PRESUMED GUILTY:  
INNOCENCE AND THE DEATH PENALTY

Address by Sean O’Brien* to the Miscarriages of Justice Conference:  
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I want to preface my remarks by giving you some personal perspectives about the innocence revolution that has been brought about by DNA. It has really changed the way that defense lawyers and prosecutors think about wrongful convictions and about the criminal justice process. But it has not changed it enough.

The criminal justice system is something that we all use. As innocent citizens, we depend on it for protection. As the accused, we depend on it to exonerate us if we are innocent, convict us if we are guilty and to rehabilitate us if we take the wrong path in life. As victims of crime, we depend upon it to solve crimes and punish wrong-doers; we hope it will restore us to our prior state of peace and prosperity.

We depend on other public institutions to keep us safe when we use things like trains and airplanes and automobiles. Typically when an airplane falls out of the sky, we will see whole armies of people who will take it apart nut by nut, bolt by bolt, until we find the part that went wrong and then we will ground all those airplanes until we figure out how to reengineer the process so that it does not happen again. That makes sense because if we were making parachutes, we certainly want them all to work. The failure rate for parachutes should be as close to zero as we can possibly get. Why should we not be equally concerned with our criminal justice system?

I want to focus on capital litigation, which is the only process in the democratic world in which litigation can result in the intentional taking of a healthy human life. I will give you some broad overviews. There are two lists of exonerees that you will hear about. There is the list of DNA exonerees that was developed through the efforts of the innocence projects that are cropping up around the country. There is another list of people who have been on death row who have been exonerated. Only relatively few of these exonerations were accomplished with DNA technology. I want to examine both lists and show you a few things to illustrate what we are learning from DNA.

This graph shows the type of offenses that were involved in the first 81 DNA exonerations.¹

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¹ Barry Scheck & Peter Neufeld, Actual Innocence, Appendix 1 (New American Library 2000)
Based on the first 81 DNA exonerations, the most common case of exoneration involves charges of rape. There is a logical, scientific explanation for that; the perpetrator of a sexual assault typically leaves behind incriminating genetic material. And so rape is in many ways the easiest of wrongful convictions to correct due to the DNA left behind. Unfortunately, in a lot of other cases, there is not an unambiguous exchange of body fluids between the perpetrator and the victim. No DNA evidence is left at the scene.

You will note that 70 of the first 81 exonerations involved rape offenses, but that the addition of the assault, kidnapping, homicide, and robbery offenses totals far more than 81 cases. Occasionally DNA can help us in a homicide case. Some of the homicide exonerations involved rape-murder charges, so that there was genetic material to test. Similarly, there is a significant overlap with assault and kidnapping. Innocent prisoners were cleared of assault, kidnapping, homicide, and robbery because the perpetrator also sexually assaulted the victim.

DNA exonerations also enable us to examine those cases to determine what factors lead to wrongful convictions. This graph identifies common sources of error discovered in the first 130 DNA exonerations.²

Even with DNA there is the occasional mistake in the lab. DNA is no more reliable than the process by which it is collected, labeled, preserved and tested. A mislabeled or contaminated DNA sample can have devastating consequences, so that false DNA inclusions or exclusions have contributed to three wrongful convictions.

A surprising number of DNA exonerations involve people who confess to crimes they did not commit. Typically we tend to think of confessions as the most reliable kind of evidence. Interrogation theory and practice teaches law enforcement officers that absent physical torture, a person will not confess to a crime he or she did not commit. That simply is not an empirically proven fact. And in fact, in many cases, interrogation techniques demonstrate that with people of limited intellect, sophisticated psychological interrogation techniques will produce a confession, regardless of whether the confession is true or reliable.

We have had two of those cases in Missouri: Johnny Lee Wilson, from Aurora, and Melvin Lee Reynolds from St. Joseph. Both men with relatively high functioning, mid-range mental retardation, gave videotaped confessions to murders that they did not commit. They were exonerated only when the actual perpetrator came forward and gave a confession that, unlike these gentlemen’s confessions, matched the physical evidence at the scene of the crime. False confessions plague the system at a fairly high rate.

“Snitch” is a criminal defense lawyer colloquial term for informants, people who make agreements with the prosecution to testify. Sometimes they are co-defendants. Sometimes they are jail cellmates. Sometimes they are just prisoners looking for an opportunity, looking for a “bigger fish” on the docket to testify against so they can get out from under charges that they are facing. They can be very, very sophisticated. If you read the Kansas City Star, over the past weekend there was a fairly in-depth article by Mike McGraw about the Kansas City firefighters’ homicide case. It took the prosecutors years to develop a case and get a conviction. They were so frustrated. The way the investigation in that case began was that notices were put up in county jails and prisons, advertising
rewards for people to come forward and give information that could lead to the arrest and conviction of persons responsible for this horrible crime in which the firefighters were murdered. The result was the entire case was based on snitch testimony. People who came forward made deals or got cash rewards in exchange for their testimony. In a number of these cases there is an unholy alliance that can develop between law enforcement and people who take advantage of this strong desire to solve an infamous crime. A defendant facing a long prison sentence will find somebody who is wanted more. This defendant bargains away a jail sentence and helps put away somebody else in prison in his place.

In Los Angeles, Clarence Chance and Benny Powell, were exonerated after serving seventeen years in prison, after being convicted on the basis of testimony of a fellow who was a professional snitch. This professional has explained how in more than 30 cases, he was able to escape prosecution on serious felony charges by offering to become an informant and testify against other people in the jail who allegedly made jailhouse confessions to him. He would have his girlfriend call the tips hotline and provide some information about the crime, pretending that she was a witness. Then the snitch would concoct an admission for another inmate that included that detail. The police would be convinced his statement was true since it included information from the anonymous call—information supposedly known only to the police and the perpetrator. Prosecutors, operating in good faith, get taken in by this sophisticated approach. Snitches have become a serious contributing factor to false convictions and they are used probably with greater frequency in capital prosecutions. In assessing innocence cases, we have learned to look at these various factors as “red flags” that justify further investigation.

Another significant factor contributing to wrongful convictions is microscopic hair evidence. When I first started practicing law in 1980 as an assistant public defender, they had just come out with technology that prosecution experts claimed could help solve crime. By looking at hairs under a microscope and looking at a sample of less than 50 people, they categorized hair characteristics and then used probabilities based on extrapolations from that sample. If one in ten people has red hair and one in ten people has curly hair, then a curly red hair could be narrowed down to one in a hundred people. More factors, such as thickness or texture, supposedly narrowed the source of the hair even further. With these additional characteristics, the probabilities could become to one in 5,000, which sounds like an impressive number to a jury.

Prosecutors and law enforcement will also use forensics to bolster eyewitness identification. In the 1980s, the admissibility of microscopic hair evidence was challenged in the beginning as simply bad science. It is inaccurate, and it has not been empirically tested or proven. DNA evidence is showing us that in cases of exoneration, more often than not, hair and fiber evidence is wrong. It would be more accurate to toss a coin. But in 60 percent of the exoneree cases in which hair and fiber evidence was used to implicate the defendant, they were incorrect inclusions. But just as often there were incorrect exclusions. Dennis Fritz was convicted because microscopic hair evidence was used to corroborate

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what was otherwise a shaky case. The expert testified not only that hairs at the scene of the crime that likely belonged to the killer “matched” hair samples taken from Dennis Fritz and Ron Williamson, but could not have come from Glenn Gore, a key prosecution witnesses. However, later mitochondrial testing of that hair proved that it was in fact Glenn Gore’s hair.4 Where a case is based on microscopic hair evidence, the defense should examine more closely the other evidence in the case.

The most frequent cause of wrongful convictions is mistaken identification. I assume that the vast majority of these cases, if not all of them, involve a totally honest but mistaken identification by the witness. It is an easy mistake to make. There must be care taken in eyewitness identifications. Lineups and photo arrays are not the gold standard for doing this. A witness is invited to make a relative judgment, “pick out the suspect who looks most like the person who attacked you.” In many of these cases when there is a cold DNA hit on the actual perpetrator, sometimes the resemblance is absolutely amazing. We are working a case right now in the Innocence Project in Kansas City of a fellow named Ricky Kidd and we have developed another suspect. Ricky’s sister thought that the photograph we had laying out on the table was her brother. Actually it was the person we believe to be the perpetrator of that crime.

The Cardozo Innocence Project has identified factors that contribute to wrongful convictions. It is no secret that these cases often involve police misconduct, prosecutorial misconduct, defense lawyer incompetence and junk science. We will find those factors in various combinations in almost every case of wrongful conviction. This graph shows the types of police misconduct involved in the first 74 DNA exonerations:5

For police misconduct, suppression of exculpatory evidence is the most common. There will be evidence in the file that the prosecutor or a police officer

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4 See Grisham, The Innocent Man, (Double Day, 2006).
may conclude is inconvenient to their theory of the case, so sometimes police detectives will not send it across the street to the prosecution. If the prosecution gets it, they will not turn it over to the defense lawyer and they will come up with some legal theory that would allow them to do that, and so the jury does not get to hear it. These factors effectively short-circuit the adversarial process. Suggestive identification procedures, such as showing the defendant’s photograph repeatedly before exhibiting the defendant in a line-up, is the most common. In 11 percent of the exonerations, there was actually a fabrication of evidence, where the police literally make up evidence, or other people with motive make up evidence. So there are a number of factors that contribute.

That same pool of cases revealed that prosecutorial misconduct contributes to a significant number of wrongful convictions:⁶

Prosecutorial misconduct includes the suppression of exculpatory evidence, but improper closing arguments play a tremendous role in many of these cases. This has been given inadequate credit for influencing jury behavior, but it certainly can. Ernest Willis was exonerated after serving three years on death row in Texas on arson evidence that turned out to be incorrect science. There are certain floor finishes that if they get so hot, they will flash a room and look like somebody poured gallons of accelerant on the floor. But really it is just the stuff put down to varnish the floors to make them look pretty. It gets hot and explodes. It looks like arson. After experts reexamined the scene, they realized that the fire that killed Willis’ family was not arson at all. At trial, the prosecutor called Willis “a cold blooded monster, devoid of empathy or feelings of any kind,” and argued that he was Satan incarnate. Later that same prosecutor dismissed all charges against Willis explaining, “he simply did not do the crime. . . . I’m sorry this man was on death row for so long and there were so many lost years.”⁷

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⁶ Ibid.
I want to talk about the application of these factors to death row cases. Death penalty cases are unique. There is a famous line from the US Supreme Court in a case called *Woodson v. North Carolina* in which the Supreme Court observed that death is different. Death is more different from a sentence of life than a sentence of life is different from a sentence of a year or two. It is final. It can never be corrected. The qualitative difference requires, according to the Supreme Court at that time in 1976, what used to be referred to as “super due process.” The right to counsel, the right to effective representation, the right to resources; all have subsequently become pretty much a hollow promise in terms of due process and the death penalty.

When we talk about exonerees, there are two lists that are floating around. The first one deals with DNA exonerations in all types of cases. However, this list does not include people like Ted White Jr., who was exonerated after the state’s case just blew up when it was finally examined closely by an aggressive defense. So, there are many people who are convicted and innocent who are not included when we are talking about just DNA exonerations. There is another list, 123 death row exonerations. There is a little quibbling about whether or not there have really been 123 innocent people sentenced to death and then released. But this list is based on actual litigation experience in which a prisoner was tried, convicted and sentenced to death and then was granted a new trial on an appeal or in a post-conviction proceeding, and then at the retrial was acquitted or charges were dismissed by the prosecution. There are two exceptions: a couple of guys in Florida were given a plea bargain to time served on second degree murder. Freddie Pitts and Wilbert Lee walked out of the courthouse saying, “You know it is the darndest thing, ten years ago we said we did not do it and they put us on death row, today we said we did it and they let us go.”

Empirically the best number we can come up with are people who are actually acquitted. There are a number of other defendants who have been given sentencing relief because of questions about their guilt and there may be innocent people among those. It is conceivable there are guilty people among those 123 death row exonerees. It is possible. It would not violate the laws of physics for that to have happened. But we are also learning that there are innocent people among the people who have been executed. There are undoubtedly some innocent people who remain on death row. So, I have a fairly high level of confidence that 123 is not a misleading number. Of that 123, only 15 of the death row exonerations are based on DNA.\(^8\)
The other exonerations were obtained the old fashioned way—shoe leather, knocking on doors, talking to witnesses, looking at tried and true forensic science methods like fingerprints and other types of physical evidence—that is, through methods other than DNA evidence.

There are a couple of things I think are important from these facts. First is that DNA is not the cure all for problems in our criminal justice system. If you look at non-sex offense cases, DNA can give us the difference between guilt and innocence in a very small number of cases in which the defendant is actually innocent. In all of these other 108 cases, these are innocent people for whom DNA testing had little or no benefit. And that is important to understand. I want to illustrate another point here:
For the non-capital DNA exonerations, there are 194, and we have 1.2 million prisoners in the United States. With 194 exonerees for 1.2 million prisoners, it does not seem that significant of a number, although I personally am convinced that in every prison in this country there are a handful of people who do not belong there. But when you look at the numbers, it does not seem like a huge amount. Compare death row exonerations; it is a little higher number:

Our current death row population, as of the close of 2006, is 3,344 people. There have been 123 exonerations. But if looked at in a different way, comparing the number of exonerations to the number of executions, the percentage grows a little higher:

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As of today, there have been 123 exonerations versus 1,062 executions. It starts to register as something that is statistically significant. Exonerations exceed ten percent of the total number of executions. For every nine people we execute, we are letting one person go because he or she was wrongly convicted. This may vary from one jurisdiction to the other. There are two states in the country, Illinois and Idaho, which have exonerated more prisoners than they executed. Projecting out the same ratio to non-capital prisoners, there would be a couple hundred thousand innocent people in our prisons. I am not sure that is the case. Even as jaded as I am as a defense lawyer, I would find that hard to believe. But there is something going on in these numbers.

Why is it that there is such a high percentage of death penalty cases that involve exoneration? It is something that I think bears some empirical research by scholars into that difference. We can hypothesize a little bit on things that contribute to this. There is a very good book, published in January of 2006 by a law professor at University of Pittsburgh School of Law, Welsh S. White, called Litigating in the Shadow of Death. He interviewed a number of death penalty defense lawyers across the country, and looked at the death penalty system and the skill, diligence, and resources required to defend a death penalty case. He considered the extent to which the quality of defense counsel contributes to the arbitrary pattern of imposing the death penalty. He includes a couple of chapters on innocence, and the various factors that work to increase the number of innocent people who get sentenced to death. The first is plea bargaining. In a capital case it is highly unlikely that the prosecutor will offer a plea bargain that would result in a sentence of less than life, usually life without parole. I think it happens occasionally, but it is rare that a person who is innocent would agree to plead guilty to a sentence of life without parole. If you were innocent, you probably would not do that. Thus an anomalous situation is created where a guilty person can avoid the death penalty through a plea bargain where an innocent person likely would not. Guilty people are less likely to roll the dice than innocent people.

The other thing that happens in the death penalty is that we have a process called “death qualification” of the jury. This was the subject of many studies in the late 1960s, which I think could bear some updating and repeating empirically. These studies involved the use of shadow juries in infamous capital cases where one jury was death qualified and other shadow juries were not. The verdicts from these shadow juries were examined. The results of these studies have been the subject of two, at least two, Supreme Court decisions. One is Witherspoon v. Illinois\footnote{Witherspoon v. Illinois, 391 U.S. 510 (1968).} in 1968 and the other is Lockhart v. McCree\footnote{Lockhart v. McCree, 476 U.S. 162 (1986).} which came down in 1986.

The way that the death qualification process works is that the prosecution asks jurors their views on the death penalty, and then is allowed to strike from the jury people who have conscientious scruples against the imposition of the death penalty. The legal standard for this has been the subject of debate. It is been tweaked a little bit. But in practical application it boils down to this: if a person is squeamish about pulling the switch, that person does not get to serve on a
capital jury. Even if a juror generally favors the death penalty, but expresses reluctance actually to impose it, he or she can be removed from the jury. The biasing effects of this selection process have been studied in various ways.

Right now I have a good friend who is defending a capital case in Atlanta, Georgia. He is in his tenth week of jury selection, where all they are talking about for ten weeks is the death penalty. They will spend two days talking about the other things like the presumption of innocence and their ability to consider the evidence, but I think all of those jurors come out of that process believing that this is a case about capital punishment. This is not a case about guilt or innocence. The jury selection process has them brought in one at a time and questioned for sometimes as long as an hour or two for just one juror. While this person is being questioned about the death penalty there are hundreds of other jurors waiting down the hallway. They are thinking about the death penalty. There is a biasing effect from that process, in and of itself. It effectively brainwashes jurors into thinking that this is a case about the death penalty. Before they have even heard opening statements, the death penalty is all that is being talked about.

The other thing that happens with the death qualification process is that by excluding people who have qualms about the imposition of the death penalty, instead of taking the jurors out of a random sampling of the middle of the ideological spectrum, the jurors are taken from the political right, the prosecution and the anti-civil libertarian side of the equation. One ends up with jurors who, by attitude, belief, and affiliation, are law enforcement friendly. The psychological studies that were done by Professor Hans Zeisel of Northwestern University in Chicago showed that a death qualified jury was substantially more likely than a regularly selected jury to find a defendant guilty.15

In more recent studies, exit polling of capital juries established that death qualified juries tend to have an opposite view of what they are told in the jury instruction about things like presumption of innocence and burden of proof. A majority of them believe that if the defendant offered an alibi defense, he had to prove his alibi beyond a reasonable doubt. Every trial court to hear evidence of Professor Zeisel's and others' research and have found that the process of death qualification is so biasing that a conviction from such a jury violates due process of law because those jurors cannot presume the defendant innocent. That is where the title of my presentation comes from, “Presumption of Guilt.” It is a part and parcel of the death penalty that I think dramatically undermines the reliability of the process.

The other common problem with the death penalty is inexperienced defense attorneys. Again referring back to Professor White's book, he describes three types of lawyers. There are the good, the bad, and the ugly. There are very experienced capital defense lawyers who understand the dynamics of death qualified juries and try to adapt their litigation and investigative practices accordingly. There are experienced criminal defense lawyers who think, wrongly, that their experience translates into the ability to defend a capital case. They make decisions instinctively based on their experience in non-capital cases, which is wrong. They fail to account for the fact that death qualified juries think

differently. They believe differently. Their thought processes are different and your burden of proof is much higher and you have to adapt your litigation strategies accordingly. These lawyers, probably more often than not, in representing an innocent client will overestimate the chances of acquittal. They will underestimate the chances of conviction. They become so inappropriately confident that they fail to prepare for the punishment phase of trial, which is what happened in Joe Amrine's case.\textsuperscript{16} All the lawyer did in the penalty stage of his trial was to put Joe on the witness stand and have him deny his guilt. Nothing annoys a jury more than telling them that the decision that they just deliberated over and arrived at was wrong. That makes them mad. They come back with a death sentence because the lawyers do not understand that these cases are different.

The other factor involved in death penalty cases is that for the most part they involve unspeakable crimes. The Amrine case involved a prison killing in the maximum security unit. What should be done to somebody who commits a murder inside of a prison? He is already doing time. There is a strong pressure to execute such a defendant. More often the case may involve crime that was committed in a particularly heinous or brutal fashion, such as dismemberment or sexual assault. The other thing that makes death cases qualitatively different is that frequently they are in the media. The Kansas City firefighters case was in the media frequently over that ten years, with everyone wondering when will there be a prosecution? The political pressure to solve these terrible crimes is very high. So corners are cut. Advertisements are put up in county jails for witnesses. All of those factors, while they exist to one degree or another in non-capital cases, exist to a very high degree in capital cases. Those risks can be seen in virtually every one of the innocence cases that have been cropping up over the last few years.

The one population that does not get closely examined are people who have been executed in cases in which there was some question about their guilt at the time of the execution, but the execution nevertheless went forward because there simply was not enough “juice” to stop the execution. The execution warrant creates kind of a hydraulic pressure to be carried out. It is like shifting a high-speed freight train to a different track once it builds up a head of steam. It is very difficult to stop. In each of these cases, while there were questions at the time of their executions, they went unresolved for many years until in the last two or three years reporters at various institutions or newspapers decided, to investigate and see if there really was anything to the claim of innocence.

I do not know how you pronounce somebody innocent once he has been executed. I do not know what the standard is. In some of these cases, the prosecutors are expressing confidence in guilt. In two cases, in the Carlos de Luna case in Texas and the Larry Griffin case in Missouri, prosecutors have reopened the trial investigation. In Griffin, I think they are seriously looking at the possibility of a new prosecution of the correct offender. I think you would agree that there is substantial reason to believe that an innocent person was executed.

This issue hits close to home for me because my law partner, Kent Gipson, represented Larry Griffin. And so Kent and I together had to tell him that his last appeal was denied, that Governor Carnahan was not going to grant clemency and that he was going to be executed within the hour. I have represented death row inmates and I have had a number of clients executed and where I had to break that news to them. Typically the client will thank you for your efforts and encourage you to go on and keep up the good fight. Larry was different. We were not getting the usual encouragement. He was quite angry and when Kent said, “Larry I think we did what we knew how to do.” Larry replied, “Well whatever you did was not enough!”

Larry was charged in a drive-by shooting of a fellow by the name of Quintin Moss in St. Louis. Quintin was a drug dealer, ran a drug house and he had been involved in some bad conduct and was in fact the police department’s chief suspect in the homicide of a fellow by the name of Reggie Griffin, who was Larry’s brother, the father of Larry’s nephew. When Larry was arrested initially as a suspect in Quintin Moss’s case, he literally said “You know, I would have killed the son of a bitch if I could find him. But I did not find him and I did not do it. Not that I did not want to.” Larry was prosecuted on the basis of the testimony of a fellow named Fitzgerald who identified Larry as the killer. Fitzgerald was presented as a good citizen who was in the neighborhood. He was a white fellow in a predominantly black suburb of St. Louis. He testified that his car had broken down and he was fixing it. He saw a car come around the corner and gunshots fired from the car upon Quintin Moss and another fellow by the name of Wallace Connors. Moss was killed. Connors was shot in the buttocks—still has a bullet in his body from that drive-by shooting. Connors had a warrant for his arrest. He was taken into custody and extradited to Texas where he served a sentence. The police did not interview him. There was a cursory interview at the beginning, but then as soon as he was shipped off to Texas, nobody went back to interview him including the defense lawyers. He was paroled from Texas, shortly after the crime in the early 1980s, and we lost track of him.

Larry was executed before the days of the Internet. Now it is pretty easy to find people, but it was much more difficult then. We did not find Connors. In 1993, Larry was in danger of imminent execution when my partner, Kent Gipson, was appointed to represent him. Larry’s previous lawyer did absolutely no investigation outside the trial court record. In the process of investigating, Kent discovered that Fitzgerald was not a standup citizen who happened to be in the neighborhood. He was a person who was involved in the killing a police officer in Boston, testified against his partners in crime, and relocated to St. Louis in the federal witness protection program. He was a heroine addict. Rather than driving through the neighborhood and breaking down, he actually was walking out of the methadone clinic across the street. So, the police sanitized their one and only eyewitness.

It was an eyewitness case, so they had the eyewitness plus motive. Fitzgerald’s true background was a fairly compelling piece of evidence, and Kent filed a habeas corpus petition asking to reexamine this case. Fitzgerald talked to Kent and he said that police showed him a photograph of Larry Griffin and told him that he was their prime suspect. Fitzgerald told Kent that when he identified Larry’s photograph, he was simply following the officers’ lead. He refused to recant his in-court identification of Larry. He stood by that. Another piece of evidence came to us quite by happenstance. A fellow by the name of Kerry
Caldwell was driving along with a burned-out taillight in his car when a police officer pulled him over. In the back of Caldwell's car was a cache of automatic weapons, so the police officer took him into custody on numerous firearms charges. He was looking at a long prison term, so he made a deal to turn state's evidence against other people who were involved in this drug ring. He admitted that he was a hit man and that he killed a number of people. He was given immunity from prosecution in exchange for his testimony against several people who were accused of several homicides in the course of drug trafficking. Kent read the St. Louis Post-Dispatch about Caldwell’s testimony which named several people he had been involved in killing. One of the victims Caldwell named was Quintin Moss. Furthermore, the car that was used in the drive-by shooting was found during the investigation in the Griffin case. Weapons were found in the car, which ballistics matched to the bullets that were found in Quinton Moss’s body. The car was registered to Ronnie Thomas, who was the defendant in the organized crime case in which Kerry Caldwell was testifying.

We thought that Caldwell’s confession plus the partial recantation by Fitzgerald would be enough to stop Larry’s execution. After all, Caldwell’s story was backed up by the physical evidence, which included the murder weapon found in Thomas’ car. We had looked for Wallace Connors and could not find him. To make a long story short, the federal judge applied what we cynical defense lawyers call the “universal rule of snitches.” This rule is that the judge will believe these snitches only when they testify for the government. The same snitches are never believed when they testify for the defendant. But here the same witness who had given the same testimony, on which a jury sent three people to prison for life without parole, was rejected by the federal judge who said he was unbelievable because he had been immunized; Caldwell had nothing to lose by coming to court and giving that testimony on Larry’s behalf. Larry was executed based on that. Governor Carnahan took the position that he should not second-guess the courts since the court adjudicated the issue of innocence, he was not going to explore it any further and so Larry’s execution went forward.

In a subsequent investigation by Terry Ganey, a very gifted writer and investigator and journalist in Columbia, who teaches at the School of Journalism, looked into the case.17 He found Wallace Connors living in California. Connors had cleaned himself up, had a good job, stable family and still has the bullet in his body. Connors was at the scene and he saw the shooting. He was not aware that Larry Griffin had been executed for the murder. He was wondering why nobody had ever contacted him because he saw the murder. He saw the shooter. He named the shooter. It was not Larry Griffin. Larry was not in the car. When this investigation is added to the other evidence, I think that makes a fairly high likelihood that Missouri has executed at least one innocent person. That took a lot of time and effort on the part of a journalist who became interested in that case.

I think there are other cases that are worthy of that kind of exploration. Roy Roberts was executed for stabbing a prison guard during a prison riot. Roy weighed 300 pounds. His name did not surface in the investigation until weeks later when a guard thought he might have seen him holding the victim while

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another inmate stabbed him. There are serious questions about Roy Roberts’ guilt.

Maurice Byrd was convicted for a gruesome homicide in Pope’s Cafeteria in St. Louis in which the victims were lined up in the freezer and shot through the eyes. In spite of an alibi defense, Byrd was convicted on the testimony of a snitch who was let out of jail the day that Byrd was sentenced to death, and a hypnotized witness who picked Byrd out of a photo spread. The snitch ended up going back to Georgia and he is now serving a life sentence in Georgia for having committed a robbery, where he took the victims to the cooler in a convenience store and shot them through the eyes. Maurice Byrd was executed for the St. Louis crime. That is one that deserves investigation.

The other is Winfred Stokes, executed for the murder of a woman that he allegedly followed home from a bar. The Missouri Supreme Court refused to allow the defense to introduce evidence that the victim had sought a protective order against her abusive boyfriend. Neighbors had called police because the boyfriend had tried to stab her. She was relocated to a secret apartment. The abusive ex-boyfriend’s fingerprints were found on a letter written to her by her lawyer and mailed to her new secret address. I think that case warrants further investigation.

In conclusion, it is obvious that DNA technology has taught us some valuable lessons about the criminal justice process. Some of those lessons we already knew, or should have known, such as the risk inherent in eyewitness and informant testimony, the dangers of coercive interrogation techniques, and the unreliability of junk science. We are learning that witnesses, judges, jurors, prosecutors and defense attorneys are no less prone to human error than the rest of us. It would be a mistake, however, to think that DNA has solved those problems. As the experience in the death row exoneration has shown us, DNA technology is capable of solving only a small percentage of crimes and wrongful convictions. It is not a panacea for what ails our criminal justice system; DNA is more accurately viewed as a thermometer that is telling us that the system is not as healthy as we thought. Unfortunately, while science is telling us that we should be giving criminal convictions greater scrutiny, politicians continue to push legislation restricting the right to counsel, and shrinking the power of the courts to review and correct capital convictions.

Perhaps the greatest obstacle facing innocent prisoners is the absence of any constitutional right to counsel after the prisoner’s first appeal. Prisoners sentenced to death have a statutory right to counsel throughout the appeal process, which could be yet another explanation for the relatively high rate of exonerations in those cases. But for innocent prisoners who are serving lengthy sentences, perhaps even life without the possibility of parole, there is no publicly-funded legal services program available. They are on their own. It is the knowledge that there are innocent people in prison with no access to counsel that has spurred the creation of programs such as the Midwest Innocence Project, which will work in partnership with UMKC School of Law and University of Missouri School of Law and Journalism School in Columbia. Faculty at all three schools will supervise law students and journalism students, who will screen and investigate prisoner claims of actual innocence and attempt to free the wrongly convicted. The urgent needs of innocent prisoners present a compelling educational opportunity for the next generation of legal leaders. I urge you to support this important project.