



National Institute of Justice

Postconviction DNA Testing Assistance Program Roundtable Summary

June 2-3, 2011
Arlington, VA

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Postconviction DNA Testing Assistance Program Roundtable Summary

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Speakers

- **Justin Brooks**, Executive Director, Institute for Criminal Defense Advocacy
- **Rebecca Brown**, Senior Policy Advocate for State Affairs, the Innocence Project, New York, NY
- **Christine Cole**, Executive Director, Program in Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University
- **Lindsay Herf**, Project Manager, Arizona Justice Project
- **Gerald LaPorte**, Program Manager, Office of Investigative and Forensic Sciences, National Institute of Justice, U.S. Department of Justice
- **John Laub**, Director, National Institute of Justice, U.S. Department of Justice
- **Michele Nethercott**, Project Manager, University of Baltimore Law Clinics
- **Natalie Roetzel**, Chief Staff Attorney, Innocence Project of Texas
- **Stephen Saloom**, Policy Director, The Innocence Project
- **Barry Scheck**, Co-Director, The Innocence Project
- **Michael Ware**, Chief, Special Fields Bureau, Dallas County District Attorney's Office

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Welcoming Remarks

John Laub, Director, National Institute of Justice, U.S. Department of Justice, Washington, DC

Dr. John Laub, Director of the National Institute of Justice (NIJ), described his agency as the research and evaluation arm of the Department of Justice (DOJ). He stated that NIJ is in the process of developing an innovative, integrated research agenda, wherein "integrated" means bringing together the three sciences that form the bedrock of NIJ — the social, forensic, and physical sciences — to serve NIJ's constituencies. One of the ideas he is emphasizing at NIJ is [translational criminology](#) (translational research, he explained, moves scientific discoveries into policy and practice). When applied to criminology, the result will be the ability to prevent, reduce, and manage crime.

Translational criminology aims to break down barriers between basic and applied research by creating a dynamic interface between research and practice. This process is a two-way street — scientists discover new tools and ideas for use in the field and evaluate their impact. In turn, practitioners provide observations from the field that stimulate basic investigations. Translational criminology also calls for systematic knowledge dissemination, and successful dissemination of research findings requires multiple strategies.

Dr. Laub characterized the Roundtable as a perfect example of translational criminology. Advances in DNA science have led to the exoneration of innocent inmates. He referred to a May 26, 2011, *New York Times* article on exoneration by University of Virginia School of Law professor Brandon Garrett. Garrett authored a book exploring why 250 individuals who were exonerated were wrongly convicted.

NIJ is currently funding 15 states in their efforts to conduct postconviction DNA testing. Dr. Laub noted that this work has had an impact not only on exonerations but also on evidence location and other important areas. He added that the meeting would help states in their efforts to spend funds on the most critical issues. NIJ wants to learn more about factors that lead to false convictions and barriers that are impeding the Innocence Projects. Dr. Laub noted that a meeting of the grantees was held in San Diego in May 2011 to discuss successes and challenges. The information obtained there provided the basis for the Roundtable topics. He thanked Mr. Gerry LaPorte, program manager at the Office of Investigative and Forensic Sciences at NIJ, as well the meeting participants. He expressed his commitment to improving the postconviction DNA program.

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Meeting Overview

Gerald LaPorte, *Program Manager, Office of Investigative and Forensic Sciences, National Institute of Justice, U.S. Department of Justice*

Mr. LaPorte provided an overview of the Postconviction DNA Testing Assistance Program. He observed that there has been concern about the small number of program applicants. NIJ hopes to increase this number by determining why states are not applying and finding out what can be done to help them. Another concern is that the states that have been awarded funding are not spending it in an expeditious manner. At the May grantee meeting, it became clear that the 18-month time frame of the grant is not long enough and might need to be lengthened. Review of postconviction cases is an inherently slow process involving lengthy investigative, judicial, and forensic testing elements. Laboratories often have backlogs of several months to a year. Mr. LaPorte noted that collaboration among the various entities involved can help speed up the process, and collaborative relationships will be emphasized in the next grant solicitation. NIJ would like to see law enforcement agencies participate as well as defense attorneys and prosecutors.

NIJ is trying to identify a model program that can be used to help other states. However, he noted that the 50 states are in some respects like 50 countries, in the sense that they each have unique processes. What works well in one jurisdiction does not always work well in another. At the May meeting, the grantees learned from one another, and Mr. LaPorte said he hoped that process would continue. He stated that everything said during the Roundtable would be in the public record, and he added that the notes from the grantee meeting would be made available.

Mr. LaPorte asked for ideas to make the program better and more efficient. He said NIJ would like to reach out to a number of states that did not apply. The information from the grantee meeting and

from the Roundtable might lead to some documentation that could help those states be comfortable with applying.

Christine Cole, *Executive Director, Program in Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University*

Ms. Christine Cole described her role as a facilitator. She encouraged candid and open conversation to help NIJ reach its objectives. She said that although all discussion points would be documented, specific comments could be kept off the record in any public report unless permission was given.

Ms. Cole and Mr. LaPorte asked participants to keep an open mind during the presentations as they heard different perspectives. They wanted the Roundtable to be seen as an educational opportunity. The organizations represented included defense attorneys, prosecutors, police, victims of crime, district attorneys, governors, judges, forensic specialists, and state legislators so that all views could be heard. Those in positions of leadership were asked to bring new information back to their constituencies.

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Postconviction: A National Perspective

These presentations addressed the current state of postconviction statutes, provided updates on Innocence Projects across the country, and touched on the programs' work with integrity units.

Postconviction DNA Testing Statutes in the United States: A National Perspective

Stephen Saloom, *Policy Director, The Innocence Project, New York, NY*

In his introductory remarks, Mr. Stephen Saloom discussed the Innocence Network (www.Innocencenetwork.org), which is an affiliation of Innocence Projects dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence in crimes for which they have been convicted, and working to redress the causes of wrongful convictions. There are 66 member organizations worldwide and 57 domestic programs that cover the entire country. In some states there are multiple projects, including those that cover more than one state. Some take cases from across the nation. They have achieved 29 exonerations based on both DNA and non-DNA evidence.

These organizations work with criminal justice partners to change practice. Many work with policymakers to create laws on various issues. Some collaborate with police agencies to determine what can be done to prevent wrongful convictions. Although some projects have many staff members, others have one or only a few. They must be efficient while providing quality services.

Mr. Saloom noted that the project provides model legislation on its Web site. He said 48 states allow DNA testing in one form or another. They believe that if there is DNA evidence available that can provide evidence of innocence, it should be tested — there is no need to leave the question outstanding. He said DNA can help us understand whether the system got it right or whether there is a serious question that the court should reconsider.

Mr. Saloom began his formal presentation by stating that 30 states either explicitly or implicitly do not limit testing to those currently incarcerated. The network of member organizations believes that testing access should be provided to:

- Persons civilly committed or on parole or probation, subject to sex offender registration.
- Persons who have finished serving their sentences.

He pointed out that even petitioners who are not incarcerated suffer collateral consequences of their wrongful convictions. Perhaps most importantly, they want the world to recognize that they did not commit the serious crimes for which they were convicted. In addition, the real perpetrators might still be out there, so a wrongful conviction has far-reaching consequences.

Mr. Saloom noted that 16 states and the District of Columbia affirmatively allow testing for those who have pled guilty. A number of other states allow it, even though they do not have a specific statute. He added that when they drafted a model for an Innocence Project in 1994, they initially did not include those who had pled guilty. He now believes testing access should be provided to:

- Persons convicted on a plea of not guilty, guilty, or *nolo contendere*.
- Persons deemed to have provided a confession or admission related to the crime, either before or after conviction.

Of the 271 DNA exonerations nationally, 28 percent involved a plea or confession. Mr. Saloom noted that 33 states and the District of Columbia do not put a timeline on filing a petition for postconviction DNA testing. He explained that petitions can be difficult to file on time for many reasons, such as:

- Litigation realities:
 - The length of time needed to review trial transcripts, re-investigate, etc.
 - Poorly preserved records.
 - Missed deadlines because of backlogs and thoroughly vetted cases.
- Litigant (and *pro se*) realities:
 - Illiteracy.
 - Low IQ.
 - Learning disabilities.
 - Lack of resources (e.g., lack of money or access to hire an attorney, or lack of access to law libraries).
 - No notice to litigants of rights and limitations.

The general Standard of Proof used around the country is: "Is there a reasonable probability of a different outcome?" For example: "The court shall order testing upon a finding of ... a reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing at the time of the original prosecution"

The question is whether the original trial verdict would stand if the fact finder at the time had known of the newly discovered DNA evidence. The alternative tends to require the petitioner to solve the crime for which he or she was wrongfully convicted. However, at least seven states have decidedly higher bars than "reasonable probability."

In all, 27 states require a judge to assume exculpatory results when considering petitions for postconviction DNA testing. Mr. Saloom emphasized that no one knows an outcome until testing is done; judges should not make assumptions based on past evidence. The statutes, he said, should require the court to assume exculpatory or favorable results.

- Whether to test should not be dependent on an individual court's assessment of the evidence (uniformity of results).
- When DNA testing can provide significant proof of innocence, case work has shown that, despite overwhelming indications of guilt, a wrongful conviction may have occurred.
- Such testing also may enhance public safety.

A Judicial Order of Evidence Inventory is explicitly permitted or required in 11 states. Often, evidence is scattered across the criminal justice system and is proving difficult for petitioners to locate. However, without evidence, a DNA petition cannot proceed. Although it is not always easy to convince busy people to look for evidence, an inventory of evidence can speed up the postconviction process. Therefore, statutes should direct the court to order an inventory of evidence or require the state to prepare such an inventory.

Currently, 39 states and the District of Columbia allow new technology as a basis for ordering additional DNA testing. DNA technology has progressed rapidly since the 1980s, and tests continue to become even more sensitive and discriminating. Therefore, judges should be allowed to order testing. Statutes should permit retesting when new technology is available that provides a reasonable likelihood of more probative results.

Mr. Saloom explained that six states explicitly permit judges to order a comparison of tested DNA with the Combined DNA Index System (CODIS). In many instances, the DNA evidence suggests innocence but the person remains in a state of limbo. Sometimes, a defendant's ability to prove innocence depends on being able to identify the real perpetrator of the crime. Judges often believe that they need explicit power to order CODIS comparisons. The databases can demonstrate links of the DNA profile in the case to those from other crimes or other offenders. Mr. Saloom said that the database potential is greatly underused and that statutes should allow for comparison of unknown DNA profiles, developed through postconviction DNA testing, with CODIS.

Twenty-three states and the District of Columbia either require or permit a judge to appoint counsel for postconviction DNA testing proceedings. Postconviction petitions deal with fundamental questions of life and liberty and can be quite complicated. Therefore, statutes should permit or require the court to appoint counsel.

Mr. Saloom closed by mentioning three other issues to consider — preservation of evidence; reactivation of victim services, such as notification; and expunction of criminal records.

Postconviction DNA and Conviction Integrity/Professional Integrity Units

Barry Scheck, *Co-Director, the Innocence Project, New York, NY*

Mr. Barry Scheck recalled the creation of the National Commission on the Future of DNA Evidence, created when then-U.S. Attorney General Janet Reno's Justice Department began dealing with postconviction DNA issues in 1998. The recommendations of this group, which included Mr. Scheck, encouraged cooperation among prosecutors, defense attorneys, laboratories, victim advocates, and the judiciary. The commission members worked in small groups, developing a series of best practice guidelines that were disseminated in monographs. Topics included postconviction DNA testing and recommendations for victims, crime labs, judges, and the defense as well as recommendations on when testing should take place. Only later was a model developed for a postconviction DNA statute. Mr. Scheck said these guidelines were adopted voluntarily across the country even before any statutes were passed. However, he expressed regret that the commission did not consider ethics issues sooner.

Mr. Scheck provided an overview of his presentation, which described organizing principles for conviction integrity and professional integrity units, identified the important issue of CODIS hits in closed cases, and proposed using the Automated Fingerprint Identification System (AFIS) to resolve closed and cold cases. He stated that these proposals are consistent with DOJ's emphasis on collaboration and evidence-based practices.

Mr. Scheck pointed out that the greatest potential of the NIJ grants can be realized when there are collaborative relationships among police, judges, and attorneys. This speeds up the process and costs less than having to litigate every decision.

He described conviction integrity units as independent groups within the district attorney's offices that review possible miscarriages of justice. They work with innocence projects, the defense, inmates who petition, and other parties. They provide postconviction discovery, conduct cooperative investigations, share leads, and discuss investigative strategy (e.g., who is more likely to get truthful evidence? who should be the one to talk to the witness?). Dallas and Houston have formal units that serve as models. The investigative process is initiated by the Defense Bar. They have to make decisions on whether a case rises to the required level of evidence. Those who investigate should be independent — not those who handled the case the first time.

Conviction integrity units operate in accordance with ABA 3.8 (i.e., they will investigate and disclose evidence leading to clear and convincing proof of misconduct). They document police, prosecutorial, or defense lawyer errors or misconduct, but they refer to professional integrity units (remediation of errors) or the Bar for more serious violations. Mr. Scheck stated that it is beneficial to have one of these groups in a prosecutor's office. They should systematically review old cases.

Professional integrity units are independent entities that conduct quality assurance and quality control (QA/QC) for an office. They use evidence-based processes to review errors or misconduct, audit line personnel and supervisors, and develop best practices and checklists. They interface with training efforts and have strong ties to the chief district attorney.

Mr. Scheck then turned to the issue of CODIS hits in closed cases (where there have been guilty pleas or convictions). The issue arises when DNA profiles from crime scene evidence (i.e., biology from probative places) in these cases produce hits from newly identified defenders or other crime scene evidence. The question is, "What should a prosecutor do?" He stated that prosecutors should investigate and disclose these incidents. If it is concluded that the information is irrelevant, the court and defense (or defendant) should be notified. An Innocence Project should be notified that there might be a case in the queue either before or after the investigation and decision. The Innocence Projects would want to know if there is a CODIS hit on someone who is claiming innocence and is asking them to review their case. This would save time for everyone. Mr. Scheck noted that, in Pennsylvania, a prosecutor sat on an exculpatory hit identifying a guilty third party for 3 years (i.e., the "Pat Brown problem").

There are many more CODIS hits in closed cases than is commonly understood. Mr. Scheck said it appears, on the basis of discussions with DNA prosecutors, that CODIS hit information goes to the police, who do not pass it along because it is part of a closed case. More information is needed on the number of hits that occur and whether there are systems in place to respond to them.

Information about CODIS hits on closed cases does not go directly to the district attorney's office — if it did, there would be more investigation. In all likelihood, cases might be reported to police departments, which already have too many cases and are probably not interested in re-opening a closed case. Mr. Mitchell Morrissey of the Denver District Attorney's Office doubted that this information would even be disclosed to the investigating detectives. He thought that no police

personnel were being notified. As a DA, he has never seen one of these hits. It is possible the information may go to a staff member who files it or does not know what to do with it. Mr. Scheck said he believed that thousands of these hits are taking place with no follow-up, and the CODIS system is not being used to its maximum advantage.

Mr. Scheck turned to the issue of AFIS hits in closed or cold cases, suggesting that improvements in AFIS could provide opportunities similar to the NIJ grant collaborations. He stated that cases with new evidence should be pursued, with or without DNA, and noted cases that were solved with fingerprint hits. He said an Act of Congress or changes in state laws were not necessary to provide AFIS access and pursue justice, although these remedies should be sought.

Cases can be solved using latent fingerprints; in some respects, this is no different than using the CODIS system. Mr. Scheck observed that, in a perfect world, the Bloodsworth legislation would be amended to include fingerprints, but it is difficult to get anything through Congress right now. However, it is possible to move forward, just by issuing some best practices on fingerprints. He suggested that, for every DNA case, fingerprint evidence should be considered as well and that this practice could be adopted immediately. Historically, he added, people are not skilled at examining fingerprints.

Questions and Comments

Mr. Morrissey noted that information about CODIS hits on closed cases goes to his lab because they are part of the police department. Mr. Scheck reiterated that all DAs should be notified about these hits, and this should be mandated. He stressed that it is important to act on information that becomes available through existing computer systems.

Ms. Gail Jaspen, chief deputy director of the Virginia Department of Forensic Science, commented that a circuit judge recently dismissed a case on fingerprint evidence. She asked if the strength of the evidence depends on the fingerprint examiner. Mr. Scheck responded that the National Research Council of the National Academy of Sciences recently issued a report on forensic evidence, including fingerprint evidence, available online at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>. He noted that current forensic processes were not developed by the mainstream scientific community, and the technology is a long way from being able to produce reliable matches. He explained that every time a fingerprint is taken, it is different, and there are also examiner errors. He recommended that there be a higher standard for AFIS hits, and he called on the government to provide more funding for statistically validated fingerprint associations, as was done with DNA. He predicted that, within 10 years, fingerprints will be as reliable as DNA evidence.

Mr. Thomas MacClellan of the National Governors Association (NGA) (director of its Homeland Security and Public Safety Division) noted that the NGA is planning a roundtable on technology and its impact on crime policy. He stated that they do not know how efficient states or localities are in following up on CODIS hits on active cases, much less on closed or cold cases. Mr. Saloom noted that, although there are legitimate reasons for not following up on some CODIS hits, many others are not acted on for unknown reasons. He said the potential of CODIS is being wasted, and it is important to use these databases in their full capacity. He noted that Mr. MacClellan's organization is on the cutting edge, but they do not have traction on this issue either.

Ms. Jaspen, of the Virginia Department of Forensic Science, stated that their CODIS hits go back to the original investigating agency. Mr. Morrissey said the Denver DA's office had a CODIS project with more than 100 hits, and a police detective was fired because of a lack of follow-up. He told his own police department that they could lose their jobs over this issue, and they were able to tell him where everything was within 2 days. He said that sometimes a detective puts CODIS hits in a basket

but does not know what they are; these notifications might be going to a staff member who just files them. Mr. Scheck asked where the responsibility should lie. He said in his view, police chiefs should be fired when these cases fall through the cracks because they are the ones responsible for training their personnel. He insisted that a bright light must shine on this issue, starting from the top.

After the break, Mr. LaPorte provided the Web site address for the free resource, [FIDEX \(Forensic Information Data Exchange\)](#).

The FIDEX tool provides an electronic platform that allows exchanges of forensic information among criminal justice stakeholders, including law enforcement, crime labs, and the courts.

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Postconviction DNA Testing Assistance Programs

The following three presentations highlighted work that is under way with NIJ's Postconviction DNA Testing Assistance Program grantees. The project's representatives summarized their programs, with an emphasis on successes and challenges.

The Arizona Bloodsworth Program

Lindsay Herf, *Project Manager, Arizona Justice Project, Tempe, AZ*

Ms. Herf described the Arizona project as a collaborative effort among the Arizona Justice Project, the Arizona Attorney General's Office, and the Arizona Criminal Justice Commission. The close collaboration of these offices began with the Larry Youngblood exoneration case. Ms. Herf emphasized the importance of postmortem analysis of these cases.

The initial implementation plan for the project in Arizona was not very successful. It involved a one-time canvassing of public defenders and prosecuting agencies, using the State Bar Web site to disseminate information about press conferences and send e-mails to attorneys. The project also contacted judges throughout the state. These efforts resulted in only three new case referrals, so the project initiated a second outreach attempt. They obtained a list from a judge and reviewed all petitions for DNA testing that were already filed with the courts, put an ad in a magazine, and talked to prison chaplains. This effort resulted in approximately 30 cases.

The project then went to the Department of Corrections to conduct prison outreach with 10 prisons in Arizona (all those that housed inmates found guilty of homicide or sexual assault) through live and televised prison presentations. To reach people on death row and others who could not be contacted directly, they used television, magazine articles, and letters to out-of-state prisons. This resulted in 287 applicants (less than 5 percent of the target group).

Ms. Herf displayed the project's screening, case review, and testing flowchart. She said the cases that remain after case review are discussed at monthly meetings of the Justice Project and the attorney general. If testing is deemed warranted after consultation with DNA experts, the partnering offices file a joint motion for that testing. She noted that one of the most time-consuming aspects of the case review process is tracking down evidence in the various locations where it might be found. One of the most helpful aspects of the process are the collaborative meetings with law enforcement and crime lab officials.

Ms. Herf said their "motto" is "test early and often" because that is the only way to get to the bottom of the case.

She explained why some prosecutors block testing:

- A jury has already rendered a guilty verdict.
- There is overwhelming evidence of guilt.
- DNA tests from crime scene evidence would not be enough to prove innocence.

Even with the state attorney general's support, the largest county in Arizona continues to oppose certain requests for DNA testing, whereas other counties in Arizona allow DNA testing and the search for the truth.

The results of the Arizona DNA project included the following:

- 10 cases of DNA testing, including one DNA exoneration (Watkins).
- 3 inconclusive results (too old, degraded).
- 5 DNA inclusions.
- 1 DNA exclusion due to a partial profile (which may or may not be enough to identify a third-party suspect).
- 17 cases in which DNA evidence was destroyed (in all 17, DNA would have resolved the claim of innocence).

Ms. Herf said the following activities were in progress:

- Postmortem review of the Watkins exoneration case.
- Police identification procedures.
- Interrogation tactics and a follow-up investigation.

Current review of Arizona's criminal justice system includes examination of the following:

- Resistance to innocence claims by prosecutors, judges, and some law enforcement officials.
- Policies for retention of evidence.
- Crime lab efficiency (DNA backlog).
- Few cries of innocence from Arizona inmates.

Key areas of concern include the following:

- Preservation of evidence (older cases).
- Advancements in DNA testing; in some cases, judges and lawyers do not keep up with the latest forensic science (e.g., Y-STR).
- Eyewitness identification procedures.
- Interrogation procedures.
- Investigation of alternative suspects.
- Representation of indigent defendants.
- Fight to access evidence.
- Fight to gain relief, even with evidence of innocence.

Mr. John Pressley Todd, Special Attorney General in the Arizona Attorney General's Office, added that the project simplified the application for the inmates, so they only had to circle a few choices and add a few words. They were also very clear in telling applicants that they were not being

represented by the Justice Project and that they were waiving their rights to any prior attorney-client privilege.

The Innocence Project of Texas

Natalie Roetzel, *Chief Staff Attorney, Innocence Project of Texas, Lubbock, TX*

The Innocence Project of Texas was formed in 2006 and was awarded an NIJ grant in 2010. Texas has had 43 DNA exonerations, with more than 100 wrongful convictions identified in the state. Ms. Roetzel noted that there are 254 separate counties in the state, all with different storage and recordkeeping procedures.

Program Objectives

- To provide *pro bono* investigative and litigation services to Texas defendants who can be proven innocent with DNA testing.
- To secure the release of men and women who could otherwise spend significant amounts of time in prison for crimes they did not commit.
- To reduce the organization's case backlog by screening out cases for which DNA is unavailable and where DNA testing would not be dispositive in proving innocence. (Non-DNA cases where innocence litigation may be feasible when utilizing other types of evidence are retained for future review.)

Statutory Context

Chapter 64 of the Texas Code of Criminal Procedure provides that postconviction DNA testing is allowed when:

- Biological evidence is secured in relation to the offense of conviction.
- It was in the possession of the state at time of trial.
- It was not previously subjected to DNA testing, or subjected to DNA testing but could be retested with newer techniques that would yield more accurate and probative results.

Program Accomplishments: Case Screening

- Hired an intake coordinator and two part-time staff members to process incoming mail and oversee the screening of innocence claims received by the office.
- Developed and implemented a comprehensive, secure, Web-based innocence claim database and input data on 5,280 claims received.
- Began tracking crime, county, court, race, and other significant biographical data, which is organized in an easily searchable format.
- Identified 324 cases for potential DNA case review.
- Separated 324 DNA cases into 2 categories:
 - Simple DNA claims where innocence can be conclusively proven with DNA testing (sexual assault-based cases).
 - Complex DNA claims where testing of several pieces of evidence may be required or where DNA testing alone would not prove innocence.

Ms. Roetzel noted that all inmates receive information on the project at the time of incarceration.

Program Accomplishments: Case Investigations

- Hired a full-time case director to oversee the investigation of DNA cases and assign cases to the project's attorneys and students for review.
- Initiated the investigation of 128 DNA cases identified in the newly created case management database.
- Completed and closed the investigation of 58 DNA cases.

Program Accomplishments: Litigation

- Hired a full-time Chief Staff Attorney to oversee the litigation of DNA cases statewide.
- Received/completed DNA testing in one case.
- Initiated DNA litigation in three additional cases.
- Prepared a motion for DNA testing in one additional case (to be filed soon).
- Identified four more cases for potential future DNA litigation.

Program Challenges: Screening

- A large volume of requests for assistance (150 letters weekly) are received.
- Backlog of requests were unprocessed at the beginning of the grant period.
- Implementing the new database system is a challenge.

Program Challenges: Investigations

- Obtaining all relevant trial and police records before assigning cases for investigation.
- Determining whether DNA evidence still exists before making a litigation decision.

Program Challenges: Litigation

- Locating *pro bono* attorneys with local connections.

Program Challenges: Administrative

- Lengthy grant application process.
- Subcontracts with individual contractors and the Innocence Project of Texas.

Success Stories

In two cases where motions for DNA testing were recently filed, the state district attorneys' offices have agreed with their motions and support their requests for testing. They are awaiting court approval in both cases. The evidence will then be transferred to the lab for testing.

In the case where DNA testing was received and completed during the grant term, the results were positive. DNA testing excludes their client as the source of the male DNA identified on biological evidence obtained from a rape kit.

Questions and Comments

The Honorable Gail Rasin, of the Circuit Court of the City of Baltimore, asked the participants if they have case law in their states on locating evidence. In Baltimore, the state's attorney has submitted

affidavits only. As a judge, Judge Rasin created her own rule requiring evidentiary hearings. Mr. Scheck said he has been litigating this issue from the very beginning. He said the general rule they use is that there is no deliberate destruction of evidence. In one of his cases, a client was exonerated because the DA went back to the crime lab and found evidence after the police said it was not there. Mr. Allen Newton filed an action against the New York City police department for failure to report accurately that they had not looked for evidence. One woman was awarded \$18 million from a jury. However, the judge set aside that verdict, even though the policies of the police were flawed. Mr. Scheck said there is exposure for police agencies that will not look for evidence. The police are targets for lawsuits in these situations. If an innocent person goes to jail because the police do not look for evidence, it costs taxpayers a great deal of money. He noted that, although it is unconstitutional, there is no case on the horizon that establishes the requirement to look for evidence. However, there is liability. In New York, some cases have been won when affidavits were found to be insufficient.

Mr. Michael Ware, Special Fields Bureau Chief of the Dallas County District Attorney's Office, pointed out that, in Dallas, the court makes a determination based on the prosecutor's response. A diligent response, as evidenced by letters and other documentation, is considered acceptable. Ms. Christine Mumma, executive director of the North Carolina Center on Actual Innocence, stated that there will no changes in this area unless there are consequences. The police can say "they looked for evidence, just not very well." She said that, unfortunately, someone spending half their life in prison is not seen as a significant consequence. The only consequences that seem to matter are money or someone being fired. She noted that North Carolina was able to change a preservation-of-evidence law so that now people can get in trouble for destroying evidence. Ms. Rebecca Brown, Senior Policy Advocate for State Affairs with the Innocence Project, noted that often there is no deterrent. Ms. Cole pointed out that, in addition to preservation, orderly maintenance and good storage processes are important. Mr. Scheck recommended that best practices on how to look for evidence should be developed. The responsible actor needs to be identified, and rules and assigned duties must be put in place because systems are different everywhere. This would make it possible for a judge to ask specific questions about the efforts made to find evidence. The Honorable George Clark, Judge of the Superior Court of San Diego, noted that the Los Angeles Police Department stores evidence in trailers because there is a problem of sheer scale in California; the amounts of evidence are staggering. He said there is evidence-tracking software that may eventually help. The Honorable Ronald Reinstein, retired Judge of the Superior Court of Arizona, expressed concern that not enough police departments are making changes because of the scale of the problem.

Postconviction DNA Testing in Maryland

Michele Nethercott, *Project Manager, University of Baltimore Law Clinics, Baltimore, MD*

Following the Kirk Bloodsworth case, Maryland enacted a postconviction DNA testing statute in 2001. In 2002 and 2008, there were significant changes to the statute. Six post-2002 cases have resulted in exonerations. In 2010, the University of Baltimore received a Bloodsworth grant.

Grant Progress to Date

- A total of 134 cases have been reviewed, 79 involving murders and the remainder involving sexual assault.
- In only 10 cases was physical evidence located.
- Orders for DNA testing have been obtained in 7 cases over the objections of the state.
- Only one case involved a consent order for testing.
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What Remains To Be Done

- There are 88 cases in line for review.
- There are 10 cases in active litigation to obtain testing orders or new trials on the basis of the results.
- There are continued outreach efforts to inmates who may benefit from testing but cannot make contact because of mental or physical disabilities. Progress has been limited. There also have been efforts to work with clergy members and with others who have direct contact with prisoners.

Challenges of the Work

It will be very difficult to complete testing during the grant period due to delays beyond their control, including:

- Congested dockets; DNA cases do not get priority docketing.
- The ongoing fiscal crisis; agencies are understaffed and charging for things they never used to charge for.
- Lack of cooperation from prosecutors; all of their testing requests that were opposed were eventually granted by a court.
- Length of time required to acquire necessary documents for case review.

The Good News

- Grant funds have enabled the work to occur in Maryland, and exculpatory results have been generated in four cases.
- Another Maryland lawyer has been trained in the role of DNA testing in criminal cases and the importance of understanding forensic science issues.
- Some prosecutors are seeing the value of the work and are becoming more proactive. One may even want to partner with them.
- Police departments have been calling to ask the project staff to talk to them about wrongful convictions.

Grant Program Changes That Would Help

- Extending the grant period: 12 to 18 months is not long enough, and programs must confront the reality that they will run out of grant funds and still have active cases pending. They are hopeful that NIJ will extend the grant period.
- Eliminating the need for applications to go through the state agency, which creates potential funding barriers and bureaucratic duplication.

Questions and Comments

Judge Reinstein asked if NIJ planned to award funding to entities other than state organizations, such as local jurisdictions. Mr. LaPorte explained that the state agency requirement is legislated by Congress. NIJ Deputy Director Kristina Rose pointed out that Congress is aware that NIJ is making changes to strengthen the program and make it more useful. She said the views of the Roundtable will be passed on to Congress to help influence those changes. Mr. LaPorte noted changes in the solicitation language that open up funding to include all violent felony offenses. He said these changes took months of work with the Office of the General Counsel. If not crafted carefully, the new

language could have affected the solicitation's certification language about retention policies for evidence.

Mr. Thomas MacClellan raised the issue of tight budgets in the states and asked how the projects would be sustainable when the NIJ grant funding is gone. He asked if the need for postconviction DNA testing would "go away" once the states got caught up in their backlogs. Ms. Cole suggested holding that issue temporarily for later discussion.

Ms. Mumma noted that there is also funding for wrongful convictions. Investing in a non-DNA case could create duplication of effort. She said this could be avoided if they identified a case as either a DNA or a non-DNA case. She added that most clerks' offices do not have any idea how to preserve evidence. She said that because some evidence is not relevant to investigations, a notice process must allow for destroying unnecessary evidence. North Carolina is trying to localize preservation of evidence by combining evidence in warehouses. It could be stored in another state and sent for when it is needed.

Concerning CODIS hits on closed cases, Ms. Mumma said the labs in her jurisdiction notified the DA's office of such hits in three cases, but the DA did not know what to do with the notification and they just filed it away. She said that a notice to the DA is not sufficient and thought that the only party who cares about CODIS hits on a closed case would be the defense counsel.

Mr. Scheck suggested to Mr. MacClellan that the governors should be looking at the opportunity to expand postconviction investigations to non-DNA cases. The criminal justice infrastructure can be improved, once collaboration and best practices are established. More efficiencies can then be built in. He said it is not just a matter of correcting wrongs — it is "catching bad guys." CODIS should indicate that a hit relates to a closed case, and the DAs should have a system that alerts them so they look into these cases. Ideally, the innocence projects should be alerted and asked if those cases are in their queue.

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Lunch Presentation: Actual Innocence Cases and the Conviction Integrity Unit

Michael Ware, *Chief, Special Fields Bureau, Dallas County District Attorney's Office, Dallas, TX*

The presentation focused on the work of Mr. Ware and the Dallas County District Attorney's Office Conviction Integrity Unit (CIU).

- The CIU was established by Dallas County District Attorney Craig Watkins in July 2007.
- It is the first of its kind in the United States.
- CIU re-examines cases in which inmates claim they are actually innocent.
- CIU reexamines cases in which inmates previously sought postconviction DNA testing and were denied.
- CIU investigates and initiates prosecutions in which evidence identifies different or additional perpetrators.
- CIU works in conjunction with the Dallas County Public Defender's Office and various Innocence Projects.

Innocence Projects and the CIU

- The CIU has worked with Innocence Projects and the Public Defender's Office to review cases in which DNA testing had been previously requested and denied.
- The previously rejected cases are identified and researched by the Innocence Projects.
- The CIU is then presented with a memorandum of the case, which is written by a law student under the supervision of an attorney.
- The memos include, among other things, the procedural history of the case and a list of evidence, if any, that remains to be tested.
- The CIU reviews the memos, pulls appropriate DA files, reviews the cases along with the Innocence Projects, and decides whether to test biological evidence, if any.

Patrick Waller

Patrick Waller was charged in 1992 with aggravated sexual assault, aggravated robbery, and aggravated kidnapping — all stemming from the same criminal episode — in Dallas County. Waller went to trial on the aggravated robbery charge, was convicted, and was sentenced to life imprisonment.

Following his conviction, Waller maintained his innocence and requested DNA testing. The CIU agreed to DNA testing of the biological evidence obtained at the time of the offense from the victim's sexual assault examination kit. The results came back with one male DNA profile, which was run through CODIS to obtain a match. A CODIS hit was obtained on the DNA profile, and the actual perpetrator was identified.

Thomas McGowan

Thomas McGowan was convicted for the 1985 offenses of burglary of a habitation and aggravated sexual assault in two separate jury trials. He was sentenced to life in prison. Following his conviction, McGowan continued to proclaim his innocence and requested that DNA testing be conducted. The DA's office forwarded the biological evidence obtained from the investigation to a lab for testing. The results excluded McGowan as a contributor to the DNA. A CODIS hit and subsequent investigation revealed that Kenneth Wayne Woodson was the true perpetrator and was serving time for an aggravated assault stemming from a home invasion and sexual assault that occurred after the 1985 crimes..

Stephen Matthew Brodie

Stephen Matthew Brodie was exonerated on November 10, 2010. Although he had served out his 5-year sentence, he was required to register as a sex offender. In *Ex Parte Stephen Matthew Brodie*, 2010 Tex. Crim. App. Unpub. LEXIS 662 (Tex. Crim. App., Nov. 10, 2010), the Court of Criminal Appeals stated, "Applicant should not have been required to register as a sex offender and is also actually innocent of these causes."

The Court of Criminal Appeals stated in its opinion:

There is new evidence which shows Applicant's actual innocence. A fingerprint and a hair from the crime scene do not match Applicant, but instead match a person who pleaded guilty to a similar crime.

Senate Bill No. 1616

Senate Bill No. 1616 relates to the collection, storage, preservation, analysis, retrieval, and destruction of biological evidence in Texas. It states:

SECTION 2. (A) The Department of Public Safety of the State of Texas, in adopting the initial standards and rules required by Article 38.43, Code of Criminal Procedure, as amended by this Act, shall consult with:

- (1) large, medium, and small law enforcement agencies;
- (2) law enforcement associations;
- (3) scientific experts in the collection, preservation, storage, and retrieval of biological evidence; and
- (4) organizations engaged in the development of law enforcement policy, such as:
 - (A) the National Institute of Standards and Technology of the United States Commerce Department;
 - (B) the Texas District and County Attorneys Association;
 - (C) the Texas Criminal Defense Lawyers Association;
 - (D) the Texas Association of Property and Evidence Inventory Technicians; and
 - (E) other organizations in this state that represent clients pursuing claims of innocence based on post-conviction biological evidence.

B) The Department of Public Safety of the State of Texas shall adopt the standards and rules required by Article 38.43, Code of Criminal Procedure, as amended by this Act, not later than September 1, 2012.

Questions and Comments

Ms. Mumma asked how the police department responded to Mr. Ware's investigation. Mr. Ware said the police were hostile, and they turned the victims against the CIU. He explained that the victims had been lied to by the police for 20 years. Some would not meet with CIU personnel outside of police presence. He added that Fox News was enlisted in the situation to make the CIU look bad.

Mr. Todd asked how many cases have resulted in the real perpetrator being identified, and Mr. Ware said seven. Mr. Scheck commented that it is sometimes helpful if a victim's advocacy organization talks to the victims when a case is first reopened.

Ms. Mumma asked if the CIU reviews the prosecutors, as Mr. Scheck discussed in his presentation. Mr. Ware said no, and he agreed with Mr. Scheck that there should be two different units (confessional and integrity). They work to educate the prosecutors, and this has changed the tenor of the office.

Mr. Morrissey related that he tried to obtain NIJ funding but, because he is not a state agency, he teamed with the attorney general. He planned to look at Denver cases while the attorney general covered the rest of the state. So far, not many people have requested testing. They are almost through with their cases. He said they do not call their group an integrity unit. He noted, too, that they have been successful in many ways, even though they have not exonerated anyone.

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Collaboration within the Postconviction Legal Community

Given the volume and complexities of postconviction cases, collaboration among involved organizations is crucial. Justin Brooks addressed the successes and challenges of reducing backlogs given the cooperation, or lack of it, of various agencies.

Postconviction DNA Testing Program: Challenges, Successes, and a Collaborative Model

Justin Brooks, *Executive Director, Institute for Criminal Defense Advocacy, San Diego, CA*

Mr. Brooks became interested in innocence projects when he read about a woman who received the death penalty under strange circumstances. He took on her case with some of his law school students and was able to get her exonerated. It took 4 years of work to get her off death row. This experience opened his eyes to the "cracks" in the criminal justice system. He decided that he wanted to work specifically with innocence projects. After contacting Mr. Scheck about this decision — and with Mr. Scheck's guidance — he moved to California and started an innocence project. Before the NIJ grant, he said, they never conducted proactive outreach. The grant has allowed them to conduct outreach and more investigations.

Mr. Brooks reviewed the goals of the project:

Goal 1: Identify and review postconviction cases in which DNA testing may support a claim of innocence.

Goal 2: Locate and secure biological evidence associated with qualifying cases.

Goal 3: Conduct DNA tests as appropriate.

Goal 4: Analyze test results and pursue relief.

Goal 1 Challenges

- There was a long negotiation period with the state Department of Corrections (DOC) to convince its staff to assist with outreach. They conducted a mailing to those who fell under the statute. The DOC would not allow them to meet with inmates in person; they had to obtain their addresses and correspond with the inmates in writing. It was difficult and time consuming.
- They needed to set up a complex protocol to efficiently review thousands of cases.
- It was difficult to obtain records from inmates and defense attorneys in the short time frame required under the grant. They had trouble getting only the records they wanted and had no place to store any additional materials received.
- It was difficult to obtain police reports.
- There were language and literacy barriers — California has a large Hispanic population. Therefore, they now have Spanish-language materials and conduct outreach in Spanish.

Goal 1 Accomplishments

- 17,670 packets of materials were distributed to inmates convicted of qualifying offenses.
- 2,305 responses to this outreach were received and screened.
- 1,009 backlogged Innocence Project cases were reviewed. Most of their cases are not DNA related, including most of the exonerations.
- 1,402 cases were closed for not meeting criteria, and 1,251 cases were referred to Innocence Projects.
- 196 cases were opened for investigation.

Goal 2 Challenges

- Difficulty in getting cooperation from some police, labs, and prosecutors to obtain records and confirmation of evidence.
- Biological evidence not collected at the time of the crime, destroyed, or not preserved in testable condition.
- Lack of centralized storage and consistent systems for tracking evidence. Said Los Angeles County, "Nothing is lost, but everything is missing."
- Inadequate uniformity and transparency in evidence destruction policies. They know the protocols of every office in the state.
- Noncompliance with the state postconviction DNA testing evidence preservation statute. Some people still have not heard of the statute.
- Existence of the statute is insufficient to ensure preservation of biological evidence.

Goal 2 Accomplishments

- Biological evidence was confirmed as preserved and testable in 26 cases.
- Biological evidence was confirmed as destroyed in 9 cases.

Goal 3 Challenges

- Litigation was necessary because of opposition from the prosecuting agency.
- Courts deny motions on DNA testing that use the wrong legal standard.
- There are restrictions on private labs using CODIS.
- There are excessive public lab delays due to backlogs. They do not have the ability to bill for DNA testing.

Goal 3 Accomplishments

- CIU is currently in negotiation on 5 cases with the DA's office in San Diego.
- Testing is proceeding in 8 cases:
 - 4 by court order after litigation.
 - 2 by agreement with the prosecuting agency.
 - 2 at private labs without the involvement of the prosecuting agency.

Goal 4 Challenges

- Significance/relevance of DNA results.
- Serious contamination problems.
- Comparing mitochondrial DNA (mtDNA) results with STR results. Every few years, new technology brings a new wave of opportunities to test or retest old DNA evidence.

- Degradation.
- CODIS.
- Lack of time under the grant.

Goal 4 Accomplishments

- Several test results from old cases have been reviewed again.
- Currently litigating one case which has testing results.

Program Successes in California

- Screened and reviewed 3,314 cases in 18 months.
- Currently litigating 24 cases.
- Developing cooperative relationships with key prosecuting agencies statewide.
- Educating the courts and other members of the justice system to facilitate and improve access to postconviction DNA testing.
- Providing expertise and assistance to other attorneys working on postconviction DNA testing cases.

Arizona

- Conducted outreach to 5,700 inmates convicted of homicide or sexual assault (out of Arizona prison population of 45,000).
- Confirmed destruction of DNA evidence in 17 cases.
- Accomplished DNA testing in 10 cases:
 - 3 inconclusive results (too old or degraded).
 - 5 DNA inclusions.
 - 1 DNA exclusion (partial profile may or may not be enough to identify third-party suspect).
 - 1 DNA exoneration.

Colorado

Colorado Attorney General's Office:

- A model that puts the force of the Attorney General's Office behind the Innocence Project efforts.
- Reviewed 3,883 cases from every county in Colorado outside Denver.

Denver DA's Office:

- Reviewed 1,074 cases from Denver County.

Colorado AG's Office:

- Cases closed: 3,406
- Cases open, pending initial review and further review: 477

Denver DA's Office:

- Cases closed: 859
- Cases open, pending initial review and further review: 215
- Cases to be reviewed: 4,957

Connecticut

- Eligible inmates who requested participation: 217
- DNA testing would not prove innocence: 72
- Cases reviewed for DNA testing: 29
- Cases where DNA testing is complete or in process: 11

Downstate Illinois

- Cases reviewed: 579
- DNA cases identified: 45

Kentucky

- Applications delivered to potentially eligible clients: 3,183
- Applications returned: 1,317
- Applications rejected: 889
- Cases for further investigation: 326
- Cases submitted for DNA testing: 8
- Cases currently in litigation awaiting ruling on testing: 3
- Exonerations: 1

Kentucky exoneration: Michael VonAllmen

- Rape, sodomy, and kidnapping charges.
- Sentence: 35 years
- Served 11 years, paroled in 1994.
- Contacted KIP in 2009 because of publicity about the Bloodsworth grant awarded to Kentucky.
- Rape kit hairs were tested and matched the victim.
- Additional investigation revealed the true perpetrator.

New Orleans

- Cases inventoried: 2,037
- Cases with biological evidence: 1,621
- Cases reviewed: 951
- Cases for which testing was obtained: 8
 - 3 confirmed guilt.
 - 3 exclusions requiring additional testing.
 - 2 were still being tested.
- Biggest problem: Evidence rooms were under water.

Baltimore Project

- 134 cases have been reviewed.
- 88 cases are awaiting review.
- In 10 cases, physical evidence has been located.
- Orders for DNA testing have been obtained in 7 cases through litigation.
- One case was by consent of the state.

North Carolina Innocence Commission

- Cases reviewed: 107
- Cases in which biological evidence exists: 28
- DNA tests ordered: 16
- DNA profiles obtained: 9

New Mexico

- 26 cases were reviewed.
- 5 cases were closed.
- 16 cases are in active investigation.
- In 3 cases, DNA evidence was obtained.

Texas

- 5,280 cases were reviewed.
- 324 were potential DNA cases.
- 58 cases were closed.
- 10 cases are being litigated.
- In 1 case, testing was completed.

Virginia

- Case files found with evidence suitable for DNA testing: 3,053
- Cases in which guilt was confirmed: 797
- Cases sent for testing under the NIJ grant: 636
- Confirmations of guilt: 79
- Potential DNA eliminations/exclusions: 53

Washington State

- Exonerations: 2

New England Innocence Project (NEIP)

- Total cases reviewed: 2,122
- Total potential DNA cases: 418
- Potential DNA cases by state:
- Connecticut: 54
- Maine: 13
- Massachusetts: 292
- New Hampshire: 18

- Rhode Island: 30
- Vermont: 10
- Current cases under investigation: 57
- Currently active cases in litigation: 19

Innocence Project in New York

- Active cases (Innocence Project clients): 226
- Consults (active, but co-counsel exists): 61
- Have documents, might take the case (the final evaluation stage): 2,956
- Cases in evaluation stages (including 2,956 "maybe" cases): 9,218

How to Deal With Backlogs

- Improve the review process.
- Increase staffing with contractors, students, and volunteers.
- Create a system for document gathering.
- Develop effective motions and a system for expediting motions.

The Key Is Cooperation

- Every stage of the process is more difficult if it requires litigation.

The Case of William Richards: A Cautionary Tale

- Access to evidence was litigated.
- DNA testing motion was litigated.
- Fought for 2 years with state DOJ lab to get DNA testing done.
- Habeas corpus case was litigated.
- Case was litigated in the Court of Appeal.
- 10 years later, case is in the California Supreme Court.

The Case of Ken March: A Tale of Success

- Case started around the same time as William Richards' case.
- Worked with San Diego DA to obtain experts, get testing done, and evaluate evidence.
- Mr. March returned home 7 years ago.

How to Get Cooperation

- Do it on the front end and not necessarily in connection with any particular case.
- Meet with the person in the office with the most authority.
- Explain the goals of the grant.

San Diego Model

- Met with DA Bonnie Dumanis.
- She appointed liaison empowered to agree to DNA testing on any case.
- Developed protocol for reviewing cases, which included memos and regular case review meetings.
- Currently, 5 cases under review by San Diego DA's office.

- Most trial DAs not helpful or cooperative, but liaison is assisting in effort.
- Expect to obtain agreed-upon testing in most of the cases.

Questions and Comments

Mr. Morrissey asked how a prosecutor in California has jurisdiction to go back in front of a judge. He said that, in Colorado, he cannot file a habeas corpus motion after a certain period of time; the authority then rests with the governor. He has no legal access to the court, nor does the defendant. Mr. Brooks responded that every state is different; there is no hard-and-fast rule for filing a habeas corpus motion. He noted that California law is different. Judge Reinstein said they have a "newly discovered evidence" provision in Arizona, but there is always a way to work with people to get something through. Judge Rasin pointed out that, in 2009, the Maryland General Assembly passed a Petition for a Writ of Actual Innocence — Newly Discovered Evidence bill that allows inmates to file at any time. Mr. Scheck said that actual innocence should be a state constitutional claim. He added that this is a live issue; one can always go to federal court under Rule 6 (which authorizes the courts to extend certain deadlines in appropriate circumstances), and a sympathetic judge can order anything by way of rule of discovery. He noted that collaboration can help a great deal to get things done.

Deputy NIJ Director Kristina Rose explained that, in some grant programs, NIJ does not award funding unless there is established cooperation, as demonstrated by a Memorandum of Understanding (MOU). The entities applying must partner in some way and have a certain level of cooperation. She wondered if that would help or hinder the Innocence Project grants. She asked the group if there was an advantage to requiring something in writing regarding cooperation among the parties. Mr. Brooks thought this should not be a grant requirement. He said the lesson from San Diego is that voluntary collaboration is the way to effect change. Because NIJ wants to reach out to more states, such a requirement could be a barrier. Ms. Mumma observed that it would not be possible to get an MOU in some places. She said it is more important to put the project's successes out there and highlight them. She thought this would convince others to step up and join forces. She added that, in North Carolina, they can apply for judicial relief at any time. In 2009, they passed a statute that applies to postconviction cases, and they have access to everything.

Mr. Morrissey reiterated to Ms. Rose that he applied for an NIJ grant and did not qualify. He said that the projects need someone like him (i.e., a DA), and this is a critical piece that the projects are missing. He pointed out that the attorney general in his state does not have access to his files. He said that access (the "keys to the kingdom") is the component that he sees missing in the grant. He also commented that the National District Attorneys Association (NDAA) does not represent every DA in the United States.

Mr. Brooks remarked that those who have been wrongly convicted are deeply cynical because the system has failed them. He said it takes a defense attorney to look at the totality of the case. He agreed that prosecutors need to be deeply involved but said that is true of all parties. Mr. Chuck Heurich of NIJ said that the grantees' proposals would be strengthened by letters of support and MOAs from everyone involved in the project. Judge Reinstein added that, as a peer reviewer, he has found that collaborative relationships described in the grant application make a difference, even if they are not specifically scored.

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Preserving the Truth: Policy and Practical Issues Relating to DNA Evidence Retention

Rebecca Brown, *Senior Policy Advocate for State Affairs, The Innocence Project, New York, NY*

Issues of evidence location in postconviction DNA cases have contributed to a national trend toward reevaluating the way biological evidence is preserved. This presentation highlighted policy and practical issues relating to DNA evidence retention and the impact of these issues on postconviction DNA cases.

Overview

Ms. Rebecca Brown described the Innocence Project Network as a national litigation and public policy organization dedicated to exonerating the innocent through DNA testing and reform of the criminal justice system to prevent future injustice. She said there are 65 Network projects litigating claims of innocence, 56 of which are in the United States. The Innocence Project was founded in 1992 at the Benjamin N. Cardozo School of Law at Yeshiva University and, in 2004, it became an independent nonprofit organization (although still closely affiliated with Cardozo). Since the organization's founding, more than 270 people have been exonerated through DNA testing in the United States, including 17 who were at one time sentenced to death.

DNA Exonerations

To date, there have been 271 DNA exonerations:

- 0-100 people, 1989-2001 (12-year period)
- 100-200 people, 2001-2007 (6-year period)
- 200-271 people, 2007-2011 (4-year period)

The average prison term served by those wrongly convicted is 13 years.

- 17 Death Row exonerations.
- 68 percent are rapes.
- 24 percent are rape/murders.
- 7 percent are murders.
- 1 percent are robberies.

Ms. Brown said that innocence claims are another form of cold cases. Of the 271 DNA exonerations across the country, 104 actual perpetrators have been identified in 120 cases. Those actual perpetrators went on to be convicted of nearly 100 additional crimes, including:

- 61 sexual assaults
- 21 murders
- Several other violent crimes.

These convictions represent only the tip of the iceberg of actual crimes committed.

Lessons Learned

Between 2004 and 2010, the Innocence Project closed a total of 330 client cases. The most common reason for closing cases during this period was that evidence was either destroyed or lost, and therefore DNA testing could not be performed.

- Evidence was lost in 13 percent of cases.
- Evidence was destroyed in 11 percent of cases.

Ms. Brown noted that, before 2004, closed case data were not systematically reliable; therefore, she was presenting data starting in 2004.

Biological Evidence Retention

Biological evidence retention is more important than ever because DNA testing methods continue to evolve, which advances the field's ability to settle more and more claims of innocence and solve cold cases.

Where Do We Look For Evidence?

- Crime scene reports
- Sexual assault reports
- Hospital records
- Rape crisis centers
- Victim statements
- Evidence collection reports
- Evidence submission reports
- Laboratory reports
- Autopsy reports
- Transcripts from:
 - Court reporter
 - Courthouse
 - Prior counsel.

Whom Do We Contact to Find Evidence?

- Law enforcement agencies
 - Local
 - City
 - County
 - State
 - Federal
- District attorney's offices
- Court clerks/reporters
- Crime labs
- Medical examiners
- Hospitals
- Rape crisis centers.

Barriers to Locating Evidence

- Multiple agencies and entities are charged with evidence retention.
- Different jurisdictions have different policies (120 policies in 120 counties).
- Even when states/jurisdictions have policies, sometimes evidence custodians have no knowledge of them.
- There is a lack of interagency communication.
- There is no real sense of policies that date back in time, or there are no records.
- Some statutes create an allowable destruction window between conviction and petition for testing.
- There are concerns that reports of evidence being lost or destroyed are not accurate.

Issues Complicating Evidence Retention

- Space and technology constraints.
- A clear sense of what physical evidence (which may or may not contain biological evidence) may be disposed of.
- Fear of defense objections to destruction of any evidence.
- Huge amount of misdemeanor/unimportant felony evidence clogging evidence rooms.
- No manpower to organize the evidence, even when determinations are made about what can be destroyed.
- Terrible records.
- No funding.
- Competing law enforcement demands.
- Poor communication among law enforcement and investigators about what evidence must be retained and what can be tossed.
- Poor training.
- Figuring out where evidence is located (e.g., piecing together past policies); hard to get a sense of history.

Legislation to Date: Problematic Provisions

- Preserving DNA, with qualifications; currently, DNA preserved only when a person petitions for DNA testing (a window of allowable destruction).
- Distinguishing between previously tested and untested evidence.
- Requiring defendant to retain information (education and comprehension issues).
- Problematic destruction policies.
- Insufficient retention intervals.
- Lack of training.

Converting Lessons Learned Into Policy Change

The Innocence Project's policy work and experience related to biological evidence retention is converting lessons learned into policy change.

The NIJ Postconviction DNA Testing Assistance Program has been helpful to the Innocence Project's advocacy work in the following states:

- Arizona
- Colorado
- Georgia
- Mississippi
- Montana
- Nevada
- Ohio
- Oregon
- South Carolina
- Vermont.

Charlotte-Mecklenburg Evidence Project

Ms. Brown described the Charlotte-Mecklenburg evidence project. A facility was moving and all the evidence was re-catalogued. Each piece of evidence was re-coded and bar coded. All of packages were scanned to a storage location. To date, the Homicide Cold Case Unit has cleared 15 cases, charged 14 persons with murder, and is actively investigating 12 reopened cases.

To have these results across the country, Ms. Brown said we need federal-to-state guidance on the establishment of statewide standards regarding proper identification, collection, preservation, storage, cataloguing, and organization of biological evidence. Two questions need to be answered: Who needs to inform others, and who should they be?

Technical Working Group (TWG) Charge

The charge to the Innocence Project's Technical Working Group (TWG) on evidence retention was "creating best practices and protocols to ensure the integrity, prevent the loss, and reduce the premature destruction of biological evidence after collection through postconviction proceedings." The TWG had representatives from across the fields of criminal justice, including scientists, victim advocates, and attorneys.

Goals of TWG

- Developing a clearinghouse of resources.
- Promoting best practices on biological evidence preservation/disposition.
- Developing resources on existing training programs.
- Increasing technological awareness.
- Recommending improvements in interagency communication.
- Providing an inventory of available funding streams.
- Conducting outreach to stakeholders.

Model Legislation: Issues to Consider

- Defining the time frames.
- Defining the crime categories.
- Considering use of sanctions.
- Considering legal remedies.
- Preparing an inventory of biological evidence on behalf of defenders (upon request?).

- Creating a responsible destruction policy.
- Identifying model training programs.

Clearinghouse of Resources

A clearinghouse of resources is needed for evidence custodians. It should include creation of a resource page on an external Web site containing Web links, publications, training information, policies, and standard operating procedures on identifying evidence, collecting and packaging evidence, preserving evidence, and retrieving evidence.

Handbook on Best Practices

- Defining proper conditions under which evidence must be preserved (e.g., refrigeration).
- Defining appropriate practices based on size of an agency.
- Defining proper packaging techniques.
- Defining best practices regarding storage and tracking.
- Defining appropriate disposition practices, including notification to interested parties.
- Defining proper chain-of-custody practices.
- Addressing bulk evidence and making it practical.
- Expanding menu of low- and high-technology options.
- Staff resources on training programs should identify and recommend categories of training content designed for the criminal justice community in:
 - Packaging.
 - Storage and tracking.
 - Disposition (including length of time).
 - Chain of custody.
 - Conditions for preservation.

A Web page on existing training programs should be created.

Increasing Technological Awareness

- Provide tips on how agencies should move from paper to electronic records.
- Create requirements for automated systems.
- Possibly evaluate evidence tracking systems (e.g., a consumer report).

Improving Communication

- Create a process map on the evidence chain of custody through the disposition stage.
- Identify current chokepoints in communication across the agencies.
- Include high- and low-technology recommendations.

Identifying Funding Sources

- Develop an inventory of grants and existing funding streams.
- Is this sufficient?

Marketing Plan/Stakeholder Outreach

- Create standard talking points/presentations for organizations including: American Society of Crime Lab Directors (ASCLD), International Association of Chiefs of Police (IACP), National

Sheriffs' Association (NSA), Major City Chiefs Police Association, International Association for Identification (IAI), International Homicide Investigator Association (IHIA), Sexual Assault Nurse Examiner (SANE) Program, National District Attorneys Association (NDAA), National Association of Attorneys General (NAAG), National Association of Medical Examiners (NAME), American Academy of Forensic Sciences (AAFS), National Legal Aid and Defender Association (NLADA), National Association of Criminal Defense Lawyers (NACDL), National Governors Association (NGA), International Association of Forensic Nurses (IAFN).

Mission Possible

Ms. Brown closed by stating that, although guidance in this area is long overdue, a committed group of stakeholders from all corners of the criminal justice community is working on solutions. She noted that the TWG is about halfway through its work and currently is developing model legislation and the handbook. She said there are good practices out there that are not widely adopted. The TWG is looking at all tracking systems, such as Radio Frequency Identification (RIFD) and bar coding. The software available now is more sophisticated and less costly than when the TWG started.

Questions and Comments

Mr. Scheck said that, since the Houston scandal, some have been advocating for regional warehouses. He asked what the group thought of shared facilities, particularly for rural counties. Ms. Brown responded that evidence that is less likely to be needed right away could be stored. Mr. Morrissey said he would love to have a state warehouse to deliver evidence to; they now run three warehouses in Colorado.

Ms. Mumma remarked they recently repackaged evidence in Charlotte, N.C., and she said property evidence associations are helpful. Their 2001 statute required a notice of destruction. In 2007, they tried to make it easier, and notices now go to defense counsel to make sure they are aware that evidence will be destroyed. Ms. Mumma receives a notice so she can make sure the evidence is appropriate for destruction. The great majority of notices come to her from Charlotte, so it appears they are in compliance with the statute.

Ms. Danielle Weiss, a consultant affiliated with NIJ, asked if TWG is exploring the list of issues now or hopes to conduct these activities. Ms. Brown said they were actively working on the handbook and creating model legislation, but they are not taking action on the other issues on the list. They are trying to collect information and make it available, functioning in some ways as a clearinghouse.

Ms. Cole asked about the deadlines for the TWG activities. Ms. Brown said the goal for the handbook is June 2012. The first working draft has been completed, and subgroups are working on various chapters. The model legislation will come next.

Mr. Morrissey noted that, in Denver, they notify the DA about plans for evidence destruction, who in turn notifies defense counsel and the defendant. If there is no response after a given time period, the evidence can be destroyed. He asked if the TWG recommended centralized storage of evidence. Ms. Brown said yes, in an ideal world, but this is not always possible because of the costs and manpower issues.

Mr. Todd remarked that, because of a statute passed in Arizona, he was supposed to be notified about destruction of evidence, but he has not seen any notices. One participant noted that it is a big responsibility to approve destruction of evidence, and many people do not want to interrupt their day to deal with this issue.

Ms. Mumma said that once sanctioned remedies were put in place, destruction of evidence was taking place more efficiently. Clerks previously tended to be territorial about holding onto evidence. However, once the state initiated sanctions, the clerks wanted to send evidence back to law enforcement. She said they conducted a survey on the preservation statute in North Carolina, and few people were aware of it. She thought that people are more likely to get training if there is a consequence or risk involved in following the wrong procedure. She said they refurbished an old warehouse with air conditioning to store old rape kits. It is an improvement over storage in desk drawers and closets, but it is not optimal.

Mr. Darrel Stephens, executive director of the Major Cities Chiefs Police Association, observed that evidence in cases where there is no suspect sits in a warehouse for years with no one interested in it. There is a process in place for getting rid of it, but the longer the process takes, the less interested people are in dealing with it.

Ms. Cole noted that there is a separate category associated with evidence related to a known suspect.

Mr. Ware said that after getting Senate Bill 1616 passed in Texas, they are dealing with many issues involving preservation of biological evidence. Most of the bill's requirements are supposed to be in place now. The Houston crime lab is concerned about the tremendous financial impact. They reached agreement that, for unsolved cases, the evidence can be kept for 40 years. The bill went through without any protest.

Mr. Morrissey asked whether in North Carolina, a due process dismissal by a judge is one remedy, and Ms. Mumma said it is one possibility.

Ms. Brown pointed out that one key issue is deciding which types of crimes should have evidence stored. She noted that about 1 percent of exonerations involve robberies. She asked the group, "What are the crime categories and what requests are coming out of those kinds of cases?" Mr. Brooks stated that touch DNA opens up the possibility of needing to go back to all of the evidence, as it may all be probative. Ms. Brown said that they cannot keep everything from robberies; some of this evidence has to be destroyed. She thought that there are some crimes for which evidence should not be kept. Mr. Stephens gave the example of breaking into cars or houses. If the individual will not do any time in jail, he asked, why should the evidence be kept? Even though it may be probative, the person is unlikely to serve jail time. Creating a requirement to keep this evidence means it will be kept forever and it is of no value.

Ms. Cole acknowledged his point, stating that the issue could relate to whether there is a sentence rather than to a crime category. The Honorable George Clarke, judge of the San Diego Superior Court, pointed out that using categories of crimes could be dangerous. Citing drug crimes as an example, he said there are lengthy and perhaps excessive sentences for minor drug crimes. Mr. Ware noted that, under the Texas statute, evidence can be destroyed at any time for closed cases, as long as the proper notice is given. The 40-year holding period only applies to unsolved crimes. Ms. Mumma noted that, in plea bargain or guilty plea cases, the period of retention is 3 years. There has to be a dialogue in court about it. In those situations, they do not even need a notice of destruction.

Mr. Brooks concluded that they need to be realistic about evidence storage. Evidence does not need health care or security — or all the things that cost money when an innocent person is incarcerated, especially if the person is sentenced for life. Evidence storage still results in cost savings by comparison. One participant noted that, although these cost savings are in the state Department of Corrections, it is the county that pays for storage.

Ms. Nethercott observed that, in Maryland and some other states, there are provisions that allow for evidence to be destroyed, as long as notice is given. However, they have never seen a single notice in their office. She asked the group why they thought people did not issue these notices, even when statutes required them. Ms. Brown responded that, in some cases, people are unaware of the law on the notification process; even if they do know about the law, they think they do not have time to follow it.

Mr. Ware said this issue is fertile ground for training. Purges of evidence are taking place without notification. Ms. Nethercott added that, even with training, notices are not being provided. She attributed this to a lack of time. However, evidence is being destroyed; until someone finds out and it causes problems, there will be no impact.

Ms. Cole said she was hearing that there is a way to notify interested parties that covers the law, and a way to notify them that protects an individual's rights. If the wrong person receives a notice, someone's rights are not being protected.

Ms. Weiss said it surprised her that some attorneys are not aware of the laws. She asked if there were any solutions from an ethical conduct perspective, short of formal sanctions. Ms. Jaspen was also surprised that people could get away with saying they did not know about the statute. When the law changes, there should be education through professional organizations. Ms. Weiss said there is a responsibility on the part of attorneys to keep track of new laws. Ms. Brown stated that, unless there is funding to educate people, there is the possibility of evidence purges because no one knows what is in storage. Not all of it is inventoried; no one has enough time to do the work.

Ms. Mumma noted that their survey on destruction policies in DAs' offices indicated that 2 people knew about the statute and 88 did not. If there is no funding to implement a policy and no education, she asked, who cares? If people are scared to get rid of evidence, that needs to be addressed as well. She suggested that the solution might be training.

Mr. Morrissey said his police department was keeping evidence for 3 years. He told them to throw misdemeanor evidence away. He thinks that they know the laws and that they regularly clear space because of the model statute's requirements..

Mr. LaPorte thanked everyone for the day's work and adjourned the meeting for the day.

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Identifying and Overcoming Challenges Related to Postconviction DNA Testing Assistance

Christine Cole, *Executive Director, Program in Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University, Cambridge, MA*

Ms. Cole facilitated a discussion designed to identify the most significant challenges affecting postconviction DNA case review in state or local jurisdictions, such as areas that are not working operationally. She also asked for suggestions to improve the grant. She mentioned collaboration and stated that, within collaboration, there are subsets of challenges, such as overcoming resistance.

Mr. Todd pointed out that the intrinsic nature of the adversarial system underlying the criminal justice system hinders cooperation. He also mentioned the possibility of lawsuits by someone who was wrongly convicted and later exonerated. Mr. LaPorte observed that human factors studies

recognize that a certain number of errors are expected (e.g., in labs). However, the current criminal justice system does not allow for errors and, therefore, people want to cover them up. He was in favor of promoting a culture in which errors can be made and people can learn from them. He noted the difficulty of achieving this in a litigious society. Mr. Todd acknowledged that those who are wrongly convicted have good reason for suing. He said Texas has a payout system in place to handle these situations. It includes a lump sum payment, health insurance, and a college education.

Ms. Cole said she heard some participants discussing the need to increase awareness of gaps in the system for all those who are involved in the system, not just the innocence projects.

Mr. Brooks said he would like to start a working group on CODIS uploading. He said that, so far, no one has proposed any answers that would fix the system. Mr. Morrissey said they notify their lab; if someone pleads guilty, they halt testing. There would be no CODIS hits in these cases; they would be dismissed. The number of CODIS hits coming later would decrease. His lab director said the only time he saw a hit that did not match the inmate was when there was consensual sex.

Mr. Brooks observed that the problem seems to be that, in the postconviction phase, someone runs a test resulting in a hit, and there are people who need to be notified who are not. He said the inmate should be told if there is a match years later. Mr. Morrissey said they advise the lab when they have closed a case. Mr. Brooks said the problem occurs when information is uploaded to CODIS from a case that is 20 years old, as the Innocence Projects do. There is no protocol about which parties should be notified.

Ms. Herf agreed that they need communication and procedures around CODIS. Ms. Jasper said that, in Virginia, they have to notify everyone involved, even if the case is 25-30 years old. They also make the lab reports available to convicted persons who want them. She said the issue is as much about notification as it is about testing. The notification letter provides contact information in case the parties have questions. The prosecutors do not receive advance notice of testing, but they receive the test results. Mr. Brooks pointed out that, in general, the information is not getting to the person whom the case most affects. Because the hit is from a crime scene that was investigated years ago, it is far beyond a CODIS protocol issue. He said there needs to be a group formed to look at the practical and legal implications. He acknowledged that many times the information will be meaningless, merely indicating that someone was at the crime scene. Nevertheless, it should go down the pipeline to the persons who have a vested interest.

On another topic, Mr. Morrissey observed that police sometimes turn the victims in postconviction cases against the Innocence Project staff. He said that in Colorado, although they have processes for victims of a crime at the time it occurs, they do not have postconviction processes. He noted that some victims hold fast to the idea that they were correct in their original identification. Another problem in their project is that there are time limits for victims' compensation related to a crime. After 10 years, a victim is not eligible for the same counseling and reimbursement compensation. Ms. Mai Fernandez, executive director of the National Center for Victims of Crime, added that some level of notification and services needs to kick in because the victim becomes traumatized all over again when a closed case is reopened. She said there is confusion around which point in time the victim should be notified. Ms. Cole asked if there are any state practices that are relevant to victims' issues. She said that Texas has done some good work. Ms. Brown said they added to their statute the reactivation of services for the victim in postconviction cases.

Judge Clarke remarked that prosecuting agencies hold the keys to relationships with all partners, yet they were underrepresented in the room. Judge Rasin was happy to hear that prosecutors care about actual innocence, and she was impressed by the work of the projects. However, she observed that not many states were represented at the meeting, the people there representing the "best and

most noble." She asked how they planned to get the word out to everyone else. She suggested there needs to be a culture change in which the concept of actual innocence is primary. She stated that requests for testing are usually opposed in the first instance. Requests for a new trial are opposed, even in simple sex offense cases where the DNA discloses that there is another perpetrator. Judge Rasin asked if professional organizations, such as the National District Attorneys Association, could get the message out.

Ms. Nethercott agreed and wanted to hear from prosecutors about how the Innocence Projects could be more effective at getting the conversation started. She asked what sort of approach would be effective. She said it was clear from the conversations that the effectiveness of this program is determined by the degree to which a primary prosecutor and law enforcement officials are willing to take some ownership. Historically, these parties have had adversarial relationships.

Mr. Kent Cattani, Chief Counsel, Capital Litigation/Criminal Appeals, in the Arizona Attorney General's Office, recommended an approach that is not case specific but starts well in advance with policymakers. He also recommended focusing on the fact that an inmate is entitled to postconviction relief. He said that, as they move away from easy cases, there are things that arguably might have changed the result of the trial, but it becomes harder to resolve these cases.

Judge Reinstein offered that most prosecutors want the truth, and some will fight for it. He said he believes the way to change the culture is through the judiciary. There are judges who have come to understand the importance of the fact that people have been exonerated. He said it would be helpful if the state supreme court is willing to look at the culture as well as having judges who know the issues and are dedicated to innocence.

Mr. Todd — noting that he is a prosecutor who has been on board with the Innocence Projects from the outset — reiterated that the root problem is the inherently adversarial system. He said the question of guilt or innocence is the heart of the matter, and this question has to be resolved. Often, when an inmate is exonerated, it is not announced in a joint press release between prosecution and the Innocence Project. This continues the adversarial mindset of one against the other. From a prosecutor's standpoint, no one wants an innocent person convicted, but society created a system in which the fact finder finds someone guilty and we as a society support that verdict. Everything that happens, from that point on, is weighted in support of the verdict. We want juries to be confident in the criminal justice system. Therefore, we do not tell the jury pool that they cannot trust eyewitnesses. This is only a small subset of where the system has gone awry, but how this subset is dealt with is key. Mr. Cattani agreed that it is important to reach out to prosecutors again and again, particularly when there is not a pending case. They might be more willing to meet under these circumstances.

Mr. Morrissey said that, even though there is an adversarial system, he is receptive when he is approached with facts, not misleading materials. He will sit down with defense attorneys and lay the cards on the table. The people he meets with know what he will do and not do. All parties want the right person in prison to prevent future crimes and future victims. He said that showing up with reporters is a bad approach. He noted that, once a case is in progress, there is a system in process and the victims have expectations. Having "the wrong guy" means dealing with angry victims and having to explain what happened to all the parties involved. He said the important thing is "how you deal with it; all you can do is your job." Some people will not be in agreement or cooperative, no matter what.

Sergeant James Markey of the Phoenix Police Department (Sex Crime Unit) said that people in law enforcement have learned not to take things personally. He acknowledged that people in the system can get upset, but he pointed out that the role of law enforcement personnel is to be unbiased fact

finders. He said he has worked on sex crimes and cold cases for 13 years and heard as many complaints from victims as from suspects. Law enforcement is involved in cases early (i.e., upstream); if they conduct bad interviews, bad lineups, or something else goes wrong, it has a downstream effect. If these errors are not noticed, they can lead to a conviction. He said law enforcement personnel have a responsibility to reopen such cases, but they are resistant because they fear the unknown. There is also pressure from victims and families, which makes law enforcement gun-shy. Sgt. Markey was concerned about ensuring quality investigations during the upstream part of the process. When law enforcement looks at cold cases, they begin with the quality of the initial investigation. He was interested in Mr. Scheck's statistics on the high number of exonerations from sex crimes and wondered how these errors occur. He asked, is law enforcement failing to conduct quality investigations? Are the cases more difficult? He pointed out that the stress of working with sex crimes leads to high turnaround in these units; people typically cannot work in them for more than 5-10 years.

Ms. Fernandez asked how often the police work with representatives of victims of sex crimes. She stated that, although these victims' representatives are supposed to be unbiased, they work from an advocacy stance. They are there for the victim, but they also have to protect the constitutional rights of the suspect. She said that, when police and victims' advocates work together, it can reduce the stress. Sgt. Markey admitted that police tend to have a mindset of not liking other groups. He said it is case specific as to how much the victims and their families access victim services, but the resources are available for anyone who needs them.

Mr. Morrissey responded to Sgt. Markey's concern about law enforcement errors in the area of sex crimes. He said these are the cases that tend to get solved, either because of DNA evidence or the victim's testimony. This does not mean sex offense detectives necessarily make more errors than police investigating other crimes — sometimes things just go wrong. Sgt. Markey said they look at probable cause to make arrests and get suspects off the street. If contrary or exculpatory evidence comes along, they have to make decisions on whether to support the case or not. They have released people after indictment because the evidence showed they were not guilty. He said they are only as good as the information given to them, and as good as their skills in interpreting the evidence.

Judge Clarke said DAs are changing, but it is a slow process. He said it is important to be open because no two cases are the same. Sometimes, there is clear probative evidence. Regardless of how a case gets started, there must be a focus on the facts of that individual case. He thought that there will always be litigation about some of these cases.

Mr. Cattani commented that the prosecution and defense sometimes take the cases too personally. He said it is important to approach each case with the right state of mind, even if there had been a bad experience in the past. The system is not designed to weed out the innocent if there is a bad identification up front. It is not a reflection on the prosecutor; it is how the system works. They need to pay more attention up front. Ms. Stephanie Stoiloff, Commander of the Miami-Dade Police Department Forensic Services Bureau, acknowledged that law enforcement becomes defensive, but she said they were using best practices from 30 years ago in some of these innocence cases. The police do things differently now, and they want to resolve the problems from the past.

Mr. Brooks said the adversarial system is the cause of many problems. In his intern training, they have made a number of changes and gotten away from that system. He noted problems with defense attorneys whose focus is not necessarily on doing the right thing. This makes negotiations with them difficult.

Ms. Brown enlarged on Ms. Stoiloff's point, saying that, in the case of police, the issue should never be about finger pointing but about making the system better. A focus on policy and best practices can decrease the adversarial aspects of the system. She noted that, unfortunately, some law enforcement practices have not been updated for many years. However, it is important to be respectful of the people doing the work. Although litigation is adversarial by nature, the focus should be on what social science tells us — best practices.

Mr. MacClellan, director of the NGA, said the postconviction projects are looking at cases that had less advanced technology. He asked what will happen when the grants end, and wondered whether the states should consider picking up these projects when the old cases are complete. He asked whether there is a need to sustain this type of work. Ms. Cole said the group could help figure out what should happen in order to work toward sustainability. Mr. McClellan pointed out that if the federal government does not continue the grants, it will be a problem for the states because of widespread budget cuts. The governors cannot support them. However, scarce resources make these issues even more important. Ms. Cole noted that only 15 states are taking part in the program. Even with reduced budgets, other states did not apply for funding.

Mr. LaPorte said the grants funding was cut from \$5 million to \$4.7 million, consistent with cuts in federal funding across the board. NIJ is trying to garner support for the program to prevent more cuts. Some difficult decisions were made about which programs to keep. He noted that NIJ competes with other law enforcement entities and is a small research group within the Department of Justice.

Judge Reinstein said they have a 4 percent surcharge in Arizona, and 7 percent goes to testing. He said it would be an easy fix to roll that money toward postconviction testing. He also said the victim community and law enforcement community need to step up and make DNA testing a major issue. If it goes away, there will be more victims, and more innocent people will be convicted.

Mr. Morrissey said his plan in Denver was to complete a certain number of DNA cases. They planned for the project to end at some point. They are not planning to ask the state for more money.

Mr. Todd noted that, as a jurisdiction works through all the existing DNA cases, new postconviction DNA cases will be avoided because of the advanced technology. He said that when they finish the Innocence Project, they can say with assurance that no one in the state has been wrongly convicted (on the basis of DNA evidence). He added that perhaps the criminal justice system should go back and revisit guilt or innocence for cases that cannot be resolved with DNA testing.

Ms. Brown said they want to make sure there are incentives in place for the states that are not applying to NIJ for funding. She said it is a concern if new states do not apply. She mentioned certification and the fact that, in order to get funds, the chief legal officer has to sign off on certain standards for testing and preservation. Ms. Cole noted that the group needed to discuss incentives that could be put in the grant.

Sgt. Markey asked where an innocence project fits into the criminal justice system. In his department, they moved three detectives into Cold Cases from the domestic violence unit. He asked what it costs to support one of the projects, and how important this issue is to the committee.

Ms. Cole asked, who is advocating for quality procedures in evidence gathering and its retention? What would a successful grant program look like? Who should be asked the hard questions?

Ms. Stoiloff recalled that, in 2009, they attended the postconviction DNA meeting in Tampa and questions were posed about where the buy-in was and who had responsibility for these projects. She

said they do not have enough of a caseload for their lab and do not need extra money for testing. She suggested getting all parties involved and possibly creating a model that involves defense, prosecutors, law enforcement, and labs; and moving forward with it. She said some parties think this issue is everyone else's problem.

Mr. Brooks responded to Sgt. Markey about how their project is financed. He said they held bake sales, concerts, and other fundraising activities in addition to the grant. He also noted that the workers are not business graduates and always have to be monitored. They are well intentioned but might do illegal things. He said the NIJ grant is very important, and relationships are very important. Addressing Mr. Morrissey, he said their projects are never-ending. They will always need to look at innocence cases. The technology and sciences are continually changing. Therefore, there will always be a need to go back and look at some cases.

Mr. LaPorte shared some plans and thoughts. He said marketing is very important. He asked what the group thought about marketing to create an integrity unit that NIJ would fund. He asked whether they should emphasize cooperation among offices in the solicitation language while not necessarily making it a requirement. Mr. Cattani said this seemed like an odd incentive. He thought that if states have cases for which evidence is available, a better incentive would be to work together, regardless. He said a collaborative effort is good, whether or not there is an integrity unit.

Mr. LaPorte liked the idea of an integrity unit because cold cases not related to DNA testing could be included. They could delete the certification language and talk about integrity units only. Ms. Rose was also in favor of the idea.

Ms. Vanessa Antoun, Resource Counsel of the National Association of Criminal Defense Lawyers, said the association wanted to know what it could do in terms of training or outreach to let people know funds are available to address possible wrongful convictions. She suggested a private conversation with Mr. LaPorte to discuss this.

Mr. McClellan had a suggestion for encouraging more states to apply for the grant. He said states could be informed that they could receive funding if they had a pool of cases that might lead to exonerations. Mr. LaPorte said he would take this under advisement. Mr. Cattani said he thought the projects are worth doing, regardless of the number of people exonerated, even if there is only one.

Ms. Shawn Armbrust, executive director of the Mid-Atlantic Innocence Project, said she would want to make sure the integrity unit is a collaborative effort. She said the Innocence Project has forced everyone to work together. She thought cooperation should be an important piece of the grant, if not a requirement.

Mr. Brooks said the way the case screening criteria are set up is also an important part of the process. If plea bargains and guilty pleas are screened out, a project could end up with no cases. He said it has to be a true partnership. In California, they have been working on cases on a trial level for a long time. There are many scientists, experts, and other resources that are used for non-DNA cases.

Ms. Fernandez asked how the Innocence Projects came to be set up as not-for-profits with students working on cases. She said the innocence issue is too important to risk losing over the success of a bake sale; she suggested that review of these cases should be part of the system. If the system "screws up," it should have an internal process for correcting wrongs.

Judge Reinstein pointed out that budget issues have affected many types of grants, including those for cold cases. In some jurisdictions, unless there is a grant writer, applying is a daunting process. Mr. LaPorte agreed that some people have trouble getting things down on paper. He said prosecutors tend to have good writers, but state agencies often do not.

Mr. Morrissey asked whether people would rather have errors pointed out by someone from within or outside of the system. He asked whether people would rather have their boss tell them about a mistake or hear it from a reporter. He said it is critical to have the process within the system, once criteria and a structure are set up in the DA's or prosecutor's office.

Ms. Armbrust said there is value in having people on the inside acting as auditors; they can see cases with a fresh pair of eyes. She thought that this is an important check on the system. The Innocence Projects are trying to fit into the adversarial system.

Mr. Morrissey said people will run into the same inefficiencies and problems with integrity units. The attorney general in his state has an integrity unit, but the attorney general cannot set foot in his office unless Mr. Morrissey lets him.

Mr. Todd said that if this effort was going to be done, it should be marketed to local DAs' offices. He was interested in knowing why Mr. Ware agreed with Mr. Brooks and Ms. Armbrust. He said it is an important part of the grant to have a tie with an outside group, such as an innocence project. He agreed that it is important to have an outside perspective, as it helps with the perception of credibility. He said that was how they did it when they went through old cases in Dallas. Mr. Cattani agreed with the concept of integrity units and credibility. However, he did not like the term *integrity*; he preferred *justice review*.

Ms. Weiss asked for feedback on the best ways to facilitate the changes being discussed. She asked if people were willing to share their grants to help others who need assistance with grant writing. She asked if the projects were conducting their own public relations and whether they were getting access to the national resources available. She also asked for ideas on the best ways to reach other states to get them involved in the Innocence Project networks (e.g., the National Association of Criminal Defense Lawyers newsletter, state bars, and the *NIJ Journal*).

Ms. Herf commented on the fact that various states did not follow up with participation after the conference held 2 years ago. There were various reasons, including a lack of comfort with writing a grant application, an attorney general who would not cooperate, an inability to find a state agency to lead the effort, and being too busy. She did not know if these reasons were ever communicated to NIJ. She believed that other states were interested however, and were trying to solicit cooperation. Ms. Armbrust said they approached many people in Washington, DC, and were told they do not apply for federal grants, so the application would have to go through the police, who do not like collaboration. She pointed out that they can apply on their own for Bureau of Justice Assistance (BJA) grants for prosecutors. She thought that, in principle, it is good to go through a state agency, but this can cause some people not to apply.

Ms. Jaspen asked how much collaboration was taking place with the NGA and the National Association of Attorneys General. She wondered if there is a way to promote these programs through professional organizations.

Ms. Roetzel said they cannot convince a state agency in Texas to apply. If they were to divide the grant up among five different groups, there would be little money for any of them. If the counties could apply directly, they could team with the lab and the DA's office. Ms. Brown said that removing the state agency requirement would not decrease collaboration. She added that a task force could be

created, similar to what was done by the governor of Colorado, which would create movement toward preserving evidence while letting the funds flow.

Mr. Todd saw a problem with the federal government "funding projects to undermine state convictions." He said it would be perceived that way, even if that is not really the case. He said that innocence projects are often viewed as defender organizations.

Ms. Cole asked about interest on the part of state groups in these issues. She said a key theme has been collaboration, but if a group cannot convince a state agency to cooperate, how can they put together a spectrum of participation from various groups?

Mr. MacClellan said the role at the state level is to provide oversight across the state. He said that this can work better or worse in different states, but the interface is necessary. He also said there is a need for sustainability. However, the state budget is the issue. There are 29 new governors who are just "getting their feet wet," and that is also true of their staffs. They would soon meet with representatives from 30 states in Utah, which would help him get a better read on the issues. He said he would like to do a webcast for the governors on this issue, using specific data from the states' innocence projects.

Mr. Richard Williams, IV, a policy associate in criminal justice with the National Conference of State Legislatures, said the interest on the part of the states is strong. He reported that 48 states are participating in postconviction DNA testing and that, often, the most successful state delegation occurs when there are forensic oversight boards. He suggested that when approaching states about grant writing, use grant-writing entities that understand the state's needs. A legislative liaison could determine the need for grant-writing support to labs.

In response to Mr. Todd, Mr. Brooks said that Innocence Projects do not undermine prosecutors. The innocence project role is to look at old cases. Sometimes, people made mistakes or lied; there is a range of reasons for errors. He said there is no perception that innocence projects undermine the states. Mr. Todd agreed that innocence projects are legitimate, but he was referring to perception only, and he said that it exists.

Judge Reinstein noted that not all states have grant writers in their agencies. He asked if the writing could be done in a DA's office or at a state supreme court. Ms. Cole said that a state agency must take the lead. However, it can be any state agency, including the state public defender's office, if the state runs that office.

Ms. Weiss asked for a short list of ways to change perceptions of the grant program (e.g., writing articles, holding a roundtable). She was concerned about leaving the meeting with no specific action items or solutions proposed, and hoped to come up with tasks that could be undertaken over the next 6 months. Ms. Nicole Harris, a policy analyst for the Innocence Project in New York, suggested making collaboration a grant requirement if that would help open up the program. Ms. Brown commented that victim services should be part of the collaborative team, and she said the funding should come from inside the system.

Mr. Morrissey asked whether a needs analysis had been conducted because a large part of the country does not see postconviction DNA testing as a critical issue. In some places, there have been few, if any, murders. He suggested that some states might not be applying because there is no need. He asked whether the states that need it are applying. Ms. Cole said that, in several police departments in large cities in Massachusetts, there was no awareness of an innocence project in the state. This indicates that something is broken. In fact, many high-crime states — such as Florida, Alabama, Mississippi, Michigan, and New York — do not have Innocence Projects. A targeted

outreach could be conducted in these and other high-crime states. Ms. Brown said model legislation was being drafted. Another participant said there is definitely a need; in Louisiana, they applied for a grant just to deal with the Parish of New Orleans. He said it is critically important to use a model, and any model put in place should include district attorneys. Ms. Nethercott agreed that targeted outreach is a good idea in the states that have a need but do not apply. If people in those systems could talk to other prosecutors, they would find out that the project does not have to be a "bloodbath." Mr. LaPorte said he could not disclose which states have already applied for funding in this cycle. Mr. Cattani said he would get involved in the program now because they have a new attorney general.

Ms. Weiss described the 2009 outreach to all states, which involved contacting various entities in the system (e.g., police, labs). They were asked to fill out questionnaires on postconviction DNA testing. Many responded that they did not have a need or said they were not the right agency. NIJ invited teams from various states and professional organizations to a meeting and placed a mix of participants together at tables. They tried to place representatives from regional areas together, such as New York and New Jersey, as well as mixing the criminal justice professionals. The meeting appeared to be a success at the time. However, after that, NIJ did not receive many applications or even e-mails asking for help. She wondered what the federal government could do to bring people to the table. She said mass mailings do not work.

Mr. LaPorte suggested that it might have been the retention of evidence requirement in the grant because it would have been daunting for the states to try to pass legislation. However, he said the language in the solicitation is very loose; it does not require a statute. All that is needed is a policy or practice. As long as the idea exists and has been verbalized, it is considered a policy. Mr. Cattani said it would have been embarrassing for a state if they had problems, and he some saw that as an impediment. Mr. LaPorte thought some states were wary of vouching for all jurisdictions. Mr. Cattani said it seemed that this was not much of a requirement, and if it is meaningless, it is an impediment. He said that it would be better to require collaboration. Ms. Cole said that the language on retention of evidence is read differently in the states. She agreed with Mr. LaPorte that some states are not comfortable making that representation for all jurisdictions. Ms. Armbrust said it would have been helpful to know what had been done by other state agencies. She said there was not enough information to legitimize the process, such as a handout that described examples from other states. Ms. Cole noted that Mr. McClellan also asked for materials to give to the governors.

On the topic of targeting, Ms. Nethercott suggested identifying staff at the innocence projects at the state and local levels to see whether they had suggestions on whom to target. She said it is not enough to sit in a conference. She volunteered to provide information about Maryland. Other participants indicated that they could provide information on their states after the meeting.

Ms. Armbrust noted that the landscape has changed since 2009, and there is new information on successes that could be provided to the states. Ms. Stoiloff said that, for the 2009 meeting, some of the people who attended were delegated by those who had the actual decisionmaking power. Therefore, the representatives' ideas were vetoed when they got back to their states. Ms. Brown noted that one good thing to come out of the meeting was the TWG. She said the attorneys general should be told not to be scared of the preservation of evidence language in the grant. She suggested that the people who have the authority to make determinations about moving forward should be sent to the meetings.

Judge Rasin suggested convening a meeting in a jurisdiction where there has been an exoneration so that someone who participated (e.g., a judge) could speak with the public defender's office, the police, and/or the state attorney general's office. She said it is powerful to hear a first-person account. In her 19 years as a judge, she has encountered many people who are lying. She agreed

that some people think new projects are nonsense, and they delegate someone less powerful to go to the meetings.

Mr. Morrissey was a speaker at the 2009 meeting in Tampa. He said no one ever contacted him after the fact. He looked into writing a grant application and finding a sponsoring agency himself. He said the attorney general was at the meeting but did not follow up; Mr. Morrissey thought this was not the attorney general's issue in Colorado. He said that if a DA from a large jurisdiction contacted him, he might consider getting involved, but it would not be his job if he were an attorney general. However, in some states, it might be appropriate for the attorney general to have a role.

Mr. Cattani suggested pitching the idea to the state attorneys general so they could communicate it to different state agencies. Mr. Morrissey said he agreed; however, in Colorado, it is not the attorney general's role to go out and talk to people. He said there has to be a way to share the money so that the DAs have access to it. Mr. Todd said there are variations in jobs across the states, but Mr. Morrissey was correct that, in Western states, the bulk of the felony case files are in the prosecutor's office. The attorney general has no real authority.

Mr. LaPorte said that, in Virginia, the Innocence Project created some employment, which is a good point to make when marketing. All of the states should apply because they need money and because the project would create jobs.

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Closing Remarks

Gerald LaPorte, *Program Manager, Office of Investigative and Forensic Sciences, National Institute of Justice, U.S. Department of Justice, Washington, D.C.*

Mr. LaPorte said he appreciated everyone's time and commitment. He was taking away a number of ideas that would become a certainty in the next solicitation (assuming there is one). He said the grant period will be 24 months instead of 12. They will also use the language on collaboration that Mr. Heurich suggested (e.g., letters of support and MOUs) and will weigh the application on the basis of these collaborations. He noted that peer reviewers take collaboration into consideration anyway, but NIJ will build it in as part of the criteria. He said that NIJ will look into the idea of integrity units, but this might come out as a separate solicitation.

Mr. LaPorte stated that there is a record of the conversation that took place, and he planned to put together a short, two- to three-page description of the program to hand out to potential applicants. Some of the information from the meeting might be used. He said it would be sent to the group for their feedback. NIJ might also create a brochure for DNA.gov to post on the NIJ portion of the Web site. He said they could work with the New York Innocence Project on this and send the brochure to their people and to other organizations. In summary, the information from the 2-day meeting would be analyzed, and there would be a summary document.

Mr. LaPorte reminded the grantees that they have to send in justifications for a no-cost extension. He said that sometimes he makes some changes before they go through, but everything is worked out.

He noted that, at the grantee meeting, they discussed collecting metrics. NIJ wants to generate more hard numbers. They have to write a report to Congress at the end of the year, and the numbers will help tell the full story. It is not only the number of exonerations that is important but

also the number of cases where guilt is confirmed, and so on. All of these metrics show the success of the program. NIJ also wants to accurately convey the number of work hours that go into the investigations. Dr. Laub said that, although there are three "official" exonerations, six to eight more are in the pipeline. There could be 10 exonerations by the time the report goes to Congress.

Mr. LaPorte adjourned the meeting and wished everyone safe travels.

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