

IN THE MISSOURI SUPREME COURT

SC No. 85448 and 85552

RUBIN WEEKS,

Movant/Appellant,

v.

STATE OF MISSOURI,

Respondent/Appellee.

**BRIEF OF AMICI CURIAE IN SUPPORT
OF APPELLANT RUBIN WEEKS**

**SEAN D. O'BRIEN, #30116
PUBLIC INTEREST LITIGATION CLINIC
305 East 63rd Street
Kansas City, Missouri 64113
816/363-2795 • Fax 816/363-2799**

**STEVEN A. DRIZIN
CENTER ON WRONGFUL
CONVICTIONS
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8576**

**VANESSA POTKIN
THE INNOCENCE PROJECT
BENJAMIN N. CARDOZO SCHOOL OF LAW
55 5th Avenue, 11th Floor
New York, New York 10003
(212) 790-0397**

Counsel for Appellant

IN THE SUPREME COURT OF MISSOURI

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| RUBIN WEEKS, |) | |
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| Movant/Appellant, |) | SC85448 |
| |) | |
| v. |) | SC85552 |
| |) | |
| STATE OF MISSOURI, |) | |
| |) | |
| Respondent, |) | |
| |) | |

BRIEF OF AMICI CURIAE

IN SUPPORT OF

MOVANT/APPELLANT, RUBIN WEEKS

The Center on Wrongful Convictions at Northwestern University School of Law and the Innocence Project at Cardozo School of Law submit this brief as amici curiae in support of Appellant, Rubin Weeks’ efforts to obtain post-conviction DNA testing in the above-entitled case.

PRELIMINARY STATEMENT

The Center on Wrongful Convictions of Northwestern University School of Law’s Bluhm Legal Clinic in Chicago, Illinois (“CWC”) was founded in 1998 as an outgrowth of work done by Lawrence Marshall, the CWC’s Legal Director, in representing clients facing the death penalty in Illinois, and the Clinic’s Executive Director Rob Warden, whose work as an investigative journalist helped expose scores of innocent men who had been wrongfully convicted in Illinois. Together,

Professor Marshall and Mr. Warden have played a role in nine of the thirteen cases in Illinois in which innocent men who were sentenced to death were exonerated. Their work, and the work of many others, contributed to the decision of Governor George M. Ryan to declare a moratorium on the death penalty in Illinois until the problems that led to the wrongful convictions could be identified and remedied.

The CWC is dedicated to identifying and rectifying wrongful convictions and other serious miscarriages of justice. The CWC has three components: representation, research, and public education. CWC faculty and staff, cooperating outside attorneys and Bluhm Legal Clinic students, investigate possible wrongful convictions and represent imprisoned clients with claims of actual innocence. The research and public education components focus on developing initiatives that raise public awareness of the prevalence, causes, and social costs of wrongful convictions and promote substantive reform of the criminal justice system.

The Innocence Project at the Benjamin N. Cardozo School of Law was founded by Barry C. Scheck and Peter J. Neufeld in 1992. It was set up as and remains a non-profit legal clinic. It also serves as an advocacy and resource center for criminal justice reform to protect the innocent. Most of the Innocence Project's clients are poor and forgotten, and have used up all of their legal avenues for relief. The hope they all have is that biological evidence from their cases still exists and can be subjected to testing. All Innocence Project clients go through an extensive

screening process to determine whether or not DNA testing of evidence could prove their claims of innocence. Thousands currently await the Innocence Project's evaluation of cases.

As one of the forerunners in the field of wrongful convictions, the Innocence Project has grown to become much more than the “court of last resort” for inmates who have exhausted their appeals and their means. It has also been actively involved in securing post-conviction DNA testing access for all defendants. This work includes support for enacting post-conviction DNA testing statutes at the state level; drafting provisions for the federal Innocence Protection Act of 2003 (passed in the House and currently pending in the Senate) which would grant any inmate convicted of a federal crime the right to petition a federal court for DNA testing to support a claim of innocence, and also encourage states – with the power of the federal grant money - to adopt adequate measures to preserve evidence and make post-conviction DNA testing available to inmates seeking to prove their innocence; and litigating claims in state court for liberal interpretations of state post-conviction DNA testing statutes to allow for maximum access to DNA testing.

Together with Northwestern University School of Law's Center on Wrongful Convictions, the Innocence Project is currently helping to organize The Innocence Network, a group of law schools, journalism schools, and public

defender offices across the country that assist inmates trying to prove their innocence whether or not the cases involve biological evidence which can be subjected to DNA testing. The Innocence Project consults with legislators and law enforcement officials on the state, local, and federal level, conducts research and training, produces scholarship, and proposes a wide range of remedies to prevent wrongful convictions while continuing its work to free innocent inmates through the use of post-conviction DNA testing. The work of both the CWC and the Innocence Project has helped to expose the problem of false confessions and false guilty pleas as a major source of wrongful convictions. See <http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm>.

DNA testing has been a major factor in changing the criminal justice system. It has provided scientific proof that our system convicts and sentences innocent people – and that wrongful convictions are not isolated or rare events. Most importantly, DNA testing has opened a window into wrongful convictions so that we may study the causes and propose remedies that may minimize the chances that more innocent people are convicted. As a result of the increased accessibility of DNA evidence, more and more *innocent* men and women – including many who have confessed or pled guilty to brutal and heinous crimes – are walking out of prison after serving lengthy prison terms for crimes that DNA testing proved they did not commit. Because DNA testing is now being done shortly after a suspect

has been arrested, it has also spared numerous false confessors the disgrace of a wrongful conviction by establishing their innocence before they were put to trial.

As of November 24, 2003, according to data compiled by the Innocence Project, DNA testing has freed 138 wrongfully convicted, *innocent* men and women from the prospect of years behind bars, and, in some cases, has given those condemned to death another chance at life. See Benjamin N. Cardozo School of Law, *The Innocence Project*, at <http://www.innocenceproject.org> (as of Nov. 24, 2003). Of these 138 DNA exonerations, 35 (or 25%) have involved false confessions, at least four of which – those of Christopher Ochoa, Jerry Frank Townsend, David Vasquez, and Marcellius Bradford – also involved defendants who plead guilty to crimes they did not commit. (For a description of these cases, see <http://www.innocenceproject.org/caseprofiles>).

Moreover, in a soon to be released study of police induced proven false confessions, Professor Steven A. Drizin of Northwestern University School of Law and Professor Richard A. Leo of the University of California, Irvine, have analyzed 125 proven false confessions, 46 (or 37%) of which were proven false through DNA evidence. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post DNA Age*, 82 N.C. L. Rev. (forthcoming May 2004). This is the largest collection of interrogation-induced false confession cases ever assembled and analyzed in research literature. According to this study, 44 (or

35%) of the 125 false confession cases (slightly more than 1/3 of the sample) resulted in conviction and incarceration. Of these 44 convictions, 15 (or 34%) were convicted solely by guilty plea. Of the cases where the individual plead guilty, at least 9 were exonerated by DNA evidence including John Jeffers (Indiana)¹, Anthony Gray (Maryland)², Keith Brown (North Carolina)³, John Dixon (New Jersey)⁴, Joseph Dick (Virginia)⁵, and Daniel Williams (Virginia)⁶ (in

¹ John Yates & Kevin Lynch, *Confession Leads to 2 Arrests in '75 Killing: Man convicted in Indiana case died in prison*, CHI. TRIB., Aug. 29, 2002.

² Todd Richissin, *Trying to Right an Injustice*, BALT. SUN, Feb. 6, 1999.

³ *DNA Analysis 6 Years Later Reverses Fortunes*, TAMPA TRIB., Jul. 8, 1997; *Prosecutors Say They Did Not Railroad Man in Rape Case*, HERALD SUN (Durham, NC), Jul. 10, 1997.

⁴ Guy Sterling, *Once a Confessor, Soon a Free Man; DNA Test Clears Newark Man Who Served 10 Years for Christmas Rape-Robbery*, STAR-LEDGER (Newark, NJ), Nov. 29, 2001, at 023, available at 2001 WL 30233099; Jim Dwyer, *Cornered Minds, False Confessions*, N.Y. TIMES, Dec. 9, 2001, available at LEXIS, News Library, Nyt File.

⁵ Tice v. Com., 563 S.E.2d 412 (Va. App., 2002).

⁶ *Id.*

addition to Christopher Ochoa (Texas), Jerry Frank Townsend (Florida), and Marcellius Bradford (Illinois)).

DNA evidence has not only exonerated those who were falsely convicted, but has also prevented the conviction of those falsely accused. According to the Drizin and Leo study, 81 individuals (or 65%) were never convicted. Overall, 57 of the 125 cases (or 46% of the sample) used scientific evidence to demonstrate innocence, of which 46 cases (or 37% of the sample and 81% of scientific exonerations) were specifically attributable to DNA testing. In light of these findings, the wholesale exclusions of guilty plea and confession cases from post-conviction DNA testing will undoubtedly deprive a number of actually innocent persons of the chance to exonerate themselves. In many cases, the denial of this simple scientific test will also allow actually guilty rapists and murderers to remain free to commit more crimes.

In our experience, defendants who falsely confess or plead guilty to crimes they did not commit may also be the defendants who are in most need of access to DNA testing. In these cases, because the defendant confessed his guilt, prosecutors are less likely to consent to DNA testing and trial courts are less likely to order such testing. Absent a statute which authorizes DNA testing, these defendants will have no way of using DNA testing to prove their innocence.

In the wake of these injustices and potential future miscarriages of justice, it is incumbent upon the courts to make sure that the criminal justice system is accurate, fair, and just and that defendants who have pled guilty or confessed are not deprived of the opportunity to prove their innocence through DNA testing. This is not only a matter of fairness but one of public safety. Accordingly, we ask that this Court interpret § 547.035 of the Missouri Revised Statutes (Mo. Rev. Stat. § 547.035) so as not to categorically exclude defendants who have plead guilty from obtaining post-conviction DNA testing.

ARGUMENT

I. THIS COURT SHOULD INTERPRET SECTION 547.035 OF THE MISSOURI REVISED STATUTES TO ALLOW A DEFENDANT WHO PLED GUILTY OR GAVE A CONFESSION TO SEEK POST-CONVICTION DNA TESTING.

Missouri allows persons in the custody of the department of corrections to petition for post-conviction DNA testing. A motion of this kind must include a statement that “(4) Identity was an issue in the trial and (5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.” Mo. Rev. Stat. § 547.035(4-5). Both the Missouri trial court and the Court of Appeals held below

that “identity” is never an issue in cases in which defendants plead guilty. However, DNA exonerations in several cases in which defendants have confessed and pled guilty tells us that identity may still be an issue and that there is no more accurate way to answer this question than through DNA testing. In the interests of justice, respectfully we urge this Court to hold that defendants who plead guilty are not categorically excluded from those eligible to obtain DNA testing.

**A. DNA evidence is the most precise and accurate way to
determine guilt in our criminal system.**

Since the time of Rubin Weeks’ arrest and guilty plea in February 1992, a revolution in science and law enforcement has taken place. Short Tandem Repeat (“STR”), mitochondrial and Y chromosome DNA testing have become the foremost forensic techniques for identifying perpetrators, and eliminating suspects, when biological tissues such as blood, hair, semen, skin or saliva are left at a crime scene. The STR system is the national standard in DNA testing and it is being used systematically. Federal and State DNA databases contain inventories of STR profiles from new and old unsolved cases and from convicted offenders. These databases are solving crimes at unprecedented rates.

In cases where relevant biological evidence is available, DNA testing is simply the most accurate form of identification available. The likelihood that any two individuals (except identical twins) will have the same 13-loci STR DNA

profile can be as high as 1 in 1 billion or greater. *Using DNA to Solve Cold Cases*, Nat'l Instit. Just., Off. Just. Programs, U.S. Dept. Just., (July 2002) at Da161. A 1995 study of forensic laboratories that conduct DNA testing found that in roughly 23 percent of the cases, DNA test results excluded the primary suspects. In the cases reported by the FBI as part of this study, DNA test results excluded 20 percent of the suspects, and only 60 percent matched the primary suspect. *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Nat'l Instit. Just., Research Report, (June 1996) at xxviii. This has also been the experience of some of the state crime laboratories. In Georgia, for example, where the Georgia Bureau of Investigations ("GBI"), routinely performs DNA testing in homicide, rape, and other violent crime cases, of the more than 700 cases in which the GBI has conducted DNA testing, 59 percent resulted in inclusion of a suspect and 25 percent excluded the suspect. See <http://www.state.ga.us/gbi/fsdna.html>.

DNA testing has exposed many of the ways in which identity has traditionally been established to be less reliable than previously thought. The criminal system has customarily solved and prosecuted crimes through the use of eyewitness identifications, blood testing, hair comparisons, confessions and admissions, and the use of testimony from informants and accomplices. DNA evidence is capable of providing and has already provided proof of innocence in

cases in which one or more of these time-honored forms of evidence have been present, even in cases where proof of guilt appears to be devastating – such as when a person confesses to a crime and then pleads guilty.

In addition to excluding defendants as the source of the tissue samples, DNA test results could also be searched in the local, state and federal DNA databanks and may match a convicted offender. The DNA Identification Act of 1994 (Public Law 103 322) formally authorized the FBI to establish a national DNA index for law enforcement purposes. Under this Act, the FBI Laboratory's already-running Combined DNA Index System (CODIS) was supplemented by the newly operational National DNA Index System (NDIS) in October of 1998. NDIS enables both state and local laboratories throughout the United States to exchange and compare DNA profiles on a national level. Currently, 48 states, the US Army, FBI, and Puerto Rico are NDIS participants.⁷ See <http://www.fbi.gov/hq/lab/codis>. As of October 2003, the NDIS contains a total of 1,474,341 profiles, including 66,714 forensic profiles and 1,407,627 total convicted offender profiles. *Id.* The federal databank has aided over 10,358 investigations. *Id.* These profiles have produced over 9,300 hits assisting in more than 10,300 investigations.

In Missouri alone, there are four NDIS participating labs containing over 24,617 offender profiles and 2,351 forensic samples that have aided 256

⁷ The only states that are not NDIS participants are Mississippi and Rhode Island.

investigations. See <http://www.fbi.gov/hq/lab/codis/mo.html>. DNA testing of crime scene evidence in Missouri has resulted in several highly publicized “cold hits” in Missouri’s database, helping law enforcement officers solve crimes which otherwise had little chance of being solved. See e.g., *Jury Convicts Rapist in Slaying in Kansas City*, ST. LOUIS POST-DISPATCH, November 13, 2003 (2003 cold hit in Missouri’s databank matched material under victim’s fingernails from 2000 murder to Wayne DuMond who was in database as convicted sex offender); *DNA is Changing the Future of Law enforcement*, THE KANSAS CITY STAR, August 10, 2003 (in November 2002 DNA taken from Douglas Belt upon his arrest for a drugstore robbery was entered into the State’s database and matched him an unknown sample from the scene of a homicide, which also matched a series of rapes committed between 1989 and 1994 in Wichita); *DNA Evidence Links Prisoner to 1986 Rape*, THE KANSAS CITY STAR, May 18, 2002 (in May, 2002 after a hit in the State Database, Jackson County Prosecutors charged a convicted sex offender with a 1986 attack on a Kansas City woman, Marcus Brummel received life sentence after being linked to a 1997 murder in the DNA database, Ronald Blewett sentenced to life with out parole after a cold hit in the database linked him to the 1999 rape and murder of and elderly woman); *DNA Leads to Murder Charge in Death of Granite City Woman; Man Accused in Killing in July Listed in State’s Database of Sex Offenders; Death Penalty Will Be Sought*, ST. LOUIS POST

DISPATCH, September 5, 2001 (cold hit in Missouri database linked blood from the crime scene of a murder victim to a convicted sex offender).

B. Interpreting Section 547.035 of the Missouri Revised Statutes to preclude court-ordered testing for those who pled guilty or confessed to a crime will result in the continued incarceration of innocent people who can be exonerated by DNA testing and will jeopardize public safety.

A guilty plea does not necessarily denote actual guilt. Innocent people have and do sometimes plead guilty. Although the phenomenon has not been extensively studied, one study of women who claimed they were innocent but pled guilty to relatively minor offenses in the English courts, found that the most common reasons listed were: 1) police pressure and persuasion; 2) they saw no point in denying the allegation as it would be their word against the word of the police; 3) they wanted to avoid being taken into custody pending trial; and 4) they believed that they would be sentenced more harshly if they went to trial. See GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS: A HANDBOOK* 184-185 (Wiley 2002) (referencing studies of British researchers). In the American system, where plea bargaining is the norm and where capital punishment is an option in a super majority of the states, there is some evidence that innocent defendants plead

guilty to murder charges to avoid the death penalty. See Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 Crim. L. Bull. 293 (2001). Whatever the reason, as demonstrated by the now 138 post-conviction DNA exonerations to date, DNA testing is capable of providing proof of innocence even in cases where the proof of guilt can be properly characterized as overwhelming, including instances where the convicted person confessed and then pled guilty to the crime. In fact, post-conviction DNA testing has proven at least four persons to be innocent of crimes to which they pled guilty. In these cases, several of which we summarize below, the toll taken on the false confessor, his family members, the victim's family members, and in some cases, the community at large, which continued to be terrorized by the real criminals while the wrongfully convicted languished in prison, was devastating. And in each of these cases, the credibility of the justice system itself was undermined.

In 1979, Jerry Frank Townsend, a mentally retarded man, was subjected to a grueling interrogation by Broward County Sheriff's detectives. After four days of questioning, Townsend implicated himself in about 20 rape-murders in Fort Lauderdale, Miami, Tampa and San Francisco. Although prosecutors did not pursue most of Townsend's confessions because there was no evidence that he could have possibly committed them, he was still charged with six murders. However, no physical evidence ever linked Townsend to any murder. In fact, even

Townsend's statements were seriously flawed – many of the details he included in his confessions turned out to be wrong, including giving the wrong races and ages of the victims, the wrong dates of the murders, and the wrong methods used to kill the victims. Nevertheless, Townsend stood trial for three first-degree murders and pled guilty to two more and a rape. The cases were reopened in 1998 and DNA evidence found at the scene of crime was tested. The results of the DNA tests implicated a serial rapist and murderer, Eddie Lee Mosley in at least four of the murders confessed to by Townsend and in eight other murders and rapes of women and children in the South Florida area. (Mosley is thought to be responsible for dozens of rapes and 18 murders dating back to the 1970's). Daniel de Vise, *Serial Killing Trial's Chance Dims*, MIAMI HERALD, November 20, 2001. *available at* 2001 WL 30041428. Townsend was released on June 16, 2001, after 22 years in prison. Ardy Frieberg, *Ex-Detective Hunted Suspect for 20 Years; Charges Bring Vindication for Investigator*, SUN-SENTINEL (Ft. Lauderdale), Dec. 16, 2000; Sydney Freedberg, *He Didn't Do It*, ST. PETERSBURG TIMES, Jan. 7, 2001; Paula McMahon & Ardy Friedberg, *DNA Clears 21-Year Inmate; Review Reverses 2 Murder Cases; 4 Others Await*, SUN-SENTINEL (Ft. Lauderdale), Apr. 28, 2001; Paula McMahon & Ardy Friedberg, *Evidence Could Free Inmate; After 21 Years, Jerry Frank Townsend Will See His 4 Broward Convictions Vacated*, SUN-SENTINEL, May 8, 2001; Ardy Friedberg & Jason Smith, *Townsend Released*;

Judge Cites ‘An Enormous Tragedy’; Attorneys Say Suspect Was Easily Led to Confess, SUN-SENTINEL, Jun. 16, 2001. Jeff Shields, *Suit: Detectives Lied in Murder Case; Frank Lee Smith Died in Prison 11 Months Before DNA Tests Showed He was not Guilty*, S. FL. Sun-Sentinel, October 12, 2002, at 1B, available at 2002 WL 101348851. See also, http://www.innocenceproject.org/case/search_profiles.php.

The exoneration of Christopher Ochoa in 2001 provides yet another concrete example of how DNA testing can prove innocence in spite of sworn testimony in which a defendant admits involvement in a crime. In 1988, Ochoa, a former high school honor student, confessed and then pled guilty to the brutal rape and murder of Nancy DePriest at a Pizza Hut in Austin, Texas. His confession even contained key details of the crime that were not then available to the public. In order to avoid the death penalty, Ochoa not only pled guilty to raping and killing DePriest, he agreed to testify against his friend and co-defendant Richard Danziger. At the trial of his co-defendant, Richard Danziger, Ochoa stated that he had personally shot the victim after he and Danziger both had raped her. Danziger was convicted and both he and Ochoa received life sentences without parole. While Danziger and Ochoa were in prison, in 1996, another convict named Achim Marino wrote authorities, claiming that he was responsible for the DePriest murder and that he could lead the authorities to evidence from the crime scene. In 2001, thirteen years

after DePriest's death, DNA testing performed on the semen recovered from Ms. DePriest's body conclusively excluded both Ochoa and Danziger as the actual perpetrators, and confirmed Marino's guilt. Although Ochoa and Danziger were freed and exonerated and Marino was convicted, Danziger left prison a shell of the man he was when he entered. As a result of a fight with another inmate, Danziger suffered brain damage and now requires life-long intensive medical care. Henry Weinstein, *DNA Testing Clears Texas Murderer and 'Accomplice,'* L.A. TIMES, Oct. 14, 2000; Jim Yardley, *Texas Inmate's Confession Slips through the Cracks,* N.Y. TIMES, Oct. 17, 2000; Paul Duggan, *Falsely Accused Texas Man Freed from Life Term,* WASH. POST, Jan. 17, 2001. See also, http://www.innocenceproject.org/case/search_profiles.php and <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Tex-Ochoa.htm>.

In another highly publicized case from Illinois, 17-year-old Marcellius Bradford confessed to participating in the 1986 abduction, rape, and murder of 22-year-old medical student, Lori Roscetti. At trial, Bradford testified that he and three co-defendants had abducted Ms. Roscetti and drove her to a remote location, where he and another teenager acted as "lookout" while two others raped her and crushed her head with a brick of concrete. In exchange for this testimony against his co-defendants, Bradford was promised a 12 year sentence instead of a life sentence.

In addition to Bradford's testimony, the convictions were based on the erroneous and possibly perjurious testimony of Pamela Fish, a lab analyst at the Chicago Crime Lab, who testified that the semen samples found in Ms. Roscetti's body and car could have come from the defendants. Fish told police that the serology test (a test used to identify the presence of an antigen that detects blood type) determined that the semen was from a person with Type O blood who was also a "secretor." A "secretor" is a person whose blood type can be discerned from bodily fluids other than blood (like saliva, sweat and semen) because they secrete identifying blood antigens through these body secretions. However, according to the Chicago police crime lab, Bradford, along with his co-defendants, were all "non-secretors," meaning their blood type can be determined only by testing their blood. Fish gave this testimony knowing that the recovered samples indicated that the perpetrators were "secretors," and that the defendants were all "non-secretors."

Thirteen years after their convictions, the evidence tested by Fish was re-analyzed using DNA testing. The results of the DNA testing revealed, not only that the semen came from a single man, but also that the genetic profile of the semen was so unique it would occur in an estimated one in eight trillion people, and so would not likely be confused with either Bradford or any of his co-defendants. After serving nearly fifteen years, in December 2001, all four men were exonerated. Steve Mills & Maurice Possley, *Report Alleges Crime Lab*

Fraud; Scientist is Accused of Providing False Testimony, CHI. TRIB., Jan. 14, 2001, available at 2001 WL 4030052; Steve Mills & Maurice Possley, *New Evidence Stirs Doubt over Murder Convictions; DNA, Recantations Suggest 4 Inmates Innocent in '86 Case*, CHI. TRIB., May 2, 2001, available at 2001 WL 4068766; Frank Main, *They Weren't the Right Ones*, CHI. SUN-TIMES, May 27, 2001; Steve Mills & Maurice Possley, *Final Roscetti DNA test clears 4*, CHI. TRIB., Dec. 4, 2001, available at LEXIS, News Library, Chtrb File. See also, http://www.innocenceproject.org/case/search_profiles.php and <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Bradford.htm>.

C. Allowing defendants who plead guilty or confessed to obtain DNA testing may also lead to identification of the actual assailant of the crime.

In over 30 of the 138 post-conviction DNA exonerations to date, DNA testing has not only exonerated the wrongfully convicted, but also identified the true perpetrator. In several of the cases discussed above, DNA evidence not only exonerated the men who falsely confessed or entered false guilty pleas, but it also implicated the true perpetrator of these heinous crimes. The DNA evidence that exonerated Jerry Frank Townsend in 1998 and 2000, implicated a man named Eddie Lee Mosley. In an unrelated Florida case, DNA testing proved that Mosley

was also the true perpetrator in the crimes of rape and murder for which Frank Lee Smith had served on death row until he died in prison. The testing was conducted on December 15, 2000, eleven months after Smith's death. Similarly, the testing of the biological evidence that exonerated Christopher Ochoa and Richard Danziger also inculpated Achim Marino. Had such testing been available earlier to Ochoa and Townsend, Marino and Mosley would not have been free to commit other serious crimes. While Townsend languished in prison, Mosley, who was institutionalized at a mental facility for part of the time, committed at least eight murders and rapes. While Ochoa and Danziger were serving time for Marino's crime, Marino committed at least three aggravated robberies, crimes for which he was later sentenced to three consecutive life sentences. David Hafetz, *Man found Guilty of '88 Slaying at Pizza Hut*, Austin American-Statesman, October 11, 2002, at B1, *available at* 2002 WL 101143998.

CONCLUSION

The phenomenon of DNA exonerations has played a significant role in reforming the criminal justice system, causing a major shift in criminal justice legislation over the past decade. Until recently, only New York and Illinois had legislation providing post-conviction DNA testing. However, in the last four years, over 30 other states, including Missouri, have enacted such laws.

On October 1, 2003, the “Innocence Protection Act of 2003” (IPA) was introduced in the 107th Congress, as part of a larger bill entitled “Advancing Justice Through DNA Technology Act” (HR 3214). By granting any inmate convicted of a federal crime the right to petition a federal court for DNA testing, including defendants who confessed to or pled guilty to crimes, this bill aims to create a federal post-conviction testing program to protect the innocent from wrongful convictions. On November 5, 2003, the Advancing Justice Through DNA Technology Act passed the House of Representatives with an overwhelming 357-67 vote. It is now pending before the Senate where it has strong support.

According to the testimony of Peter J. Neufeld, co-director of the Innocence Project, before the Subcommittee on Crime, Terrorism, and Homeland Security, in support of the IPA:

There can be no doubt that the number of wrongfully convicted innocents freed by DNA testing will dramatically increase if the post-conviction DNA legislation is passed by this Congress. The number of exonerations could at least double within five years. Likewise, the apprehension of real perpetrators through DNA databank hits will also increase. DNA testing is a win-win proposition for all Americans who believe in the ideals of justice and fairness.

http://www.innocenceproject.org/docs/Neufeld_Congressional_Testimony.html.

In his testimony, Neufeld quoted Attorney General Ashcroft who has said:

Forensic DNA operates as a truth machine with the power to convict the guilty and protect the innocent in a way that will improve dramatically the efficacy of the criminal justice system. It not only enhances the ability of law enforcement to apprehend and punish the guilty and free the innocent, who languish in America's prisons, it also insulates innocent suspects from prosecution, protects potential crime victims and brings a measure of certainty and finality to crime victims and loved ones. In this way, DNA testing injects a measure of truth into the criminal justice system's search for true justice.

http://www.innocenceproject.org/docs/Neufeld_Congressional_Testimony.html.

One of the hard lessons that the DNA exonerations have taught us is that a guilty plea is not necessarily determinative of actual guilt. DNA testing has led, and undoubtedly will continue to lead, to the exoneration of persons who have admitted to participating in crimes they did not commit, including those who falsely confess and those who falsely plead guilty. Because DNA testing is so precise and accurate, allowing such defendants to seek post-conviction DNA testing can resolve questions about the false confessor's innocence and can ensure that the real perpetrator is behind bars. In short, in the words of Attorney General Ashcroft, it can "inject a measure of truth into the criminal justice system's search

for true justice.” In the interests of furthering “true justice” in the case of Rubin Weeks, respectfully we urge that this Court reverse the decision of the Missouri trial court to categorically exclude Rubin Weeks from obtaining to DNA testing because he pled guilty.⁸

⁸ If this Court affirms the appellate court’s interpretation that those who plead guilty at trial are categorically excluded from obtaining DNA testing, this interpretation would create a false and illogical distinction among false confessors by permitting post-conviction DNA testing in cases where a defendant confesses, recants before trial and presents an alibi defense (making identity at issue for the purposes of the statute) and cases where the defendant confesses and, then for whatever reason, pleads guilty. One need only examine the 138 post-conviction DNA exonerations in the United States for proof that a decision to plead guilty can be influenced by a number of factors, none of which have to do with the defendant’s actual guilt. Moreover, one need only study the case of Christopher Ochoa to now that a recantation of a confession and a guilty plea more than a decade later may be just as reliable as a recantation before trial. The important point is that in this case there is evidence that could be subjected today to a simple test that could conclusively establish Rubin Weeks’ factual innocence. Whether Rubin Weeks pled guilty or confessed does not alter this undeniable fact.

Sincerely,

Steven A. Drizin
Center on Wrongful Convictions
Bluhm Legal Clinic
Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8576

Vanessa Potkin
The Innocence Project
Benjamin N. Cardozo School of Law
55 5th Avenue, 11th Floor
New York, New York 10003
(212) 790-0397

Sean D. O'Brien
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, Missouri 64113
(816) 363-2795

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed this ____ day of December, 2003, to counsel for Respondent, namely:

Nicole Gorovsky
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102

Steven A. Drizin