

Questions for Peter Neufeld
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1. Mr. Neufeld, you testified that, “among the first 241 post-conviction DNA exonerations nationwide, the real perpetrators were identified in 105 cases.” You go on to note that “these perpetrators were convicted of at least 90 serious, violent crimes – including 56 rapes and 19 murders – that they committed *after* innocent people were convicted for their earlier crimes.” I assume DNA evidence was the means by which actual perpetrators were identified in many of these cases. Is that correct? **Do you think that given the ability of DNA data to serve as both exculpatory and inculpatory evidence Congress should encourage the states to provide for post-conviction DNA testing that is at least as accessible as the Federal standard found in 18 U.S.C. § 3600?**

To date there have been 251 DNA exonerations. In 107 of these cases, the real perpetrator has been identified by DNA testing. The Innocence Project has previously reported the number of violent crimes committed by the real perpetrator as at least 90. Since that time, however, we have narrowed our definition for this figure. The revised number of additional violent crimes for which the real perpetrator was convicted subsequent to the crime for which the innocent person was convicted is 72. The number of crimes committed is larger than this figure however. In cases where the statute of limitations has run out on a crime before the real perpetrator was identified or in cases where the real perpetrator was already serving a lengthy prison sentence, prosecutors could not or elected not to press charges against the real perpetrators for those crimes committed while the innocent person was in prison.

The NAS report stated “With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”¹ It is a matter of public safety and a duty to provide true justice to victims and their families that post-conviction access to DNA testing is made available in every state. The Innocence Project therefore strongly

¹ “Strengthening Forensic Science in the United States: A Path Forward”, National Academy of Sciences, 2009, p.7.

believes that Congress should encourage the states to provide for post-conviction DNA testing that is at least as accessible as the Federal standard.

2. Mr. Neufeld, did the Innocence Project take a position in *Melendez-Diaz v. Massachusetts*—the case concerning the admission of forensics reports on the existence of cocaine and admission of those reports into evidence without the live testimony of the lab analyst over the defendant’s objection? What was the Innocence Project’s position and why?

The Innocence Project, as a member of the Innocence Network, submitted an amicus brief in support of the petitioner in *Melendez-Diaz v. Massachusetts*. In the brief we discuss the fallibility of forensic evidence and how essential confrontation is in mitigating the discovery of these problems.

Throughout the country, DNA exonerations have revealed the all too frequent mistakes, reliance on unvalidated assays and methods, overreaching testimony, negligence, misconduct (such as drylabbing) and other systemic problems within forensic science laboratories. The guarantee of confrontation provides a vital safeguard for exposing, during the criminal trial, the aforementioned forensic science errors revealed by wrongful convictions.

In addition to the errors uncovered by DNA exonerations listed above Justice Scalia, in his majority opinion, cited the National Academy of Sciences report in discussing the influence of law enforcement on the testimony of forensic analysts:

“According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 6–1 (Prepublication Copy Feb. 2009) (hereinafter *National Academy Report*). And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” *Id.*, at S–17. A forensic analyst responding to a request from a law enforcement official may

feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.

Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, *post*, at 10, the same cannot be said of the fraudulent analyst.”

Justice Scalia identifies an issue that has been exemplified by many of the nation’s DNA exonerations: that forensic testimony can be influenced and can stray beyond the results of the actual test or the scientific boundaries and capabilities of a test.

Once the validity and reliability research determines that boundaries and capabilities for forensic science disciplines under question, and standards for the use and interpretation of these forensic tests are put into practice, defense lawyers will be more likely to stipulate to laboratory reports and refuse the right to confrontation as forensic evidence becomes more difficult to disprove.

3. Mr. Neufeld, did the Innocence Project take a position in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308 (2009), the recent decision in which the Supreme Court held 5-4 that even assuming someone convicted of sexual assault could pursue claims under 42 U.S.C. § 1983, he had no constitutional right to obtain post-conviction access to the State’s evidence for DNA testing? If so, what was its position?

The Innocence Project was the counsel of record and argued on behalf of the respondent in *District Attorney's Office for Third Judicial Dist. v. Osborne*. Despite the widespread acceptance of DNA testing as a powerful and reliable form of forensic evidence that can conclusively reveal guilt or innocence, some states continue to unfairly obstruct access to testing.

Even in many of the states that grant access to DNA testing, the laws are limited in scope and substance. Motions for testing are often denied, even when a DNA test would undoubtedly confirm guilt or prove innocence and an inmate offers to pay for testing.

Although Federal law, under the 2004 Justice For All Act, grants access to DNA testing for federal inmates claiming innocence, it is our position that all 50 states should offer at least the same level of access to post-conviction DNA testing as does the federal government. Some states have passed statutes that include barriers to testing that are insurmountable for most prisoners. These include restrictions against inmates who pled guilty, confessed, or whose lawyers failed to request DNA testing at trial. Some laws put an unreasonable standard in place to establish proof of innocence. Others place the burden on the defense to effectively solve the crime and prove that DNA evidence promises to implicate another individual. Still others put time limitations on testing requests. Currently, two states (Alabama and Kentucky) limit post-conviction DNA access to inmates on death row, so those serving life sentences do not have access to testing. In many cases, the questionable evidence used to convict a defendant at trial – like eyewitness identification or snitch testimony – is used by judges as grounds to deny a DNA test. These barriers keep innocent people from securing DNA tests that could prove their innocence

It also bears noting that the Osborne decision did not rule out the possibility of all future constitutional challenges to state post-conviction DNA testing laws, whether under Section 1983 or other vehicles. To the contrary: in Osborne, the Court explicitly recognized, for the first time, that convicted persons have a protected “liberty interest” in pursuing access to DNA evidence that has the potential to prove their innocence, and that state procedures providing for (or denying) access to DNA evidence must meet minimum due process standards.² Osborne thus places additional pressure on those states that currently provide no vehicle for obtaining DNA testing, and/or unreasonably restrict persons who might have meritorious claims from obtaining testing, to enact or strengthen those laws.

² Brandon Garret, DNA and Due Process. 78 Fordham L. Rev. Forthcoming (2010), link to abstract: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1562820