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Preventing the Execution of the Innocent: Testimony Before the Senate Judiciary Committee

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PREVENTING THE EXECUTION OF THE INNOCENT: TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

*Barry C. Scheck**

There have been at least seventy-three postconviction DNA exonerations in North America;[1] sixty-seven in the United States,[2] and six in Canada.[3] Our Innocence Project at the Benjamin N. Cardozo School of Law has either assisted or been the attorney of record in thirty-nine of those cases,[4] including eight individuals who served time on death row.[5] In sixteen of these seventy-three postconviction exonerations, DNA testing has not only remedied a terrible miscarriage of justice, but led to the identification of the real perpetrator.[6] With the expanded use of DNA databanks and the continued technological advances in DNA testing, not only will postconviction DNA exonerations increase, but the rate at which the real perpetrators are apprehended will grow as well.

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* Prepared statement of Professor Barry C. Scheck, June 13, 2000, before the Senate Judiciary Committee; Co-Director, Innocence Project, Benjamin N. Cardozo School of Law. Commissioner, New York State Forensic Science Commission. Commissioner, NIJ Commission on the future of DNA evidence. Co-author, *Actual Innocence Before the Senate Judiciary Committee*.

In the interests of preserving the authenticity of the original testimony, the editors of the *Hofstra Law Review* have largely refrained from rigorously conforming the text of this document to the dictates of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

1. *See* Ross E. Milloy, *Some Prosecutors Willing to Review DNA Evidence*, N.Y. TIMES, Oct. 20, 2000, at A18.

2. *See id.*

3. *See id.*

4. *See Cardozo Law Innocence Project*, *at* http://www.cardozo.yu.edu/innocence_project.html (last modified Oct. 13, 2000). The number of exonerations has increased since Professor Scheck testified on June 6, 2000. As of November 16, 2001, there have been ninety-three DNA exonerations, eleven of which have been from death row. *See id.* The Innocence Project has assisted or represented prisoners in fifty-three of these cases. *See id.*

5. *See* Milloy, *supra* note 1, at A18.

6. *See id.*

There is an urgent need for national legislation to assist a narrow but important group of people: Those who are sentenced to decades in prison, or sit on death row, but could show through postconviction DNA testing that they were wrongly convicted or sentenced. I am profoundly indebted to you, Senator Hatch, for taking up this cause and holding these hearings; and, of course, I cannot thank enough Senator Leahy and Senator Smith for co-sponsoring the Innocence Protection Act.

As you consider this historic legislation, I would urge you to keep these key points in mind:

1. Do Not Limit Relief to Capital or Life Sentence Cases

Only eight of the seventy-three postconviction DNA exonerations involved inmates on death row.[7] People who have been sentenced to decades of incarceration but can prove their innocence deserve an opportunity for justice. Unless there is a uniform requirement that states give inmates such an opportunity, they will not necessarily receive. For example, the State of Washington just [passed] a postconviction DNA bill[8] but it only applies in capital or life sentence cases.[9] Fundamental fairness requires an equal opportunity for all classes of inmates across the country to prove their innocence; only federal legislation can provide such a guarantee.

2. No Statute of Limitations

In our report, *Recommendations For Handling Postconviction DNA Applications*, and in our model statute, the Commission on the Future of DNA Evidence did not create any time limits or statute of limitations for making a postconviction DNA application.[10] The key requirements were substantive—the inmate has to show a reasonable probability that DNA testing would demonstrate he was wrongly convicted or sentenced.[11] I can assure you, based on the work of the Innocence Project, which has done, by far, more postconviction DNA litigation than anyone else, that the Commission's decision not to create any new time limits or statute of limitations was a considered judgment and a correct one. When one is

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7. *See id.*

8. *See* Editorial, *Important Safeguards to Protect the Innocent*, SEATTLE TIMES, Apr. 24, 2000, at B4.

9. *See id.*

10. *See* JEREMY TRAVIS & CHRISTOPHER ASPLEN, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS vi-vii (1999), (arguing that because DNA information remains viable indefinitely, there is no reason to impose a statute of limitations requiring a motion for postconviction evidence to be analyzed within a certain amount of time).

11. *See id.* at 35.

dealing with old cases (ten, fifteen, sometimes twenty years old) it is difficult to assemble police reports, lab reports, and transcripts of testimony that are necessary to show that a DNA test would demonstrate innocence. Indigent inmates serving hard time may not have the resources or access to counsel to gather the necessary materials expeditiously.

That was true for Dennis Fritz and Ron Williamson who were exonerated with DNA testing in April of 1999 in Oklahoma.[12] Dennis received a life sentence.[13] Ron came within five days of execution.[14] DNA testing also identified the person, through a DNA databank hit, who probably committed the rape homicide.[15] It was true for Clyde Charles of Houma, Louisiana who spent nineteen years in Angola Prison, the so-called "Farm,"[16] and nine years trying, unsuccessfully, to get a DNA test within the state courts of Louisiana[17]—they said he was too late—until we got a federal judge to grant relief pursuant to a § 1983 suit for injunctive relief.[18] It was true for Herman Atkins of Riverside, California who was released in February of 2000.[19] It was true for Neil Miller of Boston who was released only because, after many years of trying through the courts, District Attorney Ralph Martin consented to DNA testing.[20] It was true for A. B. Butler of Tyler, Texas who was pardoned two weeks ago by Governor Bush after seventeen years in jail for a crime he did not commit.[21] Butler attempted unsuccessfully pro se to get DNA testing through the courts for seven years;[22] he only got

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12. *See* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 151-52 (2000).

13. *See id.* at 141.

14. *See id.* at 146.

15. *See id.* at 152.

16. *See* Alan Clendenning, *DNA Test Frees Convicted Rapist, Implicates Brother*, L.A. TIMES, Nov. 26, 2000, at A1.

17. *See id.*

18. *See* Charles v. Greenberg, No. CIV.A.00-958, 2000 WL 1838713, at *3 (E.D. La. Dec. 13, 2000). The suit for injunctive relief survived a motion to dismiss. *See id.* This led to negotiations and subsequently an agreement between the parties to give Charles access to the DNA evidence. *See id.*

19. *See* Jenifer Warren & Rone Tempest, *DNA Testing in Criminal Cases to Expand*, L.A. TIMES, Sept. 29, 2000, at A3.

20. *See DNA Tests Free Innocent Man After 10 Years*, PATRIOT LEDGER (Quincy, Mass.), May 11, 2000, at 2.

21. *See* John Moritz, *77th Texas Legislature: Senate Panel Puts DNA Testing on Fast Track*, FORT WORTH STAR-TELEGRAM, Feb. 13, 2001, at 1.

22. *See id.*

testing after the Centurion Ministries and attorney Randy Schaffer got involved and obtained consent to testing from a local district attorney.[23]

Without adequate counsel, and without resources, it is simply unrealistic and unfair to create a new statute of limitations on post-conviction DNA testing. It should be enough for the inmate to show that a DNA test would provide non-cumulative, exculpatory evidence demonstrating that he was wrongfully convicted or sentenced.

3. There Should Be A Duty to Preserve Biological Evidence While an Inmate is incarcerated

In 75% of our Innocence Project cases, where we have already determined that a DNA test would demonstrate innocence if it were favorable to the inmate, the evidence is lost or destroyed.[24] Calvin Johnson of Georgia was exonerated after seventeen years in prison for a crime he didn't commit[25] but only because, by sheer chance, a court clerk decided not to destroy, as a matter of bureaucratic routine, the rape kit that led to his freedom.[26] The rules for the preservation of biological evidence are totally haphazard across the country.[27] There should be a general requirement to preserve biological evidence and an opportunity for law enforcement, upon notice to an inmate, to move for destruction of the evidence in an orderly way. This would not only preserve the rights of inmates to produce proof of their innocence through DNA testing, but help law enforcement re-test old cases to catch the real perpetrators.

4. There Must Be More Funding to Provide Competent Counsel, Especially in Capital Cases

Recent revelations reported by the *Chicago Tribune* about the lack of adequate counsel for inmates on Death Row in Illinois and Texas[28] are troubling but not surprising. The American Bar Association has long

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23. *See* Lauren Kern, *Innocence Lost? Despite its Increasing Importance, DNA Evidence Routinely Gets Destroyed Here*, HOUSTON PRESS, Nov. 30, 2000, at 19.

24. *See All Things Considered: Interview: Attorney Barry Scheck Discusses New DNA Testing Able to Reveal Innocent People Who Have Been Convicted of Crimes* (National Public Radio broadcast, May 19, 1999), *available at* 1999 WL 32905084.

25. *See* DWYER, NEUFELD & SCHECK, *supra* note 12, at 194.

26. *See* Sharon Cohen, *Survival of Evidence Turns on Pure Luck*, L.A. TIMES, Oct. 8, 2000, at A12.

27. *See id.*

28. *See* Mike Dorning, *Ryan: 'Spirit of Justice' Needed in Death Penalty: Hyde Agrees That He Would Support Limited Safeguards*, CHI. TRIB., June 21, 2000, at 1.

been on record about this crisis,[29] and in our book, *Actual Innocence*,[30] we discuss at great length the terrible problem of incompetent counsel we found among the individuals exonerated with postconviction DNA testing.[31] DNA testing only helps correct conviction of the innocent in a narrow class of cases; most homicides do not involve biological evidence that can be determinative of guilt or innocence.[32] Nothing guarantees the conviction of the innocent more than a bad or underfunded lawyer. We have to rely on the adversary system, and the key to that system is a defense lawyer who is qualified, has adequate funds for investigation and experts, and is compensated well enough to provide good representation. I strong[ly] support those sections of the Leahy-Smith bill that provide for standards and more funding for counsel.[33]

5. Requirements About the Availability of DNA Technology Should Remain Flexible

In the vast majority of postconviction DNA exonerations some form of DNA testing was, in theory, available to the defendant at the time of trial.[34] In some instances the form of DNA testing available was not sensitive enough to produce a result,[35] but later testing was able to produce irrefutable evidence of innocence.[36] For example, Kirk Bloodsworth of Maryland, who received a death sentence,[37] had inconclusive DNA testing using RFLP (Restriction Fragment Length Polymorphism Testing)[38] but was exonerated by PCR (Polymerase Chain

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29. *See* James Podgers, *A Break for Executions: New ABA President Calls for Push on Death Penalty Moratorium*, A.B.A. J., Aug. 2000, at 99.

30. DWYER, NEUFELD & SCHECK, *supra* note 12.

31. *See id.* at 183-92.

32. *See* Geoffrey Christopher Rapp, Book Note, *DNA's Dark Side: Five Days to Execution and Other Dispatches from the Wrongly Convicted*, 110 YALE L.J. 163, 167 (2000) (reviewing JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000)).

33. *See* Innocence Protection Act of 2000, S. 2690, 106th Cong. § 201 (2000); *see also* Innocence Protection Act of 2001, S. 486, 107th Cong. § 201 (2001), *reprinted in* 29 HOFSTRA L. REV. 1113 (2001).

34. *See* DWYER, NEUFELD & SCHECK, *supra* note 12, at xv, 10.

35. *See id.* at 35-36.

36. *See id.* at 36-40.

37. *See id.* at 218.

38. *See id.* at 35-36. Restriction fragment length polymorphism ("RFLP") is a DNA fingerprint test which only works when there is a large amount of DNA available. *See id.* at 36. However, with the "messy reality of crime scenes," DNA cannot usually be found in such large quantities, which can thus render the RFLP test useless in some cases. *See id.*

Reaction) testing.[39] Other times requests for available DNA testing were wrongfully denied by trial courts,[40] or incompetent lawyers failed to request the testing.[41] In other cases, early forms of DNA testing which were not very discriminating (e.g., the PCR DQ Alpha test) and failed to exclude a defendant at the time of trial[42] but a more discriminating DNA test, developed years later, produced proof of innocence.[43] The technology is always advancing and that is why it is wise to provide for the opportunity to prove innocence with new, more accurate DNA testing. Indeed, this is precisely the course Governor Bush adopted in the Randy McGinn reprieve decision.[44] Mitochondrial DNA testing, one of the more sensitive tests that will be used in the McGinn case, can now get results by extracting DNA from the shaft of a hair;[45] previously, one needed a hair with a fleshy root to get a result.[46] This technological breakthrough is of critical importance because microscopic hair comparison—a forensic test that is increasingly being exposed as junk science—has contributed to the conviction of at least eighteen men subsequently exonerated with DNA testing.[47]

6. Postconviction DNA Exonerations Provide An Unprecedented Opportunity To Improve the Criminal Justice System

Postconviction DNA exonerations have a special value for improving the entire criminal justice system. Never before have so many people been exonerated so quickly without any debate about their actual innocence. The fact that DNA testing can so exonerate the wrongly convicted is hardly news; what is more important, however, is to figure out how the innocent got convicted in the first place. That is why Peter Neufeld, Jim Dwyer and I wrote *Actual Innocence.* We not only tell the stories of the innocent wrongly convicted[48] but identify systematically

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39. *See id.* at 36-40. The polymerase chain reaction, ("PCR"), invented by Kary Mullis in 1983, is a process by which certain chemicals are added to a single gene or fragment of DNA, and causes the DNA to replicate itself exponentially. *See id.* at 37-38. Thus, in a chaotic crime scene, where only a tiny fragment of DNA is recovered, the PCR can be used to exonerate a defendant where the RFLP may be incapable of doing so.

40. *See id.* at 191.

41. *See id.* at 187-88.

42. *See id.* at 167-69.

43. *See id.* at 67-69.

44. *See Gov. Bush Grants First Death Stay: 30-Day Reprieve for a DNA Review*, NEWSDAY (Nassau), June 2, 2000, at A22.

45. *See* State v. Council, 515 S.E.2d 508, 516 (S.C. 1999), *cert. denied*, 528 U.S. 1050 (1999).

46. *See id.*

47. *See* DWYER, NEUFELD & SCHECK, *supra* note 12, at 161-66.

48. *See id.*

the causes: Mistaken eyewitness identification, false confessions, fraudulent and junk forensic science, defense lawyers literally asleep in the courtroom, prosecutors and police who cross the line, jailhouse informants and the insidious problem of race.[49] We present mainstream solutions to these problems that conservatives and liberals, Republicans and Democrats, prosecutors and defense lawyers can all support. Certainly one of the most critical reforms is the Innocence Protection legislation you consider today. I urge you to pass a bill this year before more evidence is destroyed or degrades and the slim hope innocent men have to achieve their freedom disappears.

49. *See id.* at xv, 246.