INNOCENCE PROJECT

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WRITTEN TESTIMONY OF REBECCA BROWN
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BEFORE THE ALASKA HOUSE JUDICIARY COMMITEE
RE: HB 316 – AN ACT RELATING TO POST-CONVICTION DNA TESTING
FEBRUARY 5, 2010

Thank you for the opportunity to speak before you today and submit written comments for your consideration of HB 316, which seeks to create statutory access to post-conviction DNA testing.

The Innocence Project assists persons in proving their innocence through post-conviction DNA testing. To date there have been 250 men and women exonerated by post-conviction DNA testing nationwide, one exonerated just yesterday. The emergence of forensic DNA technology changed the fabric of the criminal justice system. Whereas prior to the advent of forensic DNA there were few clear ways to assess prisoners' claims of wrongful conviction, DNA testing of crime scene evidence can provide the criminal justice system with significant and enduring proof of innocence or guilt, from the initial stages of an investigation to years after a conviction. With the ability to transcend fallible human judgment, DNA testing – and particularly post-conviction DNA exonerations – have proven the potential for error that exists in our criminal justice system, and that our appeals processes are not sufficient for identifying those errors.

Our policy agenda is a pro-law enforcement agenda, win-win reforms that protect the innocent and help identify the guilty. It is precisely because of the dual nature of our work – both the efforts to exonerate the innocent and the constructive efforts to strengthen the capacity of the criminal justice system to make more accurate guilt/innocence determinations – that we may be able to provide a somewhat unique and hopefully helpful perspective on the complicated issue you are addressing today.

Having worked in this field for thirty years, the co-founders of our organization often remark that perhaps the most significant lesson they have learned is that in matters of crime and justice humility is important because even the most experienced among us are often wrong. They have reviewed hundreds of cases. In most, they have pored over reams of court transcripts, scrutinized piles of police reports, dissected crime lab analyses, sifted through evidence and property logs, and studied scores of witness statements, and have strongly suspected some men's guilt, only later to discover they were wrong. No less often, someone they strongly suspect is innocent turns out to be guilty. Indeed, because every one of us is human and all of us are actors in a fact-finding mission, if just one of us makes an error, jumps to a conclusion, or acts on a false assumption, an innocent man can be condemned to a guilty man's fate.

Congress recognized DNA's potential for justice, and it was bi-partisan support that led to passage of the Innocence Protection Act contained in the Justice for All Act of 2004. Then-President George W. Bush noted in his 2005 State of the Union address: "In America we must make doubly sure no person is held to account for a crime he or she did not commit. So we are dramatically expanding the use of DNA evidence to prevent wrongful conviction."

The preservation of biological evidence and access to post-conviction DNA testing – fundamental elements of the IPA's innocence protections – are as important today as ever. The Innocence Project

continues to unearth cases where post-conviction DNA testing proves the innocence of those convicted in both the relatively recent and distant past.

Unfortunately, when forensic DNA testing was first made available, it provided little help to the truly innocent who were facing charges like rape or murder, or who had been previously convicted. For these men and women, hope existed only later, with the potential of the performance of DNA testing on the crime scene evidence connected to their cases. For many, if not most of them, such testing represented a last chance to prove their innocence, as they had already exhausted all available state remedies, as well as federal habeas corpus relief. Yet without the benefit of state statutes providing access to post-conviction DNA testing, they faced daunting, if not unattainable, paths to such testing.

The scales of justice began to tilt when states started to pass laws allowing convicted persons access to post-conviction DNA testing. These laws not only allowed DNA testing to be performed on genetic material that was never tested at trial; it also allowed more modern, sophisticated technology to be utilized on previously tested evidence that had yielded inexact or unreliable conclusions.

Over time, newer DNA technologies have emerged, enabling us to create perpetrator DNA profiles from physical evidence that was previously useless. The amount of evidence items that are being successfully tested now, but could never have been tested successfully only a few years ago, is enormous. As DNA testing methods continue to emerge, they reveal new information about even those crimes committed in the distant past. Post-conviction DNA testing statutes have begun to contemplate these technological advances and many now include provisions that permit additional testing in cases where previous testing using older testing methods could not produce conclusive results.

The passage of post-conviction DNA testing statutes also explicitly exempted DNA testing motions and related proceedings from the procedural bars that govern other forms of post-conviction relief. Before the emergence of this discrete statutory avenue that allowed petitioners to seek post-conviction DNA testing, the innocent were forced to rely upon processes that put the burden on the petitioner to effectively solve the crime and prove that the DNA evidence promises to implicate another individual. In states without post-conviction DNA testing laws, many efforts to achieve testing were stymied, egregiously delayed or flatly denied.

Consider the following case of justice denied in the absence of a post-conviction DNA testing law. In March of 1989, New Jerseyan Larry Peterson was convicted of the sexual assault and murder of a woman in Burlington County. Although three men originally indicated to police that they were with Mr. Peterson at the time the murder took place, they later changed their accounts during interrogations and told law enforcement that Mr. Peterson confessed to them that he had indeed committed the crime. One forensic scientist testified at trial that her hair comparison analysis tied Mr. Peterson to the murder and another analyst with the New Jersey State Police testified that there was seminal fluid on the victim's jeans and sperm on her underwear. No seminal fluid or sperm was found in her rape kit. All tests on these items of evidence were inconclusive at the time of trial.

Mr. Peterson testified in his own defense at trial. Alibi witnesses supported his whereabouts during the time of the crime. Work records also showed that he did not work on the day that the victim was found – the day he supposedly confessed to the crime on his way to work. The jury convicted Mr.

Peterson of felony murder and aggravated sexual assault in March 1989. He was sentenced to life plus twenty years in prison.

Although there was no post-conviction DNA testing law in New Jersey, Mr. Peterson first sought access to DNA testing in 1994 under the state's existing post-conviction review process. When the court finally heard his motion in 1998, it denied his petition. In 2000, the Appellate Division affirmed the denial of his petition for post-conviction relief ruling that there was overwhelming evidence of guilt in his case. In March of 2001, the Supreme Court denied his Petition for Certification.

Mr. Peterson was without hope until New Jersey passed a statute granting access to post-conviction DNA testing. The law was made effective on July 7, 2002. On July 8, 2002, Larry Peterson became the first New Jerseyan to file a petition for post-conviction DNA testing under the new law and ultimately testing was granted, after an appeal of an initial denial.

In February of 2005, the Serological Research Institute (SERI) reported the results of testing: Mr. Peterson was excluded as a contributor of any and all of the biological evidence. Although the New Jersey State Police Laboratory had reported that there was no semen in the victim's rape kit, SERI identified sperm on her oral, vaginal, and anal swabs. Two different male profiles were found. One of the males was one of the victim's consensual partners, and his profile was also found on her underwear, jeans, and rape kit. The other unknown male was found on all of the swabs in her rape kit. Based on this evidence, Mr. Peterson's conviction was vacated in July 2005. On May 26, 2006, the prosecution decided to drop all charges against Mr. Peterson. Without the passage of New Jersey's post-conviction DNA testing law, Mr. Peterson would have perished in prison.

Today, 47 states have post-conviction DNA testing laws, which vary in substance and scope. In some states with laws, the "right" to DNA testing remains illusory for many categories of potentially innocent defendants. ***That said, the proposal under consideration in HB 316 more affirmatively denies post-conviction testing than any other statute we have ever seen.***

We offer this perspective based on our breadth of experience litigating claims of innocence all across the nation. We have worked closely with legislatures around the country to establish meaningful post-conviction DNA access, most recently in South Carolina, Mississippi and Nevada, which chose last year to expand its statute to additional categories of deserving applicants. We have learned that seemingly innocuous provisions can spell a dead end for justice for many deserving applicants and wish to spare Alaska such a fate. While there are many provisions that create barriers to meaningful access to post-conviction DNA testing in this proposal, in the interest of time, I will focus on the most problematic areas.

Timeliness

Perhaps the most restrictive provision in this proposal can be found in Section 12.73.040, which effectively puts a three year statute of limitations from the time of conviction on filing a post-conviction claim of innocence. As I mentioned earlier, nearly every single individual who was able to prove innocence through post-conviction DNA testing had already exhausted all available state remedies, as well as federal habeas corpus relief before seeking testing. Not one of these individuals would be eligible for testing under the framework contemplated in this proposal. ***There is not one law in the***

nation that includes such a restrictive timeliness provision. Indeed, 35 of 47 statutes possess no time limitation on the filing of a post-conviction DNA testing petition whatsoever. Perhaps more concerning, the inclusion of such a provision in a post-conviction testing law would make claims more difficult to bring than under the current post-conviction review process.

Barring Testing to Individuals Whose Attorneys Did Not Previously Seek Testing
Traditionally, a defendant seeking post-conviction DNA testing might be able to accomplish such testing under the post-conviction relief process. Unfortunately, though, that framework has proven illusory, given the fact that not a single Alaskan has achieved post-conviction DNA testing to date. If properly structured, a post-conviction DNA testing framework would correct this and allow an Alaskan access to testing under such a framework. Unfortunately, however, the framework proposed also effectively blocks access to post-conviction DNA testing.

A provision inserted into the existing post-conviction review law, located in Section 12.72.010(4), indicates that if an individual seeks post-conviction DNA testing to support his claim of innocence, the person's "exclusive method for obtaining that testing is an application under the post-conviction DNA testing statute," yet Section 12.73.020(5)(A), a provision in the proposed, new post-conviction DNA testing framework, bars an individual from seeking post-conviction DNA testing if the evidence "was not subjected to DNA testing, and the applicant did not waive, or the applicant's lawyer did not forego for tactical reasons, the right to request DNA testing." This provision is made worse by the requirement, in Section 12.73.010(4), which requires an affidavit by the applicant's lawyer stipulating to the reasons DNA testing was *not* sought before or during trial.

These sections effectively bar innocent individuals who were victimized by poor representation, a common cause of wrongful conviction, from post-conviction DNA testing. Put simply, this proposal requires an individual seeking DNA testing to abandon the post-conviction relief process for the purposes of accessing post-conviction DNA testing in favor of the newly created avenue for post-conviction DNA testing. Once the defendant seeks DNA testing under the post-conviction DNA testing framework, however, which is his "exclusive method for obtaining that testing," he is at the mercy of his trial attorney to disclose potential incompetence in order to be granted that post-conviction DNA testing. Therefore, he must rely upon his trial attorney, the same trial attorney who ineffectively represented him, to admit to his negligence or indolence to obtain access to post-conviction DNA testing under the post-conviction DNA testing framework.

It is improper to deny an individual the opportunity to test scientific evidence to establish innocence because a trial lawyer failed to explore DNA testing, made a poor decision, or could not afford a test. It is difficult to conceive that the same trial attorney who made a poor decision would be willing provide an affidavit to this effect. ***Put simply, these provisions deny the most vulnerable – those who were represented poorly or ineffectively – the ability of proving innocence through DNA testing.***

Barring Individuals Who Admitted Guilt
There are three areas of the proposal that would foreclose the possibility of post-conviction DNA testing to an individual who admitted or conceded guilt to the crime for which he was convicted. Section 12.73.010(b)(1)(C); 12.73.020(3); and 12.73.020(9). While it is counterintuitive to most, the innocent, with great regularity, plead guilty, falsely confess and otherwise provide admissions to

crimes they did not commit.

Researchers who study this phenomenon have determined that the following factors contribute to or cause such admissions or false confessions:

- Real or perceived intimidation of the suspect by law enforcement
- Use of force by law enforcement during the interrogation, or perceived threat of force
- Compromised reasoning ability of the suspect, due to exhaustion, stress, hunger, substance use, and, in some cases, mental limitations, or limited education
- Devious interrogation techniques, such as untrue statements about the presence of incriminating evidence
- Fear, on the part of the suspect, that failure to confess will yield a harsher punishment

Some populations, including youth and individuals with mental limitations, are particularly vulnerable, but we have uncovered many cases that involve individuals who do not fall into these "at risk" categories. ***Nearly 25% of the nation's wrongful convictions proven through DNA testing reveal involved an admission or confession.*** The proposal currently under consideration would have barred all of these people from seeking testing.

Requiring Courts to Anticipate the Outcome of Testing
Section 12.73.020(10) requires the court to assess whether there is a reasonable probability, in light of all available evidence, including even evidence that was not introduced at trial, that the requested DNA testing would demonstrate innocence. In essence, this provision would allow the courts to guess the outcome of testing rather than to just accomplish that requested testing. We have learned in the course of our work, that only DNA can provide definitive answers about guilt or innocence. Time and again, we have uncovered cases which contain multiple elements seemingly pointing to the defendant's guilt only to learn through DNA testing that the defendant is, in fact, innocent. As I described earlier, at our office, we have reviewed cases where we were fairly confident in a defendant's guilt only to learn later of his innocence and vice versa. Therefore, it is simply irresponsible to place such a burden on the court, and it certainly sets the stage for irreparable mistakes that any one of us, placed in that same position, would make.

Requiring the Petitioner to Pay for the Retrieval of Evidence
Section 12.36.200(d) of the proposal requires the defendant seeking biological evidence connected to his case to pay for its retrieval. ***There is no other state in the country that places this burden on the defendant.*** In light of all of the other barriers to meaningful post-conviction DNA testing contained in this proposal, this additional burden – particularly for an indigent defendant – could effectively bar deserving individuals from seeking testing.

We believe the Governor put forward this proposal in the hopes of helping the truly innocent who are languishing behind bars in the state of Alaska. Unfortunately there are many provisions in this bill

that would prevent access to post-conviction DNA testing from being meaningful. In essence, their hopes of demonstrating their innocence will be forever prohibited. Our office would appreciate the opportunity to offer our perspective to the Alaskan legislature with the goal of crafting a statute that provides meaningful access to testing in the way we believe Alaskans want.

Thank you for the opportunity to share these views with you. I hope you will contact me if there is any additional information that I can provide on the subject.
