

JUSTICE FOR ALL: CONVICTING THE GUILTY AND EXONERATING THE INNOCENT

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

| | Page |
|------------------------------------------------------------------------|------|
| Grassley, Hon. Chuck, a U.S. Senator from the State of Iowa | 3 |
| Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont | 1 |
| prepared statement | 26 |

WITNESSES

| | |
|------------------------------------------------------------------------------|----|
| Witness List | 25 |
| Watkins, Craig, District Attorney for Dallas County, Dallas, Texas | 5 |
| prepared statement | 28 |
| Haynesworth, Thomas, Richmond, Virginia | 7 |
| prepared statement | 33 |
| Marquis, Joshua, District Attorney for Clatsop County, Astoria, Oregon | 8 |
| prepared statement | 36 |

QUESTIONS

| | |
|------------------------------------------------------------------------|----|
| Questions submitted by Senator Chuck Grassley for Joshua Marquis | 47 |
| Questions submitted by Senator Chuck Grassley for Craig Watkins | 49 |
| Questions submitted by Senator Amy Klobuchar for Joshua Marquis | 50 |

ANSWERS

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Responses of Joshua Marquis to questions submitted by Senator Grassley | 51 |
| Responses of Joshua Marquis to questions submitted by Senator Klobuchar | 56 |
| NOTE: At the time of printing, after several attempts to obtain responses to the written questions, the Committee had not received any communication from Craig Watkins. | 62 |

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Testimony of Kirk Bloodsworth, Death Row Inmate Exonerated by DNA, March 21, 2010 | 63 |
| “Rightful Convictions,” Posted by Joshua Marquis, www.cato-unbound.org , March 7, 2012 | 64 |
| Barbara Parker Hervey, Judge, Texas Court of Criminal Appeals, March 21, 2012, statement | 69 |
| Testimony of Thomas Haynesworth, The Mid-Atlantic Innocence Project, and The Innocence Project, March 21, 2012 | 77 |
| Innocence Project National Criminal Justice Commission Act (S. 306) letter to Senate, September 2011 | 94 |
| Letter to Senator Leahy from Mary Lou Leary, U.S. Department of Justice, March 21, 2012 | 96 |
| Letter to Senator Leahy from Stephen Saloom, Esq., Policy Director, Innocence Project, March 27, 2012 | 99 |
| The National Criminal Justice Commission Act of 2011, S. 306, fact sheet | 100 |
| Endorsement letter from National Organizations, Businesses, and State and Local Organizations for the National Criminal Justice Commission Act of 2011 | 101 |
| “The Innocent and the Shammed,” by Joshua Marquis, Op-Ed Contributor, <i>New York Times</i> , January 26, 2006 | 104 |

IV

| | Page |
|--------------------------------------------------------------------------------------------------|------|
| Scott Shellenberger, State's Attorney for Baltimore County, Maryland, written testimony | 107 |

JUSTICE FOR ALL: CONVICTING THE GUILTY AND EXONERATING THE INNOCENT

WEDNESDAY, MARCH 21, 2012

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

The Committee met, pursuant to notice, at 10:08 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Klobuchar, Franken, and Grassley.

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

Chairman LEAHY. The major complexity of the discussions between the two leaders of this Committee up here is how to figure out how to work the controls on these new chairs they put in here, in case you are wondering what deliberations go on in Congress.

On a more serious matter, though, over the next two weeks on the Judiciary Committee, we are going to focus on a vital component of our jurisdiction: ensuring the integrity of convictions in our criminal justice system. As a former prosecutor, I have great faith in the men and women of law enforcement, and I know that the vast majority of the time, our criminal justice system works fairly and effectively. But in those instances when the criminal justice system does not work the way it should, the consequences are grave, and our faith in the system is shaken.

The criminal justice system only works when all relevant evidence is collected, is retained, and is tested, and then when it is appropriately shared with defense counsel. For more than a decade I have worked to ensure post-conviction DNA testing and reexamination of evidence that has resulted in innocent people being exonerated, but if you have an innocent person locked up, it means that somebody who committed the crime is out there, and we should use the same evidence to go and get the right person.

We enacted the *Innocence Protection Act* as part of the *Justice For All Act*. We did that during the Bush administration. And today the Judiciary Committee is going to focus on instances where poor evidence led to wrongful convictions. Then, next week, the Committee will turn to another important aspect of our criminal justice system to examine the need to share key evidence with the defense in order to guarantee a fair trial.

Several years ago, Congress made great strides toward protecting the integrity of the criminal justice system by passing the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program. I am

proud to see Kirk Bloodsworth here in the audience. But we have with us today Thomas Haynesworth. This is a case where the wrong things were done. Mr. Haynesworth spent 27 years in prison for a series of rapes he did not commit. With the support of the Virginia Attorney General, he was finally exonerated after DNA testing that was funded by the Bloodsworth program implicated someone else. He spent 27 years in prison because of a wrongful conviction. There is no way we can give those 27 years back to him. But at the very least, we ought to try to work to make sure nothing like that happens to somebody else.

I understand that today is a special day. It is the anniversary of Mr. Haynesworth's release from prison, but it is also your birthday, so Happy Birthday, Mr. Haynesworth. I would hope that it feels good that you can walk in and out of this room at your own volition. And we are honored that you have chosen to spend your birthday with us.

Kirk Bloodsworth was a young man just out of the Marines when he was arrested, convicted, and sentenced to death for a heinous crime that he did not commit. My wife, Marcelle, and I have gotten to know Kirk very well over the years. He was the first of many people in the United States to be exonerated for a capital crime through the use of DNA evidence, even though he ended up on death row. The thing is, when he was finally exonerated, somebody in the prison said, "You know what is interesting? There is a guy who looks just like him in a different part of the prison." And it turned out, of course, that was the person who had committed the crime. His lawyer is now a respected judge on the court here in the District of Columbia, Bob Morin.

We also have Craig Watkins, the district attorney in Dallas. Mr. Watkins has been heavily involved with Texas' Criminal Justice Integrity Unit, which is at the cutting edge of criminal justice reform. Mr. Watkins and Judge Barbara Hervey, a Democrat and a Republican, worked closely together on this project, demonstrating that integrity in the system is something which ought to unite Republicans and Democrats. The Texas Criminal Justice Integrity Unit is tackling the need to educate officials about issues such as working with forensic science. And Judge Hervey has also submitted written testimony highlighting the good work being done in Texas.

We learn regularly of defendants released after new evidence exonerates them. Levon Brooks and Kennedy Brewer were released in 2008 in Mississippi after serving a combined 32 years for a murder they did not commit. There are too many such cases.

In the coming weeks, I expect the Judiciary Committee to take up the reauthorization of the *Justice for All Act*, which will include several important provisions in addition to the Bloodsworth program. Unfortunately, the vast majority of capital cases and other serious felony cases do not include DNA evidence that can determine innocence or guilt. For those cases to be fairly considered, each side must have well-trained, competent counsel.

It also includes new protections for victims of crime, funding for State and local governments for DNA testing, and reauthorization and updating of the *Debbie Smith Rape Kit Backlog Reduction Act*. This authorized significant funding to reduce the backlog of untested rape kits so that victims need not live in fear and so we can stop

hearing about cases where somebody has been raped and is told by the police, "Well, we are not going to be able to check DNA in the rape kits for several months. In the meantime, please keep your doors locked because these people tend to come back." We do not want to see that sort of situation.

I will put the rest of my statement in the record. I apologize for my voice. We seem to have, along with all the flowers coming up a couple weeks early in DC, the pollen that comes with it.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman LEAHY. Senator Grassley.

**STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA**

Senator GRASSLEY. Thank you, Mr. Chairman. It is very good that you are holding this hearing.

The debate surrounding crime and punishment has been around for a long time. Our Founding Fathers drafted and ratified the Constitution and Bill of Rights 225 years ago. At the forefront of their mind was ensuring the protection of individual liberty from the power of government. However, our Founders did recognize that at times there are citizens that break the social contract of our civil society, and they need to be punished, provided they are afforded due process. While not strictly defining what due process was required under the Constitution, the Constitution and years of court cases have outlined that process, which has worked to ensure a baseline set of standards at both the State and federal levels of criminal prosecution.

Over time, these baseline procedures have been supplemented by statutory law, model rules, court rules, and standards of professional responsibility that are designed to ensure the fair and impartial administration of criminal justice. Unfortunately, despite the adherence to the community, laws, regulations, rules, and procedures, there is the possibility and fact that innocent people could be afforded all due process yet still be convicted.

Mr. Haynesworth, here today with us, has spent 27 years in prison for a crime that he did not commit. In December, he was declared innocent by the Virginia Court of Appeals. His case presents us with a personal example of why we must continue to ask questions about the criminal justice system and not become complacent. Cases like Mr. Haynesworth's make us realize that no system involving humans is perfect. It is sad, it is unfortunate, and an emotional reality that we must recognize. However, we must also examine the issues in an informed way that does not threaten to destabilize the entire criminal justice system.

Chief among the issues to discuss today is the question of how many innocent men and women may have been convicted over the years and how do we effectively review those cases, correct the injustices, and apply what we learn so that injustices are not repeated. This is not a very easy task. So the question becomes: How do we determine which cases should be reviewed? And how do we allocate the limited resources of government to review?

It is important to note that there is a real discrepancy in the number of individuals in prison who are actually innocent. For ex-

ample, some argue that cases where truly innocent individuals were exonerated are just the tip of the iceberg. Others argue that the number of true exonerations is small because many of the statistics on exoneration include cases where convictions were overturned procedurally, even though the individual was not found factually innocent.

Furthermore, they argue that the number of exonerations is going down each year as technological advances such as DNA testing eliminate many wrongful convictions from even occurring because DNA testing is being routinely used to prove factual innocence earlier in the investigative process. Getting a better understanding of how many cases are out there will not only inform us about whether reforms are needed but also what types of reforms would provide the best help.

We also need to be cognizant of the fact that, in addition to the federal criminal justice system, there are 50 different State justice systems, each with its own constitution, laws, rules, regulations, and procedures. This is what Justice Jackson, who was then Attorney General Jackson, had to say in a famous speech, "The Federal Prosecutor": "Outside of Federal law each locality has the right under our system of Government to fix its own standards of law enforcement and of morals." This statement is particularly important today given the current fiscal situation of our Federal Government.

We do not have the resources at the federal level to provide funding to States to review every single criminal case after each case has exhausted all appellate remedies, nor should we interfere with the day-to-day intricacies of State criminal justice.

As written testimony submitted by Judge Hervey points out, the State of Texas, via the Court of Criminal Appeals, established the Texas Criminal Justice and Integrity Unit to review their criminal justice system and proposed reforms. As States are already undertaking this effort on their own, our role in Congress should be to examine the federal criminal justice system and not to reform every State system. We should not go down the path of attempting to correct problems in State criminal justice systems. Instead, as a recent report on prosecutorial misconduct in the Ted Stevens case points out, we should expand our limited resources ensuring that the federal criminal justice system works as it should.

That said, we have a panel of witnesses here today to discuss these important topics, and I look forward to the very important testimony we are going to receive. Thank you.

Chairman LEAHY. Thank you.

We will begin with Mr. Watkins. Craig Watkins is the District Attorney for Dallas County, Texas. In November of 2006, he was elected as the first African American district attorney in Texas. He has led his office to a 99 percent conviction rate, but just as importantly, he established the Convictions Integrity Unit that has reviewed over 300 cases in the past four years and led to the exoneration of 25 wrongfully convicted prisoners. It has received national recognition for helping to ensure the effectiveness and integrity of the justice system.

So, District Attorney Watkins, we are delighted to have you here. Please go ahead, sir.

**STATEMENT OF CRAIG WATKINS, DISTRICT ATTORNEY FOR
DALLAS COUNTY, DALLAS, TEXAS**

Mr. WATKINS. Good morning, Chairman Leahy and Ranking Member Grassley. Thank you for inviting me to testify today on an issue of national importance, "Justice for All: Convicting the Guilty and Exonerating the Innocent." I would like to briefly address with you three areas related to this topic. First is the formation of the Dallas County District Attorney's Office Conviction Integrity Unit. Second is a "smart on crime" philosophy. Third is continuing our existing improvements.

John F. Kennedy said, "Change is the law of life and those who look only to the past or present are certain to miss the future." When I took office, I saw a need to look to the future of law enforcement. I saw a need to improve how law enforcement approached crime. And I saw a need to improve past practices. A prosecutor's job is not simply to obtain convictions but instead to see that justice is done.

In order to see that justice is done and eliminate threats to justice, I formed the first Conviction Integrity Unit in a prosecutor's office in the country. Dallas County is the ninth largest county in the country. We obtained more than 60,000 convictions in 2011. We have 17 felony courts and 13 misdemeanor courts. Our State of Texas this year will execute more offenders than any other State. Therefore, our interest in ensuring with absolute certainty the accuracy of the judicial system is critical to the success of our county and, in my view, on a larger scale, to the success of our country.

The Conviction Integrity Unit's work recently came full circle in a case that absolutely would not have been prosecuted without the investigative efforts of the Conviction Integrity Unit.

In 1989, a seven-year-old little girl lay peacefully asleep in her bed. In the middle of the night, a predator crept into her house, took her from her home, and sexually assaulted her. The predator violated her entire family when he assaulted her. Her mother was restless and uncertain for years. Her father suffered deeply as well. The damage this man did was unimaginable. Local, State, and federal law enforcement sought out to capture a man who gained the moniker the "North Dallas Rapist." The crime committed against that child went unsolved for years.

In the same time period, another man was charged and ultimately convicted. The man, who was deaf, professed his innocence from behind bars for years. His claim of innocence led to our administration's investigation, which ultimately exonerated him.

When the investigation started, the molester of the little child was walking the streets believing that he had gotten away with a horrific crime. Additionally, he continued to commit those same types of crimes. The victim in that case believed that the justice system had forgotten about her. Her case had gone unsolved since 1989. For years she lived in fear that her attacker was still free. At the same time, a man sat in prison for a crime he did not commit. Ultimately, our Conviction Integrity Unit pursued a life sentence for the real perpetrator. Within a matter of minutes, the jury obliged. Additionally, upon our recommendation, the Texas Court of Criminal Appeals freed the wrongfully convicted man. This is an example of what a Conviction Integrity Unit can do.

Texas has formed the first statewide Texas Criminal Justice Integrity Unit. Einstein defined insanity as doing the same thing over and over again and expecting a different results. In light of the DNA exonerations, we must continue to change what we have done and what we will do. It is nonsensical to think that we have the intellectual capacity to convict an innocent man, but we are not smart enough to free a wrongfully convicted man.

As protectors of a free society, we cannot allow our zeal to convict a person to overcome the morals and values we stand for as a country. Too often Dallas County promised fairness but instead delivered inequality. Our history is spotted with these cases, which you are likely familiar with. Universally, we are raising the necessity of accuracy in the handling of criminal trials. At the same time, our ability to deliver that accuracy has dramatically improved.

The causes of wrongful convictions are as numerous as the cases reviewed. There are instances of prosecutorial misconduct, instances of mistaken eyewitness identification, and instances of pure incompetence by those charged with handling the cases. Recognizing the flawed methods used to obtain convictions in cases involving DNA exonerations begs the question of reliability of those methods in non-DNA cases.

In the overwhelming majority of cases we review, the claimant will not actually prove his innocence. However, the overwhelming majority of flights that take off will land. When a plane crashes, we investigate what happened and we learn from it. We do not pretend that it did not happen; we do not falsely promise that it will not happen again; but we learn from it, and we make necessary adjustments so it won't happen again. The same approach should be pursued within our criminal justice system. It is human to error; however, to be humane we must recognize those errors and apply the appropriate solutions to prevent the same error.

Our "smart on crime" approach has dramatically reduced the crime rate in Dallas County. We have worked with the Dallas Police Department and other law enforcement agencies in the county to achieve an all-time low in crime and an all-time high in our conviction rate. The approach that we have used has not diminished our ability to prosecute cases, but instead has enhanced it. This approach has garnered credibility with all segments and communities in Dallas, and in order for our criminal justice system to work, we must strive for perfection and credibility.

Texas has made reforms in the areas of eyewitness identification, retention of biological evidence, and documentation of statements made by defendants and/or witnesses. These improvements have been aimed at reducing the likelihood of wrongful convictions and strengthened the foundation of the criminal justice system in Texas.

Likewise, the Federal Government has taken important steps in improving our justice system by passage of the *Justice for All Act* in 2004. These measures serve to lighten the financial burden of post-conviction DNA testing and improve the educational opportunities for the legal community. I encourage you to continue on this course and continue to provide funding for these critical programs.

There is universal agreement that the conviction of innocent persons for a crime they did not commit is intolerable in a civilized

society. We are standing at the threshold of progress as it relates to strengthening the integrity of our criminal justice system. Let us continue to take advantage of this opportunity of exploration and improvement.

Thank you for allowing me to comment at this time, and I will answer any questions that you may have.

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

Chairman LEAHY. Thank you.

We will go to each of the witnesses first, and then we are going to have some votes in between here, which we are trying to juggle things so that somebody can keep the hearing going.

As I indicated earlier, 27 years ago, Thomas Haynesworth was wrongfully convicted of attacking five women near his home in Richmond, Virginia. He maintained his innocence for nearly three decades. He was finally exonerated of his crimes. He was released from prison last March at the age of 46. He now works for the Virginia Attorney General's office. He spent the last year, as you can imagine, reintroducing himself to his friends and family.

Mr. Haynesworth, I appreciate your being here. Again, I must say I am very sorry for the reason why you are here. I am sure nobody is more sorry than you are, but, thankfully, at least you have been cleared. Please go ahead, sir.

STATEMENT OF THOMAS HAYNESWORTH, RICHMOND, VIRGINIA

Mr. HAYNESWORTH. Thank you for inviting me to testify on the issue of wrongful conviction.

Exactly one year ago, March 21, 2011, the Commonwealth of Virginia gave me the most memorable birthday present ever: I was released from prison after serving 27 years for crimes that I did not commit. I spent more than half my life and almost my entire adult life in prison. But that gift came only because of the hard work by many people in the organization, including public officials such as the Attorney General of Virginia. I am grateful to them for giving me this assistance.

In February 1984, when I was 18 years old, I was charged with five rapes and sexual assaults. I had never been arrested before. From the moment I was arrested, I told everyone that I was innocent. But four other women also mistakenly identified me, and DNA testing did not yet exist to help me prove my innocence. I was convicted of three of those crimes and sentenced to 84 years in prison. Later, the State crime lab discovered evidence in one of my cases and proved that I was innocent and that a convicted serial rapist had committed that crime.

Like many others, proving my innocence and securing my freedom was not easy. It took a lot of time and support, including the State crime lab conducting DNA testing in two of my cases. I took and passed two lie detector tests, learned from three different organizations how to work on a case, including the Mid-Atlantic Innocence Project, the Innocent Project in New York, and Hogan Lovells, a private firm that worked pro bono. Experts had to review the evidence. Two prosecutors had to work on my cases. The Virginia Attorney General and the Governor supported my case. I es-

pecially would like to thank the law enforcement officials, in particular Attorney General Cuccinelli, for their efforts to correct my wrongful conviction and support my innocence.

Proving my innocence also was not cheap. DNA tests, overtime for crime lab staff who managed this difficult project, and the work of my lawyers took hours and cost a lot of money. Luckily for me, both the State of Virginia and the Mid-Atlantic Innocence Project were able to do this work because they had received grant funding from the Federal Government to cover the DNA testing, overtime hours, and some of the attorney time. This funding came from the Federal Bloodsworth program and Wrongful Conviction Review Program. Without this support, I would still be in prison.

Congress and States should support reforms that will help prevent wrongful conviction as well as funding for grant programs that help exonerate the innocent.

Thank you for listening to my testimony today. I would be happy to answer any questions.

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

Chairman LEAHY. Thank you, Mr. Haynesworth.

We will finish with Joshua Marquis. Mr. Marquis is the district attorney of Clatsop County, Oregon, where he has served since 1994. He has been a member of the Board of Directors of the National District Attorneys Association since 1997. I know how much I enjoyed serving as a member of that same board. He is also a member of the American Bar Association's Criminal Justice Section Leadership Council. He is a past president of the Oregon District Attorneys Association.

District Attorney Marquis, we are glad to have you here. Please go ahead, sir.

STATEMENT OF JOSHUA MARQUIS, DISTRICT ATTORNEY FOR CLATSOP COUNTY, ASTORIA, OREGON

Mr. MARQUIS. Thank you very much. Senator Leahy, Ranking Member Grassley, thank you for inviting me here today. I am here on my own dime because this matter concerns me greatly.

I want to make clear this is not a partisan issue. Even though I was invited by the minority, I want to make clear that I have never voted for a Republican for national office in my life and do not plan on doing so in the future. This is not a Democrat-Republican issue.

The National District Attorneys Association, on whose board I serve and where Chairman Leahy was the vice president, I believe, during a couple of terms when he was district attorney in Burlington, Vermont, probably before I was a lawyer——

Chairman LEAHY. Probably before you were born.

[Laughter.]

Mr. MARQUIS. Maybe not quite that long ago, Senator. But we are nonpartisan. We have worked with both Democratic and Republican administrations.

I am not here to tell you that wrongful convictions do not occur or that prosecutorial misconduct does not occur. I have my job because my predecessor was arrested, indicted, convicted, jailed, and disbarred, in that order. She framed two completely innocent police

officers because they would not fix a reckless driving citation for her boyfriend, a federal ex-con. And I was subsequently appointed to fill her position and then later elected.

When I came into my office, I discovered that there were things not nearly as spectacular or as tragic as Mr. Haynesworth's case, but cases that just did not smell right. One of the wonderful things about being a prosecutor, as opposed to being a defense attorney—I have been both—is that as a prosecutor our duty is just to the truth. It is not to the client. And so if a case does not feel right, we have the ability to dismiss it. And so I went back and looked at cases and decided that some should be dismissed. In one case, I even went and asked that a perjury case conviction be vacated because, again, it just did not smell right. That is one of the advantages of being a prosecutor in our system.

As I think Mr. Watkins said, it is not news when planes land safely, as Walter Cronkite says. So Mr. Haynesworth's case and that of Kirk Bloodsworth, who is here in the audience, are remarkable because they are, frankly, very rare. You do not find news stories that say, "DNA confirms guilt of defendant." It is simply not news anymore.

Mr. Haynesworth is someone who deserves our apologies, and I was asking him—he probably deserves compensation. But as he pointed out, quite generously, the *Washington Post*, in a series of articles about his case, talked about how the Virginia Attorney General and two Commonwealth attorneys, one a Democrat and one a Republican, did everything they could. Frankly, if DNA had existed in 1982 when he was first wrongfully convicted, I do not think he would be—and he actually brought up an interesting point. He brought up two different kinds of science: DNA, which prosecutors brought into the courtrooms of this country, not defense attorneys, and fought State by State trying to get it to fit Daubert or Daubert-like standards, and now it is accepted, and now we realize it exonerates as well as inculcates. But he also mentioned lie detector tests. Lie detector tests, on the other hand, are almost universally rejected, frankly, as "junk science." They are not allowed in most States under any circumstances.

When I was last in this room was 12 years ago, and we were talking about the first iteration of the *Innocence Protection Act*. And, frankly, I was here opposing that. I had problems with it. So did my organization. We worked it out, and by 2004—I think it was called the *Justice for All Act*—it passed, and I think you are looking to—one of the witnesses there was Barry Scheck from the Innocence Project, and he was talking about a guy named Ricky McGinn. On that very day that we were here, Ricky McGinn's picture was 12 times across the cover of *Newsweek*—"Is this man innocent?"—and implied that if he could just get a DNA test, it would prove that he was innocent.

Now, again, I did not vote for George Bush, but he was then the Governor. He was running for President. Most people do not know this. The Governor of Texas does not have the ability to grant a plenary commutation. He can just grant a single 30-day reprieve. But he did that for Ricky McGinn, and Ricky McGinn got that test. But you never heard about Ricky McGinn again because Ricky

McGinn was found to have, in fact, raped and murdered Stephanie Flannery, his step-daughter. These victims have names.

By the same token, eight years earlier, Roger Coleman, another poster boy for innocent people on death row, post—conviction, 14 years after his death, DNA testing was conducted. A huge press conference was prepared. It was going to be on “Nightline” live. The envelope was opened. The Canadian laboratory had been—it turns out that one in 19 million possibility Roger Coleman had not merely raped but murdered Wanda McCoy. But good luck trying to find that case because it is an example of what I call “exoneration inflation.”

And, frankly, to mention people like Roger Coleman and Ricky McGinn in the same breath as people like Thomas Haynesworth and Kirk Bloodsworth does them a dishonor. These men are genuinely exonerated. And many States have developed programs, like Virginia and other places, to say we are not merely going to acquit people, we are going to find ways to declare them exonerated.

I commend Mr. Watkins on a conviction rate of 99 percent. I have been a prosecutor for 19 years, and the best I have ever been able to do is about 75 to 80 percent.

I have gone into much greater detail in my written testimony, which I see I am beginning to run over my time, and so I want to just touch on one or two more points.

One of them is I think Senator Durbin, who is not here, deserves credit for one of the things that we need to do to make sure that the right people are prosecuting and defending is to provide incentive, and when we have law students, young public defenders and prosecutors with debt loads of \$100,000, we will never be able to pay them very much money. So the *John R. Justice Act*, which you have funded and it is funded through the Department of Justice, although at only a \$4 million level, has been passed and has been passed through the leadership of Senator Durbin, and he deserves credit for that.

If you are inclined to do other things, I would strongly suggest avoiding something like the Webb Commission, which seeks to do, as I understand it, a soup-to-nuts examination of the criminal justice system across America. The problem with that is, as Senator Grassley pointed out, you have 50 different systems with 50 different funding sources. If you are going to do an 18-month study, which is what the Webb Commission suggests, do it of the federal system. Frankly, you advise and consent the President on the appointment of the federal prosecutors and judges, and you fund all of those agencies.

So, in closing, I would ask you to take a look; hopefully you will have questions from my written testimony, but I sometimes am concerned that—and, again, what Mr. Watkins has done is admirable. It is not the first time it has been done. For 10, 12 years, there have been programs in San Diego, St. Louis, and Minneapolis to reach out and offer inmates in prison the opportunity for free DNA tests. Most of them do not take it because most of them, unlike Mr. Haynesworth, are not innocent.

If we are to believe some defense experts, we should think that all confessions are false and coerced, eyewitness testimony cannot be trusted, the police are going to basically lie, prosecutors are

going to misconduct themselves, and really we cannot trust anything. I do not believe that is true. I think there are improvements that we can make. There are improvements that this Committee can help fund. And we owe it to people like Mr. Haynesworth and to the many victims of crime, who, frankly, I see more than my constituents as the people to whom I owe my primary obligation as a prosecutor.

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

Chairman LEAHY. Well, Mr. Marquis, thank you. You are obviously an active prosecutor, and I agree with you, when we have gone at this in the *Innocence Protection Act*, we have not done it with the idea that everybody who is arrested is arrested falsely. I think we all know that. You have emphasized very much what I always felt as a prosecutor: you also have the power to withhold prosecution if you feel a case is not right. Prosecutors do have a duty to protect everybody within the system. And what I worry about is when you have somebody as you described, like your predecessor, who distorts the system.

Incidentally, you did do some research if you found that I had been vice president of the National District Attorneys Association. I must tell you I was about to become elected president, but I gave up the honor and glory of that for the anonymity of the U.S. Senate.

[Laughter.]

Mr. MARQUIS. I think you did better.

Chairman LEAHY. There are days.

Mr. Haynesworth, I admire your courage in even coming forward after going through this ordeal. I think a lot of people would have said, "I just want to shut out the world. The world shut me out, I want to shut out the world." You have not done that, and I applaud you for that.

I think cases like yours are one of the reasons why I fought so hard for the Bloodsworth post-conviction DNA testing. If you had not had that DNA testing, do you think that you would have been able to have proven your innocence.

Mr. HAYNESWORTH. No, sir. That was one of the biggest assets to my being released from prison, was the post-DNA testing.

Chairman LEAHY. Can you describe a bit—and Senator Grassley and I were talking about this earlier—just how being locked up for a crime when you know that you did not commit the crime? How did you maintain your sanity for 27 years?

Mr. HAYNESWORTH. The first thing that I did when I got in there, I did not finish high school, so the first thing, I went back to school to get my GED, and I took some trades and took three courses of college. So I did things to help develop my mind, and then I got familiar with the law. I started going to the law library, studying the law. I had a cell partner. He also was good with law, so we studied all kinds of cases, and I just started writing numerous people and trying to get somebody to help me, just telling me to take a chance, and if you discover some DNA testing, I will approve it. And I showed them I am one of those who was innocent.

So I just did positive things, you know, to occupy my mind. I said that I wanted to be better coming out than I came in. And in pris-

on, you know, for 27 years, I told a lot of people, it kind of was a blessing to me because a lot of things that I accomplished in prison, if I had never went to prison, I do not think I would accomplish some things. So I just kept myself grounded by doing positive things.

Chairman LEAHY. Thank you very much.

District Attorney Watkins, You work to ensure the integrity of convictions obtained by your office. Numbers mean nothing if there is not integrity in those numbers, in what you do, and I think both you and Mr. Marquis would agree on that. If you are going to bring cases, you want to know that you are bringing cases that should be brought.

You described the work of the Conviction Integrity Unit, and that reviewed—and correct me if I am wrong in the numbers—300 cases, as I understand it, found 25 wrongfully convicted individuals and set them free.

What has been the public reaction? Did this increase their confidence in the integrity of the judicial and criminal justice system? Or did they say, “You guys are all wrong. Look what you did”?

Mr. WATKINS. Well, first of all, I think the perception—

Chairman LEAHY. This is a possible double-edged sword. I am just curious what happened.

Mr. WATKINS. The perception, unfortunately, of the general citizen is that a prosecutor should seek convictions. They do not understand that statutorily—and I believe it is the law in every State—it is not to seek conviction but to seek justice. And when you would see a person walking free after 27 years—I think the longest person that served in Dallas County was over 30 years—for a crime they did not commit, it automatically gives credibility not only to the DA’s office but to the criminal justice system as a whole to show that we are pursuing just as vigorously claims of innocence as we pursue convictions.

I take issue with the fact that there are some that want to take away from the importance of this work and the fact that, according to the numbers that they see, at this point they are minimal.

Unfortunately, if you limit it to DNA, obviously not every case has DNA. But what we have seen—basically we have created a laboratory within Dallas County. We have seen cases where we would exonerate a person as it relates to DNA, but also we learn what caused that person to be convicted for a crime they did not commit. And so just specifically looking at DNA I believe is short-sighted. There are issues that we found in Dallas County and throughout the State of Texas which cause a person to be wrongfully convicted. And so it opens up this Pandora’s box of cases where there is no DNA.

Chairman LEAHY. But you also put in place a number of procedures on lineups and eyewitnesses. Is that correct?

Mr. WATKINS. We did. Eyewitness identification, of the cases that we have exonerated, although DNA was available, if you just look at the pure issues in the case, eyewitness identifications caused 90 percent of the wrongful convictions. Like the district attorney from Oregon said, in 1984 we did not have DNA, but we did have eyewitness identification, which proved to be flawed.

And so the next phase—I mean, we have done this in Dallas County—is to look at those cases where there is no DNA, and we have exonerated several individuals, and the Court of Criminal Appeals has upheld those exonerations where there is no DNA, there is no science. There was prosecutorial misconduct. There was police misconduct.

Chairman LEAHY. How do you feel about videotaping interviews of suspects or even of witnesses?

Mr. WATKINS. I think, you know, we should. We have the technology to do it. It is very inexpensive. I have an iPhone, and I am sure that most police officers have a phone that will video record a confession. And so I think it is appropriate for us at some point to legislate that that should be done, because we even had false confessions.

I mentioned the deaf individual who was convicted for the crime that he did not commit and spent several years in prison. He actually confessed to the crime, and DNA proved that he did not do it. But he confessed under duress. He spent over 24 hours under interrogation, and he is deaf. He does not hear. There was never a point where they offered a person that knew sign language to come in and interrogate that individual. Under pressure, he said he committed the crime. But he did not.

I believe that this issue of wrongful convictions is more rampant than what the numbers show. We only have DNA in a few cases, and we can only prove it scientifically with those cases where there is DNA. But we can look at the elements of all of those cases outside of the DNA aspect and see that you can apply those same issues to cases where there is no DNA.

Chairman LEAHY. What I am going to do is go to vote. I am going to turn it over to Senator Klobuchar, and if there is nobody here when you finish, if you could just recess for a few minutes, because I will be back. Another former prosecutor.

Senator KLOBUCHAR. [Presiding.] Well, very good. Thank you, Chairman Leahy. I am not only a former prosecutor, but our county, Hennepin County, when I was there, took a lead on some of this work, worked with the Innocence Project, and we actually did a DNA review, as did Ramsey County, which includes St. Paul across the river, and reviewed all of our homicide conviction cases and with the DNA evidence and the new types of DNA that we had. We actually did not find wrongful convictions and did not have that problem in our own county, but I think Ramsey County had one that they brought forward. And to this day, I really do not understand why people, as you have pointed out, Mr. Watkins, would not want to do this, because our job as prosecutors is, as the title of this hearing, to convict the guilty and protect the innocent. And we saw that as a broader mission.

The other thing we did in Minnesota, as I think we were one of the first States—I know this—by a Supreme Court order of our Minnesota Supreme Court, we required that all interrogations be videotaped. And at first, the police and prosecutors were really concerned about this. It ended up being a very positive thing, and they did not want to get rid of it, to the point where our police chiefs would go and talk about it nationally, because it actually was some protection for their officers if there were any claims made of police

brutality that were not correct. It also was a way for prosecutors to see firsthand a defendant being interrogated. And we actually found it not only protected the rights of the defendant, but we also found that it helped us in some cases.

We had one case where a guy said he was blind so he could not have committed the crime, and then the police officer left and the guy got a piece of paper out of his pocket and started reading it on TV. That actually happened.

Another guy they left, and he looked down at his shoes and said, “[expletive deleted], I have blood on my shoes.” Take that off the record, that comment, but that is what he said. And so they had not discovered it.

So these were things that would not have happened if we did not have that requirement that was put in place to protect defendants’ rights. But I think it made it better for everyone.

We also, when I was county attorney, embarked on a new way of doing eyewitness ID, which, especially in some of the sexual assault cases, turned out to be the No. 1 reason false ID that people were wrongfully convicted, and we had someone similar to Mr. Haynesworth come up from another State and talk about what had happened. And we ended up actually using a different kind of ID that was researched that came out of Iowa and which, instead of looking at all the pictures at once, we looked at them one at a time when witnesses came in.

So we have done a number of things, and I just wondered if you have looked into that at all, Mr. Watkins, the idea of the sequential versus simultaneous ID and what the—I have not been caught up for the last few years on what is happening with that nationally, in addition to the videotape question that was asked earlier by Senator Leahy.

Mr. WATKINS. Sure. We in 2009 lobbied our State lawmakers to put legislation in place that required a standard as it relates to eyewitness identification, which took away the old standard and went to the double-blind system. And it is not a standard that is actually placed inherently on different jurisdictions, but it is a model, and that model is being followed by the majority of the jurisdictions in Dallas County and throughout the State of Texas at this point.

Another issue I want to point out is a lot of folks, when we have this conversation about wrongful convictions, you think about defendant rights. Well, as a prosecutor, I see it somewhat differently. I look at victims’ rights. And in all of the cases, several of the cases that we have actually exonerated the individual, we went and found the person who actually committed the crime. And sometimes it would be 20, 30 years later. And what we found is that the person that actually committed the crime continued to commit those same types of crimes after the person was wrongfully convicted.

Senator KLOBUCHAR. Exactly.

Mr. WATKINS. So we have done a disservice overall to our society by turning a blind eye to this issue. We allow the actual perpetrator, the actual criminal to continue to wreak havoc on society, when if we, you know, step back, take a look, and explore the mistakes that have been made and try to fix them, then we can actu-

ally truly get the perpetrator off the street, not waste our tax dollars on someone like Mr. Haynesworth, and protect society.

Senator KLOBUCHAR. Exactly. And I think the way you describe that is very important for people to understand.

Anything you would like to add? I do not want to miss the vote here, but, Mr. Marquis.

Mr. MARQUIS. Thank you, Senator Klobuchar. Yes, I think as a prosecutor—and you were one so you know what I am talking about—it is infinitely desirable to get preferably a video, and if not that, at least an audio, statement of the defendant. In my written testimony, I point out what the uniform standard jury instruction is in my State, and it is not exactly favorable. It tells the jury: You should view any statement said to be made by the defendant with great caution. The officer may have intentionally or deliberately—you know, blah, blah, blah. I mean, it is—so if you have a recording of it, that is desirable.

One of the things that—however, we have to remember that for the No. 9 size office that Mr. Watkins runs, you ran, I think, a couple hundred?

Senator KLOBUCHAR. We had 400 employees.

Mr. MARQUIS. Okay. Those are, frankly, rarities. I run, by American standards, a medium-sized DA's office. I have six deputies. The average prosecutor's office in the United States is one DA, one assistant, and six support staff. There are thousands, literally, of elected prosecutors.

So what I do, I spend thousands of dollars every year—well, try to—to equip these seven police agencies in my jurisdiction. However, if we say if you do not do this, we are going to exclude the statement, you are going to keep truthful evidence. So what we need to do is incentivize, for example, by having a uniform instruction that says, "If you tape, then you should give it extra consideration."

Senator KLOBUCHAR. Okay.

Mr. MARQUIS. The same thing, by the way, on—

Senator KLOBUCHAR. You know what, Mr. Marquis? I am going to a place that does not have a lot of mercy. That is the U.S. Senate floor. And I could miss the vote if I do not get back. So I am going to go back, and then if I am not able to return, we will ask in writing to allow you to finish, and I know some of my colleagues have questions as well.

I wanted to thank you all, and we are going to go into a recess right now, and then Senator Leahy will return, and Senator Franken. Thank you.

Mr. MARQUIS. Thank you.

[Recess at 10:58 a.m. to 11:13 a.m.]

Senator GRASSLEY [Presiding]. Could I call the meeting to order? The Chairman said that it was okay if I went ahead in his absence, so I think it was my turn to ask questions. I thank all the participants for their testimony and going out of their way to help us decide public policy.

I am going to ask a question of Mr. Marquis. When an innocent person is discovered, every possible measure ought to be taken to release them from prison and clear their name. What is not clear, however, is how frequently this occurs and what should be done to

reduce the chance of it happening. Mr. Marquis, you have written that the actual percentage of wrongful convictions is extremely low, and it seems that many of the wrongful convictions are from old cases, mainly the 1980s and earlier, before DNA testing was widely used.

Mr. Marquis, do you agree with Mr. Watkins that there are a lot of these cases out there? That is the first question.

Mr. MARQUIS. Senator Grassley, with all due respect, I cannot speak to Dallas because I have never been there, and I do not know what happened before he was district attorney, elected, I think, in 2007 or 2008. But, no, if we are talking about the universe of the United States, where I have the privilege of traveling around and talking, giving trainings to prosecutors on ethics.

In 2005, a man named Samuel Gross, who is a professor at the University of Michigan, did a study about wrongful convictions, and he did not confine it to DNA. He also took cases where there had been confessions by other people in prison, which is not an uncommon way, or recantations by the victim, by the eyewitness, a series of others, and did not just confine it to murders. It was also robberies and rapes. He came up with about 390 cases in a 15-year period from 1989 to 2003, and he offered the position, which was not unreasonable, that, well, there probably are more because these just are the ones that we know about from DNA and other matters.

So I said, okay, everything is in context. You have to look at everything in context. So let us take his number, round it up to 400, and then multiply it by 10. And I do not believe, by the way, that there are 4,000 wrongful murder and rape convictions in the United States in that 15-year period. I have no doubt that there were wrongful convictions, and maybe 400 was an accurate number. But, again, just for the purposes of trying to quantify this, I said let us take it and multiply it by 10.

So then you have to say, okay, out of what universe? Well, if you look at the Bureau of Justice Statistics numbers for that time period, and just assuming that we are talking about willful homicide and forcible rape, it is 1.5 million. So you divide the 1.5 million by 4,000, and you come up with an 99.27 percent rightful conviction rate.

Now, if you are in the one-half or one-quarter of one percent that is wrongfully convicted, that is small consolation for you. But as I think I pointed out in my testimony, in the United States every year pharmacists kill about 10,000 or 12,000 people—not deliberately—and medical mistakes cost over 15,000 deaths.

Now, as Mr. Watkins, I think, correctly said, what do you do? You do not just sit back—or on the planes, I mean, the airline I flew here on has killed 290 people since the death penalty was reinstated in 1976. I just use that. But I get on the plane. I had real severe turbulence coming here, and I was worried there for a minute. But I am not worried about the plane crashing because I am confident, as Mr. Watkins says, that they are going to inspect that plane, they are going to update it, and we have to do the same thing with the criminal justice system. We have to make sure.

But to answer your—I hope I answered your question, Senator Grassley. I think the idea to say that wrongful convictions do not happen, obviously Mr. Haynesworth is an example of a wrongful

conviction. Mr. Bloodsworth is. But, again, as a former journalist, their cases are rare enough; they make headlines. That does not mean we can lower our guard, but there are people who say three to five percent of the people in prison are there wrongfully. I would quit my job and, you know, go do something else if I thought it was anything remotely like that.

Senator GRASSLEY. I think I am satisfied that what you just said answers this question, but if you have something to add, I would let you add it. Do the cases of exoneration that we have heard about call into question the integrity of the entire criminal justice system?

Mr. MARQUIS. No, I think they—some of them, like Mr. Haynesworth's—if DNA had been in effect in 1984—in 1982 I think is when you were—1984, and had been properly used, what would happen is what happens now. The reason that you are seeing a drop-off in DNA exonerations is that police are using DNA at the front end.

There is always going to be a tiny number of rogue prosecutors who do bad things, like my predecessor, and there are always going to be a small number of cops who are willing to, you know, do as much as commit perjury. So I do not—the question, again, and I have said it before, is: Is this problem epidemic or is it episodic? And that does not diminish it. That does not mean, oh, well, if it is only episodic, then we do not have to really worry about it. But I think we do a tremendous disservice to the men and women in prosecution and, as Senator Klobuchar said, she was, you know, doing a program not exactly the same, but similar to what Mr. Watkins was doing, I think, 10 years ago. If we imply that somehow—if we were to believe popular culture in America, which is that, you know, any person, any one of us in this room, could be grabbed off the street at any time and wrongfully convicted of a crime. Does it happen? Yes. Does it happen a lot? No.

Senator GRASSLEY. When a convicted criminal claims innocence and demands additional DNA testing, who should pay for that test? If a DNA test then confirms his conviction, should the criminal bear any responsibility or consequences for knowingly using public resources, which are limited?

Mr. MARQUIS. Well, the National District Attorneys Association, who I represent, believes that DNA testing ought to be available to any inmate at any stage of a proceeding, even if they have been convicted, all of their appeals have been exhausted, and, again, many of the programs—the one in San Diego, the one in Minnesota, the one is St. Louis—one of the things that was striking about them is that, as Senator Klobuchar said, they did not find any people in her jurisdiction. Frankly, trying to get the money out of somebody who is doing prison time, Senator Grassley, is going to be almost impossible. I do not have any problem with the State paying for it. I think we should make DNA universally available, and I want to commend the State of New York that just two weeks ago made DNA collection universal for all arrestees. And, frankly, it ought to probably be lawyers and law enforcement. They take our fingerprints. Why not take a swab of our DNA?

Senator GRASSLEY. I have had my time, Senator, but if you are not ready, I have got one more question. But if you are ready, go ahead.

Chairman LEAHY [Presiding]. Go ahead.

Senator GRASSLEY. Sometimes we forget the basic principle here in Washington about separation of powers and restrict ourselves to carrying out constitutional responsibilities without intruding on the States. For example, most crimes are prosecuted by State authorities, especially street-level crimes like rape and murder, that seem to produce the greatest number of exonerations.

A three-part question, and let me ask all three parts. What should the Federal Government's role be in preventing wrongful convictions at the State level? Do you favor a federal review of State criminal justice systems like the Webb Commission? And I know you spoke about that some in your remarks. And what implications would result from federal interference in State prosecutions?

Mr. MARQUIS. Well, in terms of wrongful convictions, I think that, for example, if the Federal Government can help make CODIS, the national data bank, truly national, make it available, increase the number of categories where DNA and, for example, not shy away from what are called "warm" or "familial" DNA hits, where, for example, you know that the brother is not the person but is very close—there has been some reluctance, frankly, on the part of the FBI to do that. There should not be, if it helps us, if the ultimate goal is to find the person who did it.

Certainly the *John R. Justice Act* that Senator Durbin—in terms of having experienced and good prosecutors and defense attorneys—is going to reduce wrongful convictions. There is nothing worse than having someone, frankly, in a DA's office who only thinks they are going to be there for four years to get their name in the paper so they can run for some higher office or, you know, get their name in the paper so they can become a wealthy attorney. We are seeing a lot of professionalization of prosecutors' offices. And, by the way, I am long since being able to be the personal beneficiary of loan forgiveness, but it means a great deal when I talk around the country. So I think that and some of the aspects of the *Justice for All Act* have been very helpful.

On the Webb Commission, as I said, to be blunt, an 18-month review made up of people appointed entirely by the President and the Congress, both Democrats and Republicans, no stakeholder spots for defense lawyers, trial judges, prosecutors, or cops, the people who are involved in what, as you point out, are 97 to 98 percent of all criminal prosecutions in America, and with all due respect, Congress is not paying for those. Those programs are all being paid for by State legislatures that in some places, like California, are emptying prisons in enormous levels. So to do that in 18 months, I think, is unrealistic, to say the least.

And as I said, if Congress is interested in doing that, then why not confine it to that over which you have direct control, the federal prosecutors who you appoint, the federal judges who you advise and consent, and the various oversight that you have on the alphabet soup of federal agencies.

And, finally, to answer your question, the problem that comes from that is that if, for example, let us say the Webb Commission were to say we want to have—we are setting a national standard that every interview must be videotaped—which, by the way, I think would be great. As I said previously, as a prosecutor I want them to be taped so there is no question about what was said. Well, if there is no money that comes along with that for the roughly, I do not know, 2,000 non-metropolitan jurisdictions, how are we going to fund it? I mean, this sounds incredibly small potatoes, but a small police department that has been told that they have got to outfit every one of their cars with a video system and every one of their interview rooms, if they do not have the money to do it, they cannot.

So I think there is—I know that Senator Coburn, who I think normally sits on this Committee, and Senator Kay Bailey Hutchison spoke very strongly against the Webb Commission for exactly that reason.

I hope that answers your question, Senator.

Senator GRASSLEY. Thank you, Senator.

Chairman LEAHY. Thank you. I would note that States are happy to accept help from the Federal Government, whether it is using the FBI lab or the bulletproof vest bill or a number of other things. So asking for something in return, provided we provide the money, should not be a bad idea.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Mr. Watkins, I would like to ask you about forensic medical exams, specifically rape kits. Sexual assault is truly a heinous crime. It is also startlingly common. The Bureau of Justice Statistics estimates that there were about 188,000 incidents of rape or sexual assault in 2010. We have an obligation to help these victims, and the availability of DNA evidence gives us an opportunity to do so.

I introduced the *Justice for Survivors of Sexual Assault Act*, which would help reduce the backlog of untested rape kits and would guarantee that no woman ever suffers the indignity of paying for her own exam. And I would like to thank Chairman Leahy for his leadership on the *Violence Against Women Reauthorization Act*, which includes some of my key provisions, and I hope the Senate has an opportunity to vote on this bill soon.

Mr. Watkins, drawing on your experience as a district attorney, can you talk about the importance of DNA evidence in prosecuting rape and sexual assault cases?

Mr. WATKINS. Sure. Obviously, when we are talking about sexual assaults and proving these cases in court, DNA is tantamount to us having the ability to do that. In Dallas County, we went a step further. In fact, in Dallas County—it is the ninth largest county in the country—we only had one hospital that had what is called a SANE nurse, a sexual assault nurse examiner. That nurse is basically trained to take the evidence for a rape kit and is also trained to come to court and testify as it relates to those rape kits. And we were able to put in place at all the hospitals within Dallas County the ability to have this procedure done by folks that eventually will be able to come to court and testify to them.

Not only did we do that, we actually have a storage facility that will store that evidence in perpetuity. So if we do not know who committed the crime, and if it so happens that the person did commit the crime and they had been arrested and been to prison before, we can upload that information in what is called the CODIS system and get a match and bring that person to prosecution.

You know, jurors are very sophisticated these days. They watch a lot of TV, and, unfortunately, they think that, you know, they are going to get the same evidence that they get on TV like they see on "CSI." But that is not the case. But they want that. And so the more opportunity that we have to solidify scientific evidence and store it and keep it and bring it to their attention at a trial, the more opportunity we have to convict a person for committing the crime.

Senator FRANKEN. Thank you.

Mr. Haynesworth, we often hear about wrongful convictions in terms of statistics. Data compiled by the Innocence Project shows that more than 280 convicted individuals have been exonerated through DNA testing in the past 20 years, and in nearly half of those cases, the real suspect ultimately was found. Those statistics are, of course, important, but we cannot lose sight of the human toll caused by wrongful convictions. And, Mr. Haynesworth, I want to thank you for being here and reminding us of the human pain and suffering that this problem causes.

A lot of people might have given up hope after so many years behind bars. What gave you the courage to keep fighting for your freedom?

Mr. HAYNESWORTH. I think one of the most things was that when I got locked up in 1984, like I stated, I told everybody I was innocent, and I told the detective I was innocent, and the detective who worked my case did not believe me. He said, "No, we got the right man. You are the one." And from day one, I said I will prove my innocence, I will prove to them that they were wrong. I did not want to walk around being portrayed as something that I was not. You know, I was not in prison because of my fault, but somebody else's mistake.

When I first got involved with my lawyer, Sean, I stated to her that I was innocent. I even told her who I thought the perpetrator was, and it came I was right who this person was.

But then my faith in God, you know, my belief growing up in a Christian home and having faith in God that I knew and believed that one day, you know, the truth would come out, it just was a matter of fact that if I said they had my DNA, I knew I could prove my innocence.

So I just had my faith in God and the belief that one day my DNA would be discovered, and the day came I found out it had been discovered.

So I just think, you know, all the people who were there for me, Sean, the Innocence Project, you know, for the work they had done, supported me and stand behind me.

Senator FRANKEN. You wanted to clear your name.

Mr. HAYNESWORTH. That is the best thing. You know, I wanted to clear my name and prove to everybody that I was innocent, because I had a lot of persons even in my family that doubted my

innocence, and I wanted to prove to them that, you know, you have got five women who said that you raped and attacked them, and everybody said that all five cannot be wrong. So I just wanted to prove that and just clear my name.

Senator FRANKEN. Thank you.

Mr. Chairman, would it be okay if I asked a couple more questions? Thank you.

Mr. Marquis, thank you for your written testimony. I am sorry I was not here for your oral testimony. You highlighted the John R. Justice Loan Forgiveness Program, which I support. I agree with you that loan forgiveness plays an important role in recruiting and retaining quality attorneys to serve as prosecutors and defenders.

While we agree on that, it seems that we disagree about the Webb Commission, which you criticized. You said that the proposed Commission has “no dedicated positions for any stakeholders (defense attorneys, trial judges, or prosecutors).” I am reading that from page 8 of your written testimony. But the bill does require that the Commission be comprised of “individuals with distinguished reputations for integrity and nonpartisanship who are nationally recognized for expertise, knowledge, or experience in such relevant areas as law enforcement, criminal justice, court administration,” and other relevant fields. That is Section 6, paragraph (b) of the Webb Commission bill.

I guess my question is this: Would you support the Webb Commission if it included defense attorneys, prosecutors, and judges who meet that description?

Mr. MARQUIS. Well, forgive me for being too much of a lawyer, Senator Franken, but the language that you read to me was kind of spongy. In other words, it said people who—distinguished fields. When I say stakeholders, I meant literally, you know, public defenders, judges, et cetera.

I have got a couple other problems with the Webb Commission. Part of it is just the time period. Eighteen months is an extraordinarily short period of time. If I understand correctly, the intention is to do a top-to-bottom review of the American justice system, and I am assuming that means the entire American justice system, not just the federal one. And there is a lot of discussion about what happened back in the 1960s. There were, for example, a lot of—in response to the civil rights movement, police brutality, which we all saw on television, or at least I did when I was a kid, and those commissions began in turn the Law Enforcement Assistance Administration, which is long a blessed memory, but it professionalized police departments. It poured a huge amount of money into it, but to the good.

If the Webb Commission, or something like it—I know that is not the official name of it—were to do something like that, were to take a long view and be prepared even in these tough economic times to say, well, we are going to step in and make sure that, for example, the DNA labs—you make a really good point. For example, it is not just DNA testing. In order, for example, for child abuse to be adequately prosecuted, what have cropped up all around the country are Child Abuse Assessment Centers where children are interviewed not five times but once, usually on videotape, so there is no question about the children having been suggested by an

overzealous police officer, et cetera. Those have made dramatic changes in terms of how child abuse cases are prosecuted. We even have one in my little county in Oregon. And SANE nurses are one way—I am shocked to hear there is only one SANE nurse in Dallas. You know, I think we have two in my county, and I am only 40,000 population.

I jumped around a little bit, but I hope I answered your question, Senator.

Senator FRANKEN. Well, I think you bring up very valid points. What if the language said including the categories defense attorneys, prosecutors, and judges, and that the time was extended? In other words, do you think that—we have a real crisis in this country, and it seems like we have to do something about our criminal justice system. We have less than five percent of the world's population, but we have nearly a quarter of its prisoners. The cost of our correction system is staggering. The Vera Institute estimates that my State's taxpayers pay more than \$41,000 per year per inmate. That is not sustainable.

So I think we need reform, and, you know, to me reform means early childhood education, it means getting at it before it starts, and that sort of thing. But a Webb Commission or something like it seems like a good start to me, and I think that if you selected a bipartisan group of experts, including maybe the categories that you mentioned, is a "there" there for you?

Mr. MARQUIS. I think there might be, and I am sort of putting on my hat—I am on the executive Committee of the National District Attorneys Association, which, frankly, I think was the only national organization to publicly oppose the—I think the chiefs of the police and the sheriffs actually supported the Webb Commission. I think the things that you are talking about, Senator, would go a long way toward assuaging some of those.

You know, Minnesota, as you probably know, I think is either 48th or 49th in incarceration rates in the country. You are way, way down there. My State is number 30, and our approximate incarceration cost per inmate is about \$25,000.

You know, clearly we can always do better, and——

Senator FRANKEN. Well, I think that "we can always do better" is sort of a bromide that can be applied to anything.

Mr. MARQUIS. Well, then, let me be——

[Laughter.]

Senator FRANKEN. I am sorry.

Mr. MARQUIS. Then let me be more specific, Senator. If the federal——

Senator FRANKEN. I crack myself up.

[Laughter.]

Mr. MARQUIS. If the Federal Government was willing to invest significant amounts of money in both public defenders offices, if that was necessary, in DAs' offices—not federal—if they were willing to do that as part of it, then, yes, I think it probably—but if it is just to say we are going to make these broad, sweeping recommendations and, oh, by the way, have a nice day figuring out how you are going to fund all of this——

Senator FRANKEN. Okay. Well, I——

Chairman LEAHY. Could I play devil's advocate just a little bit? You know what it costs you to have these people locked up. You know what recidivism costs you. And my little State of Vermont has to struggle with this all the time. There is also a payoff for the taxpayers if it is done better.

Senator FRANKEN. Actually, I was going to say, "Thank you," and then go. So thank you.

Chairman LEAHY. You do not want to hear what I have to say?

Senator FRANKEN. I do, and I will have my staff—

Chairman LEAHY. Read the record?

Senator FRANKEN. Play me the entire remarks that you give.

Chairman LEAHY. You know, "We will check what you said in the record" fits right up there with, "The check is in the mail."

[Laughter.]

Senator FRANKEN. No. I want the video of it.

Chairman LEAHY. Well, thank you.

Senator FRANKEN. I want to get the real impact. I have got to go to something. That is all.

Chairman LEAHY. Thank you very much.

But the balance, I mean, I understand what you are saying, Mr. Marquis. Our State is small enough that even though I have a quarter of the State's population in my county when I was prosecutor, it was still pretty small. And you could look at all these things you wanted to and say, okay, great, how do we pay for it?

But I think at some point we have got to find a balance in here, whether it is on drug laws where taking cocaine, for example, if you are a well-paid stockbroker on Wall Street and you get caught with \$500 worth of powder cocaine, people say, "Oh, what a tragedy. Such a wonderful person. We will give him 20 hours' community service, and maybe he should write an essay for high school not to do that." If you are kid in the ghetto and you get crack cocaine and it costs the same amount of money, you are going to go to prison for 20 years.

Something is wrong with that, society suffers, and I think we all suffer on that. Now, that is a case where if it is a federal law, we should be doing better things about changing some of those disparities in penalties. We have taken a first step forward. We have got to do a lot more. Prosecutors can do a lot, of course, on discretion. But, still, what Senator Franken said about the percentage of number of people who are locked up in our country, something is breaking down.

Mr. MARQUIS. Well, Senator, a couple things. You just pointed out, correctly, that the federal Sentencing Guidelines that are so draconian are precisely that—they are federal. In my State, on your 27th conviction for possession of heroin or cocaine, the judge does not have the authority to send you to prison, even if they want to. The maximum sentence is 30 days in jail, and they are probably not even going to get that, even though I have family members literally coming and saying, "Please lock them up. We cannot afford an inpatient program, and at least they will not be using while they are in your jail."

But I think when we talk about the system, we also have to recognize that in the last 20 years in America, I mean, think about the Presidential election in 1988 when crime was a major issue,

there was that infamous Willie Horton ad by George Bush against Michael Dukakis, which most people considered pretty vile and racist, and why did that all happen? Because violent crime in this country was pretty much out of control. Murders are down almost 50 percent in 20 years. The number of victims is dramatically lower.

In terms of reducing the number of people who are raped and killed in this country, we are doing much, much better. And I would not suggest that it is at the—we are not simply incarcerating more and more people. If I can take the Occupy people for a moment, the one and 99 percent, it has nothing to do with money. One percent of the population victimizes 99 percent of the population. And the question is: How do you deal with that one percent? Most of us at the State level, Senator, have developed drug courts and alternative programs for even chronic drug possessors because we recognize that throwing them in prison just does not do any good. And for the most part, in States like Oregon, 77 percent of felons in my State do not go to prison. They get probationary sentences.

So, yes, I think when I say we can do better, I mean both the things that Mr. Watkins is talking about, what Senator Klobuchar is talking about, and if a federal commission would help grease the skids for helping pay for and recognize some of these things that, frankly, cost dollars, all the better.

Chairman LEAHY. I am just suggesting that we ought to figure out just how we spend our dollars. I considered myself a pretty active prosecutor. When I was there, I was the one person the police could always find at two o'clock or three o'clock in the morning. I went to more crime scenes than most people will ever see in their life during that time.

But I thank you for the testimony. I think we have a long way to go. The most important thing, though—and I think everybody would agree with this, whether you are a prosecutor or defense attorney—is that when you prosecute somebody, you want to make sure you have the right person because juries can make mistakes and juries do make mistakes. And law enforcement can make a mistake.

One of the things, when people say, “Oh, great, they arrested that guy,” they forget that if they got the wrong guy, the person who committed the crime is still out there and probably will do it again.

I thank you all very much. We will leave the record open for the rest of the week for further questions.

[Whereupon, at 11:43 a.m., the Committee was adjourned.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary

On

“Justice for All: Convicting the Guilty and Exonerating the Innocent”

Wednesday, March 21, 2012
Dirksen Senate Office Building, Room 226
10:00 a.m.

Craig Watkins
District Attorney for Dallas County
Dallas, TX

Thomas Haynesworth
Richmond, VA

Joshua Marquis
District Attorney for Clatsop County
Astoria, OR

PREPARED STATEMENT OF CHAIRMAN PATRICK LEAHY

Statement of

The Honorable Patrick Leahy

United States Senator
United States Senate
March 21, 2012

Over the next two weeks, the Judiciary Committee will focus on a vital component of our jurisdiction: ensuring the integrity of convictions in our criminal justice system. As a former prosecutor, I have great faith in the men and women of law enforcement, and I know that the vast majority of the time, our criminal justice system works fairly and effectively. In those rare instances when the criminal justice system does not work the way it should, the consequences are grave, and our faith in the system is shaken.

The criminal justice system only works when all relevant evidence is collected, retained and tested, and appropriately shared with defense counsel. For more than a decade I have worked to ensure post-conviction DNA testing and reexamination of evidence that has resulted in innocent people being exonerated and guilty people being caught and held to account. We enacted the Innocence Protect Act as part of the Justice For All Act, for example, during the Bush administration. Today, the Judiciary Committee will focus on instances where poor evidence led to wrongful convictions. Then, next week, the Committee will turn to another important aspect of our criminal justice system to examine the need to share key evidence with the defense in order to guarantee a fair trial.

Several years ago, Congress made great strides toward protecting the integrity of the criminal justice system by passing the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program. We have with us today Thomas Haynesworth. Mr. Haynesworth spent 27 years in prison for a series of rapes he did not commit. With the support of the Virginia Attorney General, he was finally exonerated after DNA testing that was funded by the Bloodsworth program implicated someone else. He spent 27 years in prison because of a wrongful conviction. Sadly, we cannot give him those years back. But we can try to ensure that this does not happen to someone else.

I understand that today is Mr. Haynesworth's birthday, and the anniversary of his release from prison. Happy Birthday. We are honored that you have chosen to spend it with us and share your story.

Kirk Bloodsworth was a young man just out of the Marines when he was arrested, convicted, and sentenced to death for a heinous crime that he did not commit. He was the first of many people in the United States to be exonerated for a capital crime through the use of DNA evidence. His lawyer is now a respected judge on the court here in the District of Columbia, Bob Morin. I have gotten to know Kirk over the years as he has worked hard to ensure that others receive a fair chance to prove their innocence. The Federal post-conviction DNA testing program was appropriately named for him. Mr. Bloodsworth is here with us today, and has submitted written testimony which will be of great use to the Committee.

Also testifying today is Craig Watkins, the District Attorney in Dallas. Mr. Watkins has been heavily involved with Texas's Criminal Justice Integrity Unit, which is at the cutting edge of criminal justice reform. Mr. Watkins and Judge Barbara Hervey, a Democrat and a Republican, worked closely together on this project, demonstrating that integrity in the system is something both Republicans and Democrats can get behind. The Texas Criminal Justice Integrity Unit is tackling the need to educate officials about issues such as working with forensic science, and best practices in eye witness testimony. Judge Hervey has also submitted written testimony highlighting the good work being done in Texas.

We learn regularly of defendants released after new evidence exonerates them. Levon Brooks and Kennedy Brewer were released in 2008 in Mississippi after serving a combined 32 years for a murder they did not commit. We have seen too many such cases nationwide. We must do better. It is an outrage and injustice when an innocent person is punished. In addition, it means that the guilty person is still on the streets, able to commit more crimes, which makes all of us less safe.

In the coming weeks, I expect the Judiciary Committee to take up the reauthorization of the Justice for All Act, which includes several important provisions in addition to the Bloodsworth program. The reauthorization bill includes important measures to try to assure competent counsel, which is a key factor in avoiding wrongful convictions. Unfortunately, the vast majority of capital cases and other serious felony cases do not include DNA evidence that can determine innocence or guilt. For those cases to be fairly considered, in addition to accurate witness testimony, each side must have competent, well-trained counsels.

It also includes new protections for victims of crime, funding for state and local governments for DNA testing and other forensic disciplines, and reauthorization and updating of the Debbie Smith Rape Kit Backlog Reduction Act. The Debbie Smith Act authorized significant funding to reduce the backlog of untested rape kits, so that victims need not live in fear while kits languish in storage. I hope that the longstanding bipartisan support for these important improvements to the criminal justice system will continue.

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

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PREPARED STATEMENT OF CRAIG WATKINS, DISTRICT ATTORNEY FOR DALLAS COUNTY,
DALLAS, TEXAS



**Dallas County District Attorney's
Office**

TESTIMONY OF DALLAS COUNTY
DISTRICT ATTORNEY CRAIG WATKINS

PRESENTED BEFORE
THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

ON MARCH 21, 2012

HEARING TOPIC:

"JUSTICE FOR ALL: CONVICTING THE GUILTY AND EXONERATING THE
INNOCENT"

Good morning, Chairman Leahy, Ranking Member Grassley, and distinguished members of the committee. Thank you for inviting me to testify today on the issue of national importance of “Justice for All: Convicting the Guilty and Exonerating the Innocent.” I would like to briefly address with you three areas related to this topic. First, is the formation of the Dallas County District Attorney’s Office Conviction Integrity Unit. Second, is a “smart on crime” philosophy. Third, is continuing our existing improvements.

I. CONVICTION INTEGRITY UNIT

John F. Kennedy said “Change is the law of life and those who look only to the past or present are certain to miss the future.” When I took office, I saw a need to look to the future of law enforcement. I saw a need to improve how law enforcement approached crime. I saw a need to improve past practices. A prosecutor’s job is not simply to obtain convictions but instead to see that justice is done.

In order to see that justice is done and eliminate threats to justice, I formed the first Conviction Integrity Unit in a prosecutor’s office in the country. Dallas County is the 9th largest county in the country. We obtained more than 60,000 convictions in 2011. We have 17 felony courts. Our State of Texas this year will execute more offenders than any other state. Therefore, our interest in ensuring with absolute certainty the accuracy of the judicial system is critical to the success of our county and in my view on a larger scale to the success of our country.

The Conviction Integrity Unit’s work recently came full circle in a case that absolutely would not have been prosecuted without the investigative efforts of the Conviction Integrity Unit.

In 1989, a seven-year-old little girl lay peacefully asleep in her bed. In the middle of the night a predator crept into her house, took her from her home, and sexually assaulted her. The predator violated her entire family when he assaulted her. Her mother was restless and uncertain

for years. Her father suffered

deeply as well. The damage this man did was unimaginable. Local, state, and federal law enforcement sought out to capture a man who gained the moniker the “North Dallas Rapist.” The crime committed against that child went unsolved for years.

In the same time period, another man was charged and ultimately convicted in a similar crime. The man, who was deaf, professed his innocence from behind bars for years. His claim of innocence led to our administration’s investigation which ultimately exonerated him.

When the investigation started, the molester of that little child was walking the streets believing that he had gotten away with a horrific crime. The victim in that case believed that the justice system had forgotten about her. Her case had gone “unsolved” since 1989. For years she lived in fear that her attacker was still free. At the same time a man sat in prison for a crime he did not commit. Ultimately, our Conviction Integrity Unit pursued a life sentence for the real perpetrator. Within a matter of minutes the jury obliged. Additionally, upon our recommendation, the Texas Court of Criminal Appeals freed the wrongfully-convicted man. This is an example of what a Conviction Integrity Unit can do.

Texas has formed the first statewide Texas Criminal Justice Integrity Unit. Einstein defined insanity as doing the same thing over and over again and expecting different results. In light of the DNA exonerations we must continue to change what we have done and what we will do. It is nonsensical to think that we have the intellectual capacity to convict an innocent man, but are not smart enough to free a wrongfully-convicted man.

As protectors of a free society we cannot allow our zeal to convict a person to overcome the morals and values we stand for as a country. Too often Dallas County promised fairness, but instead delivered inequality. Our history is spotted with these cases which are likely familiar to you. Universally we are raising the necessity of accuracy in the handling of criminal trials. At the

same time, our ability to deliver that accuracy has dramatically improved.

The causes of wrongful convictions are as numerous as the cases reviewed. There are instances of prosecutorial misconduct, instances of mistaken eyewitness identification, and instances of pure incompetence by those charged with handling the cases. Recognizing the flawed methods used to obtain convictions in cases involving DNA exonerations begs the question of reliability of those methods in non-DNA cases.

The overwhelming majority of cases we review, the claimants will not establish actual innocence. The overwhelming majority of flights that take off will land. When a plane crashes we investigate what happened and we learn from it. We don't pretend that it didn't happen; we don't falsely promise that it won't happen again, but we learn from it. And we make necessary adjustments so it won't happen again. The same approach should be pursued within our criminal justice system. It is human to error, however to be humane we must recognize those errors and apply the appropriate solutions to prevent the same error.

II. SMART ON CRIME

Our "smart on crime" approach has dramatically reduced the crime rate in Dallas County. We have worked with the Dallas Police Department and other law enforcement agencies in the county to achieve an all-time low in crime and an all-time high in our conviction rate. The approach that we have used has not diminished our ability to prosecute cases, but instead has enhanced it. This approach has garnered credibility with all segments and communities in Dallas County; and in order for our criminal justice system to work we must strive for perfection and credibility.

III. CONTINUING IMPROVEMENT

Texas has made reforms in the areas of eyewitness identification, retention of biological evidence, and documentation of statements made by defendants and/or witnesses. These improvements have been aimed at reducing the likelihood of wrongful convictions and strengthened the foundation of criminal justice in Texas.

Likewise, the Federal Government has taken important steps in improving our justice system by passage of the Justice for All Act in 2004, the Kirk Bloodsworth Post-Conviction DNA. These measures serve to lighten the financial burden of post-conviction DNA testing and improve the educational opportunities for the legal community. I encourage you to continue on this course and continue to provide funding for these critical programs.

There is universal agreement that the conviction of innocent persons for a crime that they did not commit is intolerable in a civilized society. We are standing at the threshold of progress as it relates to strengthening the integrity of our criminal justice system. Let's continue to take advantage of this opportunity of exploration and improvement. Thank you for allowing me to comment and at this time I will answer any questions that you may have.

PREPARED STATEMENT OF THOMAS HAYNESWORTH, RICHMOND VIRGINIA

TESTIMONY OF THOMAS HAYNESWORTH,
WRONGFULLY CONVICTED VIRGINIAN

TO THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

March 21, 2012

REGARDING
JUSTICE FOR ALL: CONVICTING THE
GUILTY AND EXONERATING THE INNOCENT

Record Testimony of Thomas Haynesworth, Wrongfully Convicted Virginian for the
Senate Committee on the Judiciary
March 21, 2012

Chairman Leahy and Members of the Committee, my name is Thomas Haynesworth and I spent twenty-seven years in prison for a series of crimes I did not commit. I will testify today about my wrongful conviction and the important federal grant programs that helped enable the DNA testing and legal work that helped to finally prove my innocence. Thank you for inviting me to testify before you today.

On March 21, 2011, the Commonwealth of Virginia gave me the most memorable birthday present ever: I was released from prison after serving 27 years for crimes that I did not commit. In February of 1984, when I was 18 years old, I was charged with five rapes and sexual assaults. I never had been arrested before, but one of the victims saw me walking to the store to buy sweet potatoes for my mother, and she honestly believed that I was her attacker. From the minute I was arrested, I told everyone that I was innocent. But four other women also mistakenly identified me, and DNA testing did not yet exist to help me prove my innocence. I was convicted of three of those crimes and sentenced to 74 years in prison.

No one questioned my convictions until Virginia officials discovered that DNA evidence had been saved in hundreds of old cases in the state crime lab. Luckily, evidence in one of my cases had been saved, and it proved that I was innocent and that a convicted serial rapist had committed that crime. A joint investigation by my lawyers and government officials ultimately produced more evidence – including more DNA evidence – that the serial rapist actually committed all of the crimes for which I was convicted and charged. I have been released on parole while my case is pending in court.

Like many people who have been wrongfully convicted, securing my freedom was not easy. The state crime lab conducted DNA tests in two of my cases, and I took and passed two lie-detector tests. I was represented by lawyers from the Innocence Project, the Mid-Atlantic Innocence Project and Hogan Lovells US LLP, who worked tirelessly with the offices of two prosecutors, Virginia Attorney General Ken Cuccinelli, Governor Bob McDonnell, and various experts over two years to develop the evidence that led to my release. I am particularly thankful to Attorney General Cuccinelli, who became champion of mine, and even offered me employment in his office upon my release.

Doing this work is not cheap. DNA tests, overtime for the staff of the crime lab who managed this difficult project, and the work of my lawyers took hours and cost a lot of money. Luckily for me, the Commonwealth of Virginia and the Mid-Atlantic Innocence Project were able to do this work because they had received grant funding from the federal government to cover the DNA testing, overtime hours, and some of the attorney time. Without this support, I still would be in prison today.

In a criminal justice system that each year invests billions of dollars policing, prosecuting and incarcerating millions of individuals, there are two small but important federal programs that

help people who are wrongfully convicted prove their innocence and earn release from prison -- the Kirk Bloodsworth Post-Conviction DNA Testing Program and the Wrongful Conviction Review Program at the Department of Justice. The Bloodsworth Program helps to pay for the post conviction DNA testing required to prove innocence and for the costs that go into representing people like me who need those tests. The Wrongful Conviction Review Program supports experts and lawyers who are necessary for these difficult cases that no jailhouse lawyer can do. The Bloodsworth and Wrongful Conviction Review Programs give enormous hope and chance for actual relief to innocent men like me who still are waiting their turn to be set free.

Finally, innocence programs not only save the lives of those who are wrongfully convicted, but they also help make sure our criminal justice system is fair. Without these programs, I would still be prison.

Thank you so much again for inviting me to testify today, and I am happy to answer any questions.

PREPARED STATEMENT OF JOSHUA MARQUIS, DISTRICT ATTORNEY FOR CLATSOP
COUNTY, ASTORIA, OREGON

TESTIMONY OF THE HON. JOSHUA MARQUIS
DISTRICT ATTORNEY OF CLATSOP COUNTY, OREGON
BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE
MARCH 21, 2012

Chair Leahy, Senator Grassley, and distinguished members of the Committee.

Thank you for giving me the opportunity to testify before you today on the subject of "Justice for All: Convicting the Guilty and Exonerating the Innocent." That statement is, in fact, the mission statement of my office – "Protect the Innocent and Prosecute the Guilty," and I come before you as someone who has been a lawyer for over 30 years, more than 25 of them as a prosecutor, first a Deputy DA, then a Chief Deputy DA, and the last 19 years as the appointed and then 5-times elected DA in Clatsop County – located on the mouth of the Columbia River where it pours into the Pacific – the site where Lewis and Clark ended their trek 207 years ago.

I am also here today as a member of the Executive Committee of the Board of Directors of the National District Attorneys Association, an organization on which your chair, Senator Leahy, once served - as did I - as Vice President and Sen. Whitehouse, who represented his state on the NDAA's Board of Directors. While I am not speaking on their behalf today, I also serve on the American Bar Association's Criminal Justice Counsel, where I have just finished a three-year term and was just informed I have been re-elected and am now Vice Chair of the CJS. Since graduating from the University of Oregon, I have also worked as a newspaper reporter and columnist in Los Angeles, as the speechwriter for the California Attorney General, and almost two years mid-career as a criminal defense attorney, which included serving as lead counsel in capital murder cases.

I am also here today on my own dime, because I feel very strongly about this subject, and years ago I promised my constituents they would never have to pay for any of my out-of-state travel. I care because a prosecutor's worst nightmare is not losing a case – as all of you who were trial lawyers know, any attorney worth their salt is going to lose some cases, even when they are absolutely right. No, the worst possible outcome is convicting an innocent person.

I do not come here today to tell you wrongful convictions never happen, because they do, although the frequency with which it happens is in great dispute – probably most vividly emphasized by an op-ed I wrote in the NEW YORK TIMES in 2006 (attached) where I attempted to quantify the percentage of wrongful convictions in the context of the universe of serious crime – forcible rapes and willful homicides as the Bureau of Justice Statistics defines those terms.

I would also like to make clear that this is not a partisan issue. Although I am here invited by minority staff, I am an active Democrat (we run non-partisan for DA and judge in Oregon) but I

was a super-delegate to the 1996 Democratic National Convention and have never voted for a Republican for national office and am unlikely to do so in the coming election.

One way I know that miscarriages of justice occur is that I have my job because my immediate predecessor was arrested, indicted, recalled, convicted, jailed, and disbarred - in that order. She abused her office in the worst way possible. She framed two entirely innocent police officers on charges they had stolen cocaine from evidence lockers. Her motivation was anger over their refusal to tear up a reckless driving charge against her boyfriend, who was on federal parole. After I became DA, I encountered a couple of other cases - much less spectacular - but ones that gave me great pause. One of the wonderful things about being a prosecutor is that your only client is the public, and your sole allegiance is to the truth - not to a particular client. I dismissed those cases, and in one case went back and asked a conviction be vacated. I did this not because I was certain of the defendant's innocence, but because prosecutors have a much higher standard - we have to be convinced of the defendant's guilt. If not, that case should not be prosecuted.

When I was a defense attorney, I had no such luxury and my job was to mitigate the damage to my overwhelmingly guilty clients. I stand in great admiration to the many skilled defense attorneys who do an excellent job of representing their clients.

I was also a journalist once and as Walter Cronkite said "it's not news how many planes landed safely today." It is news when an innocent person is convicted, and today you have a very newsworthy example in that of Mr. Thomas Haynesworth - a man who served over a quarter century for crimes he did not commit. He deserves our apologies and probably compensation for the years he can never get back. If DNA had been in existence and widely available back in 1984, his case may have turned out very differently.

If it has not already been pointed out, the WASHINGTON POST - in a series of articles last year on Mr. Haynesworth case - pointed out how two local prosecutors, one a Democrat, the other a Republican and the Republican state attorney general, fought to help the Innocence Project get Mr. Haynesworth first free, and then declared actually as innocent, - the latter over the clear skepticism of some of the Virginia appellate judges. The headline of the article written in the POST on September 28, 2011 was "In Virginia, an unlikely alliance between parolee, prosecutor." Not so rare in real life, however. Again, a prosecutor's job is not just to seek convictions, but justice, however corny that sounds. But the Virginia prosecutors are not the first to help bring exonerated cases to light.

In two of the Innocence Projects most famous cases -

Chris Ochoa - convicted and sentenced to life in Texas for what was called the "Pizza Hut Murder" of Nancy DuPriest in 1988. He made a false confession that sent him and a friend to prison for life. Another man wrote the DA's office AFTER Ochoa had pled guilty and essentially confessed to the murder. Agents of the DA and police went to Ochoa in prison and confronted him with this other confession. Although Ochoa continued to assert his GUILT in prison, he eventually reached out to the Innocence Project who has acknowledged that without the help of the prosecutor's office who put Ochoa in prison, he might never have been released.

In a similar case, Eddie Joe Lloyd was convicted of the murder of 16-year-old Michelle Jackson (the victims all have names too). He was sentenced to life in Michigan and as the Innocence Project says on its website, “All of Lloyd’s appeals failed. Lloyd contacted the Innocence Project in 1995, seeking assistance in having the biological evidence subjected to DNA testing. For years, Project students searched for the evidence. Finally, a number of evidence items were found with assistance from the Wayne County Prosecuting Attorney’s Office.” In 2002 Lloyd was released and later received a large settlement. But for the active assistance of the Wayne County Prosecutor, this exoneration would have either never happened or been seriously delayed, something particularly critical because Lloyd died in 2004.

For every case of a “plane crashing” there are far more where the planes landed safely, but “Guilty man convicted by DNA” is just not that compelling a story. For years two of the poster boys for wrongful convictions in capital cases were Roger Coleman of Virginia and Ricky McGinn of Texas. Each graced the covers of what were then major news magazines - Coleman was on the cover of TIME in 1992, and McGinn’s picture appears 12 times on the cover of NEWSWEEK dated June 13, 2000 – the very same day many of us gathered in this same room, with Senator Leahy also presiding, to discuss the “Innocence Protection Act,” a version of which was eventually passed into law.

But back in 2000, McGinn was held out as a possibly innocent man about to be executed by a state that didn’t care about the facts. Coleman’s name was all over the news and Internet as an example of an innocent man who had, in fact, been executed. I was recently asked to respond to an essay in the CATO Institute’s online magazine Unbound where I discussed these two cases. (Copy attached).

In 1992, Roger Coleman was sentenced to die for the 1981 rape and murder of Wanda McCoy in a tiny Virginia coal mining town. In addition to a TIME cover story, Coleman protested his innocence to Ted Koppel on ABC’s *Nightline* shortly before execution. Coleman was represented, like many death row inmates, by a top-flight law firm—Washington, D.C.’s Arnold & Porter.

The 11 years Coleman spent between his crime and his execution is much shorter than occurs in most states with the death penalty. (I have three times prosecuted Randy Lee Guzek for two murders in 1987 in Central Oregon. The first jury gave him a death sentence, as did the three I tried in 1991, 1997, and 2010 and he likely is at least 15 years from possible execution).

Coleman’s last words were, “*An innocent man is going to be murdered tonight. When my innocence is proven, I hope America will realize the injustice of the death penalty as all other civilized countries have.*” Defense expert and acknowledged DNA guru Dr. Edward Blake had the one remaining biological sample from Coleman. It was too small to be tested under the PCR testing available in 1992. When Virginia authorities tried to get the sample post-execution, Blake refused, telling the BBC it was an act of civil disobedience on his part because he was so sure Virginia would try to cover up the execution of an innocent man.

This standoff continued until January 2006, when outgoing Governor Mark Warner brokered a deal to have a neutral Canadian lab test the sample using the latest DNA technology. Coleman's most dogged supporter, Jim McCloskey of Centurion Ministries, which fights to free the wrongfully imprisoned, planned to announce the results on live TV. He didn't. The test came back with a 1 in 19 *million* probability that anyone other than Roger Coleman could have murdered and raped Wanda McCoy.

During the election summer of 2000, the death row practices of Texas came under particular scrutiny. Barry Scheck and the Innocence Project represented Ricky McGinn who had been on Texas' death row for six years for the rape and murder of his 12-year old step-daughter, Stephanie Flannery. There was a tiny speck of biological material that could not be tested when McGinn went to trial. A *Newsweek* cover featured McGinn's face, coincidentally on the same day Scheck testified before the U.S. Senate Judiciary Committee, citing McGinn's case. (I testified that same day).

Texas Gov. George W. Bush allowed a single 30-day reprieve so that the speck on Stephanie's underwear could be tested. But again, you never heard about it.

Newsweek never published an update. Hardly anyone remembers the now-executed McGinn because the DNA test proved beyond any possible doubt that he was both a killer and a rapist.

There is a play called "The Exonerated" which is still performed on college campuses after a tour Off Broadway. The theme is the story of people, once on death row and now not all on death row, and the implication is that they were... "exonerated."

Exonerated is a very powerful word and understandably evokes revulsion if we think a person spent many years in prison, worse yet, on death row. Again, I have no doubt there have been innocent men on death row in the "modern era" of capital punishment – since Gregg vs. Georgia in 1976. The dispute is whether that number is 30 or 130.

One can certainly argue that either number is unacceptable, and we strive for a system where the number is zero. But as Cass Sunstein in his 2005 essay "Is Capital Punishment Morally Required; A Life for Life Trade-Off" posits, if 12 years of more recent studies about the deterrent effect of capital punishment is true, and between 10 and 24 truly innocent people do NOT get murdered because we execute a guilty killer, how can you morally NOT have the death penalty as an option? http://papers.ssrn.com/sol3/papers.cfm?abstract_id=691447

Back to "The Exonerated." My wife says I should get a hobby. Unfortunately it is researching cases like those in the play. I wrote the original prosecutors, got copies of the trial transcripts, even audio tapes of statements made by one of the killers but never heard by the jury.

What I discovered is that despite what this much-acclaimed play, turned into a CourtTV movie starring Susan Sarandon claims, the main character – Sonia Jacobs – was almost certainly factually guilty of gunning down Florida State Trooper Phillip Black and his friend, Canadian Constable Donald Irwin on Feb. 20, 1976. After a jury recommended a life sentence for her and a

death sentence for her ex-con boyfriend, Jesse Tafero, the trial judge gave her a death sentence anyway. The Florida Supreme Court reduced the death sentence to life in 1981, and eventually the federal circuit court of appeals ordered a new trial based on information they ruled should have been turned over to the defense. The original trial prosecutor was by then the Broward States Attorney, and after conferring with the victims' families and recognizing that one key witness had recanted and un-recanted at least once each, but nonetheless confident of Jacobs' guilt, Jacobs entered an Alford plea to two counts of Murder in the Second Degree and was freed with time served. The New York TIMES just recently wrote a breezy piece about her marriage to an Irish man who had himself been convicted of a murder whose conviction was also overturned. The story did not mention she was a convicted murderer.

Despite the fact that she is both factually and certainly legally guilty of murder, the website at Northwestern's Center on Wrongful Convictions still describes her as "Exonerated" on their website:

<http://www.law.northwestern.edu/wrongfulconvictions/exonerations/flJacobsSummary.html>

Another character in the play is Kerry Max Cook, who pled no contest to murdering Debra Jo Edwards in 1977 after three trials in 1999 when the prosecutors succumbed to what I call "prosecutorial fatigue." I know what that is because I've been through it. You are certain of the defendant's guilt. Often two or more juries agree but after 20 years witnesses die, move away, sometimes lose their recollections, and often the victims' families are begging for resolution (not closure – no one ever gets closure in these cases). Cook originally claimed never to have been in the victim's home, but then his fingerprint was found on the inside of her sliding glass window.

For unfathomable reasons, the prosecutor in the first trial got the fingerprint expert to say he could "age" the print – something that is impossible, and the Texas appellate courts appropriately reversed the conviction. After a mistrial Cook was convicted AGAIN in 1994 and again given another death sentence. Northwestern is a little more circumspect about Cook and doesn't define him as "exonerated," only as "wrongly incarcerated." If ever asked on a job application, "Have you ever been convicted of a felony?" he would legally have to answer "Yes, Murder in the Second Degree."

A third person in the play is Robert Hayes, a young black man convicted in the murder of a female groom, Pamela Albertson, at a Pompana Beach, Florida race track in 1990. DNA was a new science, and it played a major part in Hayes' conviction, which resulted in his being convicted and sentenced to death. But the Florida Supreme Court held that DNA was not sufficiently reliable as a scientific standard at that time and ordered the case retried without the DNA. The prosecution went back and without the DNA the jury found Hayes not guilty. While "not guilty" is not the same thing as exoneration, it is at least closer than Jacobs or Cook, but there is a critical postscript. The Florida investigators didn't let the case go and found that Hayes had traveled around the country working in racetracks. In 1987 Leslie Dickensen was found dead, and at the time it was written off as a suicide. But by 2004, DNA was far more accepted, and in November of 2004 Hayes pled guilty to first-degree manslaughter for Dickensen's homicide 17 years earlier, based largely on DNA evidence.

The list does not end there. One oft-stated claim is that upper-middle class men never go to death row. Tell that to Jay Smith, a principal in Pennsylvania sentenced to die for the murder of teacher Susan Reinert and her two children. The case was written about by Joseph Wambaugh in “Echoes in the Darkness” and made into a movie. Reinert, who worked for Smith and was ensnared in a bizarre plot to kill her for insurance, was found dead but her children’s bodies have never been found. In 1992 the Pennsylvania Supreme Court overturned Smith’s conviction, holding that the special prosecutor failed to turn over to the defense several grains of sand removed from the “lifters” of Smith’s shoes, which could have supported Smith’s alibi claim that he was on the Jersey Shore when the murders happened. The court ruled this failure constituted such a grave Brady violation that Smith should be freed and the state could not re-prosecute him. He went on to sue everyone connected with the case, but got nowhere, primarily because all the courts hearing the case concluded he was factually guilty.

The Third U.S. Circuit Court of Appeals ruled in affirming dismissal of Smith’s civil claims “Our confidence in Smith’s convictions for the murder of Susan Reinert and her two children is not the least bit diminished . . . and Smith has therefore not established that he is entitled to compensation . . .”

The point is that men like Mr. Haynesworth are really exonerated, and to attach that label to killers like Smith and Jacobs cheapens the true injustice suffered by Mr. Haynesworth and the handful of other people who really did not do it. That hasn’t stopped organizations like the Death Penalty Information Center from listing – on the same page of their list of wrongly convicted both Jay Smith’s case and that of Kirk Bloodsworth, a man who was the first DNA exoneration off death row, and someone who is actually innocent. Knowing that wrongful convictions take place, but that they are in fact episodic – not epidemic – makes it no less important that we strive to what is really an unattainable goal, but one we should pursue nonetheless because justice is, and always will be, a work in progress.

What can be done to make sure people like Mr. Haynesworth don’t spend 27 years in prison for crimes they did not commit? Equally important how do we make sure that bureaucracy doesn’t hamstring police from having the tools to actually identify the REAL killers or rapists.

Let’s start with DNA. What was originally a “magical” science, DNA was brought into America’s courtrooms, usually state by state because prosecutors had to prove it met Daubert or similar standards for scientific reliability. That took almost a decade, and in my home state it wasn’t until 1994 when a prosecutor that preceded me in the county where I am now DA (no, NOT the one who was disbarred) put on months of hearings, and DNA was finally accepted. Eventually defense attorneys, including the Innocence Project, realized that the very tool that was sending many of their clients to prison could actually free a tiny number of them. Better yet, if police had access to DNA during the investigation the wrong person would never even be charged. That is becoming more and more common as you can see when you look at charts of how post-trial DNA exonerations have started to drop.

But for DNA to work we need a broad database and unrestricted access. For some time the FBI was very reluctant to process so-called “warm hits” or familial DNA. These comparisons cannot

provide the virtual absolute certainty of a “hot” or exact match but can go a long way towards telling investigators if the suspect even MIGHT be the person they are looking for.

New York State should be commended for just passing – last week – a DNA database that includes ALL crime, not just felonies or in some states just sex crimes that were felonies.

<http://cityroom.blogs.nytimes.com/2012/03/14/dna-database-deal-reached-in-albany/?scp=1&sq=DNA%20data%20base&st=cse>

The manner in which DNA is obtained has changed, and now all one needs is to take a Q-tip like swab to the inside of the subject’s mouth. It used to require a rather invasive needle stick. Another concern raised by some is that the government would have DNA profiles of citizens that, if ending up in the wrong hands, might be used to deny someone medical insurance, on the theory their DNA might indicate they were more likely to develop a serious congenital illness. The DNA we use to identify people is considered “junk DA” by medical scientists – it answers almost nothing for them, and we can easily write severe penalties into any misuse of DNA databases. In New York it was a non-partisan effort, as it should be.

Fingerprints were to the late 19th and early 20th Century what DNA has been to the late 20th and early 21st. Yet there are some now trying to claim that fingerprints are junk science. They are extremely reliable ... if performed correctly. One of the most notorious failures – the arrest and detention as a material witness of Oregon lawyer Brandon Mayfield, occurred not because fingerprints failed but that examiners weren’t rigorous enough in examining the original prints – not a fax copy. A mistake, by the way, duplicated by the independent fingerprint expert hired by the defense. Once a real-time comparison was made, Mayfield was cleared.

There are scientific methods that have been tested by courts, and others that have failed that test. Polygraph tests are an example of the latter, and most states ban their use in court. So when someone claims they were “cleared by a lie detector,” remember that by taking certain drugs or simply being a sociopath who isn’t bothered by the thought of molesting a 6-year-old, one can easily pass a “lie box.” There is some value in using polygraphs in probation cases but simply because the degree to which the parolee THINKS the test will reveal his lies may cause him to fess up to whatever he did.

On the other hand remember that a defense attorney’s job, despite the commendable successes of the Innocence Project, is not to seek the truth – it is to defend their client, guilty or innocent. So expect defense lawyers generally to oppose efforts to get more accurate identification of a criminal. Defense attorneys are doing their job, ethically and properly, when they work as hard as possible to make my job as hard as possible. It is through those challenges to the state’s evidence and testing that ensure that the trier of fact – usually a jury – can make the judgment of whether the state has proven its case beyond a reasonable doubt.

That brings us to another critical part of what can be done where Congress has helped, and Senator Durbin deserves a particular shout-out for his leadership on this issue.

In order for the justice system to work right, you need good lawyers on both sides, not just people putting in time until they move on to far more lucrative private practice. In public service law, as either a public defender or a prosecutor, there are many non-monetary rewards but new attorneys incur enormous student loan debts – often exceeding \$100,000. They enter professions that might pay them that amount after a decade or more if they are fortunate.

Senator Durbin led the efforts several years ago, first to get authorization of what is called the John R. Justice Act – named after the now-deceased President of the NDAA from South Carolina. The funding goes through USDOJ and was originally funded at twice the current \$4 million level – which is to be evenly split between defenders and prosecutors. I teach ethics and other subjects across the country to groups of state prosecutors, and as a 17-year board member of the NDAA the number one question I am asked by young prosecutors is “I want to stay in prosecution. Is there any possibility of any loan forgiveness on the way?”

If Congress is inclined to help those of us in state and local prosecutions (or defense) who do the vast majority of violent crime I would urge you work on funding things like lawyer loan forgiveness or the opening of a Public Safety Training Academy for lawyers similar to one NDAA operated in conjunction with USDOJ in South Carolina from 1996 to last year. The idea is not Quantico or Glynco, but one aimed at training at both the basic and advanced levels for trial attorneys.

This would be money much better spent than the so-called Webb Commission. That proposal would seek to - in 18 months, with absolutely no dedicated positions for any stakeholders (defense attorneys, trial, judges, or prosecutors) study the entire American justice system and presumably come up with some quick fixes. When we undertook a similar task in the late 1960s it massive financial investment in programs like the LEAA.

Frankly if Congress wants to study a justice system it should do so with the system in which you are literally invested - the federal courts and justice system. It would a much better idea to have the Commission examine the workings of the federal system and not attempt to figure out 50 different state systems with different funding streams and laws made not by Congress but by state legislatures, or in my state of Oregon often by direct referenda. Congress advises and consents as to the appointments of US Attorneys, US Marshals, and federal judges from District to Supreme Court.

The issue of eyewitness identification remains a controversial one. There are a group of experts, who make a handsome living telling juries that an eyewitness is the least reliable sort of witness. Either because of trauma or cross-racial identification or other issues.

I have tried hundreds of jury trials – and certainly haven’t won all of them – although every person I prosecuted I was personally convinced they were guilty (as I said before I have the luxury of dismissing cases right up to and including during trial if I have or develop doubts). But I think that the woman who is dragged from her car and beaten by her ex-boyfriend is often in a very good position to identify her attacker. If it is a total stranger of a different race it might be less reliable. Again I trust juries. And even they are the not the last word in our system.

I strongly believe that these are issues that go to weight, not sufficiency. In other words, let both sides make their case, including experts (although experts are almost always within the ability of the defense to call, the urban myth being that the state has unlimited resources is simply false) and let the trier of fact decide.

As a prosecutor in a jurisdiction with seven different police agencies, I would prefer to have all statements and certainly anything that would qualify as an admission or confession recorded, preferably on video but minimally on audio. I have purchased thousands of dollars of recorders over the years, often for small police departments that simply can't afford the few hundred dollars extra. But in my state in EVERY criminal case the jury is told by the judge regarding any statement claimed to be made by the defendant that:

When a witness testifies about statements made by the defendant, you should consider such testimony with caution.

In reviewing such testimony, you should consider, among other things, the following:

- (1) Did the defendant make the statement, and, if so, did the defendant clearly express what [he / she] intended to say?*
- (2) Did the witness correctly hear and understand what the defendant said?*
- (3) Did the witness correctly remember and relate what the defendant said?*
- (4) Did the witness intentionally or mistakenly alter some of the words used by the defendant, thereby changing the meaning of what was actually said?*

If, after weighing such factors, you conclude that the defendant said what [he / she] intended to say and that the witness to the statement correctly understood, remembered, and related to you what the defendant said, then you are authorized to consider such statements for what you deem them to be worth) Oregon Uniform Criminal Jury Instruction 1024

Other states have similar instructions so jurors are told to be suspicious of statements made by a defendant. One proposal is to limit or even ban unrecorded statements, on the theory that by punishing the police and denying otherwise truthful testimony to the jury eventually we'll get the cops to record everything.

Among other problems is the fact that machines fail, some officers forget to re-stock batteries, some departments may not be able to furnish every single car with a recording device, etc. If I wasn't clear before, let me be more so now; as a prosecutor I WANT all the defendant's statements recorded so a jury is not leery of what really happened; that the officers did NOT promise him a special deal or threaten his family or any of the other staples of popular culture which would make many Americans think at least 50 percent of those prosecuted are totally innocent and police and DAs get frequent flyer points for prosecuting and convicting innocent people.

Instead of punishing police, some of whom see their job as over once an arrest is made, why not create an incentive to record. Encourage new uniform instructions that tell jurors that if they are sure that ALL the defendant's words were recorded they should give those statements special weight.

If our goal is to seek truth, let's not find ways to deny otherwise valid evidence, let's explore ways to get MORE information to jurors.

Similar caveats extend to photo line-ups. While rarely appropriate, most attention is given to what we call "show-ups" distinguished from a line-up by the fact that the witness or victim is usually taken to a place where the suspect is either known to be or detained and asked if they recognize him. These show-ups can be dangerously suggestive so the courts have tight restrictions on when they are allowed.

Much more common is a photo "throw-down" usually in place of the more time consuming but iconic line-up (by TV and movie standards). There are claims that sequential photo line ups where witnesses are shown photos individually are better than the tradition 6-person thrown-down. There are also claims that the officer involved in the line-up should not have any involvement in the case to avoid "non-verbal" cues, intentional or otherwise.

However as the Duke University Chronicle noted in April 2006 *"a recent study conducted in Illinois found that the new strategy is not necessarily more effective. The study was recommended by the Governor's Commission on Capital Punishment in 2002, after several death row inmates were exonerated through DNA evidence. The experiment, run by the Chicago Police Department, found that sequential lineups were less accurate than the traditional ones. The correct suspect was chosen 45 percent of the time when a sequential lineup was used, and 60 percent of the time with the simultaneous lineup."*

<http://www.dukechronicle.com/article/lax-case-shines-light-police-lineup-process>

The way to ensure that an appropriate warning is given to witnesses that they may...or may NOT...see the person involved. Whenever possible the throw-down is video recorded, and most importantly the trier of fact can examine the same photos, in the same format in which they were shown to the witness for the jury to determine if the throw-down was in any way suggestible. Like other issues involving smaller police departments, it is desirable to have another officer involved but for example in my county, which is considered mid-sized by national comparative standards, none of the seven police agencies has more than a single full-time assigned detective position.

Again it is most desirable to let a jury decide the weight to be given evidence rather than allowing a professional expert telling a judge that "the latest research doesn't favor its use."

If we were to believe some defense experts, we would think that virtually all confessions are false and coerced, that almost no eyewitness can ever accurately remember what happened, that any tests offered by the prosecution are junk science, and that wrongful convictions are the norm, not the exception.

None of this means we should cease from trying to improve all these areas, but crime is down significantly in this country over 15 years ago. It is due in part to the professionalization of police agencies, something spearheaded in the 60s and 70s by things like the federally-funded Law Enforcement Assistance Administration. In 1981 when I started as a Deputy DA in Eugene,

Oregon the usual tenure was about three years before heading into far more lucrative private practice. That has changed as well as prosecution as a meritocracy, which has meant an increasing number of women and members of racial minorities becoming the elected prosecutors.

We need to work to make sure that cases like Mr. Haynesworth don't happen but also be proud that if they do, the prosecutors acted the way Commonwealth's Attorneys Kizer and Herring and Attorney General Cuccinelli did.

We owe that to the people who are victims of crime, a group too often ignored by the entire system.

Joshua Marquis has been Clatsop County District Attorney since 1994 and was re-elected in 1998, 2002, 2006, and 2012. He has served as President of the Oregon District Attorneys Association, Vice-President of the National District Attorneys Association, on whose board he has sat since 1997. He was just named Vice-Chair of the American Bar Association's Criminal Justice Section, where he has served since 2009. From 2005 to 2009 he served on Oregon's Criminal Justice Commission and he is Vice-Chair of the Board of Directors of the Animal Legal Defense Fund. He was given the "Jolene Malone Aggressive Enforcement Award" in 1995 by ALDF and the "William Shaefer Award" in 2006 by the Association of Government Attorneys in Capital Litigation. He is one of the co-authors of "Debating the Death Penalty" Oxford University Press, 2005, and is the author of numerous op-eds and book reviews in the NY TIMES, the LA TIMES, the WALL STREET JOURNAL, USATODAY, and the NATIONAL LAW REVIEW.

QUESTIONS SUBMITTED BY SENATOR CHUCK GRASSLEY FOR JOSHUA MARQUIS

**Questions for the Record for
Joshua Marquis
District Attorney, Clatsop County, Astoria, Oregon
Board of Directors, National District Attorneys' Association**

1. According to polling, the risk of executing an innocent person is one of the leading factors causing some proportion of the American public to have doubts about the death penalty. The anti-death penalty movement has therefore promoted cases of allegedly innocent people who were executed in order to call into question the continued use of the death penalty. Finding an innocent person who was executed has become their "Holy Grail." But in two high-profile cases—Roger Coleman and Ricky McGinn—individuals who went to the death chamber proclaiming their innocence were subsequently re-proven guilty by DNA testing. Most recently, supporters of Troy Davis, executed in September of 2011, garnered appeals for clemency because of alleged doubts about his guilt. But a federal district court held an evidentiary hearing on the impact of recantations of eyewitnesses and other "new" evidence of innocence. After reviewing the material, the court concluded, "[I]t is largely smoke and mirrors. The vast majority of the evidence at trial remains intact, and the new evidence is largely not credible or lacking in probative value."

- a) What do the cases of people who were convicted, claimed innocence, and then proved guilty again tell us?
- b) Should the death penalty be prohibited because of the small number of exonerations of people on death row? Why or why not?

2. Every wrongful conviction is highly touted in the media, both because of a natural tendency to report on "the plane that crashes" and not the overwhelming majority of planes that land safely every day, and because the media frequently has an anti-law enforcement bias. This was most vividly on display in the cases of Roger Coleman and Ricky McGinn, who were afforded innumerable opportunities to proclaim their innocence on national TV shows and in the print media, such as their appearances on the covers of Time and Newsweek magazines, respectively. Subsequent DNA testing proved they were in fact guilty. But the media didn't give the proof of their guilt the same level of coverage. In other cases, such as Troy Davis, the media has covered only one side of the story, refusing to provide equal coverage of the evidence of guilt. For example, in Davis' case, the media routinely reported that nine witnesses had recanted their testimony against him. The media did not fairly report, however, that a federal district court had examined the recantations (and other alleged "new evidence of innocence") and found that, in some instances, there were no substantive changes in the testimony, in other cases, that the recantations were not credible, and in two cases, the "recantations" consisted of unsworn affidavits provided by the defense.

- a) What is the impact on public confidence in the criminal justice system when advocates use the media to publicize "wrongful convictions" even though juries and appellate appeals courts (and sometimes the Supreme Court) have found a conviction proper?

- b) Why doesn't the fact that subsequent DNA testing confirms a conviction gain the same sort of exposure in the media as an exoneration?

3. Many different factors have been identified as causing wrongful convictions, including faulty eyewitness identifications, false confessions, badly done forensic science, prosecutorial misconduct, dishonest jailhouse informers, and incompetent defense lawyers. The defense bar promotes wholesale changes that would more likely result in creating barriers to the prosecution of the guilty more than freeing the innocent. It is no accident that there has been a steady drumbeat by defense counsel to call into question virtually every type of evidence that prosecutors can use to convict someone—confessions, forensics, eyewitnesses, and the like.

- c) What kinds of reforms of the criminal justice system are practical to prevent wrongful convictions, while not interfering with effective prosecution?
- d) The advent of new technology, such as better DNA testing, has increased the likelihood of convicting the guilty. However, isn't it true that DNA testing was once opposed by defense attorneys?
- e) What other technology might help convict the guilty and prevent wrongful convictions? How does the defense bar view this technology?

QUESTIONS SUBMITTED BY SENATOR CHUCK GRASSLEY FOR CRAIG WATKINS

**Questions for the Record for
Craig Watkins
District Attorney, Dallas County, Texas**

1) At the hearing, and in public statements, you have claimed a 99.4 percent conviction rate. As another witness at the hearing noted, that statistic strains credulity. Please provide the equation for how you calculated this rate and the raw figures inputted into it, including numbers of arrests, number of cases not prosecuted, number of cases that were resolved by guilty pleas, number of grand jury indictments, number of cases tried, and number of cases tried resulting in acquittals.

QUESTIONS SUBMITTED BY SENATOR AMY KLOBUCHAR FOR JOSHUA MARQUIS

QUESTIONS FOR THE RECORD

From Senator Amy Klobuchar

“Justice for All: Convicting the Guilty and Exonerating the Innocent”

March 21, 2012

Question for Mr. Marquis

Question No. 1: Other Forensic Techniques Besides DNA

Mr. Marquis, during questioning I discussed Hennepin County’s leadership in recording defendant interrogations and implementing new methods of eyewitness identification while I was the County Attorney. You did not have a chance to finish your response to my question about these and other reforms in non-DNA evidence.

- Can you discuss what reforms can be made in eyewitness identification, retention of biological evidence, and documentation of statements made by defendants and witnesses?
- In your experience, have you found that it is common for police departments around the country to be unable to afford basic recording technologies? Do you find that when such technology is available, it is used correctly?

RESPONSES OF JOSHUA MARQUIS TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Questions for the Record from Senator Grassley

for

Joshua Marquis

District Attorney, Clatsop County, Astoria, Oregon

Dear Senator Grassley,

Thank you very much for the opportunity to respond to questions. My answers are in italics underneath each particular question. I'd be happy to respond to additional questions at any time.

Joshua Marquis

District Attorney

Clatsop County, Oregon

1. According to polling, the risk of executing an innocent person is one of the leading factors causing some proportion of the American public to have doubts about the death penalty. The anti-death penalty movement has therefore promoted cases of allegedly innocent people who were executed in order to call into question the continued use of the death penalty. Finding an innocent person who was executed has become their "Holy Grail." But in two high-profile cases—Roger Coleman and Ricky McGinn—individuals who went to the death chamber proclaiming their innocence were subsequently re-proven guilty by DNA testing. Most recently, supporters of Troy Davis, executed in September of 2011, garnered appeals for clemency because of alleged doubts about his guilt. But a federal district court held an evidentiary hearing on the impact of recantations of eyewitnesses and other "new" evidence of innocence. After reviewing the material, the court concluded, "[I]t is largely smoke and mirrors. The vast majority of the evidence at trial remains intact, and the new evidence is largely not credible or lacking in probative value."

a) What do the cases of people who were convicted, claimed innocence, and then proved guilty again tell us?

ANSWER:

Among other things they prove we should not accept claims of "exoneration" at face value. A claim of actual innocence is very powerful and it means a great deal more than just an acquittal or the fatigue of a victim's family which cannot bear to go through a third or even fourth trial after repeated convictions. Cases like that of Troy Davis require much closer scrutiny because there were not "nine witnesses of whom six recanted" but more like 36 witnesses and overwhelming proof of his guilt, litigated before many tribunals, including a federal district court judge appointed by President Clinton who found evidence of Davis's guilt indisputable.

Just as we are often – rightly – cautioned not to rush to judgment, any claim of actual innocence – particularly in the face of decades of appeals and re-trials – should be viewed with great care. As I said during my oral testimony, to equate someone like

Coleman or McGinn with a man like Kirk Bloodsworth, truly exonerated by DNA, both does Mr. Bloodsworth a great dis-service and mangles the truth.

b) Should the death penalty be prohibited because of the small number of exonerations of people on death row? Why or why not?

ANSWER:

As I set forth in my op-ed in the New York Times in January of 2006 (attached to my testimony), an exploration of the TRUE incidence of wrongful convictions shows an astonishingly high rate of "rightful convictions." Most people – even death penalty opponents – agree that the relatively small number of death row inmates makes for a poor statistical sample; instead, one should expand exoneration statistics into all murder and forcible rape cases (as Professor Samuel Gross did in the Winter 2005 issue of the Journal of Criminal Law). Using Prof. Gross' own numbers and then assuming there were 10 TIMES that many actual exonerations, we came up with a 99.27% rightful conviction rate.

Five people have been taken off death row after DNA testing cast reasonable doubt on their guilt. DNA testing has cast reasonable doubt on the guilt of another nine men who had been on death row but had already been taken off for other reasons. If one takes the attitude that one mistake means abolition, we would need to ban elective surgery and most medications – they kill far more people every month than the states do in years of executions. Cass Sunstein, now a member of the President's cabinet, tackled this issue in his controversial paper "Is Capital Punishment Morally Required: A Life for Life Trade-off," where he asks the question: Can we morally afford NOT to have a death penalty if recent research correct shows that, for every one execution, between 10 and 24 innocent murder victims do NOT die.

2. Every wrongful conviction is highly touted in the media, both because of a natural tendency to report on "the plane that crashes" and not the overwhelming majority of planes that land safely every day, and because the media frequently has an anti-law enforcement bias. This was most vividly on display in the cases of Roger Coleman and Ricky McGinn, who were afforded innumerable opportunities to proclaim their innocence on national TV shows and in the print media, such as their appearances on the covers of Time and Newsweek magazines, respectively. Subsequent DNA testing proved they were in fact guilty. But the media didn't give the proof of their guilt the same level of coverage. In other cases, such as Troy Davis, the media has covered only one side of the story, refusing to provide equal coverage of the evidence of guilt. For example, in Davis' case, the media routinely reported that nine witnesses had recanted their testimony against him. The media did not fairly report, however, that a federal district court had examined the recantations (and other alleged "new evidence of innocence") and found that, in some instances, there were no substantive changes in the testimony, in other cases, that the recantations were not credible, and in two cases, the "recantations" consisted of unsworn affidavits provided by the defense.

ANSWER:

As a former reporter I can assure the Senator that it is simply not news to report "Guilty Man Sentenced." Journalism schools and law schools herald "Innocence Projects" even when, as at my alma mater the University of Oregon, they had to shut them down – not because there were not enough volunteer students or professors, but because they could not find enough inmates who met even the basic criteria for "innocence."

The Senator is right about the frenzy of reporting about Troy Davis' execution. In the summer of 2000 a similar frenzy surrounded the execution of a killer named Oliver Cruz in Texas. During an appearance on Geraldo Rivera's TV show he demanded to know how I could sanction the approval of a mentally retarded inmate (the claim was Cruz's IQ was about 69). I replied (before the Supreme Court's decision in Atkins) that I did not support executing someone who was retarded, and I produced an intake IQ report taken 11 years earlier that showed Cruz with a "performance IQ" score of 106. In a very gracious note Justice Scalia sent me after he cited several of my works in his concurrence in Kansas vs. Marsh, the Justice pointed out that people on the side of retaining capital punishment were less likely to churn out studies, and when doing so much less likely to exaggerate.

In my written testimony I detail the outright misrepresentations of a highly-touted play-become-TV-movie called "The Exonerated" in which two of the six characters -- in reality -- eventually pled guilty to the very murders for which they claim to be exonerated (in order to get out of prison), and a third is doing time for an almost identical murder after he succeeded in having his conviction using DNA overturned and was acquitted in a second trial where the prosecution was barred from using DNA evidence.

a) What is the impact on public confidence in the criminal justice system when advocates use the media to publicize "wrongful convictions" even though juries and appellate appeals courts (and sometimes the Supreme Court) have found a conviction proper?

ANSWER:

I lecture across the nation to groups of prosecutors, particularly those who try capital cases, on the effects of popular culture on the American public. A person watching TV and movies (and the news) would come to think that at least a third to half of everyone in prison is there on a wrongful conviction, usually framed by a corrupt prosecutor or crooked cop.

The real and profound changes made to the American justice system in the last 30 years go largely un-noticed in the representations that have risen to the level of urban mythology.

We see this in jury selection frequently where jurors expect TV-like dramatic courtroom confessions, incontrovertible DNA in almost any kind of case, and technology that may exist at some level but is rarely available to most street level police officers.

Ultimately, if the American people believe the system is corrupt or fundamentally unfair they will not support it and, worse yet, they will turn to vigilante justice.

c) Why doesn't the fact that subsequent DNA testing confirms a conviction gain the same sort of exposure in the media as an exoneration?

ANSWER:

In the cases of both Ricky McGinn and Roger Coleman, where any Google search will reveal scores of websites proclaiming their innocence, you will be hard pressed to find ANY reference to the DNA testing that conclusively proved their guilt. Part of this is the cognitive dissonance of simply not wanting to admit they were wrong. The other problem is almost no-one ever calls them on the issue. These two cases are just examples, but came at a time when TIME and NEWSWEEK were the two preeminent news publications in America (the pre-internet era).

3. Many different factors have been identified as causing wrongful convictions, including faulty eyewitness identifications, false confessions, badly done forensic science, prosecutorial misconduct, dishonest jailhouse informers, and incompetent defense lawyers. The defense bar promotes wholesale changes that would more likely result in creating barriers to the prosecution of the guilty more than freeing the innocent. It is no accident that there has been a steady drumbeat by defense counsel to call into question virtually every type of evidence that prosecutors can use to convict someone—confessions, forensics, eyewitnesses, and the like.

ANSWER:

What should never be forgotten – as a former criminal defense lawyer – is that the job of a defense lawyer is not primarily to exonerate the innocent – that is a rare and unintended positive side effect in a tiny percentage of cases. Their job is to cast doubt on every aspect of the prosecutor's theory – to question the science of fingerprints or DNA (remember the cross-examination during OJ Simpson's trial?). They would have the public believe that no eyewitness could possibly remember who assaulted or raped them, that any forensic science offered by the state is junk (while their expert who ids the flavor of the month is cutting edge "evidence-based science"), anyone brave enough to tell the truth about who gunned down a 4-year old girl in botched drive-by is an evil "snitch." And that prosecutors like me get frequent flyer miles for the number of people we put in prison. This is sheer Hollywood fantasy.

A good defense attorney makes the DA work harder, thereby preventing a wrongful conviction, but sciences like DNA and fingerprinting were brought into courtrooms by law enforcement, not defense attorneys.

d) What kinds of reforms of the criminal justice system are practical to prevent wrongful convictions, while not interfering with effective prosecution?

ANSWER:

Better training and pay for both prosecutors and public defenders. Encouraging our best and brightest to go and STAY in these fields when the pay disparity is so huge that America's top prosecutor earns a fifth of most equity partners in private law firms in most large American cities.

Moving towards a truth-based system that lets juries take as much admissible information in as possible – including as the British are experimenting with, letting some juries know about a defendant's prior criminal record. Not creating judicial barriers to testimony by child abuse victims and battered women.

e) The advent of new technology, such as better DNA testing, has increased the likelihood of convicting the guilty. However, isn't it true that DNA testing was once opposed by defense attorneys?

ANSWER:

As I said in my written testimony DNA was a "house to house" or "state by state" fight to get state courts to recognize the Daubert-like level of trustworthiness DNA science should be given. That battle did not end in some states until the early parts of this decade/century/millennium.

Again, a defense attorney's job is keep evidence that will inculcate their client OUT of a courtroom and AWAY from jurors. They are doing nothing dishonorable or unethical by doing their job.

e) What other technology might help convict the guilty and prevent wrongful convictions? How does the defense bar view this technology?

ANSWER:

For reasons sets forth before defense lawyers are leery of ANY new technology that is likely to help identify their clients. That is their job. One area that is being tested in England is allowing jurors in criminal cases to hear about a defendant's prior convictions. Under current American law except when a defendant testifies and only then certain convictions can be brought out, and then only to impeach the credibility of the witness. But many jurors point out after their service - rather logically - that if they had known the defendant had been convicted of 5 previous DUI cases or had two previous convictions for child molestation that it would aid them in coming to a fair and just verdict. I think we need to trust jurors more. American law is an almost unique intersection of democracy and justice.

RESPONSES OF JOSHUA MARQUIS TO QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR

QUESTIONS FOR THE RECORD

From Senator Amy Klobuchar

“Justice for All: Convicting the Guilty and Exonerating the Innocent”

March 21, 2012

Question for Mr. Marquis

Question No. 1: Other Forensic Techniques Besides DNA

Mr. Marquis, during questioning I discussed Hennepin County’s leadership in recording defendant interrogations and implementing new methods of eyewitness identification while I was the County Attorney. You did not have a chance to finish your response to my question about these and other reforms in non-DNA evidence.

- Can you discuss what reforms can be made in eyewitness identification, retention of biological evidence, and documentation of statements made by defendants and witnesses?
- In your experience, have you found that it is common for police departments around the country to be unable to afford basic recording technologies? Do you find that when such technology is available, it is used correctly?

**RESPONSES TO QUESTIONS FROM SENATOR AMY KLOBUCHAR
FROM JOSHUA MARQUIS**

Thank you very much, Senator Klobuchar, for the opportunity to respond to questions.

Because I was limited to just over six minutes in my oral testimony, I have appended the most relevant portions of my written testimony below (they are pages 8 through 10).

As you can see, I discussed in some detail the issues surrounding eyewitness ID such as whether sequential line-ups are in fact superior to more traditional “throw downs” if the proper safeguards are in effect. As a prosecutor it is very much to my advantage to have the full statements of a witness and even more so a suspect completely preserved, but many of the same practical aspects that affect witness IDA also affect recording of statements.

Part of the issue is the legal and practical relationship between prosecutors and police. It runs the gamut in state and local law enforcement – where over 95% of all criminal cases are handled – from New Jersey where all the investigators work directly for the prosecutor to states more like my own where the police agencies are largely autonomous and I am not “the top cop” despite popular culture’s portrayal of a DA.

Add to that, there are literally thousands of separate law enforcement agencies from tribal to city to county to state agencies, each with different masters and different funding sources. This affects eyewitness ID in that the gold standard is to have the detective who administers the line up (whether sequential, in-person or throw-down) be someone uninvolved in the case. This is a practical impossibility in much of America. I live in a mid-sized county in a mid-sized state (Oregon) and I have seven different local police agencies. In any major crime I use all the detectives in the investigation. Something as sensitive as a witness throw-down should not be done by a rookie officer from another agency.

The same issues spill over into recording statements. I know you, as a former prosecutor, are aware that it is very much to the prosecutor's advantage to have a fully recorded statement of a witness or, more critically, a defendant. It will serve me far better either at trial or in convincing a defense lawyer we have his client dead to rights. However, I have discovered that despite using the DA office's budget to buy thousands of dollars worth of recording devices over the last 15 years and gift them to the county police agencies, they get lost, broken and quickly out-dated. I learned recently to my horror that one of the larger agencies had non-functioning video cameras in most of their patrol cars because the company that made and installed them had gone out of business.

If we were to mandate universal recording there is no getting away from the simple logistics of who will pay, what will be the format, and how do we enforce or encourage this kind of recording.

I did not get the chance to discuss the retention of biological evidence in either my written or oral testimony. Some defense lawyers would like us to be required to maintain all evidence so long as any defendant is alive (in or out of custody), in temperature- and moisture-controlled evidence rooms. Again, this is extremely expensive and, with a wide variety of police agencies

and no funding available, the federal government will need to come up with sustainable funding if it is thinking of mandating such practices.

It is also important to note that it is easy for someone doing life to claim that some seemingly insignificant piece of evidence now has epic value, knowing that the evidence (like all the evidence in the 1987 capital murder case of Randy Guzek that I have tried in 1991, 1997 and 2010) is locked in a storage locker somewhere.

I would be happy to expand on my written or oral testimony in any way I can.

Joshua Marquis

District Attorney

Astoria, OR

ADDENDUM

FROM PAGES 8-10 OF MY WRITTEN TESTIMONY

The issue of eyewitness identification remains a controversial one. There are a group of experts, who make a handsome living telling juries that an eyewitness is the least reliable sort of witness. Either because of trauma or cross-racial identification or other issues.

I have tried hundreds of jury trials – and certainly haven’t won all of them – although every person I prosecuted I was personally convinced they were guilty (as I said before I have the luxury of dismissing cases right up to and including during trial if I have or develop doubts). But I think that the woman who is dragged from her car and beaten by her ex-boyfriend is often in a very good position to identify her attacker. If it is a total stranger of a different race it might be less reliable. Again I trust juries. And even they are the not the last word in our system.

I strongly believe that these are issues that go to weight, not sufficiency. In other words, let both sides make their case, including experts (although experts are almost always within the ability of the defense to call, the urban myth being that the state has unlimited resources is simply false) and let the trier of fact decide.

As a prosecutor in a jurisdiction with seven different police agencies, I would prefer to have all statements and certainly anything that would qualify as an admission or confession recorded, preferably on video but minimally on audio. I have purchased thousands of dollars of recorders over the years, often for small police departments that simply can't afford the few hundred dollars extra. But in my state in EVERY criminal case the jury is told by the judge regarding any statement claimed to be made by the defendant that:

*When a witness testifies about statements made by the defendant,
you should consider such testimony with caution.*

*In reviewing such testimony, you should consider, among other
things, the following:*

*(1) Did the defendant make the statement, and, if so, did the
defendant clearly express what [he / she] intended to say?*

*(2) Did the witness correctly hear and understand what the
defendant said?*

*(3) Did the witness correctly remember and relate what the
defendant said?*

*(4) Did the witness intentionally or mistakenly alter some of the
words used by the defendant, thereby changing the meaning of what was
actually said?*

If, after weighing such factors, you conclude that the defendant said

what [he / she] intended to say and that the witness to the statement

correctly understood, remembered, and related to you what the defendant

said, then you are authorized to consider such statements for what you deem them to be worth)
Oregon Uniform Criminal Jury Instruction 1024)

Other states have similar instructions so jurors are told to be suspicious of statements made by a defendant. One proposal is to limit or even ban unrecorded statements, on the theory that by punishing the police and denying otherwise truthful testimony to the jury eventually we'll get the cops to record everything.

Among other problems is the fact that machines fail, some officers forget to re-stock batteries, some departments may not be able to furnish every single car with a recording device, etc. If I wasn't clear before, let me be more so now; as a prosecutor I WANT all the defendant's statements recorded so a jury is not leery of what really happened; that the officers did NOT promise him a special deal or threaten his family or any of the other staples of popular culture which would make many Americans think at least 50 percent of those prosecuted are totally innocent and police and DAs get frequent flyer points for prosecuting and convicting innocent people.

Instead of punishing police, some of whom see their job as over once an arrest is made, why not create an incentive to record. Encourage new uniform instructions that tell jurors that if they are sure that ALL the defendant's words were recorded they should give those statements special weight.

If our goal is to seek truth, let's not find ways to deny otherwise valid evidence, let's explore ways to get MORE information to jurors.

Similar caveats extend to photo line-ups. While rarely appropriate, most attention is given to what we call "show-ups" distinguished from a line-up by the fact that the witness or victim is usually taken to a place where the suspect is either known to be or detained and asked if they recognize him. These show-ups can be dangerously suggestive so the courts have tight restrictions on when they are allowed.

Much more common is a photo “throw-down” usually in place of the more time consuming but iconic line-up (by TV and movie standards). There are claims that sequential photo line ups where witnesses are shown photos individually are better than the tradition 6-person thrown-down. There are also claims that the officer involved in the line-up should not have any involvement in the case to avoid “non-verbal” cues, intentional or otherwise.

However, as the Duke University Chronicle noted in April 2006, “a recent study conducted in Illinois found that the new strategy is not necessarily more effective. The study was recommended by the Governor’s Commission on Capital Punishment in 2002, after several death row inmates were exonerated through DNA evidence. The experiment, run by the Chicago Police Department, found that sequential lineups were less accurate than the traditional ones. The correct suspect was chosen 45 percent of the time when a sequential lineup was used, and 60 percent of the time with the simultaneous lineup.” <http://www.dukechronicle.com/article/lax-case-shines-light-police-lineup-process>

The way to ensure that an appropriate warning is given to witnesses that they may...or may NOT...see the person involved. Whenever possible the throw-down is video recorded, and most importantly the trier of fact can examine the same photos, in the same format in which they were shown to the witness for the jury to determine if the throw-down was in any way suggestible. Like other issues involving smaller police departments, it is desirable to have another officer involved but for example in my county, which is considered mid-sized by national comparative standards, none of the seven police agencies has more than a single full-time assigned detective position.

Again it is most desirable to let a jury decide the weight to be given evidence rather than allowing a professional expert telling a judge that “the latest research doesn’t favor its use.”

If we were to believe some defense experts, we would think that virtually all confessions are false and coerced, that almost no eyewitness can ever accurately remember what happened, that any tests offered by the prosecution are junk science, and that wrongful convictions are the norm, not the exception.

NOTE: At the time of printing, after several attempts to obtain responses to the written questions, the Committee had not received any communication from Craig Watkins.

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

TESTIMONY OF KIRK BLOODSWORTH, DEATH ROW INMATE EXONERATED BY DNA,
MARCH 21, 2010

Testimony of
Kirk Bloodsworth
Death Row Inmate Exonerated by DNA

Before the U.S. Senate Committee on the Judiciary
March 21, 2012

“Justice for All: Convicting the Guilty and Exonerating the Innocent”

Mr Chairman and Distinguished Members of the Committee.

My name is Kirk Noble Bloodsworth. I am the first person in the United States to be exonerated by post conviction DNA testing. In 1984, I was twenty-two years old and honorably discharged from the Marine Corps. I had no criminal record. I was convicted and sentenced to death for a crime I didn't commit.

After serving eight years, ten months and 19 days in prison, two years of which were on death row, I was allowed to have access to post-conviction DNA testing to prove my innocence. On June 28, 1993 I was released from prison, exonerated and received a full pardon from the State of Maryland. Ten years later, the lightning bolt of post-Conviction DNA testing struck a final blow of justice and the real killer in the case was captured. The man who committed the crime I was charged with plead guilty and was convicted in May, 2004.

The Kirk Bloodsworth Post-Conviction DNA Testing Program is essential and vital to the criminal justice system in the United States. This Committee will hear from Thomas Haynesworth; at least four other men have been released from prison based as a direct result of the Bloodsworth program. In simple terms, it works.

Let's be clear. Critics will say that this program is not needed for esoteric reasons. This is, in my opinion, a deliberate shield from the "Run and Shoot" method of prosecuting cases in this country. We can't get it right 100% of the time. Critics of post-conviction DNA testing sit in judgment to overwhelming evidence of factual innocence. This type of thinking almost got me killed. We are human beings, we make mistakes. Wrongful convictions have happened at least 282 in recent year. Innocent people cannot be allowed to lose their lives to a system of justice that broke down for us all.

We must stand up for idea that we cannot be perfect and although our system of justice is grand we must still seek to undo mistakes at every turn because when mistakes are made, real people suffer. Post-conviction DNA testing is a must when you considering the possibility of wrongful convictions and the possible execution of the innocent persons. This committee supported the Bloodsworth program, and can do it again. You must in good conscience ask yourselves this question... "What's your Bloodsworth?" because it's not your blood that's on the line its the blood of the people that you serve. Thank you.

“RIGHTFUL CONVICTIONS,” POSTED BY JOSHUA MARQUIS, WWW.CATO-UNBOUND.ORG,
MARCH 7, 2012

- Cato Unbound - <http://www.cato-unbound.org> -

Rightful Convictions

Posted By [Joshua Marquis](#) On March 7, 2012 @ 10:45 am In [Reaction Essay](#) | [Comments Disabled](#)

Professor Garrett cites ^[1] one of the relatively few genuine death row exonerations—Kirk Bloodsworth—and then invokes that case to argue that wrongful convictions on death row are epidemic because Georgia murderer Troy Davis' case did not turn on DNA.

In the space available it is not possible to address all of Garrett's issues, so I will concentrate on the definition and reality of exonerations using DNA testing.

Garrett repeats the often wishful thinking of death penalty opponents that "the death penalty is dying in America." Of those states that abolished the death penalty, only Oregon, in 1964, did so by popular vote—and then reinstated it in 1984 by a 75 percent vote. Using the U.S. Department of Justice's Bureau of Justice statistics, it is clear that in the first decade of the 21st century (2000-09) the states that do execute murderers used the penalty 26 percent more often than in the last decade of the 20th century (1990-1999). And, not coincidentally in the minds of many of us, over the same time period the murder rate in America declined over 20 percent.

DNA came into America's courtrooms state-by-state, mostly in the late 1980s and early 1990s. It was propounded not by defense attorneys but by prosecutors who noted what happened in England in the case well-portrayed in Joseph Wambaugh's book *The Blooding*.^[1] In it, the appropriately named Colin Pitchfork was brought to justice through a form of DNA testing that would horrify most American civil libertarians: the British police pretty much required all the males of a certain age to submit to having their blood taken by needles. (DNA can now be collected with a Q-tip like device that swabs the inside of the subject's mouth.)

For any scientific technique to be accepted or to withstand the attack that it is mere junk science, federal courts have imposed the *Daubert* standard.^[2] Virtually every state either has adopted that standard or has fashioned its own. In Oregon, for example, it is called the *Brown/O'Key* standard, and it examines "the technique's general acceptance in the field, the expert's qualifications and stature, the use which has been made of the technique, the potential rate of error, the existence of specialized literature, the novelty of the invention and the extent to which the technique relies on the subjective interpretation of the expert."^[3]

Since a prosecutor's role is to seek justice, not simply convictions, it is always in our interest to find the right person—to defeat the claim of SODDI (Some Other Dude Did It). My predecessors in Clatsop County, where I am the DA, finally convinced the Oregon appellate courts, in *State vs. Futch*, to allow DNA evidence.^[4] Defense attorneys had fought it tooth and nail until the *Futch* decision.

It turned out that in a relatively tiny percentage of cases, DNA would exonerate people. Kirk Bloodsworth's case makes headlines because it is so rare. There were two poster boys, literally, for death row innocence in the 1990s, both of whose supporters claimed DNA would free them. One of them was championed for over a decade after Virginia legally killed him.

In 1992, Roger Coleman was sentenced to die for the 1981 rape and murder of Wanda McCoy in a tiny Virginia coal mining town. (Victims have names too.) Coleman's picture graced the cover of *Time* magazine, and he protested his innocence to Ted Koppel on ABC's *Nightline* shortly before his execution. Coleman was represented, like many death row inmates, by a top-flight law firm—Washington, DC's Arnold & Porter.

The 11 years Coleman languished between his crime and his execution is much shorter than would occur in most of the 35 states with the death penalty. His last words were, "An innocent man is going to be murdered tonight. When my innocence is proven, I hope America will realize

the injustice of the death penalty as all other civilized countries have."

The same Dr. Edward Blake cited by Garrett had the one remaining biological sample from Coleman. It was too small to be tested under the PCR testing available in 1992. When Virginia authorities tried to get the sample post-execution, Blake refused, telling the BBC it was an act of civil disobedience on his part because he was so sure Virginia would try to cover up the execution of an innocent man.[5]

This standoff continued until January 2006, when outgoing Governor Mark Warner brokered a deal to have a neutral Canadian lab test the sample using the latest DNA technology. Coleman's most dogged supporter, Jim McCloskey of Centurion Ministries, which fights to free the wrongfully imprisoned, planned to announce the results on live TV.[6] He didn't. The test came back with a 1 in 19 million probability that anyone other than Roger Coleman could have murdered and raped Wanda McCoy.

During the election summer of 2000, the death row practices of Texas came under particular scrutiny. Barry Scheck and the Innocence Project represented Ricky McGinn who had been on Texas' death row for six years for the rape and murder of his 12-year old step-daughter, Stephanie Flannery. There was a tiny speck of biological material that could not be tested when McGinn went to trial. A *Newsweek* cover featured McGinn's face, coincidentally on the same day Scheck testified before the U.S. Senate Judiciary Committee,[7] citing McGinn's case. (I testified that same day.[8])

Texas Governor George W. Bush did he was allowed (a single 30-day reprieve) so that the speck on Stephanie's underwear could be tested. But again, you never heard about it. *Newsweek* never published an update. Hardly anyone remembers the now-executed McGinn because the DNA test proved beyond any possible doubt that he was both a killer and a rapist.

Do these two high profile non-exonerations means we should say "game over?" Of course not.

In response to the Senate hearings, the National District Attorneys Association, on whose board I have sat since 1997, adopted the policy that DNA tests should be afforded at any stage of a proceeding—even after all appeals have been denied—if the testing can reveal actual guilt or innocence. There is little downside to a DNA test for a convicted murderer when the test won't answer any question regarding guilt. But a defense attorney will demand one because his job is to cast doubt on any part of the state's case, not just that which establishes guilt or innocence.

Garrett references a study by Professor Samuel Gross that came out of a Northwestern Law School symposium and subsequent issue of their *Journal of Criminal Law*. [9] I used Gross' own numbers to estimate the incidence of real-life exonerations, as opposed to those in TV shows or movies. Gross cited about 390 cases from 1989 to 2003 where he and his team believed serious felony sentences were unfairly handed down against innocent defendants. The cases he cited from Oregon hardly met that test. Gross posits there must be many more exonerations than he identified because he asserts (and Garrett repeats) that in many cases DNA or a recantation by a key witness does not exist. So I rounded Gross's number up to 400 and multiplied it by ten, yielding 4,000 exonerations—far more than I believe exist for the time period. I divided the 4,000 by 15 million, the number of felonies committed during the same period, yielding a "rightful" conviction rate of 99.93%. My article in the *New York Times* [10] drew howls of protest, many attacking my math, pointing out that my base statistic of 15 million was all felonies.

Okay, so let's refine the numbers down to just willful homicide and forcible rape. This is narrower than Gross's sample and amounts to about 1.5 million. Move the decimal one point and you have a "rightful" conviction rate of 99.72%. Small consolation if you are in that .28 of one percent.

The wrongful conviction rate should be lower and prosecutors can do more than anyone in the criminal justice system to make sure that happens by being very discriminating in bringing capital cases. Pharmacists and doctors separately kill 10,000 Americans—by accident—every year, but we don't ban prescriptions or elective surgery. We try to find out what went wrong and fix it.

Garrett and his fellow opponents of the death penalty—and then true life, and then mandatory sentencing of any sort—claim they really just want to fix the problem. But, as Justice Antonin Scalia acidly pointed out in his concurrence in *Kansas v. Marsh*,^[11] they aren't interested in fixing the system, but in tearing it down. I have no doubt their beliefs are sincere and deeply held, but if we are to debate such an emotional issue we should do so with context, not ignoring the stories that don't make the front page or are relegated to the newspaper's "airplane pages" (B-2, C-5, etc).

States are doing all kinds of things to prevent the errors that led to Kirk Bloodsworth's convictions—better trained and paid public defenders and prosecutors, and a true national DNA bank, the latter of which is ironically opposed on civil liberties grounds by people apparently unaware that the DNA we use to identify a suspect is considered "junk DNA" for medical purposes. We can't, for example, find out whether a person is inclined to get Tay-Sachs disease even if we wanted to.

I can understand how libertarians generally don't trust the government to get things right and accordingly might be even more leery of the government killing someone. Professor Cass Sunstein proposed in "Is Capital Punishment Morally Required: The Relevance of Life-Life Tradeoffs"^[12] that if the series of nonideological studies done in the last decade are right, then having a death penalty spares between 10 and 24 innocent victims of murder. How can we abandon indisputably innocent men, women, and children to homicide?

Notes

- [1] Joseph Wambaugh, *The Blooding* (William Morrow), 1989.
- [2] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
- [3] *State v. Brown*, 297 Or 404, 416, 687 P2d 751 (1984).
- [4] *State v. Futch*, 123 Or App 176, 860 P2d 264 (1993).
- [5] "The Roger Coleman Case: Did Virginia Execute an Innocent Man?" Inside Out, WBUR.
- [6] William Tucker, "Guilty Again!"^[2] *American Spectator*, January 17, 2005.
- [7] Senate Judiciary Committee Testimony of Barry Scheck on Post-Conviction DNA Testing, June 13, 2000^[3].
- [8] Senate Judiciary Committee Hearing on Post-Conviction DNA Testing, June 13, 2000^[4].
- [9] Symposium: Innocence in Capital Sentencing^[5], *Journal of Criminal Law and Criminology*, Vol. 95, Issue 2, Winter 2005.
- [10] Joshua Marquis, "The Innocent and the Shammed"^[6], *New York Times*, January 26, 2006.
- [11] *Kansas v. Marsh*^[7], Supreme Court of the U.S. No. 04-1170, 548 U.S. 163 (2006).
- [12] Cass Sunstein and Adrian Vermeule, "Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs"^[8], U Chicago Law & Econ, Olin Working Paper No. 239; AEI-Brookings Joint Center Working Paper No. 05-06; U of Chicago, Public Law Working Paper No. 85.

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URL to article: <http://www.cato-unbound.org/2012/03/07/joshua-marquis/rightful-convictions/>

URLs in this post:

- [1] Professor Garrett cites: <http://www.cato-unbound.org/2012/03/05/brandon-garrett/learning-what-we-can-from-dna/>
- [2] Guilty Again!: <http://spectator.org/archives/2006/01/17/guilty-again/1>
- [3] Senate Judiciary Committee Testimony of Barry Scheck on Post-Conviction DNA Testing, June 13, 2000: <http://www.nacdl.org/Advocacy.aspx?id=11560>
- [4] Senate Judiciary Committee Hearing on Post-Conviction DNA Testing, June 13, 2000: http://lobby.la.psu.edu/049_Criminal_Justice_Reform/Congressional_Hearings/Testimony/S_Judiciary_Hatch_et_al_061300.htm

- [5] Symposium: Innocence in Capital Sentencing: <http://www.law.northwestern.edu/jclc/backissues/95-2.html>
[6] The Innocent and the Shammed: http://www.nytimes.com/2006/01/26/opinion/26marquis.html?_r=1
[7] *Kansas v. Marsh*: <http://www.law.cornell.edu/supct/pdf/04-1170P.ZC>
[8] Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=691447

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BARBARA PARKER HERVEY, JUDGE, TEXAS COURT OF CRIMINAL APPEALS, MARCH 21,
2012, STATEMENT

Statement of

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regarding

**Justice for All: Convicting the Guilty and
Exonerating the Innocent**

before the

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

March 21, 2012

Statement of
BARBARA PARKER HERVEY
**REGARDING JUSTICE FOR ALL: CONVICTING THE GUILTY AND
EXONERATING THE INNOCENT**

**To the Committee on the Judiciary,
United States Senate**

March 21, 2012

MR. CHAIRMAN and members of the Committee,

How many times have you heard the question – Is it better to convict an innocent man or to set ten guilty people free? *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (8th ed. 1778). The criminal justice system should strive to eliminate both scenarios. The problems associated with wrongful convictions have been manifested in many ways throughout the criminal justice system. Courts have been called upon to develop jurisprudence, legislatures have enacted statutes, science has continued to improve, and educational programs have been developed. We must restore public confidence in our system of justice.

Texas leads the nation in the number of wrongful convictions. However, if anyone in any of the other 49 states thinks for a minute that they do not have innocent people in prison, they may be mistaken. As a result of these wrongful convictions and other concerns, much of how the criminal justice system works is being questioned, including the effectiveness of counsel, treatment of the mentally ill, reliability of crime laboratories, and the applicability of advances in forensic science. Texas is taking a proactive approach, recognizing what went wrong in the past to prepare for the future. Texas is improving its criminal justice system and has become a leader in addressing these problems. Many of our improvements are due to legislative enactments, while others reflect the multi-faceted approach of the Texas Court of Criminal Appeals to educating the participants in the Texas criminal justice system regarding innocence issues. The Court of Criminal Appeals continues to develop its jurisprudence, serving as a leader in actual innocence case law.

I.

There are two types of actual innocence claims. In the first, a defendant may actually have committed the crime for which he has been accused, but he asserts that he is “actually innocent” of the crime because of some constitutional error that occurred at trial. *See Schlup v. Delo*, 513 U.S. 298 (1995). In other words, it is a procedural claim in

which a defendant's claim of innocence does not provide a basis for relief itself, but is tied to a showing of constitutional error at trial. In the second type of actual innocence claim, a defendant asserts that he is actually, factually innocent of a crime. *See Herrera v. Collins*, 506 U.S. 390 (1993). This claim is a substantive claim in which a defendant asserts a bare claim of innocence based on newly discovered evidence. It is this second type of actual innocence claim that has become the subject of increasing national, as well as local, attention.

In *Herrera*, the United States Supreme Court addressed the issue of whether a (bare) claim of actual innocence entitled a petitioner to federal habeas relief. *Herrera* urged in his petition that he was "actually innocent" of the murder for which he was convicted and sentenced to death. He argued that, because he is actually innocent, his execution would violate the Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment guarantee of substantive due process. *Id.*; *see also State of Texas ex rel. Holmes v. The Hon. Court of Appeals for the Third District*, 860 S.W.2d 873 (Tex. Crim. App. 1993) (Miller, J., concurring). But since the evidence supporting his claim was first produced, not at his trial, but eight years later, the Court concluded that his claim did not entitle him to relief. *Herrera*, 506 U.S. at 411-12. The Supreme Court noted that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* at 400. The Court concluded that *Herrera's* forum for relief was the executive power of clemency under state law. *Id.* at 412.

In *Herrera*, the Supreme Court also discussed the effect on the justice system of entertaining claims of innocence. The Court noted that claims of innocence would have a very disruptive effect on the need for finality in (capital) cases and would place an enormous burden on the State which could be charged with retrying a case on stale evidence. Thus, the Court noted that a high threshold showing of innocence would be required before habeas proceedings on such a claim would even be appropriate. *Id.*

Just a year after the Supreme Court handed down *Herrera*, the Texas Court of Criminal Appeals decided the case of *State of Texas ex rel. Holmes v. The Hon. Court of Appeals for the Third District*, 885 S.W.2d 389 (Tex. Crim. App. 1994). In *Holmes*, we adopted the "extraordinarily high" threshold showing of innocence set forth in *Herrera*. The Court also expressly held that habeas corpus was the appropriate vehicle in Texas in which to assert these actual innocence claims, and it overruled previous case law that conflicted with this holding. The *Holmes* case, and the changes that the Texas Legislature made to the habeas corpus statutes around the same time, opened the door for bare claims of actual innocence in Texas. Shortly after the *Holmes* decision, the Texas Court of Criminal Appeals made it clear that these bare innocence claims could be raised in both death penalty and non-death penalty cases because the incarceration of an

innocent person is as much a violation of due process as is the execution of an innocent person. *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).

Over the next several years, the Texas Court of Criminal Appeals, which receives thousands of habeas applications every year, saw quite a number of applications in which the petitioners had raised actual innocence claims based on newly discovered evidence. But with the heavy burden placed on a petitioner who attacks his conviction on a bare claim of actual innocence, many found it difficult to prevail. However, even when denying a claim, the Court attempted to help future litigants understand not only the heavy burden they faced, but to decide how they might go about meeting that burden. For instance, in *Ex parte Franklin*, 72 S.W.3d 671, 677 (Tex. Crim. App. 2002), the Court took the opportunity to explain that the type of evidence required to succeed on a *Herrera*-type actual innocence claim was evidence that goes toward affirmatively proving an applicant's innocence. And in other cases, whether relief was granted or denied, the Court continued to try to provide guidance and a thorough recitation of its analysis to help the bench and bar in presenting and understanding these claims. See *Ex parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002) (determining that the Court will not preclude actual innocence claims because the conviction was the result of a guilty plea); *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005) (affirming the habeas court's ruling after reviewing the entire record and finding that the habeas court's were findings supported by the record); *Ex parte Spencer*, 337 S.W.3d 869 (Tex. Crim. App. 2011) (explaining that "[w]e will consider advances in science and technology when determining whether evidence is newly discovered or newly available, but only if the evidence being tested is the same as it was at the time of the offense"); *Ex parte Miles*, Nos. AP-76,488 & AP-76,489, __ S.W.3d __ (Tex. Crim. App. Feb. 15, 2012) (holding that the *Herrera* standard was met where multiple pieces of newly discovered evidence, including *Brady* evidence, amounted to affirmative evidence that unquestionably established the applicant's innocence).

II.

In June 2008, the Court of Criminal Appeals established the Texas Criminal Justice Integrity Unit due to concerns over the growing number of wrongful convictions throughout Texas. The goal in creating the Unit was to review the strengths and weaknesses in the criminal justice system in the hope that meaningful reform through education, training, and legislative proposals would increase the fairness and accuracy of our system. The Texas Criminal Justice Integrity Unit aims to make proactive changes at the front-end of the system – before an innocent person ever receives an erroneous conviction.

The Unit is an ad hoc, nonpartisan group composed of 14 members selected from various segments of the criminal justice system. These members were chosen for their

interest and work on criminal justice issues. The current members of the Unit include, in addition to myself, Senator Rodney Ellis, Representative Pete Gallego, Representative Jerry Madden, Mary Anne Wiley (Deputy General Counsel to Governor Rick Perry), Judge Sid Harle (District Judge), Bill Allison (Clinical Professor of Law and Director at the University of Texas's Criminal Defense Clinic), Pat Johnson (Director of the Texas Department of Public Safety Crime Lab), James McLaughlin (Executive Director of the Texas Police Chiefs Association), Craig Watkins (District Attorney of Dallas), Jaime Esparza (District Attorney of El Paso), Gary Udashen (criminal defense attorney), Jim Bethke (Director of the Texas Indigent Defense Commission), and Edwin Colfax (Project Manager of the Texas Indigent Defense Commission).

Since its establishment, the Unit has contributed much toward eliminating the causes of wrongful convictions. Initially, the Unit sought to improve the quality of defense counsel available for indigent defendants, implement procedures to improve eyewitness identification, make recommendations to eliminate improper interrogations and to protect against false confessions, make recommendations regarding discovery practices, create reform for the standards in the collection, preservation, and storage of evidence, improve crime lab reliability, improve attorney practices and accountability, address adequate compensation for the wrongfully convicted, implement writ training, and establish local, "home rule" protocol for the prevention of wrongful convictions.

Erroneous eyewitness identification is the leading cause of wrongful convictions. Reports indicate that eyewitness misidentifications have contributed to 80 percent of the DNA exonerations in Texas and nearly 75 percent of wrongful convictions nationwide. From its inception, the Unit has urged eyewitness identification reform. In 2009, the Unit worked with the Texas Commission on Law Enforcement Office Standards and Education (TCLEOSE) to add eyewitness evidence training to the Basic Peace Officer Course curriculum, and it assisted TCLEOSE in developing a training course on eyewitness identification procedures modeled after the National Institute of Justice's Eyewitness Evidence Guide.

The Unit worked collaboratively with other criminal justice entities, such as the Texas Indigent Defense Commission and the Timothy Cole Advisory Panel on Wrongful Convictions, to recommend legislation that addressed this issue statewide. The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law. The Advisory Panel was named after Timothy Cole, the first Texan to be posthumously exonerated of a crime through DNA testing, and it was directed to advise the Indigent Defense Commission in the preparation of a study regarding the causes of wrongful convictions and make recommendations to prevent future wrongful convictions. The Advisory Panel made 11 specific recommendations for reform, which were presented to

the Governor, Lieutenant Governor, Speaker of the House, and standing committees with members on the Advisory Panel.

In the 82nd Texas legislative session, a bill was passed that requires police departments to adopt and implement written policies for the administration of photograph and live lineup identification procedures that follow best practices. *See* TEX. CODE CRIM. PROC. art. 38.20 (enacted by Acts 82nd Leg., ch. 219 (H.B. 215), § 1, effective September 1, 2011). All law enforcement agencies are required to have their policies in place by September 1, 2012. The Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) was charged with the development and dissemination of a model policy and procedure. Those law enforcement departments that have chosen not to adopt the LEMIT model policy are nonetheless charged with drafting their own, which must adhere to the minimum requirements of the statute. All law enforcement groups will be trained on the new eyewitness identification requirements.

A series of Texas legislative enactments governing DNA and its impact in the courtroom have enabled the State to make tremendous advancements in applying science to the law. *See, e.g.*, TEX. CODE CRIM. PROC. ch. 64. However, DNA is only one of the many areas of forensic science increasingly important in criminal matters. It has been, and still remains, an area requiring continuing legal education.

The need for forensic training was heightened with the release of the National Academy of Sciences' (NAS) report entitled, "Strengthening Forensic Science in the United States: A Path Forward." The Unit, with the assistance of other entities such as the Texas Department of Public Safety, the New York Innocence Project, members of the NAS, law professors, and forensic scientists, planned a major forensic science seminar in October 2010. The seminar brought together judges, scientists, criminal defense attorneys, prosecutors, legislators, and others to discuss science in the courtroom. We educated over 400 individuals on various disciplines including fingerprints, ballistics, DNA, arson, lab protocols and standards, and we displayed a virtual tour of the Texas Department of Public Safety crime lab. The conference supplied 12.5 hours of continuing legal education credit for participants for under \$10,000.

As a result of that forensic science conference, and inquiries from interested groups about how the criminal justice system will respond to the NAS report, the Unit conducted a survey of all criminal law judges in Texas about their knowledge, opinions, and reactions to the NAS report. Survey results indicated that judges were not receiving enough training in forensic science and the standards for the admissibility of such evidence. The survey results also revealed that almost half of the responding judges received zero hours of forensic science training over the previous year, and many judges requested additional training on the standards for reliability of scientific evidence. The Unit aims to use the information gleaned from the survey to develop and recommend

forensic science training for judges. In fact, the Unit, in conjunction with the Texas Forensic Science Commission, will put on a seminar this June to further educate criminal justice system participants and address continuing developments in forensic science. Among other topics, the seminar will include a discussion of the recommendations coming out of the Willingham and Willis investigation. The Texas Forensic Science Commission was formed in 2005 by the Texas Legislature and investigates complaints of forensic negligence or misconduct in Texas criminal cases. Following its investigation of the Willingham and Willis cases, the Commission issued a report and made 17 recommendations regarding initiatives designed to improve arson investigation in Texas. Several of the recommendations emphasized increased education about fire science and investigations.

Yet another area of interest for the Unit has been the collection, preservation, and storage of evidence. With the help of former Unit member State Representative Jim McReynolds, a bill was passed, effective September 2009, that established a system whereby less-populated counties (those with populations of less than 100,000) may store some biological evidence with the Texas Department of Public Safety, and it will be bar coded. This program helps communities with fewer resources comply with state requirements while protecting the integrity of biological evidence. Biological evidence, such as DNA, must be stored in climate-controlled buildings – not in unequipped courthouses or in the homes of court clerks. The DPS storage facility has been built and is currently online. Additionally, the DPS has added seven new crime labs to address the scientific needs of Texas. Assisted by a DPS forensic scientist, the Unit has continued to train clerks, judges, defense attorneys, and prosecutors on the proper preservation and storage of biological evidence.

Further, the Unit has also proposed legislation to improve crime lab reliability, including the concept of a traveling DNA lab. The traveling lab would act as an unannounced check on criminal labs throughout the state. Similar to a health department's method of operation, the traveling DNA lab would arrive at a Texas crime lab without notice to review lab operations. This recommendation has been favorably considered by past legislative sessions, and the Unit will continue to push this concept.

The Unit will continue to seek meaningful reform through education, training, and legislative recommendations. As part of that effort, the Unit's Mental Health and Substance Abuse Seminar will take place this week. The seminar is a two day conference that aims to create awareness by highlighting such issues as drug abuse and addiction, the role of support groups in addiction recovery, competency, post-traumatic stress disorder, and the ethical issues associated with representing the mentally ill. Continuing legal education credit will be available, and participants will include judges, criminal defense attorneys, prosecutors, legislators, mental health practitioners, and law enforcement as well as interested members of the public. A *Brady* seminar focusing on discovery issues

is also planned for the future. Among other issues, we will continue to look at issues regarding discovery, videotaped confessions, the writ process, developments from the NAS, the preservation, collection, and storage of evidence, and quality representation by all Texas attorneys.

III.

The Texas legislature has specifically provided funding to the Court of Criminal Appeals for the purpose of providing continuing legal education for its judges, prosecutors, and criminal defense attorneys who regularly represent indigent defendants in criminal matters. Additional funding is to be provided to statewide associations that provide innocence training for law enforcement officers, law students, and other participants. TEX. GOV'T CODE § 56.003. The current funding allocated is approximately \$18 million per biennium.

Texas has an unusual court structure. There are two supreme courts with equal power, one for civil matters and one for criminal cases. The Court of Criminal Appeals, as the court of last resort for criminal cases, handles approximately nine to ten thousand matters a year and is the busiest appellate court in the nation. This volume of work puts the Court in the unique position to perceive areas in need of serious review within our system. Thus, the Court can work with (presently eleven) different entities to provide the necessary education to criminal justice stakeholders.

The Court is charged, as part of its oversight of the training, with the responsibility of monitoring both the financial and program performance of entities awarded funds by the Court. Timely and in depth applications are required to be submitted yearly by any entity requesting grant funds. All grant funding is processed through the Office of the Texas Comptroller. The Court monitors the Comptroller's processing of the funds to ensure all receipts and disbursements are accounted for from the inception of the grant through close out.

For federal grants, federal guidelines are strictly followed, and staff is trained in both program and financial compliance. The current program administrator is a Texas attorney with five years of federal grant experience. The financial administrator is a Texas certified public accountant and a certified internal auditor with 24 years of experience in federal and state grants. The Court of Criminal Appeals monitors sub-grantee recipients of federal grants on a continual basis. Sub-grantee receipts and disbursements of grant funds are audited and reconciled to bank statements at a rate of 100 percent. Supporting documentation for disbursements is reviewed in detail for completeness, validity, and compliance with federal grant guidelines.

For grants other than federal grants, the Court of Criminal Appeals creates its own rules for the operation and monitoring of grants as authorized by statutory law. Sub-grantee recipients of federal funds are required to follow both federal guidelines and rules created by the Court insofar as its rules do not conflict with federal guidelines. Compliance with the federal guidelines and the Court's rules is strictly enforced and grantees are held accountable for their program and financial results. Non-compliance results in various sanctions including payback of unallowable expenditures and cancellation of grants.

IV.

Finally, Texas has enacted the most generous compensation bill in the nation. TEX. CIV. PRAC. & REM. CODE § 103.001. A wrongfully convicted person is entitled to \$80,000 per year of wrongful incarceration, an annuity, as well as \$25,000 per year spent on parole or as a registered sex offender. The wrongfully convicted person is also entitled to compensation for child support payments, tuition for up to 120 hours at a career center or public institution of higher learning, reentry and reintegration services, and the opportunity to buy into the Texas State Employee Health Plan.

TESTIMONY OF THOMAS HAYNESWORTH, THE MID-ATLANTIC INNOCENCE PROJECT,
AND THE INNOCENCE PROJECT, MARCH 21, 2012

TESTIMONY OF THOMAS HAYNESWORTH,
THE MID-ATLANTIC INNOCENCE PROJECT,
AND THE INNOCENCE PROJECT

TO THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

March 21, 2012

REGARDING
JUSTICE FOR ALL: CONVICTING THE
GUILTY AND EXONERATING THE INNOCENT

Record Testimony of Thomas Haynesworth, the Mid-Atlantic Innocence Project, and
the Innocence Project for the
Senate Committee on the Judiciary
March 21, 2012

Chairman Leahy and Members of the Committee, testifying before you today is Thomas Haynesworth, the Mid-Atlantic Innocence Project, and the Innocence Project, represented at the hearing by Mr. Haynesworth. Mr. Haynesworth spent twenty-seven years in prison for a series of crimes he did not commit. He was released from prison one year ago today and fully exonerated on December 6, 2011. The Mid-Atlantic Innocence Project is a non-profit organization dedicated to correcting and preventing the conviction of innocent people in the District of Columbia, Maryland, and Virginia, and represented Mr. Haynesworth in his bid to prove his innocence. The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice; the Innocence Project also represented Mr. Haynesworth.

Our testimony below describes Mr. Haynesworth's wrongful conviction—one of 289 wrongful convictions nationwide proven by DNA evidence; the important federal grant programs that enabled his exoneration and the exonerations of others; and the reforms needed to prevent future miscarriages of justice. Thank you for inviting us to submit this testimony.

I. Mr. Haynesworth's Wrongful Conviction

Mr. Haynesworth's twenty-seven-year nightmare began on the morning of February 5, 1984, when he was stopped by police while walking to the grocery store. They told him that he fit the description of a man who had assaulted five women in the East End of Richmond, Virginia. One of the victims had seen him and identified him as the man who attacked her. Based on her identification, Mr. Haynesworth—eighteen years old and with no criminal history—became a suspect in all five attacks. After being initially identified by one victim, the other victims also identified him as their attacker. He was eventually convicted for three of the five attacks¹ and sentenced to seventy-four years in prison.

Despite Mr. Haynesworth's arrest, the rapes continued. On December 19, 1984, police arrested Leon Davis, a former neighbor of Mr. Haynesworth's who was then charged with about a dozen rapes that took place during the last nine months of 1984. Davis eventually was convicted of at least three of those crimes and sentenced to seven life terms.

In 2005, in response to five exonerations based on DNA testing performed on evidence that had been serendipitously saved by the Virginia Department of Forensic Science, Governor Mark Warner ordered a review of all cases that were analyzed by the Virginia Department of Forensic Science between 1973 and 1988 in which biological evidence had been saved and a conviction obtained. Analysts discovered that one of the case files associated with Mr. Haynesworth's three convictions contained biological evidence suitable for testing.

¹ Mr. Haynesworth was acquitted of one of the two remaining attacks and a nolle prosequi was entered for the other.

Thanks to funding from the Kirk Bloodsworth Postconviction DNA Testing Grant Program (“Bloodsworth Program”) through the National Institute of Justice (“NIJ”), the evidence was tested in 2009. The semen recovered from the victim matched Leon Davis, not Mr. Haynesworth. Armed with this exculpatory material, Mr. Haynesworth’s legal team requested that the Commonwealth’s Attorneys review his other convictions, for which there was no remaining physical evidence. DNA testing also tied Leon Davis to one of the attacks of which Mr. Haynesworth was originally accused, but not convicted.

The Commonwealth’s Attorneys conducted an extensive investigation (which included two polygraph exams passed by Mr. Haynesworth) and eventually concluded that Leon Davis was responsible for the other two crimes for which Mr. Haynesworth had been convicted. It was clear that the five crimes with which Mr. Haynesworth was charged were committed by the same person, and both crimes shared uncanny idiosyncratic features with the crimes of Leon Davis. Attorney General Ken Cuccinelli also conducted an investigation and joined in Mr. Haynesworth’s petitions for writs of actual innocence for non-biological evidence, becoming a champion for Mr. Haynesworth’s case and ultimately arguing the case himself before the Virginia Court of Appeals.

On Friday, March 18, 2011, the Virginia Parole Board announced that Governor Bob McDonnell had revisited the possibility of Mr. Haynesworth’s parole, which had been denied in June 2010, and requested that he be released. Mr. Haynesworth walked out of prison three days later; unfortunately, with two sexual assaults still tainting his record, he was also required to register as a sex offender and under strict parole conditions.

Finally, after twenty-seven years of proclaiming his innocence, Mr. Haynesworth was fully exonerated on December 6, 2011, when the Virginia Court of Appeals granted his petitions for writs of actual innocence. The world has changed dramatically since he was wrongfully arrested and incarcerated in 1984, which has been a shock. He has been adjusting and learning as he works hard in his job at the Virginia Office of the Attorney General. Most importantly, however, Mr. Haynesworth has been making up for the decades he lost with his family.

II. Federal Grant Programs Helped Make Mr. Haynesworth’s Exoneration Possible

Simply put, Mr. Haynesworth would not be here today were it not for two crucial federal grant programs: the Bloodsworth Program and the Wrongful Conviction Review Grant Program, which is a part of the Capital Litigation Improvement Program through the Bureau of Justice Assistance (“BJA”).

With relatively small but strategic funding, these programs have an invaluable impact on justice and safety. In fact, in the four years that Bloodsworth awards have been made, at least nine innocent persons in six states have been proven innocent because of those funds. Additionally, settling the innocence claims of three of those nine citizens resulted in *the identification of the real perpetrator of the crimes for which they had been wrongfully convicted*.² Since its inception in 2009, the Wrongful Conviction Review Program has enabled the exoneration of at

² In fact, in 48% of DNA exonerations nationwide, the real perpetrator was identified through settling the claims of the wrongfully convicted.

least six wrongfully convicted individuals in four states. Mr. Haynesworth's exoneration was made possible by a combination of funds from both grant programs; the DNA testing was funded by the Bloodsworth program, and the Mid-Atlantic Innocence Project's Wrongful Convictions grant enabled the project to conduct the legal work in his case.³

A. The Justice for All Act and Bloodsworth Program

In 2004, Congress recognized the potential of DNA evidence and passed—with bi-partisan support—the Innocence Protection Act contained in the Justice for All Act (“JFAA”). The JFAA established a number of federal statutory innocence protections and federal incentives to help states uncover wrongful convictions. The most successful of those federal incentives to aid states in addressing claims of innocence has been the Bloodsworth Program. Named after Kirk Bloodsworth, the first person who had served time on death row to be exonerated through post-conviction DNA testing, the Bloodsworth Program provides much-needed funds to states and Innocence Network⁴ members to “review [cases that involve violent felony offenses (as defined by State law) in which actual innocence might be demonstrated] and to locate and analyze biological evidence associated with these cases.”⁵ In fact, the program has fostered a collaborative spirit among state entities and innocence organizations, and such collaboration has not only benefited innocent defendants, but it has also encouraged these parties to overcome their traditionally adversarial roles when considering post-conviction claims

The Arizona Post-Conviction DNA Testing Project, a collaboration between the Arizona Justice Project and the Arizona Attorney General's Office, is an excellent example of what can happen through these collaborations. Together, they have canvassed the Arizona inmate population, reviewed cases, worked to locate evidence, and filed joint requests with the court to have evidence released for DNA testing. In addition to identifying the innocent, the “grant enables [Arizona Attorney General Terry Goddard's] office to support local prosecutors and ensure that those who have committed violent crimes are identified and behind bars” noted the Attorney General.⁶ And according to the Arizona Justice Project's Executive Co-Director and DNA Project Manager Lindsay Herf,

We have cultivated an environment in our state in which law enforcement seeks justice hand-in-hand with the state's innocence project. Our Attorney General, Director of the Criminal Justice Commission, President of the Prosecuting Attorneys Association, and crime lab directors all strongly support this effort to uncover the truth in an efficient and cooperative manner. We are not tying up courts to argue about whether to test certain pieces of evidence in a case.

³ In total, Bloodsworth and Wrongful Conviction Review funding has aided in the exoneration of at least fourteen innocent people. Please see the Appendix for a listing of known exonerations made possible by the Bloodsworth and Wrongful Conviction Review Programs.

⁴ The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions.

⁵ The National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, Solicitation: Postconviction DNA Testing Assistance Program 3 (2011), available at: <https://www.ncjrs.gov/pdffiles1/nij/sl000953.pdf>.

⁶ *Arizona receives federal DNA grant*, <http://community.law.asu.edu/news/19167/Arizona-receives-federal-DNA-grant.htm> (last visited Mar. 11, 2011).

... We believe our cooperative model is one worth replicating. In Arizona, law enforcement sees the value in DNA as a superior truth-telling device in criminal trials. Where biological evidence is left at the scene, DNA evidence more accurately identifies the source of the evidence than eyewitness identification, confessions, and other forensic sciences. We are grateful for the funding that has allowed us the means to one day be able to say that if there is another Kirk Bloodsworth in an Arizona prison, we found him, we tested the evidence, we released him, and we captured the true perpetrator.⁷

Indeed, the Arizona Post-Conviction DNA Testing Project is able to say just that: the work of the Arizona Justice Project—with its case review and post-conviction litigation expertise—and the Arizona Attorney General has succeeded in the finding “another Kirk Bloodsworth in an Arizona prison,” John Watkins. Mr. Watkins was wrongly convicted of sexual assault and served seven and a half years in prison before proving his innocence. Using Bloodsworth funds, the Arizona Justice Project and Arizona Attorney General’s Office filed a joint motion for DNA testing. The results of testing excluded Watkins and his conviction for sexual assault was overturned.

It is important to note that the key to a successful Bloodsworth grant project is early and consistent participation from those who view the cases from the perspective of the person who may have been wrongfully convicted. In particular, members of the Innocence Network, benefiting from years of experience, have developed an expertise when it comes to case review. They approach these cases not to create reasonable doubt, but to see if new evidence suggests a likelihood that, had the fact-finder known of the evidence, it would have come to a different conclusion. An outside perspective—as opposed to solely that of parties who contributed to the original conviction—is invaluable to the assessment such new evidence and its relevance.

The Bloodsworth Program made possible Virginia’s large-scale review of cases from 1973 through 1988 discussed above, which resulted in the testing of evidence in Mr. Haynesworth’s case. Bloodsworth funding was critical to his and eight others’ exonerations. We therefore urge Congress to reauthorize the JFAA and continue to fund the Bloodsworth program, to ensure the discovery of as many of our nation’s wrongfully convicted as possible through the collaborative process it fosters.

B. The Wrongful Conviction Review Program

DNA is available in only a fraction of criminal cases.⁸ In the vast majority of cases, where DNA is unavailable or where—as in Mr. Haynesworth’s case—DNA alone is not enough to prove innocence, securing the freedom of the wrongfully convicted is made even more difficult. Those who face the post-conviction process without DNA face a maze of complicated new trial and

⁷ Email interview with Lindsay Herf (November 2008).

⁸ “In less than 10 percent of murders the criminal leaves DNA evidence behind.” 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 Medicolegal Investigations Unit of the New York State Police). In fact, one report found that “[t]he overall percentage of [NYPD homicide] cases that have a DNA analysis available to them pre-arrest is 6.7%.” David Schroeder, DNA and Homicide Clearance: What’s Really Going On?, 2007 J. Inst. Just. Int’l Stud. 279, 296 (2007).

post-conviction statutes, complex legal issues, and the daunting but urgent task of investigating an old case with the hope of uncovering exculpatory evidence. Even in the best of situations, this is an incredibly complicated task. Without high-quality representation and appropriate resources, it is nearly impossible.

Recognizing this, the BJA dedicated a portion of its Capital Litigation Improvement Program funding to the creation and continuation of the Wrongful Conviction Review Program. Through the program, funds to provide high-quality and efficient representation to potentially wrongfully convicted defendants in post-conviction claims of innocence are awarded to non-profit organizations and public defender offices dedicated to exonerating the innocent.

As a result of the Wrongful Conviction Review Program, local innocence projects—from Alaska to Minnesota, Pennsylvania to Maryland—have been able to review more claims of innocence and serve more potentially innocent clients. Derrick Williams of Florida was exonerated in April 2011, thanks to the tireless work of the Innocence Project of Florida and Wrongful Conviction Review Program funds. The Mid-Atlantic Innocence Project helped secure the exoneration of Thomas Haynesworth in Virginia with program monies and won a victory for client Michael Hash of Virginia with the same funds last week.⁹ Grant funds enabled the Northern California Innocence Project to hire staff to screen cases, thereby permitting their existing attorneys to commit to litigation, which resulted in the exonerations of three innocent Californians, Obie Anthony, Maurice Caldwell, and Franky Carillo. With Wrongful Conviction Review funding, the Innocence Project of Minnesota was able to prove that Michael Hansen did not kill his three month old. Without the aid of Wrongful Conviction Review funds, these seven innocents would likely still be languishing in prison. As such, we urge you to support this program so central to the continued uncovering of wrongful convictions in this country.

III. Reforms Needed To Prevent Wrongful Convictions

Identifying wrongful convictions after they have occurred is critically important. Even more important, however, is preventing police and prosecutors from being misled from crimes' real perpetrators during an investigation, long before a wrongful conviction ever occurs. The nation's DNA exonerations provide an unprecedented, unique, and consistent body of cases in which we know, with scientific certainty, that the criminal justice system convicted innocent people. Each one of these exonerations is a tragedy, but each one is also an unparalleled opportunity to learn how wrongful convictions happen and how to prevent them from happening in the future.

Learning such lessons is terribly important not just for the innocent persons who will not be needlessly subjected to misguided suspicion, arrest, prosecution, and incarceration, but also for the public safety. Every time police focus on an innocent person, they are distracted from the real perpetrator, threatening both their ability to bring that person to justice and prevent additional crimes that may be committed by the truly guilty individual.

Prime Causes of Wrongful Conviction Need Attention

⁹ Mr. Hash won a federal habeas corpus petition, and that decision is not being appealed by the Virginia Attorney General. Mr. Hash is not fully cleared yet, however, because a special prosecutor is deciding whether to retry him.

The Innocence Project has found that eyewitness misidentification has contributed to nearly 75% of the nation's wrongful convictions proven by post-conviction DNA testing. False confessions or admissions are another major factor, having occurred in roughly 25% of these cases. Simply put, these cases have revealed that eyewitnesses get it wrong far more often than we had ever imagined and that innocent people confess to heinous crimes they did not commit in numbers never realized.

Fortunately, there are simple remedies that can prevent these factors from causing wrongful convictions. There is an increasingly large body of peer-reviewed research showing that small changes in eyewitness identification procedures can greatly enhance the accuracy of eyewitness identifications. Research and jurisdictional practice in states and localities across the nation also has proven that the simple recording of interrogations greatly minimizes the possibility that a false confession will lead to a wrongful conviction.

A. Eyewitness Identification Reform

Mistaken eyewitness identifications contributed to nearly three-quarters of the 289 wrongful convictions in the United States overturned by post-conviction DNA evidence. Thirty years of social science research support a package of reforms that prevent wrongful convictions by improving the accuracy of eyewitness evidence. These reforms include:

(1) the use of a double-blind procedure in which neither the administrator nor the witness knows who the suspect is, alternatively, the uses of a blinded procedure in which the lineup administrator is prevented from providing inadvertent or intentional verbal or nonverbal cues to influence the eyewitness to pick the suspect;

(2) the provision of witness instructions, a series of statements issued by the lineup administrator to the eyewitness that deter the eyewitness from feeling compelled to make a selection and from looking to the lineup administrator for feedback during the identification procedure;

(3) proper filler selection, such that non-suspect photographs and/or live lineup members should be selected based on their resemblance to the description provided by the eyewitness, as opposed to their resemblance to the police suspect;

(4) the immediate acquisition of a confidence statement, wherein the eyewitness provides a statement, in his own words, that articulates the level of confidence he has in the identification made immediately after such identification;

(5) the documentation of the procedure, ideally by electronic means; and

(6) the sequential presentation of lineups, which, when combined with a double-blind or blinded procedure, has been proven to significantly increase the overall accuracy of eyewitness identifications.¹⁰

¹⁰ The Innocence Project strongly recommends employing sequential presentation of lineup members, but recognizes that some are hesitant to employ the procedure because some laboratory studies have shown a small drop-off in correct identifications when it is employed—despite the fact that there is a concomitant and far greater drop-off in incorrect identifications when sequential presentation is used. A recent landmark field study issued by the American Judicature Society (“AJS Field Study”) compared double-blind sequential and double-blind simultaneous presentation of lineups involving suspects and witnesses to actual crimes in four law enforcement agencies (Austin, TX Police Department; Charlotte-Mecklenburg, NC Police Department; Tucson, AZ Police Department; San Diego, CA Police Department). The AJS Field Study found that double-blind sequential presentation produced significantly fewer mistaken identifications than double blind simultaneous presentation

These reforms have been recognized by police, prosecutorial, and judicial experience, as well as national justice organizations. In fact, more than twelve years ago, the National Institute of Justice convened the Technical Working Group for Eyewitness Evidence (“TWGEE”), which was composed of members from the scientific, legal, and criminal justice communities. The TWGEE sought to identify best practices supported by rigorous social science research and recommended a series of protocols in a report¹¹ and an attendant training manual.¹² That report, *Eyewitness Evidence: A Guide for Law Enforcement*, embraced most of the best practices listed above. In 2006, the American Bar Association (“ABA”) passed a resolution¹³ urging governments to adopt eyewitness identification best practices. In the years since, a great deal more research has been conducted, all of which has strongly supported the TWGEE and ABA’s recommendations. Recognizing the importance of accurate identifications, the International Association of Chiefs of Police issued a model policy on eyewitness identification, accompanying paper, and training key encompassing these recommendations.

Moreover, states and localities across the nation have begun to adopt and implement eyewitness identification reforms. Many jurisdictions across the country—ranging in size from New Jersey and North Carolina to Denver, Colorado, and Dallas, Texas, to Spartanburg, South Carolina, and Northampton, Massachusetts—have implemented double-blind sequential presentation as standard procedure. Further, the States of Georgia and Wisconsin have recommended voluntary guidelines that endorse the double-blind sequential procedure and incorporate the procedure into law enforcement training.

B. The Mandatory Recording of Custodial Interrogations

False confessions or admissions played a part in 28% of the nation’s 289 wrongful convictions proven by DNA. Researchers who study this phenomenon have determined that several factors contribute to or cause false confessions, including real or perceived intimidation of the suspect

without any reduction in suspect identifications. (Gary Wells, et al., *A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies* (2011), available at: http://www.ajs.org/wc/ewid/ewid_report.asp. This finding is supported by a 2001 meta-analysis that combined the scientific results of 23 individual tests and found that when crimes and police procedures are simulated realistically, the difference between *correct* identification rates for sequential and simultaneous identification procedures are small, if nonexistent. Steblay, N., Dysart, J., Fulero, S., & Lindsay, R.C.L. (2001). Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison. *Law and Human Behavior*, 25, 459-473.) The AJS Field Study’s data show that the double-blind simultaneous procedure yielded 18.1% identifications of known innocent fillers while the double-blind sequential procedure yielded 12.2% identification of known innocent fillers. Among those witnesses who attempted to make an identification, the double-blind sequential procedure produced a higher rate of suspect identification (69.1%) than did the double-blind simultaneous procedure (58.4%). Identification of known innocent fillers by these choosers remained higher for those in the double-blind simultaneous condition (41.6%) as compared with those in the double-blind sequential condition (30.9%). This field study, together with the more than twenty-five years of laboratory studies demonstrating the superiority of sequential presentation has led the Innocence Project to strongly recommend sequential presentation as an important reform.

¹¹ Technical Working Group for Eyewitness Evidence, National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (Oct. 1999).

¹² Technical Working Group for Eyewitness Evidence, National Institute of Justice, *Eyewitness Evidence: A Trainer’s Manual for Law Enforcement* (Sept. 2003).

¹³ See Ad Hoc Committee to Ensure the Integrity of the Criminal Process, Criminal Justice Section, American Bar Association, *Achieving Justice: Freeing the Innocent, Convicting the Guilty* 23-45 (Mar. 2006).

by law enforcement; use of force or perceived threat of force by law enforcement during the interrogation; compromised reasoning ability of the suspect, due to exhaustion, stress, hunger, substance use, and—in some cases—mental limitations or limited education; devious interrogation techniques, such as untrue statements about the presence of incriminating evidence; and fear on the part of the suspect that failure to confess will yield a harsher punishment.

Electronically recording the entire custodial interrogation provides the best, most objective evidence as to what occurred in the interrogation room. Mandatory electronic recording protects the innocent, ensures the admissibility of legitimate confessions, and helps law enforcement defend against allegations of coercion. To date, Connecticut, Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Wisconsin, and the District of Columbia have enacted legislation regarding the recording of custodial interrogations. State supreme courts have required recording in Alaska, Iowa, Massachusetts, Minnesota, New Hampshire, and New Jersey. In total, approximately 840 jurisdictions nationwide have recording policies.

While law enforcement has seen the value of reform, there remains much work to be done to ensure that these critical reforms are instituted across the country. In some instances, lack of funding stands in the way of reform. In other instances, the lack of education and training about how best to implement such reforms is a barrier. The federal government is particularly well positioned to assist with research and to provide funding assistance to ensure that states and localities appreciate the benefits of wrongful conviction reform. We ask that you continue to offer such leadership in the future.

IV. Conclusion

Congress's sustained support of innocence work has already borne fruit. Mr. Haynesworth is a testament to the significance of the JFAA and Bloodsworth and Wrongful Conviction Review Programs. We therefore urge you to reauthorize the JFAA and continue to fund both grant programs. We also look forward to working with Congress and other branches of the federal government to provide states and localities with education, training, and/or funding related to wrongful conviction reform.

APPENDIX

Kirk Bloodsworth Postconviction DNA Testing Assistance Program

The Kirk Bloodsworth Post-Conviction DNA Testing Grant Program was created to help states defray the costs of post-conviction DNA testing. Since 2008, the National Institute of Justice has administered the Postconviction DNA Testing Assistance Program, awarding 24 grants, totaling \$26,671,223, to 15 different states.¹⁴ To date, Bloodsworth funding has led to the exoneration of at least nine innocent individuals.

Arizona***John Watkins***¹⁵

John Watkins was wrongfully convicted of rape when he was 20 years old and sentenced to 14 years in prison. New DNA testing obtained last year by the Northern Arizona Justice Project at the Northern Arizona University proved that Watkins did not commit the rape.

The victim of the Gilbert, Arizona rape initially said that she couldn't make an identification because she hadn't gotten a good look at the perpetrator. The one detail she could remember was that the assailant wore a white shirt. However, when police showed the victim a photo array including Watkins (the only lineup member wearing a white shirt), the victim tentatively identified him. Officers neglected to verify Watkins' alibi that he was at home with his parents at the time of the crime.

After being subjected to police questioning for more than four hours, Watkins confessed to the crime. Prosecutors offered Watkins a plea, despite knowing that details from his confession were inconsistent with the crime scene investigation. Facing a lengthy prison sentence, Watkins decided to take the plea.

As DNA testing grew more advanced over the years, Watkins asked the courts for postconviction testing twice, but he was denied both times. In 2009, the Arizona Justice Project was finally granted permission to test the rape kit and was able to confirm that Watkins was not the perpetrator. Sexual assault charges against Watkins were dismissed on December 14, 2010, and he was released after more than seven years in prison for a crime he didn't commit.

Kentucky***Michael VonAllmen***¹⁶

Michael VonAllmen served 11 years after he was wrongfully convicted of rape, sodomy, and robbery charges. He was sentenced to 35 years in prison, but he received parole in 1994.

The Kentucky Innocence Project's DNA unit, working under the Bloodsworth Actual Innocence Grant Program, tested several hairs that were collected following the rape in 1981. Unfortunately, the test results came back inconclusive.

¹⁴ Office of Justice Programs, National Institute of Justice, *Postconviction DNA Testing Funding Program*, <http://nij.gov/topics/forensics/postconviction/funding-program.htm>.

¹⁵ The Innocence Network, *Innocence Network Exonerations 2010*, 11 (2010), available at: <http://www.innocencenetwork.org/annual-reports/innocence-network-exonerations-2014-2010>.

¹⁶ *Id.* at 7.

During the reinvestigation, however, the Kentucky Innocence Project discovered new evidence supporting VonAllmen's innocence. Alibi witnesses confirmed that VonAllmen could not have been at the crime scene. Attorneys also identified an alternative suspect who was charged with a similar crime in 1978 but died five years later in a car chase from police. The two different rapes were committed at the same location, with a nearly duplicate *modus operandi*. The alternative suspect, unlike VonAllmen, fit the description of having blue eyes. VonAllmen's eyes are brown.

A Jefferson County judge dismissed VonAllmen's conviction, stating that the evidence shows he did not commit the crimes. Nearly three decades passed between the day he was convicted and his exoneration on June 4, 2010.

North Carolina

Kenneth Kagonyera and Robert Wilcoxson¹⁷

Kenneth Kagonyera and Robert Wilcoxson spent a decade each in prison for a 2000 murder they did not commit. Despite maintaining their innocence, Kagonyera and Wilcoxson pled guilty to second-degree murder charges. In a taped deposition, Wilcoxson said of the plea, "[My daughter] wouldn't have a father for the rest of her life . . . So, it was either go with the flow and get as less time as I can or still remain and claim my innocence and have a life sentence."¹⁸

In 2003 and after the two were convicted, a federal inmate called a DEA agent, confessed to the homicide, and named two accomplices. Years later, the Combined DNA Index System matched a newly uploaded offender profile—that of one of the named accomplices—to the crime scene evidence in the Kagonyera and Wilcoxson case. In April 2011, the North Carolina Innocence Inquiry Commission ruled

unanimously that there was sufficient evidence to merit judicial review. At that time, the case was referred forward to a three-judge panel . . . At the conclusion of that hearing, the Judges ruled that Mr. Kagonyera and Mr. Wilcoxson had proven their innocence by clear and convincing evidence. The charges were dismissed and Mr. Kagonyera and Mr. Wilcoxson were set free.¹⁹

Texas

Johnny Pinchback²⁰

After spending 27 years in prison for a rape he did not commit, Johnny Pinchback of Dallas, Texas, was released in May 2011.

In 1984, Pinchback was wrongfully convicted of raping two teenage girls at gunpoint and sentenced to 99 years in prison. The victims were on their way home from a local store when a man approached them and forced them to go with him to a nearby field. There, the perpetrator tied up and raped the two girls before fleeing the scene of the crime. Several days after the

¹⁷ See *Asheville area murder case turns on missteps* (Asheville Citizen-Times May 14, 2011); Jon Ostendorff, *Judges free 2 men in N.C. innocence review* (USA Today Sept. 23, 2011).

¹⁸ Ostendorff *supra* n. 4.

¹⁹ The North Carolina Innocence Inquiry Commission, *State v. Kagonyera/ Wilcoxson*, <http://www.innocencecommission-nc.gov/kagonyera.html>.

²⁰ The Innocence Network, *Innocence Network Exonerations 2011*, 6 (2011), available at: <http://www.innocencenetwork.org/annual-reports/innocence-network-report-2011>.

attack, one of the girls saw Pinchback driving near her apartment complex and jotted down the license plate number. Pinchback was cooperative with the police and believed his innocence would soon become evident. However, both girls identified Pinchback as their assailant in a photo lineup. The police, meanwhile, never had another suspect.

Fortunately for Pinchback, his case received a helping hand from his friend, fellow exoneree Charles Chatman, whom he had bonded with after sharing the same prison unit for a decade. Chatman, released in 2008, became an advocate for the wrongfully convicted and persistently lobbied the Innocence Project of Texas to examine his friend's case. Thanks to their work, as well as Chatman's own personal efforts, Pinchback achieved a court order in 2010 mandating post-conviction DNA testing. The test results excluded Pinchback as the assailant; on June 8, 2011, he was officially exonerated.

Virginia

Thomas Edward Haynesworth²¹

Thomas Haynesworth was 18 years old when he was arrested for a series of rapes in Richmond, Virginia in 1984 and wrongfully convicted based on eyewitness misidentification.

Haynesworth was on his way to the store when one of the victims spotted him and identified him as her attacker. The victims of five separate yet similar assaults all provided a similar description of the perpetrator, and eventually all misidentified Haynesworth, who was convicted in three of the cases and sentenced to 74 years in prison. Yet the crimes continued, following a very distinct modus operandi, even after Haynesworth was behind bars.

In 2006, then-Governor Mark Warner ordered a review of DNA evidence in thousands of criminal cases. DNA testing, available in only one of Haynesworth's rape convictions, implicated another man as the perpetrator— a serial rapist named Leon Davis. Based on this evidence, Haynesworth was released on parole in March 2011. The Mid-Atlantic Innocence Project and the Innocence Project, which is affiliated with Cardozo School of Law, petitioned a Virginia appeals court to throw out the remaining two convictions where biological evidence was not available. Following his release, Commonwealth's Attorneys conducted an extensive investigation, eventually concluding that Davis, not Haynesworth, was responsible for all of the crimes.

On December 6, 2011, the Virginia Court of Appeals granted Haynesworth a writ of actual innocence based on non-biological evidence.

Calvin Wayne Cunningham²²

Calvin Wayne Cunningham was convicted in 1981 of the rape of his building super and has steadfastly maintained his innocence in the crime. The rape occurred at 4 a.m., with the assailant sneaking into the apartment while the victim was sleeping on her couch. The victim identified her attacker as the black man living across the hall— Calvin Wayne Cunningham.

²¹ *Id.* at 10.

²² *Id.* at 5.

Thanks to the Mid-Atlantic Innocence Project, Cunningham was finally granted access to the DNA testing that he had been requesting for almost three decades. A test in February eliminated him as a possible perpetrator, and the Mid-Atlantic Innocence Project asked the Supreme Court to declare him actually innocent.

The Virginia Supreme Court granted him a writ of actual innocence in April, officially exonerating him of the rape on April 12, 2011. Cunningham is currently serving time in a Virginia prison on unrelated charges, and is due to be released in 2012. He served seven years for the wrongful conviction.

Washington

Larry Davis and Alan Northrop²³

Larry Davis and Alan Northrop were wrongfully convicted of sexually assaulting a housekeeper in the La Center, Washington, home where she worked. DNA testing obtained by the Innocence Project Northwest proved their innocence. Davis spent almost 16 years behind bars for a crime he didn't commit; Northrop spent 17 years.

Although the victim was blindfolded during the rape, she identified Davis and Northrop as her assailants. Investigating officers showed the victim photo lineups that included Davis and Northrop, but she was only able to tentatively identify Davis. Police then asked the victim to pick out her assailants from live lineups, but neither lineup included men from the photo arrays other than Davis and Northrop. Her misidentification was the central piece of evidence in the case since DNA testing for the size of the biological sample was not available at the time.

The Innocence Project Northwest filed a motion for a new trial in early 2010 after new post-conviction DNA testing finally proved that none of the samples taken at the crime scene matched Davis or Northrop. Although Davis had served his entire sentence, Northrop was released when a judge vacated both sentences on April 21. Both men were exonerated on July 14, 2010.

²³ The Innocence Network, *Innocence Network Exonerations 2010*, supra n. 2, at 7-8.

Wrongful Conviction Review Grant Program

The Wrongful Conviction Review Grant Program provides applicants—non-profit organizations and public defender offices dedicated to exonerating the innocent—with funds directed toward providing high quality and efficient representation for potentially wrongfully convicted defendants in post-conviction claims of innocence. Since 2009, the Bureau of Justice Assistance has administered the Wrongful Conviction Review Grant Program, awarding 33 grants, totaling \$7,473,623, to 30 different service providers covering 40 jurisdictions. To date, Wrongful Conviction Review funding has led to the exoneration of at least six innocent individuals.

California

Grant funds enabled the Northern California Innocence Project to hire staff to screen cases, thereby permitting their existing attorneys to commit to litigation, which resulted in the exonerations of three innocent Californians, Obie Anthony, Maurice Caldwell, and Franky Carillo.²⁴

Obie Anthony²⁵

Obie Anthony was convicted of the fatal shooting of Felipe Gonzales Angeles outside of a Los Angeles brothel in 1995. On October 4, 2011, a judge overturned Anthony's conviction, and he was released after 17 years.

In attempting to gain access to the brothel, Angeles was turned away. As he returned to the car, he was approached by three males. Suddenly, shots were fired. Angeles and two other men were shot, but only Angeles was killed. At the trial, only one of the victims testified and claimed to recognize Anthony from his dreams. Neither surviving victim positively identified Anthony from the photo or live lineups. The only identification came from the owner of the brothel, who had himself been convicted of manslaughter for shooting an ex-girlfriend, and was facing 12 years for pimping and pandering charges. Anthony stated that he was not at the scene and has maintained his innocence throughout his incarceration.

The Northern California Innocence Project at Santa Clara University School of Law reinvestigated the case with help from Loyola Law School's Project for the Innocent. Thanks to their efforts, an evidentiary hearing was held in September 2011. The brothel owner retracted his testimony, saying that he had never seen the shooters well enough to identify them. Further, attorneys discovered that the brothel owner had received a deal for his testimony, something both he and the district attorney had denied at trial. The surviving victim who did not testify at trial came forward to testify that the shooters were much older than Anthony. Finally, attorneys presented evidence that the brothel owner may have actually fired the shot.

Maurice Caldwell²⁶

Maurice Caldwell served 20 years in prison for a murder that he did not commit.

Caldwell's 1991 trial relied solely on the testimony of a single eyewitness (a neighbor) who claimed to have seen Caldwell commit the murder through her window. While the witness

²⁴ Email interview with Linda Starr, Supervising Attorney, Northern California Innocence Project (Mar. 8, 2012).

²⁵ The Innocence Network, *Innocence Network Exonerations 2011*, supra n. 6, at 7-8.

²⁶ *Id.* at 4.

originally told police that the shooters were not from the area and she did not know them, she picked Caldwell out of a six-photo lineup and told police she knew him by his nickname, “Twan,” because he lived next door to her. Caldwell’s original trial lawyers made no efforts to interview the witnesses who stated that Caldwell was not present at the scene, nor did he hire an investigator or present evidence about alternate suspects.

In 2008 and 2009, four men signed affidavits stating that Caldwell had no involvement with the murder; two men identified the actual shooters, and one of those men (who was serving a life sentence for a different murder) confessed to committing the murder himself and swore that Caldwell was not involved. In December of 2010, the San Francisco Superior Court granted the Northern California Innocence Project at Santa Clara University Law School’s writ of habeas corpus and overturned Caldwell’s conviction. He was officially exonerated on March 25, 2011.

Francisco Carrillo²⁷

Francisco “Franky” Carrillo was wrongfully imprisoned for 20 years for the 1991 drive-by shooting death of Donald Sarpy in Lynwood, California.

Carrillo, who was just 16 years old when he was arrested, has consistently maintained his innocence. His conviction was based on six eyewitness identifications (including that of the victim’s son), five of which were made a full six months after the murder. His first trial ended in a deadlock of 7 to 5 for acquittal, but he was convicted at his second trial in 1992.

At his sentencing hearing, the judge was notified that a witness to the crime was in the building and wanted to testify that Carrillo was not at the crime scene. The trial judge denied the request.

The real break in the case occurred when Carrillo discovered that the defense investigator’s file included a handwritten confession from the man who was denied the right to testify at Carrillo’s sentencing. The Northern California Innocence Project at Santa Clara University Law School participated in a recreation of the crime scene that demonstrated what all of the witnesses described in their recantations—that the darkness and speed of the events made it impossible to identify the perpetrator. The three main suspects declined to testify at the habeas hearing, citing their rights against self-incrimination.

On March 14, 2011, a Los Angeles Superior Court judge reversed Carrillo’s conviction and ordered him released on his own recognizance. On April 4, 2011, the Los Angeles County District Attorney’s Office dismissed the charges against Carrillo.

Florida

Derrick Williams²⁸

DNA evidence exonerated Derrick Williams of Palmetto, Florida, on April 4, 2011 after 18 years of wrongful imprisonment.

In 1992, a woman arrived at her home to find a stranger standing on her porch. As she was exiting her car, he forced his way into the vehicle, punched her, and drove her to a nearby orange

²⁷ *Id.* at 4-5.

²⁸ *Id.* at 5.

grove. There, he proceeded to sexually assault the victim. At one point, the assailant left the car to smoke a cigarette, giving the victim enough time to drive away and escape with some of the assailant's belongings still in the car.

The victim's description of her attacker did not match Williams. However, due to a highly suggestive photo lineup, she identified him as her assailant. Meanwhile, the defense provided alibi witnesses as well as the testimony of a forensic analyst who stated that a hair recovered from the perpetrator's shirt must have come from a black male who was not Williams. Despite the prosecution's shaky case, Williams was found guilty and sentenced to two consecutive life sentences in prison.

Years later, with the help of the Innocence Project of Florida, Williams obtained postconviction DNA testing. The test results excluded Williams as the assailant. After a two-day evidentiary hearing, a judge vacated Williams' conviction.

Minnesota

Michael Hansen²⁹

Charges against Michael Hansen of Alexandria, MN were dropped after he served six years of a 14.5-year sentence for allegedly killing his three-month old daughter Avryonna Hansen.

Because Avryonna's death was unexpected, she was referred for an autopsy. A local pathologist began the autopsy, but Dr. Michael McGee, the Ramsey County Medical Examiner, completed it after the local pathologist felt the case was too complicated for him. Dr. McGee testified that he found that Avryonna had a significant skull fracture and he believed that the fracture was the result of blunt force trauma inflicted while she was in her father's care. Dr. McGee could not explain precisely how Avryonna died because he did not find meaningful swelling, bleeding or brain injury during the autopsy. Dr. McGee dismissed the idea that the fracture could have been caused by Avryonna's well-documented fall from a shopping cart six days before her death.

The Innocence Project of MN re-opened the case and presented the testimony of a team of experts at a post-conviction hearing before the judge who presided over Mr. Hansen's original trial. According to the medical experts, physical evidence demonstrated that Avryonna's skull fracture was healing and occurred at least three days before she died. From this, the experts surmised that Avryonna's skull fracture came from her shopping cart fall and was healing at the time she died. They explained that Avryonna likely passed away from accidental suffocation in her sleep.

After hearing from all the expert witnesses, the trial judge granted Mr. Hansen a new trial. While his lawyers were preparing for trial, the prosecutor dropped all charges against Mr. Hansen and he was released on September 16, 2011.

²⁹ *Id.* at 8.

Virginia***Thomas Haynesworth***³⁰

Thomas Haynesworth was 18 years old when he was arrested for a series of rapes in Richmond, Virginia in 1984 and wrongfully convicted based on eyewitness misidentification.

Haynesworth was on his way to the store when one of the victims spotted him and identified him as her attacker. The victims of five separate yet similar assaults all provided a similar description of the perpetrator, and eventually all misidentified Haynesworth, who was convicted in three of the cases and sentenced to 74 years in prison. Yet the crimes continued, following a very distinct modus operandi, even after Haynesworth was behind bars.

In 2006, then-Governor Mark Warner ordered a review of DNA evidence in thousands of criminal cases. DNA testing, available in only one of Haynesworth's rape convictions, implicated another man as the perpetrator— a serial rapist named Leon Davis. Based on this evidence, Haynesworth was released on parole in March 2011. The Mid-Atlantic Innocence Project and the Innocence Project, which is affiliated with Cardozo School of Law, petitioned a Virginia appeals court to throw out the remaining two convictions where biological evidence was not available. Following his release, Commonwealth's Attorneys conducted an extensive investigation, eventually concluding that Davis, not Haynesworth, was responsible for all of the crimes.

On December 6, 2011, the Virginia Court of Appeals granted Haynesworth a writ of actual innocence based on non-biological evidence.

³⁰ *Id.* at 10.

INNOCENCE PROJECT NATIONAL CRIMINAL JUSTICE COMMISSION ACT (S. 306) LETTER
TO SENATE, SEPTEMBER 2011



September 15, 2011

United States Senate
Washington, DC 20510

RE: The National Criminal Justice Commission Act (S. 306)

Dear Senator:

Each year, millions of Americans are adversely impacted by the criminal justice system, including those who are wrongfully convicted. The United States currently has the highest incarceration rate in the world—over 2.3 million individuals—at great cost to federal, state, and local governments, totalling over \$74 billion annually. The National Criminal Justice Commission Act (S. 306), which was introduced earlier this year, would review our nation's criminal justice system and make sensible, bipartisan recommendations to improve the system's affordability, accuracy, and accountability, as well as increase fairness and public safety. **The Innocence Project urges you to please prioritize and pass the National Criminal Justice Commission Act (S. 306) as soon as possible.**

The Innocence Project, which is affiliated with Benjamin N. Cardozo School of Law at Yeshiva University, is dedicated to exonerating wrongfully convicted persons through DNA testing and reforming the criminal justice system to prevent future injustice. By improving the underlying fairness and reliability of the criminal justice system, S. 306 could help identify why wrongful convictions occur and how they can be prevented. Such accuracy in prosecution and conviction is critical to ensuring public safety and confidence in the justice system.

Nationwide, 273 individuals have been exonerated through DNA testing since 1989. Those cases are a window into the causes of wrongful convictions. For example:

- Over 75% of wrongful convictions overturned with DNA testing involved eyewitness misidentification;
- In approximately 50% of the cases, unvalidated or improper forensic science was a factor;
- More than 25% of the cases involved false confessions, admissions or guilty pleas;
- In 15% of the cases, informants provided unreliable information.

The National Criminal Justice Commission could look more closely at these and other causes of wrongful conviction and recommend improvements that would help to prevent such miscarriages of justice. The commission would be comprised of highly respected figures from throughout the justice system, including law enforcement, defense attorneys, crime victims and other experts. Texas, California, Illinois, North Carolina, Wisconsin and other states have created criminal

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Benjamin N. Cardozo School of Law, Yeshiva University

justice review commissions that have led to concrete improvements to prevent wrongful convictions, improve the accuracy of law enforcement investigations, and strengthen prosecutions. With a balanced approach and strong leadership, a national commission could identify and recommend similar advancements as well as other improvements.

Thank you so much for your time and consideration of the National Criminal Justice Commission Act. We hope that the Senate will prioritize and pass this important legislation as soon as possible so that a comprehensive review of the nation's criminal justice system can begin in earnest.

Sincerely,

Stephen Saloom, Esq.
Policy Director

LETTER TO SENATOR LEAHY FROM MARY LOU LEARY, U.S. DEPARTMENT OF JUSTICE,
MARCH 21, 2012



U.S. Department of Justice

Office of Justice Programs

Office of the Assistant Attorney General

Washington, D.C. 20531

MAR 21 2012

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing on behalf of the Department of Justice's Office of Justice Programs (OJP) to provide you with information requested by your staff in light of the Committee's hearing "Justice for All: Convicting the Guilty and Exonerating the Innocent."

As you are aware, OJP's National Institute of Justice (NIJ) administers the Post-Conviction DNA Testing Assistance Program, authorized under the Justice for All Act of 2004, Public Law 108-405. The program has led to successes by our grantees, who have shown commitment and dedication to ensuring that justice is served for those convicted of crimes they did not commit. Below you will find a selection of highlights from those efforts:

Virginia Department of Forensic Science
Exonerate: Thomas Edward Haynesworth

- On March 21, 2011, Thomas Edward Haynesworth was released on parole after serving 27 years for crimes that authorities had come to believe he did not commit. Mr. Haynesworth was arrested for rape in February 1984 and subsequently identified by a total of five women as their assailant in a series of sexual assaults in the city of Richmond and the neighboring county of Henrico. He was convicted in three attacks, acquitted in one, and one case was not prosecuted.
- DNA testing, funded through an NIJ grant, was performed on biological evidence that was preserved in an old laboratory case file relating to one of his Richmond convictions. The results eliminated Mr. Haynesworth as the source of DNA profiles identified on that evidence, and indicated the presence of DNA consistent with the profile of another convicted rapist. In September 2009, Mr. Haynesworth became the first person exonerated by the Virginia Supreme Court in a writ of actual innocence based on new DNA evidence in that case.

Virginia Department of Forensic Science**Exoneree: Calvin Cunningham**

- Calvin Cunningham was convicted of rape in Newport News in May 1981. DNA testing completed in 2010 under the award eliminated Mr. Cunningham as a contributor of the DNA profiles found on evidence preserved in an old forensic laboratory case file. On April 12, 2011, Calvin Wayne Cunningham was exonerated by the Virginia Supreme Court, which granted his petition for Writ of Actual Innocence.

Texas Office of the Governor, Criminal Justice Division**Exoneree: Johnny Pinchback**

- On May 12, 2011, the Innocence Project of Texas, through funding provided to the Texas Office of the Governor by NIJ, secured the release of Johnny Pinchback. Mr. Pinchback was incarcerated for more than 26 years for two aggravated sexual assaults that he did not commit. He was proven innocent via the DNA testing of rape kit evidence obtained from one of the victims shortly after her assault

Arizona Criminal Justice Commission**Exoneree: John Watkins**

- On December 16, 2010, John Watkins was released from custody after serving 7.5 years for a sexual assault he did not commit. No semen or sperm was detected on the rape kit items and thus, in 2003, no DNA testing was conducted on this evidence. Mr. Watkins accepted a plea offer of 14 years for the sexual assault and another non-violent felony to avoid a potential life sentence.
- Utilizing NIJ funds awarded to the Arizona Criminal Justice Commission, the Arizona Justice Project and Arizona Attorney General's Office filed a joint motion for Y-TSR DNA testing. The DNA results conclusively excluded Watkins as the donor of the male DNA found on the evidence items.

State of North Carolina, Innocence Inquiry Commission**Exonerees: Kenneth Kagonyera and Robert Wilcoxson**

- On September 22, 2011, Kenneth Kagonyera and Robert Wilcoxson were freed and found innocent of any involvement in the 2000 murder of Walter Bowman. The two men maintained their innocence throughout their incarceration, but had pled guilty to second-degree murder charges to avoid the death penalty or life in prison.
- In 2003, after the defendants had entered pleas, a federal inmate confessed to the homicide and named two accomplices. Tests on DNA from the crime scene generated a DNA profile and, after upload to CODIS, produced a match to one of the named accomplices and excluded both Mr. Kagonyera and Mr. Wilcoxson.

Washington Department of Commerce**Exoneree: Larry Davis and Alan Northrop**

- Larry Davis and Alan Northrop were exonerated on July 14, 2010, after serving 17 years. Mr. Northrop and Mr. Davis were convicted of sexually assaulting a woman in 1993 in La Center, Washington.
- The Innocence Project NW Clinic was granted a request to test crime scene evidence using new DNA technology. The Washington State Patrol Crime Laboratory, using NIJ funding, conducted DNA testing from some samples in the cases and outsourced other samples to a private laboratory. These tests excluded Mr. Northrop and Mr. Davis as contributors of the DNA profiles found on the victim.

Kentucky Justice and Public Safety Cabinet**DNA Exoneree: Kerry Porter**

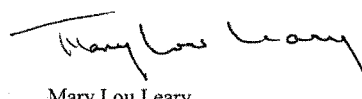
- On December 19, 2011 Kerry Porter was released from prison after serving 13 years for a murder he did not commit. Mr. Porter was sentenced to 60 years for the 1996 shooting death of his ex-girlfriend's husband despite there being no physical evidence linking Mr. Porter to the crime.
- DNA testing was not readily available and/or reliable at the time of Mr. Porter's trial, so the Kentucky Innocence Project, who receives funding from NIJ through the award to the Kentucky Justice and Public Safety Cabinet, asked for testing to be completed on a homemade silencer found at the crime scene. In 2011, DNA analysts were able to identify a male and female DNA profile from the silencer. Kerry Porter's DNA was excluded as being a contributor.

Non-DNA Exoneree: Michael VonAllmen

- Michael VonAllmen served 11 years of a 35 year sentence for rape, sodomy, and robbery. After reading an article discussing the receipt of Post-conviction DNA Testing Assistance funds by the Kentucky Innocence Project (through the Kentucky Justice and Public Safety Cabinet), Mr. VonAllmen contacted the Kentucky Innocence Project for assistance, despite the fact that he had been on parole for nearly 10 years.
- The DNA analysis produced inconclusive results. However, during the reinvestigation, the Kentucky Innocence Project discovered new evidence supporting Mr. VonAllmen's claim of innocence. A Jefferson County judge vacated Mr. VonAllmen's conviction, stating that the evidence shows he did not commit the crimes.

We look forward to working with you and the Committee on ways to continue and enhance our efforts. If I can be of assistance on this or any other matter, please contact OJP's Office of Communications at 202-307-0703.

Sincerely,



Mary Lou Leary
Acting Assistant Attorney General

LETTER TO SENATOR LEAHY FROM STEPHEN SALOOM, ESQ., POLICY DIRECTOR,
INNOCENCE PROJECT

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March 27, 2012

Chairman Leahy
United States Senate
Committee on the Judiciary

Dear Chairman Leahy:

Thank you so much again for holding the Senate Judiciary Committee hearing last week on the issue of wrongful convictions, "Justice for All: Convicting the Guilty and Exonerating the Innocent." We are particularly grateful that you invited Mr. Thomas Haynesworth, a recent exoneree from Virginia, to testify and tell his story. The Innocence Project greatly appreciates your leadership and support of programs and reforms that work to prevent and rectify these travesties of justice.

In addition to expressing our heartfelt thanks, I also would like to submit for the hearing's record documents related to the National Criminal Justice Commission Act, S. 306. Since this issue was discussed during the hearing, I would like to make sure that the Innocence Project officially states its support for the bill, as well as shares documents that both explain the bill and demonstrate the widespread support for it. With that intention, the Innocence Project would like to submit the following documents, which are attached, including:

1. A National Criminal Justice Commission Act (S. 306) fact sheet;
2. The Innocence Project's letter of support for the bill from September 2011; and
3. A sign-on letter from dozens of national and local organizations expressing support for the bill.

Thank you so much again for your vision and leadership. The Innocence Project looks forward to working with you on these and other issues this Congress.

Sincerely yours,


Stephen Saloom, Esq.
Policy Director

THE NATIONAL CRIMINAL JUSTICE COMMISSION ACT OF 2011, S.306, FACT SHEET

The National Criminal Justice Commission Act of 2011, S. 306

The National Criminal Justice Commission Act of 2011 would create a *blue-ribbon commission charged with undertaking a comprehensive, 18-month review of the criminal justice system*. Its goal would be to produce a public, final report that would propose specific reforms to address the most pressing issues facing the nation's criminal justice system.

The commission would be bipartisan, and include 14 commissioners recommended by both Republican and Democratic Congressional leadership and the White House. Members of the Commission would be appointed from private life and would have distinguished reputations for integrity and nonpartisanship, as well as expertise or experience in relevant issue areas, such as criminal justice; law enforcement; prison and jail administration; prisoner reentry, addiction and mental health issues; victims' rights; civil rights and liberties; court administration; social services; and state, local or tribal government.

What the Commission Would Do:

The Commission would propose specific criminal justice system reforms to prevent, deter, and reduce crime and violence, improve cost-effectiveness, and ensure the interests of justice. It is important to note that while the commission would conduct a comprehensive national review of the criminal justice system, it would not audit individual state systems and it would take into consideration the financial and human resource limitations, as well as the legal jurisdiction of state and local governments to make their own criminal laws. When doing its work, the commission would consider: 1) the work of previous commissions; 2) input from public hearings; 3) input from federal, state, local and tribal government officials; and 4) input from other relevant criminal justice experts and persons with experience in criminal justice system, including formerly incarcerated individuals.

Why A National Criminal Justice Commission Is Needed:

Having a transparent, bipartisan Commission conduct a comprehensive review to identify effective criminal justice policies and recommendations would lead to positive innovations in public safety.

Law enforcement, academicians, crime victims, and reform advocates have studied the issues and identified key strategies for improving the criminal justice system. System improvement based on research and knowledge about what works would increase public safety as well as public confidence in the criminal justice system.

While nationwide crime rates have declined significantly over the past two decades, the U.S. currently incarcerates over 2.3 million individuals -- *the highest incarceration rate in the world*. Approximately 91 percent of incarcerated adults are under state or local jurisdiction, overcrowding prisons and jails.

The increase in incarceration over the past twenty years has stretched the system beyond its limits and *placed an unmanageable cost burden on local, state, and federal taxpayers*. Over the past two decades, state spending on corrections has increased by 127 percent. High costs of incarceration are unsustainable in the long term, let alone during times of economic downturn.

The National Criminal Justice Commission Act has gained significant support from a broad range of constituent groups, including law enforcement, civil rights, reform, state and local, and faith-based organizations. This support is critical to the success of such a commission by helping to ensure serious and appropriate consideration of the commission's final recommendations.

ENDORSEMENT LETTER FROM NATIONAL ORGANIZATIONS, BUSINESSES, AND STATE AND
LOCAL ORGANIZATIONS FOR THE NATIONAL CRIMINAL JUSTICE COMMISSION ACT OF
2011

October 5, 2011

Re: Prioritize and Pass S. 306, the National Criminal Justice Commission Act of 2011

Dear Senator:

We write to express our strong support for S. 306, the National Criminal Justice Commission Act of 2011, introduced with bipartisan support by Senator Jim Webb. The bill establishes an independent Commission to undertake a comprehensive examination of America's criminal justice system and to make recommendations for fiscally responsible and effective reforms. We urge you to prioritize its quick passage.

The National Criminal Justice Commission would be the first time since the 1967 Commission on Law Enforcement and the Administration of Justice that we, as a nation, will have taken a comprehensive look at the criminal justice system. The need for a review is clear. At every stage of the criminal justice process – from the events preceding arrest to sentencing to the challenges facing those reentering the community after incarceration – serious problems undermine basic tenets of fairness and equity, as well as the public's expectations for safety. The result is an overburdened, expensive, and often ineffective criminal justice system.

The United States imprisons 2.3 million of its people, a greater percentage than any other nation in the world. A 2007 Pew study found that when the number of Americans on probation or parole are included, the total number of people under criminal justice supervision exceeds 7.3 million (1 in 31 adults), costing taxpayers over \$60 billion annually. The Census Bureau estimates that in 2007, state and local governments spent approximately \$195 billion on criminal justice services. In some states and local governments, criminal justice spending outpaces spending on education.

A top priority of government – federal, state, and local – is to keep the public safe. In this challenging budget environment, we simply cannot afford to keep doing things the way they have always been done. It is vital that we do everything we can to guarantee that criminal justice system expenditures maximize accountability and efficiency, while protecting public safety and the integrity of the criminal justice system.

The National Criminal Justice Commission Act of 2011 creates a commission whose members would be appointed by the legislative and executive branch to address these concerns. The Commission would be intergovernmental in nature, consisting of members from every level and facet of government—from mayors and county officials to Governors and state legislators. It would operate solely in an advisory capacity, charged with making non-binding findings and recommendations for governmental and intergovernmental reforms regarding crime prevention and deterrence strategies, cost effectiveness, and ensure the interests of justice at every step of the criminal justice system.

Since its introduction in 2009, support for the Commission has grown significantly. In addition to our organizations, S. 306 has the strong support of a range of criminal justice system

stakeholders, civil rights groups and faith-based organizations, as well as prominent law enforcement organizations and state and local government associations.

We hope Congress will join with this broad coalition in its effort to reform our criminal justice services. The work of the National Criminal Justice Commission is a strong first step. We urge you to prioritize and pass S. 306. Passage of this legislation is an important first step in developing evidence-based and cost-effective solutions to improve our criminal justice system and increase public safety.

Sincerely,

National Organizations and Businesses

AdvoCare
 American Civil Liberties Union
 American Jail Association
 American Probation and Parole Association
 Amnesty International USA
 Attention Deficit Disorder Association (ADDA)
 Biomass Coordinating Council of the American Council On Renewable Energy
 Blacks in Law Enforcement in America
 Campaign for the Fair Sentencing of Youth
 Church of Scientology
 Community Action Partnership
 Corporation for Supportive Housing
 Council of Juvenile Correctional Administrators
 Criminon
 Disciples Justice Action Network
 Drug Policy Alliance
 Families Against Mandatory Minimums
 Friends Committee on National Legislation
 Human Rights Watch
 The Inner Voices, Inc.
 The Innocence Project
 International Community Corrections Association (ICCA)
 International CURE
 Just Detention International
 Justice Policy Institute
 Lawyers Committee for Civil Rights Under Law
 The Leadership Conference on Civil and Human Rights
 Legal Action Center
 Mennonite Central Committee U.S., Washington Office
 NAACP
 NAACP Legal Defense and Educational Fund, Inc.
 The National Advocacy Center of the Sisters of the Good Shepherd
 National African American Drug Policy Coalition, Inc.

National Association of Blacks in Criminal Justice
 National Association of Counties
 National Association of Criminal Defense Lawyers
 National Association of Drug Court Professionals
 National Association of Social Workers
 National Association of VOCA Assistance Administrators
 National Correctional Industries Association
 National Criminal Justice Association
 National H.I.R.E. Network
 National Legal Aid & Defender Association
 National Organization for the Reform of Marijuana Laws
 National Religious Campaign Against Torture
 National TASC (Treatment Accountability for Safer Communities)
 NETWORK, A National Catholic Social Justice Lobby
 November Coalition Foundation
 Open Society Policy Center
 Pretrial Justice Institute
 Renew the Earth
 Safe Streets Arts Foundation
 Safer Alternative For Enjoyable Recreation (SAFER)
 The Sentencing Project
 Treatment Communities of America
 United Methodist Church, General Board of Church and Society
 Volunteers of America

State and Local Organizations

Catholic Social Services, Diocese of Scranton, Inc. (PA)
 Colorado Criminal Justice Reform Coalition (CO)
 Community Alliance on Prisons (HI)
 Council on Crime and Justice (MN)
 Drug Policy Forum of Hawaii (HI)
 Drug Policy Forum of Texas (TX)
 Hawaii State Democratic Women's Caucus (HI)
 Independence House (CO)
 League of Women Voters of South Carolina (SC)
 Major Cities Chiefs Association, Salt Lake City, UT (UT)
 New Jersey Association on Correction (NJ)
 Resource Information Help for the Disadvantaged (VA)
 South Carolina Re-Entry Initiative (SC)
 St. Leonard's Ministries (IL)

"THE INNOCENT AND THE SHAMMED," BY JOSHUA MARQUIS, OP-ED CONTRIBUTOR, *New York Times*, January 26, 2006

The New York Times

January 26, 2006
Op-Ed Contributor

The Innocent and the Shammed

By JOSHUA MARQUIS

Astoria, Ore.

AS the words scroll across a darkened TV screen, we hear an authoritative voice announce that every year an alarming number of people in this country "are wrongfully convicted." Millions of Americans who watched these promotions in recent weeks knew they were pitches for the new ABC television drama "In Justice." But if they'd been listening from the next room, they might easily have thought from the somber tone that it was a tease for the nightly news or "20/20."

"In Justice" has received dismal reviews. But that hasn't stopped its premise from permeating the conventional wisdom: that our prisons are chock-full of doe-eyed innocents who have been framed by venal prosecutors and corrupt police officers with the help of grossly incompetent public defenders. It is a misconception that has run through our popular culture from "Perry Mason" to the novels of Scott Turow to the recent hit play "The Exonerated."

It was also seen on the front pages in recent weeks, in reporting about Roger Coleman, who was executed in Virginia in 1992 for rape and murder. DNA testing at the time had placed him within one-fifth of a percent of possible suspects, leading to widespread claims that he was innocent. The governor, L. Douglas Wilder, said he would consider commuting Mr. Coleman's sentence if he passed a lie detector test. He failed and was executed.

For more than a decade opponents of the death penalty have held up the Coleman case as the example that would prove that America executed an innocent man. Yet on Jan. 12 the Canadian laboratory that had been sent the last remaining DNA sample in the case announced the results of more advanced testing: it put the odds of Mr. Coleman not being the killer at less than 1 in 19 million. Still, while Mr. Coleman's face graced the cover of Time magazine at the height of the controversy, it is unlikely you will see him on the cover again marking his rightful conviction.

Americans love the underdog. Thousands of law students aspire to be Atticus Finch, the famous fictional lawyer from "To Kill A Mockingbird." But this can go too far: one of the jurors who acquitted the actor Robert Blake of murder last year cited the TV program "CSI" as the basis of her knowledge of what good police work should be. And if we take a deep breath and examine the state of American justice, a very different picture will emerge.

To start, only 14 Americans who were once on death row have been exonerated by DNA evidence alone. The hordes of Americans wrongfully convicted exist primarily on Planet

Hollywood. In the Winter 2005 *Journal of Criminal Law and Criminology*, a group led by Samuel Gross, a law professor at the University of Michigan, published an exhaustive study of exonerations around the country from 1989 to 2003 in cases ranging from robbery to capital murder. They were able to document only 340 inmates who were eventually freed. (They counted cases where defendants were retried after an initial conviction and subsequently found not guilty as "exonerations.") Yet, despite the relatively small number his research came up with, Mr. Gross says he is certain that far more innocents languish undiscovered in prison.

So, let's give the professor the benefit of the doubt: let's assume that he understated the number of innocents by roughly a factor of 10, that instead of 340 there were 4,000 people in prison who weren't involved in the crime in any way. During that same 15 years, there were more than 15 million felony convictions across the country. That would make the error rate .027 percent — or, to put it another way, a success rate of 99.973 percent.

Most industries would like to claim such a record of efficiency. And while, of course, people's lives are far more important than widgets, we have an entire appeals court system intended to intervene in those few cases where the innocent are in jeopardy.

It is understandable that journalists focus on the rare case in which an innocent man or woman is sent to prison — because, as all reporters know, how many planes landed safely today has never been news. The larger issue is whether those who influence the culture, like an enormous television network, have a moral responsibility to keep the facts straight regardless of their thirst for drama. "In Justice" may soon find itself on the canceled list, but several million people will still have watched it, and they are likely to have the impression that wrongfully convicted death row inmates are the virtual rule.

The words "innocent" and "exonerated" carry tremendous emotional and political weight. But these terms have been tortured beyond recognition — not just by defense lawyers, but by the disseminators of entertainment under the guise of social conscience.

"The Exonerated" played for several years Off Broadway with a Who's Who of stage and screen stars portraying six supposedly innocent people who were once on death row. The play, originally subsidized by George Soros, the liberal billionaire philanthropist, now tours college campuses and was made into a television movie by Court TV.

The script never mentions that two of the play's six characters (Sonia Jacobs and Kerry Cook) were not exonerated, but were let out of prison after a combined 36 years behind bars when they agreed to plea bargains. A third (Robert Hayes) was unavailable to do publicity tours because he is in prison, having pleaded guilty to another homicide almost identical to the one of which he was acquitted.

American justice is a work in progress, and those of us charged with administering it are well aware that it needs constant improvement. But nothing is gained by deluding the public into believing that the police and prosecutors are trying to send innocent people to prison. Any experienced defense lawyer will concede that he would starve if he accepted only "innocent"

clients. Americans should be far more worried about the wrongfully freed than the wrongfully convicted.

Joshua Marquis is the district attorney of Clatsop County in Oregon and a vice president of the National District Attorneys Association.

SCOTT SHELLENBERGER, STATE'S ATTORNEY FOR BALTIMORE COUNTY, MARYLAND,
WRITTEN TESTIMONY

**Written Testimony
of Scott Shellenberger,
State's Attorney for Baltimore County, Maryland**

Kirk Bloodsworth did not murder Dawn Hamilton. Period. The reason that we know this is due solely to post conviction DNA testing.

In 1984, a young nine-year-old girl, Dawn Hamilton, was found brutally murdered in the Rosedale section of Baltimore County. The investigation eventually led to Kirk Bloodsworth.

Within one year, Mr. Bloodsworth was found guilty of murder by a jury and sentenced to death. As a young law clerk in the Baltimore County State's Attorney's Office, I watched most of the trial. I was convinced of his guilt. Mr. Bloodsworth spent two years on Maryland's death row before his case was reversed on appeal.

During a second trial in 1987, Mr. Bloodsworth was again convicted of murder, but this time spared the death penalty and sentenced to two life sentences in prison.

DNA testing did not exist at the time of the offense in 1984 or during the first two trials.

Fortunately, the judge who presided over Mr. Bloodsworth's second trial and who questioned his guilt retained the evidence from the trial. This included the clothing of the victim. Statutes and rules in existence during this time period did not require that the evidence be retained. The judge retained the evidence as a matter of custom.

In 1992, counsel for Mr. Bloodsworth asked the Baltimore County State's Attorney's Office for the evidence in the case so that an independent laboratory could perform DNA testing. While no statute or rule required the evidence be turned over, arrangements were made for the defense expert to perform DNA testing on the victim's clothing. The results revealed that the DNA found on the victim's clothing was not of Mr. Bloodsworth, but that of an unknown individual. The Baltimore County State's Attorney asked the FBI to confirm those results. By 1992 I was a senior attorney in the office handling DNA cases. I took the phone call from the FBI confirming that Mr. Bloodsworth's DNA was not present on the clothing and, in fact, there was an unknown assailant.

In 1993, Mr. Bloodsworth's murder charge was dismissed. While his case was dismissed, many in the law enforcement community still believed in his guilt and would merely say he was not guilty, not that he was innocent.

With advances in DNA testing and the establishment of known DNA databases, in 2003 a match was made between the stain on the victim's clothing and the known DNA of one Kimberly Ruffner. Mr. Ruffner, at the time, was in Maryland's Division of Corrections serving a sentence for sexual assault.

In 2004, Ruffner pled guilty to the murder of Dawn Hamilton. Ruffner was guilty. Bloodsworth was innocent.

Since 1984 and the murder of Dawn Hamilton, DNA identification testing was invented and has advanced so far that a test that once required a large stain of bodily fluids to identify a suspect can now be performed with success on a microscopic stain unseen by the naked eye.

Maryland law has also advanced. Maryland now has statutes and rules spelling out procedures for post conviction DNA testing, writs of petitions for actual innocence and evidence retention requirements.

We must, however, remain ever vigilant. The judicial system is a system created by and ruled by humans. While it does not happen often, errors can occur. It is for this reason we need to continue efforts on the local, state and federal levels to assure that the convictions we obtain are ones that are truly deserved.

