IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

EX PARTE	§	
	§	
	§	**Nos. WR-75,015-01 & 75,015-02**
	§	
JOHN E. GREEN	§	

BRIEF OF JAMES P. ABBOTT, STEVEN BISHOP, KIRK BLOODSWORTH, CLARENCE BRADLEY, ROBERT C. BUNDY, LON BURNAM, HELENE C. BURNS, DANIEL CARLUCCIO, RONNIE CARMONA, CHRIS CASTILLO, GAIL CHASEY, ROBERT J. DEL TUFO, W. THOMAS DILLARD, RAYMOND DODGE, TERRENCE P. DWYER, MELINDA ELKINS, RODNEY ELLIS, JESSICA FARRAR, NORMAN FLETCHER, JAMES A. FRY, BENNETT L. GERSHMAN, JOHN J. GIBBONS, LISA A. GLADDEN, PARRIS GLENDENING, ED GOEDHART, ANTHONY GRAVES, STEWART F. HANCOCK, JR., JO ANN HARRIS, DON HELLER, ROBERT W. HOELSCHER, GARY A. HOLDER-WINFIELD, THE INNOCENCE PROJECT, GEORGE KAIN, JOE KERNAN, GERALD KOGAN, RAY KRONE, THOMAS D. LAMBROS, RAYMOND LESNIAK, RAYMOND McKEON, ANTONIO MAESTAS, MICHELE MALLIN, WILLIAM J. MARTIN, KENNETH J. MIGHELL, BILL MONNING, MICHAEL MURPHY, J. PATRICK O'BURKE, TOM PARKER, HAROLD JAMES PICKERSTEIN, SAMUEL I. ROSENBERG, CORY SESSIONS, NORM STAMPER, RANDY STEIDL, JENNIFER THOMPSON-CANINO, DELBERT TIBBS, JOSEPH D. TYDINGS, ARMANDO WALLE, MARK WHITE
AS *AMICI CURIAE*

IN SUPPORT OF REAL PARTY IN INTEREST JOHN E. GREEN

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are a diverse group of more than 50 current and former state officials, state and local law enforcement, crime victims, victims' family members, former judges and prosecutors, organizations that assist those with claims of innocence, and exonerees, from Texas and across the country, all drawn together by their shared concern over the risk of wrongful convictions in death penalty cases. *Amici* include former law enforcement who have interrogated murder suspects, former prosecutors who have sought and secured the death penalty in individual cases, former judges who presided over capital trials or appeals, officials who have overseen executions, and legislators who have sponsored criminal justice reform or death penalty repeal legislation. Among the *Amici* are victims of crime, including those who were involved in cases in which the wrong person was convicted. *Amici* also include those who themselves were wrongfully convicted and sentenced to prison or death for crimes they did not commit.

The tie that binds this diverse group of citizens together is the profound philosophical and practical concern that the Texas death penalty, as currently applied, unreasonably and substantially risks the conviction and execution of the innocent. *Amici* feel that this threat is unacceptable in a civilized society, particularly when other options exist to ensure public safety and inspire confidence in the reliability of the system. *Amici* respectfully submit this Brief to bring to the attention of the Court the social science research documenting the prevalence and causes of wrongful convictions, the shifting public opinion that manifests itself in an increased rejection of the death penalty by

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of the Brief.

jurors, increased media attention to wrongful conviction issues, and public officials' reactions indicating wrongful convictions are a serious concern, particularly in death penalty cases. *Amici* believe that until Texas identifies and redresses the proven causes of wrongful convictions, including eyewitness misidentification, faulty forensics, unreliable informant evidence, and other documented evidentiary failures, the State runs the grave and untenable risk of convicting and executing an innocent person.

Social science research has shown that the prime causes of wrongful convictions are eyewitness misidentification, informant testimony, faulty forensic science, and false confessions. Empirical research has shown that wrongful convictions are prevalent for the crime of murder and over-represented in cases in which the defendant was sentenced to death. Wrongful convictions and the problems that cause them are well documented and have been acknowledged in Texas by several official governmental review entities. Confidence in the criminal justice system is shaken when problems go unaddressed; the public expects heightened reliability when it comes to the most severe penalties. It is crucial that the most common evidence responsible for wrongful convictions be examined for its impact on capital cases in Texas.

A thorough and fair review of the evidence surrounding the causes and prevalence of wrongful convictions—as well as an analysis of potential solutions to the issues that create these unjust results—was, until recently, underway in a Harris County courtroom in the case of *State v. John Green*. *Amici* submit that the critical hearing that had been eliciting evidence aimed at evaluating the accuracy and fairness of the Texas death penalty be continued. The trial court is the appropriate venue for hearing live testimony and developing a thorough record upon which courts can act and later review factual and

legal issues. *Amici* petition this Court to continue the hearing, so that the public may be informed about the actual operation, and associated risks, of the death penalty in Texas.

The following persons are *Amici*:

James P. Abbott, Chief of Police, West Orange, New Jersey, 1980-present; United States Congress, 8th Congressional District, Public Safety Advisory Committee Member.

Steven Bishop, Professor of Old Testament at the Seminary of the Southwest in Austin, TX; crime victim and father was murdered in 1977.

Kirk Bloodsworth, United States' first DNA exoneree in a capital conviction; exonerated in State of Maryland, 1993.

Clarence Brandley, Death Row Exoneree; Mr. Brandley was sentenced to death in 1981. In October of 1987, a judge recommended a new trial. The judge declared, that public officials had "lost sight of right and wrong."

Lon Burnam, Texas State Representative, District 90, 1997-present, Public Safety Committee Member, 81st Texas Legislature.

Helene C. Burns, Crime victim family member and volunteer with Victim's Services, Travis County Sheriff; father was convicted of capital murder for the murder of her mother.

Daniel Carluccio, Prosecutor, Ocean County, New Jersey, 1992-1997; former Deputy Public Defender, State Public Defenders, Ocean and Burlington Counties.

Ronnie Carmona, Mother of exoneree, Arthur Carmona of California, who was killed by a hit and run driver post-exoneration.

Chris Castillo, National Outreach Coordinator, Murder Victims Families for Reconciliation; crime victim; Mr. Castillo was a reporter covering the court beat when he learned his mother, Pilar Castillo, had been murdered in her Houston home.

Gail Chasey, New Mexico State Representative, 18th District, 1997-present.

Robert J. Del Tufo, United States Attorney, District of New Jersey, 1977-1980; New Jersey Attorney General, 1990-1993.

W. Thomas Dillard, United States Attorney, Northern District of Florida, 1983-1986; United States Attorney, Eastern District of Tennessee, 1981.

Raymond Dodge, Police Chief, Marlborough, New Hampshire, 1998-2006; 25 years in law enforcement.

Terrence P. Dwyer, Professor, Western Connecticut State University, 2007-present; New York State Police Bureau of Criminal Investigation, 1985-2007; General Counsel to law enforcement union in New York State.

Melinda Elkins, Crime victim family member in Ohio; Husband was wrongfully convicted of the rape and murder of her mother and the rape of her niece. He was released in 2005.

Rodney Ellis, Texas State Senator, District 13, 1990-present; Criminal Justice Committee Member, Texas Senate; Council Member, Houston City Council, 1984-1989; Board Chair, The Innocence Project.

Jessica Farrar, Texas State Representative, District 148, 1994-present.

Norman Fletcher, Justice, Supreme Court of Georgia, 1989-2005 (Chief Justice, 2001-2005).

James A. Fry, Assistant District Attorney, Dallas County, 1980-1982; prosecuted Charles Chatman in 1981, who was exonerated 27 years later after DNA testing proved him innocent.

Bennett L. Gershman, Professor of Law, Pace Law School; former prosecutor, Manhattan District Attorney's Office; former prosecutor, New York Special State Prosecutor.

John J. Gibbons, Judge, United States Court of Appeals for the Third Circuit, 1970-1990 (Chief Judge, 1987-1990); President, New Jersey Bar Association.

Lisa A. Gladden, Maryland State Senator, District 41, 2003-present.

Parris Glendening, Governor, State of Maryland, 1994-2002; Chairman, National Governors Association, 2000-2001; County Executive, Prince George's County, Maryland, 1982-1994; Council Member, Prince George's County, Maryland, 1974-1982; Council Member, Hyattsville City Council, Maryland, 1973-1974.

Ed Goedhart, Nevada Assemblyman, District 36, 2007-present.

Anthony Graves, Death Row Exoneree; Mr. Graves was convicted in 1994 of assisting in multiple murders and served 16 years on death row. He was released from Texas prison on October 27, 2010, after Washington-Burleson County District Attorney Bill Parham filed a motion to dismiss all charges.

Stewart F. Hancock, Jr., Associate Judge, New York Court of Appeals, 1986-1994; Justice, New York State Supreme Court, 1971-1986.

Jo Ann Harris, Former Assistant Attorney General in charge of the Criminal Division, United State Department of Justice.

Don Heller, United States Attorney, Eastern District of California, 1973-1977; Former Assistant District Attorney, State of New York, New York County, 1969-1973.

Robert W. Hoelscher, Co-Founder of the Innocence Project New Orleans; crime victim family member; father was murdered in Houston.

Gary A. Holder-Winfield, Connecticut State Representative, Assembly District 94, 2009-present.

The Innocence Network (the Network) is an association of 63 member organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The Network provides services in all 50 states and the District of Columbia.

George Kain, Connecticut Police Commissioner, 1999-present; Professor, Western Connecticut State University, 1994-present; Director of Training for the Police Commissioners Association of Connecticut.

Joe Kernan, Governor of Indiana, 2003-2005; Lt. Governor of Indiana, 1997-2003; Mayor of South Bend, Indiana, 1987-1996.

Gerald Kogan, Former Chief Justice, Supreme Court of the State of Florida; former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida.

Ray Krone, Death Row Exoneree; released in 2002 after ten years on Arizona's death row.

Thomas D. Lambros, Judge, United States District Court, Northern District of Ohio, 1967-1995, (Chief Judge, 1990-1995).

Raymond Lesniak, New Jersey State Senator, District 20, 1983-present.

Raymond McKeon, Retired Police Captain, So. San Francisco Police Department, 1960-1989; retired Director of Detention Ministry, Archdiocese of San Francisco, 1992-2005.

Antonio Maestas, New Mexico State Representative, 16th District, 2007-present.

Michele Mallin, Crime victim; Ms. Mallin was raped and mistakenly identified Timothy Cole as her attacker in a misleading photo line-up. After DNA evidence proved that Mr. Cole was not the rapist, Ms. Mallin began speaking out in favor of reforms to prevent wrongful convictions.

William J. Martin, Assistant State's Attorney, Cook County, Illinois; Member, Illinois Governor's Commission to study the Death Penalty, 2000-2002.

Kenneth J. Mighell, United States Attorney, Northern District of Texas, 1977-1981.

Bill Monning, California Assemblyman, 27th District, 2008- present.

Michael Murphy, Managing Partner, Impact NJ; Prosecutor, Morris County, New Jersey, 1990-1995.

J. Patrick O'Burke, Commander of Bureau of Information Analysis, Texas Department of Public Safety (DPS), 2007-2008; Deputy Commander, Narcotics Service, DPS, 2003-2007; Sergeant, Lieutenant and Captain, Narcotics Service, DPS, 1998-2003.

Tom Parker, Assistant Special Agent in Charge, Los Angeles Office, Federal Bureau of Investigation (FBI), 1994; 25-year FBI career; 5 years as a peace officer in Northern California.

Harold James Pickerstein, Chief Assistant United States Attorney, District of Connecticut, 1974-1986; United States Attorney, District of Connecticut, 1974.

Samuel I. "Sandy" Rosenberg, Maryland State Delegate, 41st District, 1983-present.

Cory Sessions, Policy Director, Innocence Project of Texas; brother of Tim Cole, first post-humorous exoneree. Mr. Cole was cleared by DNA evidence in 2008, and a state judge exonerated him in 2009. Mr. Cole was found guilty in the 1985 rape of fellow Texas Tech student Michele Mallin and sentenced to 25 years in prison. His conviction was based in part on the victim's identification of him as her attacker and what a judge later called a questionable suspect line-up. Cole died in prison in 1999.

Norm Stamper, Police Chief, Seattle, Washington, 1994-2000; San Diego Police Department, 1966-94.

Randy Steidl, Death Row Exoneree; served 12 years on Illinois' death row and 17 years in prison before being released in 2004.

Jennifer Thompson-Canino, Crime victim, author and wrongful convictions activist; twice testified against an innocent man she was convinced had raped her. She was victimized not only by the crime against her, but by her own guilt when she learned that she had misidentified her assailant.

Delbert Tibbs, Death Row Exoneree; served three years on Florida's death row and eight years in prison before being released in 1982.

Joseph D. Tydings, United States Senator, Maryland, 1965-1971; United States Attorney, District of Maryland, 1961-1963.

Armando Walle, Texas State Representative, District 140, 2009-present.

Mark White, Governor of Texas, 1983-1987; Texas Attorney General, 1979-1983.

I. Introduction

Exoneration statistics demonstrate both that the criminal justice system can sometimes work to avoid a miscarriage of justice and that the death penalty system as currently administered creates a palpable risk that the innocent will be unjustly convicted, sentenced to death, and executed. As Justice Sandra Day O'Connor noted, regarding the 90 exonerations from death row as of July 2001, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed."[2]

Justice O'Connor's conclusion that innocent people have likely been executed has been borne out in the empirical research and anecdotal narratives. The exoneration data, as well as that which chronicles the leading causes of wrongful convictions, echoes Justice O'Connor's position. As one academic observed, "[t]here is reason to fear that some executions counted as successes are actually undiscovered failures—executions of defendants who were innocent, or did not commit a crime for which the death penalty is allowed, but whom the courts inadvertently allowed to be executed."[3] Further, the inescapable conclusion that innocent individuals have been, and will continue to be, unjustly convicted has resulted in a meaningful shift in public opinion, causing caution and skepticism that can be objectively measured in myriad ways. This moving public opinion has triggered a calculated response by both legislators and public officials, in Texas and across the country.

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[2] Brian Bakst, *O'Connor Questions Death Penalty*, ASSOCIATED PRESS, July 2, 2001.

[3] James S. Liebman, Jeffrey Fagan, et. al, *A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can be Done About It* (2002), available at http://www2.law.columbia.edu/brokensystem2/sectionI.html#b (last visited March 14, 2010).

II. Empirical Studies on Wrongful Conviction

A. The History of Exonerations

In 1989, Gary Dotson became the first person exonerated by DNA evidence in the United States, sparking "a revolution in the American criminal justice system."[4] While exonerations of prisoners had occurred prior to Dotson's exoneration, Dotson's case showed that DNA testing could be a powerful tool for identifying and freeing the wrongfully convicted. In 1992, just three years after Dotson's exoneration, The Innocence Project at Cardozo Law School in New York was created with the mission to assist prisoners who could be proven innocent through DNA testing. Since that time, many innocence organizations have been created in law schools and journalism departments across the country to assist individuals with the investigation and litigation of their innocence claims. As of this writing, the network of innocence organizations nationwide stands at 63 members.

Beginning in 1989, as innocence organizations sprung up around the nation, the rate of exonerations in the United States increased.[5]

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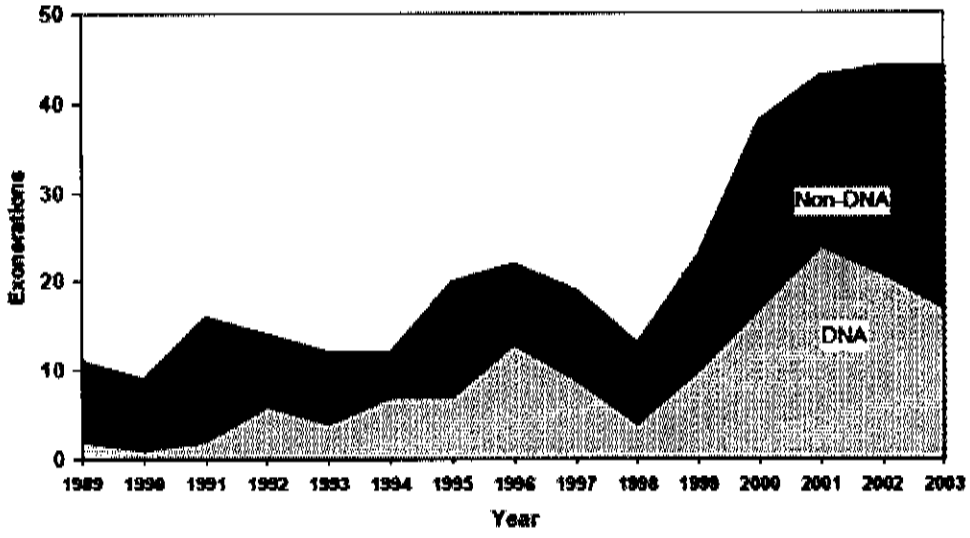
[4] Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. LAW & CRIMINOLOGY 523 (2005).

[5] *Id. at 528.*

Figure 1: Exonerations By Year, 1989-2003



The two states with the most exonerations to date—Illinois and New York—are unsurprisingly home to two of the most well-established innocence projects, The Center on Wrongful Convictions at Northwestern University Law School in Chicago and The Innocence Project at Cardozo Law School in New York.[6] Both projects, as well as most projects across the country, are clinics that utilize law students to help identify the wrongfully convicted and adjudicate their claims of actual innocence.

The use of DNA to exonerate the wrongfully convicted and the advocacy of the various innocence projects around the country on behalf of the exonerated have drawn much-needed attention to the problem of wrongful convictions in the United States. Exonerations have attracted the attention not only of the public, but also of researchers and policy makers. As the number of exonerations—both DNA and non-DNA—increased in the country, there came to be a set of data that researchers could examine in order to try to determine the causes of wrongful convictions. This research is useful not

[6] *Id.* at 541. According to its website, the Center on Wrongful Conviction has been instrumental in exonerating 23 people in Illinois alone. *See* CENTER ON WRONGFUL CONVICTIONS, *About Us*, available at http://www.law.northwestern.edu/wrongfulconvictions/aboutus/.

only to educate us as to how wrongful convictions occurred historically, but also to shed light on what steps might be taken to prevent their future occurrence.

B. Empirical Studies of Wrongful Convictions

Since 1989, when post-conviction DNA testing was first performed, there have been 261 DNA exonerations in the United States.[7] Brandon L. Garrett, a professor of law at the University of Virginia School of Law, conducted extensive empirical research into the first 250 cases of DNA exonerations (from 1989 to February 2010) looking at the reasons why these individuals were wrongfully convicted, the claims they asserted and the rulings they received during their appeals and post-conviction proceedings, how DNA testing eventually proved their innocence, and how they were exonerated.[8] Of the first 250 exonerations nationally, 40 were in Texas.[9] Professor Garrett's study involved analyzing the cases by collecting trial transcripts and appellate and post-conviction decisions.[10]

Professor Garrett's study used a narrow definition of "DNA exoneration," namely that (a) the conviction was overturned, after which there was an acquittal at re-trial or all charges were dismissed by the state, or there was an absolute pardon by the governor

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[7] The Innocence Project, available at http://www.innocenceproject.org/know/ (last visited Dec. 13, 2010).

[8] Brandon Garrett, *Judging Innocence*, 108 COLUM. L.REV. 55 (2008). This article covers only the first 200 DNA exonerations. Professor Garrett analyzes the first 250 exonerations in his upcoming book: Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011).

[9] Testimony of Brandon L. Garrett in *State of Texas v. John E. Green*, Evidentiary Hearing, Dec. 7, 2010, R.R. Vol. 4 pg. 30.

[10] Professor Garrett was able to obtain trial transcripts in 207 of the DNA exoneration cases. In 16 of the cases there a guilty plea was entered; therefore there was no trial transcript. In the remaining 27 cases, Professor Garrett was not able to obtain the transcript. Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

based on the new evidence of innocence, and (b) the exoneration was substantially based on post-conviction DNA testing.[11]

Of the first 250 DNA exonerations, Professor Garrett found that the four leading types of evidence that led to wrongful convictions were erroneous eyewitness evidence (190 of 250), faulty forensic evidence (185 of 250), informant evidence (52 of 250), and false confessions (40 of 250).[12] He also found that DNA exonerees are disproportionately minorities (70%).[13] Each of the four leading types of evidence that lead to erroneous convictions is described in more detail below.

Samuel R. Gross, Thomas and Mabel Long Professor of Law at the University of Michigan Law School, has also conducted empirical research into wrongful convictions. Unlike Professor Garrett's research, Professor Gross's research was not limited strictly to DNA cases. Instead, Professor Gross defined an exoneration as "an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted."[14] Gross identified 340 exonerations occurring between 1989 and 2003.[15] Four criteria were used to identify an exoneration in his research: (1) A governor or other appropriate executive officer issued a pardon based on evidence of the defendant's innocence (42 cases); (2) criminal charges were dismissed by courts after new evidence of innocence emerged, such as DNA (263 cases); (3) the defendants were acquitted at a retrial on the

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[11] Testimony of Brandon L. Garrett in *State of Texas v. John E. Green*, Evidentiary Hearing, Dec. 7, 2010, R.R. Vol. 4 pg. 31-32. This excludes DNA evidence proving innocence pre-trial and DNA evidence in post-conviction that was not a substantial factor in the exoneration.

[12] Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

[13] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 126.

[14] Samuel R. Gross et al., *Exonerations in the United States,1989 Through 2003*, 95 J. Crim. Law & Criminology 523 (2005).

[15] *Id.* at 524.

basis of evidence that they had no role in the crimes for which they were originally convicted (31 cases);[16] and (4) posthumous acknowledgment by the state of the innocence of defendants who had already died (4 cases).[17]

Of those 340 cases, 205 (60%) were wrongfully convicted of murder.[18] Seventy-four of all exonerations (22%) were persons convicted of capital murder and sentenced to death.[19] The overrepresentation of capitally-sentenced defendants in the set of all exonerees led Professor Gross to conclude that it is "almost certainly true" that false convictions are "much more likely in death penalty cases[ ] than in other criminal prosecutions."[20] Between 1973 and 1989, 2.3% of all capitally-sentenced defendants were exonerated, although Professor Gross cautions that the actual rate of wrongful conviction "is almost certainly greater."[21] His research also reflected that the average time between conviction and exoneration in all cases was 11 years.[22]

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[16] Samuel R. Gross et al., *Exonerations in the United States,1989 Through 2003*, 95 J. CRIM. LAW & CRIMINOLOGY 523 (2005). Professor Gross excluded from this category "any case in which a dismissal or an acquittal appears to have been based on a decision that while the defendant was not guilty of the charges in the original conviction, he did play a role in the crime and may be guilty of some lesser crime that is based on the same conduct." *Id.* at 524 n.4.

[17] *Id.* at 524. Professor Gross excluded "mass exonerations" from his study. Mass exonerations are exonerations of large numbers of people who were falsely convicted as a result of "large scale patterns of police perjury and corruption." *Id.* at 533.

[18] *Id.* at 528.

[19] *Id.* at 531.

[20] *Id.* at 532.

[21] Samuel R. Gross and Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927 (2008). Michael Risinger has estimated the rate of wrongful conviction in capital rape-murder cases to be as high as 5%. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 779 (2007).

[22] Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. LAW & CRIMINOLOGY 523, 535 (2005). The Texas Department of Criminal Justice website lists an average of 10.26 years between conviction and execution in Texas. *See* TDCJ, Death Row Facts, available at http://www.tdcj.state.tx.us/stat/drowfacts.htm.

Like Professor Garrett, Professor Gross discovered that the most common cause of wrongful convictions in all exoneration cases is eyewitness misidentification (64% of cases).[23] In 146 exonerations (43%), Professor Gross discovered perjury, *e.g.*, testimony from an interested witness falsely accusing the defendant of having committed the crime.[24] False confessions were discovered in 15% of exonerations.[25]

Following a wrongful conviction there are, of course, appellate and post-conviction processes. Unfortunately, however, exonerees did not often raise factual claims challenging the evidence supporting their wrongful convictions, and those who did rarely received new trials based on these factual claims.[26] Defendants did not receive effective review of the unreliable and false evidence that supported these convictions, and the exonerees were failed by the appellate and post-conviction process.

The Role of Eyewitness Evidence in Wrongful Convictions

Erroneous eyewitness evidence is the leading cause of wrongful convictions. As Justice William Brennan wrote, "[T]here is almost nothing more convincing that a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"[27] In the first 250 DNA exonerations, eyewitnesses misidentified 76% of the exonerees, 190 of 250.[28] In 36% (68 of 190), the exonerees were misidentified by

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[23] Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. LAW & CRIMINOLOGY 523, 542 (2005).

[24] *Id. at* 543-44.

[25] *Id. at* 544 (2005).

[26] Brandon Garrett, *Judging Innocence*, 108 COLUM. L.REV. 55 (2008) at 121. This article covers only the first 200 DNA exonerations.

[27] *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting).

[28] Professor Garrett was able to obtain trial materials in 161 of the 190 exonerees who were misidentified by eyewitnesses. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 97.

multiple eyewitnesses.[29] In total, over 290 eyewitnesses misidentified the 190 exonerees, and, of those, 73% were victims (213 of 290).[30] Approximately half of all murder exonerations (DNA and non-DNA) in Professor Gross's research (102 of 205) contained eyewitness misidentifications.[31]

Professor Garrett found two recurring problems: suggestive identification procedures and unreliable identifications.[32] Evidence indicated that the police contaminated identification procedures in 78% of the cases (125 out of 161) and that in 57% of the cases (92 of 161) the eyewitnesses were not certain at the time of the earlier identification.[33] In total, only 12% of the cases had no evidence of suggestion or unreliability (20 of 161); the remaining 88% were contaminated by suggestive identification procedures, were unreliable identifications, or both.[34]

Professor Garret was able to obtain 161 trial transcripts of the 190 DNA exoneration cases containing eyewitness misidentifications. In 125 out of those 161 cases, the suggestive nature of the identification procedure was evident from the record.[35] In 92 of these 161 cases, the unreliability of the identification was apparent from the

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[29] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 99 n. 16 (37 were identified by two eyewitnesses, 19 were identified by three eyewitnesses, eight were identified by four eyewitnesses, three were identified by five eyewitnesses and one was identified by 10 eyewitnesses).

[30] *Id.* at 99.

[31] Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. LAW & CRIMINOLOGY 523, 542 (2005).

[32] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 97.

[33] *Id.* at 97 & 98.

[34] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 115-116.

[35] *Id.* at 97.

transcript.[36] These numbers are startling, especially when one considers that there are potentially 65 cases that also may have had suggestive identification procedures and 98 cases that may have also had unreliable identifications, but evidence of such problems was either not present in the trial transcript or occurred in cases in which the transcript was unavailable. Eyewitness evidence is subject to error for myriad reasons.

Suggestive Identification Procedures: There are numerous ways in which law enforcement can contaminate identification procedures, both intentionally and unintentionally: the use of "showups" where the eyewitness is asked whether a single person was the attacker (33% or 53 of 161),[37] lineups where it is made obvious who the witness is supposed to identify because the defendant stood out (34% or 55 of 161), suggestive remarks by police about who should be identified (27% or 44 of 161) and even hypnosis (3% or 5 of 161).[38] While some of the exonerees' cases involved more than one of these problems, 78% (125 of 161) involved at least one.[39]

Unreliable Identifications: The certainty an eyewitness expresses at trial is not a true indication of how certain the eyewitnesses were when they first identified the exoneree. This false certainty can be created by different factors, including multiple identification lineups (in an at least 14 of the 161 cases the exoneree was the only person

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[36] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 98.

[37] Of these 53 showups only 11 were crime scene showups. The other 42 showups were not conducted at the crime scene right after the crime and therefore had no justification. Six of these were identified for the first time in court at a hearing or trial. *Id.* at 105.

[38] Hypnosis can create false or inaccurate memories. Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis,* 253 J. AM. MED. ASS'N. 1918, 1919 (1985); Lisa K. Rozzano, *The Use of Hypnosis in Criminal Trials: The Black Letter of the Black Art,* 21 LOY. L.A. L. REV. 635, 645 (1987).

[39] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 104.

repeated in multiple identifications),[40] police statements after the identification confirming that the eyewitness picked the "right guy," and police statements to the witness in advance of the lineup indicating that they have a suspect.[41]

From the 161 trial transcripts obtained, 40% (64 of 161) revealed that the eyewitness had not initially identified the exoneree.[42] They had instead identified a "filler", another suspect, or no one at all. In 21% (34 of 161) of the cases, the eyewitness admitted initial uncertainty about the identification.[43] In 9% (15 of 161), the eyewitness had reported that they never saw the culprit's face.[44] Nevertheless, by the time the witnesses testified in court, the eyewitness was almost always certain that the exoneree was the person they saw.[45] In two cases, the eyewitnesses identified the exoneree even though the real culprit (as it later was discovered) was present in the same identification lineup.[46]

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[40] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 109.

[41] Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998); Ryann M. Haw, Jason J. Dickonson, and Christian A. Meissner, *The Phenomenology of Carryover Effects Between Show-Up and Line-Up Identification,* 15 MEMORY 117 (2007).

[42] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 115.

[43] *Id.*

[44] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 115.

[45] In only 4 of the exonerees' cases were the eyewitnesses not sure at trial that they had identified the right person – the cases of Kirk Bloodsworth, Jimmy Ray Bromgard, William Dillon and Jerry Miller. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 120 n. 90.

[46] The cases in which this happened were those of Marvin Anderson and John Jerome White. In the case of Ronald Cotton, although not in an identification procedure, the victim Jennifer Thompson in a postconviction hearing stated she had never seen Bobby Poole before. Bobby Poole was later shown through DNA testing to be the real culprit. *Id.* at 117-118.

Not only did the eyewitness identify the wrong person in all 190 exonerees' cases that involved an eyewitness, but in 62% (100 of 161) the exonerees looked notably different from the initial description given by the eyewitness to the police. There were differences with regards to hair, facial hair, height, weight, scars, tattoos, piercings, teeth, and eyes.[47]

Social scientists have warned for decades of the "fragility and malleability of eyewitness memory."[48] As written by Professor Gary Wells, "[E]yewitness testimony is among the least reliable forms of evidence and yet persuasive to juries."[49]

The "Other-Race" Effect: The "other-race" effect, simply stated, is that the likelihood of misidentification is higher when an identification is cross-racial.[50] At least 49% (93 of 190) of the exonerees misidentified by eyewitnesses were cross-racial in nature.[51]

Child Witnesses: In 12% of the cases the eyewitnesses were juveniles or children.[52] Research has found that while children can answer open-ended questions quite accurately, they are extremely susceptible to suggestion. When asked leading questions, children easily incorporate false information into their answers.[53]

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[47] *Id.* at 121.

[48] *Id.* at 98.

[49] Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 605 (1998).

[50] *See, e.g.*, Gary L. Wells and Elizabeth Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230 (2001); Gary L. Wells and Elizabeth F. Loftus, eds., *Eyewitness Testimony: Psychological Perspectives* at 1(Cambridge University Press 1984); Elizabeth F. Loftus, *Eyewitness Testimony* (Harvard University Press 1979).

[51] Seventy-one of those were white women misidentifying black men. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 3 - Eyewitness Misidentifications - Eyewitness Misidentifications at 125-126.

[52] *Id.* at 128.

[53] *See* Michael Kennan, *Child Witnesses: Implications of Contemporary Suggestibility Research in a Changing Legal Landscape*, 26 DEV. MENTAL HEALTH L. 100 (2007); Richard Friedman, *The Suggestibility of Children; Scientific Research and Legal Implications* 86 CORNELL L. REV. 33 (2000);

The Role of Forensic Evidence in Wrongful Convictions

Professor Eric Lander noted in 1989: "At present, forensic science is virtually unregulated—with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row."[54] Little has improved in the intervening 20 years, as evidenced by the National Academy of Sciences' (NAS) scathing indictment of the state of forensic science. The NAS report, which was issued in 2009 and commissioned by Congress, concluded that the forensic disciplines lack core standards and rigorous practice methodologies, which undermines the entire field:

> The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity. This is a serious problem. Although research has been done in some disciplines, there is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods.[55]

As aptly stated by exoneree Roy Brown, "Junk science sent me to prison, but real science proved my innocence."[56] Faulty forensic evidence is the second leading type of evidence contributing to wrongful convictions.

In 74% (185 of 250) of the 250 DNA exoneration cases examined by Professor Garret, forensic evidence was presented. In 169 of those 185 cases, forensic analysts testified for the State at trial. Professor Garrett obtained 153 trial transcripts where the

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Maggie Bruck, Stephen J. Ceci and Helene Hembrooke, *Reliability and Credibility of Young Children's Reports*, 52 AMER. PSYCH. 136, 140 (1998).

[54] Eric Lander, *DNA Fingerprinting on Trial*, 339 NATURE 501, 505 (1989).

[55] National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (Executive Summary—Prepublication Copy) at S-1 (hereinafter NAS report).

[56] *See National Academy of Sciences Urges Comprehensive Reform of U.S. Forensic Sciences*, available at http://www.innocenceproject.org/Content/National_Academy_of_Sciences_Urges_Comprehensive_Reform_of_US_Forensic_Sciences.php.

State presented forensic evidence.[57] The types of forensic testimony used in the 153 trials were serology (116 of 153), hair comparison (75 of 153), fingerprint comparison (20 of 153), DNA testing (18 of 153), shoe print comparison (6 of 153), bite mark comparison (7 of 153), and voice comparison (1 of 153).[58] The review of these 153 trial transcripts found two recurring problems: reliability and validity.[59]

Reliability: A method can be unreliable if there has been no underlying frequency data on how common the observed characteristics are in the population, if subjective assessments are used to compare evidence without objective criteria, or if error rates are unknown, untested, or, according to available evidence, quite high.[60]

Serology and DNA testing were the only two forensic methods used that were deemed reliable in Professor Garrett's study. All of the other types of "forensic science" involve the subjective comparison of two objects. The NAS report narrows the field of acceptably reliable forensic testing even further, noting that:

> Often in criminal prosecutions and civil litigation, forensic evidence is offered to support conclusions about "individualization" (sometimes referred to as "matching" a specimen to a particular individual or other

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[57] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 4 – Flawed Forensics at 189. Of the 185 with forensic evidence presenting the case, four pled guilty, and thus there was no trial. In another two, there was no testimony at all by either side regarding the forensic testing, leaving 179 where forensic evidence was introduced at trial. Of those 179, four entered the evidence by stipulation. In six, analysts testified only for the defense, leaving 169 cases where analysts testified for the State. Of those 169, 16 trial transcripts could not be located, leaving 153 trial transcripts to analyze. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 4 – Flawed Forensics at 189 n.10.

[58] *Id.* at 189.

[59] A forthcoming article by Profession Rodney Uphoff also notes a link between inadequate resources and sloppy forensic work: "[T]he vast majority of crime labs are staggering under a crush of cases and are unable to keep up with the demands for their services. The lack of resources and manpower creates backlogs and encourages shortcuts. Additionally, some criminologists lack adequate training or supervision. As a result, quality control in many labs is questionable." Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, WIS. L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912310.

[60] Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

> source) or about classification of the source of the specimen into one of several categories. ***With the exception of nuclear DNA analysis, however, no forensic methodology has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.***[61]

In other forensic fields, analysts simply form a subjective opinion as to whether or not two objects "match," are "consistent," or are "similar"— terms with no clear meaning. For instance, the NAS Report concluded that "[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population;"[62] and that "no scientific studies support" the assumption "that bite marks can demonstrate sufficient detail for positive identification."[63] Even though these methods have been criticized by scientists and scholars "due to errors, evidence of unreliability, vague terms used for conclusions, and lack of scientific rigor, most are still in wide use today."[64]

Validity: Regardless of the reliability of the forensic method used, it is typical in exonerees' cases to see analysts misstate the conclusions they could draw and mislead the jury. "Invalid" testimony denotes "a violation of scientific criteria, namely conclusions not supported by empirical data. Analysts may make a range of errors, including using erroneous statistics, using statistics or probability statements where there is no research to

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[61] NAS Report at S-5 (emphasis added).

[62] *Id.* at 160.

[63] *Id.* at 176.

[64] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 4 – Flawed Forensics at 190 (footnotes omitted). *See* Joseph L. Peterson and Penelope N. Markham, *Crime Laboratory Proficiency Testing Results, 1978-1991, II: Resolving Questions of Common Origin,* 40 J. FORENSIC SCI. 1009, 1010 (1995); Michael J. Saks and Jonathan J. Koehler, *The Individualization Fallacy in Forensic Science,* 61 VAND. L. REV. 199 (2008); NAS Report at 7-8, 21-22.

support such conclusions, and disregarding exculpatory data. Even if the method is reliable, the conclusions reached may be invalid."[65]

There was invalid testimony by analysts at a staggering high frequency, in 61% of trials involving state forensic evidence: serology 58% (16 of 116); hair comparison 39% (29 of 75); fingerprint comparison 5% (1 of 20); DNA testing 17% (3 of 18); shoe print comparison 16% (1 of 6); bite mark comparison 71% (5 of 7); and voice comparison 100% (1 of 1).[66] In all of these cases the invalidity of the testimony strengthened the State's case.[67]

Invalid testimony is not just the product of a few incompetent forensic analysts; many of the analysts only testified in one of the exonerees' trials. A total of 81 different forensic analysts employed by 54 different laboratories, practices or hospitals from 28 states gave invalid testimony in these 153 cases.[68] There have even been examples of invalid testimony in which analysts have made up probabilities based on their own personal estimates.[69]

The impact of invalid testimony is most stark when considering DNA-testing testimony. As referenced above, 17% (3 of 18) of DNA testing testimony was invalid, yet we now know that all exonerees with DNA testing at the time of their conviction are

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[65] Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

[66] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 4 – Flawed Forensics at 190. Although serology is a reliable forensic science, in 51 trials the same basic error was made in relation to "masking" (where the victim's own genetic markers could overwhelm any markers from the culprit), whereby the serology evidence was inconclusive because it was consistent with the victim, but that was not what the analyst told the jury. *Id.* at 194.

[67] *Id.* at 190.

[68] *Id.* at 193.

[69] Consider, for example, Arnold Melnikoff in the cases of Jimmy Ray Bromgard and Chester Bauer, and the analyst in the case of Timothy Durham. *Id.* at 198-199.

innocent.[70] Even reliable scientific methods—if delivered in an invalid way—can result in a wrongful conviction. Moreover, even where the testimony was deemed valid, analysts in 31 cases nevertheless used "vague and potentially misleading terminology."[71] The NAS Report condemned such vague terminology: "[T]he problem with using imprecise reporting terminology such as 'associated with,' which is not clearly defined...can be misunderstood to imply individualization."[72] Peter Neufeld, co-founder of the Innocence Project, has commented that although though DNA can be "a truth machine," it is important to keep in mind that "any machine when it gets in the hands of human beings can be manipulated or abused."[73]

Forensic Evidence Concealed by the State: Professor Garrett found that in 22 DNA exonerations the State failed to disclose to the defense data that would have been exculpatory or even the outright fabrication of evidence. In at least three cases, the State "failed to report contrary conclusions by other analysts that had excluded the defendant."[74]

The Role of Informant Evidence in Wrongful Convictions

As Professor Alexandra Natapoff explains in *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*:

> Informants have become law enforcement's investigative tool of choice, particularly in the ever-expanding world of drug enforcement. Informants

[70] Twenty exonerees had DNA testing at the time of their conviction, but only 18 trial transcripts could be obtained. Sixteen exonerees had DNA testing that showed innocence. Four exonerees had DNA testing that appeared to show guilt; three of those cases involved invalid testimony and one involved lab error. *Id.* at 202 n.43.

[71] *Id.* at 200.

[72] NAS Report at 161.

[73] Adam Liptak, *The Nation: You Think DNA Evidence Is Foolproof? Try Again*, N.Y. Times, Mar. 16, 2003.

[74] Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

> are part of a thriving market for information. In this market, snitches trade information with police and prosecutors in exchange for lenience, the dismissal of charges, reduced sentences, or even the avoidance of arrest. It is a highly informal, robust market that is rarely scrutinized by courts or the public.[75]

In the 250 DNA exoneree cases, 21% involved informant testimony (52 of 250). Of those 52 cases, 28 were jailhouse informants, 23 had co-defendant testimony, and 15 had confidential-informant or cooperating-witness testimony.[76] Twenty-nine percent (97 of 340) of the DNA and non-DNA exonerations identified by Professor Gross in his study involved "a civilian witness who did not claim to be directly involved in the crime committ[ing] perjury."[77] More strikingly, 56% of all murder exonerations involved perjured testimony.[78]

Not only did the informants testify that the exonerees had made incriminatory statements but they also had intimate details of the offense,[79] which the state claimed only the true culprit could have known. This is particularly worrisome, as we now know that the exoneree was not the "true culprit" and could never have of known those details firsthand.[80] These details also increase the creditability of the informant; even though the jurors may consider an informant to be a less than trustworthy source, his knowledge of

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[75] 37 GOLDEN GATE U. L. REV. 107, 111 (2006)

[76] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 5 – Trial By Liar at 258.

[77] Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. LAW & CRIMINOLOGY 523, 543 (2005).

[78] *Id.* at 544.

[79] All but two informants claimed to have heard specific details from the exoneree. Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

[80] This information could have come from an array of sources: law enforcement, prosecutors, jailhouse sources, or even the exoneree himself talking about his case in general. Wherever the source, it did not come from the exonerees' admissions.

the intimate details of the offense may leave little doubt in a juror's mind that the informant is telling the truth.

Of the co-defendants who testified, four of them knew intimate details about the offense because, as DNA testing later showed, they were the actual perpetrators. The remaining co-defendants were also innocent; a total of 17 exonerees confessed and testified against co-defendants, who were also subsequently exonerated through DNA testing.[81]

The Role of False Confessions in Wrongful Convictions

A confession is thought to be incredibly damning evidence of one's guilt. People often believe that no one would confess to a crime they didn't commit; however, DNA exonerations have proved that false confessions do occur. Of the 250 DNA exoneration cases studied by Professor Garrett, forty exonerees confessed.[82] Of those, documentation of the confession and/or trial transcripts was obtained for 38.[83] A similar problem arises in false confessions as in informant evidence—the exoneree's apparent knowledge of specific details of the offense that only the actual perpetrator could know. Of the 38 false confessions, only two did not contain specific details that would have only been known to the perpetrator,[84] and detectives further testified under oath in 71% (27 of 36) that the details were nonpublic or corroborated facts, and that they had not disclosed them to the

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[81] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (forthcoming Harvard University Press 2011), Chapter 5 – Trial By Liar at 277.

[82] Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

[83] Brandon L. Garrett, *The Substance f False Confessions*, 62 STAN. L. REV. 1051, 1062 (2010). In 35 of these cases the confession was introduced at trial and the trial transcript obtained; in three of the cases, the exoneree pled guilty and documentation of the confession was obtained, and for two of the cases, no materials could be located.

[84] Consider the cases of Travis Hayes and Freddie Peacock. *Id.* at 1057.

exoneree.[85] Yet, in 74% (28 of 38) of the false confessions the exoneree gave facts inconsistent with the case along with nonpublic information.[86] All of the exonerees waived their *Miranda*[87] rights and all lacked counsel before confessing.[88]

Studies have shown that "police-induced confessions appear to occur primarily in the more serious cases, especially homicides and other high-profile felonies,"[89] which is consistent with Professor Garrett's findings: 70% of the false confessions involved a murder.[90] Of the 40 false confession cases, 25 were rape-murder, three were murder and 12 were rape cases.[91] While a majority of DNA exonerations were rape cases,[92] the false confessions were predominately in murder cases.

Exonerees who gave false confessions did not just incriminate themselves; 17 of the 40 false confessions went as far as to incriminate others who were equally innocent of the crime.[93] Post-conviction DNA testing later exonerated 11 of those 17 who were falsely inculpated by others.[94] In addition, some of the innocent people incriminated by false confessions later falsely confessed themselves.[95]

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[85] *Id.* at 1074.

[86] *Id.* at 1088.

[87] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[88] Brandon L. Garrett, *The Substance f False Confessions*, 62 STAN. L. REV. 1051, 1058 (2010).

[89] Richard A. Leo, *Police Interrogation and American Justice* at 245 (2008). *See* Samuel R. Gross et al., *Exonerations in the United States,1989 Through 2003*, 95 J. CRIM. LAW & CRIMINOLOGY 523, 544 (2005).

[90] Brandon L. Garrett, *The Substance f False Confessions*, 62 STAN. L. REV. 1051 at 1065 (2010).

[91] *Id.*

[92] Of the first 250 DNA exonerees, 68% were convicted of rape (171 of 250); 9% were convicted of murder (22 of 250); 21% were convicted of rape-murder (52 of 250) and 2% were convicted of other crimes (5 of 250). Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

[93] An example of this is Paula Gray in the "Ford Heights Four." Brandon L. Garrett, *The Substance f False Confessions*, 62 STAN. L. REV. 1051 at 1065 (2010).

[94] *Id.* at 1065.

[95] Consider the "Central Park Jogger" case, involving confessions of Antron McCray, Kevin Richardson, Raymond Santana, Yusef Salaam, and Kharey Wise; the "Beatrice Six" case, —involving James Dean, Ada

Although some of these false confessions were recorded,[96] they were only partially recorded; there is therefore no way of knowing what preceded the recording. Police took 38% (14 of 38) of the exonerees to the crime scene. Such visits were not recorded, and provided "features of the crime scenes that were nonpublic and corroborated by the investigation."[97] In addition, eight of the 38 exonerees volunteered incriminating information to the police prior to any custodial interrogation, and in five of those eight, the volunteered information contained details that were nonpublic.[98]

The false confessions often played a central role in the trial of the 40 exonerees. There was often little other evidence against them. Only 12 of the 40 false confession cases had eyewitnesses; six had jailhouse informants, seven had co-defendant testimony, and 21 had some type of forensic evidence.[99]

Professor Garrett's study led him to conclude that the exonerees' false confessions fell into what social scientists term "stress compliant" false confessions, whereby the stress of the interrogation process, and not necessarily any illegal coercion, secures the confession.[100] This confession is given out of a desire to "[be] allowed to go home, [bring] a lengthy interrogation to an end, or [avoid] physical injury."[101]

JoAnne Taylor, Debra Shelden, and Thomas Winslow, who implicated each other as well as two others who did not confess; Alejandro Hernandez and Rolando Cruz, who both reportedly confessed to the same crime; and Marcellius Bradford and Calvin Ollins, who both confessed and implicated two others who did not confess. *Id.* at 1065.

[96] Of the 38 false confessions where documentation was obtained, 58% (22 of 38) had recordings—13 were audio recorded and nine were videotaped. Additionally, five were at some point transcribed by a stenographer. *Id.* at 1079.

[97] *Id.* at 1086.

[98] *Id.* at 1107.

[99] *Id.* at 1066.

[100] Richard J. Ofshe and Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L., POL. & SOC'Y 189, 211, 238 (Austin Sarat &

Of the 40 exonerees who falsely confessed, 43% (17 of 40) were mentally ill, mentally retarded, or borderline mentally retarded;[102] 33% (13 of 40) were juveniles;[103] and in 65% (26 of 40), the exoneree was either mentally disabled, under 18 years of age at the time of the offense, or both.[104]

The Role of the Appellate and Post-conviction Processes in Wrongful Convictions

Professor Garrett examined all written opinions in the 250 DNA exoneration cases issued prior to the DNA exoneration. Courts issued written opinions in 66% of the cases (165 of 250).[105] The finding was that the reversal rate was no different from the reversal rates of other rape and murder trials. Of the 21 exonerees who received reversals, 15 were later reconvicted; the other six were pending retrial when DNA testing

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Susan S. Silbey eds.,1997).; Brandon L. Garrett, *The Substance f False Confessions,* 62 STAN. L. REV. 1051 at 1063 (2010).

[101] Fred E. Inbau et al., *Criminal Interrogation and Confessions* 412 (4th ed. 2001).

[102] The 14 mentally retarded or borderline mentally retarded exonerees were A. Gray, P. Gray, B. Halsey, T. Hayes, D. Jones, F. Peacock, W. Kelly, B. Laughman, E. Lloyd, C. Ollins, L. Rollins, J. Townsend, D. Vasquez, and E. Washington. In addition, A. Taylor, D. Warney, and R. Williamson were diagnosed as mentally ill. Still others may not have been examined by experts or fully diagnosed at the time of trial. Brandon L. Garrett, *The Substance f False Confessions,* 62 STAN. L. REV. 1051, 1064 (2010).

[103] *See People v. Wise*, 752 N.Y.S.2d 837, 843 (N.Y. Sup. Ct. 2002). Those juveniles were M. Bradford, D. Brown, J. Deskovic, P. Gray, N. Hatchett T. Hayes, A. McCray, C. Ollins, K. Richardson, L. Rollins, Y. Salaam, R. Santana, and K. Wise.

[104] *See* Brandon Garrett, *Judging Innocence*, 108 COLUM. L.REV. 55, 89 (2008). This is consistent with data from studies of non-DNA false confessions. *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005) ("Thirty-three of the exonerated defendants were under eighteen at the time of the crimes for which they were convicted, and fourteen of these innocent juveniles falsely confessed--42%, compared to 13% of older exonerees. Among the youngest of these juvenile exonerees--those aged twelve to fifteen-- 69% (9/13) confessed to homicides (and one rape) that they did not commit."); *see also* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 586-87 (1999) (arguing that data concerning false confessions among "certain narrow, mentally limited populations," suggest the need for special precautions during interrogations of such suspects); Brandon L. Garrett, *The Substance f False Confessions,* 62 STAN. L. REV. 1051, 1064 (2010).

[105] Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

exonerated them. One-third (55 of 165) of the cases with written decisions did not challenge the "central facts" that supported their convictions.[106]

Eyewitness Identification Challenges: Of the 124 exonerees who were convicted on the basis of eyewitness identification and obtained a judge's written decision, only 56% challenged the eyewitness identification (70 of 124). Only 7% were successful challenges (5 of 70).[107]

Forensic Evidence Challenges: Of the 112 exonerees who were convicted on the basis of flawed forensics and obtained a judge's written decision, only 32% challenged the forensic evidence (36 of 112). Only 17% were successful challenges (6 of 36).[108]

Informant Evidence Challenges: Of the 45 exonerees who were convicted on the basis of informant testimony and obtained a judge's written decision, only 36% challenged the informant evidence (16 of 45). Only 25% were successful challenges (4 of 16).[109]

Confession Evidence Challenges: Of the 22 exonerees who were convicted on the basis of false confessions and obtained a judge's written decision, only 59% challenged the false confession evidence (13 of 22).[110] Only 8% were successful challenges (1 of 13).[111]

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[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Brandon L. Garrett, *The Substance f False Confessions,* 62 STAN. L. REV. 1051 at 1107 (2010).

Only 42 exonerees made innocence related-claims and, of those, only four were granted reversals. Notably, all were on *Brady* claims. After exoneration, new *Brady* violations came to light in at least 17 cases in addition to the 29 who brought *Brady* claims in post-conviction. Harmless-error or no-prejudice rulings were issued by courts in 38% of exonerees' cases with written decisions (62 of 165). Judges commented on the guilt of the exoneree, found harmless error or found no prejudice in 62% of cases with written decisions (102 of 165). In 47% of the cases with written decisions (78 of 165), the court referenced the likely guilt of the exoneree and in 10%, the court referred to the evidence of guilt as "overwhelming."[112]

This evidence of the judicial system unequivocally getting it wrong in cases in which the ultimate punishment is at stake, and the individual cases that are emblematic of those failures, have generated a shift in the public's thoughts about the practical administration of capital punishment. Increasingly, when confronted with the empirical research and anecdotal stories of injustice, the public has demonstrated its response by increasing the level of support for the proposition that a profoundly flawed death penalty that cannot accurately sort the guilty from the innocent is untenable in a civilized society.

III. Public Response to Risk of Wrongful Convictions and Executions

Public opinion is trending significantly in favor of heightened procedural protections in capital cases. Americans are concerned about insufficient safeguards against wrongful convictions. This trend in public opinion tracks the increased number of exonerations as detailed above, as well as higher levels of death penalty exposure in the media. Evidence of this public response can be measured by declining use of the

[112] Defense Exhibit 16, Evidentiary Hearing, *State of Texas v. John E. Green*, Dec. 7, 2010.

death penalty at trial and at the execution stage, shifts in formal public opinion polling both in Texas and across the country, demonstrably higher media attention to flaws in the death penalty system, and increased grants of clemency by state governors.

A. Decline in the Use of the Death Penalty

Decline in the Number of Executions: In the past decade, the use of the death penalty has drastically declined, both nationwide and in Texas.[113] This reflects, among other factors, a heightened skepticism of the accuracy of the death penalty.[114] Since 1999, there has been a general decline in the total number of executions annually.[115] Thus far in 2010, there have been 46 executions.[116] This is less than half the number of executions in 1999.[117] This drop in annual executions in the last decade has occurred despite a relatively constant murder rate.[118]

Decline in the Number of Death Sentences: Between 1990 and 1999, the number of persons sentenced to death annually in the United States averaged close to

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[113] DEATH PENALTY INFORMATION CENTER, *The Death Penalty in 2010: Year End Report* (2010), available at http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf. *See* John Schwartz, *Death Penalty Down in U.S., Figures Show*, N.Y. TIMES, Dec. 21, 2010, at A21, *available at* http://www.nytimes.com/2010/12/21/us/21penalty.html?ref=us.

[114] *See* John Schwartz, *Death Penalty Down in U.S., Figures Show*, N.Y. TIMES, Dec. 21, 2010, at A21, available at http://www.nytimes.com/2010/12/21/us/21penalty.html?ref=us (quoting the statement of Richard C. Dieter, executive director of the Death Penalty Information Center, that "[t]here's just a whole lot more concern about the accuracy of the death penalty, the fairness and even the costs — all are contributing").

[115] *See* BUREAU OF JUSTICE STATISTICS, *Key Facts at a Glance: Executions*, available at http://bjs.ojp.usdoj.gov/content/glance/tables/exetab.cfm (last visited Dec. 21, 2010).

[116] DEATH PENALTY INFORMATION CENTER, *Facts About the Death Penalty* 1 (2010), available at http://www. deathpenaltyinfo.org/documents/FactSheet.pdf.

[117] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *Key Facts at a Glance: Executions*, available at http://bjs.ojp.usdoj.gov/content/glance/tables/exetab.cfm (last visited Dec. 21, 2010).

[118] The national murder rate per 100,000 inhabitants remained between 5.4 and 5.8 from 1999 to 2008. Criminal Justice Info. Servs. Div., Fed. Bureau of Investigation, *Table 1: Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1990-2009*, available at http://www2.fbi.gov/ucr/cius2009/data/table_01.html (last visited Dec. 21, 2010). The murder rate dropped to 5.0 in 2009, *id.*, but that change is too recent to be reflected in execution rates, and it may not be significant enough to affect execution rates at all.

300.[119] There has been a steady decline in the annual number of death sentences since 1998.[120] The number of death sentences dropped to 112 in 2009, the lowest number since the death penalty was reinstated in 1976.[121] The Death Penalty Information Center has observed that "[i]n many states, the death penalty has reached a virtual stalemate. Few people are sentenced to death; even fewer, if any, are executed."[122]

Texas has followed this national trend. In 2010, eight individuals were sentenced to death.[123] This is an historic low, representing a 70% drop since 2003[124] and the lowest number of death sentences in Texas since the death penalty was reinstated in the United States in 1976.[125] Mirroring the national trend, Texas juries are imposing death penalties less and less. In 2010, new death sentences occurred only in Brazos, Dallas, Harris, Nueces, Rusk, and Travis Counties.[126] Thus, in 2010, only 2% of counties in Texas

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[119] Tracy L. Snell, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, *2009—Statistical Tables* 20 (2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf; DEATH PENALTY INFORMATION CENTER, *A Crisis of Confidence: Americans' Doubts About the Death Penalty* 6 (2007), available at http://www. deathpenaltyinfo.org/CoC.pdf.

[120] In 2002, there was an anomalous uptick in death sentences to 166 from 159, the number in 2001. Following 2002, the annual decline in death sentences per year continued. Tracy L. Snell, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, *2009—Statistical Tables* 20 (2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf; DEATH PENALTY INFORMATION CENTER, *A Crisis of Confidence: Americans' Doubts About the Death Penalty* 6 (2007), available at http://www. deathpenaltyinfo.org/CoC.pdf.

[121] Tracy L. Snell, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, *2009—Statistical Tables* 20 (2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf.

[122] DEATH PENALTY INFORMATION CENTER, *A Crisis of Confidence: Americans' Doubts About the Death Penalty* 6 (2007), available at http://www. deathpenaltyinfo.org/CoC.pdf.

[123] At the time of writing, eight individuals have been sentenced to death in 2010, and no other death sentences are expected before the end of the year. *Texas sentences 8 to die in 2010; fewest since '76,* STATESMAN.COM, Dec. 14, 2010, available at http://www.statesman.com/news/texas/texas-sentences-8-to-die-in-2010texas-sentences-8-to-die-in-2010-fewest-1119508.html.

[124] TEXAS COALITION TO ABOLISH THE DEATH PENALTY, *Texas Death Penalty Developments in 2010: The Year in Review* 1 (2010), available at http://tcadp.org/TexasDeathPenaltyDevelopments2010.pdf.

[125] *Id.*; *Texas sentences 8 to die in 2010; fewest since '76,* STATESMAN.COM, Dec. 14, 2010, available at http://www. statesman.com/news/texas/texas-sentences-8-to-die-in-2010texas-sentences-8-to-die-in-2010-fewest-1119508.html.

[126] TEXAS COALITION TO ABOLISH THE DEATH PENALTY, *Texas Death Penalty Developments in 2010: The Year in Review* 1 (2010), available at http://tcadp.org/TexasDeathPenaltyDevelopments2010.pdf.

imposed death sentences.[127] This decline is likely attributable to a number of factors, including the introduction of life without parole as a sentencing alternative in 2005. In an article evaluating the drop in death sentences in Texas, the *Fort Worth Star-Telegram* quoted Tarrant County District Attorney Joe Shannon: "[W]ith life without parole being a viable option now, [juries] feel a lot more comfortable that that person is not going to be let out back into society."[128] The article also quoted the author of Texas's life without parole sentencing legislation, Senator Eddie Lucio, who explained: "It isn't life without parole that has weakened the death penalty. . . . It is a growing lack of belief that our system is fair."[129]

B. Shifts in Public Opinion

The Death Penalty Information Center released a report, *A Crisis of Confidence: Americans' Doubts About the Death Penalty*, based on a national opinion public poll conducted in 2007.[130] The report explains: "This poll indicates that part of the decline in sentences may be due to less willingness to impose the death penalty because of the innocence issue."[131] Opinion polling is a compelling source of data revealing the change in the national consensus about the appropriateness of the death penalty in the context of the risk of wrongful convictions.

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[127] *Id.*

[128] Aman Batheja, *Death sentences have dropped sharply after life without parole became possible*, FT. WORTH STAR-TELEGRAM., Nov. 15, 2009, at B1, available at http://articles.chicagotribune.com/2009-11-28/news/0911280167_1_death-sentences-death-row-juries.

[129] *Id.*

[130] DEATH PENALTY INFORMATION CENTER, *A Crisis of Confidence: Americans' Doubts About the Death Penalty* (2007), available at http://www. deathpenaltyinfo.org/CoC.pdf (digesting RT Stategies National Omnibus Death Penalty Poll, conducted Mar. 8–11, 2007, which surveyed 1,000 adults nationwide).

[131] *Id.* at 6.

Nationwide support of the death penalty peaked in 1994 when 80% of Americans said they favored the death penalty.[132] But, as the country has experienced mounting worries about wrongful convictions, that support has steadily declined. By 2007, death penalty support dropped to 69%,[133] and the steady decline in support has continued over the past five years. In 2007, one study found that among those who changed their opinion about capital punishment over the previous ten years, more people had decided to oppose the death penalty rather than support it—by a margin of three to two.[134] A Rasmussen Poll conducted in 2010 showed that a quarter of Americans now oppose the death penalty and support levels stand at 62%, with 12% undecided.[135] Another recent poll indicated that in states with the death penalty, a plurality of voters said it would make no difference to their vote if a representative supported repeal of the death penalty; and a majority (62%) said either it would make no difference (38%) or they would actually be more likely to vote for such a representative (24%).[136]

The number of Americans favoring alternatives to the death penalty has also increased over the past five years. In 2006, 48% of Americans preferred life imprisonment with no possibility of parole to the death penalty as the appropriate

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[132] Frank Newport, *Sixty-Nine Percent of Americans Support Death Penalty*, GALLUP NEWS SERVICE, Oct. 12, 2007, available at http://www.gallup.com/poll/101863/sixtynine-percent-americans-support-death-penalty.aspx ("The all-time high point for support for the death penalty was 80%, measured in 1994.").

[133] *Id.*

[134] DEATH PENALTY INFORMATION CENTER, *A Crisis of Confidence: Americans' Doubts About the Death Penalty* 15 (2007), available at http://www.deathpenaltyinfo.org/CoC.pdf (referencing RT Stategies National Omnibus Death Penalty Poll, conducted Mar. 8–11, 2007, which surveyed 1,000 adults nationwide).

[135] DEATH PENALTY INFORMATION CENTER, *National Polls and Studies*, http://www.deathpenaltyinfo.org/national-polls-and-studies#rasjune (summarizing Rasmussen telephone poll from June 2–3, 2010) (last visited Dec. 21, 2010).

[136] Press Release, DEATH PENALTY INFORMATION CENTER, *Poll Shows Growing Support for Alternatives to the Death Penalty; Capital Punishment Ranked Lowest Among Budget Priorities* (Nov. 16, 2010) (summarizing results of Lake Research Partners Poll, which surveyed 1500 registered voters in May 2010), available at http://www. deathpenaltyinfo.org/pollresults#Press_Release.

punishment in murder cases.[137] However, a poll from May of this year shows that 61% of surveyed voters would choose a punishment other than the death penalty for murder.[138] Surveyed voters showed support for many alternatives to execution, including life with no possibility of parole and with restitution to the victim's family (39%), life with no possibility of parole (13%), or life with the possibility of parole (9%).[139] Fears about the execution of innocent people have played a large part in this shift in attitude. In 2007, almost all of those polled (87%) believed that an innocent person had already been executed in recent years, and more than half (55%) said that that fact has affected their views on the death penalty.[140] A more recent 2010 poll of registered voters found that 71% of respondents thought that the risk of innocence was a convincing reason to eliminate the death penalty in favor of life without parole.[141] Seventy-one percent of respondents also felt that the death penalty would be an appropriate punishment only if

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[137] GALLUP, *Hot Topics: Death Penalty*, available at http://www.gallup.com/poll/1606/death-penalty.aspx ("If you could choose between the following two approaches, which do you think is the better penalty for murder -- the death penalty (or) life imprisonment, with absolutely no possibility of parole?") (last visited Dec. 21, 2010).

[138] Press Release, DEATH PENALTY INFORMATION CENTER, *Poll Shows Growing Support for Alternatives to the Death Penalty; Capital Punishment Ranked Lowest Among Budget Priorities* (Nov. 16, 2010) (summarizing results of Lake Research Partners Poll, which surveyed 1500 registered voters in May 2010), available at http://www. deathpenaltyinfo.org/pollresults#Press_Release.

[139] *Id.*

[140] DEATH PENALTY INFORMATION CENTER, *A Crisis of Confidence: Americans' Doubts About the Death Penalty* 5–6 (2007), available at http://www.deathpenaltyinfo.org/CoC.pdf (referencing RT Stategics National Omnibus Death Penalty Poll, conducted Mar. 8–11, 2007, which surveyed 1,000 adults nationwide).

[141] DEATH PENALTY INFORMATION CENTER, *Final Weighted Toplines* 14 (2010), available at http://www. deathpenaltyinfo.org/documents/topline.DPIC.DPNDP.pdf (summarizing data and methodology from Lake Research Partners Poll, which surveyed 1500 registered voters in May 2010). Specifically, 71% of respondents found this statement convincing: "The death penalty risks executing the innocent. Many innocent people have been sent to our nation's death rows before new evidence freed them and some innocent people may have been executed. It is unacceptable to execute innocent people, and in a system run by human beings that's inevitable. Executing innocent people is a risk we can completely avoid by using sentences of life with no possibility of parole." *Id.*

every precaution to protect the innocent from execution were in place.[142] Over the past 15 years, support for the death penalty has also dropped within Texas. Opposition to the death penalty in Texas grew by more than 250% between 1994 and 1998.[143]

In 2002, 59.2% of Harris County residents and 55.3% of Texans said that they believe Texas has executed an innocent person.[144] In the same year, 58.8% of Texans and 57.7% of Harris County residents believed there should be a higher threshold of proof of guilt before a jury may impose a death sentence.[145] The same poll found that 76.4% of Texans believed that scientific evidence such as DNA testing should be *required* before sentencing a person to death.[146] A strikingly large proportion of Texans believe that the application of the death penalty is unfair. Only a slim majority of Harris County residents (52.5%) and Texans (59.2%) believe that the death penalty is applied fairly in the United States.[147] The evolving attitude both in Texas and nationwide indicates that there is a need for a review of the death penalty. It is clear that the American public is ready for such a review; in 2007 a significant majority (58%) believed that it was time for a moratorium on the death penalty while the process undergoes a

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[142] *Id.* at 7.

[143] Kathy Walt, *Death penalty's support plunges to a 30-year low / Karla Faye Tucker's execution tied to Texans' attitude change,* HOUSTON CHRON., Mar. 15, 1998, at A1, available at http://www.chron.com/CDA/archives/archive.mpl?id=1998_3040915 (discussing 1994 and 1998 Scripps Howard Texas polls).

[144] DEATH PENALTY INFORMATION CENTER, *State Polls and Studies: Texas,* http://www.deathpenaltyinfo.org/harrissupportdp.pdf (summarizing results of Houston Chronicle Poll conducted with University of Houston's Center For Public Policy Survey Research Institute from Nov. 29–Dec. 21, 2002, which sampled 1,773 adults).

[145] *Id.*

[146] *Id.*

[147] *Id.*

careful review.[148] Shifting public opinion can also be objectively measured by the increase in media attention to and condemnation of wrongful convictions and executions in the United States in general, and Texas in particular.

C. Media Coverage

Between 2007 and 2010, the editorial boards of all five major Texas newspapers repeatedly expressed concern over the issue of wrongful convictions in the state, particularly in capital cases.[149]

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[148] DEATH PENALTY INFORMATION CENTER, *A Crisis of Confidence: Americans' Doubts About the Death Penalty* 9–10 (2007), available at http://www.deathpenaltyinfo.org/CoC.pdf (referencing RT Stategies National Omnibus Death Penalty Poll, conducted Mar. 8–11, 2007, which surveyed 1,000 adults nationwide).

[149] *See* Editorial, *Forget the Messenger, Focus on the Flaws in Criminal Justice System*, AUSTIN AMERICAN-STATESMAN, Dec. 6, 2010; Editorial, *Science – Like Death – Has Its Limits*, AUSTIN AMERICAN-STATESMAN, July 28, 2010; Editorial, *Death Row Inmate Entitled to Delay for DNA Tests*, AUSTIN AMERICAN-STATESMAN, Mar. 23, 2010; Editorial, *Death Penalty: With Doubts Raised, It's Time to Address State's Flawed System*, AUSTIN AMERICAN-STATESMAN, Jan. 3, 2010; Editorial, *Debate Over Capital Punishment*, DALLAS MORNING NEWS, Dec. 2, 2010; Editorial, *Death Row Case Underscores Fallibility*, DALLAS MORNING NEWS, Oct. 29, 2010; Editorial, *Murder Conviction Chock Full of Holes*, DALLAS MORNING NEWS, Sept. 16, 2010; Editorial, *Dems' Caution Over Capital Punishment*, DALLAS MORNING NEWS, June 30, 2010; Editorial, *Hold Up Skinner Execution for DNA Tests*, DALLAS MORNING NEWS, Mar. 23, 2010; Editorial, *Three Capital Cases Illustrate How Tactics Trump Truth*, DALLAS MORNING NEWS, Feb. 27, 2010; Editorial, *Re-Examining the Evidence in Willingham Case*, FORT WORTH STAR-TELEGRAM, Aug. 3, 2010; Editorial, *Death Penalty on Trial*, HOU. CHRON., Dec. 5, 2010; Editorial, *Death by Arson? Junk Science and the Death Penalty, a Toxic Combination*, HOU. CHRON., Oct. 21, 2010; Editorial, *Reforms Needed to End Injustices*, SAN ANTONIO EXPRESS-NEWS, Dec. 3, 2010; Editorial, *Photo Lineups that Follow Best Practices*, AUSTIN AMERICAN-STATESMAN, May 14, 2009; Editorial, *Travis County Judge Finds Justice After All*, AUSTIN AMERICAN-STATESMAN, Feb. 10, 2009; Editorial, *Perry's Certainty about Execution Ignores Science*, DALLAS MORNING NEWS, Sept. 25, 2009; Editorial, *The Troubling Case of Cameron Todd Willingham*, DALLAS MORNING NEWS, Aug. 28, 2009; Editorial, *Guilt and Innocence*, HOU. CHRON., Sept.17, 2009; Editorial, *Up in Smoke*, HOU. CHRON., Sept. 1, 2009; Editorial, *Room for Doubt*, HOU. CHRON., Jan. 22, 2009; Editorial, *A Lethal Failure of Justice*, SAN ANTONIO EXPRESS-NEWS, Sept. 21, 2009; Editorial, "Major Leap Toward Restoring Justice," AUSTIN AMERICAN-STATESMAN, June 5, 2008; Editorial, *Texas Needs a Way to Learn From Its Grave Mistakes*, AUSTIN AMERICAN-STATESMAN, May 21, 2008; Editorial, *Death Penalty Moratorium Needed*, DALLAS MORNING NEWS, Dec. 29, 2008; Editorial, *Police Don't Learn From DNA Exonerations*, DALLAS MORNING NEWS, Oct. 13, 2008; Editorial, *State Needs Innocence Commission*, DALLAS MORNING NEWS, May 12, 2008; Editorial, *Unassailable Justice: Cantu Case Underscores Need for Outside Review*, DALLAS MORNING NEWS, July 15, 2007; Editorial, *Death No More*, DALLAS MORNING NEWS, Apr.18, 2007; Editorial, *Cases Illustrate Need for Innocence Project*, SAN ANTONIO EXPRESS-NEWS, Feb. 27, 2007

In August 2010, the *Fort Worth Star-Telegram* published an editorial stating that "[a]ll Texans, including those who support the death penalty, should want to know the truth—and to make certain that no one's life is taken erroneously in our name."[150] Concerns over wrongful convictions led four of these papers—*The Austin American Statesman*, the *Fort Worth Star Telegram*, *The Houston Chronicle* and the *San Antonio Express-News*—to call for a reform of the Texas death penalty system.[151] In January 2010, the *Austin American Statesman* wrote, "Whether you support or oppose the concept, there's no ignoring the serious problems in the execution of how we execute

[150] Editorial, *Re-examining the Evidence in Willingham Case*, FORT WORTH STAR-TELEGRAM, Aug. 3, 2010.

[151] *See* Editorial, *Forget the Messenger, Focus on the Flaws in Criminal Justice System*, AUSTIN AMERICAN-STATESMAN, Dec. 6, 2010; Editorial, *Science – Like Death – Has Its Limits*, AUSTIN AMERICAN-STATESMAN, July 28, 2010; Editorial, *Death Row Inmate Entitled to Delay for DNA Tests*, AUSTIN AMERICAN-STATESMAN, Mar. 23, 2010; Editorial, *Death Penalty: With Doubts Raised, It's Time to Address State's Flawed System*, AUSTIN AMERICAN-STATESMAN, Jan. 3, 2010; Editorial, *Re-Examining the Evidence in Willingham Case*, FORT WORTH STAR-TELEGRAM, Aug. 3, 2010; Editorial, *Getting Facts Straight in Texas Murder Case*, FORT WORTH STAR-TELEGRAM, May 27, 2010; Editorial, *Death Penalty on Trial*, HOU. CHRON., Dec. 5, 2010; Editorial, *Death by Arson? Junk Science and the Death Penalty, a Toxic Combination*, HOU. CHRON., Oct. 21, 2010; Editorial, *Reforms Needed to End Injustices*, SAN ANTONIO EXPRESS-NEWS, Dec. 3, 2010; Editorial, *Confirm Guilt Beyond Doubt by DNA Testing*, SAN ANTONIO EXPRESS-NEWS Oct. 24, 2010; Editorial, *The Yogurt Shop Case: Injustice for All*, AUSTIN AMERICAN-STATESMAN, Nov. 1, 2009; Editorial, *Photo Lineups that Follow Best Practices*, AUSTIN AMERICAN-STATESMAN, May 14, 2009; Editorial, *Travis County Judge Finds Justice After All*, AUSTIN AMERICAN-STATESMAN, Feb. 10, 2009; Editorial, *Texas Justice System Has Major Flaws*, CORPUS CHRISTI CALLER TIMES, Sept. 14, 2009; Editorial, *Perry's Certainty about Execution Ignores Science*, DALLAS MORNING NEWS, Sept. 25, 2009; Editorial, *The Troubling Case of Cameron Todd Willingham*, DALLAS MORNING NEWS, Aug. 28, 2009; Editorial, *Guilt and Innocence*, HOU. CHRON., Sept. 17, 2009; Editorial, *Up in Smoke*, HOU. CHRON., Sept. 1, 2009; Editorial, *Major Leap Toward Restoring Justice*, AUSTIN AMERICAN-STATESMAN, June 5, 2008; Editorial, *Texas Needs a Way to Learn From Its Grave Mistakes*, AUSTIN AMERICAN-STATESMAN, May 21, 2008; Editorial, *Police Don't Learn From DNA Exonerations*, DALLAS MORNING NEWS, Oct. 13, 2008; Editorial, *State Needs Innocence Commission*, DALLAS MORNING NEWS, May 12, 2008; Editorial, *Unassailable Justice: Cantu Case Underscores Need for Outside Review*, DALLAS MORNING NEWS July 15, 2007; Editorial, *Houston Crime Lab Woes Continue to Spark Debate*, SAN ANTONIO EXPRESS-NEWS, June 20, 2007.

people. Eleven Texas death row inmates have been exonerated."[152] This was followed up with a piece in July that declared: "All we seek is a system that offers ready remedy for inherent imperfection."[153] Similarly, *The Houston Chronicle* argued: "It's clear that the Texas capital punishment system is horribly flawed and carries an unacceptably high likelihood that innocent people have been and will be executed for crimes they did not commit."[154]

Since 2007, opinion pieces discussing wrongful convictions have appeared in every major Texas newspaper.[155] Cases such as those of Cameron Todd Willingham and Tim Cole provoked concern, prompting a number of former prosecutors to call for reform. Former Dallas County Assistant District Attorney James A. Fry was so shocked

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[152] Editorial, *Death penalty: With Doubts Raised, It's Time To Address State's Flawed System*, AUSTIN AMERICAN-STATESMAN, Jan. 3, 2010

[153] Editorial, *Science – Like Death – Has Its Limits*, AUSTIN AMERICAN-STATESMAN, July 28, 2010

[154] Editorial, *Death Penalty On Trial*, HOU. CHRON., Dec. 5, 2010

[155] *See* Editorial, *Forget the Messenger, Focus on the Flaws in Criminal Justice System*, AUSTIN AMERICAN-STATESMAN, Dec. 6, 2010; Editorial, *Science – Like Death – Has Its Limits*, AUSTIN AMERICAN-STATESMAN, July 28, 2010; Editorial, *Death Row Inmate Entitled to Delay for DNA Tests*, AUSTIN AMERICAN-STATESMAN, Mar. 23, 2010; Editorial, *Death Penalty: With Doubts Raised, It's Time to Address State's Flawed System*, AUSTIN AMERICAN-STATESMAN, Jan. 3, 2010; Editorial, *Re-Examining the Evidence in Willingham Case*, FORT WORTH STAR-TELEGRAM, Aug. 3, 2010; Editorial, *Getting Facts Straight in Texas Murder Case*, FORT WORTH STAR-TELEGRAM, May 27, 2010; Editorial, *Death Penalty on Trial*, HOU. CHRON, Dec. 5, 2010; Editorial, *Death by Arson? Junk Science and the Death Penalty, a Toxic Combination*, HOU. CHRON., Oct. 21, 2010; Editorial, *Reforms Needed to End Injustices*, SAN ANTONIO EXPRESS-NEWS, Dec. 3, 2010; Editorial, *Confirm Guilt Beyond Doubt by DNA Testing*, SAN ANTONIO EXPRESS-NEWS, Oct. 24, 2010; Editorial, *The Yogurt Shop Case: Injustice for All*, AUSTIN AMERICAN-STATESMAN, Nov. 1, 2009; Editorial, *Photo Lineups that Follow Best Practices*, AUSTIN AMERICAN-STATESMAN, May 14, 2009; Editorial, *Travis County Judge Finds Justice After All*, AUSTIN AMERICAN-STATESMAN, Feb. 10, 2009; Editorial, *Texas Justice System Has Major Flaws*, CORPUS CHRISTI CALLER TIMES, Sept.14, 2009; EDITORIAL, *Perry's Certainty about Execution Ignores Science*, DALLAS MORNING NEWS, Sept. 25, 2009; Editorial, *The Troubling Case of Cameron Todd Willingham*, DALLAS MORNING NEWS, Aug. 28, 2009; Editorial, *Guilt and Innocence*, HOU. CHRON., Sept. 17, 2009; Editorial, *Up in Smoke*, HOU. CHRON., Sept. 1, 2009; Editorial, *Major Leap Toward Restoring Justice*, AUSTIN AMERICAN-STATESMAN, June 5, 2008;Editorial, *Texas Needs a Way to Learn From Its Grave Mistakes*, AUSTIN AMERICAN-STATESMAN, May 21, 2008; Editorial, *Police Don't Learn From DNA Exonerations*, DALLAS MORNING NEWS, Oct. 13, 2008; Editorial, *State Needs Innocence Commission*, DALLAS MORNING NEWS, May 12, 2008; Editorial, *Unassailable Justice: Cantu Case Underscores Need for Outside Review*, DALLAS MORNING NEWS, July 15, 2007; Editorial, *Houston Crime Lab Woes Continue to Spark Debate*, SAN ANTONIO EXPRESS-NEWS, June 20, 2007.

when a man whom he sent to prison was exonerated that he called out for death penalty reform in a *Dallas Morning News* opinion piece.[156] Mr. Fry, a Republican of more than 30 years, cited eyewitness misidentification and inadequate funding for indigent defense as contributors to not only to that particular wrongful conviction, but many others as well.[157] Mr. Fry wrote, "[His] was not a capital crime, but the problems that led to his wrongful conviction raise the question: How can we continue carrying out executions in Texas when we know the system is so prone to error?"[158]

Similarly, following the posthumous pardon of Tim Cole, in March 2010, former Bexar County District Attorney Sam Milsap wrote in the *Houston Chronicle* that Cole's case raised serious concerns regarding the integrity of other convictions in the state.[159] Although Cole's case was not a capital one, Mr. Milsap was particularly concerned by the possibility of innocent defendants already executed: "That case brought home to me, in a way that nothing else could have, that the system we trust to determine who may live and who must die simply doesn't work in all cases....Before we send a man to his death, shouldn't we do everything in our power to be certain of his guilt?"[160] The Texas newspaper coverage and editorial positions reflect the changing tide in public opinion regarding the intolerability of the risk of wrongful convictions and executions.

D. Clemency Increasingly Granted Due to Concerns about Innocence

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[156] James A. Fry, Op-Ed., *I Put Away an Innocent* Man, THE DALLAS MORNING NEWS, May 14, 2009.

[157] *Id.*

[158] *Id.*

[159] Sam Milsap, Op-Ed., *DNA Testing Works, but Not if We Fail to Utilize It*, HOU. CHRON., Mar. 9, 2010.

[160] *Id.*

Governors are increasingly in the position of protecting the innocent from execution and are asked to intervene in clemency proceedings to correct mistakes made in the legal process. Since 1976, a total of 250 clemencies have been granted nationwide. Between 1991 and 2000 only 26 clemencies were granted; since that time, 206 have been granted.[161] The post-2000 figure includes a blanket clemency grant by Illinois Governor George Ryan, who granted clemency to 167 inmates on death row in 2003.[162] However, even without these 167 clemency grants, there was still a marked increase of 13 clemency grants between 2001 and 2010.[163]

Since 1976, four broad clemency grants have been conferred on death row populations. In 1986, Governor Toney Anaya granted clemency to all death row inmates in New Mexico; in 1991, Governor Richard Celeste granted clemency to eight death row inmates in Ohio; in 2003, Governor George Ryan granted clemency to all death row inmates in Illinois; and in 2007, Governor Jon Corzine granted clemency to all death row inmates in New Jersey.[164]

The reasons governors have given for their commutations include questions over the proportionality of the death sentence in relation to the crime, questions over the mental health of the defendant, the remorse of the defendant, the religious conversion of the defendant, the lack of adequate legal representation for the defendant, and doubts

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[161] DEATH PENALTY INFORMATION CENTER, *Clemency*, available at http://www.deathpenaltyinfo.org/clemency (last visited Dec. 14, 2010).

[162] *Id.*

[163] *Id.* The state that has granted the largest number of clemencies since 1976 is Illinois, with 172 clemency grants. Ohio, New Jersey, Virginia, Florida, Georgia, New Mexico, North Carolina and Oklahoma have all granted between 4 and 14 clemencies each. Indiana, Kentucky, Maryland, Missouri, Louisiana, Oklahoma, Texas, Alabama, Arkansas, Idaho, Montana, Nevada and Tennessee have granted between 1 and 4 clemencies each. Only one federal clemency has been granted. *Id.*

[164] *Id.*

over the guilt of the defendant.[165] This last reason—the possible innocence of a defendant—has been on the increase as a reason for clemency.

Between early 1976 and the end of 2002 (a 28-year period), governors cited possible innocence as a reason for granting clemency in 14 cases. Since 2003 (an 8-year period), there have been 11 cases in which governors cited possible innocence as a reason for granting clemency. In addition to these individual cases of clemency, two blanket clemencies were also granted due to questions about possible innocence. These two blanket clemencies increase the total number of clemencies granted due to possible innocence, from 2003 onwards, to 186.[166]

The first of these blanket commutations occurred in 2003 in Illinois, under Republican Governor George Ryan. On January 31, 2000, Governor Ryan declared a moratorium on executions in Illinois, remarking that the Illinois capital punishment system is "so fraught with error that it has come close to the ultimate nightmare, the state's taking of innocent life."[167] Governor Ryan then formed a state commission to examine the administration of the death penalty in Illinois. Prior to this announcement, Illinois had released 13 condemned inmates from death row; it had executed 12. In April 2002, the Governor's Commission found that death sentences were given disproportionately to the poor, to ethnic minorities, and in cases in which informant testimony was used. The Commission's report called for an overhaul of the criminal justice system and offered 85 recommendations, stating that "we are unanimous in

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[165] *Id.*

[166] *Id.*

[167] Deborah Hastings, *To Execute Or Not? A Question of Cost*, USA TODAY, Mar. 08 2009, available at http://www.usatoday.com/news/nation/2009-03-07-exepensive-to-execute_N.htm?csp=34 (last visited Dec. 21, 2010).

agreeing that reform of the capital punishment is required in order to enhance the level of scrutiny at all junctures in capital cases."[168] On January 10, 2003, Governor Ryan granted four pardons after concluding that Aaron Patterson, Madison Hobley, Leroy Orange and Stanley Howard were innocent. The following day, on January 11, 2003, Governor Ryan announced that he was granting clemency to all 167 death row inmates, stating, "[as] the Illinois death penalty system is arbitrary and capricious—and therefore immoral—I no longer shall tinker with the machinery of death."[169]

Four years later, on December 16, 2007, Governor Jon Corzine commuted the sentences of all death-sentenced persons in New Jersey to life without parole. The following day, he signed a bill abolishing the death penalty in New Jersey. He commented, "today New Jersey is truly evolving.... I believe society first must determine if its endorsement of violence begets violence, and if violence undermines our commitment to the sanctity of life. To these questions, I answer yes."[170]

The cases in which clemency has been granted due to doubts over the possible innocence reveal the flaws in the legal system that lead to wrongful convictions. These flaws include inadequate legal representation, questionable witnesses, and unreliable physical evidence.

In 2005, in Indiana, Governor Joe Kernan commuted the death sentence of Michael Daniels due to doubts over Daniels's personal responsibility for the crime and the quality of the legal process that led to his death sentence. Evidence had emerged

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[168] STATE OF ILLINOIS, *April 2002 Recommendations Only*, Report of the Governor's Commission on Capital Punishment (2002).

[169] *Governor Clears Illinois Death Row*, BBC NEWS, Jan. 11 2003, available at http://news.bbc.co.uk/2/hi/americas/2649125.stm.

[170] Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007, available at http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html .

about Daniels's mental status and about whether he was the triggerman in the underlying crime. Governor Kernan remarked, "I have now encountered two cases where doubt about an offender's personal responsibility and the quality of the legal process leading to the capital sentence has led me to grant clemency.... These instances should cause us to take a hard look at how Indiana administers and reviews capital sentences."[171]

In 2008 in Ohio, Governor Ted Strickland commuted John Spirko's death sentence, concluding that:

> [T]he lack of physical evidence linking him to the murder, as well as the slim residual doubt about his responsibility for the murder that arises from careful scrutiny of the case record and revelations about the case over the past 20 years, makes the imposition of the death penalty inappropriate in this case.[172]

In 2008, in Oklahoma, Governor Brad Henry granted clemency to Kevin Young, commuting his death sentence to life in prison without the possibility of parole. The Oklahoma Pardon and Parole Board's recommendation of clemency was based on several factors, including the prosecution's use of questionable witnesses.[173]

Earlier this year, in Ohio, Governor Ted Strickland granted clemency to Kevin Keith, saying:

> Clearly, the careful exercise of a governor's executive clemency authority is appropriate in a case like this one, given the real and unanswered questions surrounding the murders for which Mr. Keith was convicted. Mr. Keith still has appellate legal proceedings pending which, in theory, could ultimately result in his conviction being overturned altogether. But the pending legal proceedings may never result in a full reexamination of his case, including an investigation of alternate suspects, by law

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[171] *Governor Should Suspend Death Penalty Pending Review*, S. BEND TRIB., Jan. 18, 2005, at B4.

[172] Governor's Statement Regarding Clemency Application of John G. Spirko, Jan. 9, 2008, available at http://governor.ohio.gov/Default.aspx?tabid=578 (last visited Dec. 21, 2010).

[173] Governor's Statement Regarding Clemency Application of Kevin Keith, Sep. 2, 2010, available at http://governor.ohio.gov/Default.aspx?tabid=1778 (last visited Dec. 21, 2010).

> enforcement authorities and/or the courts. That would be unfortunate—this case is clearly one in which a full, fair analysis of all of the unanswered questions should be considered by a court. Under these circumstances, I cannot allow Mr. Keith to be executed.[174]

Despite the nationwide increase in clemency grants due to concerns over executing the innocent, in Texas, clemency has been granted only once since 2003. Governor Rick Perry granted clemency to Kenneth Foster in 2007.[175] Foster had not killed the victim, but had been driving the vehicle at the time of the shooting, and was tried with his co-defendant for capital murder. Since 2001, Texas has executed 200 inmates and has never spared a life based on claims of innocence, despite the many cases where compelling and lingering claims of innocence existed, the most notable of which is the case of Cameron Todd Willingham.[176]

IV. Legislative Response

Retention of the death penalty as it is currently applied in Texas creates an unacceptable risk of the conviction and execution of the innocent. Although it is intended to accurately identify those who are deserving of the death penalty, the present capital punishment system is subject to mistakes that have resulted in the conviction of the innocent. Such errors are inevitable in a system run by human beings, who are subject to frailties and error. Research has confirmed these failures, as has the public response, measured by opinion polling; the attention to these issues and cases by the media; reduced use of the death penalty by prosecutors and juries; and increased political reaction in the form of grants of clemency and the creation of review entities.

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[174] DEATH PENALTY INFORMATION CENTER, *Clemency*, available at http://www.deathpenaltyinfo.org/clemency (last visited Dec. 14, 2010).

[175] *Id.*

[176] Lise Olsen, *Perry Uses Clemency Sparingly on Death Row*, HOU. CHRON., Oct. 8, 2009, available at http://www.chron.com/disp/story.mpl/metropolitan/6673053.html.

This political reaction has also included the actions of legislatures across the country and in Texas, which have introduced and, in many states, enacted legislation that is intended to reduce the risks of inaccurate convictions and wrongful death sentences. In some states, after years of study, efforts at reform, and ongoing mistakes, legislatures have abolished the death penalty altogether. While the import of the legislation that has been enacted is immediately obvious, the increase in both the scope and volume of legislation that has been introduced across the country and in Texas is compelling, even though not all legislation has been made law. Many of these bills, particularly those that were close to passage, show that legislators in the death penalty states—and the constituencies they represent—are deeply concerned about the risk of wrongful convictions. Considered in the aggregate, this data is strong evidence of a shifting national consensus that recognizes both the existence of an untenable risk of wrongful conviction and a demonstrable desire to repair the broken system.

A. National Abolition, Moratorium, and Commission Legislation

Since 2006, three states—New York, New Jersey, and New Mexico—have removed themselves from the roster of death penalty states in overwhelming part because they were no longer willing to risk the conviction and execution of the innocent. In at least 15 other states, bills were introduced in the last five years to repeal the death penalty.[177] Maryland's legislature contemplated full repeal of the death penalty, but instead passed an incredibly restrictive narrowing bill, which is discussed below.[178] In

[177] These states are Colorado (HB 1274) (2009); Illinois (HB 262, SB 3539) (2010); Kansas (SB 208, SB 375) (2010); Kentucky (HB 45) (2010); Louisiana (HB 323) (2008); Maryland (HB 3165, SB 279) (2009); Mississippi (SB 2270, SB 2274) (2010); Missouri (SB 591) (2010); Montana (SB 236) (2009); Nebraska (LB 306) (2010); New Hampshire (HB 556) (2009); Pennsylvania (SB 1281) (2010); South Carolina (HB 1245) (2010); and Washington (SB 5476) (2009).

[178] HB 316/SB 279 (2009) was signed into law by the Governor of Maryland on May 7, 2009.

another—Connecticut—the abolition bill was not signed into law because the governor vetoed the bill after passage in the legislature.[179] The federal government likewise took up abolition legislation.[180] This means that, of the 38 states that had the death penalty in 2006, fully half have taken up abolition legislation in the last five years. Much of the discussion about the wisdom of the death penalty as a public policy centers on its accuracy and fairness, including the inherent risk of utilizing an irreversible punishment erroneously.[181]

On March 18, 2009, New Mexico became the second state in two years to abolish the death penalty. In his remarks at the signing of this repeal, Governor Bill Richardson, a long-time and self-described "firm believer in the death penalty," stated that he signed the bill abolishing the death penalty because the criminal justice system creates the risk that innocent people will be convicted and executed and that risk is too great to continue to ignore:

> I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the State is going to undertake this awesome responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong. ***But the reality is the system is not perfect – far from it. The system is inherently defective. DNA testing has proven***

[179] HB 6578 (Ct. 2009).

[180] SB 650, 11th Cong. (2009).

[181] *See, e.g.*, *New Mexico Abolishes Death Penalty*, CBSNEWS.COM, Mar. 18, 2009, available at http://www.cbsnews.com/stories/2009/03/18/national/main4874296.shtml# (reporting that during debate on abolition bill, a state senator noted that ours is "a justice system of human beings, and human beings make mistakes"); *Maryland Death Penalty Debate in the Spotlight*, BALTIMORE SUN, Feb. 25, 2009, available at http://weblogs.baltimoresun.com/news/local/politics/2009/02/maryland_death_penalty_debate.html (discounting reports that budget concerns were driving abolition legislation and noting that Maryland Senator Bryan Simonaire explicitly grounded his support of the bill in concerns about executing an innocent man).

> ***that. Innocent people have been put on death row all across the country.***[182]

Governor Richardson made clear, however, that even advances in the forensic sciences cannot cure the capital system of its inherent potential for human error:

> Even with advances in DNA and other forensic evidence technologies, we can't be 100-percent sure that only the truly guilty are convicted of capital crimes. Evidence, including DNA evidence, can be manipulated. Prosecutors can still abuse their powers. We cannot ensure competent defense counsel for all defendants. ***The sad truth is the wrong person can still be convicted in this day and age, and in cases where that conviction carries with it the ultimate sanction, we must have ultimate confidence – I would say certitude – that the system is without flaw or prejudice.*** Unfortunately, this is demonstrably not the case.[183]

During the debate on the bill, legislators were also focused on the risk of innocent persons being convicted. As Senator Cisco McSorley noted, "[a]s beautiful as our justice system is . . . it is still a justice system of human beings, and human beings make mistakes."[184]

Approximately 15 months before New Mexico's abolition bill was signed into law—on December 17, 2007—New Jersey Governor John Corzine signed legislation repealing his state's death penalty.[185] Governor Corzine acted on the recommendation of a study commission created by the legislature, which included clergymen, prosecutors, a

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[182] Press Release, Office of New Mexico Governor Bill Richardson, Governor Bill Richardson Signs Repeal of the Death Penalty, Mar. 18, 2009, available at http://www.eji.org/eji/files/03.19.09%20NM%20Press%20Release.pdf (emphasis added).

[183] *Id.*

[184] *New Mexico Abolishes Death Penalty*, CBSNEWS.COM, Mar. 18, 2009, http://www.cbsnews.com/stories/2009/03/18/national/main4874296.shtml#.

[185] *See* Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of Eight*, N.Y. TIMES, Dec. 18, 2007, at B3, available at http://www.nytimes.com/2007/12/18/nyregion/18death.html; *see also* Act of Dec. 17, 2007, Pub. L. No. 2007, c. 204 §1 (codified at N.J. Stat. Ann. §2C:11-3 (West Supp. 2008)).

former judge, a police chief, and advocates for victims and murder victims' family members.[186] The report recommended that the legislature abolish the death penalty in New Jersey.[187] Among other findings, the Commission concluded that "[t]he penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake."[188] The report discussed at length what it found to the unacceptably high risk of executing an innocent person.[189]

Earlier in 2007, Maryland Governor Martin O'Malley wrote in a *Washington Post* opinion piece that the death penalty "inherently necessitates the occasional taking of wrongly convicted, innocent life."[190] Governor O'Malley asked Maryland lawmakers to repeal the state's death penalty.[191] He also established a commission to study the death penalty.

In response, the Maryland legislature passed legislation creating the Maryland Commission on Capital Punishment. The Commission recommended that the legislature abolish the death penalty.[192] In making this recommendation, a key concern of the commission was "the serious risk that innocent persons will be executed."[193] Indeed, among the Commission's findings was the conclusion that "[d]espite the advance of

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[186] *See* N.J. DEATH PENALTY STUDY COMM'N, *New Jersey Death Penalty Study Commission Report* 3 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

[187] *Id.* at 2.

[188] *Id.* at 1.

[189] *Id.* at 51–55.

[190] *See* Martin O'Malley, Op-Ed., *Why I Oppose the Death Penalty*, WASH. POST, Feb. 21, 2007, at A15, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/02/20/AR2007022001292.html?referrer=emailarticle.

[191] *Id.*

[192] MD. COMM'N ON CAPITAL PUNISHMENT, *Final Report to the General Assembly* 9 (2007), available at http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf.

[193] *Id.* at 18, 70. *See also id.* at 61-81 (discussing problems leading to wrongful death sentences, including the same problems addressed in these pleadings).

forensic sciences, particularly DNA testing, the risk of execution of an innocent person is a real possibility."[194] The Commission also found that "while DNA testing has become a widely accepted method for determining guilt or innocence, it does not eliminate the risk of sentencing innocent persons to death since, in many cases, DNA evidence is not available and, even when it is available, is subject to contamination or error at the scene of the offense or in the laboratory."[195]

The Maryland legislature did not wholly comply with Governor O'Malley's request, but it did enact the most restrictive narrowing bill in the country, gutting its prior capital punishment framework. Maryland's new law bars the death penalty in the absence of "(i) biological evidence or DNA evidence that links the defendant to the act of murder; (ii) a videotaped and voluntary interrogation and confession of the defendant to the murder; or (iii) a video recording that conclusively links the defendant to the murder . . . ."[196] The statute also categorically prohibits the death penalty in cases in which the prosecution relies solely on evidence provided by an eyewitness.[197] It is wholly transparent that this legislation is meant to minimize, if not eliminate, the possibility of convicting and executing an innocent person.

In 2004, the New York Court of Appeals found that the New York capital-sentencing statute contained a jury deadlock instruction that was unduly coercive, and therefore ruled the statute unconstitutional.[198] Legislative efforts to revive the death

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[194] *Id.* at 18.

[195] *Id.* at 20.

[196] Md. Code Ann., Crim. Law § 2-202 (a)(3) (West 2009); *see also* 2009 Md. Laws Ch. 186 (S.B. 279) (establishing this procedure).

[197] Md. Code Ann., Crim. Law § 2-202 (c) (West 2009).

[198] *People v. LaValle*, 817 N.E.2d. 341, 361 (N.Y. 2004).

penalty by repairing this defect failed.[199] An assembly member interviewed by the *New York Times* explained that his vote against reviving the death penalty was animated by concerns that there are innocent people on death row: "I just don't know how you explain that to a mother whose child is completely innocent and who is murdered by the state for something they didn't do."[200]

The New York Assembly's decision not to enact new death penalty legislation followed a series of public hearings held by the Assembly Standing Committees on Codes, Judiciary, and Correction. The chairpersons of those committees produced a report summarizing those hearings entitled *The Death Penalty in New York.*[201] Though the report did not take a position on the death penalty, it made clear that the committees received extensive testimony and other evidence regarding the reliability—or lack thereof—of capital convictions.[202] This testimony included the fact that between 1995 and 2005, there had been more than 153 post-conviction DNA-based exonerations, and that 14 of those exonerees had been sentenced to death.[203] Significantly, the witnesses offering testimony that the death penalty carries an unacceptable risk of executing the innocent included a retired superintendant of the state's infamous Sing Sing prison.[204]

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[199] *See* Patrick D. Healy, *New York Assembly Democrats Close Off Death Penalty for 2005*, N.Y. TIMES, Apr. 13, 2005, at B1, available at http://www.nytimes.com/2005/04/13/nyregion/13death.html?_r=1&emc=eta1.

[200] *Id.*

[201] Joseph R. Lentol, Helene Weinstein & Jeffrion Aubry, *The Death Penalty in New York* 22–26 (2005), available at http://www.assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf.

[202] *Id.* at 22–27.

[203] *Id.* at 22.

[204] *Id.* at 25.

In the states in which abolition legislation failed to become law, eight took up moratorium legislation.[205] This legislation was often considered in conjunction with legislation to establish commissions to study the administration of the death penalty. Of the states that took up such legislation, in addition to the states discussed above, three established commissions to study and review issues in the administration of that state's capital punishment system.[206] These states include California, New Hampshire, and Illinois, which remains under a moratorium announced by former Governor George Ryan on January 31, 2000.[207]

Because of actual error and the risk of further wrongful convictions, then-Illinois Governor George Ryan imposed a moratorium on capital punishment in Illinois.[208] Governor Ryan's actions were prompted by the exoneration of 13 men from Illinois's death row since 1977. One of those exonerees—a man named Anthony Porter, who had an IQ of 51 and who was unequivocally innocent—had come within two days of execution; Mr. Porter spent nearly 17 years on death row before being released.[209] As

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[205] These states are Alabama (HB 280) (2010); California (AB 2266) (2006); Delaware (HB 171) (2009); Georgia (SB 175) (2009); Mississippi (HB 63) (2010); Missouri (HB 1870, HB 1683, SB 930) (2010); and Nevada (AB 190) (2009). None of these bills were enacted.

[206] California established the Commission on the Fair Administration of Justice through SR 44 (2008). Maryland established its Commission on Capital Punishment through HB 1111/SB 614 (2009). New Hampshire's bill was passed in 2009 (HB 520). Tennessee's Committee to Study the Administration of the Death Penalty was created in 2007 by SB 1911/HB 2162. The states in which commission legislation was introduced but did not pass were Delaware (HJR 32) (2006); Georgia (SR 1030) (2006); Kentucky (HCR 88) (2007); Mississippi (HB 63) (2010); Missouri (HB 1870, HB 1683, SB 930) (2010); Montana (HB 697) (2007); and Nevada (AB 190) (2009. As discussed above, New Jersey and New York also established study commissions in the process of abolishing the death penalty in those states.

[207] Exec. Order No. 4, 24 Ill. Reg. 7439 (2000), available at http://www.idoc.state.il.us/ccp/ccp/executive_order.html.

[208] Exec. Order No. 4, 24 Ill. Reg. 7439 (2000), available at http://www.idoc.state.il.us/ccp/ccp/executive_order.html.

[209] *See Reducing the Risk of Executing the Innocent: The Report of the Illinois Governor's Commission on Capital Punishment: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 107th Cong. 20 (2002) (statement of Hon. George Ryan, Governor, State of Illinois).

discussed above, in addition to imposing the moratorium, Governor Ryan appointed a bipartisan Commission on Capital Punishment, composed of legal experts on all sides of the issue, including prosecutors, defense attorneys, former judges, and civil attorneys.[210]

The commission was ordered "[t]o study and review the administration of the capital punishment process in Illinois to determine why that process has failed in the past, resulting in the imposition of death sentences upon innocent people."[211] The Commission's work encompassed two years of intensive study. It convened at least once a month for a full day, and formed subcommittees designed to conduct in-depth evaluations of different phases of the capital justice system.[212] Public hearings were held, as were private meetings with exonerees and representatives of surviving family members of victims.[213]

In its 2002 report, the Commission noted that it was "unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death."[214] The report went on to recommend sweeping reforms of Illinois's criminal justice system. This consisted of 85 specific recommendations for reform,

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[210] GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *Report of the Governor's Commission on Capital Punishment* v–vii (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html.

[211] Exec. Order No. 4, 24 Ill. Reg. 7439 (2000), available at http://www.idoc.state.il.us/ccp/ccp/executive_order.html.

[212] GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *Report of the Governor's Commission on Capital Punishment* 2 (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html.

[213] *Id.*

[214] *Id.* at 207.

including broadening access to DNA and other forensic testing, videotaping the entire interrogation process, and recording witness interviews.[215]

In January 2003, concerned that reforms recommended by the commission had not been passed by the legislature, Governor Ryan commuted all Illinois death sentences to prison terms of life or less.[216] Explaining his decision to conduct the largest emptying of death row in history, Governor Ryan stated, "The facts that I have seen in reviewing each and every one of these cases raised questions not only about the innocence of people on death row, but about the fairness of the death penalty system as a whole. Our capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die."[217]

On November 19, 2003, the Illinois legislature enacted a large number of the commission's recommended reforms.[218] In doing so, the state House and the Senate unanimously overrode former Governor Rod Blagojevich's partial veto of the reform bill.[219] Illinois has determined that even this groundbreaking series of reforms is insufficient to ensure confidence in the state's administration of the death penalty. The same day that the legislature enacted the commission's reforms, it passed legislation to create a Capital Punishment Reform Study Commission.[220] The bipartisan commission was instructed to study the effect of the reforms enacted in 2003 and report annually to

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[215] *Id.* at *passim*.

[216] Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A1, available at http://www.nytimes.com/2003/01/12/national/12DEAT.html?pagewanted=1.

[217] *Id.*

[218] SB 472 (Ill. 2003) (enacted).

[219] *See* Edwin Colfax, *Summary of the November 19, 2003 Veto Override by the Illinois Legislature*, DEATH PENALTY INFORMATION CENTER, available at http://www.deathpenaltyinfo.org/node/966 (last visited Dec. 20, 2010).

[220] Public Act 93-605 (enacted Nov. 19, 2003).

the legislature.[221] On October 28, 2010, the Commission submitted its sixth and final report.[222] After a painstaking review of the previously enacted reform measures and their implementation, the Commission concluded that Illinois's system remains deeply flawed and recommended no fewer than 26 additional reform measures, related to such areas as eyewitness identification, interrogation, and jury instructions.[223]

Illinois's experience is instructive. Its history of study and reform, followed by further study, which identified the need for further reform, demonstrates that no amount of tinkering can cure a fundamentally broken system. There are simply too many points at which human error opens the door to the possibility of an innocent life being taken by the state.

B. National Reform Legislation

It is evident that other states are also well aware that their criminal justice systems are rife with the type of structural flaws identified in Part II, *supra*, as they have taken up a bevy of reform bills intended to address the flaws that lead to the conviction of innocent persons.

Eyewitness Identification Reform: Thirteen states took up eyewitness identification bills, proposing that law enforcement articulate and/or refine procedures and standards for improving the accuracy of eyewitness identifications.[224] As noted

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[221] *Id.*

[222] ILLINOIS CAPITAL PUNISHMENT REFORM COMMITTEE, *Sixth and Final Report*, Oct. 28, 2010, available at http://www.icjia.state.il.us/public/pdf/dpsrc/CPRSC%20-%20Sixth%20and%20Final%20Report.pdf.

[223] *Id.* at Appendix 1.

[224] These states are California (SB 756) (2007), (SB1544) (2006); Connecticut (SB 357) (2009) (SB 5832) (2008), (SB 595) (2006); Georgia (HB 997) (2008), (HB 525, HB 308) (2007), (HB 1256) (2006); Kentucky (HB 389) (2009), (HB 298) (2008); Maryland (HB 103) (2007) (enacted); Missouri (HB 589) (2009), (HB 2488, HB 2049) (2008), (HB 1233) (2007), (HB 1330, SB 768) (2006), (HB 557, SB 397) (2005); New Hampshire (HB 1105) (2006); North Carolina (HB 1625) (2007) (enacted); Ohio (SB 358) (2008); Oregon (HB 2322) (2009), (SB 1010) (2007); Pennsylvania (HB 560, SB 713, SB 712) (2007), (SB

above, mistaken eyewitness identification is well documented as the leading cause of wrongful convictions in Texas and in the United States. More than 75% of those individuals exonerated based on post-conviction DNA testing were convicted based on faulty eyewitness identifications.[225] Further, the Center on Wrongful Convictions at Northwestern University School of Law studied the cases of 86 defendants who had been sentenced to death but legally exonerated based on strong claims of actual innocence, finding that eyewitness testimony played a role in the convictions of 54% of the death-sentenced defendants.

As more cases with incorrect identifications have surfaced, together with a groundswell of research documenting the scientific fragility of identifications, increased attention has been given to the safeguards—or lack thereof—in eyewitness identification procedures. Four of the states that took up this subject—Georgia, Maryland, North Carolina, and Virginia—enacted that legislation.[226] The bills introduced in two others—California and Maryland—passed the legislature but were vetoed by the governor.[227]

Interrogation Reform: Twenty-one states took up interrogation reform legislation calling for electronic recording of interrogation sessions.[228] Approximately

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947, SB 946) (2005), Texas (SB 117) (2008), (SB 799) (2007); and Virginia (HB 2632, SB 1164) (2005) (enacted).

[225] THE JUSTICE PROJECT, *Eyewitness Identification, A Policy Review,* available at www.thejusticeproject.org.

[226] *See* note 224, *supra.*

[227] *Id.*

[228] These states are Arizona (HB 2154) (2009), (HB 2315, HB 2313) (2008), (HB 2547) (2006); Arkansas (SB 788) (2009) (enacted); California (AB 1855, SB 1590) (2008), (SB 511) (2007), (SB 171) (2005); Connecticut (SB 348) (2009), (SB 608) (2008), (SB 456) (2006); Florida (SB 1434) (2008), (SB 176) (2007), (SB 1070, SB 770) (2006); Georgia (HB 525) (2007), Illinois (SB 72) (2005) (enacted); Indiana (HB 1328, SB 172) (2009), (HB 1302) (2008), (SB 574, SB 385) (2007), Kansas (SB 221) (2007), (SB 206) (2005); Kentucky (HB 747) (2006); Maryland (HB 6) (2008) (enacted); Missouri (SB 310) (2009), (HB 1330, SB 768) (2006), (HB 557, SB 397) (2005); Montana (HB 534) (2009) (enacted); Nebraska (LB

25% of the exonerations in the United States, revealed through post-conviction DNA testing, involved a false confession.[229] In a study of 340 exonerations in the United States from 1989 to 2003, 15% involved false confessions. Of the 340 exonerations, 205 were wrongful convictions for murder and of those 20% were caused by false confessions.[230] As Professor Gross has noted:

> Not surprisingly, false confessions tend to be concentrated in the most serious and high profile cases, lending credence to the argument that false confessions – as well as wrongful convictions based on false confessions – are more likely to occur in the most serious cases because there is more pressure on police to solve such cases.[231]

Confessions are powerful evidence, so much so that juries will sometimes convict based on a confession alone, ignoring other exculpatory evidence. An electronic record would allow law enforcement and prosecutors to review the interrogation later, to observe the suspect's demeanor and watch for inconsistencies. This ensures that a more informed decision is made about whether to charge a suspect on the basis of a statement, helping to prevent the prosecution of an innocent individual. The uniquely incriminating influence of a confession at trial makes it particularly important to safeguard innocent defendants from wrongful convictions based on false confessions. Six of the states that considered bills that would require recording interrogations—Arkansas, Illinois,

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179) (2009); North Carolina (HB 1626) (2007) (enacted); Ohio (SB 358) (2008); Oregon (SB 253) (2009), (SB 323) (2007); Pennsylvania (HB 609) (2007); Tennessee (HB 3733) (2008), (HB 2159, HB 1125) (2007); Texas (HB 938) (2009), (SB 116) (2008), (HB 802) (2007); Virginia (HB 606) (2008), (HB 1693, HB 1169) (2006); Wyoming (HB 116) (2009).

[229] THE JUSTICE PROJECT, *Electronic Recording of Custodial Interrogations, A Policy Review*, available at www.thejusticeproject.org.

[230] Samuel R. Gross et al., *Exonerations in the United States,1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005).

[231] *Id.*

Maryland, Montana, Nebraska, and North Carolina—enacted such bills.[232] California's legislature approved its bill, but it was vetoed by the governor.[233]

Racial Justice Legislation: Three states—California, North Carolina, and Pennsylvania—have taken up racial justice legislation; of these, North Carolina enacted its groundbreaking Racial Justice Act, which authorizes defendants to utilize statistical evidence to establish that race was the basis of the decision to either seek or impose the death penalty.[234] There is, of course, no shortage of data on the invidious role that race has long played in the capital system, including decisions about which defendants are exposed to the death penalty, which defendants are sentenced to death, and which jurors are excluded by prosecutors from serving on capital juries.[235] Racial justice legislation is a direct result of that shameful legacy of racially disparate outcomes in capital cases.[236]

Innocence Commissions and DNA Access Legislation: Perhaps the most significant of the reform bills are those that establish innocence or forensic commissions and grant defendants post-conviction DNA-testing rights. Ten states introduced this type of commission legislation, three of which—Illinois, North Carolina, and Texas—passed their bills.[237]

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[232] *See* note 228, *supra*.

[233] *Id.*

[234] The bills introduced in California (SB 1331) (2010) and Pennsylvania (HB 1996) (2009) were not passed. North Carolina's legislation was HB 472/SB 461, enacted in 2009.

[235] *See* DEATH PENALTY INFORMATION CENTER, *Race and the Death Penalty*, available at http://www.deathpenaltyinfo.org/race-and-death-penalty#inmaterace (last visited Dec. 20, 2010).

[236] *See, e.g.*, Justice John Paul Stevens, *On the Death Sentence*, N.Y. REVIEW OF BOOKS, available at http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/?pagination=false.

[237] These states are Arizona (HB 2292) (2008); Florida (SB 2564) (2007); Illinois (SJR 9) (2007); Indiana (SB 574) (2007); North Carolina (HB 937) (2009) (enacted), (HB 1323) (2006) (enacted); Oklahoma (HB 3033) (2008), (SB 940) (2007), (SB 1471) (2006); Pennsylvania (SB 1069) (2006); South Carolina (SB 444) (2007); Tennessee (HB 2592) (2008), (HB 1333) (2007); and Texas (HB 498) (2009) (enacted).

Seventeen states took up post-conviction DNA access legislation. An overwhelming 14 of those states—all save Kentucky, Missouri, and Tennessee—passed such bills, for an 82.4% success rate.[238] The success of this post-conviction DNA access legislation, which specifically addresses the fear that defendants have been convicted of crimes they did not commit, leaves little doubt that legislators are deeply concerned about wrongful convictions. Considered in combination with the other reform measures moving through state legislatures—including abolition and moratorium bills, study commission legislation, and other criminal justice reforms—there can be no question that there is a growing concern across the nation about the reliability of capital punishment.

C. Legislative Reform Efforts in Texas

Concerns about wrongful convictions and the failure of the current scheme to identify and rectify its mistakes through the post-conviction process have steadily grown in Texas. As argued in the upcoming January 2011 issue of the *Texas Monthly*, following the recent exoneration of Anthony Graves, it is time for Texas to take decisive action:

> The flaws in our death penalty system have become too obvious to ignore any longer. Five times in the past seven years we've learned about a person wrongly convicted and taken off death row or a person convicted on bogus forensic science—and executed. It's clear: Until the day comes when we are able to guarantee that our system will never put innocent men and women to death, we can't continue to use a form of punishment that is irreversible. It's time for Texas to put a moratorium on capital punishment.[239]

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[238] These states are Alabama (HB 146) (2009) (enacted); California (SB 542) (2008) (enacted); Illinois (SB 1023) (2007) (enacted), (SB 2737) (2006) (enacted); Louisiana (HB 778) (2008) (enacted); Mississippi (SB 2709) (2009) (enacted); North Carolina (HB 1190) (2009) (enacted); Ohio (SB 262) (2006) (enacted); Oregon (HB 2133) (2007) (enacted), (SB 244) (2007) (enacted); South Carolina (HB 3901, HB 3061) (2007) (enacted); South Dakota (HB 1166) (2009) (enacted); Texas (HB 681) (2007) (enacted); Utah (BR 485) (2008) (enacted); Virginia (SB 1391) (2009) (enacted), and Wyoming (SB 65) (2008) (enacted).

[239] Michael Hall, *Life After Death*, TEXAS MONTHLY, Jan. 2011 (forthcoming), available at http://www.texasmonthly.com/2011-01-01/btl2.php.

Those same concerns led *The Dallas Morning News* editorial board to abandon its century-old stance on the death penalty in 2007:

> This board has lost confidence that the state of Texas can guarantee that every inmate it executes is truly guilty of murder. We do not believe that any legal system devised by inherently flawed human beings can determine with moral certainty the guilt of every defendant convicted of murder. That is why we believe the state of Texas should abandon the death penalty—because we cannot reconcile the fact that is it both imperfect *and* irreversible.[240]

The Texas legislature has begun to respond to these concerns, though far more work is necessary.

Legislative Reform in Texas to Date

Eyewitness Identification Reform: In 2009, two key innocence reform bills, one addressing eyewitness identification procedures[241] and the other addressing the recording of custodial interrogations,[242] were introduced and passed the Texas Senate. As a result of an unrelated slow-down of legislative action in the Texas House, the bills did not pass the full legislature.

Therefore, despite the compelling scientific data, national recognition of the need for change, and relative ease with which Texas could implement change, Texas has not adopted any of the procedures that would allow for more reliability in eyewitness identification. Eyewitness identification procedures are consistently recognized as an area of Texas law in which reform is desperately needed. Eyewitness identification reform is one of the issues being addressed by the Texas Criminal Justice Integrity Unit,

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[240] *Death No More*, DALLAS MORNING NEWS, Apr. 18, 2007, available at http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-toy_01edi.ART.State.Edition1.43b925d.html.

[241] SB 116 (Tex. 2009) (concerning recording of interrogations).

[242] SB 117 (Tex. 2009) (concerning eyewitness identification).

created by the Court of Criminal Appeals in 2008, and the Timothy Cole Advisory Panel on Wrongful Convictions, created by the Texas Legislature in 2009 to make recommendations on the prevention of wrongful convictions. Both entities have recognized the complete lack of statewide standards for the conduct of identification procedures. With the problems unaddressed, the risk of wrongful conviction attributable to mistaken eyewitness identification remains intolerably high.

Forensic Science Reform: Calls for forensic science reform reached a fevered pitch in Texas following the exposure of the shoddy work of the Houston Police Department's (HPD) now-notorious crime lab. In 2002, media reports and a subsequent audit uncovered serious problems in the HPD DNA lab, including untrained analysts, inaccurate work, and the damage of evidence caused by leaks from building's roof.[243] Errors were also uncovered in other HPD departments, including those dealing with blood typing, firearm examination, and drug analysis.[244] In August 2004, an internal investigation discovered 280 boxes of evidence that had been improperly stored, which contained such items as body parts, a fetus, and blood stained clothing related to cases processed between 1979 and 1991.[245] These discoveries led to the appointment of an independent investigator in 2005 and a more than five-million dollar investigation of the HPD Crime Lab that spanned the next several years.

Michael Bromwich, the former U.S. Justice Department Inspector General who was appointed as an independent investigator to review the scandal, found there were

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[243] Steve McVicker and Roma Khanna, *New Tests Urged in HPD Final Report,* HOU. CHRON., June 13, 2007.

[244] *Id.*

[245] Roma Khanna, *Police Turn Up Hundreds of Boxes of Evidence from Crime Lab*, HOU. CHRON., Aug, 26, 2004.

repeated cases in which DNA samples were incorrectly tested, unqualified analysts performed questionable work without supervision, exculpatory evidence was not disclosed to defendants, and analysts fabricated documentation of results without having actually conducted any testing at all.[246] Mr. Bromwich's final report in 2007 recommended that new DNA testing be made available to prisoners in more than 400 cases as a result of substandard or incomplete forensic testing conducted in their cases.[247] Mr. Bromwich evaluated about a quarter of those 400 cases and found "major problems" in about a third of the cases he reviewed, including four Harris County death penalty cases.[248] In his final report, he wrote:

> While the number of proven wrongful convictions attributable to the Crime Lab's DNA work is small...the possibility of other wrongful convictions resulting from DNA analysis during this era cannot be dispelled.[249]

Most recently, the *Houston Chronicle* reported that an audit of the Houston Police Crime Lab's fingerprint division identified problems in more than 200 cases—more than half of the cases that had been selected for review following the revelation of inaccuracies.[250] The problems discovered were serious enough to lead the authorities to require that more than 4,000 violent crime cases from the past six years be re-analyzed—

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[246] Michael Bromwich, *Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room*, June 13, 2007, available at http://www.hpdlabinvestigation.org/reports/070613report.pdf.

[247] *Id.*

[248] The four death penalty cases in which Bromwich found "major problems" related to the forensic testing conducted at HPD included Franklin Alix, Juan Carols Alvarez, Gilmar Guevara, and Derrick Jackson. *See* Michael Bromwich, *Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room*, June 13, 2007, available at http://www.hpdlabinvestigation.org/reports/070613report.pdf.

[249] *Id.* at 198.

[250] Moises Mendoza and Bradley Olsen, *HPD Fingerprint Unit is Focus of Criminal Probe,* HOU. CHRON., Dec. 2, 2009.

a process that no doubt will be costly and time-intensive for the City of Houston. According to the *Chronicle*, the Latent Prints Comparison Unit suffers from "significant deficiencies with staffing, a lack of proper supervisory review, inadequate quality control, technical competence inconsistent with industry standards, insufficient training, and inadequate standard operating procedures."[251]

In response to these revelations, various state-sponsored entities to study these problems were created. In 2005, the Texas legislature created, and Governor Rick Perry approved, the Texas Forensic Science Commission;[252] by executive order, Governor Perry created the Criminal Justice Advisory Council.[253] In 2008, this Court created a Criminal Justice Integrity Unit.[254] These entities all aim to improve the quality of evidence introduced in criminal cases in Texas and therefore reduce the instances and risk of wrongful convictions. However, despite the stated intentions of these entities, ***not one has yet resulted in the passage of a single reform measure that would address the well-known causes of wrongful convictions***. There have been no changes to the actual, day-to-day protocol of law enforcement, laboratories, or courts as a result of new policies formed by these state-sponsored entities.

Informant Testimony Reform: The central problem with informant testimony—and what makes it risk factor for wrongful conviction—is that there are no safeguards to

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[251] *Id.*

[252] HB 1068 (Tex. 2005) (enacted), available at http://www.capitol.state.tx.us/tlodocs/79R/billtext/pdf/HB01068F.pdf.

[253] Exec. Order No. RP-41, 30 Tex. Reg. 1879 (2005), available at http://www.lrl.state.tx.us/scanned/govdocs/Rick%20Perry/2005/RP41.pdf.

[254] Press Release, Office of Judge Barbara Hervey, Texas Court of Criminal Appeals, June 3, 2008, available at http://www.thejusticeproject.org/wp-content/uploads/cca-tcjiu-press-release1.pdf.

ensure its reliability. As Professor Alexandra Natapoff explains in *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*:

> Because investigations and cases rely so heavily on informants, protecting and rewarding informants has become an important part of law enforcement. Police and prosecutors are well known for protecting their snitches: all too often, when defendants or courts seek the identity of informants, cases are dismissed or warrant applications are dropped. More fundamentally, police and prosecutors become invested in their informants' stories, and therefore may lack the objectivity to know when their sources are lying.
>
> Informants are thus punished for silence and rewarded for producing inculpatory information, even when that information is inaccurate. The system protects them from the consequences of their inaccuracies by guarding their identities and making their information the centerpiece of the government's cases. The front line officials who handle informants – police and prosecutors – are ill equipped to screen that information, and once they incorporate it into their cases, they acquire a stake in its validity. This phenomenon explains in part why snitch testimony generates so many wrongful convictions: it permeates the criminal system and there are few safeguards against it.[255]

Safeguards against unreliable informant testimony have been proposed by Professor Natapoff, other legal scholars, and The Justice Project. The recommendation made by all is that informant testimony be subjected to a *Daubert*-type reliability hearing before trial to test the reliability of the informant and his or her information.[256] Other recommendations include written, detailed pre-trial disclosures by prosecutors concerning the informants they intend to call as witnesses, corroboration by independent evidence, and cautionary jury instructions.[257]

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[255] 37 GOLDEN GATE U. L. REV. 107, 112 (2006).

[256] *Id.* at 113-16. *See also* THE JUSTICE PROJECT, *In-custody Informant Testimony* 3-4, available at www.thejusticeproject.org.

[257] *Id.* at 3-5.

Texas has failed to adopt these safeguards. Thus, the risk of wrongful conviction from the introduction of perjured informant testimony is unabated in Texas. In the wake of the well-documented scandal arising from false testimony in drug cases in Tulia, Texas, legislation was passed requiring corroboration of some testimony.[258] Those statutes have been entirely ineffective, however, because of the limited and weak corroboration requirements that were put in place.[259]

Interrogation Reform: Texas's practices governing the use of statements by an accused is found in Article 38.22, § 3 of the Texas Code of Criminal Procedure. The statute provides that "no oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceedings unless (1) an electronic recording, which may include motion picture, video tape, or other visual recording is made of the statement." While it may appear on first read that the statute requires recording interrogations, the "key to understanding the statute is the phrase 'statement of an accused made *as a result of* custodial interrogation.'"[260] The Texas statute requires only that the *final statement*—not the interrogation itself—be recorded. Further, this provision applies only to oral statements. There is no recording requirement at all when the statement from the accused is in writing. The absence of a recording requirement from the start of the interrogation can resulted in flawed decision-making by the judge and jury.

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[258] *See generally, Targeted in Tulia, Texas?*, CBSNEWS.COM, July 4, 2004, available at http://www.cbsnews.com/stories/2003/09/26/60minutes/main575291.shtml.

[259] *See* TEX. CODE CRIM. PROC. art. 38.075; 38.141; 38.141.

[260] THE JUSTICE PROJECT, *Electronic Recording of Custodial Interrogations in Texas: A Review of Current Statutes, Practices, and Policies*, available at www.thejusticeproject.org.

Reform of the Post-Conviction Process: In 2001, Texas provided convicted persons with a statutory right to post-conviction DNA testing under certain narrow circumstances. Codified at Chapter 64 of the Code of Criminal Procedure, the Act was amended in 2003 to ease its requirements and give broader access to DNA evidence for testing.[261] In the last legislative session, another reform bill that would have expanded access to DNA testing even further passed in the Senate but failed in the House.[262]

Also in 2009, after years of criticism about the failure to provide adequate capital representation in state habeas corpus proceedings, the Texas legislature passed a bill creating a state-funded Office of Capital Writs to represent indigent death row inmates in state habeas corpus proceedings.[263] The office opened in late 2010. While it is hoped that the office will have sufficient staffing and funding to adequately represent inmates in critical state habeas proceedings, Texas, like many states, faces a serious revenue shortfall for the 2011-2013 biennial budget.[264]

Texas Legislative Reform Prospects in 2011

In 2009, the Texas legislature passed House Bill 498, authored by Representative McClendon (D-San Antonio) and Senator Ellis (D-Houston), establishing the Timothy Cole Advisory Panel on Wrongful Convictions.[265] The Panel was established under the umbrella of the Texas Task Force on Indigent Defense to assist the Task Force by studying and preparing a report regarding the causes of wrongful convictions, procedures

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[261] TEX. CODE CRIM. PROC. art. 64.01.

[262] *See* SB 1864 (Tex. 2009) (relating to post-conviction forensic DNA).

[263] SB 1091 (Tex. 2009) (enacted), available at http://www.capitol.state.tx.us/tlodocs/81R/billtext/pdf/SB01091F.pdf.

[264] *See, e.g.*, Dave Mann, *Texas Budget Mess Now as Bad as California's*, TEX. OBSERVER, July 8, 2010, available at http://www.texasobserver.org/contrarian/texas-budget-mess-now-as-bad-as-californias.

[265] HB 498 (Tex. 2009) (enacted), available at http://www.capitol.state.tx.us/tlodocs/81R/billtext/pdf/HB00498F.pdf.

designed to prevent future wrongful convictions, effects of state law on wrongful convictions, and advisability of the creation of an innocence commission to investigate specific cases of wrongful convictions.[266]

The Panel was named after Timothy Cole, who was wrongly convicted and sentenced to 25 years in prison for the 1985 rape of 20-year-old Michele Mallin. Mr. Cole was convicted of the crime after being identified by the victim as her attacker. His picture was the only color Polaroid photo in a group of five black and white mug shots. Mr. Cole maintained his innocence from the start of the case and another man, Jerry Wayne Johnson, attempted to confess for the crimes for which Mr. Cole had been convicted, but those statements were ignored.[267]

In 1999, Timothy Cole died in prison after suffering a severe asthma attack. Posthumous DNA testing revealed that in fact he was innocent of the crime and that Jerry Wayne Johnson was in fact the rapist. As a result, Mr. Cole was exonerated and granted a posthumous pardon by Governor Rick Perry in March 2010.[268]

Over the course of a year, the Advisory Panel held several formal meetings, in addition to a number of less formal subcommittee meetings. The report, issued in August 2010, includes 11 specific recommendations for reform in the areas of eyewitness identification, custodial interrogations, pre-trial discovery, post-conviction proceedings (including expanding the scope of Chapter 64's post-conviction DNA testing), and the

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[266] *Id. See* TEXAS TASK FORCE ON INDIGENT DEFENSE, *Timothy Cole Advisory Panel on Wrongful Convictions*, Oct. 8, 2010, available at http://www.courts.state.tx.us/tfid/tcap.asp.

[267] THE JUSTICE PROJECT, *Convicting the Innocent: Texas Justice Derailed: Stories of Injustice and the Reforms That Can Prevent Them* 3 (2009), available at http://www.thejusticeproject.org/wp-content/uploads/convicting-the-innocent.pdf.

[268] Press Release, Office of the Governor Rick Perry, Gov. Perry Grants Posthumous Pardon for Innocence to Tim Cole, Mar. 1, 2010, available at http://governor.state.tx.us/news/press-release/14312/.

innocence projects.[269] The introductory letter from the Panel's presiding officer notes that, "There is no question every Texas citizen has suffered harm from the incarceration of the actually innocent. Neither studies, academic or anecdotal, nor debate, spirited or otherwise, are necessary to reach this conclusion. The time for insistence to act is now."[270]

The Texas Legislature will take up several of the Panel's recommendations in the upcoming legislative session, which convenes on January 11, 2010. Several pieces of legislation recommended by the Panel have been pre-filed in both the Texas House of Representatives and the Texas Senate. These include a bill that will establish minimum guidelines for photographic and live-lineup identifications,[271] a bill that will require audio or audio/visual recordings of certain custodial interrogations,[272] a bill that expands access to post-conviction DNA testing for convicted individuals,[273] and a bill that will expand access to successive writs of habeas corpus for inmates in cases where new scientific evidence is discovered that was unavailable at trial or where the scientific evidence presented at trial has been subsequently discredited.[274]

In some cases, substantial changes were made to bills of the same subject matter filed during the previous legislative session. This was the result of a rigorous discussion among prosecutors, police leadership, defense attorneys, judges, the Governor's office,

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[269] TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, *Report to the Texas Task Force on Indigent Defense* (2010), available at http://www.courts.state.tx.us/tfid/pdf/FINALTCAPreport.pdf.

[270] *Id.* at iv.

[271] HB 215 (Tex. 2011) (introduced by Rep. Gallego), with companion SB 121 (Tex. 2011) (introduced by Sen. Ellis).

[272] HB 219 (Tex. 2011) (introduced by Rep. Gallego), with companion SB 123 (Tex. 2011) (introduced by Sen. Ellis).

[273] SB 122 (Tex. 2011) (introduced by Sen. Ellis).

[274] HB 220 (Tex. 2011) (introduced by Rep. Gallego).

and criminal justice experts. These discussions will propel the bills towards improved chance of passage.

House Bill 215/Senate Bill 121 requires all police and sheriff's departments in Texas to adopt and implement a detailed written policy on the administration of photographic and live-lineup identification consistent with specified minimum requirements. These requirements include: (1) basing the policy on scientific research on eyewitness memory; (2) ensuring the policy addresses the selection of fillers, instructions given to a witness before conducting the procedure and documentation and preservation of the results, including witness statements, regardless of the outcome; and (3) ensuring the policy addresses procedures for the administration of blind photo arrays and the assigning of an administrator who is unaware of which member of the live lineup is the suspect or providing alternative procedures designed to prevent opportunities for influence of the witness.

House Bill 219 requires the audio or audio/visual recording of each custodial interrogation in its entirety performed at a police or sheriff's department or other place of detention for a short list of serious violent crimes including murder, capital murder, kidnapping, sexual assault and continuous sexual abuse of a child. There is a good cause exception for failing to record a custodial interrogation and several reasons why law enforcement will not be held to the recording requirement are specifically listed, including technical difficulties and the suspect's unwillingness to cooperate. Failure to comply with the recording requirement results in a jury instruction.

Senate Bill 122 removes the current limitations in Texas law on the post-conviction testing of known DNA samples not previously tested. House Bill 220 expands

access to successor writs of habeas corpus to individuals where there is either scientific evidence that was unavailable to the convicted person at the time of trial or where relevant scientific evidence discredits scientific evidence relied on by the State at trial.

All of these bills are animated by the conclusion that the current system does not adequately protect the innocent from accidental conviction or incorrect sentencing. While these bills are poised for serious consideration during the upcoming legislative session, they do not yet reflect the state of the law and do not yet apply to the case at hand. Until the Texas criminal justice makes substantial reforms to the procedural and substantive provisions that form the basis of the day-to-day administration of the death penalty, the system remains too vulnerable to error.

V. Conclusion

Amici respectfully ask this Court to allow the continued development of evidence at the trial level regarding the research documenting the prevalence and causes of wrongful convictions; the shifting public opinion that manifests itself objectively in a higher degree of rejection of the death penalty by jurors; the increased media attention to wrongful conviction issues; and public officials' reactions to the serious concern of wrongful convictions in death penalty cases. *Amici* believe that until Texas identifies and redresses the proven causes of wrongful convictions, including eyewitness misidentification, faulty forensics, unreliable informant evidence, and other documented causes of wrongful convictions, the State of Texas runs the grave and untenable risk of convicting and executing an innocent person.

Confidence in the criminal justice system is shaken when problems go unaddressed because the public expects heightened reliability when it comes to the most

severe of penalties. It is crucial that the most common evidence responsible for wrongful convictions be publicly examined for its impact on capital cases in Texas. *Amici* believes that the public is entitled to this level of transparency about the death penalty system and further urges that Texas judicial system evaluate the risks of wrongful convictions and executions as well as the shifts in public opinion and policy maker responses that result.

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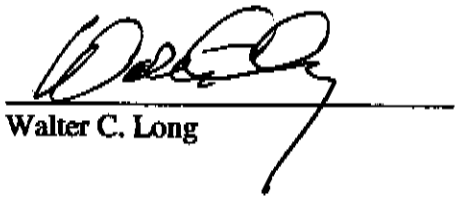
CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served by mail on counsel for Relator, **Allen Curry**, Assistant District Attorney, 1201 Franklin Street, Suite 600, Houston, TX 77002; Respondent, **Honorable Kevin Fine**, Presiding Judge, 177th District Court, 1201 Franklin Street, Suite 1900, Houston, TX 77002; **Greg Abbott**, Office of the Attorney General, PO Box 12548, Austin, TX 78711; **Jeffrey Van Horn**, State Prosecuting Attorney, PO Box 12405, Austin, TX 78711; and counsel for Real Party in Interest John Edward Green, **Richard Burr**, PO Box 525, Leggett, TX 77350, this 22nd day of December 2010.



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