Testimony of

The Honorable Paul A. Logli

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My name is Paul Logli and I am the elected state's attorney in Winnebago County, Illinois. I want to thank you, on behalf of the National District Attorneys Association, for the opportunity to present our position on DNA testing in post conviction settings and share some thoughts on the issue of counsel competency. The views that I express today represent the views of that Association and the beliefs of thousands of local prosecutors across this country.

To place my remarks in context - let me briefly tell you about my jurisdiction. Winnebago County is located about 70 miles west of Chicago. It has a population of nearly 280,000 people living in a diverse community. The county seat is Rockford--the second largest city in the state. I have been a prosecutor for 18 years and am honored to have served in my current position for 16 years, having been elected to office 4 times. I previously served as a judge of the local circuit court for nearly 6 years. I currently supervise a staff that includes 38 assistant state's attorneys. Annually, my office handles about 4000 felony cases.

I want to emphasize to the Committee that as a prosecutor I represent the only trial attorneys in the United States whose primary ethical obligation is to seek the truth wherever it takes us. I, as well as all local prosecutors, support the use of DNA technology in catching criminals, convicting the guilty and identifying the truly innocent.

DNA TESTING IN THE CRIMINAL JUSTICE SYSTEM

To augment my remarks I would like to ask that a copy of the National District Attorneys Association's Policy on DNA Technology and the Criminal Justice System be placed in the record. It sets out in greater detail the points that I wish to make today.

Our Association has consistently embraced DNA technology as a scientific breakthrough in the search for truth. Since the mid-1980s, when DNA evidence was first introduced we have fought for its admission in criminal trials and we have been instrumental in providing training to prosecutors on using DNA Evidence in investigations and in the courtroom. With the use of DNA evidence, prosecutors are often able to conclusively establish the guilt of a defendant in cases where identity is at issue. Prosecutors and law enforcement agencies also utilize DNA technologies to eliminate suspects and exonerate the innocent. It is our view that this powerful weapon against the criminal offender is best used when such resources are made fully available in the earliest stages of an investigation and before a conviction.

Forensic DNA typing has had a broad, positive impact on the criminal justice system. In recent years, convictions have been obtained that previously would have been impossible. Countless suspects have been eliminated prior to the filing of charges. Old, unsolved criminal cases, as well as new cases, have been solved. In a very few case, mistakenly accused defendants have been

freed both before trial and after incarceration. Increasingly, the unidentified remains of crime victims are being identified.

Advances in DNA technology hold enormous potential to enhance our quality of justice even more dramatically. However, significant increases in resources are needed to enlarge forensic laboratory capacity and expand DNA databases. No other investment in our criminal justice system will do more to protect the innocent, convict the guilty and reduce human suffering.

In keeping with these beliefs, the National District Attorneys Association has supported funding for forensic laboratories to eliminate backlogs in the testing of biological samples from convicted offenders and crime scenes. Funding by the federal government is a critical component in realizing the full potential of DNA testing. Federal funding should not be contingent upon a state's adoption of any specific federally mandated and unfunded legislation such as post conviction relief standards.

We strongly supported the Paul Coverdell National Forensic Science Improvement Act in recognition that we needed to strengthen our ability to exploit DNA technology and we will continue to support legislative efforts to provide funding support for state forensic laboratories, an example of which is our association's support of Senator Biden's efforts to eliminate the unconscionable backlog of untested rape kits in police department evidence rooms across this country.

POST-CONVICTION RELIEF

The National District Attorneys Association has always supported the use of DNA testing where such testing will prove the actual innocence of a previously convicted individual and not serve as a diversionary attack on the conviction.

First, we need to clear up several popular misconceptions.

The vast majority of criminal cases do not involve DNA evidence. Just as fingerprint evidence, although available for decades, is seldom a conclusive factor in a prosecution, DNA evidence will likewise, even though it is increasingly available and more determinative, will not be a factor in a large majority of cases.

Secondly, the absence of a biological sample, in and of itself, is not necessarily dispositive of innocence. There can be many reasons why an identifiable biological sample was not available at a crime scene, yet an individual can still be guilty of the commission of a crime. In many cases DNA testing results that exclude an individual as the donor of biological evidence do not exonerate a suspect as innocent. In a sexual assault involving multiple perpetrators, for example, a defendant may have participated in the rape without depositing identified DNA evidence. In such cases, the absence of a sample or a comparative exclusion is not synonymous with exoneration. Moreover, as powerful as DNA evidence is, it tells us nothing about issues such as consent, self-defense or the criminal intent of the perpetrator.

Lastly, the issue of post-conviction DNA testing, such as contemplated by the Innocence

Protection Act, involves only cases prosecuted before adequate DNA technology existed. In the future, the need for post-conviction DNA testing should cease because of the availability of pretrial testing with advanced technology. Thus, while the debate is important, we are examining a finite number of cases whose numbers are dwindling.

We believe that post-conviction DNA testing, in most cases, should be afforded only where such testing was not previously available to the defendant. Post-conviction testing should be employed only in those cases where a result favorable to the defendant establishes proof of the defendant's actual innocence, exonerating the defendant as the perpetrator or accomplice to the crime.

In limited circumstances post-conviction DNA testing may be appropriate where testing previously has been performed. Although DNA testing in criminal cases became available in the mid-1980s, the forms of testing typically used today were not widely available until the mid-1990s. These present-day methodologies allow the testing of much smaller samples in a shorter time and are reliable on degraded samples.

Because of these considerations the National District Attorneys Association has consistently supported state legislation that removes barriers to post-conviction DNA testing in appropriate cases and with appropriate safeguards.

We recognize that in some states, legislative enactment of new legal remedies may be required to provide post-conviction DNA testing. Many states have enacted such legislation, and others are considering such measures. The NDAA supports enabling legislation that addresses concerns of prosecutors and victims, such as avoiding frivolous litigation and preserving necessary finality in the criminal justice system. These statutes should provide for the inclusion in the national CODIS database of DNA profiles obtained as a result of post-conviction DNA testing. This provision will help to solve crimes and deter abuses of the post-conviction relief mechanism.

Having said this, however, I need to emphasize that post-conviction testing should be employed only in those cases in which a result favorable to the defendant establishes proof of the defendant's actual innocence. Requiring only that the results of a DNA test produce material, non-cumulative evidence, and not specifically prove innocence, allows defendants to waste valuable resources, unnecessarily burden the courts and further frustrate victims. Decisions about such issues as the categories of convicted persons to be offered post-conviction relief and the standards to be employed are best made at the state or local level, where decisions can reflect the needs, resources and concerns of states and communities.

The resources for DNA testing are finite. Conducting frivolous or non-conclusive tests could mean that another test freeing an innocent person or apprehending a guilty person would not be done in a timely manner or at all.

The National District Attorneys Association believes that post-conviction relief remedies must protect against potential abuse and that such remedies must respect the importance of finality in the criminal justice system. Thus, such remedies should be subject to limits on the period in which relief may be sought.

Current prohibitions limiting post-conviction relief are grounded in legitimate policy, enhancing the search for the truth and minimizing potential abuse. The defense, for example, should be expected to exercise due diligence in developing and presenting all legally appropriate exonerating or mitigating evidence to the trial jury. Potentially exonerating evidence should be actively pursued. A trial jury's verdict should be accorded great weight and normally should be overturned only where harmful legal error has occurred or an innocent person convicted. The peace of mind of a crime victim or crime victim's family should not be frivolously disturbed by a lack of finality arising from post-conviction relief remedies. For these reasons, any initiatives to identify and exonerate the innocent should also protect against abuses.

Time limits on the period in which post-conviction relief may be sought provide one of the most important means to ensure finality in the criminal justice system. Post-conviction relief remedies are needed only for a relatively small group of cases prosecuted before present-day DNA technology existed. Reasonable time limits on the consideration of these cases should not interfere with due process for convicted individuals who may seek relief.

Law enforcement should be permitted to destroy biological samples from closed cases, provided that convicted individuals are given adequate notice and opportunity to request testing. Otherwise, police agencies and the courts would be required to retain virtually all evidence for all time.

NDAA also support the decisions of individual prosecution offices to initiate post-conviction DNA testing programs. Such programs can serve to strengthen public confidence in the criminal justice system.

In summary, any post-conviction DNA testing program should focus only on those cases where identity is an issue and where testing would, assuming exculpatory results, establish the actual innocence of an individual. Such programs should recognize the need for finality in criminal justice proceedings by establishing a limited time period in which cases will be considered and then reviewing those cases in an expedited manner.

COMPETENCY OF COUNSEL

No one, especially prosecutors, wants incompetent defense lawyers on the other side of the counsel table, especially in a murder case. This issue is not only confined to the 38 states with capital punishment, but also concerns the 12 states and the District of Columbia that do not have the death penalty. Any prosecutor who has had to retry a case more than once, especially a capital case, is most supportive of good and competent counsel for the defense. It benefits no one, especially victims, to have to retry a major case. Having said that, we do not believe that federally- mandated or coerced competency standards for state court defense counsel are either workable or necessary.

Our system of criminal law is inherently a state system - some 95% of all criminal trials are at the local level of government. A single solution to issues of counsel competency fails to recognize the distinction between the various state systems and the authority of the judiciary in

each. The judiciary is trusted with serving as the arbitrator for all facets of the court system and, in real world instances, serve as the final determinator of counsel competency every day.

We can only assume that the judiciary would find it most disturbing that anyone other than they would be tasked to determine the competency of any attorney appearing in a state courtroom. Moreover even if other means are pursued to determine competency the judiciary will still have the final word in the matter.

The president of NDAA, Kevin Meenan, recently directed that a survey be completed of state competency standards and the results are, I believe, significant in terms of the work before this committee.

Of the 38 states that allow a death sentence to be imposed as a criminal penalty, 22 states have either a statute or court rule that establishes standards for competency of counsel at the trial, appellate and/or post-conviction level.. Among these statutes and rules there are certain common elements; while the specifics may vary these include: minimum years of experience; minimum number of trials; minimum number of capital trials; whether the attorney has demonstrated necessary proficiency; the amount of training in capital defense required; whether the attorney is familiar with the practice and procedure of the state criminal court; and whether the attorney is familiar with the utilization of experts, including but not limited to psychiatric and forensic experts.

My point is that the states are fulfilling their obligations to their citizens. I recognize that not all states have adopted competency standards and believe that there are meaningful incentives that the Congress can provide to effectively enhance competency in all jurisdictions.

In many states the criminal justice system is strapped for operating funds and setting up or expanding effective public defender offices becomes an impossible proposition. "Seed" money to set up systems and purchase equipment; assistance in providing training for both prosecutors and defense counsel; and help in bringing the best lawyers to work in the criminal justice system will do more then federally imposed requirements.

The Bureau of Justice Statistics has just released a survey on local prosecutors ("Prosecutors in State Court, 2002, May 2002) that has some telling insights into counsel competency. While the report refers only to prosecutor offices I would suspect that it applies equally to those in public defender offices.

In portraying issues in regard to recruiting and retaining assistant prosecutors the report points out that in 2001 half the entering prosecutors in this country earned less than $35,000 a year, half of our experienced prosecutors earn less than $45,000, and most supervisory attorneys earn less than $60,000 per year.

The assistant state's attorneys in my office start at $38,000 I would note that administrative assistants and paralegals earn more here in Washington then do our young prosecutors and public defenders who provide essential legal representation on a daily basis in the state courts back home.

My point in relating this is that the provisions advanced by the Innocence Protection Act as to counsel competency miss the mark. If we can't recruit and retain the best our law schools and profession have to offer we can never hope to artificially mandate competency standards.

What we need to do, with your assistance, is to shore up the foundation of our criminal justice system to ensure that attorneys who participate in the system receive the training and compensation necessary to be able to stay in the system without compromising choices of getting married or starting a family.

The Federal Government cannot, and is not expected to, pay the salaries of local prosecutors and public defenders. But there is something you can do that would serve as a powerful incentive for many to stay in the state criminal justice system.

A study done of the student loan indebtedness of assistant district attorneys in New York (nine separate offices) found that 70% of them have over $50,000 of loan indebtedness while nearly 20% of them owe in excess of $100,000 on student loans.

The result of these dire financial forces is that, according to the BJS report, over 1/3 of prosecutor offices report difficulty with recruiting and retaining staff lawyers. Another report in the March 21, 2001 New York Law Journal states that in both Queens and Brooklyn, about 2/3 of the assistant district attorneys hired between 1992 and 1996 had already left the prosecutor's offices.

This should not be news to you. The Congress has considered the concept of student loan forgiveness in several forms in recent years.
? Federal agencies had been authorized to pay student loans for attorneys for several years but the programs are just now being funded because of problems retaining attorneys
? To retain military attorneys a "bonus" is being paid after about 10 years of service
? In a bill before you now, to reauthorize the federal court system, there is a provision for loan forgiveness for federal public defenders

Bottom line - we cannot compete with the private sector in recruiting and retaining attorneys. When we have continual turnover it impacts on our ability to serve justice. It adversely affects our entire system, from our most junior prosecutor, or public defender, to our supervisory attorneys and division chiefs.

I would urge that the Congress examine ways to provide student loan forgiveness as a means of allowing us to recruit and retain the "best and the brightest" in both prosecutor and public defender offices.

In addition to providing incentives to young public defenders and prosecutors to stick with their chosen careers, I would suggest that ensuring that adequate training is available will further enhance the "competency" of the system. Congress can best help by providing opportunities for training, including ethics training, at the state level and at national facilities such as the National Advocacy Center for state and federal prosecutors in Columbia, South Carolina.

If we want competent counsel for our system we need to make the effort to give them the opportunity to strive for excellence, not merely seek to get through the next case. With -holding funds from state criminal justice programs in order to enforce federally dictated counsel competency standards, only serves to set back efforts to strengthen our system.

On behalf of America's prosecutors I, and the National District Attorneys Association, urge you to do those things that we believe will truly advance our mutual goals of improving the criminal justice system. We look forward to continuing to work with you on maximizing our use of DNA technology, and ensuring that our criminal justice system is provided the highest degree of legal skills on both sides of counsel table, and in every courthouse in our nation..