

THE JUSTICE PROJECT

Protecting the Innocent: Opportunities for Reform

Kirk Bloodsworth was the first person exonerated from death row by DNA evidence and is now a Program Officer for The Justice Project's Campaign for Criminal Justice Reform and The Justice Project Education Fund. His story is just one of the hundreds of similar stories of wrongful convictions that have occurred in the United States.

If you would like to find out how to help prevent wrongful convictions, please visit our website: www.thejusticeproject.org.

The Problem: A Broken System

The American criminal justice system is broken. The development of DNA technology and the subsequent exonerations of 200 innocent people have opened a window into the errors in the criminal justice system that can lead to wrongful convictions. Since the reinstatement of the death penalty in the 1970s, 123 people have been exonerated from death row alone. In fact, the most comprehensive study of capital appeals ever conducted found that nearly seven of every 10 death sentences handed down by state courts and fully reviewed in the period 1973 to 1995 were overturned due to “serious, reversible error,” including egregiously incompetent defense counsel, snitch and accomplice testimony, prosecutorial misconduct, false confessions, racial manipulation of the jury, and faulty jury instructions.

Unfortunately, the injustices Kirk Bloodsworth suffered are not unique to Kirk’s case. His story serves as a powerful illustration of the systemic failures within the criminal justice system that can and do lead to wrongful convictions of innocent defendants. Though DNA testing eventually helped exonerate Kirk, in the vast majority of criminal cases, DNA or other biological evidence is not available to establish guilt or innocence. Given the documented cases of miscarriages of justice in the United States – and the research indicating that many of the errors leading to wrongful convictions can be prevented *before* they occur – it becomes imperative that we take stock of the procedures within the control of the criminal justice system that contribute to these problems in order to ensure that the most reliable evidence possible makes it into a courtroom and before a jury.

What Can Be Done To Help Prevent Wrongful Convictions?

When innocent people are convicted, the real criminals remain at large, and the cost to public safety is great. States need to ensure that the most basic protections for their citizens – both innocent suspects and innocent victims of crime – are in place so that we can be confident that the criminal justice system is both fair and accurate. Significant progress can be made toward improving the accuracy and reliability of criminal convictions by:

- **Improving Eyewitness Identification Procedures**

Faulty eyewitness identification is one of the leading causes of wrongful conviction and has been a factor in approximately 75 percent of the DNA exonerations in capital and non-capital cases. In Kirk’s case, five separate eyewitnesses who testified at trial were later shown to be mistaken. Two of the witnesses were children, and though the identification procedures proved to be highly suggestive, the eyewitness evidence carried immense weight at trial and ultimately led to Kirk’s wrongful convictions. Kirk’s case is a powerful illustration of the fallibility of eyewitness identification. Because eyewitness evidence, much like scientific evidence, is susceptible to contamination, some eyewitness identification procedures actually increase the risk of false identification. By improving these procedures in small ways, the actual quality of eyewitness evidence can be improved.

In order to prevent similar miscarriages of justice, states should enact procedural changes that will enable law enforcement to obtain the most reliable evidence from eyewitnesses for use in a criminal investigation. Decades of empirical research have proven that a number of pragmatic changes to identification procedures

can help improve the accuracy and reliability of eyewitness identifications, and help ensure that the highest quality of eyewitness evidence is collected. Best practices – including Cautionary Instructions, Effective Use of Fillers, Documentation, Double-Blind Administration, among others – are based on scientific and empirical research that has been extensively documented and peer-reviewed within the scientific community, and components of these guidelines are already being used by many law enforcement officers in their current practice.

For more information on specific procedural improvements, the latest scientific research, model state policies, and pertinent case studies, view The Justice Project's recent publication, *Eyewitness Identification: A Policy Review* – available on request and through our website: www.thejusticeproject.org.

- **Expanding Post-Conviction DNA Testing**

First introduced in a United States court in 1986, forensic DNA testing has profoundly enhanced the truth-seeking function of the criminal justice system and revolutionized the way we determine guilt or innocence. Moreover, scientific progress that occurred in the 1990s now makes it possible to obtain results in cases where previous testing proved inconclusive. Thus, current post-conviction DNA testing procedures not only present an opportunity to exonerate the innocent in cases where testing was never conducted, but also in cases where the technology at the time could not provide conclusive results.

Though Kirk ultimately proved his innocence through DNA testing – and thus became the first inmate exonerated from death row by DNA evidence – the evidence in his case almost went undiscovered and untested. While it appeared that the evidence in his case had been destroyed, Kirk's attorneys eventually discovered that evidence containing biological samples had been stored, on a whim, in a judge's closet following his second trial. In 1992, the prosecution agreed to DNA testing of this evidence, and the results proved that Kirk could not have committed the crime. Though many states have laws on the books enabling inmates to seek DNA testing, such testing is often impossible in the years following a conviction because evidence has been lost, destroyed or contaminated. Kirk's case demonstrates that preservation requirements for biological evidence in many states are vastly inadequate to the task of protecting the innocent. What's more, no state provides, as an absolute right, access to post-conviction DNA testing, so many inmates have to fight the prosecution and the courts in order to have evidence tested at all. To help prevent further miscarriages of justice in this country, states must require that biological evidence be preserved and ensure that their post-conviction DNA testing statutes are comprehensively updated so that the systemic causes of wrongful convictions do not go unheeded – that the innocent do not languish in prison – and that the guilty do not remain free to commit more crimes.

The Justice Project led a five-year campaign to pass the Innocence Protection Act (IPA), which was signed into law by President Bush on October 30, 2004 as part of the larger Justice for All Act of 2004. The IPA established the "Kirk Bloodworth Post-Conviction DNA Testing Program," which will help states defray the costs of post-conviction DNA testing for those with claims of innocence.

- **Improving Forensic Evidence Testing Procedures**

Due to the public's increasing expectation and belief in the fact-finding power of scientific evidence, it is important that forensic evidence admitted into courtrooms, and considered by juries, be held to the highest standards. High-profile media coverage of crime lab problems across the U.S. has increasingly drawn public attention to both the causes and consequences of faulty forensic testing that involved instances of bias, misconduct and sloppiness. In several instances, innocent people, like Kirk, have spent years in prison due to misrepresentations of forensic results, while the actual criminals remained on the street. These cases have undermined confidence in the accuracy of forensic testimony, and make clear the need for competently trained analysts, the use of the most up-to-date scientific procedures, and independent oversight to help prevent future errors. Prosecutors, defendants, crime victims, police, and the public benefit from a system that minimizes error.

- **Improving Standards for Admissibility of Accomplice and Snitch Testimony**

The Center on Wrongful Convictions at Northwestern University School of Law released a comprehensive [report](#) in 2004 on cases in which snitch testimony (testimony of accomplice and jailhouse informants) led to the wrongful conviction of innocent people in the United States. As the report details, informant-dependent prosecutions are the leading cause of wrongful convictions in capital cases.

Although often proved unreliable, testimony from cunning and unscrupulous criminal informants is used by some prosecutors to obtain convictions. Though not a factor in Kirk's case, more than 50 defendants convicted of capital crimes and later exonerated were sentenced to death based upon testimony by witnesses with incentives to lie. In the face of serious concerns about the inherent unreliability of snitches, there are measures that states can implement to help ensure that the use of cooperating witness testimony does not undermine fairness and accuracy in criminal trials. By improving the standards for admissibility of this evidence at trial, states can ensure that finders of fact are able to make more informed decisions about the reliability of accomplice and snitch testimony.

- **Ensuring Proper Safeguards Against Prosecutorial Misconduct**

In 2003, the Center for Public Integrity released a [report](#), entitled *Harmful Error*, on misconduct by prosecutors in thousands of cases nationwide. Misconduct ranges from suppression of exculpatory evidence, destruction, mishandling or fabrication of evidence, courtroom misconduct, and other improper behaviors cited in hundreds of the judicial opinions studied. The Center found that prosecutorial misconduct contributed to wrongful convictions in 28 cases where the defendants were later exonerated.

Prosecutors in Kirk's case engaged in "tunnel vision," focusing on one suspect and refusing to consider evidence of his innocence, or to consider and investigate other suspects. The prosecutors and police also breached their obligations to turn over critical exculpatory evidence, failing to notify the defense of the existence of alternate suspects until almost two years after Kirk was convicted. While the vast majority of prosecutors strive to ensure justice, many have been shown to bend and even break the rules to ensure a conviction. Prosecutors need to be held accountable for their actions through policies that both educate and dissuade prosecutors from engaging in conduct that obstructs the administration of justice.

- **Expanding Discovery in Criminal Cases**

The advertent or inadvertent withholding of exculpatory evidence can have dire consequences in criminal trials, so measures must be taken to ensure that it does not happen. The defense's right to discovery, the formal practice of exchanging non-privileged material with the opposing counsel, is an essential protection against unjust imprisonment and a vital step toward reducing the number of convictions overturned on appeal.

In Kirk's case, the prosecution failed to disclose evidence of multiple potential suspects, one of whom was found wandering in the woods near the crime scene. Kirk's attorney only discovered this information after Kirk had been convicted. Had the evidence been disclosed before trial, Kirk's ordeal might have been avoided entirely – and police could have focused their limited time and resources on locating the true perpetrator. States need to enact regulations that create a system of checks and balances that protect a defendant's right to due process and guard against the suppression of discoverable evidence without placing undue burden on the state. Expanded discovery from the prosecution is essential to ensuring that the results achieved by our courts can be trusted.

- **Electronic Recording of Custodial Interrogations**

Electronic recording of custodial interrogations has emerged as a powerful innovation and fact-finding tool for the criminal justice system. In some cases, DNA will provide compelling evidence of guilt, and in others it can exonerate the innocent. Likewise, an electronic recording of an interrogation provides an objective record of a critical phase in the investigation of a crime – tangible evidence that can be carefully

reviewed for inconsistencies or to evaluate the suspect's demeanor and appreciate the context in which a statement is provided.

Though not a factor in Kirk's case, confessions are often viewed as the most powerful evidence at trial, and can even overcome other types of evidence pointing to the defendant's innocence, such as scientific proof. Studies suggest that false confessions played a significant role in 15-25 percent of wrongful conviction cases. While juveniles and the mentally disabled are particularly prone to false confessions, adults who are not mentally impaired also give false confessions due to a variety of factors including mental and physical exhaustion, coercion tactics, and ignorance of the law. Given the extremely powerful impact a confession has on the outcome of a case, creating an objective record of the custodial interrogation is critical. Full documentation of interrogations, which has been successfully implemented in a number of jurisdictions, makes it more likely that unreliable statements will not be used to obtain a wrongful conviction.

For more information on specific best practices, model state policies, and pertinent case studies, view The Justice Project's recent publication, *Electronic Recording of Custodial Interrogations: A Policy Review* – available on request and through our website: www.thejusticeproject.org.

- **Ensuring Standards for the Appointment and Performance of Counsel in Capital Cases**

All Americans have a constitutional right to competent legal representation. The single most important safeguard against wrongful convictions like Kirk's is providing indigent defendants with access to good quality, well-funded legal representation.

While some defendants are fortunate to have tireless and competent advocates in the courtroom, many criminal defendants are not so lucky. Instances of inadequate legal representation range from attorneys lacking experience or resources to attorneys under the influence of alcohol or drugs in the courtroom. Incompetent defense attorneys often fail to investigate cases thoroughly, fail to present compelling or mitigating evidence, and fail to call witnesses that would aid in the defense. In addition, monumental caseloads, caps on fees for public defenders, and a severe lack of resources for investigation and expert assistance further inhibit the presentation of an adequate defense.

The American Bar Association (ABA) has developed specific guidelines for the appointment and performance of lawyers in death penalty cases, which the U.S. Supreme Court has cited as an appropriate performance standard for defense counsel in capital cases. These guidelines are the gold standard for implementing effective systems of capital representation, yet no state has fully implemented the guidelines to date. Without systemic and performance standards for the appointment of adequate counsel in death penalty cases, states face the very real possibility of convicting and sentencing an innocent person to death. Ensuring sufficient funding, adequate training and oversight for indigent defense services is essential to ensuring the accuracy of the results in the criminal justice system.

The Justice Project

The Justice Project is comprised of two nonpartisan organizations dedicated to fighting injustice and to creating a more humane and just world. The Justice Project, Inc., which lobbies for reform, and The Justice Project Education Fund, which increases public awareness of needed reforms, work together on the Campaign for Criminal Justice Reform to reaffirm America's core commitment to fairness and accuracy by designing and implementing national and state-based campaigns to advance reforms that address significant flaws in the American criminal justice system, with particular focus on the capital punishment system.

For additional information, questions or comments, please contact our offices at (202) 638-5855, or email info@thejusticeproject.org. Visit www.thejusticeproject.org for additional information and materials, including model policy approaches, current research and scholarship on criminal justice and death penalty reform, and to become educated and involved in criminal justice reform at both the state and national levels.