Testimony of

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June 18, 2002

Our procedure has always been haunted by the ghost of the innocent man of the innocent man convicted. It is an unreal dream.

Judge Learned Hand, 1923.

Today those ghosts walk the land.

There are now 108 Americans who have been exonerated by post-conviction DNA testing. Thirteen of the exonerated had at one time been sentenced to death. Thirty-two of the exonerated were convicted of murder, and many of them would have almost certainly faced execution if the death penalty had been available in the jurisdictions where they were tried.

The pace of post-conviction DNA exonerations has accelerated because states have begun to pass statutes that permit those claiming innocence a chance to gain their freedom and thirty-five law schools have started a network "innocence projects" on shoe string budgets to prevent, as best they can, these DNA statutes from becoming unfunded, unrealized mandates. There can be no doubt the number of wrongly convicted freed by DNA testing would dramatically increase if the post-conviction DNA legislation were passed by this Congress -- the number of exonerations would at least double within five years -- just as apprehension of the real perpetrators of these crimes through DNA databank "hits" would impressively proliferate. This is a "win-win" proposition for law enforcement, innocents who rot in America's prisons and death rows, crime victims, families of all involved, and anyone who loves justice.

Accordingly, we who toil in the trenches trying to harness the enormous power of this technology for the public good are grateful to Senators Specter, Feingold, and Feinstein for convening these hearings and recognizing critical importance of moving this legislation now, just as we owe an enormous debt to Chairman Leahy, Senator Gordon Smith, and all the co-sponsors of the Innocence Protection Act (IPA).

DNA testing is not a panacea for what ails the administration of the death penalty in America or the rest of the criminal justice system. The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing. DNA technology is no substitute for competent counsel, and nothing guarantees the conviction of the innocent more than incompetent, ill-trained, or ineffective defense counsel. That is why the counsel provisions of the legislation before you is so critical.

But it would be a terrible mistake to overlook the unique importance of these post-conviction DNA exoneration cases. They have created a great "learning moment" in the history of our criminal justice system and surely constitute the most remarkable and instructive data set criminal justice researchers have ever possessed. It permits us to identify as never before the causes of wrongful convictions and their remedies for the good of the entire system. In our book, Actual Innocence: When Justice Goes Wrong and How to Make it Right, by Scheck, Neufeld,

and Dwyer (Penguin 2001), we took a first step in this direction, but the 85 recommendations recently outlined by Governor Ryan's Commission on Capital Punishment, based on a study of wrongful capital convictions in Illinois, take the agenda of "innocence reforms" much further, and help create a blue print for a new kind of civil rights movement in the criminal justice system that benefits both the accused and victims. Every time an innocent person is arrested, convicted, or sent to death row, the real offender is at large, free to commit more crimes.

There is no better illustration of how the legislation you are considering today will produce these benefits than the case of Ray Krone, who is here with us today. Mr. Krone was convicted of murder and sentenced to death in Arizona principally on the basis of bite-mark analysis, one of many longstanding forensic assays that DNA testing is helping reveal to be junk science. Using the new Arizona post-conviction DNA statute, legislation that tracked verbatim the model bill produced by the Commission on the Future of DNA Evidence of the National Institute of Justice (the same model followed by the Innocence Protection Act), Ray Krone was able to get testing of blood and saliva stains, originally thought to have been left by the murderer, that were found on the pant leg and tank top of the victim. An STR (Short Tandem Repeat) DNA test performed on the stains showed Krone was not the source, yet that new evidence alone might not have been enough to vacate his conviction. The stains, it could be argued, might not have come from the murderer after all; unlike semen in a sexual assault (the evidence invariably involved in the first 74 DNA exonerations), where samples can be taken from any possible prior consensual partners, getting "elimination samples" for small blood and saliva stains could prove more difficult. Luckily, however, the STR profile from the stains could be run through the national DNA databank (STR technology is the technique used in forensic DNA databanks throughout the world), and it generated a "hit," a sex offender who had committed similar crimes (he bit his rape victims) in the Phoenix area.

But we are in a race against time and every day counts. In 75% of the cases where the Innocence Project has determined that a DNA test on some piece of biological evidence would be determinative of guilt of innocence, the evidence is reported either lost or destroyed, and without laws specifically to prevent it, precious DNA evidence is surely being thrown away, wittingly or unwittingly, every day. As these post-conviction cases get older, even when the evidence is found, the likelihood grows that bacterial degradation could make successful testing impossible. On the other hand, reporter Laurie Cohen of the Wall Street Journal has documented that at least 40% of the post-conviction DNA tests performed by private and public laboratories generate evidence favorable to the inmate claiming innocence and demanding the test.

SPECIFIC COMMENTS ON PROPOSED LEGISLATION

A. Making Access to DNA Testing To Prove Actual Innocence Inmates A Constitutional Right For All Inmates Under Section 5 of the Fourteenth Amendment.

Senator Specter's bill represents the best approach to this issue which has extremely significant short and long term implications. Although in Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed. 2d 203 (1993), there undoubtably were six United States Supreme Court Justices who believed that it would violate due process and the Eighth Amendment's prohibition against cruel and unusual punishment to execute or imprison an inmate who could prove that he or she was actually innocent, and there are almost certainly at least six votes on today's Supreme Court for the same proposition, there are still some federal and state courts who resist the proposition that

even irrefutable post-conviction proof of actual innocence based on DNA evidence, standing alone, would raise a federal constitutional claim. Some even believe only inmates on death row are entitled to such relief, not those who are serving life sentences or substantial prison terms. Such reasoning does not make common or constitutional sense and has led to some bizarre and outrageous situations.

For example, this month a law student from the Kentucky Innocence Project located evidence from a blood stain near a broken window that investigators believed came from the assailant in an old murder case. The bloodstain has never been tested and the inmate, Michael Elliott, who is serving a life sentence, claims it will prove him innocent and identify the real offender. Instead of consenting to tests, the local prosecutor moved in the trial court to destroy the evidence -- and the motion was granted! An appeal to a Kentucky Court of Appeals was successful in preventing the destruction order from issuing, Michael Elliot v. Hon. Lewis B. Hopper Laurel County Circuit Court, No. 2002-A-OO818-0A (Ky. Ct. App. June 4, 2002), but, due in part to the fact that Kentucky's post-conviction DNA statute only covers inmates on death row, not inmates serving life terms, Michael Elliott has not been able to obtain Kentucky courts an order mandating that the evidence be preserved and a DNA test conducted.

Instead, we have had to file a Section 1983 civil rights law suit in federal court seeking access to the evidence for purposes of post-conviction DNA testing, based on the constitutional theories embodied in Senator Specter's bill, including the argument that Kentucky's statutory scheme violates the Equal Protection Clause by authorizing post-convicting DNA testing that could prove innocence only for death row inmates, not men serving life sentences like Michael Elliott. In those states which have not passed post-conviction DNA statutes, or in states, like Kentucky, where statutes do not adequately protect a right of access to prove innocence, the Innocence Project has filed Section 1983 actions with great success -- eventually getting the inmate the requested testing, even if the federal court did not ultimately reach the constitutional issue. See Godschalk v. Montgomery County District Attorney's Office, 177 F. Supp. 2d 366 (E.D. Pa. 2001) (recognizing a due process right to access to evidence for post-conviction DNA testing, which was subsequently tested exonerating Godschalk of two rapes to which he had falsely confessed); Harvey v. Horan, 285 F. 3d 298 (4th Cir. March 28, 2002) (a Fourth Circuit panel reversed the district court's ruling Harvey had a due process right to conduct post-conviction DNA testing, but Judge Luttig rejected the panel's decision in an opinion arising out of a rehearing en banc that became moot when testing was obtained pursuant to Virginia's newly enacted DNA statute and Harvey's guilt was confirmed.); and Charles v. Greenberg, 2000 WL 1838713 (E.D. La. 2000) (after district court denied summary judgment, a settlement resulted in DNA testing which Charles had unsuccessfully sought for nine years in state court; he was exonerated after serving 19 years of a life sentence).

The extraordinarily comprehensive opinion in the Harvey case of Judge Luttig, a well known conservative jurist, is certainly the most forceful judicial analysis addressing the constitutional right of access to DNA testing for all state inmates. It is an excellent indicator that the constitutional view reflected in Senator Specter's bill will be adopted by the Supreme Court, or certainly accepted as a proper remedy to expand civil rights that is not in conflict with prior decisions of the Court.

B. Time Limits

One of the strongest arguments supporting statutes of limitations for post-conviction motions claiming newly discovered evidence of innocence is skepticism that a re-trial many years after the crime was committed, even with new evidence of innocence, would be a more reliable fact-

finding than the original proceeding, given the fading of memories and disappearance of witnesses. Post-conviction DNA testing provides a unique rebuttal to this concern because it invariably results in a more accurate and reliable fact-finding with respect to crucial items of biological evidence. Consequently, the principal "finality" concern behind time limits for new evidence of innocence motions has much less force when it comes to post-conviction DNA testing and is substantially outweighed not just by considerations of justice for the wrongly convicted but also the additional unique capacity of DNA testing to identify the real offender through databank "hits."

But there are even more significant practical problems that make time limits a profoundly bad idea. Based on close to ten years of experience assessing and litigating more post-conviction DNA applications than any other office in the country, the Innocence Project has found that it takes an average of between three to five years to evaluate and perfect a post-conviction application from the time an inmate's letter arrives in our office until the time an adequately documented motion can be filed. The difficulties are legion: The inmates are indigent. They have no lawyers and their lawyers from trial or appeal have often been disbarred, died, or disappeared. They do not have complete copies of their transcripts and neither does anyone else. Important police and laboratory reports relating to key items of biological evidence cannot be found. And most importantly, no one can find the evidence. It might be in the court house as an exhibit, at the crime laboratory, in the prosecutor's safe, with the court reporter, at a hospital or medical examiner's office, or different items could be at a variety of these locations. Since the cases are very old, inventory records are lost, and long-term storage facilities for each institution change. The search for these records and the evidence, which are indispensable to non-frivolous post-conviction DNA claims, are painstaking and time consuming. It requires an extremely dedicated and patient group of law students, investigators, support staff and attorneys to do it right, and astonishing staying power from the wrongly convicted, their families, and their friends.

Take the case of Marvin Anderson who is here with us today. A model high school student in Hanover, Virginia and volunteer fireman, he was convicted of a robbery, rape, kidnaping he didn't commit in 1983. He spent extra time in prison because he proclaimed his innocence to the parole board, thereby not showing the "remorse" necessary for early release. Even after being paroled Marvin and his amazing family kept pressing for DNA testing. Just before the Innocence Projects in New York and the Capital Region were about to close his case, the vaginal swabs were accidentally discovered by the Virginia Crime Laboratory when checking lab reports - the analyst had bizarrely stapled the swabs to his written notes! DNA testing has not only proven Marvin innocent, but identified the real assailant.

And what about the inmates who suffer from mental retardation or other disabilities? Jerry Frank Townsend is a mentally retarded man in Florida who pled guilty to eight murders to avoid execution. He was innocent of all these murders. They were committed by Eddie Lee Mosely, a serial offender who is believed to have committed as many as sixty-two rapes and murders in the Broward Country/ Fort Lauderdale, Florida area. Mr. Townsend's innocence only came to light because of some heroic efforts by Fort Lauderdale detectives John Curcio and Doug Evans (they were fought by Broward County detectives) and DNA testing of samples in the Frank Lee Smith case, an inmate who died of cancer on Florida's death row after being denied, by a two year statute of limitations, post-conviction DNA tests that would exonerate him posthumously.

The decision not to include time limits in the Leahy-Smith bill was the right one. At the Innocence Project, we regard the issue of time limits as the most critical difference between the bills. Out of the twenty-five states that have passed post-conviction DNA statutes, a number have

imposed time limits that we know will deny testing to inmates claiming innocence who cannot possibly make the deadlines. These include: Idaho (July 1, 2002 deadline); New Mexico (July 1, 2002 deadline); Delaware (September 1, 2002 for all cases where conviction was final prior to 9/1/00; 3 years from date of final conviction for all other cases); Florida (October 1, 2003, or two years from date of final conviction, whichever is later); Louisiana (August 31, 2005, and after that date within two years of conviction, except in death penalty cases where there is no limit); Michigan (January 1, 2006, and only those convicted on or before 1/1/01 can get post-conviction testing); and Washington (December 31, 2004).

C. Procedural Default Problems

In various ways, S. 800 incorporates the concept of procedural default, under which a defendant whose lawyer did not make the right decisions at trial may not obtain DNA testing later. First, the bill requires the inmate to show that DNA testing did not occur earlier "through no fault of the convicted person." Second, the inmate's claim of innocence must be "not inconsistent with previously asserted theories." Third, the identity of the perpetrator must have been "at issue in the trial."

The analytical problem with these obstacles is that they could be construed to deny DNA testing to an innocent mentally retarded inmate, like Jerry Frank Townsend, who had pleaded guilty. The logic of "procedural default" - that a defendant must make a claim at the right time or forever lose the right to make it - simply breaks down when it results in the execution or continued incarceration of an innocent man who failed to obtain DNA testing earlier for any reason.

But, again, the practical problems weigh heavily in favor of avoiding procedural default litigation. The cost, time, and energy needed to litigate these issues in the post-conviction DNA testing context is simply not worth it. It costs so much less to simply do the test when it can be shown that the results will result in material, non-cumulative evidence of innocence than to litigate these procedural issues. The provision of the Leahy-Smith bill that requires a showing that the request for post-conviction testing is not being done for purposes of delay provides a remedy for ferreting out those who will inevitably abuse process.

D. A Cost Efficient Model for Evaluating Post-Conviction DNA Claims - Fund Innocence Projects.

The Leahy-Smith bill provides funding for prosecutors to conduct post-conviction DNA testing reviews and nothing for law school innocence projects or innocence projects run by public defender offices. This is a serious error.

Law school innocence projects are a cost-effective way to evaluate these claims and eliminate frivolous requests. Law students work cheap (for credits) and benefit enormously from a well supervised program that requires them to read records from beginning to end, understand theories of prosecution and defense, master the basics of conventional serology and DNA testing, and write substantial motions for relief. They must get to know their clients and their families. They experience the ultimate professional experience - exoneration of the innocent - as well as the most difficult, dealing with a client who was not truthful. It is a great experience for those who want to prosecute, defend, or practice law in any area.

On the other hand, innocence reviews by prosecutors have some obvious, built in conflict of interest problems if it turns out an inmate was wrongly convicted and police or prosecutorial misconduct led to the conviction. These are, admittedly, not necessarily insuperable conflicts. The big problem, one cited by a number of prosecutors, such as Norman Gahn of Wisconsin, who has worked hard with us to win the right to post-conviction DNA testing, is that prosecutors

should be focusing on old "cold" cases that can now be solved through DNA testing. As a commissioner on New York State's Forensic Science Review Board I have spent a great deal of time training and urging law enforcement to pursue these cases which raise the same challenging investigative issues as post-conviction DNA matters. In New York City alone, we have been able to start a program where more than 16,000 old rape kits will be subjected to DNA typing instead of being thrown away. Through the "Debbie Smith Act," and other legislation being proposed in both the House and Senate, I am sure this problem will be addressed and prosecutors will receive substantial funding, as they should, to re-evaluate cold cases.

In the post-conviction area, law school innocence projects and public defender offices represent the best and most cost-effective way to make post-conviction DNA testing legislation something other than an unfunded mandate. Indeed, California pioneered this approach. When post-conviction DNA legislation was passed two years ago, the state legislature authorized $650,000 to be spread among law schools, public defenders, and prosecutors to evaluate the cases. It has worked well. I strongly urge this Committee to provide for such funding.