Testimony of

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"Habeas Corpus Proceedings and Issues of
Actual Innocence"

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Chairman Specter and Members of the Committee:
In an epilogue to his 1995 decision vacating the conviction and death sentence of Ron Williamson of Oklahoma, United States District Court Judge Frank Seay wrote:
While considering my decision in this case I told a friend, a layman, I believed the facts and law dictated that I must grant a new trial to a defendant who had been convicted and sentenced to death. My friend asked, "Is he a murderer?" I replied simply, "We won't know until he receives a fair trial."
God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case. Accordingly, the Writ of Habeas Corpus shall issue...

On remand, both Ron Williamson, who came within five days of execution, and Dennis Fritz, who served twelve years of a life sentence, proved their innocence through a series of DNA tests which also identified the real murderer, Glen Gore. Gore was the chief witness against Williamson and Fritz, and Judge Seay found Williamson's lawyer grossly ineffective on a number of grounds, including the failure to investigate Gore as a possible suspect. He also ruled that suppressed Brady material, and refusal by the trial court to appoint a forensic expert (an Ake error), were material due process violations. All these contentions were rejected by the Oklahoma Criminal Court of Appeals as procedurally defaulted or without merit such that, under S.1088, Judge Seay would have surely been deprived of jurisdiction to hear the case and reach the merits. If S. 1088 had been the law in 1995, Ron Williamson would have surely been dead, an innocent man executed; Dennis Fritz would probably still be in prison; and Glen Gore would have had an opportunity to commit still more crimes (Gore was in prison on other charges, but eligible for imminent release before DNA tests identified him as the real murderer). And, needless to say, the successful federal civil rights lawsuit brought by Williamson and Fritz that exposed stunning misconduct by state and local police authorities, such as suppression of the fact that Gore told another inmate he committed the murder just before he testified against them, would have never occurred.
The take-home lesson from the Williamson and Fritz case is that the wrongly convicted ordinarily cannot prove their innocence until they have competent counsel, appropriate experts, access to suppressed exculpatory evidence, and perhaps most important of all, a full and fair hearing on the merits of their procedural due process claims. The reason we care about procedural due process, after all, is that it leads to accurate results, and its opposite leads to the opposite. That is exactly why so many innocence cases do not start out presenting innocence claims at all, but rather procedural due process violations, and proof of innocence only emerges once the rubble of other legal errors has been swept aside. So any habeas bill that tries to restrict claims to just those that start off with fully developed showings of innocence will -- by making sure that innocence showings don't emerge from the rubble -- bury them.
Yet that is exactly what the sweeping curtailment of federal habeas jurisdiction proposed by S.B. 1088 would do, as the Washington Post editorialized on Sunday. It would bury the truly innocent under a welter of state and federal procedural bars. It would undermine efforts to raise the low standard of representation of the indigent tolerated by state courts (a competent, adequately funded lawyer is the best protection the wrongly convicted can get). And inevitably, by keeping the innocent in prison and out of court, it will leave the real perpetrators free to commit more crimes. In an era where DNA testing and other forms of proof demonstrate that more innocents are wrongly convicted than anyone ever suspected, congressional efforts should be focused on lowering the procedural hurdles to proving innocence and speeding up post-conviction processes so that more constitutional claims can be heard on the merits. S. 1088 takes us in precisely the wrong direction.
I. Dimensions of the Innocence Problem
In the last sixteen years, primarily due to the impact of DNA testing, it has become clear that wrongful convictions plague our justice system in far greater numbers than ever imagined. To date there have been 159 post-conviction DNA exonerations in the United States. In forty-five of those cases, the real perpetrator was then apprehended. An additional 196 convicted defendants - almost all in murder cases - were exonerated between 1989 and 2003, without benefit DNA evidence. There is every reason to believe these exonerations are just the tip of an iceberg. Forensic experts believe less than 20% of serious criminal cases contain any biological evidence where DNA testing could be employed to help protect the innocent and identify the guilty.
So what can be done about the other 80% of cases where the usual causes of wrongful convictions -- ineffective lawyers, suppressed Brady material, prosecutorial or police misconduct, fraudulent and flawed forensic science, mistaken identifications, false confessions, or perjury - are at play? DNA testing is not a panacea for our justice system but a learning moment. The DNA exoneration cases teach us that more must be done to correct the weaknesses in our fact-finding system, to strengthen procedural due process protections, especially effective representation by counsel, not less. That is why I am especially troubled by the provisions of S. 1088 that severely curtail federal review of ineffective assistance of counsel claims, and by those provisions which give the Attorney General, rather than the courts, the power to determine whether or not a state provides competent counsel to death row inmates in state postconviction proceedings.

II. The Long, Hard Road to Proving Innocence
There is no better way to explain the disastrous effect this bill would have on innocent persons in our nation's prisons and death rows than through the case histories of individuals who survived that nightmare - but who would not be free men today had the proposed bill been law when their cases were before the courts. Their cases demonstrate just how hard it already is, under current law, to prove your innocence in court - even when your trial was tainted by serious constitutional violations, and even when you have DNA test results on your side. The barriers that now exist to proving and getting a conviction overturned based on actual innocence make it clear that we need to bring more - not less - judicial scrutiny to such cases, and that the "escape hatch" the proposed bill purports to provide for innocent habeas petitioners will be useless to them in practice.
Brandon Moon, who traveled from his home in Kansas City, Missouri, to be here today, is one such case. Brandon was an Army veteran and a promising college student with no criminal record when he was misidentified by a rape victim in El Paso, Texas in 1987, and convicted by a jury of that brutal crime. He spent 17 years in Texas' harshest prisons -- and had to serve as his own lawyer for fifteen of those years -- before he was exonerated and freed by DNA evidence seven months ago. Brandon had begged his court-appointed lawyer to investigate the newly-emerging science of DNA technology before trial, and to hire an independent expert to review the state's dubious serology evidence against him, but the lawyer failed to do either. Brandon then managed to secure a court order for rudimentary DNA analysis one year after his conviction, and the preliminary results appeared to exclude him as the source of the rapist's semen. But he had no funds to complete the testing; to have experts review the results; or to hire another lawyer to get the job done. He thus spent the next fifteen years filing habeas petitions pro se, imploring both state and federal courts to examine his DNA tests and order more of them, and to review serious constitutional errors from his

original trial. Lacking competent counsel to assist him, Brandon quite understandably found it difficult to navigate these treacherous procedural waters, and indeed, his 1992 "mixed" federal habeas petition was dismissed for failure to exhaust all of his claims.

Although those claims were soon denied by state and federal courts - both on their merits and on procedural grounds -- over a decade later Brandon managed to find experienced pro bono counsel, who was at last able to retain experts and investigators to complete the DNA testing that proved his innocence beyond any doubt. It was also revealed that the serologist from the state crime lab who testified against Brandon at trial had, in fact, made serious and fundamental errors, and that the state had been notified of those errors by one of its own experts in the mid-1990s, but did nothing in response. On the day of Brandon's exoneration, the El Paso District Attorney honorably apologized to him in open court for the 17-year ordeal he had endured. Anyone present on that day would have found it hard to believe that this was the same Brandon Moon who had been repeatedly cited for "abuse of the writ" by that office during the preceding decade, and whose DNA testing claim was called "patently frivolous" by the federal courts in 1998. Even more sobering, because the conclusive DNA evidence that exonerated Brandon could -- in theory -- have been developed by him or by competent counsel before that time, no federal court would have the power to even consider that new evidence of innocence if the provisions of this bill were the law of the land.

I am also joined today by Darryl Hunt of North Carolina, who last year emerged victorious after a twenty-year struggle to prove his innocence of the rape/murder for which he was wrongfully convicted and faced the death penalty in 1984. Darryl is here today as a free man - and the real perpetrator of the crime, Willard Brown, has confessed and is behind bars for life - thanks to state-of-the-art DNA evidence and the tireless advocacy of a team of post-conviction attorneys and investigators. But the gates to freedom did not open magically or instantly once DNA ruled Darryl out as the man whose semen was found in the victim's corpse - far from it. For years, Darryl's lawyers were repeatedly thwarted in their efforts to have his conviction vacated based on these DNA results, during a decade of litigation. The federal courts who heard his case not only twisted themselves into knots to explain away the DNA evidence and deny his actual innocence claims, but also failed to give him a hearing or any discovery on his due process/Brady claims before rejecting them -- including his assertions that the state had withheld material evidence pointing to the real perpetrator.

It is only because Darryl's legal team never gave up -- and eventually secured a new round of DNA testing, whose results were entered into the national DNA databank and pegged Willard Brown as the rapist-murderer -- that this litigation came to its rightful end at long last. And it bears emphasizing that Darryl was not the only individual who suffered great harm as a result of the courts' two-decade-long failure to take his actual innocence claims seriously; crime victims did, too. For while this innocent man was behind bars, Willard Brown committed what officials now admit were at least two other violent rapes, and possibly more. Tellingly, however, it was not until after Brown's arrest in December 2003 that additional Brady material - showing that the State had critical inside information pointing to Brown all along - was finally turned over to Darryl Hunt's lawyers.

And it is not just those exonerated by DNA evidence who can attest to the long, hard road that federal habeas law already imposes on the innocent. Last month, thanks to over fifteen years of investigation by Centurion Ministries and the pro bono legal services of attorney John Zwerling of Wilmer, Cutler, Pickering, Hale & Dorr, Joseph Wayne Eastridge and Joseph Sousa won an order from a federal district judge vacating their 29-year-old murder convictions - but just barely. In a 59 page decision, the Court found that numerous pieces of credible evidence established the men's actual innocence, such that "no reasonable juror" would likely have convicted them of murder. But even that finding was insufficient to overturn their convictions on its own under current law; it was only enough to pry open the doors to relief based on other constitutional claims of merit, claims that would otherwise have been procedurally barred. Yet it is almost certain that none of those claims, including innocence, would even be given a hearing under the radical curtailing of the Writ now proposed.

Make no mistake: there is a way to "streamline" the claims of the actually innocent, but it is not to be found in this bill. If Brandon Moon had competent post-conviction counsel provided to him in the early 1990s, rather than fighting a lonely and largely fruitless battle pro se, I have no doubt he would now be celebrating his second decade as a free man, instead of his first few months. If Darryl Hunt had been given a prompt, full and fair hearing on his Brady and actual innocence claims - complete with meaningful, court-supervised discovery and full compliance by the state - I have no doubt that conclusive proof of his innocence and the true perpetrator's identity would have emerged years earlier. And if the courts had not spent fifteen years untangling Joseph Eastridge's claim of innocence from the procedural hurdles he found erected at nearly every turn, his co-defendant Michael Diamen, who died before the Court ruled in their favor this year, might have lived to see his name cleared. But the proposed bill turns the lesson of these cases on its head. It threatens to make what is already a tortuous, difficult mountain for the wrongfully convicted to climb into a wholly impenetrable steel wall. Instead of racing to erect such a wall in front of the federal courthouse doors, shouldn't we be asking what we can do to better ensure that the wrongfully convicted get their day in court?

III. House v. Bell - One Step Forward, or Ten Steps Back?

Ironically, the proposed radical curtailment of innocent prisoners' access to the courts is racing ahead just as the U.S. Supreme Court is poised to clarify and strengthen this area of law. Two weeks ago, the Court announced that this fall, it will hear the case of Paul House, a Tennessee death row inmate who has presented the federal courts with powerful new evidence of his actual innocence. That evidence includes, among other things, DNA testing that directly rebuts the key forensic testimony offered against Mr. House at trial, as well as multiple, credible confessions to the murder by the real perpetrator; indeed, it is so strong that six judges of the en banc Sixth Circuit are convinced that it establishes Mr. House's actual innocence beyond any doubt and would set him free without delay. Yet none of those key facts were developed, or even cursorily investigated, by the court-appointed attorney who represented Mr. House in his state post-conviction proceedings, leading the barest possible majority of the 6th Circuit to bar review of his serious constitutional claims.

House v. Bell will be the first time the Supreme Court has tackled an actual innocence case in over a decade, and much about our justice system - including the remarkable uses of DNA technology to prove innocence and expose scientific errors at trial - has changed since then. We hope and expect the Court will take this opportunity to clarify a number of key issues that have confused the circuits and harmed the innocent in recent years. These include what constitutes a cognizable "actual innocence" claim under our federal Constitution; what lesser, but still substantial, showing of innocence is enough to merit a hearing on other constitutional claims; and how new scientific evidence (i.e., proof that the jury based its verdict on "false facts") should weigh in the balance. There is every reason to hope that the Court will draw upon the sobering lessons we have learned from DNA and other exonerations, and make it easier - and faster - for the truly innocent to have their claims heard on the merits. Surely, this body should not rush to usurp the Supreme Court's authority and expertise in that regard. Our Constitution, and the innocent persons for whom it provides the final safeguard against wrongful execution and imprisonment, deserve no less.

CONCLUSION

The radical changes in law proposed by S. 1088 will dramatically increase the risk that innocent people will be executed or imprisoned for crimes they did not commit, and that the true perpetrators of those crimes will never be brought to justice. This Committee should scrutinize and reject -- not rush to pass -- this ill-conceived legislation.