INNOCENCE PROJECT

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March 11, 2013

Kansas House Committee on Corrections and Juvenile Justice
300 SW 10th Ave.
Topeka, KS 66612-1504

Re: **SB 40: Amending provisions relating to DNA evidence – Testimony in Opposition**

Dear Chairman Rubin and Members of the Committee:

Based on the Innocence Project's experience and close study of the nation's 302 DNA exonerations, we strongly urge the Kansas Legislature not to change the language of the state's post-conviction DNA testing access statute as proposed in SB 40.

This legislation is surely well intentioned, but by requiring that post-conviction DNA testing results "exonerate," rather than "be favorable to," the petitioner, **this legislation would have the unfortunate consequence of fostering injustice and undermining public safety.** Virtually the only type of case in which post-conviction DNA testing results can, on their own, "exonerate" a petitioner are single perpetrator rape cases.

As such, **if the language contained in this legislation had been applied to the cases of the nation's 302 innocent individuals who were exonerated after post-conviction DNA testing, almost half of them might not have been allowed to prove their wrongful convictions.** Instead, those innocent people would have remained languishing in prison and borne the false stigma of guilt for the rest of their lives.

Refusing to allow judges to order such testing in appropriate cases undermines public safety as well. In nearly half of the nation's wrongful convictions, post-conviction DNA testing not only freed the innocent, but also enabled identification of the real perpetrators of those crimes. Of the nation's DNA exonerations, 125 actual perpetrators have been identified in 146 underlying cases. Those actual perpetrators went on to be convicted of 130 additional crimes, including 70 sexual assaults, 32 murders, and 28 other violent crimes while the innocent sat behind bars for the original offenses of those real perpetrators.

Take, for example, the tragic wrongful conviction of Texan, Michael Morton. Convicted in 1987, he spent nearly 25 years in a Texas prison for the murder of his wife, Christine Morton. In June 2011, a judge finally ordered DNA testing on a bandana found near the Morton home after the murder. That testing revealed that the bandana had traces of Christine's blood and hair. It also contained the DNA of another, unknown male.

The DNA testing results alone may therefore not have been enough to exonerate Mr. Morton. But the unknown male's DNA profile was then run through the national DNA databank and matched a convicted felon from California, who also had a criminal record in Texas. Further investigation by Morton's lawyers revealed that a pubic hair from the unknown male was also found at the scene of the murder of Debra Masters Baker in Travis County, Texas. Mrs. Baker was, like Christine Morton, bludgeoned to death in her bed; her murder occurred two years after Christine's death, while Mr. Morton was in prison.

The post-conviction DNA testing alone in Mr. Morton's case would not have "exonerated" him, but instead, only have been "favorable" to him. Because the judge was able to order such testing, however, the real perpetrator in that crime was identified—but only after having committed another murder. Twenty-five years later, the innocent Mr. Morton is free, and the real perpetrator has finally been convicted.

There are other instances where post-conviction DNA testing of probative crime scene evidence has been favorable to the convicted person, but was not enough to exonerate him—and yet, because of that DNA testing, other information came to light that ultimately revealed the wrongful conviction of the petitioner and led to his exoneration.

Consider the case Damon Thibodeaux, who was sentenced to death for the New Orleans-area murder of his half-cousin, Crystal Champagne, based largely on his recanted confession. Mr. Thibodeaux spent 15 years in prison for the crime before his exoneration through DNA testing in September 2012. Mr. Thibodeaux was among the suspects brought in for questioning by police after the murder. After eight ½-hours of interrogation, he gave a recorded statement confessing to consensual and non-consensual sex with the victim and then to beating and murdering her. This confession was inconsistent with the crime in numerous details. Although forensic examiners could find no evidence of semen in the victim's body, a detective theorized that a sexual assault still could have occurred and that post-mortem maggot activity had consumed and degraded the evidence. Additionally, two eyewitnesses testified that they saw someone pacing near where the body was found. They both selected Mr. Thibodeaux from a photo array and identified him in court.

In 2007, based on evidence of Thibodeaux's innocence, the Jefferson Parish District Attorney's Office initiated a joint reinvestigation with the Innocence Project and the rest of Mr. Thibodeaux's legal team. The parties conducted multiple rounds of DNA and forensic evidence testing of the crime scene and other physical evidence and interviewed numerous fact witnesses. The eyewitnesses who identified Thibodeaux as the man they had seen pacing near the crime scene had already seen Mr. Thibodeaux's photo in the news media before taking part in the identification procedure. Moreover, they revealed that the sighting had occurred the day after the body was found, when Mr. Thibodeaux was already in custody. DNA testing performed by Dr. Edward Blake and other forensic experts concluded that there was no evidence connecting Mr. Thibodeaux to the murder and that, contrary to his statement, the victim had not been sexually assaulted. DNA testing on both Mr. Thibodeaux and Ms. Champagne's clothing confirmed that he could not have been the perpetrator. DNA on a cord in a tree hanging above Ms.

Champagne's body, which had tested positive for blood in the original investigation, revealed male DNA that did not belong to Mr. Thibodeaux. The reinvestigation further confirmed that his confession was false in every significant aspect and included a thorough examination of the reasons why Thibodeaux had falsely confessed, including exhaustion, psychological vulnerability, and fear of the death penalty. The prosecution's own expert had concluded that Mr. Thibodeaux falsely confessed based on fear of the death penalty.

It was only in combination with these facts that post-conviction DNA testing *helped* to prove Mr. Thibodeaux was actually innocent of the crime for which he had been wrongly convicted. The Jefferson Parish District Attorney ultimately agreed with that finding, and decided to join with the Innocence Project in seeking to vacate Mr. Thibodeaux's conviction and ultimately, exonerate him.

Like DNA itself, related policy issues can be complicated. We appreciate the sponsor's worthy intentions in the filing of this legislation, but urge you not to limit access to post-conviction DNA testing in Kansas in this way. Indeed, the move in states across the nation is to remove, not create, obstacles to post-conviction DNA testing.

Thank you for your consideration. If you have any further questions, please do not hesitate to contact me at ssaloom@innocenceproject.org or (212) 364-5394.

Respectfully submitted,

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Policy Director

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March 11, 2013

Kansas House Committee on
Corrections and Juvenile Justice
300 SW 10th Ave.
Topeka, KS 66612-1504

RE: Opposition to SB40, Amending provisions relating to DNA evidence

Society's most basic expectation of the criminal justice system is that it reliably distinguish between the innocent and the guilty. DNA testing is a powerful tool to ensure, in both the trial setting and in post-conviction litigation, that this fundamental distinction is correctly made. K.S.A. 21-2512, as initially enacted, gave a significant, if limited, number of incarcerated citizens the opportunity to establish their innocence through post-conviction testing.

As currently enacted, the statute strikes an appropriate balance between protecting both the innocent and society's interest in the finality of criminal investigations. K.S.A. 21-2512 vests discretion in the trial court to determine if the DNA evidence is of such significance to warrant relief. As with other evidentiary issues, it is the original trial judge who heard the case that is in the best position to evaluate how DNA results affect the weight of the evidence used to determine guilt. The amendment proposed in SB40 upsets the balance struck in the current statute and, more significantly, undermines the criminal justice system's ability to distinguish between the guilty and the innocent.

The proposed amendment could prohibit relief for any person, regardless of the results. The amendment states that the DNA testing must exonerate the petitioner. Exoneration is defined as "conclusively establish that the petitioner did not engage in the conduct." This outcome determinative requirement places a higher burden on the defendant than the burden he or she must bear to obtain relief from constitutional violations. It is also higher than the burden placed on the State to convict the defendant.

Depending upon the facts of the individual case, results of DNA testing will have differing exculpatory weight. DNA testing reveals the personal identity of biological material. This information, however, must be evaluated with the other evidence in the case. Even in a case that was tried as a single perpetrator rape, if DNA testing reveals the presence of a third party, the State may still attempt to deny its exculpatory power and change its theory of the case.

Take, for example, the case of Roy Wayne Criner. He was convicted and sentenced to 99 years for the 1986 rape and murder of a 16-year-old girl in Montgomery County, Texas. In 1997, DNA testing established that the semen found in the victim did not belong to Mr. Criner. Additional testing revealed that the DNA on the cigarette butt found at the scene was also Mr. Criner's. According to the prosecution, however, the absence of Mr. Criner's DNA, did not conclusively establish he did not participate in the crime. Although the prosecution did not argue at trial that two people were involved in the rape and murder of the victim, subsequent to the DNA testing, the prosecution asserted that the

DNA evidence only established that the victim had come into contact with two men, one of whom was not Mr. Criner. The Texas Criminal Court of Appeals agreed. It was not until August of 2000, when then-Governor George W. Bush granted a pardon on the grounds "that credible new evidence raises substantial doubt about the guilt of Roy Criner," that Mr. Criner was released

The failure of the prosecution and courts to acknowledge that the DNA results created "substantial doubt" as to Mr. Criner's guilt not only resulted in an innocent person being incarcerated, but also resulted in the failure to punish the perpetrator of the crime. Removing the trial court's ability to weigh the results of DNA testing, along with the rest of the evidence produced at trial, results in guilty persons escaping punishment. Based on the tireless efforts of the Innocence Project in New York, 302 innocent persons have been released from prison and 125 actual perpetrators have been identified. Those persons who initially escaped punishment went on to commit an additional 130 crimes, including 70 sexual assaults and 32 murders.

The experience of organizations across the county is that DNA evidence alone cannot conclusively exonerate an innocent person. DNA testing can shed new light on a conviction and can lead to additional evidence, that, when evaluated on a whole and weighed against the original theory of the prosecution, can substantially call into the question the legitimacy of the conviction. It can also lead to the apprehension of the actual perpetrator. Prosecutions are complex. DNA evidence is complex. Trial courts must be given the flexibility to address those complexities to obtain just results.

We respectfully request that the Legislature reject SB40 and retain K.S.A. 21-2512 in its current form to ensure fair access to testing, relief to those whose convictions are undermined, and punishment for those who might otherwise escape justice.

Thank you for your consideration. If you have any further questions, please do not hesitate to contact us.

Respectfully Submitted,

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House Corrections and Juvenile Justice Committee
Testimony of the Kansas Association of Criminal Defense Lawyers
SB 40 - Opponent
March 12, 2013

KACDL is a 325+ member organization dedicated to justice and due process for criminal defendants. KACDL joins others in opposition to SB 40, which amends K.S.A. 21-2512, the statute concerning post-conviction DNA testing.

Fortunately, Mr. Stephen Saloom, Policy Director for Innocence Project, brought this bill to our attention. The Innocence Project is an opponent of this bill. Also opposing the bill is the Paul E. Wilson Project for Innocence and Post-Conviction Remedies at the KU School of Law.

The Kansas Association of Criminal Defense Lawyers joins these respected and successful organizations in opposition to SB 40. We adopt the arguments made in their respective written testimonies. I would like to highlight two statistics Mr. Saloom cites in his letter:

- **". . . if the language contained in [SB 40] had been applied to cases of the nation's 302 innocent individuals who were exonerated after post-conviction DNA testing, almost half of them might not have been allowed to prove their wrongful convictions."**

- **"Refusing to allow judges to order such testing in appropriate cases undermines public safety as well. . . . Of the nation's DNA exonerations, 125 actual perpetrators have been identified in 146 underlying cases. Those actual perpetrators went on to be convicted of 130 additional crimes . . . while the innocent sat behind bars for the original offenses of those real perpetrators."**

We urge this Committee to reject SB 40.

Thank you for your consideration,

Jennifer C. Roth

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