

INNOCENCE PROJECT

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**Testimony of Barry C. Scheck
Co-Director, Innocence Project
Joint Committee on Judiciary
Senate Bill 1035; House Bill 6425
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Good morning Chairman Coleman, Chairman Fox and members of the Committee. My name is Barry Scheck and I am Co-Founder and Co-Director of the Innocence Project. I appreciate the opportunity to testify and ask that my written statement and materials be included in the record.

The Innocence Project assists persons in proving their innocence through post-conviction DNA testing. To date, 266 men and women have been exonerated by post-conviction DNA testing nationwide. The Innocence Project has, in the vast majority of these cases, either represented or assisted in the representation of these innocents. Of particular relevance to this committee's inquiry today, 17 of the people proven innocent by DNA evidence had been sentenced to death.

Every time an innocent is convicted, the person who really committed the crime escapes justice and may go on to commit other crimes. The Innocence Project works on reforms that go to the root causes of wrongful convictions – mistaken identification, false confessions, unreliable forensic science, law enforcement misconduct and poor lawyering. Our policy agenda is a pro-law enforcement agenda: win-win reforms that protect the innocent and help identify the guilty. It is precisely because of the dual nature of our work – both the efforts to exonerate the innocent and the constructive efforts to strengthen the capacity of the criminal justice system to make more accurate guilt/innocence determinations – that we may be able to provide a somewhat unique and hopefully helpful perspective.

In the most serious crimes, criminalists believe that biological evidence susceptible to DNA testing, perhaps our best tool for producing highly reliable – but certainly not infallible – evidence of guilt or innocence, exists in very few cases.¹ Most homicide cases turn on eyewitness testimony, confessions, the credibility of witnesses or circumstantial evidence, not DNA testing. As such, DNA testing is not a panacea that can prevent wrongful executions. Although DNA has helped us to shed light on the existence of wrongful convictions across the nation, it simply does not have the capacity to ensure either a fair or accurate application of this

¹ While testable human biology may be present at a growing number crime scenes, estimates from leading criminologists around the country indicate that well under 10% of criminal cases possess probative biological evidence. Department of Justice Oversight: Funding Forensics Sciences – DNA and Beyond. 108th Cong., 1st Sess., (2003) (testimony of Michael M. Baden, M.D., Director of the Medicological Investigations Unit of the New York State Police: "In less than 10 percent of murders the criminal leaves DNA evidence behind. About 5 percent of a crime lab's workload involves DNA analysis."); Kelly M. Pyrek, *Forensic Nurse Magazine* (Sept. 2005) (quoting a chair of a consortium of four major crime laboratory associations: requests for DNA analysis is "only 5 percent of what comes in the door."); Cara Garretson, *Cybercrime Conference Highlights RFID Security*, Mar. 6, 2007 (quoting Jim Christy, Director of the Future Explorations unit of the Department of Defense's Cyber Crime Center: "Only about 1 percent of criminal cases introduce DNA evidence -- contrary to what typically is portrayed on television crime dramas -- because most of the time it's not relevant").

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irreversible sentence.

Having worked in this field for 30 years, perhaps the most significant lesson I have learned is that, in matters of crime and justice, humility is important because even the most experienced among us are often wrong. My partner, Peter Neufeld, and I have reviewed hundreds of cases. In some cases, after I have pored over reams of court transcripts, scrutinized piles of police reports, dissected crime lab analyses, sifted through evidence and property logs and studied scores of witness statements, I have strongly suspected some men's guilt, only later to discover I was wrong. No less often, someone I strongly suspect is innocent turns out to be guilty. Indeed, because every one of us is human and all of us are actors in a fact-finding mission, if just one of us makes an error, jumps to a conclusion or acts on a false assumption, an innocent man can be condemned to a guilty man's fate.

A. The Risk of Executing An Innocent

1. What Can Be Learned From DNA Exonerations

Post-conviction DNA testing has demonstrated that the risk of convicting an innocent is much greater than even the most cynical expected, and it naturally follows that the risk of executing an innocent is greater than previously believed. No one can responsibly or sensibly quantify the risk of executing an innocent; there are simply too many sources of error that occur at unknowable rates at every stage of the criminal process to make that kind of judgment.

DNA testing has, on the other hand, provided some very sobering data about the frequency of error in different parts of the system that are very compelling in trying to assess, with necessarily incomplete information, the fallibility of the system as a whole:

**** FBI Exclusion Data.** The National Institute of Justice has performed the only known survey of DNA exclusions of defendants in criminal cases. In that study, the FBI reported that since it began conducting DNA testing in 1989, it found that in at least 24% of the cases where it gets results – ordinarily matters where a suspect has been arrested or indicted based on non-DNA evidence – the defendant was excluded.² This robust finding is also conservative because, if multiple suspects in a case are excluded, the FBI will count it as just one “primary” suspect being excluded. Surveys by the National Institute of Justice corroborate that private laboratories, as well as state and local laboratories, report similar, or even higher, exclusion rates.

**** Pre-Conviction/Post Indictment Exclusions.** Although unfortunately no one is keeping systematic track of the data, law enforcement officials across the country acknowledge that thousands of cases, including many homicides, arrests and indictments based on seemingly compelling proof like a detailed confession or multiple eyewitnesses have been vacated before conviction and the real assailant has been identified, all based upon DNA testing.

² Office of Justice Programs, National Institute of Justice, Department of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 20 (June 1996).

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**** Governor Warner's Virginia Experiment.** In 2001, the Innocence Project asked officials in Virginia to search the state's archives for a former lab analyst's old notebooks, since DNA testing on vaginal swabs she had remarkably stapled into her notebook had led to the exoneration of one of our clients, Marvin Anderson. Officials subsequently discovered notebooks with biological evidence from over 330 old cases, most of them collected before DNA testing was available. Two more people were exonerated after DNA testing on samples from the notebooks. Recognizing that this evidence could shed light on the propriety of the convictions in those cases, Virginia Governor Warner declared: "A look back at these retained case files is the only morally acceptable course," and agreed to test all of them. He started out, however, with a small random sample of these convicted felons. Out of the first 29 of these randomly selected cases, there were two exonerations (and in one case the real assailant was identified), which is close to a 7% exoneration rate.³

False Confessions/Guilty Pleas to Capital Offenses

There are 17 cases where innocent men were sentenced to death and subsequently exonerated by DNA testing.⁴ Take the case of Kirk Bloodsworth, for instance. Kirk was the first man in the United States whose capital conviction was overturned by post-conviction DNA testing. Kirk was convicted based on the mistaken identification of five eyewitnesses of having raped and murdered a little girl in Baltimore County, Maryland. Even after DNA testing forced a prosecutor to vacate his conviction and dismiss the case against him, the prosecutor still wouldn't concede Kirk was innocent. It wasn't until, after years of prodding the prosecutor to so concede, a DNA profile from semen found in the girl's underwear was run in the CODIS system and came up with a "hit" to the real assailant who, astonishingly, had actually lived on the same cell block with Kirk. For those of you who haven't, I urge you to read his wonderful book, written with Tim Junkin, entitled *Bloodsworth*,⁵ to get a true sense of how an innocent, a Marine with no criminal record, could come so close to execution.

Similarly, John Grisham came out with his first non-fiction book about the case of Ron Williamson, one of our clients who came within five days of execution in Oklahoma.⁶ That case is also chronicled in *Actual Innocence*, a book Jim Dwyer, Peter Neufeld and I wrote about DNA exoneration cases and the lessons that can be learned from them.⁷

Each of the 17 DNA exonerations of men sentenced to death is a chilling reminder of how the innocent can be executed, as are the more than 30 homicide cases where innocents were convicted, but not sentenced to death before DNA exonerated them. Many of these men -- Eddie

³ *Follow the DNA to find the truth*, The Roanoke Times, Dec. 16, 2005. It is worth emphasizing that Virginia is second only to Texas in executions.

⁴ *The Innocent and the Death Penalty*,

http://www.innocenceproject.org/Content/The_Innocent_and_the_Death_Penalty.php (last visited Mar. 4, 2011).

⁵ Tim Junkin & Kirk Bloodsworth, *Bloodsworth*, (North Carolina: Algonquin Books 2004).

⁶ John Grisham, *The Innocent*, (New York: Doubleday 2006).

⁷ Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* (New York: Doubleday 2000).

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Joe Lloyd in Detroit, Michigan; John Restivo, John Kogut, and Dennis Halstead in Nassau County, New York -- I know very well and feel certain they would have been sentenced to death and possibly executed if Michigan or New York had capital punishment when they were convicted.

But I would like to bring to your attention some case histories that are very instructive about the risk of error generated peculiarly by capital punishment and the extreme difficulty of ever finding out about such grievous errors: the false guilty plea and/or false confession cases. The very fact that someone might plead guilty and/or give a false confession in a capital case to avoid execution might seem unlikely or preposterous to some, but DNA testing shows this does happen, and one must assume that in cases where DNA testing is not available or would not be probative, discovering a false confession would be close to impossible.

- **Anthony Gray**, who was convicted in Prince George's County, Maryland, was sentenced to two concurrent life sentences after pleading guilty to rape and murder charges in order to avoid the death penalty. Police officers had coaxed a confession out of Gray, who is borderline retarded, by telling him that two other men arrested in connection with the case had told police that Gray was involved.

Some years later, the conviction came under intense scrutiny when a man arrested in connection with a burglary reported unpublicized details about the rape and murder for which Gray had been convicted. DNA testing of semen recovered from the crime scene excluded Gray and the other two men originally arrested for the crime, and produced a match to the burglary suspect, who eventually pled guilty to the crime for which Gray had been imprisoned for seven years.

- **David Vasquez** was arrested for the murder of a woman in Arlington, Virginia, who had been sexually assaulted and then hanged. Vasquez, who is mentally impaired, confessed to the crime and provided details that were not released to the public. Vasquez could not provide an alibi and was placed near the scene of the crime by two eyewitnesses. Additionally, investigators found two pubic hairs at the crime scene that resembled those of Vasquez.

Faced with what appeared to be a collection of evidence that pointed to his guilt, Vasquez entered a guilty plea. DNA testing later proved that the murder was committed by another man, Timothy Spencer. Prosecutors joined with defense attorneys to secure the eventual pardon of Vasquez.

- **Christopher Ochoa** pled guilty to the rape and murder of an Austin, Texas woman. He confessed to the crime and implicated another man, Richard Danziger. The state offered to give him a life sentence if he agreed to plead guilty and testify against Danziger at trial. Under threat of receiving the death penalty and by the advice of his attorney, Ochoa agreed to the state's terms.

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At trial, however, Ochoa changed his story and claimed that he, and not Danziger, had shot the victim. Consequently, prosecutors charged Danziger with rape instead of the murder. Danziger could not provide a reason as to why Ochoa, his friend, might have testified against him.

Both men received life sentences and years later, the police, then-Governor Bush's office, and the District Attorney's Office received letters from a man named Achim Marino, claiming that he was solely responsible for the crime for which Ochoa and Danziger had been convicted. His letter told investigators precisely where to locate items that were stolen from the scene of the crime, which police were able to obtain.

Thirteen years after the commission of the crime, Ochoa and Danziger were exonerated and released from prison. Ochoa, who graduated from law school in 2006, now states that his confession and implication of Danziger were the results of police pressure and fear of the death penalty.

- **Jerry Frank Townsend**, a mentally retarded man in Florida, was convicted of six murders and one rape and sentenced to seven concurrent life sentences. This began when, in 1979, Townsend was arrested for raping a pregnant woman in Miami, Florida. During the investigation, he confessed to other murders. The confessions were largely the consequence of Townsend wanting to please authority figures, a common adaptive practice by someone with his limited mental capacities.

Eventually, Townsend was cleared by DNA evidence in 1998, when a victim's mother asked a Ft. Lauderdale police detective to review the Townsend cases. In 2000, DNA testing of preserved evidence implicated another man, Eddie Lee Mosley, and also cleared Townsend for two of the six murders. This cast substantial doubt on the accuracy of all of Townsend's confessions. In April 2001, further DNA testing cleared Townsend of two additional killings to which he had previously confessed, and ultimately, two months later, he was cleared of all charges and released from prison – after having served 22 years for crimes he did not commit.

Each of these cases demonstrates an unfortunate ripple effect caused by the presence of the death penalty. Because each of these men feared being sentenced to death, they confessed or pled guilty to crimes they did not commit in order to secure a lesser sentence.

Some have expressed concern that repealing the death penalty will weaken the ability of prosecutors to get life without parole pleas. Whatever the merits of that argument, it must be acknowledged that fear of the death penalty has resulted in innocent people falsely confessing or pleading guilty to murder, simply in order to avert being wrongfully executed.

The Very Real Risk of Tunnel Vision

Another phenomenon common to many of the nation's wrongful convictions is that of "tunnel vision." Tunnel vision refers to the natural disinclination of individuals to consider alternatives to their preferred line of thought. This can probably best be understood in the context of

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physicians treating afflictions, but can happen to anyone – in their personal or professional lives – predisposed to a favored outcome. It is a perfectly instinctive tendency borne out of “our need to process efficiently the flood of sensory information coming from the outside world. Without some system of categories or ‘schemata’ to organize that information, it would remain, in the imagery of noted psychologist and philosopher William James, a ‘blooming, buzzing confusion.’”⁸ This same necessary system of categorization, interpretation and selective attention, which, it is posited, was integral to our evolution as a species, can have significant and unintended consequences in the criminal justice context.⁹

In the criminal justice system, when a heinous crime has been committed (such as those that would render the perpetrator eligible for the death penalty), the resultant social and political climate can create undeniable and tremendous pressure on law enforcement to find the culpable. Such events can lead law enforcement to unknowingly focus on a particular conclusion or outcome and inadvertently dismiss or filter information or evidence that points to another. Through that filter, all information that supports the adopted outcome is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative, while evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable. Specifically, tunnel vision occurs when actors in the criminal justice system “focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt.”¹⁰

Consider the case of Virginian Marvin Anderson. Despite strong evidence to the contrary, Mr. Anderson was found guilty of robbery, forcible sodomy, abduction and two counts of rape of a 24 year-old woman in Hanover, Virginia in 1982. DNA proved his innocence in 2002. Police investigators had focused on Anderson because the rapist, who was African American, had mentioned to the victim that he had a white girlfriend, and Anderson was the only black man police knew of who was living with a white woman. Tunnel vision affected Anderson’s case from the beginning, leading police, prosecutors, defense counsel and eventually the jury and reviewing courts, to minimize and discredit alibi evidence, a mismatch between the victim’s description of the perpetrator and Anderson’s appearance, and the absence of physical evidence. Even more significantly, the premature focus on Anderson meant that no one pursued evidence that was available before trial that pointed toward the true perpetrator. As the Virginia Innocence Commission concluded, “[o]nce the victim identified Anderson,...the police did not pursue additional leads.”¹¹

⁸ Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 292 (2006) (quoting D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1 (2002)).

⁹ *Id.* at 309.

¹⁰ *Id.* (quoting Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. Rev. 847, 848 (2002)) (emphasis added).

¹¹ Innocence Comm’n for Va., *A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia*, 10 (2005), <http://www.thejusticeproject.org/wp-content/uploads/a-vision-for-justice.pdf> (last visited Mar. 4, 2011).

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This case is just one of many that have been impacted by tunnel vision. With the propensity to influence any criminal case, tunnel vision is a very real risk; given the heightened pressure placed on law enforcement in the face of a homicide, death-eligible cases are certainly not immune.

2. Recent Non-DNA Cases Where There Is Strong Proof Innocents Were Executed

Wrongful convictions and executions have happened and will continue to happen. This occurrence is not an urban myth or a fantasy drummed up by any particular advocacy group. Let me provide you with compelling examples of possible innocents who were executed that have recently come to light:

- **Cameron Todd Willingham** of Corsicana, Texas was executed in February 2004 for murder by arson. Later that year, an investigation proved and newspaper accounts published new scientific evidence that it was impossible to determine arson after all. A panel comprised of national arson experts agreed in March 2006 that the science underlying Willingham's conviction was invalid. The panel also looked at the case of Ernest Willis, another Texan, who was convicted of murder by arson and concluded that in his case as well, the science was unsupportable. Although Willis and Willingham were on death row in Texas at the same time, Willis was exonerated – and later compensated by the state – when his conviction was undermined and only through a retrial could he have remained on death row. There is no evidence demonstrating that the facts in the Willingham case, however, were ever revisited until recently. This case has risen to national prominence since the Texas Forensic Science Commission began investigating an allegation of possible professional negligence or misconduct connected to the arson analysis in the Willingham case.¹²
- **Ruben Cantu** of San Antonio, Texas was executed in August 1993 for a robbery-murder. The Houston Chronicle investigated claims that Cantu was innocent and that the identification made by a survivor of the robbery was coerced by law enforcement. A co-defendant subsequently signed an affidavit stating that Cantu was not present and had no role in the commission of the robbery or murder.¹³
- **Carlos DeLuna** of Corpus Christi, Texas was executed in December 1989 for the stabbing death of a convenience store clerk. Although DeLuna identified another man as the perpetrator, his claims were dismissed. In June 2006, the Chicago Tribune discovered that the person DeLuna named, Carlos Hernandez, was no stranger to law enforcement and had a history of knife-related violence. Hernandez reportedly also told friends and family that he committed the crime. Hernandez died in jail in 1999.¹⁴

¹² David Grann, *Trial by Fire*, Sept. 7, 2009, http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann (last visited Mar. 4, 2011).

¹³ Lise Olsen, *The Cantu Case: Death and Doubt*, July 24, 2006, <http://www.chron.com/disp/story.mpl/front/3472872.html> (last visited Mar. 4, 2011).

¹⁴ Maurice Possley & Steve Mills, *I didn't do it. But I know who did*, June 25, 2006,

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Another noteworthy case that has generated a great deal of press recently is the case of **Anthony Graves**. Thankfully, his innocence was discovered before the ultimate penalty could be administered. Anthony was convicted and sentenced to death for his alleged involvement in the horrific murders of two women and four children in rural Somerville, Texas in 1992. Anthony became a suspect when another man, Robert Earl Carter, told police that the two had committed the crime together, apparently in an effort to deflect blame from himself. Carter was also sentenced to death row and was executed in 2000. Three years earlier, Carter stated publicly and to state officials that Graves, in fact, did not have a role in the murders. He even maintained the sentiment minutes before his execution: "Anthony Graves had nothing to do with it. ... I lied on him in court." The evidence against Anthony hinged primarily on Carter's previous accusation and jailhouse statements claimed to be overheard by law enforcement officers. Yet Mr. Graves remained slated for execution.

It wasn't until 2006 that the Fifth Circuit Court of Appeals overturned Anthony's original conviction and demanded he be taken off death row. Nevertheless, the state decided to retry Anthony. The special prosecutor for the retrial – who had sent 19 people to death row as a Harris County assistant district attorney – chose not to proceed, but to dismiss the case, commenting that "After months of investigation and talking to every witness who's ever been involved in this case, and people who've never been talked to before, after looking under every rock we could find, we found not one piece of credible evidence that links Anthony Graves to the commission of this capital murder."¹⁵ Although he has yet to be officially exonerated, Anthony was released upon the dismissal of charges against him last October – nearly 20 years after his wrongful conviction ordeal began.

The Challenges of Proving Innocence

The cases above – possible wrongful *executions* – highlight the challenges to proving innocence after a conviction. Innocent convicts must overcome substantial procedural barriers to even receive a hearing, let alone to obtain relief. A post-conviction petitioner generally must meet a very high burden in order for his conviction to be vacated, a burden that is frequently nearly impossible to meet short of probative DNA evidence exculpating him. Additionally, in order to present a viable claim of innocence, success often hinges on its coupling with a procedural claim, such as ineffective assistance of counsel. In many cases, innocent defendants languish in prison until DNA testing actually inculpatates another actor.¹⁶ And as I previously mentioned, while

<http://www.chicagotribune.com/news/chi-tx-1-story,0,653915.story> (last visited Mar. 1, 2011).

¹⁵ Prisoner ordered free from Texas' death row, *Houston Chronicle*, Oct. 28, 2010,

<http://www.chron.com/disp/story.mpl/metropolitan/7266470.html> (last visited Mar. 4, 2011).

¹⁶ Rickey Johnson was convicted in 1983 of aggravated rape and was sentenced to life without parole in Louisiana. His conviction was secured based upon the strength of conventional serological testing and an eyewitness identification made by the victim. The case went to trial years before DNA tests were to become a common law-enforcement tool, so no DNA tests were performed on the evidence. Throughout his ordeal, Mr. Johnson maintained his innocence and held out hope that the truth would one day be discovered. In 2006, after the Innocence Project took on Mr. Johnson's case, the DA agreed to test swabs from the rape kit using conventional STR testing. The tests produced just three markers--enough to potentially exculpate Mr. Johnson, but not a

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many posit that DNA can provide the certainty we all seek with respect to questions about innocence and guilt in criminal cases, it simply cannot be viewed as a panacea. Testable and probative biological evidence is available in proportionally few criminal cases. In the post-conviction setting, the availability of probative biological evidence is further diminished since it is not uncommon for evidence to be lost or destroyed in the window of time between conviction and a petition for post-conviction DNA testing. We have found that by the time their petitions for DNA testing were granted by the court, most of our clients had exhausted federal habeas corpus. In other words, once a conviction becomes final, the system no longer works to protect the presumption of innocence; but instead, it works to protect the integrity of the conviction.¹⁷

B. Wrongful Convictions and Connecticut Reforms

1. Fundamental Flaws in the Criminal Justice System

Each of the aforementioned cases is instructive because they reveal not only how easily mistakes can happen, but also how many miscarriages of justice cannot be proven in the absence of a definitive test like DNA. Indeed, only a narrow percentage of criminal cases involve biological evidence that can be subjected to DNA testing, and, in many instances, that evidence has been contaminated, degraded, lost or destroyed when a case is revisited years later in the post-conviction context.

The nation's 266 DNA exonerations have taught us that any number of factors – sometimes many functioning at once – can yield a wrongful conviction and that the appeals process does not provide the needed protections to detect them. The public benefit of DNA exonerations, however, lies in their opportunity to understand how the criminal justice system – from eyewitness to police to prosecutor to judge to jury to appellate courts to the Supreme Court – can find a person guilty beyond a reasonable doubt when the accused is simply innocent.

The Innocence Project has examined these 266 wrongful convictions proven through DNA testing, and identified those factors that confound the criminal justice system, sometimes at the earliest stages. These include, but are not limited to: mistaken eyewitness identifications; faulty forensic work – predicated on improper crime scene collection, contamination, drylabbing, falsified results, the use of unvalidated assays, and statistical exaggerations about their rigor;¹⁸

sufficient number to help identify the perpetrator. In 2007, a new form of DNA testing, miniFiler-STR, was performed. MiniFiler-STR makes the examination of badly degraded evidence possible. Through the use of this new technology, eight additional markers were found, yielding a full profile. That profile not only definitively proved Mr. Johnson's innocence, thereby leading to his exoneration, but also enabled the evidence to be run through CODIS, the national DNA database. The process resulted in a CODIS hit and the true perpetrator, a man who was housed in the same prison as Mr. Johnson, himself, was identified.

¹⁷ "The postconviction phase of a criminal case presents an effective role-reversal for the respective parties...Before conviction, when the government bears the burden of proof and the defendant enjoys the presumption of innocence...In the postconviction context, the reverse is true. The defendant bears the burden of proof, and all presumptions favor the government." Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 Cal. W. L. Rev. 389, 410 (2002).

¹⁸ "With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have

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false or coerced confessions; reliance on jailhouse informants; poor defense; and prosecutorial misconduct.

2. Status of Connecticut Reforms Aimed at Solving Crime and Curbing the Risk of Executing An Innocent

The eyewitness identification, interrogation, informant and other practices that have led to wrongful convictions proven by post-conviction DNA testing in many other states are the same practices that are used in Connecticut. In fact, there have been three post-conviction DNA exonerations in Connecticut. There are a number of measures that Connecticut could take, but to date has not taken, to more proactively solve crimes and curb the risk of convicting or executing innocents. The following represent just a few areas that would further inoculate Connecticut from wrongful conviction and execution, but which are not generally in place in Connecticut:

a. Eyewitness Identification Reform

Mistaken eyewitness identifications were a contributing factor in more than 75% of the nation's wrongful convictions proven by DNA testing. Despite solid and growing proof of the inaccuracy of traditional eyewitness identification procedures – and the availability of simple measures to reform them – eyewitness identifications obtained through time-honored, but flawed, protocols remain among the most commonly used and compelling evidence brought against criminal defendants.

In fact, one of Connecticut's DNA exonerations involved a mistaken identification. James Calvin Tillman was convicted of rape and robbery based almost entirely upon the eyewitness identification of the victim, a white woman who was unknown to James, an African-American man. In 2005, the Connecticut Innocence Project took on James's case. DNA testing was performed on crime scene evidence that conclusively excluded him as the perpetrator, and on July 11, 2006, after spending more than 18 years behind bars, James was exonerated.

Despite these facts, it is not clear that any jurisdictions in Connecticut regularly employ the slight improvements to eyewitness identification procedures proven to minimize the possibility of eyewitness misidentification. Currently, there are three bills before the Legislature this session seeking to institute eyewitness identification reform in Connecticut;¹⁹ these bills will be heard on March 9, 2011. Without changes, however, the possibility of eyewitness misidentification plaguing the most serious of cases in Connecticut remains very real.

the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." National Academy of Science Report, *Strengthening Forensic Science in the United States: A Path Forward*, p. 7 (The National Academies Press 2009). Put simply, most forensic disciplines have never been established as scientifically valid or reliable. Indeed, I would urge the Commission to review the National Academy of Science's report for further information on the subject.

¹⁹ H.B. 3644, Gen. Assem., Jan. Sess. (Conn. 2011), S.B. 47, Gen. Assem., Jan. Sess. (Conn. 2011), H.B. 5037, Gen. Assem., Jan. Sess. (Conn. 2011).

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b. The Electronic Recording of Custodial Interrogations in All Jurisdictions

In about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty. These cases show that confessions are not always prompted by internal knowledge or actual guilt, but are sometimes motivated by external influences. A variety of factors can contribute to a false confession during a police interrogation: duress; coercion; intoxication; diminished capacity; mental impairment; ignorance of the law; fear of violence; the actual infliction of harm; the threat of a harsh sentence; and a general misunderstanding of the situation and its consequences.

In 2010, the Connecticut Supreme Court declined to require electronic recording of police interrogations under either due process or its supervisory powers. Two bills on the issue of recording interrogations have been filed recently²⁰ and are to be heard on March 9, 2011, though there is nothing yet on the books.

c. Connecticut Crime Laboratories: Oversight and Funding

The need for forensic oversight has been underscored in recent years by cases of people across the nation who were wrongfully convicted based, at least in part, on forensic negligence or misconduct. Forensic errors – and their dire consequences – have become commonplace: a study of the first 200 DNA exonerations conducted by Brandon L. Garrett, a law professor at the University of Virginia, found that errant forensic science contributed to wrongful convictions in 57 percent of the cases.²¹

Despite the best efforts of the forensic science field, lab technicians can make both inadvertent and calculated errors. Given that the field is comprised of humans, no state is immune from forensic errors. Regardless of the relative weight one believes should be given to evidence of forensic error or misconduct in the assessment of a particular case, forensic crime lab issues do tend to raise questions about the consistency and reliability of the crime lab system's results in the minds of jurors.²² Additionally, Connecticut's forensic lab system – like so many systems

²⁰ S.B. 39, Gen. Assem., Jan. Sess. (Conn. 2011), S.B. 954, Gen. Assem., Jan. Sess. (Conn. 2011).

²¹ Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76 (2008).

²² Connecticut, like every other state across the country, has not been invulnerable to forensic crime lab issues. In one instance, the state forensics lab incorrectly logged in hair evidence from two separate crime scenes, one a murder scene, the other, a robbery. *Discovery of lab mistake may exonerate murder defendants*, The Day, Sept. 25, 2008. This error tended to link the known perpetrators of the robbery to the murder. The case against those defendants was dropped shortly after the discovery of this lab error. *Mallove slaying: 'Unanswered questions' set suspects free*, Norwichbulletin.com, Nov. 7, 2008, <http://www.norwichbulletin.com/news/x1197778881/Mallove-slaying-Unanswered-questions-set-suspects-free> (last visited Mar. 4, 2011). In another, fingernail scrapings potentially containing DNA in a high-profile murder case were contaminated by a lab technician at the state forensics lab. *Jovin Murder Case Bungled Again*, Hartford Courant, Nov. 19, 2009, http://articles.courant.com/2009-11-19/news/hc-jovin-investigation-botched..artnov19_1_suzanne-jovin-ms-jovin-mr-settachatgul (last visited Mar. 4, 2011).



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across the nation – seems to be in need of additional funding.²³

The fact is that, as a recent report of the National Academy of Sciences clearly established, [Advances in DNA testing have] revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.²⁴

And of course, as with any human endeavor, are many ways that forensic evidence – as a result of the handling, analysis, reporting, or use by attorneys – can mislead fact-finders into a wrongful conviction.

Conclusion

Public opinion remains ambiguous about the question of whether capital punishment ought to be an available sentencing option, but support for the death penalty, regardless of country or region, is greatest when no other sentencing options are presented to respondents.²⁵ Reasonable people, however, can differ as to whether the death penalty is a morally appropriate punishment for the most heinous of murders committed by the worst of the worst offenders.

I also assume that reasonable people agree – and this is a moral question – that since “death is different,” an irreversible punishment, all necessary resources must be provided to ensure that every aspect of the capital punishment system – investigation, defense, prosecution, trial, appeal and post-conviction – is as fair and accurate a result as possible.

As the nation’s wrongful convictions have revealed, errors can occur at every turn, and it is only DNA testing – when properly performed – that can topple a house of cards built upon just one imperfect element. Since DNA exists in relatively so few cases, an individual’s life can hinge on a sloppy report, an inadvertent cue or the work of an overburdened practitioner. And even though its reach is limited with respect to its ability to shed light on every case, DNA has helped us to expose a range of systemic problems, including:

- Juries relying on incorrect, misleading or partial information;
- Public and private defenders providing ineffective assistance of counsel;
- Crime lab mishandling and contamination of evidence; the falsification of results; the misrepresentation of forensic findings on the stand; and the provision of statistical exaggerations about the results of testing;

²³ *Evidence on Hold*, Hartford Courant, Jan. 30, 2010.

²⁴ National Academy of Science Report, *Strengthening Forensic Science in the United States: A Path Forward*, p. 4 (The National Academies Press 2009).

²⁵ Franklin E Zimring, *The Contradictions of American Capital Punishment* (New York: Oxford University Press, 2003).

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- Witnesses misidentifying innocent people as the actual perpetrators;
- Innocent people confessing to crimes that they did not commit;
- Innocent people pleading to crimes they did not commit, particularly when they fear the administration of the death penalty; and
- Unreliable informants acting on the basis of real or perceived incentives.

If steps are taken to address those problems, that will also help to reduce wrongful convictions. But note that I say “reduce” wrongful convictions – because when human beings are involved, you can never completely eliminate them. Can we state with certainty that Connecticut’s criminal justice system, as currently operated, will always uncover actual innocence in capital cases? Given the range of potential error, even an excellent judicial case review process simply cannot fairly be expected to identify every miscarriage of justice without fail.

It is precisely these error-prone areas that require and deserve attention, as well as the dedication of resources. Rather than focusing limited resources on the administration of the death penalty, we should shift our attention and resources to the prevention of wrongful conviction and the implementation of policies that will help us to solve more crimes. In doing so, we will meet the dual goal of making our streets safer and enhancing public confidence in the criminal justice system.

Connecticut must recognize and reform the various systemic weaknesses that can cause wrongful convictions – and therefore, wrongful executions. It is only after having implemented those reforms, assessed their effectiveness, and soberly recognized the remaining threat of wrongful conviction presented by systemic and human error that Connecticut can fairly assess whether a capital punishment system should persist. At this time, however, the risk of executing an innocent person is too great, and therefore unacceptable.

Thank you for allowing me to testify on this crucially important issue. I am happy to answer any questions you may have.

