THE JUSTICE PROJECT

Improving Access to Post-Conviction DNA Testing

A Policy Review

Kirk Noble Bloodsworth spent almost nine years in prison for the rape and murder of nine-year-old Dawn Hamilton before DNA testing proved he did not commit the crime.

To date, more than two-hundred wrongfully convicted people have been exonerated through post-conviction DNA testing.

"When innocent people are convicted and the guilty are permitted to walk free, any meaningful reform effort must consider the root causes of these wrongful convictions and take steps to address them."

—Patrick Leahy
Senior United States Senator from Vermont

INTRODUCTION

DNA testing is a remarkable technology that has developed rapidly since the first accurate description of DNA in 1953 by scientists James Watson and Francis Crick. DNA has emerged as a highly reliable source of information and a powerful tool for proving guilt and innocence. Its many benefits are becoming increasingly clear to courts, prosecutors, defense counsel, and to the public. Post-conviction DNA testing gives those who have been wrongfully convicted an opportunity for relief, and has been used to exonerate over two-hundred innocent people in the United States. DNA testing also makes possible the prosecution of "cold" cases, and many states are establishing DNA databanks for convicted felons to find new leads in old cases.

Without post-conviction DNA testing, it is likely that the more than two-hundred DNA exonerees would still be in prison today. A majority were convicted before DNA testing could have proven their innocence in court. Some of them would still be awaiting execution, or would have been executed, for crimes they did not commit. As of June 2008, all but seven states have laws addressing post-conviction DNA testing. Many states' laws, however, are too lax in their standards for preserving evidence, and the windows in which a defendant can introduce "new evidence" are often unduly narrow. Furthermore, most state laws fail to provide adequate counsel for post-conviction DNA testing petitioners.

The federal government recognized the importance of post-conviction DNA testing with the passage and signing into law of the Innocence Protection Act on October 30, 2004.[1] Included in the Innocence Protection Act (IPA) is a post-conviction DNA testing program that authorizes $25 million over five years to help states defray the costs of post-conviction DNA testing.[2] The program is named after Kirk Bloodsworth, the first death row inmate whose innocence was proven by DNA analysis. The time is right for states to follow the federal government's lead in passing comprehensive post-conviction DNA testing laws. Expanding post-conviction DNA testing contributes to a more accurate criminal justice system and restores public confidence in the ability of the system to correct its own errors.

While DNA testing has become the new gold standard for determining guilt or innocence, it does not necessarily solve the problems of wrongful convictions. The vast majority of criminal cases do not include biological evidence that could definitively determine the identity of the perpetrator through such an accurate testing method. Still, where such evidence is available and can provide compelling information about a criminal offense, justice demands that DNA testing be conducted.

The Justice Project Recommendations:

- States should require the preservation of biological evidence throughout a defendant's sentence and devise standards regarding custody of evidence.
- States should ensure that all inmates with a DNA-based innocence claim may petition for DNA testing at any time and without regard to plea, confession, self-implication, the nature of the crime, or previous unfavorable test results.
- States should require judges to grant post-conviction testing petitions when testing may produce new material evidence that raises a reasonable probability of the petitioner's innocence or reduced culpability.
- States should ensure that petitioners have access to objective and reliable forensic analysis at independent and privately funded labs, subject to judicial approval.
- States should provide counsel and cover the cost of post-conviction DNA testing in cases where a petitioner is indigent.
- States should standardize post-testing procedures for cases that produce testing results favorable to a petitioner.

The Justice Project has developed this policy review to facilitate communications among the legal community, local law enforcement agencies, policymakers, the public, and others by explaining the problems surrounding post-conviction DNA testing, and by recommending positive reforms that can significantly improve its practice. By implementing the reforms recommended in this policy review, states can significantly increase fairness and accuracy in the criminal justice system.

PROBLEMS & SOLUTIONS

The passage of post-conviction DNA testing statutes acknowledges the serious flaws in our system of justice while providing an opportunity to increase the credibility and quality of the system. In 2004, Congress passed the Innocence Protection Act (IPA), which authorizes federal funding to states whose programs comply with certain requirements of the Act. While the Innocence Protection Act put the federal government at the forefront of post-conviction DNA testing, there are still seven states that do not have post-conviction DNA testing statutes.[3] Of the states that do have post-conviction DNA testing statutes, many limit access to post-conviction DNA testing by allowing the destruction of evidence or unreasonably limiting the conditions under which a defendant can petition for testing.[4] In some states, innocent people remain imprisoned due to legal and bureaucratic hurdles that prevent post-conviction DNA testing. In Idaho, for example, a defendant only has one year to file a post-conviction DNA testing petition.[5] Historically, courts have limited the amount of time one can petition for relief because "new evidence" has traditionally become less reliable as time lapses. DNA evidence is different. In fact, DNA evidence can last for decades, and can be used to prove guilt or innocence with greater accuracy long after cases close. Statutes that limit accessibility to such powerful evidence compromise the fairness and accuracy of our criminal justice system.

States should enact laws requiring the most expansive use of DNA evidence possible. States with post-conviction DNA testing statutes that create barriers to accessibility of such evidence should revise their laws. The following reforms will allow states to remedy many of their failures to do justice.

> The loss or destruction of DNA evidence jeopardizes the integrity of the criminal justice system.

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The loss or destruction of DNA evidence jeopardizes the integrity of the criminal justice system. After spending twelve years in prison, Kevin Byrd was exonerated based on DNA evidence. At the time of his exoneration and pardon, then-Governor George W. Bush said he expected Byrd's to be the first of many re-examinations of old cases using preserved DNA evidence. However, within a week, evidence custodians at the Harris County Clerk's office willfully destroyed at least fifty old rape kits in storage, making any relief for others wrongfully convicted extraordinarily difficult, if not impossible.[6] The Supreme Court had ruled in *Arizona v. Youngblood* that loss or destruction of evidence is a violation of due process if it is done in an act of "bad faith."[7] However, Texas and federal law sanctioning the destruction of these kits effectively precluded any claim that the destruction was an act of "bad faith" as well as any judicial censure on those grounds. Mr. Byrd's own evidence had been slated to be destroyed before it was tested. Whether due to a filing error or an unknown party's intentional intervention, his evidence was saved, and it proved his innocence. Statutes requiring preservation of evidence would significantly expand opportunities to correct otherwise irreversible errors.

Currently, all but twelve states (and the District of Columbia) lack statutes requiring the preservation

of evidence throughout an inmate's incarceration.[8] Even in states with such statutes on the books, rules regarding the preservation of evidence are often ignored. In New York City, for example, despite the support of prosecutors for post-conviction DNA testing, such testing did not happen in several cases because evidence had been lost.[9] States must require that evidence be preserved and catalogued throughout an inmate's sentence, and destroyed only upon written permission from the defendant or the defendant's attorney. States should also devise standards regarding the proper collection and retention of biological evidence, and administer training programs for those charged with evidence preservation. It is essential that the chain of custody over DNA evidence be documented as long as evidence is preserved to ensure that DNA evidence is accessible and has not been tampered with or otherwise altered.

States should ensure that all inmates with a DNA-based innocence claim may petition for DNA testing at any time and without regard to plea, confession, self-implication, the nature of the crime, or previous unfavorable test results.

Limiting access to post-conviction DNA testing on the basis of a plea, confession, or previous unfavorable test result undermines the fairness and accuracy of the criminal justice system. Excluding defendants who confessed or pled guilty does not take into account evidence that many false confessions and even some plea bargains are obtained from innocent people.[10] Nearly a dozen of the more than two-hundred DNA exonerees in the United States initially pled guilty, and fifty of the first two-hundred purportedly confessed to crimes that they did not commit.[11] When test results could be probative of guilt or innocence, or are relevant to a sentencing determination, defendants must be permitted to petition for post-conviction DNA testing regardless of their pre-trial plea or confession.

Time limitations on a wrongfully convicted person's right to petition for DNA testing do not reflect technological changes that have occurred or may occur. Without proper preservation requirements, exculpatory DNA evidence might only be found after many years have elapsed and new technology has developed.[12] The original method used to test DNA, Restriction Fragment Length Polymorphism analysis (RFLP), matched a suspect to DNA at the rate of one in many millions, but required relatively large and well-preserved samples and took up to six weeks to analyze. The short tandem repeat test (STR), developed in the late 1990s, could be performed on much smaller samples. Furthermore, with match rates of up to one in a trillion, STR tests are more discriminating than the older RFLP tests. They can therefore exclude more suspects as the source of crime-scene DNA and prove the innocence of wrongfully incarcerated individuals where RFLP tests could not.[13] Because DNA testing technology continues to improve, a defendant's right to request testing must not be subject to time limitations. If new technology has been developed that might change the outcome of a test, it is necessary to perform a new test.

States should require judges to grant post-conviction testing petitions when testing may produce new material evidence that raises a reasonable probability of the petitioner's innocence or reduced culpability.

Unclear or extraordinarily complex standards to initiate testing often limit a petitioner's ability to prove his or her innocence. In states without testing statutes, standards for gaining access to DNA testing are inconsistent; statutes are not the only means to secure testing, but without statutes wrongfully convicted prisoners have few reliable and consistent opportunities available to use DNA to prove their innocence.[14] States should enact statutes specifying the procedures a court is to follow when a defendant files a petition for DNA testing, in order to reduce administrative mistakes, increase efficiency, and codify this essential process. In determining whether to permit DNA testing, a judge should consider whether the results of DNA testing are materially relevant to a claim of innocence and/or might lead to a lesser sentence. If the court determines there is reasonable probability that the results will meet one of these criteria, post-conviction DNA testing should be performed.

While there are a number of states that require a defendant simply to show that post-conviction DNA testing could provide new, relevant evidence, there are also many that require the defendant to prove that the results of DNA testing would conclusively demonstrate their innocence. Because few courts or

juries rely entirely on one piece of biological evidence for a conviction, such standards make it difficult to petition successfully for testing.

The Innocence Protection Act specifies that post-conviction DNA testing should be performed if it may produce new material evidence that would "raise a reasonable probability that the applicant did not commit the offense."[15] Senator Patrick Leahy, co-sponsor of the IPA, commented that this standard reflects "the principle that the criminal justice system should err on the side of permitting testing, in light of the low cost of DNA testing and the high cost of keeping the wrong person locked up."[16] States should follow the federal model for allowing DNA testing, which is less cumbersome and allows more opportunities for those wrongfully convicted to prove their innocence.

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States should ensure that petitioners have access to objective and reliable forensic analysis at independent and privately funded labs, subject to judicial approval.

Due to the high levels of credibility that forensic testimony has with jurors, erroneous or misleading forensic science severely undermines the fairness and accuracy of criminal trials. A recent independent investigation found that analysts at the Houston crime lab repeatedly tested DNA samples incorrectly and, in some cases, made up results without actually testing evidence.[17] The special investigator hired to examine the lab's work recommended retests of many cases, which so far have proven the innocence of three men who were wrongfully convicted by incorrect testing and misleading or false analyst testimony.[18]

Most states lack statutory standards for forensics laboratories to prevent wrongful conviction as a result of incorrect or improperly conducted tests.

At the federal level, Congress acknowledged the need for forensics reform by passing the Justice for All Act of 2004. The bill directly addresses the need for forensic oversight, instructing the U.S. Attorney General to create and appoint members to a federal forensic science commission and requiring federal laboratories to undergo frequent audits.[19] States should follow the federal government's lead by creating standards and regulations to increase and maintain the objectivity, reliability, accuracy, and efficiency of forensic laboratories, and ensure that forensic analysis is performed in accordance with the highest scientific standards. Ideally, a state-run oversight board would set and enforce standards for laboratory accreditation. A good accreditation program should provide an independent review of management practices and lab policies, while taking steps to ensure that testing and analysis are performed accurately. An evidence tracking system should be implemented to allow easy access to evidence at all times.

To best ensure the objectivity and reliability of forensic analysis, laboratories should be independent from the jurisdiction or control of law enforcement or any prosecutorial body. Some states have already adopted this reform.[20] A defendant should have access to independent forensic experts of his or her choosing, subject to the agreement of the prosecutor and the approval of the court. If the parties cannot agree on a laboratory, the court should designate a testing facility and provide parties with a reasonable opportunity to show cause for the court to allow testing to be performed at their preferred facility.

Timeliness requirements must be a component of any comprehensive post-conviction statute. Statutes that require DNA testing to be done "as soon as practicable," such as North Carolina's, are good models.[21] States should ensure that rapid testing is practicable by eliminating any backlog of evidence waiting to be tested.

States should provide counsel and cover the cost of post-conviction DNA testing in cases where a petitioner is indigent.

The complexity of the petitioning process creates an unreasonable burden for a wrongfully convicted person who needs DNA testing to prove his or her innocence. The National Institute of Justice

issued a report outlining appropriate steps in filing a petition for post-conviction DNA testing, which include but are not limited to: (1) gathering trial transcripts, laboratory reports, police reports, appellate briefs, post-conviction briefs, and evidence collection lists; (2) investigating and searching for evidence; (3) sending letters to ask custodial authorities to preserve evidence; (4) consulting with prosecutors; (5) learning procedures for executive clemency; (6) deciding on a laboratory and method of testing; (7) establishing a chain of custody; and (8) learning the law in the relevant state.[22] As one scholar notes, "[i]ndigent inmates serving hard time may not have the resources or access to counsel to gather the necessary materials expeditiously."[23] The task is difficult even for experienced advocates. Relegating this job to petitioners creates a barrier to seeking truth and finding justice. Furthermore, without a lawyer, many petitioners may not know the full extent of their rights for post-conviction DNA testing. They may assume that their time for testing has run out, or that their DNA samples have been discarded. For a petitioner without a lawyer, the nominal ability to petition for post-conviction DNA testing will be practically meaningless. States must provide legal counsel to indigent petitioners to help navigate the complex process.

Generally, states that have post-conviction DNA testing laws have been reasonable about providing testing to all eligible inmates regardless of financial circumstances, but some state statutes are silent on the matter. If an individual cannot pay for DNA testing, the state has an obligation to cover the costs.

States should standardize post-testing procedures for cases that produce testing results favorable to a petitioner.

Even when the results of DNA testing conclusively show that the petitioner is innocent, he or she may remain in legal limbo that further delays fairness in the criminal justice system. Because DNA testing statutes in some states do not provide for any type of post-testing procedure, states may neglect to identify the true perpetrator of the crime, or even continue to imprison an innocent individual. An in-depth study of the first two hundred individuals exonerated by DNA testing found that "[f]orty-one (or twenty-one percent) received a pardon from their state executive, often because they lacked any available judicial forum for relief."[24]

States must enact policies governing the action a court should take following testing that produces favorable results to the petitioner. The court should schedule a hearing to determine the appropriate relief to be granted, whether it is an order granting a new hearing, an order releasing the petitioner from custody, or an order to address the urgent need for relief as the situation may require. Once DNA testing has proven a petitioner's innocence, relief should be provided as soon as possible. States must institute procedures to allow an innocent person relief in an expeditious manner.

THE LEGAL LANDSCAPE

When DNA evidence was first introduced into the criminal justice system, many regarded it as a powerful tool to assist prosecutors in convicting and incarcerating the guilty. DNA evidence has also gained attention as a remarkable method of proving the innocence of the wrongfully convicted. DNA plays a vital role in exonerations, thus it is important to understand how this issue has developed in the legal field and the consequent impact of the judicial debate on post-conviction DNA testing.

FEDERAL APPROACH

By 1996, post-conviction DNA testing had become a prominent issue in the legal community. As a result, the U.S. Department of Justice published a report detailing the stories of twenty-eight men who were exonerated based on post-conviction DNA testing.[25] The report drew serious attention from both the scientific and the criminal justice communities. Consequently, Attorney General Janet Reno established the National Commission on the Future of DNA Evidence "to identify ways to maximize the

value of DNA in our criminal justice system" and to provide recommendations for prosecutors, defense attorneys, and judges on how to handle requests for post-conviction DNA testing.[26] While these standards were only recommendations, they provided guidance that ultimately shaped some state legislation and, when not mandated by state law itself, were adopted by many prosecutors' offices.[27]

In 2000, Senator Patrick Leahy introduced the Innocence Protection Act (IPA) in Congress. While the IPA incorporated many of the recommendations promulgated by the Justice Department Commission, it also put forth unique standards aimed at addressing weaknesses in the Commission's recommendations. Most notably, the IPA proposed a uniform national standard for access to DNA testing and for procedures that courts should follow when confronted with exculpatory post-conviction DNA evidence.[28] On October 30, 2004 the IPA was signed into law.[29] Among other provisions, the IPA provides access to post-conviction DNA testing in federal cases and, with some exceptions, prohibits the destruction of DNA evidence in a federal case while a defendant remains incarcerated.[30] The IPA also established the Kirk Bloodsworth Post-Conviction DNA Testing Program, which awards grants to states in order to help defray the costs of post-conviction DNA testing.[31]

The Innocence Protection Act provides access to post-conviction DNA testing in federal cases and, with some exceptions, prohibits the destruction of DNA evidence in a federal case while a defendant remains incarcerated.

COURTS' APPROACH

Supreme Court

Lower courts have looked to the Supreme Court for guidance over the issue of DNA preservation, specifically in *California v. Trombetta* and *Arizona v. Youngblood*.[32] While both cases present doctrines that define when due process mandates evidence preservation, the cases differ on how to determine when the destruction of evidence constitutes a violation of a defendant's right to due process. In *Trombetta*, the Supreme Court formulated a test that focuses on the probative value of the destroyed evidence and whether apparent exculpatory value existed in that evidence before it was destroyed.[33] On the other hand, in *Youngblood*, the test is not centered on the probative value of the destroyed evidence but rather on the government's actions and the circumstances surrounding the destruction of the evidence.[34] The *Youngblood* ruling held that due process is not violated unless the defendant can show that the loss or destruction of evidence is an act of "bad faith."[35] The bad faith standard is nearly impossible to prove and the three dissenting Justices in the case pointed out that the line between good faith and bad faith is often difficult to judge.[36] Proof that the party responsible for the destruction of evidence acted in bad faith has been elusive for most defendants. In the twelve years following the ruling, only three decisions were published in which a judge ruled that bad faith was a factor, and thus violated the defendant's right to due process.[37]

Federal Courts

Although circuit courts have been reluctant to address the issue of requests for post-conviction DNA testing, one case in particular demonstrates the need for legislative action to ensure proper procedural safeguards. In *Harvey v. Horan*, petitioner James Harvey requested access to the biological evidence from his case being held by the Commonwealth of Virginia.[38] Although the evidence had been previously tested using the procedures that were available at the time of his trial in 1990, Harvey sought access to the evidence in order to have it retested using more advanced technology. The Fairfax County Commonwealth Attorney refused to turn over the evidence. The Fourth Circuit upheld the Commonwealth's Attorney's action, holding that Harvey's request for post-conviction DNA testing did not apply to the limited purposes of section 1983 claims under U.S. Code, which are intended to redress constitutional and federal statute violations, neither of which Harvey claimed were violated.[39] While the Fourth Circuit denied Harvey's request, the court noted that criminal defendants should not be precluded from "avail[ing] themselves of advances in technology."[40] The court further stated that "if this entitlement is to be conferred, it should

be accomplished by legislative action rather than by a federal court as a matter of constitutional right."[41]

State Courts

New York State courts were among the first to deal with the issue of how to classify requests by inmates for post-conviction DNA testing and to provide post-conviction DNA testing by statute. In 1990, New York's Supreme Court, held in *Dabbs v. Vergari* that Charles Dabbs was allowed to conduct post-conviction DNA testing, finding that Dabbs' request should be treated as a post-conviction motion for discovery.[42] The court pointed to *Brady v. Maryland* noting that "notwithstanding the absence of a statutory right to post-conviction discovery, a defendant has a constitutional right to be informed of exculpatory information known by the state."[43] Based on the DNA evidence, which rendered exculpatory results, Dabbs was exonerated nine years after his conviction.[44] Following *Dabbs* the Suffolk County Court held in *People v. Callace* that while *Brady* was not applicable to Callace's case, post-conviction DNA testing could be classified as "newly discovered evidence" since DNA analysis was not available for the defendant at the time of trial.[45]

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After *Dabbs*, other states began dealing with the issue of requests for post-conviction DNA testing. In 1991, the New Jersey Superior Court Appellate Division granted a defendant the chance to conduct post-conviction DNA testing based on recent developments in the scientific and judicial community.[46] In 1992, Indiana's Appellate Court held that the defendant was entitled to post-conviction DNA testing based on the fact that the defendant did not have access to the testing at trial.[47] Also in 1992, Pennsylvania's Superior Court vacated the defendant's conviction, and ordered the state to conduct DNA analysis.[48]

Requests for post-conviction DNA testing initially proceeded on a case-by-case basis. Some courts classified the post-conviction DNA testing as newly discovered evidence while others did not, especially in cases in which the defendant could have had access to testing at the time of trial. For example, in 1994 the Iowa Supreme Court held that post-conviction DNA testing was not newly discovered evidence since some form of serological testing existed at trial and the defense failed to use it.[49] The court noted that in order for evidence to be considered newly discovered, the evidence must not only be relevant but also likely to change the case's outcome.[50] Even in states like New York, where courts had previously held that requests for post-conviction DNA testing constituted "newly discovered evidence," the New York Supreme Court, Appellate Division held that it was not new evidence when some form of testing had existed at the time of trial, but the defense did not use it.[51]

Illinois, the second state to provide post-conviction DNA testing by statute, also contributed significantly to case law in favor of a defendant's right to post-conviction DNA testing. In 1996, the Illinois Supreme Court found that newly discovered evidence that shows a defendant is actually innocent is within the jurisdiction of the court as a matter of due process.[52]

In 1999, the South Dakota Supreme Court was also confronted with the issue of requests for post-conviction DNA testing.[53] The petitioner, who was convicted of murder and sentenced to life in prison, moved for post-conviction discovery in order to obtain access to evidence that had been microscopically examined during his trial, but had not been tested using DNA analysis.[54] Because South Dakota lacked a statute establishing a procedural right to post-conviction DNA testing, the court had to promulgate a judicial rule and denied the petition for post-conviction DNA testing, finding "no likelihood that a favorable DNA test result of the hair and blood evidence would produce an acquittal if a new trial was granted."[55]

States should not rely on the inconsistent and often arbitrary approaches state courts have taken toward post-conviction DNA testing. Since 1997, forty-three states (and the District of Columbia) have passed post-conviction DNA testing statutes. But many of these statutes need improvement. All states should enact statutes that ensure consistent, meaningful, and effective access to post-conviction DNA testing.

BENEFITS & COSTS

As with any good policy, the benefits of post-conviction DNA testing statutes outweigh the costs. While post-conviction DNA testing statutes require states to incur initial costs, the costs are minimal and could end up saving states money in the long run.

COSTS OF WRONGFUL CONVICTION

The most obvious cost of a judicial system without post-conviction DNA testing is the denial of justice for innocent prisoners. Many exonerees lose more than years of their life behind bars.

Families of the wrongfully convicted also bear an intense burden. While Clarence Elkins spent seven years in prison after being wrongfully convicted, his wife, Melinda, led a public campaign to uncover the truth, and his two sons assigned themselves night watchmen duties at their home because they were afraid that the real killer might come to silence their mother.[56] Wrongful convictions also prolong and exacerbate the suffering of crime victims and their families. Jennifer Thompson-Cannino, who was raped when she was twenty-two years old, was absolutely certain that her rapist was Ronald Cotton, who spent more than ten years in jail before being exonerated by DNA testing. Thompson-Cannino, who identified Cotton in several lineups, suffers from a deep sense of guilt for her part in Cotton's lost years: "Ronald Cotton and I are the same age," she now says, "so I knew what he had missed during those eleven years. …I live with constant anguish that my profound mistake cost him so dearly."[57]

> The main costs of post-conviction DNA testing reform are threefold: the costs accrued by the time judges and clerks spend in court, the laboratory testing fees, and the physical space to store forensic evidence.

Each time a person is wrongfully convicted, the actual perpetrator remains free to commit more crimes. In forty percent of the cases handled by The Innocence Project, DNA testing both exonerates the innocent and identifies the actual perpetrator. Furthermore, "[i]n every single one of those cases, that perpetrator had committed violent crimes in the intervening years."[58] Every wrongful conviction undermines the justice and fairness that citizens expect from the American judicial system.

BENEFITS OF REFORM

Post-conviction DNA testing provides an outlet—often the only outlet—through which defendants can prove their innocence. If a piece of retested evidence reveals a new DNA profile that does not match the petitioner's, not only can the defendant be released or at least granted a new trial, but the new profile can be run through the FBI's nationwide DNA database, the Combined DNA Index System (or CODIS). If the true perpetrator has been arrested since 1994, when the DNA Identification Act passed, his DNA may be in the database, enabling police officers to identify him with a so-called "cold hit." Conversely, if a defendant was convicted before 1994 and has a piece of evidence retested, his DNA will be added to the database. Even if the results are in his favor and he is exonerated of the crime for which he was sentenced, his DNA can be tested for other unsolved crimes. This system not only achieves further cold hits, but it also deters defendants who have committed crimes from frivolously petitioning for testing.

Additionally, a record of the cases in which defendants have been wrongfully convicted, incarcerated, and finally exonerated provides law enforcement officials with invaluable data that can aid in the prevention of further wrongful convictions. Prosecutors and law enforcement can analyze verdicts where post-conviction DNA testing has overturned a sentence to recognize trends that point to weaknesses in their investigation strategies. Correcting these weaknesses can create a more fair and accurate criminal justice system, but also raise the credibility of the evidence in a case.

Each DNA exoneration demonstrates that our criminal justice system failed to provide justice. However, it is even more important to public confi-

dence in the criminal justice system that the wrongfully convicted be able to make a DNA-based case. By allowing those individuals with claims of being wrongfully convicted to prove their innocence, we restore some measure of public confidence—and some measure of trustworthiness—to our criminal justice system.

COSTS OF REFORM

The main costs of post-conviction DNA testing reform are threefold: the costs accrued by the time judges and clerks spend in court, the laboratory testing fees, and the physical space to store forensic evidence.

First, it is worth mentioning that some individuals petition for DNA testing regardless of whether a law specifically provides for it. Due to the lack of clear procedure, these post-conviction DNA testing petitions require a good deal of time and resources. A strong post-conviction DNA testing statute provides courts and petitioners with guidelines to streamline and simplify the process. Thus, the cost of compensating judges and clerks for their time is more manageable than it might at first appear.

Second, DNA testing costs range widely, depending on the method used. On average, the costs are surprisingly low. A representative of the Iowa Division of Criminal Investigation said that the average test, including personnel costs, can be as low as fifty dollars.[59] The Virginia Department of Planning and Budget estimated that each test would cost thirty-five dollars in their fiscal analysis of a proposed post-conviction DNA testing bill.[60]

Most of the expense for post-conviction DNA testing will be front-heavy for two reasons. As pre-conviction DNA testing becomes standard procedure, there will be fewer defendants petitioning for relief. Because of continued technological innovation, those more recently incarcerated will certainly still petition—as they should have the right to do—but once the backlog is cleared, the influx of petitions will slow. In New York, for example, the state received petitions from only one-hundred inmates during the first seven years of its post-conviction DNA testing statute.[61] In addition, as with most technology, even the most expensive DNA tests are becoming cheaper as the technology matures and becomes more widely used.

Third, securing proper facilities and space for storing evidence during the length of a defendant's incarceration will incur costs. The price of expanding the storage of forensic evidence will vary from state to state, depending on how inclusive their existing procedures of retaining evidence are. The state of Texas determined that the increased costs of an identical program would "not have any significant fiscal impact on [Department of Criminal Justice] agency operations."[62] Contrary to popular belief, not all DNA evidence requires expensive refrigeration units. Rather, most DNA evidence can be safely stored at room temperature, as long as the temperature is constant and the air is dry.[63] Furthermore, because scientists can conduct DNA tests on microscopic pieces of evidence, evidence custodians only need preserve the parts of evidence that contain DNA matter. Strands of hair, swabs of fluid, and clippings from garments do not take up nearly as much room as the pounds of narcotics that many jurisdictions retain.

PROFILES OF INJUSTICE

Kirk Bloodsworth's Story

Although no physical evidence linked him to the crime, Kirk Noble Bloodsworth was convicted of raping and murdering nine-year-old Dawn Hamilton in 1985. He was sentenced to death in Maryland and in 1993, DNA testing proved his innocence. A decade after Bloodsworth's exoneration, the state attorney's office finally compared DNA from the victim's clothes to DNA in state and federal databases of convicted felons. They immediately found a match and the real killer confessed.

Detectives William Ramsey and Robert Capel were in charge of investigating the rape and murder. Two boys, a ten-year-old and a seven-year-old, saw Dawn walk into the woods with a white, tall, thin, blonde, mustachioed man. Capel interviewed each boy on the evening the crime occurred. Using templates

of facial features, a severely limited and unreliable method, the ten-year-old boy helped Capel create a composite of the man. The boy asked to change several features, but Capel did not call in a freelance artist because his office wanted to release the composite to the public immediately.[64] When they released the sketch, the detectives were inundated with tips from people claiming to know men resembling the suspect. Most leads were never adequately pursued, including one linking the man in the sketch to a man wanted for a series of rapes in the Fells Point area of Baltimore.[65]

Two weeks into their search, with public pressure mounting to find the assailant, Ramsey and Capel had targeted Kirk Bloodsworth. Bloodsworth was a former marine with no criminal background. While he lived near the crime scene and had left the Baltimore area shortly after the crime was committed, he was shorter, stockier, and ruddier than the description of the suspect. Ramsey and Capel questioned and photographed Bloodsworth, who maintained his innocence. When detectives presented a photo spread to the two boys, the ten-year-old identified Bloodsworth, but said that Bloodsworth had more red in his hair than the man he saw with Dawn Hamilton. The seven-year-old did not identify any of the men.[66] The identification by the ten-year-old witness was enough for Bloodsworth to be arrested and brought to trial in February of 1985.

> "Did the system work? I was released, but only after eight years, eleven months, and nineteen days, all that time not knowing whether I would be executed or whether I would spend the rest of my life in prison. My life had been taken from me and destroyed."
>
> —Kirk Bloodsworth

Despite extensive investigation, no physical evidence tied Bloodsworth to the crime.

The FBI also tested the rape kit from the crime. Although the medical examiner performing the autopsy identified spermatozoa on the cotton swabs, the FBI forensic laboratory determined that no semen was present. The FBI's serology expert made markings on the victim's underwear circling and pointing to various stains, but he was unable to detect any semen on the underwear or shorts. One of the markings on the underwear, a black arrow, pointed directly to the stain that exonerated Bloodsworth nine years later.[67]

Bloodsworth was convicted of first degree murder, sexual assault, and rape on March 8, 1985, largely due to eyewitness testimony. The judge sentenced him to death, and Bloodsworth lived on death row for more than a year.

But on July 29, 1986, the Maryland Court of Appeals reversed Bloodsworth's conviction, citing the failure of the prosecution to fully comply with pretrial discovery laws. The prosecutors failed to disclose information about other suspects in the case. Bloodsworth was retried, and again convicted of the crime he did not commit. Bob Morin, the attorney ultimately responsible for Bloodsworth's exoneration, said that the investigation "was not a flawless investigation. But a lot of the flaws in the investigation all got played out in front of the jury, not once but twice."[68] The judge in Bloodsworth's second trial sentenced him to two consecutive life sentences.

Bob Morin agreed to take Bloodsworth's case in 1989, even though he knew it would be difficult to get another trial. In April of 1992, Bloodsworth, who worked in the prison library and had read about DNA testing used to solve crimes in England, urged Morin to have the evidence from the crime scene tested. Although the physical evidence could have been legally destroyed after Bloodsworth's conviction, the judge from Bloodsworth's second trial had kept some of the evidence in a cardboard box in his chambers.[69] Morin sent the evidence to a highly renowned DNA scientist and paid for the test out of his own pocket.[70]

In April of 1993, DNA testing proved that the semen on Dawn Hamilton's underwear did not come from Kirk Bloodsworth. Morin informed the state attorney's office of the test results, but the prosecutors insisted on performing their own DNA test to confirm the results. Bloodsworth spent two additional months in prison waiting for the state's results.

Bloodsworth was released on June 28, 1993, after spending nearly nine years in prison. Even after his release, the state attorney's office did not apologize

or acknowledge Bloodsworth's innocence. Sandra A. O'Connor, Baltimore County State's Attorney, told reporters: "I'm not prepared to say he's innocent. Only the people who were there know what happened."[71]

The state's reservations about Bloodsworth's innocence lingered an additional ten years, until September 2003. Although Maryland State Police had established a state database containing DNA samples of convicted felons from both state and federal records in 1994, the Baltimore County state's attorney's office failed to submit the data from Dawn Hamilton's case despite pressure from Kirk Bloodsworth and the public.[72] When they finally did, nearly twenty years after the crime and ten years after Bloodsworth's exoneration, they found a match. The real killer, Kimberly Ruffner, confessed and pled guilty to the crime.

Ruffner had been convicted of the attempted rape and stabbing of a woman in the Fells Point area of Baltimore in the summer of 1984. He was also one of Kirk Bloodsworth's fellow inmates in the Maryland prison system. Ann Brobst, the attorney who had prosecuted Bloodsworth in both trials, delivered the news to Bloodsworth.

In 2000, Senator Patrick Leahy of Vermont invited Kirk Bloodsworth to speak before the Senate about the Innocence Protection Act (IPA). Part of the IPA, the Kirk Bloodsworth Post-Conviction DNA Testing Program, authorizes twenty-five million dollars over five years to help states pay the costs of post-conviction DNA testing.

As part of his testimony before the Senate, Kirk Bloodsworth gave voice to the grief that comes from wrongful conviction:

> "Did the system work? I was released, but only after eight years, eleven months, and nineteen days, all that time not knowing whether I would be executed or whether I would spend the rest of my life in prison. My life had been taken from me and destroyed. I was separated from my family and branded the worst thing possible—a child killer. I cannot put into words what it is like to live under these circumstances… Did the system work? My family lived through this nightmare with me. My father spent his entire retirement savings. As a result, he cannot retire and must work on and on. My mother, whom I loved and stood up for me—stood right beside me the entire time—died before I was released. …I was not allowed to go to her funeral."[73]

Kirk Bloodsworth now works as a program officer for The Justice Project, and spends his time traveling around the country speaking about the need for expanded post-conviction DNA testing.

Morin informed the state attorney's office of the test results, but the prosecutors insisted on performing their own DNA test to confirm the results. Bloodsworth spent two additional months in prison waiting for the state's results.

Clarence Elkins' Story

Clarence Elkins served seven years of a life sentence for a crime he did not commit. In spite of exculpatory post-conviction DNA tests, the court denied his motion for a new trial. Elkins was finally exonerated after he mailed a cigarette butt from a fellow prisoner to his lawyer. The DNA from the cigarette matched DNA found on both victims.

In June 1998, an intruder raped Clarence Elkins' six-year-old niece, Brooke Sutton, and raped and murdered her grandmother (Elkins' mother-in-law), Judith Johnson. When Sutton regained consciousness hours after the crime, she ran to a neighbor's house for help. The neighbor, Tonia Brasiel, who later became part of the investigation, was slow to respond, leaving the traumatized child out on her porch before driving her home. Despite the child's report of the murder, Brasiel failed to call the police or an ambulance.[74] When Elkins' niece finally did speak to investigators,

she identified the murderer as "Uncle Clarence."

Detectives collected strands of hair from the crime scene, but DNA testing proved that the hairs were not from Elkins. Vaginal swabs from Johnson and traces of DNA from Sutton's underwear also failed to link Elkins to the crime.

Sutton's eyewitness testimony was enough for investigators to pursue Clarence Elkins. Four days after the attack, he was arrested and charged with murder, attempted aggravated murder, rape, and felonious assault. In May 1999, Elkins stood trial with the possibility of receiving the death penalty.

Due to the lack of any physical evidence connecting Clarence Elkins to the crime, prosecutors relied heavily upon the testimony of Elkins' young niece. Elkins' attorney, Lawrence Whitney, contended that nineteen witnesses placed Elkins an hour away from the crime on the evening of the murder. The jury was not convinced, and on June 4, 1999, Elkins was convicted. He was sentenced to life in prison. Melinda Elkins, whose belief in her husband's innocence estranged her from her sister and her niece, told reporters, "It was a triple tragedy for me. I lost my mother, my husband, and my sister in one instance."[75]

Detectives collected strands of hair from the crime scene, but DNA testing proved that the hairs were not from Elkins. Vaginal swabs from Johnson and traces of DNA from Sutton's underwear also failed to link Elkins to the crime.

In 2002, Elkins and his attorneys filed a motion for a new trial. Brooke Sutton, Elkins' niece, had recanted her testimony. The court denied Elkins' motion for a new trial, Elkins appealed, and in 2003, the state upheld the denial for a new trial, claiming that Sutton's initial testimony was more credible than her recantation.[76]

With the help of Martin Yant, a private investigator who specializes in wrongful convictions, Melinda Elkins continued to investigate the case. When national news media directed its attention to her cause, individuals moved by her story donated tens of thousands of dollars to help pay for DNA testing.[77]

In 2004, the Ohio Innocence Project sent evidence from the crime scene, including a vaginal swab from the rape kit, hair and skin cells from underneath Johnson's fingernails, and DNA from Sutton's nightgown, to a laboratory for DNA testing. The results confirmed that Elkins' DNA was not found in any of the material tested.

In March 2005, Elkins and the Ohio Innocence Project were granted a hearing on their request for a new trial based on the new DNA evidence. Michael Carroll, the Summit County assistant prosecutor, told reporters that "the public sentiment is that [the DNA evidence] is significant, but I don't think it is. So, I think it's best we have a hearing and just air things out."[78]

In spite of the exculpatory DNA test results, in July 2005 the court denied Elkins' motion for a new trial.

Martin Yant and Melinda Elkins had developed suspicions about another man who was eventually charged with the crime: Earl Gene Mann.

At the time of the crime, Mann was living with Tonia Brasiel, the neighbor to whom Elkins' niece fled for help. And in May 2002, Earl Mann was sentenced to prison for raping his and Brasiel's three daughters. Melinda Elkins wondered if Brasiel's odd response to Brooke Sutton's plea for help on the morning after the crime was due to her boyfriend's involvement in the murder; Melinda suspected that Brasiel had even coached the six-year-old victim to name "Uncle Clarence" as her attacker.[79]

In order to prove that he committed the crime, Melinda Elkins needed a DNA sample from Mann. She even "sent some letters to Earl Mann under a fictitious name as a pen pal, hoping he would write back to me. I had even included the envelopes,"[80] which she hoped Mann would lick, leaving DNA traces. He never responded. The state of Ohio had Mann's DNA profile in its massive database, but laws prohibited her from accessing it.[81]

Clarence Elkins had moral qualms about going to extreme lengths to take DNA from Mann: "I didn't want to point any fingers like those that had been pointed at me."[82] But one day in the summer of 2005, Elkins saw fellow inmate Mann flick away his cigarette butt. Elkins kept the butt inside his *Strong's Bible Concordance* and mailed the evidence to his attorney in a plastic bag.[83]

The suspicions of Melinda Elkins were confirmed when test results identified Mann's DNA as the same as that found on the victim. Still, the Summit County Prosecutor's Office was not interested in hearing about the case. This led Mark Godsey, co-founder of the Ohio Innocence Project, to ask state Attorney General Jim Petro to help. Petro took the unusual step of intervening via press conference, where he urged the county to release Elkins in time for Christmas.[84] Petro told reporters: "Our experience with Summit County is they didn't really know what DNA meant. They didn't think of it as conclusive as we did. And I was kind of surprised at that."[85]

Elkins was released on December 15, 2005. In March of the following year, he agreed to accept a little over one million dollars from the state as compensation for his wrongful conviction.[86]

Earl Mann pled not guilty, although two DNA tests showing that the chances that someone else committed the murder are nineteen million to one.

SNAPSHOTS OF SUCCESS

CALIFORNIA

In September of 2000, the California State Senate and Assembly unanimously passed, and Governor Gray Davis signed into law, a model post-conviction DNA testing statute. The law requires the state to preserve DNA evidence for the duration of a defendant's time in prison. The petition for post-conviction DNA testing is considered regardless of the initial plea before trial, and the law stipulates that the testing should be performed at a laboratory that is "mutually agreed upon" by the district attorney and the petitioner. Finally, indigent defendants can request legal counsel, and the court may provide state-funded tests when the defendant cannot afford them.

California's statute was only the seventh in the United States providing for post-conviction DNA testing. At the time of the law's passage, most states with post-conviction DNA testing statutes limited the opportunity to petition to defendants on death row. California's law allows anyone convicted of a felony to petition. Furthermore, the language used to determine the standard is appropriately broad: a successful petition for DNA testing would "raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction."[87]

FLORIDA

Florida's post-conviction DNA testing statute passed in 2001, after two separate high-profile exonerations. The law included a strict statute of limitations: a defendant only had two years from the date of his or her conviction, or until October 1, 2003 (whichever was later) to submit a petition for DNA testing. Evidence preservation standards were subject to the same statute of limitations. In September 2003, as the filing deadline approached, the Florida Bar issued an emergency request to the Florida Supreme Court asking for a one-year extension. The Court extended the deadline, and on May 20, 2004, the Florida Legislature passed a bill to amend the statute giving defendants four years after a conviction, or until October 1, 2005 (whichever was later) to petition for testing.

But as the 2005 deadline approached, defense lawyers and petitioners were once again rushing to submit motions for DNA testing. *The Miami Herald* interviewed Senator Alex Villalobos, the Republican who sponsored the original DNA testing law: "'I don't want to just extend the deadline for two years again. We'll just be back here again in two years.' In the past, opponents of testing in old cases have argued that leaving the window open robs victims and their families of finality. Villalobos, a former prosecutor, disagrees. 'If I'm a victim or the family member of a victim, I don't have finality if the wrong person is in prison. That's not justice for anyone.'"[88]

On August 8, 2005, Governor Jeb Bush issued an executive order to prevent evidence custodians from destroying evidence that could contain DNA material. Unfortunately, the order allowed disposal of evidence if defendants failed to request testing within ninety days after the state sent written notices of pending destruction to defendants, their lawyers, prosecutors and the attorney general.

Finally, on June 23, 2006, Governor Bush approved the Legislature's amendment to the post-conviction DNA testing law. The amended law imposes no time limitations for petitioners, and requires preservation of evidence throughout a defendant's sentence. The law includes other model provisions: defendants may petition for testing regardless of their initial plea, and the state appoints counsel and pays for DNA testing if the applicant is indigent.

NEBRASKA

In 2001, Nebraska passed legislation allowing any person in state custody to petition for post-conviction DNA testing. Nebraska's law places no statute of limitations on petitioners. The court must appoint counsel for indigent petitioners, and the cost of DNA testing may also be provided by the state. Furthermore, evidence that could be used for DNA analysis must be preserved upon request for testing.

The bill includes model language establishing the importance of post-conviction DNA testing:

> "Over the past decade, DNA testing has emerged as the most reliable forensic technique… Because of its scientific precision and reliability, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant. In other cases, DNA may not conclusively establish guilt or innocence but may have significant probative value to a finder of fact. DNA evidence produced even decades after a conviction can provide a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial. DNA testing responds to serious concerns regarding wrongful convictions, especially those arising out of mistaken eyewitness identification testimony; and there is a compelling need to ensure the preservation of biological material for post-conviction DNA testing…"[89]

The bill's sponsor, Senator Ernie Chambers, introduced another bill into the Nebraska Legislature on May 21, 2007 to express "support of all efforts to learn from DNA exonerations to increase the accuracy and reliability of criminal investigations, strengthen prosecutions, protect the innocent, and enhance public safety."[90] The bill was adopted on May 31, 2007. Nebraska's statute does contain one major flaw: DNA evidence must only be preserved once a defendant petitions for testing. Nebraska could improve its statute by requiring all DNA-testable evidence to be preserved for all inmates for the duration of their sentences.

VOICES OF SUPPORT

"Post-conviction DNA testing is an essential safeguard that can save innocent lives when the trial process has failed to uncover the truth. But it would be neither just nor sensible to enact a law that merely expanded access to DNA testing. It would not be just because innocent people should not have to wait for years after trial to be exonerated and freed. It would not be sensible because society should not have to wait for years to know the truth. When innocent people are convicted and the guilty are permitted to walk free, any meaningful reform effort must consider the root causes of these wrongful convictions and take steps to address them."[91]

Patrick Leahy
Senior United States Senator from Vermont
United States Senate, November 19, 2004

"Advanced DNA testing improves the just and fair implementation of the death penalty. …[I]t is indisputable that advanced DNA testing lends support and credibility to the accuracy and integrity of capital verdicts. …All Americans—supporters and opponents of the death penalty alike—should recognize that DNA testing provides a powerful safeguard in capital cases. We should be thankful for this amazing technological development. I believe that post-conviction DNA testing should be allowed in any case in which the testing has the potential to exonerate the defendant of the crime."[92]

Orrin Hatch
Senior United States Senator from Utah
United States Senate Committee on the Judiciary,
June 13, 2000

"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."[93]

George W. Bush
President of the United States
State of the Union, February 2, 2005

"Nobody should have to wait for justice. …I struggled for nearly twenty years to clear my name. This legislation [The Innocence Protection Act] will prevent innocent people from ending up on death row, and it will ensure that the truly guilty are caught."[94]

Kirk Bloodsworth
The first death row inmate exonerated by DNA evidence
The Washington Post, September 10, 2004

"If I'm a victim or the family member of a victim, I don't have finality if the wrong person is in prison. That's not justice for anyone."[95]

J. Alex Villalobos
Florida State Senator
Miami Herald, August 7, 2005

"Our system of justice . . . is capable of producing erroneous determinations of both guilt and innocence. A right of access to evidence for tests which . . . could prove beyond any doubt that the individual in fact did not commit the crime, is constitutionally required, I believe, as a matter of basic fairness."[96]

Hon. J. Michael Luttig
4th U.S. Circuit Court of Appeals
The Washington Post, March 29, 2002

"Prosecutors have nothing to lose—unless they put their pride before their professionalism—in allowing post-conviction DNA requests to go forward. If the DNA test proves the defendant is guilty, then all doubts will be resolved. If it exonerates the defendant, then there is an opportunity to correct a tragic mistake and begin the search for the real criminal."[97]

William Sessions
Former Director of the FBI and former prosecutor
The Washington Post, September 21, 2003

"Using DNA technology fairly and judiciously in post-conviction proceedings will help those of us responsible for the administration of justice do all we can to ensure a fair process and a just result."[98]

Janet Reno
Former Attorney General of the United States
Post-Conviction DNA Testing: Recommendations for Handling Requests, 1999

"What should govern on these questions is not legal precedent, not factual loopholes, but the fundamental obligation of everyone in the criminal justice system to ensure that only the factually guilty suffer in prison."[99]

Peter Neufeld
Co-Founder of The Innocence Project
Actual Innocence, 2001

"The [Massachusetts] DA's office has recognized the importance, both morally and ethically, of providing a defendant some kind of meaningful access to DNA technology that could serve to exonerate him—especially when the government now relies on that very science to convict him."[100]

Mark T. Lee
Asst. District Attorney, Suffolk County, Massachusetts
New England Law Review, Spring 2001

"The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial."[101]

Justice Harry Blackmun
United States Supreme Court
Arizona v. Youngblood, November 29, 1988

"[Youngblood] is the Dred Scott decision of modern times."[102]

Dr. Edward T. Blake
DNA scientist, Forensic Science Associates
Denver Post, July 22, 2007

QUESTIONS & ANSWERS

Once a statute is enacted, will the judiciary be flooded with petitions for DNA testing?

This has not been the case in states with post-conviction DNA testing laws. For example, New York, which has quite liberal standards for post-conviction DNA testing, only received a total of one-hundred applications during the first seven years that its statutes were in effect.[103] Furthermore, a number of different factors—the length of time evidence is preserved, and which defendants are eligible for testing, to name just two—could lead to different results. By and large, states with post-conviction DNA testing statutes did not experience an overwhelming deluge of applications after the passage of these laws. While there should be an initial increase in applications, the increasingly widespread use of pre-trial DNA analysis will likely contribute to a tapering off of demand after the initial backlog of cases is processed.

Will post-conviction DNA testing undermine the finality of our legal system?

Finality does offer closure to victims of a crime and the victims' families. Still, the benefits to justice that post-conviction DNA tests bring are too great to ignore. DNA testing also has the benefit of increasing finality by adding a degree of certainty to the judicial process. Florida State Senator J. Alex Villalobos, a former prosecutor, argues that "If I'm a victim or the family member of a victim, I don't have finality if the wrong person is in prison. That's not justice for anyone.[104]

Why should defendants who plead guilty or confessed to a crime be allowed access to DNA testing?

Documented false confessions leading to wrongful convictions occur more than anyone suspected prior to DNA testing. Likewise, nearly a dozen of the over two-hundred DNA exonerees pled guilty to crimes we now know that they did not commit.

While it might be difficult to accept that an innocent person might confess to a crime they did not commit, many of the reasons are well known. Intense and often extreme pressure from police interrogators, youth and vulnerability, and mental illness or handicap all leave an innocent suspect likely to confess to a crime they have not committed. Often, innocent suspects will believe that by confessing to a crime, they will be able to escape the extremes of an interrogation and then prove their innocence at trial.

Take for example the case of Jeff Deskovic, who falsely confessed to murder, rape, and possession of a weapon. Deskovic, then sixteen years old, believed that by telling interrogators what they wanted to hear he would not be jailed. Jurors believed his false confession despite DNA evidence presented at trial that proved he was not guilty. Deskovic spent fifteen years in prison for a crime he did not commit before subsequent DNA tests matched the murder to another man already serving time in prison for murder.[105]

Given the relatively low cost of DNA testing, there is no compelling reason to deny testing, regardless of a defendant's pre-trial plea or confession.

Will the cost of DNA testing be too burdensome for states to achieve?

The cost of a DNA test can be as little as thirty-five dollars, and even the most expensive testing still costs less than housing an inmate in prison for a year.[106] It's the cost of storing evidence that contributes most of the related expenditure, and this cost can vary widely from state to state, depending on the state's size as well as how advanced its current evidence storage system is. California estimated it would cost about one million dollars a year, but Texas said it would not pose a "significant fiscal impact."[107]

Is it necessary for defendants sentenced today, whose forensic evidence has already been tested, to be able to perform more DNA testing during their sentence?

The number of samples analyzed should certainly decrease in the coming years, but because technology is constantly advancing, evidence that could not be previously tested can now be analyzed, and evidence that could not reveal conclusive results can often now exonerate or further inculpate the defendant.[108] Likewise, some exonerees (such as the above mentioned Jeff Deskovic) were wrongfully convicted on other grounds despite the presence of exculpatory DNA evidence at trial. We should plan for future technological breakthroughs or positive matches to other persons on DNA databases now, ensuring that when DNA technology improves, we are prepared to accommodate its impact.

A MODEL POLICY

AN ACT CONCERNING POST-CONVICTION DNA TESTING[109]

I. Purpose

The purpose of this Act is to ensure that the innocent are protected by providing post-conviction DNA testing as a means of exonerating the wrongfully convicted. Because post-conviction DNA testing is a scientifically reliable method of proving a wrongfully convicted person's innocence: all biological evidence related to a defendant's criminal case should be preserved; a defendant should have the right to petition for post-conviction DNA testing; courts should have procedures in place to oversee the petitioning process and order testing; counsel should be provided to indigent defendants throughout the petitioning process; discovery related to the testing of biological evidence should be disclosed; and a Task Force should be established to devise standards regarding the proper collection and retention of biological evidence.

II. Scope

These standards should be applied in all criminal cases where biological evidence exists.

III. Definitions

A. When used in this Act, "biological evidence" means the contents of a sexual assault examination kit; and/or any item that could contain blood, semen, hair, saliva, skin tissue, or other identifiable biological material from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately (*e.g.*, on a slide, swab, or in a test tube) or is present on other evidence (including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes, etc.).

B. When used in this Act, "DNA" means deoxyribonucleic acid.

C. When used in this Act, "custody" means actual custody of a person under a sentence of imprisonment, custody of a probationer, parolee, or person on extended supervision by the department of corrections, actual or constructive custody of a person pursuant to a dispositional order, in institutional care, on conditional release, or on supervised release pursuant to a commitment order.

D. When used in this Act, "profile" means a unique identifier of an individual, derived from DNA.

E. When used in this Act, "state" refers to any governmental or public entity within [State] (including all entities within any city, county, or other locality) and its officials or employees, including but not limited to law enforcement agencies, prosecutors' offices, courts, public hospitals, crime laboratories, and any other entity or individual charged with the collection, storage, and/or retrieval of biological evidence.

IV. Petition for Post-Conviction DNA Testing

Notwithstanding any other provisions of law governing post-conviction relief, a person convicted of a crime and who asserts he did not commit that crime may at any time file a petition requesting forensic DNA testing of any biological evidence secured in relation to the investigation or prosecution attendant to the conviction. Persons eligible for testing include the following:

A. Persons currently incarcerated, serving a sentence of probation, or who have already been released on parole;
B. Persons convicted on a plea of not guilty, guilty (including "Alford" pleas), or *nolo contendere;* or
C. Persons who have finished serving their sentences.

V. Proceedings

The petitioner shall be granted full, fair, and prompt proceedings upon the filing of a motion under this Act. The petitioner shall serve a copy of such a motion upon the attorney for the state. The state shall file its response to the motion within thirty days of the receipt of service. The court shall hear the motion no sooner than thirty and no later than ninety days after its filing. Once the court hears the motion, and if the court grants the petitioner's request, testing should be performed as soon as is practicable.

VI. Order for Post-Conviction Testing

The court shall order testing upon the filing of a motion for post-conviction DNA testing, but only after the court provides the state with notice and an opportunity to respond and it holds a hearing on the motion in which it finds:

A. A reasonable probability that DNA evidence is materially relevant to a claim of innocence or reduced culpability;
B. One or more of the item(s) of evidence that the petitioner seeks to have tested still exists;
C. The evidence to be tested was secured in relation to the offense underlying the challenged conviction and:
    1. Was not previously subjected to DNA testing; or
    2. Was previously subjected to DNA testing and can now be subjected to additional testing using new methods or technologies
D. DNA testing that provides a reasonable likelihood of more probative results; and
E. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself has the potential to establish the integrity of the evidence. For purposes of this Act, evidence that has been in the custody of law enforcement, other government officials, or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement of this subsection, absent specific evidence of material tampering, replacement, or alteration; and
F. The application for testing is made to demonstrate innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.

VII. Order for Post-Conviction Comparison of Crime Scene Evidence to Forensic DNA Databases

Upon motion by a petitioner, and after the state has been provided with notice and an opportunity to respond and a hearing is held;

A. If the court determines any of the following to be materially relevant to a claim of innocence or a reduction in sentence:
    1. The State and/or National DNA Index System,
    2. Other suspects in the case, and
    3. Evidence from other cases
        a. Is materially relevant to a claim of innocence;
        b. Or a match between the crime scene evidence and any DNA from items 1-3 may lead to a lesser sentence;

B. The court shall order that the state crime laboratory:
    1. Generate a DNA profile from specified crime scene evidence, and compare the generated DNA profile to:
        a. Profiles in the [State] Designated Offender DNA Database (or other appropriate state name of offender database);
        b. [State] crime scene evidence database;
        c. The National DNA Index System;
        d. DNA samples from other suspects in the case; and
        e. DNA evidence from other cases; and
    2. Promptly report back to the court the results of all such DNA comparisons.

VIII. Counsel

The court may appoint counsel for an indigent petitioner at any time during proceedings under this Act.

A. If the petitioner has filed *pro se*, the court shall appoint counsel for the petitioner upon a showing that DNA testing may be material to the petitioner's claim of wrongful conviction.

B. The court, in its discretion, may refer *pro se* requests for DNA testing to qualified parties for further review, without appointing the parties as counsel at that time. Such qualified parties may include, but shall not be limited to, indigent defense organizations or clinical legal education programs.

C. If the petitioner has retained private *pro bono* counsel that may include, but shall not be limited to, counsel from a nonprofit organization that represents indigent persons, the court may, in its discretion, award reasonable attorney's fees and costs at the conclusion of litigation.

D. Counsel must be appointed no later than forty-five days after the date the court finds reasonable grounds or the date the court determines that the person is indigent, whichever is later.

IX. Discovery

A. At any time after a petition has been filed under this Act, the court may order:
    1. The state to locate and provide the petitioner with any documents,

notes, logs, or reports relating to items of physical evidence collected in connection with the case or otherwise assist the petitioner in locating items of biological evidence that the state contends have been lost or destroyed;

2. The state to take reasonable measures to locate biological evidence that may be in its custody;
3. The state to assist the petitioner in locating evidence that may be in the custody of a public or private hospital, public or private laboratory, or other facility; and/or
4. The production of laboratory reports prepared in connection with the DNA testing, as well as the underlying data and the laboratory notes, if evidence had previously been subjected to DNA testing.

B. If the prosecution or the petitioner previously conducted any DNA or other biological evidence testing without knowledge of the other party, such testing shall be revealed in the motion for testing or response.

C. If the court orders new post-conviction DNA testing in connection with a proceeding brought under this Act, the court shall order the production of any laboratory reports prepared in connection with the DNA testing. The court may, in its discretion, also order production of the underlying data, bench notes, or other laboratory notes.

D. The results of any post-conviction DNA testing conducted under this Act shall be disclosed to the prosecution, the petitioner, and the court.

E. Upon receipt of a motion for post-conviction DNA testing, the state shall prepare an inventory of the evidence related to the case and issue a copy of the inventory to the prosecution, the petitioner, and the court.

X. Choice of Laboratory

A. If the court orders DNA testing, such testing shall be conducted by a facility mutually agreed upon by the petitioner and the state and approved by the court.

B. If the parties cannot agree, the court shall designate the testing facility after providing parties with a reasonable opportunity to show cause for the court to allow testing to be performed at their preferred facility.

C. The court shall impose reasonable conditions on the testing to protect the parties' interests in the integrity of the evidence and the testing process.

XI. Payment

A. If a state or county crime laboratory conducts post-conviction DNA testing under this Act, the state shall bear the costs of such testing.

B. If testing is performed at a private laboratory, the court may require either the petitioner or the state to pay for the testing if cause be shown by the defense and as the interests of justice require.

C. If the state or county crime laboratory does not have the ability or resources to conduct the type of DNA testing to be performed, the state shall bear the costs of testing at a private laboratory that has such capabilities and is mutu-

ally agreeable to the petitioner and to the state.

D. If, under the above subsection (C), parties are not able to agree on a laboratory, then the court shall designate the testing facility and provide parties with a reasonable opportunity to show cause for the court to pay for testing at their preferred facility.

XII. Appeal

The petitioner shall have the right to appeal a decision denying post-conviction DNA testing.

XIII. Successive Petitions

A. If the petitioner has filed a prior petition for DNA testing under this Act or any other provision of law, the petitioner may file and the court shall adjudicate a successive petition or petitions under this Act, provided the petitioner asserts new or different grounds for relief, including, but not limited to, factual, scientific, or legal arguments not previously presented, or the availability of more advanced DNA technology.

B. The court may also, in its discretion, adjudicate any successive petition if the interests of justice so require.

XIV. Additional Orders

A. The court may in its discretion make such other orders as may be appropriate. This includes, but is not limited to, designating:

1. The type of DNA analysis to be used;
2. The testing procedures to be followed;
3. The preservation of some portion of the sample for testing replication;
4. Additional DNA testing, if the results of the initial testing are inconclusive or otherwise merit additional scientific analysis; and/or
5. The collection and DNA testing of elimination samples from third parties.

B. DNA profile information from biological samples taken from any person pursuant to a motion for post-conviction DNA testing shall be exempt from any law requiring disclosure of information to the public.

XV. Procedure Following Test Results

A. If the results of forensic DNA testing ordered under this Act are favorable to the petitioner, the court shall schedule a hearing to determine the appropriate relief to be granted. Based on the results of the testing and any evidence or other matter presented at the hearing, the court shall thereafter enter any order that serves the interests of justice, including any of the following:

1. An order setting aside or vacating the petitioner's judgment of conviction, judgment of not guilty by reason of mental disease or defect, or adjudication of delinquency;
2. An order granting the petitioner a new trial or fact-finding hearing;

3. An order granting the petitioner a new sentencing hearing, commitment hearing, or dispositional hearing;
4. An order discharging the petitioner from custody;
5. An order specifying the disposition of any evidence that remains after the completion of the testing;
6. An order granting the petitioner additional discovery on matters related to DNA test results or the conviction or sentence under attack, including, but not limited to, documents pertaining to the original criminal investigation or the identities of other suspects; and/or
7. An order directing the state to place any unidentified DNA profile(s) obtained from post-conviction DNA testing into state and/or federal databases.

B. If the results of the tests are not favorable to the petitioner, the court:
   1. Shall dismiss the petition; and
   2. May make any further orders that are appropriate, including those that:
      a. Provide that the parole board or a probation department be notified of the test results;
      b. Request that the petitioner's DNA profile be added to the state's convicted offender database;
      c. Provide that the victims be notified of both the application for DNA testing and the results.

XVI. Consent

A. Nothing in this Act shall prohibit a convicted person and the state from consenting to and conducting post-conviction DNA testing by agreement of the parties, without filing a motion for post-conviction DNA testing under this Act.

B. Notwithstanding any other provision of law governing post-conviction relief, if DNA test results are obtained under testing conducted upon consent of the parties which are favorable to the petitioner, the petitioner may file and the court shall adjudicate, a motion for post-conviction relief based on the DNA test results under section XV of this Act.

XVII. Standards and Training of Evidence Custodians

A. From appropriations made for that purpose, a statewide Task Force comprised of members appointed by the Governor; the Attorney General; the state's District and County Attorneys Association; the state's Criminal Defense Lawyers Association; the state's Bar Association; the Judiciary/Criminal Justice Committee of the [State] Senate; the Judiciary/Criminal Justice Committee of the [State] House of Representatives; the Chief Justice of the Supreme Court; the chancellor of the State University system; the [state] property clerk's association; and the State Police, shall devise standards regarding the proper collection and retention of biological evidence; and

B. The Division of Criminal Justice Services shall administer and conduct training programs for law enforcement officers and other relevant employees that

are charged with preserving biological evidence regarding the methods and procedures referenced in this Act.

XVIII. Preservation of Evidence

A. Notwithstanding any other provision of law, every appropriate governmental entity shall retain each item of physical evidence that may contain biological material secured in connection with a criminal case in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence for the period of time that any person connected to that case, including any co-defendant(s) convicted of the same crime, remains incarcerated, on probation or parole, civilly committed, or subject to registration as a sex offender.

B. This Act applies to evidence that:
    1. Was in the possession of the state during the investigation and prosecution of the case; and
    2. At the time of conviction was likely to contain biological material.

C. This requirement shall apply with or without the filing of a petition for post-conviction DNA testing, and to pleas of not guilty, guilty (including "Alford" pleas), or *nolo contendere*.

D. In cases where a petition for post-conviction DNA testing has been filed under this Act, the state shall prepare an inventory of the evidence related to the case and submit a copy of the inventory to the petitioner and the court.
    1. If evidence is intentionally destroyed after the filing of a petition under this Act, the court may impose appropriate sanctions on the responsible party or parties.
    2. If the court finds that evidence was intentionally destroyed in violation of the provisions of this statute, it shall consider appropriate remedies.
    3. If the court determines that evidence was destroyed in violation of any of the provisions of this statute, the court may impose appropriate sanctions and/or remedies for noncompliance such as contempt, granting a new trial, dismissal of charges, and/or sentence reduction or modification.

E. Should the state be called upon to produce biological evidence that could not be located and whose preservation was required under the provisions of this statute, the evidence custodian assigned to the entity charged with the preservation of said evidence shall provide an affidavit in which he describes, under penalty of perjury, the efforts taken to locate that evidence and that the evidence could not be located.

XIX. Development of Centralized Tracking System

The statewide Task Force shall also make recommendations for a statewide centralized tracking system for all biological evidence in the state's possession. The system shall allow evidence connected to both open cases and post-conviction DNA testing cases to be located expeditiously.

STATISTICS

As of June 2008, over two-hundred people have been exonerated with DNA evidence. The first in-depth study of the first two hundred individuals exonerated by DNA testing found that "[m]ore than one quarter of all post-conviction DNA exonerations (fifty-three) occurred in cases where DNA was available at the time of the criminal trial" (after 1990).[110] Reasons for these wrongful convictions include advances in DNA technology since the time of trial, forensic fraud, the failure of defense counsel to request DNA testing, conviction despite DNA exclusion, and court denial of the DNA testing request.

The study found that "courts denied at least twelve exonerees relief despite at least preliminary DNA test results excluding them; each was later exonerated after an executive or higher court granted relief. Forty-one (twenty-one percent) received a pardon from their state executive, often because they lacked any available judicial forum for relief."[111]

The study notes that "[t]he demographics of the group are not representative of the prison population, much less of the general population."[112] It describes the group as all male save one, with twenty-two juveniles, twelve mentally handicapped people, one-hundred twenty-four black, and seventeen Hispanic exonerees. Seventy-three percent of those proven innocent of rape are black or Hispanic, while only about "thirty-seven percent of all rape convicts are minorities."[113]

According to The Innocence Project, the real perpetrator has been identified in eighty-two of the first 218 DNA exoneration cases. [114]

LITERATURE

SUGGESTED READINGS

The following materials are recommended reading for individuals interested in enhancing their knowledge of post-conviction DNA testing.

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ENDNOTES

[1] The Innocence Protection Act of 2004, 18 U.S.C.A §§ 3600, 3600A and 42 U.S.C.A. § 14163 (West, WestLaw through 2008 Pub. L. 110-244), was passed as part of the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended in scattered sections of 18 U.S.C.A and 42 U.S.C.A. (West, WestLaw through 2008 Pub. L. 110-244)).

[2] As of June 2008, funding for this program has not yet been distributed to states.

[3] Alabama, Alaska, Massachusetts, Mississippi, South Carolina, and South Dakota lack statutes allowing post-conviction DNA testing. Oklahoma's statue expired in 2005. Wyoming passed a post-conviction DNA testing law in March of 2008 that will go into effect on July 1, 2008.

[4] Solomon Moore, *Exoneration Leads to Change in Legal System*, N.Y. TIMES, Oct. 1, 2007, at A1. See *infra* note 7 for states that sufficiently require preservation of evidence.

[5] IDAHO CODE ANN. § 19-4902 (West, WestLaw through 2008 Chs. 1-410).

[6] Cynthia Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1239-40 (2005).

[7] *Ariz. V. Youngblood*, 488 U.S. 51, 58 (1988).

[8] States that require preservation of evidence throughout a person's incarceration are California, CAL. PENAL CODE § 1417.9 (West, WestLaw through 2008 Ch. 31); Connecticut, CONN. GEN. STAT. ANN. §54-102jj(b) (West, WestLaw through 2008 Supplement to the Connecticut General Statutes); Florida, FLA. STAT. ANN. § 925.11(4)(a) (West, WestLaw through 2008 2d Reg. Sess.); Hawaii, HAW. REV. STAT. §844D-126(a) (West, WestLaw through 2007 3d Spec. Sess.); Maryland, MD. CODE ANN., CRIM. PROC. § 8-201(i)(2) (West, WestLaw through 2008 Reg. Sess.); Michigan, MICH. COMP. LAWS ANN. § 770.16(11) (West, WestLaw through P.A. 2008, No. 162); Minnesota, MINN. STAT. ANN. § 590.10 (West, WestLaw through 2008 Reg. Sess.); New Hampshire, N.H. REV. STAT. ANN. § 651-D:3(II) (West, WestLaw through 2008 Ch. 24); New Mexico, N.M. STAT. ANN. § 31-1A-2(L) (West, WestLaw through laws effective May 14, 2008, 2d Reg. Sess.); Rhode Island, R.I. GEN. LAWS § 10- 9.1-11(a) (West, WestLaw through 2007 legislation); Texas, TEX. CRIM. PROC. CODE ANN. art. 38.43 (Vernon, WestLaw through 2007 Reg. Sess.); Wisconsin, WIS. STAT. ANN. § 978.08(2) (West, WestLaw through 2007 Act 24); and Washington, DC, DC CODE ANN. § 22-4134(a) (West, WestLaw through May 12, 2008).

[9] Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 641 (2001).

[10] *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60, 74 (2008) (providing numbers of DNA exonerees who falsely confessed and accepted plea bargains).

[11] *Id.* at 74; The Innocence Project, News and Information: Fact Sheets, http://www.innocenceproject.org/Content/351.php (last visited June 19, 2008).

[12] JUNKIN, *infra* note 64, at 245.

[13] Frederick R. Bieber, *Science and Technology of Forensic DNA Profiling: Current Use and Future Directions*, *in* DNA AND THE CRIMINAL JUSTICE SYSTEM 23, 28-36 (David Lazer, ed., 2004).

[14] *See* Karen Christian, *"And the DNA Shall Set you Free": Issues Surrounding Post-conviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1208-14, 1241 (2001) (discussing the inconsistency of post-conviction DNA testing among states without statutes and the need for a consistent approach). *See also* Rachel Steinback, *The Fight For Post-Conviction DNA Testing is Not Yet Over: An Analysis of the Eight Remaining "Holdout States" and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted*, 98 J. CRIM. L. & CRIMINOLOGY 329, 339-342 (discussing the problems with non-statutory approaches to securing post-conviction DNA testing).

[15] Innocence Protection Act of 2004, 18 U.S.C.A. § 3600(a)(8)(B).

[16] 150 CONG. REC. S11611 (statement of Sen. Leahy).

[17] MICHAEL BROMWICH, FINAL REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM (2007) at 114.

[18] One recent case, reported on October 3, 2007, involves inmate Ronald Taylor. An HPD analyst had testified at his original trial that no semen was present at the crime scene. Recent tests, however, have shown that testimony to be false. The semen at the scene matches the DNA of a convicted felon already in jail. Taylor was exonerated in January 2008. *Indictment Dismissed Against Houston Man Cleared by DNA Testing*, ASSOCIATED PRESS ST. & LOC. WIRE, Jan. 15, 2008, at State and Regional.

[19] Justice for All Act of 2004, Pub. L. No. 108-405, § 306, 118 Stat. 2260, 2274-75 (codified as amended at 42 U.S.C.A. § 14136c (West, WestLaw through 2008 Pub. L. 110-244)); Justice for All Act of 2004, § 302, 118 Stat. 2260, 2272-73 (codified as amended at 42 U.S.C.A. § 14132 (West, WestLaw through 2008 Pub. L. 110-244)).

[20] Forensics laboratories in Arkansas are supervised by an appointee of the governor, while Maryland's forensics laboratories are under the Maryland Department of Health and Mental Hygiene. Virginia also utilizes independent laboratories. Alabama utilizes an autonomous Department of Forensic Services, but its head is appointed by the Attorney General rather than the governor. ARK. CODE ANN. § 12-12-304 (West, WestLaw through 2008 First Exec. Sess.); MD. CODE ANN., HEALTH-GEN § 17-2A-02 (West, WestLaw through all chapters of 2008 Reg. Sess. effective through June 1, 2008); VA. CODE ANN. § 9.1-1100 (West, WestLaw through 2007 Reg. Sess.); and ALA. CODE § 36-18-1 (West, WestLaw through Act 2008-270).

[21] N.C. GEN. STAT. ANN. § 15A-269 (e) (West, WestLaw through 2007 Reg. & Exec. Sess.).

[22] NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T JUSTICE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 45-50 [hereinafter NAT'L COMM'N] (2001).

[23] *When is Justice Served?: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 104 (2000) [hereinafter *Hearing*] (testimony of Barry Scheck).

[24] Garrett, *supra* note 10, at 120.

[25] NAT'L INST. JUSTICE, U.S. DEP'T JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).

[26] NAT'L COMM'N, *supra* note 22, at 43.

[27] Seth F. Kreimer and David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Post-conviction DNA Testing*, 151 U. PA. L. REV. 547, 557 (2002).

[28] Christian, *supra* note 14, at 1228; Justice for All Act of 2004, Pub. L. No. 108-405, § 411, 118 Stat. 2260, 2278-84 (codified as amended at 18 U.S.C.A. §§ 3600-3600a (West, WestLaw through 2008 Pub. L. 110-244)).

[29] Innocence Protection Act of 2004, *supra* note 1.

[30] Justice for All Act of 2004, Pub. L. No. 108-405, § 411, 118 Stat. 2260, 2278-84.

[31] Justice for All Act of 2004 § 412, 118 Stat. at 2284-85.

[32] *Cal. v. Trombetta*, 467 U.S. 479 (1984); *Ariz. v. Youngblood*, 488 U.S. 51 (1988).

[33] *Trombetta*, 467 U.S. at 488-89.

[34] *Youngblood*, 488 U.S. at 57-58.

[35] *Id.* at 58.

[36] *Id.* at 66 (Blackmun, J., dissenting).

[37] Susan Greene & Miles Moffeit, *Trashing the Truth: Destruction of Evidence*, DENVER POST, July 22, 2007, at A1.

[38] *Harvey v. Horan*, 278 F.3d 370, 372 (4th Cir. 2002).

[39] Civil Action for Deprivation of Rights, 42 U.S.C.A. § 1983 (West, WestLaw through 2008 Pub. L. 110-244).

[40] *Harvey*, 278 F.3d at 376.

[41] *Id.*

[42] *Dabbs v. Vergari*, 570 N.Y.S.2d 765, 767 (1990).

[43] *Id.*

[44] *People v. Dabbs*, 587 N.Y.S.2d 90, 91 (N.Y. Sup. Ct. 1991).

[45] *People v. Callace*, 673 N.Y.S.2d 137, 138 (N.Y. Co. Ct. 1991).

[46] *State v. Thomas*, 586 A.2d 250, 252 (N.J. Super. Ct. App. Div. 1991).

[47] *Sewell v. State*, 592 N.E.2d 705, 706-08 (Ind. Ct. App. 1992).

[48] *Commonwealth v. Bison*, 618 A.2d 420, 425-26 (Pa. Super. Ct. 1992).

[49] *Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994).

[50] *Id.* at 863-64.

[51] *People v. Kellar*, 605 N.Y.S.2d 486, 486 (App. Div. 1993).

[52] *People v. Washington*, 665 N.E.2d 1330, 1336-37 (Ill. 1996).

[53] *Jenner v. Dooley*, 590 N.W.2d 463, 472 (S.D. 1999).

[54] *Id.* at 466.

[55] *Id.* at 472.

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[59] Holly Schaffter, *Post-conviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 735 (2002).

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[61] Margaret A. Berger, *Lessons from DNA: Restriking the Balance Between Finality and Justice*, *in* DNA AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 13, at 109, 115.

[62] National Conference of State Legislatures, Comparison of State Post Conviction DNA Laws, http://www.ncsl.org/programs/health/genetics/DNAchart.htm (last visited June 20, 2008).

[63] California Senate Bill 1342 Task Force, Post-conviction DNA Testing Task Force Final Report, http://ag.ca.gov/publications/finalproof.pdf (last visited June 17, 2008).

[64] TIM JUNKIN, BLOODSWORTH 46 (2005).

[65] *Id.* at 53.

[66] *Id.* at 91.

[67] *Id.* at 283.

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[69] Jones, *supra* note 6, at 1245; JUNKIN, *supra* note 64, at 245.

[70] Chebium, *supra* note 68.

[71] Stephanie Hanes, *DNA That Freed Man Leads to New Suspect; Killing: Kirk Bloodsworth, Convicted and Then Cleared in the Rape-Murder of a Child, Learns a Man He Knew in Prison is Charged with the Crimes*, BALT. SUN, Sept. 23, 2003, at 1A.

[72] Susan Levine, *Death Row Inmate Hears Hoped-for Words: We Found Killer*, WASH. POST, Sept. 6, 2003, at A1.

[73] JUNKIN, *supra* note 64, at 268.

[74] Deborah Rieselman, *Wrongfully Imprisoned Man Thanks UC Students for Freedom*, U. CIN. MAG., http://www.magazine.uc.edu/exclusives/elkins.htm (last visited on June 19, 2008).

[75] Phil Trexler, *Girl's Story Again Key, This Time in Bid to Free Uncle Convicted in 1998 Slaying*, AKRON BEACON J., May 24, 2002, at A1.

[76] *State v. Elkins*, No 21380, 2003 WL 22015409, at 4-5 (Ohio App. 9th Aug. 27, 2003).

[77] Phil Trexler, *Woman's Lonely Battle is Won at Last; Melinda Elkins Lost Her Mother to Murder, Her Husband to Injustice, and Her Sister to Suspicion. Now Comes Healing*, AKRON BEACON J., Dec. 22, 2005, at A1.

[78] Phil Trexler, *Judge Grants Request for Feb. 23 Hearing over New DNA Evidence in 1998 Slaying*, AKRON BEACON J., Dec. 29, 2004, at B1.

[79] Rieselman, *supra* note 74.

[80] Cynthia Bowers, *Wife's Detective Work Frees Hubby*, CBS NEWS, Dec. 20, 2005, http://www.cbsnews.com/stories/2005/12/20/earlyshow/main1140199.shtml.

[81] McCarty & Bischoff, *supra* note 56.

[82] Rieselman, *supra* note 74.

[83] *Id.*

[84] McCarty & Bischoff, *supra* note 56.

[85] *Id.*

[86] Phil Trexler, *Ohio to Settle Elkins Lawsuit: Local Man Exonerated in 1998 Murder, Rape to Get $1.075 Million for His Years in Prison*, AKRON BEACON J., Mar. 31, 2006, at A1.

[87] CAL. PENAL CODE § 1405(c)(1)(B) (West, WestLaw through 2008 Reg. Sess. Ch. 31 & 2007-2008 Third Exec. Sess. Ch. 7).

[88] Lisa Arthur & Jay Weaver, *DNA Testing Deadline Challenged*, MIAMI HERALD, Aug. 7, 2005, at B2.

[89] NEB. REV. STAT. § 29-4118 (2001).

[90] L.R. 214, 100th Leg., 1st Reg. Sess. (Neb. 2007).

[91] 150 CONG. REC. S11612 (statement of Sen. Leahy).

[92] *Hearing*, supra note 23, at 2 (statement of Sen. Orrin Hatch).

[93] Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126, 130 (Feb. 2, 2005).

[94] Mary Fitzgerald, *Victims Push for DNA Bill on Hill*, WASH. POST, Sept. 10, 2004, AT A27.

[95] Arthur & Weaver, *supra* note 88.

[96] Brooke Masters, *Two Conservative Jurists Back DNA Testing*, WASH. POST, Mar. 29, 2002, at A7.

[97] William Sessions, Op-Ed., *DNA Tests Can Free the Innocent. How Can We Ignore That?*, WASH. POST, Sept. 21, 2003, at B2.

[98] NAT'L COMM'N, *supra* note 22, at iii.

[99] BARRY SCHECK ET AL., ACTUAL INNOCENCE 247-48 (2001).

[100] Mark Lee, *The Impact of DNA Technology on the Prosecutor: Handling Motions for Post-Conviction Relief*, 35 NEW ENG. L. REV. 663, 664 (2001).

[101] *Ariz. v. Youngblood*, 488 U.S. 51, 66 (1988) (Blackmun, J., dissenting).

[102] Greene & Moffeit, *supra* note 37.

[103] Berger, *supra* note 61, at 115.

[104] Arthur & Weaver, *supra* note 88.

[105] Fernanda Santos, *DNA Evidence Frees a Man Imprisoned for Half His Life*, N.Y. TIMES, Sept. 21, 2006, at B1; The Innocence Project, Know the Cases: Jeff Deskovic, http://www.innocenceproject.org/Content/44.php (last visited June 20, 2008).

[106] Christian, *supra* note 14, at 1236.

[107] National Conference of State Legislatures, *supra* note 62.

[108] Bieber, *supra* note 13, at 27.

[109] Elements of this model policy were inspired by, or taken from, the following sources: 18 U.S.C.A. § 3600 (West, WestLaw through 2008 Pub. L. 110-244); The Innocence Project, An Act Concerning Access to Post-Conviction DNA Testing, http://www.innocenceproject.org/docs/Model_Statute_Postconviction_DNA.pdf (last visited on June 17, 2008); The Innocence Project, "An Act to Improve the Preservation and Accessibility of Biological Evidence," http://www.innocenceproject.org/docs/Preservation_Evidence_Prescriptive_08.pdf (last visited on June 17, 2008); and Nina Morrison, *Essential Elements of Postconviction DNA Testing Statutes*, INNOCENCEPROJECT.ORG, Oct. 2, 2003, http://www.innocenceproject.org/docs/IP_Legislation_Memorandum.html.

[110] Garrett, *supra* note 10, at 130.

[111] *Id.* at 120.

[112] *Id.* at 66.

[113] *Id.* at 67.

[114] The Innocence Project, *supra* note 11.

THE JUSTICE PROJECT

Working to Increase Fairness and Accuracy in the Criminal Justice System

ABOUT THE JUSTICE PROJECT

The Justice Project is comprised of two nonpartisan organizations dedicated to fighting injustice and to creating a more humane and just world. The Justice Project, Inc., which lobbies for reform, and The Justice Project Education Fund, which increases public awareness of needed reforms, work together on the Campaign for Criminal Justice Reform to reaffirm America's core commitment to fairness and accuracy by designing and implementing national and state-based campaigns to advance reforms that address significant flaws in the American criminal justice system, with particular focus on the capital punishment system.

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NATIONAL AGENDA FOR REFORM

The Justice Project (TJP) has developed a national program of initiatives designed to address and affect the policies and procedures that perpetuate errors and contribute to the conviction and incarceration of innocent people, especially within the death penalty system. As such, TJP advocates for 1) improvements in eyewitness identification procedures; 2) electronic recording of custodial interrogations; 3) higher standards for admitting snitch or accomplice testimony at trial; 4) expanded discovery in criminal cases; 5) improvements in forensic testing procedures; 6) greater access to post-conviction DNA testing; 7) proper standards for the appointment and performance of counsel in capital cases; and 8) safeguards against prosecutorial misconduct.

As part of its efforts to increase fairness and accuracy in the criminal justice system, TJP is developing comprehensive policy reviews on each of the eight reform initiatives outlined above. The policy reviews are designed to bridge the education gap and provide the necessary information with which policymakers, legal and law enforcement practitioners, advocates, and other stakeholders learn about the best practices within these reform areas, the reasoning behind small yet important changes in procedure, their practical effect, and the costs and benefits of implementation. For more information, please visit www.thejusticeproject.org.

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"Law's evolution is never done,
and for every improvement made
there is another reform that is overdue."

— Justice William J. Brennan, Jr.

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