S. HRG. 111–424

STRENGTHENING OUR CRIMINAL JUSTICE SYSTEM: EXTENDING THE INNOCENCE PROTECTION ACT

HEARING

BEFORE THE

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ONE HUNDRED ELEVENTH CONGRESS

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STRENGTHENING OUR CRIMINAL JUSTICE SYSTEM: EXTENDING THE INNOCENCE PROTECTION ACT

TUESDAY, NOVEMBER 10, 2009

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

The Committee met, Pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy and Sessions.

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

Chairman LEAHY. Good morning. Today, the Judiciary Committee is going to focus on a vital component of our jurisdiction, which, of course, is to ensure that our criminal justice system works fairly and effectively to advance justice. Five years ago, Congress made great strides toward that goal. We passed the Justice For All Act; that included the Innocence Protection Act. Today, we begin to build on that important step.

I introduced the Innocence Protection Act in 2000 with the primary goal of making sure that death penalty cases are conducted fairly. Its passage in 2004 was a ground breaking moment. But, unfortunately, recent headlines make clear that our work is far from done in this area. The New Yorker reported this fall that in 2004, the unthinkable may have happened: the State of Texas may have executed an innocent man. While we may never know for sure the truth in that case, it is abundantly clear that our criminal justice system did not work as it must to fully test the strength and validity of the evidence. In that case, forensic evidence which may not have had any scientific basis at all went largely unquestioned.

In Duchess County, New York, last month, a judge released Dewey Bozella after finding that evidence concealed for more than 30 years showed he was not guilty of the rape and murder for which he spent 26 years in prison. Think of that. Evidence that had been concealed that would have showed his innocence, he spends 26 years in prison. Key evidence had not been preserved. The worst part about that—and as a former prosecutor, this is the nightmare you always have. When you prosecute the wrong person, that means the person who committed the crime is still out there. And in this case, they destroyed evidence which would have allowed them to convict the likely perpetrator, a man who went on

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to commit another heinous murder. It is not enough just to—you want to make sure you get the guilty, and you want to make sure you do not lock up the wrong person. Because if you lock up the wrong person, that means the person who committed the crime is still out there. And in many, many cases, they are going to be a repeat offender. Mr. Bozella is here today with his wife and with the team of lawyers who prevailed after so many years.

Mr. Bozella, would you stand up, please? Thank you very much for being here, sir.

[Applause.]

Chairman LEAHY. Now, I spent 8 years as a prosecutor, as many of you know, and I have great faith in the men and women of law enforcement. I worked with them on a daily basis, many times at 2 and 3 and 4 o'clock in the morning. And I know that the vast majority of the time our criminal justice system works fairly and effectively. I also know though that the system only works as it should when each side is well represented by competent and well-trained counsel and when all the relevant evidence is retained and tested. Mr. Bozella's case is not unique; we learn regularly of defendants released after new evidence exonerates them. We have to do better. It is an outrage when an innocent person is punished. As I said before, the guilty person is still on the streets, and they are able to commit more crimes, and we are less safe.

One of the key programs created in the Innocence Protection Act was the Kirk Bloodsworth Post Conviction DNA Testing Grant Program. Kirk Bloodsworth, whom I know very well, was a young man just out of the Marines when he was arrested, convicted, and sentenced to death for a heinous crime. The only problem was he was not the one who committed the crime. He was the first person in the United States to be exonerated from a death row crime through the use of DNA evidence, but he sat for years on death row. And then they found when they tested the DNA evidence that they were able to find the person who did commit the crime.

This program provides grants to States for testing in cases like Kirk's where someone has been convicted, but where significant DNA evidence was not tested. The last administration resisted implementing the program for several years, but we worked hard to see the program put into place. We are going to be hearing from Keith Findley of the Innocence Network, who will talk about the good that is coming from Bloodsworth grants in his own State of Wisconsin, but I think a whole lot of other States, too.

But the vast majority of capital cases and other serious felony cases do not include DNA evidence that can determine innocence or guilt. For those cases to be fairly considered, each side must have adequate, competent, well-trained counsels. Any prosecutor worth his or her salt will tell you that the most important thing is to have good counsel on the other side. Then you know where you are. And to that end, the Innocence Protection Act included the Capital Representation and Prosecution Improvement Grants. I look forward to hearing from Andre de Gruy, the Director of Mississippi's Office of Capital Defense Counsel. I will probably continue to mispronounce your name. Did I come close?

Mr. DE GRUY. You got it exactly, Senator.

Chairman LEAHY. His office received funds to train counsel in capital cases; otherwise, there would have been no resources.

Houston District Attorney Patricia Lykos—Lykos?

Ms. LYKOS. Lykos.

Chairman LEAHY. Thank you, District Attorney. On a side thing, when I was on the board of the National District Attorneys Association, part of the time the Harris County prosecutor was a man named Carol Vance, and he was the president of the association. I was down there several times for meetings and fell in love with Houston and Harris County.

But she has been a leader in encouraging post-conviction DNA and other forensic testing, and in advocating for effective defense counsel. As I said, I believe that the system works better for all involved when each side is represented well and all evidence is considered. And I know, District Attorney, you agree. I also look forward to hearing from Barry Matson, a prosecutor who has also recognized the need to seek the truth and who has been helpful in our efforts to reform our forensic system.

The Justice For All Act included several other very important programs, including new protections for victims of crime, funding for State and local governments for DNA testing and other forensic disciplines, and the Debbie Smith Rape Kit Backlog Reduction Act. The Debbie Smith Act authorized significant funding to reduce the backlog of untested rape kits so that victims need not live in fear while these kits languish in storage. And I have worked hard to ensure that the Debbie Smith Act is fully funded. I have been working hard to get to the bottom of some disturbing findings that we have had of substantial backlogs that continue. Debbie Smith and her husband, Rob, are here today. Debbie, I just talked with you a minute ago. Where are you and Rob? I see you, right back there. I welcome them back to the Committee. If Debbie Smith had not been so heroic in coming forward with the horrible story of the crime committed against her, I do not think we would have moved that act forward, and I put her in my pantheon of heroes during my decades on this Committee.

So we will rededicate ourselves to doing what we must to ensure that we have a criminal justice system where the innocent remain free, the guilty parties are punished and we get the right person, and all sides have the tools and resources they need.

With that, I will yield to another former prosecutor, Senator Jeff Sessions of Alabama.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman, and I am sorry to have been running late. We had——

Chairman LEAHY. There is a lot of that going on.

Senator SESSIONS. There is a lot happening. We had a very interesting Budget Committee hearing with a bipartisan group of Senators proposing ways to contain the surging debt that we have in the country, and it is something that I have been participating in. I thought I would be back on time.

Mr. Chairman, I look forward to working on the reauthorization of the act, and I look forward to seeing how well we are proceeding

with some of the laws that have been passed. I would note that it is troubling that we still apparently have backlogs in analysis of rape kits and other analysis of that kind. It is pretty stunning to me.

I have a philosophy that I will sum up before listening to the panel. But our great criminal justice system should be seen as a whole. It should be coherent. It includes prisons, police, sheriffs, State and Federal investigators, and prosecutors. It includes judges, probation officers, and the billions of dollars spent on this system. As crime goes up, so do arrests. The Police arrest one suspect with a powder substance, another with fingerprints, another with ballistics, another commits a rape, and they have DNA. And there are not sufficient funds to expeditiously analyze that evidence, clear the innocent, convict the guilty, and move forward with the case. It is a bottleneck in this system that continues to exist.

I would add parenthetically that if anybody went through this system and has a reasonable basis to assert that there is forensic evidence of any kind that would free them, we ought to figure out a way to get them that evidence. But, of course, people can conjure up anything when they are serving a long period of time in jail. You have to have some reasonableness on this. But, fundamentally, that is a minor cost to the overall system to ensure the integrity of the system.

I would just say that somehow we have got to get our State and local people more committed to effective forensic evidence, and I hope that the Coverdell Act, which I supported, or the other piece of legislation out there, could help create incentives for our State and local governments to do a better job of this.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, and I think, you know, this is something that goes way beyond any question of politics, partisan politics.

Senator SESSIONS. Right.

Chairman LEAHY. Especially those of us who have served as prosecutors, we want to get the guilty person. We do not want to convict the innocent person. Aside from what a blot that is on the justice system when you convict an innocent person, it means the guilty person is still out there and they can still commit the crime.

So the first witness is Patricia Lykos, the District Attorney of Harris County, and I believe—am I correct on this?—that you are the first woman to hold that post since it was created more than 100 years ago.

Ms. LYKOS. Yes, sir.

Chairman LEAHY. In 1981, she was appointed to serve as judge of the 180th District Court where she presided over more than 20,000 felony criminal cases over the course of 14 years. She then served as 10 years as senior district judge and special assignments judge, and then she won her election to her current position. The judge began her career as a Houston police officer, worked her way through college and law school, was in private practice as a lawyer. She received her undergraduate degree from the University of Houston, her law degree from the South Texas College of Law.

I think I could say parenthetically you are a district attorney who has seen every single side of the system.

Ms. LYKOS. Yes, sir.

Chairman LEAHY. Please go ahead.

STATEMENT OF PATRICIA LYKOS, DISTRICT ATTORNEY, HARRIS COUNTY, HOUSTON, TEXAS

Ms. LYKOS. Chairman Leahy, Senator Sessions, my name is Pat Lykos. I am the elected District Attorney of Harris County, Texas—the third most populous county in the United States of America. Our square miles are almost 1,800, and our county seat is the city of Houston, which is the fourth largest city in the United States. Thank you for this opportunity to testify in support of the reauthorization of the Innocence Protection Act.

Wrongful convictions are abhorrent to Americans, and most especially these miscarriages of justice undermine the rule of law, which is the foundation of our Republic, which makes us the greatest country that the world has ever seen, bar none. Civil order requires that the people have faith, trust, and confidence in the system.

I come to you with the perspective of a police officer, criminal defense attorney, criminal court judge, presided over thousands of felony cases, including capital cases, and now as district attorney.

One of my first initiatives was to create a post-conviction review section that was separate and apart from our excellent appellate division. But, gentlemen, it is not enough to redress yesterday's wrongs. We must ensure that there is future justice.

You all are former prosecutors, and you understand the profound duty that prosecutors have. We are the No. 1 law enforcement officer in our jurisdiction. It is up to us to ensure the rights of both the accused and the victim, and we must always, always disclose in discovery from the inception of a case to post-conviction any Brady material.

We have to serve and protect our people. We have to prevent crime. We have to suppress it, and we have to reduce it. And we have to have initiatives to go after the really bad guys—and girls, if you will.

Fundamental principles of law do not change, but systems must. And if we are to effectively safeguard our communities, we have to improve the processes consistent with due process.

Felons go undetected and undeterred because reliable forensic capabilities are either scarce or unavailable to the criminal justice system. The focus on post-conviction situations should not obscure the greatest need, and that is, the timely and accurate gathering of relevant evidence and DNA testing at the inception of investigations.

We have a Medical Examiner's Office in Harris County that is independent, that is staffed by scientists. It is located in the Texas Medical Center. I would urge this honorable Committee to consider, either through this act or related acts, we must fund crime labs.

Whenever scientific evidence is introduced, it is sponsored by the office; it is in the name of the district attorney. It is our honor at stake, and we must be assured of the integrity.

In the city of Houston, we have 3,800 rape kits that are in the property room and 1,000 that are in the laboratory right now. This is criminal.

I am here shamelessly asking you to make us the prototype, the pilot project for what a 21st century state-of-the-art crime lab should be. This is a job stimulus that I think everybody can approve.

In addition, sir, we need through the National District Attorneys Association training. As you well know, 95 percent of all the cases are prosecuted by local prosecutors. We must have the expertise to be able to introduce it. We must be able to train law enforcement in the gathering—preserving the scene and the collection of evidence and the preservation of the evidence and so forth. We must have that training.

And, lastly, I could not agree with you more. I want capable defense attorneys on the other side. That's justice to have effective representation. I do not want to have to retry a case again because of ineffective assistance of counsel.

Thank you so much for this opportunity. Honor in dealing justly with all is everything. Leaders see the right thing to do and they do it, and I cannot thank this Committee enough for your interest and your commitment to the rule of law.

[The prepared statement of Ms. Lykos appears as a submission for the record.]

Chairman LEAHY. District Attorney, thank you very much.

I am going to put into the record a statement by Senator Feingold, a member of this Committee. We will leave the record open for statements from either side.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman LEAHY. This always happens when we have conflicting meetings going on, and I appreciate Senator Sessions leaving his to come here, and then we have a number of Senators who have gone down to Fort Hood along with President Obama. The Senate had a moment of silence earlier this morning, but, again, a case where both sides of the aisle share the horror of what happened in Texas. Those of us who have had members of our family in the military—in my case, a son—you worry when they are deployed into a combat area. You have a sense of their safety when they are in especially a place like Fort Hood, which is one of the finest military bases that we have, as you know, right there in Texas, one of the finest military bases in the country. And so we all share the shock and horror and the grief for the families.

Andre de Gruy was appointed the first Director—am I correct on that?—the first Director of the Mississippi Office of Capital Defense Counsel on July 6, 2001. He served as assistant public defender of Hinds County, Mississippi. He is president of the Mississippi Public Defenders Association, served as staff attorney, later as Director of the Mississippi Capital Defense Resource Center. In 2001, he was selected by then-Governor Ronnie Musgrove to open the Office of Capital Defense Counsel, one of the first offices in the country to fund defense for capital crimes at the State level to relieve the burden normally placed on counties. A law degree from Mississippi College School of Law in 1990.

Thank you for coming north and joining us. Please go ahead, sir.

STATEMENT OF ANDRE DE GRUY, DIRECTOR, MISSISSIPPI OFFICE OF CAPITAL DEFENSE COUNSEL, JACKSON, MISSISSIPPI

Mr. DE GRUY. They gave me one simple instruction, and I failed to follow it.

[Laughter.]

Mr. DE GRUY. Thank you, Mr. Chairman, and thank you, Senator Sessions, primarily for giving me the opportunity to come here and explain to you the successes I feel we have had in Mississippi with the funding we received through the Innocence Protection Act, and I want to explain to you why, in my opinion, it is so important that we continue this and expand the Innocence Protection Act.

My office is the only State-funded public defender agency of any kind at the trial level in the State of Mississippi. All other felony defense is provided at the county level, mostly through contract public defenders. We only have four full-time public defender offices in the State who actually have investigators on their staff.

My office has handled over 100 cases in the 8-plus years we have been in existence. That is about a third of the cases that are indicted each year in the State of Mississippi on death penalty-eligible offenses.

The Mississippi Public Defender Task Force recently did an evaluation of funding and found that prosecutors are funded at more than twice the level of the defense. That includes county and State funding.

We created a defender training division about 2 years ago. They train everyone from youth court defenders through capital defenders. That, too, is funded at 50 percent of the prosecutor funding. Without the Innocence Protection Act funds, we would not have been able to have any training in death penalty cases.

What we have done—and a little bit about Mississippi. We have executed ten people. We have had 11 cases reversed for inefficiency assistance of counsel. I think it is this funding disparity that contributes to more ineffective assistance of counsel than death sentences that are actually carried out. The system as it is set up in Mississippi risks the conviction of innocents and the execution of innocents.

The finding of ineffective assistance in 11 of these cases, which is over 5 percent of the total death sentences imposed, is just the tip of the iceberg because the standard of proving ineffective assistance is so high, most of our lawyers that are found to have provided deficient performance, there is actually no reversal, including lawyers who are admitted to drug treatment immediately after the trial or who are disbarred; or in the case of Eddie Lee Howard, his lawyer, when he filed the appeal, the Mississippi Supreme Court took the extraordinary step of removing him and ordering the local court to appoint another attorney. That attorney also had no qualifications because we have no standards in Mississippi. Mr. Howard is still on death row.

Kennedy Brewer was also represented by the same lawyer. Eventually, through DNA testing, it was proven that someone else raped the child he was convicted of raping and killing. My office took

over, along with the Innocent Project and a local defender, and represented him at the second trial. We never got that far because in the defense investigation we found the actual perpetrator, turned it over to the State Attorney General's office. That man is now under indictment, and not only was Kennedy Brewer exonerated, in a related case in the same county a man who did not have DNA to get him out of prison was released from a life sentence because the State now believes that the actual perpetrator committed both of these crimes 2 years apart. That is what we can do with a properly funded defense office.

What we have been able to do with the limited training funding we have received is to first send 18 capital defenders to national training programs during the first 2 years of the grant cycle. In the second 2 years, we have been able to have training in Mississippi, and not just a training program, but a training program that we have had the funding to bring in national experts and to follow the cases after the training is over. The best example of our success I believe is in Harrison County, Mississippi, on the Gulf Coast. They opened a full-time office in the wake of Hurricane Katrina. The lawyers in that office had never tried a death penalty case. They came to our first training session. We have continued to work with them over the past 3 years. They have handled four cases. They had a death sentence, they had a life sentence; they also had a directed verdict of not guilty based on the handling of DNA evidence that they learned at our training; and they had a defendant found not guilty—the death penalty was taken off the table because of mental retardation.

We need this continued funding not only to train public defenders in how to handle these cases, to assist them as we go forward, but I was asked not only for the reauthorization of the act but actually expanding to allow us to hire some lawyers to help fill out the staff that we have.

I realize I am over time. I thank you again for this opportunity, and I urge you to reauthorize the Innocence Protection Act.

[The prepared statement of Mr. de Gruy appears as a submission for the record.]

Chairman LEAHY. Thank you, and we will have other questions, and your own experience, of course, is very important. Your whole statement will be placed in the record, so do not be concerned on the time.

Keith Findley is a clinical professor at the University of Wisconsin Law School, co-founder and co-director of the Wisconsin Innocent Project, serves as President of the Innocence Network, an affiliation of 52 Innocence Projects all around the world. Professor Findley's areas of expertise include criminal defense work and appellate advocacy. From 1990 to 1997, he worked as an assistant State public defender in Wisconsin, litigated hundreds of post-conviction appellate cases at all levels of State and Federal courts, including the U.S. Supreme Court. He received his undergraduate degree from Indiana University, his law degree from the Yale Law School.

Professor Findley, glad to have you with us. Please go ahead, sir.

STATEMENT OF KEITH A. FINDLEY, PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL, MADISON, WISCONSIN, CO-FOUNDER AND CO-DIRECTOR, WISCONSIN INNOCENCE PROJECT, AND PRESIDENT, THE INNOCENCE NETWORK

Mr. FINDLEY. Chairman Leahy, Senator Sessions, and other members of the Committee—I have violated, that same simple rule. I am so sorry.

Spoken off microphone.

I am here today as President of the Innocence Network, which is now an affiliation of 54 Innocence Projects, primarily in the United States but also with members throughout the world. I want to thank you very much for inviting me and giving me this opportunity to testify today before this Committee.

I would like to first address the importance of reauthorizing the Kirk Bloodsworth Post-Conviction DNA Testing Assistance Program and the other DNA initiatives of the Justice For All Act. DNA testing is, of course, of tremendous importance in our system of justice. We all know how important DNA is in the investigation and prosecution of crimes. But I would like to emphasize how important DNA testing is as well in the post-conviction context.

We in the Innocence Network are aware of at least 245 cases in this country now in which an innocent person was wrongly convicted of a serious crime and later exonerated by post-conviction DNA testing.

But I also want to emphasize that post-conviction DNA testing also serves an important public safety and law enforcement function, and that is because very often post-conviction DNA testing as well not only exonerates an innocent person, but also identifies the true perpetrators of those serious crimes.

In the Nation's first 241 DNA exonerations, the DNA testing also identified 105 true perpetrators of those crimes in many cases through a hit in the CODIS data base, that is, the national data base of convicted offenders. These were people who had gone on, because we had failed to convict the right person to begin with, had gone on to commit an additional 19 murders, 56 rapes, and 15 other violent crimes.

Post-conviction DNA testing is also important for another reason, and it is a reason that transcends these individual cases of injustice. That is, these post-conviction DNA cases provide us with a learning moment, a learning opportunity. They give us a case we can study to learn what it is that leads the system to make these mistakes. And in this regard, the lessons from these cases are benefiting both law enforcement and the wrongly accused. These cases are helping us to identify sources of error in the criminal justice system even in cases where we don't have DNA to come along and save the day, errors like mistaken eyewitness identification evidence to flawed forensic sciences to inadequate provision of defense counsel, as we have been hearing about here. And these lessons then lead to reforms, best practices that improve the reliability of the system and thereby assist both the prosecution and the accused.

Against this backdrop, we see the importance of the DNA initiatives of the Justice For All Act. Among other things, the law pro-

vides funding for four separate DNA grant programs, including one, the Bloodsworth Program, for post-conviction DNA testing.

Now, Congress wrote into all four of these programs financial incentives to the States to encourage them to adopt laws requiring preservation of biological evidence after conviction and laws giving convicted individuals a right to post-conviction DNA testing of that evidence when it might prove innocence.

For reasons outlined in my written testimony, the program did not initially achieve its goals because, quite simply, it frankly was not implemented. No funding was disbursed in the first few years under these programs. But the program is now up and running. The Department of Justice has granted, indeed, significant awards in the past 2 fiscal years, and it needs to be reauthorized now so that its original goals can indeed be effectuated. And I am pleased to say that we in Wisconsin have been the recipients of one of those.

The grants that we receive and other States are receiving are very exciting because they allow us to move forward in a much more proactive way to continue to identify cases of wrongful conviction and continue learning the lessons for improving the system.

Our recommendations in a nutshell at this point, which are set forth more fully in my written testimony, include:

First, reauthorize all four incentive grant programs attached to Section 413 of the JFAA, with their incentive provisions for preservation and access to DNA. And we also encourage Congress to address the problem posed by the fact that more than half of the States still lack adequate evidence preservation statutes. Without evidence preservation, post-conviction DNA testing is of no use.

The short-term solution that we propose for this is providing a one-time limited waiver to States that can make a showing that they are making a good-faith effort to comply with the preservation requirements.

The longer-term solution that we encourage Congress to consider is to join us in asking the National Institute of Justice to convene a national technical working group on the proper preservation of biological evidence to provide the States with much needed technical assistance to help them figure out how to accomplish this goal of preserving biological evidence after conviction.

Finally, we also recommend several minor amendments to those portions of the Innocence Protection Act that provide a right of access to post-conviction DNA testing for individuals convicted of Federal offenses, and those two recommendations we have in that regard are:

First to establish clear authority for courts to order that DNA profiles be run through CODIS, the national data base of convicted offenders, because that kind of testing is often needed to complete the exoneration process and to help identify true perpetrators who otherwise evade capture;

And, second, we ask that you clarify that individuals who confess to crimes are still entitled to seek post-conviction DNA testing. Many States have statutes that prohibit people who have confessed or pled guilty from obtaining post-conviction DNA testing, yet we know that nearly a quarter of the post-conviction DNA exonerations involve people who confessed or pled guilty to their crimes.

And, therefore, if we are truly interested in rooting out innocence in our system, then we need to make that testing available to those people as well.

I thank you.

[The prepared statement of Mr. Findley appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Mr. Matson is from Alabama, so, one, I am delighted—and I welcome you being here, Mr. Matson, but I am going to yield to the Senator from Alabama and let him give the introduction.

Senator SESSIONS. Thank you, Mr. Chairman.

Barry Matson is really a fabulous prosecutor with great experience. He is now the chief prosecutor of the Alabama Computer Forensic Laboratories in Hoover, Alabama, where they train people from all over the country in how to utilize evidence lawfully from a computer to identify criminal activity and prosecute those cases.

Also, before this position, he was a chief felony prosecutor in Talladega, Alabama, where he tried a lot of murder cases and serious crimes, so he has a lot of in-depth person experience both at the academic level—he is also the editor of the Alabama Prosecutor; I do not know how you find time to do all these things—as well as leading the forensic laboratory.

So, Barry, we are delighted to have you back again. You have testified previously on related matters, and we are delighted to hear your testimony today.

Chairman LEAHY. Did you mention Deputy Director of the Alabama District Attorneys Association?

Senator SESSIONS. No. He is the Deputy Director of the Alabama District Attorneys Association.

Chairman LEAHY. Do you sleep at all?

Mr. MATSON. I also cut the grass and take out the trash.

[Laughter.]

Chairman LEAHY. Trust me, even Senators do that. Go ahead, Mr. Matson.

STATEMENT OF BARRY MATSON, DEPUTY DIRECTOR, ALABAMA DISTRICT ATTORNEYS ASSOCIATION, AND CHIEF PROSECUTOR, ALABAMA COMPUTER FORENSICS LABORATORIES, MONTGOMERY, ALABAMA

Mr. MATSON. Thank you. Chairman Leahy, Senator Sessions, it is an honor to be here to talk on something that is so vital to the preservation of justice in our country.

I want to talk to you first, though, and tell you a story about Tracy and Loretta Phillips, and I would ask you—in my written testimony, it is detailed in greater detail. But Tracy and Loretta Phillips lived on Coffee Street in a community that I grew up in, and they were renovating a house, and they were planning a yard sale the following morning. They lived a life like most people. Tracy had a small business and Loretta kept the children.

On Friday afternoon, Loretta went out to put yard sale signs up for the following morning. She met a guy named John Russell Calhoun who inquired about the yard sale and asked what she was selling in the yard sale, and there was a television he was inter-

ested in. So he came back to the house on Coffee Street and looked at the television, decided not to buy on Friday, and left.

That night, the children were upstairs watching some television program, had spend-the-night company, and Loretta and Tracy settled in downstairs to watch a movie that they had rented. A child in the yard behind them called and said, "Loretta, there is somebody in your back yard looking in your house." Tracy went out to investigate, came back in, said, "Loretta, I did not see anybody out there."

All of a sudden, John Russell Calhoun burst into that house. She recognized him immediately. And Tracy fought John Russell Calhoun and tried to defend that family. Loretta ran upstairs and barricaded herself and put those children on the balcony. She heard the fight downstairs and later heard steps coming up those hardwood floor stairs that they were redoing and resurfacing.

There was a knock on the door, and it was Tracy. He said, "Loretta, open the door, he has got a gun to my head." She opened the door and there stood Tracy, beaten and disheveled, with John Calhoun with a gun to his head.

They came in. Tracy pled for the family's life. The children were motionless on the balcony. Calhoun did not want money. He did not want property. He wanted Loretta, and he told her to remove her clothes. Tracy begged for the family. Ultimately, Loretta acquiesced. She laid back on the bed. Calhoun forced Tracy's face between her legs, and he shot him in the back of the head and killed him.

Now, this is graphic, horrible cases that happen every day. After Tracy fell to the floor dead, the children ran out to their father, and they were locked in a bedroom without a telephone. Loretta suffered for the next 45 minutes to an hour, and she was raped and sodomized.

Ultimately, the police came. Calhoun fled the scene, was found days later. In that case, there is DNA semen evidence, there is ballistics, there is eyewitness testimony. There is the car that was parked outside that the police found that belonged to Calhoun, a sports car with a driver's license in it.

I prosecuted that case that was made by law enforcement, and he received the same sentence he gave Tracy Phillips, which was death. And I hope that that sentence one day is carried out.

But what we have to understand is—and I honor the work that the Innocence Project has done to free people that were wrongfully convicted, and no one should ever serve a day for a sentence they did not commit. But what you have to understand is that it is not just those 200-some-odd cases that have been attacked and ultimately the person who was wrongfully convicted was freed. It is every case every day.

I know that in the next 10 years the case involving John Russell Calhoun will be assaulted, and I as a prosecutor—and I represent about 90 percent of the prosecutors in this country, which are small counties, small cities, with very small budgets. And I know that in the next 10 to 15 years I am going to be called everything in the book, that that case is going to be assaulted. And about 15 years from now, when I am retired, dead, or dying, along with everybody else in that case, there is going to be a request or pleadings or

something to attack that conviction that should not be attacked. And that happens in every case, and we have to understand that it is not just those cases. It is every case in this country, because small jurisdictions are not—it is not really an Atticus versus Goliath.

In Alabama, I think it is important to note that we have 67 counties with 42 DAs. There are 12,000 lawyers in our States and just a little over 300 prosecutors. We had 200,000 reported crimes in 2008, and 20,000 of them were violent offenses. In 1997, the indigent defense funds in our State was $14 million. The budget for the DAs in our State was $17 million. In 2007, the budget for indigent defense in our State was $70 million. Do you know what the budget was for the DAs? $44 million.

That is a trend in most States. Funding for indigent defense should be there. It is open ended, and it is moving that way across this country. And we support that funding, but most of the jurisdictions in our State and across this country are small DA's offices with one prosecutor, two prosecutors, maybe a secretary, and we are now the Atticus versus Goliath in most jurisdictions because the funding for expert testimony for witnesses for the defense is open ended and is growing exponentially.

In our State, the average assistant DA's salary is $40,000. I know up here $3 million for efficiency in Washington, D.C., is pretty average, but in Alabama, it is not. But $40,00 is the average salary. In my State, if I represent somebody as an indigent that is charged with capital murder, it is nothing for me to get a fee of $120,000 in that one case.

So you have to understand the tables are turning, and what I am here asking you to do with this act—and I applaud Congress for recognizing the need to have an effective judicial system. And I am not attacking the criminal defense bar at all because I know, just like Chairman Leahy said, it makes me a better prosecutor and it makes us more effective to have a strong criminal defense bar. But prosecutors need training, and we need funding, and we need to be equipped to be able to represent the people out there who are suffering, for the Loretta Phillips of the world and for the Tracy Phillips of the world, who are damaged and hurt every day. And we are not.

I know that Mr. Bright testified before this Committee on this act recently and talked about the disparity in prosecution and defense, and I know that has been mentioned here. But you have to understand that there are those pockets of that, but the trend is that prosecutors' offices are not sufficiently funded, and we need funding and we need training.

I echo the sentiment of my colleague at the end of the table that we need funding for the DNA backlog, we need funding for training, and we need funding for our offices.

I thank you very much.

[The prepared statement of Mr. Matson appears as a submission for the record.]

Chairman LEAHY. Thank you very much, and thank you again for being here. You have visited us before, and I appreciate it.

Mr. Findley, you describe in your testimony examples from around the country of collaborative efforts to bring both law en-

forcement and the local Innocence Projects together to evaluate credible claims of innocence.

Now, I think in Wisconsin the post-conviction DNA testing project has a partnership between the Wisconsin Innocence Project, the Wisconsin Department of Justice, the Department of Corrections, and the State Public Defenders. Is that correct?

Mr. FINDLEY. That is correct, Senator.

Chairman LEAHY. What is the significance of the Bloodsworth grant program to this? Does it help? Does it hinder? Tell us more about it.

Mr. FINDLEY. The Bloodsworth Post-Conviction DNA Testing Assistance Program is of vital importance to the work we do. And what is really exciting about what is happening with these grant proposals is that it is bringing together all perspectives in the criminal justice system, people coming together from prosecution, police, and the defense, recognizing that we have a shared interest.

We heard pleas here today for more funding for the defense. We heard pleas for more funding for the prosecution. And the reality is we need both, and that is what we are recognizing right now through these exoneration cases, is that we all have an interest in identifying true perpetrators, convicting the truly guilty, and making sure that we do not convict the innocent.

So what is happening, in particular through these Bloodsworth grant programs right now, is that representatives of all perspectives in the criminal justice system are coming together, and most of these grants, ours included, represent situations where prosecutors and defense attorneys are working together to try to implement this post-conviction DNA testing. And it is of vital importance because the resources otherwise simply are not there to do this post-conviction DNA testing.

And what these programs are allowing us to do now is move one step beyond what we have been, which is sort of a reactive process, waiting for people in prison to self-identify, and allowing us to proactively go out and search the landscape to find cases where DNA testing could be of benefit.

Chairman LEAHY. Because one of the things struck by Mr. Matson—and I have heard this from other prosecutors—is: When do you reach finality? Now, the case he described would appear to be a fairly open-and-shut case. I had open-and-shut cases, and I would wonder when the appeals would finally stop. I won them all, but I wondered when they were going to stop.

Does this kind of collaborative effort get us somewhere toward the finality that Mr. Matson properly raises as a problem?

Mr. FINDLEY. Yes, I think it does. This is why post-conviction DNA testing is a win-win proposition. Finality is an important interest in our system, but finality in convicting the wrong person serves no one's interest.

What the post-conviction DNA testing can do, the reason we say if there is DNA there that can be dispositive, that can be conclusive, it should be tested post-conviction, is because it is either going to do one of two things, most likely: Either it is going to prove that the individual is, in fact, guilty, in which case we have indeed enhanced finality. The case now finally comes to rest without further

questions. Or it will prove that the person is wrongly convicted, in which case no one has interest in the finality of that judgment.

Chairman LEAHY. Well, Ms. Lykos, let me take it from the district attorney's point of view. Do you have a similar collaborative approach in Harris County? You have to press the——

Ms. LYKOS. I did not realize that failure to follow a simple rule was contagious.

Chairman LEAHY. If you knew the number of times I forget, you would not feel badly about it. Go ahead.

Ms. LYKOS. We are working collaboratively, sir, and, in fact, we have initiated ourselves testing of biological information. But it is so vital that from the inception of an investigation that we do have the access to the crime labs. You cannot have law enforcement boots on the ground competing for the same dollars as a crime lab. And I cannot beseech you enough. We can create a new paradigm for what a crime lab should be, and there is really no comparison between the defense bar and the prosecution because of our multiple responsibilities. And just one simple thing, you know, our mandate to always disclose Brady material. The defense, of course, does not have that with respect to inculpatory evidence. But, in addition, there are hired lawyers representing them, and our role is just not merely prosecuting vigorously those who are guilty. And I do not want to be repetitious as to the myriad of other responsibilities we have.

Chairman LEAHY. You know, I am intrigued by what you have done in the lab. I am trying to think whether I can actually get down there to see it or we could send some of the key staff from here down to see it. You would make sure if we did that that we got in there to see everything?

Ms. LYKOS. Mr. Chairman, the planets are aligned in Harris County.

[Laughter.]

Ms. LYKOS. I mean, Republicans, Democrats, this is not a political issue.

Chairman LEAHY. This strikes me, and, you know, we struggle with how do you—and you struggle with this all the time, and everybody—Senator Sessions and I have been prosecutors—struggled with it. You want to convict the guilty. You do not want to make a mistake on getting an innocent person in there, as we have seen the horrible results when it happens. And you want to get finality—all the things that I think every one of us can agree on. It is how we reach it.

I looked at what Mr. de Gruy said. We had a case when Mississippi had executed ten people, the State saw 11 convictions or sentences reversed because of ineffective assistance of counsel. I remember when *Gideon* v. *Wainwright* came down. The book "Gideon's Trumpet" was one of the things that really inspired me when I was going to law school. But are you saying that we do not always have that right to competent counsel that *Gideon* promised?

Mr. DE GRUY. Actually, 30 years before *Gideon* in *Powell* v. *Alabama*, the Supreme Court recognized the right to competent counsel in death penalty cases. We are approaching 80 years, and I can say that we are coming really close in Mississippi in probably 50

percent of the cases. We cannot wait another 80 years to get it done.

Chairman LEAHY. I have gone over my time, and I apologize to Senator Sessions, and please take whatever amount of time you would like.

Senator SESSIONS. And I do have a matter, Mr. Chairman, involving my State's seafood industry, and I have to slip out in a few moments. But I do think that our judges do take special interest, do they not, Mr. de Gruy, in a capital murder case, they take it more seriously and in general more intensely watch the case?

Mr. DE GRUY. Many of our judges do. In fact, the reason that State funding came about was because several judges took it so seriously that they did what Mr. Matson talked about and said, "I am going to find the most experienced, the most qualified lawyer, and, county, you are going to pay him what it takes." And one of those cases, that gentleman is probably going to be executed within the next year.

Senator SESSIONS. I think the fact that you have, in Mississippi, 11 cases overturned as a result of ineffective assistance of counsel indicates that the appellate courts are monitoring these cases closely, and, you know, it is not necessarily incompetence if a lawyer makes a mistake in a death penalty case. He just made a judgment. He thought it was going go one way, and it went another way, and a witness, instead of helping, hurt. Those kinds of things happen.

But I do think that we are doing a better job about competence of counsel, and the training strikes me as a very valuable thing.

Mr. Matson, what happens if there is a—well, first of all, would you agree, as a prosecutor who has tried these cases, that the DNA should be done up front when the case is tried?

Mr. MATSON. Exactly, and I think that is what you are seeing now. Many if not all of the exonerations by DNA are cases, you know, 20, 25 years ago where we were doing serology and blood typing comparisons. And now if there——

Senator SESSIONS. That is before DNA.

Mr. MATSON. That is before DNA, before 1990 with the proliferation of DNA, and now we have mitochondrial DNA and those types of sciences. But most of those cases are from that time. Now, law enforcement, they collect that evidence, it is preserved, and it is either tested by the State or it is available to be tested by——

Senator SESSIONS. Defense lawyers can request——

Mr. MATSON. Certainly.

Senator SESSIONS. And, Ms. Lykos, with regard to that, is there some danger that a defense lawyer who is committed to a number of DNA samples tested that they might not ask for all of it to be tested for important reasons they think in their defense, that it might confirm the guilt of their defendant and that then on appeal another appointed lawyer might say that is incompetent counsel, and you have got to give a new trial or re-test this evidence? Are those realistic problems that can cause extra effort in trying to maintain these convictions?

Ms. LYKOS. I think you are spot on, Senator, but more importantly, in my jurisdiction if it is relevant biological evidence, we test it prior to trial. The sin is and what is so unconscionable is

the capability, we do not have it there, to have almost 4,000 rape kits in a property room. Epithelial is not being tested where we could solve all sorts of property crimes and other offenses because we cannot get to the rape kits.

Senator SESSIONS. Well, I agree. It is my observation that is what happens. The shortfalls in the forensic science funding is because they are such a small part of the system, they do not have the clout that the DAs and the sheriffs and the police chiefs have with the State legislatures. Do you think that could be a problem in reality?

Ms. LYKOS. Yes, sir, and I am looking forward to you all remedying that.

Senator SESSIONS. From Washington.

Ms. LYKOS. Yes, sir.

Senator SESSIONS. Well, we are not going to fund everything from Washington. The State, you know, we help it. We give it money. But we were just having a budget hearing down the hall. That is where I came from. We are spending a lot of money, I am telling you. The entire debt of the United States of America will triple in 10 years, and they have got four different plans to create a commission to contain spending. So we just cannot do everything, I would tell you.

Mr. Matson, I will just give you a moment here to just briefly express the other side of the forensic situation, the post-conviction motions. I am sure you have been through some of those and seen them. Are there some abuses that we could eliminate as we seek to ensure that every defendant has the right, post-conviction, to have evidence examined that possibly could make a difference in their conviction?

Mr. MATSON. Yes, Senator. What you see is—and you will hear about a story where somebody makes a request to have some evidence tested, and maybe there is a opposition or maybe the judge does not rule or there is some delay. But what is really untold is that that happens in every case. So every circuit judge has those petitions in every case, and you are trying to sift through a legitimate request for someone who earnestly wants to have something tested versus, you know, the hundreds or maybe thousands of requests that are not grounded, that have, you know, no significant basis for having the evidence retested.

Senator SESSIONS. Let me just interrupt. OK. So here is a case before the judge. Are you telling me that good defense lawyers have a form motion on their computer that demands forensic examination of everything that possibly impacts the case, and 30 years ago you had a confession and an eyewitness testimony and that was sufficient to go to trial with?

Mr. MATSON. Certainly. You have cases where you have—I had one that I thought about talking about where a fellow broke into his ex-wife's home and beat her, drug her out, and, you know, shot her in front of witnesses, told people he was going to do it, sat there and waited for the police, and his first words were, "A man's got to do what a man's got to do." And then there are requests to have the gun tested for touch DNA now. You know, the gun is 20 years old, and it has not been in law enforcement. It was an exhibit at trial.

So a lot of times, evidence that is an exhibit at trial, the chain of custody means the court reporters had it in their drawer or in a bag in a filing cabinet or in a vault in the courthouse for some time, not in the presence of law enforcement. So now you have that person on death row. By the way, they have gotten three trials, and three juries have said he should receive death. And now we are looking at having evidence tested again.

Senator SESSIONS. Thank you.

Chairman LEAHY. Thank you very much.

Senator SESSIONS. Sorry I have to leave.

Chairman LEAHY. No, no. I understand.

I am going to put some other questions in the record, but picking up on what Mr. Matson said about the evidence retention, and, again, from my own experience, this is and can be a problem whether you are in a large office or a small office, as many prosecutors are. It is a key component of the Bloodsworth Grant Program, the evidence retention. To receive grant funding, States must not only demonstrate they provide access to post-conviction DNA testing, but that they preserve biological evidence for the duration of the incarcerated person's prison sentence.

Now, more than 25 States lack statutes requiring the preservation of biological evidence. The Dewey Bozella case in New York makes clear that preservation of that is critical. The right to post-conviction DNA testing is meaningless if the very evidence to be tested is destroyed.

Evidence retention policy is complicated. It can be expensive. We tried to set up a temporary solution to get the Bloodsworth Program going, but that does not work.

Professor Findley, you mentioned in your testimony a solution might be a two-step process. Tell me about that. Tell me some more about that. How does that work? Because on the Bloodsworth bill, that had strong bipartisan support. And we can pass something, but we do not want to pass these bills just to feel good about passing them. We want to make sure they work once they get out there.

Mr. FINDLEY. Yes, and what the Innocence Network and the Innocence Project have suggested, there is indeed this two-step—two alternatives, essentially. One is the short-term solution.

Part of the problem, of course, is that—the incentive program for preservation of evidence is very important because, obviously, you cannot do DNA testing if the evidence has not been preserved. So the incentive program makes good sense. The problem is because, as you have identified, more than 25 States do not have adequate provisions. That means we are not getting the preservation there, and it also means that the Bloodsworth grant funding money and the other DNA initiative money is not flowing in those States.

So what we have proposed for the short-term solution is to get the money flowing and to give States a chance to start working on these problems. The short-term solution would essentially be to grant the States a one-time waiver if they can demonstrate that they have an adequate post-conviction DNA testing statute and if they show that they have imposed a moratorium on destruction of evidence while they convene a State-level working group to try to develop a plan for permanent preservation of the evidence.

These questions are complicated enough, though, that we think that really the long-term solution is the better one, and that is to ask the National Institute of Justice to convene a National Working Group to help the States understand the best way to preserve evidence to solve some of the technical problems with that. And this is something we are hearing from all of the States, from law enforcement in the States. They need guidance in this area. And so if we can implement that and then give States a waiver, if they are following those guidelines and working toward that, I think we could meet all of our objectives.

Senator Leahy, if I could, could I take just a moment to address one of the questions Senator Sessions raised? That has to do with the importance of testing everything before trial. And, of course, it is very important to do that, and it is being done primarily. But I have to tell you that that does not mean that the need for post-conviction DNA testing is being diminished. We would have thought that by now we would have seen a curtailing of the rate of post-conviction DNA exonerations as we work our way through the pool of cases that were prosecuted back in the old days, before testing. But we are not seeing that. In fact, the rate is accelerating. We are continuing to see these cases because there still are many, many cases where the DNA testing, even though the technology is there, is not done for any number of reasons, including incompetence of defense counsel.

And there is no flood of post-conviction DNA testing requests. California, our largest State, since it passed a statute requiring access to DNA testing, sees now on average one to two DNA testing requests per month in the entire State.

So I just wanted to make those points clear.

Chairman LEAHY. And one thing we should point out, as prosecutors and defense counsel know, not every case has DNA.

Mr. FINDLEY. Absolutely.

Chairman LEAHY. Just like in the old days, everybody would say, "Well, where are the fingerprints?" Well, not every case had fingerprints. And I think sometimes we watch these programs on television. I call it the CSI factor. Aha, the jury is there waiting, "Where is the DNA? Where is the blood match? Where are the fingerprints?" Well, some cases do not have DNA. They do not have fingerprints. They do not have blood tests. You have to build your case otherwise. And we have to know that.

I want to thank you all for doing this. You will get copies of your testimony. If there are things you wish to add to it or things that you wish to add related to others, please do so. This is not in any way a "gotcha" hearing. This is a hearing where we are just trying to figure out what is the best way to do this. You have taken a lot of time to come here. All four of you have helped a great deal, and I appreciate it.

We will stand in recess.

[Whereupon, at 11:10 a.m., the Committee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Testimony of André de Gruy
Director Mississippi Office of Capital Defense Counsel

"Strengthening Our Criminal Justice System: Extending the Innocence Protection Act."
United States Senate
Committee on the Judiciary

November 10, 2009

Thank you Mr. Chairman and members of this committee for the opportunity to tell you of the past successes of the Innocence Protection Act and hopefully to help you understand the important need we have in places like Mississippi for the extension of the Act.

I am André de Gruy, director of the Mississippi Office of Capital Defense Counsel. The Office was created by the Capital Defense Litigation Act of 2000 with the dual purpose of reducing the cost of capital defense on the counties of Mississippi and to improve the quality of defense in death penalty eligible cases.

I opened the Office in 2001 with two staff attorneys and a small support staff. In 2005 we increased to a staff of four attorneys. Working as co-counsel with locally appointed and funded public defenders, my office opens15-20 death eligible cases per year but across Mississippi there are approximately 60 indigent defendants charged with death penalty eligible offenses.

My office is the only state funded public defender office handling cases at the trial level. Two-thirds of the indigent death penalty cases and all other indigent felony prosecutions are handled by county funded public defenders. Four of our 82 counties have full-time defender offices staffed with lawyers and investigators. The remaining 78 counties either use ad hoc appointment or flat-fee contract defenders to provide representation.

The "systems" vary greatly in funding and quality of representation across the state. Our felony courts are state funded as are our felony prosecutors. The most recent study by the Mississippi Public Defender Task Force found that funding for the prosecution function was approximately twice the funding level for the defense function.

This funding disparity is also present in the training provided prosecutors and defenders. Prior to 2008 we had no defender training program and no more than $50,000 per year was spend on defender training by the Judicial College. We now have a defender training division in the state funded Office of Indigent Appeals but it is funded at 50% of a similar unit for prosecutor training in the state Attorney General's Office.

These funding shortages coupled with a lack of caseload limitations and no standards for the appointment of counsel particularly in death penalty cases call in to question the constitutionality of the criminal justice system in Mississippi and risk the conviction and execution of innocent people.

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Since reinstatement of the death penalty Mississippi has imposed just over 200 death sentences. Today we have 60 people on death row. In this era we have executed 10 people yet 11 convictions or sentences have been reversed because of ineffective assistance of counsel.

Those 11 are just the cases that were able to meet the high standard required for reversal based on ineffective assistance of counsel. At least 3 Mississippi lawyers were disbarred or suspended from practice between the time they tried a death penalty case and the direct appeal was filed. One lawyer was involuntarily committed for drug treatment before the direct appeal was decided. On post-conviction review the state supreme court observed that the apparent drug abuse explained some of his behavior but did not result in prejudice warranting a finding of ineffective assistance of counsel. Another lawyer who had previously been found to have provided deficient performance in a death penalty case was appointed on another death case and in that case had to be ordered to appear and argue the only issue he raised in the direct appeal brief.

In the Eddie Howard case the state supreme court took the extraordinary step of remanding a case after the brief of appellant was filed. The court directed the lower court to determine if new counsel should be appointed where the brief filed "may not have represent[ed] counsel's best efforts." This attorney represented Kennedy Brewer in another case. Mr. Brewer received a new trial after six years on death row and was eventually fully exonerated.

There have been a total of 3 former Death Row inmates cleared of the charges that sent them to Death Row. Two were acquitted in retrials and Mr. Brewer had all charges dismissed after an investigation by the defense team identified actual killer. I had the privilege of working with a local defender and The Innocence Project on Mr. Brewer's case. Our efforts not only freed Kenny we also solved a related killing that led to the exoneration of Levon Brooks who was serving a life sentence. In addition to these cases my office has had 2 acquittals in capital trials and charges dropped on a third client facing the death penalty.

I believe we have had more defense lawyers found ineffective than people executed because of the funding shortages and inadequate training and support available to the lawyers appointed in death penalty cases. I believe the successes we've had in exonerating the innocent are what can and will happen with better funding and training for public defenders.

In the first 18 years I did capital defense there were 2 death penalty training programs for trial defenders in Mississippi. Very few Mississippi public defenders could afford to attend programs in other states. In 2005-06 through funding provided by the Innocence Protection Act 18 Mississippi defenders were able to attend training programs sponsored by the National Consortium for Capital Defender Training.

In 2007 we received our first grant under the Act and have now conducted 2 training programs attended by almost 38 Mississippi lawyers and investigators. We have received a second grant and are hoping to conduct 2 more programs, one focusing on mental health problems present in so many of these cases. Problems the average public defender never faces in his practice.

These training opportunities have allowed us to expose these lawyers to the standard of practice expected in capital defense and introduce them to experienced capital lawyers from around our

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state and other parts of the country who attended as trainers. Because of the federal funding that allowed for the intensive training format and the long-term mentoring that followed the programs we have been able to improve the quality of representation in far more than the 15 cases we directly handle each year.

Unfortunately we have been unable to apply for the 2009 training grant. Because of funding shortages in my office Mississippi is far from having "an effective system for providing competent legal representation" as defined by the Act. Meeting this definition was required to apply this round.

I fully support the standards for appointment of counsel found in the Act. I continue to encourage my Supreme Court to adopt strong standards as they have in post-conviction cases and encourage my legislature to adequately fund the Act they passed in 2000 to assure competent counsel.

I'm not suggesting watering down standards but am requesting training funds be made available to states like Mississippi that can demonstrate progress towards the Act's goal. I'm also asking that funding of capital defense improvement grants go beyond training. In a state like Mississippi, that prior to 2000 provided no state funding for death penalty defense but now provides about $2,000,000 for trial and post-conviction cases, could be enticed to go further and meet its constitutional obligation if the investment were matched with federal funds.

Again I thank you for your time and interest in this important issue. I thank you for the support your past funding has provided the state of Mississippi, my fellow public defenders and our clients. And I encourage you to re-authorize the Innocence Protection Act.

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Senate Judiciary Committee
Hearing on "Strengthening Our Criminal Justice System: Extending the Innocence Protection Act"
Tuesday, November 10, 2009

Statement of U.S. Senator Russell D. Feingold

Mr. Chairman, thank you for holding this important hearing. It was thanks to your leadership that the Innocence Protection Act became law in 2004, and reauthorizing that important piece of legislation must be a priority. Each year, more and more prisoners are exonerated, often by post-conviction DNA testing. There can be no doubt that our criminal justice system continues to be flawed, and Congress needs to keep devoting resources to addressing these problems.

The Innocence Protection Act is a critical part of those efforts – to ensure that the right people are being held responsible for their crimes. From improving access to post-conviction DNA testing to increasing the maximum amount of compensation that the federal government must pay in cases of wrongful conviction, the IPA contains important reforms that passed with broad bipartisan support in 2004.

I want to note in particular the work of Professor Keith Findley, the co-founder of the Wisconsin Innocence Project and president of the Innocence Network. The Wisconsin Innocence Project was recently awarded a federal grant under the IPA's Kirk Bloodsworth program for its post-conviction DNA testing program. As this committee learned in a hearing last year, it has taken some time for the Bloodsworth grant program to get under way due to overly restrictive interpretation of the statutory requirements. I am very pleased that the program is now on track and that Wisconsin is benefiting from it.

The Wisconsin Innocent Project has worked for more than a decade to exonerate innocent people, and this grant will provide it with the additional capacity necessary to expand its efforts. As Professor Findley explains in his testimony, Wisconsin is taking a proactive approach to post-conviction DNA testing, conducting a systematic review to identify cases where such testing could be beneficial. This is no small task, but the results will not only help find innocent people in prison for crimes they didn't commit, they also could help explain systemic problems in the criminal justice system.

This is important because wrongful convictions can be caused by any number of flaws. Inadequate defense counsel, racial and geographic disparities, faulty forensics, police and prosecutorial misconduct, and wrongful convictions based solely on the testimony of a jailhouse informant or a single mistaken eyewitness identification all taint this country's criminal justice system. And all of these factors have led to the wrongful convictions of individuals later exonerated by DNA evidence.

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Mr. Chairman, I think everyone can agree that sending innocent people to prison is wrong and hurts our system of justice. I look forward to working with you to help address these problems.

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TESTIMONY OF KEITH A. FINDLEY, PRESIDENT OF THE INNOCENCE NETWORK; PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL ON BEHALF OF THE INNOCENCE NETWORK

BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

November 10, 2009

REGARDING THE IMPORTANCE OF THE BLOODSWORTH PROGRAM CONTAINED IN THE JUSTICE FOR ALL ACT OF 2004

Testimony of Keith A. Findley
On Behalf of the Innocence Network
Before the Senate Committee on the Judiciary
November 10, 2009

Chairman Leahy, Senator Specter, and other Members of the Committee, my name is Keith Findley and I am the President of The Innocence Network. I am here to testify with regard to the importance of the Kirk Bloodsworth Post-Conviction DNA Testing Assistance Program ("Bloodsworth Program"). Further, I will testify about the need for reauthorization and improvement of Sections 303, 305, 308 and 413 of the Innocence Protection Act (collectively, "DNA Initiatives") contained within the Justice For All Act of 2004 ("the JFAA"). Thank you for inviting me to testify before you today.

The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions. To date, 245 men and women have been exonerated by post-conviction DNA testing nationwide, and the 54 constituent organizations of the Innocence Network have either represented or assisted in the representation of each of these innocents.

My testimony today will provide:

I. A description of the significance of the Bloodsworth Program, including a brief overview of both the importance of post-conviction DNA testing and the Program;

II. Recommendations to enhance the value of the JFAA's DNA Initiatives as tools to preserve biological evidence, settle claims of innocence and solve crimes.

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I. The Significance of the Bloodsworth Program

A. The Importance of Post-Conviction DNA Testing

Forensic DNA technology, simply put, changed the fabric of the criminal justice system. Before DNA, there were few surefire ways to assess claims of actual innocence. Now, DNA testing of crime scene evidence can provide the criminal justice system with significant and enduring proof of innocence or guilt, from the initial stages of an investigation to years after a conviction. Indeed, in the early days of the FBI DNA Laboratory, some 25 per cent of the DNA tests excluded suspects who had been identified by other types of evidence.[1] Since 1989, at least 245 innocent people have been exonerated by post-conviction DNA testing after their wrongful convictions for serious crimes.

1. Post-Conviction DNA Testing Aids the Innocent.

While forensic DNA testing is itself only dispositive of guilt or innocence in a limited number of criminal cases, when it *is* dispositive, it can answer the question of innocence or guilt beyond dispute. And as the science progresses, the realm of cases in which DNA testing is dispositive is growing. A review of a list of items, produced by the National Institute of Justice ("NIJ"), where biological evidence can be found illustrates the variety of items that, today, can be successfully tested with improved technology: fingernail scrapings; skins cells in the hinge of eyeglasses; dandruff, saliva, hair, sweat and skin cells from hats, bandanas and masks; saliva cells on tape or ligatures; traces of blood on a bullet; traces of blood and/or hairs on, or in the crevices of, a variety of weapons used to inflict injury; or even blood and tissue cells swabbed from the bullet inside a gun, identifying the person who might have last loaded it.[2] Post-conviction DNA testing statutes have begun to contemplate these technological

[1] United States Department of Justice, Federal Bureau of Investigation, *Ensuring Public Safety and National Security Under the Rule of Law: A Report to the American People on the Work of the FBI 1993-1998* (1999).
[2] The National Institute of Justice, *Using DNA to Solve Cold Cases*, 21 (2002) *available at* http://www.ncjrs.gov/pdffiles1/nij/194197.pdf.

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advances and many now include provisions that permit additional testing in cases where previous testing using older testing methods could not produce conclusive results.

A Case Study in the Importance of Post-Conviction DNA Testing to the Innocent

Consider the following case of justice denied in the absence of a post-conviction DNA testing law. In March 1989, New Jerseyan Larry Peterson was convicted of sexual assault and murder. Although three men originally indicated to police that they were with Mr. Peterson at the time the murder took place, they later changed their accounts during interrogations and told law enforcement that Mr. Peterson confessed to them that he had indeed committed the crime. One forensic scientist testified at trial that her hair comparison analysis tied Mr. Peterson to the murder and another analyst with the New Jersey State Police testified that there was seminal fluid on the victim's jeans and sperm on her underwear. No seminal fluid or sperm was found in her rape kit. All tests on these items of evidence were inconclusive at the time of trial.

Mr. Peterson testified in his own defense at trial. Alibi witnesses supported his whereabouts during the time of the crime. Work records also showed that he did not work on the day that the victim was found - the day he supposedly confessed to the crime on his way to work. The jury convicted Mr. Peterson of felony murder and aggravated sexual assault in March 1989. He was sentenced to life plus twenty years in prison.

Although there was no post-conviction DNA testing law in New Jersey, Mr. Peterson first sought access to DNA testing in 1994 under the state's existing post-conviction review process. When the Court finally heard his motion in 1998, it denied his petition. In 2000, the Appellate Division affirmed the denial of his petition for post-conviction relief, ruling that there was overwhelming evidence of guilt in his case. In March of 2001, the state supreme court denied his Petition for Certification.

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Mr. Peterson was without hope until New Jersey passed a statute granting access to post-conviction DNA testing. The law became effective on July 7, 2002. On July 8, 2002, Larry Peterson became the first New Jerseyan to file a petition for post-conviction DNA testing under the new law and ultimately testing was granted, after the appeal of an initial denial.

In February 2005, the Serological Research Institute ("SERI") reported the results of testing: Mr. Peterson was excluded as a contributor of any and all of the biological evidence. Although the New Jersey State Police Laboratory had reported that there was no semen in the victim's rape kit, SERI identified sperm on her oral, vaginal, and anal swabs. Two different male profiles were found. One of the males was one of the victim's consensual partners, and his profile was also found on her underwear, jeans, and rape kit. The other unknown male was found on all of the swabs in her rape kit. Based on this evidence, Mr. Peterson's conviction was vacated in July 2005. On May 26, 2006, the prosecution decided to drop all charges against Mr. Peterson. Without the passage of New Jersey's post-conviction DNA testing law, Mr. Peterson would have spent the rest of his life in prison, but innocent.

2. Post-Conviction DNA Testing Reveals Systemic Potential for Error.

With the ability to transcend fallible human judgment, DNA testing - and particularly post-conviction DNA exonerations - have proven the potential for error that exists in our criminal justice system, that our appeals processes are not sufficient for identifying those errors, and perhaps most importantly, that there are consistent and widespread factors that mislead our criminal process that should be examined and remedied. In this regard, the importance of the DNA exonerations transcends the significant contributions that DNA makes to correcting injustices in individual cases. The DNA exonerations provide, for the first time in the history of the criminal justice system, a body of cases in which we know, with scientific certainty, that the criminal justice system erred. These exonerations therefore provide case studies in error that we can examine, to identify the features of our criminal

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justice system that lead to wrongful convictions, so that we can improve the system and effectuate reforms to prevent such errors in future cases, where there may not be DNA evidence to rely upon to catch the errors. In fact, DNA exonerations have identified seven common causes of wrongful convictions: eyewitness misidentification; unvalidated or improper forensic science; false confessions or admissions; government misconduct; informants or snitches; and bad defense lawyering. For instance, of the nation's first 225 DNA exonerations, 77 per cent were attributable to eyewitness misidentification, 52 per cent to unvalidated or improper forensic science, 23 per cent to false confessions or admissions and 16 per cent to informant or snitch testimony.[3, 4] Understanding these causes of wrongful convictions allows for the improvement of the criminal justice system through targeted reforms.

Throughout the country, policy makers, judges, prosecutors, police and defense attorneys are beginning to learn the lessons from these cases, and are implementing reforms that simultaneously help guard against wrongful convictions of the innocent, while more reliably identifying and convicting the guilty. In many states, for example, these cases have led to reforms in the procedures police use to obtain eyewitness identification evidence, reforms that social science research shows can reduce the rate of eyewitness error—and thereby simultaneously protect the innocent and help convict the truly guilty. In literally hundreds of jurisdictions across this country, police are beginning to electronically record their custodial interrogations, because DNA exonerations have shown that false confessions are a reality, and experience shows that electronic recording is one of the most effective methods of both guarding against coerced confessions and developing powerful evidence of guilt from valid confessions. Recently, especially in light of the new report issued this past February by the National Academy of Sciences that highlights extensive problems with forensic science evidence, and given the high rate at

[3] It should be noted that an exoneration may have more than one contributing cause; as such, the total percentage points reflected here properly equals more than 100.
[4] The Innocence Project – Understand the Causes, http://www.innocenceproject.org/understand/.

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which forensic science errors have contributed to wrongful convictions, reform efforts are under way to improve the reliability and validity of forensic sciences. These calls for reform run the gamut from increasing research in and funding for forensic sciences, to mandatory accreditation and certification of crime laboratories and analysts, to ensuring that crime laboratories are independent of both parties in the criminal justice system. Each of these reforms, and many others like them, promises to enhance the ability of the criminal justice system to more accurately sort the innocent from the guilty, and in this sense, to benefit both prosecution and defense. And continued post-conviction DNA testing serves an important role in providing the impetus for such reform efforts.

3. Post-Conviction DNA Testing Assists Law Enforcement in Apprehending the Real Perpetrator.

In this regard, as Chairman Leahy aptly put it: "Post-conviction DNA testing does not merely exonerate the innocent, it can also solve crimes and lead to the incarceration of very dangerous criminals. In case after case, DNA testing that exculpates a wrongfully convicted individual also inculpates the real criminal."[5] Put differently, innocence claims are simply another form of cold cases. In 105 of the nation's first 241 DNA exonerations, the process of settling these claims of innocence also resulted in the detection of the true perpetrator, in many cases through a "hit" to the CODIS database. After these 105 innocent men were wrongfully convicted, the true perpetrators, who were later discovered through DNA testing, went on to commit – and be convicted of – 19 murders, 56 rapes and 15 other violent crimes.[6]

B. The JFAA and Bloodsworth Program

In 2004, Congress recognized DNA's potential, and passed, with bi-partisan support, the Innocence Protection Act contained in the JFAA. The JFAA established, for the first time, a number of

[5] 150 Cong. Rec. S11609-01 (2004).
[6] Of particular note are the 12 murders, 26 rapes and 13 other crimes of violence committed in the Committee members' homes states by the real perpetrators as the wrongfully convicted languished in prison.

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federal statutory innocence protections and federal incentives to help states uncover wrongful convictions. Then-President George W. Bush noted in his 2005 State of the Union address: "In America we must make doubly sure no person is held to account for a crime he or she did not commit. So we are dramatically expanding the use of DNA evidence to prevent wrongful conviction."[7]

The JFAA was intended to serve as an incentive to states to enable proper post-conviction DNA testing by rewarding states, through four federal-to-state funding programs related to DNA outlined in Section 413 of the JFAA, with proper polices and practices for the preservation of biological evidence and post-conviction DNA testing. Section 413, in relevant part, states

> For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to eligible entities that...(1) meet the requirements under section 303, 305, 308, or 412, as appropriate; and (2) demonstrate that the State in which the eligible entity operates--(A) provides post-conviction DNA testing of specified evidence...(B) preserves biological evidence secured in relation to the investigation or prosecution of a State offense...[8]

The four JFAA DNA Initiatives covered by Section 413 are the following JFAA Sections:

- 303, DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;
- 305, DNA Research and Development;
- 308, DNA Identification of Missing Persons; and
- 412, Kirk Bloodsworth Postconviction DNA Testing Grant Program.

That is to say, a bi-partisan Congress, in passing the JFAA, and - presumably - then-President Bush, in signing the JFAA into law, intended for those monies for the above-listed programs to be tied to the preservation of biological evidence and post-conviction DNA testing access requirements per Section 413.

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[7] Text of President Bush's 2005 State of the Union Address, The Washington Post, *available at* http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_020205.html.
[8] Justice for All Act § 413.

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Yet, despite the overwhelming support for this invaluable legislation, the JFAA's innocence protection incentivizing grant programs have not been fully effective in encouraging states to adopt DNA preservation and testing statutes because they were supplanted by an alternate set of grant programs in "The President's DNA Initiative." This initiative provided similar DNA-related grant funding to states, but without the JFAA's requirements that recipient states properly preserve biological evidence and provide access to post-conviction DNA testing. As a result, Congress's intent in passing the innocence protection programs under the JFAA was thwarted, and the JFAA's requirements were rendered toothless. This executive maneuvering was devastating to wrongfully convicted individuals for whom DNA testing was the only path to proving innocence, many of whom were clients of Innocence Network projects. It was also devastating to those of us who had hoped that the JFAA would enhance state and local systems of justice by fostering appropriate post-conviction DNA testing and by enabling jurisdictions to recognize and learn from wrongful convictions proven by post-conviction DNA testing.

In addition, in the first few years of the JFAA, no grants were issued for post-conviction DNA testing under the Bloodsworth Program. The first grants under that program were awarded in FY 2008, and then only to five states.

But all is not lost. In early 2009, the National Institute of Justice convened a "Post-Conviction DNA Case Management Symposium" that assembled stakeholders from all perspectives in the criminal justice system from virtually every state to examine the issue. That symposium fostered cooperation among diverse actors in the criminal justice system on issues related to post-conviction DNA preservation and testing. Further, in particular and of special import to the Innocence Network, the spirit of the Bloodsworth Program—to provide funds to enable states to process post-conviction claims of innocence that could be proven by DNA testing—was ultimately respected under the Office of Justice Program's more recent grant funding. As noted, in FY 2008, five states applied for and received

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Bloodsworth Program funds. In FY 2009, another nine will receive funding. Many Innocence Network members are either direct recipients of or are partners with state agencies that have received Bloodsworth funding.

C. The Value of the Bloodsworth Program

The Bloodsworth Program will prove integral to the work of many Innocence Network member organizations. The funding will dramatically improve the ability of Innocence Network members to meet the tremendous need for post-conviction DNA testing. Many of the projects funded under the Bloodsworth Program will enable projects in various states to proactively search for and identify non-negligent homicide and rape cases in which DNA testing can prove guilt or innocence, but which are otherwise overlooked or hidden. Examples of the projects funded under the Bloodsworth Program include:

1. Arizona

With the $1,386,699.00 that Arizona was awarded for FY 2008, the Arizona Justice Project, in conjunction with the Arizona Attorney General's Office, began the Post-Conviction DNA Testing Project. Together, they have canvassed the Arizona inmate population, reviewed cases, worked to locate evidence and filed joint requests with the court to have evidence released for DNA testing.[9]

With this much-needed assistance, the offices working in tandem have sent evidence from three cases to the crime lab for testing. Of those samples, two are in queue for testing and one confirmed test results obtained prior to trial. According to the Post-Conviction DNA Testing Project Manager, Lindsay Herf,

> Although we have not yet uncovered DNA that proves a wrongful conviction, the project has already had **amazing results**. We have **cultivated an environment in our state in which law enforcement seeks justice hand-in-hand with the state's innocence project**. Our Attorney General, Director of the Criminal Justice Commission, President

[9] To date, the Arizona Post-Conviction DNA Testing Project, thanks to Bloodsworth funding, has presented to almost 2,500 inmates in six different Arizona prisons and received 179 applications for assistance.

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> of the Prosecuting Attorneys Association, and crime lab directors all strongly support this effort to uncover the truth in an efficient and cooperative manner. We are not tying up courts to argue about whether to test certain pieces of evidence in a case. We meet with DNA experts and come to an agreement as to the most beneficial method of DNA analysis. We have **alerted the state's law enforcement agencies to the need for better evidence retention practices**. We have been given access to a population that the grant was intended to benefit, the prisoners. **Each prisoner is personally invited to participate in the program if they have a claim of innocence**. Even the prisoners have been cooperative. We have received requests for assistance from only about 8% of those who attend our sessions. **We have not suffered from a flood of frivolous requests**.
>
> We believe our cooperative model is one worth replicating. In Arizona, law enforcement sees the value in DNA as a superior truth-telling device in criminal trials. Where biological evidence is left at the scene, DNA evidence more accurately identifies the source of the evidence than eye-witness identification, confessions, and other forensic sciences. We are grateful for the funding that has allowed us the means to one day be able to say that if there is another Kirk Bloodsworth in an Arizona prison, we found him, we tested the evidence, we released him, and we captured the true perpetrator.

2. California

California was awarded $2,500,000.00 for FY 2009. With these funds, according to Cookie Ridolfi, Director of the Northern California Innocence Project:

> The California DNA Testing Assistance Program (CADNAP) will **systematically identify and review** forcible rape, murder, and non-negligent manslaughter convictions in cases where DNA testing might raise a reasonable probability that an innocent person was convicted.
>
> By working in cooperation with the California Department of Correction (CDC), CADNAP will be **identifying those prisoners** who have been convicted of the relevant offenses and then **contacting them with information** about the program. The CDC will distribute information packets to the inmates, including a questionnaire and stamped, self-addressed envelope that an inmate can use to request consideration of a case. The project is receiving support and direction from the Northern California Innocence Project at Santa Clara University School of Law and the California Innocence Project at California Western School of Law.

3. Connecticut

Connecticut received $1,486,134.00 for FY 2009. The funding will be used in a collaborative effort by the Office of the State's Attorney and the State of Connecticut Forensic Science Laboratory to

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expedite the identification of relevant cases for testing and the exoneration of wrongfully convicted individuals. According to Karen A. Goodrow, Director of the Connecticut Innocence Project:

> The funding offered through the Bloodsworth Grant is **essential in order for states to obtain adequate resources** to insure that innocent inmates, serving lengthy sentences for crime which they did not commit, have an opportunity to demonstrate their innocence through post-conviction DNA testing. The Bloodsworth Grant funding is particularly **crucial to small projects** such as [the Connecticut Innocence Project], which operate on relatively modest budgets. States with small projects and limited resources rely heavily on the availability of Bloodsworth funding...Moreover, the use of the Bloodsworth Grant in a collaborative manner provides a **necessary tool for law enforcement** to insure that the true perpetrators of crime are brought to justice.

A 2006 applicant for Bloodsworth funding, the Connecticut Innocence Project could have more expeditiously processed the claims of two wrongfully convicted prisoners, had it received such funding when it first applied.[10]

4. Louisiana

Louisiana was awarded $1,376,206.00 under the Bloodsworth Program. The funds will be distributed to a number of Orleans Parish organizations including the Orleans Parish Clerk of Court, District Attorney's Office, New Orleans Police Department, Innocence Project New Orleans, and the New Orleans Police and Justice Foundation, each of which will have a role assisting in the project. The purpose of the project is to find every item of evidence relating to a homicide or rape case in the possession of the Orleans Parish Clerk of Court, determine the status of the case in which the evidence relates, screen the case documents and determine the likelihood of DNA testing being determinative of guilt or innocence. Finally, the project will perform evidence screening and testing in those cases where biological evidence exists, would be suitable for testing and would be determinative of the guilt or innocence of the person convicted.

According to Emily Maw, Director of the Innocence Project New Orleans,

[10] Miguel Roman was released from prison on December 19, 2008, after serving twenty and a half years in prison for crimes he did not commit. Kenneth Ireland was released from prison on August 5, 2009, after serving twenty one years in prison for crimes he did not commit.

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> Funding for this project is **so crucial** because there is **currently no complete inventory of the evidence** that is stored at the Orleans Parish Courthouse – the busiest criminal courthouse in the State of Louisiana. The storm exacerbated the previously chaotic practices and so in addition to there being no inventory of the evidence stored there (that in some cases dates back to the 1940's and 1950's), there is still not definitive answer as to what evidence was destroyed by the flooding from Hurricane Katrina and what survived. Additionally, much evidence that did survive is un-identifiable until someone opens the evidence. While the office has been trying to computerize its evidence inventory moving forward, none of the pre-2008 evidence stored at the courthouse will ever be identified and inventoried without the Bloodsworth grant coming to Louisiana. At the end of this project, there will be for the first time, a **complete, computerized inventory of the evidence** in the possession of the Orleans Parish Clerk of Court's office. Additionally, while there have been [eight] non-DNA exonerations in Orleans Parish since 1990, and while Orleans Parish has the most rape and homicide convictions in the state, there have been no DNA exonerations from the parish because, for the most part, the evidence in rape and homicide cases from even relatively recent cases in Orleans Parish can never be found. This grant will change that and **enable us to do an effective audit of New Orleans's criminal convictions for the first time in history**.

5. Maryland

Maryland received a grant of $284,871.00 for FY 2009. The funds will be disbursed by the Governor's Office of Crime Control and Prevention to the University of Baltimore. By way of background, the Maryland Office of the Public Defender created a small unit within that statewide system to handle cases of post-conviction claims of innocence in 2002. The unit was staffed by three attorneys and a paralegal until the spring of 2008 when budget cuts decimated the project, resulting in the elimination of all support staff and the transfer of two of the three attorneys. In the fall of this year, the Office of the Public Defender and the University of Baltimore Law School entered into a partnership in order to preserve the Maryland Innocence Project, which found itself with much work and little support.

Since its creation, the Maryland Project has won five new trials on the basis of post-conviction DNA testing, two of which resulted in exoneration. Further, two cases are currently pending before the Maryland Court of Appeals on the contention that the lower court erred in denying new trial based on the DNA testing results. The project has one case that is currently awaiting the court's decision on a

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motion for new trial. Two other cases are on remand from the Court of Appeals: one to enter an order for DNA testing and the other for reconsideration of the denial of the motion for DNA testing.

Essential to the very survival of the Maryland Project, the Bloodsworth funds will go to **pay for the retention of one staff attorney and a paralegal, along with the costs of testing, investigators and related office expenses**.

6. Minnesota

Through the Bloodsworth Program, the Minnesota Board of Public Defense, the Innocence Project of Minnesota, the Minnesota Bureau of Criminal Apprehension and the Hennepin County Attorney's Office were granted $859,527.00 for FY 2009. The monies will fund a joint task force of prosecutors, defense attorneys, investigators and staff from the Innocence Project of Minnesota to conduct a **review of more than 13,000 violent-crime convictions** to determine whether DNA testing is warranted. If it is, testing will be conducted. Where the testing indicates that a convicted person is innocent, the Innocence Project of Minnesota will commence the legal work to secure his or her release. If the testing determines that another person committed the crime, such information will be turned over to the appropriate law enforcement authorities.

"This partnership is the first statewide effort to perform systematic DNA testing," Ed Magarian, co-chair of the Innocence Project of Minnesota, and partner at Dorsey & Whitney noted.

> It represents an unprecedented level of collaboration between a non-profit organization, law enforcement, prosecutors, and defense attorneys. We are all vitally interested in exonerating the innocent, but also in drawing attention to the fact that **when someone is wrongfully convicted, the person guilty of the crime may remain on the street, free to reoffend**. This grant and this collaboration further our goals of securing justice, which we, as Minnesotans, all share.

"DNA evidence is a powerful tool in both securing convictions and in exonerating the innocent," said Pat Diamond, Deputy Hennepin County Attorney. "By systematically reviewing convictions that were obtained before DNA testing was widespread, the Partnership will **serve important interests in**

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promoting public confidence in the criminal justice system and seeing that justice is done. Nobody is served by a wrongful conviction. Even if an innocent person has served his sentenced, the guilty remain on the street and free to reoffend."

7. North Carolina

The North Carolina Innocence Inquiry Commission will receive $566,980.00 under Bloodsworth the Program. The Commission is partnering with the State Bureau of Investigation, LabCorp and the North Carolina Center on Actual Innocence. The funds will cover the **hiring of two attorneys to work on DNA cases, the costs of testing and other related office expenses**.

8. Wisconsin

Wisconsin's Office of Justice Assistance plans to use the $647,286.00 disbursed to it through the Bloodsworth Program to support state-mandated post-conviction DNA testing, which has already resulted in the exoneration of at least six people. The Wisconsin project will involve a partnership between the Wisconsin Innocence Project at the University of Wisconsin Law School, the Wisconsin Department of Justice, the Wisconsin Department of Corrections, the State Public Defender, and the Wisconsin Office of Justice Assistance, which will involve a **proactive and systematic search for every non-negligent homicide and forcible rape case that could benefit from post-conviction DNA testing**. The bulk of the work to search for and identify appropriate cases for post-conviction DNA testing will be undertaken by the Wisconsin Innocence Project, but with the cooperation of the other partner agencies. These funds will permit us, for the first time, to **actively identify appropriate cases**, which otherwise would be overlooked because the innocent prisoners involved lack the ability to advocate for themselves, or the savvy and knowledge to recognize the potential for DNA testing in their cases or to seek the help they need. In many cases, innocent defendants are not aware of the remarkable sensitivity of modern DNA testing, so they are unaware that DNA testing is possible in their cases. This

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project builds off of the experience of states like Virginia, where 31 rape cases were randomly selected for post-conviction DNA testing. The DNA tests of those randomly selected cases in 2005 proved that two of the 29 individuals who had been convicted in those cases were in fact innocent.[11]

The Wisconsin grant application also promises to use the post-conviction DNA testing in these cases to advance our understanding of the criminal justice system. The Wisconsin plan involves a commitment by the participating agencies to work together to draw lessons from the DNA exonerations and to use those lessons to improve the system's reliability and effectiveness.

II. Recommendations to Enhance the Value of the JFAA's DNA Initiatives

In order to assure that the innocence protections intended under the JFAA are achieved, all four incentive grant programs attached to Section 413 of the JFAA should be reauthorized and funded. As noted earlier in this testimony, the four grant programs governed by Section 413 of the JFAA are:

- Section 303, DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;
- Section 305, DNA Research and Development;
- Section 308, DNA Identification of Missing Persons; and
- Section 412, Kirk Bloodsworth Postconviction DNA Testing Grant Program.

Failure to re-authorize and fund these programs would render moot the incentives created under the JFAA. Although their influence was thwarted by executive maneuverings following the JFAA's original passage, and although some improvements in post-conviction DNA testing access and the preservation of biological evidence in the intervening years, many states still fail to provide the innocent with access to proving their innocence through post-conviction DNA testing.

Many laws fail to include adequate safeguards for the preservation of DNA evidence; indeed,

[11] Frank Green, *DNA tests clear 2 men of rape*, Richmond Times Dispatch, Dec. 15, 2005, *available at* http://truthinjustice.org/mjburton2.htm.

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more than half the states lack evidence preservation requirements that ensure preservation of biological evidence throughout an incarcerated person's sentence.[12] Without preservation, of course, there is no possibility to use DNA to exonerate wrongly convicted individuals. The experience of Innocence Network member organizations is that in at least 25% of the cases they investigate for purposes of finding evidence to prove innocence, the biological evidence that could potentially prove innocence has been lost or destroyed. Untold numbers of innocent people languish in prison because the evidence that could free them—and could in many cases identify the true perpetrators—has not been preserved.

Although 47 states have post-conviction DNA testing access statutes, many of these testing laws are limited in scope and substance and fall short of the JFAA's original intent. For example, nearly twenty states fail to provide counsel to indigent applicants seeking post-conviction DNA testing as recommended in the Innocence Protection Act.[13] The complexity of the petition process for DNA testing is quite cumbersome and difficult, even for experienced advocates. Without counsel, most indigent petitioners do not know the full extent of their rights for post-conviction DNA testing or the potential value or availability of DNA testing in their cases.

Twelve states still have a statute of limitation that precludes innocent people from access to post-conviction DNA testing. For example, South Carolina limits the time for seeking post-conviction DNA testing to "no later than seven years from the date of sentencing."

Some states preclude testing when it was previously available, but not conducted or accomplished. In some cases where post-conviction DNA testing could provide the answer about innocence or guilt, courts refuse to order testing because it hadn't been requested at trial. Such a law,

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[12] Arkansas, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming lack provisions that ensure the preservation of biological evidence throughout an incarcerated person's sentence.

[13] Virginia, Georgia, Idaho, Illinois, Louisiana, Maine, Michigan, Montana, Nevada, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah and Delaware have testing statutes that do not provide counsel to indigent applicants seeking testing.

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for instance, effectively bars testing for individuals who did not receive effective assistance of counsel at trial.

A handful of states still limit access to DNA testing to certain categories of offenses or capital cases, leaving the vast majority of innocent defendants, convicted of other types of crimes or non-capital offenses, with no opportunity to prove their innocence through DNA testing.[14] Several states do not allow individuals to appeal denied petitions for testing. Still others fail to require full, fair and prompt proceedings once a DNA testing petition has been filed, allowing the potentially innocent to languish interminably in prison. Further, some laws present insurmountable hurdles to the individual seeking access, putting the burden on the defense to effectively solve the crime and prove that the DNA evidence promises to implicate another individual. Despite the fact that 11 of the first 225 individuals proven innocent through DNA testing initially pled guilty, certain laws still do not permit access to DNA when the defendant originally pled guilty.

Finally, some laws fail to explicitly affirm judicial discretion to enter orders requiring pre- and post-conviction comparisons of profiles derived from crime scene evidence to be run in the Combined DNA Index System ("CODIS"), the nation's DNA database. Without such authority, the full potential for DNA to both exonerate the innocent and identify the true perpetrators of crimes is undermined.

Congress already created a valuable vehicle for motivating states to establish proper rules for access to post-conviction DNA testing and the preservation of biological evidence: Section 413 of the Justice for All Act of 2004. Re-authorization of that section and funding of those programs will provide the unrealized incentives Congress intended in 2004.

Recommendation #1

Provide Incentives to States to Implement Innocence Reforms Through Reauthorization and Funding

[14] Alabama and Kentucky limit access to post-conviction DNA testing to individuals under a sentence of death. Nevada only recently changed its law, expanding DNA testing access beyond capital cases. Georgia, Kansas, Indiana, Maryland and Oregon limit access to post-conviction DNA testing to certain crimes or classes of felonies.

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of All Four Section 413 Grant Programs

It is only through the incentives offered by the four grant programs in Section 413 of the JFAA that states will appreciate the value of implementing innocence reforms in the face of other competing needs.

The Innocence Network recommends Congressional reauthorization and funding of all four of the JFAA Section 413 grant programs for FY 2009 – FY 2014. The additional five years of funding will, in part, replace those years essentially lost due to the implementation challenges of Section 412, the Bloodsworth Program. However, it is worth stating that even if all of the funding connected to this grant program had been disbursed as early as FY 2005 as intended by Congress, the survival of this grant program would still be essential to meet the ongoing need to perform post-conviction case review and DNA testing.

Recommendation #2

Extend the Provisional Language Guiding the Kirk Bloodsworth DNA Testing Assistance Program (and other reauthorized Section 413 grant programs)

As a result of its stated difficulty in administering Bloodsworth Program in years past, the Department of Justice sought the following provisional language to loosen Section 413 grant requirements to assure the disbursal of unspent, unobligated funds, as well as those funds for the remaining fiscal years in the funding cycle:

> $5,000,000 shall be for the purposes described in the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program (Public Law 108-405, section 412): Provided, that unobligated funds appropriated in FY 2006 and FY 2007 for grants as authorized under sections 412 and 413 of the foregoing Public Law are hereby made available, instead, for the purposes herein before specified....

The Department of Justice represented that this provisional language freed it from the constraints of the Justice for All Act's authorizing language and ultimately allowed for the disbursal of funds associated with this grant program.

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As with last year's appropriation language, the Innocence Network recommends an extension of the use of this provisional language so that future grant applicants can meet Section 413 requirements and receive expeditious funding under the Bloodsworth Program. This provisional language should also apply to the other Section 413 grant programs that are reauthorized, so that larger pots of federal-to-state funding – and by extension greater incentives – are made available to states that take steps to ensure compliance with the innocence protections sought in the Justice for All Act.

Recommendation #3

Address the Insufficiency of State Level Evidence Retention Policies and Its Effect on the Disbursal of Section 413 Funds

Many states have not applied for Bloodsworth funding because their evidence retention policies fall short of even the relaxed requirements articulated in the two most recent solicitations. In order to honor the Congressional intent of providing immediate funding for post-conviction DNA testing to all states in need of financial support in this area, we propose a short-term (#3(a)) and long-term solution (#3(b)) to address the preservation of evidence requirement, which has been a proven barrier to the disbursement of funds.

Recommendation #3(a)

Short-term Stopgap Measure to Allow Post-Conviction DNA Testing Funds to Immediately Flow to All States in Need: Addressing Preservation of Biological Evidence on the State Level Through a One Time Waiver

Allow potential applicants who do not meet the evidence retention obligation, even given the relaxed requirements under the loosened appropriations language, to seek post-conviction DNA testing funding – and other federal-to-state grant funding subject to evidence retention requirements under Section 413 – if the following requirements are met:

- ✓ the applicant state has an adequate post-conviction DNA framework;
- ✓ the chief legal officer of the state issues an order enacting a moratorium on the destruction of

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biological evidence in all violent, felony crimes statewide pending a permanent statewide evidence retention policy; and

- ✓ the applicant state has taken steps – either through the executive or legislative branch – to establish a statewide working group to become compliant with Bloodsworth evidence retention requirements, with an established timeline and articulated process for the production of an updated statewide policy.

This stopgap measure shall only be applicable to an applicant state once; if efforts are not made to address evidence retention in earnest after grant awards are made, future applications should be not permitted.

Recommendation #3(b)

Long-term Solution to Address Evidence Retention: Establishment of a National Technical Work Group on the Proper Preservation of Biological Evidence

The creation of multiple state-level working groups to address biological evidence retention would be unnecessary if federal guidance was provided to the states on best practices in this area. The Innocence Project has already requested that the NIJ convene a national technical working group on the proper preservation of biological evidence and delivered a working document that describes a proposal for consideration.

- ✓ *The Innocence Network requests Congress to join the Innocence Project and the Innocence Network in calling on the NIJ to establish a National Technical Working Group on the Proper Preservation of Biological Evidence.*

- ✓ *Should a National Technical Working Group be established, potential grant applicants in future years could issue moratoria on evidence destruction pending the recommendations of the federal working group.*

- ✓ *A National Technical Working Group would not only provide the long-awaited and critically necessary technical support to states regarding best practices for the retention of biological evidence; it could also provide non-binding guidance to the Office of Justice Programs about how best to achieve the evidence retention goals articulated in Section 413 for those grant programs subject to those requirements.*

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We believe this longer-term solution is more efficient than the short-term solution offered above, as it would obviate the need for multiple state-level evidence preservation working groups and allow Section 413 monies to flow immediately so long as state-level moratoria on evidence destruction are issued. It is our hope that the establishment of a national technical working group will replace the need to implement the stopgap, or waiver, measure in future years.

Recommendation #4

Consider Modest Proposals to Realize More Fully the Potential of Section 411 of the Justice for All Act

Section 411 of the Justice for All Act established statutory access to post-conviction DNA testing for individuals convicted of federal crimes. Understandably, the creation of this alternate avenue to seek post-conviction relief had to be balanced with concerns about overwhelming the federal courts and flooding the criminal justice system with frivolous requests for post-conviction DNA testing. As has been our experience on the state level, however, those jurisdictions establishing statutory access to post-conviction DNA testing have not reported a flood of frivolous petitions.[15]

In light of this reality, and combined with Attorney General Holder's recent remarks that states would do well to follow the federal lead with respect to establishing state-level statutory access to post-conviction DNA testing, the Innocence Network believes that the federal statute should be broadened to assure that more categories of deserving candidates for testing have the opportunity to do so. This is of

[15] The Innocence Project queried the National Conference of State Legislatures, the U.S. Department of Justice Bureau of Justice Statistics, American Judges Association and the National Center for State Courts, among other entities, to determine the burden post-conviction DNA testing motions place on courts nationwide. Despite the many inquiries, it became clear that no one entity in the United States maintains a record of how many such petitions are filed across the country. The Innocence Network, based upon its deep and close involvement with the court proceedings in states in which post-conviction DNA petitions have been filed, represents that it knows of no state that claims "a flood of litigation" has resulted from enactment of a post-conviction DNA testing statute. In 2006, the Innocence Project also polled members of the Innocence Network to see if they could provide hard numbers on the petitions for post-conviction DNA testing filed in the various states. Of the many projects that responded, not one represented that its state suffered from a flood of litigation. California, for instance, has the nation's largest prison population. When its post-conviction DNA testing law was made effective in January of 2001, the California Office of the Attorney General estimated that requests peaked at 20 per month statewide. Today that number hovers, at most, around 1-2 requests monthly.

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significant importance given the fact that states will be looking to the federal government for guidance in this area as they establish testing laws for the first time or seek changes to their existing laws in the interests of justice. The following recommendations will also function in service of law enforcement efforts to identify the true perpetrators of crime by expanding access to previously barred individuals and maximizing use of CODIS, the national DNA database.

Therefore, the Innocence Network recommends consideration of the following proposals to clarify, and in some areas, enhance the federal post-conviction DNA testing law: [16]

1. Establish Judicial Authority to Order Comparisons of CODIS

Section 411 does not provide explicit judicial authority to order the comparison of profiles derived from crime scene evidence to the CODIS database; the discretion to do so currently lie solely in the hands of law enforcement. A right to compare crime scene evidence to the DNA database is of critical importance, however, because in many cases, excluding a defendant from the DNA profiles developed from crime scene evidence is alone not sufficient to establish that person's innocence. In those cases, matching the DNA to another offender, or to DNA from another crime that the defendant could not have committed, is needed to give the DNA from the case its full probative power. Moreover, as the nation's DNA exonerations have demonstrated, the ability to realize the full potential of the national DNA database will not only help to free the innocent; it will also supply the needed evidence to identify and prosecute the truly guilty.

A Case Study in the Need for Database Comparisons

The Jeffrey Deskovic case illustrates precisely why such database comparisons serve the interests of justice. When Mr. Deskovic first sought a comparison of the crime scene evidence in his case to the CODIS database – in the hopes of identifying the true perpetrator of the crime for which he was wrongfully convicted – a federal habeas court rejected the application as outside its authority to act

[16] These proposals have already been enacted in a number of states, and have proven quite workable in those jurisdictions.

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and appellate lawyers in the Westchester County District Attorney's office advised that New York's post-conviction DNA statute did not cover his request because he was not seeking *a new DNA testing technique* to demonstrate he was excluded from the semen found on vaginal swabs. (He had already been excluded by earlier DNA tests from these samples, but ultimately convicted regardless of that DNA exclusion, as the prosecution had argued at trial that the semen came from a prior consensual partner.) Notwithstanding that legal opinion, the newly elected District Attorney, Janet DiFiore, personally authorized new DNA tests so a DNA profile from the vaginal swab samples could be run through CODIS. Within two days there was a "hit" to Steven Cunningham, a convicted murderer who was in prison for strangling the sister of his live-in girlfriend, who immediately confessed. Mr. Deskovic, a teenager with no criminal record, served 16 years in prison for the rape and murder committed by Mr. Cunningham, a wrongful conviction that could have been exposed years earlier had the statutory fix proposed below been in place.

This case demonstrates that without express statutory authority for judges to order comparisons of crime scene evidence in CODIS upon request of an accused or convicted person, the innocent are forced to rely upon the good will and discretion of government actors. In the interests of consistent justice, federal law should explicitly permit a judge to grant a petitioner's motion for such evidence comparison whenever the judge deems that action to be in the interests of justice, be that during the course of an investigation or following a defendant's conviction.

We recommend that the federal post-conviction DNA testing law be amended to allow, upon court order, for a DNA profile derived from the crime scene evidence, to be compared to the CODIS database, either pre-trial or post-conviction. We propose the following model language to address this area in need of renovation:

For purposes of making an application pursuant to 18 U.S.C.A. § 3600, for purposes of making a credible application for executive clemency, or before trial, for purposes of obtaining exculpatory

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evidence, a court may order that a law enforcement entity that has access to the Combined DNA Index System submit the DNA profile obtained from probative biological material from crime scene evidence to determine whether it matches a profile of a known individual or a profile from an unsolved crime. The petitioner must show that the DNA profile derived from probative biological material from crime scene evidence complies with the Federal Bureau of Investigation's scientific requirements for the uploading of crime scene profiles to the National DNA Index System.

2. Adopt a Provision that Clarifies that Individuals Who Confessed to Crimes May Seek Post-Conviction DNA Testing Under the Federal Statute

A false confession, admission or dream statement was found to have contributed to nearly 25% of the wrongful convictions in America's 245 DNA exonerations. While for most it is virtually impossible to fathom why a person would wrongly confess to a crime he or she did not commit, researchers who study this phenomenon have determined that the following factors contribute to or cause false confessions:

- Real or perceived intimidation of the suspect by law enforcement
- Use of force by law enforcement during the interrogation, or perceived threat of force
- Compromised reasoning ability of the suspect, due to exhaustion, stress, hunger, substance use, and, in some cases, mental limitations, or limited education
- Devious interrogation techniques, such as untrue statements about the presence of incriminating evidence
- Fear, on the part of the suspect, that failure to confess will yield a harsher punishment

Unfortunately, despite the demonstrated prevalence of false confessions, a notable provision – which requires the petitioner to prove "identity was at issue" at trial – in some state laws have been interpreted by the courts to bar post-conviction DNA testing to those who confessed to the crime for which they were convicted. This significant provision is contained in the federal post-conviction access to DNA testing law and reads: "If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial."[17]

We recommend that this provision in the federal post-conviction DNA testing law be clarified to read:

[17] Justice for All Act § 411(a)(7).

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If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial. The fact that evidence of a confession by the applicant was introduced into evidence does not preclude an application for testing under this clause from being granted.

III. Conclusion

Some 75 DNA exonerations have been realized since the passage of the JFAA, even despite the failure of its federal-to-state grant programs. How many more wrongfully convicted would have been able to prove their innocence had these funds flown as Congress had originally intended?

Fortunately, with the recent funding of the Bloodsworth Program and the continued hard work of the many member projects of the Innocence Network, those wrongfully convicted can finally be vindicated. Moreover, reauthorization and re-appropriation of the JFAA DNA Initiatives will further aid in the discovery and prevention of wrongful convictions.

Thank you for the opportunity to present before you today. If the Committee has any questions about any of the testimony presented, it would be my pleasure to explore these matters further with you.

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Benjamin N. Cardozo School of Law, Yeshiva University

MEMORANDUM
On Flood of Litigation Concerns[1]

When post-conviction DNA statutes were first being considered by states, a major concern was that to allow prisoners such review would be to open floodgates of litigation. While forty-seven states have established post-conviction DNA testing laws, the "flood" concern has not materialized; in fact, no state has seriously claimed that post-conviction DNA testing requests have caused a significant problem in its court systems.

Indeed, with the screening, work and/or costs typically required to effectively file a claim that post-conviction DNA testing can prove innocence, the vast majority of the guilty are naturally screened out of the process. At the Innocence Project, for example, we carefully screen the cases that we are willing to consider; we have so many requests that we cannot waste resources on those cases where DNA testing will likely only prove guilt. What is more, we make it clear to those pressing for testing that if DNA testing proves their guilt, it will only hurt their chances at parole, or their other bases of appeal. A deterrent to those considering seeking testing not through such an organization, but instead through a private criminal defense lawyer, is the fact that the petitioner has to pay significant amounts to even seek such testing.

When a non-meritorious claim does slip through the cracks and guilt is confirmed despite a credible claim of innocence, such DNA proof of guilt only provides the finality that victims and the court system itself can truly appreciate. This was what happened in Virginia's 2006 review of DNA in the Roger Coleman case. DNA proved the guilt of Mr. Coleman, even though he claimed innocence to the very moment of his execution. Where DNA can provide an answer to those lingering questions, everyone deserves to know that answer.

In order to determine the burden such motions place on courts nationwide, the Innocence Project queried the National Conference of State Legislatures, the U.S. Department of Justice Bureau of Justice Statistics, American Judges Association, and the National Center for State Courts, among other entities. Through these inquiries, it became clear that no one entity in the United States maintains a record of how many such petitions are filed across the country.

Nevertheless, the Innocence Project has been deeply and closely involved with the court proceedings in states in which post-conviction DNA petitions have been filed and knows of no state that claims "a flood of litigation" has resulted from enactment of a post-conviction DNA testing statute.

In 2006, the Innocence Project also polled members of the Innocence Network (at the time, comprising more than 30 other like projects throughout the nation) in order to determine the number of petitions for post-conviction DNA testing filed in their states. What follows is a thorough report of what we learned in the few states that attempted to comment.

[1] Please note that much of the data in this memorandum are from research performed in 2006 and 2007. There has been no effort to update the information contained herein.

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Arizona
The founder of the Arizona Justice project reported that only a "small handful" of petitions had been filed in the years since Arizona's statute became law. He estimated the number, as of 2006, as less than 25.

California
California has the nation's largest prison population, with over 170,000 prisoners. Bureau of Justice Statistics, *Prisoners in 2005*, http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf. When its post-conviction DNA testing law was made effective in January 2001, the California Office of the Attorney General estimated that requests peaked at 20 per month statewide. Today, that number hovers, at most, around one to two requests monthly.

Georgia
Georgia's post-conviction DNA testing statute took effect in July 2003. In 2004, the Georgia Innocence Project took the step of sending personal letters to the approximately 1,400 persons imprisoned in Georgia in connection with rapes. Only about 10 percent of the recipients even responded. It is likely many survey recipients did not seek the project's help because they acknowledged their guilt and realized the pursuit of DNA testing would only be harmful to them. As such, even active efforts to encourage the statute's employment have yielded a minimal impact on Georgia's criminal justice system.

Illinois
Fewer than 12 requests for post-conviction DNA tests were filed in Cook County – the largest county in Illinois and the second largest in the nation - between the enactment of the state's post-conviction DNA testing law on January 1, 1998 and late March 2002. Of those tests, seven led to the exoneration of the defendant.

Maine
According to documents the Innocence Project obtained late last year from the Maine Department of Public Safety, the state has conducted post-conviction DNA testing in only three cases as a result of requests for testing made under its statute. That statute became law in 2001.

Minnesota
The Innocence Project of Minnesota reported to the Innocence Project that a mere five of its cases have involved DNA testing since the state's 2005 passage of a DNA testing statute.

Ohio
The Ohio Innocence Project ("OIP") reported that: "We have the stats showing that less than 300 inmates filed for testing under Ohio's bill. This was with a one-year deadline, and less than 300 filed." OIP went on to explain that if there was not a one year deadline (before the bill sunset) far fewer would have applied, as applicants would have had the time to consider the legal requirements without the pressure to file immediately or lose all opportunity to do so. Thus, without the "sunset" provision, OIP was confident that the number would have been far lower.

Utah
Only seven petitions have been filed in the state since the state's 2002 passage of a post-conviction DNA testing statute.

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Wyoming
No petitions have been filed under Wyoming's statute since the state passed its own DNA testing law last year.

These were all of the informative responses that we received. No one responded to indicate anything suggesting a flood of litigation had occurred in their states.

Other Considerations
Petitions for post-conviction DNA testing typically reach courts only after undergoing a long vetting process by members of the Innocence Network or by other lawyers.

Representatives of a petitioner will not waste their time if a claim clearly lacks merit, and such gate-keeping spares courts. *Pro se* filings do arise occasionally, but the IP has found that most potential petitioners actively seek legal assistance if they possess legitimate legal claims.

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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
"Strengthening Our Criminal Justice System: Extending The Innocence Protection Act"
November 10, 2009

Today, the Judiciary Committee focuses on a vital component of our jurisdiction: ensuring that our criminal justice system works fairly and effectively to advance justice. Five years ago, Congress made great strides toward that goal by passing the Justice For All Act, which included the Innocence Protection Act. Today, we begin to build on that important step.

I introduced the Innocence Protection Act in 2000 with the primary goal of making sure that death penalty cases are conducted fairly. Its passage in 2004 was a groundbreaking moment. Unfortunately, recent headlines make clear that our work in this area is far from done. *The New Yorker* reported this fall that in 2004, the unthinkable may have happened: the state of Texas may have executed an innocent man. While we may never know for sure the truth in that case, it is abundantly clear that our criminal justice system did not work as it must to fully test the strength and validity of the evidence. In that case, forensic evidence which may not have had any scientific basis went largely unquestioned.

In Duchess County, New York, last month, a judge released Dewey Bozella after finding that evidence concealed for more than 30 years showed he was not guilty of the murder for which he spent 26 years in prison. Key evidence, including DNA evidence, that could long ago have conclusively exonerated Mr. Bozella, was not preserved. Equally troubling, the destruction of that evidence has made it impossible to convict the likely perpetrator, a man who went on to commit another heinous murder. Mr. Bozella is here today with his wife and with the team of lawyers who prevailed after so many years in getting his case reexamined.

As a former prosecutor, I have great faith in the men and women of law enforcement, and I know that the vast majority of the time our criminal justice system does work fairly and effectively. I also know though that the system only works as it should when each side is well represented by competent and well-trained counsel, and when all relevant evidence is retained and tested. Mr. Bozella's case is not unique; we learn regularly of defendants released after new evidence exonerates them. We must do better. It is an outrage when an innocent person is punished. The guilty person is still on the streets, able to commit more crimes, which makes all of us less safe.

One of the key programs created in the Innocence Protection Act was the Kirk Bloodsworth Post Conviction DNA Testing Grant Program. Kirk Bloodsworth was a young man just out of the Marines when he was arrested, convicted, and sentenced to death for a heinous crime that he did not commit. He was the first person in the United States to be exonerated from a death row crime through the use of DNA evidence.

This program provides grants to states for testing in cases like Kirk's where someone has been convicted, but where significant DNA evidence was not tested. The last administration resisted implementing the program for several years, but we worked hard to see the program put into place. Today, we will be hearing from Keith Findley of the Innocence Network, who will talk

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about the good that is coming from Bloodsworth grants in his state of Wisconsin and throughout the country.
Unfortunately, the vast majority of capital cases and other serious felony cases do not include DNA evidence that can determine innocence or guilt. For those cases to be fairly considered, each side must have adequate, competent, well-trained counsels. To that end, the Innocence Protection Act included the Capital Representation and Prosecution Improvement Grants. I look forward to hearing today from Andre de Gruy, Director of Mississippi's Office of Capital Defense Counsel, whose office received funds to train counsel in capital cases where there otherwise would not have been any resources for training.

Houston District Attorney Patricia Lykos has been a leader in encouraging post-conviction DNA and other forensic testing, and in advocating for effective defense counsel. I believe that the system works better for all involved when each side is represented well and all evidence is considered. Ms. Lykos agrees. I also look forward to hearing from Barry Matson, a prosecutor who has also recognized the need to seek the truth and who has been helpful in our efforts to reform our forensic system.

The Justice For All Act included several other very important programs, including new protections for victims of crime, funding for state and local governments for DNA testing and other forensic disciplines, and the Debbie Smith Rape Kit Backlog Reduction Act. The Debbie Smith Act authorized significant funding to reduce the backlog of untested rape kits, so that victims need not live in fear while kits languish in storage. I have worked hard to ensure that the Debbie Smith Act is fully funded, and I have been working hard to get to the bottom of disturbing findings that substantial backlogs continue. Debbie Smith and her husband Rob are here today. I welcome them back to the Committee.

Today, we will rededicate ourselves to doing what we must to ensure that we have a criminal justice system where the innocent remain free, the guilty parties are punished, and all sides have the tools, resources, and knowledge they need to advance the cause of justice.

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Testimony of Patricia R. Lykos

Before the Senate Committee on the Judiciary

November 10, 2009

Chairman Leahy, Senator Sessions and Members of the Committee

My name is Pat Lykos, I am the elected District Attorney of Harris County, Texas—the third most populous county in the United States, encompassing 1800 square miles.

Thank you for the opportunity to testify in support of the reauthorization of the Innocence Protection Act.

Wrongful convictions are abhorrent to Americans and such miscarriages of justice erode the Rule of Law, the foundation of our Republic.

Equally shocking to the conscience, is the fact that the availability of biological testing is quite limited.

Please permit me to provide the perspective of one who has labored long in the criminal justice system and who has the responsibility of being the top law enforcement officer in my county.

I worked my way through undergraduate and law school as a Houston Police Officer and then practiced law, primarily as a litigator, which included criminal defense. Subsequently, I was elected to the bench and served as an active and assignment criminal court judge for more than 20 years, including presiding over capital cases.

When I took office as District Attorney, one of my first initiatives was to create a post-conviction review section that was separate and apart from our excellent appellate division. This independence emphasized the objectivity necessary to critically and timely examine cases (and to request scientific testing) where evidence suggests that the defendant may be innocent. Concurrently, a new policy was implemented to the effect that when biological evidence exists that bears upon the guilt or innocence of the defendant it will be tested prior to trial.

In Texas, district attorneys represent the state in all criminal matters and are statutorily and morally charged with the solemn duty to see that justice is done.

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This mandates a complex multiplicity of imperatives:

> The district attorney is responsible to ensure that the rights of defendants are protected and to see that investigating agencies are observant of these rights. Protection of victims and their rights are a vital consideration.
>
> Prosecutors must evaluate cases and determine whether to accept charges; often they have to further investigate. Investigations are also originated by the office. When charges are filed, the lawyers then prepare and vigorously prosecute. Responsibility continues with appeals and post-conviction review. The obligation to disclose exculpatory evidence continues throughout.
>
> To serve and protect the citizenry, the office must prevent, suppress and reduce crime. This involves collaborative efforts with federal, state and local agencies and with the private sector. Initiatives range from disrupting, arresting and prosecuting organized criminal activity--to creating innovative rehabilitative programs, diverting non-violent juveniles, first-offenders and the mentally disabled from detention.
>
> Fundamental principles of law do not change, but systems must, if we are to effectively safeguard our communities. District attorneys have the obligation to improve processes, consistent with due process.

When innocent people are convicted, it is a triple tragedy: injustice for those individuals; denial of justice for the victims; and the lack of justice for society, as the actual criminals are free to continue their depredations.

Equally repugnant, is the fact that technological and scientific tools exist that can prevent many wrongful convictions and just as importantly, lead to the identification, apprehension and successful prosecution of dangerous criminals, but local authorities lack the expertise and laboratories. Felons go undetected and undeterred because reliable forensic capabilities are either scarce or unavailable to the criminal justice system. Focus on post-conviction situations should not obscure the greatest need which is timely and accurate gathering of relevant evidence and DNA testing at the inception of investigations

The travails, some years ago, of the Houston Police Department Crime Laboratory are well publicized. Police Chief Harold Hurtt has done a magnificent job of reconstituting the lab. The fact remains that the HPD crime lab cannot handle the magnitude of serology and DNA testing demands of the fourth largest city in America; there are almost 4,000 rape kits sitting, untested, in the department's property room and another 1,000 in the lab. The department does not collect epithelia in property crimes because it does not have the capacity to test.

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The unincorporated area of Harris County, if it were a municipality would be the 5th largest city in the United States. The Harris County Medical Examiner's Officer (MEO), which is located in the Texas Medical Center, provides forensic services to this area, independent of any law enforcement agency. Its Forensic Biology Section is staffed by scientists using the most advanced technology to perform serology and DNA testing. The MEO holds five accreditations, including three specific to the crime laboratory.

The elected officials of Harris County and the City of Houston, Republicans and Democrats, (please see attachment one), are working together to develop a regional, independent crime lab. They recognize that neither the police department nor sheriff's office has the finances, or the expertise to operate a sophisticated laboratory capable of handling the volume of the metropolitan region. The mission of police agencies is to maintain law and order and that requires the presence of officers and deputies to prevent and solve crime. In the best of times it is a strain to provide adequate personnel. Crime labs should not have to compete with law enforcement for the same dollars. An independent lab eliminates any inference of bias.

Harris County has the will, the plan, and the support of the medical/scientific community, (please see attachment two), to create a new paradigm for a 21st Century; a state-of-the-art crime laboratory. What it lacks is money to hire the additional scientists and acquire the necessary technology.

I respectfully suggest to the honorable members of this committee that they consider including the following provisions in the Act; to perhaps create a COPS[1]-like program to address the issues.

I. Fund pilot projects that would be models for the nation in the development and maintenance of forensic science laboratories worthy of this great nation. This will protect the innocent and will reduce crime. Harris County, Texas volunteers to be the first project.

When scientific evidence is introduced in our courts, it is sponsored in the name of the district attorney. Each district attorney is vouching for the integrity of the science, the practitioners and witnesses. Justice and our honor are at stake.

Civil order requires that the public have trust and confidence in the system.

II. Fund the National District Attorneys Association to train prosecutors to understand, evaluate and present scientific evidence. Prosecutors can then train law enforcement officers in proper evidence collection and scene preservation. It is imperative that inculpatory and exculpatory evidence be gathered. DNA is an immense crime-fighting tool and properly

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gathered and analyzed will not only prevent wrongful convictions, it will greatly reduce violent and property crime and the number of unsolved crimes.

Prosecutors have a myriad of responsibilities; the most important is the duty to ensure justice which in itself involves numerous and diverse obligations and tasks. Also, there is the job of combating crime; science and technology are vital to getting the job done.

III. Provide training to criminal defense attorneys in scientific evidence so they may effectively represent their clients. I want defendants to have competent lawyers at all levels of criminal proceedings; it helps me discharge my duty.

Honor and dealing justly with all, is everything. Leaders see the right thing to do and do it.

I cannot laud this Committee enough for your interest and commitment to the Rule of Law.

[1]Community Oriented Policing Services

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MATSON TESTIMONY

Tracy and Loretta Phillips lived, worked and raised a family. Their life was not unlike many in America. Tracy, a husband and father, had a small business and Loretta stayed home and raised children. They had purchased an older home and were in the midst of a 'do-it-yourself' renovation, when they planned to have a yard sale on Saturday May 9, 1998. On the Friday before, Loretta and her daughter were out hanging 'yard sale' signs when they encountered John Russell "Cody" Calhoun. Calhoun approached Loretta and asked where the yard sale was to be held. The signs gave the address of the Phillips home on Coffee Street. Calhoun inquired about the items they might be selling in the yard sale and actually rode to the Phillips home and spoke with Tracy about purchasing a television. Later that night Tracy and Loretta had popped popcorn and were sitting down to enjoy a rented movie. The house was cluttered with yard sale items to be displayed the following day. The children, along with sleep over company were upstairs in the couple's bedroom watching television. Around 10:30pm, a young girl in a house behind the Phillips's home called Loretta to report a man in their back yard looking into the house. Tracy investigated, but saw no one. Suddenly, John Russell Calhoun burst into the back door holding a pistol. Tracy fought Calhoun as Loretta ran upstairs to protect the children. Loretta hid the children on a second floor balcony and waited. The noise down stairs subsided. She heard foot steps coming gradually up the hardwood stairs. A knock on her bedroom door was followed by Tracy saying, "Loretta, open the door, he has a gun to my head". Crying, Loretta slowly opened the door to see a beaten and distraught Tracy. Standing behind Tracy was the man she had seen earlier that day. He had a pistol pressed to Tracy's head. Loretta, shaking and sobbing listened as Tracy pleaded for the family's life and said that they had children in the house. Tracy offered money and property in an effort to have Calhoun spare the lives of the family. Calhoun made it clear that he didn't come for property as he announced that he wanted Loretta. Loretta was a beautiful woman who had recently recovered from ovarian cancer and was finally in good health. She begged Calhoun to leave them in peace, but he refused. With the life of her family in the balance, Loretta removed her clothing and lay back on the bed. The children remained motionless on then balcony. As Loretta lay back onto the bed, Calhoun forced Tracy's face between Loretta's legs. As Calhoun exclaimed, "kiss it goodbye", he fired single gunshot into the back of Tracy's head. The blast exploded onto

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Loretta's body. The couple's 12 year old daughter ran into the bedroom calling out, "Daddy Daddy Daddy!" Calhoun then threatened to kill the children as Loretta begged for their lives. Leaving Tracy's lifeless body in a pool of blood Calhoun locked the children in an upstairs bedroom with no telephone. Calhoun drug Loretta down stairs where she was repeatedly raped and sodomized. During the horrific sexual assault, Calhoun bit Loretta, leaving distinctive bite impressions on her back. While pistol whipping Loretta during the attack, the cylinder on the revolver opened and the remaining bullets fell from the gun. Loretta repeatedly offered Calhoun jewelry if he would just leave the rest of her family alive. Suddenly, he grabbed a handful of her jewelry, threw some to the ground and fled the home. Loretta ran to her children and made a desperate call to the police.

While Loretta was being assaulted, a patrol officer who was investigating a report of a gun shot in the neighborhood located Calhoun' red sports car on the street near the home. Calhoun's drivers' license was inside the vehicle. As the officer moved down the street, Calhoun made his way to his car and escaped. He was apprehended several days later hiding from the police.

Law enforcement responded to Loretta's call to find a home and family destroyed. Trained officers recovered Calhoun's DNA through semen from the scene and from Loretta's person. Bite mark and ballistics evidence was collected pointing to Calhoun. The physical evidence and the eyewitness testimony of the victims built a rock solid case that I prosecuted. He had two experienced and very capable appointed attorneys who defended him vigorously. Their fee in that one case was more than most prosecutors make in a year. Calhoun had retained expert testimony and consulted with many other experts in preparation of their defense. After a lengthy pre-trial period, the case was set for trial. After many days of testimony and argument, Calhoun was convicted and a jury of his peers recommended death. As Loretta testified about that night, Calhoun sat across the courtroom and smiled. At a full sentencing hearing (and after being afforded every right under our constitution), he was sentenced to death - the same sentence he gave Tracy Phillips.

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MATSON TESTIMONY

I am a career prosecutor. My name is **Barry Matson**. I am the Deputy Director of the **Alabama District Attorneys Association** and the Chief Prosecutor for the Alabama Computer Forensic Laboratories. I want to thank this committee for the honor and privilege of appearing before you on such a vital issue facing the American System of Justice.

Prior to my current position, I was the Chief Deputy District Attorney in Talladega County, Alabama for over 16 years. One of my duties since taking my current position is to travel the state of Alabama and prosecute recusal cases in our 42 separate judicial circuits. In my career, have personally prosecuted every manner of criminal offense, from violent sexual assaults, narcotic trafficking, white collar and public corruption cases as well as many capital and non-capital murder cases. I have found that many people say they have an opinion on crime and punishment in America. It is easy to pontificate theories and ideals over a coffee cup in a diner or from a podium in some marbled column law school, but until you have seen the murdered bodies of an innocent family, held the hand of a grieving mother, felt the heartbreak of a community as it unravels under the weight of murder after murder, you really don't know. Until you have stood in the well of the court room and subjected yourself to the sting of criticism and felt the weight of the prosecutor's burden of proof, you really don't know.

I tell the story of Tracy, Loretta and their family, not just because it needs to be told, I tell it because I know the adulteration of the truth that will unquestionably arise in the post conviction process. The average death row tenure in Alabama is nearly 20 years or more. In these twenty years, most of the witnesses, attorneys and court officials will be retired, dead or dying. I know that some academician or some criminal defense lobbyist will select James Russell "Cody" Calhoun as their next project. They will claim he is 'innocent' and needs to be set free. I hope he is never freed. He may actually see true justice one day. But in the course of the coming appeals to both the criminal courts and the court of public opinion, the truth will be distorted, ravaged, and intentionally misrepresented in a effort to feed the agenda driven anti-accountability anti-death penalty defense bar and lobbyist.

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MATSON TESTIMONY

Truth and Justice

I am not sure when it happened. But somewhere along the way, a fundamental wrong occurred. A misconception brewed into a consciousness. A myth that is perpetuated by academics, talking heads and Hollywood do-gooders, that the criminal bar and their lobbyists are seekers of truth. This myth could not be farther from the real truth. As a prosecutor, **my** oath is to seek justice. The defense has no such burden. Please understand, I am not assaulting the American defense bar. I believe in a strong, well funded criminal defense bar and believe that competent defense attorneys make me a better and more effective prosecutor. A strong criminal defense bar is vital to the integrity of our criminal justice system. But I also know that the toughest criminal defense lawyer I ever knew once told me with a smile, *"the last thing I want to find is the truth; I only want to get my client off"*.

In my testimony today I will endeavor to speak for the 'every day' prosecutor struggling for real truth in the courtrooms of this great country. I will attempt to bring light into the dark places of our adversarial system and call it like I see it. I speak of it, because I know. I have stood in that well and felt the sting of criticism and carried the heavy weight of the burden of truth. I know prosecutors everywhere continually face these challenges with integrity, a strong work ethic, and a deep seeded passion to protect the public and to do justice. Mr. Chairman and members of this committee, we, and no one else, are the only people in the criminal justice system charged with the responsibility of seeking justice. We know, "*A prosecutor is held to a higher standard than that imposed on other attorneys because of the unique function [we] perform in representing the interest, and exercising the sovereign power, of the state* . . ."People v. Hill, 17 Cal 4th 800 (1988).

We applaud Congress for its hard work and deep concerns that led to the bipartisan passage of the **Innocence Protection Act of 2004.** We have benefited from much of the funding for training and I know that victims of crime have felt the embrace of its measures to insure that they are recognized and represented in the criminal justice

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process. We are grateful for the Initiatives that arose from this act, such as partnerships to create specialized trainings for trial judges, state and local defense counsel and prosecutors who litigate death penalty cases. These programs have sought to improve the reliability of jury verdicts in death penalty cases and ensure quality representation for the accused. The Department of Justice partnered with three lead agencies, the National District Attorneys Association (NDAA), the National Legal Aid & Defenders Association (NLADA) and the National Judicial College (NJC), to develop a training specific to each discipline. Training sessions were delivered at the state and local levels. These trainings focus on investigation techniques; pretrial and trial procedures, including the use of expert testimony and forensic science evidence; advocacy in capital cases; and capital case sentencing-phase procedures. We support all attempts to strengthen the integrity of our justice system and efforts to assure that no person is ever wrongfully convicted.

As for the use of DNA in criminal jurisprudence, let there be no mistake. It was the prosecutors and dedicated forensic scientists in this country who fought to see that the science of DNA was accepted in all the courts of our nation. As late as 1990 the National Academy of Sciences and many others now associated with the Innocence Project fought against the admissibility of DNA evidence.

We know that the stories of those individuals freed by DNA science are powerful and we take pride that it was the American prosecutor who fought in court and supported statutes that made forensic DNA possible. We also know that a crucial part of the DNA story is yet to be adequately told. The tragic cases where DNA has served to exonerate are now over 20 to 25 years old. They were cases from the days of serology and blood typing only. *Today we test all relevant and probative evidence and submit them for DNA testing.* We look for the presence of DNA on all types of physical evidence. We know that the simple fact is that presence is more probative than absence. It tells us a lot more about a case when we find the presence of someone's DNA than when we find the absence of someone's DNA. And that's why DNA has proven so much more powerful in proving guilt than in proving innocence, and why we talk about a couple of hundred cases

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of DNA exonerations — but there are hundreds of thousands of cases of DNA inculpation.

The Myth of Atticus versus Goliath.

On September 22, 2009 the House Subcommittee on Terrorism, Crime and Homeland Security of the Judiciary Committee held hearings on the re-authorization of the Innocence Protection Act. Among those making presentations were criminal defense lobbyist Stephen Bright, President of the Southern Center for Human Rights in Atlanta, and Barry Scheck, Co-Director of the Innocence Project in New York. In his testimony, Mr. Bright said:

> *"The best protection against conviction of the innocent is competent representation for those accused of crimes and a properly working adversary system. Unfortunately, a very substantial number of jurisdictions throughout the country do not have either one . . . we* ***must*** *rely on a properly working adversary system to bring out all the facts and help the courts find the truth."*

He also cited the disparities between resources available to the prosecution and that available to the defense:

> *"There is no working adversary system in much of this country, particularly in the jurisdictions that condemn the most people to death. The disparities between the prosecution and the defense are so immense in some places that the prosecution's case is not subject to adversarial testing. . . . This significantly increases the risk of wrongful convictions."*

Bright went on to say that, *Alabama, which has the largest number of people on death row per capita in the United States, and pays lawyers only $2000 per case for handling an appeal in a death penalty case.* He further adds, *the Alabama courts have held there is no right to counsel for this critical stage of the process.* I site this rhetoric only to point out the inaccuracies and to set the record straight.

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MATSON TESTIMONY

Facts

Alabama has 67 counties and 42 elected District Attorneys. The great state of Alabama has approximately 12,000 practicing lawyers and only a little over 300 part time and full time prosecutors. In 2008 there were 201,880 crimes reported in Alabama. Of that number 20,446 were violent Crimes. In that same year there was a 13 % increase in homicides from 2007 totaling 342. The state reported 358 suicides. The total property value stolen in 2008 was over 250 million dollars. And 265 law enforcement officers were assaulted in the line of duty. (Source: The Alabama Criminal Justice Information System, ACJIS).

Funding

In 1997, indigent criminal defense appropriations in Alabama were approximately 14 million dollars, while District Attorney's offices received about 17 million dollars. In 2007 the amount paid for indigent defense reached nearly 70 million dollars, while the District Attorney's offices received a little more than 44 million dollars from the state general fund. Any additional funds for the Prosecution must be made up through grants or collections. The funding by the State of Alabama for District Attorney's offices is a finite sum, but the funding for criminal indigent defense is open ended and growing at a rate of over 10% per year with absolutely no limitations on its maximum payout. This means any additional funding needed for indigent defense *must* be paid and *any* shortfall *shall* be made up by the state general fund budget.

In Alabama the average yearly salary of a full time prosecutor is approximately 40,000 dollars. It is not uncommon for an appointed criminal defense attorney to make in excess of 100,000 dollars in a single capital defense case.

Many small jurisdictions across this land are very similar to the small jurisdictions of Alabama. In one of our rural counties a lone prosecutor stands in the gap. He serves in a county with a large and active defense bar. He prosecutes District Court misdemeanors, violations, juvenile court, as well as child support and worthless checks. He also maintains a large Circuit Court criminal docket with every type of violent and non-violent criminal offense. He handles capital and non-capital murders as well. His office

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space and funding are wholly inadequate. Yet he diligently seeks the truth everyday in every case to the best of his ability. He has local and out-of-county defense attorneys that are often retained but many times are appointed by the court. Daily he prosecutes in every court in his jurisdiction. He is to the court system what a trauma doctor is to an emergency room. If it comes in the door, he deals with it in a professional and effective manner with the tools and skills he has available.

This local rural prosecutor also knows that an appointed attorney, through the payment of indigent representation fees can make three times a prosecutors salary by only accepting only appointed cases. They are able to recoup overhead expenses through the same indigent payment system.

Like many states, Alabama has a world class independent forensic sciences agency that will do any forensic analysis requested by the state OR defense at no cost to the defense. The court system in Alabama regularly approves the outside expert witness for all types of defense needs in both capital and non capital cases. The defense simply makes a motion for extraordinary expenses and the trial court can order the State to pay the expense directly to the expert.

Our Administrative Office of Courts, (AOC) recently conducted a training and recruitment of the top litigators in our state to begin the representation of capital litigants in post conviction proceedings. For years many high priced out of state civil firms have come into our state and many others to doggedly represent capital appellants. These civil law firms are able to write off hundreds of thousands of dollars in the representation of these defendants. *It is simply not true that capital litigants in Alabama are not represented by counsel in the appeals process.*

I also have difficulty following the logic that the way to free more innocent people is to pay lawyers more money to fight in court after someone has already been convicted. As Mr. Bright has said, we must strengthen our adversarial system. Some how the defense 'projects' think the defendant and not the victim and community are the only ones who

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deserve a fair and vigorous litigation of the facts. By fully funding prosecutors' offices and supporting specialized training, you will ensure that prosecutorial charging decisions as well as litigation will be handled in manner consistent with professionalism and fairness

In Conclusion

Mr. Chairman, one thing that has been grossly overlooked in all of this process is the fact that prosecutors and forensic science professionals do more to free the innocent and safeguard the liberties of our citizens than any defense project or academician will accomplish in a career. Those entities have no burden or have taken no oath to seek the truth. Conversely, they are required to suppress the truth when it serves the best interest and needs of their client. **We abhor injustice whether it comes in the form of a wrongful conviction or a wrongful acquittal.**

In the story, *To Kill a Mockingbird*, Atticus Finch tells Scout that you never really know somebody until you crawl up in their skin and walk around for a while. Perhaps only another prosecutor can truly understand the burden that we carry. Likewise, only another prosecutor can understand the satisfaction we gain from our profession. We must as professional prosecutors remember our fundamental obligation to ourselves, our victims, and the public we represent. We are to be firm and uncompromising in our principles, with fairness and honesty as our standard.

With every good wish, I sincerely express my gratitude to this Committee for its passion and deep commitment to see that true justice is available for all the citizens of our great nation.

Barry D. Matson
Deputy Director of the Alabama District Attorneys Association
Chief Prosecutor for the Alabama Computer Forensic Laboratories

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Luis A. Sanchez, M.D.
Chief Medical Examiner

(713) 796-9292
FAX : (713) 796-6844

JOSEPH A. JACHIMCZYK FORENSIC CENTER

October 14, 2009

The Honorable Bill White
Mayor of the City of Houston
901 Bagby, 3rd Floor
Houston, TX 77002

Chief of Police Harold L. Hurtt
Houston Police Department
1200 Travis, 16th Floor
Houston, TX 77002

Dear Mayor White and Chief Hurtt,

Harris County is requesting a meeting to review and act on the Forensic Biology (DNA) Expansion Plan Assessment that was authorized by Court on June 23, 2009 and completed on September 18, 2009 with professional consultants to develop an implementation timeline and recommendations for resources needed for the county to provide DNA testing for the City of Houston. The report outlines incremental steps in four phases to obtain the goal of a unified, expanded, and scientifically-based Harris County DNA laboratory.

At the September 29th Harris County Midyear Review, Commissioners Court ordered that the Medical Examiner and Management Services meet with the District Attorney and representatives from the City of Houston regarding the recommendations of the DNA Expansion Assessment Study. There is a need for review and evaluation of timelines and the process for development of the expanded operation, including capital costs, operating budget, and a cost recovery model for the phases identified by the consultants.

We believe we have a great opportunity for the City and the County to regionalize DNA testing to better serve the citizens of Houston and Harris County. The proposed integration is in conformity with the independent structure and culture promoted by the National Academy of Sciences in a report issued earlier this year entitled *Strengthening Forensic Science in the United States*. It is important that all phases of the assessment study be reviewed with you so that a definitive timeline and transition plan can be developed.

1885 Old Spanish Trail, Houston, Texas 77054
www.co.harris.tx.us/me

EXHIBIT "1"

56472.041

Ed Emmett
County Judge

El Franco Lee
Commissioner, Precinct 1

Steve Radack
Commissioner, Precinct 3

Sylvia R. Garcia
Commissioner, Precinct 2

Jerry Eversole
Commissioner, Precinct 4

Luis A. Sanchez, M.D.
Chief Medical Examiner

Patricia R. Lykos
District Attorney

LAS/MED:dw/sb

1885 Old Spanish Trail, Houston, Texas 77054
www.co.harris.tx.us/me

Texas Medical Center

Richard E. Wainerdi, P.E., Ph.D.
President, Chief Executive Officer
and Chief Operating Officer

October 30, 2009

Patricia R. Lykos
Harris County District Attorney
1201 Franklin
Houston, Texas 77002

Dear Pat:

The Texas Medical Center consists of 48 member institutions, half of which are agencies of government, (federal, State, County, City) and half of which are private not-for-profit 501.c.3's. It is the largest medical complex in the world.

The Texas Medical Center fosters an environment where scientists and doctors can collaborate and develop the use of DNA in forensic investigation, molecular genetics and medicine. The Medical Examiner's Office is an active member in the Texas Medical Center and has established a dynamic academic environment dedicated to the advancement of the forensic sciences. TMC applauds Harris County Medical Examiner's Office's effort to regionalize testing of DNA for Harris County and the City of Houston and its municipalities. It would be an excellent choice to fund and the Texas Medical Center will support the Harris County Medical Examiner in every way possible.

Sincerely,

Dick

Richard E. Wainerdi

REW/lcn

John P. McGovern Campus 2450 Holcombe Blvd, Ste 1 Houston, Texas 77021-2040
(713) 791-8800 fax (713) 799-8220 www.tmc.edu

EXHIBIT "2"

56472.043

Harris County, Texas Statistics

- 1,778 square miles.
- Nation's third most populous county with nearly 4.1 Million
- Has a larger population than 24 states.
- Is bigger than Rhode Island and nearly as big as Delaware.
- Now accounts for 1.9% of all U.S. jobs, up from 1.7%.
- Municipalities: 34

Harris County District Attorney Statistics

2008 Criminal Charges Filed January-December

Misdemeanors[1]	65,295
Felonies[2]	46,085
Total:	111,380

2009 Criminal Charges Filed January-October

Misdemeanors[1]	61,547
Felonies[2]	38,958
Total:	100,420

New Juvenile Cases Presented for Filing 2008

Misdemeanors	6,827
Felonies	2,812
Total:	9,639

New Juvenile Cases Presented for Filing 2009

Misdemeanors	4,357
Felonies	2,344
Total:	6,701

Diverted*
2009 1,533

[1]Offenses punishable by fine up to $4,000.00 or 1 year in Harris County Jail.

[2]Offenses punishable by fine up to $10,000.00 or not less than 2 years nor more than 99 or life confinement in Texas Department of Criminal Justice Institutional Division or not less than 180 days nor more than 2 years in State Jail depending on the degree level of felony offense.

*As of October 31, 2009, number of Misdemeanor charges not filed but placed in new Juvenile Diversion Program which began March 9, 2009.

EXHIBIT "3"