

**CHAPTER 6**

**INNOCENCE ISSUES**

## THE ISSUE

Across the nation, 265 wrongfully convicted individuals have been exonerated through post-conviction DNA testing since 1989.<sup>1</sup> Collectively, these men and women served more than 3,370 years in prison for crimes they did not commit. In 119 of the nation's first 265 DNA exonerations, the true perpetrators were identified in the process of settling claims of innocence, many of who had gone on to commit additional serious crimes while the innocent languished behind bars.<sup>2</sup>

These exonerations have demonstrated with absolute certainty that mistaken convictions can and do happen, in states across the country. Without access to DNA testing and preserved evidence, however, none of these exonerations would have been possible. Indeed, it is beyond question that many more wrongful convictions will never be identified because DNA evidence was destroyed and/or the innocent were prevented from having DNA evidence tested after their wrongful conviction.

## HISTORY OF THE PROBLEM

### 1. History of the Justice for All Act

Recognizing this need, Congress passed, with overwhelming bi-partisan support, the Justice for All Act (JFAA) in 2004.<sup>3</sup> Title IV of the JFAA, the Innocence Protection Act (IPA), established a funding mechanism to settle claims of innocence through post-conviction DNA testing, and produced a set of innocence protections. The Act has long been championed by Senator Patrick Leahy (D-VT), and members on both sides of the aisle, in both the House and Senate, have taken strides to reauthorize and re-appropriate its provisions.

Specifically, the innocence protection provisions of the JFAA include: a requirement that recipients of Paul Coverdell Forensic Science Improvement Grants (Coverdell Program)<sup>4</sup> – a source of financial support to crime labs – certify the presence of a governmental entity positioned to conduct independent, external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of forensic results; the creation of the Kirk Bloodsworth Post Conviction Review Grant Program (Bloodsworth Program),<sup>5</sup> which provides funding for post-conviction DNA case review and testing; and a directive that recipients of DNA Training and Education for Law Enforcement, Correctional Personnel and Court Officers, DNA Identification of Missing Persons, and DNA Research and Development) (Section 413 Programs) create statewide

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<sup>1</sup> Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/> (last visited Jan. 10, 2011).

<sup>2</sup> Among the first 255 exonerations, 94 real perpetrators have been identified (affecting 111 exonerees, among which nearly half were convicted of additional violent crimes. These 44 real perpetrators went on to commit 61 sexual assaults, 21 murders and nine other violent crimes. Interview with Dr. Emily West, Research Director, Innocence Project in New York, N.Y. (Jan. 3, 2011).

<sup>3</sup> Justice for All Act, Pub. L. No 108-405 (codified in scattered sections of 42 U.S.C.).

<sup>4</sup> 42 U.S.C. § 3797k(4).

<sup>5</sup> 42 U.S.C. 14136(e).

schema for both access to post-conviction DNA testing and adequate preservation of biological evidence.<sup>6</sup>

The Bloodsworth Program, in particular, has aided agencies seeking to help free the wrongfully convicted. The program's administrator, the National Institute of Justice (NIJ) has encouraged state applicants to draft proposals that fund a range of entities involved in settling innocence claims, from law enforcement agencies to crime laboratories. Additionally, the Bloodsworth Program has fostered the cooperation of innocence projects and state agencies. For example, with the \$1,386,699 that Arizona was awarded for fiscal year 2008, the Arizona Justice Project, in conjunction with the Arizona Attorney General's Office, began the Post-Conviction DNA Testing Project.<sup>7</sup> Together, they have canvassed the Arizona inmate population, reviewed cases, worked to locate evidence, and filed joint requests with courts to have evidence released for DNA testing. In addition to identifying the innocent, Arizona Attorney General Terry Goddard has noted that the "grant enables [his] office to support local prosecutors and ensure that those who have committed violent crimes are identified and behind bars."<sup>8</sup> Similar joint efforts have followed in Connecticut, Louisiana, Minnesota, North Carolina, and Wisconsin.<sup>9</sup>

In a laudable move that will help the Bloodsworth program – and, indeed, all states and localities – realize the probative potential of preserved biological evidence, the NIJ recently funded a National Institute of Standards and Technology project to create a national working group with the goal of identifying best practices relating to proper evidence preservation. The group had its first meeting in August 2010, and hopes to promulgate its recommendations and guidance to states by early fall 2012.<sup>10</sup>

## 2. Causes of Wrongful Convictions

It is not enough, however, to ensure that those wrongfully convicted men and women who remain in prison have the tools with which to prove their innocence. These compelling cases of wrongful convictions demand a conscientious review of what went wrong in these cases leading fact-finders to believe beyond a reasonable doubt that an innocent person was guilty of every element of these serious crimes. Those exonerated by DNA testing are not, after all, the only people who have been wrongfully convicted in recent decades. For every case that involves DNA evidence, there are

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<sup>6</sup> 42 U.S.C. § 14136 note.

<sup>7</sup> Sandra Day O'Connor College of Law, *Arizona receives federal DNA grant*, COLLEGE OF LAW NEWS (Oct. 21, 2008), available at: <http://community.law.asu.edu/news/19167/Arizona-receives-federal-DNA-grant.htm%20%28last%20visited%20Jan.%202010,%202011%29>.

<sup>8</sup> Press release, Justice Project, *Arizona Receives Federal DNA Grant* (October 9, 2008), available at: [http://www.azag.gov/press\\_releases/oct/2008/Justice%20Project%20Release.pdf](http://www.azag.gov/press_releases/oct/2008/Justice%20Project%20Release.pdf).

<sup>9</sup> *Strengthening Our Criminal Justice System: Extending the Innocence Protection Act, Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2009) (statement of Keith Findley, Professor of Law, University of Wisconsin), available at: [http://judiciary.senate.gov/hearings/testimony.cfm?id=4162&wit\\_id=8302](http://judiciary.senate.gov/hearings/testimony.cfm?id=4162&wit_id=8302).

<sup>10</sup> Interview with Rebecca Brown, Policy Advocate and Member of the NIST/NIJ Technical Working Group on Biological Evidence Preservation, Innocence Project in New York, N.Y. (Jan. 3, 2011).

many that do not. Reviewing the cases of those for whom DNA has proven innocence helps to pinpoint weaknesses in the justice system that, if addressed, can reduce the number of wrongful convictions. Learning from wrongful convictions does not just protect the innocent; it also enhances the accuracy and efficacy of our criminal investigations. Every time an innocent person is wrongfully suspected, arrested, prosecuted, or convicted, the justice system's focus is distracted from the real perpetrators of these serious crimes, and public safety is put at risk.

In response to the proliferation of wrongful convictions across the country, many states have formed statewide commissions to identify and remedy the causes of wrongful conviction.<sup>11</sup> These efforts have proven incredibly valuable in those states, but because these causes transcend state borders, a more uniform and comprehensive approach to learning from wrongful convictions would be of tremendous value to the nation as a whole.

Last year, Senators Jim Webb (D-VA), Lindsey Graham (R-SC), and Orrin Hatch (R-U), along with Representatives William Delahunt (D-MA), Darrell Issa (R-CA), Marcia Fudge (D-OH), Tom Rooney (R-FL), and House Crime Subcommittee Chairman, Robert Scott (D-VA), introduced the National Criminal Justice Commission Act of 2010 (S. 714 111th Cong. (2010); H.R. 5143, 111th Cong. (2010)), which would create a commission to study and recommend reform of the broader criminal justice system.<sup>12</sup> The bill passed in the House in July with a voice vote and awaited passage in the Senate.<sup>13</sup> Integral to such an examination of criminal justice reform is an analysis of wrongful convictions and their causes, as they reflect deeper concerns with the system as a whole. Indeed, a federal inquiry into the causes of wrongful convictions will strengthen the capacity of the criminal justice system to make guilt/innocence determinations more accurate, promising in turn to provide guidance to states in their efforts to bolster their respective fact-finding endeavors.

### 3. Compensation for the Wrongfully Convicted

Just as it is important to learn from and seek to prevent wrongful convictions, it is also imperative that those men and women who suffered wrongful conviction and imprisonment be fully compensated for that harm. Twenty-seven states and Washington D.C. provide a statutory scheme by which to compensate the exonerated.<sup>14</sup> Such compensation is critical to the ability of the wrongfully convicted to rebuild their lives in earnest. These men and women face a myriad of significant challenges to successfully returning to the community from which they were wrongfully removed. Upon their release from prison, these individuals deserve, at a minimum, the removal of avoidable financial roadblocks in their efforts to begin their lives anew.

In an effort to ensure that wrongful conviction recoveries are not unfairly taxed as income, Representative John Larson (D-CT) and Senator Charles Schumer (D-NY) introduced the Wrongful

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<sup>11</sup> See, Innocence Project, *Innocence Commissions in the U.S.*, [http://www.innocenceproject.org/Content/Innocence\\_Commissions\\_in\\_the\\_US.php](http://www.innocenceproject.org/Content/Innocence_Commissions_in_the_US.php) (last visited Jan 20, 2011).

<sup>12</sup> S. 714, 111th Cong. (2010); H.R. 5143, 111th Cong. (2010).

<sup>13</sup> *H.R. 5143: National Criminal Justice Commission Act of 2010*, NEW YORK TIMES, <http://politics.nytimes.com/congress/bills/111/hr5143>.

<sup>14</sup> Innocence Project, *State Compensation Laws*, <http://www.innocenceproject.org/news/LawView1.php> (last visited Jan. 10, 2011).

Conviction Tax Relief Act of 2010 (H.R. 4743, 111th Cong. (2010)).<sup>15</sup> The bill would have clarified federal tax law so that compensation awards received are not subject to federal income tax. The legislation would have also provided the wrongfully convicted with an income tax credit on payroll taxes paid over the same earnings.

The unique horrors suffered by the 265 men and women who have spent an average of 13.2 years behind bars for crimes they did not commit compel action. Otherwise, their lost years – and the relationships, professional development and life experiences that they lost with them – will have been in vain.

## RECOMMENDATIONS

### 1. The Justice for All Act

#### A. *The Justice for All Act is Not Being Enforced to its Full Potential.*

The JFAA, legislation passed by a bi-partisan Congress, represents a significant step towards uncovering and preventing wrongful convictions. The incentives and programs it created to make testing post-conviction DNA – and thus the discovery of the wrongly convicted and the real perpetrator – possible, must continue to be enforced and funded.

#### B. *Ensure Effective Administration of the Justice for All Act.*

##### *Legislative*

Congress, through its Judiciary Committees, should ensure the reauthorization of all four programs governed by the Section 413 innocence protection requirements, through FY 2014. These Section 413 programs were written to ensure that states and localities receiving federal funding possess schema for biological evidence retention and post-conviction DNA testing. In doing so, Judiciary Committee members should consider the Department of Justice’s proposal to amend the JFAA’s language to more easily allow for the disbursement of program funds.

As a result of its stated difficulty in administering the Bloodsworth Program in years past, the Department of Justice sought the following provisional language to loosen Section 413 grant requirements and assure the disbursement of unspent, unobligated funds, as well as those funds for the remaining fiscal years in the funding cycle:<sup>16</sup>

<sup>15</sup> H.R. 4743, 111th Cong. (2010).

<sup>16</sup> *Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs? Hearing Before the S. Comm. on the Judiciary, . 110th Cong., 2d Sess., 27 (2008) (testimony of Dr. John Morgan).*

\$5,000,000 shall be for the purposes described in the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program (Public Law 108-405, section 412): Provided, that unobligated funds appropriated in FY 2006 and FY 2007 for grants as authorized under sections 412 and 413 of the foregoing Public Law are hereby made available, instead, for the purposes herein before specified....<sup>17</sup>

The Department of Justice represented that this provisional language freed them from the constraints of the JFAA's authorizing language, and would ultimately allow for the disbursement of funds associated with this grant program.<sup>18</sup> This language should also apply to the other Section 413 Programs when reauthorized, so that states have a strong incentive to comply with the innocence protections sought in the JFAA.

The Appropriations Committees should continue to fund these critical programs at current levels, through either the current or proposed disbursement language discussed above.

Finally, Congress, through the work of the Judiciary Committees, should maintain the present statutory forensic oversight requirements for the Coverdell Program. These oversight requirements are central to ensuring that the states are equipped to discover errors in forensic examinations – errors that may lead to wrongful convictions.

#### *Executive*

The Department of Justice, through the Office of Justice Programs (OJP), is well-positioned to ensure vigorous enforcement of the JFAA. OJP should loosen current procedural and administrative burdens on potential Bloodsworth Program applicants (e.g. certification from the Chief Legal Officer) to achieve even distribution of post-conviction DNA testing monies across deserving applicant states and localities in need.

Additionally, OJP should more rigorously enforce the forensic oversight requirements of the Coverdell Program by verifying the existence of the appropriate forensic oversight entity and process upon an applicant's application for such funds. OJP should also track state and local responses to allegations of negligence or misconduct in forensic analyses in a way that ensures that such responses are in line with the program's purpose, and that allow it to take appropriate measures if such responses are not.

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<sup>17</sup> Consolidated Appropriations Act, 2008, Pub. L. No. 110-161.

<sup>18</sup> *Id.*

## 2. Addressing Innocence through a Federal Commission

### A. *Wrongful Convictions are an Issue Nationwide; They do not Stop at State Borders*

Each DNA exoneration should be looked upon as an opportunity to identify both the criminal justice system's shortcomings, and the remedial steps that can be taken to prevent other wrongful convictions. The federal government is particularly well-positioned to help analyze the nation's exonerations and to promulgate suggestions for state reforms.

### B. *Establish a Federal Commission to Address Causes and Remedies of Wrongful Convictions*

#### *Legislative*

Congressional members should reintroduce and work to pass the National Criminal Justice Commission Act,<sup>19</sup> a legislative proposal which would create a commission to study and recommend reform of the broader criminal justice system, and ensure that innocence issues are included in the commission's work.

In the alternative, Congress should pass legislation that would establish an independent, federal innocence commission. Appropriate appointments are critical. Whether established through legislative action or executive order, as suggested below, such a commission should have independent investigative powers, and be comprised of key players from throughout the criminal justice system, including: prosecutors, judges, law enforcement officials, defense attorneys, forensic scientists, crime lab representatives, victim advocates, the wrongfully convicted, and Innocence Project representatives.

This commission should be charged with examining post-conviction DNA exoneration cases to establish the causes of wrongful conviction in each case. The commission should also be responsible for recommending reforms to the federal criminal justice system, and creating a template of such legislative and administrative reforms that could then be adopted by the individual states. Key features of an effective commission include access to first-rate investigative resources, political independence, and subpoena power.

#### *Executive*

The President should issue an Executive Order establishing a presidential innocence commission with the same foci as discussed above.

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<sup>19</sup> S. 714, 111th Cong. (2010); H.R. 5143, 111th Cong. (2010); *See System Change*, in SMART ON CRIME (2011).

### 3. Wrongful Conviction Tax Relief

#### A. *It is Unclear Whether Wrongful Conviction Recoveries are Subject to Federal Taxation*

When an innocent person is convicted of a crime, that person is robbed of his or her freedom, family, and livelihood to be put through the unique horror of prison. The difficulty of reentering society is profound. To make matters worse, all compensation packages are, in theory, currently subject to federal taxation.

#### B. *Exempt Compensation to the Wrongfully Convicted from Federal Income Tax*

##### *Legislative*

Congress should work to pass a reintroduced version of Wrongful Convictions Tax Relief Act of 2010, which would amend the Internal Revenue Code to clarify that wrongful conviction compensation packages are not subject to federal income tax.<sup>20</sup>

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<sup>20</sup> H.R. 4743, 111th Cong. (2010).

## APPENDICES

### Experts

Barry Scheck, Co-Founder, Innocence Project  
(<http://www.innocenceproject.org/about/Contact-Us.php>)

Peter Neufeld, Co-Founder, Innocence Project  
(<http://www.innocenceproject.org/about/Contact-Us.php>)

Exonerees: many of the nation's 265 DNA exonerees will speak in support of and the need for these reforms (<http://www.innocenceproject.org/know/>)

### *Innocence Commissions*

Hon. John K. Van de Kamp, Chair, California Commission on the Fair Administration of Justice (<http://www.ccfaj.org/m-JohnVanDeKamp.html>)

Senator Stewart J. Greenleaf, Pennsylvania Republican Senate Judiciary Chair and Sponsor of legislation establishing an Advisory Committee on Wrongful Conviction in Pennsylvania ([http://www.legis.state.pa.us/cfdocs/legis/home/member\\_information/senate\\_bio.cfm?id=173](http://www.legis.state.pa.us/cfdocs/legis/home/member_information/senate_bio.cfm?id=173))

Beverly Lake, Jr., former Chief Justice of the North Carolina Supreme Court and creator of the North Carolina Actual Innocence Commission  
(<http://www.shanahanlawgroup.com/Bio/ILake.asp>)

### Further Resources

BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (New American Library 2000).

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *FINAL REPORT (2008)*, available at <http://ccfaj.org/documents/CCFAJFinalReport.pdf>.

NEW YORK STATE BAR ASSOCIATION, *TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT (2009)*, available at: <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf>.

Innocence Project, [www.innocenceproject.org](http://www.innocenceproject.org) (last visited Jan 10, 2011).  
Justice for All Act, Pub.L. No 108-405, *available at*: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_bills&docid=f:h5107enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h5107enr.txt.pdf).

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