Testimony of

Prof. Larry Marshall

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Good morning. My name is Lawrence Marshall, and I am a Professor of Law at Northwestern University School of Law in Chicago, where I serve as Legal Director of Northwestern University's Center on Wrongful Convictions. In that capacity, I have had the privilege of working on many of the cases you have been discussing here this morning. In fact, the staff of the Center on Wrongful Convictions has been involved in nine of the cases in which innocent men have been exonerated off of Illinois' death row. In addition, we have worked with lawyers throughout the country on cases of wrongful convictions in other jurisdictions and we have intensely studied the causes and possible remedies for this grave problem. Studies that our Center has done on three of the leading causes of wrongful convictions-eyewitness error, false confessions, and informant testimony-are attached as an appendix to this testimony.

Today's hearing is an important step in America's continuing education about the realities of how the death penalty system is administered. There is no substitute for facts in this regard. When the debate is about the ethics and morality of capital punishment in the abstract, one can argue based on one's personal view and philosophy. But when the discussion focuses on the pragmatic issue of the system's propensity for error, there can be no meaningful discourse in the absence of data. My personal experience with the death penalty serves as an example of this point.

Twelve years ago, when I was asked to represent my first capital client, I had certain perceptions about the capital punishment system. I believed that the system was plagued by racism and arbitrariness, and that whether a defendant lives or dies often had more to do with skin color and net worth, than with the defendant's particular culpability. But despite these flaws, I assumed that there was one matter about which we could all be sure: that those who were convicted of capital crimes and sentenced to die were unmistakably guilty of the crimes for which they stood convicted. I believed that despite any other flaws, our capital justice system had so many safeguards in place that it was virtually unimaginable that a truly innocent person would be convicted and sentenced to death. Most of America shared this assumption in 1990.

Over the past decade, the facts have shattered this belief. As you have heard, these facts have led the Governor of Illinois-a long time supporter of the death penalty-to declare a moratorium on executions. And these facts have led the Governor's bipartisan commission to declare that the death penalty system in Illinois is in need of broad, systemic reforms and that, even if these reforms are adopted, there is still no failsafe way to protect against wrongful executions. Because of these facts, the people of Illinois are now immersed in a serious debate about whether the death penalty can be fixed, and whether it is worth trying to fix, given the tremendous costs associated with fixes that would only reduce-not eliminate-the risk of error.

This discussion must not be limited to Illinois because the problem is not at all unique to Illinois. Illinois does not convict more innocent people than other states do; Illinois has simply done a better job of exposing its errors. The high rate of wrongful convictions that has been exposed in Illinois is a reflection of some serendipitous events and a tribute to the diligent work of journalists, investigators, academicians and public interest lawyers. Through the efforts of these groups, and some fortuities involving confessions of real killers, several wrongful convictions

were exposed in the mid 1990s. Once this happened, many of the key players in the criminal justice system-defense lawyers, prosecutors, judges, legislators, the Governor-started paying more attention to other inmates' claims of actual innocence. Pleas that might have been summarily dismissed years earlier now were taken more seriously. And, lo and behold, this scrutiny led to reversal after reversal after reversal-not based on some procedural technicality, but based on evidence of actual innocence.

In a few of these cases, the evidence of innocence has come about through DNA testing, but that is the exception, not the norm. Most homicide cases do not yield biological samples capable of identifying the perpetrator or excluding a wrongfully charged suspect. We must avoid taking false comfort, then, in the current availability of DNA testing. In those cases in which DNA testing is possible it is, of course, imperative to make such testing available. But we must recognize that for every person whose innocence can be established through DNA testing, there are many equally innocent defendants whose lives depend on the fortuities of the right witness emerging at the right time. Several Illinois inmates were freed through such strokes of good fortune. Thankfully, though, Governor Ryan did not glibly assume that we had already detected all of the errors that had been committed. Thus, he created a model for what every jurisdiction must do-he has put in place a top-to-bottom examination of the way in which the death penalty is implemented. And he has refused to allow executions to proceed while that examination is underway.

No other State has examined its system yet with this sort of microscope; nor has the federal system undertaken such of scrutiny of its own death penalty. Consequently, as we sit here today, the only one jurisdiction that had subjected its death penalty system to intense examination has found that system deeply flawed. It is now time for all other jurisdictions to subject their systems to similar scrutiny.

Predictably, there are some who have tried to dismiss the Illinois experience as an isolated cluster, that has no bearing on the fairness and accuracy of the death penalty system in their states. The facts belie this claim. Nationally, according to the Death Penalty Information Center, 101 innocent men and women have been released from death rows in the United States since 1973. Eighty-eight of these cases have been in 23 jurisdictions other than Illinois. This problem is hardly isolated to any one state.

In November 1998, the Center on Wrongful Convictions hosted the National Conference on Wrongful Convictions and the Death Penalty. At that conference, 29 innocent men and women who had once been sentenced to die sat on one stage-a living testament to the fallibility of the capital punishment system. The next day, the Governor of Virginia was quoted in the newspapers boasting that none of the wrongly convicted came from Virginia, and that his jurisdiction was obviously running its system without error. This claim was senseless to its core. In 1998, Virginia had the strictest rules in the land regarding an inmates right to raise a claim of actual innocence after trial. Even if an inmate could present compelling evidence of actual innocence, the courts would not hear his claim if it was brought more than 21 days after trial. Other inmates were executed as they begged on the gurney for a DNA test that might establish their innocence. It was no surprise, then that a system that precluded inmates from trying to establish innocence was a jurisdiction in which no death row inmate had been exonerated. Some of these draconian rules finally were relaxed, and very predictably, a Virginia death row inmate was cleared through DNA testing after having spent 16 years in prison for a crime he did not commit.

In addition to those who suggest that the problem of wrongful convictions is limited to Illinois, there are others who claim that all of the evidence about exonerations simply proves that the

system works well at avoiding the execution of the innocent. The tragic error of this assertion is that it assumes-with no justification-that we are catching all of the errors before execution. The evidence belies this belief. For example, Kirk Bloodsworth of Maryland was convicted of the heinous rape and murder of a young girl and was sentenced to death. Bloodsworth was exonerated nine years after conviction when DNA testing proved that he could not possible have been the person responsible for the crime. But Bloodsworth's case could easily have come out differently. Had the victim in that case not been raped, there would have been no DNA evidence to test and Bloodsworth would never have been exonerated. He would have been just as innocent, but he would not have been able to prove it. There are many Kirk Bloodsworths on death rows today-just as innocent, but without the potential for exculpatory DNA testing.

Each of the 101 wrongful conviction cases yields lessons to be learned, and we must come to terms with those cases and lessons before we proceed to execute a class of people that undoubtedly includes many innocent men and women. As I said earlier, what we need here are facts, and until those facts are developed in every jurisdiction it ought to be unthinkable to kill anyone. Over the past decade, I have spoken about the death penalty to thousands of individuals. On hundreds of occasions people have told me that they used to support the death penalty, but as they learned more about the practicalities of its administration-its racism, its arbitrariness, its focus on the poor, and its propensity to condemn the innocent-their support for imposing the punishment has diminished. Not once has anyone ever told me that they used to have doubts about capital punishment, but as they have learned more about the fairness with which it is applied, they have now come to support the penalty more strongly.

The importance of shining light on this subject is clear. If a system's death penalty cannot survive the kind of robust scrutiny that the Illinois death penalty has come under, then it simply should not survive. When executions are carried out, they are done in the name of the people. The people have an absolute right to know the truth about how well that system is working-or not working.