

**Testimony of Barry C. Scheck
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Maryland Commission on Capital Punishment
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Good afternoon to Chairman Civiletti and Commissioners. My name is Barry Scheck and I am Co-Founder and Co-Director of the Innocence Project. I appreciate the opportunity to testify and ask that my written statement and materials be included in the record.

The Innocence Project assists persons in proving their innocence through post-conviction DNA testing. To date there have been 220 men and women exonerated by post-conviction DNA testing nationwide. The Innocence Project has, in the vast majority of these cases, either represented or assisted in the representation of these innocents. Of particular relevance to this Commission's work, seventeen of the people proven innocent by DNA evidence had been sentenced to death. One of these seventeen men was exonerated just two weeks ago.

Today I will address those elements of the Commission's mandate relating to an examination of the risk of executing an innocent and the impact of DNA evidence in assuring fairness and accuracy in capital cases.

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

In the most serious crimes, criminalists believe that more than 85% do not involve biological evidence susceptible to DNA testing, perhaps our best tool for producing highly reliable - but certainly not infallible - evidence of guilt or innocence. Most homicide cases turn on eyewitness testimony, confessions, the credibility of witnesses, or circumstantial evidence, not DNA testing. Therefore DNA testing is not a panacea that can prevent wrongful executions. Although DNA has helped us to shed light on the existence of wrongful convictions across the nation, it simply does not have the capacity to ensure either a fair or accurate application of this irreversible sentence.

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

A. The Risk of Executing An Innocent

1. What Can Be Learned From DNA Exonerations

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

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

**** FBI Exclusion Data.** The National Institute of Justice has performed the only known survey of DNA exclusions of defendants in criminal cases. In that study the FBI reported that since it began conducting such DNA testing in 1989, it found that in at least 24% of the cases where it gets results – ordinarily matters where a suspect has been arrested or indicted based on non-DNA evidence – the defendant was excluded.¹ This robust finding is also conservative because if four suspects in a case are excluded for purposes of this statistic the FBI will count it as just one “primary” suspect being excluded. Surveys by the National Institute of Justice corroborate that private laboratories, as well as state and local laboratories, report similar exclusion rates, or even higher exclusion rates.

**** Pre-Conviction/Post Indictment Exclusions.** Although unfortunately no one is keeping systematic track of the data, law enforcement officials across the country acknowledge that thousands of cases, including many homicides, arrests and indictments

¹ Department of Justice, Office of Justice Programs, National Institute of Justice, NCJ 161258, “Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial”, p. 20, June 1996.

based on seemingly compelling proof like a detailed confession or multiple eyewitnesses, have been vacated and the real assailant identified before conviction based upon DNA testing.

**** Governor Warner's Virginia Experiment.** In 2001, the Innocence Project asked officials in Virginia to search the state's archives for a former lab analyst's old notebooks, since DNA testing on vaginal swabs she had remarkably stapled into her notebook had led to the exoneration of one of our clients, Marvin Anderson. Officials subsequently discovered notebooks with biological evidence from over 330 old cases, most of them collected before DNA testing was available. Two more people were exonerated after DNA testing on samples from the notebooks. Recognizing that this evidence could shed light on the propriety of the convictions in those cases, Virginia Governor Warner declared that, "A look back at these retained case files is the only morally acceptable course," and agreed to test all of them. He started out, however, with a small random sample of these convicted felons. Out of the first 29 of these randomly selected cases, there were two exonerations (and in one case the real assailant was identified), which is close to a 7% exoneration rate. ["Follow the DNA to find the truth," The Roanoke Times, 12/16/05.]

It is worth emphasizing that Virginia is second only to Texas in executions.

Some Case Histories of DNA Exonerations: False Guilty Pleas to Capital Offenses

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

Similarly, last fall, John Grisham will come out with his first non-fiction book about the case of Ron Williamson, one of our clients who came within five days of execution in Oklahoma.² That case is also chronicled in *Actual Innocence*,³ a book Jim Dwyer, Peter Neufeld and I wrote about DNA exoneration cases and the lessons that can be learned from them.

² John Grisham, *The Innocent* (New York: Doubleday, 2006).

³ Barry Scheck, Peter Neufeld, and Jim Dwyer, *Actual Innocence* (New York: Doubleday, 2000).

Each of the seventeen DNA exonerations of men sentenced to death is a chilling reminder of how the innocent can be executed, as are the more than thirty homicide cases where innocents were convicted, but not sentenced to death before DNA exonerated them. Many of these men -- Eddie Joe Lloyd in Detroit, Michigan; John Restivo, John Kogut, and Dennis Halstead in Nassau County, New York -- I know very well and feel certain they would have been sentenced to death and possibly executed if Michigan or New York had capital punishment when they were convicted.

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

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

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

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

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

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

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

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

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

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

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

Each of these cases demonstrates an unfortunate ripple effect caused by the presence of the death penalty. Because each of the men featured in the aforementioned case studies feared being sentenced to death, they pled guilty to crimes they did not commit in order

to secure a lesser sentence. Some have expressed concern that repealing the death penalty will weaken the ability of prosecutors to get life without parole pleas. Whatever the merits of that argument, it must be acknowledged that fear of the death penalty has often resulted in innocents falsely pleading guilty to life without parole.

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

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

- **Cameron Willingham** of Corsicana, Texas was executed in February 2004 for murder by arson. Later that year, an investigation proved and newspaper accounts published new scientific evidence that it was impossible to determine arson after all. A panel comprised of national arson experts concurred in March 2006 that the science underlying Willingham's conviction was invalid. The panel also looked at the case of Ernest Willis, another Texan, who was convicted of murder by arson and concluded that in his case as well, the science was unsupportable. Although Willis and Willingham were on death row in Texas at the same time, Willis was exonerated – and later compensated by the state – when his conviction was undermined and only through a retrial could he have remained on death row. There is no evidence demonstrating that the facts in the Willingham case, however, were ever revisited until now. Just last month, the Texas Forensic Science Commission announced its intention to investigate possible professional negligence or misconduct connected to the arson analysis in the Willingham case.
- **Ruben Cantu** of San Antonio, Texas was executed in August 1993 for a robbery-murder. The Houston Chronicle investigated claims that Cantu was innocent and that the identification made by a survivor of the robbery was coerced by law enforcement. A co-defendant subsequently signed an affidavit stating that Cantu was not present and had no role in the commission of the robbery or murder.⁴
- **Carlos DeLuna** of Corpus Christi, Texas was executed in December 1989 for the stabbing death of a convenience store clerk. Although DeLuna identified another man as the perpetrator, his claims were dismissed. In June of 2006, the Chicago Tribune discovered that the person DeLuna named, Carlos Hernandez, was no stranger to law enforcement and had a history of knife-related violence. Hernandez reportedly also told friends and family that he committed the crime. Hernandez died in jail in 1999.⁵

⁴ See <http://www.chron.com/disp/story.mpl/front/3472872.html>

B. The Causes of Wrongful Conviction

1. Fundamental Flaws in the Criminal Justice System

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

The nation's 220 DNA exonerations have taught us that any number of factors – sometimes many functioning at once – can yield a wrongful conviction and that the appeals process does not provide the needed protections to detect them. The public benefit of DNA exonerations, however, lies in their opportunity to understand how the criminal justice system – from eyewitness to police to prosecutor to judge to jury to appellate courts to the Supreme Court – can find a person guilty beyond a reasonable doubt when the accused is simply innocent.

The Innocence Project has examined these 220 wrongful convictions proven through DNA testing, and identified those factors that confound the criminal justice system, sometimes at the earliest stages. These include, but are not limited to: mistaken eyewitness identifications; faulty forensic work – predicated on improper crime scene collection, contamination, drylabbing, falsified results, the use of unvalidated assays, and statistical exaggerations about their rigor; false or coerced confessions; reliance on jailhouse informants; poor defense; and prosecutorial misconduct.

2. Recent Maryland Debacles Affecting the Quality of Forensic Results

These problems happen across the nation and do not stop at state borders. Indeed, despite its efforts to implement some of the reforms intended to curb the production of wrongful convictions, lingering questions about guilt and innocence have not been put to rest in Maryland.

In 2003, the Baltimore County Police Department was forced to evaluate nearly 500 cases when it came to light that Concepcion Bacasnot, an incompetent serologist, provided false testimony that contributed to the conviction of Bernard Webster, another Maryland man proven innocent through DNA testing. Mr. Webster spent 20 years in prison for a rape that he did not commit while the actual rapist went on to attack at least one other woman in her home in Baltimore. The discovery of Ms. Bacasnot's faulty testimony led Bill Toohey, a police spokesman, to state the following: "The very first

⁵ See http://www.chicagotribune.com/services/newspaper/printedition/friday/friday/chi-tx-1-story_0.4226884.htmlstory

thing we did was to make sure there is no one on death row because of her work.” Ms. Bacasnot had previously resigned in 1987, after she demonstrated a lack of basic knowledge of serology in the pretrial hearing of Robert Bedford’s capital case.

Just last month, the Baltimore Sun reported on the dismissal of a city crime lab director following revelations of DNA contamination and “other operational issues.” Police disclosed that a partial review of 2,500 cases found 12 instances in which a previously unknown genetic profile was linked to a laboratory employee. A supervisor in the crime lab’s DNA unit conceded last week that a full accounting of the scope of the problem would present a challenge for them. Further, the director of the national crime lab accreditation board – which accredited the lab in December of 2006 – expressed astonishment that the lab had failed to take steps to catalogue the DNA profiles of its own employees.

And in February of last year, an audit of the Maryland State Police by the legislature’s Joint Audit Committee found lapses in the agency’s use of DNA evidence. According to the audit, more than 25,000 samples were neither analyzed nor entered into the DNA database over a three-year period.

Just one month later, a veteran Maryland firearms examiner, Joseph Kopera, committed suicide in the wake of revelations that he not only claimed in court to have credentials that he did not earn, but that he had also falsified at least one document asserting his qualifications. Interestingly, one of the cases in which Mr. Kopera testified involves James Kulbicki, a sergeant with the Baltimore Police Department, who was convicted of the murder of a woman with whom he was engaged in a paternity dispute. Supplementing Mr. Kopera’s misleading testimony was the State’s reliance upon comparative bullet lead analysis (CBLA), a forensic technique that has since been determined to be unreliable.

In fact, in 2002, the National Research Council (NRC) of the National Academy of Science (NAS) was asked by the FBI to examine the scientific basis of CBLA. Following the publication of NRC’s report, the FBI voluntarily discontinued the use of CBLA pending the results of a 14-month review of the technique in light of the recommendations put forth in the NRC’s report. In 2005, the FBI announced a permanent discontinuation of CBLA.⁶

Since that time, the Innocence Network, 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, along with the National Association of Criminal Defense Lawyers, formed a joint task force to prevent the future use of misleading testimony that is based upon CBLA. A joint investigative report by the Washington Post and CBS News’ “60 Minutes” has also since revealed that thousands of convictions across the country could have been predicated upon faulty FBI testimony that

⁶ See <http://www.fbi.gov/pressrel/pressrel07/bulletlead111707.htm>.

assumed the validity of the now discredited CBLA assay.⁷ The FBI has now agreed to identify cases in which CBLA was used at trial so that a comprehensive review of court transcripts can determine which ones warrant reexamination.

Despite this backdrop, Mr. Kulbicki's post-conviction petition to vacate his conviction, on the basis of unreliable forensic evidence, was denied. Although defense attorneys argued that not only did measurements of the bullet markings recorded in Mr. Kopera's notes exclude Mr. Kulbicki's off-duty weapon as the source of the bullet fragment, Mr. Kopera's testimony in court did not comport with his own notations. The defense also argued that DNA tests of bone fragments that appeared to link Mr. Kulbicki to the crime were immaterial when it was discovered that the crime lab analyst who performed the testing handled a sample from the victim and the sample being tested in the same work space. The court determined that despite the fact that Mr. Kopera was untruthful about his credentials, and provided misleading testimony in support of the prosecution's theory, this was deemed not to undermine the validity of his testimony asserting inculpatory test results.

As these cases demonstrate, Maryland has a troubled history with forensic error and misconduct, extending into even recent headlines.

C. Status of Maryland Reforms Aimed at Solving Crime and Curbing the Risk of Executing An Innocent

There are a number of measures that Maryland could but to date has not taken to more proactively solve crimes and curb the risk of convicting or executing innocents. While Maryland has implemented a number of forward-thinking reforms in some areas, much more could and should be done to assure the fair administration of justice, including:

1. Oversight Authority of Maryland's Crime Laboratories

Regardless of the relative weight one believes should be given to evidence of forensic error or misconduct in their assessment of a particular case, there is no question that Maryland has a disturbing history in this regard. Without an honest accounting of the state of forensic analysis in Maryland, it is simply irresponsible to allow forensic results to influence matters of life and death.

In recognition of this reality, efforts have been made to address the problem, but they remain insufficient. In April of last year, Maryland passed a groundbreaking law establishing oversight of the state's crime laboratories by an independent board – the

⁷See <http://www.washingtonpost.com/wp-srv/nation/specials/silent-injustice/index.html?day=2> and <http://www.cbsnews.com/stories/2007/11/16/60minutes/main3512453.shtml>.

state's Department of Health and Mental Hygiene – with experience in clinical laboratory practices. While this law recognizes the incredible pressures experienced by state crime labs, including a lack of qualified and trained staff, as well as inadequate resources and equipment, the Governor has not committed to funding the necessarily positions so that it may be implemented. Therefore, this innovative law is only symbolic and is not positioned to address some of the lingering crime laboratory problems in Maryland already described.

2. Elimination of DNA Backlog

In July of last year, perhaps in anticipation of first-time legislation in Maryland requiring the collection of DNA from individuals upon arrest, the Governor announced the clearance of a backlog of more than 24,000 untested samples in the possession of the Maryland State Police. Unfortunately, this laudable progress did not address the backlog in metropolitan labs in jurisdictions such as Baltimore City or Prince Georges County. Neither county-funded nor locally-funded crime labs, therefore, were provided with the resources they needed to clear their backlogs since they did not receive the state money needed to accomplish these goals.

Perhaps even more troubling, however, is that Maryland has prioritized database expansion of offender profiles over crime scene evidence processing, failing to take into consideration that without crime scene profiles, offender profiles will lay dormant and crimes will go unsolved. After all, any DNA database is only as good as the matches it can generate.

According to GeneWatch UK, a British organization that monitors DNA usage in the United Kingdom, the collection of DNA from crime scenes increases the chance of identifying a crime's suspect by 14 percent as compared with cases when DNA is not collected.⁸ An influx of crime scene evidence also has borne dividends within the United States. A federal grant gave the Detroit Police Department resources to forward significant collections of crime scene evidence to the Michigan State Police for comparison with the existing profiles in its DNA database. Of 171 genetic profiles generated from of the crime scene evidence in those cases, 72 linked to known offenders in the state's databank, for a 43 percent success rate.⁹

The prompt collection and processing of crime scene evidence also will prevent innocent individuals from languishing behind bars, thereby protecting their basic liberties. Delays in DNA analysis can prompt defendants to take unfounded guilty pleas,

⁸ See GeneWatch UK, "Police Retention of DNA: A briefing for Members of the Scottish Parliament," Feb. 2006 (available at

www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/MSPbriefpolicendnadfinal.rtf),

(offering that matches to suspects rise from 26 percent to 40 percent when crime scene DNA is collected).

⁹ Mike Martindale, "DNA Used to Crack 72 Metro Cold Cases," DETROIT NEWS, June 19, 2007.

rather than remain indefinitely in jail. Moreover, the slow turnaround times surely have delayed trials across Maryland.

Two reforms needed to improve Maryland's criminal justice system is (1) to ensure that the processing of actual crime scene DNA evidence takes priority over the processing offender samples and that (2) additional resources are provided to city and county-funded crime labs to reduce their existing backlogs. Of course, the recent mandated addition of arrestee profiles to Maryland's databases will place additional resource burdens upon crime laboratories, exacerbating a situation that was not fully addressed by the Governor's prioritization of backlog reduction at the state level.

3. Proper Preservation of Biological Evidence

Modern DNA technology, coupled with today's comprehensive information and communications technology, has exponentially increased the power of preserved evidence. Preserved evidence can not only prove (or disprove) claims of innocence in ways unimaginable just a generation ago, but it can also solve old cases. In July of this year, for instance, cold case detectives in Montgomery County located a sample of bodily fluids associated with a 1982 murder in their files and subsequent DNA testing identified the culprit and provided long-awaited answers to the victim's family.¹⁰

As technology improves, even evidence currently viewed as insignificant may have probative value. Unfortunately, though, evidence preservation policies in Maryland have proven insufficient to keep up with technology's promise. Although DNA testing is the gold standard of forensic technology, when properly performed on untainted evidence, efforts to locate that very evidence in Maryland continues to fall short. Just last year, Maryland's highest court held that greater efforts had to be made to find evidence connected to a 1974 murder case, arguing that searching the police department's evidence room was insufficient.¹¹ City prosecutors and police told the judge in this case that a thorough search for the evidence would require an inventory with a \$50,000 price-tag.¹²

Those who litigate innocence claims in Baltimore argue that this case is not anomalous, indicating that pre-1990 cases are difficult to track by complaint number. In order to realize the probative value of biological evidence, statewide efforts must be undertaken to assure that old evidence is catalogued and can be located.

4. Eyewitness Identification Reform

Two of the three DNA exonerations in Maryland were plagued by mistaken

¹⁰ Patrick Dunne, "DNA Test Helps Solve 26-year-old Case," *Gazette.net*, July 23, 2008.

¹¹ Douglas S. Arey vs. State, CA No. 82, Sept. term 2006. Reported. Opinion by Raker, J. Filed Aug. 1, 2007.

¹² Melisa Harris, "DNA Search Delayed," *BALTIMORE SUN*, April 18, 2008.

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

Last year, the Maryland legislature passed a law requiring each law enforcement agency in the state to adopt written policies that comply with standards issued by the Department of Justice. Those DOJ standards, established nearly a decade ago, do not include the use of a blind administrator, the single best reform available to minimize the possibility of the lineup administrator from providing inadvertent or intentional verbal or nonverbal cues to influence the eyewitness to pick the suspect.

Despite the rather restrained requirements placed upon law enforcement agencies across the state, there has been partial compliance at best. Many law enforcement agencies did not – as they were required to by law – file copies of their policies with the Department of State Police. Of those agencies that did comply with the requirement that they submit their policies, not all drafted policies that comply with the moderate standards promulgated by the DOJ.

5. The Electronic Recording of Custodial Interrogations in All Jurisdictions

Earlier this year, the Maryland legislature passed a criminal procedure law establishing as public policy that certain law enforcement agencies should make reasonable efforts to record custodial interrogations in connection with murder, rape, and certain sexual offense cases. It also called upon the Governor's Office of Crime Control and Prevention (GOCCP) to report on the progress of jurisdictions in establishing interrogation rooms capable of creating audiovisual recordings of custodial interrogations. While \$2 million has been committed by GOCCP to this effort over a two-year period, these monies cannot be used for interrogation rooms in Maryland State Police barracks, which investigate all homicide investigations for all the Division of Correction and all outlying jurisdictions. And despite the commitment of funds to this endeavor, many jurisdictions have not been outfitted with interrogation rooms. To date, the Baltimore Police Department does not have a single interrogation room.

6. Increased Resources for Indigent Defense & Prosecution

The United States and Maryland constitutions assure the provision of counsel for those accused of crimes, regardless of the ability to pay.¹³ Despite these constitutional protections, indigent defense remains sorely underfunded across the nation. Because capital cases are such an extraordinary drain on defender resources, given the stakes involved, the presence of a death penalty can force the diversion of resources away from many of the other important, non-capital cases that offices handles.

Indeed, it is incumbent upon defender agencies, through thorough investigations, to identify the very causes of wrongful conviction, from faulty forensic testimony to mistaken eyewitness identification. When defender agencies are forced to make difficult decisions in the face of limited resources, inevitably the administration of justice suffers. A Standing Committee of the American Bar Association on Legal Aid and Indigent Defendants has recommended that each State government establish oversight entities charged with ensuring uniform, quality indigent defense in all criminal proceedings.¹⁴

As well, prosecutorial agencies must also juggle resources in order to prepare for capital cases. In recent years, State's Attorney Patricia Jessamy has asserted that her agency has been "hobbled by lack of funds," pointing to an inability to hire investigators to monitor witnesses.

Maryland should establish a commission charged with identifying the current resource shortfalls for both defense and prosecutorial agencies, in light of representations from both that funding shortages are affecting the delivery of their services.

D. The Impact of DNA Evidence in Assuring the Fairness and Accuracy of Capital Cases

The question I have come here to address is the impact of DNA on ensuring fairness and accuracy in capital cases. When it comes to fairness, DNA has no impact on ensuring the death penalty is administered fairly and uniformly. I understand that racial, geographic, and socio-economic disparities have already been discussed at previous hearings, so I will not discuss them here except to say that if you seek to reduce arbitrariness in the death penalty, DNA cannot help you.

With respect to accuracy, some have proposed the notion that if the death penalty was restricted to only cases where DNA could prove guilt, the risk of executing an innocent person would be eliminated. This is simply untrue. Maryland has experienced its share of crime lab difficulties, which, on its face should demonstrate the potential fallibilities of forensic evidence. Crime lab difficulties aside, we have come to learn that it is the precision of DNA databases that underpins the reliability of DNA evidence.

¹³ *Gideon v. Wainwright*, 372 U.S. 335 (1963)

¹⁴ ABA Standing Comm. on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004).

Specifically, questions are being raised – even in very recent headlines – about the probability of a match between a DNA profile, or partial profile, derived from crime scene evidence entered in CODIS (the FBI’s national DNA database) and a convicted offender’s profile.

A DNA profile is considered complete when it identifies genetic characteristics at various locations, or markers, on the human genome. When a DNA profile derived from crime scene evidence fails to match the DNA profile of a particular individual, even at one marker, this is considered an ‘exclusion.’ Exclusions are absolute. Therefore, at the Innocence Project, we are always certain of a petitioner’s innocence when a match between his profile and the crime scene evidence cannot be made. On the other hand, inclusions - when a DNA profile derived from crime scene evidence matches the DNA profile of a particular individual – are subject to greater interpretation. There are several reasons for this, not least of which is the possibility of the cross-contamination of samples.

Indeed, a death penalty based upon DNA evidence would actually *increase* the arbitrariness of the death penalty system, as the capital punishment system would be reserved for those who left DNA behind at the crime scene, and not necessarily the “worst of the worst.” Is the murder of one person involving a struggle really more death-worthy than someone who shoots ten people from a distance and thus leaves no DNA behind?

Conclusion

Public opinion remains ambiguous about the question of whether capital punishment ought to be an available sentencing option, but support for the death penalty, regardless of country or region, is greatest when no other sentencing options are presented to respondents.¹⁵ The same is true for Maryland.¹⁶ Reasonable people, however, can differ as to whether the death penalty is a morally appropriate punishment for the most heinous of murders committed by the worst of the worst offenders.

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

As the nation’s wrongful convictions have revealed, errors can occur at every turn, and it is only DNA testing – when properly performed – that can topple a house of

¹⁵ Zimring, Franklin E. *The Contradictions of American Capital Punishment*. New York: Oxford University Press, 2003.

¹⁶ Maryland poll regarding the death penalty, conducted by Gonzalez Research & Marketing Strategies (March, 2007).

cards built upon just one imperfect element. Since DNA exists in relatively so few cases, an individual's life can hinge on a sloppy report, an inadvertent cue, or the work of an overburdened practitioner. And even though its reach is limited with respect to its ability to shed light on every case, DNA has helped us to expose a range of systemic problems, including:

- Juries relying on incorrect, misleading or partial information;
- Public and private defenders providing ineffective assistance of counsel;
- Crime lab mishandling and contamination of evidence; the falsification of results; the misrepresentation of forensic findings on the stand; and the provision of statistical exaggerations about the results of testing;
- Witnesses misidentifying innocent people as the actual perpetrators;
- Innocent people confessing to crimes that they did not commit;
- Innocent people pleading to crimes they did not commit, particularly when they fear the administration of the death penalty; and
- Unreliable informants acting on the basis of real or perceived incentives.

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

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

With a current death row population of five individuals, Maryland's death penalty system appears, in large part, a symbolic exercise, yet the risk of executing an innocent – particularly in light of proven wrongful convictions associated with heinous crimes – still exists. We have to ask ourselves how much risk is acceptable when a life is at stake and an execution cannot be reversed, particularly when other aspects of the criminal justice system deserving our attention remain unaddressed.

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

time, however, the risk of executing an innocent person is too great, and therefore unacceptable.

Thank you, Mr. Chairman. I am happy to answer any questions you and the Commissioners may have.