INNOCENCE PROJECT

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Committee on the Judiciary

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Chairman Nadler, Chairwoman Lee, Ranking Member Jordan, Ranking Member Biggs, thank you for inviting me to testify about pretrial reform measures the Congress and Executive could undertake to promote accurate and fair outcomes in our criminal legal system. My colleagues at the Innocence Project, fifty-six innocence organizations in the Innocence Network, and about seventy "Conviction Integrity Units" of District Attorney offices across the country spend most of our time examining cases where the innocent are convicted and the guilty escape apprehension. Every time that happens it's a tragedy for the wrongly convicted, the persons harmed by the crime, and the families of all involved. It's a public safety issue that in my experience is a pressing concern for Democrats and Republicans, liberals and conservatives. Since 1989 the National Registry of Exonerations (NRE) reports more than 2,700 wrongful convictions, including 375 cases where the exonerations resulted from post-conviction DNA testing. The root cause of most of these wrongful convictions lies in some aspect of the pretrial process. I will share with you today some thoughts about reforms in five areas that can make a difference: 1) Discovery Reform; 2) False Confessions; 3) The "trial penalty" and innocents who plead guilty; 4) Improving access to reliable forensic science through funding independent crime laboratories and experts for the defense; and 5) Improving indigent defense services and community safety by funding "holistic representation."

1) Discovery Reform

An exhaustive report recently issued by the NRE contains some extraordinary findings:

- Concealing exculpatory evidence – the most common type of misconduct – occurred in 44% of exonerations.
- Black exonerees were slightly more likely than whites to have been victims of misconduct (57% to 52%) but this gap is much larger for exonerations for murder (78% to 64%) – especially with death sentences (87% to 68% -- and for drug crimes (47% to 22%).

- Police officers committed misconduct in 35% of cases. They were responsible for most witness tampering, misconduct in interrogation, and fabricating evidence – and a great deal of concealing exculpatory evidence and perjury at trial.
- Prosecutors committed misconduct in 30% of the cases. Prosecutors were responsible for most of the concealing of exculpatory evidence and misconduct at trial, and a substantial amount of witness tampering.
- *In state court cases, prosecutors and police committed misconduct at about the same rates, but in federal exonerations, prosecutors committed misconduct more than twice as often as police. In federal exonerations for white-collar crimes, prosecutors committed misconduct seven times as often as police.*

Government Misconduct and Convicting the Innocent, at iii-iv (emphasis added).

The Due Process Protections Act of 2020 amended the Federal Rule 5 of the Federal Rules of Criminal Procedure to require federal district courts to enter a standing a "Brady order" reminding prosecutors in each case of their obligations to disclose exculpatory evidence and setting forth consequences for failing to do so. This was certainly a good first step but it doesn't go far enough to solve the systemic discovery problem. The difficulty is not simply that "Brady orders" can differ between Judicial Councils of the Circuits, or that orders may not be specific enough in putting prosecutors on notice of what is or is not exculpatory information – information that the ABA, state ethical rules, and case law traditionally define as "information that tends to negate guilt or mitigate the offense."[1] The problem is that it keeps the burden of finding and disclosing information on the prosecutor and does not permit the defense sufficient, automatic, and timely access to information that police and other governmental entities have in their possession. A much better system,

[1] New York State has "Brady order" that provides specific notice. *See*, Press Release, N.Y. State Unified Court System, Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases (Nov. 8, 2017).

the Occam's razor for disclosure, is "open file" discovery where the data is accessed online and disclosure can be carefully monitored and documented.

Many states and local jurisdictions have claimed they had "open file" discovery, until a scandalous wrongful conviction case where suppressed exculpatory evidence was discovered decades after conviction proved the file was not as open as everyone believed it to be. Usually, stakeholders write it off as just negligence or the conduct of a bad actor. But Texas, where most counties said they had "open file" discovery, truly stepped up after the wrongful conviction of Innocence Project client Michael Morton.

Michael was convicted of bludgeoning his wife to death in front of his three year old son in Williamson County, Texas. He testified when he left for work his wife Christine was alive and the crime must have been committed by someone who broke into the home from a wooded area behind the house. The prosecutor, Ken Anderson, who later became a judge in Williamson County, suppressed Brady material that included a police report documenting a neighbor seeing a suspicious individual casing the Morton home from the wooded area just prior to the murder. A bandana containing blood from Morton's wife Christine and skin cells from the assailant was finally subjected to DNA testing (it was opposed for years by Williamson County prosecutors) and eventually produced a "hit" in the CODIS database that identified the real killer and led to solving another similar murder. Anderson ultimately pled guilty to misdemeanor contempt for failing to turn over exculpatory evidence, was disbarred, and did eight days in jail. The case received extensive national publicity and deeply troubled the law enforcement community in Texas. As a result, and after a powerful

lobbying effort led by Morton himself, Texas passed The Michael Morton Act (Texas Code of Criminal Procedure, Art. 39.14).

The Morton Act is the best example so far of real "open file" discovery where disclosures are ordinarily made online in most jurisdictions. Most significantly, it provides for pre-plea discovery: "Before accepting a plea of guilty or nolo contender, or before trial, each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article." Art. 39.14(j). The Morton Act is a good model for the federal system and states across the nation. Congress should adopt a version of it and DOJ should incentivize states to adopt it through a grant program.

2) False Confessions

According to the NRE, at last count, false confessions were involved in 336 of 2755 exonerations since 1989 (12%). A false confession is an especially dangerous problem because it is counter-intuitive, most people (including prosecutors, police, and jurors) believe no one would confess to a crime unless they were guilty. In fact, the existence of a confession can create a cognitive bias for investigators to lower their assessment of the probative value of objectively reliable evidence simply because it is inconsistent with the confession. *See generally*, Saul M. Kassin, *Why Confessions Trump Innocence,* 67 Am. Psychologist 431 (2012). Confessions have frequently led to "tunnel vision" in pretrial investigations that result in wrongful convictions, which is "the product of a variety of cognitive distortions, such as confirmation bias, hindsight bias, which can impede accuracy in what we perceive and how we interpret what we perceive." Keith Findley, *Tunnel Vision,*

in Cutler, editor, *Conviction of the Innocent: Lessons from Psychological Research*, APA Press, 2010, at 6.

There are three steps Congress can take which would greatly reduce the incidence of false confessions.

First, Congress should codify DOJ's Recordation of Interrogations Policy to make sure all federal investigations are recorded from Miranda warnings forward.

Second, and most importantly, Congress should add "reliability" as a factor to be considered by federal courts before admitting a confession into evidence. Right now, under *Colorado v. Connelly,* 479 U.S. 157, 169-70 (1986), the Supreme Court ruled that the government need only show that a confession was voluntary and statements will only be excluded under the Due Process Clause if they were secured through unduly coercive police interrogation, even if the confession or admission is plainly unreliable. Indeed, the Connelly Court invited legislatures to be addressed by "the evidentiary laws of the forum." *Id., at* 167. This makes no sense. Reliability is a key factor to be considered in admitting eyewitness identification evidence, *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), and expert forensic science testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) and FED. R. EVID. 702. Indeed, experts in interrogation, both psychologists and law enforcement officials, have long agreed that "reliability" was key factor in deciding that a confession was not false, specifically did the suspect confess to "held back" facts that only the police or perpetrator would know, or did the suspect provide information that led to other incriminating information the police didn't know about. *See,* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors*

and Recommendations, 34 LAW & HUM. BEHAV. 3, 14–22 (2010) [hereinafter *Police-Induced Confessions*].

And third, law enforcement should stop engaging in explicit lies and deception during interrogations. Falsely telling suspects that their bloody fingerprint or their DNA was found at the crime scene when it was not, or that they failed a polygraph test, when they did not, are the kind of lies that lead to false confessions. *See* Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 762 (2013); Katie Wynbrant, *From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions*, 126 YALE L.J. 545, 546 (2016). The International Investigative Interviewing Research Group, a Europe-based network of law enforcement practitioners and academics opposes both the use of explicit deception because of the effect false evidence can have on innocent suspects and because "sanctioned deception by an investigator [also] serves to undermine the legitimacy of the court and wider principles of justice." Chicago's Wicklander-Zulawski & Associates, one of the largest police training companies in the United States, and several members of the federal government's High-Value Detainee Interrogation Group, which brings together intelligence professionals from the F.B.I., the C.I.A. and the Defense Department for national security purposes take the same position. Col. Steven M. Kleinman, a former Air Force intelligence officer who has interrogated terrorists and violent extremists, put it this way: "While this tactic might appear benign at first glance, it has proved to be insidiously problematic as a factor in generating false confessions nationwide." Legislation banning deception during interrogations has been introduced in New York, Oregon, and Illinois. Congress should do so as well.

3) The "Trial Penalty" and Innocents Who Plead Guilty

According to the NRE, 1 out of every five wrongful convictions is the result of an innocent person pleading guilty, more specifically 569 of 2755 exonerations since 1989 involved a plea (20.6%). This is, by any measure, a deeply disturbing finding. Plainly, the problem of cash bail and excessive bail factors into the false guilty plea problem. I won't address it because I know others are doing so and the Committee is working hard on this issue. Another extremely important problem that coerces the innocent to plead guilty is the "trial penalty," a subject that has been ably addressed by the NACDL and others in a double issue of the *Federal Sentencing Reporter,* in April and June of 2019, entitled "The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End," and edited by NACDL Executive Director Norman Reimer and NACDL President Elect Martin Antonio Sabelli. Again, I know the Committee will be addressing the "trial penalty" issue when holding hearings on sentencing reform and mandatory minimums. From the point of view of the Innocence Project and organizations within the Innocence Network, I would be remiss if I didn't at least underscore our concern that reform in this pretrial area is essential to redress the disgraceful phenomenon of innocent people pleading guilty.

4) Improving Access To Reliable Forensic Science Through Funding Independent Crime Laboratories And Experts For The Defense

Lack of access to reliable forensic science testing and experts is a profound problem for indigent defense, prosecutors, and police alike. The National Academy of Science addressed this issue in a landmark 2009 Report, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press 2009) (NAS Report). The NAS Report bemoaned the fact

that most crime laboratories are run by police departments. In many labs the forensic analysts themselves are sworn police officers, sheriff deputies, or state troopers. In others, the analysts are civilian employees of police agencies. The NAS Report called for the creation of independent laboratories. NAS Report at 183. The dangers of having crime labs run by police departments are self-evident: It's an obvious conflict of interest. Culture eats policy for lunch. Try as they might, analysts will be influenced to see their function as helping the police as opposed to being an independent third force in the criminal legal system that just reports objective scientific results. Indeed, when there's a budget crunch, police departments often see crime labs as playing a secondary role and will starve the laboratory for resources without decreasing demands for testing results, no matter how much the analysts complain. These pressures in the past have led to infamous crime laboratory scandals in West Virginia (Fred Zain), Oklahoma (Joyce Gilchrist), and the Houston Police Department crime laboratory. The recent dismissal of tens of thousands of cases in Massachusetts due to fraudulent results being produced by overworked inadequately supervised drug chemists show the problem has not disappeared. The monetary costs of this scandal have yet to be fully determined but will surely be astronomical. The costs in terms of loss of public confidence in the pretrial system are profound.

There is one extremely instructive story that ought to guide Congressional funding and policies – the decision not to fix the scandal plagued Houston Police Department Crime Laboratory but to re-invent it as an independent governmental entity, the Houston Forensic Science Center. The story is told brilliantly by Sandra Guerra Thompson in her book **Cops in Lab Coats:** *Curbing Wrongful Convictions through Independent Forensic Laboratories* (Carolina

Academic Press 2015). It starts with the wrongful conviction of Innocence Project client George Rodriguez, the largest independent audit of a crime laboratory in American history, a federal civil rights law suit, and finally a decision by Harris County to set up an independent, completely transparent forensic science center that does blind proficiency testing, adopts best practices recommended by the NAS Report and consults with scientists outside of the traditional crime laboratory community. You should have Sandra Thompson and laboratory Director Peter Stout come before you and explain how they have stood up a laboratory that forensic scientists across the United States and abroad come to visit when they want to see how to do the work well and independently. It turns out to be both a scientifically strong laboratory and extremely efficient. It's got a civilian oversight board and has garnered great public trust. More independent centers of excellence of this kind should be funded across the country. It certainly won't solve all the scientific problems that plague many forensic disciplines, but it will help, if only to inspire the best forensic analysts to become independent of police departments.

5) Improving Indigent Defense Services And Community Safety By Funding "Holistic Representation."

Between sixty to ninety percent of defendants charged in serious criminal cases require, because they are indigent, a state provided lawyer. Indigent defense in the states has always been comparatively underfunded by the federal government compared to funding for state prosecutors, about thirty per cent less, according to economist and law professor John Pfaff. See, John F. Pfaff, Locked In: The True Causes of Mass Incarceration – And How to Achieve Real Reform, 137-38 (2017). Pfaff points out that an annual grant of four billion dollars to state and

local governments would be three times the amount currently spent on indigent defense, especially if the grant was tied to pre-existing spending by local governments so that they couldn't reduce their own spending one-for-one with the grant. I suggest modifying Pfaff's proposal in one important way: indigent defense funding should provide incentives for defender systems to provide "holistic" defense, "an approach where public defenders work in interdisciplinary teams to address the immediate case and the underlying life circumstances – such as drug addiction, mental illness, or family or housing instability – that [complicate] client contact with the criminal justice system. See, Anderson & Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes,* 132 Harv. L. Rev. 819, 820 (2019). This recent and comprehensive study compares the effect of holistic defense on criminal justice outcomes over a ten-year period in the Bronx and produced exciting results. While holistic representation did not affect conviction rates, it decreased the likelihood of a custodial sentence by over fifteen percent and reduced the anticipated sentence length by almost twenty-five percent. During the study period, holistic defense resulted in 1.1 million fewer days of custodial punishment. *Id.,* at 822-23. Holistic defense, it turns out, is not only a good way to raise the quality of representation for the poor but also a cost-effective investment in communities that will reduce pretrial custody, minimize reliance on armed police intervention, and maximize deployment of social work and "helping" professionals who can find non-custodial resolutions of cases. In short, a rigorous ten-year study provides strong proof that "holistic defense" helps re-align the pretrial process in a way that promotes public safety and reduces custodial punishment. In this historical moment, it's a good program to pursue.