

Questions for the Record from Senator Grassley
for
Joshua Marquis
District Attorney, Clatsop County, Astoria, Oregon

Dear Senator Grassley,

Thank you very much for the opportunity to respond to questions. My answers are in italics underneath each particular question. I'd be happy to respond to additional questions at any time.

Joshua Marquis

District Attorney

Clatsop County, Oregon

1. According to polling, the risk of executing an innocent person is one of the leading factors causing some proportion of the American public to have doubts about the death penalty. The anti-death penalty movement has therefore promoted cases of allegedly innocent people who were executed in order to call into question the continued use of the death penalty. Finding an innocent person who was executed has become their “Holy Grail.” But in two high-profile cases—Roger Coleman and Ricky McGinn—individuals who went to the death chamber proclaiming their innocence were subsequently re-proven guilty by DNA testing. Most recently, supporters of Troy Davis, executed in September of 2011, garnered appeals for clemency because of alleged doubts about his guilt. But a federal district court held an evidentiary hearing on the impact of recantations of eyewitnesses and other “new” evidence of innocence. After reviewing the material, the court concluded, “[I]t is largely smoke and mirrors. The vast majority of the evidence at trial remains intact, and the new evidence is largely not credible or lacking in probative value.”

a) What do the cases of people who were convicted, claimed innocence, and then proved guilty again tell us?

ANSWER:

Among other things they prove we should not accept claims of “exoneration” at face value. A claim of actual innocence is very powerful and it means a great deal more than just an acquittal or the fatigue of a victim’s family which cannot bear to go through a third or even fourth trial after repeated convictions. Cases like that of Troy Davis require much closer scrutiny because there were not “nine witnesses of whom six recanted” but more like 36 witnesses and overwhelming proof of his guilt, litigated before many tribunals, including a federal district court judge appointed by President Clinton who found evidence of Davis’s guilt indisputable.

Just as we are often – rightly – cautioned not to rush to judgment, any claim of actual innocence – particularly in the face of decades of appeals and re-trials – should be viewed with great care. As I said during my oral testimony, to equate someone like

Coleman or McGinn with a man like Kirk Bloodsworth, truly exonerated by DNA, both does Mr. Bloodsworth a great dis-service and mangles the truth.

b) Should the death penalty be prohibited because of the small number of exonerations of people on death row? Why or why not?

ANSWER:

As I set forth in my op-ed in the New York Times in January of 2006 (attached to my testimony), an exploration of the TRUE incidence of wrongful convictions shows an astonishingly high rate of “rightful convictions.” Most people – even death penalty opponents – agree that the relatively small number of death row inmates makes for a poor statistical sample; instead, one should expand exoneration statistics into all murder and forcible rape cases (as Professor Samuel Gross did in the Winter 2005 issue of the Journal of Criminal Law). Using Prof. Gross’ own numbers and then assuming there were 10 TIMES that many actual exonerations, we came up with a 99.27% rightful conviction rate.

Five people have been taken off death row after DNA testing cast reasonable doubt on their guilt. DNA testing has cast reasonable doubt on the guilt of another nine men who had been on death row but had already been taken off for other reasons. If one takes the attitude that one mistake means abolition, we would need to ban elective surgery and most medications – they kill far more people every month than the states do in years of executions. Cass Sunstein, now a member of the President’s cabinet, tackled this issue in his controversial paper “Is Capital Punishment Morally Required: A Life for Life Trade-off,” where he asks the question: Can we morally afford NOT to have a death penalty if recent research correct shows that, for every one execution, between 10 and 24 innocent murder victims do NOT die.

2. Every wrongful conviction is highly touted in the media, both because of a natural tendency to report on “the plane that crashes” and not the overwhelming majority of planes that land safely every day, and because the media frequently has an anti-law enforcement bias. This was most vividly on display in the cases of Roger Coleman and Ricky McGinn, who were afforded innumerable opportunities to proclaim their innocence on national TV shows and in the print media, such as their appearances on the covers of Time and Newsweek magazines, respectively. Subsequent DNA testing proved they were in fact guilty. But the media didn’t give the proof of their guilt the same level of coverage. In other cases, such as Troy Davis, the media has covered only one side of the story, refusing to provide equal coverage of the evidence of guilt. For example, in Davis’ case, the media routinely reported that nine witnesses had recanted their testimony against him. The media did not fairly report, however, that a federal district court had examined the recantations (and other alleged “new evidence of innocence”) and found that, in some instances, there were no substantive changes in the testimony, in other cases, that the recantations were not credible, and in two cases, the “recantations” consisted of unsworn affidavits provided by the defense.

ANSWER:

As a former reporter I can assure the Senator that it is simply not news to report “Guilty Man Sentenced.” Journalism schools and law schools herald “Innocence Projects” even when, as at my alma mater the University of Oregon, they had to shut them down – not because there were not enough volunteer students or professors, but because they could not find enough inmates who met even the basic criteria for “innocence.”

The Senator is right about the frenzy of reporting about Troy Davis’ execution. In the summer of 2000 a similar frenzy surrounded the execution of a killer named Oliver Cruz in Texas. During an appearance on Geraldo Rivera’s TV show he demanded to know how I could sanction the approval of a mentally retarded inmate (the claim was Cruz’s IQ was about 69). I replied (before the Supreme Court’s decision in Atkins) that I did not support executing someone who was retarded, and I produced an intake IQ report taken 11 years earlier that showed Cruz with a “performance IQ” score of 106. In a very gracious note Justice Scalia sent me after he cited several of my works in his concurrence in Kansas vs. Marsh, the Justice pointed out that people on the side of retaining capital punishment were less likely to churn out studies, and when doing so much less likely to exaggerate.

In my written testimony I detail the outright misrepresentations of a highly-touted play-become-TV-movie called “The Exonerated” in which two of the six characters -- in reality -- eventually pled guilty to the very murders for which they claim to be exonerated (in order to get out of prison), and a third is doing time for an almost identical murder after he succeeded in having his conviction using DNA overturned and was acquitted in a second trial where the prosecution was barred from using DNA evidence.

a) What is the impact on public confidence in the criminal justice system when advocates use the media to publicize “wrongful convictions” even though juries and appellate appeals courts (and sometimes the Supreme Court) have found a conviction proper?

ANSWER:

I lecture across the nation to groups of prosecutors, particularly those who try capital cases, on the effects of popular culture on the American public. A person watching TV and movies (and the news) would come to think that at least a third to half of everyone in prison is there on a wrongful conviction, usually framed by a corrupt prosecutor or crooked cop.

The real and profound changes made to the American justice system in the last 30 years go largely un-noticed in the representations that have risen to the level of urban mythology.

We see this in jury selection frequently where jurors expect TV-like dramatic courtroom confessions, incontrovertible DNA in almost any kind of case, and technology that may exist at some level but is rarely available to most street level police officers.

Ultimately, if the American people believe the system is corrupt or fundamentally unfair they will not support it and, worse yet, they will turn to vigilante justice.

c) Why doesn't the fact that subsequent DNA testing confirms a conviction gain the same sort of exposure in the media as an exoneration?

ANSWER:

In the cases of both Ricky McGinn and Roger Coleman, where any Google search will reveal scores of websites proclaiming their innocence, you will be hard pressed to find ANY reference to the DNA testing that conclusively proved their guilt. Part of this is the cognitive dissonance of simply not wanting to admit they were wrong. The other problem is almost no-one ever calls them on the issue. These two cases are just examples, but came at a time when TIME and NEWSWEEK were the two preeminent news publications in America (the pre-internet era).

3. Many different factors have been identified as causing wrongful convictions, including faulty eyewitness identifications, false confessions, badly done forensic science, prosecutorial misconduct, dishonest jailhouse informers, and incompetent defense lawyers. The defense bar promotes wholesale changes that would more likely result in creating barriers to the prosecution of the guilty more than freeing the innocent. It is no accident that there has been a steady drumbeat by defense counsel to call into question virtually every type of evidence that prosecutors can use to convict someone—confessions, forensics, eyewitnesses, and the like.

ANSWER:

What should never be forgotten – as a former criminal defense lawyer – is that the job of a defense lawyer is not primarily to exonerate the innocent – that is a rare and unintended positive side effect in a tiny percentage of cases. Their job is to cast doubt on every aspect of the prosecutor's theory – to question the science of fingerprints or DNA (remember the cross-examination during OJ Simpson's trial?). They would have the public believe that no eyewitness could possibly remember who assaulted or raped them, that any forensic science offered by the state is junk (while their expert who ids the flavor of the month is cutting edge "evidence-based science"), anyone brave enough to tell the truth about who gunned down a 4-year old girl in botched drive-by is an evil "snitch." And that prosecutors like me get frequent flyer miles for the number of people we put in prison. This is sheer Hollywood fantasy.

A good defense attorney makes the DA work harder, thereby preventing a wrongful conviction, but sciences like DNA and fingerprinting were brought into courtrooms by law enforcement, not defense attorneys.

d) What kinds of reforms of the criminal justice system are practical to prevent wrongful convictions, while not interfering with effective prosecution?

ANSWER:

Better training and pay for both prosecutors and public defenders. Encouraging our best and brightest to go and STAY in these fields when the pay disparity is so huge that America's top prosecutor earns a fifth of most equity partners in private law firms in most large American cities.

Moving towards a truth-based system that lets juries take as much admissible information in as possible – including as the British are experimenting with, letting some juries know about a defendant's prior criminal record. Not creating judicial barriers to testimony by child abuse victims and battered women.

e) The advent of new technology, such as better DNA testing, has increased the likelihood of convicting the guilty. However, isn't it true that DNA testing was once opposed by defense attorneys?

ANSWER:

As I said in my written testimony DNA was a "house to house" or "state by state" fight to get state courts to recognize the Daubert-like level of trustworthiness DNA science should be given. That battle did not end in some states until the early parts of this decade/century/muillennium.

Again, a defense attorney's job is keep evidence that will inculcate their client OUT of a courtroom and AWAY from jurors. They are doing nothing dishonorable or unethical by doing their job.

e) What other technology might help convict the guilty and prevent wrongful convictions? How does the defense bar view this technology?

ANSWER:

For reasons sets forth before defense lawyers are leery of ANY new technology that is likely to help identify their clients. That is their job. One area that is being tested in England is allowing jurors in criminal cases to hear about a defendant's prior convictions. Under current American law except when a defendant testifies and only then certain convictions can be brought out, and then only to impeach the credibility of the witness. But many jurors point out after their service - rather logically - that if they had known the defendant had been convicted of 5 previous DUI cases or had two previous convictions for child molestation that it would aid them in coming to a fair and just verdict. I think we need to trust jurors more. American law is an almost unique intersection of democracy and justice.

QUESTIONS FOR THE RECORD

From Senator Amy Klobuchar

“Justice for All: Convicting the Guilty and Exonerating the Innocent”

March 21, 2012

Question for Mr. Marquis

Question No. 1: Other Forensic Techniques Besides DNA

Mr. Marquis, during questioning I discussed Hennepin County’s leadership in recording defendant interrogations and implementing new methods of eyewitness identification while I was the County Attorney. You did not have a chance to finish your response to my question about these and other reforms in non-DNA evidence.

- Can you discuss what reforms can be made in eyewitness identification, retention of biological evidence, and documentation of statements made by defendants and witnesses?
- In your experience, have you found that it is common for police departments around the country to be unable to afford basic recording technologies? Do you find that when such technology is available, it is used correctly?

RESPONSES TO QUESTIONS FROM SENATOR AMY KLOBUCHAR **FROM JOSHUA MARQUIS**

Thank you very much, Senator Klobuchar, for the opportunity to respond to questions.

Because I was limited to just over six minutes in my oral testimony, I have appended the most relevant portions of my written testimony below (they are pages 8 through 10).

As you can see, I discussed in some detail the issues surrounding eyewitness ID such as whether sequential line-ups are in fact superior to more traditional “throw downs” if the proper safeguards are in effect. As a prosecutor it is very much to my advantage to have the full statements of a witness and even more so a suspect completely preserved, but many of the same practical aspects that affect witness IDA also affect recording of statements.

Part of the issue is the legal and practical relationship between prosecutors and police. It runs the gamut in state and local law enforcement – where over 95% of all criminal cases are handled – from New Jersey where all the investigators work directly for the prosecutor to states more like my own where the police agencies are largely autonomous and I am not “the top cop” despite popular culture’s portrayal of a DA.

Add to that, there are literally thousands of separate law enforcement agencies from tribal to city to county to state agencies, each with different masters and different funding sources. This affects eyewitness ID in that the gold standard is to have the detective who administers the line up (whether sequential, in-person or throw-down) be someone uninvolved in the case. This is a practical impossibility in much of America. I live in a mid-sized county in a mid-sized state (Oregon) and I have seven different local police agencies. In any major crime I use all the detectives in the investigation. Something as sensitive as a witness throw-down should not be done by a rookie officer from another agency.

The same issues spill over into recording statements. I know you, as a former prosecutor, are aware that it is very much to the prosecutor's advantage to have a fully recorded statement of a witness or, more critically, a defendant. It will serve me far better either at trial or in convincing a defense lawyer we have his client dead to rights. However, I have discovered that despite using the DA office's budget to buy thousands of dollars worth of recording devices over the last 15 years and gift them to the county police agencies, they get lost, broken and quickly out-dated. I learned recently to my horror that one of the larger agencies had non-functioning video cameras in most of their patrol cars because the company that made and installed them had gone out of business.

If we were to mandate universal recording there is no getting away from the simple logistics of who will pay, what will be the format, and how do we enforce or encourage this kind of recording.

I did not get the chance to discuss the retention of biological evidence in either my written or oral testimony. Some defense lawyers would like us to be required to maintain all evidence so long as any defendant is alive (in or out of custody), in temperature- and moisture-controlled evidence rooms. Again, this is extremely expensive and, with a wide variety of police agencies

and no funding available, the federal government will need to come up with sustainable funding if it is thinking of mandating such practices.

It is also important to note that it is easy for someone doing life to claim that some seemingly insignificant piece of evidence now has epic value, knowing that the evidence (like all the evidence in the 1987 capital murder case of Randy Guzek that I have tried in 1991, 1997 and 2010) is locked in a storage locker somewhere.

I would be happy to expand on my written or oral testimony in any way I can.

Joshua Marquis

District Attorney

Astoria, OR

ADDENDUM

FROM PAGES 8-10 OF MY WRITTEN TESTIMONY

The issue of eyewitness identification remains a controversial one. There are a group of experts, who make a handsome living telling juries that an eyewitness is the least reliable sort of witness. Either because of trauma or cross-racial identification or other issues.

I have tried hundreds of jury trials – and certainly haven’t won all of them – although every person I prosecuted I was personally convinced they were guilty (as I said before I have the luxury of dismissing cases right up to and including during trial if I have or develop doubts). But I think that the woman who is dragged from her car and beaten by her ex-boyfriend is often in a very good position to identify her attacker. If it is a total stranger of a different race it might be less reliable. Again I trust juries. And even they are the not the last word in our system.

I strongly believe that these are issues that go to weight, not sufficiency. In other words, let both sides make their case, including experts (although experts are almost always within the ability of the defense to call, the urban myth being that the state has unlimited resources is simply false) and let the trier of fact decide.

As a prosecutor in a jurisdiction with seven different police agencies, I would prefer to have all statements and certainly anything that would qualify as an admission or confession recorded, preferably on video but minimally on audio. I have purchased thousands of dollars of recorders over the years, often for small police departments that simply can't afford the few hundred dollars extra. But in my state in EVERY criminal case the jury is told by the judge regarding any statement claimed to be made by the defendant that:

***When a witness testifies about statements made by the defendant,
you should consider such testimony with caution.***

***In reviewing such testimony, you should consider, among other
things, the following:***

***(1) Did the defendant make the statement, and, if so, did the
defendant clearly express what [he / she] intended to say?***

***(2) Did the witness correctly hear and understand what the
defendant said?***

***(3) Did the witness correctly remember and relate what the
defendant said?***

***(4) Did the witness intentionally or mistakenly alter some of the
words used by the defendant, thereby changing the meaning of what was
actually said?***

If, after weighing such factors, you conclude that the defendant said

what [he / she] intended to say and that the witness to the statement

correctly understood, remembered, and related to you what the defendant

said, then you are authorized to consider such statements for what you deem them to be worth)
Oregon Uniform Criminal Jury Instruction 1024)

Other states have similar instructions so jurors are told to be suspicious of statements made by a defendant. One proposal is to limit or even ban unrecorded statements, on the theory that by punishing the police and denying otherwise truthful testimony to the jury eventually we'll get the cops to record everything.

Among other problems is the fact that machines fail, some officers forget to re-stock batteries, some departments may not be able to furnish every single car with a recording device, etc. If I wasn't clear before, let me be more so now; as a prosecutor I WANT all the defendant's statements recorded so a jury is not leery of what really happened; that the officers did NOT promise him a special deal or threaten his family or any of the other staples of popular culture which would make many Americans think at least 50 percent of those prosecuted are totally innocent and police and DAs get frequent flyer points for prosecuting and convicting innocent people.

Instead of punishing police, some of whom see their job as over once an arrest is made, why not create an incentive to record. Encourage new uniform instructions that tell jurors that if they are sure that ALL the defendant's words were recorded they should give those statements special weight.

If our goal is to seek truth, let's not find ways to deny otherwise valid evidence, let's explore ways to get MORE information to jurors.

Similar caveats extend to photo line-ups. While rarely appropriate, most attention is given to what we call "show-ups" distinguished from a line-up by the fact that the witness or victim is usually taken to a place where the suspect is either known to be or detained and asked if they recognize him. These show-ups can be dangerously suggestive so the courts have tight restrictions on when they are allowed.

Much more common is a photo “throw-down” usually in place of the more time consuming but iconic line-up (by TV and movie standards). There are claims that sequential photo line ups where witnesses are shown photos individually are better than the tradition 6-person thrown-down. There are also claims that the officer involved in the line-up should not have any involvement in the case to avoid “non-verbal” cues, intentional or otherwise.

However, as the Duke University Chronicle noted in April 2006, “a recent study conducted in Illinois found that the new strategy is not necessarily more effective. The study was recommended by the Governor’s Commission on Capital Punishment in 2002, after several death row inmates were exonerated through DNA evidence. The experiment, run by the Chicago Police Department, found that sequential lineups were less accurate than the traditional ones. The correct suspect was chosen 45 percent of the time when a sequential lineup was used, and 60 percent of the time with the simultaneous lineup.” <http://www.dukechronicle.com/article/lax-case-shines-light-police-lineup-process>

The way to ensure that an appropriate warning is given to witnesses that they may...or may NOT...see the person involved. Whenever possible the throw-down is video recorded, and most importantly the trier of fact can examine the same photos, in the same format in which they were shown to the witness for the jury to determine if the throw-down was in any way suggestible. Like other issues involving smaller police departments, it is desirable to have another officer involved but for example in my county, which is considered mid-sized by national comparative standards, none of the seven police agencies has more than a single full-time assigned detective position.

Again it is most desirable to let a jury decide the weight to be given evidence rather than allowing a professional expert telling a judge that “the latest research doesn’t favor its use.”

If we were to believe some defense experts, we would think that virtually all confessions are false and coerced, that almost no eyewitness can ever accurately remember what happened, that any tests offered by the prosecution are junk science, and that wrongful convictions are the norm, not the exception.