon our State. There are several reasons for this.

First, with an adult inmate population of 164,523, we have the largest number of prisoners in the U.S. (See U.S. DOJ, Bureau of Justice Statistics, April 2000 Bulletin: "Prison and Jail Inmates at Midyear 1999" at www.ojp.usdoj.gov/bjs/.) Other than Texas, no state has even half of California's prison totals. Most states have far fewer. (Id.) Clearly, California's potential number of convicted offender DNA testing requests is second to none, when looking at statistics, alone.

In addition, our State DNA laboratory already faces a significant, if not staggering workload, in part due to our long-standing collection of convicted offender Data Bank samples, the lack of attendant funding for sample analysis, and our commitment to fully using DNA evidence in criminal cases. California's current backlog for DNA Data Bank samples is about 115,000. The FBI's 1999 annual survey for DNA Data Banks lists only one state with a larger backlog.

Our State's DNA Lab also has a current backlog of 150 pending cases, where our criminalists are analyzing evidence submitted by law enforcement agencies from nearly every California county. In addition, the State's backlog of older unsolved and suspectless case evidence is substantial. For example, there are about 18,000 rape kits waiting to be analyzed by DNA techniques and eventually compared with our convicted offender DNA DataBase. Unfortunately, we are understaffed to handle even our present and forseeable workload. Though we have funding for many additional analysts, we have not yet been able to hire them. State salaries for DNA analysts have not proved competitive enough for us to hire the personnel we need.

Accordingly, what may be merely difficult eleswhere impacts us on an entirely different scale in California.

The Attorney General of the State of California, Bill Lockyer, and his staff have reviewed Senator Leahy's bill, and look forward to studying Senator Hatch's bill. We appreciate that both bills seek to enhance the accuracy and confidence in the administration of our laws. However, we believe the remedy proposed by the Leahy bill will erect such formidable practical, financial and legal obstacles that it will threaten the entire effort to use DNA effectively for criminal justice. Our difficulty with the Leahy bill is its open-ended mandate to essentially preserve and retest virtually all available case evidence.

Rather than relying upon well-developed legal principles for assessing new evidence, the Leahy bill provides no meaningful filter for distinguishing baseless from potentially meritorious claims.

Senator Leahy's bill with its low threshold requirement that the DNA testing "may produce" relevant evidence reads more like a discovery statute for a case that has never been to trial, than a special post-conviction remedy for a fully litigated criminal cause. (See generally, Fed. R. Evid. 401 [definition of "relevant evidence" does not require that it relate to a disputed fact]; see also *State of New Jersey* v. *Halsey* (N.J. Super.2000) 748 A.2d 634 ["However, every defendant cannot forever seek to have post-judgment tests conducted in the hopes that something beneficial may result, even assuming that the evidence to be tested remains available."].)

Most conspicuously absent from Senator Leahy's bill is any plain language requiring an evidentiary nexus between actual innocence and the DNA test requested. There is no requirement the DNA evidence would be dispositive of a material question of identity, which in the context of the entire case and facts, would generate a reasonable doubt of guilt or culpability that did not otherwise exist. (Cf. *U.S.* v. *Bagley* (1985) 473 U.S. 667, 682; *People* v. *Savory* (III.App. 1999) 722 N.E.2d 220 [appeal pending]; see also draft Model Statute of NIJ's National Commission on the Future of DNA Evidence). Without such meaningful parameters, the bill invites large-scale and costly fishing expeditions for evidence that our state criminal justice system cannot, and should not, be forced to assume.

Indeed, rather than requiring a trial court to evaluate a request in its developed factual context, the bill rests on the opposite, but erroneous premise that: "Uniquely, DNA evidence showing innocence, produced decades after a conviction provides a more reliable basis for establishing a correct verdict than *any evidence* proffered at the original trial." (Leahy bill, Finding 4; emphasis added.) Obviously, this ignores the reliability of such evidence as fingerprints, and properly taken confessions. It also ignores case-specific matters such as whether the issue in a rape case is consent rather than identity, and whether there are multiple assailants, which undercuts the materiality of any DNA testing result. (See e.g. *People* v. *Gholston* (Ill.App. 1998) 697 N.E.2d 375).

A less conspicuous, but equally problematic component of the Leahy bill is a broad provision that allows a trial court to resentence a defendant in any manner it sees fit, based simply upon "favorable" results.

While this might seem noncontroversial, those of us who have litigated DNA cases at trial or on appeal know, in reality, what can and does happen in these cases. Defense experts often testify that there has been an error in the DNA test result implicating the defendant. Similarly, defense counsel typically argue that an "inconclusive" result is significant or "favorable" to the case. Under the Leahy bill, we foresee a rush, therefore, not to prove actual innocence, but to establish the "inconclusive result" which is arguably enough to open the door to a trial court's discretionary reevaluation of the defendant's entire cause. This will lead to extensive hearings on the meaning of test results, but without regard to the evidentiary impact, if any, of the test results on the case as a whole.

In addition, the Leahy bill is ambiguous in several respects. There is certain to be litigation over whether the DNA testing request is based upon a "new" technique, or simply an old technique that has been improved in the regular course of scientific development. Defense attorneys routinely claim that changes in protocol, changes in amounts of chemicals added to processes, changes to enzymes, changes to make a procedure more efficient, whether a system adds markers, or tests them in combination or individually, or whether a system utilizes different visualization methodologies all constitute changes in the fundamental technology sufficient to establish it as a new DNA technique. We disagree that basic improvements to existing methodologies constitute new techniques, but this has been a very time consuming, difficult, and sometimes fruitless exercise to prove to judges who often have limited scientific background.

Other issues which the Leahy bill raises include: (1) Must the defense prove a sufficient chain of custody before the evidence is tested? (2) What will happen if the

evidence to be tested will consume the sample; does law enforcement have to relinquish its right to the evidence? (3) What happens if evidence which should have been preserved, is not properly preserved or handled by the law enforcement? (4) Which lab should test the sample and whether the testing must be observed by both defense and prosecution experts when there is limited sample? (5) What is the impact, if any, of the defendant's own failure to test the available DNA evidence split prior to trial, or reveal the results of his own "confirmatory" testing by various techniques? (6) Should a defendant be permitted to retest with each different technology even if that test does not have a significantly better power of discrimination? We also note, because the Leahy bill has no timeliness requirements, and no stated prohibition on multiple DNA testing requests, it would permit a defendant to wait to the eve of execution, and then sequentially apply for DNA post-conviction tests, i.e., first polymarker, then STRs, etc., even though all are available now.

Moreover, I cannot imagine having to explain to the many victims of serial crime in my cases that their assailants will have yet another day in court, and that a law passed by our Congress is so open-ended it arguably allows a court the discretion to fashion just about any remedy it sees fit, as long as there may be an "inconclusive" DNA result.

People v. *Barney* (1992) 8 Cal.App.4th 798, was a court trial and DNA RFLP case. which involved the 1988 kidnapping, robbery, and attempted rape of a woman by a defendant who had seven prior convictions, many related to sexual assault. The trial court specifically found: "in the final analysis, the same verdicts would have been reached without any DNA evidence." Indeed, the non-DNA evidence against Barney was overwhelming. Among other things, Barney left his wallet containing his California identification and social security cards in the victim's automobile, and the victim gave the police an accurate description of Barney and identified him. Cellmark Diagnostics which analyzed the semen stains on the victim's pantyhose, estimated that the probability of a random match between the samples was one in 7.8 million. On appeal, the Court ruled the DNA RFLP evidence inadmissible, but harmless error. In 1999, the California Supreme Court in *People* v. *Soto* (1999) 21 Cal.4th 512 ruled generally accepted and admissible the same product rule calculations used in Barney, but found to be a source of error in that case.

In *People* v. *Britton* (June 27, 1994) AO58925 [nonpub.opn.], the defendant, known as "The Creeper" for his "trademark" of wearing socks but no shoes, was charged with 30 felony counts for a series of rape and sodomy offenses involving six victims for crimes committed from December 15, 1990, to April 4, 1991. Though the defendant was convicted of several of the charged offenses where there was DNA RFLP evidence, the jury specifically declined to convict him of the counts against the victim where DNA was essentially the only evidence, despite the random match probability estimate of 1 in 48 million. The Court of Appeal found: "We must resist respondent's energetic effort to induce us to question the merits of the opinion in Barney [finding DNA RFLP evidence inadmissible]. The DNA evidence is so obviously marginal to the convictions returned in this case that any error in receiving it would clearly be harmless. For us to reach out to decide such a peripheral issue would therefore violate the salutary principles constraining judicial review." Though the defendant also maintained that the remaining counts which did not involve DNA evidence, were nonetheless tainted by its "prejudicial spillover effect," the Court of Appeal disagreed, stating it was "convinced there was no prejudice," finding: "The evidence on the Jessica S. counts shows that appellant was found by the police in the victim's house minutes after the attack; that appellant had his pants down around his thighs, and claimed to have urinated in a bathroom that in fact had no functioning toilet; that appellant claimed he had entered the home to check on another intruder, who was not seen by the victim's mother or the police; and that appellant's car was left some distance from the house with the keys in the ignition, as if to allow a quick getaway."

In *People* v. *Wallace* (1993) 14 Cal.App.4th 651, 661 the defendant, known as the "flex-tie" rapist for the way in which he bound his victims, was convicted of 48 felony counts with 76 enhancements for a series of rape and kidnapping crimes committed against 11 victims from July 1988 through April 1989. DNA RFLP testing performed in 1990 lined the defendant to some of these crimes, which the appellate court found were undeniably perpetrated by the same person given their distinctive m.o. In addition, among other evidence, several victims unequivocally identified the defendant; he was found in possession of the same brand of flex-ties as recovered from the victims, as well as duct tape and lubricant used in his crimes; and he confessed. With respect to the DNA RFLP evidence, the well-credentialed prosecution

expert—a member of both the NRC I and II committees [1]—found a match between the crime scene samples and defendant's sample, even though the FBI lab which analyzed the evidence testified to an "inconclusive" result. The prosecution expert explained that the FBI has a very broad "inconclusive" category, and the extra bands on the case autorads were "technical artifacts" which were "extraneous to the genetic typing result." The prosecution expert then estimated the random probability of match between the defendant's samples and the crime scene samples as 1 in 26 million, but the jury heard only the artificially low figure of 1 in one million Caucasians, because of the expert's "personal philosophy" about statistical evidence. The district attorney argued the DNA evidence played only a limited role in the case; and the Court of Appeal specifically found "[e]ven excluding the DNA analysis," the evidence of defendant's guilt was "overwhelming." (Id.)

In *People* v. *Quintanilla* (Aug. 11, 1994) AO54959 [nonpub.opn.], the defendant who had a substantial criminal record was convicted of 15 felonies with enhancements in connection with the abduction and sexual assault of the victim. DNA PCR evidence was introduced to support the verdicts. The Court would not reach the merits of the admissibility of DNA PCR evidence because it found "any error in connection with this evidence was harmless." The Court stated: "The key evidence of guilt, aside from the victims' very positive in-court identifications, was the fingerprint on the car. The odds of that happening at random were at least as remote as any odds that have been claimed for RFLP fingerprinting. With an actual fingerprint no 'DNA fingerprint' was needed, much less the more generalized results of DQ-alpha genotyping. As noted in the parties' briefs, since PCR testing 'merely narrowed the group from which other suspects might be drawn rather than definitively identif[ied] appellant as [the victim's] assailant,' 'the DNA evidence was more important in the investigatory stages of the case than it was at trial.'" In addition to the fingerprint, the defendant was found in possession of the victim's jewelry. DNA evidence also excluded a different suspect in the case.

In each case it is likely under Senator Leahy's bill that the defendant persuasively could argue he can obtain post-conviction testing by "new" DNA techniques. Each points out why it is imperative for a trial court decision to rest not merely on the availability of testable evidence, or a new DNA technique, but upon the facts of each case, which can show why further DNA testing would not undermine confidence in the case's outcome.

In addition, you should know the laboratories that perform DNA tests in California routinely make DNA evidence available for defense testing. The results of any such DNA testing, however, are not divulged to the prosecution. Oddly, such results do not have to be factored into the calculus of whether the defendant can obtain post-conviction DNA testing.

We also respectfully find the Leahy bill cost estimates to be vastly understated. The Leahy bill sets forth that the cost of testing samples is about $2,000–$5,000 per case. In reality, the cost of the bill will be much greater, and essentially compels the creation of a new infrastructure to meet its requirements. In addition to the cost estimate for testing an unknown number of samples, possibly reaching into the thousands each year in California, alone, some additional costs or matters which must be considered including the following:

(1) State DNA Lab personnel to provide a first or second opinion in evaluating the quality of evidence and whether evidence has been properly handled.

(2) The cost of taking DNA reference samples from the defendant and others associated with the case.

(3) State DNA Lab personnel necessary to monitor and/or confirm testing if done by another laboratory, particularly if the testing points to an exclusion of the defendant or is inconclusive due to degradation of sample, etc.

(4) The impact on State Lab program as a whole of court orders to produce results within a certain time frame.

(5) State personnel time to testify in the many hearings involving post-conviction DNA testing, particularly hearings regarding the meaning of tests result, which also require paying defense attorneys and expert witnesses; DNA defense experts typically may be paid from $175 to $250 an hour.[2]

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[1] National Research Council, DNA Technology in Forensic Science (1992) ("NRC I Report"); National Research Council, The Evaluation of Forensic DNA Evidence (1966) ("NRC II Report").

[2] Supreme Court noted that one expert made about $100,000 testifying as a defense expert in 1990–1991, even though he had not received a research grant in about eight years. (See also Fiocoma, D. Unravelling the DNA Controversy: *People* v. *Wesley,* A Step in the Right Direction (1995) Journal of Law and Policy, fn. 105 [making similar observations, and noting "Even other scientists are amazed to discover the amount of money that can be made from testifying for the

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(6) Investigator, district attorney and attorney general resource time to litigate cases.

(7) Trial and appellate court resources.

(8) Leasing additional storage space for case evidence that cannot be destroyed (including bulky items such as cars, blankets, and bathrobes) and building freezer space to preserve evidence.

In this regard, we note that the Leahy bill's directive to preserve "all biological evidence secured in connection with a criminal case" throughout a person's entire period of incarceration is very broadly stated and may ignore the privacy rights of innocent persons. Victims, family members, witnesses, innocent suspects, and boyfriends may feel quite differently about whether their samples should be stored indefinitely by law enforcement pursuant to the Leahy bill.

In addition, though it is difficult to make cost projections, we estimate the price tag of building and maintaining freezer space to "preserve" evidence that is presently retained would be substantial. For 100,000 cases we conservatively estimate a cost of $7.2 million to build new facilities, with yearly energy costs of about $1.2 million to sustain the facilities plus th cost of leasing space.

In our opinion, the huge resource allocation that the Leahy bill would require at the post-conviction phase is the wrong way to go. A fair and reasonable post-conviction DNA testing program will permit our emphasis where it should be: getting convictions right in the first place by using DNA evidence to properly identify suspects; so innocent suspects are spared searching investigations ... or even convictions, and suspects who are investigated are burdened on a greater factual basis. For this reason, expanding the national Data Bank program, and funding to eliminate the DNA Data Bank backlog is critical and we appreciate the Hatch Bill's attention to these matters.

Finally, we emphasize that an elastic standard for post-conviction DNA testing ultimately does not serve the interests of justice for other reasons, as well.

Any further delay in our pending criminal casework caused by large-scale, court-ordered post-conviction DNA testing, ultimately could mean the difference between cases that can be prosecuted and ones that cannot—as investigative leads must be pursued, and witnesses located while memories are still fresh. Solving crime, of course, is important not only to law enforcement, but to victims and their families, who need closure for these cases.

Likewise, delays in our pending case work and investigations imperil the right of persons wrongly accused of crime, like Mr. Raul Zamudio, who had his house burned down by community members who thought he was responsible for a series of sexual assaults and murders in their small town, and who spent over 75 days in jail until DNA evidence revealed his innocence and identified Gustavo Marlow, Jr., as the perpetrator. (See e.g., *People* v. *Marlow* (April 25, 1995) H0110375 [previously published at 34 Cal.App.4th 460].)

Similarly, because a substantial increase in workload due to post-conviction DNA testing would impede our ability to solve old cases through Databank matching, it also delays the exoneration of innocent individuals through the data bank procedure. This is because the DNA Data Bank not only helps law enforcement identify and prosecute the persons responsible for otherwise suspectless crimes, it also helps identify wrongly convicted individuals such as Kevin Green, imprisoned nearly 17 years—until the DNA data bank evidence helped expose the truth. (See California A.B. 110 [adding Section 17156 to Rev.& Tax Code, relating to miscarriage of justice, and "appropriating $620,000 from the General Fund to the Department of Justice for payment to Kevin Lee Green" related to his unlawful incarceration for crimes committed by Gerald Parker].)

Moreover, it is our opinion the broad access to post-conviction DNA testing provided for in the Leahy bill does not best serve the rights of the wrongly convicted persons the bill ostensibly is designed to protect. If the Leahy bill passes, the truly innocent will find their claims further frustrated and delayed as they face courts clogged with meritless claims.

Curiously, the Leahy bill states "the number of cases in which post-conviction DNA testing is appropriate is relatively small and will decrease as pretrial testing becomes more common and accessible." (See Leahy bill, Finding 11.) If this is the case why isn't the bill reasonably tailored to permit testing only in those small number of cases where identity is at issue, and actual innocence can be ascertained by specific DNA tests. Why not put reasonable parameters on access to post-conviction DNA testing, so it is both effective and affordable.

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defense at *Frye* hearings, despite the fact that it often means altering the truth about DNA reliability."].)

In our opinion, the best approach would provide fair access to testing for the wrongly convicted, while respecting the finality of convictions, and the basic tenets of our criminal justice system.

Thank you.

The CHAIRMAN. Judge Baird, we will turn to you.

STATEMENT OF CHARLES F. BAIRD

Mr. BAIRD. Good morning, Chairman Hatch and Senator Leahy and members of the committee. My name is Charlie Baird. I presently serve as co-chair of the National Committee to Prevent Wrongful Executions. Because the committee has not yet crafted its recommendations, I speak not for the committee as a whole, but as a member of the committee and as one who has years of direct experience with the Texas criminal justice system.

I am a former judge on the Texas Court of Criminal Appeals, the highest criminal court in Texas. I served on that court for 8 years. In that time, I participated in more than 400 capital punishment appeals, and I reviewed numerous writs of habeas corpus from capital defendants and literally thousands of petitions and writs from non-capital cases.

In that judicial capacity, I authored many opinions which affirmed the conviction and sentence of death. I voted for many more opinions which did the same thing, and many of those defendants have, in fact, been executed. Prior to my service on the court, I practiced law in Houston, Texas. In total, I have more than 20 years of direct experience of working in the Texas criminal justice system.

The criminal justice system can be improved markedly with the passage of the Leahy-Smith-Collins bill. Please permit me to tell you why I feel confident in making that statement.

First, the legislation makes DNA testing available in cases where it is not presently available. This is very important because DNA can often determine the ultimate question in any criminal trial, the guilt or innocence of the accused. In Texas and around the country, several inmates on death row or in prison have been exonerated through the marvel of DNA testing. Those innocent individuals were destined to a life of confinement or to be executed for crimes they did not commit. They now have their freedom. That is the gift of DNA.

However, as we know in Texas, oftentimes conclusive DNA testing which exonerates the defendant is not enough. In this instance, I speak of an inmate named Roy Criner. Mr. Criner was charged with the rape and murder of a 16-year-old girl. The State's theory of prosecution was that Mr. Criner was the sole perpetrator of this offense.

Crucial to the State's theory of prosecution was evidence that the semen found in the victim was consistent with Mr. Criner's blood type. The jury convicted Mr. Criner and assessed his punishment at 99 years in prison. When Mr. Criner's case came before the Court of Criminal Appeals, I voted to affirm that conviction and sentence.

It is important to note that Mr. Criner's trial occurred in 1990, before DNA testing was considered scientifically sound and accepted in most courts. As technology improved and DNA became more

accepted, Mr. Criner sought and eventually obtained permission to have the semen genetically tested. Mr. Criner's family paid for that testing. That test exonerated Mr. Criner.

When the district attorney reviewed the results, he was skeptical and insisted on his own test. That test was conducted by the Texas Department of Public Safety. That test, the second test, also exonerated Mr. Criner. The trial court then conducted a hearing where both test results were admitted into evidence. Following that hearing, the trial recommended that the Texas Court of Criminal Appeals, my former court, order a new trial for Mr. Criner.

However, six members of the Court of Criminal Appeals voted to deny Mr. Criner a new trial. Their reasoning was twisted, contorted and confused. Although I and two other judges dissented, we could not carry the day. So today, as I appear before you, Senators, in Texas we have a man incarcerated for the remainder of his life who has two DNA evidence tests which conclusively establish his innocence.

While Mr. Criner has no remedy in Texas, the Leahy-Smith-Collins bill would encourage States to provide a remedy. Moreover, the legislation would provide a Federal remedy for State inmates if their particular States did not offer a remedy. The result is that under the Leahy-Smith-Collins legislation, all inmates who are able to prove their innocence through DNA testing can gain their freedom.

Mr. Criner is not the only Texas inmate who has been exonerated. Kevin Byrd was convicted of rape in 1985. He was exonerated in 1997, when DNA evidence conclusively established his innocence. Even though Mr. Byrd spent 12 years in prison, because of DNA testing he is now a free man. A.B. Butler has also gained his freedom through DNA testing. He was convicted of rape in 1983 and served 17 years in prison for a crime he did not commit. While DNA cannot give Mr. Butler back those 17 years, DNA did secure his freedom.

The criminal justice system should embrace DNA testing because it has the potential of eliminating human error and conclusively establishing the guilt or innocence of the accused. Where DNA is involved, the legislation must have two vital components. First, it must permit access to the evidence. For this evidence to be accessible, it must be preserved, and the defendant must have the ability to subject that evidence to testing.

In Texas, there is no right to post-trial DNA testing. It is left totally to the discretion of the trial judges. In Texas, there is duty to preserve the evidence for later DNA testing. Indeed, this evidence is routinely destroyed. In fact, after Kevin Byrd was exonerated by DNA testing, the State secured orders for the destruction of 50 rape kits in 50 separate cases where the defendants are still incarcerated. Because this is permissible in Texas, those defendants will never have an opportunity to prove their innocence.

Second, courts must be open to receive this evidence. Too often, procedural bars prevent this evidence from being considered. The doors of our courts must always be open to consider cases where a person deprived of his liberty can prove his innocence.

While we all recognize that DNA testing can transform the human frailties of the criminal justice system to the certainty of

science, we must also recognize that DNA is not present in every case. And in these cases, the criminal justice system must operate as designed, to reach a correct result through the adversary system of two attorneys competing mightily before an impartial judge and jury.

However, far too often the adversary system breaks down, and because the defense attorney is not experienced, not competent, or in some cases not even awake, the verdicts from trials where these types of defense representation occurs are not reliable and work only to undermine and destroy confidence in the judicial system.

This legislation is especially important because it would establish national standards for the representation of capital defendants. Establishing this national standard would guarantee that those who are charged with capital crimes will be effectively represented before society extracts the ultimate punishment.

This legislation is necessary because many States do not have statewide guidelines for the qualifications of counsel, and some States like Texas leave it totally up to the trial judges to determine counsels' level of competence. Therefore, in Texas, where there are 700 separate judges, each judge operates under his or her own definition of competent counsel. This legislation would ensure that every indigent defendant, regardless of the locality of his alleged offense, would received qualified, experienced and competent counsel. This legislation fulfills the guarantees of the sixth amendment to effective assistance of counsel to all indigents accused of a capital crime.

The reforms I urge you to adopt will benefit victims as well as criminal defendants. No one, and least of all victims, wants the agony of retrials because of incompetent lawyers who make mistakes, who fail to present all the evidence, and who otherwise fail to make the system truly adversarial. No one wants a system that convicts the wrong person and lets the real perpetrator walk the streets, free to victimize again.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Baird.

Mr. Marquis.

STATEMENT OF JOSHUA K. MARQUIS

Mr. MARQUIS. Thank you, Chairman Hatch, Senator Leahy, and honorable members of the committee. I appreciate the opportunity to come here and speak to you today. My name is Joshua Marquis and I am the elected District Attorney in Clatsop County. That is where the Columbia River meets the Pacific at the end of the Lewis and Clark Trail.

Like General Edmonson, I am a Democrat. I remember meeting Senator Leahy when I was a delegate at the Democratic Convention in 1996, and he shared some of his experiences as a prosecutor in Vermont.

Senator LEAHY. You remember.

Mr. MARQUIS. I remember.

I want to commend Senator Leahy for bringing this important issue up.

I am not scientific expert on DNA, and I bring a different perspective than many of your other witnesses. I am a working pros-

ecutor who has argued successfully for the death penalty in one case, chose not to seek it in many others, and I have even been a defense attorney, in which I have successfully kept my clients off death row.

I am the person who has to make the decision whether to seek the death penalty in my office, and I am the person who has to make the decision not to. So this is not an academic or esoteric discussion for me. And from that perspective, I commend you for bringing this issue to the front. But I believe that language is absolutely essential when we are talking about something this important, and that is the reason I strongly urge you to consider Senator Hatch's bill and the language of his bill.

Senator Smith recently said back in our home State that he wants to make a good system nearly perfect, and I think that is an appropriate and laudable statement. But I think the words are very important, "near perfect," because no human endeavor is without any possibility of error. And if we are going to demand one hundred-percent perfection, as some death penalty opponents have suggested, we literally are going to have to abolish not only the death penalty, but all long terms of imprisonment.

Any of you who have arrived or will depart from this hearing by commercial airliner are probably taking a greater risk of death than we are of wrongfully executing an innocent person.

Senator BIDEN. We can't do anything about that.

Mr. MARQUIS. We can't, and I know Senator Wyden and Congressmen DeFazio have some ideas on the Transportation Committee.

There are some proponents of 2073 who barely hide their agenda to basically abolish the death penalty, ignoring the almost 70 percent consistently of Americans who support the concept of capital punishment. These abolitionists, again, demand 100-percent perfection.

A study recently orchestrated by an antideath penalty group was released yesterday by a PR firm here in Washington, DC, which makes the counterintuitive claim that the high degree of reversals means that the system is flawed so much that it is unreliable. That is a completely counterintuitive argument which would also argue that you shouldn't get into a car that has an air bag or a seat belt because obviously something with those kinds of devices in it is much too dangerous to ride around in.

There is a concerted campaign in this country to shift the debate about capital punishment from a legitimate issue about the morality of the death penalty to framing the question as I am sure Mr. Scheck will very ably do: well, OK, maybe you are for the death penalty, but surely you are not for executing innocent people. That is sort of like putting together a commission, frankly, to prevent kicking small children across the floor with steel-toed boots. No one is for that.

Let me speak specifically to the DNA testing bills. I am a member of the National DA's Association Board of Directors. I am not speaking for that Board. We haven't had the chance to meet since these proposals have come in, but I know the prosecutors across this country support reasonable legislation that ensures the integrity of the process.

The concept behind Senator Leahy's bill has value, but it is drafted so broadly and has so few standards that it would create a useless tidal wave of litigation from bored and guilty criminals who simply demand DNA testing whenever there is a possibility it will reveal relevant evidence. And I would cite the committee to the standard that is used in the Supreme Court decision in *Herrera* v. *Collins,* where they talked about a truly persuasive demonstration of actual innocence. I mean, there is very much a difference there. I think Senator Hatch's proposals would fix that problem. Without that fix, let me give you a very concrete example.

I am about to retry for the fourth time a man who murdered two people in central Oregon. The defendant has never claimed actual innocence. That State of Oregon has paid probably close to $2 million to defend this man. He was represented by competent indigent lawyers. Without the Hatch bill definitions, this man could come back into court a fifth time and claim that his nine previous appellate and trial lawyers didn't know what they were talking about, and that because we have a bunch of items like a TV set that has blood on it that we have been keeping in a storage locker for 13 years since these people were murdered, he could say, ah-hah, I heard that there is another inmate in prison and he actually did it and he told me he left his blood at the scene, and I demand that you get out that TV set and you test it for DNA.

Oh, you haven't preserved that test? Some clever defense attorney will get up and say that prosecutor has deliberately destroyed that information. And that person will get, at minimum, a new trial, or might get free, and I am going to have to tell those victims to come back for a fifth time for trial. And I don't know if I can do that.

DNA can be a marvelous science. As early as 1983, the English used it in Narborough, England, where a 15-year-old girl named Lynda Mann was murdered. The constables went out and decided to DNA-test every single male adult in the community. And after 4 years, and unfortunately another murder, they caught a man, appropriately named Colin Pitchfork, in 1987.

But it is important to remember that even in those cases when DNA is overwhelming, such as the O.J. Simpson case, skillful defense attorneys can convince juries to simply disregard the scientific evidence. In some cases, like stranger-to-stranger cases that have been described by some of the other witnesses, DNA evidence can be dispositive, but there are many, many murders in which it is not. In a classic domestic violence murder, it won't really answer any questions.

I have handled about two dozen homicide cases. In only one was DNA an issue, and it was helpful, but it was not dispositive. The idea of allowing modern technology to convict the guilty and free the innocent is already under widespread use. Although existing DNA labs already have a serious backlog, the Justice Department has estimated that there are about 350,000 DNA samples awaiting testing. The DNA resources in our Nation are already taxed beyond their abilities.

The actually innocent may find themselves at the very end of a long list if we make the list too large. Senator Hatch's allocates money to strengthen those resources, and I know that Senator

Feingold and I think Senator DeWine have sponsored a bill, the CODIS bill, to help fund DNA testing, and I applaud that.

One of the witnesses you will hear from in a few minutes is Barry Scheck, a very skilled defense attorney. In an op ed piece last week, he painted a picture of a justice system where eyewitnesses can't be trusted, the cops lie, prosecutors fabricate, and defense attorneys are incompetent. I don't believe we live in that country.

Mr. Scheck has correctly pointed out that DNA can not only exonerate, but can also convict. And I look forward to the day when people like him bring their considerable legal talents to bear to aid some small-town, underfunded prosecutor who needs to use DNA to convict a killer.

Let's remember who we are trying to protect—the innocent—and let's use that word carefully. We mean people that didn't do it. And let's never forget the hundreds of thousands of murder victims that we have to answer to, all of us in the criminal justice system.

Thank you very much, Senator.

[The prepared statement of Mr. Marquis follows:]

PREPARED STATEMENT OF JOSHUA K. MARQUIS

I am honored to be here today and thank Chairman Hatch, Senator Leahy, Senator Smith, and the honorable members of this Committee for giving me the chance to testify about DNA testing legislation.

I'm the elected District Attorney in Clatsop County, on Oregon's North Coast. I have handled more than two dozen homicide cases and have four aggravated murder cases pending, two of which potentially involve the death penalty. Before being appointed and then elected District Attorney, I was the chief deputy to other Oregon counties. I have also served as the speechwriter to former California Attorney General John Van de Kamp, and I worked as a reporter and columnist for the Los Angeles Daily Journal newspaper.

I serve as co-chair of the Media Committee on the Board of the National District Attorneys Association. I'm also Vice-President of the Oregon District Attorneys Association.

DNA, USEFUL TOOL OR MAGIC BULLET?

DNA can be a marvelous forensic too, but it is not a magic bullet. In 1983, in the English village of Narborough, 15-year-old Lynda Mann was murdered. Two years later another young girl in the village was murdered. DNA technology was in its infancy, but local constables got the idea to use DNA technology. They systematically collected blood samples from every adult male in the town, and methodically and eventually caught the rapist, appropriately named Colin Pitchfork, in 1987.[1] But it is important to remember that even when DNA evidence is overwhelming, as it was in, for example, the OJ Simpson case, a skillful defense lawyer can convince a jury to ignore the scientific evidence.

The idea of allowing modern technology to convict the guilty and free the innocent is now in widespread use, and existing DNA labs are seriously backlogged. The Justice Department has estimated there are 350,000 DNA samples currently awaiting testing.[2]

The concept behind Senator Leahy's bill has value, but standards are necessary to make it workable. Without standards it could open the floodgates to a deluge from guilty and/or simply bored criminals who will demand DNA testing whenever there is even a possibility it will reveal relevant evidence. Mr. Scheck's Innocence Project requires that DNA testing be positive of actual guilt or actual innocence, a far cry from the Leahy bill. In some cases, like a stranger-to stranger rape, DNA can be dispositive. But in a domestic murder the presence of DNA evidence answers no significant questions. Senator Hatch's proposals recognize that difference.

Let me give you a concrete example, I tried, for the second and third time, and now I or perhaps another prosecutor will need to try for the fourth time, the penalty phase of a vicious murder of two Oregon residents who were slaughtered in their home in 1987. The defendant has never claimed actual innocence. The state of Oregon has shelled out more than million dollars for his defense. The defendant has

been sentenced to death by three separate juries. Without the definition provided in the Hatch bill, this defendant could come into court a fifth time, claiming his nine previous trial and appellate lawyers forgot to raise a DNA issue. He could claim that a spot of blood on a TV set that has been kept in a locked mini-storage locker might show relevant evidence that someone else's blood was at the crime scene. DNA technology is improving almost monthly. However, since no one has ever claimed the TV set has relevant biological evidence, the DNA sample may well be untestable or seriously contaminated. A defense attorney might then get up in court and claim that the prosecutor has allowed critical evidence that could clear the client to be destroyed. This killer would get yet another trial, forcing the victims to come back again. Or, worse yet, he might even get out of prison.

"INNOCENT" OR JUST OVERTURNED?

As a career prosecutor my worst nightmare is that I convict an innocent person of a crime that sends them to prison, to say nothing of death row. In this country we have an incredibly elaborate appellate system that recognizes that police, prosecutors, judges and juries are not infallible. More than 400,000 homicides cases have been charged since the Supreme Court, in 1976, allowed states to re-implement capital punishment. Somewhere between five and ten thousand of those cases, depending on the source and the way they are counted, have garnered the death penalty. In that same time, for those same numbers, death penalty opponents have cited 87 cases in which evidence later surfaced that showed the condemned to be actually innocent or raised sufficient doubts to remove them from death row. Only eight of these cases have involved DNA.[3]

And we must be careful with our use of the language. The media have interchangeably used the word "exonerated", "freed" or "cleared" to describe cases where the actual guilt of the defendant is still very much an open question. Make no mistake about it: It is far from clear that we are really talking about "actually innocent."

While there are many people, like my own state's Senator Gordon Smith, whose goal is to make our system more efficient, there are also those whose real intent is simply to abolish the death penalty. On National Public Radio last week, Peter Neufeld admitted that he will never be satisfied with any system of capital punishment. The American people have consistently supported the death penalty as a concept. A recent Newsweek poll showed more than 70 percent support for capital punishment. In my own state a recent poll showed more than two-thirds of Oregonians would vote against the so-called "Life for Life" initiative which would abolish the death penalty that our state's voters popularly abolished in 1964, and re-instated—more than once—twenty years later.

Honorable and principled people like my state's former Senator and Governor Mark Hatfield, have sincere moral objections to the death penalty. But some opponents have recognized they have lost that battle with the public and are attempting now to re-shape the discussion in the form of a new urban myth: that our justice system is growing increasingly reckless in its zeal to execute and, worse yet, that significant numbers of innocents are ending up on death row. This is a myth in search of a crisis that doesn't exist.

WHY THE SYSTEM WORKS

Another study, launched by anti-death penalty advocates here in Washington on Saturday, June 10th, made the bizarre claim that because America's state and federal courts overturn such a high proportion of capital cases, that must mean the system "is so fraught with error as to make it unreliable." Interestingly, the states with the lowest reversal rates in this somewhat recycled study are Virginia and Texas, states that abolitionists constantly attack for their capital punishment systems. The state with supposedly one of the "worst" reputations—Illinois—in fact overturns 66 percent of cases, according to Professor Leiban's study.

The study inadvertently or intentionally misses the obvious point. When we apply to death sentences what Justice Powell called "super due process," as well we should, we would expect to find the extreme scrutiny that results in otherwise clearly guilty defendants getting yet another trial. But make no mistake, almost every last one of these cases is not an "innocent on death row." It is someone whose case is overturned, like two cases I'm getting ready to retry, solely because the victim's family was allowed to tell the sentencing jury something about what the victims were like as living human beings, before the defendant robbed them of their lives.

We can and must use technology to accomplish what Senator Smith has called "making a good system near perfect." "Near perfect" is the operative expression. No human endeavor is without risk. Our elaborate system of appeals in capital cases

has the lowest error rate not only of any criminal sanction in the world, but is far less risky than elective surgery or a trip to the pharmacy. We must never forget the other, massively larger part of this risk-benefit analysis—the thousands of truly innocent victims who die at the hands of criminals that the legal system has failed to hold accountable.

I commend Senator Leahy for bringing the issue before your committee, but I strongly urge you to adopt the precise and effective language of Chairman Hatch's proposal. The standards laid down in Chairman Hatch's bill would ensure that even cases where defendants have exhausted state and federal appeals would be eligible for DNA testing if the testing would have the potential to show "actual innocence." Chairman Hatch's standard is similar to the statutes in New York and Illinois, as well as the standard enumerated by the United States Supreme Court in *Herrera* v. *Collins*[4] Without this preciseness of language we will be opening the barn door to a flood of demands by jail-house lawyers who are indisputably guilty. The DNA resources in our nation are already taxed beyond their abilities. Senator Hatch's bill allocates money to strengthen those resources.

I urge you to look carefully at this issue and consider both the "actually innocent," a term which 99 percent of the time describes the killers' victims, and the "actually guilty."

And I thank you again for this opportunity.

ENDNOTES

[1] The Blooding, Joseph Wambaugh, 1989.
[2] David Boyd, DOJ Office of Science & Technology, 2000.
[3] Amnesty International USA, Program to Abolish Death Penalty, 2000.
[4] *Herrera* vs. *Collins,* 506 U.S. 390(1993).

The CHAIRMAN. I think all of you have been excellent. I have really appreciated this, and, of course, along with Senator Leahy and others on this committee, believe we have to resolve these problems in a way that is best under the circumstances. That is why we file these bills, so that we can have all kinds of comment and criticism, and then we get together and see what we can do to resolve the problems. There is no question, there are some distinct differences between the two bills, but nevertheless both are well intentioned and both hopefully will help solve some of these very serious problems in our society.

Now, Mr. Edmonson, you described the case of Loyd Winford Lafevers who confessed two and was twice convicted of the brutal kidnapping, beating, and murder burning of an elderly woman. In addition, Lafevers' testimony was corroborated by witness testimony. His execution was recently postponed to allow for post-conviction DNA testing even though there is absolutely no doubt about his guilt.

Let me just ask you this question. Why not give Federal judges wide latitude to consider motions for post-conviction DNA testing? Is there a danger in providing too much discretion in authorizing post-conviction testing?

Mr. EDMONSON. The danger from the standpoint of the——

Senator THURMOND. Mr. Chairman, pardon me for interrupting. I have got to leave and I would like to ask that my statement follow that of the ranking member of the committee.

The CHAIRMAN. Well, I will be happy to put that in the record, without objection. Thank you, Senator Thurmond. We appreciate you being here.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF SENATOR STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, REGARDING POST-CONVICTION DNA

Mr. Chairman, I am pleased that we are holding this hearing today. DNA testing is the greatest advancement in criminal law since fingerprinting. In fact, law enforcement is beginning to maintain DNA samples in much the same way as it keeps fingerprints, and this development is revolutionizing crime fighting. The more complete and integrated our DNA criminal databases are throughout the country, the more violent crimes we can solve.

Of course, DNA is just as effective at establishing innocence as it is at determining guilt. Indeed, opponents of capital punishment have seized upon cases where a defendant has been taken off death row because of DNA testing as proof that the death penalty is broken and should be discarded. I strongly disagree.

The death penalty is a necessary form of punishment for some of the most heinous and inhumane crimes. Sometimes it is the only punishment that can provide finality for victims and that truly fits the crime.

Only steadfast opponents to the death penalty can argue that it is used too often in the federal system today. Last year, my subcommittee found that the Attorney General permits prosecutors to seek the death penalty in less than one-third of the cases when it is available. Also, we discovered that the Attorney General has established an elaborate review system at Main Justice to consider whether a U.S. Attorney may seek the death penalty. Her review permits defense attorneys to argue that she should reject the death penalty in a particular case, but it does not permit victims to argue for the death penalty.

Capital punishment has long been under attack in the media and on the political left, and today the assault is at least as relentless as it has been in decades. Yet, the public continues to strongly support the death penalty, and its use is more common today than it has been since the Supreme Court reinstated the death penalty in 1976.

I welcome the expanded use of DNA testing to help eliminate any doubt about a defendant's guilt or innocence. We must do all we can to promote absolute certainty in our criminal justice system, especially when the death penalty is at stake. As we do, we will actually make the case for the death penalty stronger, not weaker.

The criminal justice system in America is not perfect, but overall it works quite well. It is our responsibility to make any needed reforms over the federal system, but the states must maintain responsibility over their systems. The Federal government can provide resources to encourage them along the way, but the solution is not a federal takeover of the administration of justice throughout the courtrooms of America.

I welcome our witnesses to discuss this matter.

The CHAIRMAN. Mr. Edmondson.

Mr. EDMONDSON. The danger that the State recognizes in that kind of a scenario is simply the open-ended extension of the appellate process and the lack of finality to the appellate process.

The case that you mention, the Lafevers case, is particularly egregious because at its retrial in 1993 where Lafevers was again given the death penalty, DNA testing was discussed by defense counsel and they chose not to have DNA testing done. And it was only on the eve of execution that they decided at that hour that DNA would be relevant.

The State objected on the grounds that it could not possibly under any circumstances, regardless of whose blood was on the pants that they wanted tested, show Lafevers innocent under any theory. Notwithstanding that, the order was entered, the stay was placed, and that case is on hold indefinitely.

The CHAIRMAN. I see.

Ms. Camps, do you believe that a post-conviction DNA testing statute should require a prisoner to make an initial showing that testing has the potential to prove innocence in order to obtain testing, and if so, why?

Ms. CAMPS. I think that is really a critical component of the bill because it is really the appropriate standard that we are looking

for in determining access to post-conviction DNA testing, not whether there should be access, but that standard for it without an assertion of actual innocence, without identity being at issue, the DNA is not always material to the case. And so that could be an enormous problem for us if there is a wide open standard which is based merely on relevancy, such as the Leahy bill, because relevancy, no matter how weak the evidence may be, if it tends to prove an issue to the jury, it might be considered evidence that could be admitted under the Leahy bill.

The CHAIRMAN. Thank you.

General Spitzer, you stated under the New York statute post-conviction testing is allowed only, quote, "upon the court's determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment that there exists a reasonable probability that the verdict would have been more favorable to the defendant," unquote.

Now, interpreting this statute, the New York court, in *People* v. *Tukes* ruled that, "The legislature intended that DNA testing be ordered only upon a court's threshold determination that testing results carry a reasonable potential for exculpation." My legislation is based on the New York statute in key respects. Both allow post-conviction DNA testing only in cases where testing has the potential for exculpation.

Do you believe that it is appropriate to require that post-conviction testing have some potential for exoneration, or should testing be required in any case where it, quote, "may," unquote, produce relevant exculpatory evidence? Do you share any of Mr. Edmondson's and Ms. Camps' concerns about requiring testing in unnecessary cases?

Mr. SPITZER. I think anybody who speaks and is mindful of the budgetary implications for any governmental entity obviously shares their concerns. The question is are they outweighed by the larger concerns that militate in favor of the Leahy bill. And without adopting specifically the language that is in the Leahy bill, I think that clearly there is a divergence between what I view as the excessively high threshold that you have set for the prime facie showing that would be necessary to get the testing versus any absence of standards at all.

I think what we are seeking is to balance these concerns and ensure—and this is what this statute is all about—ensure that we will permit access and will permit testing to be done where—and I think the New York statute is rightfully phrased—there is a reasonably probability that the verdict would have been more favorable to the defendant.

There is nothing magical about that phrasing. I have testified that it has worked. I think that Senator Leahy has tried to craft a standard that perhaps has a slightly lower threshold. I think that I would in this context err on the side of a lower threshold rather than a higher threshold. I have heard the testimony of my colleagues, individual cases where, of course, the system might be abused. That is not dispositive testimony, in my view.

What we are looking for is those cases where we need to guarantee access to testing to permit defendants to prove and obtain the exculpatory evidence. I think the New York statute has

worked. I do not think it is magical, but I would certainly err on the side of a lower threshold rather than a higher one, and I prefer the Leahy statute.

The CHAIRMAN. Well, I think my legislation contains a fair and reasonable standard for testing. To obtain post-conviction testing, the defendant must make a, quote, "prime facie," unquote, showing that, one, identity of the perpetrator was an issue at trial; and, two, DNA testing would, assuming exculpatory results, establish the defendant's innocence of the crime.

Now, a prime facie showing, in my opinion, is a lenient requirement. In 1977, the Seventh Circuit defined the term "prime facie showing" in the Federal Criminal Code. The court defined prime facie showing as, "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court."

In other words, the legislation that I have filed requires a showing that post-conviction testing has the potential to prove innocence. This is consistent with, and I think arguably more lenient than the Illinois, New York, and Arizona post-conviction DNA statutes.

Mr. SPITZER. Well, we do not feel that it is more lenient.

The CHAIRMAN. I would like you to look at it because I think that is the case.

Mr. SPITZER. Well, I have heard you say so. I respectfully disagree with you. I think there are also instances where innocence, per se, may not be at issue, where there would be factors relevant to sentencing, certainly in the capital context where it would be important to permit testing even if somebody's presence at a crime scene was not the only factor, where DNA testing would nonetheless shed light on the nature of the crime and what happened.

So I think there are several elements in the prime facie standard that you have put together here, and I admire your bill and I think it is an enormous step forward. The notion of Federal guidelines is something that I fully support, despite the federalism concerns my colleagues have raised. Nonetheless, when it comes to crafting the particular standard that is in your bill, I think again there are pieces there that I would, with all due respect, disagree with.

The CHAIRMAN. Thank you. My time is up. I will submit the rest of my questions in writing. I am sorry I didn't get to ask——

Senator LEAHY. Go ahead.

The CHAIRMAN. Could I just take one or two questions because I would like to get one for each of you?

Senator LEAHY. Sure.

The CHAIRMAN. Let me just ask each of you a question.

Mr. Marquis, there have been reports in the media recently about poorly funded indigent criminal defense lawyers. I am concerned about that, too. Are you aware that the Federal Government, through the Administrative Office of U.S. Courts, spends approximately $20 million per year in payments to criminal defense lawyers to represent State death row inmates just in Federal habeas appeals? As a prosecutor from a rural county, do you always have greater resources than the criminal defendants that you prosecute?

Mr. MARQUIS. No. Actually, Senator, it is the exact opposite. As I say, I have prosecuted probably 3 capital cases and 12 or 13 non-

capital murders. I have been outspent a minimum of 10 to 100 to 1 by indigent defense in the State of Oregon.

I don't object to that. I think that if you are going to put somebody on trial for their life, you ought to give them good defense. But I think this idea that across the United States these are drunk, sleeping lawyers is a myth. I just don't think it is true.

The CHAIRMAN. Well, thank you.

Mr. Baird, just one question to you and then I will submit the rest of my questions because I don't want to impose on my colleagues' time. Mr. Baird, you described the Criner case in detail. Clearly, Mr. Criner would be able to obtain testing under the standards in my legislation, and he would be able to move for a new trial based on the testing results, notwithstanding the time limits based on such motions.

Now, the question really is for you, Mr. Marquis, and Mr. Edmondson. How should courts consider DNA testing results if post-conviction testing produces exculpatory evidence?

Mr. EDMONDSON. How should they consider it?

The CHAIRMAN. Yes.

Mr. EDMONDSON. I think in the Criner case, for example, the trial court there, a very prudent man, conducted a hearing where all of the evidence was admitted into evidence and then the trial judge made specific findings of fact and conclusions of law, and submitted those to the Court of Criminal Appeals, which had jurisdiction to review those findings. And I think that ought to typically defer heavily to the trial judge who makes those findings, and if those findings are favorable to the accused, not hesitate to grant a new trial.

The CHAIRMAN. Mr. Marquis?

Mr. MARQUIS. I am concerned sometimes because a judge is under tremendous pressure not to be reversed, and as we can see from this study, they get reversed all the time.

And I would go back to something that General Spitzer said that I think really concerns me, and it deals with actual innocence. He is talking about re-testing not simply to determine if people didn't do it, but if it would be helpful during the sentencing proceeding. And I think we need to focus on actual innocence.

The CHAIRMAN. Let me just ask you one additional question on that point. Should courts examine post-conviction testing results under the established procedures for considering a new trial, provided the time limits are waived, or is a new procedure needed?

Mr. MARQUIS. I think the existing procedures, as long as your bill went into effect, would give trial courts the ability to make that decision.

The CHAIRMAN. General Edmondson.

Mr. EDMONDSON. I think it goes back to the question of focus on what it is the DNA evidence purports to prove. If all it does is provide additional evidence that might have been interesting to a jury, then I would object to causing a new trial based upon that.

If it does, in fact, establish factual innocence, then certainly, consistent with the law passed in Oklahoma, consistent with our policy prior to that law, it ought to result in a new trial, if not an immediate agreed order of dismissal without a new trial.

I certainly can't comment on the Texas case because I am not familiar with it. I don't know what the thinking was, but in a case where there may have been multiple perpetrators, the fact that the result does not match this particular defendant is not necessarily exonerating.

The CHAIRMAN. Were there multiple perpetrators in that case?

Mr. BAIRD. No, sir. The entire theory——

The CHAIRMAN. I gathered that there was not.

Mr. BAIRD. I am sorry?

The CHAIRMAN. I took it that there were not multiple perpetrators.

Mr. BAIRD. The entire State's theory was that Mr. Criner was the sole perpetrator, that he deposited the semen found in the victim, and that that semen did, in fact, match blood——

The CHAIRMAN. And two DNA testings showed it wasn't his.

Mr. BAIRD. Yes, sir.

The CHAIRMAN. That is outrageous to me. I mean, I think either of our bills would resolve that, and hopefully we will get the best bill out of the committee that we possibly can. All of your testimony has been very helpful here today.

Let me just say, under my bill if post-conviction testing produces exculpatory evidence, the defendant is permitted or allowed to move for a new trial based on newly discovered evidence, notwithstanding any previous statutory time limits on such motions.

Now, my legislation directs courts to consider a new trial motion based on post-conviction testing results under established judicial precedents. At least that is what we believe. By contrast, other proposals seem to create a new procedure in which courts must grant a hearing and are authorized to do so to give any order that serves the interests of justice, any order. Now, that seems exceptionally broad to me and I am very concerned about it because what I don't want to do—the whole purpose of that 1996 bill, the antiterrorism and effective death penalty bill, was to end the charade of just multiple, frivolous appeals that literally kept judgment from being executed for years and years and years.

Now, I can't blame criminal defense lawyers who hate the death penalty for utilizing every aspect of the law to try and keep their clients from being executed. On the other hand, the law is the law, and it was a matter of great concern to us. So we passed that bill, and it has worked, I think, pretty well.

There are critics, of course, but generally they are critics who just don't like to have a finality of judgment.

But be that as it may, I will submit the rest of my questions. I apologize for taking two or three minutes more.

[The questions of Senator Hatch are located in the appendix.]

The CHAIRMAN. I will turn to Senator Leahy. I will give you whatever time you want. I will turn to the ranking member, who really has been instrumental in bringing this to the forefront. Of course, all of us are concerned about it on this committee, and I think everybody on this committee is aware of and concerned about these problems, and I think this committee in the end will do a very good job in resolving them. I think your testimony in this case has been very, very helpful to us.

Senator LEAHY. Well, Mr. Chairman, a lot of people brought it to our attention. I mean, the editorials in the Washington Times in favor of this, columnist George Will in favor of this, Pat Robertson in favor of this, Bruce Fein in favor of this, as well as the New York Times and the Washington Post—these people also bring it to our attention.

Judge Baird, I think Chairman Hatch may have left the wrong impression of what his legislation does inadvertently. You indicated in your written statement that you supported Governor Bush's decision to grant a reprieve to Ricky McGinn so that DNA tests could be performed. Now, as I understand it, the new tests could not establish the innocence of the crime he was convicted for. What they might do is establish whether he was eligible because of the facts of the case for the death penalty under the Texas law.

Now, Chairman Hatch's bill would not allow DNA testing for that purpose, the purpose of whether he would be eligible for the death penalty or not. Is that your understanding?

Mr. BAIRD. I understand basically that. I understand that there could be perhaps a possible total exoneration, but I certainly understand that there could be an exoneration of the rape, which was the aggravating element that raised the murder to capital murder for which he received the death penalty.

Senator LEAHY. So it could not acquit him of the murder, but may acquit him of the aggravating death penalty-imposing activity?

Mr. BAIRD. That is right, Senator, and without that activity, then, of course, he is not death-eligible and would not be on death row.

Senator LEAHY. I would note that Chairman Hatch's bill would not allow DNA testing for this purpose, but I agree with you and I agree with Governor Bush on that.

The CHAIRMAN. My bill would.

Senator LEAHY. Now, Mr. Marquis, I find fascinating some of your testimony, being outspent a hundred to one by assigned counsel, when you have police officers and technicians and those who hold evidence and all that. Then they must be spending literally millions of dollars on those cases on defense attorneys. As a prosecutor, I often found myself outspent, but never at a hundred to one. You may want to talk to your legislature about this.

Mr. MARQUIS. I do, frequently.

Senator LEAHY. I also looked at your testimony about a person flying on an airplane faces a higher chance of death than a person on death row. The report yesterday, the most comprehensive study of death penalty cases ever done, showed that 68 percent of capital convictions suffered from serious reversible error. Frankly, if I thought a plane had a two-in-three chance of crashing, I would not fly on that airplane.

Now, Ms. Camps, in your written testimony you say that the——

The CHAIRMAN. Can he answer that?

Senator LEAHY. Well, I was just making an observation.

The CHAIRMAN. Yes, but I mean I think he ought to be able to answer.

Senator LEAHY. Well, no. I am just going by his testimony, Mr. Chairman. He says he is outspent a hundred to one, and I said I would hope that he might be able to get——

The CHAIRMAN. But I am talking about the 68 percent.

Senator LEAHY. We will go back to that in just a moment, if we could.

Ms. Camps, in your written testimony you say the Leahy-Smith-Collins bill requires law enforcement to preserve all biological evidence throughout a person's entire period of incarceration. That is not so. My bill permits the government to destroy biological evidence while a person remains incarcerated so long as it notifies the person of its intention to destroy the evidence and affords the person 90 days to request DNA testing.

Do you think that 90-day notice of the destruction of biological evidence is going to impose undue costs on the State of California?

Ms. CAMPS. Well, with all due respect, Senator Leahy, what we anticipate are forum responses from the defense community asking us to preserve the evidence, and basically then the bill would absolutely mandate that we are going to preserve the evidence for the entire period of incarceration until we resolve the question about whether that evidence is going to be relevant to the defendant.

Senator LEAHY. So the 90 days would impose an undue cost on the State of California?

Ms. CAMPS. The actual preservation of evidence throughout a person's entire period of incarceration would impose a significant burden upon us.

Senator LEAHY. Well, let me ask you this. California, according to the Columbia University study, spends on their cases about $1 million for a killer sentenced to life without parole. It is between $4 and $5 million if they get capital punishment.

Now, of course, California has the absolute right to spend $3 or $4 million more to seek the death penalty than to have life without parole. But with that extra $3 to $4 million, is it your testimony that the very specific and very limited DNA testing in my bill, something that may save an innocent person from execution, is placing an undue cost burden on the State of California?

Ms. CAMPS. We have to look at it in terms of our total resources for using DNA evidence at trial and our resources for analyzing the samples as well, our laboratory resources for examining the DNA evidence. And so in that context, in the context of what it costs us to actually perhaps re-test all available case evidence, we do see that as a significant burden. And we are hopeful that a more appropriate standard that would limit the availability——

Senator LEAHY. Even though the $3 to $4 million extra that it costs to execute somebody over the cost of life without parole—even with that extra cost already borne by the State of California, the additional costs of DNA testing could be too much?

Ms. CAMPS. It is not the additional cost of a test in any particular case. It is the additional cost of the entire infrastructure of a system proposed by the bill for the preservation of evidence.

Senator LEAHY. I just thought you were a wealthier State, but I appreciate that.

Judge Baird, this week the Chicago Tribune reported that of the last 132 executions in Texas, 43 have been of defendants who were represented at trial by counsel who have been disbarred, suspended, or disciplined for ethical violations. Has Texas changed their record that has led to that kind of a disturbing report?

Mr. BAIRD. I cannot sit here today with any confidence and tell you that Texas has, in fact, changed. That is what I liked about your legislation, was the recognition that DNA is not the silver bullet in all these cases, that what you have got to have in these other cases is adequate, effective, competent counsel.

And the problem in Texas is there is no guideline for this competency standard, and therefore it is kind of left to each individual trial judge to set that. And I think we would be better off if we had some type of Federal standard, as proposed in your legislation.

Senator LEAHY. Now, General Spitzer, you have heard Ms. Camps talk about how this would impose a burden on the State of California. You have testified that New York has had legislation similar to the Leahy-Smith-Collins provision on DNA testing for a number of years. Has the cost of providing access to DNA testing been prohibitive?

Mr. SPITZER. No, I certainly do not think so, and I am not sure that I accept the purely utilitarian calculus that some of my colleagues are suggesting either. I think your point is well taken that what we are aspiring to here is a degree of certainty and assurance of correctness in our criminal justice system that defies the calculus of is it worth $5 or $100. I think that the incremental costs relating to storage of samples simply should not be the determinative factor.

And with respect to your notice provision, my understanding and expectation would be that if, in fact, a notice were sent out that the State intended to destroy certain biological samples, perhaps we would get a forum response back from the defendants requesting that it be restored. But then we could shift the burden back to make a prime facie showing to establish whatever needed to be shown to justify the test.

So I think that there are creative ways and reasonably simple ways to overcome that problem that confront both the cost of storage, which would permit the State no longer to become a storage bin for all old evidence, but also to aspire—not to necessarily reach certainty, but to aspire to the certainty that your statute reaches for.

Senator LEAHY. Well, under New York's post-conviction DNA statute—and obviously I have studied that and Illinois a great deal as we were trying to put this together because you have a track record—as I understand it, the defendant can enforce his right to get DNA testing through the courts, and I followed that in my legislation. Now, under Chairman Hatch's proposal, there is no enforcement method.

I wonder about the New York approach. Has it resulted in undue litigation?

Mr. SPITZER. No, it has not, and I think it has worked out very well. Judges exercise their discretion, as they always do appropriately, and I think the track record is one that suggests that, in fact, we could replicate that standard nationally without any undue burden to our judicial system.

Senator LEAHY. General Edmondson, we are going to be hearing today from Dennis Fritz. He spent 12 years in prison in Oklahoma for a crime that later it was determined he did not commit, and that was thanks to DNA testing. Now, the State opposed having

that DNA testing for years. All this time he was locked up, he was asking for DNA testing and the State said no. He and his co-defendant, Ron Williamson, were finally released from prison last year. In fact, I think Williamson had come within less than a week of being executed. Fortunately, he wasn't.

Now, would you agree that legislation that helps people like Fritz and Williamson to get DNA testing that proves their innocence may well be responding to a real problem?

Mr. EDMONSON. I would certainly agree that the legislation that Oklahoma passed this year would have been very useful to Mr. Fritz at the time of his appeal. The co-defendant, Mr. Williamson, who was on death row—and by the way, this image of his being within days of being executed—the common practice prior to the Effective Death Penalty Act was when one stage of the appeal was over and nothing happened on the defense side, the State would ask for an execution date to get the appeal off high center.

By asking for an execution date, we would then give a deadline to the defense to file their next round of appeals. In Mr. Williamson's case, his post-conviction relief had been denied by the Supreme Court and no action had been taken to initiate Federal habeas. Because of that, the State filed an application for an execution date, which was granted by the court.

Everyone knew that the defense was going to file a petition for writ of habeas corpus and the execution date would be stayed. If Mr. Williamson suffered distress over that, it was because his attorney didn't share that fact with him.

Senator LEAHY. Well, General, just so we don't put too fine a point on this, if you are Dennis Fritz and you are Ron Williamson and you are on death row, even though you may have other appeals coming up, if you know you are innocent and you know that there is DNA testing that you are being denied out there that might prove your innocence, isn't it reasonable to assume there might be a tad bit of stress on the part of the person who is there just figuring that his life is in the hands of lawyers who may or may not do this right or a system which may or may not allow him to have his evidence and he may well end up being executed?

Mr. EDMONDSON. I know, Senator, that I would start suffering stress the day I walked into the prison and it would continue.

Senator LEAHY. I would think so.

Mr. EDMONDSON. Williamson was reversed and sent back for a new trial on incompetence of counsel. In preparation for new trial, the State asked for DNA testing. As a result of the DNA testing, the State and defense jointly moved to dismiss the charges against Williamson and Fritz. Again, we do not want to be in the business of incarcerating, much less executing innocent people.

Senator LEAHY. I have discussed this with your governor. In fact, he and I were on one of the Sunday talk shows recently about this and expressed somewhat similar views.

I will submit my other questions for the record, Mr. Chairman.

[The questions of Senator Leahy are located in the appendix.]

The CHAIRMAN. Thank you, Senator Leahy.

We will turn to Senator Grassley. If we could limit ourselves to five minutes, I would appreciate it, but I certainly want to have as many questions as we can ask. But we also can submit questions,

and I hope that all of you will immediately respond to help the committee to understand this better so that we don't foul it up.

Senator GRASSLEY. Mr. Marquis, I would like to start out with asking you to respond to a study that Senator Leahy brought up, the Professor Liebman study. Is this really a new study? Does it show that these prisoners were actually innocent?

Mr. MARQUIS. No and no, Senator Grassley. It is a recycled study. Professor Liebman is a prominent criminal defense lawyer, as well as being a professor at Columbia. His sample for some reason goes from 1973 to 1995. The death penalty wasn't reinstated until 1976. And he seems to have a very odd form of mathematics because he apparently counts—if the same case is reversed two or three times, that counts as more reversals.

It has nothing to do with whether or not the people are factually guilty or actually innocent. It has to do with the idea that if we use, as Justice Powell says, super due process in capital cases, which I believe we must, we are going to have a high reversal rate. I think the acknowledged reversal rate in the country is about 33 percent.

And I note with amusement that Professor Liebman's study—by their standards, the very best States are Texas and Virginia, which have the most executions. And I suspect that some of your witnesses who oppose the death penalty are not going to hold up Texas and Virginia as paragons of death penalty systems.

Senator GRASSLEY. Thank you very much. Prior to asking a couple of questions, I want to make this point. To get ready for this hearing I asked some questions in my office of some people from the FBI about the ability to do the sort of requirements that these bills might require. And there are evidently a few over a hundred crime labs that do DNA testing and they are pretty busy with what they have right now for cases pending and requests for tests. If we are going to have backlog of cases of people who are on death row having DNA testing, we are going to have to have considerable resources put into it so we don't get further backlogged.

I don't make this point to say that we should not consider legislation like this to know that only the guilty are put to death, but with the idea that we need to make sure that we put the resources into it that are there or understand that there is going to be further backlog someplace else along the road. So I wanted to make that point, and if there is any disagreement, I would ask anybody to check me on it.

I want to start with you, Ms. Camps. You stated that DNA testing programs should not undermine the criminal justice system from the financial point of view. Could you elaborate on the potential cost to the criminal justice system if Congress forces States to establish post-conviction DNA testing?

Ms. CAMPS. Well, it is difficult to estimate exactly what the cost of a bill will be of this magnitude and we are worried about the impact of it. We have several matters that figure into the cost of the bill, including the cost of taking reference samples from the defendant, the cost of the investigator time to look at and review the evidence, the cost of the district attorney time to review the case, the cost of the trial and appellate courts to review the decision.

There is an enormous new burden on the criminal justice system as a whole for a program that would have a broad mandate to sort of retest all available evidence. We look at the Leahy bill more as a test first, ask questions later approach, and we want the approach that asks the questions first and only tests in appropriate cases in order to limit the expense.

Senator GRASSLEY. Are you suggesting that requirements contained in this legislation without the resources being put to it are effectively a moratorium, then, on the use of the death penalty?

Ms. CAMPS. Well, we think that to the extent that the bill permits multiple testing and it certainly wouldn't prohibit it, it could certainly be used as a stalling tactic for defendants to ask for, first, an STR test, then a mitochondrial DNA test, then a polymarker test. And so that is a factor in considering what would be appropriate legislation and what would be the effect of permitting multiple testing requests.

Senator GRASSLEY. Now, I want to ask Mr. Baird to respond to Ms. Camps' suggestion that she made in her testimony that the Leahy bill doesn't adequately distinguish between requests for DNA testing based on arguments with merit and arguments without merit.

Mr. BAIRD. Senator, I don't follow that line of reasoning after reading Senator Leahy's bill. I understand that the defendant has got to show that testing would create a reasonable probability that he was erroneously convicted. That seems to me a fairly high threshold and standard before which he would even be entitled to this testing.

Senator GRASSLEY. Then maybe I should ask Ms. Camps, then, to respond to your response.

Ms. CAMPS. I would like to respond to that because we read Senator Leahy's bill very differently that it has a contrast with both the Illinois and the New York language that is very significant. I mean, language that says may produce non-cumulative exculpatory evidence relevant to a claim is very different from a statute that requires identity be an issue and an actual assertion of innocence, and that the evidence would be materially relevant to the defendant's request. The key words that are missing there are "material" and "innocence."

So to the extent that the Illinois statute is supposed to be a paradigm for the Leahy bill, we don't see it, nor do we see it from the New York statute. That is why we also believe that the New York experience would not be directly relevant. The New York statute has a cut-off that applies to cases before 1996, and the reasonable probability that a verdict would have been more favorable to the defendant.

Now, that same reasonable probability language does not appear in the Leahy bill, and that is a term of art to us in the related law of the materiality of undisclosed evidence and in effective assistance of counsel cases. It means probability sufficient to undermine confidence in the outcome of the verdict. So, to us, that is a very different standard than "may produce relevant evidence" because the relevant evidence may not even be to a disputed fact.

Senator GRASSLEY. My time is up, and I will submit the rest of my questions for response in writing.

[The questions of Senator Grassley were not available at press time.]

The CHAIRMAN. Thank you, Senator Grassley.

We will turn to Senator Biden.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you, Mr. Chairman, and thank you for holding this hearing. You and I have been here a long time. I have been here 28 years, and I hope we get it right this time because this pendulum keeps swinging back and forth. You have got those who want to hang them high and those who suggest no one should be hung, figuratively speaking, and we have gone through this exercise.

I predict to you that if we don't take some corrective action, the American public is going to shift its opinion markedly, as it is beginning to do, down from 90 percent favoring the death penalty to 60 percent. When I first got here, only 40-some percent of the American people supported the death penalty. By the time it became clear that the average person committing a capital offense in a State served, on average, only seven years in prison, there was a hue and cry the other way. So this pendulum swings back and forth in a way that is not healthy not only for the criminal defendant, but for the justice system.

I should say at the front end of this thing the first Federal death penalty after it was declared unconstitutional that was declared constitutional was a bill written by me in 1988, in the Biden crime bill, because the Crime Control Act of 1994 had the death penalty at the Federal level.

I support the death penalty. Let me put it this way: I don't oppose the death penalty on moral grounds, but I have been fastidious in arguing along the lines Senator Smith did that if you are going to have a death penalty, you had better go out of your way to make sure you don't execute an innocent person.

I want to remind everybody of the chronology here, at least at the Federal level. The 1988 Act passed. In 1991, I asked for the study that is now finally the one we are now talking about. I am the guy that asked for that study when I was chairman of this committee that has just been released. Then my friends, the chairman and others, became very focused on habeas corpus, which I thought should have stayed the way it was and was not being abused. And to the extent it was abused, it was a small price for society to pay to make sure an innocent person didn't get wrongfully convicted and put to death. Then we went through a big fight over that.

I introduced, and I am going to ask to submit for the record the Habeas Reform Act of—mine was defeated—the short title was "The Act may be cited as the Habeas Corpus Reform Act of 1993." I would like to ask unanimous consent that section (c)(8), "Provision of Counsel," be reprinted in the record at this point, if I may, Mr. Chairman.

The CHAIRMAN. Without objection.

[The information referred to follows:]

EXCERPT FROM 103D CONGRESS, 1ST SESSION, S. 1488

TITLE III--HABEAS CORPUS REFORM

SEC. 301. SHORT TITLE.

This title may be cited as the `Habeas Corpus Reform Act of 1993'.

SEC. 302. FILING DEADLINES.

(a) IN GENERAL- Section 2242 of title 28, United States Code, is amended--

(1) by amending the heading to read as follows:

`Sec. 2242. Filing of habeas corpus petition; time requirements; tolling rules';

(2) by inserting `(a)(1)' before the first paragraph, `(2)' before the second paragraph, `(3)' before the third paragraph, and `(4)' before the fourth paragraph;

(3) by amending the third paragraph, as designated by paragraph (3), to read as follows:

`(3) Leave to amend or supplement the petition shall be freely given, as provided in the rules of procedure applicable to civil actions.'; and

(4) by adding at the end the following new subsections:

`(b) An application for habeas corpus relief under section 2254 shall be filed in the appropriate district court not later than 180 days after--

`(1) the last day for filing a petition for writ of certiorari in the United States Supreme Court on direct appeal or unitary review of the conviction and sentence, if such a petition has not been filed within the time limits established by law;

`(2) the date of the denial of a writ of certiorari, if a petition for a writ of certiorari to the highest court of the State on direct appeal or unitary review of the conviction and sentence is filed, within the time limits established by law, in the United States Supreme Court; or

`(3) the date of the issuance of the mandate of the United States Supreme Court, if on a petition for a writ of certiorari the Supreme Court grants the writ and disposes of the case in a manner that leaves the sentence undisturbed.

`(c)(1) Notwithstanding the filing deadline imposed by subsection (b), if a petitioner under a sentence of death has filed a petition for post-conviction review in State court within 270 days of the appointment of counsel as required by section 2258, the petitioner shall have 180 days to file a petition under this chapter upon completion of the State court review.

`(2) The time requirements established by subsection (b) shall not apply unless the State has provided notice to a petitioner under sentence of death of the time requirements established by this section. Such notice shall be provided upon the final disposition of the initial petition for State post-conviction review.

`(3) In a case in which a sentence of death has been imposed, the time requirements established by subsection (b) shall be tolled--

`(A) during any period in which the State has failed to appoint counsel for State post-conviction review as required in section 2258;

`(B) during any period in which the petitioner is incompetent; and

`(C) during an additional period, not to exceed 60 days, if the petitioner makes a showing of good cause.

`(d)(1) Notwithstanding the filing deadline imposed by subsection (b), if a petitioner under a sentence other than death has filed--

`(A) a petition for post-conviction review in State court; or

`(B) a request for counsel for post-conviction review,

before the expiration of the period described in subsection (b), the petitioner shall have 180 days to file a petition under this chapter upon completion of the State court review.

`(2) The time requirements established by subsection (b) shall not apply in a case in which a sentence other than death has been imposed unless--

`(A) the State has provided notice to the petitioner of the time requirements established by this section and of the availability of counsel as described in subparagraph (B); such notice shall be provided orally at the time of sentencing and in writing at the time the petitioner's conviction becomes final, except that in a case in which the petitioner's conviction becomes final within 30 days of sentencing, the State may provide both the oral and the written notice at sentencing; in all cases, the written notice to petitioner shall include easily understood instructions for filing a request for counsel for State post-conviction review; and

`(B)(i) the State provides counsel to the petitioner upon the filing of a request for counsel for State post-conviction review; or

`(ii) the State provides counsel to the petitioner, if a request for counsel for State post-conviction review is not filed, upon the filing of a petition for post-conviction review.

`(3) The time requirements established by subsection (b) shall be tolled in a case in which a sentence other than death has been imposed--

`(A) during any period in which the petitioner is incompetent; and

`(B) during an additional period, not to exceed 60 days, if the petitioner makes a showing of good cause.

`(e) An application that is not filed within the time requirements established by subsection (b) shall be governed by section 2244(b).'.

(b) TECHNICAL AMENDMENT- The chapter analysis for chapter 153 of title 28, United States Code is amended by amending the item relating to section 2242 to read as follows:

`2242. Filing of habeas corpus petition; time requirements; tolling rules.'.

SEC. 303. STAYS OF EXECUTION IN CAPITAL CASES.

Section 2251 of title 28, United States Code, is amended--

(1) by inserting `(a)(1)' before the first paragraph and `(2)' before the second paragraph; and

(2) by adding at the end the following new subsections:

`(b) In the case of a person under sentence of death, a warrant or order setting an execution shall be stayed upon application to any court that would have jurisdiction over a habeas corpus petition under this chapter. The stay shall be contingent upon the exercise of reasonable diligence by the applicant in pursuing relief with respect to the sentence and shall expire if--

`(1) the applicant fails to file for relief under this chapter within the time requirements established by section 2242;

`(2) upon completion of district court and court of appeals review under section 2254, the application is denied and--

`(A) the time for filing a petition for a writ of certiorari expires before a petition is filed;

`(B) a timely petition for a writ of certiorari is filed and the Supreme Court denies the petition; or

`(C) a timely petition for certiorari is filed and, upon consideration of the case, the Supreme Court disposes of it in a manner that leaves the capital sentence undisturbed; or

`(3) before a court of competent jurisdiction, in the presence of counsel, and after being advised of the consequences of the decision, the applicant competently and knowingly waives the right to pursue habeas corpus relief under this chapter.

`(c) If any 1 of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution unless the applicant has filed a habeas corpus petition that satisfies, on its face, section 2244(b) or 2256. A stay granted pursuant to this subsection shall expire if, after the grant of the stay, 1 of the conditions specified in subsection (b) (2) or (3) occurs.'.

SEC. 304. LIMITS ON NEW RULES; STANDARD OF REVIEW.

(a) LIMITS ON NEW RULES-

(1) IN GENERAL- Chapter 153 of Title 28, United States Code, as amended by section 306(a), is amended by adding at the end the following new section:

`Sec. 2257. Law applicable

`(a) Except as provided in subsection (b), in a case subject to this chapter, the court shall not

announce or apply a new rule to grant habeas corpus relief.

`(b) A court considering a claim under this chapter shall apply a new rule when--

`(1) the new rule places a class of individual conduct beyond the power of the criminal lawmaking authority to proscribe or prohibits the imposition of a certain type of punishment for a class of persons because of their status or offense; or

`(2) the new rule constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

`(c) As used in this section, a `new rule' is a rule that changes the constitutional or statutory standards that prevailed at the time the petitioner's conviction and sentence became final on direct appeal.'.

(2) TECHNICAL AMENDMENT- The chapter analysis for chapter 153 of title 28, United States Code, as amended by section 306(b), is amended by adding at the end the following new item:

`2257. Law applicable.'.

(b) STANDARD OF REVIEW- Section 2254(a) of title 28, United States Code, is amended by adding at the end the following: `Except as to Fourth Amendment claims controlled by Stone v. Powell, 428 U.S. 465 (1976), the Federal courts, in reviewing an application under this section, shall review de novo the rulings of a State court on matters of Federal law, including the application of Federal law to facts, regardless of whether the opportunity for a full and fair hearing on such Federal questions has been provided in the State court. In the case of a violation that can be harmless, the State shall bear the burden of proving harmlessness.'.

SEC. 305. LIMITS ON SUCCESSIVE PETITIONS.

Section 2244(b) of title 28, United States Code, is amended to read as follows:

`(b)(1) A claim presented in a habeas corpus petition that was not timely presented in a prior petition shall be dismissed unless--

`(A) the petitioner shows that--

`(i) the failure to raise the claim previously was the result of interference by State officials with the presentation of the claim, in violation of the Constitution or laws of the United States;

`(ii) the claim relies on a new rule that is applicable under section 2257 and was previously unavailable; or

`(iii) the factual predicate for the claim could not have been discovered previously through the exercise of reasonable diligence; and

`(B) the facts underlying the claim, if proven and viewed in light of the evidence as a

whole, would be sufficient to--

`(i) undermine the court's confidence in the factfinder's determination of the applicant's guilt of the offense or offenses for which the sentence was imposed; or

`(ii) demonstrate that no reasonable sentencing authority would have found an aggravating circumstance or other condition of eligibility for a capital or noncapital sentence, or otherwise would have imposed a sentence of death.

`(2) Notwithstanding other matters pending before the court, claims for relief under this subsection from a case in which a sentence of death was imposed shall receive a prompt review in a manner consistent with the interests of justice.'.

SEC. 306. NEW EVIDENCE.

(a) IN GENERAL- Chapter 153 of title 28, United States Code, as amended by section 304(a)(1), is amended by adding at the end the following new section:

`Sec. 2256. Capital cases; new evidence

`For purposes of this chapter, a claim arising from a violation of the Constitution, laws, or treaties of the United States shall include a claim by a person under sentence of death that is based on factual allegations that, if proven and viewed in light of the evidence as a whole, would be sufficient to demonstrate that no reasonable factfinder would have found the petitioner guilty of the offense or that no reasonable sentencing authority would have found an aggravating circumstance or other condition of eligibility for the sentence. Such a claim shall be dismissed if the facts supporting the claim were actually known to the petitioner during a prior stage of the litigation in which the claim was not raised. Notwithstanding any other provision of this chapter, the claim shall not be subject to section 2244(b) or the time requirements established by section 2242. In all other respects, the claim shall be subject to the rules applicable to claims under this chapter.'.

(b) TECHNICAL AMENDMENT- The chapter analysis for chapter 153 of title 28, United States Code, as amended by section 304(a)(2), is amended by adding at the end the following new item:

`2258. Capital cases; new evidence.'.

SEC. 307. CERTIFICATES OF PROBABLE CAUSE.

The third paragraph of section 2253 of title 28, United States Code, is amended by adding at the end the following: `However, an applicant under sentence of death shall have a right of appeal without a certificate of probable cause, except after denial of a habeas corpus petition filed under section 2244(b).'.

SEC. 308. PROVISION OF COUNSEL.

(a) IN GENERAL- Chapter 153 of title 28, United States Code, as amended by section 304(a)(1), is amended by adding at the end the following new section:

`Sec. 2258. Counsel in capital cases; State court

`(a) COUNSEL- (1) A State in which a sentence of death may be imposed under State law shall provide legal services to--

`(A) indigents charged with offenses for which capital punishment is sought;

`(B) indigents who have been sentenced to death and who seek appellate, post-conviction, or unitary review in State court; and

`(C) indigents who have been sentenced to death and who seek certiorari review of State court judgments in the United States Supreme Court.

`(2) This section shall not apply or form a basis for relief to nonindigents.

`(b) COUNSEL CERTIFICATION AUTHORITY- A State in which a sentence of death may be imposed under State law shall, within 180 days after the date of enactment of this subsection, establish a State counsel certification authority, which shall be comprised of members of the bar with substantial experience in, or commitment to, the representation of criminal defendants in capital cases, and shall be comprised of a balanced representation from each segment of the State's criminal defense bar, such as a statewide defender organization, a capital case resource center, local public defender's offices and private attorneys involved in criminal trial, appellate, post-conviction, or unitary review practice. If a State fails to establish a counsel certification authority within 180 days after the date of enactment of this subsection, a private cause of action may be brought in Federal district court to enforce this subsection by any aggrieved party, including a defendant eligible for appointed representation under this subsection or a member of an organization eligible for representation on the counsel certification authority. If the court finds that the State has failed to establish a counsel certification authority as required by this subsection, the court shall grant appropriate injunctive and declaratory relief, except that the court shall not grant relief that disturbs any criminal conviction or sentence, obstructs the prosecution of State criminal proceedings, or alters proceedings arising under this chapter.

`(c) DUTIES OF AUTHORITY; CERTIFICATION OF COUNSEL- The counsel certification authority shall--

`(1) establish and publish standards governing qualifications of counsel, which shall include--

`(A) knowledge and understanding of pertinent legal authorities regarding issues in capital cases;

`(B) skills in the conduct of negotiations and litigation in capital cases, the investigation of capital cases and the psychiatric history and current condition of capital clients, and the preparation and writing of legal papers in capital cases;

`(C) the minimum qualifications required by subsection (d); and

`(D) any additional qualifications relevant to the representation of capital defendants;

`(2) establish application and certification procedures for attorneys who possess the qualifications established pursuant to paragraph (1);

`(3) establish application and certification procedures for attorneys who do not possess all the qualifications established pursuant to paragraph (1) but who possess, in addition to the minimum qualifications required by subsection (d), additional resources (such as an affiliation with a publicly funded defender organization) and experience that enable them to provide quality legal representation comparable to that of an attorney possessing the qualifications established pursuant to paragraph (1);

`(4) establish application and certification procedures, to be used on a case by case basis, for attorneys who do not necessarily possess the minimum qualifications required by subsection (d), but who possess other extraordinary experience and resources that enable them to provide quality legal representation comparable to that of an attorney possessing the qualifications established pursuant to paragraph (1);

`(5) publish a current roster of attorneys certified pursuant to paragraphs (2) and (3) to be appointed in capital cases;

`(6) establish and publish standards governing the performance of counsel in capital cases, including standards that proscribe abusive practices and mandate sound practices in order to further the fair and orderly administration of justice;

`(7) monitor the performance of attorneys certified pursuant to this subsection; and

`(8) delete from the roster the name of any attorney who fails to meet the qualification or performance standards established pursuant to this subsection.

`(d) MINIMUM COUNSEL STANDARDS- All counsel certified pursuant to paragraph (2) or (3) of subsection (c) or appointed pursuant to subsection (f) shall possess, in addition to any qualifications required by State or local law, the following minimum qualifications:

`(1) familiarity with the performance standards established by the counsel certification authority;

`(2) familiarity with the appropriate court system, including the procedural rules regarding timeliness of filings and procedural default; and

`(3) in the case of counsel appointed for the trial or sentencing stages, at least 2 of the qualifications listed in subparagraph (A) and 1 of the qualifications listed in subparagraph (B), or 1 of the alternative qualifications listed in subparagraph (C):

`(A) QUALIFYING TRIAL EXPERIENCE (MUST HAVE 2)- Prior experience within the last 10 years as--

Senator BIDEN. What all of you end up saying at some point along the line here is we should get it right the first time, but we hardly ever get it right in terms of criminal defense counsel. Nobody, nobody, nobody I know can look me in the eye and tell me that they think that there is adequate criminal defense counsel in capital cases. It may happen, but when it happens, it is an accident. It is an accident as much as it is a certainty.

So what I don't understand is why we don't write back into the law standards. We have the right federally, notwithstanding your sacred State rights, to impose upon you all minimum counsel standards in death penalty cases in Federal habeas corpus, and I don't understand why we don't do that.

If, in fact, we had those in place—and I will not take the time to read them now—85 percent of the cases we are talking about wouldn't even be in the game. You wouldn't have to worry, Mr. Spitzer—and I know you and I are on the same side of this thing—you wouldn't have to worry about preserving all that evidence because we would have had a counsel smart enough to ask for its presentation at the front end. And if it was being withheld, you would have had a counsel smarter in the appeals process to be able to move on it. So we don't have adequate counsel.

I have tried those cases. My friend always talks about his days as a prosecutor. We are in agreement. I was a public defender. If you want to know whether you are a good trial lawyer, be a public defender. We have no one on our side. When you win when you are a public defender, you haven't got the FBI, you haven't got the State troopers, you don't have any investigators. You don't have nothin', as they say.

So I have been on the other end of this defending these cases, and the truth of the matter is one of the first cases I tried, my motion was my client was being represented by incompetent counsel—me. I challenge any one of you to, one month out of law school, being assigned a capital case. Do you all think you are competent enough to handle that case?

Mr. Marquis, do you think you would have been?

Mr. MARQUIS. No, absolutely not.

Senator BIDEN. You know darn well you wouldn't have been. Look who we assign to these cases. Nobody makes money on these cases unless you represent an O.J. or something like that. That doesn't happen, so what happens? We take the people either who have no clients because they are incompetent or we assign people who are brand new and may become competent. Death penalty appeals are complicated.

I can see the warning light is on. I am inclined to call for an absolute moratorium on the death penalty. And I want to congratulate Senator Feingold for leading on this effort here. My problem with the Feingold legislation is that there is a requirement that the United States Congress has to act affirmatively or negatively on the recommendation of a commission. I think that is bad public policy for us to force ourselves to do that. I don't think we should set a commission up and then be locked into what they do unless we affirmatively act. But I agree with the ABA in calling for a moratorium on the death penalty.

My only admonition to you all as you focus on this is—hopefully, this is the first of many hearings here—we have got to get this right, we have got to get this right, and there is not adequate counsel now made available in death cases. It does not exist. There should be a minimum standard that we have.

And as you point out, in Texas, Mr. Baird—how many judges are there out there? A big State.

Mr. BAIRD. Seven hundred.

Senator BIDEN. If each of them makes a judgment as to whether or not counsel is adequate, I think we have one heck of a lousy standard out there and there is no level playing field on that score.

Now, this stuff does cost money, and I am going to say something that maybe will cost me at home. But I believe my constituents, who probably support the death penalty by more than a majority, are willing to spend money to make sure we get it right, to make sure we get it right.

So my only comment, Mr. Chairman, is that at the Federal level, since the two Acts I referenced—I authored both of them—since that occurred, there have been a total of 18 people sentenced and now pending on appeal. There are 3 awaiting re-trial, 32 sentenced to less than death, 10 acquitted. Twenty-four requests for death penalty were withdrawn by the Federal Government. The prosecution was discontinued in 62 cases; committed suicide or died in the meantime, 3, and waiting or on trial for capital charges, 44, for a total of 196 death penalty cases brought federally since then. You all kill more people than that in Texas, or almost that many people, 131 over the period of time this was in place.

I really think this is something that we should try to take—and I am not suggesting any of you have done this—we should try to take the politics out of this. We should try to point out, as Senator Grassley did, that the study we are about to hear does not suggest that those 7 in 10 errors were errors relating to innocence. That is the implication.

Those who don't like the death penalty are out there saying, you know what this means, this study I asked for in 1991, this means that 7 out of 10 people were convicted of death and they are innocent. Not true. That is not what it says. But I hope the rest of you admit that it does mean some of these folks were innocent, flat out innocent.

And you can't prove the negative. How many people have been executed who were innocent? A rhetorical question and I will yield the floor after it. Would any of you be willing to bet—you say, Lord, here is the deal. I am going to make a guess. Now, if I am wrong, I don't get to heaven. I will bet you, Lord, nobody in any of the State systems in the last 10 years have been executed who was innocent.

Are any of you ready to make that one, bet your entry?

Mr. MARQUIS. Mr. Chairman, can I answer that?

The CHAIRMAN. Sure.

Senator BIDEN. Sure. You must be an atheist if you are ready. [Laughter.]

Mr. MARQUIS. No, just confident in my goodness, Senator.

It goes back to Senator Leahy's comment about my comparison with airplanes. The airline that I fly on, which I won't name but

I am very fond of and I fly all the time, has lost 270 people who are dead as a result of various things. You have a number of very skilled witnesses, and Mr. Scheck in particular, who will come up here. I am a very concrete thinker. I don't think they are going to be able to tell you about one single human being that is dead who should not have been since capital punishment was reinstated.

Senator BIDEN. I think that is true.

Mr. MARQUIS. So when you compare that kind of risk analysis, you are right, Senator. If we are looking for absolute perfection, we are never going to find it.

Senator BIDEN. Well, old concrete thinker, let me put it to you this way. If I sat on a different committee, the Commerce Committee, and those 219 people or whatever who died who fly with your airline—hopefully, we went and investigated whether those airlines had the proper maintenance checks. Since those people died, I will lay you 8 to 5 we put in new rules. We have increased the probability it won't happen again because we required maintenance records be checked a different way.

Old concrete thinker, you wouldn't have done that. You would have sat here, based on what you tell me, and said we are not going to do anything. Leahy is not asking for perfection. Leahy is saying, OK, 219 were killed, to keep this crazy metaphor going; 219 were killed. All I am saying is maybe we should go back and look at the way we check the maintenance records.

The maintenance records aren't being kept accurately enough, and so what I want to do is pass a new Federal law saying you have got to check the plane once a week instead of once a year. That is all we are saying here. He is not asking for perfection. What we are asking for is what is a rational standard for us to apply to increase within the probability of what reasonable people would look to the likelihood that an innocent person will not die.

You may be right about which bill is better—Leahy, New York, Illinois. That is arguable, but I hope no one is arguing that DNA should not be a tool used and be able to be used more than it has been now, more than courts have allowed it now, more than we have applied it now and in the past.

And in terms of competent counsel, I hope none of you are going to argue, because I think you are probably buried in concrete if you are intellectually, I don't have a problem; on balance, I believe in death penalty cases there is competent counsel.

Do you believe that?

Mr. MARQUIS. In my State, but I can't speak for the other States.

Senator BIDEN. What does your gut tell you? You are ready to comment on DNA in the rest of the States.

Mr. MARQUIS. No. I am able to talk about the State where I have practiced and where I have both defended capital cases and prosecuted them.

Senator BIDEN. And you are confident in your State the threshold for counsel is sufficient?

Mr. MARQUIS. You have to be death-qualified. You have to have previously tried a murder case. You have to have two lawyers. You have to have practiced essentially for 10 years.

Senator BIDEN. Good idea. Now, do you think that would be a good standard federally?

Mr. MARQUIS. Absolutely, but I——

The Chairman. All right, you have just answered the question. It doesn't exist in other States. I thank you.

I yield the floor.

The Chairman. Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator Feinstein. Thank you, Mr. Chairman. I think Senator Biden has made a good point that there should be some national standard of competency for counsel in death penalty cases. I think it is absolutely egregious to have people represented by a counsel if that counsel is drunk, if that counsel is not qualified to try a death penalty case. Maybe more than anything what all of this shows is the time has come and we need to do it.

Now, to both of these bills, let me say I am on the horns of a dilemma as to which bill I believe is preferable. It is my understanding that both Hatch and Leahy would allow DNA testing for any prisoner where there is biological evidence and the test can be met regarding relevance.

However, the Hatch bill requires that DNA testing was not available at the time of trial. The Leahy bill simply requires that some advancements in testing have been made. So Hatch effectively limits testing to pre-1996 cases and provides an incentive that the testing be done at the time of the trial, whereas Leahy, as I understand it, allows testing even for future cases or at any time. So as I see it, those are the parameters between the two bills.

Now, of the testimony we have just heard, I am most concerned obviously with the State of California. First of all, there are 164,000-plus people in State prison. There is a backlog of 115,000 DNA cases, as I gather. The testimony of Ms. Camps in essence said something about unfunded mandates in terms of Federal law prescribing and not paying for additional costs. So I want to ask Ms. Camps a little bit more about her specific concerns.

You mention—and I am using your written statement now—"our difficulty with the Leahy bill is its open-ended mandate which essentially preserves and re-tests virtually all available case evidence," which I believe is a fair interpretation of what the bill does. It provides no meaningful filter for distinguishing baseless from meritorious claims. It does not have an evidentiary nexus between innocence and the DNA test required. It allows a trial court to resentence a defendant in any manner it sees fit, simply based on favorable results. And it points out that is ambiguous in several respects and has no timeliness requirements and no stated prohibition on multiple DNA resting requests.

As I look at what California is saying, then, essentially what you are saying is it is kind of open season. Anyone can request a test at any time or any number of times, and I take it you see that, then, as an undue burden placed on the States by the Federal Government. Is that correct? If not, would you state exactly how you do see it?

Ms. CAMPS. It does present a considerable burden, and the problem with the burden is that we only have certain laboratory resources to conduct testing on our DNA evidence. So if we experi-

ence a large volume of post-conviction DNA testing requests that we cannot handle, what we will have is a system where we postpone our pending case work, where we are not analyzing the unsolved evidence samples that will solve suspectless crime, and we are not processing our DNA databank samples.

Now, DNA databanks are really the most significant crime-solving tool since fingerprints, and I can tell you that I am sickened by the preventable tragedies in my cases, the serial rapes and murders in our towns. But I am inspired by law enforcement's ability to do something about this in the form of DNA databank crime-solving.

So the opportunity to stop the criminal defendant early in his criminal career before he has victimized numerous people is so significant and so substantial to us that we have to concentrate most of our resources—well, we certainly cannot detract from the resources that we give to DNA databank testing in order to accommodate other burdens on the DNA testing system here because our crime statistics in California show that the average violent sex offender begins his criminal career at the age of 18 and commits 8 more offenses.

If we can stop that recidivist offender after crime number 2 instead of crime number 8, that is a real significant savings in terms of lives. And to the extent that we are detracting from our ability to test those samples and address our backlog, we are perhaps taking a step backward rather than a step forward.

Senator FEINSTEIN. Well, let me stop you here.

The CHAIRMAN. Would the Senator just yield for a clarification because I think the Senator is under a misapprehension?

Senator FEINSTEIN. Yes, go ahead.

The CHAIRMAN. Maybe Ms. Camps can clean it up. This is a key question that Senator Feinstein has raised. If post-conviction DNA testing could show that a prisoner was innocent, could such a prisoner under my bill obtain testing under the standards in my legislation? In other words, does my legislation provide a sufficient mechanism for obtaining post-conviction DNA testing, or are they foreclosed because the dumb attorney didn't move for DNA testing?

Ms. CAMPS. We believe that the Hatch bill standard is appropriately stated because it is narrowly tailored to the situation where DNA evidence——

The CHAIRMAN. So nobody is going to be denied DNA testing under the Hatch bill.

Ms. CAMPS. We don't believe so, no.

The CHAIRMAN. I don't either. The fact is that there have been improvements in DNA testing, and that alone allows for further examination under my bill.

So you are wrong on that conclusion, Senator. I just wanted to clarify that.

Senator FEINSTEIN. Well, I appreciate that. So you are saying it is not limited to pre-1996 cases?

The CHAIRMAN. No, not at all. Anybody who meets the standards of the bill, which are reasonable standards, will be able to get DNA-tested, and use that in court for a motion for a new trial.

Senator LEAHY. Except that Mr. Fritz under your bill, Orrin—Mr. Fritz is going to testify later—would not have had DNA available under——

The CHAIRMAN. He surely would.

Senator LEAHY. No, he would not.

The CHAIRMAN. Yes, he would, because DNA testing has been refined and it has been improved.

Senator LEAHY. Well, we will let Mr. Fritz testify.

The CHAIRMAN. Well, he doesn't know. I mean, my gosh, Ms. Camps knows.

Am I right on that, Ms. Camps?

Ms. CAMPS. Yes. I mean, the wording in the bill was not subject to DNA testing requested because the technology for such testing was not available at the time of trial.

The CHAIRMAN. That is right.

Ms. CAMPS. And so actually that is a fairly wide open standard for testing there because availability might be equated with general acceptance, which in California actually has not taken place until recently.

Senator FEINSTEIN. Supposing it was available and the counsel didn't ask for it or there wasn't DNA testing at the time of the trial, that individual should still have the ability, if biological evidence would show innocence and was present, to ask for a test, right?

Ms. CAMPS. I think that under the Hatch bill language, he would be able——

The CHAIRMAN. That is right.

Senator LEAHY. That is not what it says.

The CHAIRMAN. That is what it says.

Senator LEAHY. They may not have had DNA testing. They may have retained all the blood samples and everything else, but not had DNA testing at that time. But they now do have DNA testing, and the way your bill is worded, Mr. Chairman, it would not have been available. That is all I am pointing out.

Ms. CAMPS. There is technological availability and there is what is considered legal availability.

The CHAIRMAN. That is right, absolutely.

Senator LEAHY. What I am saying is it might not have been able to have been tested at the time, but you still have the samples available and it could be tested now. And what I am saying is why preclude it because it could not have been tested at the time of the trial but now could be tested and might be exculpatory. Why shouldn't it be allowed to be tested?

The CHAIRMAN. Look, it is the exact language that was in the Illinois statute. In other words, it was not subject to DNA testing requests because the technology for such testing was not available at the time of trial. Now, we have had improved technology. So you are right—there is no question in my mind about that—that my bill will allow DNA testing under those circumstances.

I wanted to clarify that for Senator Feinstein because she, I think, was under a misapprehension, and I think you have been very helpful in doing that.

Senator FEINSTEIN. So if I understand the position of the California Attorney General, you are saying that the Hatch bill fulfills your concerns that you have with the Leahy bill. Is that correct?

Ms. CAMPS. While we still need to study the Hatch bill in greater depth, it does address the bulk of our concerns regarding the appropriate standard for post-conviction DNA testing by providing access to those who can benefit by it.

Senator FEINSTEIN. And how would you feel if a competency standard were added to the bill?

Ms. CAMPS. Essentially, we think that the two issues should remain separate, that the post-conviction DNA testing bill should be separate from the competency. It is a very complex area and to tie those two together probably isn't, in our opinion, the best way to go, whereas tying the whole DNA testing system together with the financial availability for DNA databanks and that type of situation expanding the databank to include more crimes, we think those are more logically connected.

Senator FEINSTEIN. Mr. Chairman, if I might ask others a question whether a competency standard should be added to the bill?

The CHAIRMAN. Sure.

Senator FEINSTEIN. That would be a minimum competency standard for death penalty cases.

Mr. SPITZER. Let me observe that in New York we have done that. We have created a rather sophisticated system, I think, to determine death penalty competency on the part of counsel, and I think we need that everywhere. I think the two issues can be logically separated. Each addresses a distinct and yet very major problem that we have in our criminal justice system. So one is not logically dependent upon the other.

But I think that if we are trying to establish a comprehensive solution, certainly including and defining competency makes sense. I will just add a footnote of concern. I am not convinced that it will be an easy task to define what competency should mean, and I think that that will be a difficult burden, not one that we should not undertake, but it will be difficult.

Senator FEINSTEIN. Thank you. Anybody else?

Mr. EDMONSON. Senator, I have two problems. One, of course, is the State sovereignty issue, which is not my precious sovereignty; it happens to be in the Constitution, for good or ill. And the other is that the committee and the Congress may be making a decision based on representation that was provided in the 1980s resulting in reversals in the 1990s, instead of looking at, at least on a national basis, the competency of counsel that is being provided today.

Oklahoma responded to what I think was a broken system and established a capital defense apparatus as part of our indigent defense system a decade ago. They are available in every county of the State of Oklahoma. They are provided the resources for technical investigation, for investigators, for paralegals. That apparatus is in place in Oklahoma. In the 1980s, it wasn't. What we had was a patchwork county by county, with court-appointed counsel.

In my county, we had judges that happened to look for the best lawyers to handle capital cases, and as a result of that no death penalty case during my term as district attorney or preceding it out

of Muskogee County has been reversed. What we worried about was the lawyer who came in and hired the guy who did his worker's comp case to defend him in a capital case.

We had no problems with the attorneys that were appointed by the judge to provide representation. They were high-quality lawyers, and as a result our convictions out of that county have been upheld. But it was a patchwork and it was broken, but it was fixed in Oklahoma. I don't know about the other 49 States. I am hearing about New York right now, and I would certainly ask you to examine what is in place today, not the horror stories of what was in place in the 1980s that resulted in the conviction reversals that were in the Columbia report.

Senator FEINSTEIN. Thank you. Anybody else?

Mr. BAIRD. If I might add to that, I think that it needs to be in this legislation—this legislation is moving along the track and it has gotten a lot of favorable comments so far from every Senator. There is a crisis in the State of Texas as far as providing quality representation for people charged with capital crimes, and I will promise you the State of Texas is not going to address that. It is nice that Illinois and California and Oklahoma have, but there are a lot of States out there that have not addressed these concerns. And if this committee does not, they will not be addressed by those individual States.

If I might just continue for one moment, we have a case in Texas where the lawyer slept through the trial. The Court of Criminal Appeals where I sat affirmed that case over my dissent. It was later reversed by a Federal judge. It is now before the fifth circuit, and the State of Texas stood up before the fifth circuit and said that was, in fact, competent counsel and that conviction should stand. So we need desperately some Federal standards out there.

Senator FEINSTEIN. Thank you very much, judge. I appreciate that.

Mr. Marquis.

Mr. MARQUIS. I like the standard we have in Oregon, and I am glad you are U.S. Senator and not me, Senator Feinstein, so I don't have to dictate to the other 49 States what competence standards are. But I share some of these concerns. I think you have a really good concept in the DNA bill of doing something about that, and I am afraid that could get side-tracked.

And Judge Baird can correct me if I am wrong, but I believe as a result of, I think, that particular case in Texas, Texas has made some changes already and now I think requires two lawyers in capital cases.

Mr. BAIRD. That is not correct.

Mr. MARQUIS. I stand in error.

Senator Feinstein. Thank you very much. Thanks, Mr. Chairman.

The CHAIRMAN. I am informed that is correct. Are you sure?

Mr. BAIRD. Yes, sir, I am sure.

The CHAIRMAN. Well, I am informed by our counsel that we have a statute in our office that says it is correct, but we need to find out. It is important, but both of your points are well taken and we just have to pay attention to them and see what we can do to resolve some of these problems.

Senator Feingold, we will finish with you and then we are going to go the next panel.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Well, Mr. Chairman, thank you. I want to thank you for holding this hearing, and I have a more extensive statement that I will submit for the record, but I do want to make a few comments after listening to this excellent hearing for 2 hours and 20 minutes.

First of all, on the point that was just being addressed, we have checked the language several times and I simply cannot agree with the chairman's statement that everyone will have access to DNA because there is a separate requirement of a prime facie showing that identity of the defendant was raised at trial. So if that was not raised by an incompetent counsel in some other context, that person, even if this person was entirely innocent, would not have access to DNA. So I think the record needs to be corrected on that.

As the chairman indicated, this is a very key point, and I think to some extent the actual language of the bill has not been accurately portrayed here.

Another correction. I appreciate Mr. Marquis suggesting that I was a co-sponsor of a bill, but that was the senior Senator from Wisconsin, Senator Kohl. And I am sure it is a fine bill, but it is not the bill I am on, and it is unwise to take credit for something a senior Senator is doing if you are a junior Senator. [Laughter.]

But more importantly, it is because I am a strong supporter of the Innocence Protection Act, and that is the only DNA bill that I am on at this time, a bill that among other things ensures post-conviction access to DNA testing. I commend Senator Leahy tremendously for his leadership on this issue, and I am so delighted that Senator Gordon Smith, Senator Susan Collins, Senator Jeffords and others have joined on a bipartisan basis to work with Senator Leahy on this. And I am pleased to hear that the chairman appreciates the significance of DNA testing and has scheduled this hearing today.

Mr. Chairman, lack of access to DNA testing is only one of the many flaws in our criminal justice system, particularly with respect to the administration of the death penalty. I am disappointed that today's hearing does not address the remaining very important provisions of the Leahy bill, and that no additional hearings on the Leahy bill or on the broader issue of the fairness and accuracy of the administration of the death penalty have been scheduled.

As the chairman knows, I wrote to him in February requesting a comprehensive hearing on the fairness and accuracy concerns with the administration of capital punishment. And I was joined in that request by my colleagues Senators Torricelli, Kennedy, Levin, and Durbin. My colleagues and I who wrote you may disagree on the general moral and practical merits of capital punishment, but we agree that the process by which this ultimate punishment is administered must be one of utmost fairness and justice.

We have not yet received a definitive response to that request, and while I am pleased that we have this hearing today, given its limited scope I hope that we will hear shortly a response to the re-

quest of many members of this committee. And I can tell the members of the audience here, it is unusual for one panel of a hearing to go on this long. There is tremendous interest in this issue. There is tremendous anxiety on this across the United States of America, and this is not an adequate forum by itself to address this issue.

DNA testing, of course, goes to the question of whether innocent people are being wrongly sent to death row. But only 8 of the 87 people who have later been proven innocent after serving time on death row were exonerated based on DNA evidence. The remaining 79 individuals were released based on other problems plaguing the administration of capital punishment in this country.

Moreover, the numerous problems, whether they range from inadequate counsel to jailhouse confessions in our Nation's administration of capital punishment, go beyond the problem of innocent people being sentenced to death, as troubling as that is. There are also serious flaws that result in the difference between a death sentence or a sentence that is less than death.

Mr. Chairman, I want to shorten my remarks, but I do want to get these other points out because there was a lot of talk about the Liebman study. The Liebman study findings are not only intolerable, they are an embarrassment for a Nation that prides itself on its adherence to the fundamental principles of justice and fairness.

And I might add, Mr. Chairman, Professor Liebman's study reviewed cases only from 1973 to 1995, before enactment of the Antiterrorism and Effective Death Penalty Act by Congress in 1996. That is a law that restricted the ability of convicted offenders, especially death row inmates, to appeal their sentences. And I wouldn't be surprised to learn, Mr. Chairman, if, since enactment of the 1996 law, the rate of errors going undetected on appeal is even higher than before.

It is also disturbingly clear that sometimes there are errors due to racial bias in the criminal justice system. Last week's Supreme Court decision involving convicted murderer Victor Saldano is a case in point. The Supreme Court vacated the death sentence of Mr. Saldano because it found that a Texas court had improperly allowed a psychologist to testify at the sentencing phase that the race of Mr. Saldano was evidence of his future dangerousness.

Contrary to the statements of Governor Bush, I believe that these revelations do not show that the almost conveyor belt of death in Texas is working. When the attorney general of his State admits that racial bias was a factor in sending seven inmates to death row, it is just another sign that the system is not working. A recent expose by the Chicago Tribune also shows that many of those already executed under Governor Bush's watch had much less than the, "full access to the courts," that Governor Bush professes all those executed under his watch have received.

Mr. Chairman, the Innocence Protection Act is a good first step in addressing some of the most glaring flaws in our Nation's administration of capital punishment. In addition to providing access to post-conviction DNA testing, the Leahy bill begins to address the egregious problems involving incompetent defense counsel, which Senator Biden so eloquently addressed. I hope my colleagues will join in supporting the Leahy bill.

Mr. Chairman, I will conclude by noting that the U.S. Senate can and should go one step further. It has become increasingly disturbingly clear that our Nation's administration of capital punishment has gone amok. Studies like that of Professor Liebman are further proof that our Nation should suspend all executions and undertake a thorough review of the system by which we impose sentences of death.

A bill I have introduced, the National Death Penalty Moratorium Act, would do just that. My bill is a common-sense, modest proposal to pause and study the problems plaguing capital punishment. It is very similar, almost identical, to what Governor Ryan did in Illinois, a moratorium combined with a blue ribbon panel of both pro- and anti-death penalty individuals who will review it.

Mr. Chairman, do we really believe that we should keep executing people as these problems are raised in such a frightening way? I think the only rational course is to have a brief moratorium. In fact, I think this almost Orwellian notion of comparing the executions to the decision to take an airplane is a suggestion of how far people are willing to go to try to not admit what is staring us right in the face. We have to stop this for a while to make sure that nobody is being executed in error.

Indeed, momentum for a nationwide moratorium on executions has been growing for some time, from both death penalty foes and supporters. Reverend Pat Robertson, a death penalty supporter, has endorsed a moratorium. In an editorial on June 6, the Washington Times essentially endorsed a moratorium. And I was delighted with Senator Biden's remarks saying that we need a moratorium, and I think we could easily talk about the specifics of how the moratorium would conclude. That was his concern about the bill. I would very much like to receive his support.

Finally, Mr. Chairman, two further clarifications. In your initial remarks, Mr. Chairman, you pointed out a decline in the administration of actual executions between 1997 and 1998. But the chairman did not note what is most significant, which is that last year, 1999, was the all-time record of 98 executions in this country. And if we are not going to reach that high mark this year, I suggest it is not because this system isn't moving as fast as it can. I suggest it is because finally people are beginning to see the problems with it and we are at least beginning to pause in some cases, but not all cases.

The other clarification I think is a reference to Mr. Marquis again, who suggested that support for the death penalty has been consistent over many years. That simply isn't the case. As Senator Biden pointed out, support was as high as 80 percent at one point. The polls are showing a decline in support for the death penalty, and it may not be because people don't ultimately, from a majority point of view believe in the death penalty. It is because of these concerns, and that is exactly what the polling indicates.

So, Mr. Chairman, I hope this committee will lead the Congress and Nation in reexamining the absurdly faulty system by which we impose sentences of death in our Nation today. We should ensure—indeed, Mr. Chairman, I believe as Members of Congress we have a duty to ensure—that the world's greatest democracy has a system of justice that is beyond reproach.

Mr. Chairman, I will just ask one question of Mr. Marquis.

You recognize in your testimony that police, prosecutors, judges and juries are not infallible, and you make the claim speaking of successful death penalty appeals that, quote, "Almost every last one of these cases is not an innocent on death row," unquote. I assume that you would not find acceptable a system that executes even one innocent person, or am I misstating your position?

Mr. MARQUIS. No. I think we should strive for a system that never executes an innocent person, Senator.

Senator FEINGOLD. Thank you, Mr. Chairman.

[The prepared statement of Senator Feingold follows:]

STATEMENT OF SENATOR RUSSELL D. FEINGOLD

I want to thank you for holding this hearing, which will focus on one of the most striking injustices in our criminal justice system today—lack of access to DNA testing of potentially exculpatory evidence. The American people have become acutely aware of the greater level of certainty that modern technology has brought to our nation's criminal justice system. In a recent poll conducted for The Justice Project, 89 percent of Americans favored requiring courts to give convicted persons on death row the opportunity to have DNA tests conducted in order to prove innocence. DNA testing, or what we've heard referred to as "the fingerprint of the 21st century," is a truly remarkable advance in forensic science. It has led to the literal unlocking of jailhouse doors for dozens of people wrongly accused, some even wrongly sentenced to death. In fact, more than 60 people wrongly accused have been exonerated through the use of DNA testing. According to the Justice Department's National Commission on the Future of DNA Evidence, advances in DNA technology have made DNA evidence a predominant forensic technique. The Commission, in its report released last year, continues: "The advent of DNA testing raises the question of whether a different balance should be struck regarding the right to postconviction relief. * * * The strong presumption that verdicts are correct, one of the underpinnings of restrictions on postconviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA results."

Mr. Chairman, the power and the promise of DNA technology cannot be underestimated. I look forward to hearing more about this issue from the witnesses today. I am proud to be a cosponsor of the Innocence Protection Act, a bill that, among other things, will ensure post-conviction access to DNA testing. I commend Senator Leahy for his leadership on this issue. The work he has done over the last few months to educate our colleagues and the American people about one of the most egregious flaws in our criminal justice system—the lack of access to DNA testing—has been tremendous and invaluable. I am pleased to hear that you too appreciate the significance of DNA testing and scheduled this hearing today. I hope you will support Senator Leahy's bill, which has bipartisan support.

But, lack of access to DNA testing is only one of many flaws in our criminal justice system, particularly with respect to the administration of the death penalty. I am disappointed that today's hearing does not address the remaining, very important provisions of the Leahy bill and that no additional hearings on the Leahy bill or on the broader issue the fairness and accuracy in the administration of the death penalty have been scheduled. DNA testing of course, goes to the question of whether innocent people are being wrongly sent to death row. But there have been scores of other innocent people released based on evidence that has nothing to do with DNA. In fact, only eight of the 87 people who have been later proven innocent after serving time on death row were exonerated based on DNA evidence. The remaining 79 individuals were released based on other problems—problems like incompetent legal counsel, mistaken identifications, recanted witness testimony, or the revelation that the defendant's so-called voluntary confession was, in fact, extracted after police misconduct.

Moreover, the numerous problems in our nation's administration of capital punishment goes beyond the problem of innocent people sentenced to death, as troubling as that is. There are also serious flaws that result in the difference between a death sentence or a sentence less than death. A landmark study released just yesterday by habeas expert and Columbia Law Professor James Liebman shows the depth of the problem. That study, entitled "A Broken System: Error Rates on Capital Cases," concludes that our nation's courts found serious, reversible error in nearly 7 out of

10 cases where persons were sentenced to death. Most of these errors resulted from egregiously incompetent defense lawyers who didn't look for—and even missed—important evidence that the defendant was innocent or did not deserve to die; police or prosecutors who discovered important evidence but suppressed it, again keeping it from the jury; or faulty instructions to jurors. Of these nearly 70 percent of cases overturned for error, over 80 percent of the people whose capital judgments were overturned by post-conviction courts were found to deserve a sentence less than death when the errors were cured on retrial. And 7 percent were found to be innocent of the crime all together. Mr. Chairman, these findings are not only intolerable. They're an embarrassment for a nation that prides itself on its adherence to the fundamental principles of justice and fairness.

Now, some could argue that this high rate of reversal shows that the system works. I couldn't disagree more. Rather, it shows that our criminal justice system, and particularly the administration of the ultimate punishment, the death penalty, has gone awry. Just ask Anthony Porter. After conviction by an Illinois trial court, Mr. Porter appealed his death sentence. He was days away from execution when actors very much outside the system—journalism students at Northwestern University—convinced a court to stay his execution and later proved that he was the wrong man.

And I might add, Professor Liebman's study, as troubling as it is, reviewed cases only from 1973 to 1995, before enactment of the Anti-terrorism and Effective Death Penalty Act by Congress in 1996. That is a law that restricted the ability of convicted offenders, especially death row inmates, to appeal their sentences. Mr. Chairman, I wouldn't be surprised if since enactment of the 1996 law, the rate of errors going undetected on appeal are even higher today than before. As members of Congress, we are responsible for this increased risk that errors won't be detected. But we also have the opportunity to undo the injustice of the 1996 law and restore justice and fairness to our criminal justice system. Mr. Chairman, simply put, our system doesn't work. It is fraught with errors. It is broken.

As Professor Liebman's study shows, we have found, and are continuing to find, that these high rates of error are very often due to woefully incompetent defense counsel. Lawyers who sleep through trial. Lawyers who are drunk. Lawyers who are suspended or disbarred. Lawyers whose first trial is a trial where a man's life is on the line. The result is a lawyer who fails to find or introduce evidence that can prove the innocence of the defendant or mitigate his punishment from death to something less than death.

The Leahy bill begins to address these egregious problems involving incompetent defense counsel. The bill would require states to implement a system of appointing competent counsel to indigent defendants and providing adequate compensation to such counsel An article published this past Sunday in the Chicago Tribune illustrates the extent of the problem of incompetent defense counsel and other problems in one of the 38 states that authorize the use of the death penalty. That article reviewed the cases of the 131 inmates on Texas death row who have been executed under Governor George Bush. As you know, Governor Bush has the dubious distinction of being the governor who has presided over the most executions since the reinstatement of the modern death penalty in 1976. The Chicago Tribune found that of these 131 cases, 40 involved trials where the defense attorneys presented no evidence or only one witness during the sentencing phase: 29 cases included a psychiatrist who gave testimony that the American Psychiatric Association condemned as unethical and untrustworthy; 43 included defense attorneys publicly sanctioned for misconduct—either before or after their work on capital cases; 23 included jailhouse informants, considered to be among the least credible of witnesses; and 23 included visual hair analysis, which has proved unreliable.

It is also disturbingly clear that sometimes errors are due to racial bias in the criminal justice system. Last week's Supreme Court decision involving convicted murderer Victor Saldano is a case in point. The Supreme Court vacated the death sentence of Mr. Saldano because it found that a Texas court had improperly allowed a psychologist to testify at the sentencing phase that the race of Mr. Saldano was evidence of his future dangerousness. The State of Texas had introduced this testimony to support its argument that Mr. Saldano should receive the death penalty, since in Texas a jury must consider whether a defendant could be "a continuing threat to society" when deciding the death penalty. And last Friday, the Attorney General of Texas acknowledged that this same psychologist had provided similarly racially charged expert testimony in six other cases of inmates now on death row. The Attorney General informed defense counsel for those six inmates that the State of Texas would not object if they seek to overturn their clients' death sentences based on the psychologist's improper testimony. This action by the Texas Attorney General is the fair, just and right thing to do. I believe his action was based on fair-

ness and justice, principles which I hope will continue to guide his judgment after his governor's presidential election race ends.

Contrary to the statements of Governor Bush, I also believe that these revelations of errors and bias do not show the conveyor belt of death in Texas is working. When the Attorney General of his state admits that racial bias was a factor in sending seven inmates to death row, it is just another sign that the system is not working. The expose by the Chicago Tribune also shows that many of those already executed under Governor Bush's watch had much less than the "full access to the courts" that Governor Bush professes all those executed under his watch have received. Mr. Chairman, questions of fairness and justice go beyond whether someone is guilty and include whether a defendant should be subject to a death sentence or a sentence less than death.

The Innocence Protection Act is a good first step in addressing some of the most egregious flaws in our nation's administration of capital punishment. I hope my colleagues will join together in supporting this bill. Mr. Chairman, I also want to emphasize that I hope this is not the last hearing in this Committee on the problems plaguing capital punishment. As you know, I wrote you in February requesting a comprehensive hearing on the fairness and accuracy concerns with the administration of capital punishment. I was joined in that request by my colleagues, Senators Torricelli, Kennedy, Levin and Durbin. My colleagues and I who wrote you may disagree on the general moral and practical merits of capital punishment but we agree that the process by which this ultimate punishment is administered must be one of utmost fairness and justice. My colleagues and I have not yet received a response to that request. While I am pleased that you called this hearing, given its limited scope, I do not consider it a satisfactory response to this request.

The execution of the first federal death row inmate in almost 40 years is now less than two months away. Before our federal government takes this action in the name of the American people, I urge my colleagues to consider the wisdom of this action. I believe that in light of the continuing revelations of serious, disturbing flaws in our administration of capital punishment and the imminent execution of a federal death row inmate, it is absolutely imperative that this Committee undertake a thorough review of all the problems plaguing the administration of capital punishment at the state and federal levels—beyond the very important issue addressed today, access to DNA testing.

But, Mr. Chairman, I conclude by noting that the U.S. Senate can and should go even one step further. It has become increasingly, disturbingly clear that our nation's administration of capital punishment has gone amok. Studies like that of Professor Liebman are further proof that our nation should suspend all executions and undertake a thorough review of the system by which we impose sentences of death. A bill I have introduced, the National Death Penalty Moratorium Act, would do just that. Our nation's administration of capital punishment has reached a crisis stage. My bill is a common sense, modest proposal to pause and study the problems plaguing capital punishment.

Indeed, momentum for a nationwide moratorium on executions has been growing for some time, from both death penalty foes and supporters. Reverend Pat Robertson, a death penalty supporter, has endorsed a moratorium. The American Bar Association has called for a moratorium. And in an editorial on June 6, the Washington Times essentially endorsed a moratorium. I urge my colleagues to join me and Senators Levin and Wellstone in supporting my bill. It's the fair, just and right thing to do. I hope this Committee will lead the Congress and the nation in re-examining the absurdly faulty system by which we impose sentences of death in our nation today. We should ensure—indeed, Mr. Chairman, I believe, as members of Congress who have sworn to uphold the Constitution, we have a duty to ensure—that the world's greatest democracy has a system of justice that is beyond reproach.

The CHAIRMAN. Thank you.

Now, Mr. Baird, I do want to clarify this because counsel has pointed out to me that under the Texas Code of Criminal Procedure, Chapter 2605–2, the Appointment of Counsel in Death Penalty Cases, Reimbursement of Investigative Expenses, et cetera, subparagraph (e) says this: "The presiding judge of the district court in which a capital felony case is filed shall appoint counsel to represent an indigent defendant as soon as practicable after charges are filed. If the death penalty is sought in the case, the judge shall appoint lead trial counsel from the list of attorneys qualified for appointment. The judge shall appoint a second counsel

to assist in the defense of the defendant unless reasons against the appointment of the two counsel are stated in the record."

Senator LEAHY. It is not automatic.

The CHAIRMAN. It may not be, but there would have to be reasons not to. I think Mr. Marquis is right on that issue, according to the Texas Code.

Mr. BAIRD. May I just add one thing to that, Senator?

The CHAIRMAN. Sure.

Mr. BAIRD. Certainly, there is no qualification or no requirement that there be two lawyers appointed on the appeal, and there has never been two lawyers appointed to assist in post-conviction capital cases.

The CHAIRMAN. Well, we are talking about the trial, which is what I asked you about before, and which Mr. Marquis said you have the right to two attorneys down there.

Senator LEAHY. No, it is not a right.

The CHAIRMAN. You have a right, subject to some reason not to do it, but you certainly have an instant right. That is what that statute says.

Senator Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Mr. Chairman. First, let me thank you for holding this hearing, and Senator Leahy for his outstanding work in this area, as well as the witnesses. I want to particularly welcome the outstanding Attorney General from my State, Eliot Spitzer, for being here, who is doing a great job and making it a people's office.

I apologize to all the witnesses. We have a Banking Committee hearing and I have been trying to go back and forth, but I ended up spending most of my time there.

Mr. Chairman, I guess my view is somewhat different than any of the views stated here. I think DNA testing is great because I think it brings out truth. I think those on one side of the issue or on the other side of the issue of capital punishment are taking what is basically a neutral but far more effective method of proving the truth and saying it buttresses their cause.

I think it is fabulous and I think it is appropriate that innocent people, whether it be for capital crimes or other crimes, will be exonerated and in the first instance not proven guilty by mistake because of DNA. I think it is also very estimable that guilty people will be proven guilty. I think both sides of this issue are important issues.

To be against DNA testing is sort of to be Luddite. It is to take one of the newest advances in criminal justice and say we shouldn't use it. But I think those on either side who use it as proof that we ought to have more punishment or less punishment are mixing apples and oranges.

I tend to be someone who has believed in the last 20 years that societal rights were sacrificed for individual rights in the criminal justice system, and I saw in my communities in the mid-1980's a system that had run amok where people were not punished for

crimes that they were convicted of. That is a value choice each of us has to make. It is not an easy choice.

DNA testing, once you make that value choice, allows things to happen in a more consistent, in a more truthful way. So, to me, it is neutral even though it evokes great passions, neutral in terms of one's value judgment of where you come out in the criminal justice system.

Certainly, in capital crimes we ought to be very careful. I have supported all sorts of changes in the law to make sure people get counsel, even though I support capital punishment in certain instances and believe that it is an appropriate punishment. I agree with much of Senator Leahy's bill, although I must say there is a provision in it right now that would prevent me from supporting it, the provision that says that if you commit under Federal law a capital crime in a State that doesn't have capital punishment, the Federal law would not apply. That is not, to me, what our——

Senator LEAHY. With a number of exceptions.

Senator SCHUMER. With a number of exceptions, but I disagree with the concept. I don't think I would want to see that law applied for gun crimes, Federal gun crimes. I don't think I would want to see that law on anything. We are making a Federal judgment here, and I don't think the State law should be part of it. And I would urge the Senator—I have talked to him privately a little—to take that out of his bill and it might make it a little more palatable to some of us in this area.

And then I would just like to make one other point before I ask a question. In terms of having DNA be a useful tool on both sides of the issue in terms of finding truth, we need real help in our State of New York to help convict people who have raped women and have not been brought to justice. We have 15,000 rape kits in New York State sitting in refrigerated warehouses awaiting DNA testing and possible matching to people with profiles already in State or Federal databases.

Nationwide, the Department of Justice estimates there are 180,000 rape kits that require an analysis. A recent survey by the Police Executive Research Forum found that in some instances police don't even bother to submit rape kits to crime labs because they are convinced that the kits will never be tested. It is expensive. I guess it is about $2,000 for each test.

So we need to do a much better job of using DNA to exonerate the innocent and not convict the innocent, but also to catch criminals. And to start, I am proposing legislation that will help States reduce their backlog of unsolved crime evidence particularly in the area of rape by providing $100 million in Federal grant funding over 4 years. That funding will go to States to use at labs to screen for quality assurance to reduce backlogs in unsolved crime evidence that needs to be DNA-tested.

Senator BIDEN. What is the cost of the bill, Senator?

Senator SCHUMER. About $100 million.

Senator BIDEN. Sign me up.

The CHAIRMAN. Is that for the rape——

Senator SCHUMER. Rape kits, yes.

The CHAIRMAN. Well, I am willing to work with you on that, too, because my bill provides $60 million to reduce these State DNA backlogs.

Senator SCHUMER. Good.

Senator LEAHY. Can you get our bullet-proof vest bill out while we are spending this money to protect the police officers?

The CHAIRMAN. We are going to get that out. Don't worry about that.

Senator SCHUMER. In any case, I am glad to have support for this idea.

The CHAIRMAN. It is a good idea.

Senator SCHUMER. If you spend $100 million over 4 years, it would eliminate the national backlog by about 2004. And I would hope this legislation could complement the DeWine-Kohl bill which eliminates the backlog of convicted offender DNA samples, something I also support. Together, these bills will dramatically enhance the administration of justice by ensuring that DNA testing occurs as widely as possible on the State and Federal levels.

And so in sum, Mr. Chairman, we owe it to both the victims of crime and potentially innocent people who are incarcerated or could be incarcerated to expand our use of DNA. We owe it to our society to bring a fairer system about, and I hope that we will move forward in making that happen.

My question, Mr. Chairman, is this. I would first ask the panel what they think of the proposal that I have made, and I would welcome general comments on my general comments. I would first give the courtesy to my friend and colleague from New York Mr. Spitzer.

Mr. SPITZER. Thank you, Mr. Schumer, soon to be senior Senator Schumer. It is a pleasure to be here, and I agree with——

Senator SCHUMER. I want to tell you a story about that, if I might interrupt.

Mr. SPITZER. That was not my total answer.

Senator SCHUMER. The first day I got to the Senate, the first person I met waiting at the door was Senator Hollings. And he came over to me and said, well, you are something. And I said, well, thank you, Senator. And he said, I hear you are going to be the senior Senator in two years. I said, yes, sir. He said, I have been here 37 years and I am still the junior Senator. He has Strom Thurmond, as you know.

Mr. SPITZER. I am the senior Attorney General from New York State.

Senator SCHUMER. And the junior.

Mr. SPITZER. And the junior, that is correct.

Let me make several observations about your points. First, with respect to funding to overcome the backlog of DNA testing, it is absolutely critical and it is a problem that we are confronting across the United States. In New York, in particular, we are expanding the DNA database because it is such a powerful, and as you observe, a neutral tool. It exonerates and it finds individuals guilty.

We are expanding the database, we are making it more applicable. We are expanding the universe of crimes where we seek to use DNA. It is absolutely critical, and so any additional funding we can

get from any source will be not only of use, but is necessary to permit us to turn it into the tool that we should make it.

With respect to the federalism point that you alluded to in terms of not creating an exception based upon State law where we are striving for a national standard, I agree with you there as well. And I will freely admit that when I was elected attorney general, I had something of an epiphany about federalism. I suddenly became a bit more protective of States' rights. Having said that, I think this is an area where we need uniformity, we need national standards, and everything we can do to determine what that national standard should be and then apply it across all 50 States is commendable and important.

Senator SCHUMER. One other question for you, Mr. Spitzer. New York offers DNA tests to convicted offenders when there is a reasonable probability that the test would result in a verdict more favorable to the defendant.

Mr. SPITZER. Yes, sir.

Senator SCHUMER. That is really not a neutral—I mean, obviously, a convicted offender isn't going to want to test if he thinks he is going to make the case of the prosecutor better. But why aren't we offering DNA tests in any situation where it might bring about greater knowledge, greater justice, whether it is more favorable to the defendant or more favorable to the prosecution? I didn't understand why New York took what you say, and I couldn't agree with you more, is a neutral truth serum almost and then just used it in one direction but not the other.

Mr. SPITZER. I think your point is well taken, but I would distinguish between access to DNA testing pre-conviction at the initial trial phase where, yes, it is neutral and it should be as widely available as is physically possible, versus access on subsequent review where we are already post-trial, post-conviction.

I think much of the discussion today has focused on what threshold should be. We do not want to revisit and relitigate every case from ground zero, but then say there should be some affirmative reason to reopen, in essence, a factual inquiry that has been already concluded. So I would differentiate between the appellate standard for access to a DNA test where some sort of showing might be necessary and an initial inquiry at a trial phase, where I agree with you entirely everybody should have access.

Senator SCHUMER. DNA testing is going to bring about certain situations where somebody has been declared innocent and then the evidence is going to point to the fact that they did the crime.

Mr. SPITZER. Absolutely.

Senator SCHUMER. And, of course, we have our constitutional standards, but it is also going to have its effect in that direction as well.

Any other comments?

Mr. MARQUIS. Senator, I think it is an excellent idea. In my testimony, I pointed out the backlog there is. I think anything that would help DNA—the only concern I have, to answer your last point, is someone who has been declared innocent can never be retried.

Senator SCHUMER. Correct. I just think those who think DNA is sort of not a neutral type, but rather it is being used by many—

and I respect the views of my colleague from Wisconsin, who is morally opposed to capital punishment. I am not.

This is a neutral tool and it is going to show that mistakes were made in both directions. Now, in a capital case, obviously you want to err on the side of caution, but it is going to show that mistakes were made on both sides of the ledger in all sorts of crimes.

Thank you, Mr. Chairman.

Senator LEAHY [presiding]. You are up next. You haven't asked any questions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Senator Leahy. I appreciate the opportunity to participate in this, and I think Senator Smith earlier said we want to make a good system better. There is no reason that this committee shouldn't be always alert to whatever we can do to make the system better, and if there is some possibility that some cases may not be getting appropriate review of DNA evidence because they can't prove that DNA evidence was exculpatory, per se, and just can't meet the burden of proof, may be we can help eliminate that problem. I am supportive of efforts that would do so.

I did spend 15 years, really 17 years as a prosecutor, and I do believe that the purpose of our system is to achieve justice. I used to tell my assistants that they should never prosecute a case if they didn't believe the defendant was guilty, and if they didn't believe a defendant was guilty, to come and see me immediately. I might not agree with them, but if I did, we would stop that case. There are plenty of guilty people that need to be prosecuted. Heaven knows, we don't need to prosecute innocent people.

But I would say that this concept of using DNA is consistent with my philosophy of justice, which is to get the truth. I have often opposed many of the procedural rules that have favored defendants at the expense of truth. For example, broad interpretations of the exclusionary rule in *Mapp* v. *Ohio* have caused real critical evidence seized by police to be omitted for trial for technical violations when actually guilty defendants are released. *Miranda* v. *Arizona* has also caused some people who have confessed and are clearly guilty to have those confessions suppressed even though they were not threatened or coerced into giving those confessions.

We do have a new technology now that will help us in criminal justice. Since it has been developed forward, I don't believe our criminal justice experts would dispute it is working fairly well today. I mean, routinely, if a defendant is arrested today for serious violent crime and asks for a DNA test, isn't it true that virtually universally that test can be obtained if they request it and they have some basis for it being relevant?

Is that correct?

Mr. MARQUIS. Yes, Senator.

Senator SESSIONS. So what we are dealing with now is what happened in the early days either before DNA was available or when people didn't know to ask for it.

Isn't it true that in a serious case a defendant can get an independent DNA expert in most States to validate the finding of the State's expert analysis? Do you know that?

Mr. MARQUIS. In my State, they can.

Senator SESSIONS. They can?

Mr. MARQUIS. Yes.

Mr. EDMONDSON. That is true in Oklahoma at either the trial stage or the appellate stage.

Senator SESSIONS. Good to see you, General Edmondson. I enjoyed serving with you as attorney general, and thank you for your wise comments earlier today.

Well, I have had my staff review "Actual Innocence", and I think it does raise some questions along the lines that I have just discussed.

Senator Leahy, I am interested in seeing what we can do to improve this system in any way we can.

I will put my remarks in the record, but with regard to the fundamental state of the criminal justice system, Ms. Camps, you are dealing with it, and I know Mr. Edmondson is. Do you think the criminal justice system is in crisis today and that there is something peculiarly dangerous about our current climate of death penalty cases?

Ms. CAMPS. That is a very complex question. I actually think that to the extent that we are considering DNA evidence to resolve questions of actual innocence, it is exceptionally important in all of our cases, and that includes our capital cases.

To the extent that we are going to make contingent large changes in the criminal justice system on the availability of DNA testing, we should be awfully concerned about what the standards are going to be for that testing. We also think it is most appropriate to keep those issues separate, to keep the post-conviction DNA testing issue separate from the competency of counsel issues in revamping our whole approach to death penalty administration.

Senator SESSIONS. I certainly think that is true.

Attorney General Edmondson, do you think that our criminal justice system is sinking and it is in a crisis and is less just today than it was, say, 10 years ago, or how do you see it?

Mr. EDMONDSON. I do not have that feeling. I believe that the results that were shown in the Columbia study—I think the comment was made earlier that when cases are reversed on appeal, it is the courts giving the States guidance on how to do it right, and it has resulted in changes. I see that as a positive thing rather than a negative thing. I think it is an indication that the system is working, not that the system is broken.

In the wake of those reversals, as I mentioned, Oklahoma adopted a capital defense team that is fully funded. In the wake of *Eke* v. *Oklahoma,* Oklahoma began funding expert witnesses for the defense. We went beyond the requirements of *Brady* because some prosecutors were——

Senator SESSIONS. *Brady* is the requirement of a prosecutor to produce exculpatory evidence.

Mr. EDMONDSON. Exculpatory evidence, because prosecutors were having to decide what they thought was exculpatory and what they didn't, and that was being reviewed and second-guessed by judges. So we adopted a criminal discovery code in the State of Oklahoma.

Senator SESSIONS. It went further than the constitutional requirement of *Brady?*

Mr. EDMONDSON. Even further, but all of those were things that happened as a result of cases being reversed and guidance from the courts on how to do it properly.

I don't think we are in crisis today. I think we are doing a good job. We are funding the defense, and for the first time we have the ability to see the end of the appeals process and that is what I am concerned might be disturbed.

Senator SESSIONS. Along that line, I had a capital litigation section in my office and there were two death penalty cases carried out in my two years as attorney general. It is a very serious matter. But from what I learned about the State court systems—and 99 percent of these cases are in State courts—prosecutors at the county and circuit levels have really learned and gotten better. The courts have gotten better. And many of the objections that occurred right after 1976 when we got back into the death penalty prosecutions have been settled, and prosecutors are adhering to those rules far more completely, and judges too, than in the past.

Would any of you disagree with that?

Mr. SPITZER. I do not want to jump to that conclusion. I am not sure it is the relevant question, quite frankly, because I think your question doesn't probe in the right area. "Are we in crisis" is not the threshold that seems to be relevant here.

We may not be in crisis, but that does not mean that there is not both a legal and perhaps even a moral obligation to improve upon what we have. And I think for the reasons that have been stated so eloquently by some other Senators, how you define crisis, I do not know. But I will say that the studies that are done and the stories that continue to emerge do not reflect to me a status quo that should leave any one of us comfortable, and I think quite the opposite.

And I think given the advent of new technology, to say that there is not crisis and therefore we need not address this problem, is to pursue a form of logic that I think is dead wrong.

Senator SESSIONS. Well, I didn't say that. I said in the beginning we needed to do something.

Mr. SPITZER. Well, in which case I wonder what the relevance of the word "crisis" is.

Senator SESSIONS. I would just say I think it is indisputable that we are doing better in handling important criminal cases in America today than we were 20 years ago, and we can continue to get better and I really support that idea. A lot of people are bandying about that we are in a crisis, which I haven't seen in my own experience.

Mr. Chairman, I am sorry to go over.

The CHAIRMAN. Thank you, Senator.

I want to thank this panel. It has taken us much longer than I thought it would to go through it, but each of you has contributed, I think, greatly to this. So I am very grateful to you.

Did you want to make a comment?

Senator LEAHY. Just this, Mr. Chairman. The panel has taken a long time, but I think that underscores the importance of this issue.

The CHAIRMAN. I agree.

Senator LEAHY. A couple of things we should keep in mind. In looking for competent counsel and looking for the availability of all the evidence, it cuts both ways. It doesn't just acquit the innocent, but it makes sure the guilty are convicted. I can't think of anything worse than to convict somebody innocent of a heinous crime, have him in jail for years, and find during that time that the person who committed the heinous crime is out there in all likelihood committing more crimes.

I also can't think of anything worse from a prosecutor's point of view than to have a case, because of incompetent counsel or whatever, remanded for a new trial five or 6 years later because you can't try it, in all likelihood. Half the witnesses are gone, the evidence is gone. You are probably going to have to seek a plea bargain of some sort, and so that creates a problem.

Ms. Camps, I would point out, because there may be some who may have misunderstood your earlier testimony—I don't think you intended to misstate my proposal, but my proposal is very clear that the court in ordering DNA testing has to determine that testing would produce non-cumulative exculpatory evidence relevant to the claim of the applicant that the applicant was wrongfully convicted or sentenced, which would be, I believe, substantially more than the impression that may have been left of what is required.

But all of us should agree that something is going wrong here, and all of us would agree with Senator Sessions that if you have a good prosecutor, the last thing in the world he or she wants is to convict somebody who is innocent, because if we do maintain the credibility of the criminal justice system, in most cases the prosecutor comes in with the advantage into a court and most juries tend to side with the prosecutor right off the get-go.

The CHAIRMAN. Ms. Camps, you look like you wanted to make a comment.

Ms. CAMPS. With respect to the Leahy standard——

Senator LEAHY. Give Senator Smith credit, too, on this bill. You keep leaving him out.

Senator BIDEN. Especially when you are criticizing it. [Laughter.]

The CHAIRMAN. There is nothing like fairness on this committee, is all I can say.

Senator LEAHY. I don't want you to think only Democrats can think like this. I want you to understand that some Republicans like this legislation, too.

Go ahead, Ms. Camps.

Ms. CAMPS. Obviously, we think that the accessibility to post-conviction testing is very important. But, of course, we are concerned about the standard. That standard that it may produce relevant evidence is very different from presenting a prime facie case that identity is at issue and that it is material to an actual assertion of innocence, because materiality is a key word that we don't see in your proposal and we think that it is limited in terms of its probity to the actual trial evidence.

So if you have a case where identity is not at issue, where the issue in a rape case is consent and not identity, that DNA evidence is not going to show anything that is of significant value to that case. And so we want to limit it to those cases where it is truly

useful and it can actually undermine the confidence in the outcome of the verdict.

Senator LEAHY. But you are not saying they have got to prove their innocence before they can ask for this evidence?

Ms. CAMPS. No, but there has to be—the words from New York are "reasonable probability." There are standards for that. But "may produce," we find, is too low a threshold.

The CHAIRMAN. Well, we want to thank you all for being here. I would like to just recess for two minutes. I want to chat with a couple of you, and then we will call the second panel. Thank you.

[The committee stood in recess from 12:57 p.m. to 1:03 p.m.]

The CHAIRMAN. I would like to call forward our second panel and have them take their seats at the table. Now, I am limited in time. In fact, I have to leave here by 1:45, and I doubt that we will be finished by then, but I have got to leave.

So, Senator Sessions, could I ask you to continue for me? I have a doctor's appointment, so I have to leave at 1:45.

Senator SESSIONS. I am at your disposal.

The CHAIRMAN. Thank you. You are great.

Senator LEAHY. Aren't we all? Aren't we all?

The CHAIRMAN. I just wish that were true.

Senator SESSIONS. I have been disposed of several times.

The CHAIRMAN. Our first witness is Barry Scheck, who is a professor at Benjamin N. Cardozo School of Law, and the co-founder of the Innocence Project. Mr. Scheck is also a member of the National Commission on the Future of DNA Evidence, and person I have a lot of respect for. We may differ on whether or not there should be a death penalty, but I have a great deal of respect for your knowledge and your ability.

Mr. SCHECK. Thank you.

The CHAIRMAN. Our second witness is George Clarke, whom I also have a lot of respect for, Deputy District Attorney for the County of San Diego, and a member of the National Commission on the Future of DNA Evidence. We are honored to have you here.

Our next witness is Bryan Stevenson, the Executive Director of the Equal Justice Initiative of Alabama, and Assistant Professor of Law at New York University School of Law. And this isn't your first time here. We are glad to have you here, too, and we will look forward to your testimony.

Mr. STEVENSON. Thank you, Mr. Chairman.

The CHAIRMAN. We would also like to welcome Dennis Fritz, a former inmate who was released based on post-conviction DNA evidence. I think your testimony is very critical to this hearing today, so we are honored——

Senator LEAHY. He is also a former high school science teacher, too.

The CHAIRMAN. Well, we are glad to have you here and we are sorry about what you went through.

Finally, we welcome James Wooley, a white-collar defense lawyer and member of the National Commission on the Future of DNA Evidence. We have great respect for you, Mr. Wooley, as well.

We will begin with Mr. Scheck. If you could limit yourselves to five minutes, it really helps me to hear all of you. I may not be able to be here for all the questions, but it would be very helpful to me.

So, Mr. Scheck, we will turn to you, and once again we are glad to have you here.

PANEL CONSISTING OF BARRY C. SCHECK, PROFESSOR OF LAW, AND CO-DIRECTOR, INNOCENCE PROJECT, BENJAMIN N. CARDOZO SCHOOL OF LAW, AND MEMBER, NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, NEW YORK, NY; GEORGE CLARKE, DEPUTY DISTRICT ATTORNEY, SAN DIEGO COUNTY, CA, AND MEMBER, NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, SAN DIEGO, CA; BRYAN A. STEVENSON, DIRECTOR, EQUAL JUSTICE INITIATIVE OF ALABAMA, AND ASSISTANT PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, MONTGOMERY, AL; DENNIS FRITZ, KANSAS CITY, MO; AND JAMES WOOLEY, BAKER AND HOSTETLER, AND MEMBER, NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, WASHINGTON, DC

STATEMENT OF BARRY C. SCHECK

Mr. SCHECK. Thank you, Senator Hatch. There is one other qualification I should state that I think may help the committee with my testimony, and that is I am a Commissioner of Forensic Science in the State of New York, which means we have a commission that regulates our crime labs and helps set up our DNA databank. And working with Howard Safir, whom I sue a lot of times in civil rights actions, the Mayor of the City of New York, and Governor Pataki, we have worked hand in hand in cleaning up the DNA backlog. I am the one that told them to test those 15,000 untyped rape kits in the City of New York, and so I think I have a good handle on the cost issue which seems to be of concern in light of Ms. Camps' testimony.

First, let me say, Senator Hatch, there have been at least 73 post-conviction DNA exonerations in North America, 67 in the United States, 6 in Canada. Our Innocence Project has either assisted or been the attorney of record in 39 of these cases, including the 8 people that were sentenced to death. In 16 of these 73 cases, the DNA testing has not only remedied the miscarriage of justice, but has led to the identification of the real perpetrator, just as it did in the case of Dennis Fritz.

With the expedited, expanded use of DNA databanks and with the continued technological advances in DNA testing, not only will post-conviction DNA testing continue exonerating people, but it also is going to increase the number of times that we are able to identify the real perpetrator.

There is an urgent need for national legislation to assist in what is actually a narrow but important group of people, those who have been sentenced to decades in prison or sit on death row, but could show through post-conviction DNA testing that they were wrongly convicted or sentenced.

I am profoundly indebted to you, Senator Hatch, for taking up this cause and holding these hearings. And, of course, I cannot thank enough Senator Leahy, Senator Feingold, and Senator Smith for cosponsoring the Innocence Protection Act.

Let me just hit a few key points in considering this historic legislation. First, very quickly, we can't limit this just to capital life sen-

tence cases. Neither bill does, but the reason I raise it is that when you look at some of the post-conviction DNA statutes that are passing, particularly in the State of Washington and the State of Tennessee, they only limit it to capital cases or life sentence cases. What about all the other people like Dennis Fritz who were in jail for decades who could prove their innocence with a DNA test?

The issue is statute of limitations. In the report that Woody Clarke and Jim Wooley and I served on, Recommendations for Handling Post-Conviction DNA Applications, which comes out of our Commission on the Future of DNA Evidence, a commission that was made up primarily of law enforcement people, police chiefs, crime lab directors, prosecutors such as my colleagues, we came to the considered judgment that in terms of seeking a post-conviction DNA application, there should be no statute of limitations.

By that, I simply mean that if a DNA could show a reasonable probability that you were wrongfully convicted or sentenced, then you should have a chance. And the reason that is so important is that we are looking at cases that are 10, 15, 20 years old. By the time, whatever standards you choose, an inmate is able to find the transcripts, find the lab reports, find the police reports and make the necessary showing that a favorable DNA test would show a reasonable probability of wrongful conviction or sentence, it takes a number of years, particularly in jurisdictions where there are no counsel, certainly not in post-conviction, that can handle this. It was true in just about every one of these cases where people were exonerated.

The other point I should jump to right away—and on this statute of limitations point, just look at all the people. I mean, we had just since our book "Actual Innocence" was published, Clyde Charles, in Louisiana, 19 years in jail in the infamous "Farm" in Angola Prison. He spent nine years trying to get the DNA tests.

Another inmate that greatly concerns me is a man named Archie Williams, in Baton Rouge, Louisiana. He really gets to the point. He has been convicted in a case where it was one perpetrator, a single eyewitness. The prosecution took the position at the time of trial that the blood type from the semen matched Mr. Williams. He is asking for a DNA test. The Louisiana courts won't let him have that test. We have been pushing for it for years. We are now in Federal court.

The rationale they came up with—and this is why I think the actual innocence standard, Senator Hatch, is too high. The rationale that the Louisiana courts came up with, and it has happened in case after case, is they suddenly said, well, I don't care if the prosecution's theory at the trial is that he was the semen donor; it is possible that there was another consensual donor; maybe the husband of the victim had sex with her.

Well, that is something we can test with elimination samples, and we have done it in case after case. Yet, the courts have denied him access, even though it is perfectly appropriate.

If you watch tonight, "The Case for Innocence," a "Frontline" special produced by Ofra Bickel that is going to show you the case of Roy Criner——

The CHAIRMAN. What time is that on? Do you know?

Mr. SCHECK. I don't know when PBS is running it, but it is——

The CHAIRMAN. It is "Frontline?"

Mr. SCHECK. Yes, and I will send a copy of the tape, sir, because it will show the Criner case.

The CHAIRMAN. Well, I would like to have it.

Mr. SCHECK. When you see the reasoning of the courts there, it is going to trouble you.

The CHAIRMAN. It troubles me now.

Mr. SCHECK. So I think "actual innocence" is too high. We have so many people who have spent so many years knocking on the doors, unable to get the DNA tests because of the statute of limitations. And I know, given the tenor of these hearings, something is going to be done about it.

Now, let me get to the cost point about preserving the biological evidence and why actually the proposal in the Leahy bill is going to help. As Jim Wooley and Woody Clarke certainly will tell you, we had the people on our DNA commission from the Los Angeles Police Department crime lab come to us and make a presentation that they have all this evidence and they are afraid to get rid of it.

I can tell you, because we are the ones in the trenches litigating these cases, the rules on preservation of evidence across the States is totally haphazard. It doesn't even matter what the rules are. It is totally fortuitous whether they save the samples or not.

But if we say, if you are in jail and biological evidence could be determinative, it should be preserved, unless the State comes in and gives you notice of 90 days and says, we are going to destroy it. That is going to help, and it is going to help remember, because every time an innocent person is put in jail, the real perpetrator is out there committing more crimes, and that is how DNA testing and DNA databanking can help us. So with these old cases, it is a net plus to law enforcement that they have to inventory in a sensible way the old, unsolved cases. There is no bigger supporter than I am of testing these old, unsolved cases.

I have a problem, Senator, just in the language. I hear from the tenor of your remarks that you wouldn't intend it to be a bar, but when we talk about the evidence was not subject to DNA testing requested because the technology was not available at the time of the trial, taken literally, almost every person exonerated with a DNA test would be excluded if it was taken literally, because since 1988, as Dennis will tell you, there was some form of DNA testing that was, in theory, out there.

The compromise that our DNA commission and the Leahy bill says is that if a more accurate DNA test could show you innocent, then you have shot at it because there have been some improvements in the technology.

The CHAIRMAN. I am for that, so there is no problem.

Mr. Scheck. OK.

The Chairman. We will resolve that one way or the other. I think ours does. Ours is the exact language of the Illinois statute.

Mr. SCHECK. Right.

The CHAIRMAN. And we thought we had solved the problem. I think we have, but we will look at that. You are making a good point there, as far as I am concerned.

Mr. SCHECK. The final point I just want to make, as I see my time is up, is that this is going to be a narrow number of cases really in the final analysis. Seventy-five percent of the time in these innocence cases, the evidence is lost or destroyed and we can't get the test, even if it could be dispositive on the issue of guilt or innocence.

If we pass the Leahy bill, just with that standard today, I don't think nationwide ultimately by the time we find the evidence there would be a hundred cases. But these cases are of such critical importance to learning something about the criminal justice system. In our book "Actual Innocence," we go through what DNA testing shows us in these post-conviction situations, what we can learn about mistaken identification, false confessions, jailhouse informants, bad lawyers, prosecutorial and police misconduct—all the causes of the conviction of the innocent.

And we propose mainstream proposals that Republicans and Democrats, liberals and conservatives, prosecutors and defense lawyers, can all get behind because they not only prevent the conviction of the innocent, but they lead to the identification of the guilty before they commit more crimes. That is what this is about and that is what we lay out here.

And, Senator, I am so happy that you have presented this. It is a race against time. We are in a race against time as they go through bureaucratically destroying the biological evidence that are the keys to the freedom of people. We can learn so much to fix this system and change it.

I agree with Senator Schumer's remarks that this is neutral. Draw what conclusions you may want about the death penalty, but the need for this kind of innocence protection legislation and the need for more standards and more money for counsel. I can't emphasize enough how important that is.

Thank you, sir.

The CHAIRMAN. I want an autographed copy of that book, okay?

Mr. SCHECK. Well, I should say that I brought a whole series and they are all available for each Senator here.

Senator SESSIONS. How much is it, Mr. Scheck? [Laughter.]

The CHAIRMAN. I will put it in my autographed book section after reading it.

[The prepared statement of Mr. Scheck follows:]

PREPARED STATEMENT OF PROF. BARRY C. SCHECK

There have been at least 73 post-conviction DNA exonerations in North America; 67 in the United States, and 6 in Canada. Our Innocence Project at the Benjamin N. Cardozo School of Law has either assisted or been the attorney of record in 39 of those cases, including 8 individuals who served time on death row. In 16 of these 73 post-conviction exonerations, DNA testing has not only remedied a terrible miscarriage of justice, but led to the identification of the real perpetrator. With the expanded use of DNA databanks and the continued technological advances in DNA testing, not only will post-conviction DNA exonerations increase, but the rate at which the real perpetrators are apprehended will grow as well.

There is an urgent need for national legislation to assist a narrow but important group of people: Those who are sentenced to decades in prison, or sit on death row, but could show through post-conviction DNA testing that they were wrongly convicted or sentenced. I am profoundly indebted to you, Senator Hatch, for taking up this cause and holding these hearings; and, of course, I cannot thank enough Senator Leahy and Senator Smith for co-sponsoring the Innocence Protection Act.

As you consider this historic legislation, I would urge you to keep these key points in mind:

1. Do not limit relief to capital or life sentence cases

Only 8 of the 73 post-conviction DNA exonerations involved inmates on death row. People who have been sentenced to decades of incarceration but can prove their innocence deserve an opportunity for justice. Unless there is a uniform requirement that states give inmates such an opportunity, they will not necessarily receive. For example, the State of Washington just passed a post-conviction DNA bill but it only applies in capital or life sentence cases. Fundamental fairness requires an equal opportunity for all classes of inmates across the country to prove their innocence; only federal legislation can provide such a guarantee.

2. No statute of limitations

In our report, *Recommendations For Handling Post-Conviction DNA Applications,* and in our model statute, the Commission on the Future of DNA Evidence did not create any time limits or statute of limitations for making a post-conviction DNA application. The key requirements were substantive—the inmate has to show a reasonable probability that DNA testing would demonstrate he was wrongly convicted or sentenced. I can assure you, based on the work of the Innocence Project, which has done, by far, more post-conviction DNA litigation than anyone else, that the Commission's decision not to create any new time limits or statute of limitations was a considered judgment and a correct one. When one is dealing with old cases (10, 15, sometimes 20 years old) it is difficult to assemble police reports, lab reports, and transcripts of testimony that are necessary to show that a DNA test would demonstrate innocence. Indigent inmates serving hard time may not have the resources or access to counsel to gather the necessary materials expeditiously.

That was true for Dennis Fritz and Ron Williamson who were exonerated with DNA testing in April of 1999 in Oklahoma. Dennis received a life sentence. Ron came within 5 days of execution. DNA testing also identified the person, through a DNA databank hit, who probably committed the rape homicide. It was true for Clyde Charles of Houma, Louisiana who spent 19 years in Angola Prison, the so-called "Farm," and 9 years trying, unsuccessfully, to get a DNA test within the state courts of Louisiana—they said he was too late—until we got a federal judge to grant relief pursuant to a Section 1983 suite for injunctive relief. It was true for Herman Atkins of Riverside, California who was released in February of 2000. It was true for Neil Miller of Boston who was released only because, after many years of trying through the courts, District Attorney Ralph Martin consented to DNA testing. It was true for A.B. Butler of Tyler, Texas who was pardoned two weeks ago by Governor Bush after 17 years in jail for a crime he did not commit. Butler attempted unsuccessfully pro se to get DNA testing through the courts for 7 years; he only got testing after the Centurion Ministries and attorney Randy Schaffer got involved and obtained consent to testing from a local district attorney.

Without adequate counsel, and without resources, it is simply unrealistic and unfair to create a new statute of limitations on post-conviction DNA testing. It should be enough for the inmate to show that a DNA test would provide non-cumulative, exculpatory evidence demonstrating that he was wrongfully convicted or sentenced.

3. There should be a duty to preserve biological evidence while an inmate is incarcerated

In 75% of our Innocence Project cases, where we have already determined that a DNA test would demonstrate innocence if it were favorable to the inmate, the evidence is lost or destroyed. Calvin Johnson of Georgia was exonerated after 17 years in prison for a crime he didn't commit but only because, by sheer chance, a court clerk decided not to destroy, as a matter of bureaucratic routine, the rape kit that led to his freedom. The rules for the preservation of biological evidence are totally haphazard across the country. There should be a general requirement to preserve biological evidence and an opportunity for law enforcement, upon notice to an inmate, to move for destruction of the evidence in an orderly way. This would not only preserve the rights of inmates to produce proof of their innocence through DNA testing, but help law enforcement re-test old cases to catch the real perpetrators.

4. There must be more funding to provide competent counsel, especially in capital cases

Recent revelations reported by the Chicago Tribune about the lack of adequate counsel for inmates on Death Row in Illinois and Texas are troubling but not surprising. The American Bar Association has long been on record about this crisis, and in our book, Actual Innocence, we discuss at great length the terrible problem of incompetent counsel we found among the individuals exonerated with post-convic-

tion DNA testing. DNA testing only helps correct conviction of the innocent in a narrow class of cases; most homicides do not involve biological evidence that can be determinative of guilt or innocence. Nothing guarantees the conviction of the innocent more than a bad or underfunded lawyer. We have to rely on the adversary system, and the key to that system is a defense lawyer who is qualified, has adequate funds for investigation and experts, and is compensated well enough to provide good representation. I strongly support those sections of the Leahy-Smith bill that provide for standards and more funding for counsel.

5. Requirements about the availability of DNA technology should remain flexible

In the vast majority of post-conviction DNA exonerations some form of DNA testing was, in theory, available to the defendant at the time of trial. In some instances the form of DNA testing available was not sensitive enough to produce a result, but later testing was able to produce irrefutable evidence of innocence. For example, Kirk Bloodsworth of Maryland, who received a death sentence, had inconclusive DNA testing using RFLP (Restriction Fragment length Polymorphism Testing) but was exonerated by PCR (Polymerase Chain Reaction) testing. Other times requests for available DNA testing were wrongfully denied by trial courts, or incompetent lawyers failed to request the testing. In other cases, early forms of DNA testing which were not very discriminating (e.g., the PCR DQ Alpha test) and failed to exclude a defendant at the time of trial but a more discriminating DNA test, developed years later, produced proof of innocence. The technology is always advancing and that is why it is wise to provide for the opportunity to prove innocence with new, more accurate DNA testing. Indeed, this is precisely the course Governor Bush adopted in the Randy McGinn reprieve decision. Mitochondrial DNA testing, one of the more sensitive tests that will be used in the McGinn case, can now get results by extracting DNA from the shaft of a hair; previously, one needed a hair with a fleshy root to get a result. This technological breakthrough is of critical importance because microscopic hair comparison—a forensic test that is increasingly being exposed as junk science—has contributed to the conviction of at least 18 men subsequently exonerated with DNA testing.

6. Post-conviction DNA exonerations provide an unprecedent opportunity to improve the criminal justice system

Post-conviction DNA exonerations have a special value for improving the entire criminal justice system. Never before have so many people been exonerated so quickly without any debate about their actual innocence. The fact that DNA testing can so exonerate the wrongly convicted is hardly news; what is more important, however, is to figure out how the innocent got convicted in the first place. That is why Pete Neufeld, Jim Dwyer and I wrote Actual Innocence. We not only tell the stories of the innocent wrongly convicted but identify systematically the causes: Mistaken eyewitness identification, false confessions, fraudulent and junk forsenic science, defense lawyers literally asleep in the courtroom, prosecutors and police who cross the line, jailhouse informants and the insidious problem of race. We present mainstream solutions to these problems that conservatives and liberals, Republicans and Democrats, prosecutors and defense lawyers can all support. Certainly one of the most critical reforms is the Innocence Protection legislation you consider today. I urge you to pass a bill this year before more evidence is destroyed or degrades and the slim hope innocent men have to achieve their freedom disappears.

The CHAIRMAN. Mr. Clarke, we will turn to you.

STATEMENT OF GEORGE CLARKE

Mr. CLARKE. Thank you, Mr. Chairman. I have already asked Barry for a copy of the book with his autograph.

Senator LEAHY. Give him Senator Hatch's copy.

Mr. CLARKE. Perfect.

I want to thank you also, Senator Leahy and members of the committee, for this opportunity to address you on a topic that I think is of tremendous importance to all of us in the criminal justice system, as well as the public.

As was mentioned, I do serve, along with Barry and Jim Wooley, on the National Commission on the Future of DNA Evidence. Since 1998, we have been engaged in a study of various aspects of foren-

sic DNA typing which included, as Barry mentioned, the post-conviction uses of that typing and the important use it has in helping to exonerate inmates who were convicted of crimes prior to approximately 1992, in that range, and so forth.

Many of you are familiar perhaps with the study undertaken by the National Institute of Justice and its 1996 report, a copy of which I have, "Convicted by Juries: Exonerated by Science," which chronicles the cases of 26 inmates who were convicted of crimes, again, a number of years ago prior to the availability of DNA typing, who were later exonerated by DNA typing and released from prison. I think that study is very important because it gives us a good deal of instruction about the power of this technology to truly deal with the truly innocent in that context.

One of those 26 cases actually took place in San Diego. A man named Frederick Rene Daye was convicted of the 1984 kidnaping and sexual assault of a female victim. He was tried, he was convicted of those crimes and sentenced to a very lengthy term in prison. He was convicted based on not only eyewitness identification by the victim herself, but also eyewitness identification by a totally independent third party who witnessed the kidnaping itself. Frederick Daye just a number of years ago was unequivocally exonerated by DNA typing.

My own office has begun a program—this is an in-house program—of reviewing our own older cases—this is in San Diego County—to determine the propriety of post-conviction DNA typing. I am not aware of any other program or any other prosecutor's office in the country that has begun such a program, but we are just in the beginning stages of that.

With the assistance of our California Department of Corrections, we have identified 560 inmates who are currently still serving sentences for crimes committed prior to 1992, and it is from that list that we have begun our study. Our goal is to identify those individual cases in which inmates have consistently maintained their innocence and that they were misidentified either by eyewitness identification or other circumstantial evidence indicating that they were the individual who committed that crime. In the appropriate cases that we discover, we will offer DNA typing to those inmates to help resolve the question of actual guilt or actual innocence.

I have had the opportunity to closely examine, I believe, both the bill sponsored by Senator Leahy and others, as well as the Hatch legislation. And in my opinion, the standard set forth in the Leahy bill frankly casts too wide a net, and I will explain a little bit more about what I mean by that in a moment.

As Ms. Camps pointed out, resources that are currently available for DNA typing can provide for only a fraction of the actual needs of that typing. Evidence, as has already been noted, in tens of thousands of cases of serious and violent crimes are denied the power of DNA typing. Nearly 1 million individuals, we were told as a commission, have provided convicted offender samples and they have yet to be typed and entered into our national database systems.

The most important point I think for your consideration is this. Senate bill 2073 requires the granting of DNA typing so long as that evidence is available, obviously, and that it would, if exclu-

sionary, be relevant and exculpatory. Now, as Ms. Camps pointed out, that is a standard that is of some difficulty to me. I think it can be interpreted as has been presented by Senator Leahy and others, which would frankly render it in a manner not totally unlike the Hatch legislation.

My fear is that it will not, and that using terms like "exculpatory" and "relevant" would frankly allow testing of a forcible rape that occurred in a hotel room—allow testing of a semen stain found on the bedspread that the likelihood is has absolutely nothing to do with the rape itself, and I will describe a couple of more examples in a moment.

In contrast to that standard, in my view, the Hatch legislation prescribes that an applicant must provide, as has been noted, a threshold or prime facie showing that identity was at issue in the prior proceedings and that results of DNA typing, if exclusionary, would establish the inmate's innocence. In other words, the Hatch bill contains what I think is a fair and common-sense requirement that innocence be able to be established by such DNA testing, similar to what I believe the statutes in Illinois, New York and Arizona provide.

The decision of this committee and Congress on this issue, I think, is an extremely important one because interpretation of the significance of DNA results, even if testing is actually conducted, can be extremely difficult. for over 100 years, forensic science has provided us an example already, and that is, as has been noted earlier, traditional fingerprints on the end of our fingers.

Fingerprints from crime scenes have proven material in some cases, but frankly they are not material evidence in most cases. Charged defendants are frequently excluded from having left fingerprints at crime scenes, but that evidence proves to provide practically no relevant or even probative information whatever.

Most importantly, those exclusions do not normally establish innocence. Examples in biological cases are common—DNA typing of evidence that may be actually from a husband, a boyfriend, or other consensual partner. Multiple-assailants DNA may, in fact, exclude an individual charged, or in this case convicted of a crime and yet not establish innocence.

The standard that we will apply in our own office program closely mirrors that in the Hatch suggested legislation. The criteria in that bill, I believe, strike a necessary balance between the interests of society and our community, and the interests in exonerating innocent individuals.

Importantly, the standards set forth in the Hatch legislation, in my view, would allow Fred Daye to receive testing, in the example I gave you earlier. And I think that is a critical standard that that testing, in fact, would be available. I want to commend the Hatch legislation as well for the funding that has been provided as well.

But I think, in conclusion, no one should question the benefit that post-conviction DNA testing can provide. The integrity of that same justice system, however, demands that any decision be based on material evidence demonstrating actual innocence. I think our justice system and the American public frankly should demand nothing less.

Thank you.

The CHAIRMAN. Thank you so much.
Professor Stevenson, we will turn to you.

STATEMENT OF BRYAN A. STEVENSON

Mr. STEVENSON. Thank you, Mr. Chairman, and it is an honor for me to be back before this committee. No one in this room, and certainly no one who is familiar with the workings of our criminal justice system, could deny that as we sit here today, there are innocent men in jails and prisons in this country. They have been wrongfully convicted. And given the rise in the number of people who have been sentenced to prison over the last 30 years, from 200,000 in 1972 to 2 million today, it is quite likely that there are a lot of men and women who are innocent, sitting in jails and prisons today.

In the death penalty context, the recent evidence that we have seen of 87 people being released from death row after evidence of innocence being presented—as we sit here today, it is very likely that there are innocent people awaiting execution, moving ever closer to execution. The legislation pending before this committee is critically urgent in identifying some of those innocent people and preventing greater injustice. It is not a resolution of the problem.

After someone has been in prison for 12 years or 15 years, or been on death row for 6 years or 10 years, to simply say we now recognize that you are innocent is a great injustice. Someone's life has been taken away from them in very fundamental ways. That is why I am so pleased that this committee has taken the urgency of this matter and made it a priority in dealing with this very critical problem.

Yesterday, the Columbia University report indicated that in two-thirds of death penalty cases, we have made mistakes. It is not a report that suggests that in 66 percent of all death penalty cases, the people were innocent. When you consider the fact that we have had thousands of cases in this country where people have been sentenced to death and in nearly two-thirds of them their convictions or death sentences were illegally imposed, I think it imposes on all of us the need to begin to seriously question how we are thinking about criminal justice enforcement in this country.

There was a lot said earlier today about how, when we try to improve the workings of the criminal justice system, we necessarily burden the interests of victims of violent crime. And I would really like to challenge that because as someone who has lost a family member to homicide, as someone who has seen a family member murdered, as someone who has relatives who have been sexually assaulted and brutally assaulted, we do a disservice to victims when we suggest that protecting the innocent, be they folks who have never had exposure to the criminal justice system or people who are wrongly sitting in jails and prisons, is something that victims are against.

Victims of violent crime and survivors of people who have been victimized by violent crime don't want just anybody convicted for the crime that took their loved on. They want the somebody who actually committed the crime. And what this legislation does today is allow us to move closer to giving them that assurance.

Now, post-conviction DNA testing will do something quite useful. It will allow us to identify those cases where biological evidence can lead to the identification of those wrongfully convicted. But it would be wrong for any of us to conclude that post-conviction DNA testing is the answer to the problem of innocent people on death row or in jails and prisons.

In my State of Alabama, we have 187 people under sentence of death. In only 8 percent of those cases was the aggravated murder for which someone was convicted aggravated by rape or sexual assault. It is likely that in even fewer of those cases will there be biological material and DNA testing that will be useful. In half of those cases, they were tried in the last 5 years, where presumably DNA testing has already been applied. So we are talking about a very small number.

Our review of cases nationwide suggests that less than 10 percent of death penalty cases are even eligible at the conceptual level of being cases where biological material may make a difference. Tragically, many of the innocent people for whom DNA evidence could make a difference won't get the benefit of this bill because, as Mr. Scheck has indicated, we have destroyed the biological material and rape kits that might lead to those tests. Again, that is why I think this bill is so urgent.

But the critical point that I really want to stress for all the members of this committee is that under neither of the bills that we have discussed today will we advance in any significant way the opportunity to identify the innocent if we do not provide counsel. It would be a mistake for anyone in this room to think we are doing something useful in creating a right or remedy of post-conviction DNA testing if we don't match that right with counsel.

The controversy that we have been discussing about what is the requisite showing of what is necessary to implicate testing underscores the value and the need for counsel to be involved in these proceedings. And in too many States, in even death penalty proceedings, that is simply not the case.

In my State of Alabama, we have 187 people on death row as I sit here right now. We have some 27 people on death row who do not have legal representation. After this Congress passed the Antiterrorism and Effective Death Penalty Act and created a one-year deadline, many of those people are within months of having that deadline permanently foreclose having their cases reviewed.

We have already had people miss the deadline. I can't tell you what is going to happen to those folks, but I can tell you that if we don't provide for counsel in these cases, none of the remedies that we are talking about, none of the remedies that we are grappling with are going to make a huge difference.

It was interesting to note in the Columbia report that the leading cause of error in death penalty cases is bad lawyering. It is something that we cannot disconnect from our efforts to deal with DNA testing. No one is going to be able to write a note saying I want a DNA test and, based on either bill, get a test. They are going to have to do more than that. And for the illiterate, mentally ill, imprisoned disadvantaged people who are usually the victims of these wrongful prosecutions, we cannot expect either bill to make a difference without providing people with lawyers.

We have, I think, an opportunity as the leading democracy in the world, as a nation that is activist on human rights in the international context, to improve our system of justice. But I also think we have an obligation as people who care about justice, people who insist that we do all that can be done to prevent people from being wrongfully convicted and certainly being wrongly executed, to take what is offered in the Leahy bill and use it as an opportunity to begin to think more critically about these issues.

Without the counsel provisions in the Leahy bill, we will do very little today, very little. We will not advance this issue at all. By providing counsel, we can not only make post-conviction DNA testing a useful tool for identifying wrongly convicted people, but we might also get to the other people who have been wrongly convicted. Again, 90 percent of the people who have been innocent on death row and had their cases overturned and been released could not use post-conviction DNA testing.

It is a critical issue that I think warrants this committee's attention, and I am grateful for the opportunity to speak to it, and especially grateful that this committee and the chairman and committee members have taken this issue on. We desperately need your intervention.

My Senator, Senator Sessions, has talked about whether things have gotten better. In our State of Alabama, things have gotten better in a lot of areas. But in the area of post-conviction counsel, things have gotten worse. In 1990, I could tell you if I were sitting here that we had a resource center that made sure that there were no people on death row that did not have legal representation. Today, as I sit here, I have to tell you that we have dozens of people without legal representation.

The State law in Alabama still limits compensation for lawyers in post-conviction cases to $1,000 per case. We cannot advance justice, we cannot effectively deal with post-conviction DNA testing, we cannot get to the core problems of innocent people wrongly convicted until we deal with that problem. I am grateful that the Innocence Protection Act has taken that on and matched it with the critical issues that are presented by DNA testing, and grateful for the interest and work of this committee.

Thanks very much.

The CHAIRMAN. Thank you, Mr. Stevenson.

[The prepared statement of Mr. Stevenson follows:]

PREPARED STATEMENT OF BRYAN STEVENSON

I greatly appreciate the opportunity to address the important legislation pending before this Committee. The "Innocence Protection Act" or Senate Bill 2690 is an enormously important step forward in the effort to improve the administration of criminal justice in the United States. The advent of DNA testing technology has dramatically advanced forensic science as applied to law enforcement and criminal investigations. However, notwithstanding our ability to now identify some innocent people who have been wrongly convicted of a crime, there are several procedural and technical obstacles that prevent many imprisoned people from proving their innocence through DNA evidence. By creating an appropriate and efficient mechanism for postconviction testing and by affording indigent people with the essential assistance of counsel, S. 2690 provides much needed reform in a critical area where the demands of justice are most compelling.

DNA TESTING

Which were the primary methods of scientific identification used before DNA testing became widespread. As a result if improved DNA testing techniques and more reliable testing protocols, forensic scientists and lab investigators can now make definitive determinations about the identify of someone's blood, hair, semen and other genetic evidence. This technological advance had revolutionized pretrial and trial proceedings in criminal prosecutions in the last five years. Forensic scientists can offer dramatically greater assurances in some cases that the accused is guilty of the crime for which he or she has been charged. Similarly, in the last several years, DNA testing has prevented hundreds of wrongful prosecutions against people suspected of committing a violent crime who were in fact innocent. Law enforcement agencies across the county now routinely send DNA samples to the Federal Bureau of Investigation for testing in any case involving the arrest of someone for rape or rape-murder. As has been previously reported, of the first 18,000 results analyzed by the FBI labs, DNA testing excluded the suspect in 26 percent of the cases. This evidence of error regarding those whom the police wrongly suspected of committing a serious violent crime compels more effective use of DNA testing in the postconviction context and makes the elimination of testing barriers absolutely crucial.

As an attorney who has primarily represented capital defendants and death row prisoners for 15 years, I am very impressed with the revealing influence of DNA testing in some capital cases. In new capital cases, it is rare that an aggravated rape-murder or sexual assault case is prosecuted without some effort to introduce DNA test result evidence. There have also been dozens of cases where people suspected of capital crimes have been cleared pretrial as a result of DNA tests.

POSTCONVICTION DNA TESTING

In the postconviction context, DNA testing has proved somewhat more complicated. Because DNA testing was not readily utilized in many jurisdictions until after 1994–1995, there are many people who have been wrongly convicted of crimes in the 1970's and 1980's who are still in prison. Some of these wrongly convicted prisoners could be exonerated by DNA testing if a procedural mechanism were available to assist both in facilitating a test and in providing the necessary relief if the test result revealed that the imprisoned applicant was not guilty. While dozens of imprisoned people have already won their release after DNA testing established their innocence, many others have been blocked from DNA testing because postconviction remedies are not longer available to them.

Many states have statutes of limitation which bar new evidence claims in postconviction proceedings. Many innocent people have been unable to obtain adequate legal representation to secure a test and have an attorney advocate on their behalf. Consequently, many innocent men and women remain imprisoned or under a sentence of death. Each month the effort to provide relief to these wrongly convicted prisoners is undermined by the destruction of biological material necessary to conduct DNA testing. The failure of some law enforcement agencies to preserve scientific evidence has eliminated any hope for some wrongly convicted prisoners to prove their innocence.[1]

The Innocence Protection Act provides for important new procedures and requirements that would address many of the problems currently preventing the identification of wrongly convicted prisoners through postconviction DNA testing. Requiring the preservation of biological evidence, affording wrongly convicted prisoners a right to DNA testing regardless of time restrictions under existing postconviction procedures, and improving defense services to the poor who have been falsely accused and wrongly convicted, as provided in S. 2690, is an extremely important step forward.

A. While improved procedures for obtaining postconviction DNA testing are crucial, DNA will uncover only a small percentage of the cases where innocent people have been wrongly convicted

The Innocence Protection Act will do much to restore confidence in many criminal cases where biological evidence can resolve lingering questions about guilt or innocence. Our nation's status as the world's leading democracy and our activism on

[1] There are dozens of examples of law enforcement agencies destroying critical biological evidence even where there is evidence that some accused have been wrongly convicted. In 1997, Harris County, Texas court officials destroyed DNA samples in 50 cases within days after Kevin Byrd, who had been convicted in Harris County, was released from prison after DNA tests showed that he was not guilty of the crime for which he had been convicted.

human rights in the international context requires us to take all steps possible to protect against wrongful convictions and execution of the innocent. Improved procedures for postconviction DNA testing will tremendously aid the goal of a more reliable and fairer administration of criminal justice. However, it is worth keeping in mind that DNA testing will touch a relatively small subset of cases where innocent people have been wrongly convicted. Improved access to DNA testing for prisoners will be useful only in those case where (1) biological evidence can determinatively establish guilt or innocence, most notably rape, rape-murder and sexual assault cases, (2) the accused is still in prison or on death row and, most likely, had his case tried before 1994, and (3) the biological evidence has been preserved and is still available for testing. This is a relatively fixed and finite universe of cases.

The Innocence Protection Act can over a relatively short period of time accomplish much of what it intends by affording wrongly convicted prisoners a meaningful opportunity to obtain relief through DNA testing. It is hoped that after a few years, DNA testing will become less critical in the postconviction review of criminal cases where legitimate claims of innocence can still be made. This is certainly true, assuming improved access to counsel, in the death penalty context, where there is a relatively narrow category of cases that can benefit from postconviction DNA testing. Only 8 of the 87 innocent people who have been released from death row since 1973 were proved innocent based on DNA evidence. The incidence of rape-murder or sexual assault-murder as the basis for a capital prosecution and a sentence of death is comparatively small in the universe of cases in which the death penalty has been imposed.

In my state of Alabama, it is estimated that only 23 of the 187 people who are currently on death row have been convicted of murders aggravated by rape or sexual assault where biological evidence may be determinative of guild. In 10 of the 23 cases where death was imposed, the trials took place after 1994 when DNA evidence was presumably available and utilized. While DNA evidence may sometimes prove useful in cases where the condemned has not been convicted or charged with an accompanying rape or sexual assault, a reasonable presumption exists that postconviction DNA testing will be meaningful in only about 6% of death penalty cases in Alabama. The availability of physical evidence and the credibility of an innocence claim based on other evidence will further reduce the viability and likelihood of postconviction DNA testing in these cases.

While the identification of a single innocent person on death row would justify this important legislation, no one should believe that this Act will trigger an enormous number of applications for postconviction DNA testing in the capital punishment context. A random review of about a third of the death penalty cases nationwide in which data was readily available reveals that in only 116 of 1403 cases was a death-sentenced prisoner convicted of a crime accompanied by rape of sexual assault of the victim prior to 1994. While there may be significant differences between jurisdictions in the number of capital convictions where biological evidence can be tested, it is worth noting that it appears that less than ten percent of those sentenced to death have been convicted of crimes accompanied by rape and sexual assault prior to 1994. Again, given the other limiting factors that restrict the viability of DNA testing in postconviction cases, we can make important but limited progress in the identification of innocent people who have been wrongly convicted through expanded DNA testing. There will still be much work to do to avoid executing the innocent and to identify the wrongly convicted after postconviction DNA testing procedures are improved.

B. The Importance of Providing Counsel

In most instances postconviction DNA testing has required the assistance of counsel to accomplish the exoneration of an innocent person who has been wrongly convicted of a crime. The provisions in S. 2690 for improving defense services to prisoners who have been wrongly convicted are thus crucial to the effectiveness of any effort to protect innocent people from further incarceration or execution.

In many DNA exonerations, the accused had been coerced into making a confession or other false or unreliable inculpatory evidence was presented. On April 15, 1999, Ronald Williamson was released from death row in Oklahoma after DNA evidence cleared him of the crime for which he had been convicted. Mr. Williamson was sentenced to death in 1988 and had come within five days of execution in 1994. His trial lawyer had failed to investigate his extensive record of mental illness or the fact that another man had confessed to the crime. Without postconviction counsel and assistance, Mr. Williamson's innocence could not have been established even with DNA testing. The assistance of counsel for the convicted prisoner is essential whenever postconviction DNA testing is employed to correct a wrongful conviction of an innocent person.

In the last 30 years the number of people incarcerated in the United States has increased dramatically. In 1972, there were 200,000 people in jails and prisons. Today there are over 2 million people incarcerated in federal, state and local jails and prisons. The dramatic increase in the number of people imprisoned has presented enormous challenges to the administration of criminal justice. One frequently ignored problem associated with the enormous increase in the number of people prosecuted and imprisoned is the ability of state governments to provide adequate legal representation to the accused or the imprisoned and to protect against wrongful conviction of the innocent.

In the death penalty arena this problem is especially acute. There are now close to 3,700 people on death row in the United States. Hundreds of these condemned prisoners have no legal representation. The ability of indigent death row prisoners to find competent legal representation throughout the litigation process has created tremendous uncertainty and raised serious concerns about the fairness and reliability of capital sentencing in many jurisdictions. The problems involved in providing adequate counsel for capital defendants and death row prisoners are the primary reasons why the American Bar Association has recommended that a nationwide moratorium on capital punishment be implemented.

In Alabama, our death row population has doubled in the last ten years. There are dozens of death row prisoners who are without legal representation and who cannot present compelling claims that their convictions and death sentences are legally and factually invalid. While state law permits an Alabama circuit judge to appoint a lawyer for postconviction proceedings, the law does not authorize any appointment of counsel until after a petition has been filed. Petitions cannot typically be filed until the case has been investigated and a lawyer has expended hundreds of hours of work. Even with appointment, state law in Alabama limits compensation for appointed counsel to $1000 per case.[2] This rate is so extraordinarily low that no lawyer can reasonably take on one of these difficult cases unless he or she is willing to represent the client for what amounts to pro bono service. Finding attorneys to handle these cases pro bono requires active recruitment, support services for recruited counsel, and basic, practical assistance to those who agree to take on a case.[3] The general crisis surrounding adequate legal services for death row prisoners has been exacerbated by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The AEDPA has now created a one-year deadline for people who have been wrongly convicted to present their claims in federal habeas proceedings. The initiation of this one-year time line is not tied to the requirement that indigent prisoners, even death row prisoners, have counsel available to them. Many death row prisoners are therefore now failing to have claims of innocence presented solely because they cannot secure legal representation. The elimination of federal funds for capital representation resource centers by Congress in 1995 has further added to the difficulty of making sure wrongful convictions in death penalty cases can be adequately brought to state and federal courts. From the late 1980's until 1995, federal funding was available through the U.S. Administrative Office of Courts, Defender Services Division to support resource centers which recruited and trained lawyers to handle capital cases in postconviction proceedings. Capital resource centers also provided direct services to dozens of death row prisoners and greatly reduced the number of prisoners for whom no lawyer had been found. After Congress eliminated federal funding of resource centers around the country in 1995, many centers, including the center in Alabama, were forced to close.

The provisions in S. 2690 that provide for better-funded legal representation to death row prisoners are absolutely critical if any meaningful effort is going to be made to minimize the risk of wrongful executions in this country. The problem of poor lawyering at trial contributes directly to the risk of convicting the innocent. In capital cases, mounting evidence of how poorly many death-sentenced prisoners were represented at trial continues to surface. Hundreds of death-sentenced prisoners were represented at trial by lawyers who were subsequently disbarred or suspended from legal practice for incompetent, unethical or criminal conduct. In Illinois, at least 33 death sentenced prisoners were represented by lawyers who were later disbarred or suspended from practice.[4] Much has been written about capital trials in the U.S. where defense attorneys were asleep, intoxicated, publicly stating

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[2] The $1000 rate was authorized by the state legislature in 1999; the rate until 1999 was $600 per case. Section 15–12–21, Code of Alabama (1975).

[3] Recruitment efforts by volunteers and the American Bar Association to meet the demand for pro bono services to death row prisoners have been unable to keep pace with the growing number of death-sentenced prisoners in the United States. Funded counsel for death row prisoners has thus become a critical issue.

[4] Amnesty International, "U.S. Death Penalty: Failing the Future," (April 2000 Report, pg. 66).

a belief that their client should be executed, directing racial slurs at the client, or otherwise providing ineffective assistance of counsel.[5]

In 1999 a federal court agreed that a Texas death row inmate in effect had no lawyer at his 1984 trial. Calvin Burdine, whose lawyer had slept during most of his trial, was ordered to receive a new trial after a federal judge concluded that Mr. Burdine's constitutional right to counsel had been denied by his lawyer's sleeping. However, without legal representation in postconviction proceedings, Mr. Burdine's claims could not have been presented. There is no constitutional right to counsel for postconviction review, and many people on death row cannot effectively file the appeals that have frequently proved vital in demonstrating innocence or otherwise establishing that a conviction or sentence is illegal.[6]

C. Other factors leading to the wrongful conviction of innocent people

Too many capital cases have been tried by defense attorneys who called no witnesses, made no argument or otherwise failed to act as an invested advocate. The risk of wrongful conviction in these cases is unquestionably high. Convicting the innocent is also a function of other factors, including incompetent or malicious suppression of exculpatory evidence by police and prosecutors, a reliance on jailhouse informants, and other misconduct or overreaching in capital proceedings.

Prosecutorial misconduct or the suppression of exculpatory material has been especially prominent in the cases of innocent people who have been released from death row. Walter McMillian was released from Alabama's death row after it was established that exculpatory statements from the state's primary witness against Mr. McMillian had been concealed. The witness had told investigating officers repeatedly that Mr. McMillian had no involvement in the murder for which he was subsequently convicted. Statements by this witness to another state investigator that he was "framing and innocent man for murder" were similarly never turned over to defense counsel. The desire to achieve a capital murder conviction at any cost frequently results in proceedings where a reliable determination of guilt or innocence is not likely. Mr. McMillian was actually placed on Alabama's death row for 15 months while awaiting his trial.

In some cases, the innocent have been sent to death row due to flaws in blood or semen testing but to equally unreliable evidence from jailhouse informants. Jailhouse informants or "snitches" are convicts who seek favorable treatment in their own cases in exchange for providing prosecutors with incriminating evidence in another case, often one in which competent evidence is lacking. These snitches frequently provide the only "confession" from a man who has otherwise insisted on his innocence to law enforcement and the public. One of the men released in recent years from Illinois' death row, Steven Manning, was convicted in 1993 on the word of a jailhouse informant who testified that Mr. Manning had twice confessed to the crime when the two shared a jail cell. For his testimony convicting Mr. Manning, the informant had eight years shaved off his own sentence for theft and other offenses. Mr. Manning was exonerated and charges were dropped this year after FBI tapes surfaced showing that in none of his conversations with this convicted felon did Mr. Manning admit any guilt of the crime. There are few cases where such tape recordings will be available to prove that the snitch has fabricated his testimony in a capital prosecution for his own benefit.

In some cases informants have testified against innocent capital defendants in an effort to deflect guilt from themselves. The United States Supreme Court granted relief to Curtis Kyles of Louisiana in 1995 because the prosecution had suppressed evidence about its paid informant who may himself have been the actual murderer. While the informant gave detailed testimony implicating Mr. Kyles, there was undisclosed evidence indicating that it was the snitch himself who had possession of the victim's belongings and who had been described by the eyewitness to the crime. The Supreme Court criticized the "uncritical readiness" of the prosecution to accept this informant's doubtful story. Yet it was on this testimony that Mr. Kyles was con-

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[5] *See e.g.*, Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale Law Journal 7, May 1994.

[6] Despite the elaborate review process surrounding capital cases in the United States, there have been eighty-five documented cases to date of innocent people who have been wrongly sentenced to death for crimes they did not commit. Some of these innocent men and women came within hours of an execution before being spared. For every seven people executed in the United States, an innocent death row prisoner has been identified. This shockingly high rate of error has caused a few states to consider a moratorium on capital punishment, but has left most proponents of the death penalty undeterred. Recent advances in DNA testing have played a role in identifying some of the innocent on death rows across the United States. However, police and prosecutorial misconduct, mistaken identifications, inadequate defense lawyering and other problems have accounted for most of these unjust death sentences.

victed and sentenced to death. Moreover, his relief did not come until years later when his pro bono lawyers pressed his case on federal habeas corpus—a result now jeopardized by the strict timelines and standards of the Anti-Terrorism and Effective Death Penalty Act that currently governs habeas corpus cases.

There have been and continue to be cases in which innocent people find themselves behind bars and cannot depend on scientific testing for exoneration. In 1987 charges were dropped against Oklahoma death row inmate Clifford Bowen when the state had failed to disclose information pointing decidedly to another suspect. There had been no physical evidence tying Bowen to the crime, and he was on death row despite the existence of 12 alibi witnesses who placed him 300 miles away from the scene. In a better-known case, Anthony Porter was released last year from Illinois' death row after volunteers found, among other things, that someone else had committed the crime, and that a witness had been pressured by the police to incriminate Mr. Porter. Indeed, a study indicated that, prior to Governor Ryan's establishing a moratorium on executions, Illinois capital cases were riddled with a myriad of errors, including that (1) in at least 46 death penalty cases, the prosecution's evidence included testimony from prison informants, a notoriously unreliable source of evidence; (2) in at least 20 cases, the prosecution's evidence rested partly on the visual comparison of hairs by laboratory technicians, a forensic method known to be unreliable; and (3) in at least 35 cases black defendants had been tried by all-white juries. Steps must be taken to ensure that such methods do not continue to be utilized to trap the innocent, and that those wrongly convicted will have both the time and the legal resources necessary to establishing the truth.

CONCLUSION

The Innocence Protection Act is desperately needed. Postconviction DNA testing and improving legal representation for death row prisoners is absolutely critical if we are to prevent innocent people from being executed and if we are committed to providing equal justice for all. I strongly urge this Committee to recommend passage of this important legislation.

The CHAIRMAN. Mr. Fritz, we are happy to hear your testimony at this time.

STATEMENT OF DENNIS FRITZ

Mr. FRITZ. Good morning, Chairman Hatch, Senator Leahy, and other members of the committee. My name is Dennis Fritz and I currently reside in Kansas City, MO. I want to say that it is such a great honor and pleasure to be before this committee today representing all wrongfully convicted people around the world, even, for unjust crimes that they are currently serving.

Actually, before I get into my presentation, I would just like to say that unless that shoe is on the other foot, we don't realize actually what we are going through. I mean, we can look at someone else and their problems and their dilemmas and we can make a judgment and we can look at this and go forth with our decision-making, which is good.

But I went through such a devastating time. As a matter of fact, in May 1987 I was arrested for a rape and murder that I neither committed nor had any knowledge of whatsoever. I was arrested 5 years after the crime had occurred, and from that day forward everything just went straight downhill in the judicial process.

I spent the next 12 years serving a life sentence until I was finally able to prove my innocence, for which I give many, many thanks to Barry Scheck and Peter Neufeld and the Innocence Project for their many, many efforts in securing not only my release, but other wrongfully convicted people. My co-defendant, Ron Williamson, as was previously mentioned, was also wrongfully convicted of the crime and was sentenced to death. He had come within 5 days of being executed.

We were both freed on the same day in April 1999, after it was proven through DNA evidence that neither of us could have committed the crime. The prosecutor agreed with defense counsel to dismiss the charges. As a matter of fact, the DNA evidence also established who the real killer was. That was a blessing.

At the time of the murder, I was a science teacher and a football coach at a junior high school in Ada, OK. My daughter, Elizabeth, was 11 years old. I loved my family, I loved my job. Just the fact that I was a murder suspect got me fired from my teaching position. Five years later, I was then arrested. The detectives then told me they knew I had not committed the crime, but they believed I knew who did it.

From the very beginning, I always told them that I was innocent, but it made no difference with these people. They were bent on conviction. They needed a conviction in this case. It had been 5 years. It was an election year, and anything that I said didn't make any difference.

My trial began on April 8, 1988. To say the very least, it was a total living nightmare. The prosecutor's case was almost entirely built on the lies of jailhouse snitches who got their sentences reduced for testifying against me. Even the real killer himself was used as a prosecution witness against both myself and the co-defendant. At the time of the trial, no one had even bothered to test his DNA evidence, even though he had been the last one seen with the victim shortly before her death arguing and shoving her against a car. But no one bothered to test his DNA evidence.

At that time, in 1988, DNA evidence was actually available for testing in my case. The only reason that it was not is because the proper laws were not enacted for that DNA to have been tested. Otherwise, if they had been, I would not have had to endure those 12 years of suffering and misery and pain that not only I went through, but my blessed family members did. That is where the real pain goes.

I mean, I was a sacrifice, maybe, to see the perpetuation of the advancement of your ideals, your decisions today. I will accept that, but that hurt my family. That disturbs me very much. I am mad, but on the other hand, I am happy that this committee has convened today and that these steps are being made for enactment of laws that definitely need to be enacted.

After I was convicted, I appealed my case throughout both the State and Federal Oklahoma courts. My appeals were denied at every stage of the judicial proceedings. At the time of my conviction in 1988, DNA testing actually, like I have mentioned, was just accepted by the scientific community.

For years while I was in prison, I repeatedly petitioned the courts to allow me to get the DNA testing done on the crime scene samples. Every time, I was flat out denied. By the time I got in touch with Barry Scheck and Peter Neufeld, I had already lost seven court decisions and had just about lost actually all hope of ever being a free man again.

Twelve long and tormenting years passed after that time and I did not see my daughter, Elizabeth. I could not bear for her to see actually what was going on in the prison. The visiting room was so disgusting, I wouldn't allow her to come. So I restricted her visi-

tations and I spoke with her over the telephone. I knew that she loved me, I knew that she believed that I was innocent. And my mother as well supported me throughout this terrible, hellish nightmare. I was subjected to indignities that no person should have ever had to suffer or suffer in the future, let alone being a person who is actually innocent of a crime.

The refusal of the State of Oklahoma to compare my DNA with the crime scene evidence was only one of the reasons why I lost all those years of my life. The other reason was my trial attorney's total ineffectiveness. First, he had no real incentive to defend me because he had only received $500 for representing me in a capital murder case. Besides that, he had never handled a capital murder case in his life. In fact, he had never handled any type of criminal case whatsoever due to the fact that he was a civil liability attorney.

I wholeheartedly believe that if I had had adequate representation from a qualified lawyer, I would have not been convicted. I would have never been forced to endure these cruelties which Senator Leahy's bill seeks to prevent. It is more than past time to put an end to these unmerciful travesties of injustice that occur when the truth is hidden or disregarded.

I appeal to you, the members of this committee, to enact the laws to fully assure that no human being will ever have to suffer as I did for something of which they are totally innocent.

Thank you.

The CHAIRMAN. Thank you, Mr. Fritz. Certainly, your testimony is very moving to all of us here today, as it should be, and a good message for all of us to take under consideration on this committee. So you have done the country a great service in coming here today.

Mr. FRITZ. It was all my pleasure.

The CHAIRMAN. I have been very moved by your humble testimony and it means a lot to me, and I sure don't want to see anybody else go through that to the extent that we can prevent it.

Mr. WOOLEY, we are happy to have you here. You have a very excellent reputation and we look forward to taking your testimony.

STATEMENT OF JAMES WOOLEY

Mr. WOOLEY. Thank you, Chairman Hatch, Senator Leahy. It really is truly an honor and a privilege to be here, and I commend the committee for taking up this topic.

Let me introduce myself. My name is Jim Wooley. I am a partner at a law firm called Baker and Hostetler, but up until January of this year I had spent 10 years as a Federal prosecutor in the Northern District of Ohio as an assistant U.S. Attorney. Prior to that, I was an assistant District Attorney in the Manhattan D.A.'s Office in New York. I am also currently an adjunct professor in criminal procedure at Case Western Reserve University Law School.

In 1990 and 1991, I was the prosecutor in a case called *United States* v. *Yee,* a homicide case which is often referred to as the landmark forensic DNA case in this country. The case involved the first DNA test ever performed by the FBI lab. The DNA evidence was admitted as evidence after an extensive pretrial challenge which was very ably led by Mr. Scheck and others, who by the way

was appointed counsel, and extremely competent appointed counsel, in that matter.

Because of my role in the Yee case, I became and remain very active in the forensic DNA community. I was a member of the Ohio DNA Advisory Council, and I am currently serving on the National Institute of Justice's Commission on the Future of DNA Evidence, along with Mr. Clarke, Mr. Scheck, and others.

I have been asked to testify here today regarding proposed Federal legislation which, as I understand it, would provide for post-conviction DNA testing on behalf of Federal inmates who were convicted at a time when DNA testing may not have been available. I have seen different versions of proposed and existing legislation on this topic, and it is my belief that a statute addressing this topic needs to be drafted in a manner that allows post-conviction access to DNA testing to innocent Federal inmates without over-burdening the system with post-conviction proceedings on meritless requests.

Of the existing and proposed statutes I have seen, I believe the statute proposed by Senator Hatch does the best job of striking this balance, for the following reasons. I will say that I believe they all attempt to strike the balance. I prefer the Hatch statute and its effort to strike the balance for the following reasons.

Most importantly, the Hatch bill does provide access to DNA testing for the innocent Federal inmate who was convicted at a time when DNA testing may not have been available to prove his or her innocence. I have reviewed other statutes that provide for post-conviction DNA testing on a lesser standard than the Hatch bill, but I have not yet seen one that would give a truly innocent Federal inmate relief in a case where the Hatch bill would not.

The Hatch bill allows an inmate to make a motion when evidence, "was not subject to DNA testing because the technology for such testing was not in existence at the time of trial." Other proposed statutes draw no distinction between inmates who have pleaded guilty and inmates who may have been convicted after trial. There is equal access to both classes of inmates. I believe it is important to draw the trial/guilty plea distinction here in the context of a proposed Federal statute.

I may be the only former or current Federal prosecutor who has testified on either of the two panels, and I am very familiar with Federal criminal Rule 11 which, as I am sure you all know, mandates a very thorough inquiry by a Federal judge before any guilty plea can be accepted. As part of that inquiry, under rule 11(f), the court must satisfy itself that there is a factual basis for the plea.

In my 10 years as a Federal prosecutor, the factual basis was invariably established by the defendant admitting in open court that he or she engaged in the conduct that he or she was accused of committing. Often, this admission is under oath and includes the defendant describing in his or her own words exactly what they did.

I believe that a Federal inmate who has confessed his guilt in open court while represented by counsel should not have the same access to post-conviction DNA testing as an inmate who has consistently maintained his or her innocence, but was convicted after

a trial. I think that is an important distinction in the context of a Federal statute.

The Hatch bill provides a reasonable time limit of 2½ years from the date of its enactment to allow Federal inmates to file requests for post-conviction DNA testing. In 1996, Congress amended the habeas corpus statute to incorporate a one-year time limit on collateral attacks on Federal convictions. I think that amendment reflected the sentiment that it is appropriate to place reasonable time restrictions on post-conviction claims.

I think that thinking also applies here. If there are innocent Federal inmates who were convicted before DNA was available, even if they were convicted 12, 13, 14 years ago, those cases shouldn't be barred from consideration. But a reasonable window of time of 2½ or 3 years, or whatever, to have those matters considered I think is appropriate.

The Hatch bill provides that a court should not order post-conviction testing if, after the review of the record of the trial of the applicant, the court determines that there is no reasonable possibility that the testing will produce exculpatory evidence that would establish the actual innocence of the applicant. This gives the court the ability to deny a post-conviction request if it determines that the DNA testing would not be material to the finding of guilt.

There is no need to burden the system with mandatory post-conviction DNA testing in cases where the results of a DNA test could have no bearing on the finding of guilt. In imposing a materiality requirement, the Hatch bill is consistent with the Illinois statute, the New York statute, and also well-settled legal precedent that imposes a materiality requirement in other settings involving post-conviction requests for relief.

I have seen other statutes, including the Leahy statute, that would require post-conviction DNA testing in cases upon a showing merely that an exculpatory DNA test would be relevant. Relevant evidence covers a very broad spectrum, much broader than relevant and material evidence.

For example, it would be certainly relevant to show that a Federal inmate convicted of extortion did not lick a postage stamp on an envelope that contained an extortionate demand. But it would certainly not be material if the other evidence in the case included legal wiretap recordings of the inmate's extortionate demands. There is no basis in law or logic for abandoning the concept of materiality in the limited context of a post-conviction request for DNA testing.

In this regard, I should also note that the proposed statutes that mandate DNA testing without a finding that it would be material also draw no distinction between the trial and the guilty plea, which I think is important in the Federal system. The combination of those attributes of the statute would allow a Federal inmate who has confessed and pleaded guilty in open court to force the system to conduct DNA testing even if the results would not prove his innocence, but would instead produce evidence that would merely be relevant to his claim. In other words, the Federal extortion inmate would be entitled to mandatory DNA testing of the postage stamp even though he pleaded guilty and his extortionate demands were lawfully tape recorded.

In closing, I would say that the Hatch bill does an excellent job of allowing access to post-conviction DNA testing to innocent Federal inmates without creating the possibility that the system could be burdened with meritless requests that would obscure the ones with merit, and that is why I support the Hatch bill.

I thank you for your time and your consideration.

The CHAIRMAN. I want to thank this panel for being here. I feel badly that I have to leave. I am going to turn the committee over to Senator Sessions to begin the questioning and then he will go to Senator Leahy. But this has been a very good panel. Both panels have been excellent.

We are going to try to get these problems resolved. We need your help. I would like to get it out of the realm of politics. I would like to get it out of the realm of prodeath penalty/antideath penalty. I would like to do what is logical, just and right, and if we can do that, you will have a bill this year. If we can't do it, if it is just another big, broad way of trying to get rid of the death penalty, we are going to go nowhere. Or if it is just a bill that is trying to implement the death penalty, we are going to get nowhere.

So I would challenge you to help the committee. Each of you has your beliefs about the death penalty, but to me that is not the real issue here. The real issue is how do we do justice and do we implement justice and how do we ensure that justice is going to occur. So I am challenging you to help us to do that.

I think Senator Leahy and I work very well together on many matters, and I intend to work very closely with him on this one. And I would like to get it out of politics, if we can, and there has been a little bit of a temptation here to put into politics by some. Justice is more important to me than anything else.

Senator LEAHY. Mr. Chairman.

The CHAIRMAN. Yes.

Senator LEAHY. I might say I couldn't agree with you more about keeping it out of politics. That is why on my legislation we both Republicans and Democrats on it. The 45 people who will join similar legislation in the House, LaHood-Delahunt, they have both Republicans and Democrats on that. We have both supporters and opponents of the death penalty on it.

That is why I have spent nearly a year in putting this together to make sure that we would have both those who support the death penalty and those who oppose the death penalty, both Republicans and Democrats, conservatives and moderates and liberals, on it. We have tried very much to keep it out of politics.

And when I have been asked questions about this, even to interject this in any way into the presidential race, at each of my interviews on that I have stated very clearly this is not intended for it. Now, the assistant attorney general from California spoke of the Leahy bill. One of the reasons I corrected her was to make sure she understood this was not just a Democrat bill. This is a Democrat and Republican bill, as it is in the House.

The CHAIRMAN. Well, there are a lot of Republicans who don't think it is a Republican bill at all, and there are some Democrats who don't think it is a Democrat bill. So the point I am trying to make is that we have had lots of criticism of both bills here. That

is the purpose of this. It isn't to sit here and triumph our own bills. I am not trying to do that.

We are going to file our bill to create the discussion because there are differences between these two bills that are very significant. I think some of the criticisms of the Leahy bill and of the Hatch bill we have to look at, and what I want to do is come up with a bill that is truly bipartisan in every way and gets a hundred percent of the people, if we can, or at least a high percentage of Democrats and Republicans to vote for it. That is what I want to do.

If we can do that, I will feel like Senator Leahy and I and other members on this committee, including the distinguished Senator from Alabama, who plays a significant role in this area, will have done something really worthwhile for the country. So, again, I am calling for everybody to put aside politics, triumphing one bill over another, and let's just see if we can come up with a bill that literally will solve the problems and yet be fair to both sides, prosecutions and defenses, and hopefully prevent people like Mr. Fritz from ever having to go through that kind of suffering again.

Your testimony probably is the most relevant here today because you are the one who has really suffered from an injustice in the law. And I think that these people that Mr. Baird brought up, Mr. Criner—if the way he has described it is right, that is despicable that he is still in jail. Frankly, I don't care who wants to make political hay out of what. All I can say is that I think both of our presidential candidates would agree with what I am saying here, so I don't want to see anybody trying to make hay against one or the other candidates.

Mr. FRITZ. Mr. Hatch, I have heard mentioned here a couple of times today talk about State sovereignty. You know, I am very respectful of that myself, but also I think one thing that I really see that is just as equally important is judicial economy. Moving the courts and getting these cases going and the financial considerations that several members spoke about is going to have to take place to initiate this. But I think the only way that something like this is going to truly work is through a federally-funded bill.

The CHAIRMAN. Well, we have got that point and, of course, that is what we are talking about, and I hope we can prevent convictions like yours from ever happening again. I would like to do that. The history of this world is a history of some injustice, and a lot of us are trying to work through that and trying to find ways of overcoming injustice.

I just want to thank you all because I think these two panels have been just excellent, irrespective of what our differing points of view are on the death penalty. To me, that is almost irrelevant to this discussion. We want to make sure that we can do what is right.

So let me turn the time over to Senator Sessions, if you can take over and be the first questioner.

Senator SESSIONS [presiding]. I thought I would ask a couple of questions that I know Senator Hatch was concerned about. Two of our witnesses, Mr. Scheck and Mr. Clarke, worked on DNA evidentiary issues in the O.J. Simpson murder prosecution. Mr.

Scheck worked on behalf of Mr. Simpson and Mr. Clarke worked on behalf of the State of California, so I have a question.

One of our panelists was convicted, Mr. Fritz, before the DNA technology was commonly available. As we all know, he was released last year after DNA tests revealed that the biological evidence found at the crime could not have come from him.

Is there any doubt that Mr. Fritz could have obtained post-conviction DNA testing under the standard in the Hatch legislation?

Mr. SCHECK. Well, I think that one good thing about all of this is that Mr. Clarke and I and our DNA Commission are in agreement. If Mr. Clarke and I sat down and looked at the cases, I think he will tell you, as well, 99 percent of the time, 99.9 percent of the time, we would agree on how to do this.

I think the real problem is that we really don't have a lot of training for lawyers certainly in the forensic area, and we all know the terrible problems of counsel in capital cases, frankly, and non-capital cases in order to get this done. The problem, as I mentioned to the chairman, is that arguably one could say that in Dennis' case that in 1988 I think Oklahoma was the first State—Life Codes introduced DNA testing in the State of Oklahoma, so it was actually around then. There are other cases in the State of Oklahoma that the same thing happened.

There is a guy named Robert Miller who is profiled in our book, who again was sentenced to death for the worst and most brutal kind of rape and murders of elderly women. And DNA testing proved that he was innocent, and also identified the person who committed the crime in the State of Oklahoma. He tried to get DNA testing, too.

The answer is, under that provision, there is serious doubt that Dennis could have gotten the test. And, frankly, it took him over four years of petitioning the courts to get it. So under the statute of limitations, there is again a difficulty here; in other words, the new statute of limitations that says within a certain number of years—I think the latest version I saw was 30 months—you have to make an application to get the DNA tests and get all the records together. And that would be difficult in Dennis' case and many of the others.

Senator SESSIONS. Well, Mr. Clarke, I understand at the trial of Mr. Fritz, identity was an issue and the State's evidence rested on biological evidence. So under the Hatch bill, certainly would you agree that he would have been able to obtain relief?

Mr. CLARKE. There is no question in my mind. As I was becoming familiar with Mr. Fritz' case, including through what he was describing today, I was thinking of our own in-office review program, and this is the type of case that would stand out, I think, as clearly one under the program that we have instituted that again will mirror the standard described in the proposed Hatch legislation. This is a case that would cry out for DNA typing, an individual who claimed all along "it wasn't me." The question is, is there evidence that could help resolve that clearly, and I think this is exactly the type of case that the Hatch legislation would demand testing in.

Senator SESSIONS. Mr. Wooley, perhaps, and Mr. Scheck, in the Hatch legislation you have got a 30-month requirement to get your

request in, I guess, and filed. Let's talk about that a little bit. In one instance, it doesn't seem to bother me whether it was indefinite because as each year goes by, fewer and fewer people are going to be available to claim it. So at first blush, it doesn't.

But it does suggest to me that if you have an unlimited time, people would be delaying and seeking the request and the evidence may be less available. But primarily it could be used as a last-minute tool to file on the eve of a date set for execution to delay executions.

Mr. Wooley, would you comment on whether or not you could agree to anything other than a 30-month rule in your theory there?

Mr. WOOLEY. Senator Sessions, I look at it as a former Federal prosecutor. In the Federal system, I think it is a very reasonable time limit. What it is not is a statute of limitations, and I think on the first reading of it some people look at it and say it looks like a statute of limitations. But the fact is the Hatch bill would allow someone who was convicted at a time when Mr. Fritz was convicted to bring his matter before a Federal judge.

It would just say from the date of the enactment of the statute, you have 30 months to try to get that together. Within the Federal system, where I think we are going to see a very limited number of situations that fall in this category, given the different nature of Federal prosecutions, I think it is a very reasonable, workable time limit. I wouldn't begin to opine about how that would work in different State systems, where I have never practiced.

Mr. SCHECK. I think that is a big difference because the bill is really directed, when you get down to it, to the States. And in the States, our DNA Commission reached the judgment after much debate that a statute of limitations, that 30 months, wouldn't make sense because it just takes so long. The older the case, the more difficult it is to gather the transcripts and get everything together.

Senator SESSIONS. But the time commences after you make the claim, does it not, not after the judge makes a ruling? You have to make a claim and commence the process within 30 months.

Mr. SCHECK. We are talking about people who are indigent. Some of them could be mentally retarded in many instances. Take Earl Washington, in Virginia, who is going to get tests that I have a high degree of confidence are going to show he is innocent. That is another case profiled on the "Frontline" special tonight.

You really can't expect that people are going to be able to get the materials together, particularly without counsel, as Mr. Stevenson says, with any particular time limit. The bottom line is—and let me try to be non-political about this—I think Governor Bush made the right call in the *McGinn* case, which is exactly this kind of case, because I came in within 2 weeks. The lawyers previous to that had never been able to focus the presiding judge on the appropriate tests because they didn't understand them, frankly.

They never said we can have an STR DNA databanking test done on semen in the underwear, and a mitochondrial DNA test done on the pubic hair that would be determinative perhaps of guilt or innocence, but certainly as to whether or not he was death-eligible. And there were all of these appeals that went on and nobody really frankly had the training or understanding to make that

clear. And then when the presiding judge saw it, he made the right call, and it went to Governor Bush and he made the right call.

You know, I have real doubts under the Hatch statute as written right now whether McGinn would get relief. But I think it is appropriate, as Governor Bush decided in that case, that he get relief, and we have to draft these statutes so that kind of—and I have no idea how it is going to turn out in his case, but watch Earl Washington in Virginia, where Governor Gilmore just 2 weeks ago finally agreed to do the testing. I have a high degree of confidence he is going to be exonerated based on the prior results, and that man was sentenced to death.

Senator SESSIONS. Well, I would just say this. The Supreme Court, Justice Powell writing a number of years ago, said a pattern seems to be developing in capital cases of multiple review, which is true. Before anybody is ever executed, it always gets to the Federal court of appeals and the State supreme court, often two or more times.

But, anyway, patterns of review in which claims that could have been presented years ago are brought forward often in piecemeal fashion only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate, even in capital cases, abuse of the process.

So I guess if we could figure out perhaps a 30-month statute to make sure we are not ending up with a devise to piecemeal delay cases even longer than they are today, I might be willing to listen. The 30 months seems to me an adequate amount of time.

Senator Leahy.

Senator LEAHY. Thank you.

Mr. Clarke, you are a member of the National Commission on the Future of DNA Evidence. Do you support the Commission's recommendation that there should be no statute of limitations on claims of post-conviction DNA testing?

Mr. CLARKE. Well, I think one of the items that we looked at in the context of post-conviction review was a question of whether there should be a provision where—and in the ultimate version there is—that a court in deciding whether or not to grant relief, that is grant DNA testing, must reach a threshold decision, is this for purposes of delay or not. In other words, is this the fifth, sixth, seventh Federal habeas corpus petition in a State capital verdict? That is obviously much of what was addressed by Congress in terms of death penalty habeas corpus reform, and so on.

I think that provision in not only our recommendations, but also the model statute that our commission provided helps account for that. There is not a strict time limit contained in our recommendations and model statute. There is, however, a provision that in a sense deals with that which is designed to eliminate the use of such a device simply to delay execution. So I think in many respects that solves it. I don't have an objection to either a fixed amount or a provision similar to the one that we utilized in our model statute.

Mr. STEVENSON. Senator, if I could just comment on that, I do think it is worth acknowledging that to the extent that we put restrictions on when these petitions must be filed, we have to increase the resources we are going to allocate in the defense commu-

nity to manage them because the community of people who are going to actually get the most requests are defense communities. They are going to get a hundred requests and have to decide among that hundred requests which of them meet the guidelines.

And under the Hatch bill, unless there is going to be some allocation for counsel, Mr. Fritz would not get relief. In my State of Alabama, there is no place for Mr. Fritz to write. Who is he going to write for the assistance? We don't have an appellate defender office, we don't have a post-conviction defender office. He would have to write a private lawyer and convince that private lawyer, for $1,000, to look into his case. And I suspect it would take him longer than 30 months in many instances, and certainly a lot of people, to even find that lawyer. And so I think it is fine for us——

Senator LEAHY. And even be assured that that lawyer was a competent lawyer.

Mr. STEVENSON. Absolutely.

Senator LEAHY. As you and I both know, around courthouses there are some lawyers who basically—their office is the pay phone booth in the courthouse.

Mr. STEVENSON. Well, that is absolutely right. I think that if we provide people with adequate representation—as Senator Sessions suggests, you know, this thing can exhaust itself over a period of time. In several years, we should see a very small number of these kinds of requests being made because people have either disqualified themselves by having the technology available at trial or they have exhausted the remedies.

Innocent people on death row in jails and prisons are not anxious to stay in jail and prison. If you afford them this remedy, I guarantee you the innocent people will demand testing as soon as possible. They have no interest to stay in prison longer, kind of waiting to see what happens.

Senator LEAHY. Well, I agree with you on that, and let me just follow up, then, with the real-life situation of Mr. Fritz.

Mr. Fritz, you were a science teacher, a coach; by nature of that position, a respected member of the community, a family man. And then, as you have testified, your world came crashing down on you when you were charged with a crime that you did not commit when the Oklahoma authorities basically put you at the scene even though you hadn't been there.

Then once convicted—as we now all acknowledge, both the prosecutor and everybody else acknowledge was a mistake—you asked the State of Oklahoma to have your DNA tested. In other words, you wanted to say, look, I am willing to take this chance; I will prove I am not the person. Why did they say no?

Mr. FRITZ. Well, every time I petitioned both the State and Federal courts for the motion to test and inspect the DNA evidence, they always answered back that I had never raised a constitutional claim. And I always replied, well, how unconstitutional is it to keep an innocent man in the penitentiary. I always briefed immediately all kinds of different labeled motions that I would, in my unskilled desire to get the testing done——

Senator LEAHY. You weren't able to get an attorney?

Mr. FRITZ. No; As a matter of fact, the only attorney that I had as a matter of right was after my State direct appeal. And since

I didn't have any money, I couldn't afford an attorney, so I worked on my own case from that point on.

Senator LEAHY. So, Mr. Fritz, when the court said it is not a constitutional claim—I don't want to put words in your mouth, but would you say that perhaps you took a less abstract view of it than they did insofar as you were the one who was locked up?

Mr. FRITZ. Most definitely.

Senator LEAHY. You were the one who was innocent and you were the one who thought that perhaps that affected your constitutional rights. Is that a fair statement?

Mr. FRITZ. Yes. I could actually see what was happening. It was just a procedure whereby me being a pro se litigant, I got the cursory review that I was expecting. No real attention was ever paid to my case circumstances or my challenges that I made.

Actually, where my mistake came in was that I argued the sufficiency of the evidence all the way through to the U.S. Supreme Court under the weight of the evidence because I didn't know that after you get out of the State courts, you have to argue the elements. So that was their hole in the fence.

Senator LEAHY. You weren't a lawyer?

Mr. FRITZ. No.

Senator LEAHY. Mr. Scheck, Chairman Hatch's proposal says DNA testing is allowed only if the technology was not available at the time of trial. When did DNA technology become available, and how would this threshold requirement have affected Mr. Fritz in his case or any of these other people you have helped exonerate?

Mr. SCHECK. I think in almost virtually every case one could say, in theory, DNA testing was available at the time of the trial. And DNA testing has changed. We have more discriminating tests than we had in the past. I think that the Leahy-Smith bill accurately captures the balance and is consistent with exactly what we put in our DNA Commission report, in that you want to make a showing that there is an accurate test available that could be dispositive of the issue of guilt or innocence.

None of us are here suggesting that in a case where somebody has done DNA testing which is pretty incriminating, like an RFLP test, that that person is ever going to get the test. We are saying, all of us here, that if there was, let's say, what they call a DQ-alpha test which wasn't very discriminating, like in the case of Tim Durham of Tulsa, OK, that a retest with a more discriminating technology can prove innocence.

That is the kind of balance we can strike and I think it is accurately and correctly put in the Leahy-Smith bill. And the language, unfortunately, in the Hatch bill, in theory, read literally, could preclude virtually every one of our clients from getting the test.

And the problem, I have to say, is let's be frank. In cases where there were heinous crimes committed, in many jurisdictions where the prosecutors and the judge are either running for reelection or are heavily invested in the verdict, nobody really likes looking into these cases and doing the DNA tests. They really don't in many instances. Some people do.

We have our commission recommendations that say people should consent to the DNA testing notwithstanding the statute of limitations. Fifty percent of the time, the prosecutors in appro-

priate cases stand up and do justice, like my friend Woody here, but a lot of times they don't. That is why we need real requirements and a standard that is reasonable.

Senator SESSIONS. Senator Feingold.

Senator FEINGOLD. Mr. Chairman, briefly, I was intrigued by your reference to Justice Powell because at the end of his career, after he saw this mess of the death penalty, the one thing he said he would do over basically was he would get rid of the death penalty. That is how he ended his career, even though he was one of the architects of the Federal death penalty.

I understand Chairman Hatch's admonition about politics with regard to this issue. We have to be very careful. The problem is that one of the places where the death penalty is terribly active happens to be the State of Texas, and it is simply not possible for us to talk about this problem without, on occasion, referring to what is going on in Texas in some of the cases.

In the spirit of just making the record correct, I want to make a point with regard to this issue that the chairman raised, which is the requirement in Texas that there be two counsel as somehow an answer to the question of adequate representation.

Take the case of lawyer Joe Cannon, in 1979, when Mr. Carl Johnson was convicted of murder and sent to death row by a Texas State court. During the trial, his lead counsel, Joe Cannon, was often asleep. Now, Mr. Cannon had co-counsel, as apparently required by Texas law. Mr. Philip Scardino, who was two years out of law school and recalls the whole experience as "frightening." He said, "All I could do was nudge him sometimes and try to wake him up."

Johnson's appellate attorney, David Dow, said the trial transcript gives the impression that there was no one in the courtroom defending Johnson. It, quote, "goes on for pages and pages and there is not a whisper from anyone representing him," unquote. Mr. Johnson was executed in 1995, the twelfth execution under Governor Bush's period as governor. It is literally cold comfort to Mr. Johnson that there is this second counsel requirement.

And I would add that Mr. Fritz here would not have had the problem of his incompetent counsel resolved by the Hatch bill. That isn't dealt with by the Hatch bill, so the bill is inadequate in that regard.

A second point for the record. Some have suggested that the Hatch bill is adequate and that it is okay; that as long as somebody has happened to plead guilty, that should be a bar in some cases to future DNA tests. Let me just suggest that in some cases people might plead guilty to avoid the death penalty. Maybe they would take life imprisonment out of fear that they would get the death penalty. I think we have to at least look into whether that is a very wise provision.

Mr. SCHECK. Senator Feingold, I should add that there is a case, David Vasquez, in Virginia, who was a mentally retarded man who pled guilty and took a life sentence. And DNA proved that he did not commit the crime, but a man named Spencer who was ultimately executed in the State of Virginia for a series of rape homicides. So, that does happen.

Senator FEINGOLD. Well, I thank you for that. I just want it noted for the record that these two are specific examples of particular points about how we draft this legislation. It is not about politics; it is about trying to make this really work.

Mr. Scheck, I want to thank you especially. I want to say that I have read every word of your book already.

Senator SESSIONS. Senator Feingold, if I could make one response, and I will give you extra time. As I understand it, this trial in 1979 was before the counsel law passed, and Governor Bush did sign that law.

Senator FEINGOLD. I appreciate your point.

Senator SESSIONS. So the point is not invalid that you made, but I did want to correct that bit of the record.

Senator FEINGOLD. Mr. Chairman, if it is just a question of two counsel, that doesn't mean you have got adequate counsel.

Senator SESSIONS. Well, one of them ought to be awake if they have got two of them. Both of them ought to be awake.

Senator FEINGOLD. As I say, cold comfort for the gentleman who is no longer with us.

Mr. Scheck, I want to thank you for this book. It was truly an eye-opening examination of the failings of our criminal justice system. I commend you and Peter Neufeld and Jim Dwyer, and you and your colleagues at the Innocence Project for what you have contributed. It has been very helpful with regard to all that we have done.

Mr. SCHECK. Thank you, Senator.

Senator FEINGOLD. And I just want to ask one question because I know it is very late, and I thank the chairman, of Mr. Stevenson.

I understand that you often speak of the problems of discrimination in our criminal justice system, and in particular in the administration of capital punishment. You mentioned that topic only briefly in your written testimony and I thought I would just give you a minute or two here to say a little bit about what the committee should know about this and whether the Innocence Protection Act addresses the problem.

Mr. STEVENSON. Well, there are obviously a lot of factors that we can identify that are common in cases where innocent people end up wrongfully convicted. The Illinois review, for example, showed that in 33 of the cases where people had been sentenced to death, the lawyers had been subsequently disbarred or disciplined for bad lawyering.

We know that there is this problem of using jailhouse snitches or informants and witnesses who are inherently unreliable. We know that there is this problem of suppressing exculpatory evidence and misconduct. The dynamics surrounding many of these capital cases where everybody is invested in getting the right result are very compelling.

I represented a man who spent 6 years on death row for a crime he didn't commit, where he was actually placed on death row for 15 months before going to trial. And that was justified by the atmospherics that a capital case sometimes creates.

And then there is a problem of race. In 80 percent of the cases where people have been executed in my State of Alabama, they were tried by juries that grossly underrepresented African-Ameri-

cans. It is not a Southern problem. Illinois made the same finding with regard to racial bias in jury selection in those proceedings.

My office has been involved in 23 cases where courts have reversed capital murder convictions after finding that prosecutors exercised peremptory strikes in a racially discriminatory manner. And I think if we are going to comprehensively deal with this problem of innocence, we have got to be thinking about all of these issues because when we look at the capital context and we see that only 10 percent of the 87 people who have been released have been released on DNA evidence, there are other factors that explain the other 90 percent that are critically important if we are going to make a difference.

Senator FEINGOLD. Thank you very much. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you, Senator Feingold.

Some progress has been made, Mr. Stevenson, I think you would recognize, subsequent to *Batson,* which was the requirement by the United States Supreme Court that judges scrutinize the jury strikes of a prosecutor. Some of these reversals, I assume, are based on the *Batson* Supreme Court ruling that you obtained?

Mr. STEVENSON. That is correct. In fact, almost all of them are. Before *Batson,* there would have been no opportunity to bring these issues to court, and they have all been subsequent to *Batson.* I think *Batson* has made a huge difference. Unfortunately, because of the way in which these proceedings take place, now what happens is a prosecutor has to give a race-neutral reason for explaining why people of color have been excluded.

Unfortunately, in too many places, that hasn't solved the problem. It has just made jury selection a lot more entertaining because you get these wonderfully creative reasons about why people are being excluded which we continue to believe are pretext. But it has advanced this effort. I think we have made some progress on this issue, but I think there is a lot more progress to be made.

Senator SESSIONS. It is my observation, post-*Batson,* that juries probably overrepresent the African American community on the jury. In other words, you will tend to have routinely a larger percentage of the jury that is African American than in the community in Alabama. Would you agree with that?

Mr. STEVENSON. Well, I think it really depends on where you are. We just had an execution in the State of Alabama where the prosecutor, prior to the execution, admitted that peremptory strikes were used in a racially-conscious manner. In that particular county, Russell County, no one has ever been tried in a capital case where the representation of African-Americans has been proportionate to the community percentage. That is a county that is 40 percent black. They have never had a trial jury with more than one African American on it.

Senator SESSIONS. That case would have been tried prior to *Batson.*

Mr. STEVENSON. No. It was tried after *Batson.*

Senator SESSIONS. The conviction?

Mr. STEVENSON. Yes. The appeal took place after *Batson* as well. But *Batson* does not apply to any case that was not tried or pending on a direct appeal before 1986.

Senator SESSIONS. I would have thought that would have been a good basis for appeal.

Mr. STEVENSON. Well, we thought so too, Senator. [Laughter.]

Senator SESSIONS. Well, a lot of things have happened. The legislature has improved and narrowed their statutes for death penalties. Congress has passed Federal laws that are effective. I think we should be constantly conscious of the possibility that prejudice or other factors, or than evidence of guilt or innocence, enter into a case, and I think that is important.

Mr. Fritz, thank you for your moving testimony that strikes at the heart of what our justice system is about. It ought to cause all of us to pause and think, those of us who have been in the prosecuting business for a long time, to really think about it.

One thing I would mention with regard to the time limit is I think, Mr. Stevenson, you are correct. An innocent person is going to promptly demand his DNA evidence as soon as he feels like he has a right to get it. But a person who is guilty may use that by waiting until the last minute as a delay, and if we could deal with that possibility, I would be open to working with Senator Leahy on maybe getting around the 30-month rule.

Mr. Scheck, you shared in your book some comments about eyewitness testimony. I have seen two cases, one of which was in Federal court when I was an assistant United States Attorney that turned out to be an innocent person. A person robbed a bank. He had a certain briefcase and a pistol, and he was identified in photograph display. The individual was arrested and was brought in All five bank tellers identified him.

Sometime later, an individual was caught in nearby Pensacola, FL, with a briefcase with a latch that didn't quite open, a chrome-plated revolver, and a briefcase of money that came from the bank. And we held a lineup and two of the tellers still picked out the wrong guy and three of them picked out the correct guy.

I don't know that there is any way we can deal with that. Sometimes, maybe I think a cautionary jury charge might be appropriate. But when you have never seen a person before and you are having to make an I.D. under stressful circumstances, there has been some history that errors have occurred. You mentioned that in your book. Do you agree with that?

Mr. SCHECK. Oh, absolutely. There is no question that the mistaken eyewitness identification is the single greatest cause of the conviction of the innocent. We found that in our study, in actual innocence of the post-conviction DNA exonerations. Historically, that has always been true.

I appreciate the fact that you mentioned five eyewitnesses in your case. Kirk Bloodsworth was a man who was sentenced to death in Maryland and there were five eyewitnesses who said he committed the rape and murder of this little girl. DNA testing proved him innocent.

We actually have, Senator, some suggestions that DNA teaches us. That is why these post-conviction DNA cases are so important. There is a Justice NIJ report, "A Guide for Law Enforcement on Eyewitness Evidence," that sets out some recommendations that I think would greatly reduce the conviction of the innocent without in any way reducing correct identifications. It is a real series of rec-

ommendations here that advances justice. Be generous to us in our ability to identify these miscarriages with DNA. We will learn a lot about the system and how to fix it.

Senator SESSIONS. Well, I agree. It is just scary if that is all you have is an eyewitness. There is one other case that I knew, and I talked to the mother, a convenience store robbery. The man was at her home and he came outside and the victim identified him, and he was tried and convicted and he was at home with her all night, and she knew he didn't do it. Eventually, they overturned the conviction and he was released, but he served, unfortunately, some time in jail. That was an eyewitness identification that was somewhat troubling.

Mr. CLARKE. Actually, in that vein, Senator Sessions, if I might, I think one of the benefits of this experience has been a, I will call it healthy skepticism that jurors have about eyewitness identification. I mean, there is an expression that I am sure you are familiar with and we are all familiar with who have tried cases before: give me a good circumstantial evidence case any day over eyewitness identification.

Senator SESSIONS. You are exactly right. You give me the briefcase, the pistol, and the money from the bank, and you can have somebody saying that is the guy. In fact, both of those people looked alike when they were put in the lineup. They had the same brown hair and receding hairline, and the same thin features, not exactly, but you could see how a teller with good faith could make an error.

I would offer into the record a letter to this committee from the National Association of Attorneys General, signed by 30 attorneys general asking us to be cautious with the Leahy legislation. So I would offer that into the record.

Senator SESSIONS. Anything else you have, Senator Leahy? We have a vote going on, I believe.

Senator LEAHY. We had one witness that we had asked to have before us, Calvin Johnson. He was exonerated by DNA after 16 years in prison. I will put his handwritten letter in the record, but let me just take a moment to read from it. He speaks about being released when they found they had the wrong person and the Innocence Project released him on DNA evidence. Just listen to the last part of his letter.

"But at 42 years of age, I have so much catching-up to do. Where would I have been if those 16 years had not been stolen from me? Would I have a family of my own? Would I own my own home? Would I have money saved for my children's future? Could I go to a bank and obtain a loan? My answer is yes. And now after 16 years, with no family of my own, no home of my own, no real credit established, all I want is the opportunity to fulfill my dreams, to help my parents in the later years of their life, to live the American dream, and to be a productive and active citizen in our society."

[The letter referred to follows:]

JUN-13-2000 TUE 09:19 AM FAX NO. P. 01/05

Dear Ms. Landry,

This is a letter that I wrote to the state of Georgia after my release, to be heard by the (or revived by the) House and Senate in hopes of receiving compensation for the years of suffering that I and my family endured, before the miracle of DNA brought us back together again after 16 yrs.

Calvin C. Johnson Jr.

(1) 12-5-99

To the State of Georgia I'm going to try to express the unexpressable, to describe my deepest feelings, to put into words the pain, the suffering, the emotional turmoil that I felt and lived with for 16 years as an innocent man never knowing if I would one day be freed, or if the rest of my breathing days would be spent behind prison walls.

I lived with a fear of what if, what if I'm paroled, what if I have to try to get a job, what if I want to get married, what if I decide to move into your neighborhood, what if? The what if came from the fear of living in a society with the stigma of the words Convicted Rapist. There were times in my heart that I felt it would be better to die in prison than to face the world with the tag of Convicted Rapist on my back.

My only choice was to relentlessly pursue my innocence. To prove beyond any doubt that 16 years ago the wrong man was convicted, imprisoned and sentenced to Natural Life in the Georgia penal system.

(2)

Those 16 years were the hardest years of my life, and the only consolation I felt came from the love of my family and my faith in a higher power that one day the truth would prevail.

Everyday that I woke up behind bars, everytime the door locked on my cell, everytime I cut a bush or swept a floor, everyday that I put in eight hours work for the State of Georgia for 16 years not receiving a penny for one single day, everytime I received a visit and watched as my family walked out the door, and as my fiancee left to pursue her own life, a life without me, a life to start her family, a family that I now couldn't give her, everytime I saw a happy couple or a small child, I felt a deep cut inside of me. It was the thought of what could be. Instead each day as I looked into the mirror and saw the waste of life going on without me, I felt a deep, deep waste.

When my mother suffered a stroke shortly after my conviction

(3)

I knew her heart had been broken. When I couldn't be there for her, when I couldn't help in anyway when she suffered heart attack after heart attack as the years went by, my own heart nearly broke. As I watched her health deteriorate, and watched as my family suffered both financially and emotionally my heart fell to my knees.

How can one describe the pain you feel when your behind bars for a crime you know you didn't do When the prison counselor tells you, you may never receive parole if you don't sign an admission of guilt and complete a sexual offenders program, when the parole board denies you parole over and over again because they say you won't accept responsibility for the crime when staff, guards, and fellow inmates all looked down upon you because your labled as a sex offen Nothing can possibly express what I or my family endured for those 16 years.

Now after 16 years of prayer,

(4)

after years of constant support from my Father, my sisters, and most of all my Mother who suffered another stroke in February of 1999, and will probably be in a hospital for the remainder of her life, unable to move from her own bed because of paralisis and with the help of The Innocence Project, I've been freed on DNA evidence But at 42 years of age I have so much catching up to do. Where would I have been if those 16 years had not been stolen from me? Would I have a family of my own, would I own my own home, would I have money saved for my children's future, could I go to a bank and obtain a loan? My answer is yes, and now after 16 years with no family of my own, no home of my own, no real credit established, all I want is the opportunity to fulfill my dreams, to help my parents in the later years of their life, to live the American dream, and to be a productive and active citizen in our society.

Sincerely,
Calvin C. Johnson Jr.

Senator LEAHY. Frankly, being innocent, being locked, whether facing the death penalty or life imprisonment, being in the situation Mr. Fritz was, being in the situation Calvin Johnson was, I suspect that if that happened to any member of the United States Senate, he or she would probably go insane. And I think that we owe it to all these people to do the right thing.

Mr. Stevenson, there is some suggestion that the appropriate standard for counsel is the standard announced by the Supreme Court in the *Strickland* case. Do you agree with that?

Mr. STEVENSON. No. I think we have to do better than the way in which that decision has been interpreted. Even the Court I think is beginning to rethink that, as the most recent decision handed down a few months ago suggests. We can do a lot better, and I don't think there is much disagreement about how we can do that. It is just can we get the resolve to make it happen.

Senator LEAHY. I will put in the record a memo of my own, Mr. Chairman, saying how my bill does respect State sovereignty and does not violate any federalism principles.

[The memo referred to follows:]

MEMO OF SENATOR PATRICK J. LEAHY

THE EFFECT OF THE INNOCENCE PROTECTION ACT ON STATE SOVEREIGNTY

In the view of former Associate Deputy Attorney General under President Reagan, Bruce Fein, the Innocence Protection Act of 2000 "respects our traditions of federalism in the field of criminal justice, and represents a measured and fact-bound response to the documented truth-finding deficiencies in death penalty and sister prosecutions, especially where DNA evidence might be conclusive on the question of innocence." Any concern that this legislation intrudes on state sovereignty and state interests in law enforcement is misplaced. On the contrary, as detailed in the following section-by-section analysis, the bill addresses serious problems in the criminal justice system in a way that respects the states and complements their own efforts on the same fronts.

Title I

Section 102: DNA Testing in the Federal Criminal Justice System. The first section would ensure that DNA testing is available in appropriate cases in federal court and would not affect the states at all or implicate state interests of any kind. Recent reports establish that innocent men and women are erroneously convicted and sentenced in a disturbing number of cases. Congress certainly has authority and responsibility to do something about that. This section would constitute a careful, measured approach and sets forth only the most basic elements of an effective DNA testing scheme.

Section 103: DNA testing in State Criminal Justice Systems. This second section would encourage the states to make DNA testing available in appropriate cases in state court, under conditions and according to procedures that parallel the standards and processes that § 102 would establish for federal criminal cases. Importantly, however, this section would only encourage the states to act; it would not require them to do so. Under this section, the states would have to give assurances that they make DNA testing available as a condition to their eligibility to receive federal funds from specified federal assistance programs. If a state preferred to do nothing regarding DNA testing, it would have the option of simply forgoing an application for funds under any of the listed programs.

Congress sometimes enacts "unfunded mandates," i.e., requirements that the states undertake costly activities with no federal financial assistance. Section 103 avoids that problem. In effect, this section would merely establish that states receiving funds from one of the specified programs must devote some of that federal money to DNA testing. To complain that this section would intrude upon state sovereignty is to argue that the states, rather than Congress, are entitled to decide how federal money will be spent.

Moreover, § 103 makes it clear that states could qualify for federal funds by establishing a DNA testing scheme that goes no further than the bare-bones system that § 102 would create for federal cases. The states would have to preserve biological

material for testing, ensure that testing occurs in appropriate cases, and give defendants an opportunity to present exonerating test results in a hearing in state court. The scheme is carefully thought out and conditioned in various ways that forestall needless expense and delay. For example, a state may destroy biological material if a defendant does not make a timely application for DNA testing. And, in any case, DNA testing need only be undertaken if a state court first determines that there is a chance that testing will produce exonerating results.

A few states already have comparable DNA testing programs. Other states have similar programs on the drawing board. Certainly, those states have no complaint about § 103. Only states that thus far have not addressed the demonstrable problem of erroneous convictions would be affected. Again, those states would only be invited to act by the promise of federal funding.

Section 104: Prohibition Pursuant to Section 5 of the 14th Amendment. This third section would address a common problem in many state criminal justice systems. Once criminal defendants are convicted and sentenced, they typically have only a specified period of time in which to seek a new trial on the basis of newly discovered evidence. Time limits of that kind make sense in most instances. Yet they were enacted at a time when DNA testing was unheard of. As states have come to understand the value of DNA testing, they have made testing available in ongoing and future cases. But many states have made no provision for older cases, in which defendants may have been wrongly convicted and sentenced in the absence of DNA testing that is only possible now. This section would require states to lift the time limits that ordinarily apply and allow prisoners in some cases to present newly discovered DNA evidence. No one doubts that it would violate the Fourteenth Amendment for a state to imprison or execute an innocent person. Section 104 is a modest measure meant to forestall that by eliminating filing deadlines as a bar to the presentation of DNA test results in appropriate cases.

The bill identifies and addresses any concerns that the states might have. Section 104 would only create a right to DNA testing under compelling conditions and a right to present exonerating results to a state court or, perhaps, a state administrative agency, despite a filing deadline that ordinarily would bar a newly discovered evidence claim. It contains numerous conditions that protect legitimate state interests. It states, for example, that prisoners are entitled to testing only if there is some biological material related to their cases, if that material is in the state's custody, and if it has not previously been tested according to the most effective procedures. Even then, a state need not grant a prisoner's request if a state court concludes that testing could not produce results establishing a "reasonable probability" that a prisoner was erroneously convicted or sentenced. Section 104 also states that prisoners are entitled to present test results to a state court or agency only if the results are "noncumulative" and "exculpatory." Thus this section protects the states from frivolous applications for DNA testing that can make no difference.

The enforcement provision in § 104 also respects state sovereignty. That section does not authorize federal courts to consider the merits of claims resting on exonerating DNA evidence. It only authorizes prisoners to file suit in some court (federal or state), asking for an order requiring the state to allow testing and a chance to present favorable results to a state court or agency.

Title II

Section 201: Amendments to Byrne Grant Programs. This initial section in Title II is another conditional spending provision. It would encourage the states to provide effective legal assistance to indigent defendants in death penalty cases. The Anti-terrorism and Effective Death Penalty Act of 1996 also invited the states to improve the legal services available in capital cases. That Act promised the states that if they established effective systems for providing counsel at the so-called "post-conviction" stage of state proceedings, the states would receive certain procedural advantages when and if death penalty cases reached the federal courts. Unfortunately, that provision in AEDPA was unsuccessful. Apparently, the procedural advantages it promised in federal court provided an insufficient incentive to persuade the states that they should adopt a qualifying scheme for counsel in state post-conviction proceedings. This section in our bill is more ambitious than the provision in AEDPA, inasmuch as it hopes to convince the states that they should improve counsel services at all stages of death penalty prosecutions. Importantly, however, § 201 offers what AEDPA withheld—economic incentives.

There is ample evidence that the states often provide poorly prepared and compensated attorneys to indigents in death penalty cases, that those attorneys contribute to an extraordinarily high rate of errors, and that a great deal of time and effort is required thereafter to correct erroneous convictions and sentences. The reason typically given for these difficulties is that an effective defense counsel system

is expensive. Section 201 offers the states the financial assistance they need. This section would establish the basic outlines of an qualifying system, makes states that create such a scheme eligible for federal funds, and, again, give states that prefer not to participate the option of doing nothing.

Section 202: Effect on Procedural Default Rules. This section would apply only in cases arising in states that choose not to improve their systems for providing defense counsel to indigents in the manner described in § 201. The premise, then, is that in the cases to which this section would apply, prisoners either had no counsel in state court at all or had counsel without the assurance of quality representation. In cases of that kind, this section would instruct federal courts not to assume that the state courts arrived at accurate findings of facts and not to hold prisoners accountable for failing to raise federal constitutional claims at the appropriate time. The idea, of course, is that effective defense counsel should ordinarily see that the facts are fully developed and that all available claims are raised. The federal courts should not assume that those functions were performed in cases in which effective counsel was not present.

The bill is scrupulous to respect competing state interests. Section 202 would not authorize federal courts to award any kind of legal relief to state prisoners. It would only avoid corrupting federal court consideration of constitutional claims via assumptions about state proceedings that are unwarranted. Again, this section would affect only cases in which states have decided, for their own reasons, that they prefer this result to the alternative of supplying effective defense attorneys to capital defendants.

Section 203: Capital Representation Grants. This third section continues the basic theme in the bill: to encourage the states to improve their justice systems in exchange for the financial wherewithal to do it. Section 203 instructs the Administrative Office of United States Courts to make awards and enter contracts with state agencies and private organizations for the purpose of improving the representation that indigents receive in death penalty cases. This section avoids the "unfunded mandate" problem in yet another way. It would not effectively ear mark federal funds from established programs for this purpose. It would authorize new, additional funding, available upon application without additional conditions. Of course, no state is obliged to apply for the new grants. There is always the option of doing nothing.

Title III

Section 301: Increased Compensation in Federal Cases. This section deals only with men and women who were erroneously convicted in federal court and thus affects no state interests. There is already a statute providing for compensation in these cases. The effect of § 301 is only to raise the maximum limits to bring them into line with current values.

302: Compensation in State Death Penalty Cases. This section affects the states, but again, only by conditioning federal funds on a state's willingness to cooperate. Many states already have programs by which innocent people may be compensated for the time they spend in prison. This section would encourage state that have no such schemes to establish them. States that want federal funds from the Criminal Justice Facility Construction Grant Program would have to give assurances that they have a reasonable system for compensating erroneously convicted people. Section 302 respects state prerogatives at two levels. First, this section recognizes that a state may choose not to compensate innocent people and allows such a state to take that position. Second, if a state chooses to establish a compensation scheme, this section leaves it to the state to decide how much compensation to provide.

Title IV

Section 401: Federal Death Penalty Prosecutions. This first section in title IV recognizes that many states do not employ capital punishment and that the citizens in those states may object if federal prosecutors seek the death penalty in federal cases that arise locally. This section would not absolutely bar federal death penalty prosecutions in noncapital states. It would, however, limit such prosecutions to cases in which state authorities are unable or unwilling to press state charges that would not lead to the death penalty. This plainly is an instance in which our bill is at pains to acknowledge and respect state interests. No state that employs the death penalty would be affected by this provision. It would only affect states that do not use capital punishment and, in those states, would reconcile federal death penalty prosecutions with local policy against the death penalty.

Section 402: Alternative of Life Imprisonment Without Possibility of Parole. This technical provision would bring an earlier federal death penalty provision into line with more recent federal statutes and would affect no state interests.

Section 403: Right to an Informed Jury. This provision would encourage the states to see that juries in capital cases understand the sentences that are available once a defendant is convicted in a capital case. The point is to avoid jury confusion. Juries sometimes believe, for example, that if a defendant is not sentenced to death, he or she may escape punishment altogether or may receive a sentence to prison that carries the very real possibility of parole within a few years. The Supreme Court has grappled with cases in which juries were given piecemeal information about sentencing options, and the results have not be satisfying. Section 403 would resolve the difficulties in those cases straightforwardly, simply by encouraging the states to give juries a complete and accurate account of the possibilities. Here, too, our bill respects a state's entitlement to take a different position, provided the state conforms to the Constitution. This section is not an "unfunded mandate." It would only encourage the states to provide juries with complete information as a condition for the states' eligibility for federal funding under the Violent Crime Control and Law Enforcement Act.

Section 404: Annual Reports. This Section would instruct the United States Attorney General to collect data regarding capital punishment. The Attorney General's reports would assist the states in evaluating the success of their policies.

Section 405: Discretionary Appellate Review. This section would cure a problem with one of the federal statutes governing federal habeas corpus proceedings: 28 U.S.C. § 2254(b). That statute provides that a state prisoner must exhaust all the "available" avenues for pressing a federal claim in state court before advancing that claim in federal court in a petition for a writ of habeas corpus. In many states, defendants are able to seek appellate review regarding a claim in the state's highest court, but that court may decline, in its discretion, to entertain it. Typically, state supreme courts refuse to consider ordinary claims and reserve their time and effort for claims of broad significance. Accordingly, while a petition for discretionary review at the state supreme court level is "available" to prisoners who have ordinary claims, state supreme courts frequently explain in their rules that claims of that nature should not be advanced. Petitions containing common claims only clog state supreme court dockets, taking up time and resources that might be devoted to claims that state supreme courts wish to examine.

In O'Sullivan v. Boerckel, the United States Supreme Court concluded that § 2254(b) nonetheless requires prisoners to petition state supreme courts for discretionary review of ordinary claims. If prisoners fail to do so, they typically forfeit the opportunity to advance those claims in federal court. The Court acknowledged that its ruling would not be welcome in many states, inasmuch as it requires prisoners actually to defy state supreme court rules discouraging ordinary claims. Still, the Court construed § 2254(b) to contemplate that discretionary review in a state supreme court must be pursued, so long as that procedure is "available" in the state concerned.

Section 405 would amend § 2254(b) to state that discretionary review in a state supreme court is not an "available" state court avenue that must be exhausted before a prisoner goes to federal court. This manner of resolving this problem is sensitive to state prerogatives. It would prevent the federal statutory requirements prisoners must satisfy in order to obtain access to federal court from frustrating the appellate processes that the states have chosen for proceedings in their own courts. Importantly, § 405 would not bar a state from making appellate review in its highest court mandatory. In those states, prisoners would have to seek appellate review with respect to both ordinary and exceptional claims at the state supreme court level. Again, then, the bill allows the states to make the choice they think best.

Section 406: Sense of the Congress Regarding the Execution of Juvenile Offenders and the Mentally Retarded. This resolution would not have the force of federal law and thus would not affect state interests nor any operational impact on states that regard the execution of juveniles and mentally retarded persons as sound public policy.

Senator SESSIONS. I think it is time for us to go vote. We have got just a few minutes. I would just conclude by saying something that I think is fundamentally important for the American people to understand. In the overwhelming number of cases that come forward, there is strong to overwhelming evidence of guilt. There are some that are close calls.

I think in some ways, if I could have a magic wand, I would focus more on the close cases than we do on the others. But every case now is provided with attorneys. They go file sometimes 15, 16 years. We had two executions in Alabama when I was attorney general; one was 15 and one was 18 years in the making, with appeals going on for that long. I think we need to bring finality to the cases in which there is a powerful evidence of guilt, and we should be open to evidence that would indicate some may not be guilty. I think that is the philosophy we ought to take.

Thank you very much. It was an excellent panel.

We are adjourned.

[Whereupon, at 2:30 p.m., the committee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

CLATSOP COUNTY,
DISTRICT ATTORNEY'S OFFICE,
Astoria, OR, July 7, 2000.

Hon. PATRICK LEAHY,
U.S. Senator, Committee on the Judiciary, Washington, DC.

DEAR SENATOR LEAHY: I have received an extensive list of questions which I will try to answer to the best of my abilities. As I said when I testified I do not claim to be a DNA expert and manage a prosecutor's office with five deputies and eleven support staff, so my perspective is that of a working prosecutor.

RESPONSES OF JOSHUA K. MARQUIS TO QUESTIONS FROM SENATOR LEAHY

Answer 1. I read about your bill in early May and the endorsement given by Senator Gordon Smith from a clipping service I receive from the National District Attorneys Association. I was fixed a copy of S. 2073 on May 12, 2000 by Senator Smith's staff and after I read it I asked to meet with the Senator at his office in Portland, Oregon. I was later contacted by the Chairman's staff, who faxed me a copy of the un-numbered "Criminal Justice Integrity Act" proposal. They asked me for constructive criticism of their proposal and to review his proposal and the strengths of both bills.

I spoke extensively with Senator Smith's staff before coming to Washington and furnished them with a draft of my testimony before I submitted it to committee staff.

Answer 2, 3 and 4. We have a bi-annual legislature which discussed but did not pass any post-conviction DNA legislation in the 1999 session, largely because it is simply unnecessary in Oregon. We have never had a capital case since 1976 in which a defendant claimed wrongful conviction, much less one involving DNA. Therefore the number of years capital defendants were wrongfully incarcerated in Oregon is zero. We have had three non-capital murder cases in recent years in which the local prosecutors joined with defense attorneys to ensure the release of defendants about whom serious doubts were raised. Those prosecutors, from three different large counties in Oregon, met their ethical duties with honor. I must admit I resent the implications of Mr. Scheck and others that it is the criminal defense bar that acts as the last defense for the "actually innocent." As a former prosecutor yourself, I am sure you know my profession's mandate is to "seek not merely a conviction, but justice above all else."

Answer 5. Unlike highly unusual and ill-advised law just passed in Illinois, Oregon has no specific law mandating preservation of evidence. A prosecutor's failure to maintain evidence would result in swift and fatal results to his case . . . it would likely be dismissed. I believe it would be inadvisable to create criminal penalties for public servants who accept low pay, when actual official misconduct is already punishable, and can even be a capital offense in states like California. There is no more need to "mandate preservation of evidence" through federal statute than to pass a law that says it's wrong to lie to a judge. Both are self-evident, with dire consequences to the prosecutor if violated.

Answer 6. The Oregon Judicial Department's State Court Administrator and the staff of the Indigent Defense program manage a rigorous multi-tiered screening and qualification process to ensure that lawyers appointed to many levels of felony indi-

gent defense are peer-reviewed and screened by local judges, who are NOT responsible for the financial costs of indigent defense which is paid centrally by the state court administrator. As I testified before your committee Oregon spends about $1.70 for indigent defense contrasted with the $1 spent by the state and counties for all prosecution services (indigent AND retained defendants). You expressed some disbelief when I said I had been outspent 100 to 1 in a capital case. I would refer you to the one case in which I have sought and obtained the death penalty (State of Oregon v. Randy Guzek, Deschutes County, 1991, 1997). In that case, even if you include ALL my salary, that of my support staff, the police officers, and trial preparation costs, prosecution costs may have totaled $20,000 over two trials while defense costs (still under seal at the request of the defense) are near or over $2 million.

Answer 7. We have so few "wrongfully convicted" defendants in Oregon that no-one has seen the need for special legislation. In one recent case a city paid over a million dollars to a man whose murder conviction (non-capital) was set aside, even though Oregon law caps state liability at $100,000.

Answer 8. Oregon receives NO federal funds for indigent defense.

Answer 9 a. The cost of DNA testing is hard to estimate since almost all testing is done by the Forensics Division of the Oregon State Police who will perform tests for both prosecution AND defense at no cost—beyond the budgets already set aside for the state police (to give you some perspective our state spends about 7 percent of our state's budget on ALL law enforcement functions (except prisons which are another 7 percent) as opposed to about 57 percent for education. We have built a single new prison in the last ten years.

Answer 9b. the Oregon department of Corrections estimates the average inmate per year cost at just under $24,000 a year.

Answer 10. I think Congress can serve a critical role by setting an example by mandating the way federal cases are handled, but am concerned about huge unfunded federal mandates like federally-drafted indigent defense standards. But there is a difference between what a defense lawyer will call "newly discovered evidence,"—the interminable number of jail-house lawyers who suddenly "remember" an statement that might cloud the conviction of a cell-mate, and "actual innocence," a standard I believe espoused by Mr. Scheck's Innocence Project and a standard I do not consider too high.

Answer 11. The Vasquez case once again demonstrates the high ethical standards shown by the overwhelming number of America's prosecutors when faced with credible evidence of "actual innocence." I don't believe any legislation is a substitute for the requirement for career prosecutors to follow their ethical duty to protect the innocent and prosecute the guilty—the motto of the NDAA when you served as Vice President.

Answer 12. Mr. Scheck likes to derisively refer to what he refers to as the "unindicted co-ejaculator" theory. The Keri Kotler case would be an excellent one to ask Mr. Scheck about. In that case he secured not only Mr. Kotler's release, but also an almost 2 million dollar settlement for wrongful arrest and conviction for a highly distinctive rape. Within weeks of getting his windfall Mr. Kotler raped another woman under virtually identical circumstances. This time Kotler left lots of his DNA on the victim. Scheck now posits that the police must have somehow gathered Kotler's DNA in a spray bottle and planted it on the victim.

There are cases in which an "exculpatory DNA result" will not answer the more fundamental question of actual innocence. I do not think actual innocence is too high a standard when we are speaking of post-conviction, post-appeal testing procedures. Otherwise we are inviting virtually every person in prison to rehash their case on the grounds that a DNA test might not establish their innocence, but it would have helped them impeach a witness on a collateral matter or improved their argument at sentencing. I strongly believe that the goal of freeing the wrongfully convicted means those who didn't commit the crime.

Answer 13a. WAS If DNA was available and his lawyer was competent (and not subject to post conviction relief for ineffective assistance of counsel) I would not expect that the chairman's bill would deal with that situation.

As I said before, those cases in which real, actual evidence of innocence is presented, has been largely met by co-operation from prosecutors. Mr. Scheck can cite a handful of un-cooperative prosecutors out of literally millions of felony convictions over the last couple decades.

Answer. 13b. In my state a defendant whose lawyer failed to provide adequate counsel could seek post-conviction relief.

Answer 13c and d. STATE habeas corpus relief would normally be available to defendants in such cases. In Oregon our state appellate courts tend to extend more rights to the accused than federal courts mandate.

Answer 14. I absolutely agree that trial courts should give complete and truthful descriptions of the possible sentences a capital or murder defendant cases (assuming the jury is asked to set the penalty as it does in aggravated murder cases in Oregon). In my state, DEFENSE lawyers have fought ferociously to keep judges from instructing juries as to what life with parole means or what a sentence to the Psychiatric Security Review Board might mean where someone found guilty but insane).

Answer 15. In the Winship case Justice Harlan echoed a percept virtually all Americans share—"Better to let ten guilty go free rather than convict an innocent one." The next logical question, which no-one wants to ask, should be "is it better to let 10,000 guilty murderers free to insure that an innocent man might not be convicted?" What level of risk are we willing to take? You said, quite reasonable, that you would never fly an airline that had a 68 percent risk of crashing, citing the Liebman study. As Senator Biden so ably pointed out that study did not claim that even a fraction of those claimed 68 percent were innocent men. My rhetorical question is whether we would be willing to take a 2 out of 3 risk that you were setting a murderer free every time we tried someone for such a crime.

I greatly appreciate the honor of having appeared before your committee and appreicate your interest in the issues than concern all Americans of good will. As an active life-long Democrat I am glad to see a diversity of opinion on this critical issue.

Respectfully submitted,

JOSHUA MARQUIS,
District Attorney.

CLATSOP COUNTY,
DISTRICT ATTORNEY'S OFFICER,
Astoria, OR, July 7, 2000.

Hon. DIANE FEINSTEIN,
U.S. Senator, Committee on the Judiciary, Washington, DC.

DEAR SENATOR FEINSTEIN: I think your idea of placing a date certain in any DNA legislation is an excellent idea in keeping with the need to use precise language that guarantees that such appeals are used to free only the "actually innocent," not hordes of criminals seeking to exploit a well-intentioned loophole in our criminal laws.

As a career prosecutor and former speech-writer to John Van de Kamp, I greatly appreciate your considered and reasoned questions about the various DNA bills before the Judiciary Committee.

I am confident that a bill can be worked out that most everyone can live with and accomplish the goal or prosecuting the guilty and protecting the innocent.

Sincerely,

JOSHUA MARQUIS,
District Attorney.

RESPONSE OF DENNIS FRITZ TO A QUESTION FROM SENATOR FEINSTEIN

Question 1. To avoid any questions about whether DNA technology was "available" at the time of trial, do you think that putting a date certain in the bill would be appropriate—for instance, allow only cases tried before 1999 to qualify for post-conviction testing? Can we safely say that DNA technology is advanced enough to institute such a date cutoff?

Answer 1. In the first place, I don't think that the question of whether or not DNA testing was "available" at the time of trial should be avoided. If DNA testing was not available at trial, and DNA evidence does exist for such testing purposes, then the evidence should be rightfully tested. I feel that putting a date certain in the bill would be too restrictive and would not allow defendants' a full and fair exposure to the actual testing process. Although I do feel that DNA testing is advanced enough to accommodate such a date cutoff restriction, I believe that such a restriction would limit a certain number of wrongfully convicted inmates to the testing process. If this number was just one (1) wrongfully convicted inmate, then it would be immoral and unjust to put such a type of restriction on a human being's availability to have the DNA testing done in this case.

RESPONSES OF DENNIS FRITZ TO QUESTIONS FROM THE SENATE COMMITTEE ON THE JUDICIARY

Question 1. Have you received any compensation from the State of Oklahoma for the 12 years that you spent in prison? Have you received any official apology?

Answer 1. No, I have not received any compensation whatsoever from the State of Oklahoma since my incarceration and release, nor have I ever received any verbal or written formal apology concerning my false and unjust conviction.

Question 2. To your knowledge, has your co-defendant, Ron Williamson, received any compensation or apology for the years he spent on death row?

Answer 2. To my knowledge, my co-defendant, Ronald Williamson, has never received any compensation or apology for the years he spend on death row.

Question 3. Chairman Hatch has proposed legislation that would give prisoners a limited right to seek DNA testing. But unlike the Leahy-Smith-Collins bill, which authorizes the appointment of counsel for indigent applicants seeking DNA testing, the Hatch proposal contains no such protection; even death row inmates suffering from mental illness would be forced to navigate the legal system alone. Do you believe that you or Ron Williamson would have been able to obtain DNA testing without the assistance of counsel?

Answer 3. Absolutely not! Due to the fact that I had not received the death penalty, I was not afforded the opportunity for representation of counsel past my state direct appeal. Therefore, in having to do my own case, I repeatedly motioned both state and federal Courts for the opportunity to inspect the crimescene evidence for DNA testing. On every such occasion, I was denied by all Courts whereby it was started that I did not have a constitutional right to the testing. Without being able to fully speak for the co-defendant, Ronald Williamson, I can specifically state that in my case circumstances described above, the chances for me to have received DNA testing were zero as my denied motions will reflect. Only after Mr. Barry Scheck and Peter Neufeld entered their record of appearance, were they able to get the Court approved DNA testing in both my case and the co-defendants.

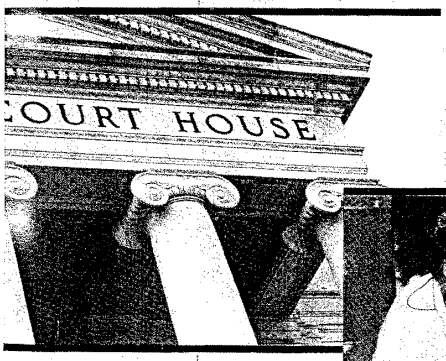
Question 4. Do you feel that the criminal justice system worked in your case, since you were eventually able to prove your innocence?

Answer 4. No! The only reason that the criminal justice system did work in my case was because the co-defendant received a new trial on Habeas whereby the district attorney proceeded to initiate the DNA testing without wanting to additionally include myself in the testing process. At that time, I had to file restraining motions to stop the district attorney and Oklahoma State Bureau of Investigation from proceeding with the testing, until I had a chance to include my representative Innocence Project to protect and assure the proper testing process.

Department of Justice
of Justice Programs
National Institute of Justice

Convicted by Juries, Exonerated by Science:

Case Studies in the Use of DNA Evidence to Establish Innocence After Trial



Research Report

CHAPTER 1

Introduction

"I had," said he, "come to an entirely erroneous conclusion which shows my dear Watson, how dangerous it always is to reason from insufficient data."

*Arthur Conan Doyle, **The Adventure of the Speckled Band***

One way to view science is that it is a search for truth.[1] Forensic science is no exception. As Attorney General Janet Reno emphasized, "The use of forensic science as a tool in the search for truth allows justice to be done not only by apprehending the guilty but also by freeing the innocent."[2]

This report describes a study that focused on the freeing of the innocent—persons initially convicted and imprisoned but later released through postconviction forensic use of DNA technology.

Purpose and Scope of the Study

The principal purpose of the study, initiated in June 1995, was to identify and review cases in which convicted persons were released from prison as a result of posttrial DNA testing of evidence. As of early 1996, researchers had found 28 such cases: DNA test results obtained subsequent to trial proved that, on the basis of DNA evidence, the convicted persons could not have committed the crimes for which they were incarcerated.

The study also involved a survey of 40 laboratories that conduct DNA testing.

This report does not probe the strengths or weaknesses of forensic DNA technology when applied to criminal cases.[3] The discussion of DNA instead is limited to its use in exculpating convicted defendants serving prison sentences.

The authors do not claim to be scientific experts in DNA technology. This report cites reference materials that probe technological details more deeply than occurs on these pages.

The balance of this chapter outlines the study's design and provides basic background information on forensic DNA identification testing. Chapters II and III, respectively, present the study's findings and their policy implications. The final chapter consists of brief profiles of the 28 exculpatory cases. A glossary defines DNA-related terms, and the appendix reports DNA test results for some of the exculpated persons profiled in this report.

Study Design

To identify cases that met study criteria—defendant conviction, imprisonment, and subsequent exoneration and release resulting from posttrial exculpatory DNA tests—researchers examined legal and newspaper data bases and interviewed a variety of legal and DNA experts. Once initially identified as likely candidates for the study, cases were verified and assessed through interviews with the involved defense counsel, prosecutors, and forensic laboratory staff; through reviews of court opinions; and, in some instances, through examinations of case files.

For example, initial identification of the Glen Woodall case resulted from an automated search of newspaper data bases, which identified articles about the case in several West Virginia newspapers, the *Philadelphia Inquirer*, and the *Cleveland Plain Dealer*. An opinion by the West Virginia Supreme Court of Appeals in the appeal of Woodall's conviction (*State* v. *Woodall*, 385 S.E.2d 253, W. Va. 1989) contained the name of Woodall's defense attorney, who was called and interviewed at length and who provided materials related to the criminal case.

Those materials described improper activities by Fred Zain, once a serologist for the West Virginia State Police. A phone conversation with the West Virginia assistant attorney general handling the Zain misconduct cases resulted in the receipt of public case documents containing extensive details on Zain's activities related to the Woodall investigation and prosecution.

A review of transcripts from the criminal and, later, civil cases yielded the name of the laboratory that conducted the DNA testing that exculpated Woodall. A lengthy interview was conducted with the laboratory's forensic scientist who performed the DNA tests on the Woodall evidence. He provided documentation related to his examinations in the case.

Cases related to a special West Virginia Supreme Court of Appeals investigation into government misconduct surrounding Woodall's case (438 S.E.2d 501, W. Va. 1993; 445 S.E.2d 165, W. Va. 1994) also were reviewed.

Researchers collected information for the survey of DNA-testing laboratories through telephone interviews. An experienced crime laboratory director assisted the Institute for Law and Justice in conducting the survey.

This study, conducted in a short time period with limited funding, reflects a modest level of analysis and focuses on a relatively small number of cases.

One can state with confidence, however, that as of the study's completion, the 28 cases identified represent most of the situations in the country where convicted felons had been released from prison on the basis of postconviction DNA testing.[4]

Background on Forensic Use of DNA Identification Testing

Perhaps the most significant advance in criminal investigation since the advent of fingerprint identification is the use of DNA technology to help convict criminals or eliminate persons as suspects. DNA analyses on saliva, skin tissue, blood, hair, and semen can now be reliably used to link criminals to crimes. Increasingly accepted during the past 10 years, DNA technology is now widely used by police, prosecutors, defense counsel, and courts in the United States.

An authoritative study on the forensic uses of DNA, conducted by the National Research Council of the National Academy of Sciences, has noted that:

> ...the reliability of DNA evidence will permit it to exonerate some people who would have been wrongfully accused or convicted without it. Therefore, DNA identification is not only a way of securing convictions; it is also a way of excluding suspects who might otherwise be falsely charged with and convicted of serious crimes.[5]

Forensic use of DNA technology in criminal cases began in 1987 when police asked Dr. Alec J. Jeffreys (who coined the term "DNA fingerprints"[6]) of Leicester University (England) to verify a suspect's confession that he was responsible for two rape-murders in the English Midlands.[7] Tests proved that the suspect had not committed the crimes. Police then began obtaining blood samples from several thousand male inhabitants in the area to identify a new suspect.[8] In another 1987 case in England, Robert Melias became the first person convicted of a crime (rape) on the basis of DNA evidence.[9]

In one of the first uses of DNA in a criminal case in the United States, in November 1987, the Circuit Court in Orange County, Florida, convicted Tommy Lee Andrews of rape after DNA tests matched his DNA from a blood sample with that of semen traces found in a rape victim.[10]

Two other important early cases involving DNA testing are *State* v. *Woodall*[11] and *Spencer* v. *Commonwealth*.[12] In *Woodall*, the West Virginia Supreme Court was the first State high court to rule on the admissibility of

DNA evidence. The court accepted DNA testing by the defendant, but inconclusive results failed to exculpate Woodall. The court upheld the defendant's conviction for rape, kidnaping, and robbery of two women. Subsequent DNA testing determined that Woodall was innocent, and he was released from prison (see the case profile in chapter IV for more details).

The multiple murder trials in Virginia of Timothy Wilson Spencer were the first cases in the United States where the admission of DNA evidence led to guilty verdicts resulting in a death penalty. The Virginia Supreme Court upheld the murder and rape convictions of Spencer, who had been convicted on the basis of DNA testing that matched his DNA with that of semen found in several victims. In *Spencer*, the defendant's attack upon the introduction of DNA evidence was limited to the contention that its novelty should lead the court to "hold off until another day any decision ..."[13] There was no testimony from expert witnesses that challenged the general acceptance of DNA testing among the scientific community.[14]

The first case that seriously challenged a DNA profile's admissibility was *People* v. *Castro*;[15] the New York Supreme Court, in a 12-week pretrial hearing, exhaustively examined numerous issues relating to the admissibility of DNA evidence. Jose Castro was accused of murdering his neighbor and her 2-year-old daughter. A bloodstain on Castro's watch was analyzed for a match to the victim. The court held the following:

- DNA identification theory and practice are generally accepted among the scientific community.
- DNA forensic identification techniques are generally accepted by the scientific community.
- Pretrial hearings are required to determine whether the testing laboratory's methodology was substantially in accord with scientific standards and produced reliable results for jury consideration.

The *Castro* ruling supports the proposition that DNA identification evidence of *exclusion* is more presumptively admissible than DNA identification evidence of *inclusion*. In *Castro*, the court ruled that DNA tests could be used to show that blood on Castro's watch was not his, but tests could not be used to show that the blood was that of his victims.

In *Castro*, the court also recommended extensive discovery requirements for future proceedings, including copies of all laboratory results and reports;

explanation of statistical probability calculations; explanations for any observed defects or laboratory errors, including observed contaminants; and chain of custody of documents. These recommendations soon were expanded upon by the Minnesota Supreme Court, in *Schwartz* v. *State*,[16] which noted, "...ideally, a defendant should be provided with the actual DNA sample(s) in order to reproduce the results. As a practical matter, this may not be possible because forensic samples are often so small that the entire sample is used in testing. Consequently, access to the data, methodology, and actual results is crucial...for an independent expert review."[17]

In *Schwartz*, the Supreme Court of Minnesota refused to admit the DNA evidence analyzed by a private forensic laboratory; the court noted the laboratory did not comply with appropriate standards and controls. In particular, the court was troubled by failure of the laboratory to reveal its underlying population data and testing methods. Such secrecy precluded replication of the test.

In summary, courts have successfully challenged improper application of DNA scientific techniques to particular cases, especially when used to declare "matches" based on frequency estimates. However, DNA testing properly applied is generally accepted as admissible under *Frye*[18] or *Daubert*[19] standards.[20] As stated in the National Research Council's 1996 report on DNA evidence, "The state of the profiling technology and the methods for estimating frequencies and related statistics have progressed to the point where the admissibility of properly collected and analyzed DNA data should not be in doubt."[21] At this time, 46 States admit DNA evidence in criminal proceedings. In 43 States, courts have ruled on the technology, and in 3 States, statutes require admission (see exhibit 1).

Exhibit 1. DNA Evidence Admission in Criminal Trials by State

State	DNA Admitted	State	DNA Admitted
Alabama	Yes	Montana	Yes
Alaska	Yes	Nebraska	Yes
Arizona	Yes	Nevada	Statute
Arkansas	Yes	New Hampshire	Yes
California	Yes*	New Jersey	Yes*
Colorado	Yes	New Mexico	Yes
Connecticut	Yes	New York	Yes
Delaware	Yes	North Carolina	Yes
Florida	Yes	North Dakota	No
Georgia	Yes	Ohio	Yes
Hawaii	Yes	Oklahoma	Statute
Idaho	Yes	Oregon	Yes
Illinois	Yes*	Pennsylvania	Yes
Indiana	Yes	Rhode Island	No
Iowa	Yes	South Carolina	Yes
Kansas	Yes	South Dakota	Yes
Kentucky	Yes	Tennessee	Statute
Louisiana	Yes	Texas	Yes
Maine	No	Utah	No
Maryland	Yes*	Vermont	Yes
Massachusetts	Yes	Virginia	Yes
Michigan	Yes	Washington	Yes
Minnesota	Yes	West Virginia	Yes
Mississippi	Yes	Wisconsin	Yes
Missouri	Yes	Wyoming	Yes

* Decision by Intermediate Court of Appeals

Notes

1. "Science is the search for truth—it is not a game in which one tries to beat his opponent, to do harm to others."—Linus Pauling, 1958. Cited in Beck, Emily Morison (ed.), *Familiar Quotations*, Boston: Little, Brown and Company, 1980.

2. Keynote address by Attorney General Janet Reno before the American Academy of Forensic Sciences, Nashville, Tennessee, February 21, 1996.

3. For articles debating the forensic use of DNA technology, see Thompson, William, "Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the DNA War," *The Journal of Criminal Law & Criminology*, 84, 1 (1993):22–104; Harmon, Rockne, "Legal Criticisms of DNA Typing: Where's the Beef?" *The Journal of Criminal Law & Criminology*, 84, 1 (1993):175–188; and Neufeld, Peter, "Have You No Sense of Decency?" *The Journal of Criminal Law & Criminology*, 84, 1 (1993):189–202.

4. The study's results have been reviewed by many persons, including those involved in a peer review process. To date, no one has identified additional cases that, as of the study's completion in February 1996, are the type examined in this report.

5. National Research Council, National Academy of Sciences, *DNA Technology in Forensic Science*, Washington, D.C.: National Academy Press, 1992:156. (Cited as NRC report.) Another reference source is McKenna, Judith, J. Cecil, and P. Coukos, "Reference Guide on Forensic DNA Evidence," *Reference Manual on Scientific Evidence*, Federal Judicial Center (1994). This guide has a useful glossary of terms at p. 323.

6. Jeffreys, Alec J., Victoria Wilson, and Swee Lay Thein, "Hypervariable 'Minisatellite' Regions in Human Nature," *Nature*, 314 (1985):67; "Individual-Specific 'Fingerprints' of Human DNA," *Nature*, 316 (1985):76.

7. The first reported use of DNA identification was in a noncriminal setting to prove a familial relationship. A Ghanaian boy was refused entry into the United Kingdom (U.K.) for lack of proof that he was the son of a woman who had the right of settlement in the U.K. Immigration authorities contended that the boy could be the nephew of the woman, not her son. DNA testing showed a high probability of a mother-son relationship. The U.K. Government accepted the test findings and admitted the boy. See Kelly, K.F, J.J. Rankin, and R.C. Wink, "Methods and Applications of DNA Fingerprinting: A Guide for the Non-Scientist," *Criminal Law Review* (1987):105, 108; Note, "Stemming the DNA Tide; A Case for Quality Control Guidelines," *Hamline Law Review*, 16 (1992):211, 213–214.

8. Gill, Peter, Alec J. Jeffreys, and David J. Werrett, "Forensic Application of DNA Fingerprints," *Nature*, 318 (1985):577. See also Seton, Craig, "Life for Sex Killer Who Sent Decoy to Take Genetic Test," *The Times* (London) (January 23, 1988):3. A popular account of this case, *The Blooding*, was written by crime novelist Joseph Wambaugh, New York, N.Y.: William Morrow & Co., Inc., 1989.

9. Bureau of Justice Statistics, "Forensic DNA Analysis: Issues," Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, June 1991, at 4, note 8.

10. The admissibility of the DNA evidence was upheld by the intermediate appeals court, which cited the uncontroverted testimony of the State's expert witnesses. *State* v. *Andrews*, 533 So.2d 841 (Dist. Ct. App. 1989). See also Office of Technology Assessment, Congress of the United States, *Genetic Witness: Forensic Uses of DNA Tests*, Washington, D.C.: July 1990.

11. 385 S.E.2d 253 (W. Va. 1989).

12. 384 S.E.2d 775 (1989). Additional court appeals by Spencer were rejected by the Virginia Supreme Court at 384 S.E.2d 785 (1989); 385 S.E.2d 850 (1989); and 393 S.E.2d 609 (1990).

13. Supra note 12 at 783.

14. Id., at 797.

15. 545 N.Y.S.2d 985 (Sup. Ct. 1989). Castro's case was never tried. He pleaded guilty to the murders in late 1989.

16. *Schwartz* v. *State*, 447 N.W.2d 422 (1989).

17. Id., at 427. The Minnesota Supreme Court further held that the use of statistical probabilities testimony should be limited because of its potential for prejudicing the jury. Id., at 428. The opinion was later modified in *State* v. *Bloom*, 516 N.W.2d 159 (1994).

18. *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923). The test for the admissibility of novel scientific evidence enunciated in this case has been the most frequently invoked one in American case law. To be admissible, scientific evidence must be "sufficiently established to have gained general acceptance in the particular field in which it belongs."

19. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). The Supreme Court used this civil case to articulate new standards for interpreting the admissibility of scientific evidence under the Federal rules of evidence. This standard, while encompassing *Frye*, allows a court to expand its examination to include other indicia of reliability, including publications, peer review, known error rate, and more. The court also should consider factors that might prejudice or mislead the jury. For the application of *Daubert* to DNA technology, see Sheck, Barry, "DNA and *Daubert*," *Cardozo Law Review*, 15 (1994):1959.

20. This brief overview is not a treatise on DNA evidence admissibility in criminal cases. For more authoritative articles, see, Thompson, supra note 3; Kaye, D.H., "The Forensic Debut of the National Research Council's DNA Report: Population Structure, Ceiling Frequencies and the Need for Numbers," *Jurimetrics Journal*, 34, 4 (1994):369–382; Comments, "Admissibility of DNA Statistical Data: A Proliferation of Misconception," *California Western Law Review*, 30 (1993):145–178.

21. National Research Council, National Academy of Sciences, *The Evaluation of Forensic DNA Evidence* (prepublication copy), Washington, D.C.: National Academy Press, 1996:2.14.

CHAPTER II

Study Findings

Findings pertaining to characteristics of the 28 DNA exculpatory cases identified during the study are discussed first. The chapter concludes with the results of the telephone survey of DNA laboratories.

General Characteristics Shared by Many Study Cases

The 28 cases in this study were tried in 14 States and the District of Columbia. The States are Illinois (5 cases), New York (4 cases), Virginia (3 cases), West Virginia (3 cases), Pennsylvania (2 cases), California (2 cases), Maryland, North Carolina, Connecticut, Kansas, Ohio, Indiana, New Jersey, and Texas. Many cases share a number of descriptive characteristics, as noted below.

Most cases mid- to late 1980s. Most cases involved convictions that occurred in the 1980s, primarily mid- to late 1980s, a period when forensic DNA technology was not readily accessible. The earliest case involved a conviction in 1979, the most recent in 1991.

In each of the 28 cases, a defendant was convicted of a crime or crimes and serving a sentence of incarceration. While in prison, each defendant obtained, through an attorney, case evidence for DNA testing and consented to a comparison of the evidence-derived DNA to his own DNA sample. (In *Nelson*, the prosecutor conducted the tests.) In each case, the results showed that there was not a match, and the defendant was ultimately set free. Exhibit 2 presents an overview of the study cases.

Sexual assault the most frequent crime. All 28 cases involved some form of sexual assault. In six (*Bloodsworth, Cruz, Hernandez, Linscott, Nelson,* and *Vasquez*), assailants also murdered their victims. All alleged assailants were male. All victims were female: most were adults, others teenagers or children. All but one case involved a jury trial. (The nonjury case, *Vasquez,* involved a guilty plea from a defendant who had mental disabilities.) Of the cases where the time required for jury deliberations was known, most had verdicts returned in less than 1 day, except for *Kotler*, which required 2 days.

Prison time served. The 28 defendants served a total of 197 years in prison (an average of almost 7 years each) before being released as a result of DNA testing. The longest time served was 11 years, the shortest 9 months. For a variety of legal reasons, defendants in several cases continued to remain in prison for months after exculpatory DNA test results. In *Green*, DNA testing was performed after conviction but prior to sentencing.

Exhibit 2. Overview of DNA Study Cases

Case Name/Location	Primary Charges	Date Convicted	Sentence/Served
Alejandro, Gilbert Uvalde, TX	Sexual assault	October 1990	12 yrs/4 yrs
Bloodsworth, Kirk Baltimore, MD	Murder, rape	March 1985	Death, later reduced to life/Almost 9 yrs
Bravo, Mark Diaz Los Angeles Co., CA	Rape	December 1990	8 yrs/3 yrs
Brison, Dale Chester County, PA	Rape, kidnaping	June 1991	18–42 yrs/3½ yrs
Bullock, Ronnie Chicago, IL	Aggravated sexual assault	May 1984	60 yrs/10½ yrs
Callace, Leonard White Plains, NY	Sodomy, sexual abuse	March 1987	25–50 yrs/Almost 6 yrs
Chalmers, Terry Leon White Plains, NY	Rape, sodomy	June 1987	12–24 yrs/8 yrs
Cotton, Ronald Burlington, NC	Rape (2 counts)	January 1985 November 1987 (second trial)	Life+54 yrs/10½ yrs
Cruz, Rolando Chicago, IL	Murder, kidnaping, rape	March 1985	Death/11 yrs
Dabbs, Charles Westchester Co., NY	Rape	April 1984	12½–20 yrs/7 yrs
Davis, Gerald Wayne Kanawha Co., WV	Kidnaping, sexual assault (2 counts)	May 1986	14–35 yrs/8 yrs
Daye, Frederick Rene San Diego, CA	Rape (2 counts), kidnaping	August 1984	Life/10 yrs
Dotson, Gary Chicago, IL	Rape, aggravated kidnaping	July 1979	25–50 yrs/8 yrs
Green, Edward Washington, DC	Rape	July 1989	Never sentenced/9 months
Hammond, Ricky Hartford, CT	Sexual assault, kidnaping	March 1990	25 yrs and 3 yrs probation/2 yrs
Harris, William O'Dell Charleston, WV	Sexual assault	October 1987	10–20 yrs/7 yrs, then 1 yr home confinement

Exhibit 2. Overview of DNA Study Cases (continued)

Case Name/Location	Primary Charges	Date Convicted	Sentence/Served
Hernandez, Alejandro Chicago, IL	Murder, kidnaping, rape	March 1985	Death/11 yrs
Honaker, Edward Nelson County, VA	Rape, sexual assault, sodomy	June 1985	3 life terms+34 yrs/10 yrs
Jones, Joe C. Topeka, KS	Rape, aggravated kidnaping	February 1986	Life+10–25 yrs/6½ yrs
Kotler, Kerry Suffolk County, NY	Rape (2 counts)	February 1982	25–50 yrs/11 yrs
Linscott, Steven Cook County, IL	Murder, rape	November 1982	40 yrs/3 yrs in prison; 7 yrs out on bond
Nelson, Bruce Allegheny Co., PA	Murder, rape	September 1982	Life/9 yrs
Piszczek, Brian Cuyahoga Co., OH	Rape	June 1991	15–25 yrs/4+ yrs
Scruggs, Dwayne Indianapolis, IN	Rape	May 1986	40 yrs/Over 7½ yrs
Shephard, David Union County, NJ	Rape	September 1984	30 yrs/Almost 10 yrs
Snyder, Walter (Tony) Alexandria, VA	Rape, sodomy	June 1986	45 yrs/Almost 7 yrs
Vasquez, David Arlington Co., VA	Murder, rape	February 1985	35 yrs/5 yrs
Woodall, Glen Huntington, WV	Sexual assault, kidnaping	July 1987	2 life terms+203–335 yrs/4 yrs, then 1 yr under electronic home confinement

Many defendants also qualified for public defenders or appointed counsel. Most defendants appealed their convictions at least once; many appealed several times. Most appeals focused on trial error (e.g., ineffective assistance of counsel) or new evidence. For example, in some cases, the victims recanted their defendant identification testimony.

Prior police knowledge of the defendants. Police knew 15 defendants prior to their arrests, generally through criminal records. It is not known

whether, in some cases, that may have influenced police to place suspects in photo spreads and lineups shown to victims and other eyewitnesses.

Evidence Presented During/After Trial: Common Attributes

The 28 cases shared several common themes in the evidence presented during and after trial.

Eyewitness identification. All cases, except for homicides, involved victim identification both prior to and at trial. Many cases also had additional eyewitness identification, either placing the defendant with the victim or near the crime scene (e.g., in *Bloodsworth*, five witnesses testified that they had seen the defendant with the 9-year-old victim on the day of the murder). Exhibit 3 presents an overview of the evidence and DNA testing in the study cases.

Many defendants presented an alibi defense, frequently corroborated by family or friends. For example, Edward Honaker's alibi was corroborated by his brother, sister-in-law, mother's housemate, and trailer park owner. The alibis apparently were not of sufficient weight to the juries to counter the strength of the eyewitness testimony.

Use of forensic evidence. A majority of the cases involved non-DNA-tested forensic evidence that was introduced at trial. Although not pinpointing the defendants, that evidence substantially narrowed the field of possibilities to include them. Typically, those cases involved comparisons of nonvictim specimens of blood, semen, or hair at the crime scene to that of the defendants. Testimony of prosecution experts also was used to explain the reliability and scientific strength of non-DNA evidence to the jury.

Alleged government malfeasance or misconduct. Eight cases, as reported by defense attorneys and reflected in some judges' opinions, involved allegations of government misconduct, including perjured testimony at trial, police and prosecutors who intentionally kept exculpatory evidence from the defense, and intentionally erroneous laboratory tests and expert testimony admitted at trial as evidence. For example:

- In *Honaker*, the defendant's attorney alleged that the government intentionally kept exculpatory evidence from the defense, including information that two of the government's witnesses were secretly hypnotized to enhance their testimony and that the prosecution's criminalist was never

Exhibit 3. Overview of Selected Evidence and DNA Testing

Defendant	Selected Evidence	DNA Testing
Alejandro, Gilbert	DNA evidence testimony; victim ID	Restriction Fragment Length Polymorphism (RFLP) tests of semen stain on victim's nightgown excluded Alejandro.
Bloodsworth, Kirk	Five witness IDs; self-incriminating statements	Polymerase Chain Reaction (PCR) test of panties excluded Bloodsworth.
Bravo, Mark Diaz	Victim ID; blood analysis; misrepresentation	RFLP test of blanket, sheet, and victim's panties excluded Bravo.
Brison, Dale	Victim ID; hair analysis; weak alibi	RFLP test of semen-stained panties excluded Brison.
Bullock, Ronnie	Two victim IDs; police ID; proximity of residence	PCR test of semen-stained panties excluded Bullock. DNA tests on vaginal and anal swabs were inconclusive.
Callace, Leonard	Victim ID; blood analysis; weak alibi	RFLP test of semen-stained jeans excluded Callace.
Chalmers, Terry Leon	Victim ID; weak alibi	PCR test of two vaginal swabs excluded Chalmers.
Cotton, Ronald	Victim ID; similarity of shoes and flashlight	PCR test of vaginal swab and underwear excluded Cotton.
Cruz, Rolando	Alleged "dream visions" of the murder; inculpatory witness statements	PCR test of semen-stained underwear excluded Cruz and included Brian Dugan.
Dabbs, Charles	Victim ID; blood analysis	RFLP test of semen-stained panties excluded Dabbs.
Davis, Gerald Wayne	Victim ID; semen analysis	PCR test of the victim's underwear excluded Davis. No DNA found matching the victim from DNA tests done on Davis' bedsheets and underwear.
Daye, Frederick Rene	Victim ID; witness ID; blood analysis; misrepresentation	PCR test of semen-stained jeans excluded Daye.
Dotson, Gary	Victim ID; semen analysis; hair analysis	RFLP test of panties was inconclusive. PCR test of panties excluded Dotson and included victim's boyfriend.
Green, Edward	Victim ID; blood analysis	RFLP test of the victim's clothing excluded Green.

Exhibit 3. Overview of Selected Evidence and DNA Testing (continued)

Defendant	Selected Evidence	DNA Testing
Hammond, Ricky	Victim ID; victim ID of car; hair analysis; weak alibi	RFLP and blood tests excluded Hammond.
Harris, William O'Dell	Victim ID; semen analysis	PCR test of evidence slide excluded Harris.
Hernandez, Alejandro	Self-incriminating and inculpatory statements; inculpatory witness statements	PCR test of semen-stained underwear excluded Hernandez and included Brian Dugan.
Honaker, Edward	Victim ID; witness ID; hair analysis; similarity of clothing	PCR test of vaginal swab excluded Honaker and both of victim's boyfriends.
Jones, Joe C.	Victim ID; proximity to crime scene; similarity of pants; 2 witness IDs	PCR test of partial vaginal swab excluded Jones.
Kotler, Kerry	Victim ID; non-DNA genetic analysis	PCR test of panties excluded Kotler and victim's husband.
Linscott, Steven	Blood analysis; hair analysis; "dream confession"	Pretrial DNA tests were inconclusive. PCR test excluded Linscott.
Nelson, Bruce	Testimony of codefendant, self-incriminating statement	RFLP test excluded Nelson.
Piszczek, Brian	Victim ID; weak alibi	PCR test of vaginal and anal swabs and nightgown excluded Piszczek.
Scruggs, Dwayne	Victim ID; similarity of boots	PCR test of vaginal swab and bloodstain excluded Scruggs.
Shephard, David	Victim ID; blood analysis; weak alibi	DNA test of panty liner excluded Shephard.
Snyder, Walter (Tony)	Victim ID; similarity of clothing; blood analysis; weak alibi	PCR test of vaginal swab excluded Snyder.
Vasquez, David	Witness ID; no alibi; confession; hair analysis	PCR test of evidence matched Timothy Spencer. Attempts to compare hair with blood samples were inconclusive.
Woodall, Glen	Blood analysis; hair analysis; victim ID; similarity of clothing	PCR and RFLP tests of vaginal swabs and clothing excluded Woodall.

told that Honaker had a vasectomy (and could not have been the source of the sperm in the victim).

- In *Cruz*, a supervising officer in the sheriff's department admitted, during the third trial, that he had lied about corroborating the testimony of his deputies in the earlier trials. This testimony focused on Cruz's "dream visions" of the murder.

- In *Kotler*, the government's serologist reportedly lied about his qualifications. In addition, Kotler's attorneys alleged that the government intentionally withheld exculpatory evidence from the defense. For example, police reports stated that the victim did not actually positively identify the defendant's picture but described him only as a "look alike." Furthermore, as recorded in police reports, the victim's description of the defendant was inaccurate for age, height, and weight. The defense was never informed about those reports.

- In cases involving defendants Glen Woodall, William O'Dell Harris, and Gerald Wayne Davis (and his father), the perjured testimony of Fred Zain, a serologist then with the West Virginia State Police, was in large part responsible for the wrongful convictions that ensued. The West Virginia Supreme Court of Appeals, in a special report on Zain's misconduct in more than 130 criminal cases, stated that such behavior included "...overstating the strength of results; ...reporting inconclusive results as conclusive; ...repeatedly altering laboratory records; ...."[1] The report also noted that Zain's irregularities were "the result of systematic practice rather than an occasional inadvertent error." In addition, the report stated that Zain's "supervisors may have ignored or concealed complaints of his misconduct."[2]

- In *Alejandro*, the defendant was also wrongfully convicted by expert testimony from Fred Zain, who had moved from West Virginia to Texas and worked for the Bexar County crime laboratory. In July 1994, a Uvalde County grand jury indicted Zain for perjury, tampering with government records, and fabricating evidence. As of early 1996, charges of tampering and of fabricating evidence had been dropped, leaving three charges for aggravated perjury in effect, for which Zain reportedly seeks dismissal on statute of limitations grounds.

Evidence discovered after trial. In most of the cases in this study, DNA test results represented newly discovered evidence obtained after completion of the trials. States have time limits on filing motions for new trials on

the basis of newly discovered evidence. For example, in Virginia, new evidence must be presented by motion within 21 days after the trial.[3] Thus, the *Honaker*, *Snyder*, and *Vasquez* cases required a pardon from Virginia's governor to release the defendants from prison.

In some of the study cases, prosecutors waived time limits when presented with the DNA exculpatory results. However, prosecutors also have contested defendants' attempts to release evidence for DNA testing.

States also differ in the legislation and procedures pertaining to postconviction appointment of counsel and to authorization to pay for the DNA testing. Many cases involved indigents.

DNA testing. The DNA testing phase of these cases also has common characteristics. Nearly all the defendants had their tests performed by private laboratories. The tests were conducted using blood from defendants, blood or blood-related evidence from victims, and semen stains on articles of the victims' clothing or on nearby items (a blanket was tested in one case). In over half the cases, the prosecution either conducted a DNA test totally independent of that of the defense or sent test results obtained by the defendant's laboratory to a different one to determine whether the laboratory used by the defense interpreted test results properly.

Eight laboratories used Restriction Fragment Length Polymorphism (RFLP) DNA testing, 17 conducted Polymerase Chain Reaction (PCR) testing, and 2 used both tests. For one case, the type of DNA test conducted is unknown.

Preservation of evidence. In some cases, evidence samples had deteriorated to the point where DNA testing could not be performed. In *Brison*, the laboratory could not test cotton swabs from the rape kit but, instead, tested a semen stain from the victim's underwear. In *Daye*, after the appellate court affirmed the defendant's conviction and the State Supreme Court denied certification, the evidence was about to be destroyed when Daye's attorney filed to stay the destruction in order to conduct DNA testing.

The chain of custody in some of the cases also demonstrated a lack of adherence to proper procedures. Authorities on the subject note that the "mishandling of real evidence affects the integrity of the factfinding process."[4] In *Dabbs*, the defendant's attorneys reported that the defense was initially advised by the prosecution that the evidence (victim's underwear that contained a semen stain) had been destroyed (a conclusion based on failure of

authorities to find the evidence in police or court custody). Eventually, the defense found the evidence at the county crime laboratory.

Results of DNA Laboratory Survey

Conducted in June 1995, the nationwide telephone survey of 40 public and private laboratories that performed DNA tests sought answers to such questions as: From the time the laboratories began DNA testing, how many cases have they handled? Of that number, what percentage yielded results that excluded defendants as sources of the DNA evidence or were inconclusive?

The 40 surveyed laboratories yielded 19 whose available data were sufficient for the purposes of this study. The 19 included 13 at the State/local level, 4 in the private sector, an armed forces laboratory, and the FBI's laboratory.

Most of the laboratories had initiated DNA testing only within the previous few years. Twelve began testing between 1990 and 1992. Three of the four private laboratories began in 1986 or 1987, while the FBI started DNA testing in 1988.

Seven of the laboratories reported using RFLP testing; four, PCR testing; and eight, both types of tests.

The 19 laboratories reported that, since they began testing, they had received evidence in 21,621 cases for DNA analysis, with the FBI accounting for 10,060 cases. Three of the 4 private laboratories averaged 2,400 each; the State and local laboratories averaged 331 each.

In about 23 percent of the 21,621 cases, DNA test results excluded suspects, according to respondents. An additional 16 percent of the cases, approximately, yielded inconclusive results, often because the test samples had deteriorated or were too small. Inconclusive results aside, test results in the balance of the cases did not exclude the suspect.

The FBI reported that, in the 10,060 cases it received, DNA testing results were about 20 percent inconclusive and 20 percent exclusion; the other 18 laboratories (11,561 cases) reported about 13 percent and 26 percent, respectively.*

*If inconclusive cases were omitted, the exclusion rate for the FBI would be approximately 25 percent, and the average exclusion rate for the other 18 laboratories would be about 30 percent.

Unfortunately, the laboratories were unable to provide more details. They did not maintain data bases that would permit categorization of DNA test results by type of offense and other criteria. What happened to the suspects who were excluded through DNA testing also cannot be determined. Were they released, or were they charged on the basis of other evidence, for example?

Thus, only the most general information is known about the results of DNA testing by laboratories. To obtain more detailed information would require a comprehensive research project.

Notes

1. Matter of West Virginia State Police Crime Laboratory, 438 S.E.2nd 501, 503 (W.Va. 1993).

2. Id., at 504.

3. Virginia Supreme Court Rules, Rule 3A: 15(b).

4. Giannelli, Paul, "Chain of Custody and the Handling of Real Evidence," *American Criminal Law Review*, 20, 4 (Spring 1983):527–568.

CHAPTER III

Policy Implications

The 28 cases examined by the study raise issues that have policy implications for the criminal justice system. The most significant are presented below.[1]

Reliability of Eyewitness Testimony

In the majority of the cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong. In one of the clearest examples of eyewitness testimony overwhelmingly influencing the jury, the Pennsylvania Intermediate Court of Appeals commented on the evidence in the Dale Brison case:

> The Commonwealth's evidence consisted primarily of the victim's identification testimony. However, the victim's stab wounds in addition to the weather and reduced visibility may well have affected the victim's ability to accurately view her assailant, and thus, she may have been prompted to identify appellant merely because she remembered seeing him in the neighborhood. Moreover, the victim did not specifically describe any of her assailant's facial characteristics to the police. There was also no conclusive physical evidence, aside from a single hair sample which may have been consistent with any male of [A]frican-[A]merican descent, linking appellant to the crime.[2]

This points conclusively to the need in the legal system for improved criteria for evaluating the reliability of eyewitness identification.

In *Neil* v. *Biggers*,[3] the U.S. Supreme Court established criteria that jurors may use to evaluate the reliability of eyewitness identifications. However, the reliability of eyewitness testimony has been criticized extensively in the literature.[4] In a recent interview, Dr. Elizabeth Loftus, one of the best-known critics of the reliability of eyewitness identification, commented on the role of DNA testing in exonerating innocent persons who served time in prison. Dr. Loftus noted that a significant factor is the potential susceptibility of eyewitnesses to suggestions from police, whether intentional or unintentional. As reported, Dr. Loftus stated that there is "pressure that comes from the police [who] want to see the crime solved, but there is also a psychological pressure that is understandable on the part of the victim who wants to see the bad guy caught and wants to feel that justice is done."[5]

Dr. Loftus has recommended more open-ended questioning of victims by the police to avoid leading questions. In addition, Dr. Loftus and others

have recommended use of expert testimony regarding the pros and cons of relying on eyewitness testimony.[6]

Reliability of Non-DNA Analyses of Forensic Evidence Compared to DNA Testing

In many of the study cases, according to documentation examined and those interviewed, scientific experts had convinced juries that non-DNA analyses of blood or hair were reliable enough to clearly implicate the defendants. Scientific conclusions based on non-DNA analyses, however, were proven less discriminating and reliable than those based on DNA tests. These findings point to the need for the scientific community to take into account the reliability of non-DNA forensic analyses vis-à-vis DNA testing in identifying the sources of biological evidence.

In a recent habeas corpus hearing in a murder case, a U.S. district court held that expert testimony on microscopic hair comparisons was inadmissible under the *Daubert* standard.[7] The court cited studies documenting a high error rate and found that there are no accepted probability standards for human hair identification. The court ruled that in this case the expert's hair testimony was "imprecise and speculative, and its probative value was outweighed by its prejudicial effect."[8]

Competence and Reliability of DNA Laboratory Procedures

One of the lasting effects of the O.J. Simpson case will likely be greater scrutiny by defense lawyers of the prosecution's forensic DNA evidence presented in criminal cases. In the Simpson case, the defense, in essence, put the crime laboratory on trial. The National Research Council (NRC) report entitled *DNA Technology in Forensic Science* states:

> There is no substantial dispute about the underlying [DNA] scientific principles. However, the adequacy of laboratory procedures and the competence of the experts who testify should remain open to inquiry.[9]

The NRC report recommends some degree of standardization to ensure quality and reliability. The report recommends that each forensic laboratory engaged in DNA testing must have a formal, detailed program of quality assurance and quality control. The report also states:

> Quality-assurance programs in individual laboratories alone are insufficient to ensure high standards. External mechanisms are needed to ensure adherence to the practices of quality assurance. Potential mechanisms include individual certification, laboratory accreditation, and state or federal regulation.[10]

As recently reported by the American Society of Crime Laboratory Directors, 32 public DNA laboratories have been accredited. In addition, one private laboratory is accredited.[11]

Whether laboratories that conduct DNA tests possess the requisite qualifications has significant cost implications for the criminal justice system in terms of reducing the number of redundant DNA tests. In many cases in this study, both prosecution and defense obtained independent DNA tests of the biological stain evidence. Although independent examinations are common in areas that are more open to interpretation (e.g., mental fitness for trial), DNA testing, for exculpatory purposes, should be performed in a qualified laboratory, and the results, if they exculpate the suspect, should be accepted by both parties. Such acceptance would seem more likely if DNA tests were performed by laboratories that all parties agreed were qualified.

Preservation of Evidence for DNA Testing

In some States, sentenced felons may experience difficulty obtaining access to evidence for DNA testing. With an increasing volume of criminal cases, some police agencies destroy evidence when defendants have exhausted their appeals. Even when defendants obtain access to the evidence, it may be too deteriorated for DNA testing. In some of the study cases, insufficient evidence prevented laboratories from conducting Restriction Fragment Length Polymorphism (RFLP) testing, but Polymerase Chain Reaction (PCR) testing was still possible.

Preserving biological stain evidence and maintaining the proper chain of custody of the evidence are essential for successful DNA testing.[12] At the trial stage, however, the U.S. Supreme Court has ruled that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.[13] After a defendant's conviction, prosecutors are not required by constitutional duty to preserve evidence indefinitely. As noted earlier, in *Daye*, the evidence was about to be destroyed when his attorney filed to stay the destruction to conduct what turned out to be an exculpatory DNA test.

Training in DNA Forensic Uses

The introduction of DNA technology into the criminal trial setting is likely to create uncertainty, spawned in part by the complexity of the technology, and also to possibly generate unrealistic expectations of the technology's power in the minds of some or all of the players: prosecution, defense, judges, and jurors. The scientific complexities of the technology may influence all parties to rely more heavily on expert testimony than on other types of evidence.

As the use of DNA technology becomes more widely publicized, juries will come to expect it, like fingerprint evidence. This will place more pressure on prosecutors to use the technology whenever possible, especially as the cost decreases. Prosecutors must be trained on when to use the technology and how to interpret results for the jury.

When the prosecution uses DNA evidence, the defense will be forced to attack it through expert testimony. The defense must rebut the persuasiveness of the evidence for the jury. As stated in the NRC report, "Mere cross examination by a defense attorney inexperienced in the science of DNA testing will not be sufficient."[14] Thus, defense counsel as well as the prosecution and judiciary must receive training in the forensic uses of DNA technology.

Third-Party Consensual Sex Sources

The primary objective of the defense in using DNA testing in rape cases is to show that the defendant is excluded as the source of the semen evidence. Even when exclusion is established, the prosecution may be motivated, as in *Davis*, to eliminate as suspects any and all consensual sex partners as sources of semen in rape cases. During the first trial of Gerald Wayne Davis, the prosecution contended that the semen in the victim came from Davis. After DNA testing had excluded Davis as the source of the semen, the prosecution contended, in the second trial, that Davis could have still raped the victim but not ejaculated and that the semen in the victim could have come from the victim's fiancé just prior to the rape. The prosecution never obtained a blood sample from the fiancé because he died before the second trial.

A question under the law is whether third parties can be compelled to provide biological evidence for DNA testing. In some cases, the government refused to release defendants after exculpatory DNA results until third parties were located and tested. Kerry Kotler was held for an additional year after his exculpatory DNA test so the government could test the victim's husband. Edward Honaker was held for an additional 9 months after his exculpatory DNA test so the government could test the victim's boyfriend and "secret lover."

Multiple-Defendant Crimes

The DNA technology used to analyze biological evidence from crime scenes must not be oversold as an exculpatory tool—it does have limitations. Multiple-suspect crimes present a particular problem for use of DNA identification as a crime-solving tool. In multiple-suspect sexual assaults without eyewitnesses, such as a rape-murder, it is possible that only one of the suspects ejaculated in, or even raped, the victim. In such cases, DNA testing of semen would seem likely to exculpate one or more of the suspects. This type of situation presents a real dilemma for police and prosecutors. Because of exculpatory DNA tests on semen and possibly other exculpatory evidence (e.g., an alibi, lack of other physical evidence), pressure mounts on prosecutors to release one or more of the suspects. The only other evidence against them may be the testimony of a suspect who is matched to the crime by DNA analysis.

In *Dabbs*, for example, the victim testified that she was dragged into an alley and raped by one man while two other men held her down. The police arrested Dabbs on the basis of identification of him by the victim, a distant cousin. The other alleged assailants were never identified or arrested. The DNA test showed that the semen evidence from the victim did not match Dabbs. One theory of the case, however, was that Dabbs participated in the crime but was not the rapist. The prosecutor ultimately dismissed the original indictment against Dabbs because of the DNA results and the reluctance of the victim to testify at a new trial.

Posttrial Relief

Most States have a time limit on presenting evidence newly discovered after trial, conviction, and sentencing. The reason for limiting the time to file appeals based on new evidence is to ensure the integrity of the trial process

and jury verdicts. Many DNA issues in the study cases were not raised until he postconviction stages. Absent constitutional issues, many State procefures, as in Virginia,[15] may preclude consideration of new exculpatory DNA evidence at postconviction stages. Some of the study defendants, after receiving exculpatory DNA results, were released only by agreement of the prosecutor; sometimes they needed a pardon by the governor.

Some States, such as Oregon, permit judges to use discretion to waive new-evidence rules and set aside verdicts or order new trials.[16] Thus, some States may allow an out-of-time motion for a new trial when newly discovered evidence clearly serves the interests of justice.[17]

At postconviction stages, appointment of counsel and payment for DNA testing become issues for indigents. While some appeals courts have ordered State-paid DNA testing for indigents where justified (e.g., where the overall case against the defendant is weak), other court rulings deny such relief, especially where the exculpatory value is speculative.[18] As DNA testing to exculpate convicted persons becomes more widespread, States need to consider these issues.

Future DNA Forensic Uses

The momentum is growing, spurred in part by the public's education from the Simpson trial, for DNA testing in criminal cases. Juries may begin to question cases where the prosecutor does not offer "conclusive" DNA test results if the evidence is available for testing. More defense attorneys in court-appointed cases may file motions for DNA testing and request the State to pay for the tests (this issue may also be raised as a *Brady* motion for the prosecutor to conduct the tests).

The shift will be for more DNA testing in pretrial stages. Prosecutors should find that DNA testing is as helpful to them as to the defense in excluding suspects early in the investigation. This will enable the police and prosecution to save money in the long run by focusing investigations in more fruitful directions.

In Britain, mass DNA screening in search of suspects has, in recent years, produced arrests in several highly publicized cases. The most recent case involved the rape-murder of a 15-year-old South Wales girl.[19] The South Wales constabulary obtained saliva swab samples from over 2,000 men who lived in the vicinity of the murder. Police went door-to-door inviting men to

a makeshift laboratory to submit the samples. The saliva samples were used to develop DNA profiles to compare to the DNA profile obtained from the assailant's semen.

British law does not permit compulsory sampling, but the police made it clear that anyone who refused would become the subject of intense police investigation. A 19-year-old resident of the victim's neighborhood was arrested when his saliva sample was the only one of the thousands taken that could not be eliminated.

Such DNA dragnet methods, while employed sparingly in Great Britain, may increase as the ease and affordability of DNA testing improves. It is unlikely that such mass-testing methods would gain favor in the United States. Constitutional protections against self-incrimination and unreasonable searches and seizures, as well as the American public's zealous protection of privacy rights, would preclude such DNA dragnet practices from being implemented in this country.

Notes

1. This report does not discuss the issue of government misconduct because it is not particularized to the use of DNA technology. Beyond the limited instances noted in this report, enough examples of government misconduct in the criminal justice system exist in the popular media for government officials to be well aware of the problem.

2. *Commonwealth* v. *Brison*, 618 A.2d 420, 425 (Pa. Super. 1992).

3. *Neil* v. *Biggers*, 409 U.S. 188, 199–200 (1972) (factors include accuracy of the witness' prior description of the defendant, opportunity to view the defendant at the time of the crime, level of certainty demonstrated, witness' degree of attention, and time between the crime and the confrontation).

4. Loftus, Elizabeth, and D. Fishman, "Expert Psychological Testimony on Eyewitness Identification," *Law and Psychology Review*, 4 (1978):87–103 (lack of reliability on cross-racial identification); Loftus, Elizabeth, and W. Wagenaar, "Ten Cases of Eyewitness Identification: Logical and Procedural Problems," *Journal of Criminal Justice*, 18 (1990):291–319 (witnesses can be induced to point to the suspect after subtle suggestion on the part of the investigator); and Cutler, Brian, et al., "The Reliability of Eyewitness Identification: The Role of System and Estimator Variables," *Law and Human Behavior*, 11, 3 (1987):233–258 (level of stress experienced during crime may affect identification).

5. "DNA Testing Turns a Corner as Forensic Tool," *Law Enforcement News* (October 15, 1995):10.

6. Loftus, Elizabeth, and N. Schneider, "Judicial Reactions to Expert Testimony Concerning Eyewitness Reliability," *UMKC Law Review*, 56, 1 (1987):1–45; and Handberg, Roger, "Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury," *American Criminal Law Review*, 32, 4 (Summer 1995):1013–1064.

7. *Williamson* v. *Reynolds*, 904 F. Supp. 1529 (E.D. Okl. 1995).

8. Id., at 1558. The National Research Council report, *DNA Technology in Forensic Science*, notes that, in contrast to microscopic hair comparison, with the advent of DNA technology, the use of hair as an individual identifier will become more common. National Research Council, National Academy of Sciences, *DNA Technology in Forensic Science*, Washington, D.C.: National Academy Press, 1992:158.

9. *DNA Technology in Forensic Science*, supra note 8, at 145–146.

10. Id., at 16. In its 1996 DNA report, *The Evaluation of Forensic DNA Technology* (National Academy Press, Washington, D.C.), the National Research Council reaffirmed this position (page 3.12). The DNA Identification Act of 1994 (Public Law 103–322) also provides for a DNA advisory board to set standards for DNA testing.

11. Telephone conversation with Manuel Valdez, treasurer, American Society of Crime Laboratory Directors, March 8, 1996. (More than 100 public laboratories perform DNA tests.)

12. See "Oops! We Forgot to Put It in the Refrigerator: DNA Identification and the State's Duty to Preserve Evidence," *The John Marshall Law Review*, 25 (1992):809–836.

13. *Arizona* v. *Youngblood*, 109 S. Ct. 333, 337 (1988). The Supreme Court also stated that "police do not have a constitutional duty to perform any particular tests."

14. Supra note 9 at 160.

15. Virginia Supreme Court Rules, Rule 3A: 15(b).

16. An Oregon judge recently released Laverne Pavlinac and John Sosnovske from prison, where they had served 5 years after being convicted of murdering a young woman. The judge set aside their convictions because Keith Hunter Jesperson, a convicted serial killer, pleaded guilty to the murder for which the couple was convicted. See *The New York Times*, November 28, 1995:28.

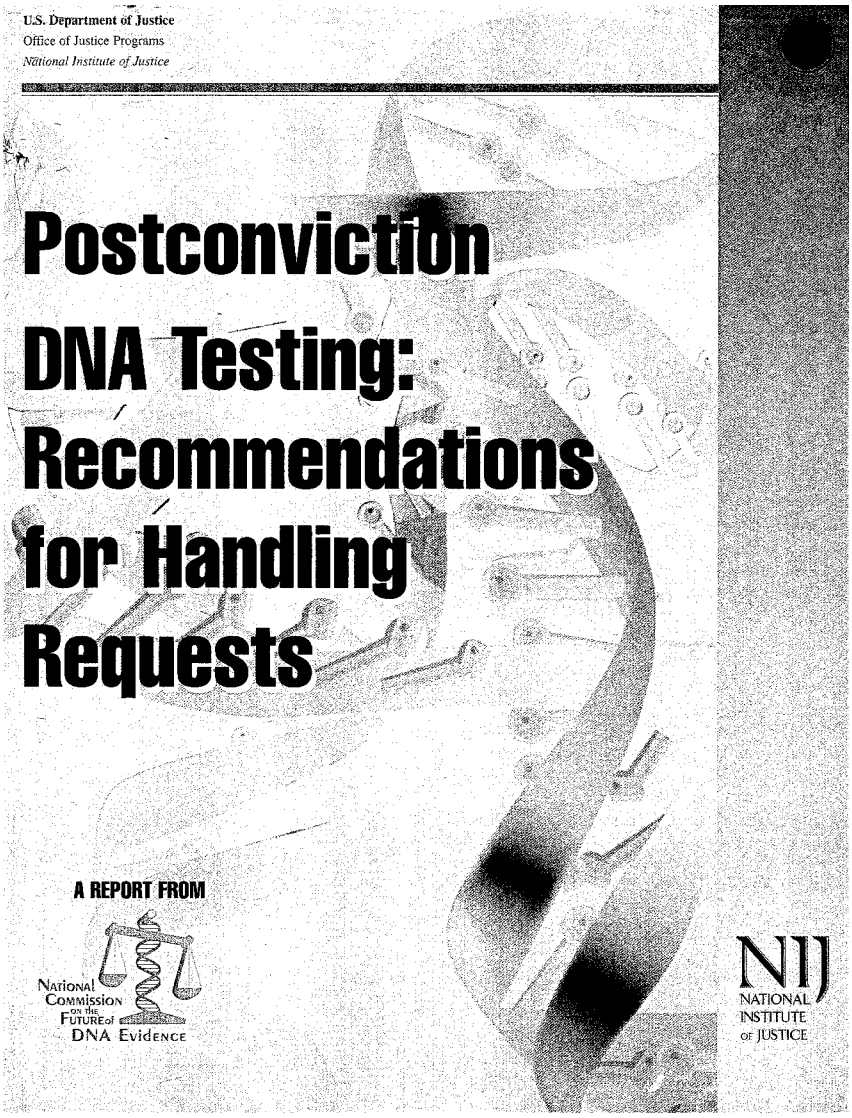
17. *Tuffiash* v. *State*, 878 S.W. 2d 197 (Tex. App. 1994). This case involved perjured trial testimony from Fred Zain, the State's forensic serologist.

18. See *State* v. *Thomas*, 586 A. 2d 250 (N.J. Appl. Div. 1991); and *Commonwealth* v. *Brison*, 618 A. 2d 420 (Pa. Super. 1992). Compare to *People* v. *Buxon*, 593 N.Y.S. 2d 87 (App. Div. 1993).

19. "Crime-Solving by DNA Dragnet," *The Washington Post* (February 2, 1996):A21.

CHAPTER IV

Profiles of DNA Exculpatory Cases


U.S. Department of Justice
Office of Justice Programs
National Institute of Justice
Postconviction DNA Testing: Recommendations for Handling Requests
A REPORT FROM
National Commission on the Future of DNA Evidence
NIJ
National Institute of Justice

Chapter 1

Introduction

Background

DNA Testing

In little more than a decade, DNA (deoxyribonucleic acid) evidence has become the foremost forensic technique for identifying perpetrators, and eliminating suspects, when biological tissues such as saliva, skin, blood, hair, or semen are left at a crime scene. First introduced into evidence in a United States court in 1986 and the subject of numerous court challenges in the ensuing years, DNA evidence is now admitted in all United States jurisdictions.

Over the years, the technology has undergone rapid change and refinement that has increased both its capability to obtain meaningful results from old evidence samples and its discriminatory capabilities. At first, crime laboratories relied primarily on restriction fragment length polymorphism (RFLP) testing, a technique that is very discriminating but requires a comparatively large quantity of good quality DNA. Now, however, most laboratories are shifting to using tests based on the polymerase chain reaction (PCR) method, a kind of molecular copying technique that can generate reliable data from extremely small amounts of DNA in crime scene samples. Indeed, we are moving into an era where a PCR-based test using mitochondrial DNA can successfully obtain results from a shaft of hair or dried bones. (See discussion in chapter 3.)

In 1986, in the first known use of DNA testing to solve a criminal identification, Colin Pitchfork's DNA was matched by multilocus RFLP testing to the DNA from semen from two rape/homicides in Narborough, England. Before Pitchfork was identified, a 17-year-old mentally challenged mental hospital kitchen porter, who had confessed to one of the murders, was released after 5½ months in custody when the DNA results showed the same person raped both girls and eliminated the kitchen porter as the source of the semen. Although homicide detectives originally thought the DNA evidence contradicting the confession was "bloody outrageous," the kitchen porter was released based on the work of the same people who had put him in custody.

[Details of the investigation, identification, and prosecution of Pitchfork are presented in the novel, *The Blooding*, by former Los Angeles Police Officer Joseph Wambaugh. Perigold Press, 1989.]

Moreover, law enforcement agencies and legislatures have come to understand the potential of using DNA testing systematically by constructing DNA databases on a State and Federal level that inventory DNA profiles from new unsolved cases, old unsolved cases, and convicted offenders. As these DNA databanks grow in size, society will benefit even more from the technology's incredible power to link seemingly unrelated crimes and to identify with alacrity suspects who were until then completely unknown to investigators. In the United States, to date, DNA testing is for the most part used in rape and homicide prosecutions. In Great Britain, DNA evidence is

also regularly used to obtain burglary convictions. As American databanks expand, DNA testing will undoubtedly be used to solve a broader spectrum of crimes in the United States as well.

A remarkable feature of DNA testing is that it not only helps to convict but also serves to exonerate.[1] A 1995 survey of laboratories reported that DNA testing excluded suspects in about one-fourth to one-fifth of the cases. (See the National Institute of Justice publication, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996)). These suspects were fortunate: Before the advent of DNA testing they might have been indicted on the basis of an eyewitness' statement or other evidence and possibly been convicted on the basis of such proof. Numerous instances of erroneous imprisonment have come to light through efforts such as the Innocence Project, which helps convicts obtain postconviction DNA testing. As of this writing, more than 60 convictions in the United States have been vacated on the basis of DNA results. Some of the cases are discussed in the NIJ study cited above. Almost half of the convictions that have been vacated were set aside after 1996. The technological progress that occurred in the 1990s now makes it possible to obtain conclusive results in cases in which previous testing had been inconclusive. Consequently, postconviction testing will be requested not only in cases in which DNA testing was never done, but also in cases in which a newer, more sensitive technology may now be able to furnish a conclusive answer.

The Commission

The documentation of erroneous convictions provided the impetus for Attorney General Janet Reno to establish a National Commission on the Future of DNA Evidence. Five working groups that report to the Commission were organized, and members of the working groups were appointed by the chair of the Commission, Chief Justice Shirley Abrahamson of Wisconsin. As shown in the biographies contained in appendix IV, the members of the Working Group on Postconviction Issues included two defense counsel and two prosecutors, a judge, a victims' rights advocate, a scientist, and academics, who have had considerable experience with various issues relating to the forensic use of DNA.

The Working Group on Postconviction Issues was directed to respond on an expedited basis in recognition of the need for speed when an innocent person may be imprisoned. The urgency of the task was compounded by the uncertainty surrounding many issues relating to postconviction DNA testing. It is, after all, a scant decade since DNA evidence was first introduced in a criminal proceeding. Consequently, considerable confusion exists about numerous questions, ranging from the preservation of DNA evidence to the applicability of statutes of limitation with regard to newly discovered evidence. Over time, these issues will have to be resolved by legislatures and courts in each jurisdiction. In the interim, it is hoped that the recommendations below will be helpful. The suggestions are based on the working group's consensus on how defense counsel, prosecutors, judicial officers, victims' advocates, and DNA laboratories can respond effectively at the various stages of a postconviction request for DNA testing.

These suggestions seek to maximize opportunities for the truly innocent to obtain redress without forfeiting the legal system's need for finality. For while we realize that claims of factual innocence must be taken seriously, and that we cannot tolerate the incarceration of those not guilty, we must also recognize the desirability of definitive determinations. In an era in which courts are hard put to handle their current dockets and judicial budgets are strained, proceedings

[1] As used in this document, "exoneration" may mean either that a person cannot have committed the charged crime or that reasonable doubt exists as to whether the person committed the charged crime. In the latter instance, DNA results may result in a new trial rather than the inmate's release. See chapter 2.

should be reopened only in the rare instance when justice so demands. Consequently, State-funded postconviction DNA testing should be granted only when there is a strong probability that the results that can be anticipated from DNA testing would have changed the prior verdict. Furthermore, even aside from concerns of efficiency and economy, closure is essential for victims and their families, for witnesses, and for judicial officers and prosecutors. Finality is a fundamental value that can properly be ignored only in the extraordinary case. Fortunately, DNA analysis now provides us with the ability to do justice in the exceptional situation.

The need for postconviction DNA testing will wane over time. Within the next decade, DNA testing with highly discriminatory results will undoubtedly be performed in the vast majority of cases in which biological evidence is relevant. Furthermore, advanced technologies that are not yet in all laboratories will become commonplace. When that occurs, requests for postconviction relief that seek DNA testing or retesting will for the most part cease.

The chapters that follow present information that is pertinent to postconviction requests for DNA testing. Chapter 2 deals with the applicable law, chapter 3 provides an overview of the applicable science, and chapters 4 through 8 contain suggestions on how prosecutors, defense counsel, judges, victims' rights advocates, and laboratory personnel might proceed most effectively at various stages of such a postconviction proceeding. To implement these recommendations properly, participants in postconviction DNA proceedings need to consider 1) the category of case in which the DNA testing is sought and 2) whether circumstances require the participants to adjust the roles they customarily play in adversarial proceedings.

A Framework for Analysis

Clearly, postconviction DNA testing will be useful only if a case meets certain criteria, which cannot be determined until sufficient information is gathered. The recommendations in chapter 4 contain numerous suggestions on how to obtain the needed details at different stages of a postconviction proceeding. As information becomes available, it may be helpful to evaluate a case in terms of five broad categories, recognizing that the case may have to be reclassified because of new information, evidence, or technology, and that the boundaries delineating these categories are not always clear or undisputed. These categories are not intended to spell out legal consequences, which may in any event vary somewhat from jurisdiction to jurisdiction. Our aim is to provide the reader with an organizational framework for identifying issues and appropriate steps to take at various stages of an application for postconviction DNA testing. It must also be remembered that technology may vary from jurisdiction to jurisdiction and even within jurisdictions. Laboratories do not uniformly adopt innovations with regard to DNA testing at the same moment in time. Consequently, some techniques that are discussed in chapter 3 may not be available in a particular laboratory.

Category 1 consists of cases in which both the prosecutor and defense counsel concur on the need for DNA testing. In such a case, if the parties cooperate, it should be possible to make the necessary arrangements without recourse to a court and without demanding payment for DNA testing when the inmate is indigent.

In some instances, however, exclusionary test results will not be determinative of innocence, although they may help an inmate obtain a new trial, a pardon, commutation, or clemency. There also are cases in which the prosecutor and defense counsel cannot agree on whether an exclusion

would amount to a demonstration of innocence, would establish reasonable doubt of guilt, or would merely constitute helpful evidence. In cases such as these and others, which are assigned to **category 2**, the assistance of a judicial officer may be essential to determine whether, and under what conditions, testing should be conducted.

Category 3 consists of cases in which, because of the present state of evidence or technology, testing will be inconclusive. Future developments may cause such a case to be reassigned to a different category.

Unfortunately, in **category 4** cases, it will be impossible to do any testing because the crime scene samples were never collected, were destroyed, or cannot be found despite best efforts. As chapter 4 relates in considerable detail, a case should never be relegated to category 4 until every possible attempt has been made to ascertain the availability of biological evidence.

Experience indicates that **category 5** cases exist in which false claims of innocence are made. In these cases, prosecutors and defense counsel generally agree that no testing is warranted. If an inmate nevertheless persists in pursuing a request for testing, defense counsel should warn the client that the results may substantiate the inmate's guilt.

The examples that follow of recurring fact patterns illustrative of these categories are not intended to be exclusive.

Category 1. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results will exonerate the petitioner.

> **Example 1:** Petitioner was convicted of the rape of a sexually inactive child. Vaginal swabs were taken and preserved. DNA evidence that excludes the petitioner as the source of the sperm will be dispositive of innocence. Note that in a case such as this, the victim's DNA—also obtainable from the vaginal swab—operates as a control that confirms that the correct sample is being tested. In addition, the victim's age and sexual status guarantee that the swab contains only biological material related to the crime.
>
> **Example 2:** Petitioner was convicted of the rape of a woman who reported that she was sexually attacked by two men. Vaginal swabs were taken and preserved. Exoneration of the defendant may depend on whether the DNA test of sperm on the vaginal swabs shows two male DNA profiles, both of which exclude petitioner.
>
> **Example 3:** Petitioner was convicted of the rape of a sexually active woman who reported that she had engaged in consensual sexual intercourse within 24 hours of the rape. Vaginal swabs were taken and preserved. Exoneration of the defendant may depend on whether a DNA sample from the victim's consensual partner is available.
>
> **Example 4:** Petitioner was convicted of a homicide. The evidence showed that the victim, who had been stabbed repeatedly, had resisted fiercely and that a single perpetrator was involved. There were pools of blood leading from the crime scene. Standard blood typing of the crime scene bloodstains showed that some samples were consistent with the blood of the victim and others were consistent with the blood of the petitioner. The blood samples were retained. DNA testing that excludes the petitioner as a source of the bloodstains would be dispositive of his innocence.

Category 2. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results would support the petitioner's claim of innocence, but reasonable persons might disagree as to whether the results rule out the possibility of guilt or raise a reasonable doubt about guilt. This category also includes cases in which, for policy and/or economic reasons, there may be disagreement as to whether DNA testing should be permitted at all or, for indigent inmates, at State expense. As the recommendations below indicate, the decision on whether this is a case for testing may have to be made by a judicial officer, who may also wish to ensure that defense counsel is available. These cases may raise difficult policy issues about how far postconviction relief should reach. Bearing on the decision to test will be factors such as:

- The other evidence in the case.
- Whether conviction was based on a guilty plea, a no contest plea, or a trial.
- The availability of DNA testing at the time of trial.
- The type of DNA technology available at the time of trial.
- The petitioner's current status.

Example 5: Petitioner was convicted of a homicide. The prosecution argued in closing that blood on a shirt found at petitioner's home came from the victim. Standard blood typing had shown a match between the sample and the victim's blood. DNA testing that excludes the victim as a source of the bloodstains might be helpful to petitioner's claims but does not prove that he was not guilty. How a case such as this should be treated will depend on the role the bloody shirt played at petitioner's trial and the strength of the other evidence against him. The prosecutor and defense counsel may not concur in their evaluations.

Example 6: Petitioner is presently incarcerated for a crime for which biological evidence is irrelevant. Petitioner had, however, been convicted of a prior crime in which biological evidence was collected and is still available. Evidence of petitioner's conviction of that prior crime had been utilized in connection with the crime for which he is incarcerated. The conviction may have been used to enhance sentencing; as one of the strikes in a "three strikes and you're out" jurisdiction; in connection with impeachment or the threat of impeachment; or as substantive proof, either as prior crimes evidence, or as evidence that satisfies a rule such as Rule 413 or 414 of the Federal Rules of Evidence, which make admissible in sexual assault cases evidence that defendant previously committed a sexual assault. If DNA testing were to exonerate him in connection with the prior crime, it might be helpful to petitioner.

Example 7: Petitioner has been released from prison after serving time for a crime in which biological evidence was collected. Petitioner claims that he cannot get a job because of his criminal record. DNA evidence that would lead to the expungement of the prior conviction might be helpful to the petitioner even though he is no longer incarcerated.

Category 3. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, the results will not be relevant to a guilt or innocence determination.

Example 8: Petitioner is presently incarcerated for a gang rape. The victim testified that seven persons were involved but that she is not sure that all actually engaged in sexual intercourse. If the vaginal swabs that were preserved are tested and petitioner's DNA profile is not found, the significance of the results will be minimal. It should be noted, however, that if other participants in the rape can be identified through DNA testing and petitioner can show the unlikelihood that he ever had any contact with the other participants, this case may fall into category 1 or 2.

Example 9: Biological evidence exists that cannot be analyzed with current technology.

Category 4. These are cases in which biological evidence was never collected, or cannot be found despite all efforts, or was destroyed, or was preserved in such a way that it cannot be tested. In such a case, postconviction relief on the basis of DNA testing is not possible.

Category 5. These are cases in which a request for DNA testing is frivolous.

Example 10: DNA testing results will be irrelevant, for instance, when petitioner testified about a consent defense in a rape case, or a self-defense claim in a homicide prosecution. If petitioner raised such a defense for tactical reasons but did not testify, the case may belong in a different category. A further caveat is that, even if petitioner testified, a judicial officer may have to rule on claims by petitioner, such as lack of capacity (insanity or mental retardation), or that the defense was coerced.

Example 11: The trial transcript discloses the existence of other evidence that makes petitioner's claim meaningless, as in a burglary conviction where petitioner was apprehended at the scene of the crime.

The Roles of the Participants

The recommendations in chapter 4 presuppose cooperation and concern on the part of those who play a part in handling postconviction requests for DNA testing. These attributes are essential in achieving the goals of exonerating the innocent while preserving the judicial system's needs for integrity, finality, and efficiency. When an inmate is truly innocent, or the facts are such that favorable testing results would create reasonable doubt, the interests of prosecutors and defense counsel converge so that they may at some points have to modify their usual adversarial posture and engage in a joint cooperative venture. The discussion below considers the factors that affect participants' roles at various stages of postconviction requests for DNA testing.

The Role of Prosecutors

Prosecutors understand that DNA testing can demonstrate actual innocence in a category 1 case. As officers of justice, prosecutors have an interest not only in exonerating the wrongly accused, but in bringing the guilty to justice. A groundless conviction means that the real perpetrator is probably still at large. DNA testing assists law enforcement because it may identify the true culprit in the case being challenged, clear up unsolved crimes, and prevent future criminal acts.

Consequently, some prosecutors may opt not to take a traditional adversarial stance when their office receives a request for postconviction DNA testing. Their response will be affected by the category of case, their familiarity with DNA testing, and the resources of their office. (See chapter 4, Recommendations for Prosecutors.) Prosecutors who are knowledgeable about DNA testing

and have ready access to laboratory facilities and expertise may feel comfortable initiating DNA testing themselves instead of waiting for defense counsel to take the laboring oar. On the other hand, a prosecutor who has had no previous experience with DNA and/or has inadequate technical assistance may respond to requests for DNA testing by seeking assistance from the legal community and/or scientists with DNA testing expertise, or by making appropriate referrals to defense counsel or to projects that handle actual innocence claims.

Even the prosecutor who basically treats requests for DNA testing like all other applications seeking postconviction relief should adopt a cooperative attitude with regard to certain matters or truly innocent persons will be unable to substantiate their claims. Except in the case of patently frivolous category 5 claims, use the following as a guide:

- Prosecutors should not delay responding to a request for DNA testing. Immediate action may be required because the statute of limitations may bar future proceedings. (See discussion in chapter 2.)
- Once a request for DNA testing is made, prosecutors should take affirmative steps to prevent the destruction of potentially relevant evidence (e.g., material from the crime scene or standards from victims or third parties) that may or may not have been tested. Immediate action may be needed when there is a policy authorizing the routine destruction of evidence.
- Prosecutors should use their best efforts to locate the crime scene samples. The prosecutor who handled the case originally may be the only person who knows where they are.

Furthermore, prosecutors should consider at the outset whether expeditious discussions with defense counsel might not resolve the matter promptly. Defense counsel may be unaware of prior DNA testing that confirmed guilt. The evidence may not have been introduced at the original trial because restrictions on the admissibility of DNA evidence existed at the time, or because the abundance of other evidence convinced the prosecution that DNA evidence would be superfluous and needlessly expensive.

Defense counsel may be raising an issue about prior DNA testing that could be resolved if the prosecutor showed defense counsel underlying laboratory notebooks or other materials that the jurisdiction does not ordinarily disclose. In such instances, prompt disclosure will ultimately save time and money.

The Role of Defense Counsel

Defense counsel should appreciate that convictions are rarely reopened and that a noncontentious attitude may expedite the location of needed biological samples and accelerate the testing process that is an innocent client's best hope for relief.

On the other hand, defense counsel must also recognize and inform their clients that truth may have a price and that inculpatory results will have to be disclosed to the prosecution. Convicted felons are not entitled to testing without risking the consequences of false claims of innocence.

The Role of Law Enforcement Personnel

Cooperation on the part of law enforcement officials may be crucial; materials needed for testing or retesting may be in their possession. Consequently, they can assist in:

- Finding the evidence that was sent to the laboratory for testing.

- Identifying and locating other evidence that is now testable.
- Preserving the evidence.

The Role of the Court

Judges may feel compelled to take a proactive stance to protect the inmate seeking relief if the prosecution and defense are refusing to cooperate. A court may be especially likely to exercise its discretion in the interests of justice in a potential category 1 case, particularly if the court fears that the passage of time may make it impossible to ascertain the validity of a claim of actual innocence.

The judge's assistance may be sought in connection with such matters as locating and preserving evidence, obtaining discovery from laboratories, and compelling third parties to provide samples for elimination testing. (See chapter 6, Recommendations for the Judiciary.)

The court might also consider whether to exercise its discretion to appoint an expert to assist the court in a case that presents disputed, complex, technical issues relating to DNA testing or interpretation.

The Role of the Victims' Advocate

The role of the victims' advocate in postconviction proceedings is essential and complex. The advocate's usual role is to provide support, which will likely be needed during a postconviction proceeding as it may be extremely traumatic for surviving victims and their families to learn that a person found guilty is now attempting to vacate the conviction. The early involvement of victims' advocates lessens the chance of victims and their families making this discovery through the media and ensures that they are kept informed and treated with appropriate concern and respect.

In category 1 cases, advocates may also have to prepare their clients for the possibility that the inmate will be exonerated. If this occurs, advocates face the difficult task of providing support for the person whose misidentification of the culprit may have been the chief evidence leading to the original guilty verdict.

Advocates will at times be called upon to persuade a victim to agree to DNA testing even though the victim is convinced of the accuracy of the identification he or she made at the inmate's trial. For exclusionary purposes, samples may also have to be tested from persons who were engaged in sexual relations with the victim at the relevant time. Victims may be reluctant to provide names or to urge these persons to cooperate. In order to expedite postconviction proceedings, victims' advocates must make victims appreciate the desirability of cooperating because DNA testing may lead to the apprehension of the person who was truly guilty and prevent future criminal acts.

The Role of Laboratory Personnel

The public or private laboratory skilled in DNA testing can assist in the postconviction process in a number of ways, including:

- Agreeing to conduct some pro bono testing at the request of a judicial officer, prosecutor, defense counsel, or project.
- Making its personnel available to assist participants in a postconviction proceeding who lack adequate technical expertise.

Chapter 2

Legal Issues

Background

An understanding of the novel legal issues posed by postconviction requests for DNA testing requires an appreciation of the traditional legal approach to postconviction relief that predated the forensic use of DNA typing. The judicial system provided two principal avenues of relief for a convicted defendant who had exhausted the process of appeal. The inmate could seek: 1) a new trial if the conviction rested on an error of fact contradicted by newly discovered evidence, or 2) a writ of habeas corpus in State or Federal court (after efforts to obtain relief in State court had been exhausted). In addition, it was conceded that the limited circumstances in which postconviction relief was available might cause some cases in which guilt was erroneously determined to fall between the cracks. In such a case, an inmate could still seek executive clemency as a means of correcting a miscarriage of justice.

Under common law, the window during which relief could be sought on the grounds of newly discovered evidence was extremely narrow, limited to the term of the court in which the judgment of conviction was entered. Most States have since expanded the applicable time bars, but at this time only 15 States permit new trial motions based on newly discovered evidence to be made more than 3 years after conviction. This restrictive approach rests on:

- The strong presumption that the verdict is correct because the accused was found guilty by a jury of peers after a trial conducted with full constitutional protections.
- The need for finality. (See discussion in chapter 1.)
- The recognition that the likelihood of more accurate determinations of guilt or innocence diminishes over time as memories fade, witnesses disappear, and the opportunity for perjury increases.
- The need to conserve judicial resources by not opening the floodgates to meritless and costly claims.

Federal habeas jurisprudence traditionally assumed that relief could not be grounded on an erroneous finding of guilt unless a constitutional error had occurred at the defendant's trial. This conclusion—that proof of actual innocence does not alone suffice to set aside a prior conviction —views the States as responsible for correcting faulty adjudications unaccompanied by a constitutional violation. It was justified by the assumption, mentioned above, that questions of guilt or innocence become more uncertain with the passage of time, so that accurate determinations are considerably less likely at a new trial.

The Impact of DNA Testing

The advent of DNA testing raises the question of whether a different balance ought to be struck regarding the right to postconviction relief. The results of DNA testing do not become weaker over time in the manner of testimonial proof. To the contrary, the probative value of DNA

testing has been steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects. (See chapter 3.) We already have seen cases in which an exclusionary DNA test can prove actual innocence. (See example 1 in chapter 1.) In other cases, DNA results may raise a reasonable doubt about guilt. The strong presumption that verdicts are correct, one of the underpinnings of restrictions on postconviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA results. On the other hand, the need for finality and the conservation of judicial resources remain important concerns, and there are numerous types of cases in which the results of DNA testing would be debatable or inconclusive. (See A Framework for Analysis in chapter 1.) To date, however, only in New York and Illinois have State legislatures restructured the right to postconviction relief now that the possibility exists in some cases that more accurate and definitive adjudications can be achieved than at the original trial.[2]

In addition to challenging the assumptions that support the structure of postconviction relief, DNA evidence also has given rise to thorny legal issues because postconviction requests for testing do not fit well into existing procedural schemes or established constitutional doctrine. As an initial matter, postconviction procedures in both State and Federal court assume petitioners already have, in hand, new evidence that they claim proves innocence; postconviction DNA cases, however, invariably begin with applications to find and test evidence that is, and has been, in the control of the prosecution since the time of the original trial. The typical inmate making a postconviction DNA request wants: 1) discovery of the evidence so that it can be tested, 2) the right to present favorable test results in a judicial proceeding or in an executive proceeding for clemency, and 3) the State to pay for the testing. At this point in time, the law in many jurisdictions is not clear as to the legal theory that entitles the petitioner to have any of these requests granted, or what the appropriate procedural mechanisms are for making these demands. Frequently, these issues are intertwined, and petitioners make omnibus motions in which they raise all potentially relevant grounds for relief together.

Because of this present state of legal uncertainty, litigating postconviction DNA applications often will be unnecessarily complex, expensive, and time consuming, unless prosecutors, defense counsel, and trial courts work cooperatively to assess cases, find the evidence, arrange for DNA testing, and make joint requests for judicial or executive relief when the facts so warrant after a result favorable to the petitioner. That is why the recommendations in this report are designed to suggest how postconviction DNA applications can be handled expeditiously, ethically, flexibly, and lawfully by all parties, in any jurisdiction, with little or no need for judicial intervention.[3]

[2] New York and Illinois statutes specifically authorize postconviction DNA testing. See, N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney Supp. 1999); 725 Ill. Comp. Stat. 5/116-3(a) (West Supp. 1998). These statutes permit an indigent inmate to obtain postconviction DNA testing at State expense when certain evidentiary thresholds are met. The New York statute requires a showing that if the results of the requested DNA testing had been admitted at trial, there is "a reasonable probability that the verdict would have been more favorable to the defendant." The Illinois statute provides that testing should be conducted when test results would produce "new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." Neither statute sets a time limit on bringing the motion. The New York statute applies only to convictions occurring before January 1, 1996; it will not therefore apply if DNA testing used in connection with a later trial was inconclusive but retesting might now produce conclusive results due to technological advances.

[3] Courts have, in the interests of justice, vacated convictions and released inmates when newly discovered DNA evidence demonstrates innocence and the prosecution joins in the motion. Accordingly, in Maryland, where newly discovered evidence of innocence motions cannot be brought more than 1 year after final judgment, Kirk Bloodsworth was nevertheless released, and his murder conviction vacated, based upon exculpatory DNA testing proffered in a joint motion by the prosecution and defense. Six months later Bloodsworth was pardoned by the Governor of Maryland after serving almost 9 years in prison, 2 on death row. See Connors, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, NIJ Research Report [hereinafter "NIJ Report"] 35–37 (1996). A similar chain of events led to the release of Dwayne Scruggs when a judge in Indiana granted a joint newly discovered DNA evidence motion that was filed long after Indiana's 30-day statute of limitations had passed. *Id.* at 68–70.

The purpose of this chapter is to identify the kinds of legal issues that have already arisen, and others that will probably develop, as applications for postconviction DNA testing continue to be made and the DNA technology available to conduct those tests advances. No attempt has been made to set forth in full the law of any particular jurisdiction.

Can a Right to Discovery Be Inferred From Statutes Providing for Postconviction Relief?

Courts do not agree on whether a request for DNA testing in a postconviction proceeding implies a right to discovery even if the statute is silent about such a right. Compare *People* v. *Callace*, 573 N.Y.S.2d 137, 138 (Suffolk County Ct. 1991) (finding discovery right pursuant to statute authorizing vacation of convictions on the basis of newly discovered evidence; decision predates statute discussed in note 2) and *Jenkins* v. *Scully*, No. CIV-91-298E, 1992 WL 32342, at *1 (W.D.N.Y. Feb. 11, 1992) (State ordered to produce evidence for DNA testing pursuant to rules governing habeas corpus), with *Ohio* v. *Wogenstahl*, No. C-970238, 1998 WL 306561, at *1 (Ohio Ct. App. Dist. 1 June 12, 1988) (request for DNA retesting because trial results were inconclusive is in the nature of a discovery request that the court is not required to grant in a postconviction proceeding).

Is There a Constitutional Right to Testing Under the Brady *Doctrine?*

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Supreme Court held that a defendant has a constitutional right at or before trial to be informed of exculpatory evidence in the hands of the State. A number of courts have extended *Brady* to requests for DNA testing even when the request is made after trial and although it is potentially exculpatory evidence that is being sought. In *Arizona* v. *Youngblood*, 488 U.S. 51 (1988), petitioner claimed that his conviction should be vacated because the State before trial had destroyed rectal swabs containing sperm which could have demonstrated his innocence if subjected to serological testing. Although the Supreme Court found that the conviction would not be overturned without proof that the swabs were destroyed in bad faith, nothing in the opinion suggests that petitioner would not have been entitled to testing if the swabs now existed.

These Supreme Court decisions provide an avenue for access to testing even when no formal discovery procedures exist as part of the postconviction statutory scheme in that jurisdiction. But see *Wogenstahl*, 1998 WL 306561, at *2–*3 (not *Brady* violation to refuse request for testing). While the weight of reported cases acknowledges a right of access to the evidence for purposes of DNA testing on *Brady* grounds, there are many unreported, summary decisions in which trial courts have simply dismissed applications for postconviction testing without reaching any *Brady*-based constitutional arguments.

An early case applying *Brady* is *Matter of Dabbs* v. *Vergari*, 570 N.Y.S.2d 765 (Sup. Ct. Westchester County 1990), in which an inmate requested access to perform DNA testing as a prelude to a possible motion to vacate the conviction based on newly discovered evidence. The prosecution opposed the motion on the grounds that no statutory right to the requested postconviction discovery then existed in New York; that the results of proposed testing were speculative; and that granting the petitioner's request would prompt other convicted sex offenders to demand DNA testing. The *Dabbs* court, relying on *Brady*, supported its decision to allow the requested testing as follows:

- [A] defendant has a constitutional right to be informed of exculpatory information known to the State....

- A corollary to the duty of disclosure is the duty to preserve exculpatory material....
- Courts have dismissed indictments after convictions because of destruction or loss of evidence by the police when that police conduct has deprived a defendant of material of high exculpatory potential....
- [W]hile it is unclear what such testing will ultimately reveal, [defendant] has demonstrated an adequate foundation for the testing by showing that the victim's panties, a gauze pad, and rape tests slides have high exculpatory potential.

Dabbs, 570 N.Y.S.2d at 767–68 (citations omitted). DNA testing ultimately exonerated Dabbs and his conviction was vacated. See *People* v. *Dabbs*, 587 N.Y.S.2d 90, 93 (N.Y. Sup. Ct. 1991).

In *State* v. *Thomas*, 586 A.2d 250 (1991), the court rejected lateness arguments from the prosecution and held that DNA evidence is such a potentially powerful tool to demonstrate actual innocence that even the most unyielding procedural bars must give way:

> Under these circumstances, consideration of fundamental fairness demands that the [DNA] testing of this now 7-year-old rape kit material be done now.... Our system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed. That failure is even more tragic when an innocent person is sentenced to a prison term.... We regard it as... important to rectify that failure.... There is a possibility, if not a probability, that DNA testing now can put to rest the question of defendant's guilt.... We would rather [permit the testing] than sit by while a [possibly] innocent man... "languishes in prison while the true offender stalks his next victim."

Thomas, 586 A.2d at 253-54 (citations omitted).

Other cases embracing a *Brady* analysis are: *Sewell* v. *State*, 592 N.E.2d 705, 707–708 (Ind. Ct. App. Dist. 3 1992) (inmate allowed access to rape kit for DNA testing 10 years after conviction notwithstanding the absence of discovery procedures; "Advances in technology may yield potential for exculpation where none previously existed. The primary goals of the court when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice and the promotion of the orderly ascertainment of truth."); *Commonwealth* v. *Brison*, 618 A.2d 420, 423 (Pa. Super. Ct. 1992) ("where evidence has been preserved, which has high exculpatory potential, that evidence should be discoverable after conviction"); *Mebane* v. *State*, 902 P.2d 494, 497 (Kan. Ct. App. 1995) (requests for DNA testing can be granted under *Brady* when proper showing made).

Is There a Constitutional Right to Demonstrate Actual Innocence That Provides a Basis for Access to Testing Through Habeas Corpus Review in Federal or State Court?

In *Herrera* v. *Collins*, 506 U.S. 390 (1993) the Supreme Court addressed the question of whether it would violate the 14th Amendment's due process clause or the Eighth Amendment's prohibition against cruel and unusual punishment to execute an inmate who claimed he could prove, through newly discovered evidence proffered in a Federal habeas petition, that he was "actually innocent." Herrera had to present his newly discovered evidence in a Federal habeas petition because he was time barred from pursuing the claim in the Texas State courts.

In a plurality opinion, the Supreme Court rejected Herrera's habeas petition on the grounds that his factual showing was insufficient, but strongly suggested that it would violate the Constitution to punish someone who could make a "truly persuasive" showing of actual innocence.[4] See *Herrera*, 506 U.S. at 417 (plurality opinion of Chief Justice Rehnquist). See also 506 U.S. at 427 (O'Connor, J., concurring). Justice White, in a concurring opinion, and Justice Blackmun, writing for Justices Souter and Stevens in a dissenting opinion, set somewhat lower thresholds: According to Justice White, relief should be granted when, in light of the newly discovered evidence, "no rational trier of fact could [find] proof beyond a reasonable doubt." 506 U.S., at 429 (citation omitted); and Justice Blackmun concluded "that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent." 506 U.S. at 442.

The discussion in *Herrera* about "actual innocence" is quite hypothetical. Justices Scalia and Thomas expressed doubt that the Court would ever again have to confront this issue, "since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon." 506 U.S. at 428. Several justices pointed to the evidential infirmities that occur over time as making it unlikely that a petitioner could make the requisite showing. This assumption was certainly reasonable under the facts of *Herrera*, which vividly illustrate why courts fear stale post-trial claims of innocence.[5]

Now, however, in some cases the possibility of demonstrating actual innocence has moved from the realm of theory to the actual with the availability of postconviction DNA testing. (See examples in chapter 1.) The opinions in *Herrera* may, therefore, provide a reasonable basis for an inmate who cannot obtain relief in State court to seek Federal habeas relief, even though, as noted in *Herrera,* it had long been the rule that newly discovered evidence claims do not state a ground for Federal habeas relief absent an independent constitutional violation occurring in the underlying State criminal proceeding.[6] *Herrera*, 506 U.S. at 399. Indeed, Federal courts have been quite willing to order DNA testing to supplement independent constitutional claims. See, e.g., *Toney* v. *Gammon*, 79 F.3d 693, 700 (8th Cir. 1996); *Jones* v. *Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997); *Jenkins*, 1992 WL 32342, at *1.

Are There Other Bases on Which Petitioners Can Obtain Access to Testing?

Freedom of Information Act (FOIA) statutes in many States are very broad and frequently permit access to "tangible" objects that might embrace the kind of biological evidence needed for postconviction DNA testing. Inmates seeking access to evidence have been pursuing State FOIA claims as separate actions or in conjunction with other postconviction motions. These FOIA requests specify that DNA testing will not be performed on the evidence, without court approval, unless the samples can be divided to permit replicate testing. There are no reported decisions to date on such FOIA requests.

The Innocence Project also has claimed a right of access to testing under section 1983 of the Civil Rights Act on the ground that courts act under the color of State law when they refuse access to testing. As of this writing, there are no reported decisions that discuss this theory.

[4] The punishment in *Herrera* was death, but the same constitutional arguments would apply to lesser punishments.

[5] Petitioner claimed 10 years after his conviction that his brother, who had died 6 years previously, was the actual killer. To prove this claim petitioner proffered a number of inconsistent affidavits. Proof of guilt at trial had been extensive, including a signed letter by petitioner found in his possession at the time of his arrest in which he admitted his guilt. 506 U.S. at 421–424 (O'Connor, J. concurring).

[6] See Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 Buff. L. Rev. 501, 516–518 (1996).

What Kind of a Showing Must the Petitioner Make to be Afforded Access to Testing?

A petitioner who is proceeding pursuant to a newly discovered evidence motion must meet the standard set forth in the governing statute. The precise formulation differs from jurisdiction to jurisdiction. In New York, the newly discovered evidence must be "of such a character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant[.]" NY Crim. Pro. § 440.10 (1)(g) (McKinney 1994). Other States say the newly discovered evidence should provide "conclusive proof" that there would have been a different verdict. See Wilkes, *State Postconviction Remedies and Relief*, § 1-13, at 31–32 (1996 ed.), § 1-13, at 30–32. Some States use, either as the exclusive ground for relief or as an additional, "catch-all" provision, a general "interests of justice" standard as suggested by section (1)(a)(5) of the 1980 Uniform Post-Conviction Procedure Act, "evidence, not previously presented or heard, exists requiring vacation of the conviction or sentence in the interest of justice." See Wilkes, supra, app. B, at 905.

Courts that afford access to testing via *Brady* motions, (see discussion supra), also require some showing by the petitioner that in light of the evidence introduced at trial DNA testing could somehow have affected the outcome. The reported cases report a variety of tests and conditions.

Clearly the courts perform the kind of analysis suggested in A Framework for Analysis in chapter 1 in determining whether access to testing is warranted. See, e.g., *People* v. *Gholston*, 697 N.E.2d 375, 379, (Ill. App. Ct. 1998) (refusing testing where multiple defendants participated in the sexual assault, one or more of whom may have ejaculated, and there was no evidence that defendant ejaculated; defendant had confessed to being at the scene); *Mebane*, 902 P.2d at 497 (will only allow testing if case involved a single perpetrator and trial evidence was weak); *Thomas*, 586 A.2d at 254 ("when the State's proofs are weak, when the record supports at least a reasonable doubt of guilt, and when there exists a way to establish guilt once and for all...").

The concurring and dissenting opinions in *Herrera* discuss various standards that might be required for showing "actual innocence." (See discussion supra.)

May Consensual Partners Be Required to Provide Elimination Samples?

On occasion, when an application for postconviction DNA testing is made, the prosecution opposes relief by taking a different factual position on the biological evidence than it did at trial. Most frequently, it claims in rape cases that no DNA testing needs be performed when the eyewitness identification is strong; the sperm on vaginal swabs or underwear, attributed to the defendant at trial, may have come from a prior consensual partner of the victim; and the defendant may have failed to ejaculate. While this argument has succeeded in some unreported cases, published decisions reject this position as a reason not to do initial testing that could exclude an inmate, or, once an inmate has been excluded, to deny a new trial without conducting a test that shows the prior consensual partner is, in fact, the source. See, e.g., *Commonwealth* v. *Reese*, 633 A.2d at 206, 209–10 (Pa. Super. Ct. 1995).

Our recommendation is that "elimination" samples from third parties may be needed in such a case but that they normally should not be sought until after an exclusion has been obtained from DNA testing. This is advisable both to minimize stress for victims and third parties, as well as to create a stronger legal basis for obtaining the "elimination" samples once it becomes necessary to do so.

In fact, elimination samples from third parties have routinely been obtained at the request of prosecutors, courts, and governors in more than a third of the postconviction DNA exonerations to date. The samples have generally been gathered on a voluntary basis, although in more than a few instances judges have made it clear to prosecutors that, in light of the DNA exclusion, the inmate's judgment would be vacated if the third-party samples were not produced. And as previously noted, in one reported decision, *Commonwealth* v. *Reese*, 663 A.2d at 209-10, the trial court made it clear that the potential need for third-party elimination samples was not, in and of itself, a basis not to permit access to evidence and potentially exculpatory DNA testing. Otherwise, we have not identified any reported cases that directly deal with a third party contesting the taking of an elimination sample in the context of postconviction DNA exclusion.

In a number of reported paternity cases, courts have compelled third-party relatives to submit to DNA testing for the purpose of establishing paternity.[7] Similarly, the U.S. Supreme Court has upheld the issuance of grand jury subpoenas, based upon a showing of relevancy to the investigation, not probable cause, to obtain "nontestimonial" evidence[8] such as voice exemplars from third parties for "elimination" purposes. See *United States* v. *Dionisio*, 410 U.S. 1, 5–7 (1973).

How Do Time Limits in Motions for a New Trial Based Upon Newly Discovered Evidence Affect Requests for Postconviction DNA Testing?

All States provide some type of statutory scheme, common law authority, or court rule for postconviction relief based upon "newly discovered evidence of innocence." "Newly discovered evidence" is generally construed to mean evidence that was not available at the time of trial, or evidence that counsel could not obtain with the exercise of due diligence.

Among the States, time limits on motions for a new trial based on newly discovered evidence of innocence vary considerably.[9] While some States impose no time limits or make them waivable, a substantial number require the motion to be made within 60 days after judgment. Another sizeable group of States calls for motions to be made within 1 to 3 years. Rule 33 of the Federal Rules of Criminal Procedure has a 2-year time limitation for new trial motions based upon newly discovered evidence. These statutes can impose substantial barriers to gaining access to DNA postconviction testing or to being allowed to introduce favorable results.

Even when a postconviction motion based on newly discovered evidence would lie, prosecutors still have successfully defeated the motion in some cases by using a laches argument. In *Ziegler* v. *State*, 654 So. 2d 1162 (Fla. 1995), although the Florida Supreme Court recognized that Florida's 2-year statute of limitations would not bar Ziegler from obtaining a particular kind of DNA test that had not been available at the time of his conviction (1976), the court nonetheless denied

[7] See, e.g., *Sudwishcher* v. *Estate of Hoffpauir*, 589 So. 2d 474 (La. 1991); *Lach* v. *Welch*, 1997 WL 536330 (Conn. Super. Ct. Aug. 15, 1997), 1994 WL 271518 (Conn. Super. Ct. June 13, 1994); *In re Estate of Rogers*, 583 A.2d 782 (N.J. Super. Ct. App. Div. 1990). See also Charles Nelson Le Ray, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C.L. Rev. 747 (1994) (discussing generally DNA testing on nonparty relatives).

[8] It is well established that the compelled taking of blood from a person for testing in the course of a criminal investigation is not a violation of the party's Fifth Amendment right against self-incrimination. See *Schmerber* v. *California*, 384 U.S. 757, 761–65 (1966). Moreover, on the basis of this distinction, one may be constitutionally compelled to provide handwriting exemplars, see *United States* v. *Mara*, 410 U.S. 19, 21–22 (1973) and *Gilbert* v. *California*, 388 U.S. 263, 266–67 (1966); to provide voice exemplars, see *Dionisio*, 410 U.S. at 5–7; to stand in a lineup, see *United States* v. *Wade*, 388 U.S. 218, 221–23 (1967); to don incriminating clothing, see *Holt* v. *United States*, 218 U.S. 245, 252–53 (1910); to submit to fingerprinting, see *United States* v. *Peters*, 687 F.2d 1295, 1297 (10th Cir. 1982); and to submit to photographing and to provide hair samples, see *In re Rosahn*, 671 F.2d 690, 694 (2d Cir. 1982).

[9] See Wilkes § 1-13, at 30 and app. A (survey of State postconviction remedies). See also *Herrera*, 506 U.S. at 410–11 nn. 8–11 (survey of applicable statutes).

his 1994 application because the DNA test Ziegler wanted to perform became "available" in 1991 and Ziegler, who had a postconviction motion pending on other grounds in 1991, did not seek the DNA test within the 2-year time limit. The Florida Supreme Court also found that the DNA test Ziegler was seeking would not produce sufficient exculpatory evidence to vacate the conviction even if the results were favorable to Ziegler. *Ziegler*, 654 So. 2d at 1164. The "laches" theory enunciated in *Ziegler* has recently been followed, although criticized in a dissent, by a lower Florida appellate court considering the DNA request of an indigent inmate who filed 2 years after the test was arguably "available" but whose conviction would probably be vacated if the test results were favorable. See *Dedge* v. *State*, 723 So. 2d 322, 324 (Fla. Dist. 5 Ct. App. 1998). One can expect further litigation in Florida, and in any other jurisdiction adopting the laches theory enunciated in *Ziegler*, about when new types of forensic DNA testing first became "available" as a scientific matter, and when, as a practical matter, such testing was truly "available" to indigent defendants.

It is important to note, however, that in addition to providing for new trial motions based on newly discovered evidence, many States have their own habeas statutes, court rules, and/or "interests of justice" case law that permit courts to extend or override time bars on newly discovered evidence motions. For example, in Mississippi there is explicit statutory authority to grant an untimely new trial motion "in the interest of justice" where the prisoner can produce evidence "not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence." Miss. Code. Ann. § 99-39-23 (1998).

Texas, in contrast, has "catch-all" rules that implicitly permit courts to override time bars to post-trial, newly discovered evidence motions. See *Tuffiash* v. *State*, 878 S.W.2d 197, 198 (Tex. Crim. App. 1994) (out of time post-trial motion to vacate conviction based upon newly discovered evidence granted because "[i]n an appropriate case, for good cause shown, Rules 2(b) and 80(c) of the Texas Rules of Appellate Procedure allow this court to suspend requirements and provisions of any rule in a particular case on application of a party or on our own motion and may order proceedings in accordance with our direction" (citation omitted)).[10]

Even without statutes that explicitly authorize exceptions to time-barred applications, courts have, in the interests of justice, vacated convictions and released inmates when newly discovered DNA evidence demonstrates innocence and the prosecution joins in the motion.[11] The Supreme Court of South Dakota recently turned aside the prosecutor's timeliness objection and authorized access to vaginal swabs for postconviction testing, *Davi* v. *Joseph Class, Warden*, unpublished decision, case No. 19844, Order of Remand (S.D. 1998), although the Court did not issue a written opinion on the subject. See also *Jenner* v. *Dooley*, No. 204-28, 1999 WL 105032 at *8, *9 (S.D. Feb. 10, 1999) (setting out guidelines for when postconviction scientific analysis may be authorized.

Finally, it has been suggested that in the State courts petitioners with strong newly discovered evidence should consider making constitutional arguments based on *Herrera* as a direct challenge to the constitutionality of State statutes of limitations that would bar "actual innocence" claims. See Vivian Berger, *Herrera* v. *Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 Wm. & Mary L. Rev. 943, 1012–15 (1994); *Holmes* v. *Honorable*

[10] See, NIJ Report, supra note 3 at 34–35 (discusses cases in which Texas prisoners had their convictions vacated as a result of untimely newly discovered evidence motions).

[11] See discussion at note 3, supra.

Court of Appeals for the Third District, 885 S.W.2d 389, 397–98 (Tex. Crim. App. 1994) (en banc) (habeas corpus appropriate vehicle for raising factual innocence claim).

Is a Petitioner Entitled to Testing in Order to Pursue Executive Clemency if the Results are Favorable?

Notwithstanding the narrow opening it arguably opened in *Herrera* for Federal habeas "actual innocence" claims, the Supreme Court stressed that executive clemency "is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted." 506 U.S. at 411–12. Clemency is supposed to act as a "fail safe" mechanism, a protection against the "unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Id.*, at 415. In fact, executive clemency has been a mechanism for obtaining postconviction DNA exonerations, particularly in Virginia, where newly discovered evidence motions are time barred 21 days after final judgment. Significantly, however, most of the Virginia proceedings that culminated in executive clemency began in court with successful requests for access to court exhibits containing critical biological evidence that was ultimately subjected to DNA testing. See NIJ Report, supra, note 3 at 57, 72.

Because clemency is "an act of grace" by the executive branch, not a right (see *Herrera*, 506 U.S. at 413), the issuance of a grant is highly discretionary. Some governors work with formal advisory boards, some do not, and the standards of review governors employ are usually informal, if not unabashedly susceptible to political considerations. See Berger, supra, at 966–67; Bandes, supra note 6, at 520–21. As a result, the Supreme Court has been extremely reluctant to examine, much less question, the fairness or operation of State executive clemency systems. See *Ohio Adult Parole Authority* v. *Woodward*, 523 U.S. 272 (1998); *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458 (1981).

Moreover, it must be remembered that the vast majority of clemency decisions turn on forgiveness for an act committed, extraordinary rehabilitation, or other considerations that do not involve reevaluation of the guilt or innocence decision. Consequently, in the wake of *Herrera*, commentators studying executive clemency have identified statutory limitations, lack of money, investigatory powers, and/or expertise and have expressed serious doubt as to whether State clemency systems are doing an adequate job of assessing claims of actual innocence and wrongful conviction. See Victoria Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 Vand. L. Rev. 311, 369–72 (1996); Henry Pietrkowski, *The Diffusion of Due Process in Capital Cases of Actual Innocence After Herrera*, 70 Chi.-Kent L. Rev. 1391, 1401–13 (1995). Therefore, inmates who have not yet obtained exculpatory postconviction DNA evidence should be wary about seeking access to the relevant biological case material or permission to conduct DNA tests from officials within the executive clemency system.

Another unresolved issue is whether *Herrera* supports a due process "access" argument for an inmate who is precluded from presenting newly discovered DNA evidence of innocence in a State court but seeks, in the alternative, DNA testing to pursue executive clemency. The reasoning of the *Herrera* decision, with its emphasis on executive clemency as the historic safety valve and remedy for those who cannot get newly discovered evidence of innocence heard by the courts, suggests that States should not be able to both shut the courthouse door with a time bar and arbitrarily obstruct an inmate's opportunity to enter the executive clemency system armed with exculpatory DNA test results. To buttress this argument, inmates should be prepared to show the State will not be prejudiced in any ongoing cases by the testing, and that they will pay the costs of testing, as well as any reasonable administrative expenses that arise in the handling

of the evidence. Again, mindful of the Supreme Court's recent ruling in *Ohio Adult Parole Authority* v. *Woodward*, 523 U.S. 272 (1998), this argument should not be cast as a challenge to the fairness or procedures of a State's executive clemency system, but rather as the fair exercise of judicial power to obstruct or permit access to case evidence in the possession of the court or other criminal justice agencies.

Is an Indigent Petitioner Entitled to Have the State Pay for Postconviction DNA Testing?

The special New York and Illinois postconviction DNA statutes[12] require the State to pay for testing if the petitioner is indigent and there is a reasonable basis to believe that postconviction DNA testing could produce substantial evidence of innocence. There are no reported decisions as of this date mandating that indigent petitioners receive funds for postconviction DNA testing that could establish innocence. It is, however, our experience that once a court decides that postconviction DNA testing should be performed, or the prosecution and defense agree that testing is appropriate, funds for testing have been provided either by the court (just as it funds pretrial expert fees for an indigent defendant), by the public defender's office, or by the prosecution. Increasingly, as State and local crime laboratories develop the capacity to do DNA testing, postconviction DNA testing is simply referred by all parties to the public laboratory, which does it "free." Nonetheless, concern that the "floodgates" would be opened, and the public treasury depleted, by demands for postconviction DNA testing has been cited informally and formally as a factor in judicial and prosecutorial rejection of requests for postconviction DNA testing even in the category 1 and category 2 cases discussed in chapter 1. Payment for postconviction DNA testing by indigent petitioners is, therefore, likely to emerge as a significant issue for litigation. A related question is whether an indigent petitioner is entitled to funds for an expert needed to interpret the testing results.

Two Supreme Court cases bear on the payment issue. In *Ake* v. *Oklahoma*, 470 U.S. 68, 83 (1985) the Court held that an indigent defendant had a due process right to the services of a psychiatric expert when the expert's testimony would be "a significant factor in [the] defense." When expert assistance to an indigent provides "a reasonable chance of success," the Court reasoned, "the potential accuracy of the jury's determination is so dramatically enhanced" that "the State's interest in its fisc must yield." *Id.* Petitioners who can show that they have a "reasonable chance of success" to prove innocence through postconviction DNA testing, a technology that "dramatically enhances" the accuracy of factfinding, even decades after a verdict, will obviously find useful language in *Ake*. Nevertheless, there is a significant legal difference between a request to fund relevant DNA testing in a pretrial posture—where it is surely constitutionally required—and a post-trial application after the petitioner has been found guilty.

A second case, *Little* v. *Streater*, 452 U.S. 1 (1981), has relevance to the payment issue because it recognizes the constitutional significance of a technological advance that can definitively alter fact determinations. In *Streater*, the Court held that an indigent Connecticut inmate who was being sued in a paternity action had a right, under the due process and equal protection clauses, to funding for blood grouping tests because "[u]nlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute." 452 U.S. at 14. "Thus," the Court emphasized, "access to blood grouping tests for indigent defendants such as appellant would help to insure the correctness of paternity decisions in Connecticut." Plainly, the kind of conclusive results

[12] See discussion at note 2, supra.

DNA testing can generate in a criminal case are directly analogous to blood group paternity tests, but a postconviction application for DNA testing, cutting against the State's interest in preserving the "finality of judgments," is still a more difficult constitutional posture than the pretrial, "quasi-criminal" paternity testing request made in *Streater*.

Is an Inmate Whose Conviction is Vacated on the Basis of Favorable Postconviction DNA Testing Results Entitled to Compensation?

A survey of statutes that compensate persons wrongly imprisoned concludes that compensation statutes exist in only 14 States and the District of Columbia. Most of these statutes have low yearly caps, as well as total caps, and States pay few claims. See Michael Higgins, *Tough Luck for this Man*, 85 A.B.A.J. 46 (1999).

Chapter 3

Biological Issues

DNA

DNA is the abbreviation for deoxyribonucleic acid, which is the genetic material present in the nucleus of cells in all living organisms. DNA has been called the "blueprint of life," since it contains all of the information required to make an organism grow and develop. It encodes all of the information that gives each of us our physical characteristics and allows us to function and be recognized as human. The majority of the DNA is identical from one human to another, but there are locations in the DNA that have been found to differ from one individual to another, with the exception of identical twins. These are the regions of DNA that are analyzed and used to compare the DNA obtained from an unknown evidence sample to the DNA of a known individual in DNA identification testing. Because each individual inherited half of his or her DNA from each parent, DNA testing can be used to determine if individuals are genetically related to each other. DNA is found in all cells with a nucleus and is the same throughout the body, so virtually every fluid or tissue from a human contains some DNA and can be analyzed by DNA identification testing. DNA also is stable and does not change over time, so samples collected years ago may be compared to samples collected recently.

When DNA testing is done, several basic steps are performed regardless of the type of test. The general procedure includes: 1) the isolation of the DNA from an evidence sample containing DNA of unknown origin and, generally at a later time, the isolation of DNA from a sample (e.g., blood) from a known individual; 2) the processing of the DNA so that test results may be obtained; 3) the determination of the DNA test results (or types), from specific regions of the DNA; and 4) the comparison and interpretation of the test results from the unknown and known samples to determine whether the known individual is excluded as (is not) the source of the DNA or is included as a possible source of the DNA (see further discussion below).

Each additional test at a previously untested locus (location or site) in the DNA provides another opportunity for the result of "exclusion" if the known individual being used for comparison is *not* the source of the DNA from an evidence sample of unknown origin. If, however, the known individual is the source of the DNA on the evidence sample, additional testing will continue only to include that individual as a possible source of the DNA. When a sufficient number of tests have been performed in which an individual cannot be excluded as the source of the DNA by *any* of the tests, a point is reached at which the tests have excluded virtually the world's population and the unique identification of that individual as the source of the DNA has been achieved.

Types of Samples Suitable for DNA Testing

Questioned or Unknown Samples

Questioned or unknown samples collected from the crime scene can be any biological sample including: liquid blood or bloodstains, liquid saliva or saliva stains, and liquid semen or dried

semen stains (including from vasectomized males) deposited on virtually any surface; genital/vaginal/cervical samples collected on swabs or gauze, or as aspirates; rectal/anal swabs; penile swabs; pieces of tissue/skin; fingernails; plucked and shed hairs (e.g., head, pubic, body); skin cells on drinking vessels, clothing (e.g., neck collars, waistbands, hat linings); slides containing tissue, semen, etc.; and liquid urine.

Samples From Unidentified Bodies

Samples collected from unidentified bodies can include: blood, buccal swabs, hairs, bone, teeth, fingernails, tissues from internal organs (including brain), muscle, and skin.

Reference Samples From Known Individuals

The most common reference samples collected from known individuals are blood, oral/buccal swabs, and/or plucked hairs (e.g., head, pubic).

Samples to Use When No Conventional Reference Samples Are Available

Other samples that may be considered when individuals are unavailable or are reluctant to provide samples include clothing where biological fluids may be deposited (e.g., women's panty crotches or blood-, saliva-, or semen-stained items) and other clothing in close contact with the body where skin cells may have rubbed off (e.g., collars, waistbands, hats), bedding (with vaginal/semen stains or rubbed off skin cells), fingernail clippings, cigarette butts, toothbrushes, hairs in razors and hairbrushes, discarded facial tissues or handkerchiefs with nasal secretions, condoms, gum, feminine products, pathology paraffin blocks or slides from previous surgery or from autopsy, and teeth.

Reference Samples From Individuals Who Have Been Transfused

If an individual has received transfusions shortly before the collection of a blood sample (e.g., homicide victim), the DNA test results may indicate the presence of DNA from two or more sources. Generally the predominant DNA types reflect the types from the individual. However, other sources of reference samples for individuals who have received transfusions may need to be collected. These would include: blood-stained clothing or other material (bedding, etc.) and oral, vaginal, and other swabs in addition to the items listed above.

Use of Samples From Relatives for Testing

Because a child inherits half of its DNA from each parent, it is possible to use reference samples collected from close relatives (e.g., biological father, mother, and/or full siblings or the individual's spouse and their children) to identify or confirm the identity of bodies that have not been identified through other means. It is also possible to use reference samples collected from close relatives for comparison to crime scene samples, for example, in missing body cases where a bloodstain or tissue sample from a possible crime scene can be tested to demonstrate a biological relationship to known individuals.

Determination of Paternity or Maternity of a Child or Fetus

Aborted fetal tissue can be analyzed for determining paternity, for example, in sexual assault and/or incest cases where conception occurred. Paternity and/or maternity of a child can be confirmed using blood or other samples listed above from the child and the alleged parent(s).

Storage and Preservation of Samples

Any probative biological sample that has been stored dry or frozen, regardless of age, may be considered for DNA analysis. Nuclear DNA from blood and semen stains more than 20 years old has been analyzed successfully using polymerase chain reaction (PCR). Samples that have been stored wet for an extended period of time should be considered for testing only using PCR and may be unsuitable for DNA analysis. Mitochondrial DNA analysis has been performed on very old bones, teeth, and hair samples.

Samples generally considered unsuitable for testing with current techniques include embalmed bodies (with the possible exception of bone or plucked hairs), pathology or fetal tissue samples that have been immersed in formaldehyde or formalin for more than a few hours (with the notable exception of pathology paraffin blocks and slides (see above)), and urine stains. Other samples such as feces, fecal stains, and vomit can potentially be tested, but are not routinely accepted by most laboratories for testing.

Determination of the Age of the Sample

It is not possible to determine the age of a biological sample or the time of deposition of the sample by DNA analysis, with the notable exception of sperm detected on vaginal/cervical swabs or in vaginal aspirates. Although sperm may be present, generally, sufficient sperm to obtain DNA test results cannot be collected from the vaginal cavity of a living female more than 24 to 48 hours after deposition. Several factors may affect the ability to obtain DNA test results from sperm collected from a deceased individual, such as the extent to which the individual engaged in physical activity after the sperm was deposited, the time of death in relation to the deposition of the sperm, and the decomposition of the body.

Testing of Samples Deposited on Various Substrates

DNA test results can be obtained from biological samples deposited on a wide range of substrates (e.g., many types of cloth/fabric found in clothing, bedding, car upholstery, etc. and carpet, glass, tile, wood, plastic, metal, vinyl, wallboard, and latex (gloves, condoms)). Substrates that may be problematic are leather, dirt, or any dirty substrate (e.g., carpet, shoes, car upholstery) and vegetable matter (e.g, leaves).

Determining Which Samples to Test

Care should be taken in selecting samples for testing that will give meaningful/useful results for a particular case. There is no point in testing samples that have no relevance to the crime for which an individual was convicted. (See discussion of category 5 cases in chapter 1.)

It may be important to reevaluate/analyze previously collected evidence samples to determine if there are: 1) other relevant evidence samples that could be tested (e.g., slides made from vaginal or cervical swabs, if no vaginal swab remains for testing); 2) samples containing stains or other biological samples that had not been detected previously; or 3) samples that were unsuitable for testing with previous techniques but may give conclusive results with currently available DNA tests (e.g., very small blood or semen stains, hair shafts).

The availability of and need for samples from known individuals who should be tested for exclusionary purposes will need to be carefully considered. For example, in sexual assault cases in which the defendant is excluded as a donor of the DNA, it is imperative that a sample from the victim and any known consensual partner(s) be tested in order for that exclusionary result to provide exculpatory evidence. Additionally, the testing of the victim's sample in sexual assault cases can serve as a built-in control to confirm that the testing has been performed correctly and that the questioned sample is, in fact, linked to that victim.

It is advisable that samples be split whenever possible. This permits a portion of the sample to be available for:

- Retesting by opposing counsel.
- Retesting if there is a problem in the testing and it needs to be repeated.
- Additional testing for aiding in the interpretation of test results (e.g., mixtures), for providing more tests for exclusionary purposes, or for aiding in the identification of the true perpetrator when the convicted individual is excluded in postconviction testing.
- Future testing when new technologies become available.

For additional discussion, see the Selection of Samples for Testing section in chapter 8, Recommendations for Laboratory Personnel.

Previous Testing: Was It Done? What Do the Tests Mean?

To aid in the evaluation of a case and to assess the need and feasibility of doing DNA tests in postconviction cases, it is imperative that the following information be obtained regarding any previous testing that was done:

- **What items of evidence existed at the time of the original trial and what type of analyses or tests were done on that evidence?** This would include any microscopic or serological analysis (e.g., identification of sperm; detection of semen, saliva, or human blood; hair comparison; ABO blood typing; typing of other protein markers) as well as any DNA tests. This information should be obtained regardless of whether the results were used in the trial and regardless of whether the evidence still exists for retesting. This information may aid in determining whether to proceed with DNA testing in a postconviction relief case or categorize the case as one in which DNA testing would be meaningless (e.g., no biological sample exists on the evidence or sufficient conclusive restriction fragment length polymorphism (RFLP) results exist). This information also may aid in the identification of additional evidence and in locating the evidence for testing.
- **What are the limitations of the tests that were performed?** It is important to understand what the previous test results really mean and whether those results could have been obtained if another individual other than the alleged donor was the source of the sample. For instance, ABO blood testing and/or DQα. PCR test results alone are not sufficiently discriminating such that a falsely accused individual would necessarily be excluded with these tests; additional DNA testing may be suggested in these cases. Conversely, if a multiple-probe RFLP match was obtained previously, additional testing may not be advised unless there is a strong indication of an error in the testing.

- **Were the results used at trial and, if they were not used, what was the reason?** If the test results were used at the trial, it is important to understand how the results were used in the case and whether they were accurately presented to the trier-of-fact. Test results may not have been presented at the trial because they were obtained at a late date, or because they were inconclusive or not supportive for either the prosecution or defense position. Alternatively, test results may not have been presented at the trial because the prosecution reasoned that the other evidence in the case was overwhelming and chose not to admit the evidence. There are many cases in this country where four- or five-probe RFLP results have been obtained but not used at a trial for various reasons (e.g., the attorney did not want to go through an admissibility hearing, a witness was not available, or the results were obtained too late to provide in discovery).

- **Were there any test results reported to be inconclusive and, if so, what were the reasons for the inconclusive results?** The changes in expertise and technology available for forensic DNA testing may require the reexamination of previously inconclusive test results and/or retesting of the samples. Due to the technical limitations of various tests and the variation in expertise of scientists, some laboratories take a more "conservative" approach than others when reporting test results and report a result as inconclusive when other experts may report the result as an inclusion or exclusion. This has been especially true for DNA test results when a mixture of DNA from two or more individuals has been obtained. No results or inconclusive results (because only weak or partial results were obtained) may have been reported for a sample that might yield conclusive results if other tests are attempted. For example, samples that yielded no or uninterpretable results with RFLP testing may well yield interpretable results with nuclear PCR testing. Similarly, samples that were unsuitable for nuclear PCR testing may yield results with mitochondrial DNA testing.

  In older cases appropriate evidentiary samples or standards may not have been available or recognized as relevant and/or were unsuitable for testing with DNA tests available at that time. Reevaluation of collected evidence samples may lead to the identification of other relevant biological samples that had been previously undetected, or previously tested items that may give conclusive results with current techniques. Additional testing with newer, more sensitive, and more discriminating tests (e.g., short tandem repeats (STRs), Y chromosome) may help resolve previously inconclusive test results where the evidence sample and the known standards from the victim and suspect all gave the same test results, or evidentiary samples previously yielded no DNA foreign to the victim (e.g., vaginal swab, breast swab, fingernail clippings). Identification and testing with current techniques of other or newly discovered evidence samples, standards, or relatives of the victim may lead to conclusive results.

- **Are copies of the laboratory case notes, including any original photographs taken and films of any DNA test results, available for review by an expert?** In many of the situations listed above, it will be necessary for an expert to review the data previously obtained by a laboratory in order for that expert to advise an attorney regarding the need for retesting and/or the types of tests to request.

  It is recommended that one or both attorneys, and/or the court, seek the advice of an expert who can provide information regarding the issues and questions raised above. The expert may need to obtain copies of the previous test results and laboratory case notes for review in order to adequately advise the attorney/court. Whenever possible the appropriate attorney should obtain the needed materials and provide them to opposing counsel as requested. If additional testing is to be performed in a postconviction case, it may be important to consider what

comparisons will need to be made with already existing results (e.g., for third-party individuals, for comparison with database records, for comparison with other cases). Also see chapter 8 for additional information.

Location of Samples in Postconviction Cases

Samples for testing in postconviction cases may be found in a variety of places. Places and persons to consider include:

- Police department evidence or property rooms. Evidence is often found here if the evidence was never tested or it was sent to the State crime laboratory, which then returned it.
- Prosecutor's office. Evidence is often found here when it has been introduced at trial.
- State and local crime laboratories often will retain slides or other pieces of evidence after conducting testing. Laboratories usually will return to the police department the clothing and vaginal swabs that are introduced as exhibits at trial.
- Hospitals, pathology departments, medical examiners' offices, clinics, or doctors' offices where sexual assault kits are prepared.
- Defense investigators.
- Courthouse property/evidence rooms.
- Offices of defense counsel in jurisdictions that require parties to preserve exhibits produced at trial.
- Independent crime laboratories.
- Clerks of court.
- Court reporters.

Types of DNA Tests

Restriction Fragment Length Polymorphism Testing

The use of RFLP testing in human DNA identification was pioneered by Professor Sir Alec Jeffreys and first reported in 1985.[13] Since then, RFLP testing has been widely used by public and private crime laboratories and paternity testing laboratories throughout the United States and the world for determination of paternity (and other biological relationships) and for the exclusion or inclusion of individuals as the source of a biological sample. RFLP testing has been widely used and accepted in the courts and there are currently approximately 300 appellate rulings regarding RFLP testing in the United States. RFLP testing has been used in postconviction relief cases and has resulted in a number of exonerations.[14]

RFLP testing generally requires that a sample contain DNA that is not degraded (broken into smaller fragments), from 100,000 or more cells (e.g., a dime-sized or larger saturated bloodstain). Because of these sample requirements, many small samples collected from crime scenes are not suitable for RFLP testing (but see PCR testing below, which requires 10 to 1,000 times

[13] Jeffreys, A.J., V. Wilson, and S.L. Thein, "Individual-specific 'fingerprints' of human DNA," *Nature*, 316 (1985):76–79.

[14] See NIJ Report, note 3.

less DNA than RFLP testing). The procedure for RFLP testing requires that DNA isolated from a biological sample be specifically cut into smaller fragments using a protein called a restriction enzyme. The restriction enzymes most commonly used for RFLP testing of forensic samples have been *Hae*III, *Hin*fI, and *Pst*I. The DNA fragments are then separated based on their relative length, and the DNA fragment size variations among different individuals are determined using DNA probes (e.g., MS1, YNH24, MS621, TBQ7) specific for discrete locations in the human genome (e.g., DIS7, D2S44, D5S110, D10S28, respectively). These results are generally visualized as a series of bands on films. The relative position and number of the bands obtained from an evidentiary sample are compared to those obtained from known individuals for the determination of exclusion or inclusion. For a further discussion on the RFLP testing process, please refer to the 1992 National Research Council report.[15] RFLP testing has a high degree of discrimination such that falsely accused individuals will likely be excluded with testing at only one or a few regions of the DNA (loci). Generally, close biological relatives can be easily differentiated with testing at a few loci.

Polymerase Chain Reaction Testing—Nuclear DNA

PCR testing of nuclear DNA was developed by Dr. Kary Mullis at Cetus Corporation in 1984 and has rapidly become the most widely used technique in the field of molecular biology. First applied to DNA identification testing in a criminal case in the United States in 1986,[16] PCR testing has been used widely by crime laboratories (both public and private) in the United States and throughout the world since the early to middle 1990s. PCR testing has been widely used and accepted in the courts and there are currently more than 80 appellate rulings regarding PCR testing in the United States. PCR testing has been used in postconviction relief cases and has resulted in a number of exonerations.[17]

PCR testing of nuclear DNA as it is commonly used in forensic testing laboratories may be done on a wide variety of samples that are quite small, containing 50 to 100 cells or more (e.g., visible dot of blood, a single hair root). PCR is the test method of choice for samples that contain DNA that is degraded (e.g., pathology specimens, samples that have been improperly stored or are aged). The PCR test process consists of three basic steps: 1) the preparation of DNA in a sample for testing, 2) the amplification (or copying) of specific regions of the DNA using an enzyme called *Taq* polymerase, and 3) the analysis or readout of the test results.

Several different PCR-based test systems have been developed and are in common use for forensic DNA testing. The AmpliType® HLA DQα Forensic PCR Amplification and Typing Kit has been used since the early 1990s and provides results in the form of blue dots on a white background for one location in the DNA. As with serological tests, an exclusion with this test eliminates an individual as the source of the sample; however, an inclusion with this test simply includes an individual within a set of a large number of individuals that also have the same DNA types. A falsely accused individual may be included as a possible donor of a DNA sample with this test system; additional tests would need to be done to achieve an exclusion for a falsely accused individual. The AmpliType® PM PCR Amplification and Typing Kit allows for the typing of five regions of the DNA (LDLR, GYPA, HBGG, D7S8, and GC) in a format similar to the DQα test kit. The DQα and PM kits are now combined into one kit called the AmpliType®

[15] National Research Council, *DNA Technology in Forensic Science*, National Research Council, 1992.

[16] Blake, E., J. Milhalovich, J. Higuchi, P.S. Walsh, and H. Ehrlich, "Polymerase chain reaction (PCR) amplification and human leukocyte antigen (HLA)-DQ oligonucleotide typing on biological evidence samples: Casework experience," *J. For. Sci.*, 37 (1992):700-726.

[17] See NIJ Report, note 3.

PM + DQA1 PCR Amplification and Typing Kit, which allows for the amplification and typing of the six regions of the DNA. The use of the PCR with STR sequences and larger variable number tandem repeat (VNTR) sequences (such as in the AmpFLP D1S80 PCR Amplification Kit) has become common in many laboratories. With these test systems, the results are generally visualized as bands on films or multicolored peaks on a graph. Amplification by PCR of a small portion of the amelogenin region of the X and Y sex chromosomes allows the gender of the donor to be determined.

In the near future, DNA testing at a number of STR locations will likely replace RFLP and earlier PCR-based tests in most laboratories throughout the United States and the world. The Federal Bureau of Investigation (FBI) has recently established the 13 core STR sequences that will be used in the Combined DNA Index System (CODIS) database of convicted offenders.

PCR testing has a high degree of discrimination such that falsely accused individuals may be excluded with only one or a few test results, depending on the type of test system used.

Polymerase Chain Reaction Testing—Mitochondrial DNA

DNA contained in the mitochondria (an organelle involved in producing energy) of cells can be isolated and the sequence of the DNA bases can be determined. Mitochondrial DNA testing is generally performed on samples that are unsuitable for RFLP or PCR testing of nuclear DNA, such as dried bones or teeth, hair shafts, or any other samples that contain very little or highly degraded nuclear DNA. Mitochondrial DNA testing of forensic samples is increasing in the United States and throughout the world; at this time testing is available only in a limited number of laboratories. Mitochondrial DNA test results have been presented in court in a number of cases.

Mitochondria and their DNA are passed from a mother to her offspring. For comparison purposes, samples may be collected from any relative in the maternal lineage. For mitochondrial testing, the PCR is used to copy specific sequences in the hyper variable regions of the mitochondrial DNA. The DNA sequence is obtained from the mitochondrial DNA from the unknown sample and compared with the DNA sequence from a known individual. Mitochondrial DNA testing can be used to link a sample to a particular family.

Possible Results/Conclusions From DNA Tests

Inclusions

When the results obtained from the standard sample from a known individual are all consistent with or are all present in the results from the unknown crime scene sample, then the results are considered an inclusion or nonexclusion. The term "match" is also commonly used when the test results are consistent with the results from a known individual. That individual is included (cannot be excluded) as a possible source of the DNA found in the sample. Often, statistical frequencies regarding the rarity of the particular set of genetic information observed in the unknown evidence sample and for a known individual are provided for various population groups.

It is possible for a falsely accused individual to be included as a source of a sample, particularly if the test system used only tests at one or a few loci (e.g., the DQα). In this situation, additional testing at more loci should be performed with the remaining evidence and/or DNA.

In some cases where inclusions are reported, the results are not meaningful or are inconclusive for that particular case from a legal perspective. Situations where this might apply are when the results obtained are all consistent with the individual from whom the samples were collected (e.g., victim's results only on vaginal swabs taken from the victim, defendant's results only on a bloodstain on defendant's clothing).

Exclusions

When the results obtained from the standard sample from a known individual are not all present in the results from the unknown crime scene sample, the results are considered an exclusion, a nonmatch, or noninclusion. With limited exceptions, an exclusion of an individual at any one genetic region eliminates that individual as a source of the DNA found in the sample. (See Previous Testing, above.)

In some cases where an exclusion is reported, it may be necessary to do additional testing for that exclusion to be meaningful to the case or to provide evidence for exoneration. A situation where this might apply is when the defendant is excluded as a donor of the DNA in a sexual assault case, but no samples are available from the victim and/or consensual partners. (See Determining Which Samples to Test, above.)

Inconclusive Results

Results may be interpreted as inconclusive for several reasons. These include situations where no results or only partial results are obtained from the sample due to the limited amount of suitable human DNA or where results are obtained from an unknown crime scene sample but there are no samples from known individuals available for comparison. In the latter case, the results would be suitable for comparison once an appropriate sample for comparison is tested.

Databases

RFLP-based and PCR-based databases have been constructed and are continuing to be expanded in many laboratories throughout the United States and the world with samples from convicted sex offenders and convicted felons, as well as samples from unsolved crimes. These databases will be especially helpful for linking previously unrelated cases and for screening a large number of known individuals already convicted of a crime to newly tested crime scene samples.

DNA databases of mitochondrial sequences are being established that are currently being used for statistical purposes. It is possible that databases containing mitochondrial sequences may be constructed for comparison to crime scene samples in the future.

Testing in the Future

Testing of hair shafts using mitochondrial DNA sequencing likely will become more widely available in the immediate future. It may be possible to isolate and test DNA from other samples that are not routinely tested today (e.g., fingerprints).

Y-specific probes are sequences of DNA found only on the Y (or male) chromosome. Development and validation of these probes are in progress. These probes will be especially useful for mixed samples in which the female component is not relevant or may make interpretation of the

results more difficult (e.g., sexual assault samples, fingernails from female victims when the assailant is male) and in the analysis and determination of the number of male sources of DNA in samples where there are multiple male contributors (e.g., multiple assailants and/or consensual partners in sexual assault samples). Because Y chromosomes are inherited through the male lineage, Y-specific probe results may be used to link a crime scene sample to a particular family.

DNA probes useful for identification testing are being developed from many other organisms and may be useful in crime scene investigation. There are reported cases in which DNA from cat hair[18] and from a particular type of plant has been used to link individuals to a particular crime scene.

Progress is being made in developing technologies for miniaturization of DNA tests (e.g., microchip analysis) that may be applied to forensic testing in the future. Expansion of existing technologies (e.g., sequencing of nuclear DNA) may emerge for forensic testing. Other as yet unknown or undeveloped technologies may be forthcoming that could be applied to forensic testing. It is likely that future tests could increase the sensitivity and speed of testing, as well as increase the discrimination capability of a test to unique identification of an individual.

[18] Menotti-Raymond, M., V.A. David, J.C. Stephens, L.A. Lyons, and S.J. O'Brien, "Genetic Individualization of Domestic Cats Using Feline STR Loci for Forensic Applications," *Journal of Forensic Sciences*, 42 (1997): 1039–51.

STRICTLY EMBARGOED TO MONDAY JUNE 12, 2000, 12:01 AM (ET)

A Broken System:

Error Rates in Capital Cases,

1973-1995

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STRICTLY EMBARGOED TO MONDAY, JUNE 12, 2000, 12:01 AM (ET)

A Broken System: Error Rates in Capital Cases, 1973-1995*

I. Introduction

A new debate over the death penalty is raging in the United States.[1] Until now, the focus of that debate has been the fairness of particular capital convictions and sentences. This Report addresses a different and broader question: **the reliability—indeed, the bare rationality—of the death penalty system *as a whole***. It asks whether the mistakes and miscarriages of justice known to have been made in individual capital cases[2] are isolated, or common? The answer provided by our study of 5,760 capital sentences and 4,578 appeals is that **serious error**—error substantially undermining the reliability of capital verdicts—has reached **epidemic proportions** throughout our death penalty system. **More than two out of every three capital judgments reviewed by the courts during the 23-year study period were found to be seriously flawed.**

Americans seem to be of two minds about the death penalty.[3] In the last several years, executions have risen steeply, reaching a 50-year high.[4] Two-thirds of the public support the penalty.[5]

Two-thirds support, however, represents a steady *decline* from the four-fifths of the population that supported the penalty only six years ago, leaving support for capital punishment at a 20-year low.[6] When life without parole is proposed as an alternative, support for the penalty drops even more—often below a majority.[7] Grants of executive clemency reached a 20-year high in 1999.[8]

In 1999 and 2000, Governors, attorneys general and legislators in Alabama, Arizona, Florida, and Tennessee have fought high-profile campaigns to speed up and increase the number of executions.[9]

In the same period, however:

- The Republican Governor of Illinois, with support from a majority of the electorate, decla a moratorium on executions in the state.[10]
- The Nebraska Legislature did the same. Although the governor vetoed the legislation, Legislature appropriated money for a comprehensive study of the even-handedness of state's exercise of capital punishment.[11] Similar studies have since been ordered by the Cl Justice, task forces of both houses of the state legislature and the Governor of Illinois,[12] also the Governors of Indiana and Maryland and the Attorney General of the United State
- Serious campaigns to abolish the death penalty are under way in New Hampshire[16] and (w the support of the Governor and a popular former Republican Senator) in Oregon.[17]
- The Florida Supreme Court and Mississippi Legislature have recently acted to improve quality of counsel in capital cases,[18] and bills aiming to do the same and to improve cap prisoners' access to DNA evidence have been introduced in both houses of the United Sta Congress, with bipartisan sponsorship.[19]
- Observers in the *Wall Street Journal*, *New York Times Magazine*, and *Salon* and on *ABC T Week* see "a tectonic shift in the politics of the death penalty ."[20] In April 2000 alone, Geo Will[21] and Rev. Pat Robertson—both strong death penalty supporters—expressed dou about the manner in which government officials carry out the penalty in the United Stat and Robertson advocated a moratorium on *Meet the Press*.[22]

Fueling these competing initiatives are two beliefs about the death penalty. One is that de sentences move too slowly from imposition to execution, undermining deterrence and retributi subjecting our criminal laws and courts to ridicule, and increasing the agony of victims.[23] The otl

is that death sentences are fraught with error, causing justice too often to miscarry, and subjecting innocent and other undeserving defendants—mainly, the poor and racial minorities—to execution.[24]

Some observers attribute these seemingly conflicting events and opinions to "America's schizophrenia—we believe in the death penalty, but shrink from it as applied."[25] These views may not conflict, however, and Americans who hold *both* may not be irrational. It may be that capital sentences spend too much time under review *and* that they are fraught with disturbing amounts of error. Indeed, it may be that **capital sentences spend so much time under and awaiting judicial review precisely *because* they are so persistently and systematically fraught with alarming amounts of error.** That is the conclusion to which we are led by a study of all 4,578 capital sentences that were finally reviewed by state direct appeal courts, 248 state post-conviction reversals of capital judgments, and all 599 capital sentences that were finally reviewed by federal habeas corpus courts between 1973 and 1995.[26]

II. Summary of Central Findings

In *Furman v. Georgia*[27] in 1972, the Supreme Court reversed all existing capital statutes and death sentences. The modern death-sentencing era began the next year with the implementation of new capital statutes designed to satisfy *Furman*. Unfortunately, no central repository of detailed information on post-*Furman* death sentences exists.[28] In order to collect that information, we undertook a painstaking search, beginning in 1991 and accelerating in 1995, of all published state and federal judicial opinions in the U.S. conducting direct and habeas review of *state* capital judgments, and many of the available opinions conducting state post-conviction review of those judgments. We then (1) checked and catalogued all the cases the opinions revealed, and (2) collected

hundreds of items of information about each case from the published decisions and the NAACP Legal Defense Fund's quarterly death row census, and (3) tabulated the results.[29]

Nine years in the making, our central findings thus far are these:

- Between 1973 and 1995, approximately **5,760** death sentences were imposed in the U.S.[30] Only **313 (5.4%; one in 19)** of those resulted in an execution during the period.[31]
- Of the 5,760 death sentences imposed in the study period, **4,578** (79%) were finally reviewed on "direct appeal" by a state high court.[32] Of those, **1,885 (41%; over two out of five)** were thrown out because of "serious error," *i.e.*, error that the reviewing court concludes has seriously undermined the reliability of the outcome or otherwise "harmed" the defendant.[33]
- Nearly all of the remaining death sentences were then inspected by state post-conviction courts.[34] Our data reveal that state post-conviction review is an important source of review in states such as Florida, Georgia, Indiana, Maryland, Mississippi, North Carolina, and Tennessee.[35] In Maryland, at least **52%** of capital judgments reviewed on state post-conviction during the study period were overturned due to serious error; the same was true of at least **25%** of the capital judgments that were similarly reviewed in Indiana, and at least **20%** of those reviewed in Mississippi.[36]
- Of the death sentences that survived state direct and post-conviction review, **599** were finally reviewed in a first habeas corpus petition during the 23-year study period.[37] Of those 599, **237 (40%; two out of five)** were overturned due to serious error.[38]
- The **"overall success rate"** of capital judgments undergoing judicial inspection, and its converse, the **"overall error-rate,"** are crucial factors in assessing the effectiveness of the capital punishment system. The "overall *success* rate" is the proportion of capital judgments

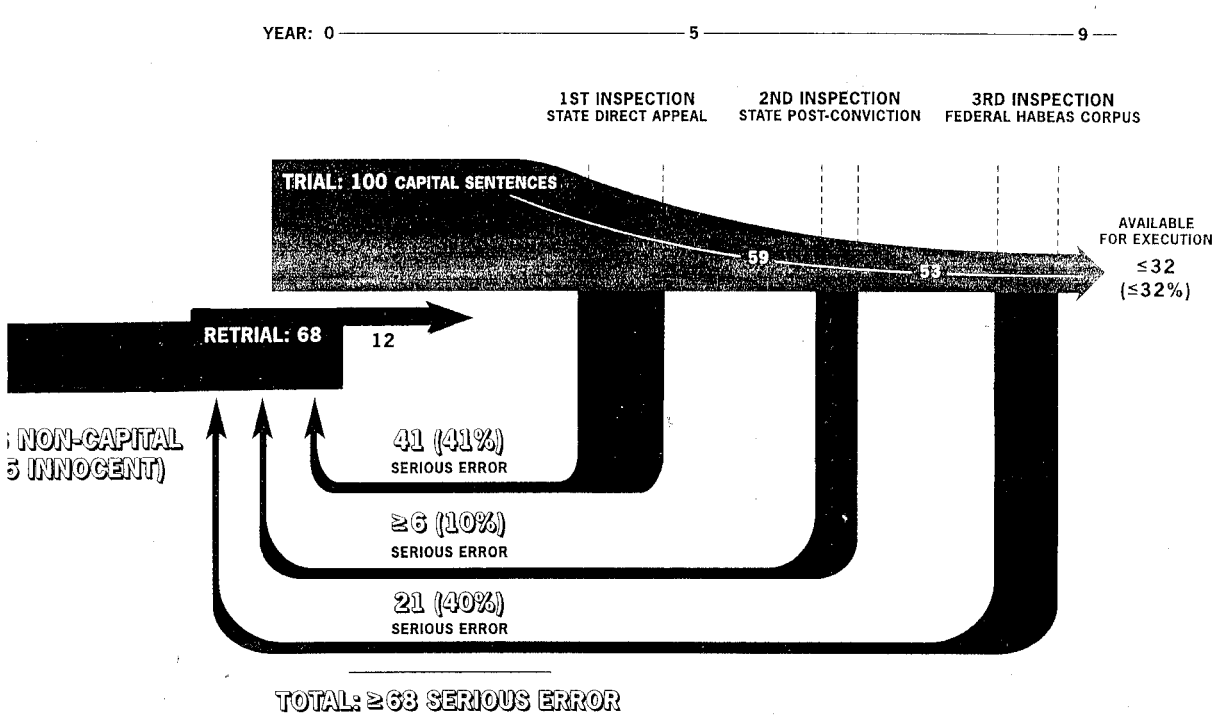
that underwent, and *passed*, the three-stage judicial inspection process during the study period. The "overall *error* rate" is the reverse: the proportion of fully reviewed capital judgments that were *overturned* at one of the three stages due to serious error.[39] ***Nationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%.***[40]

- "Serious error" is error that **substantially undermines the reliability of the guilt finding or death sentence imposed at trial.**[41] Each instance of that error warrants public concern. **The most common errors** are **(1) egregiously incompetent defense lawyering** (accounting for **37%** of the state post-conviction reversals), and **(2) prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty** (accounting for another **16%—19%**, when all forms of law enforcement misconduct are considered).[42] As is true of other violations, these two count as "serious" and warrant reversal *only* when there is a reasonable probability that, but for the responsible actor's miscues, the **outcome of the trial would have been different.**[43]
- The seriousness of these errors is also revealed by what happens on retrial, when the errors are cured. In our state post-conviction study, an astonishing **82% (247 out of 301) of the capital judgments that were reversed** were **replaced on retrial with a sentence *less* than death, or *no* sentence at all.**[44] In the latter regard, **7% (22/301) of the reversals for serious error resulted in a determination on retrial that the defendant was *not guilty* of the capital offense.**[45]
- The result of **very high rates of serious, reversible error** among capital convictions and

sentences, and **very low rates of capital reconviction and resentencing**, is the **severe attrition of capital judgments**. As is illustrated by the flow chart below:

1. For every 100 death sentences imposed and reviewed during the study period, **41 were turned back** at the state direct appeal phase because of serious error. Of the 59 that got through that phase to the second, state post-conviction stage, **at least**[46] **10%—meaning 6 more of the original 100—were turned back** due to serious flaws. And, of the 53 that got through that stage to the third, federal habeas checkpoint, **40%—an additional 21 of the original 100—were turned back** because of serious error. All told, at least **68 of the original 100 were thrown out because of serious flaws**, compared to only 32 (or less) that were found to have passed muster—**after** an average of **9-10 years** had passed.
2. And among the individuals whose death sentences were overturned for serious error, 82% (56 in our example) were found on retrial **not** to have deserved the death penalty, including **7% (5)** who were ***found innocent of the offense***.

THE ATTRITION OF CAPITAL JUDGEMENTS



- High error rates pervade American capital-sentencing jurisdictions, and are geographically dispersed. Among the 26 death-sentencing jurisdictions with at least one case reviewed in both the state and federal courts and as to which information about all three judicial inspection stages is available:
  1. **24 (92%)** have overall error rates of **52% or higher**;
  2. **22 (85%)** have overall errors rates of **60% or higher**;
  3. **15 (61%)** have overall error rates of **70% or higher**.
  4. Among other states, Maryland, Georgia, Alabama, Mississippi, Indiana, Oklahoma, Wyoming, Montana, Arizona, and California have overall error rates of **75%** or higher.[47]
- It sometimes is suggested that Illinois, whose governor declared a moratorium on executions in January 2000 because of a spate of death row exonerations there,[48] generates "uniquely" flawed death sentences.[49] Our data dispute this suggestion: **The overall rate of serious error found to infect Illinois capital sentences (66%) actually is slightly *lower* than the nationwide average (68%).**[50]
- High error rates have persisted for decades. A **majority** of all cases reviewed in **20 of the 23 study years**—including in 17 of the last 19 years—were found seriously flawed. In **half** of the years studied, the error rate was **over 60%**. Although error rates detected on state direct appeal and federal habeas corpus dropped some in the early 1990s, they went back up in 1995[51]. The amount of error detected on state post-conviction has apparently *risen throughout* the 1990s.[52]
- The **68% rate of *capital* error** found by the three stage inspection process is **much higher**

than the error rate of less than 15% found by those same three inspections **in *noncapital* criminal cases.**[53]

- Appointed federal judges are sometimes thought to be more likely to overturn capital sentences than state judges, who almost always are elected in capital-sentencing states.[54] In fact, state judges are the first and most important line of defense against erroneous death sentences. They found serious error in and reversed **90% (2,133** of the **2,370)** capital sentences that were overturned during the study period.[55]
- Under current state and federal law, capital prisoners have a legal right to one round of direct appellate, state post-conviction and federal habeas corpus review.[56] **The high rates of error found at *each* stage—including even at the *last* stage—and the persistence of high error rates *over time* and *across the nation*, confirm the need for multiple judicial inspections.** Without compensating changes at the front-end of the process, the contrary policy of cutting back on judicial inspection makes no more sense than responding to the insolvency of the Social Security System by forbidding it to be audited.
- Finding all this error takes time. Calculating the amount of time using information in published decisions is difficult. Only a small percentage of direct appeals decisions report the sentence date. By the end of the habeas stage, however, a larger proportion of sentencing dates is reported in one or another decision in the case. Accordingly, it is possible to get a good sense of timing for only the 599 cases that were finally reviewed on habeas corpus. Among those cases:

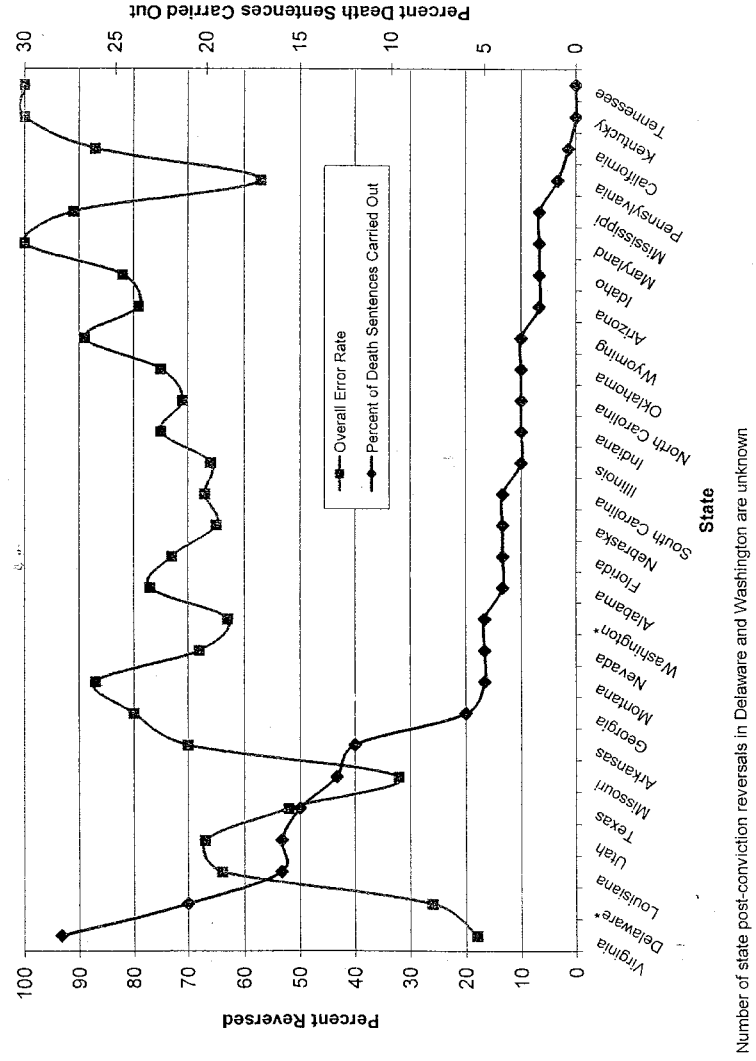
  1. It took an average of **7.6 years** after the defendant was sentenced to die to complete federal habeas consideration in the 40% of habeas cases in which reversible error was

found.

2. In the cases in which no error was detected at the third inspection stage and an execution occurred, **the average time between sentence and execution was 9 years.** Matters did not improve over time. **In the last 7 study years** (1989-95), **the average** time between sentence and execution ***rose* to *10.6 years.***[57]

- High rates of error, and the time consequently needed to filter out all that error, frustrate the goals of the death penalty system. Figure 1 below compares the overall rate of error detected during the state direct appeal, state post-conviction, and federal inspection process in the 28 states with at least one capital case in which both inspections have been completed (the orange line), to the percentage of death sentences imposed by each state that it has carried out by execution (the red line).[58] In general, **where the rate of serious reversible error in a state's capital judgments reaches 55% or above (as is true for the vast majority of states), the state's capital punishment system is effectively stymied—with its proportion of death sentences carried out falling *below 7%*.**

Figure 1. Overall Error Rate and Percent of Death Sentences Carried Out, 1973-95



* Number of state post-conviction reversals in Delaware and Washington are unknown

The recent rise in the number of executions[59] is not inconsistent with these findings. Instead of reflecting improvement in the *quality* of death sentences under review, the rising number of executions may simply reflect how many *more* sentences have piled up for review. If the error-induced pile-up of cases is the *cause* of rising executions, their rise provides no proof that a cure has been found for disturbingly high error rates. To see why, consider a factory that produces 100 toasters, only 32 of which work. The factory's problem would not be solved if the next year it made *200* toasters (or added 100 new toasters to 100 old ones previously backlogged at the inspection stage), thus doubling its output of working products to *64.* With, now, 136 duds to go with the 64 keepers, the increase in the latter would simply mask the persistence of crushing error rates.

The decisive question, therefore, is not the *number* of death sentences carried out each year, but the *proportion.* And as Figure 2 below shows:[60]

- In contrast to the annual *number* of executions (the middle line in the chart), **the *proportion* of death row inmates executed each year** (the bottom line) **has remained remarkably stable—and *extremely low*.** Since post-*Furman* executions began in earnest in 1984, **the nation has executed an average of about 1.3% of its death row inmates each year**; in no year has it ever carried out more than **2.6 percent—or 1 in 39**—of those on death row.[61]
- Figure 1 thus suggests that **executions are increasing, *not* because of improvements in the quality of capital judgments, but instead because so many more people have piled up on death row that, even consistently tiny *proportions* of people being executed—because of consistently prodigious error and reversal rates—are prompting the *number* of executions to rise.**[62] As in our factory example, rising output does not indicate better products, and instead seems to mask the opposite.

Figure 2. Persons on Death Row and Percent and Number Executed, 1974-99

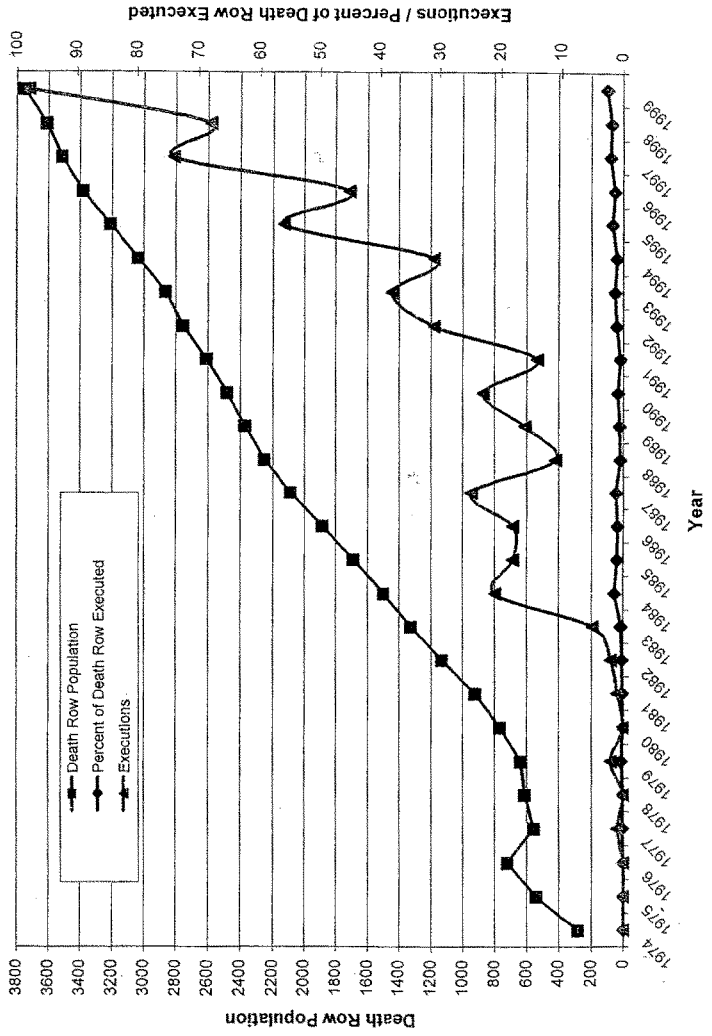


Figure 1, p. 11 above, illustrates another finding of interest that recurs throughout this Report: The pattern of capital outcomes for the State of **Virginia** is highly anomalous, given the State's **high execution rate (nearly *double* that of the next nearest state, and *5 times* the national average)** and its **low rate of capital reversals (nearly *half* that of the next nearest state, and less than *one-fourth* the national average)**. The discrepancy between Virginia and other capital-sentencing states on this and other measures[63] presents an important question for further study: Are Virginia capital judgments in fact half as prone to serious error as the next nearest state and 4 times better than the national average?[64] Or, on the other hand, are its courts more tolerant of serious error? We will address this issue below and in a subsequent report.[65]

III. Confirmation from a Parallel Study

Results from a parallel study by the U.S. Department of Justice suggest that our **32%**, or **one-in-three,** figure for valid death sentences actually overstates the chance of execution:

- Included in the Justice Department study is a report of the outcome as of the end of 1998 of the 263 death sentences imposed in 1989.[66] A final disposition of only 103 of the 263 death sentences had been reached nine years later.[67] Of those 103, 78 (76%) had been overturned by a state or federal court. Only 13 death sentences had been carried out.[68] So, for every **one** member of the death row class of 1989 whose case was finally reviewed and who was executed as of 1998, **six** members of the class had their cases overturned in the courts.
- Because of the intensive review needed to catch so much error, 160 (61%) of the 263 death sentences imposed in 1989 were still under scrutiny nine years later.[69]
- The approximately 3,600 people on death row today have been waiting an average of 7.4

years for a final declaration that their capital verdict is error-free—or, far more probably, that it has to be scrapped because of serious error.[70]

- Of the approximately 6,700 people sentenced to die between 1973 and 1999, only 598—**less than one in eleven**—were executed.[71] About four times as many had their capital judgments overturned or gained clemency.[72]

IV. Implications of Central Findings

To help appreciate these findings, consider a scenario that might unfold immediately after any death sentence is imposed in the U.S. Suppose the defendant, or a relative of the victim, asks a lawyer or the judge, "What now?"

Based on almost a quarter century of experience in thousands of cases in 28 death-sentencing states in the U.S. between 1973 and 1995, a responsible answer would be: *"The capital conviction or sentence will probably be overturned due to serious error. It'll take nine or ten years to find out, given how many other capital cases being reviewed for likely error are lined up ahead of this one. If the judgment is overturned, a lesser conviction or sentence will probably be imposed."*[73]

As anyone hearing this answer would probably conclude as a matter of sheer common sense, all this error, and all the time needed to expose it, are extremely burdensome and costly:

- Capital trials and sentences cost more than noncapital ones.[74] Each time they have to be done over—as happens 68% of the time—that difference grows exponentially.
- The error-detection system all this capital error requires is itself a huge expense—apparently *millions of dollars* per case.[75]
- Many of the resources currently consumed by the capital system are not helping the public,

or victims,[76] obtain the valid death sentences for egregious offenses that a majority support. Given that nearly 7 in 10 capital judgments have proven to be seriously flawed, and given that 4 out of 5 capital cases in which serious error is found turn out on retrial to be more appropriately handled as non-capital cases (and in a sizeable number of instances, as non-murder or even *non-criminal* cases),[77] it is hard to escape the conclusion that large amounts of resources are being wasted on cases that should never have been capital in the first place.

- Public faith in the courts and the criminal justice system is another casualty of high capital error rates.[78] When most capital-sentencing jurisdictions carry out fewer than 6% of the death sentences they impose,[79] and when the nation as a whole never executes more than 2.6% of its death population in a year,[80] the retributive and deterrent credibility of the death penalty is low.
- When condemned inmates turn out to be *innocent*[81]—an error that is different in its consequences, but is *not* evidently different in its causes, from the other serious error discussed here[82]—there is no accounting for the cost: to the wrongly convicted;[83] to the family of the victim, whose search for justice and closure has been in vain; to later victims whose lives are threatened—and even taken—because the real killers remain at large;[84] to the public's confidence in law and legal institutions; and to the wrongly *executed*, should justice miscarry at trial, and should reviewing judges, harried by the amount of error they are asked to catch, miss one.[85]

If what were at issue here was the fabrication of toasters (to return to our prior example), or the processing of social security claims, or the pre-takeoff inspection of commercial aircraft—or the conduct of *any other* private- or public-sector activity—neither the

consuming and the taxpaying public, nor managers and investors, would for a moment tolerate the error-rates and attendant costs that dozens of states and the nation as a whole have tolerated in their capital punishment system *for decades*. Any system with this much error and expense would be halted immediately, examined, and either reformed or scrapped.

The question this Report poses to taxpayers, public managers and policymakers, is whether that same response is warranted here, when what is at issue is not the content and quality of tomorrow's breakfast, but whether society has a swift and sure response to murder, and whether thousands of men and women condemned for that crime in fact deserve to die.

* * * * *

The remainder of this Report more fully describes our findings. Part V describes the review process for capital sentences. Part VI describes our study methodology. Parts VII, VIII and IX more thoroughly document and display our findings about the frequency with which reversible error is found in capital judgments in the United States between 1973 and 1995, and the time taken to find those errors. Part VII examines relevant factors at the national level. Part VIII does so using comparative analyses of the 28 capital-sentencing states in which at least one case had advanced through the entire post-sentence inspection process. And Part IX does the same thing, comparing the 8 federal judicial circuits and corresponding regions into which they are divided. After presenting a variety of information, Parts VII, VIII and IX preliminarily address the potential causes of so much error in capital sentencing. Finally, Part X briefly describes the more sophisticated analyses we will undertake in the next phase of our study (to be published in the Fall) to set the stage for proposed reforms.

Jun-12-2000 09:19pm From-BU LAW 617-353-3077 T-832 P.002/007 F-198

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June 8, 2000

Honorable Patrick Leahy
United States Senate
Washington, D.C.

Dear Senator Leahy:

This letter addresses the validity of § 104 of your bill, the Innocence Protection Act of 2000. I understand that concerns have been raised that § 104 may exceed Congress' power under § 5 of the Fourteenth Amendment. I hope this letter will lay those concerns to rest.

Section 104 is a carefully targeted provision. It does not establish any basis for relief from a state criminal conviction or sentence. Nor does it expand federal authority to adjudicate claims in habeas corpus. It only creates an entitlement to DNA testing (in certain circumstances) and an opportunity to present the results of that testing to some *state* adjudicatory institution, notwithstanding any state time limit or procedural default rule that would otherwise operate. I think § 104 can fairly be explained as a remedial enactment that establishes a mechanism by which Fourteenth Amendment rights can be enforced. If it does more than that, then I think that it can be justified as a preventive statute that reaches a target that is not itself a constitutional violation in order to forestall potential Fourteenth Amendment violations prophylactically.

According to *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress has § 5 power to prescribe "remedies" for Fourteenth Amendment violations. Id. at 518. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court held that convicts who wish to advance newly discovered evidence of "actual innocence" usually must do so within the time limits fixed by state law, that time limits of that kind are not generally unconstitutional, and that prisoners who are foreclosed by filing deadlines should seek executive clemency. Nevertheless, the Court made two statements in *Herrera* indicating that in some circumstances, not presented in *Herrera* itself, bare innocence claims *do* implicate the Fourteenth Amendment. The first statement is this:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. Id. at 417.

Obviously, a federal court has jurisdiction to issue habeas relief only if a prisoner is in custody in violation of federal law, typically the Fourteenth Amendment. This statement must assume, accordingly, that a state violates the Fourteenth Amendment by executing a person who makes a "truly persuasive" demonstration of actual innocence.[1]

To be sure, this first statement in *Herrera* has it that a federal court is warranted in awarding habeas relief if there is no state procedural means of presenting a bare innocence claim to a state court. That may be only a reminder that federal habeas courts stay their hand while prisoners exhaust state court opportunities to litigate federal claims. I think, though, that the Court means something else—namely, that a state violates the Fourteenth Amendment by failing to provide a state court opportunity to advance an actual innocence claim in a case in which the evidence of innocence is extraordinarily powerful. Just previously in the *Herrera* opinion, the Court had explained that time limits for new-trial motions are common and generally perfectly valid. Then, in this statement, the Court took account of the (admittedly rare) case in which a time limit would be unconstitutional: A time limit violates the Fourteenth Amendment if it forecloses an actual innocence claim advanced by a convict able to make a stronger threshold showing than the prisoner in *Herrera* was able to make.[2]

Elsewhere in *Herrera*, the Court recognized that a death row convict who presses new evidence of actual innocence does not claim that some procedural error at the trial or sentencing stages renders his or her death sentence unconstitutional. Instead, such a convict argues that an error was made in the determination of guilt on the underlying charge. Then, the Court said this:

> It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution [a death row convict] could not be executed, but that he could spend the rest of his life in prison. Id. at 405.

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[1] Six of the Justices who wrote separately in *Herrera* were explicit that the Constitution will not permit the execution of a person who makes a sufficient showing of innocence. See id. at 419 (O'Connor and Kennedy) (stating that "the execution of a legally and factually innocent person would be a constitutionally intolerable event"); id. at 429 (White) (also assuming that "a persuasive showing of 'actual innocence' made after trial" and also "after the expiration of the time provided by law for the presentation of newly discovered evidence" would "render unconstitutional the execution of petitioner in this case"); id. at 431 (Blackmun, Stevens & Souter) (dismissing the state's "astonishing" argument that it would be constitutional to execute a person who was "validly convicted and sentenced" but who nonetheless can "prove his innocence with newly discovered evidence").

[2] The Court has often held that Fourteenth Amendment rights can be satisfied only if the states open their courts to hear claims. E.g., *Jackson v. Denno*, 378 U.S. 368 (1964) (holding that the Fourteenth Amendment requires a state court hearing on the voluntariness of a confession).

This second statement indicates that if an actual innocence claim makes out a Fourteenth Amendment violation at all, it must do so irrespective of whether the convict faces a death sentence or a prison term.

Together, the Court's two statements in *Herrera* make a single point that should be uncontroversial: A state convict on death row or serving a term of years is in custody in violation of the Fourteenth Amendment if he or she makes a "truly persuasive" demonstration of "actual innocence" and the state nonetheless bars that claim on the procedural ground that a filing deadline passed before the evidence of innocence became available.

Some of the findings in § 101 of IPA (findings 14-16) embrace this proposition as Congress' understanding of what the Court suggested in *Herrera*. The point of those findings is to demonstrate that Congress is trying to follow (rather than lead) the Supreme Court regarding the meaning of the Fourteenth Amendment and thus to satisfy *Flores*. Congress appreciates that the square holding in *Herrera* was that an innocence claim generally does not state a Fourteenth Amendment violation and that ordinary time limits for new-trial motions generally are valid. Congress is not trying to trump any of that (in the way that Congress tried to override the Court's interpretation of the Free Exercise Clause when it enacted RFRA). Instead, Congress is trying to act on the Court's independent description of the kind of case in which an actual innocence claim *does* state a Fourteenth Amendment violation.

Section 104 is not vulnerable to constitutional attack simply because *Herrera* rejected a single prisoner's claim and upheld filing deadlines generally. As a matter of fact, there is a good argument that § 104 is peculiarly appropriate as a legislative attempt to grapple with a constitutional problem that current law does not handle very well. The *Herrera* opinion described the difficulties that innocence claims present in federal habeas corpus and relied in some measure on those difficulties for its statement that such a claim would have to be very strong to be cognizable in some other case. Still, the Court acknowledged that cases raising such a sufficiently strong claim may come along. Having been warned by the Court that cases like this are troubling, Congress may enact a sensible means of dealing with them.

The Court did not address DNA evidence in *Herrera*. But a case in which a convict presents DNA testing results showing an extremely high statistical probability that he or she was not the perpetrator fits the Court's hypothesized case of a "truly persuasive" demonstration of innocence about as well as any case could. A DNA case may be the paradigm of a case in which there is no argument either that some procedural error occurred at trial or that there was insufficient evidence to warrant a verdict of guilt, but in which later-discovered evidence nonetheless shows that a mistake was made.

This is why I think that § 104 of IPA can be defended as a procedural mechanism for enforcing the very Fourteenth Amendment right that the Court itself recognized in *Herrera*. Subsection (a) requires a state to grant a prisoner's request for DNA testing of biological materials in the state's possession. It is hard to think that the right of a convict to be free of an erroneous death or prison sentence does not entail a threshold right of access to the data needed to make the required

showing. Then, subsection (b) bars a state from relying on procedural default (i.e., a failure to meet the usual filing deadline) to deny a prisoner the chance to present favorable test results to a state court or other state body. That, of course, addresses precisely the kind of procedural bar rule that *Herrera* indicated would establish a federal court's power to grant habeas relief on federal grounds.

Subsection (c) is a straightforward right-of-action provision, authorizing prisoners to sue in either state or federal court for appropriate declaratory or injunctive relief from a state's failure to comply with subsections (a) and (b). Since § 104 is anchored in § 5 of the Fourteenth Amendment, Congress can subject the states themselves to suit, whether they consent or not. Obviously, Congress can foreclose any claim of immunity for these actions. Actually, it is not essential (only simple) to make the states themselves proper defendants—so long as officer suits against state agents are available and neither state sovereign immunity nor some form of official immunity poses a bar. The exhaustive language in subsection (c) only heads off confusion over whether independent doctrines somehow compromise the lawsuits that subsection (c) authorizes in chief.

I hasten to point out that subsection (c) does not empower a federal court itself to entertain an actual innocence claim, based on DNA testing results or any other kind of evidence. Subsection (c) only authorizes a prisoner to file a lawsuit in federal court (or state court), seeking an order enforcing subsections (a) and (b)—that is, the statutory requirements that the state allow testing and an opportunity to present favorable results to a state entity of the state's choosing. Subsection (c) leaves it to that state entity to determine the merits of such a claim. If a federal court has any occasion to examine it thereafter, it will not be because of anything in § 104 of IPA.

Even if I am wrong and § 104 is *not* simply a procedural device for enforcing something that is itself a Fourteenth Amendment right, this provision is still valid as a prophylactic measure. Surely what the Court said in *Herrera* indicates that there is some Fourteenth Amendment right in the offing—i.e., a Fourteenth Amendment right that can be violated and, accordingly, that Congress can enforce via § 5. It is not essential that a state's denial of DNA testing or an opportunity to present favorable testing results to a state tribunal must violate the Fourteenth Amendment. Congress can nevertheless require states to allow both testing and a chance to present the results as a means of forestalling what *would* violate the Fourteenth Amendment—either foreclosing extremely strong innocence claims on the ground that they are out of time or, certainly, actually executing or imprisoning innocent people.

The Court explained in *Flores* that Congress can target state behavior that does not itself violate the Fourteenth Amendment, so long as the means Congress employs is "congruent" with and "proportionate" to the constitutional evil sought to be prevented. 521 U.S. at 530-32.

Section 104 is congruent with the identified potential constitutional violation inasmuch as it is plainly and logically related to that evil. How else to protect against punishing the innocent but by ensuring that they have the data they need to prove their innocence and an opportunity to advance that data? Certainly, it would be hard to argue that § 104 seeks (invalidly) to declare that something is a violation of the Fourteenth Amendment in the teeth of a Supreme Court decision to the contrary.

The *Herrera* precedent clearly indicates that there is a Fourteenth Amendment violation about which to be concerned.

The Supreme Court held in *Arizona v. Youngblood*, 488 U.S. 51 (1988), that the Fourteenth Amendment itself imposes no blanket requirement that the states preserve biological materials that might contain evidence helpful to criminal defendants. According to the Court, defendants can ordinarily establish a constitutional violation in an evidence-preservation case only by showing that state officers acted in "bad faith." Everyone should understand, however, that § 104 imposes no explicit requirement that biological materials must be preserved for DNA testing. Other provisions in IPA encourage the states to retain biological materials by making preservation a precondition for receiving federal funds. Section 104, by contrast, deals explicitly only with materials in the state's custody. Section 104 operates without a state's voluntary agreement. But this provision does not expressly require the states to preserve material that the Fourteenth Amendment allows them to discard (in good faith).

I anticipate that § 104 would be read to require preservation *implicitly*. It would make little sense to demand that the states allow testing if they were free to avoid that obligation simply by destroying any material that might be tested. If § 104 is read that way, though, it is still a valid preventive measure. The Court explained in *Youngblood* that the difference between a meritorious and an unmeritorious Fourteenth Amendment claim in this context turns on whether the state officers concerned acted in "bad faith." When the Constitution itself is violated only by behavior accompanied by a particular mental state, Congress can prevent constitutional violations by enacting statutes that condemn the behavior *without* proof of the mental state. In *City of Rome v. United States*, 446 U.S. 156 (1980), the Court acknowledged that voting regulations would be unconstitutional only if state officers acted with a "purpose" to discriminate to the detriment of minority voters. The Court also recognized that the Voting Rights Act authorized the Attorney General to disapprove voting rules on the basis of "discriminatory effect" alone. The Court held that Congress could authorize disapproval of rules with a discriminatory *effect* as a means of preventing the adoption and enforcement of rules with a discriminatory *purpose*.[3]

Section 104 is also proportionate inasmuch as it strives to avoid restricting state action that does not entail a potential constitutional violation. Both subsections (a) and (b) are limited to persons in custody on the basis of a state court judgment. Congress is not proposing that states are insensitive to the value of DNA testing and that the Federal Government must step in and establish a general federal statutory scheme by which the states must deal with DNA evidence in current and future cases. Section 104 implicitly assumes that the states are now familiar with DNA evidence, that they have their own reasons for testing, and that they will not arbitrarily refuse to conduct tests on motion by a defendant. Section 104 recognizes, though, that many prisoners were convicted and sentenced before DNA testing became available and routine.

[3] The *City of Rome* case dealt with Congress' authority to enforce the Fifteenth Amendment. Congress' power to enforce the Fourteenth Amendment is equally broad. The Supreme Court cited *City of Rome* with approval in the portion of its opinion in *Flores* explaining the scope of congressional power under § 5.

The idea is only to ensure that prisoners are not foreclosed on the basis of filing deadlines enacted without any thought that this kind of probative scientific evidence might become feasible. The first eight findings in § 101 of IPA explain that DNA testing is now generally possible, that it was not in the past, that only two states have enacted legislation that makes testing available for older cases, and that as many as thirty states impose time limits on motions of this kind that have long since expired for those cases. So Congress has done its homework, identified the real potential that states are violating and will continue to violate Fourteenth Amendment rights, and offered a remedy aimed only at state behavior that presents potential constitutional difficulty.

In addition, both subsections (a) and (b) contain qualifiers that restrict their sweep and protect legitimate state interests. Subsection (a) specifies that prisoners are entitled to testing only if the state has custody of biological material related to their cases that has not previously been tested according to current techniques. Even then, a state may deny a request if a court determines that testing could not produce results establishing a "reasonable probability" that a prisoner was erroneously convicted or sentenced. Subsection (b) specifies that prisoners are entitled to present test results to a state tribunal only if those results are "noncumulative" and "exculpatory." Those conditions reflect a reasoned, balanced attempt to give prisoners the opportunity to make a threshold showing of innocence, but not more than that, and thus to safeguard the states from a flood of frivolous requests.

I hope this letter is useful to you.

Very truly yours,

Larry W. Yackle
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June 12, 2000

Hon. Orrin Hatch
United States Senate
Washington, D.C

Dear Senator Hatch :

I am writing you as a member of The National Committee to Prevent Wrongful Executions. By now the published numbers and news stories are becoming familiar—more than eighty death row prisoners have been released, many because of the DNA technology which established that the genetic material gathered in their cases was not theirs. Seventy-two prisoners have been released from prison because the DNA testing established that the prisoner being held was not the person who committed the crime. 26% of those persons arrested, where DNA evidence is available, have been established as not guilty because testing that genetic (DNA) material clearly showed that the genetic material was not that of the accused person.

When an innocent man or woman is in custody, in prison or on death row, the real criminal is possibly still a free person and in a position to rape or kill again.

Given the high stakes—literally life and death—we need to be as certain as possible about the guilt of the accused person before sentencing that person to die. In today's environment we have two capabilities that will better assure that certainty; access to DNA testing for those for whom it could reasonably be exculpatory and better safeguards in the system to ensure that those arrested have competent defense counsel. Additionally , ensuring that juries understand their sentencing options will help make certain that the system works as it was intended to work.

Taking the steps with Federal and State legislation can help assure that DNA testing is available at all reasonable times; that competent defense counsel will protect the rights of the accused at all stages of the criminal prosecution and that juries are fully informed as to their sentencing options.

I applaud the efforts you and your colleagues, on both sides of the aisle, are bringing to these critical issues and encourage your efforts on behalf of the innocent to ensure that justice is done.

Sincerely,

William S. Sessions