Senate Judiciary Committee Testimony of Barry Scheck
On Post-Conviction DNA Testing
June 13, 2000

SENATOR Hatch: Our first witness is Barry Scheck, who is a professor at Benjamin M. Cardozo School of Law and the co-founder of the Innocence Project. Mr. Scheck is also a member of the National Commission on the Future of DNA Evidence. Personally, I have a lot of respect for him, and we may differ on whether or not there should be a death penalty, but I have a great deal of respect for your knowledge and your ability.

Mr. BARRY SCHECK: Thank you. There's one other qualification I should state that I think may help the committee with my testimony. That is I am a Commissioner of Forensic Science in the State of New York, which means we have a commission which regulates our crime labs and helps set up our DNA databank. And working with Howard Schaeffer (ph), who I sue a lot of times in civil rights actions, the mayor of the city of New York, and Governor Pataki. We've worked hand in hand in cleaning up the DNA backlog. I'm the one that told them to test those 15,000 untyped rape kits in the city of New York. So I think I have a good handle on the cost issue which seems to be of concern in light of Ms. Camps' testimony.

First let me say, Senator Hatch, that there have been at least 73 post-conviction DNA exonerations in North America -- 67 in the United States, six in Canada. Our Innocence Project has either assisted or been the attorney of record in 39 of these cases, including the eight people that were sentenced to death.

In 16 of these 73 cases, the DNA testing has not only remedied the miscarriage of justice, but it's led to the identification of the real perpetrator, just as it did in the case of Dennis Fritz.

With the expedited expanded use of DNA databanks and with the continued technological advances in DNA testing, not only will post- conviction DNA testing continue exonerating people, but it also is going to increase the number of times that we're able to identify the real perpetrator.

There is an urgent need for national legislation to assist in what is actually a narrow but important group of people -- those who have been sentenced to decades in prison or sit on death row, but could show through post-conviction DNA testing that they were wrongly convicted or sentenced.

I am profoundly indebted to you, Senator Hatch, for taking up this cause and holding these hearings. And of course I cannot thank enough Senator Leahy, Senator Feingold, Senator Smith, for cosponsoring the Innocence Protection Act.

Let me just hit a few key points in considering this historic legislation. First, very quickly, we can't limit this just to capital life sentence cases. Neither bill does, but the reason I raise it is that when you look at some of the post-conviction DNA statutes that are passing, particularly the State of Washington, the State of Tennessee, they only limit it to capital cases or life sentence

cases. And what about all the other people like Dennis Fritz who were in jail for decades who can prove their innocence with the DNA test?

The issue of statute of limitations. In the report that Woody Clarke and Jim Wooley and I served on recommendations for handling post-conviction DNA applications, what comes out of our commission on the future of DNA evidence, a commission that was made up primarily of law enforcement people, police chiefs, crime lab directors, prosecutors such as my colleagues. We came to the considered judgment that in terms of seeking a post-conviction DNA application there should be no statute of limitations.

By that I simply mean that if a DNA test could show that with reasonable probability you were wrongly convicted or sentenced, then you should have a chance. And the reason that's so important is that we're looking at cases that are 10, 15, 20 years old. By the time, whatever standards you choose, an inmate is able to find the transcripts, find the lab reports, find the police reports, and make the necessary showing that a favorable DNA test would show reasonable probability of wrongly convicted or sentenced, it takes a number of years. Particularly in jurisdictions where there are no counsel, certainly not in post-convictions, that can handle this. It was true in just about every one of these cases where people were exonerated.

The other point I should jump to right away -- And on this statute of limitations point. Just look at all the people. I mean just since our book, Actual Innocents, was published, Clyde Charles in Louisiana, 19 years in jail in the infamous farm in Angola prison. He spent nine years trying to get the DNA tests.

Another inmate that greatly concerns me, a man named Archie Williams in Baton Rouge, Louisiana. He really gets to the point. He has been convicted in a case where it was one perpetrator, a single eyewitness. The prosecutor took the position at the time of trial that the blood type from the semen matched Mr. Williams. He's asking for a DNA test. The Louisiana courts won't let him have that test. We've been pushing for it for years. We're now in federal court.

The rationale they came up with, and this is why I think the actual innocence standard, Senator Hatch, is too high. The rationale the Louisiana courts came up with -- and it's happening case after case -- is they suddenly said I don't care if the prosecution theory at the trial is that he was the semen donor. It's possible that maybe there was another consensual donor. Maybe the husband of the victim had sex with her. Well that's something we can test with elimination samples, and we've done in case after case. Yet the courts have denied him access, even though it's perfectly appropriate.

If you watch tonight, the Case for Innocence, a Frontline special produced by Alford Beckel (ph), that is going to show you the case of Roy Cliner (ph), the –

SEN. HATCH: What time is that on, do you know?

MR. SCHECK: I don't know when PBS is running it, but it's

SEN. HATCH: It's Frontline?

MR. SCHECK: Yes, and I will send a copy of the tape, sir. It will show the Cliner case. When you see the reasoning of the courts there, it's going to trouble you. So I think actual innocence is too high.

SEN. HATCH: It troubles me now.

MR. SCHECK: We've had so many people who have spent so many years knocking on the doors, unable to get the DNA tests because of the statute of limitations, and I know, given the tenor of these hearings, something's going to be done about it.

Now let me get to the cost point about preserving the biological evidence and why actually the proposal of the Leahy bill is going to help.

As Jim Wooley and Woody Clarke certainly will tell you, we had the people in our DNA commission from the Los Angeles police department crime lab come to us and make a presentation that they have all this evidence and they're afraid to get rid of it.

I can tell you, because we're the ones in the trenches litigating these trenches. The rules on preservation of evidence across the states is totally haphazard. It doesn't even matter what the rules are. It's totally fortuitous whether they save the samples or not.

But if we say if you're in jail and biological evidence could be determinative it should be preserved unless the state comes in and gives you notice, 90 days, and says now we're going to destroy it. That's going to help. And it's going to help remember because every time an innocent person is put in jail the real perpetrator is out there committing more crimes. That's what DNA testing and DNA databanking can help us.

So in these old cases it's a net plus to law enforcement that they have to inventory in a sensible way the old, unsolved cases. There is no bigger supporter than I am of testing these old, unsolved cases.

I have a problem, Senator, just in the language. I hear from the tenor of your remarks that you wouldn't intend it to be a bar, but when we talk about -- "the evidence was not subject to DNA testing requesting because the technology was not available at the time of the trial" –

Taken literally, almost every person exonerated with the DNA tests would be excluded, if it was taken literally. Because since 1988, as Dennis will tell you, there was some form of DNA testing that was in theory out there.
The compromise that our DNA Commission, Leahy bill says, that if a more accurate DNA test can show you innocent, then you have a shot at it, because there have been some improvements in the technology.

SEN. HATCH: I'm for that. So there's no problem. We'll resolve that one way or the other.

I think ours does, but -- Ours is the exact language of the Illinois statute, and we thought we'd solved the problem, I think we have, but we'll look at that. You're making a good point.

MR. SCHECK: The final point I just want to make, as I see my time is up, is that this is going to be a narrow number of cases, really, in the final analysis. Seventy-five percent of the time in these innocence cases the evidence is lost or destroyed, unfortunately, and we can't get the test, even if it could be dispositive on the issue of guilt or innocence. If we pass the Leahy bill, just with that standard today, I don't think nationwide, ultimately, by the time we find the evidence, there would be 100 cases. But these cases are of such critical importance to learning something about the criminal justice system.

In our book, Actual Innocence, we go through what DNA testing shows us in these post-conviction situations. What we can learn about mistaken identification, false confessions, jailhouse informants, bad lawyers, prosecutorial police misconduct, all the causes of convictions of the innocent, and we propose mainstream proposals that Republicans and Democrats, liberals and conservatives, prosecutors and defense lawyers can all get behind because they not only prevent the conviction of the innocent but the lead to the identification of the guilty before they commit more crimes.

That's what this is about. That's what we lay out here. And Senator, I'm so happy that you presented this. It's a race against time. We are in a race against time as they go through bureaucratically destroying the biological evidence that are the keys to freedom of people. Cases, we can learn so much to fix this system and change it.

I agree with Senator Schumer's remarks that this is neutral. Draw what conclusions you may want about the death penalty, but the need for this kind of innocence protection legislation and the need for more standards and more money for counsel, I can't emphasize enough how important that is.

SEN. HATCH: I want an autographed copy of that book, okay?

MR. SCHECK: I brought a whole series, and they're all available for each senator.

SEN. HATCH: I'll put it in my autographed book section after reading it.....

SEN. FEINGOLD: Mr. Scheck, I want to thank you for this book. It was truly an eye-opening examination of the failings of our criminal justice system. I commend you and Peter Neufeld (ph) and Jim Dwyer (ph) and you and your colleagues at the Innocence Project for what you've contributed, and it's been very helpful ...

MR. SCHECK:Thank you, sir.

SEN. FEINGOLD: ... in regard to all that we've done.

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Prepared Statement of Prof. Barry C. Scheck

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Before the Senate Judiciary Committee

There have been at least 73 post-conviction DNA exonerations in North America; 67 in the United States, and 6 in Canada. Our Innocence Project at the Benjamin N. Cardozo School of Law has either assisted or been the attorney of record in 39 of those cases, including 8 individuals who served time on death row. In 16 of these 73 post- conviction exonerations, DNA testing has not only remedied a terrible miscarriage of justice, but led to the identification of the real perpetrator. With the expanded use of DNA databanks and the continued technological advances in DNA testing, not only will post-conviction DNA exonerations increase, but the rate at which the real perpetrators are apprehended will grow as well.

There is an urgent need for national legislation to assist a narrow but important group of people: Those who are sentenced to decades in prison, or sit on death row, but could show through post-conviction DNA testing that they were wrongly convicted or sentenced. I am profoundly indebted to you, Senator Hatch, for taking up this cause and holding these hearings; and, of course, I cannot thank enough Senator Leahy and Senator Smith for co-sponsoring the Innocence Protection Act.

As you consider this historic legislation, I would urge you to keep these key points in mind:

1. Do Not Limit Relief to Capital or Life Sentence Cases.

Only 8 of the 73 post-conviction DNA exonerations involved inmates on death row. People who have been sentenced to decades of incarceration but can prove their innocence deserve an opportunity for justice. Unless there is a uniform requirement that states give inmates such an opportunity, they will not necessarily receive. For example, the State of Washington just passed a post-conviction DNA bill but it only applies in capital or life sentence cases. Fundamental fairness requires an equal opportunity for all classes of inmates across the country to prove their innocence; only federal legislation can provide such a guarantee.

2. No Statute of Limitations.

In our report, Recommendations For Handling Post-Conviction DNA Applications, and in our model statute, the Commission on the Future of DNA Evidence did not create any time limits or

statute of limitations for making a post-conviction DNA application. The key requirements were substantive -- the inmate has to show a reasonable probability that DNA testing would demonstrate he was wrongly convicted or sentenced. I can assure you, based on the work of the Innocence Project, which has done, by far, more post-conviction DNA litigation than anyone else, that the Commission's decision not to create any new time limits or statute of limitations was a considered judgment and a correct one. When one is dealing with old cases (10, 15, sometimes 20 years old) it is difficult to assemble police reports, lab reports, and transcripts of testimony that are necessary to show that a DNA test would demonstrate innocence. Indigent inmates serving hard time may not have the resources or access to counsel to gather the necessary materials expeditiously.

That was true for Dennis Fritz and Ron Williamson who were exonerated with DNA testing in April of 1999 in Oklahoma. Dennis received a life sentence. Ron came within 5 days of execution. DNA testing also identified the person, through a DNA databank hit, who probably committed the rape homicide. It was true for Clyde Charles of Houma, Louisiana who spent 19 years in Angola Prison, the so-called "Farm," and 9 years trying, unsuccessfully, to get a DNA test within the state courts of Louisiana -- they said he was too late -- until we got a federal judge to grant relief pursuant to a Section 1983 suit for injunctive relief. It was true for Herman Atkins of Riverside, California who was released in February of 2000. It was true for Neil Miller of Boston who was released only because, after many years of trying through the courts, District Attorney Ralph Martin consented to DNA testing. It was true for A. B. Butler of Tyler, Texas who was pardoned two weeks ago by Governor Bush after 17 years in jail for a crime he did not commit. Butler attempted unsuccessfully pro se to get DNA testing through the courts for 7 years; he only got testing after the Centurion Ministries and attorney Randy Schaffer got involved and obtained consent to testing from a local district attorney.

Without adequate counsel, and without resources, it is simply unrealistic and unfair to create a new statute of limitations on post- conviction DNA testing. It should be enough for the inmate to show that a DNA test would provide non-cumulative, exculpatory evidence demonstrating that he was wrongfully convicted or sentenced.

3. There Should Be A Duty to Preserve Biological Evidence While an Inmate is Incarcerated.

In 75% of our Innocence Project cases, where we have already determined that a DNA test would demonstrate innocence if it were favorable to the inmate, the evidence is lost or destroyed. Calvin Johnson of Georgia was exonerated after 17 years in prison for a crime he didn't commit but only because, by sheer chance, a court clerk decided not to destroy, as a matter of bureaucratic routine, the rape kit that led to his freedom. The rules for the preservation of biological evidence are totally haphazard across the country. There should be a general requirement to preserve biological evidence and an opportunity for law enforcement, upon notice to an inmate, to move for destruction of the evidence in an orderly way. This would not only preserve the rights of inmates to produce proof of their innocence through DNA testing, but help law enforcement re-test old cases to catch the real perpetrators.

4. There Must Be More Funding to Provide Competent Counsel, Especially in Capital Cases.

Recent revelations reported by the Chicago Tribune about the lack of adequate counsel for inmates on Death Row in Illinois and Texas are troubling but not surprising. The American Bar Association has long been on record about this crisis, and in our book, Actual Innocence, we discuss at great length the terrible problem of incompetent counsel we found among the individuals exonerated with post-conviction DNA testing. DNA testing only helps correct conviction of the innocent in a narrow class of cases; most homicides do not involve biological evidence that can be determinative of guilt or innocence. Nothing guarantees the conviction of the innocent more than a bad or underfunded lawyer. We have to rely on the adversary system, and the key to that system is a defense lawyer who is qualified, has adequate funds for investigation and experts, and is compensated well enough to provide good representation. I strong support those sections of the Leahy - Smith bill that provide for standards and more funding for counsel.

5. Requirements About the Availability of DNA Technology Should Remain Flexible.

In the vast majority of post-conviction DNA exonerations some form of DNA testing was, in theory, available to the defendant at the time of trial. In some instances the form of DNA testing available was not sensitive enough to produce a result, but later testing was able to produce irrefutable evidence of innocence. For example, Kirk Bloodsworth of Maryland, who received a death sentence, had inconclusive DNA testing using RFLP (Restriction Fragment Length Polymorphism Testing) but was exonerated by PCR (Polymerase Chain Reaction) testing. Other times requests for available DNA testing were wrongfully denied by trial courts, or incompetent lawyers failed to request the testing. In other cases, early forms of DNA testing which were not very discriminating (e.g., the PCR DQ Alpha test) and failed to exclude a defendant at the time of trial but a more discriminating DNA test, developed years later, produced proof of innocence. The technology is always advancing and that is why it is wise to provide for the opportunity to prove innocence with new, more accurate DNA testing. Indeed, this is precisely the course Governor Bush adopted in the Randy McGinn reprieve decision. Mitochondrial DNA testing, one of the more sensitive tests that will be used in the McGinn case, can now get results by extracting DNA from the shaft of a hair; previously, one needed a hair with a fleshy root to get a result. This technological breakthrough is of critical importance because microscopic hair comparison -- a forensic test that is increasingly being exposed as junk science -- has contributed to the conviction of at least 18 men subsequently exonerated with DNA testing.

6. Post-Conviction DNA Exonerations Provide An Unprecedented Opportunity To Improve the Criminal Justice System.

Post-conviction DNA exonerations have a special value for improving the entire criminal justice system. Never before have so many people been exonerated so quickly without any debate about their actual innocence. The fact that DNA testing can so exonerate the wrongly convicted is hardly news; what is more important, however, is to figure out how the innocent got convicted in the first place. That is why Peter Neufeld, Jim Dwyer and I wrote Actual Innocence. We not only tell the stories of the innocent wrongly convicted but identify systematically the causes: Mistaken eyewitness identification, false confessions, fraudulent and junk forensic science,

defense lawyers literally asleep in the courtroom, prosecutors and police who cross the line, jailhouse informants and the insidious problem of race. We present mainstream solutions to these problems that conservatives and liberals, Republicans and Democrats, prosecutors and defense lawyers can all support. Certainly one of the most critical reforms is the Innocence Protection legislation you consider today. I urge you to pass a bill this year before more evidence is destroyed or degrades and the slim hope innocent men have to achieve their freedom disappears.

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