

HOUSE COMMITTEE ON GOVERNMENT REFORMS

**SUBCOMMITTEE ON GOVERNMENT EFFICIENCY, FINANCIAL MANAGEMENT,
AND INTERGOVERNMENTAL RELATIONS**

**HOW EFFECTIVELY ARE STATE AND FEDERAL AGENCIES WORKING
TOGETHER TO IMPLEMENT THE USE OF NEWLY DEVELOPED DNA
TECHNOLOGIES?**

STATEMENT OF BARRY C. SCHECK

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RELEVANT BIOGRAPHY

Barry Scheck has been a Professor of Law at the Benjamin N. Cardozo School of Law in New York City for 23 years where he serves as Co-Director of the Innocence Project, a clinical program that uses post-conviction DNA testing to exonerate wrongly convicted inmates. He recently co-authored *Actual Innocence* Peter Neufeld and Jim Dwyer, a book that studies the causes and remedies for wrongful convictions (mistaken identification, false confessions, bad lawyering, junk or fraudulent forensic science, police or prosecutorial misconduct) using the now 87 post-conviction DNA exonerations in the United States as a database for the analysis. There are now twenty-five law schools, as well as some graduate schools in the journalism and the social sciences, that have innocence projects and are participating in a National Innocence Network. The purpose of this Network is not just to take on cases to exonerate the wrongly conviction, with or without the help of DNA evidence, but to spur a vigorous effort to understand and attack the causes of wrongful convictions in collaboration with scholars from many disciplines as well as actors from all parts of the criminal justice system.

Professor Scheck has served for six years as a Commissioner on New York's Forensic Science Review Board, a unique regulatory body that governs all crime laboratories in the state including New York's DNA databank system. As a Commissioner on the National Institute for Justice's Commission on the Future of DNA Evidence, Professor Scheck not only focused on the Post-Conviction and Legal Issues reports, but concentrated his efforts on the problem of getting old, unsolved crimes (particularly rapes and homicides) tested expeditiously. He has also spent considerable time litigating DNA cases (criminal and civil, usually for the defense but sometimes consulting with prosecutors and detectives) as well as training detectives, crime scene analysts, and laboratory technicians on methods for expeditiously and accurately collecting and processing evidence from crime scenes. He has written extensively on these issues and related privacy and constitutional concerns that have arisen around the growth of DNA databanks.

A STRUGGLE TO CORRECT PRIORITIES:

HOW TO EXONERATE THE INNOCENT, IDENTIFY THE GUILTY EXPEDITIOUSLY, SOLVE OLD NO SUSPECT CASES, PROMOTE USEFUL RESEARCH, AND AT THE SAME TIME AVOID SWEEPING POLICIES THAT WILL UNNECESSARILY OFFEND CITIZENS OR INFRINGE ON THEIR CIVIL LIBERTIES.

With few exceptions, at either the state or federal level, funding for DNA typing and databanking has been woefully insufficient and misdirected because it ignores priorities that are not only cost-effective but strategies that maximize our chances of exonerating the innocent and apprehending the guilty.

I. Capacity to Solve New Crimes

Every time an innocent person is arrested, indicted, incarcerated before trial, tried, convicted, sentenced to a long prison term or, heaven forbid, subjected to the death penalty, the real perpetrator is at large free to commit more crimes. DNA technology has the potential in a limited number of cases (maybe 20% of serious felonies) to provide definitive evidence about who really committed the crime. The sooner DNA testing is conducted, the better for all concerned.

The efficient administration of DNA testing as an investigative tool hinges, in the first instance, on typing evidence from new crimes before they are solved and databanking the DNA profiles. Linking unsolved crimes to each other from different jurisdictions, or within a jurisdiction provides clues that are solid and often counterintuitive. In the United Kingdom, which is far ahead of us in this process, the aggressive training of police officers to identify DNA evidence at the crime scene and type unsolved crimes (certainly all rapes, murders, and burglaries) within 7 to 10 days after the commission of the crime has been the key to their success in getting databank hits. Virtually no crime laboratory in the United States has that capacity. Getting laboratories to this capacity in dealing with fieldwork -- new cases -- should not be impaired by efforts to get at the backlog of convicted offenders. Unless you have the unsolved crimes in the databank, what is the point of spending a lot of money on a convicted offender backlog, especially typing inmates who are serving lengthy prison terms? This simple, common sense point is not reflected in our funding priorities. In the 2000-2001 fiscal year, NIJ allocated funding for backlog reduction to 21 states (approximately \$14.4 million) but mandated that only 1% of the cases typed by unsolved cases as opposed to convicted offenders.¹ The capacity to type new crimes cannot be impaired while efforts are made to address the DNA backlog problem.

Ultimately, the processing of new evidence for its DNA profile at the local level effects the way in which crime is addressed at all levels. The capacity to solve new crimes is not specific to police precincts and prosecutors. Rather, such information augments the national capacity to identify perpetrators of current, past and future crimes. The capacity to solve new crimes confers a simultaneous capacity to address unsolved crimes, offering victims and their families a higher potential for closure and a heightened faith in criminal justice and law enforcement throughout the United States.

II. The Capacity To Test Old Unsolved Crimes

The failure to type old, unsolved cases is a national scandal, especially unsolved rape kits which are literally being thrown away by the thousands. Frankly, if crime victims generally were aware of this situation they would be banging on the doors of crime laboratories, district attorney's offices, and courthouses.

A survey conducted by the Police Executive Research Forum (PERF) and researchers at Eastern Kentucky University concluded that at least 150,000 rape kits have not been DNA typed in cases where the police have no suspect. This survey was discussed at length in the September 26, 1999 proceedings of the National Commission on the Future of DNA Evidence created by the U.S. Department of Justice (attached as Appendix VII). The conclusion of the discussion, acknowledged by the study's authors, was that the 150,000 figure is extremely underestimated.

I have first-hand experience with the situation in New York City. Three years ago, as a Commissioner of Forensic Science, I learned that 25,000 untyped rape kits existed in the New York City Medical Examiner's office and were about to be thrown away as the five year statute of limitations ran. When I brought this to the attention of then Police Commissioner Howard Safir, he immediately took steps to deal with it. He was able to outsource to private laboratories, through a bidding process, only 8,000 of these kits. The problem was not just lack of capacity in the New York State and city laboratories, but lack of capacity at the private laboratories. It goes without saying that typing of these rape kits has led to the apprehension of serial rapists before they commit more crimes.² To my knowledge no other jurisdiction has attempted to attack the backlog of old, unsolved rape cases in such great numbers and even this effort has not, to say the least, proceeded as quickly as desired. More limited but strategic typing of old rape and/or homicide cases in Milwaukee, San Diego, Oakland and other jurisdictions, initiated by prosecutors and police officers who know the investigatory power of DNA technology, have led to spectacular results. But, unfortunately, these law enforcement officials are fighting an uphill battle to get resources. Even more disturbing, the PERF-Eastern Kentucky University survey showed that many departments do not even consider sending their evidence from nonsuspect cases to be typed.

To put it quite bluntly, it is more important to do typing in unsolved rapes and homicides than to type convicted offenders who will be spending the next twenty years in prison. It is good law enforcement, it is cost effective, and most importantly, it is a matter of basic fairness and compassion for the victims of these crimes and their families.

Many states have begun extending or, in some instances, abolishing statutes of limitations to allow for the possibility of typing old cases. Unless one is careful, these efforts can be counterproductive because statutes of limitations do serve an important purpose in preventing unfair prosecutions based on stale evidence (imagine cases where DNA is not dispositive because the defense is consent but the case is being tried a decade or more after the incident) as well as relieving police and prosecutors from demands to pursue very old cases at the expense of new ones they can more efficiently solve. There is, however, a very good, sensible way to accommodate all these concerns B passing statutes that permit the filing of John Doe warrants against DNA profiles which will toll statutes of limitations. This approach was pioneered by

Milwaukee prosecutor Norman Gahn and has been followed in many jurisdictions.³ The best bill that codifies this practice and, most importantly, provides for extra funding so that DNA laboratories can do the typing for the John Doe warrants before the statute of limitations has run, was proposed last year by New York's Assembly Speaker Sheldon Silver (See Appendix 1 for the full text of the bill).

III. The Capacity To Do Post-Conviction Testing

Perhaps the most dramatic use of DNA typing has been in the exoneration of individuals who are actually innocent of a crime for which they have been incarcerated and in some cases sentenced to death. Appendix II provides a list of the 88 wrongfully convicted men in the United States exonerated to date through post-conviction DNA testing alphabetically and chronologically. There are an additional 7 post-conviction exonerations in Canada.

Post-conviction testing serves a multitude of important law enforcement purposes beyond simply the most fundamental and obvious reason to do it -- correct injustices. Indeed, the most important lessons DNA testing can offer the criminal justice system lie in a careful analysis of these post-conviction cases to find the causes and remedies for wrongful convictions which can be applied in the vast majority of criminal cases where there is no DNA evidence to test. Peter Neufeld, Jim Dwyer and I have made an effort to review these issues in *Actual Innocence*. The problems associated with mistaken eyewitness identification, false confessions, junk forensic science, inadequate defense counsel, police and prosecutorial misconduct, and informer testimony are serious but solvable. These solutions are mainstream proposals that Republicans and Democrats, conservatives and liberals, prosecutors and defense lawyers can all embrace. As George Will noted in his generously supportive review of *Actual Innocence*, conservatives in particular should keep in mind that the criminal justice system is just another government program, so skepticism is in order.

For many years only New York and Illinois had post-conviction DNA statutes that permitted inmates to get testing at state expense if the results would raise a reasonable probability they were wrongfully convicted. So it is no surprise that for years New York and Illinois had the greatest number of post-conviction exonerations. Some states have limited relief to inmates on death row only, denying the possibility of relief to innocent people who could be imprisoned for decades on non-capital charges. Other states have created very limited windows of opportunity for the post-conviction DNA testing. For example, Florida just passed a post-conviction statute that gives inmates only two years to make their applications. I can assure you, after a decade of involvement in these cases, such a statute is worse than having a statute at all. In order to meet the standards necessary to get a post-conviction DNA test, inmates must be able to find the transcripts of their trials, police reports, lab reports, and other critical case materials. For indigents who are not entitled to counsel this is virtually an impossible task in old cases. The vast majority of our Innocent Project cases take more than two years to perfect. Indeed, 75% of the time critical biological evidence is reported lost or destroyed, although it takes years to determine if that's really the case. In short, post-conviction DNA applications are very labor-intensive enterprises. It is cruel and self-defeating to pass post-conviction DNA statutes that set up impossible windows of opportunity or, even if there are no time limits, exist as unfunded

mandates, giving the indigent no realistic hope of being able to find evidence or prove innocence.

There is a cost-effective way to address this problem. There is now an Innocence Network of innocence projects at twenty-five law schools in the United States. These projects work with public defender offices, volunteer lawyer organizations, volunteer investigators, district attorney's offices and journalism graduate schools in an effort to exonerate the wrongfully convicted through post-conviction DNA testing. These Innocence Projects are run by professors that were prosecutors, public defenders, judges, and police officers. They are not only interested in correcting injustices but learning lessons, doing scholarship, and making practical changes to improve the criminal justice system. Providing funds for these institutions to perfect post-conviction DNA applications is cost effective (idealistic law students cost nothing and are very enthusiastic about this work) and greatly benefits the system as a whole. The need funding the Innocence Network will dramatically increase if the Innocence Protection Act passes in this session since that legislation would require all states who want to receive federal funding to participate in the national DNA databanking system (and all states do) would have to pass post-conviction DNA testing statutes.

IV. Capacity to Type "Owed" Samples from Released Offenders

According to the FBI the current statistic for released offenders who have not submitted a sample to be processed for its DNA profile, so called "owed" samples, is estimated at 1 million. This is another overlooked, scandalous situation. Think about it. These owed samples predominantly involve individuals convicted of murders, rapes, and other serious felonies who are on the street. The owed samples are the first convicted offender samples that should be typed because these individuals are at large and could commit crimes against citizens who are not in prison, as opposed to untyped offender samples from individuals who are still incarcerated. This is common sense, yet no state other than New York, to the best of my knowledge, has endeavored to type these owed samples first. The principal reason this happened in New York is that our Forensic Science Review Board ordered it. Admittedly, for law enforcement officials this is a difficult course. It is easier to collect samples from incarcerated inmates. But just because it is easy, and law enforcement officials are under pressure to reduce their backlog, that doesn't make a policy that types the incarcerated inmate first, and ignores the offender on street, sensible. While I sympathize with the resistance Justice Department officials encountered from state and local authorities to typing the owed samples first, I think it was a serious error not to require it, or at least offer very substantial incentives to do so. This Committee should urge action on this issue now.

V. Capacity to Type the Backlog of Convicted Offender Samples

There are now about 400,000 untyped convicted offender samples of inmates who are incarcerated. Of course this backlog should be cleared, but not before the owed samples. An efficient way to approach the problem is to set up a system where a state types all newly convicted offender in a systematic way and all offenders about to be released. Get to the long-term prisoners later.

VI. Capacity to Do Mitochondrial DNA Testing

Finally, the Committee should be aware of a comparatively new forensic DNA typing technique, mitochondrial testing, which can extract DNA directly from the shaft of a hair. This important technique is quickly demonstrating that results from microscopic hair comparisons are unreliable. The FBI itself estimates that 5 to 10% of its own microscopic inclusions are proven wrong by mitochondrial testing. The error rate for past cases at the state and local level is undoubtedly much higher. In the state of Oklahoma alone, out of the 1,400 cases handled by Oklahoma City Analyst Joyce Gilchrist, there will undoubtedly be hundreds of cases requiring mitochondrial testing of hair samples. All across the country there will be hundreds of post-conviction cases, as well as hundreds of unsolved cases, which require this form of comparatively expensive testing (as much as \$2,000 a hair at some laboratories). The FBI and private laboratories do not have anything near the proper capacity to deal with these cases. It is an important funding priority.

Notes

1. This is not intended as a criticism of NIJ staff; the priorities more reflected, I think, the demands of the public laboratories.
2. For example, typing of 17 unsolved rape kits revealed the existence of a serial rapist who would invariably wear a mask and commit offenses in different boroughs. In one of his attacks, however, the victim was able to pull the mask off his face and provide a sketch to detectives that was helpful in the offender's ultimate apprehension.
3. In December 2001, Gahn obtained a John Doe warrant in order to keep a 1994 unsolved rape case alive beyond the statute of limitations date. Subsequently, the John Doe DNA profile was linked to an incarcerated offender, Bobby Richard Dabney Jr. In March of this year, Dabney was charged with the 1994 rape. The Dabney case was the twelfth John Doe warrant issued in Milwaukee. Similarly, Milwaukee Police Detective Lori Gaglione, through DNA typing of a 1992 unsolved homicide was able to issue a warrant for Leonardo Pimentel Sanchez, a convicted rapist whose sample was in an offender databank based on a 1989 rape. Sanchez had been released and deported from the United States to Mexico eight separate times. If the unsolved case had been typed earlier or generally available, he could have been apprehended. See, Doege, David. "DNA Brings Charge in 1994 Rape; Genetic Profile Warrant Issued Before Match was Found." *Milwaukee Journal Sentinel*, March 15, 2001. In Austin, Texas, four days before the statute of limitations was set to expire, a grand jury indicted "John Doe" for a 1995 rape solely based on the unknown suspect's DNA profile so as to continue and hopefully conclude the investigation in about 100 unsolved rape cases between 1995 and 1998. Villa, Judi. "DNA Puts Heat on Sex-Crime Cases Gone Cold." *The Arizona Republic*, December 18, 2000.