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

*Peter Neufeld**

There have been at least sixty-seven postconviction DNA exonerations in the United States.¹ 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,² including eight men who served time on death row.³ For all of these men, existing appellate remedies failed to catch the mistakes and correct the injustice.⁴ In one third of the exonerations, bad lawyering contributed to their convictions yet in only one case was ineffective assistance of counsel recognized by an appellate court.⁵ Mistaken eyewitness identification was a critical factor in almost 90% of the unjust convictions yet not a single trial or appellate court found the eyewitness testimony to be unreliable.⁶

* Prepared statement of Peter Neufeld, June 20, 2000, before the House Committee on the Judiciary; Co-Director, Innocence Project, Benjamin N. Cardozo School of Law; Commissioner, New York State Forensic Science Commission; 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 JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* xiv (2000). Since the book's publication, the number of exonerations has grown and the frequency with which they occur increased. As of October 30, 2001, there have been ninety-five postconviction DNA exonerations.

2. See *Cardozo Law Innocence Project*, at http://www.cardozo.yu.edu/innocence_project.html (last modified Oct. 13, 2000).

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

4. See *id.*

5. See DWYER, NEUFELD & SCHECK, *supra* note 1, at 185-87.

6. See Sharon Cohen & Paul Shepard, *Inmates Fight Prejudice Against DNA Testing*, L.A. TIMES, Oct. 8, 2000, at A1.

In fifteen of the sixty-seven postconviction exonerations, DNA testing has not only remedied a terrible miscarriage of justice, but led to the identification of the real perpetrator.⁷ Every time an innocent man is sent to prison or death, the real perpetrator remains at liberty committing more crimes.

In most of the sixty-seven exonerations, the prosecutor did not consent to DNA testing.⁸ Instead, defense attorneys were compelled to litigate access to the evidence.⁹ For the sixty-seven innocent men, the average length of incarceration before exoneration exceeded ten years.¹⁰ The average delay caused by litigation, where DNA testing was eventually permitted and led to an exoneration, is 4.5 years.¹¹ At the Innocence Project, we continue to represent dozens of men who so far have been turned down by prosecutors and courts in their bid to secure DNA testing. Each day of further delay increases the likelihood that the critical biological evidence will be lost or destroyed. Indeed in almost 75% of the cases initially accepted by the Innocence Project—matters where it has been established that a favorable DNA result would be sufficient to vacate the inmate's conviction—the files are ultimately closed because the relevant biological evidence was not preserved.¹² Many of these men may be actually innocent but they shall remain in prison or die because there is simply nothing left to test. Our project's sixteen law students are in a race against time to secure genetic testing for our 200 clients before the evidence vanishes. Another 1000 cases are backlogged, awaiting assignment to the overwhelmed law students. It is for these men, and the dozens more who continue to write to us each month—who appeal to us as the “court of last resort”—that the Innocence Protection Act is so desperately needed.

The primary impediment to exonerating wrongfully convicted inmates through the use of DNA testing has been a legal roadblock—restrictive statutes of limitation. Thirty-five states have statutes of limitations of three years or less on motions to present newly discovered

7. See Milloy, *supra* note 3. More recent statistics show this figure has increased (from fifteen of the sixty-seven postconviction exonerations) to sixteen of eighty-two postconviction exonerations. See *id.*

8. See DWYER, NEUFELD & SCHECK, *supra* note 1, at xvi.

9. See *id.*

10. See *id.* at 266 (stating that the average length of incarceration before exoneration is 9.56 years).

11. See Cohen & Shepard, *supra* note 6.

12. See Innocence Protection Act of 2000, S. 2690, 106th Cong. § 101(a)(17) (2000).

evidence of innocence.¹³ Similarly, federal habeas corpus applications have a six-month statute of limitations in capital cases and a one-year statute in all other matters.¹⁴

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

1. There Should Be No Statute Of Limitations

New York enacted its postconviction DNA testing statute in 1994.¹⁵ Had New York created a thirty month window from the date of enactment, it would have slammed shut on Vincent Jenkins who spent sixteen years in prison for a crime he did not commit.¹⁶ The DNA testing that set him free was conducted in January 1999, more than four years after the law was enacted. We continue to receive letters from and on behalf of New York inmates who for whatever reason were previously unaware of the opportunity for testing. It simply isn't fair to punish factually innocent prisoners who may be retarded or, as a result of a wrongful conviction, suffer a debilitating mental illness.

13. See *Herrera v. Collins*, 506 U.S. 390, 410-11 (1993). Twenty-two states require a filing within six months. See ALA. CODE § 15-17-5(a)(5) (2000) (thirty days); ARIZ. REV. STAT. ANN. § 24.1(b) (West 1998) (sixty days); ARK. CODE ANN. § 36.22 (Michie 1992) (thirty days); FLA. STAT. ANN. § 3.590 (West 2001) (ten days); HAW. RULE PENAL P. 33 (1992) (ten days); 725 ILL. COMP. STAT. ANN. 5/116-1 (West 1993) (thirty days); IND. CODE ANN. § 59(c) (West 2001) (thirty days); MICH. COMP. LAWS ANN. § 770.2 (West 2000) (forty-two days); MINN. STAT. ANN. § 26.04(3) (West 1992) (fifteen days); MO. R. CRIM. P. 29.11(b) (1992) (15-25 days); MONT. CODE ANN. § 46-16-702(2) (1991) (thirty days); S. D. CODIFIED LAWS § 23A-29-1 (Michie 1988) (ten days); TENN. R. CRIM. P. 33(b) (1992) (thirty days); TEX. RULE APP. P. 31(a)(1) (1992) (thirty days); UTAH R. CRIM. P. 24(c) (1992) (ten days); VA. SUP. CT. R. 3A:15(b) (1992) (twenty-one days); WIS. STAT. ANN. § 809.30(2)(b) (West 2001) (twenty days). One state requires the motion be filed within the term in which the judgment was rendered, which was the common-law rule. See MISS. CIR. CT. CRIM. R. 5.16 (1992). In addition, four states have waivable time limits of one hundred twenty days or less. See GA. CODE ANN. § 5-5-40 (Harrison 1995) (thirty days, can be extended); IDAHO CODE § 19-2407 (Michie Supp. 1992) (fourteen days, can be extended); IOWA R. CRIM. P. 23 (1993) (forty-five days, can be waived); OHIO R. CRIM. P. 33A(6), B (1988) (120 days, can be waived); OR. REV. STAT. § 136.535 (1991) (five days, can be waived).

14. See 28 U.S.C. § 2244(d)(1) (Supp. IV 1999) (applying one year limitation for application for a writ of habeas corpus by a person in custody as the result of a judgment of a state court); 28 U.S.C. § 2263(a) (Supp. IV 1999) (applying 180 day limitation for filing a writ of habeas corpus in capital cases).

15. See N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney Supp. 2001).

16. Jenkins' motion to produce the rape kit and for additional DNA testing was granted on April 15, 1993. See *Jenkins v. Scully*, No. 91-CV-0298E(M), 1993 WL 124698, at *1 (W.D.N.Y. Apr. 15, 1993). After seventeen years of imprisonment for a crime he did not commit, Jenkins was finally released. See Editorial, *The Cardinal's Final Journey*, DAILY NEWS (New York), May 9, 2000, at 42; Steven Frier, Opinion, *Executions Don't Solve Violent Crime Problems*, RECORD (Bergen County, N.J.), Apr. 11, 2000, at L19.

In the report, *Postconviction DNA Testing: Recommendations for Handling Requests*,¹⁷ and in the model statute,¹⁸ the Commission on the Future of DNA Evidence¹⁹ did not create any time limits or statute of limitations for making a postconviction DNA application.²⁰ The key requirements were substantive—the inmate has to show a reasonable probability that DNA testing would demonstrate he was wrongly convicted or sentenced.²¹ 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 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 or cause a reduction in sentence. Indigent inmates serving hard time do not have the resources or access to counsel to gather the necessary materials expeditiously. Frequently, it takes us four years or more to get the necessary materials together and to locate the biological evidence.

That was true for Dennis Fritz and Ron Williamson who were exonerated with DNA testing in April of 1999 in Oklahoma.²² Dennis received a life sentence.²³ Ron came within five days of execution.²⁴ DNA testing also identified the person, through a DNA databank hit, who probably committed the rape homicide.²⁵ It was true for Clyde Charles of Houma, Louisiana who spent nineteen years in Angola Prison, the so-called “Farm,”²⁶ and nine years trying, unsuccessfully, to get a DNA test within the state courts of Louisiana²⁷—they said he was too late—until we got a federal judge to grant relief pursuant to a section

17. See JEREMY TRAVIS & CHRISTOPHER ASPLEN, U.S. DEPT OF JUSTICE, *POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS* vi-vii (1999).

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

19. See TRAVIS & ASPLEN, *supra* note 17.

20. See *id.* at vii (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).

21. See *id.* at 3.

22. See DWYER, NEUFELD & SCHECK, *supra* note 1, at 151-52.

23. See *id.* at 141.

24. See *id.* at 146.

25. See *id.* at 152.

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

27. See *id.*

1983 suit for injunctive relief.²⁸ It was true for Herman Atkins of Riverside, California who was released in February of 2000.²⁹ 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.³⁰ It was true for A. B. Butler of Tyler, Texas who was pardoned three weeks ago by Governor Bush after seventeen years in jail for a crime he did not commit.³¹ Butler attempted unsuccessfully pro se to get DNA testing through the courts for seven years;³² he only got testing after the Centurion Ministries and attorney Randy Schaefer got involved and obtained consent to testing from local district attorney.³³

One purpose of this legislation is a recognition that actual innocence should trump procedural obstacles to freedom.³⁴ It should be enough for the inmate to show that a DNA test would provide non-cumulative, exculpatory evidence that he was wrongfully convicted or sentenced.

2. There Should Be A Duty To Preserve Biological Evidence While An Inmate Is Incarcerated

Calvin Johnson of Georgia was exonerated after seventeen years in prison for a crime he didn't commit³⁵ but only because, by sheer chance, an assistant district attorney noticed a dumpster full of sealed boxes of trial evidence in the hallway of the courthouse about to be thrown out.³⁵ The rules for preservation of biological evidence are totally haphazard across the country.³⁷ There should be a general requirement to preserve

28. 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.*

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

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

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

32. See *id.*

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

34. See TRAVIS & ASPLEN, *supra* note 17, at iii (providing a message from the Attorney General, Janet Reno).

35. See DWYER, NEUFELD & SCHECK, *supra* note 1, at 194.

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

37. See *id.*

biological evidence and an opportunity for law enforcement, upon notice to an inmate, to move for destruction of the evidence in an orderly way. A general preservation rule is preferable to one that requires an inmate to file a motion for DNA testing to trigger the state's obligation to preserve evidence. That latter approach might encourage the wholesale and precipitous destruction of biological evidence. In Harris County, Texas, shortly after Kevin Byrd, cleared by DNA testing, was pardoned by the governor, the clerk ordered the destruction of fifty rape kits.³⁸

Preservation is neither burdensome nor unduly expensive. In Virginia, where the law would permit destruction of samples soon after conviction,³⁹ local courthouses routinely save samples for decades in a comparatively traceable fashion.⁴⁰ The suggestion that expensive freezer equipment would have to be built with high energy costs is mistaken. As long as the evidence is stored in a dark dry room, air conditioned in the summer, the evidence will remain robust for years.⁴¹

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.

3. Inmates Should Not Have To Prove That The Technology Was "Unavailable" At The Time Of Trial

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.⁴² In some instances the form of DNA testing available was not sensitive enough to produce a result,⁴³ but later testing was able to produce irrefutable evidence of innocence.⁴⁴ For example, Kirk Bloodsworth of Maryland, who received a death sentence,⁴⁵ had inconclusive DNA testing using RFLP (Restriction Fragment Length

38. *See id.*

39. Conversation with Paul Ferrara, Director of Virginia's Forensic Science Laboratory.

40. *See id.*

41. *See id.*

42. *See* DWYER, NEUFELD & SCHECK, *supra* note 1, at xv, 10.

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

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

45. *See id.* at 218.

Polymorphism Testing)⁴⁶ but was exonerated by PCR (Polymerase Chain Reaction) testing.⁴⁷

At other times, requests for available DNA testing were wrongfully denied by trial courts,⁴⁸ or incompetent lawyers failed to request the testing.⁴⁹ In May, 1998, James O'Donnell was convicted by a New York jury of attempted sodomy.⁵⁰ Because it was an "attempt," there was no semen and hence neither the prosecutor nor the defense attorney requested DNA typing.⁵¹ But the assailant had bitten the victim and the victim, defensively, scratched the skin of her attacker.⁵² The police specialists had promptly swabbed the bite mark for saliva and collected the scrapings from beneath the fingernails.⁵³ Last month it was revealed that the saliva and tissue left by the perpetrator, did not come from Mr. O'Donnell.⁵⁴ Should Mr. O'Donnell remain in prison simply because neither his counsel nor the prosecutor adequately appreciated the evolving applications of this revolutionary technology?

In other cases, early forms of DNA testing, which were not very discriminating (e.g., the PCR DQ Alpha test), failed to exclude a defendant at the time of trial, but a more discriminating DNA test, developed years later, produced proof of innocence.⁵⁵ 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.⁵⁶ Mitochondrial DNA testing, one of the more sensitive tests that will be used in the McGinn case, can now get

46. 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.*

47. 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 36-40. 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.

48. *See id.* at 191.

49. *See id.* at 187-91.

50. *See People v. O'Donnell*, Ind. No. 289/97 (N.Y. Sup. Ct. Dec. 12, 2000).

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See DWYER, NEUFELD & SCHECK, supra* note 1, at 66-69.

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

results by extracting DNA from the shaft of a hair;⁵⁷ previously, one needed a hair with a fleshy root to get a result.⁵⁸ At the Innocence Project, we screen new cases to make sure they meet our criteria. Our resources are meager. Nevertheless, we do not reject cases simply because there may be significant inculpatory non-biological evidence. In four of the exonerations, three or more eye witnesses testified with certainty at the original trials. The DNA proved they were wrong. If the number of eyewitnesses should be a factor, then Kirk Bloodsworth—identified by five witnesses—should never have received testing. I have attached to my testimony, the opinion piece of a rape victim, Jennifer Thompson, published this past Sunday in the *New York Times* for it demonstrates how certainty does not ensure reliability.⁵⁹ In fifteen of the exonerations, confessions and admissions were introduced at trial. Generally, this type of evidence can be the most compelling and probative of guilt. The DNA proved the confessions were false.⁶⁰ Had Tony Snyder's purported confession prevented him from securing postconviction DNA testing, he would be fourteen years into his forty-five year sentence.

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 Texas⁶¹ are troubling but not surprising. The American Bar Association has long been on record about this crisis,⁶² and in our book, *Actual Innocence*,⁶³ we discuss at great length the terrible problem of incompetent counsel we found among the individuals exonerated with postconviction DNA testing.⁶⁴ DNA testing only helps correct conviction of the innocent in a narrow class of cases; most homicides do not involve biological

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

58. See *id.*

59. See Jennifer Thompson, Editorial, 'I Was Certain, but I Was Wrong,' N.Y. TIMES, June 18, 2000, at 15.

60. See generally DWYER, NEUFELD & SCHECK, *supra* note 1, at 78-106 (discussing suspects who were motivated to confess to crimes that they did not commit).

61. 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.

62. 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.

63. DWYER, NEUFELD & SCHECK, *supra* note 1.

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

evidence that can be determinative of guilt or innocence.⁶⁵ 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.

5. 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 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 Barry Scheck, Jim Dwyer and I wrote *Actual Innocence*.⁶⁶ We not only tell the stories of the innocent wrongly convicted but identify systemic 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.⁶⁷ 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.

65. *See id.* at xv.

66. DWYER, NEUFELD, & SCHECK, *supra* note 1.

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