

Testimony of  
**Larry A. Hammond**

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Testimony Before the Senate Judiciary Committee  
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Chair, Arizona Justice Project

I am pleased to be afforded this opportunity to appear before this Committee to offer the perspective of the Arizona Justice Project (AzJP) on the two subjects relevant to this hearing. I will first provide a very brief background of the AzJP and its work with respect to the evaluation of DNA cases. I will then summarize our Project's experience with the National Institute of Justice (NIJ) in applying for a grant under what has become known as the Bloodsworth Grant Program. Finally, I will address our Project's efforts to encourage greater independent oversight of Arizona's crime laboratories.

#### I. The Arizona Justice Project

The AzJP has been in existence for 10 years. We were founded in 1998 by Arizona Attorneys for Criminal Justice (AACJ). Our mission is to seek out and address cases of actual innocence or other manifest injustice. From inception, we have relied almost exclusively on volunteer assistance from lawyers, investigators, experts and consultants. We have developed very substantial relationships with Arizona's law schools - the Sandra Day O'Connor College of Law at Arizona State University (ASU) and the James E. Rogers College of Law at the University of Arizona (UofA). We have screened over 2500 inmate cases and have, at any given time, approximately 50 cases either in court or in an advanced state of evaluation. Operating on an almost entirely pro bono basis, the Project has enjoyed some notable successes, some of which are detailed on the AzJP website at [www.azjusticeproject.org](http://www.azjusticeproject.org).

The general topic of the forensic sciences employed by crime laboratories and the more specific subject of DNA testing, have been of importance to the Project from its inception. As an adjunct to the work of the AzJP, we have offered a course at the ASU College of Law (I have co-taught the course along with our ASU faculty coordinator and tireless AzJP case supervisor, Professor Bob Bartels). One aspect of the course has focused on biological evidence and the work of Arizona's crime laboratories. Our students have been given DNA tutorials and have toured crime labs. In addition, as discussed in more detail below, post-mortems of exonerations have been an important part of the Project's work, and in that connection we have encountered some of the more glaring defects in at least one of Arizona's crime labs.

Until very recently the Project survived on occasional donations and a small annual grant from the Arizona Bar Foundation (\$20,000). As a consequence, when we have needed the particular expertise of consultants in the DNA field, we have been constrained to seek volunteer aid. In

truth, resource limitations have been a prevailing reality for our Project. The administrative hub of the Project has been located within the law firm of Osborn Maledon. The firm, which I helped found 13 years ago, has generously provided most of the Project's administrative support (coordinated by my legal secretary, Donna Toland). The firm has borne most of the Project's day-to-day out-of-pocket expenses. Within the last few weeks, thanks to a very substantial grant from the Arizona Bar Foundation (\$150,000), we have now relocated the administration of the Project to ASU where we have a newly selected Executive Director, Professor Carrie Sperling, a new part-time administrative assistant, and a development director, as well as new offices and other support. These have been very exciting days for everyone associated with the Project.

## II. The NIJ Postconviction DNA Testing Assistance Program (the Bloodsworth Grant Program)

I am sorry to say that our excitement about the work of the AzJP has been tempered by the frustrations that have marked our efforts to obtain a grant from the National Institute of Justice - frustrations that have been made all the more unsettling when seen in contrast with the often quite creative and helpful relationship we have enjoyed with NIJ's reviewing personnel. At the same time, our cooperative relationship with the other members of the Arizona grant application team could not have been more positive. A brief chronology may help illuminate the ups and downs of our experience with this grant application.

The AzJP is not exclusively focused on DNA cases, but as with each of the now more than 40 wrongful conviction projects in America, these cases form an important part of our work. Sadly, the DNA cases often have proven to be among the most difficult cases our Project encounters. Locating and securing the files in these cases - some of which are quite old - has often been an almost insuperable first hurdle. The inmate, his/her family, and the former defense lawyers often cannot locate and assemble the trial, appeal and post-conviction file. In many cases, the prosecutors have been uncooperative in helping our volunteers find the relevant files. The same was true of the biological evidence. In those cases in which we have succeeded in assembling the file, the cost of obtaining consulting assistance from experts on DNA analysis has further slowed our evaluations. Indeed, in many cases, we simply found it necessary to tell inmates that we lacked the resources and time to help them.

All of that seemed to change two years ago when the idea for this grant application began to emerge. The essence of our application (a copy of which is submitted with this testimony) called for a unique partnership between our Project, the Arizona Attorney General, and the umbrella organization for Arizona's law enforcement and crime lab community (the Arizona Criminal Justice Commission - ACJC). Three essential ideas emerged that animated this application: (1) Together we would develop a means of identifying and addressing virtually every homicide and sexual assault case in which an Arizona inmate had a serious claim of actual innocence that might be confirmed by DNA evidence. The first goal of this grant team was to work toward the day when Arizona might be among the first States - if not the first State - to be able to say that we had identified and fairly assessed every conviction where DNA might allow us to exonerate an innocent person or capture the real perpetrator. All innocence projects, and ours was no exception, have relied on word of mouth and inmate self-identification to locate the relevant cases. The more systematic approach to these cases envisioned by this grant would establish an important precedent.

(2) The application also contemplated what we believe is an almost unprecedented partnership between a project like ours and the State's chief law enforcement arm. Here the grant contemplated that the Attorney General's Office would actively aid in the location of records and the discovery of DNA materials. The grant also contemplated the cooperation on an as-needed basis of the State's crime labs in evaluating evidence and in expediting database searches for matching DNA profiles. This cooperation would remove our Project's greatest single impediment - getting the files and materials foundational to determining the existence of a wrongful conviction.

(3) Finally, each successful exoneration would become the subject of a thorough retrospective assessment so that, hopefully, we could jointly identify the underlying causes of any erroneous conviction as a foundation for considering possible reforms. The Office of the Attorney General and the Justice Project had already begun to do this with respect to two DNA exonerations in our State, and we had all become convinced of the utility of these post-mortems as teaching tools for the criminal justice community.

It would be inaccurate and fundamentally misleading to suggest that these goals, and the ideas for how to realize them, materialized in any fully developed way at the outset of the grant-seeking process. To the contrary, one of the most positive aspects of our experience with NIJ occurred during the early stages of the process. The reviewers at NIJ took sincere interest in our application from the very outset. Many of the important details that appear in the final application are the result of suggestions made by these reviewers. For example, the suggestion that the DNA work be handled out of offices at the ASU College of Law was one that germinated during the evaluation process. The idea of generating as a "deliverable" a post mortem after every exoneration also matured as we worked with NIJ's staff. The final application owes much to the creative and constructive suggestions from the staff at NIJ.

This makes all the more confusing the sudden decision by NIJ in the summer of 2007 to announce to us that our grant application had been rejected - rejected not because of any deficiency in the merits of our proposal, but instead because we had been found not to be an "eligible" applicant. Not only was the rejection letter from NIJ a great surprise, it was also uninformative. It afforded no hint as to why we had suddenly been deemed not to be "eligible." It was not until considerably later in the summer of last year that we learned that the in-house lawyers for NIJ had determined insufficient Attorney General Terry Goddard's certification that Arizona had in place "practices" that addressed the preservation of biological evidence. The certification is an attachment to the application and to our knowledge it had not been questioned prior to the final rejection. If there was a written opinion supporting this determination of ineligibility, we were not given it. If there was a further analysis that might explain the sudden about-face, we were not made aware of it. All we were told was that no applicant from any State had been deemed eligible and that the decision was not subject to reconsideration.

This then led to the efforts to amend the Justice Department's appropriation to clarify the eligibility of our application. This too has proved to be both a confusing and disappointing process. When the legislation first was signed by the President late in 2007, we were told that the legislative change would satisfy the statutory requirements so that our application could be funded. The only question was whether the funding would occur immediately or whether it

might take a few months. Within the last few days, however, we have been told that NIJ now expects the grant application process to commence anew. This is another great disappointment for our Project. As one might expect, we have been holding a growing collection of inmate cases that should be reviewed under the grant. The inmates, their families, the victims and their families, are all powerless to do anything to accelerate this process. (At the time of our original application we had identified three such cases; there are now 18.) Our Project is equally powerless. There have been no changes in Arizona law and practice with respect to evidence preservation. The Attorney General's good faith certification remains in place. Nothing has occurred that would call it into question.

We can say this. The concepts underlying this grant application are good ones. They will serve well the public and the criminal justice community. This is a more than worthy subject for the Justice Department and Congress to embrace in a nonpartisan manner. If and when funded, we are convinced that it will lay the foundation for a unique law enforcement and innocence project joint program - one that will realize accomplishments that have yet to be achieved in any State of which we are aware. We submit that the grant will also help shed additional light on the issue of evidence preservation. We should know at the end of this grant cycle a great deal more whether the "practices" in this area require improvement.

### III. Independent Crime Lab Oversight

Our Project is also intimately informed about and interested in the subject of crime laboratory oversight. We are aware of, and have followed closely, the crime lab funding decisions made by NIJ under the Justice for All Act (JFAA). We are familiar with the Inspector General's Reports on this subject. We are also more than mindful of the irony of NIJ's apparently rigorous approach to the eligibility requirements of the Bloodsworth Grant Program as contrasted with the less than demanding approvals of crime lab funding under the JFAA. Our perspective on the crime lab oversight topic may be worth this Committee's consideration.

As we have explained, one of the Arizona Justice Project's areas of special interest has been the retrospective assessment of DNA exonerations to determine root causes of wrongful convictions with the hope of encouraging corrective actions that will improve the criminal justice system in our State. This is an undertaking we have approached in cooperation with the Office of the Arizona Attorney General.

Our most recent port-mortem has focused on the now famous exoneration of Ray Krone. Mr. Krone was the 100th DNA exoneree, and as such, his case received considerable national attention. Mr. Krone was convicted and sentenced to death for the murder of a young female bartender in Central Phoenix more than 15 years ago. His sentence and conviction were reversed by the Arizona Supreme Court; he was tried a second time; convicted again and sentenced to life in prison. After serving ten years in prison, three years of it on Death Row, Mr. Krone was exonerated by DNA evidence. Most accounts of the case have focused on the flawed use of bite-mark evidence and the questions of junk science raised by the State's reliance on that evidence at Mr. Krone's trials. Our examination of the case after Mr. Krone's release from prison, however, has caused our volunteers to examine another important aspect of Mr. Krone's case - the handling and evaluation of biological evidence by the City of Phoenix Crime Laboratory.

This is not the place to undertake a detailed explication of this phase of Mr. Krone's case. It is, we believe, relevant and important to observe, however, that there were in this case a number of items of biological evidence retrieved from the murder scene that (1) were never compared by the crime lab, (2) were largely ignored for many years during which Ray Krone remained on Death Row and in prison, but which (3) eventually proved to be matches to the DNA of a man who lived near the bar. His identity undetected, the real perpetrator continued to commit acts of sexual misconduct. There is at least one victim - a 7-year old girl - and possibly more victims who might have been spared this man's criminal behavior had the crime lab properly evaluated the hair, blood and saliva left at the crime scene.

Once the reality of these discoveries became known, the Office of the City of Phoenix Auditor recommended that an audit of the Phoenix Crime Lab be undertaken. Arizona had no existing agency capable of conducting such an audit, and therefore an ad hoc team of specialists in various fields was assembled for this purpose. That group of experts eventually produced a report looking at a range of activities of the lab. As one might expect, the examiners were most critical of the biological evidence unit. The lab examiner who was involved in the Krone case had been dismissed. In several respects relevant to the JFAA, however, the audit of this case has ended in a most disappointing way: (1) the results of the audit have never been made public; (2) the auditors' recommendations have been deemed advisory only; and (3) possibly the most relevant original recommendation has been ignored. The auditors thought it important at the outset to identify and to re-examine other cases in which this particular examiner might have been involved. In fact, a list of at least some of his cases was culled from the lab's records for that purpose. That recommendation was never carried out. In the absence of a public airing of the auditors' conclusions, it is not possible to determine why, apparently, no remedial action was taken.

It is with this history in mind that we have repeatedly urged the State to develop a system of greater and more enforceable control and oversight of crime labs. In 2004, the Attorney General's Office established a DNA Forensic Science and Technology Task Force. In the summer of 2006 the AzJP met with several members of that Task Force, including leaders from the Arizona Criminal Justice Commission, the Arizona Department of Public Safety's crime laboratory, and the Attorney General's Office. The central purpose of our meeting was to convey our concerns regarding the lack of independent oversight of the State's crime labs. The Justice Department's Inspector General's first JFAA Compliance Report had been issued and, therefore, the subject of independent oversight was a topic of obvious importance. Our discussion sought to highlight the role that laboratory misconduct or negligence plays in wrongful convictions. In that connection, we talked about some of the notable cases such as the Houston Crime Lab debacle. We also provided examples of legislation pending at that time in other states. We urged these Arizona criminal justice leaders to consider legislative proposals that would establish independent oversight and increase the likelihood of detection of misconduct and negligence.

Although it was the intent of the Attorney General to have some defense community involvement in the Task Force, by the time the Task Force issued its recommendations in late 2007 there was no participation from any source other than the law enforcement community. The recommendations we suggested are not discussed in the Task Force report. Instead, the principal recommendation of the Task Force called for the creation of an Advisory Committee to oversee

the State's crime laboratories. While the Advisory Committee has no enforcement powers and plainly falls short of the independent oversight expectations of Congress in the JFAA, it is a step in the right direction.

The composition of that Committee is one of the most obvious issues. It simply does not reflect the breadth and diversity of informed perspectives one might hope to bring to any serious oversight undertaking. Although no innocence project or criminal defense representative was appointed to that Advisory Committee, the AzJP has been invited to participate as an observer. In that capacity, we will continue to urge wider participation by those interested in the performance of our crime labs. We expect to continue to suggest that the composition of the Committee be expanded to include knowledgeable members of the academic community both within and outside of Arizona as well as at least one representative of a private DNA laboratory in Arizona.

#### IV. Concluding Observations

We wish to end on a largely optimistic note. We have every reason to expect that the DNA post-conviction grant will be funded and that our Project will eventually be able to move forward in cooperation with the Attorney General and the Arizona crime labs. We hope that within a few months the frustrations and disappointments described in our testimony will be in the past and NIJ's confidence in our grant content will be proven well-founded and beneficial to defendants, victims, and justice system participants alike in Arizona.

We also have every confidence in the good faith and cooperative intentions of ACJC and the Arizona Attorney General's Office. Most with whom we have spoken in Arizona do not fear the kind of independent oversight contemplated by Congress in the JFAA. Indeed, they would welcome it. Most good forensic scientists want to enjoy both the reputation and the reality of independence. They also do not fear oversight. It is our hope that these hearings will help us all to realize that goal.