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CALIFORNIA COMMISSION ON THE FAIR

ADMINISTRATION OF JUSTICE

Remedies for Wrongful Conviction and Post Conviction Access to Testing

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Introduction

Representing the California Public Defenders' Association at today's proceedings is Mark Windham, Los Angeles County Head Deputy Public Defender, manager of the Department's DNA Unit, which was created by Michael P. Judge during 2005. Currently the unit is comprised of 12 attorneys and a forensic science research analyst. This staff works full time handling cases based upon DNA evidence.

Currently the attorneys are counsel on approximately 100 cases. The caseload is steadily increasing as more database cold hit cases are filed.

Our perspective is informed by this experience as well as the manager's ten years of practice focused upon the litigation of DNA evidence in capital trials.

REMEDIES FOR WRONGFUL CONVICTION MUST ADJUST TO A NEW PARADIGM IN FORENSIC SCIENCE TESTING.

I. A NEW PARADIGM FOR DNA TESTING HAS ARRIVED

The old paradigm of DNA evidence contemplated DNA testing following the production of other evidence. It corroborated the original investigation where evidence already inculpated the defendant, or it contradicted it, either pre-trial, resulting in dismissal or settlement, or else post-trial, with a wrongfully convicted person exonerated and freed. The use of DNA testing was inconsistent, depending upon limited resources and competing priorities.

During an interim paradigm, increasingly widespread DNA testing almost certainly reduced the occurrence of wrongful convictions.

A new paradigm has arrived wherein DNA testing and database searches come at the beginning of the investigation. Corroboration with other evidence is developed later. **1/3 of all suspects are excluded pre-filing.** This data is from the FBI and is consistent with the recent experience of the Los Angeles Police Department Scientific Investigation Division according to Greg Matheson, director of their lab. Obviously this figure has enormous implications for the possible extent of wrongful convictions where DNA testing is not available, at

the same time that it underscores the value of DNA evidence for convicting the guilty and freeing the innocent.

II. CONSEQUENCES OF THE NEW PARADIGM

Because of this new paradigm for DNA evidence there certainly will be fewer wrongful convictions. Though these will be increasingly rare events there will be as a consequence, errors that will be **harder to detect** because of false confidence in the DNA evidence.

Exhibit 'A' for this dynamic is the scandal at the Houston Crime Lab: **Josiah Sutton** was wrongly convicted with DNA evidence because one sample was withheld from discovery, and the prosecutor misrepresented the significance of another sample. The sample that had been withheld did not match Mr. Sutton, and the sample the prosecutor presented in court that 'matched' Mr. Sutton would also have matched tens of millions of other people. More sophisticated post-conviction testing excluded Mr. Sutton and he was freed after several years of imprisonment. In that case there was a perfect storm of prosecutorial misconduct and defense incompetence. With the increasing use of DNA evidence there will be more cases of 'hard to detect' wrongful convictions.

III. POLICY IMPLICATIONS

A. Lawyer Competence is Crucial.

If DNA evidence is the “silver bullet” then we must consider who is pulling the trigger. Prosecutors, defense attorneys and judges must be aware of not only the considerable power of DNA evidence, but also its limitations. As Mr. Chamberlain, the Assistant Attorney General, has pointed out, “DNA evidence may tell you who held the gun but not who pulled the trigger.” The limitations of the evidence of course are more complicated and subtle than in this clear example, and in many instances become apparent only to the well-trained defense attorney. I am confident that any client represented by the Los Angeles County Public Defender’s DNA Unit will receive state of the art representation. In every case we obtain complete discovery; we scrutinize the DNA evidence; we obtain the assistance of expert witnesses whenever needed; we identify the legal and factual issues and litigate them appropriately. I do not have the same confidence for the level of skill among the bar generally. In the DNA cases where we have succeeded private attorneys as counsel my review of the client files has consistently indicated that the level of preparation is inferior. It is vitally important that all officers of the court receive effective training in this

area or, as in the case of Josiah Sutton, wrongful convictions will occur despite, and indeed because of the use of DNA evidence by attorneys who do not fully understand it.

B. Premium on Complete Discovery (Pre-trial and Post conviction).

It's important to understand how DNA attorneys review DNA testing data. Rarely do we re-test biological samples, though we may test additional samples or stains which we believe may be more probative than the samples selected by the crime lab. Rather, our analysis ordinarily depends upon scrutiny of the raw electronic data generated during the original DNA testing. The reason for this is that the standard STR testing procedure which is now utilized is typically very reliable, but subject to errors of interpretation. Review of the electronic data by an expert with the appropriate software reveals the possible errors. The method we utilize to check the lab results is to review the bench notes and the machine records along with a number of other important documents that are maintained by every accredited lab and then conduct expert review of the electronic data.

This is a highly effective and efficient means of preventing wrongful convictions or revealing them after the fact. This method depends upon

preservation of the electronic data, which is very simple to do. Very little physical space is required because these are small computer data files, nor is much time required to back up the data. No law, however, compels the preservation of electronic data. Penal Code § 1417.1 requires preservation of trial exhibits, but the electronic data would not ordinarily be introduced at trial. Penal Code § 1417.9 only requires the preservation of biological evidence, not electronic evidence. Until recently, one major county crime lab in this state did not maintain the data. In order to prevent wrongful convictions such as Josiah Sutton's and in order to allow prompt review of post conviction claims, *all* crime labs must maintain this data and provide it upon defense request, along with the other pertinent testing records.

C. Offender Database Access.

Today Mr. Chamberlain gave a number of reasons why the Department of Justice opposes defense access to the offender database. His proposition is perplexing, that 'the database is designed for investigation of unsolved crimes only, and when there is a conviction, the crime is 'solved,' thus use of the database is not appropriate'. I hasten to point out the obvious, that *all* of the two hundred plus convictions that now have been overturned in this country were considered 'solved,' yet in

each case the wrong person had been incarcerated while the true offender was free to harm others again. It makes no sense to limit use of the database for this reason, or for any of the statutory or contractual reasons advanced, whether the proposed defense use is pre-trial or post-conviction. I agree with Ms. Ridolfi, and in the interest of time, I would adopt her rejoinder as my own. What I can emphasize are the reasons why defense access to the database is important. Defense access is the only remedy for three potential causes of wrongful convictions: contamination, coincidence, and the Hobson's choice in the case of third party culpability.

Databases are subject to contamination and thus must be open to defense scrutiny. For example, in Michigan, the Jane Mixer murder case revealed a contamination problem. A cold case investigative search of the offender database produced two 'hits' (matches) to the two types found on her body: one was a convicted murderer and the other, a nurse named Gary Leiterman. The problem was that the convicted murderer was four years old at the time of the offense. He committed his crime years after the Mixer murder but his genotype was entered into the Michigan offender database before the database search was undertaken in her cold case. Obviously he was ruled out as a suspect in

her murder, but somehow his DNA had contaminated her crime scene sample, and then the genotype was matched to his in the database search. Similarly, a person easily could be the victim of database contamination, implicated as a perpetrator, corroborated just by the fact of his inclusion in the database, perhaps for a sexual or violent offense, yet completely innocent of this crime, and without the helpful alibi of being four years old and attending preschool at the time of the murder!

The Michigan example is not unique. The Jayden Leskie inquest in Australia probed the murder of a child. DNA found on the child's clothes was matched to a female inmate of a locked mental institution. She had no way to get out of the facility to commit this crime. Though the crime lab attributed this match to coincidence, indeed the inmate had been raped, and her rape kit was tested at the same laboratory that tested the child's clothes. Ultimately contamination was confirmed to be the cause of the false match.

Contamination does unavoidably occur in DNA laboratories and may only be exposed in some cases through defense access, which the DOJ claims is prohibited by existing law.

Coincidental match to an innocent person also may occur in offender databases. The heightened risk of coincidental matches was

underscored by the recent study of the Arizona Offender database.

Among about 65,000 offenders there were 122 pairs of individuals who matched at 9 loci and 10 pairs who matched at 10 loci, 1 at 11 loci and 1 at 12 loci. This dramatically exceeds the level of matching one would expect to find in the population in general, even including siblings and other relatives. While this is probably a characteristic of this particular offender database, it is not known if California has comparable levels of coincidence because that data remains secret. Still, the standard 13 locus STR test would distinguish between any of those who matched in Arizona, but the problem remains in the many cases where DNA which has become degraded due to exposure to elements at a crime scene, or for some other reason yields only partial results, for example at 5 or 6 loci only. Coincidental database match is a risk in any such case and this potential for wrongful conviction justifies defense access after judicial review and a court order.

The third reason to allow defense access to the Offender database is to avoid a Hobson's choice that risks wrongful conviction. There are instances in which defense counsel in its own investigation of a crime, needs to search the offender database for a 'third party suspect.' Penal Code § 299.5 purports to limit such searches to law enforcement

agencies. Mr. Chamberlain has invoked other authority and rationales for the same bar. Countervailing due process concerns, however, support a right to access. See; ABA Criminal Justice Standards on DNA Evidence, Standard 8.3 (b), and generally Davis v. Alaska (1974) 415 U.S. 308. A hypothetical case illustrates the circumstances where such discovery may be warranted. Suppose a defendant in a murder case claims that his DNA is on the murder weapon along with the victim's because he found the knife and picked it up. The defense confidentially retests the knife and finds a third genetic profile that might belong to the killer if the defendant's version is true. The defense seeks to search the database to ascertain if that third profile belongs to a known offender. With this lead, the defense can find the true killer and exonerate the client. On the other hand, the genetic profile might match another unknown victim. If the attorney must ask law enforcement to perform the search, and the search reveals a second murder victim, the lawyer's zealous defense may lead to a death penalty for his client, hence "the Hobson's choice." While in such case it might be reasoned that the defendant should pay the price for his dishonesty, the attorney, who must act in the client's best interest, would not risk the search unless it could be completed confidentially. The defendant's ability to

show his innocence is chilled when the attorney cannot prepare confidentially. It is inappropriate to give the defendant “the Hobson’s choice of going forth with his discovery efforts . . . or refraining from pursuing these discovery materials to protect his constitutional rights and prevent undesirable disclosures to his adversary.” People v. Superior Court (Barrett) 80 Cal.App. 4th 1305, 1321. The defendant should “not be forced to choose between pursuing discovery efforts by revealing privileged information or forgoing discovery to maintain a privilege,” Garcia v. Superior Court (City of Santa Ana) 07 S.O.S. 5005, August, 2007. A diligent and zealous advocate consistently utilizes the protections of the Sixth Amendment and the attorney client privilege in order to investigate and prepare a defense. For this reason attorneys have issued subpoenas duces tecum in attempts to gain such information. The Attorney General has successfully moved to quash in every instance known to me, denying the need and citing the statutory scheme.

The defense should not face this Hobson’s choice. Our statutes should be amended to allow defense searches under appropriate circumstances, in conformity with the ABA Standards and with the Illinois Statute, which somehow coexists with Federal law and the CODIS M.O.U.

which purport to disallow cooperation with states which allow defense access. In some rare cases, the due process concern is paramount.

Wrongful convictions are relatively rare, yet their consequences are so grave that enormous effort is made to ferret them out and this

Commission has been established to seek to understand how to prevent them. Defense access to the Offender Database to find an actual perpetrator when the defendant is not, is necessary to prevent wrongful convictions. We should not forget that in every case of wrongful conviction, it was in fact a third party who was responsible for the crime.

IV. RECOMMENDATIONS

FIRST – A statute must be enacted to require preservation of records of the DNA testing itself including electronic data. This is distinguished from mere reports of the testing or testimony about testing. DNA testing is highly reliable – the errors tend to be in human interpretation of the tests, which can be efficiently scrutinized only when these records are maintained. We still must preserve biological data, because the wrong sample may have been tested, or inadequate technology may have been used for the testing, but preservation of the electronic data and pertinent records is also important.

SECOND – There must be pre-trial as well as post conviction defense access to the genetic profiles in the database after judicial review and court order, with names of the offenders removed to protect their privacy. This is necessary to avoid the Hobson’s choice of revealing potentially damaging information or failing to pursue possible exoneration, to scrutinize the real problems of coincidence such as was suggested by the revelations in Arizona and contamination as was seen in Michigan and Australia. Notwithstanding the supposed statutory and contractual barriers, due process demands such access in certain cases.

THIRD – The best strategy for wrongful convictions is their prevention. This requires open discovery, access to experts, and effective training.

I would offer as a model DNA discovery in Los Angeles County. Discovery is open, complete and informal. I would like to compliment District Attorney Steve Cooley, Sheriff’s Lab Director Barry Fisher and Greg Matheson, of the Los Angeles Police Department’s Scientific Investigation Division who have made this possible. They have confidence in their DNA testing programs and know that open discovery communicates their commitment to its integrity. They also know it’s the right thing to do.

Having the discovery, testing records and electronic data does no good unless a qualified expert who has the appropriate software to review the testing can be appointed confidentially by the court to assist the defense. While we occasionally have some problems getting the experts we need in Los Angeles, after making the appropriate showing our motions almost always are granted. In other jurisdictions this may be more of a problem. Because of the vital importance of expert assistance in DNA cases, I recommend a statutory guarantee when the test results are at issue.

Effective training is the other important component of preventing wrongful convictions with DNA evidence. Defenders, prosecutors and bench officers all must be well informed in order to reduce the risk of error.

Expanding the use of DNA evidence can prevent wrongful convictions because unlike eyewitnesses or informants or confessions or less exacting forensic sciences, an objective record can be scrutinized after the fact of identification. So long as we understand that use of DNA evidence in our justice system requires effective training for prosecutors and defenders, open discovery and access to experts, an understanding that it easily can be misused, that it does have limitations,

that we must be mindful of its implications for civil liberties and privacy, and that it must be scrutinized just as any other sort of incriminating evidence, the justice system is far better off with its widespread use.

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